

SOJOURNER A., on her own behalf and as guardian ad litem for her infant Y.A.; and ANGELA B., on her own behalf and as guardian ad litem for her infant W.B., on behalf of themselves and all others similarly situated,

Plaintiffs - Appellants,

v.

THE NEW JERSEY DEPARTMENT OF HUMAN SERVICES, et al.,

Defendants - Respondents.

SUPREME COURT OF NEW JERSEY

Docket No. 52,981
Appeal No. A-160-01

App. Div. Docket No.:
A-2787-00T5
(Before Judges King, Wecker & Winkelstein)

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PRELIMINARY STATEMENT

Plaintiffs submit this Reply Brief to address the legal and factual errors in the Brief on Behalf of Defendants-Respondents ("Db"). As set forth in Plaintiffs-Appellants' Supplemental Brief ("Pb") and Petition for Certification, the Child Exclusion provision of the Work First New Jersey program ("WFNJ") violates the privacy and equal protection guarantees of the New Jersey Constitution because its purpose and effect is to coerce poor women's reproductive decisions.

ARGUMENT

I. Defendants Again Press Inapplicable Legal Standards for Evaluating the Constitutionality of the Child Exclusion.

Defendants misconstrue the legal standard under which this case must be determined. The New Jersey Constitution demands the "most exacting scrutiny" of both direct and indirect infringements of the right to procreative autonomy, requiring a balancing test that "weigh[s] the governmental interest in the classification against the interests of the affected class." Planned Parenthood, 165 N.J. 630, 631 n.6 (2000); Right to Choose v. Byrne, 91 N.J. 287, 308-10 (1982). Defendants bear the burden of demonstrating both the governmental interest and a real and significant nexus between this interest and the infringement on the fundamental right. Planned Parenthood, 165 N.J. at 631; State v. Miller, 83 N.J. 402, 414-15 (1980);

Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 42-43 (1976).

Defendants ignore these standards set and assert that the Child Exclusion must be upheld if it "bears a rational relationship to some legitimate end" and that Plaintiffs must demonstrate beyond a reasonable doubt that it fails to do so. Db43. Yet Defendants themselves recognize that their proposed "rational relationship" standard applies only when "a legislative classification neither burdens a fundamental right nor targets a suspect class." Id. As the record makes clear, and as the Appellate Division acknowledged, the Child Exclusion "affects a welfare recipient's decision whether to have another child." Sojourner A. v. N.J. Dep't of Human Servs., 350 N.J. Super. 152, 171 (App. Div. 2002). It thus strikes at the fundamental principle of individual autonomy in reproductive choice and requires this Court's close scrutiny. As a result, the rational basis test relied on by Defendants is inapplicable, and Defendants must instead demonstrate that the burden the Child Exclusion places on affected women's reproductive autonomy is outweighed by a public interest actually served by the provision. They have failed to make such a showing.

Further, the federal constitutional analysis relied upon so heavily by Defendants is not relevant to the present case. As this Court has reiterated, "[S]tate Constitutions are separate

sources of individual freedoms and restrictions on the exercise of power by the Legislature. . . . Thus, in appropriate cases, the individual states may accord greater respect than the federal government to certain fundamental rights." Right to Choose, 91 N.J. at 300. In particular, this Court has repeatedly held that the New Jersey Constitution accords greater respect than the federal constitution to the right of privacy, demanding the most exacting scrutiny of indirect infringements of this right. See Pb29-33.

While federal constitutional analysis of indirect infringements of fundamental rights generally proceeds under rational basis review, New Jersey constitutional analysis rejects this rigid tiered structure. See Right to Choose, 91 N.J. at 308-09. Right to Choose, Planned Parenthood, and Sanchez v. Department of Human Services, 314 N.J. Super. 11 (App. Div. 1998), provide the proper analytical framework for this case. Right to Choose makes clear that, while a state need not fund social welfare programs at all, once it chooses to provide such programs, it cannot use funding choices to coerce poor women in their exercise of procreative rights. 91 N.J. at 306-07. As Right to Choose held, a decision to provide funding for one procreative choice, but not the other, constitutes undue government interference with privacy rights when the state seeks to "influence the decision between abortion and childbirth." 91

N.J. at 306. The Child Exclusion similarly deprives poor women and their families of benefits for which they are otherwise eligible because they have exercised their constitutional right to procreate. In doing so, it discriminates against poor women who choose to give birth while receiving benefits, with the purpose of influencing women's procreative choices. This is impermissible, because "[i]n that constitutionally protected zone [of reproductive choice], the State may be an umpire, but not a contestant." Id. at 307 n.5.

