2020 VT 79

No. 2020-036

Jane Doe

v.

Department for Children and Families

Supreme Court

On Appeal from
Superior Court, Caledonia Unit,
Civil Division

June Term, 2020

Mary Miles Teachout, J.

Daniel D. McCabe of Adler & McCabe, PLC, St. Johnsbury, for Plaintiff-Appellee.

Thomas J. Donovan, Jr., Attorney General, and Bartholomew J. Gengler, Assistant Attorney General, Montpelier, for Defendant-Appellant.

PRESENT: Reiber, C.J., Robinson, Eaton, Carroll and Cohen, JJ.

¶ 1. **CARROLL, J.** Defendant, the Department for Children and Families (DCF), filed this interlocutory appeal seeking review of the superior court's order denying its motion to dismiss the complaint for a declaratory judgment filed by plaintiff Jane Doe. We conclude that there is no justiciable controversy and reverse and remand.

¶ 2. The record reveals the following facts. Plaintiff filed suit against DCF in the civil division of the superior court, seeking judicial review of agency action under Vermont Rule of Civil Procedure 74 or 75. The complaint alleged that shortly before plaintiff married her husband, John Doe, in the summer of 2018, allegations were made against husband. Although charges were initially brought, the case was eventually dismissed, and the record was sealed. DCF then opened an investigation regarding the risk John Doe posed to plaintiff's minor children, who were residing

with her and would live with her husband after the marriage. John Doe took part in an evaluation as part of the investigation and the evaluator concluded that he posed a risk to children. DCF told plaintiff that, if John Doe did not leave her home, DCF would consider recommending that a petition be filed to declare that her children were children in need of care or supervision (CHINS). Plaintiff complied with DCF's request and lived separately from her husband. Plaintiff then filed this suit asking the civil division to review DCF's decision to initiate a family-support case and requesting an injunction to preclude DCF's intrusion into her home.

¶ 3. Plaintiff subsequently amended her complaint to also allege a violation of her constitutional right to raise her children without undue state interference, citing the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 4 of the Vermont Constitution. She sought review of DCF's actions to open a family-support case and requested a forum to litigate the basis for that decision.

¶ 4. The State moved to dismiss the complaint for lack of subject-matter jurisdiction and for failure to state a claim. The State asserted that the civil division lacked jurisdiction because jurisdiction over CHINS matters rested with the family division of the superior court. The State further alleged that plaintiff's claims were not ripe.

¶ 5. The court issued a written order denying plaintiff's request for a preliminary injunction and granting the motion to dismiss. The court first concluded that it had jurisdiction over plaintiff's claims. Because plaintiff's claims did not fall into any of the specific types of proceedings over which the family division has exclusive jurisdiction, 4 V.S.A. § 33, the matter fell within the civil division's general jurisdiction, id. § 31. The court further concluded that the decision by DCF to open a family-support case was not a contested case appealable under the Vermont Administrative Procedures Act. See 3 V.S.A. § 815(a) (providing right to appeal by person "who is aggrieved by a final decision in any contested case"). The court held that DCF's decision to open a family-support case was a discretionary decision not reviewable under Rules 74

or 75. Therefore, the court concluded that plaintiff's complaint as pled did not state a claim. Rather than granting immediate dismissal, however, the court indicated that an action for declaratory relief could provide a mechanism for plaintiff to raise her claims and allowed plaintiff twenty days to amend her complaint.

¶ 6. Plaintiff followed the court's suggestion and filed a second amended complaint, adding a claim seeking a declaratory judgment that plaintiff's husband did not present a risk of harm. Plaintiff attached a letter from DCF from August 2019 indicating that DCF was closing the family-support case and DCF would consider whether to file a CHINS petition in the future if John Doe were to move back in the home. The State again moved to dismiss. In December 2019, the court denied the motion to dismiss in a brief order, concluding that plaintiff had "asserted a sufficient ongoing violation of her constitutional right to maintain family integrity." The State moved for interlocutory appeal of the decision, which the civil division granted in January 2020.

¶ 7. On appeal, we review the court's decision on the motion to dismiss de novo. Negotiations Comm. of Caledonia Cent. Supervisory Union v. Caledonia Cent. Educ. Ass'n, 2018 VT 18, ¶ 8, 206 Vt. 636, 184 A.3d 236. "A motion to dismiss for failure to state a claim upon which relief can be granted should not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." Richards v. Town of Norwich, 169 Vt. 44, 48, 726 A.2d 81, 85 (1999) (quotation omitted). On review, this Court "assumes that all factual allegations pleaded in the complaint are true." Id. at 49, 729 A.2d at 85.

