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Sent: Saturday, January 27, 2018 4:49 PM

To: ilsapp@listserve.com

Subject: [ILSAPP] Decisions of Interest

Attachments: ATT00001.txt

CRIMINAL

Second Circuit

United States v Tigano, 1/23/18 – **EGREGIOUS CONSTITUTIONAL SPEEDY TRIAL VIOLATION / INDICTMENT DISMISSED**

In 2008, the defendant and his father were arrested on charges related to a marijuana-growing enterprise in Cattaraugus. Five years later, the father disposed of charges against him in a plea deal. The defendant refused to accept a plea and proceeded to trial nearly seven years after his arrest. In District Court for the Western District, the defendant was convicted on five of the six counts against him after a four-day trial, and he received a 20-year sentence. During the entirety of the pretrial proceedings, the defendant was incarcerated in a Niagara County jail, and he demanded a speedy trial. On appeal, he argued that his Sixth Amendment right to a speedy trial had been violated. The Second Circuit agreed; observed that years of subtle neglects had resulted in the most egregious trial delay in that court's jurisprudence; and dismissed the indictment.

The defendant was the victim of poor trial management and general indifference. Three competency examinations were done. Each confirmed that the defendant was competent to stand trial. The driving motivation for the first two exams was the defendant's demand for a speedy trial, and the third was based on his refusal to accept a plea deal. Multiple delays flowed from confusion regarding overlapping motions before the magistrates involved; from a year-long delay by the government in presenting a written plea offer; and from its insistence on a joint resolution for the cases of the father and son. The reviewing court provided a detailed discussion of the right to speedy trial, harkening back to the Magna Carta and reviewing the relevant elements in the analysis of constitutional speedy trial claims under *Barker v. Wingo*, 407 US 514. Those factors are: the length of delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant—including from oppressive pretrial detention. The reasons for the delays in the instant case were primarily the aforementioned failures by the trial court and the government. But defense counsel also contributed to the problem in seeking to usurp the client's decision to go to trial and in obtaining multiple extensions, the court stated. Gary Stein represented the appellant.
http://www.ca2.uscourts.gov/decisions

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Third Department

Matter of Christopher YY. v Jessica ZZ., 1/25/18 – **SAME-GENDER PARENTS AND PATERNITY / EQUITABLE ESTOPPEL APPLIED**

The respondents mother and wife were married prior to the mother giving birth to their daughter, who was conceived through artificial insemination using sperm donated by the petitioner. In a written agreement, the petitioner waived any paternity claims. However, when the infant was seven months old, he filed a paternity petition, and the mother moved to dismiss. After an evidentiary hearing, Chemung County Family Court denied the dismissal motion and ordered genetic testing. With permission of the Third Department, the mother appealed from that interlocutory order. Pursuant to Family Ct Act § 532 (a), when a paternity petition is filed, Family Court, must order the mother, her child, and the alleged father to submit to tests to determine paternity—unless the court makes a written finding that such testing is not in the best interests of the child, on the basis of res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married woman. Family Court had proceeded properly by holding a hearing to address such issues, the Third Department held; but the trial court had erred in denying the motion to dismiss.

Biology is not dispositive in a paternity determination. Since the child was born to the mother while the respondents were married, they were entitled to the presumption of legitimacy afforded by Domestic Relations Law § 24 and Family Ct Act § 417. That presumption is rebuttable based on evidence that the spouse was not the child's parent. Traditional analysis had not addressed such concept for same-gender parents, observed the reviewing court, declaring that a child born to a same-gender married couple must be presumed to be their child. Based on equitable estoppel, it was not in this child's best interests for genetic tests to be done. The petitioner had acquiesced in the creation of a strong parent-child bond between the wife and child. He understood that he was donating sperm to permit the mother and the wife to be the sole parents of any child conceived; and he was aware that they wanted to raise the child together and planned to marry. Further, he had disavowed any parental intentions and had taken steps to preclude the respondents from pursuing him for paternity or child support. The petitioner was not involved in the child's prenatal care or present at her birth, did not know her birth date, never attended doctor appointments, and did not see her for months after her birth. By his own admission, he had donated sperm as a humanitarian gesture.

In contrast, the wife was in a recognized parent-child relationship. She was present at the child's birth, gave the child her surname, was recorded as a mother on the child's birth certificate, and was listed as a parent for purposes of government benefits. The wife played a significant role in raising, nurturing, and caring for the child. The child's image of her family would be destroyed if the petitioner's application were granted. The fact that the parents were both mothers did not warrant a finding that the child had an interest in knowing, or having a relationship with, the man who donated his sperm. Genetic testing in such circumstances would expose children born into same-gender marriages to instability for no reason other than to provide a father-figure to children who already had two parents. The Third Department noted that a new attorney for the child had taken a position contrary to that of the Family Court AFC, who had advocated in favor of genetic testing. The appellate attorney's position was based on events after the challenged determination; at oral argument, the court was advised that the child has been in foster care

for many months and that neglect petitions were pending against the respondents. However, such events did not alter the conclusion that the petitioner should be equitably estopped from asserting paternity, in light of the circumstances known to Family Court at the time of the hearing. Allowing consideration of post-hearing developments would invite ongoing challenges to family units and create instability and uncertainty. Ouida Binnie-Francis represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00495.htm

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