Winter 2-23-1988

Antkowiak v. Ambach (Manhattan Lawyer Weekly Opinion Service)

Manhattan Lawyer Weekly Opinion Service

Prisoners' Rights

N.Y. COURT OF APPEALS

Inmate correspondence — Prohibitions against business correspondence and "kiting," 7 NYCRR §§ 720.3(e)(4), 720.3(b)(17) — First Amendment

In the Matter of Lucas; Alexander, J.; No. 17; February 11, 1988.

This appeal involves a challenge to the constitutionality of Department of Corrections regulations requiring that business correspondence be submitted for mailing unsealed and subject to inspection (7 NYCRR § 720.3(e)(4)), and that no material be included in an outgoing envelope if not specifically intended for the addressee (a practice known as "kiting,"), in violation of 7 NYCRR § 720.3(b)(17).

Petitioner instituted an article 78 proceeding in which he claimed that the regulations impinge upon his First Amendment rights under the Federal and State constitutions in that they chill speech by subjecting business mail to inspection, and foreclose all speech to certain individuals by effectively frustrating an inmate's ability to respond to "personals" advertisements or engage through organizers in pen pal correspondence.

The Supreme Court dismissed the petition and the Appellate Division affirmed, holding that the regulations at issue are not content restrictions, and that petitioner's First Amendment rights were therefore not implicated. Although this court concludes that the challenged regulations do implicate First Amendment interests, it nevertheless affirms the order of the Appellate Division inasmuch as, under the appropriate standard of review, the regulations do not unconstitutionally abridge petitioner's right to freedom of expression.

The standard for assessing the validity of prison regulations that infringe on inmates' constitutional rights has been articulated by the Supreme Court as follows: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." **Turner v. Safley,** — U.S. —

The stated justification for infringement on business mail is to enable corrections officials to prevent inmates from ordering merchandise or services on credit. The regulation seeks to prevent inmates from committing fraud on businesses. *See* **Rodriquez v. James,** 823 F.2d 8. Although the inspection requirement may chill in some measure an inmate's freedom to express political views to business enterprises, this court finds that the business mail regulation operates in a "neutral fashion without regard to the content of the expression." **Turner v. Safley,** 107 S.Ct. 2254. If the submitted letter does not offer to purchase on credit or otherwise impermissibly obligate an inmate's funds, it is dispatched.

Finally, the court finds that the "kiting" regulation simply requires that any letter in the envelope be intended for the addressee. Petitioners complaint is unavailing inasmuch as respondent has asserted a legitimate penological goal in requiring that inmates correspond with identified individuals. **Turner v. Safley,** 107 S.Ct. 2254.

ATTORNEYS: Robert Selcov and David C. Leven for appellant; Robert Abrams, Attorney General (Harvey M. Berman and O. Peter Sherwood of counsel) for respondents.

Public Utilities

N.Y. COURT OF APPEALS

Public Service Law § 66-d(2) — Constitutionality — Violation of due process — Impermissible taking of property

Rochester Gas & Electric Corporation v. Public Service Commission of the State of New York; Simons, J.; No. 10; February 11, 1988.

The Legislature — in an effort to stimulate production of natural gas indigenous to New York — amended Public Service Law § 66-d(2), authorizing the defendant Public Service Commission ("PSC") to require certain utilities to transport non-owned natural gas through their pipelines if the utility has excess capacity, receives reasonable compensation for doing so and if the transportation of the non-owned gas will not burden the utility or its rate payers or impair the overall quality of its service to customers. Plaintiff, a utility selling gas to customers in Rochester and seven surrounding counties, contends that the statute and implementing order violate its due process rights and effect an unconstitutional taking of its property.

Legislative enactments are presumed valid and one who challenges a statute bears the burden of proving the legislation unconstitutional beyond a reasonable doubt. Additionally, this legislation involves economic legislation and modern substantive due process principles require that the judiciary give great deference to the Legislature in that area.

Plaintiff claims that section 66-d(2) has fundamentally changed the nature of its business and compels it to use its distribution system to operate in ways contrary to the provisions of the Transportation Corporation Law, under which it was incorporated. It contends that RG&E was chartered as a "gas corporation" and it maintains that as such it is only obliged to transport and sell its own gas.