¶ 8. DCF argues that (1) plaintiff lacks standing to seek a declaration regarding her husband, a third party; (2) plaintiff's claims fall under the jurisdiction of the family division and therefore the complaint should be dismissed; and (3) plaintiff seeks a purely advisory opinion. We conclude that there is no justiciable controversy and therefore any decision would be advisory and reverse on that basis. Therefore, we do not reach DCF's other arguments in favor of dismissal.

¶ 9. The jurisdiction of Vermont courts is limited to deciding "actual cases or controversies involving litigants with adverse interests." Turner v. Shumlin, 2017 VT 2, ¶ 8, 204 Vt. 78, 163 A.3d 1173 (per curiam) (quotation omitted). A claim is not ripe "if the claimed injury is conjectural or hypothetical rather than actual or imminent." Id. ¶ 9.

¶ 10. The prohibition against advisory opinions applies to actions for a declaratory judgment. Wood v. Wood, 135 Vt. 119, 121, 370 A.2d 191, 192 (1977). A declaratory judgment is meant "to provide a declaration of rights, status, and other legal relations of parties to an actual or justiciable controversy." Doria v. Univ. of Vt., 156 Vt. 114, 117, 589 A.2d 317, 318 (1991) (quotation omitted); see 12 V.S.A. § 4711 (giving superior court jurisdiction "to declare rights, status, and other legal relations whether or not further relief is or could be claimed"). The question, however, must not be premature, "vague or indefinite," or "subject to varying or imprecise answers." Wood, 135 Vt. at 121, 370 A.2d at 192. "It is the tradition of constitutional common law that the establishment of legal doctrine derives from the decision of actual disputes, not from the giving of solicited legal advice in anticipation of issues." Id.

¶ 11. In this case, plaintiff seeks to have her husband live with her and her children without the possibility that DCF will intervene either through a revived family-support case or by recommending that a CHINS petition be filed. To that end, plaintiff seeks a declaration that having her husband live with her and her children does not pose a risk of harm to her children. Plaintiff contends that she received an ultimatum: either her husband lived outside the home or DCF would present the state's attorney with a CHINS petition. Plaintiff asserts that this ultimatum interferes with her right to raise her children as she sees fit and that she has no other forum to challenge DCF's actions. See Troxel v. Granville, 530 U.S. 57, 66, 68-69 (2000) (recognizing "fundamental right of parents to make decisions concerning the care, custody, and control of their children" and concluding that "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further

question the ability of that parent to make the best decisions concerning the rearing of that parent's children").

¶ 12. To be entitled to a declaratory judgment, a plaintiff must demonstrate that there exists an actual controversy. The U.S. Supreme Court has recognized that "[t]he difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test." Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297 (1979). A person is not required to wait for "the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." Id. at 298 (quotation omitted).

¶ 13. Plaintiff contends that the threatened injury to her constitutional rights is enough to satisfy the requirement, and relies on Beecham v. Leahy, 130 Vt. 164, 287 A.2d 836 (1972). In that case, plaintiffs, an unmarried pregnant woman and a doctor, brought an action seeking a declaratory judgment regarding the validity of a criminal law relating to abortion. The doctor refused to perform an abortion for the woman on the grounds that it would subject him to criminal prosecution. The defendants sought to dismiss the suit on the basis that there was no justiciable controversy.

¶ 14. The Court explained that "the consequences giving rise to the seeking of declaratory relief must be set out so that the court can see they are based upon a reasonable and realistic expectation of their actual occurrence, and not on a concern merely anticipatory or feared." Id. at 168, 287 A.2d at 838. The Court further explained that in cases of possible criminal prosecution, a person does not have to wait to become a respondent in a criminal action "to test the validity of the statute or ordinance upon which such a criminal charge would be based." Id. However, the Court emphasized that "no Vermont case has gone to the point of permitting resort to the declaratory device where the action or activity to be tested is still only anticipatory and subject to voluntary avoidance." Id. at 168, 287 A.2d at 839. Because the doctor was not under a

compulsion to provide an abortion, the Court concluded that there was no justiciable controversy as to him. Id. As to the woman, the Court held that she was entitled to proceed because she had no ability to produce a case or controversy, and "[y]et a very real wrong, in the eyes of the law exists." Id. at 170, 287 A.2d at 840.