Defendants simply misstate the holding in Planned Parenthood when they attempt to distinguish it from the present case by asserting that the parental notification provision at issue there "explicitly burdened" the exercise of the protected procreative right. Db53. In fact, this Court analyzed the parental notification provision as an indirect burden on the right of privacy, and closely scrutinized the state's asserted interests and the nexus between these interests and the provision. Planned Parenthood, 165 N.J. at 630.

Accordingly, Murrow v. Clifford, 404 F. Supp. 999 (D.N.J. 1975) and Rinier v. State, 273 N.J. Super. 135 (App. Div. 1994), certif. denied, 138 N.J. 269 (1994), cert. denied 415 U.S. 1016 (1995), both of which were federal, not state, constitutional challenges applying rational basis review because the relevant rights were only indirectly affected, do not offer meaningful

guidance for this Court in this case. For the same reasons, C.K. v. Shalala, 883 F. Supp. 91 (D.N.J. 1995), aff'd, 92 F.3d 171 (3d Cir. 1996), and N.B. v. Sybinski, 724 N.E.2d 1103 (Ind. Ct. App. 2000), are of little relevance here, given that the courts applied federal constitutional law and thus an entirely different legal standard in analyzing the challenged provisions.¹

Finally, Sanchez shows as a matter of law that the Child Exclusion constitutes a penalty or burden on the right to procreative autonomy because it reduces the level of assistance upon the exercise of that right. 314 N.J Super. at 24. Sanchez was decided under both the federal and state constitutions, and while Saenz v. Roe, 526 U.S. 489 (1999), may have modified the relevant federal constitutional analysis, it has no bearing on the court's state constitutional holding that provision of a lower level of benefits to welfare recipients who choose to exercise a fundamental right than to those who do not works an "obvious" impact on exercise of that right without furthering any permissible governmental interest and thus violates Article I, paragraph 1. See 314 N.J. Super at 30-31. The same analysis and conclusion is required here.

¹ While N.B. also considered a due process challenge brought under the Indiana constitution, the due process guarantee under the Indiana constitution is identical to the federal standard. 724 N.E.2d at 1112.

II. Defendants Have Failed to Show that the Child Exclusion Significantly Furthers Any Governmental Interest.

To pass muster under the New Jersey Constitution, a provision that burdens a fundamental right must directly further a governmental interest of sufficient importance to outweigh the burden on that right. Defendants have demonstrated no legitimate governmental interest actually served by the statute. Indeed, the only interest actually served is that of influencing procreative choices.

Defendants state that the Child Exclusion's purpose is to "enhance family structure while simultaneously fostering responsibility and self-sufficiency," Db8; to "diminish the dependency on welfare, promote individual responsibility, and strengthen the family unit," Db42; "to give AFDC recipients the same structure of incentives as working people, to promote individual responsibility, and to strengthen the family unit," Db47; and to send a "message" to welfare recipients that they should consider their benefit level before having a child, thereby perhaps reducing out-of-wedlock births. Db57. The stringent analysis demanded by the New Jersey Constitution requires close examination of these interests and the extent to which the Child Exclusion actually furthers them.

First, Defendants assert that the Child Exclusion enhances family structure and strengthens the family unit, yet Defendants

make no attempt to demonstrate the Child Exclusion's effect on family structure other than by presenting conclusory assertions as to its ameliorative effect. Thus, Defendants fail to meet their burden of demonstrating a close nexus between this governmental interest and the challenged provision. See Planned Parenthood, 165 N.J. at 613. Defendants' allusions to strengthening family structure seem to refer to their suggestion that the Child Exclusion reduces out-of-wedlock births. Db57. This suggestion is in significant tension with Defendants' insistence that the Child Exclusion has neither an intent to limit nor any meaningful effect on the birth or abortion rates of welfare recipients. Moreover, the Child Exclusion is poorly designed to accomplish this purported purpose, as it applies equally to children born in or out of wedlock. See N.J.S.A. 44:10-3.8 (repealed by L. 1997, c. 38, § 17); Dsb8. This provision clearly does not encourage childbirth within marriage when it works the same penalty on childbirth regardless of whether the child's parents are married or unmarried.

