

NEW YORK COURT OF APPEALS ROUNDUP

JUDICIAL COMPENSATION, FOREIGN ADOPTION, GARNISHMENT, CONSTITUTIONAL ISSUES

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Last month the Court of Appeals handed down a much-anticipated decision over the legality of the Legislature's failure to raise judicial salaries in 11 years, in which the Court found a violation of the Separation of Powers doctrine. In a decision that should give comfort to the parents of children adopted abroad, the Court held that New York law governs the parental rights of a father who adopted a child in Cambodia because both parent and child now reside in the state.

In another decision, the Court held that intangible property, such as the ownership interests in out-of-state businesses at issue, follows the owner, and thus may be garnished by in-state service of a garnishment order upon owner/debtor, regardless of where he resides. Lastly, Judge Robert S. Smith's dissent from an order dismissing an appeal addressed an interesting issue of appellate jurisdiction, specifically when the Court must review a case raising a constitutional issue.

Judicial Compensation

In one of the more unique issues to come before the Court in its history – the entitlement of its members and other judges in the state to an increase in compensation – a 5-1 majority of the Court declared that, "as a matter of law, the State defendants' failure to consider judicial compensation on the merits violates the Separation of Powers Doctrine" of the New York State Constitution.

In doing so, the Court nonetheless acknowledged that whether, and by how much, judicial compensation should be adjusted was within the province of the Legislature. Importantly, however, the Court at the same time cautioned the Legislature that the issue of whether the Legislature has met its constitutional obligations with respect to judicial compensation was

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"within the province of the Court" and the Court expected "appropriate and expeditious legislative consideration." So the clock can be said to be ticking!

The three related cases, *Maron v. Silver*, *Larabee v. Governor of the State of New York* and *Chief Judge of the State of New York v. Governor of the State of New York*, arose out of the fact that the judges of the state have not received a raise in compensation, including any cost-of-living increase, since 1999. During this period, the "real value" of judicial salaries declined by approximately 25 percent to 33 percent. Bottom line, the Court found that this resulted in the domination or interference with the function of the judiciary and consequently violated the Separation of Powers doctrine, citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

In 2006, the Legislature failed to authorize a disbursement of an increase—although it was included in the state's budget—because no agreement could be reached on a pay increase for the Legislature. The same result occurred in 2007, when the Assembly refused to increase judicial salaries without an increase in legislative pay. And again in 2008-09, although Governor David A. Paterson and the Legislature approved judicial salary increases in the budget, no legislative action occurred to make it happen.

The Court rejected challenges to the inadequacy of judicial salaries based upon the State Equal Protection Clause and upon two theories advanced under the State Compensation Clause, specifically that the failure to provide cost-of-living increases amounted to a diminution of salary as a result of inflation, and that it was discriminatory to provide cost-of-living increases to state employees generally while denying such increases to judges.

In the final analysis, what moved the Court to render its declaration under the Separation of Powers doctrine was the failure of the Legislature, by objective assessment and based upon the judiciary's needs, to fix judicial compensation without the matter being tied to "unrelated policy initiatives or legislative compensation adjustments." Such conduct rendered the judicial branch a hostage to the legislative branch. The Court, in an opinion by Judge Eugene F. Pigott, Jr., with a dissent by Judge Robert S. Smith (Chief Judge Jonathan Lippman taking no part) held that result unconstitutional.

The Court's ruling can be said to be an act of judicial statesmanship, giving to the Legislature that over which it clearly has power, but denying the Legislature the ability to abuse the judiciary by impairing its right to be an equal branch of state government, coupled with the threat of additional action if change is not seasonably forthcoming.

Unfortunately for the judges who serve in the system and those well-qualified others who may wish to serve, the Court's order cannot provide immediate help. In addition, as reported elsewhere in the New York Law Journal,¹ in light of the \$9 billion state deficit, Assembly Speaker Sheldon Silver suggests there is no urgency in resolving the judicial salary crisis, other than that the Assembly will consider it "when economic conditions improve."

Foreign Adoption

The facts of L.M.B. v. E.R.J. are unusual; however the Court's unanimous decision, by Judge Robert S. Smith, addresses matters of broader importance to foreign adoptions.

The parties, Johnson & Johnson heir and socialite Libet Johnson and celebrity weight-loss doctor Lionel Bissoon, were romantically involved but unmarried when they decided to adopt an orphan who was in the United States on a medical visa. In an attempt to avoid U.S. visa restrictions on the adoption of Cambodian orphans, the couple decided that Mr. Bissoon would regain his Trinidadian citizenship and adopt the boy so that he would no longer be Cambodian, after which a New York adoption would be effectuated.

In 2004, Mr. Bissoon obtained from a Cambodian Ministry an Adoption Certificate (the "2004 Certificate") stating that he was "allowed to adopt" the boy. A new birth certificate was issued naming Mr. Bissoon the boy's father. The parties' plan did not work, however, because at the time, Trinidad and Tobago did not permit single men to adopt.

After the parties' relationship ended, Ms. Johnson pursued adopting the child herself. In 2005, Mr. Bissoon signed a letter to the Cambodian Ministry stating that he wished to "relinquish" the "permission" to adopt that he had been given. Ms. Johnson submitted this letter and her own application to the Ministry, and in 2005 she was granted an Adoption Certificate. Thereafter, the parties quarrelled, and their relationship, which had until that point remained friendly, became hostile.

In 2006—without providing notice to Mr. Bissoon—Ms. Johnson filed a petition with the New York County Surrogate styled as one to "re-adopt[]" the child. She later agreed that was an incorrect characterization. The petition was granted, but when Mr. Bissoon learned of the adoption, he filed a petition to have it vacated. In opposition, Ms. Johnson submitted two documents from the Cambodian government generated after Mr. Bissoon challenged her adoption of the child, one from the Ministry stating that it had granted Ms. Johnson permission to adopt, and another from the Council of Ministers "clarif[ying]" that the permission to adopt previously given to Mr. Bissoon was "null and void."

