



Resolving a conflict between the Appellate Division departments, the Court of Appeals last week held that municipalities have a common law duty to protect children that they place in foster care, without needing to plead a traditional special duty. The Court cautioned, however, that merely having a duty does not mean that the duty will be breached in every instance; rather, municipalities are required to protect foster children only insofar as the risks of harm are reasonably foreseeable. Let's take a look at that opinion and what else has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

CONSTITUTIONAL LAW, SEPARATION OF POWERS, ETHICS

Cuomo v New York State Commn. on Ethics & Lobbying in Govt., 2025 NY Slip Op 00902 (Ct App Feb. 18, 2025)

Issue: Does the Ethics Commission Reform Act of 2022, on its face, unconstitutionally vest the State Commission on Ethics and Lobbying in Government with executive power, in violation of the separation of powers?

Facts: Former Governor Andrew Cuomo sued NYSCOELG, arguing that its creation violated the separation of powers doctrine by usurping power granted exclusively to the sitting Governor of New York, after the agency investigated Cuomo's use of state resources to write his book, *American Crisis: Leadership Lessons from the COVID-19 Pandemic*, and ordered that he disgorge more than \$5 million in profits from the book's sales. The trial court held that because NYSCOELG was granted not only the authority to investigate and report on ethics violations, but also the authority to punish, that usurps the Governor's power to impose and enforce penalties that has been traditionally the hallmark of executive power.

The Third Department affirmed, notwithstanding the laudable purpose for creating the ethics commission. The Court held, "by enacting the foregoing scheme for the enforcement of the applicable ethics laws, the Legislature, though well intentioned in its actions, violated the bedrock principles of separation of powers . . . [T]his Court may not utilize the Legislature's motive or the beneficial purposes of this legislation to overlook this violation. Even the most advantageous legislation violates the dictates of separation of powers if it results in one branch of government encroaching upon the powers of another for the purpose of expanding its own powers.

Pursuant to the Governor's authority to execute the laws, she is afforded wide discretion in determining the proper methods of enforcement. However, Executive Law § 94 revokes the Governor's enforcement power with respect to the ethics laws, thereby depriving her of all discretion in determining the methods of enforcement of these laws. Instead, it places this power into the hands of [NYSCOELG], an entity over which she maintains extremely limited control and oversight, as she appoints a minority of members and has no ability to remove members. Moreover, appointments must be approved by the IRC, an external nongovernmental entity made up of people who are in that position solely by virtue of their employment and do not answer to the populace. As such, Executive Law § 94 creates an agency with executive power, in that it has the authority to investigate and impose penalties for the violation of the ethics laws, while being entirely outside the control of the executive branch. Thus, it usurps the Governor's power to ensure the faithful execution of the applicable ethics laws."

Holding: The Court of Appeals reversed, holding that the Act was not unconstitutional in every conceivable application. The Court explained, "plaintiff has failed to establish the facial unconstitutionality of the Act. Three factors compel our decision. First, our separation of powers doctrine is flexible and based on a commonsense view of the workings of government, thus allowing for some overlap between the coordinate branches. Second, New York's Governor does not have sole and unlimited powers to appoint or remove state officers because our State Constitution disperses those powers between the Legislature and the Governor. Third, the integrity of our constitutional design depends on the public's trust in government, and the Act provides an additional ethics enforcement mechanism narrowly targeted to the problems inherent in the Executive Branch's self-regulation."

Contrary to former Governor Cuomo's argument, the Court held, "the Legislature—not the Governor—may ordinarily define the terms on which non-constitutional state officers may be appointed and removed. Moreover, the Legislature structured the Commission to address a narrow but crucial gap arising from the inherent disincentive for the Executive Branch to investigate and discipline itself, which has serious consequences for public confidence in government. The Act does not displace the Executive Branch to accomplish that goal; instead, it confers upon an independent agency power to enforce a narrow set of laws, thus mitigating the unique danger of self-regulation. The Act addresses a threat to the legitimacy of government itself with an extraordinary response. While the Act extends very close to the boundary of permissible legislation, it is not intrinsically a constitutional affront to the separation of powers doctrine."

TORTS, SPECIAL DUTY

Weisbrod-Moore v Cayuga County, 2025 NY Slip Op 00903 (Ct App Feb. 18, 2025)

Issue: Do municipalities owe a duty of care to the children the municipalities place in foster homes because the municipalities have assumed custody of those children?

Facts: “Plaintiff, formerly a child in foster care, commenced this action pursuant to the Child Victims Act (see CPLR 214-g) against defendant Cayuga County and “Does 1-10,” who she alleged were “persons or entities with responsibilities for [p]laintiff’s safety, supervision and/or placement in foster care.” According to the complaint, the County placed plaintiff in foster care in 1974, when she was three months old. While in the foster home selected by the County, plaintiff allegedly suffered horrific abuse. Plaintiff alleged that her foster parent sexually abused her over the course of approximately seven years, beginning when she was 18 months old and continuing until she was eight years old. The foster parent allegedly coerced plaintiff’s compliance with the sexual abuse by inflicting severe physical abuse, resulting in plaintiff sustaining broken bones and a head wound.” Asserting a claim for negligence, the plaintiff alleged “that the County had a duty to exercise reasonable care in selecting, retaining, and supervising her foster placement, and that the County breached this duty by placing her in the foster home and failing to adequately supervise her placement to ensure that she was safe under her foster parents’ care.”