¶ 15. Here, the facts as pled show that the action to be tested is "still only anticipatory and subject to voluntary avoidance." Id. at 168, 287 A.2d at 839. DCF closed the family-support case and told plaintiff that if her husband moves in with her and her children that DCF would consider whether to recommend that a CHINS petition be filed. There is no indication that a CHINS petition is "certainly impending" if plaintiff's husband moves in with her. See Babbitt, 442 U.S. at 298. DCF has indicated that the possibility "will be considered." It has not indicated that such action is imminent. Moreover, whether a petition will be filed is subject to "voluntary avoidance." DCF is not granted authority to file a CHINS action. It is ultimately up to the state's attorney to prepare and file a CHINS petition. 33 V.S.A. § 5309(a) (providing that state's attorney files CHINS petition and if state's attorney fails to do so, DCF may "request that the Attorney General file a petition on behalf of the Department"). Therefore, plaintiff's alleged injury is hypothetical, and the issue is not yet ripe. See State v. M.W., 2012 VT 66, ¶ 11, 192 Vt. 198, 203, 57 A.3d 696, 699 (2012) (concluding that ripeness is built on the premise "that courts should not render decisions absent a genuine need to resolve a real dispute").

¶ 16. In some other situations, individuals have been able to bring a declaratory-judgment action to challenge the constitutionality of a law without first exposing themselves to liability. See, e.g., Terrace v. Thompson, 263 U.S. 197, 216 (1923) (holding that landowners were not required to "to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights" as to constitutionality of Anti-Alien Land Law). The reasoning of those cases is that challengers should not be coerced into the choice of either abandoning their rights or risking prosecution. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (2007).

These cases, however, involve facial challenges to the validity or constitutionality of a law. See Flanders Lumber & Bldg. Supply Co. v. Town of Milton, 128 Vt. 38, 44, 258 A.2d 804, 808 (1969) (holding that "person whose property would be harmfully affected by an amendment of a zoning ordinance" could bring action for declaratory judgment to challenge "validity of the amendment"). Mother is not challenging the validity of any statute or rule; rather, she is seeking a factual determination regarding her husband's risk to her children. This is outside the scope of a declaratory-judgment action.

¶ 17. Moreover, any judgment in this case would not settle the matter between the parties. See Northfield Ins. Co. v. Montana Ass'n of Ctys., 2000 MT 256, ¶ 12, 10 P.3d 813 (explaining that justiciable controversy requires that: party has genuine interest in outcome; controversy exists "upon which the judgment of the court may effectively operate"; and outcome "will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest" (quotations omitted)). Essentially, plaintiff asks for a declaration that she is capable of making decisions in her children's best interests. As she states, she wants "a judicial declaration that her choices are within [the constitutionally protected] boundaries." The distinguishing feature between a declaratory-judgment action and an advisory opinion is that the former has some conclusive, legal effect. See Chase v. State, 2008 VT 107, ¶ 13, 184 Vt. 430, 966 A.2d 139 (explaining that if ruling "would not bind the Board, it would be a mere advisory opinion"). Here, any judgment would not change or clarify the parties' legal status. Declaratory relief is not appropriate when it would "only advise the ultimate decision-maker on points of law." Williams v. State, 156 Vt. 42, 58, 589 A.2d 840, 850 (1990). "The judiciary is not empowered to render advisory opinions the sole purpose of which is to aid in the resolution of a dispute that properly belongs in another tribunal." Id.

¶ 18. Whatever declaration the superior court might make about plaintiff's parenting choices thus far or her husband's present level of dangerousness would have no binding effect on

future action by DCF, the state's attorney, or the family division. DCF has statutory authority to "respond to reports of alleged neglect or abuse," and to assess the validity of any allegation of abuse or neglect. 33 V.S.A. § 4915(a), (b). Any declaration would not prevent DCF from interacting with plaintiff and carrying out its statutory duty to protect children by assessing and investigating possible risks. See id. §§ 4915a, 4915b (providing mandatory procedures for assessment and investigation). In addition, the family division has "exclusive jurisdiction" over CHINS proceedings, and its orders "take precedence over . . . any order of another court of this State, to the extent they are inconsistent." 33 V.S.A. § 5103(a), (b). Therefore, whatever declaration the civil division may make regarding plaintiff's actions or the risk posed by her husband, these statements would not preclude action by DCF or have a binding effect on the family division in a subsequent CHINS proceeding.

¶ 19. This Court is sympathetic to plaintiff's desire to know in advance what will happen if she allows her husband to live in the home with her and her children. However, for all parents, the right to family integrity is balanced against the state's "legitimate and compelling interest in the safety and welfare of [children]." In re A.D., 143 Vt. 432, 435, 467 A.2d 121, 124 (1983). As explained above, DCF has a statutory mandate to assess and investigate in situations where children are at risk for abuse or neglect. When DCF acts in a particular case, there are mechanisms for court review of the action to ensure that parents' rights are not improperly curtailed. The court cannot, however, make a factual determination regarding the propriety of events that have not yet occurred.

Reversed and remanded.

FOR THE COURT:

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Associate Justice