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First in the Nation: N.J. Court Subordinates Father's Desire to be in Delivery Room to Mother's Privacy Rights

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I. Introduction

On March 10, 2014, Judge Sohail Mohammed of the New Jersey Superior Court, Chancery Division, released his opinion in *Plotnick v. DeLuccia*.^[1] At issue in the case was whether a father has a right to be present at his child's birth over the mother's objection, an issue that according to Judge Mohammed, had never been litigated in New Jersey or the United States.^[2] Citing to existing jurisprudence dealing largely with privacy rights, Judge Mohammed held in favor of the mother, Rebecca DeLuccia, concluding that a father's right to be notified of—and present during—a mother's delivery of his child is subordinate to a mother's pre-birth and privacy rights during her delivery.

II. The Case

The parties in the case, Steven Plotnick and Rebecca DeLuccia, began a relationship in 2012, and DeLuccia found out she was pregnant in February 2013. However, the relationship between Plotnick and DeLuccia dissolved a few months later. Ultimately, Plotnick retained counsel and in October 2013, Plotnick's attorney wrote a letter to DeLuccia relaying Plotnick's desire to be involved with the pregnancy and the child's life. DeLuccia obtained counsel in November. Midway through November, Plotnick filed an order to show cause application and his accompanying certification with the court. In the application, Plotnick sought a temporary mandatory injunction order that: "1) he be notified when the mother, defendant, enters labor; 2) he can be present at the delivery of the child; 3) he be able to sign the birth certificate the day of the child's birth; 4) his surname is included on the birth certificate; and 5) a parenting-time order be issued."^[3] DeLuccia objected to Plotnick's presence at the child's birth, citing her own right of privacy.^[4]

While the court first considered the issues of ripeness, and the definition of "parent-child relationship" and "father" under the New Jersey Parentage Act,^[5] crucially DeLuccia stated that she had no intention to deny Plotnick the ability to sign the birth certificate.^[6] DeLuccia further repudiated that the child would not have Plotnick's surname. Rather, in DeLuccia's certification filed with the court, she merely expressed a "desire for 'privacy' during labor." The court "infer[ed] 'privacy' to mean that defendant [id] not desire plaintiff to be present at the birth."^[7]

III. The Preliminary Mandatory Injunction

The court, citing *Crowe v. De Gioia*,^[8] noted that an injunction should only be granted when three conditions are met.^[9] First, the injunction must be necessary to prevent irreparable harm.^[10] Second, the applicant must present a settled underlying claim and make a showing of a reasonable probability of success on the merits.^[11] Third and finally, in order for the court to grant the injunction, balancing the relative hardships of the parties must favor granting the relief requested.^[12]

A. Irreparable Harm

The first prong of the standard for an injunction is whether that relief is necessary to prevent irreparable harm. As a preliminary point, the court looked to federal authority and expressed that the right of a woman to choose "subordinate[s] the interests of a father to a mother."^[13] Jurisprudence recognizes that although the father has a "deep and proper concern and interest" in the pregnancy, the mother's interests still prevail.^[14]

Citing *Roe v. Wade*^[15] and *Planned Parenthood v. Casey*^[16] the court noted that the husband's interest in the life of his child does "not permit the State to empower him with this troubling degree of authority over his wife" and "has no enforceable right to require a wife to advise him before she exercises her personal choices."^[17] Summarizing *Casey*, the court stated that "while acknowledging the state's and husband's interest, the Supreme Court cautioned against state action in the pre-birth time frame that would interfere with the individual right possessed by the mother."^[18] Invoking state authority, the court then noted that New Jersey Constitution article I, paragraph 1 provides broader protection than the corresponding federal provision Due Process provision.^[19]

Despite the federal and state authority cited in support of the strength of the mother's interests, the court still concluded that monetary damages would not make the father whole if he were to miss the child's delivery, and accordingly, there *would* be irreparable harm if the court were to find in his favor at a later time.^[20] Therefore, this matter was emergent.

B. Settled Claim and Likelihood of Success on the Merits

The second prong necessary for an injunction to be granted is a demonstration that the claim is settled and there is a likelihood of success on the merits. Hurting his case, the plaintiff was unable to cite to any legislative or judicial authority to support his position that he has a right to be notified of the delivery.

The legislative research done by the court revealed that the plaintiff was unlikely to succeed on the merits of the claim that served as the basis for the requested injunction. The court first noted that while the mother's legal rights of privacy are well-settled, the rights the plaintiff alleges are unsubstantiated by legislation or case law.^[21] The court dug in deeper to demonstrate why the plaintiff's claim was unlikely to succeed. It explained that the Supreme Court "has never placed the father's interests above or even equal to the mother post-*Roe*. In fact, in *Casey* the Court clearly stated the father's interests pre-birth are not equal to the mother's interest."^[22]

Second, at the state level, and consistent with the court's earlier analysis, under the New Jersey Constitution, "[i]n the context of a woman's fundamental rights in reproductive matters, the New Jersey Supreme Court has consistently affirmed that Article I, Paragraph 1 is broader than the federal Due Process Clause."^[23] Thus, while the father's right to pre-birth notification had not been decided previously, the court commented that "it would be paradoxical if [it] were to find that the mother here would have to inform a non-marital partner when she enters labor, when [it] has found that minors do not need to notify their parents when seeking an abortion, and federal law has found spousal notification equally burdensome."^[24]

Third, there are additional, non-Due-Process protections of the mother's pre-birth interest. Namely, the court opines that by voluntarily entering a hospital, a mother enjoys the "doctor-patient privilege" and a "licensor-licensee relationship" with the hospital, thus creating the expectation of privacy "and the related exclusionary principle of long standing societal norms."^[25] Further, highlighting the holding of *Kinsella v. NYT Television*,^[26] the court explained that the New Jersey Hospital Patient Bill of Rights Act "confers various rights upon hospital patients, including privacy to the extent consistent with providing adequate medical care."^[27] Extending that premise to its logical conclusion, the court stated that "certainly forcing an individual into the room against her wishes would violate [the mother's] privacy rights."^[28] Finally, citing the Health Insurance and Portability Act of 1996 (HIPAA),^[29] the court noted that federal law also guarantees a patient's right to privacy. While the court acknowledged that HIPAA may provide narrower protection than the Hospital Patients Bill of Rights Act, HIPAA only preempts state laws that do not provide as much privacy protection as the federal counterpart.^[30] In other words, because the New Jersey Hospital Patient Bill of Rights offers more privacy protection, HIPAA's preemptory function is irrelevant.

