NEW YORK COURT OF APPEALS ROUNDUP

THE GOVERNOR'S BUDGET POWERS UNDER THE NEW YORK CONSTITUTION; DEATH BENEFITS DISTRIBUTION; SELF-DEFENSE AGAINST DOMESTIC VIOLENCE

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The Court of Appeal's plurality, concurring and dissenting opinions in two cases decided last month grapple with the Governor's and Legislature's respective powers in the budget process. This month we discuss those cases, as well as: a matrimonial opinion ruling that equitable distribution of a spouse's death benefits must be separately and clearly provided for in a court order because references to distribution of a "pension" will not be construed to include death benefits; and a domestic violence self-defense decision that explains that a person attacked with deadly force in his home may respond in kind although retreat may be possible, not only when the attacker is a stranger, but also if the attacker is another resident.

Governor's Budget Control

The Court's decision in two cases challenging the Governor's dominance in setting the State budget is significant for two reasons. First, it will be read by many in the Executive Branch as rendering the Governor's control of the budget for practical purposes immune from legislative or judicial challenge, including challenge to the right of the Executive Branch to insert into appropriation bills provisions seeking to affect the substantive law and policy of the State. Second, the result in the two cases comes about through a plurality decision (a rarity for the Court of Appeals), together with an opinion by Judge Albert M. Rosenblatt, concurring *only* in the result, which concurrence was joined in by Judge George Bundy Smith.

That exuberance by the Executive Branch may be premature is clear from the strong dissent by Chief Judge Judith S. Kaye, joined in by Judge Carmen Beauchamp Ciparick, the concurrence by Judge Rosenblatt, and the reservations in the plurality opinion itself by Judge Robert S. Smith, joined in by Judges Victoria A. Graffeo and Susan Phillips Read. Together they suggest that the Governor may not be omnipotent in forwarding to the Legislature his budget on a "take it or leave it" basis.

While the background and reasons for the State's 20-year history of inability to seasonably pass a budget are arcane, they are explained clearly in the comprehensive opinions issued by the Court. Changes in the State Constitution giving the Governor the power to set the budget came into being in 1927, after more than a dozen years of trying to wrest such power from the Legislature. The reform movement, led by Henry L. Stimson, was persuaded that the Governor was in a better position than the Legislature to prepare a budget because of a greater awareness of the monetary needs of the various departments of State government. In addition, the change was thought to eliminate the potential for "log rolling" and "pork barrel" appropriations that resulted in a budget reflecting the wish of legislators to demonstrate to their constituents their concern for local needs, rather than what was good for the State generally, and producing "extravagance, waste and irresponsibility."

1927 Constitutional Amendment

The change in the Constitution in 1927 made the Governor the "constructor" of the budget and the Legislature the "critic." Under the Constitution, the Governor submits a budget to the Legislature together with proposed appropriations. The Legislature has no power to alter the Governor's appropriation bill except to strike out or reduce individual items; it may not increase the amount of any appropriation. The Legislature may add appropriations, but only if they are stated separately and distinctly from what the Governor has proposed. If the Governor's budget and appropriations are passed by both the Senate and Assembly, they become law immediately. Those appropriations added by the Legislature, however, are subject to a "line item" veto by the Governor, which veto may be overridden by a two-thirds vote of the Legislature.

If the Governor and Legislature do not agree on the budget and appropriations, a stalemate may ensue, which has the potential to produce financial chaos within State government. What has caused the delays in the passage of a State budget for the past 20 years has been the time taken for the Governor and the leadership of the Legislature to break the "gridlock" and settle upon a budget and appropriations they both find acceptable.

In a perfect world it would be hard to criticize the solution of executive budgeting crafted by Stimson, but its history in recent decades has shown that solution to be a failure because of the unwillingness of the leadership in the Legislature and the Governor to seasonably reach a reasonable agreement on what is good for the State.[1] This failure is eloquently reflected in the two cases decided by the Court.

Silver* v. *Pataki* and *Pataki* v. *Assembly

Silver v. Pataki related to the Governor's 1998 budget, which the Legislature passed without alteration except to strike out or reduce particular items. The Legislature proceeded to pass legislation that, while not altering the amounts of the appropriations it had

already passed, altered how that money would be spent. The Governor responded by exercising his line item veto to delete 55 of the provisions passed by the Legislature. Next, Assembly Speaker Sheldon Silver brought to action in New York County to have the vetoes declared unconstitutional. He was met with a defense by the Governor that the vetoed items were unconstitutional. After the defense by the Governor was sustained in the Supreme Court and the Appellate Division, First Department, an appeal as of right was taken to the Court of Appeals.

The Court had no difficulty in sustaining the orders below, holding that the legislation passed by the Senate and Assembly violated the "no alteration" clause of the Constitution even though it did not alter the dollar amount of the appropriations; the Governor had the right not only to fix initially the amount of appropriations, but to fix how the money would be spent.

Pataki v. New York State Assembly involved in the Legislature's enactment, after the Governor's 2001 budget became law, of legislation that effectively amended the Governor's appropriation. Again, the Court concluded that this violated the no-alteration provision of the Constitution because the legislation amounted to a "substitution" for what the Governor had proposed.

The more substantive argument asserted by the Legislature (and the argument that is likely to be back before the Court) is whether, under the guise of an appropriation bill, the Governor can include matters involving changes in the State's substantive law that amount to policy decisions vested in the Senate and Assembly under the State Constitution.

The plurality concluded that it would "leave for another day" a determination of how far the Governor may go in including as part of appropriation bills matters that should be left to the Legislature. The plurality saw the issue as "troublesome" and "susceptible to abuse" by the Governor, and foresaw difficultly in trying to "fix" the line between policy and appropriations. At the same time, it suggested that it would not favor resolving such disputes through the judicial process. As to the appropriation bill then being scrutinized, which contained the Governor's school funding proposal, the plurality found nothing in the bill that was "essentially non-budgetary."