The Surrogate found that the 2004 Certificate evidenced a "full and final" adoption under Cambodian law, a determination that Ms. Johnson did not challenge in the Court of Appeals. The Surrogate also rejected Ms. Johnson's position that the foreign adoption should not be recognized by New York, and vacated Ms. Johnson's adoption of the child. The Appellate Division, First Department, affirmed. The child continued to live with Ms. Johnson, with visitation by Mr. Bissoon.

Ms. Johnson pressed three arguments in the Court of Appeals. First, she argued that the issue of whether Mr. Bissoon's letter served to relinquish his rights (and thereby served as consent to Ms. Johnson's adoption of the child under New York law) should be governed by Cambodian law. Judge Smith's opinion observed that such a ruling would create "unacceptable uncertainty" for New York parents who adopt a child in another country. Instead, once parental rights are

established in another country by parents now living in the state and those rights are recognized by New York, New York law governs the parent/child relationship.

Next, Ms. Johnson asserted that the act of state doctrine required New York's courts to give effect to the two Cambodian documents issued after the litigation had commenced. The Court held that, even assuming those documents constituted acts of the Cambodian government, they were not acts "done within [Cambodia's] own territory" because they purported to govern individuals outside of the country, and thus the act of state doctrine was inapplicable.

Finally, Ms. Johnson maintained that the courts below failed to consider the best interests of the child. The Court stated that the best interests of the child are always important but were not dispositive because parental rights cannot be ignored on simply a best interest of the child basis.

Garnishment

In *Hotel 71 Mezz Lender LLC v. Falor*, the Court unanimously reversed the 3-1 decision of the Appellate Division, First Department, which had relied upon a 1904 Court of Appeals decision. The Hotel 71 Court stated that the restrictive view of *National Broadway Bank v. Sampson*, 179 N.Y. 213 (1904), that the situs of intangible property for purposes of attachment is the debtor's domicile, was overruled a year later by *Harris v. Balk*, 198 U.S. 215 (1905), and in any event is inconsistent with CPLR Article 62. Just as "debt clings to the debtor," intangible property interests travel with their owner and are attachable in New York when the debtor is present in the state.

The property at issue was ownership/membership interests in 23 out-of-state business entities. The interests were "uncertificated," i.e., not reduced to a written instrument such as a stock certificate, and thus, unlike a stock certificate, were intangible. They belonged to defendant Mitchell, one of the guarantors of a \$27.3 million loan for the development of a hotel in Chicago. The guarantors submitted to the jurisdiction of the state for any dispute arising out of the guarantee. Although Mitchell resided outside of the state, he was present at the hearing in Supreme Court, New York County, at which Justice Charles E. Ramos authorized the garnishment and a garnishment order was served upon him. Justice Ramos also appointed a receiver of Mitchell's ownership interests. The Appellate Division held that attachment of a debt or other intangible property may only be effected by service within the state upon a resident, and that the appointment of a receiver was an abuse of discretion.

In reinstating the trial court's rulings, the Court, in an opinion by Judge Theodore T. Jones, noted that this was not a matter of quasi in rem jurisdiction. Instead, New York's courts had jurisdiction over Mitchell's tangible and intangible personal property while Mitchell was within the state because he had contractually submitted to personal jurisdiction here. Mitchell's business interests were akin to contractual rights such as the right to collect a debt, assignable and transferable, and therefore subject to attachment under Article 62.

The Court also disagreed with the First Department's ruling that the Supreme Court had abused its discretion in appointing a receiver, pointing out that the receiver was to oversee Mitchell's

interests in various businesses, not to run the day-to-day operations of those businesses. Receivership may be particularly appropriate in the case of intangible property that lacks a ready market and cannot be easily auctioned by a sheriff, such as the property at issue. In addition, the businesses were in danger of insolvency.

Constitutional Issues

The petitioner in *Matter of Kachalsky v. Cacace* commenced an Article 78 proceeding to challenge the denial of his application for a license to "have and carry concealed" a pistol. The Appellate Division, Second Department, unanimously affirmed respondent's determination that "proper cause" for issuance of the license did not exist. The Appellate Division's decision did not address petitioner's argument that the "proper cause" requirement of Penal Law §400.00(2)(f) for such a license violates the Second Amendment to the U.S. Constitution.

Six judges of the Court of Appeals voted to dismiss the appeal sua sponte on the ground that "no substantial constitutional question is directly involved." Judge Robert S. Smith dissented, however, concluding that the Court lacked discretion not to hear the appeal. As Judge Smith pointed out, both Article 6, §3(b)(1) of the New York Constitution and CPLR 5601(b) implementing it provide for appeal as of right to the Court of Appeals of a decision that finally determines an action in which the construction of the state or federal Constitution is "directly involved." The Court has interpreted these provisions to apply only to "substantial" constitutional questions.

According to the dissent, a question of constitutional construction should be deemed insubstantial only when it is frivolous. For the Court to do otherwise (which Judge Smith admitted he has joined in doing in the past) effectively gives it discretion over whether to hear appeals raising constitutional questions. Judge Smith argued that the issues raised in *Kachalsky*—whether the Second Amendment limits the powers of states and whether the "proper cause" requirement is consistent with that Amendment—are not frivolous, and thus even if the Court would have reasonable grounds to decline to review them if it had discretion to do so, the Court did not have discretion here.

Endnotes:

1. "[Albany Erred by Tying Up Judges' Raises, Court Rules](#)," New York Law Journal, Feb. 24, 2010.

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