Key Issues for Pennsylvanians: What Is at Stake with the Pennsylvania Supreme Court

By Nathan Fox, Brian Guthrie & Bill O'Shea

PENNSYLVANIA OCTOBER 2009

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Pennsylvanians will soon elect a new justice to serve a ten-year term on the Pennsylvania Supreme Court, a court that regularly decides crucial matters affecting the daily lives of those who live, work, and do business in Pennsylvania. By way of example, this paper highlights several areas of the Pennsylvania Supreme Court's decision-making. The influence of this court, or indeed any state court, surely merits the people's careful attention.

Gun Control

It is likely that the court will soon consider the application of the constitutional right to bear arms, as it relates to Pennsylvania law. Particularly, the court may consider the rights of individual municipalities to place restrictions on the possession of firearms within their own jurisdictions. While the court has so far exempted gun owners from several municipal restrictions, recent attempts by cities such as Philadelphia and Pittsburgh to tailor gun laws are likely to bring this issue before the court once again.

Pennsylvania's leading gun control case is *Ortiz v. Commonwealth*.[1] In that case, the issue was whether Philadelphia and Pittsburgh could, through the passage of local ordinances, regulate the ownership of so-called "assault weapons" when the Pennsylvania legislature passed a statute expressly prohibiting them from doing so.[2] In 1993, both Philadelphia and Pittsburgh enacted ordinances banning certain types of assault weapons within their respective boundaries. The legislature quickly responded by amending the Pennsylvania Crimes Code to include a provision that prevented local government entities from regulating the lawful ownership, possession, transfer, or transportation of firearms when carried, or transported, for purposes not otherwise prohibited by Pennsylvania law.[3] The supreme court specifically held that, since the Pennsylvania constitution protects the ownership of firearms, any such regulation would be a matter of statewide concern and, therefore, the proper concern of the state legislature, not local city councils.

Philadelphia renewed attempts to restrict gun ownership by enacting ordinances prohibiting the lawful possession of firearms in a number of ways: ordinances limited handgun purchases to one per month; prohibited straw purchases and sales; mandated the reporting of lost or stolen firearms; required a license in order to acquire a firearm within, or bring a firearm to, Philadelphia; required the annual renewal of a gun license; stated that a firearm can be confiscated from anyone posing a risk of harm; prohibited the possession or transfer of assault weapons; and required that any person selling ammunition report the purchase and the purchaser to the police department.[4] All provisions were struck down in *Clarke v. House of Representatives*, where the Commonwealth Court held that the ordinances were substantially similar to those in *Ortiz* and underscored the preemption of the legislature in matters relating to gun laws.[5] However, dicta in both the Commonwealth Court's opinion and dissent intimated that, because the ordinances contained language limiting their effect to the General Assembly's authorization, the regulations might be valid if the city demonstrated that the law recognized its power to act despite the legislative prohibition.

Philadelphia responded by passing new ordinances in April of 2008. The language was substantially similar to the 2007 ordinances, but the City removed the authorization language that plagued its prior attempt.[6] The Commonwealth Court considered the new ordinances in *National Rifle Association v. City of Philadelphia*, striking down the prohibition on owning an assault weapon and the straw purchaser restriction, but also finding that the petitioners lacked standing to challenge the remaining ordinances.[7] While the city argued that the laws fell outside the state preemption, as

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they only pertained to the *unlawful* use of firearms, the court ultimately relied on the "crystal clear" language of the supreme court's holding in *Ortiz* and rejected the city's argument.

The United States Supreme Court's ruling in *District of Columbia v. Heller* has focused much of the firearms debate on the language of the Second Amendment and other federal laws; even so, it is important to understand that much of the debate regarding gun ownership occurs at the state level. Article 1, Section 21 of the Constitution of Pennsylvania sets forth in specific language that "[t]he right of the citizens to bear arms in defense of themselves and the State shall not be questioned."

Both the *Clarke* and the *National Rifle Association* decisions have been appealed to the Pennsylvania Supreme Court. The Court has undergone a near complete changeover since *Ortiz*, with Chief Justice Ronald D. Castille the only remaining justice from that decision, leaving some uncertainty on how the Court might rule if the issues raised in *Ortiz* would come before the Court again. If the Court agrees to hear either *Clarke* or *National Rifle Association*, its interpretation of the Pennsylvania Constitution would not only affect Pennsylvanians, but could also have a ripple effect on the interpretation of gun laws across the nation.

