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Treatment of Pregnant Mothers and Infertile Women Under Family Law Statutes

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The Supreme Court's term included two notable cases in the area of family law, though neither case stemmed from a matrimonial matter. One case, *New Jersey Dep't of Children & Families v. A.L.*, 213 N.J. 1 (N.J. 2013), required the court to interpret statutory language and address whether it was appropriate to determine if a substantial risk of harm exists when a mother tests positive for cocaine immediately after giving birth, but there is no immediate harm to the newborn. The other case, *In re T.J.S.*, 212 N.J. 334 (N.J. 2012), handled the overlap between family law and constitutional law by addressing whether the New Jersey Parentage Act, which does not recognize an infertile wife as a legal mother of her husband's biological child born to a gestational carrier, violates the right to equal protection.

Statute Does not Cover Unborn Children

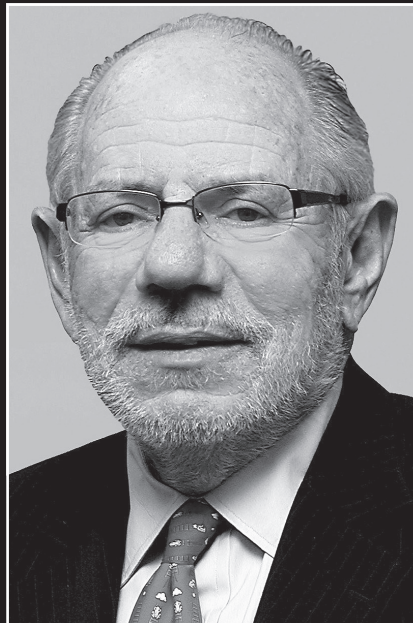
In *NJDCF v. A.L.*, the court reversed the judgment of the Appellate Division, which affirmed the trial court's decision. The court addressed whether a court can find abuse or neglect of a child under N.J.S.A. 9:1-1, et al. (Title Nine), if an expectant mother uses drugs during pregnancy but there is no evidence of actual harm when the baby is born. The court held that indication of the new mother using drugs during pregnancy did not prove imminent danger or a substantial risk of harm to the newborn. Further, the court held that a mother's positive drug

test was not enough to establish abuse or neglect under Title Nine.

The defendant in the case, A.L., gave birth to a son, A.D. When she was admitted to the hospital, A.L. tested

positive for cocaine. However, two hours after he was born, A.D. tested negative for cocaine. Later that day, he tested positive for cocaine metabolites, but his health was otherwise good. A.L. and her newborn son were released from the hospital, but the hospital reported A.L.'s positive drug results to the New Jersey Division of Child Protection and Permanency (DCPP). After an investigation, the DCPP determined that the alle-

gations of neglect against A.L. were substantiated. The DCPP filed a complaint for the care and supervision of the newborn, and moved for a finding of abuse or neglect against A.L. The trial court



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gations of neglect against A.L. were substantiated. The DCPP filed a complaint for the care and supervision of the newborn, and moved for a finding of abuse or neglect against A.L. The trial court

concluded that A.L.'s "prenatal drug use, without more, when corroborated by [the newborn's] positive testing, is sufficient to establish by a preponderance of the evidence that [the newborn] is an 'abused or neglected child'" under N.J.S.A. 9:6-8.21(c)(4)(b). The Appellate Division affirmed the trial court's finding of abuse and neglect, concluding that, "A.L.'s use of cocaine two days before [the child's] birth created the very risk of harm that

Family Law

N.J.S.A. 9:6-8.21(c)(4)(b) is designed to prevent.”

Title Nine governs acts of abuse and neglect against a child. Pursuant to N.J.S.A. 9:6-8.21, an abused or neglected child is “a child less than 18 years of age ... whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian ... to exercise a minimum degree of care ... by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof.” Throughout Title Nine, a “child” is repeatedly defined as “any person under 18 years of age.” N.J.S.A. 9:2-13(b). The focus of Title Nine is to protect children who have suffered harm or face imminent danger.

In *NJDCF v. A.L.*, the court was called upon to determine if the protection of Title Nine could be extended to protect an unborn child. The court held that the legislative intent and the statutory language were clear, “[a]bsent evidence of clear legislative intent, court decisions in New Jersey have declined to extend the reach of a statute to an unborn child when the statute refers to a ‘person’ or a ‘child.’” The court explained that:

Elsewhere, the Legislature explicitly extended protection to an ‘unborn child.’ As noted earlier, N.J.S.A. 30:4C-11 authorizes the DCPD to provide services, with a mother’s consent, in response to an application — including ‘an application on behalf of an unborn child.’ Had the Legislature meant to apply Title 9 to an unborn child, it could have used the words it inserted at N.J.S.A. 30:4C-11.

Additionally, the court was required to decide whether the newborn “ha[d] been impaired’ or was in ‘imminent danger of becoming impaired’ as a result of his mother’s failure to exercise a minimum degree of care by unreasonably inflicting harm or allowing a ‘substantial risk’ of harm to be inflicted.” There are various ways to demonstrate that a newborn has been impaired, such as

symptoms of drug withdrawal, respiratory distress, cardiovascular or central nervous system complications, low gestational age at birth, low birth weight, poor feeding patterns, weight loss through an extended hospital stay, lethargy, convulsions or tremors. When indications of impairment or actual harm are not present, such as in this case, a finding of abuse or neglect can be based on proof of imminent danger and substantial risk of harm.

