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Recent Developments: *Taxiera v. Malkus*: After-Born Illegitimate Children Have a Right to Establish Paternity of Their Deceased Putative Father

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of Maryland enjoyed absolute immunity when vetoing or approving legislation.

The Court of Appeals of Maryland began its analysis by noting that it was undisputed that some degree of public official immunity applied to the governor when performing gubernatorial duties involving the exercise of discretion. *Mandel*, 320 Md. at 107, 576 A.2d at 768. The question before the court was whether such immunity was absolute or qualified. An absolute immunity from tort liability, the court stated, "stands even if the official acts in bad faith, or with malice or corrupt motives, and protects both judges and legislators, so long as their acts are 'judicial' or legislative in nature." *Id.* (quoting Prosser & Keeton, *The Law of Torts*, §132, at 1056-57 (5th ed. 1984)). Governor Mandel argued that his veto/approval function was a legislative one, and therefore should be protected to the same extent as legislators.

Due to the lack of Maryland precedence regarding gubernatorial immunity specifically, the court based its analysis on cases dealing with 42 U.S.C. §1983, a statute which the court believed to be the driving force in the development of public official immunity. Section 1983 allows suits against public officials who have caused the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." 42 U.S.C. §1983 (1982). The cases, as noted by the court of appeals, took a "functional" approach to immunity law in that "[t]he scope of immunity is determined by function, not office." *Mandel* at 120, 576 A.2d at 774 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 785 (1982) (White, J., dissenting)).

The court of appeals found that when applied to cases dealing with executive immunity, the functional approach produced disparate results. In *Scheuer v. Rhodes*, for example, the Supreme Court suggested that a governor would enjoy qualified immunity for his deployment of National Guard units. The Court analogized such action to possible arrest situations confronted by police officers whose actions are subject to good faith. *Mandel* at 117, 576 A.2d at 772 (citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974)).

In contrast, the Court found in *Imbler v. Pachtman*, 424 U.S. 420 (1976) that a state prosecutor's function of initiating

and presenting a case was covered by absolute immunity since the discretion involved was similar to that of a judge. "Thus, '[a]lthough a qualified immunity from damages liability should be the general rule for executive officials[,] . . . there are some officials whose special functions require a full exemption from liability.'" *Mandel*, at 120, 576 A.2d at 774 (quoting *Butz v. Economou*, 438 U.S. 478, 508 (1978)).

When applying the functional approach to the facts *sub judice*, the court of appeals found that the function of the veto, "as a matter of historical development as well as theory[,] . . . [was] a legislative power." *Id.* at 121-22, 576 A.2d at 775 (quoting E. Mason, *The Veto Power*, 100 (A. Hart. ed. 1967)). As such, the exercise of gubernatorial veto power requires that it is absolutely immune from tort liability. *Id.* The court explained that the act of deliberating on the constitutionality, justice, and public expediency of legislative measures before deciding whether or not to exercise veto power was "plainly the function of a legislator." *Mandel* at 122, 576 A.2d at 775 (quoting *People v. Bowmen*, 21 N.Y. 517, 521-22 (1860)).

In support of its conclusion, the court next cited *Hernandez v. City of Lafayette*, 643 F.2d 1188 (1982), in which the United States Court of Appeals for the Fifth Circuit squarely held that there is absolute legislative immunity under §1983, which encompassed the executive veto function. *Mandel*, at 126-27, 576 A.2d at 777-78. In *Hernandez*, the court of appeals stated that "[t]he mayor's veto, like the veto of the President or a state governor, is undeniably a part of the legislative process." *Id.* (quoting *Hernandez v. City of Lafayette*, 643 F.2d at 1193-94 (1982)).

The court rejected the O'Haras' argument that the governor must be exercising the state's entire legislative power on the subject at issue in order to assert absolute immunity. The court did not accept such language as a condition precedent to absolute immunity, but rather found that it could be asserted for lesser delegations, such as the power to veto.

By equating the governor's veto power to a legislative function, the Court of Appeals of Maryland specifically noted that it was confining its holding to the

point of intersection of executive and legislative powers. Therefore, although a Governor of Maryland is an elected official, he will nonetheless enjoy absolute immunity when exercising his constitutionally mandated power in a legislative capacity.