The Legislature has defined the powers of corporations and it can re-define them by statutory amendment to promote the public interest. More to the point, however, plaintiff is not being compelled to offer service greater or different than that authorized by its original charter. Gas corporations are charged with the duty of supplying gas for public use and none of the statutes regulating plaintiff indicate that duty is to be fulfilled only by selling its own gas. Although the statute might force plaintiff to do something which, as a matter of form, differs from what it has customarily done because it no longer has title to all the gas in its pipelines, the substance of the transactions is the same: the company provides gas to the community, something it has always done and is obliged to do. Accordingly, there is nothing in the Transportation Corporation Law which inhibits defendant from implementing the statute or enforcing its order. To the extent section 66-d(2) may force RG&E to do something it did not anticipate and does not want to provide, the statute must be examined under traditional due process principles.

Section 66-d(2) does nothing more than compel the utility to provide access to its pipelines to New York State gas producers on occasions when it will not be burdensome to the utility or its remaining customers and upon payment of reasonable fees. It is a reasonable regulation consistent with the public interest in developing the State's resources, furthering competition, and controlling the cost of natural gas in the retail market. Accordingly, the Legislature acted well within constitutional limitations when it modified the manner in which plaintiff was required to satisfy its public obligations, declaring that the public must be afforded reasonable access to the utility's pipeline network in the manner specified.

RG&E's claim that section 66-d-(2) changes it from a private carrier to a common carrier must also fail, for that theory of substantive due process was "relegated to obscurity in **Nebbia v. New York,** (291 U.S. 502)." **Montgomery v. Daniels,** 38 N.Y.2d 41, 67. After **Nebbia,** even private corporations may be deemed affected with a public interest and subjected to reasonable regulation under the state's police power.

Under the guidelines set forth in **Connolly v. Pension Ben. Guarantee Corp.,** 106 S. Ct. 1018, there was no taking of plaintiff's property. There was little economic impact on plaintiff, for the statute requires a utility to transport non-owned gas only when it has excess capacity — a service for which the customer pays — and if access does not overly burden the utility or its customers by requiring extra rates, for example. Plaintiff's general investment expectations included the knowledge that it was subject to extensive regulation as a public utility; therefore, the current statutory scheme could not have frustrated its reasonable expectations. Finally, the government's action involves only minimal, intermittent access to plaintiff's pipelines, under circumstances which will not interfere with plaintiff's regular business. No permanent appropriation of plaintiff's property rights is involved.

ATTORNEYS: Richard N. George, Robert L. Daileader, Jr., Jeffrey R. Clark for plaintiff-appellant. Lawrence G. Malone, Robert A. Simpson for respondent.

Real Estate

APPELLATE DIVISION SECOND DEPARTMENT

Summary judgment — Letter as repudiation of contract

Stewart v. Sternberg; No. 2687E; February 8, 1988.

Plaintiffs entered into a "purchase offer" agreement to purchase the defendants' home. The document provided that it was "to remain in force and effect unless or until superceded by further contract." Defendants subsequently submitted to plaintiffs a "proposed contract of sale" which was accompanied by a letter providing that the contract had to be accepted in toto and "[i]f the signed contracts [were] not returned to [the defendants], together with the down payment called for thereunder, by . . . November 28th, [the defendants would] conclude that [the plaintiffs] are no longer interested in purchasing the premises."

By letter dated November 25th, plaintiffs objected to the defendants' "proposed contract of sale" and attached "a listing of various and sundry items which must be addressed if this contract is to be implemented." Plaintiffs further stated that if the defendants did not accept these changes, there would be "no purchase" by them.

In disposing of the defendants' motion for summary judgment, the trial court assumed arguendo, that the purchase offer satisfied "the criteria for a contract for the sale of real property." It then granted the defendants' motion for summary judgment based on the ground that "there can be no question but that the letter of November 25, 1983 from plaintiff William M. Stewart constituted a repudiation of that contract."

This court finds that an issue of fact exists as to whether the plaintiffs' November 25th letter, constituted a repudiation of the contract, or was merely meant as a counteroffer to the defendants' "proposed contract of sale." Accordingly, the defendants' motion for summary judgment must be denied.

ATTORNEYS: Stewart & Stewart (William M. Stewart, [illegible] of counsel) for appellants; Reavis & McGrath (Douglas P. Catalano of counsel) for respondents.

Social Services

SECOND CIRCUIT

Education of the Handicapped Act, 20 U.S.C. § 1400 — Placement in unapproved private school

Antkowiak v. Ambach; Miner, J.; Nos. 87-7300, -7344; January 27, 1988.

Plaintiff commenced an action on behalf of his emotionally disturbed daughter, Lara, under the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400 *et seq.* (1982); the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982); and 42 U.S.C. § 1983 (1982) in which he sought and obtained declaratory and injunctive relief to effect a state placement at an unapproved out-of-state facility and reimbursement from the state for her private placement there. On appeal, this court reverses the decision of the U.S. District Court for the Western District of New York.