This case ultimately turned on the evidence presented, and the court’s determination that the DCPD did not meet its burden of proof in establishing that the child was in imminent danger and at a substantial risk of harm. The DCPD relied upon two pieces of evidence: (1) that the mother tested positive for cocaine upon admission to the hospital; and (2) that the newborn tested positive for cocaine metabolites. The DCPD did not present any expert testimony. The court made it clear that “Title 9 is not intended to extend to all parents who imbibe illegal substances at any time. ... [N]ot all instances of drug ingestion by a parent will substantiate a finding of abuse or neglect.” The court held that the DCPD could not meet its burden of proof in establishing actual harm or imminent danger to the newborn, and the decisions of the trial court and Appellate Division were reversed.

An Overlap of Family Law and Constitutional Law

The other seminal case this year was decided by an equally divided court. In *In Re: T.J.S.*, the court did not issue a full written opinion, but rather issued a per curiam opinion upholding the judgment of the Appellate Division. In this case, the issue was whether the N.J. Parentage Act, which provides that an infertile man is the father of a child born to his artificially inseminated wife, violates equal protection by not recognizing an infertile woman as the legal mother of her husband’s biological child born to a gestational carrier. This was a case of first impression for New Jersey, and it caused the court to balance family law with constitutional law.

The plaintiffs in this case were husband and wife. The wife could not carry

a child to term, so the parties elected to enter into a surrogacy agreement with a gestational carrier. The parties used an anonymous egg donor and the husband’s sperm to create an embryo, which was implanted in the carrier. Prior to the child’s birth, the parties sought a court order, declaring their parentage under the N.J. Parentage Act (N.J.S.A. 9:17-38 to -59). The parties did not want to go through the adoption process because it would place their child in an uncertain situation until same could be finalized. The trial court determined that the parties should be the parents listed on the newborn’s birth certificate, so long as the carrier relinquished her rights to the child.

Three days after the child was born, the carrier relinquished her rights, and the birth certificate was issued with the parties listed as the newborn’s parents. However, the Department of Health and Senior Services, Bureau of Vital Statistics and Registration (the State) learned of the prebirth order and moved to vacate the portion directing the wife to be listed as the mother on the birth certificate. The parties opposed the motion. The parties argued that the provisions of the Parentage Act conferring paternity upon a husband either presumptively, where the child is born to the wife during marriage, N.J.S.A. 9:17-43(a), or by operation of law, where the wife is artificially inseminated with donor sperm, N.J.S.A. 9:17-44, should be read gender neutrally to also apply to an infertile wife; otherwise, the act is unconstitutional because it treats infertile married men and women differently without sufficient justification.

The trial court granted the state’s motion, and indicated that adoption was the wife’s appropriate remedy. The Appellate Division affirmed, holding that the plain language of the act provides for a declaration of maternity only to a biologically or gestationally related female. In a published opinion, the Appellate Division held that the right to be legally declared the child’s mother based solely on the parties’ shared intent and by the most convenient and immediate means possible is not a fundamental right. The Appellate Division indicated that the act’s

Family Law

gender-based differentiation in Section 44 may survive an equal protection challenge if it is based on real physiological differences between men and women. The Appellate Division stated, “[t]he right to equal protection does not require us to scrutinize gender distinctions that are based on real physiological differences to the same extent we would scrutinize those distinctions when they are based on archaic, invidious stereotypes about men and women.” The Appellate Division made it clear that the act’s presumption of paternity cannot be understood or interpreted to create a presumption of maternity. In affirming, the Supreme Court observed that the plain language of the act provides that maternity is grounded on a biological or genetic connection to the child. The court explained that the act would survive an equal-protection challenge because the legislature devised a statutory means through which the wife in this case could

efficiently be declared the child’s mother. In noting that the wife may be attempting to circumvent the adoption process, the court stated, “[c]onvenience and desire by litigants, however, cannot supplant the clear legislative preference or the constitutional commands that are based on the biological connection between the Carrier and the child.”

While the court did not elaborate much on the issue, other than to reiterate the Appellate Division’s points, the dissenting Justices expressed their concern with the act and its “unequal treatment of similarly situated infertile married women and infertile married men under the law.” While those dissenting noted that in some situations, anatomical differences may cause laws to be applied differently, in this case, once a surrogate knowingly and voluntarily surrenders her parental rights, their situations are not meaningfully different. However, the court was divided

3-3, which caused the court to affirm the decision of the Appellate Division.

The court examined the construction of the act, and made it clear that any change to the act must be done so through the Legislature. The court provided similarly situated parties with hope for the future, noting that:

Although the Legislature passed a bill that would have created an exception to the adoption statute for couples like plaintiffs, that bill was vetoed by the Governor, in part because of what he considered to be insufficient study of the larger social questions that are implicated by the bill that was passed.

In light of this recent decision by the court, the study called for by the governor may be on the horizon sooner rather than later. ■