

Marriage Law Digest

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**FLORIDA V. PRESIDENTIAL WOMEN'S
CENTER
No. SC04-2186
Supreme Court of Florida
April 6, 2006**

This case involved federal and state constitutional challenges to a law requiring informed consent before an abortion could be performed. The trial court and court of appeals ruled that the law was unconstitutional.

The plaintiffs argued that the use of the term "reasonable patient" in the statute was vague because it doesn't specify that consent is necessary only if reasonable under the patient's specific circumstances. Plaintiffs further argued that the law required doctors to disclose nonmedical risks. The state however, had conceded that it interpreted the statute to require consideration of a patient's individual circumstances and that the duty to inform does not apply to nonmedical risks. Thus, as construed, the law is a neutral informed consent statute similar to the common law duty and is constitutional.

**UNITED STATES V. WILLIAMS
No. 04-15128
U.S. Court of Appeals for the Eleventh
Circuit
April 6, 2006**

Defendant was convicted of promoting child pornography and challenged the charging statute as facially unconstitutional. The court held that since the statute applies to non-commercial promotion, it must be

subject to strict scrutiny. The court identified three problems with the promotion statute: (1) it applies even where the touted material is non-existent or not pornographic, (2) the First Amendment protects speech advocating illegal conduct and (3) it is unclear what kinds of pictures could be included in the prohibition (i.e. because the lasciviousness of the pictures is dependent on the intent of the promoter rather than on any objective factor). The law was therefore unconstitutional.

**C.G. V. C.W.
Case No. B4/2006/0340
U.K. Court of Appeal (Civil Division)
April 6, 2006**

The dispute involved partners in a same-sex relationship, one of whom was the mother of two children (conceived by artificial insemination). The couple broke up when the children were 3 and 1 years old. A previous action had established that the mother had primary custody but was restrained from moving to Cornwall so as not to upset the children's pattern of visitation with the mother's former partner. The mother defied the order and moved to Cornwall with the children, then sought ratification of her decision while the former partner sought to become the primary custodian of the children. The trial court gave primary custody to the former partner.

On appeal, the court held that the established legal presumption in favor of a natural parent does not apply in disputes involving same-sex couples because society has changed since the rules recognizing such a presumption were formulated. The court

argued that “we have moved into a world where norms that seemed safe twenty or more years ago no longer run.” The court believed that a person can be a psychological parent by “mutual agreement” and “careful planning.” The court also believed that small children “will not distinguish between one woman and the other on the grounds of biological relationship.” In this case, because the mother will likely diminish the children’s relationship with the former partner, the court assigned primary custody to the partner, removing it from the mother.

One concurring justice expressed hesitation to have primary custody removed from the mother but felt deference to the trial court was appropriate.

**STATE OF CONNECTICUT V. JOHN M.
AC 25313
Connecticut Court of Appeals
April 11, 2006**

A stepfather was convicted of a sexual assault on his stepdaughter. The appeals court reversed the conviction because there was no definitive evidence offered that the victim was the daughter of the stepfather’s wife.

The court also addressed the stepfather’s claim that the incest statute violated equal protection guarantees since it applied only to incest involving persons of the opposite-sex. The court held that this was sexual orientation discrimination and weighed the state’s purported interest under rational basis scrutiny. The state asserted it had an interest in preventing genetic defects related to inbreeding. The court noted that the statute applied to combinations of offenders and victims that might be incapable of inbreeding, so the distinction the state suggested was arbitrary and irrational. The

court then raised another possible interest—the expression of moral disapproval. The court held that under *Lawrence v. Texas*, this is an insufficient basis to uphold a statute. The court thus conclude that there was no rational basis for the distinction between same and opposite-sex incest and struck down the statute.

One justice concurred, arguing that the majority should have limited its opinion to the evidentiary issue.

**IN RE KAREN MAYS-HOOPER
No. 04-1040
Supreme Court of Texas
April 7, 2006**

A trial court gave visitation of a child to the mother’s mother-in-law after the mother had divorced the child’s father who subsequently died. On appeal, the supreme court noted that the facts of this case were almost identical to those in *Troxel v. Granville*. Noting that the mother here was not unfit and the court did not give any special weight to her wishes, it reversed the trial court judgement.

**IN RE JANE DOE
Case No. 1D06-0489
Florida District Court of Appeal, First
District
April 5, 2006**

A minor was denied judicial bypass of a parental notice requirement before securing an abortion. She wanted to abortion for financial and educational reasons (i.e. she feared a child would interfere with educational goals). She wanted the bypass in order to avoid problems with her relationship with parents. The trial court held that the minor was from a secure home where she had received substantial support from her mother and grandmother and thus

notification was appropriate.