The issue here is not that the court failed to give "due weight" to state proceedings, as the Commissioner argues, but that under the EHA, neither the hearing officer nor the district court could order placement at an unapproved school. Federal courts have the authority under the EHA to enforce state procedure consistent with the federal scheme, but procedures "inconsistent with the federally-mandated procedures cannot, of course be enforced by a federal court." **Town of Burlington v. Department of Educ.,** 736 F.2d 773 (1st Cir. 1984), *aff'd sub nom* **Burlington School Comm. v. Massachusetts Dept. of Educ.,** 471 U.S. 359 (1985).

For a state to qualify for funds under

the EHA, that state must have adopted "a policy that assures all handicapped children the right to a free appropriate public education," 20 U.S.C. § 1412(1)(1982), *id.*, § 1412(2). Because "certain types of handicapping conditions . . . require very costly educational programs," New York school districts are "required to enter into contracts with private schools for the purpose of providing educational opportunity" to the handicapped. 1978 N.Y. Laws, ch. 786, § 1. That option, however, is open only after the State Education Department has determined that "there are no appropriate public or private facilities" in the state. New York Educ. Law §§ 4402(2)(b)(3); 4407(1).

The State Education Department's Office for the Education of Children with Handicapping Conditions, through the Division of Program Monitoring, maintains an "approved list" of private and out-of-state schools eligible to contract for the education of handicapped students from New York. The State Education Department closed new admissions to Hedges, the Pennsylvania treatment center at issue here, for reasons including the fact that Hedges was not licensed in its home state (which is a requirement for approval), it purportedly used "seclusion rooms," and it had a policy of allowing students over 14 years old to sign themselves out of treatment.

Neither the State Education Department nor the Buffalo School Board could place and fund Lara in an unapproved private school "without violating the EHA's requirement that handicapped children be educated at public expense only in those private schools that meet [s]tate educational standards," **Schimmel by Schimmel v. Spillane,** 819 F.2d 477 (4th Cir. 1987). The hearing officer had no jurisdiction to compel either the school or the state to violate federal law. Likewise, the district court could not order plaintiff's placement without forcing the State Education Department to violate the EHA. Thus the district court exceeded its authority, under 20 U.S.C. § 1415(e)(2), to grant appropriate relief under the EHA.

ATTORNEYS: Bruce A. Goldstein (Bouvier, O'Connor, Cegielski & Levine, James R. Sheldon, Jr., Neighborhood Legal Services, Inc., Ronald M. Hager, State University of N.Y. at Buffalo School of Law, Legal Assistance Program, of counsel) for plaintiff-appellee, cross-appellant; Leslie Neustadt (Robert Abrams, Atty. Gen. of the State of N.Y., of counsel) for defendant-appellant, cross-appellee; (Elizabeth L. Schneider, Monroe County Legal Assistance Corp., of counsel) for *Amicus Curiae* Western New York Disability Coalition.

Trusts and Estates

APPELLATE DIVISION SECOND DEPARTMENT

Testamentary capacity — Tape-recorded will

In the Matter of Sadie Scher; No. 3479E; February 8, 1988.

In a probate proceeding, the objectants appeal from a decree of the Surrogates Court which granted the petitioner's motion for judgment during trial as a matter of law, and thereupon admitted the will to probate. This court affirms the decree, and orders costs payable by the appellants personally.

The decedent, an 89-year-old blind woman, executed a will in an attorney's office in the presence of three subscribing witnesses. The entire execution of the will was tape-recorded. The tape affirmatively demonstrated the decedent's testamentary capacity; to wit: she knew the nature and extent of her property; she named the natural objects of her bounty, her children and grandchildren; and she stated her reason for leaving her house to one daughter and providing a $1,000 bequest to each of the others, rather than dividing her estate equally. No evidence of fraud was adduced at trial.

In light of the uncontroverted proof of due execution and the decedent's testamentary capacity, and the absence of proof that the decedent executed the will as a result of fraud or undue influence, there were no issues to submit to the jury (*see,* **Matter of Walther,** 6 N.Y.2d 49.

ATTORNEYS: Seth Rubenstein for appellants; Solomon Cohen for respondent.

SURROGATES COURT

Inter vivos trust — Rule against perpetuities, EPTL § 9-1.1 — Power of appointment — "Two lives" rule — "Lives in being" rule — Gift by implication

Matter of Witkind; Roth, S.; No. 3966-85; January 28, 1988.