Mandel represents a significant broadening of the immunity doctrine in an area which had never been considered in regard to the highest executive official of the state. Specifically, a Governor of Maryland enjoys absolute immunity when exercising the official function of vetoing or approving legislation, regardless of the motives that may underlie the function. This is in accord with the absolute immunity which the other branches of government have long enjoyed. By so ruling, the evidentiary problems that would arise if a governor were held accountable for every veto decision he made were avoided. So too was avoided the possible separation of powers problem that may occur if the judiciary was empowered with the ability to judge the acts of the executive when exercising duties which he is constitutionally bound to perform. The court's decision permits such judgment to remain with the governor's constituents, where it belongs.

— Lesley M. Brand

***Taxiera v. Malkus*: AFTER-BORN ILLEGITIMATE CHILDREN HAVE A RIGHT TO ESTABLISH PATERNITY OF THEIR DECEASED PUTATIVE FATHER**

In *Taxiera v. Malkus*, 320 Md. 471, 578 A.2d 761 (1990), the Court of Appeals of Maryland ruled that an illegitimate child born after her alleged father's death has the right to establish the paternity of her putative father. In so holding, the court stated that such an interpretation of Maryland's paternity statutes conforms with the legislature's intentions of promoting the welfare and best interests of children born out of wedlock.

Elaine Taxiera, a Delaware resident, filed suit in the Circuit Court for Dorchester County against Frederick Malkus, the Personal Representative of the Estate of Levi Brown, Jr. *Id.* at 473, 578 A.2d at 762. She sought a declaration under §1-208 of the Estates and Trusts Article that Brown was the father of her

illegitimate daughter, Leah, who was born four months after Brown's death. Section 1-208(b) states that a child born out of wedlock shall be considered to be the child of his father only if the father:

- (1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings; or
- (2) Has acknowledged himself, in writing, to be the father; or
- (3) Has openly and notoriously recognized the child to be his child; or
- (4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

Id. (quoting Md. Est. & Trusts Code Ann. §1-208(b) (1974)).

While the action was pending, Taxiera filed a "Complaint to Establish Paternity," pursuant to Maryland's paternity statutes, asking that Brown be declared the father of Leah, and that child support be paid by Brown's estate. *Id.* at 473-74, 578 A.2d at 762 (citing Md. Fam. Law Code Ann. §§5-1001-48 (1984 & Supp. 1990)).

The court noted the purpose of the paternity statute is "to promote the general welfare and best interests of children born out of wedlock by securing for them, as nearly as practicable, the same rights to support, care, and education as children born in wedlock." *Id.* at 474, 578 A.2d at 762 (quoting Md. Fam. Law Code Ann. §5-1002(b)(1) (1984)). The ensuing sections, which are couched in present tense terms of a putative father who is alive at the time that the paternity action is in process, deal with a complaint against the putative father of an illegitimate child. Specifically, §5-1043 states that if a father dies *after he is judicially declared to be the child's father, or after he is ordered to make support payments*, the court may summon the personal representative of the deceased father and order child support to be paid from the estate. *Id.* at 475, 578 A.2d at 762 (emphasis added). Thus, under a literal reading of the statute, it would appear that a court could not order child support to be paid from the estate of a father who, like Brown in this case, died before any of these two events occurs.

Malkus moved to dismiss the paternity complaint on the grounds that the statute did not apply unless there had been a judicial determination of parentage *before* the putative father died. *Id.* at 475, 578 A.2d at 763 (emphasis added). In the alternative, Malkus contended that the right to child support terminated with the death of Brown. *Id.* Taxiera, however, argued that Leah would be denied the equal protection of the law if §5-1043 were interpreted so as to prevent her from establishing Brown's paternity after his death. *Id.*

Taxiera's declaratory judgment action was stayed pending determination of the paternity action. *Id.* at 476, 578 A.2d at 763. The trial court then dismissed Taxiera's complaint and held that the paternity statute "becomes relevant only after. . . the court has already declared the putative father to be the father. . . or the court has ordered the father to make child support payments." *Id.* at 476-77, 578 A.2d at 763-64. Thus, because these events had not occurred, the court held that the action could not proceed under §5-1043. *Id.* at 477, 578 A.2d at 764.

