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Justices Show They Can't be Typecast as Legislators

By Peter G. Verniero

On Tuesday, the New Jersey Supreme Court decided not to decide. The day before, it flexed its judicial muscle by tearing up portions of an agreement between two private parties. The two cases illustrate the strength of the system.

The question in Tuesday's case was whether a minor child, identified only as A.M.S., had a constitutional right to visit her four older siblings who live with a separate, adoptive family. Because the two families allowed the siblings to maintain their relationship, the court unanimously declined to rule on the difficult question of whether siblings have a constitutional right to visit each other over their parents' objection.

The court's rationale was stated plainly: Judges should decide constitutional issues only when they have to. Because the two families fostered contact among the children, there was no issue of constitutional concern from any child's perspective and therefore no need for the court to act.

The court also invited the Legislature to study the question and consider a statute addressing it before the judiciary is asked again to rule. In a single stroke, the court stayed its hand and deferred to the Legislature, acting contrary to those critics who believe the court is sometimes too activist in its decisions.

We should give equal attention to the conduct of the families. They resolved their differences on behalf of the children without judicial intervention. No matter how diligent and smart judges might be, they are poor substitutes for conscientious parents where family matters are concerned. Simply put, parties should settle more such disputes outside the courtroom.

Compare Tuesday's case with the case decided only one day earlier. In Monday's decision, the same Supreme Court invoked its full authority by voiding parts of an agreement between a parent and a commercial operator of a skate park. The agreement would have limited the operator's liability in connection with injuries sustained by the parent's child while playing at the park. The court, by a 5-2 vote, again stated its rationale in straightforward terms: Its "duty to protect the best interests of the child" required it to set aside the agreed-to limitation of liability.

At the same time, the court unanimously upheld the portion of the agreement that now will require the parents to resolve their differences with the skate park operator before a neutral arbitrator rather than a courtroom jury. (Indeed, that aspect of the court's decision might turn out to be most significant, as it furthers a recent trend toward resolving disputes outside the courtroom.)

Although divided on some issues, the justices showed us how they can disagree without being disagreeable. The court's majority in the skateboard case explained its view that, in certain circumstances, a child's interests should trump an operator's quest to limit commercial liability. The dissenting justices responded that an adult's right to waive such liability as a matter of choice should also permit that same adult to act similarly on a child's behalf. No name calling. No inflammatory rhetoric. Just a succinct explanation of competing rationales.

I'll leave it to others to debate whether the court decided the two cases correctly. Apart from the merits, they underscore the court's willingness to distinguish questions based on the facts and circumstances at hand.

It bears repeating that the cases belie the notion espoused in some quarters that the first impulse of our courts is to "legislate" from the bench. They also demonstrate the court's refusal to employ a one-size-fits-all approach to its decisions.

Neither decision generated much attention prior to its release. Yet the issues contained in each are significant. That underscores how, although they shun the spotlight, judges are vital to the system. They are relevant not because of who they are but because of what they do and how they do it. They draw distinctions and apply sometimes subtle principles of law. They make rulings only when asked and, even then, may decline to act.

As illustrated by the A.M.S. case, they sometimes decide that the most appropriate decision is no decision at all.

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