Trustees of this *inter vivos* trust request the court to determine whether the power to appoint the corpus of the trust was validly executed and, if not, what disposition should be made of the corpus.

The donor, William H. Butler, created the trust at issue in 1925 for his daughter Gladys, then three years of age. The trust instrument gave Gladys a general testamentary power of appointment. Mr. Butler died in 1937 survived by Gladys, who at the time was unmarried and without issue. His will poured over his entire residuary estate into the 1925 trust for the benefit of Gladys. Gladys married in 1945, was divorced in 1947 and had one child, Vivian. Gladys died in 1980 survived only by Vivian. In her 1954 will, Gladys exercised the power of appointment over the principal of the 1925 trust in favor of Vivian, absolutely. However, in a 1978 codicil, she modified such exercise by appointing the principal in further trust for the income benefit of Vivian, giving Vivian in turn a general testamentary power to appoint the principal.

Special rules govern the permissible period for the exercise of a power of appointment. EPTL § 10-8.2 provides that the permissible period is determined by the law in effect when the power is exercised and not the law in effect at the time the power is created. Since Gladys exercised her power of appointment upon her death in 1980, the "lives in being plus twenty-one years" rule applies. If the general testamentary power of appointment is not also "presently exercisable," then the permissible period would commence in 1925, the date of the creation of the power and Gladys' exercise of that power in further trust for the income benefit of Vivian would suspend the absolute power of alienation of the principal of the trust for a life which was not "in being" at the creation of the trust. Because a general testamentary power of appointment is not "presently exercisable," the power of appointment given Gladys must be measured from 1925, the date of creation of the power. Accordingly, since Vivian was not "in being" in 1925 or in 1937, the exercise of the power of appointment is void in its inception because it suspends the absolute power of alienation of the principal of the trust beyond the statutorily permissible period. Since Gladys' exercise of her power in favor of a person not in being at the time of its creation cannot be salvaged, it must be treated as void under the rule against perpetuities and therefore as a failure to exercise the power.

The more difficult question is the determination of the disposition of the trust corpus. Looking at the donor's intent, it is clear that Mr. Butler intended that the distant relatives named as alternative contingent takers should not take at all if Gladys exercised the power or (failing to exercise) died unmarried (i.e. legally divorced) but left issue, namely her only child, Vivian. It is difficult to seriously contend otherwise.

In this construction proceeding, the right of Vivian Witkind Davis to take the corpus of her mother's trust outright can be sustained on one principle of law. Her right to take in further trust can be sustained on another theory. This court holds that Vivian Witkind Davis takes the principal of her mother's trust outright as a gift by implication.

A court may give effect to an intention or purpose indicated "by implication" where the express language of the instrument manifests such an intention or purpose and the creator has simply neglected to provide for the contingency which in fact occurred. In the instant case, Mr. Butler provided for the contingency that Gladys died married with issue in which case he directed that her surviving husband would take one-fourth and the issue would take three-fourths. He simply neglected to provide for the exact contingency that did occur, i.e., Gladys dying unmarried (legally divorced) and leaving issue.

Nonetheless, even from this unskillfully drafted instrument, Mr. Butler's clear and convincing intention and purpose are obvious "by implication," that if Gladys died with issue and unmarried, her issue would take both their three-fourths share and the one-fourth share of the divorced husband. The court therefore finds a "gift by implication" of the entire remainder interest to Vivian Witkind Davis, as sole issue of Gladys Witkind, under the terms of the trust instrument.

Vivian could also take the corpus in trust under an alternative theory. In the absence of a finding of a "gift by implication," EPTL 7-1.7 and case law (*see* **Matter of Hayman,** 104 Misc. 803, *aff'd,* 229 App. Div. 853, *aff'd,* 256 N.Y. 557) support a conclusion that the principal of the trust reverted back to the grantor's estate to be disposed of as he directed by will or under the laws of intestacy. Turning to Mr. Butler's will, it is clear that he poured his entire residuary into the 1925 inter vivos trust for Gladys and additionally provided that if for any reason the directions set forth could not be executed his entire residuary estate should go to Gladys outright. In turn, Gladys' 1978 codicil disposed of her entire residuary estate in trust for her daughter Vivian.

Therefore, under this second theory, the remainder interest of the 1925 inter vivos trust could be turned over to the trustee named in Gladys' codicil to be held in trust for the income bnenfit of Vivian Witkind Davis. Since Vivian was "in being" in 1980, when Gladys died, this secondary trust is valid.