DEATH PENALTY STATUTE INVALIDATED, DISCRIMINATION IN DISABILITY COVERAGE UPHELD

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The Court of Appeals' *People v. LaValle* decision invalidating New York's death penalty statute due to its jury deadlock instruction generated another harsh dissent in a death penalty case and unfortunate political attacks on the Court. This month we discuss that decision, as well as *Matter of Polan v. New York State Insurance Department*, which held that a disability insurer may discriminate between physical and mental disabilities in providing coverage, and *Frankel v. Frankel*, which held that a lawyer discharged in a matrimonial action has standing to seek fees from the adversary spouse.

Death Penalty

New York's death penalty statute required the trial judge to instruct the jury at the outset of its penalty phase deliberations (and thus not only in the event of a deadlock) that if it failed to unanimously agree upon one of the two alternatives available to a jury - death or life without parole - the court would impose a more lenient sentence with a minimum term between 20 and 25 years and a maximum term of life. The majority in *People v. LaValle* held that the provision both violated the State constitution's due process clause and could neither be modified by the Court nor severed from the statute.

The defendant, sentenced to death after being convicted of first degree murder in the course of and in furtherance of first degree rape, argued that the charge was unconstitutionally coercive in that jurors who believed a death sentence was inappropriate might yield to jurors favoring death in order to avoid the possibility of the defendant some day being paroled. The Court held this to be "an unconstitutionally palpable risk."

The majority opinion, by Judge George Bundy Smith, observed that no other state instructs the jury that failure to agree upon a sentence will result in a less severe sentence. It cited the legislative history of the deadlock provision, noting that at least one legislator feared it would be coercive and that another expressed the view that not informing the jury of the consequences of failing to reach a unanimous sentencing decision "would be a much more serious constitutional problem." The majority opinion also referenced a Capital Jury Project study's findings that jurors "grossly underestimate" how long capital murderers not sentenced

to death usually stay in prison, and that "the 'sooner jurors think a defendant will be released from prison, the more likely they are to vote for death . . .'."[1]

In addition, the Court's decision reviewed numerous U.S. Supreme Court decisions relating to the issue. The *LaValle* opinion implies that earlier Supreme Court precedent supports finding a federal constitutional violation, but later precedent supports the opposite result. But the Court of Appeals did not decide the case under the federal constitution; rather, it found a due process violation under the State constitution.

The Court ruled that the deadlock instruction was coercive. Further, the instruction undermined the reliability of a death sentence by injecting into the penalty phase deliberations the future dangerousness of the defendant, a factor that New York (unlike many other states) did not make an aggravating factor for the jury to consider. Because capital cases require a heightened level of scrutiny and death sentences a heightened level of reliability, the Court held, the deadlock instruction could not stand.

That holding led to the question of the appropriate remedy. Should the instruction be judicially rewritten to render it constitutional? The Court said that to do so would usurp legislative prerogative, particularly where correction might entail enhancing the sentence a court imposes following deadlock to life without parole. Should the provision be excised from the statute so that no deadlock instruction is given? In a ruling that inflamed the dissent even more than the ruling that the instruction was unconstitutional, the majority held that due process requires a jury be advised of the consequence of its failure to reach unanimous agreement, lest the jurors be left to speculate. This necessitated the result that no one can be put to death under the current statute.

Judge Albert M. Rosenblatt wrote a concurring opinion that expressed his disagreement with the dissent's assertion that the majority was substituting its own preference on the death penalty for that of the Legislature. "Just as judges should not shrink from carrying out the legislative will, so too should they not shrink from declaring statutes unconstitutional in proper cases, however distasteful *that* may be." (Emphasis in original.)

The lengthy three-judge dissent was authored by Judge Robert S. Smith and joined in by Judges Victoria A. Graffeo and Susan Phillips Read. It argued that the instruction was constitutional, reasoning that the coercive nature of the instruction could work either way, *i.e.*, it could convince jurors favoring death to agree to a sentence of life without parole. The dissent argued that the State constitution did not "require the elimination from the system of every possibility of juror compromise." And noting that many states do not advise juries of the consequence of failing to reach a unanimous verdict on penalty, the dissenting opinion characterized as "astonishing" the majority's conclusion that there exists a constitutional right to an instruction on the subject. The dissent concluded, "[t]oday's decision, in our view,

elevates judicial distaste for the death penalty over the legislative will."

Mental Disability Discrimination

The issue in *Matter of Polan v. State of New York Insurance Department* was whether Insurance Law § 4224(b)(2) was violated when an employer disability insurer provided coverage for employees disabled by physical disabilities until age 65 or the disability ended, while providing coverage for employees with disabilities caused by mental and nervous disorders or diseases for only 24 months, unless the employee at the end of the 24 months was hospitalized or institutionalized, in which event the benefits continued until the employee was no longer confined.