Second, Defendants assert that the Child Exclusion promotes "responsibility" among welfare recipients. It is difficult to imagine what Defendants mean by promoting "responsibility" in this context other than discouraging births that they find to be undesirable. Perhaps Defendants are arguing that lowering welfare benefits through the Child Exclusion promotes

responsibility by encouraging recipients to seek additional income through work.² In Sanchez, however, the Appellate Division held that while the State's goal of promoting work among welfare recipients may be "salutary," there is no rational relationship between that goal and the provision of reduced welfare benefits to a class of recipients exercising a fundamental right—in that case, welfare recipients who exercised their constitutionally protected right to travel. 314 N.J. Super. at 26-28. Just as in Sanchez, there is no evident relationship between this penalty on the exercise of a fundamental right to procreation and the promotion of work.

To the contrary, the evidence in the record indicates that the Child Exclusion is actually associated with a slight decrease in earnings from employment: Defendants' own expert conceded that the Child Exclusion was primarily "symbolic" and has played no role in bringing about any improvements in recipients' employment and earnings. Pa856-57, Pa860. In addition, if Defendant's purpose is to encourage work among welfare recipients, the Child Exclusion seems an odd vehicle for accomplishing it. Why not adopt across-the-board reductions, so

² Defendants also suggest that the Child Exclusion encourages work by creating a system of income incentives identical to those experienced by working people, who, Defendants assert, do not receive salary increases upon the birth of a child. Of course, most working people do in effect receive a salary increase upon the birth of a child, in the form of tax deductions and credits, which are worth more than the incremental welfare benefit for additional children under WFNJ.

that all welfare recipients, both those choosing to exercise their fundamental right to procreate and those choosing to exercise their fundamental right not to do so, may benefit? Cf. Planned Parenthood, 165 N.J. at 638 (parental notification requirement did not advance proffered interest in protecting minors' mental health, when no such requirement was placed on minors carrying to term); Sanchez, 314 N.J. Super at 28 ("we can find no rational basis for assuming that reduced benefits will encourage new residents to work, or that new residents need such encouragement more than long-time residents").

Of course, to the extent that "strengthening family structure" and "encouraging responsibility" are mere euphemisms for discouraging welfare recipients from giving birth, the state's purposes do not justify burdening poor women's right of procreative autonomy. Planned Parenthood, 165 N.J. at 613; Right to Choose, 91 N.J. at 307 n.5; Saunders, 75 N.J. at 219; Sanchez, 314 N.J. Super. at 22-23. Rather, the right to privacy protects against burdensome legislation motivated by nothing more than a desire to coerce those most intimate choices central to personhood protected by Article I, paragraph 1. See Saunders, 75 N.J. at 219; Sanchez, 314 N.J. Super. at 21.

When Defendants insist that the Child Exclusion has not been shown to have any effect on welfare recipients' procreative decisions, see Db15-22, they put themselves in an odd position.

Though this provision is explicitly keyed to women's decisions to give birth while receiving welfare, Defendants resist any assertion that the provision is even relevant to women's decisions to give birth while receiving welfare. At most, Defendants seem willing to suggest that perhaps the Child Exclusion sends a "message" to welfare recipients. The content of that message is unclear, however, especially because the most obvious meaning of this provision--that welfare recipients should not give birth--is the message Defendants deny they intend to convey. Regardless, it seems that the undesirability of their procreation is, understandably, the "message" that has been received by welfare-reliant women, since, as discussed infra, the evidence clearly demonstrates that the Child Exclusion has resulted in more welfare recipients obtaining abortions than would have been the case in the absence of the provision.