The court also considered Taxiera's argument that the "Survival of Actions" statute, §6-401(c) of the Courts and Judicial Proceedings Article, permitted the action to continue in spite of Brown's death. Believing that the only remedy provided by the paternity statute was an award of child support, the court held that it did not have the power to require the payment of child support by a deceased father's estate. *Id.*

Taxiera appealed to the court of special appeals but prior to argument, the court of appeals granted certiorari to consider the significant issue of public importance presented by the case. *Id.* at 478, 578 A.2d at 764.

First, the court of appeals explained that in §5-1005 of the paternity statute, a court may determine the legitimacy of a child pursuant to §1-208 of the Estates and Trusts Article. If it is judicially determined under §1-208 that Brown was Leah's father, Leah would be considered his child and lineal descendant under the relevant paternity statutes. *Id.* at 479, 578 A.2d at 764-65. Thus, the court focused on §5-1002, which explicitly set forth the duty of the state "to improve the deprived social and economic status of children born out of

wedlock," to determine if Leah was legitimate. *Id.* at 479, 578 A.2d at 765 (quoting Md. Fam. Law Code Ann. §5-1002(1) (1984)).

After citing various Maryland cases holding §1-208(b) to be a legitimation statute, the court stated that "the trend of the courts throughout the country is to give liberal interpretation to legitimation statutes or legislation which seeks to achieve that purpose (the modern legislative policy of mitigating the impact of illegitimacy)." *Id.* at 479-80, 578 A.2d at 765 (quoting *Thomas v. Solis*, 263 Md. 536, 542, 283 A.2d 777 (1971)). Thus, the court held that the provisions of §1-208(b) do not exclude a posthumous illegitimate child from inheriting from the father. *Id.* at 480, 578 A.2d at 765. Although a course of action under §1-208(b) was not available to Taxiera, plaintiffs, including after-born illegitimate children, who fulfill the requirements of the statute could receive its benefits. *Id.* at 479 n.5, 578 A.2d at 764 n.5.

Malkus, however, contended that the paternity statute did not expressly authorize an action against a deceased putative father's personal representative. *Id.* at 480, 578 A.2d at 765. He argued that because the statute referred to the putative father in the present tense as a defendant, and because of the various provisions of the statute including the giving of notice to the defendant, there was a legislative intent that the law only apply to *living* putative fathers. *Id.* (emphasis added). Therefore, Malkus argued that §1-208(b)(1) of the Estates and Trusts Article was applicable only to putative fathers who were alive at the time the paternity complaint was filed. *Id.*

The court, however, stated that "[w]hile the language of the statute is the primary source for determining legislative intent, the plain meaning rule is not absolute." *Id.* Rather, the language must be construed with regard to the statute's purpose, aim or policies. *Id.* Moreover, the court recognized that the most harmonious construction of related statutes, such as the ones at issue, is one which gives full effect to both statutes. *Id.* at 481, 578 A.2d at 765.

Consequently, the court concluded that the legislative scheme, encompassing a consistent reading of §1-208 of the

Estates and Trusts Article and the paternity statutes, was intended to provide a mechanism to assure that children born out of wedlock after their putative father's death may obtain a judicial determination of their paternity for purposes of establishing inheritance and other rights. *Id.* at 481, 578 A.2d at 766. Thus, the court concluded that the circuit court was empowered under the paternity statute to declare whether Brown was the father of Leah, despite the fact that he had died before the paternity action was filed and without regard to whether an award of child support could be made against his estate. *Id.* at 482, 578 A.2d at 766. Consequently, the court reversed the circuit court's judgment and remanded the case with directions to conduct further proceedings to determine, by a preponderance of the evidence, whether Brown was Leah's father. *Id.*

Thus, the court significantly expanded Maryland's paternity laws, as children born out of wedlock may now obtain a declaration of paternity even if the alleged father's death occurred prior to the petition. While the number of fraudulent paternity claims may increase, this concern, as the court noted, does not outweigh the legitimate purpose of promoting the general welfare and best interests of illegitimate children through their right to establish paternity.

— Steven Vinick

***Jones v. Speed*: EACH APPOINTMENT AT WHICH A PHYSICIAN NEGLIGENTLY FAILS TO CORRECTLY DIAGNOSE HIS PATIENT MAY CONSTITUTE A SEPARATE NEGLIGENT ACT UNDER MARYLAND'S MEDICAL MALPRACTICE STATUTE OF LIMITATIONS.**

In the recent decision of *Jones v. Speed*, 320 Md. 249, 577 A.2d 64 (1990), the court of appeals ruled that Maryland's five year statute of limitations does not prevent a patient from bringing a medical malpractice claim against her negligent physician in spite of the fact that the initial misdiagnosis occurred more than five years before bringing suit.