> The statute in relevant part provides:
>
> (b) No insurer doing in this state the business of accident and health insurance . . . shall . . .
>
> (2) Refuse to insure, refuse to continue to insure or limit the amount, extent or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of the physical or mental disability, impairment or disease, or prior history thereof, of the insured or potential insured, except where the refusal, limitation or rate differential is permitted by law or regulation and is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

Polan was diagnosed with major depression in 1991 and has been unable to work since 1994. She became eligible for long-term disability benefits in 1994, but such benefits came to an end 24 months later. Her challenge in the Supreme Court to the termination of benefits was dismissed on the basis that no private right of action existed under the statute and enforcement was within the jurisdiction of the Superintendent of Insurance.

Undeterred, Polan filed a complaint with the Insurance Department claiming that the insurer's policy violated the statute by treating mental disability differently from other disability by the imposition of the 24-month limit, without the statutory requirement of an actuarial or experiential basis for the distinction.

The insurer responded that the statute did not require equal benefits for all conditions (physical or mental disabilities), and that because all of the insured's employees received the same benefits, there was no contravention of the statutory command. The Insurance Department found no violation.

Polan then filed an Article 78 proceeding challenging the Insurance Department's determination. The Supreme Court found no discrimination with respect to Polan's eligibility and access to insurance, and dismissed the petition. The Appellate Division,

First Department, affirmed 3-2, and the Court of Appeals unanimously affirmed in an opinion by Judge Susan Phillips Read.

The robust decision of the Court is based upon, *inter alia*, its view that the anti-discrimination language of the statute was clear and did not require the insurer to offer the same benefits for all ailments unless statistically or empirically justified; decisions in federal courts interpreting similar statutes in Maine and Texas, and addressing the Americans With Disabilities Act; the placement of § 4224(b)(2) within Article 42 of the Insurance Law which governs insurers, rather than Article 32 which "mandates terms and conditions of insurance policies;" the Governor's memorandum approving the legislation; comments of the sponsoring legislators; and the position of the National Association of Insurance Commissioners - an impressive array of support for the general proposition that § 4224(b) is not a statute dealing with the terms or conditions of an insurance policy, but rather the issue of access to or eligibility for the insurance.

We respectfully submit that the statute in the clearest language explicitly does deal with the terms and conditions of insurance coverage. It condemns policies that limit "the amount, extent or kind of coverage . . . solely because of the physical or mental disability, impairment or disease." The insurer reduced Polan's benefits to 24 months and in so doing discriminated against her when compared to an insured with a physical disability and, we therefore suggest, violated § 4224(b) without making the requisite showing of justification that the statute requires. The *amicus curiae* brief filed with the Court by The Association of the Bar of the City of New York eloquently supports this conclusion. We do agree with the Court's first premise: that the plain language of a statute is the best evidence of the Legislature's intent and should be dispositive. That principle appears not to have been followed here.

Matrimonial Counsel Fees

Frankel v. Frankel raised the question of whether a lawyer for a spouse in a matrimonial action who was discharged by his client without cause can seek counsel fees from the adversary spouse. In an opinion by Judge Albert M. Rosenblatt, for a unanimous court, the Court answered "yes" and reversed the determination, by a divided court, in the Appellate Division, Second Department. There the majority had concluded that the discharged lawyer had no standing because Domestic Relation Law § 237(a) authorized such relief only for "the current attorney of record" in the action.

The Frankels were divorced in 2001 in an action brought by the husband in 1998. The wife had paid her lawyer a $5,000 retainer and the Supreme Court later awarded the wife's lawyer a $2,500 interim fee. Following a 32-day custody battle for the children, the Court granted an additional fee of $25,000 to the wife's lawyer to be paid by the husband in monthly installments of $1,500. Soon thereafter the wife discharged her lawyer without cause.

The Court of Appeals' reversal was based upon "policy" considerations as well as "precedents."

The policy related to the negative consequences that would flow to the non-monied spouse if the Appellate Division's decision were upheld. While the monied spouse would have a wide choice of counsel because of the assurance of the payment of fees, the non-monied spouse would have to find counsel prepared to accept the risk of never being paid. Such "disparity" would discourage lawyers from representing the non-monied party and be contrary to the overall policy of § 237(a) of providing litigants in matrimonial cases with a level playing field free of the issue of which of the parties has the fat wallet.

The Court also relied upon its prior decision in *O'Shea v. O'Shea*, 93 N.Y.2d 187 (1999), which had concluded that the trial court in a matrimonial action in its discretion could award counsel fees under § 237(a) for legal services rendered both before and after the action itself on the basis of the unique policy of fee shifting in divorce cases.

In a footnote, the Court provided guidance to judges involved in handling matrimonial cases, noting the desirability of making interim awards rather than deferring the issue to the trial judge who hears the case so that issues like those raised in *Frankel* may be avoided and the non-monied spouse have adequate resources to afford the legal expense incurred during the course of the litigation.

[1] *Quoting* Bowers and Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 703 (Feb. 1999).