III. Defendants' Attack on the Factual Record Is Unavailing.

A. Defendants Have Misconstrued the Rutgers Study.

As the court below found, "the immediate impact of the imposition of the family cap was to increase abortions . . . as well as a decline over time in birth rates," 350 N.J. Super. at 162, precisely as Plaintiffs contend. Defendants fail to acknowledge this finding. Rather, they launch into an unavailing attack on Plaintiffs' reading of the Rutgers Study, which

supported the court's conclusion that the Child Exclusion has increased abortions and decreased births among affected women.

Defendants' critique begins with the specious argument that the Rutgers Study is irrelevant because it studied a welfare program, AFDC, that has since been replaced by Work First New Jersey (WFNJ). Db16, 20. As Defendants admit, however, "[t]he AFDC family cap was essentially the same as the WFNJ family cap." Db44 n.*. The family cap--or Child Exclusion--is the sole subject of this lawsuit.

Defendants' next claim--that the Rutgers Study examined the entire FDP program, not just the Child Exclusion--is accurate, but it does not diminish the study's findings about the impact of the Child Exclusion. Defendants rely on the testimony of Carol Harvey, co-author of the study, who stated that she evaluated all aspects of the FDP program. Db17. However, Dr. Harvey conducted a cost/benefit analysis of FDP; she did not assess the impact on birth rates and abortions. Da6; Harvey Dep. at 18. Dr. Michael Camasso, the principal researcher and co-author, testified that he primarily studied the Child Exclusion and its impact on birth rates and abortions. Pa295a. Thus, while the Rutgers researchers refer to the FDP generally, it is clear that with respect to birth and abortion data, the key provision at issue was the Child Exclusion. The draft report referred only to the Child Exclusion when explaining outcomes

with respect to births and abortions. Camasso, et. al, Report on the Impact of New Jersey's Family Development Program (1997), at 2. The Final Pre-Post Report states that it makes "comparisons of birth and abortion rates before the implementation of the family cap waiver and after its effective implementation." Camasso et. al, Final Report on Impact of New Jersey's Family Development Program (1998), at 3; see also Pa754a.

The State's contention that the Rutgers Study showed only a slowing of a decline in the abortion rate, not an increase in abortions, again completely disregards the opinion below, which accepted that the FDP, including the Child Exclusion, caused more abortions and fewer births among welfare recipients. 350 N.J. Super. at 161-62. Defendants claim that there is an inconsistency between Plaintiffs' assertion that the Child Exclusion increased abortions among affected women, and the Rutgers' Study finding of a slowing of the decline in abortion rates in this group. Db18-20. However, this betrays a fundamental misunderstanding of the Rutgers Study, particularly the pre-post report. The entire methodology of the pre-post report was to examine trends, evaluate what would have happened according to those trends, then compare those predictions to what actually did happen. After doing so, the researchers concluded specifically that there were more abortions due to the

FDP and Child Exclusion than would have occurred otherwise. In fact, the court below accepted the Rutgers study's precise number, stating that there were 1,429 additional abortions attributable to the Child Exclusion. 350 N.J. Super. at 161-62. Dr. Camasso expressed complete confidence that this increase in relative abortion rates was caused by the Child Exclusion. Camasso Dep. at 127-28. The reliability of this finding is further confirmed by its consistency with another study using a different methodology. See Pb14-15. Nor does the evidence show that the Child Exclusion's impact on abortion and birth rates was "minor" or "lasted for only a brief period," as Defendants argue. Db19-20. Moreover, Defendants entirely ignore the impact on births among women affected by the Child Exclusion, namely, a decrease of 14,057 over just four years, 350 N.J. Super. at 161-62.

Defendants also make much of the caveats that the authors of the Rutgers report attached to their findings. Db21-22. For the most part, these statements are simply those of any responsible scientists--they acknowledge that unknown, unstudied facts could be at work. Even the passages upon which Defendants rely, however, describe the findings as "evidence for . . . causal inferences," "highly suggestive" of exactly what Plaintiffs contend--that the Child Exclusion policy impacted the reproductive decisions of welfare recipients. The State itself

asserted as much when it released the Rutgers Study. See Pb15. Defendants' attempt to now distance themselves from that conclusion cannot stand.

