

NEW YORK COURT OF APPEALS ROUNDUP

WITNESSING ABUSE NOT NEGLECT; POLITICAL PARTY IMBALANCE; “GRAVE” BRAIN INJURY

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This month we discuss three recent decisions of the Court of Appeals. In *Nicolson v. Scoppetta*, the Court rejected a presumption of child neglect and removal from the home whenever a parent allows her child to witness domestic abuse of that parent. In *Matter of Graziano v. County of Albany*, the Court found that, although an action on behalf of a local board of elections can be brought only with the approval of a majority of the board, a single commissioner has an implied right to challenge conduct that disadvantages his political party's representation in board matters. And in *Rubeis v. The Aqua Club Inc.*, the Court resolved an issue over which Departments of the Appellate Division had been divided - when a brain injury constitutes a “grave injury” for purposes of the Workers’ Compensation Law and thus dissolves an employer’s protection from third-party claims arising out of an injury to its employee.

Witnessing Abuse Not Neglect

Nicholson v. Scoppetta presents the difficult problem of balancing the imperative of protecting children from harm caused by domestic violence and the equally compelling need to protect and maintain family relationships. The basic question presented was whether a child could be removed from her home and deemed neglected because the parent had failed to protect the child from witnessing that parent being abused.

The matter reached the Court by way of a certification from the United States Court of Appeals for the Second Circuit of three questions that the Circuit deemed unsettled under State law, the answers to which could control the outcome of the appeal before it and whether the Court should reach the constitutional issues that the case presented.

This class action initially was brought in the United States District Court for the Eastern District of New York, which had, *inter alia*, enjoined the Administration for Children’s Services, an agency of New York City, from *ex parte* removing children from their homes “solely because the mother is the victim of domestic violence.”

The three certified questions were (1) whether the definition of “neglected child” in the Family Court Act (the “Act”) could be satisfied where the only allegation was that the child had been allowed to witness domestic abuse of her parent or other caretaker; (2) could the witnessing of such abuse result in injury to the child constituting “danger” or “risk” to the child’s “life or health” under the Act; and (3) is the witnessing of such abuse by itself sufficient to show “removal is necessary” or in the child’s “best interests,” or was additional evidence required to justify removal.

The Court of Appeals in an opinion by Chief Judge Judith S. Kaye, for a unanimous court, answered the first question with a resounding “No;” more is required to show neglect under New York law than failing to prevent the child from witnessing domestic violence. Relying upon § 1012(f) of the Act, which defines a “neglected child,” the Court concluded that a finding of neglect requires proof by a preponderance of the evidence of actual or imminent danger of physical, mental or emotional harm to the child, together with a showing of a “causal connection” between the basis for the claim of neglect and the circumstances that caused the actual harm to the child or imminent danger of such harm.

Moreover, the Court concluded, because the claims were alleged threats to the child’s emotional or mental health, any impairment to the child must be “clearly attributable” to the parent’s failure to exercise the required degree of care, which the Court defined as taking the actions that a reasonable and prudent parent would take in similar circumstances. Finally, the Court acknowledged that neglect might be found in a home “plagued by domestic violence” where the requisite showing was made by evidence, for example, that the child was experiencing fear and distress or that the parent was unaware of the impact of the violence on the child.

In answering the last two questions certified, the Court appears to have concluded that they were not capable of a categorical response beyond that exposure to violence is not presumptively grounds for removal, because the questions required a consideration of the circumstances of each case. The Court did, however, come down on the side of preserving family relationships in the child’s home by cautioning that the circumstances under which a child could be summarily removed would be rare and that the child protective agency would be required to produce particularized evidence to justify removal, including in some cases a showing of efforts made to prevent removal and the impact removal would have on the child.

In the final analysis, as appears to have always been the case, it is the best interests of the child that determines the appropriateness of removal and the methods used by the child protective agency to secure removal.

Political Party Imbalance

Election Law § 3-212(2) provides that all actions of a local board of elections must be supported by a majority vote of the commissioners. Under § 3-300 of that Law and the New

York constitution, both major political parties must be equally represented on such boards. Thus, bipartisan commissioner agreement is generally necessary before a board of elections can institute a lawsuit. In *Matter of Graziano*, the Court of Appeals grappled with the issue of whether one commissioner alone can challenge conduct that allegedly impairs his party's equal representation, despite the majority vote prerequisite of § 3-212(2). Both the Court's majority and dissent concluded that a single commissioner can commence an action in these circumstances.

At a time when a frequent source of disagreement within the Court is whether various decisions are consistent with statutory provisions and properly deferential to the Legislature's will, the differing ways in which the majority and dissent reached the conclusion that § 3-212(2) did not bar the case at hand are of particular interest.