The concurring opinion by Judge Rosenblatt concluded that the Constitution precluded the Governor from including in appropriation bills matters that did not "relate specifically" to an appropriation, and that appropriation bills that do more than propose a sum of money and provide a general statement of purpose invade the province of the Legislature. Judge Rosenblatt disagreed with the plurality's unwillingness to draw a line in order to provide guidance and prevent an appropriation bill from being used to usurp a legislative prerogative. The concurrence nonetheless found the school funding component of the appropriation bill at

issue to be within the Governor's budgeting powers.

The dissent by Chief Judge Kaye shows a deep concern about the Governor's power to use a proposed budget to have an impact on the substantive law of the State, and a belief that executive budgeting was not intended to shift law-making authority out of the hands of the Legislature. At the same time, the dissent acknowledged the inherent problem of fixing "the line" between an appropriation bill and legislation, while concluding that the alteration by the Governor of the Education Law dealing with funding for public schools represented an abuse of the budgeting process. Chief Judge Kaye sees the alternative of curbing the Governor's ability to include legislation in appropriation bills through the creation of a "stalemate" by rejecting his budget, as unacceptable.

Two bits of homespun philosophy come to mind in reviewing the 72 pages of well-crafted opinions in these cases. First, "it's not over till it's over," and second, "what goes around comes around."

Death Benefits Distribution

Divorce lawyers should all be aware of the Court's ruling in *Kazel v. Kazel*, that death benefits are distinct from pension benefits, and that if a party is to receive all or a portion of a former spouse's death benefits that "should be separately, and explicitly, stated" in the Qualified Domestic Relations Order ("QDRO") entered in connection with a divorce.

The plaintiff and decedent had been married for 28 years when they divorced. Vested rights in a noncontributory pension plan acquired during a marriage constitute marital property subject to equitable distribution, and thus the matrimonial court directed in a QDRO that plaintiff receive a fixed percentage of her ex-husband's allowance under his "Pension Plan." The ex-husband died ten years later, after he had remarried and before he had reached retirement age. The Pension Plan administrator refused to award the Plaintiff, his ex-wife, any portion of the pre-retirement death benefits due under the Plan.

Plaintiff brought an action to have the QDRO modified. The Appellate Division, Fourth Department, affirmed (4-1) the Supreme Court's denial of plaintiff's request, and granted leave to appeal to the Court of Appeals, which unanimously affirmed.

Chief Judge Judith S. Kaye's opinion for the Court observed that ERISA and the Internal Revenue Code require pension plans to provide spousal survivor benefits. The rights of the employee's spouse at the time of death can be overcome only by a court order that, in clear language, designates the former spouse as a surviving spouse for purposes of the plan to receive all or a portion of the death benefits.

The QDRO in this case referred only to a "pension." There was no evidence that the matrimonial court had even considered death benefits, let alone intended to provide for their distribution, and the Court refused to infer such an intention. Under *Kavel*, references to pension plans and pension benefits "will not be deemed to include death benefits."

Self-Defense Against Domestic Violence

Although *People v. Mark P. Jones* involved a man's attempt to invoke self-defense and the "castle doctrine" against a female domestic partner, as the Court noted in its decision the law in this area is of particular importance to women, who are most often the victims of domestic violence.

New York's self-defense statute provides that a person attacked with deadly force may respond with deadly force only if unable to retreat with complete safety. The statute also provides, however, that there is no duty to retreat before responding with deadly force if the person is not the initial aggressor and is attacked in his own home. *See* Penal Code § 35.15 (2) (a) (i).

Judge Albert M. Rosenblatt's opinions frequently contain interesting historical background, and *Jones* is no exception. It traces to 1603 the "castle doctrine" (so named from its one's-home-is-one's-castle roots) embodied in the Penal Code's home exception to the duty to retreat in self-defense cases. The opinion also recounts early 20th century precedent from various states applying the doctrine to situations involving attacks by one member of a household against another, including a Court of Appeals decision holding that a father had no duty to retreat before shooting his son during an attack in the residence they shared. *See People v. Tomlins*, 213 N.Y. 240 (1914) (Cardozo, J.). The Court in *Jones* unanimously held that someone attacked with deadly force in his home by another resident may respond in kind without retreating, just at if the attacker were an intruder.

The Court thus found that the trial court, having instructed to jury on the use of deadly force in self-defense, should have granted defendant's request for an instruction on the home exception. Its failure to do so was harmless error, however. The defendant's live-in girl friend had slapped him and picked up a steak knife, but dropped the knife when the defendant grabbed her. Defendant then strangled his girlfriend to death. The Court ruled that these facts did not support that defendant reasonably believed his girlfriend was using or about to use deadly force, a prerequisite to invoking the justification defense, and thus the conviction could stand despite the error.

[1] The expression "three men in a room" has been used to criticize the way anything gets accomplished in State government. This criticism has become more forceful. *See* J. Creelan &

L. Moulton, *The New York State Legislative Process: An Evaluation and Blueprint for Reform*, issued by the Brennan Center for Justice at NYU Law School at vii (2004) ("New York State's legislative process is broken"); The Record of the Association of the Bar of the City of New York, Vol. 59, No. 2 300 at 304 (2004), the President's Farewell Address ("We, along with many, if not most, others in the State, continue to be frustrated by the legislative paralysis in Albany. We have long complained that the Legislature is dysfunctional, populated by members who have little chance of losing their seats, with a seemingly permanent division of the legislative Houses along party lines. The result is endless political posturing, with little progress on key issues.").