B. Contrary to Defendants' Claims, the Uncontested Evidence Clearly Shows Severe Harm to Plaintiffs and the Plaintiff Class

1. Plaintiffs' Expert Evidence is Properly Before this Court

Defendants attempt to explain away the failure of the courts below to properly consider Plaintiffs' expert evidence on the impact of the child exclusion by purporting to attack its admissibility. However, this evidence was permitted by the trial court, and Defendants did not appeal its admission into the record. Therefore, they cannot now contest its admissibility. R. 1:7-2.

Even taking Defendants' attack as aimed at the weight to be accorded Plaintiffs' expert evidence, this, too, is impermissible. The court below granted Defendants' motion for summary judgment, and was therefore obligated to construe the evidence in the light most favorable to Plaintiffs. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995); see also J.L. v. J.F., 317 N.J. Super 418, 437 (App. Div.), cert. denied, 158 N.J. 685 (1999). The law does not permit reweighing the evidence at this juncture. 40 N.J. Prac. Appellate Prac. &

Proc. §4.10; Pinkowski v. Township of Montclair, 299 N.J. Super. 557, 566 (App. Div. 1997).

Plaintiffs' expert witnesses were clearly competent to testify as experts in their respective fields.³ The essence of Defendants' attacks on the competency of Plaintiffs' experts is that these individuals lacked experience with or data concerning welfare recipients in New Jersey or the New Jersey welfare program itself. See Db34-35. Plaintiffs, however, do not contend that these individuals are "experts" on New Jersey welfare law, generally. Rather, Plaintiffs designated these six individuals as experts on the harmful effects suffered by the Plaintiff class as a result of the Child Exclusion's denial of an incremental increase in welfare benefits. The Evidence Rules clearly allow them to apply their abundant knowledge and expertise regarding hunger, homelessness and poverty to New Jersey's welfare program. Expertise can be based on a wide range of factors, including "knowledge, skill, experience, training, or education." N.J.R.E. 702. The expert need not have personal experience with the situation at issue, but must have "sufficient acquaintance with the standards recognized and

³ Under New Jersey Evidence Rule 783, expert testimony is admissible if it is sufficiently reliable to aid the court or jury in determining the question at issue, State v. Cavallo, 88 N.J. 508, 519 (1982). The standard for qualifying an expert is to be interpreted liberally. See Planned Parenthood v. Verniero, 22 F. Supp. 2d 331, 338 (D.N.J. 1998).

applied by the . . . profession in the situation under investigation to justify his expression of an opinion." Carbone v. Warburton, 11 N.J. 418, 425 (1953). See State v. Frost, 242 N.J. Super. 601, 617 (App. Div. 1990).

Defendants further argue that the opinions stated by Plaintiffs' designated experts are "factually unsupported and speculative" net opinions. Db25. The "net opinion" rule only requires that an expert witness "give the why and wherefore of his expert opinion," as opposed to a bare conclusion. Jimenez v. GNOC Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 394 (1996). As demonstrated by their affidavits and deposition testimony, each of Plaintiffs' six designated experts based those opinions on substantial observations and research and gave ample evidence of the "why and wherefore" of his or her opinions, thereby providing sufficient factual foundation to support the conclusions.

In sum, Defendants' implication that Plaintiffs' evidence was rejected by the courts below is groundless. All evidence presented by Plaintiffs is properly in the record and appropriately before this Court. Defendants have never presented any evidence to refute any of the findings of Plaintiffs' experts or any of the facts of Plaintiffs' case; thus, Plaintiffs' evidence is uncontested.

2. The Uncontroverted Evidence Demonstrates the Child Exclusion's Severe Harm to Plaintiffs and their Class

Defendants fail even to acknowledge, much less to counter, the lower court's finding that "[r]eduction of welfare benefits may lead to homelessness and malnutrition." 350 N.J. Super. at 162. Defendants also attempt to minimize the graphic evidence of deprivation in Plaintiffs' depositions and declarations, see Pb17, 20, 22, 23-24, by emphasizing, in particular, Sojourner A.'s current job. Db13-14. The fact that Sojourner A. was eventually able to obtain employment and improve her family's circumstances is, of course, irrelevant to the effect of the Child Exclusion's deprivation of benefits while she was receiving welfare benefits. It is this harm--harm that other class members continue to suffer--which this Court must weigh as it assesses the constitutionality of the Child Exclusion.