The court of appeals reversed. It held that “[i]n determining whether a minor is ‘sufficiently mature,’ the court need only find that the minor has the necessary emotional development, intellect and understanding to make an informed decision regarding terminating her pregnancy.” The court found fault with the judgement below because it was based on a finding of immaturity stemming from the child’s age (17), lack of plans for marriage, lack of preparation to raise a baby, and inability to provide for herself. The court found that the minor’s age and confidence and self-assurance were enough to demonstrate her maturity. The court further criticized the trial court’s reliance on its own experiences.

One judge dissented, arguing that the appeals court had just re-constructed the facts the trial court had relied on when the appeals court should rather have deferred to the trial court.

IN THE MATTER OF BEAL
No. 2004-748
Supreme Court of New Hampshire
April 11, 2006

In a divorce action, the trial court ordered the parties to sell property in Canada to settle with creditors. On appeal, the court held that state law does not allow divorce judgements to include orders related to third parties.

IN THE MATTER OF INFANT GIRL W.
No. 55A01-0506-JV-289
Court of Appeals of Indiana
April 13, 2006

Two women serving as foster parents for an 18-month old child sought a joint adoption

which was approved by the trial court.

On appeal, the county Office of Family and Children argued that the state adoption statute did not allow for joint adoptions by partners in unmarried couples. The appeals court noted that the Indiana adoption statute allows a resident of Indiana to adopt as well as requiring any person who is married to have their spouse join the adoption petition. The court then held that the use of the singular term “resident” “necessarily” includes the plural. The court further concluded that the failure of the adoption statutes to make provision for joint adoptions by unmarried couples doesn’t mean they are excluded from such adoptions. The court further argued that a statutory bar to second parent adoptions by unmarried couples doesn’t control this situation because here the partners are seeking the adoption at the same time. In a footnote, the court said there would be no need to worry about unintended consequences from the decision, because in any event, the adoption statute still requires a consideration of the best interests of the child.

One judge dissented. He noted the fact that the law of adoption is entirely statutory. He also noted that previous decisions of the court of appeals had recognized second parent adoptions by same-sex couples. The legislature, however, had amended the adoption statutes in 2005 to make clear that a second parent adoption was only possible if the individual seeking the adoption was married to the parent of the child. The dissent argued that it would not make sense for the law to prevent unmarried couples from adopting sequentially while allowing them to adopt simultaneously. Such a result would make the 2005 legislation easily avoidable (i.e. an unmarried couple would just petition for simultaneous rather than

sequential adoption). The dissent further noted that the adoption statute uses gender specific terms (“the adoptive father or the adoptive mother or both”) which clearly does not contemplate adoptions that do not involve a mother *and* father. Finally, the dissent argued that the only statutory exceptions to single parent adoptions are for married couples (either jointly adopting or when a stepparent adopts a spouse’s child).

**OWENS V. SASKATCHEWAN HUMAN
RIGHTS COMMISSION
2006 SKCA 41
Court of Appeal for Saskatchewan
April 13, 2006**

In response to an advertisement for “Pride Week,” an individual paid for an ad which featured four Bible references and a stick illustration of two men holding hands circled with a bar across the illustration. Three gay men filed a complaint about the ad with the provincial Human Rights Commission alleging that the ad exposed them to hatred and affronted their dignity under the provincial human rights code. The Commission’s Board of Inquiry found that the ads exposed the complainants to hatred and enjoined printing of stickers based on the ads as well as fining the ad’s creator.

The appeals court held that the human rights law applied only to extreme kinds of speech and is “a justifiable limit on religiously inspired speech.” The court said: “There is no doubt that the advertisement is jarring and would have been seen by many as distressing and offensive. That, however, is not the basis on which the Code prohibits speech. The overriding question is whether the advertisement was characterized by the intense feelings and strong sense of detestation, calumny and vilification referred to” in a previous “hate speech” case. Here, given the context of ongoing

public debate over gay rights, the ad could be understood as an expression of a policy opinion. The court believed an “objective reader” could understand the strong language in the cited Bible verses in the ad as softened by other Biblical verses calling for love to others. The court concluded that the ads did not rise to the level of prohibited hate speech.