The County moved to dismiss, arguing that the plaintiff failed to plead that it owed her a special duty. Plaintiff opposed, arguing that the County’s duty arose from the “custodial relationship” of the foster care placement. Although Supreme Court denied the County’s motion, the Appellate Division, Fourth Department reversed, and dismissed the complaint. The Fourth Department held, “because the County was acting in a governmental capacity in administering the foster care system, plaintiff was required to plead and prove that the County owed her a special duty under one of three recognized categories,” but she failed to do so.

Holding: The Court of Appeals reversed, clarifying its prior special duty precedent by holding that the “three-category special duty rule was developed by this Court for circumstances other than persons in governmental custody, which is a pre-existing and well-established category of common-law special relationships.” The Court explained, the government’s duty to safeguard those in its custody “stems from common-law principles and is not restricted to cases where the government has direct physical control. Of course, the government’s duty to those in its custody does not mandate unrelenting surveillance in all circumstances, and does not render [the government] an insurer of safety. The government’s duty is only to protect those in its custody from risks of harm that are reasonably foreseeable. Such risks extend to reasonably foreseeable harm inflicted by non-governmental third parties. The principal rationale for recognizing a duty of care in our governmental custody cases is that, by taking a person into custody, the government necessarily limits that person’s avenues for self-protection. Particularly, with respect to children in its custody, the government’s duty derives from the fact that the government, by assuming custody over the child effectively takes the place of parents and guardians. Foster children are no exception. By assuming legal custody over the foster child, the applicable government official steps in as the sole legal authority responsible for determining who has daily control over the child’s life. We thus hold that a municipality owes a duty to a foster child over whom it has assumed legal custody to guard the child from foreseeable risks of harm arising from the child’s placement with the municipality’s choice of foster parent.”

The Court cautioned, however, “[t]he duty we announced today does not require government employees to monitor foster children 24 hours a day and take responsibility for harm inflicted by third parties on foster children. Our holding merely requires that municipalities, in making decisions about the child’s placement, make those decisions with reasonable care. Contrary to the foreboding picture painted by the dissent, recognition of a duty on the part of municipalities administering foster care systems does not impart strict liability upon the government. The dissent’s fears in this respect unnecessarily conflate the existence of a duty with breach of that duty. Like other duties in tort, however, the scope of the government’s duty to protect foster children will be limited to risks of harm that are *reasonably foreseeable*.”

CRIMINAL LAW, PERSISTENT VIOLENT FELONY OFFENDER STATUS

People v Hernandez, 2025 NY Slip Op 00904 (Ct App Feb. 18, 2025)

Issue: Does the persistent violent felony offender statute toll the 10-year lookback period for time that a criminal defendant spends in presentence incarceration?

Facts: “In 2015, defendant robbed a Manhattan convenience store at gunpoint and assaulted the proprietor. A jury convicted him of that robbery in 2017. Prior to sentencing, the People filed a predicate felony statement (see CPL 400.16) listing two prior violent felony convictions, the dates of conviction and sentence on those crimes, and detailing the relevant dates of incarceration that extended the ten-year period described in Penal Law § 70.04 (1) (b) (iv) . . . According to the People’s calculations, defendant was incarcerated for nearly 14 years (5049 days) during the relevant period.” At defendant’s sentencing hearing, “defendant did not challenge the People’s account of his prior convictions or the amount of time spent incarcerated for each crime. Rather, he made a purely legal argument, namely the one he presses here, that under the terms of Penal Law § 70.04, the time he served in presentence incarceration for the 1990 felony should not be excluded from the ten-year lookback period. The parties agreed that if the period of presentence incarceration did not factor into the calculation for determining persistent offender status, the sentence on the 1990 offense would be outside of the ten-year limitations period and the conviction could not serve as a predicate for a persistent violent felony offender sentence.”

Supreme Court held that “under the plain language of the statute, the period of presentence incarceration must be excluded, and the relevant lookback period tolled, and sentenced defendant as a persistent violent felony offender pursuant to Penal Law § 70.08,” to the minimum available 20-years to life incarceration. The Appellate Division, First Department affirmed.

Holding: The Court of Appeals affirmed, holding that the plain text of the persistent felony offender statute “unambiguously requires that the ten-year lookback period be extended by any period of incarceration ‘between the time of commission of the previous felony and the time of commission of the present felony,’ including any period of presentence incarceration for the prior crime. That is, the first part of the phrase mandates that such time ‘shall be excluded’ and the second clause requires that the ten-year period ‘be extended’ by that period of incarceration.” The Court explained, “[w]e cannot avoid the deliberate legislative choice made here by accepting defendant’s invitation to rewrite the statute’s reference to ‘commission of the previous felony’ (Penal Law § 70.04 [1] [b] [v]) to read ‘sentence imposed’ for that crime.”

CasePrepPlus | February 28, 2025

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