John A. Graziano, the Republican commissioner on the Albany County Board of Elections, brought an action against Albany County alleging that the County's interference with the Board's hiring of staff resulted in an imbalance of his party's representation on that staff. The Democratic commissioner did not authorize or join in the action. The Appellate Division, Third Department, dismissed the petition on the basis that, under § 3-212(2), Graziano alone lacked standing to sue as he did not constitute a majority of the Board.

The Court of Appeals reversed in part, in an opinion by Judge Victoria A. Graffeo. The Court first addressed capacity to sue, a separate inquiry from standing. A board of election's capacity to sue to vindicate its rights is found in § 3-212(2). Thus, to the extent that he was attempting to challenge the County's interference with Board functions as a whole, Graziano could not act alone and that aspect of his claim was correctly dismissed. However, to the extent that Graziano was asserting a claim in his capacity as a commissioner but on behalf of his party to redress a political imbalance, his suit was not an "action of the board" falling within the statutory provision requiring majority action. Graziano did have the capacity to bring a political imbalance claim on his own although it was not explicitly granted in any legislation, the Court held. This capacity could be inferred from the State constitutional and Election Law provisions ensuring equal representation on boards of election, and a commissioner's "unique role as guardian of the rights of his party."

The Court next held that the petition sufficiently alleged injury-in-fact to the Republican party to confer standing upon Graziano to the extent that he was challenging County action leading to an imbalance in favor of the Democrats.

The dissent, by Judge Albert M. Rosenblatt and joined in by Chief Judge Kaye and Judge George Bundy Smith, argued that § 3-212(2) did apply to claims directed at political imbalance. In the situation of alleged partisan imbalance, however, the plain language of the statutory provision should "yield" to the important interest of bipartisanship found in the constitution and Election Law, and provide a single commissioner with capacity to assert an

implied cause of action. But in this case, the dissenters maintained, Graziano had failed to adequately allege that the County's conduct with respect to the board's staff had resulted in unequal representation of Republicans, and thus his petition should be dismissed for lack of standing.

"Grave" Brain Injury

Prior to the 1996 Workers' Compensation Reform Act, a defendant in a personal injury action brought by an injured worker could assert a third-party claim for indemnification or contribution against the worker's employer, without limitation. The Reform Act provided employers immunity from such claims except when the employee sustained a "grave injury," as defined in the Act. The statutory description of each qualifying injury has been strictly applied by the courts. For example, the Court of Appeals had previously held that "loss of multiple fingers" means total loss of multiple fingers, not partial loss.¹

The three cases decided together in *Rubeis*, each involving an employee who fell from a roof or ladder, turned upon whether the resulting brain damage qualified as "grave" under the relevant portion of the statutory definition: "injury to the brain caused by an external physical force resulting in permanent total disability." The Third and Fourth Departments had interpreted the phrase to require that the employee be permanently disabled from employment, even if otherwise able to function in society. The Second Department interpreted it to require that the employee be unable to care for himself or, as the Court of Appeals described the Second Department test, "essentially [in] . . . a vegetative state."

The majority and dissent in the Court of Appeals concluded that the statutory definition was not clear on its face and that the two interpretations given by the Appellate Division both were plausible. They divided 6-1 over which interpretation to adopt, at least in part because they disagreed as to the legislative intent.

Chief Judge Kaye authored the opinion of the Court, which described intent of the Reform Act as to "narrow tort exposure for employers while also protecting the interests of injured workers." The majority then embarked upon a text-based analysis that rejected the vegetative state test as "out of step with the balance of the [grave injury] section." The Court reasoned that none of the other grave injuries set forth in the statute, such as "loss of a nose," required that the injury prevent the employee from performing daily activities. In adopting the less harsh test, however, the Court made clear that the exception to employer immunity applies only when the employee is unemployable "*in any capacity*" (emphasis in original), not merely in his former job.

Judge Susan Phillips Read, the lone dissenter, considered the legislative intent to be two-fold: first, to reduce employer liability, and second, to describe the grave injury completely so as to "insulate [the definition] . . . from judicial interpretation (and the perceived

attendant risk of judicial expansion).” Judge Read conceded, however, that with respect to brain injury the Legislature had failed to provide a definition that was self-explanatory.

The dissent rejected a textual approach on the basis that the Reform Act had been heavily negotiated, and the resulting compromises seem so “downright peculiar” as to defy analysis. How else could the inclusion within grave injury of loss of an index finger but exclusion of loss of a thumb be understood? Thus, according to Judge Read, the Court could be guided only by the Legislature’s intent to have the statute interpreted narrowly by the judiciary and limit employer liability, which pointed to adoption of the vegetative state test of permanent disability.

¹ See *Castro v. United Container Machinery Group, Inc.*, 96 N.Y. 2d 398 (2001).