Same Sex Relationships

Pennsylvania has a Defense of Marriage Act ("DOMA") that has been in place since 1996.[8] The act reads:

> [i]t is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.[9]

Pennsylvania's DOMA serves as the backdrop for the several instances in which Pennsylvania courts have considered the rights of same-sex couples. In the first instance, *Devlin v. City of Philadelphia*, the court established a dichotomy that presently exists in Pennsylvania: a home rule city or municipality may recognize same-sex life partnership as a marital status but may not grant preferential tax treatment to those same-sex couples. In *Devlin*, the Pennsylvania Supreme Court addressed whether the City of Philadelphia's ordinances providing same-sex life partners preferential tax treatment violated the Pennsylvania Constitution.[10] The supreme court held that, while the City did not exceed its home rule charter by enacting ordinances designating same-sex life partnership as a marital status, the City's exemption from realty transfer taxes for life partners did violate the requirements of the Uniformity Clause of the Pennsylvania Constitution.

The Pennsylvania Supreme Court has also heard cases involving the rights of same-sex couples with respect to adoption and visitation rights. In *T.B. v. L.R.M.*, a woman in a same-sex relationship agreed to have a child through artificial insemination, after which she cohabitated with her partner and the child for three years.[11] When the relationship ended, she filed suit for shared custody and visitation.[12] The court applied the doctrine of *in loco parentis* which "refers to a person who puts oneself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption" and ultimately concluded that the elements were satisfied, so that she was entitled to custody and visitation, because the doctrine is not limited to biological parents. Further, the court found that a same-sex parent's inability to marry or adopt a child in Pennsylvania is irrelevant where a party "assumed status and discharged parental duties."[13]

More recently, in *In re Adoption of R.B.F.*, the court permitted a same-sex partner's exemption from a requirement in Pennsylvania's Adoption Act that a legal parent must give up parental rights when seeking to adopt his or her domestic partner's child.[14] The court's holding was that "there is no language in the Adoption Act precluding two unmarried same-sex partners (or unmarried heterosexual partners) from adopting a child who had no legal parents."[15]

Health Care and Medical Malpractice

There is much debate over whether the costs associated with medical malpractice lawsuits in Pennsylvania have caused practicing physicians, as well as new doctors trained in Pennsylvania's highly acclaimed medical schools, to flee from the state.[16] In its report, *Understanding Pennsylvania's Medical Malpractice*

Crisis, the Pew Charitable Trusts found that "[w]hile medical malpractice insurance problems are national in scope, Pennsylvania has been especially hard-hit" and that the greatest factor contributing to the physicians' financial burden is "the rising cost of legal claims."[17] Evidence of this is seen in a 2007 Pennsylvania Supreme Court report, which found that 1,693 malpractice suits were filed in the state in 2006, an average rate of more than four suits a day.[18] Since this cycle of rising costs and fleeing physicians continues to occur, especially in rural areas, the Pennsylvania Supreme Court is expected to be at the center of a debate that is now national in scope.[19]

On several occasions, the Pennsylvania General Assembly has sought to address this continuing crisis. When the Pennsylvania General Assembly originally passed medical malpractice reform in the late 1970s, significant portions of the Pennsylvania Healthcare Services Malpractice Act ("PHSMA") were struck down by the Pennsylvania Supreme Court in *Mattos v. Thompson*.[20] In *Mattos*, the court held that the legislation violated the Pennsylvania Constitution's guarantees of access to the courts and trial by jury.[21] Only a few years later, the court struck down a key remaining section of the PHSMA regarding attorneys fees on the basis that it previously declared the PHSMA unconstitutional.[22]

In 2002, the legislature passed the Medical Care Availability and Reduction of Error Act ("MCARE"), which modified many Pennsylvania laws concerning malpractice liability, including patient compensation funds and physicians insurance. The supreme court will play a pivotal role in addressing issues that have started to emerge as trial courts apply MCARE to malpractice lawsuits. For example, one of MCARE's more significant provisions is the establishment of a fund to assist doctors in paying insurance premiums, particularly those in high-risk medical malpractice areas, such as obstetrics and gynecology. The fund is bankrolled by a cigarette tax, as well as premium payments by other doctors. Because of the relative decline in medical malpractice lawsuits over the last five years, the fund now has a surplus of over 600 million dollars.[23] The Pennsylvania Medical Society contends these monies must be restricted to reducing doctors' malpractice insurance premiums, but Governor Rendell's plan is to use these funds to provide healthcare insurance for Pennsylvania's needy.[24] On July 24, 2009, the Commonwealth Court ruled that this issue will go to trial and, whatever the outcome, it will almost certainly be appealed to the supreme court.[25]

It also bears noting that the supreme court's role in this important issue has not been limited to deciding cases. Most notably, the court has addressed some of the state's challenges by implementing several rule changes in response to the most recent medical malpractice crisis. One significant rule requires a physician's certification of any malpractice suit in an effort to curb frivolous actions.[26] Additionally, the rules now require any medical malpractice suit to be filed in the county where the alleged malpractice occurred, to avoid forum shopping for high-verdict jury pools.[27]

Conclusion

As this paper explains, there are myriad important issues reaching the court which merit the public's attention. It is critical that the electorate focuses on how profoundly these issues affect Pennsylvanians and, by extension, forces a meaningful conversation about the proper role of judging.