C. The Mathematica Report Does Nothing to Refute Plaintiffs' Demonstration of Harm Due to the Child Exclusion Nor Does it Support a Governmental Interest in the Provision.

Defendants point to a Mathematica Policy Research study of WFNJ, apparently in an effort to show the success of "welfare reform" and to refute Plaintiffs' allegations of harm. Db8-11. However, this case challenges only the Child Exclusion. Defendants' repeated efforts to focus on other provisions of the New Jersey welfare law is a smoke screen for the fact that there

is no legitimate state interest served by the Child Exclusion itself.

Defendants first incorrectly assert that, according to the Mathematica study, welfare cash benefits comprise only a small fraction of the total household income of WFNJ recipients. Db10-13. This is simply not true. Defendants' confusion arises from a misreading of the 1999 report, one in a series, by Mathematica.⁴ Specifically, the part of the 1999 report relied upon by Defendants described all individuals who had ever received welfare, including both past and present recipients. Pa405. Defendants' references to sources of income other than welfare benefits, therefore, reflect the income of those who have left welfare for employment--a worthy achievement, but one not relevant to those affected by the Child Exclusion who by definition are current WFNJ recipients. For current recipients, including Plaintiffs, only 9% had any earned income at the time of the 1999 survey, and only 8% had such income at the time of the 2000 survey. Pa408, 2000 Mathematica Rpt. at 35.

Defendants similarly misunderstand the findings of the 1999 Mathematica study with respect to the situations of those still

⁴ The Mathematica study is an ongoing longitudinal study of families in the WFNJ program. This report has been superceded by a final report, published in 2000. Anu Rangarajan and Robert G. Wood, Current and Former Recipients of WFNJ Clients: How Are They Faring 30 Months Later? Final Report (November 16, 2000) <<http://mathematica-mpr.org>> (hereinafter "2000 Mathematica Rpt.").

receiving welfare, including Plaintiffs. That study indicated that individuals who remained on the rolls were likely to face serious hardships including extreme poverty, illness and housing difficulties. Pa452. The final Mathematica study, which more specifically addressed the condition of "TANF stayers," reached the same conclusion. 2000 Mathematica Rpt., Executive Summary at xxiv. Specifically, 20% of families with children receiving WFNJ benefits had income below 50% of the federal poverty level. More than one in three suffer from severe health problems. About 25% report running out of food or having to use a food bank or soup kitchen within the last year. Nearly 10% are or have been homeless. Id. at 129.

These findings confirm the experience of the named Plaintiffs and the testimony of Plaintiffs' experts that welfare recipients are likely to encounter serious hardships that are exacerbated by the denial of incremental benefits for all needy children in the household. Defendants have not pointed to a single piece of evidence that would indicate that the Child Exclusion lead individuals to work or lessen the burden on those who still need assistance and are subject to it.⁵ On the other

⁵ Nowhere in the Mathematica report--or any other report--is there any indication that the Child Exclusion has had any effect on moving welfare recipients into paid employment. Mathematica alludes specifically to work requirements, time limits and expanded child care benefits as key features of WFNJ that may lead to increased employment. 2000 Mathematica Rpt. at 4-5; Pb22.

hand, the record demonstrates that the per capita decrease in benefits resulting from the Child Exclusion can have serious, detrimental consequences for the health and well-being of families already living in poverty, impeding their ability to provide their children with adequate food, housing and clothing. Defendants have failed to present any evidence to the contrary.

Taken together, the Rutgers and Mathematica studies, experiences of Plaintiffs and language of the provision itself establish that the Child Exclusion has both the purpose and effect of burdening poor women's procreative decision-making while failing to further any legitimate state interest, thus unconstitutionally burdening their rights of privacy and equal protection under the New Jersey Constitution.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully urge this Court to reverse the decision of the Appellate Division in this case, declare the Child Exclusion unconstitutional and enjoin its enforcement.

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