**BEHYMER-SMITH V. CORAL ACADEMY
OF SCIENCE
3:06-CV-206-BES
U.S. District Court, District of Nevada
April 13, 2006**

A ninth grader sought a temporary restraining order of school decision to not allow him to present a poem with mild profanity in a non-curricular competition. The court held that the poem is not the kind of vulgar, lewd or obscene speech that would disrupt the school or present an obstacle to its educational mission. Additionally, the poetry competition is not a school sponsored activity and so the recital does not constitute speech on the part of the school. The court thus granted the restraining order so the student could perform the poem.

**SOOHOO V. JOHNSON
A05-537
Minnesota Court of Appeals
April 4, 2006**

The adopted mother of two children challenged a visitation award to her former domestic partner. The trial court declined to grant custody to the partner as a “de facto” parent since that status is not recognized in Minnesota law but ordered visitation.

The appeals court held that the statute allows visitation with any person the child has lived with for two years if (1) visitation

would be in the best interests of the child, (2) there is a parent-child relationship, and (3) visitation would not interfere with the child's relationship with their natural or adoptive parent. Here, the mother had argued that having the children spend 1/3 of their time with the partner interfered with her relationship with the children. The court believed, however, that the mother was confusing her consternation with her former partner with an interference with her parental relationship. The court accorded great weight to the psychologist's recommendations in favor of visitation. The court distinguished *Troxel v. Granville* because (1) it was only a plurality decision, (2) the Minnesota statute gives some deference to the parent's wishes. The court ruled that the trial judge had not given parental rights to the partner, only visitation. Thus, the statute was not unconstitutional.

**JESPERSEN V. HARRAH'S OPERATING
COMPANY
No. 03-15045
U.S. Court of Appeals for the Ninth Circuit
April 14, 2006**

A bartender at a casino was fired for refusing to wear makeup as called for in the employer's dress code. The district court found no discrimination since men and women were equally burdened by the company's code.

In an en banc ruling, the court of appeals held that the appearance standards created no greater burden on either sex so it does not violate Title VII. The court noted, however, that employment decisions made on the basis of stereotypes about either sex may also establish a violation of Title VII if it creates an objective obstacle to job performance. Here, the court held that the policy applies to both men and women and

does not objectively interfere with job performance. Rather, it only conflicts with the plaintiffs subjective objection to wearing makeup. The court said that to hold otherwise would allow Title VII claims by anyone who objects to an employment appearance standard.

One dissent agreed with the majority on the undue burden analysis but disagreed on the sex stereotyping point. The dissent noted that women and not men are required to wear makeup because of a stereotype that women need makeup.

Another dissent joined the first but also added that plaintiff should have been found to have established a triable case of a sex-specific undue burden. The dissent noted that it takes time and money to put on makeup and no similar requirement is made for men.

**IN THE MATTER OF A BIRTH OF A
CHILD TO CATHERINE M. O'CONOR
Docket No. FD-13-838-06B
Superior Court of New Jersey, Chancery
Division
April 5, 2006**

After a child was born to one partner in a same-sex couple (as a result of artificial insemination), the other partner sought to have her name added as a "mother" on the child's birth certificate. The partner claimed that if the birth certificate statute was construed to disallow a recognition of her "maternity," the statute would be unconstitutional under the equal protection clause of the New Jersey constitution and the New Jersey Law Against Discrimination. The court noted that the paternity statute allows the husband of a wife who has conceived through artificial insemination to be presumed the child's father. The court also noted that same-sex couples cannot

marry in New Jersey. The court concluded that this did not create a constitutional violation, however, because the partner was free to get the same result by adopting the child. The court held that “nothing in the State Constitution provides that an adult with no biological connection to a child has a fundamental right to create parental rights to that child by the most convenient method.” In addition, to change the clear statutory language “would amount to a usurpation of the role of the legislature.”

BRYAN V. GARRISON

WD64888

**Missouri Court of Appeals, Western
District**

April 11, 2006

An unmarried father challenged a visitation award to his child’s maternal grandmother (two 2-week visits, during summer and two 1-week visits when not in school as well as periodic visits) as excessive.

The court held that a visitation award to grandparents “must be minimally intrusive on the family to be constitutional.” Such an award must also not be “commensurate with parental visitation.” Finding that this award was too extensive, it was reversed.

AID FOR WOMEN V. FOULSTON

Case No. 03-1353-JTM

**U.S. District Court for the District of
Kansas**

April 18, 2006

Plaintiffs challenged the Kansas attorney general’s application of a mandatory reporting statute to underage sexual activity that was consensual. The attorney general took the position that all illegal sexual activity involving minors is inherently injurious. Plaintiffs wanted to avoid reporting if they concluded that, in their

professional opinion, the particular sexual activity did not injure the minor.