Therefore, the court concluded that the plaintiff did not demonstrate the likelihood of success on the merits because the mother's privacy interests are well established and protected by legislative and judicial authority.^[31]

C. Relative Hardships of the Respective Parties

And finally, the court considered the relative hardships that each party would suffer in granting or denying an injunction. Here, the hardship upon the mother would be the discomfort of having an unwanted person present during her delivery.^[32] "Her special relationship to the child to be born, which has been recognized by the Supreme Court in *Casey* would be infringed."^[33]

Conversely, if an injunction was to be denied and subsequently the father was not notified, the court noted the father would suffer the hardship of missing the birth of his child.^[34] While the court recognized the father's hardship, it held that "in the absence of any statutory support, it lacked authority to grant the father the right he is seeking."^[35] Thus, while the court calls the father's interests and intentions "laudable," the court was unwilling to subordinate the mother's privacy interest to the father's interest in being present during the child's birth.^[36]

IV. Conclusion

While the Chancery Division applied the facts to an established standard for granting temporary mandatory injunctions, the issue presented in *Plotnick v. DeLuccia* was ostensibly novel. The ultimate position established is that the protections that the Due Process Clause provides to the mother's pre-birth interests is greater than the father's interest in being present during delivery. As the plaintiff was unable to provide any legislative or judicial support, and therefore was unable to establish any legal right to be present at the birth, the court was unwilling to grant the injunction the plaintiff was seeking. Accordingly, the court found that all of the factors "overwhelmingly favor[ed] the mother's interests over the father's application for his notice and appearance at the child's birth."^[37] Laura Nunnick, Plotnick's attorney, said that her client had only wanted to see his child as soon as possible after the birth.^[38] Plotnick, who was permitted to see the child after the birth, decided against appealing Judge Mohammed's decision, and therefore, for now it seems that this case, which may be the first of its type in the Nation, will stand as the lone precedent in this tumultuous area of law.

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[1] *Plotnick v. DeLuccia*, No. FD-16-00008-14, 2013 WL 7869380, at *1 (N.J. Super. Ct. Ch. Div. Nov. 19, 2013).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] See New Jersey Parentage Act, N.J. STAT. ANN. §§ 9:17-38 to -53 (West, Westlaw through L. 2014, J.R. No. 1).

[6] *Plotnick*, 2013 WL 7869380, at *7.

[7] *Id.*

[8] 447 A.2d 173 (N.J. 1982).

[9] *Plotnick*, 2013 WL 7869380, at *7.

[10] *Id.* (citing *Crowe*, 447 A.2d at 176).

[11] *Id.* (citing *Crowe*, 447 A.2d at 177).

[12] *Id.* (citing *Crowe*, 447 A.2d at 177).

[13] *Id.* at *8.

[14] *Plotnick*, 2013 WL 7869380, at *8 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992)).

[15] 410 U.S. 113 (1973).

[16] 505 U.S. 833.

[17] *Plotnick*, 2013 WL 7869380, at *9 (citing *id.* at 898).

[18] *Id.*

[19] *Id.* (citing *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 632-33 (N.J. 2000)) (applying the "right to choose" balancing test in which the women's health and privacy are placed on the one side of the scale and weighed against the State's interest in potential life, and concluding, "We have not hesitated, in an appropriate case, to read the broad language of article I, paragraph 1, to provide greater rights than its federal counterpart.").

[20] *Id.* at *11.

[21] *See id.* at *11-12.

[22] *Id.* at *12.

[23] *Plotnick*, 2013 WL 7869380, at *12.

[24] *Id.*

[25] *Id.* at *12-13 (citing *Sayles v. G & G Hotels, Inc.*, 57 A.3d 1129, 1135 (N.J. Super. Ct. App. Div. 2013)).

[26] 887 A.2d 1144, 1147 (N.J. Super. Ct. App. Div. 2005).

[27] *Plotnick*, 2013 WL 7869380, at *13 (citing *Kinsella*, 887 A.2d at 1147 (citing New Jersey Hospital Patient Bill of Rights Act, N.J. STAT. ANN. §§ 26:2H-12.7 to -12.11 (West, Westlaw through L. 2014, J.R. No. 1.))).

[28] *Id.*

[29] Health Insurance and Portability Act of 1996, 42 U.S.C.A. §§ 1320d - 1320d-8 (West, Westlaw through P.L. 113-74 approved 1-16-14).

[30] *Plotnick*, 2013 WL 7869380, at *13.

[31] *Id.* at *14.

[32] *Id.*

[33] *Id.*

[34] *Id.* at *15.

[35] *Id.*

[36] *Plotnick*, 2013 WL 7869380, at *15.

[37] *Id.* at *16.

[38] Salvador Rizzo, *NJ Court Ruling Blocking Newborn's Dad from Delivery Room is First in Nation*, STAR-LEDGER (Mar. 12, 2014, 6:42 AM), http://www.nj.com/politics/index.ssf/2014/03/mom_can_keep_dad_out_of_the...

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