Endnotes

1 545 Pa. 279, 681 A. 2d 152 (1996).

2 545 Pa. at 283-284, 681 A. 2d at 155.

3 545 Pa. at 283, 681 A. 2d at 154-155.

4 Philadelphia Code §§ 10-814(a); 10-821(a); 10-830(a); 10-831; 10-834; 10-835; (all adopted May 9, 2007) (all were struck down, the original bill numbers are as follows - Bill 040117-A; Bill 060700; Bill 040136-A; Bill 040137; Bill 040312; Bill 040315; and Bill 040118-A).

5 957 A.2d 361 (Pa. Cmwlth. 2008), *notice of appeal filed* (74 M.A.P. 2008, October 6, 2008).

6 Philadelphia Code §§ 10-821(a); 10-831; 10-834; 10-835; 10-836 (all adopted April 10, 2008).

7 No. 1305 C.D. 2008 (Pa. Cmwlth. June 18, 2009) *notice of appeal filed* (July 16, 2009).

8 *See* 23 Pa.C.S.A. § 1704.

9 *Id.*

10 862 A.2d 1234 (Pa. 2004).

11 786 A.2d 913, 914-15 (Pa. 2001).

12 *Id.*

13 *Id.* at 917-919.

14 803 A.2d 1195, 1196 (Pa. 2002).

15 *Id.* at 1202.

16 In 1989, Pennsylvania ranked 12th among the states in the number of doctors under age 35; by 2000 the state had dropped to 41st. Christopher Guadagnino, *Obstetrician scarcity in Pennsylvania*, Physicians News Digest - Online Edition, May 23, 2004, *available at* http://www.physiciansnews.com/obstetricianscarcity-in-pennsylvania/.

17 Pew Charitable Trusts, Understanding Pennsylvania's Medical Malpractice Crisis 4 (2003), *available at* http://www.pewtrusts.org/our_work_report_detail.aspx?id=37128.

18 David Wenner, *Pennsylvania Malpractice Cases Declined Further*, The Patriot News, Apr. 14, 2008, available at http://www.pennlive.com/midstate/index.ssf/2008/04/state_says_malpractice_cases_s.html.

19 *See* Greg Giroux, *Rivals Talk Health, Drink Beer, Ignore Specter*, CQPolitics, Sept. 3, 2009, *available at* http://blogs.cqpolitics.com/eyeon2010/2009/09/specter-foes-sestak-toomey-deb.html ("Toomey said that a health overhaul effort should address limits to the medical malpractice lawsuits that he said have contributed to 'driving doctors out of Pennsylvania" and is "discouraging people from entering the field of medicine.'"); Brett Chase, *Malpractice Debate Gets New Life*, Portfolio.com, Sept. 3, 2009, http://www.portfolio.com/views/blogs/heavydoses/2009/09/03/medical-malpractice-enters-healthreform-debate/ ("Doctors in Pennsylvania admitted that they performed unnecessary tests and referred patients to other doctors as defensive measures to avoid lawsuits,"); *and* Dionne Searcey & Jacob Goldstein, *Tangible and Unseen Health-Care Costs: Spending by Doctors Extends Beyond Insurance as Many Take Steps to Protect Themselves; Patients' Wishes Push up Bills, Too*, Wall St. J, Sept. 3, 2009, *available at* http://online.wsj.com/article/SB125193312967181349.html?mod=googlenews_wsj ("In a survey of Pennsylvania doctors in high-liability specialties such as obstetrics, 59% of respondents said they often ordered more tests than were medically necessary.").

20 421 A.2d 190 (Pa. 1980).

21 *Id.* at 196.

22 Heller v. Frankston, 475 A.2d 1291 (Pa. 1984).

23 Michael Vitez & Heather J. Chin, *Bill to Expand Pa. Health Insurance Sparks Debate*, Philadelphia Inquirer, B8 July, 1, 2009.

24 *Id.*

25 The PA Medical Society v. The Dept. of Public Welfare, *unreported opinion*, July, 24, 2009, No. 584 M.D. 2008, *available at* http://www.courts.state.pa.us/OpPosting/Cwealth/out/584MD08_7-24-09.pdf.

26 Pa.R.C.P. No. 1042.3 Certification of Merit:

> (a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either:
>
> an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or
>
> the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

27 Pa.R.C.P. No. 1006(c)(2) Venue. Change of Venue. "If the action to enforce a joint or joint and several liability against two or more defendants includes one or more medical professional liability claims, the action shall be brought in any county in which the venue may be laid against any defendant under subdivision (a.1)."

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