The court concluded that the relevant statute does not require reporting of all sexual activity involving minors, only that which creates an injury to a minor: “the language of the statute recognizes that some illegal sexual conduct, such as consensual, voluntary sexual activity with an age-mate, falls outside the scope of the statute, as it may not cause injury,” so the attorney general’s interpretation of the statute is wrong.

The court also addressed a constitutional issue: “whether minor patients have a right to informational privacy concerning consensual sexual activity with an age-mate where there is no evidence of force, coercion, or power differential.” The court noted that minors have a right to privacy. The court believed plaintiffs could be harmed if they believed they could be prosecuted for not reporting all sexual activity their minor clients engage in or are unclear what kind of activity is covered. The court also suggested that minors might be more reluctant to disclose information to doctors if there is a reporting requirement. This, in turn, could trivialize real sexual abuse cases and increase public officials’ workload. The court thus granted an injunction against the Kansas attorney general, preventing the broad application proposed.

CHRISTIAN LEGAL SOCIETY CHAPTER

OF UNIVERSITY OF CALIFORNIA,

HASTINGS V. KANE

No. C 04-04484 JSW

**U.S. District Court, Northern District of
California**

April 17, 2006

The Christian Legal Society challenged

Hastings' policy of requiring students to be allowed to participate in clubs if the club is to be registered with the school. CLS requires members to ascribe to specific doctrinal beliefs and not engage in homosexual conduct and this ran afoul of Hastings policy prohibiting discrimination on the basis of sexual orientation.

The court held that the policy regulates conduct (here, discrimination) rather than speech. Even if speech were affected, however, it would not be the target of the regulation. The court said that "States have the constitutional authority and a substantial, indeed compelling, interest in prohibiting discrimination on the basis of religion and sexual orientation." Here, "the Nondiscrimination Policy furthers a governmental interest unrelated to the suppression of free expression—protecting students from discrimination." To the court, "Hastings' interest in eradicating discrimination would certainly be achieved less effectively without a policy which prohibits the harmful conduct." Also, "[a]s long as student groups do not exclude students based on the prohibited categories, the groups are free to express to express any beliefs or perspectives they choose." The court held that Hastings' policy creates a limited public forum and that CLS was not excluded from the forum because it is religious and the nondiscrimination policy is viewpoint neutral. The court believed that Hastings was not requiring CLS to admit members, only making conditions for official school recognition (i.e. if they admitted homosexuals, they could be recognized, but did not have to allow admissions if they did not get recognition). The court noted that CLS could still meet and communicate through non-official arrangements. The court further held that Hastings' policy is a neutral law not directed at religious exercise and that CLS was not

treated differently from other groups.

**HARPER V. POWAY UNIFIED SCHOOL
DISTRICT
No. 04-57037
U.S. Court of Appeals for the Ninth Circuit
April 20, 2006**

A student was ordered not to wear a shirt with the words "Be Ashamed, Our School Embraced What God Has Condemned" and "Homosexuality is Shameful" during a school-permitted "Day of Silence" meant to teach students to tolerate "those of a different sexual orientation." He sought an injunction to prevent the school from preventing his wearing the shirt. The district court denied the injunction and the student appealed, alleging five constitutional violations: (1) free speech, (2) free exercise, (3) Establishment Clause, (4) Equal Protection, and (5) Due Process.

The majority of the ninth circuit panel characterized the case as involving a "T-shirt with its demeaning message." The majority believed that public school students are generally "vulnerable to cruel, inhuman, and prejudiced treatment by others." For the court, the "determinative issue" was "the impermissible intrusion on the rights of gay and lesbian students." The court held that the *Tinker* case said schools could restrict the speech of students if that speech infringes the rights of other students" including "psychological injury." The court held that "[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. . . . Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society." The court also