In July of 1978, Elizabeth Jones consulted Dr. William Speed about her severe headaches. Although Mrs. Jones

expressed concern that the headaches may have been caused by an intracranial abnormality, the doctor did not perform a Computerized Axial Tomography study (CAT scan) or other diagnostic studies. Mrs. Jones continued to see Dr. Speed until September 16, 1985. During this period she made sixteen visits to the doctor, but Dr. Speed never ordered diagnostic studies of any kind despite her persistent headaches. On February 13, 1986 she suffered a nocturnal seizure. A neurologist ordered a CAT scan, noted a brain tumor and had it surgically removed. Since then, she has been free of headaches and related symptoms. On July 14, 1986, the Joneses filed suit against Dr. Speed for failure to diagnose the tumor despite his seven years of treatment. *Id.* at 254, 577 A.2d at 66.

Mr. and Mrs. Jones first filed their claim against Dr. Speed with the Health Claims Arbitration Panel. *Id.* at 252, 577 A.2d at 65. Dr. Speed moved for summary judgment claiming that even if he had been negligent in failing to diagnose Mrs. Jones' brain tumor, the injury occurred upon the plaintiff's first visit to him on July 17, 1978, more than eight years before the complaint was filed. As such, her claim was barred by section 5-109(a) of the Courts and Judicial Proceedings Article of the Maryland Code which requires that an action be brought within "[f]ive years of the time the injury was committed," or three years from the date which the injury was discovered. Md. Cts. & Jud. Proc. Code Ann. section 5-109(a)(1), (2) (1989).

Finding that the injury occurred on July 17, 1978, the Chairman of the Health Claims Arbitration Panel granted the doctor's motion. *Jones*, 320 Md. at 252, 577 A.2d at 65. The Joneses filed a notice of rejection of the Chairman's order and filed a complaint in the Circuit Court for Baltimore City. Agreeing that the claim was barred by the statute of limitations, the circuit court also granted Dr. Speed's motion for summary judgment. On appeal, the Court of Appeals of Maryland granted certiorari before the court of special appeals heard the case. *Id.* at 253, 577 A.2d at 65-66.

In their complaint, the Joneses alleged in their first count that Dr. Speed was negligent when Mrs. Jones first visited him and he failed to order tests which would detect her brain tumor. The fol-

lowing counts incorporated the first by reference but also stated that similar acts of negligence occurred on each of Mrs. Jones' subsequent visits. The final count was a joint claim for loss of consortium. *Id.* at 252-53, 577 A.2d at 65. According to the Joneses, each time that the defendant examined Mrs. Jones and failed to order tests which would have revealed the tumor, a separate act of negligence with its own injury occurred. Thus, because many of the appointments took place within five years of filing the complaint, they constituted negligent acts committed within the statute of limitations. *Id.* at 255-56, 577 A.2d at 67.

The Court of Appeals of Maryland agreed with the Jones' reasoning and held that §5-109(a) did not bar their medical malpractice claim by reason of the statute of limitations. However, the court cautioned that on remand they must prove that the defendant committed a separate act of negligence within that five year time frame. Mere proof that she continued to suffer because of an earlier negligent act would not be enough. *Id.* at 261, 577 A.2d at 70.

Dr. Speed advanced several attacks which failed to undermine the Jones' argument. He claimed that accepting the plaintiffs' rationale would breathe life into the "continuous course of treatment rule." *Id.* at 256, 577 A.2d at 67. That rule, the court noted, tolled the statute of limitations by delaying the accrual date of undiscoverable medical malpractice until the termination of medical treatment. The rule had been explicitly rejected in *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985). Under that rule, Mrs. Jones would not have been barred from suing as to her first appointment because the treatment of her headaches continued to well within five years of her bringing her suit. However, under the court's decision, she was only permitted to bring suit as to any negligence committed within five years of her complaint, making clear that the "continuous course of treatment rule" remained dead. *Jones*, 320 Md. at 256-57, 577 A.2d at 67.

The court also rejected Dr. Speed's assertion that accepting the Jones' theory would "frustrate the legislative intent to provide absolute protection to health care providers for acts of negligence occurring more than five years before