concluded that “[t]hose who administer our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development.” The school had not violated the student’s right of speech because it “had a valid and lawful basis for restricting Harper’s wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn.” The court limited its holding to “injurious speech that strikes at a core identifying characteristic of students on the basis of their membership in a minority group.” The court believed that the school policy might constitute viewpoint discrimination, but “public schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred.” The court made numerous analogies comparing the shirt at issue in the case and racist speech. In an interesting note, the court said: “We do not, of course, consider whether Harper’s views are consistent with his religion, nor do we ask whether his religion truly encourages homophobic conduct. Similarly, we do not consider whether the isolated excerpt from the New Testament, Romans 1:27, is representative of Christian doctrine generally.” The court held that since the speech rights of the student were not likely violated, the school’s decision did not likely implicate a hybrid right free exercise claim justifying strict scrutiny analysis. In either case, the school had not created a substantial burden on the student’s free exercise. The court further held that the student wasn’t punished for religious belief since he wasn’t really punished at all, just asked to stop wearing the shirt. The student had also argued that the school had attempted to coerce his religious views and this violated

the Establishment Clause. Since the court concluded that there was no evidence that the school’s actions were based “on anything other than an entirely secular and legitimate aim of protecting the rights of students and promoting a tolerant and safe learning environment” and “teaching of secular democratic values does not violate the First Amendment, even if that teaching conflicts in some respect with a sincerely held view that a student or his parents may attribute to the particular religion to which they adhere,” the school had not violated the Establishment Clause. Since there was no evidence that the school had tried to change the student’s beliefs, it cannot have tried to coerce him. The court did not address the due process claim and said the equal protection claim was the same as the viewpoint discrimination, both without merit.

Judge Kozinski dissented. He noted that the shirt did not cause disruption of school activities. He argued that possible disagreement over controversial subjects does not justify banning one point of view on that subject (here, allowing the “Day of Silence,” but not the t-shirt). He also argued that the court has “no business assuming without proof that the educational progress of homosexual students would be stunted by” the t-shirt. The student’s t-shirt here was just a response in an ongoing public discussion. The majority creates a new right to be free of statements “that demean students based on their ‘minority status such as race, religion, and sexual orientation’” but this right has no support in the law. The dissent also called into question the constitutionality of the school’s harassment policy, noting that the policy “seems to prohibit any student speech, whether it be in the classroom, elsewhere on campus, in connection with any school activity, going to and returning from school and quite

possibly all other times and places, if it is derogatory, intended to be derogatory or believed to be derogatory of other students based on certain characteristics—race, ethnicity, sexual orientation, religion, sex or disability.” He concludes that “[s]o interpreted, the school’s harassment policy is substantially overbroad.”

COOK V. RUMSFELD
Civil Action No. 04-12546-GAO
U.S. District Court, District of
Massachusetts
April 24, 2006

This case was a constitutional challenge to the military’s Don’t Ask, Don’t Tell Policy alleging violations of due process, equal protection and free speech. The court held that *Lawrence* did not expressly recognize a fundamental right and used rational basis review. So, here plaintiffs asserted right to adult consensual relationships does not merit heightened scrutiny. The court also noted that sexual orientation is not a suspect class. Thus, plaintiffs’ equal protection claim also merited rational basis review.

Here, the plaintiffs argued that the law was too broad because it does not apply to others who would threaten morale and discipline, the court, however, noted that this kind of argument has no relevance for rational basis review. The court held that it would not be necessary to reassess the challenged policy based on current empirical evidence. Here, plaintiffs haven’t shown “that Congress could not reasonably conceive that the service of open homosexuals in the military would have the deleterious effect on ‘morale, good order and discipline, and unit cohesion’ that was described by some military leaders and is contained in the legislative record.” The court held that the policy was not just a desire to harm an unpopular group. In regards to the First

Amendment claim, the court held that the policy was directed at conduct, not speech.

IN RE O.S.
No. 3-05-0796
Appellate Court of Illinois, Third District
April 17, 2006

A mother whose parental rights were terminated after the court decided she had not properly bonded with her child as part of her effort to be reunified with her child after incarceration, challenged the decision, alleging that the child welfare agency had interfered with her opportunity to bond with the child. The court held that if the child welfare agency acts to ensure a parent will fail the best interests test, “there has been a violation of due process tainting the constitutionality of the termination of respondent’s parental rights.” Here, the agency has acted so as to ensure reunification will fail, including by making the mother represent herself as an “aunt” when with the child in order to prevent the child’s confusion on learning that his foster mother was not his natural mother. The court thus ordered the trial court to give the mother another chance to bond with the child without child welfare agency interference.

RICHARDS V. SECRETARY OF STATE
FOR WORK AND PENSIONS
Case-423/04
European Court of Justice
April 27, 2006

A man who underwent surgery to appear to be a woman sought retirement at age 60 (the age for female eligibility), rather than 65 when men became eligible. The court concluded that this constituted sex discrimination by treating transsexuals differently from other women.