

# Marriage Law Digest

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Marriage Law Foundation

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## **MASON V. COLEMAN**

**447 Mass. 177**

**Massachusetts Supreme Judicial Court**

**July 10, 2006**

A divorced mother who shared child custody with her ex-husband planned a move to New Hampshire when the father objected. A trial court enjoined the move saying it would not be in the children's best interests because the Massachusetts school was better, there had been problems with others present in the mother's home and the move would interfere with the father's custody.

The SJC affirmed, holding that the test for relocation in situations of joint custody is the best interests of the child.

## **PEOPLE V. THE LION'S DEN, INC.**

**No. 5-05-0413**

**Illinois Appellate Court, Fifth District**

**July 28, 2006**

A city obtained an injunction on the operation of an adult bookstore, relying on a statute prohibiting such stores within 1,000 feet of certain locations. The store challenged the constitutionality of the statute.

The court held that since the law is a zoning law, it is content-neutral and intermediate scrutiny thus applies to an analysis of the law's constitutionality. The court said that the legislation did not need to present evidentiary support for its regulation since this kind of evidence can be presented if the statute is challenged. Here, the business had not called into question the state's evidence.

The court also held that just because there was no place in the village for this particular business, doesn't create a constitutional problem because the business could still be located in other parts of the county.

The court believed the trial court was right to define adult business by its most important activity rather than by the majority of its sales or the percent of its floor space used for adult materials.

## **SAEGERT V. SIMONELLI**

**12 Misc.3d 1193(A)**

**N.Y. Supreme Court, Nassau County**

**August 1, 2006**

The same-sex partner of a woman killed in a traffic accident sued for wrongful death. The court, following *Langan v. St. Vincent's Hospital* and *Hernandez v. Robles* held that the partner lacked standing to assert a wrongful death suit on behalf of her partner.

## **FANTASY RANCH INC. V. CITY OF**

**ARLINGTON**

**No. 04-11337**

**U.S. Court of Appeals for the Fifth Circuit**

**August 2, 2006**

An adult business challenged the city's proposed temporary suspension of its license for repeated violations of a "no touch" rule requiring separation of customers from nude dancers.

The court held that because the ordinance was aimed at secondary effects of the dancing, it is content neutral so only intermediate scrutiny applies. The court

decided the ordinance was within the power of the city to enact, and that the city had evidence of contact between touching and secondary effects and that its prior “no touch” rule (not requiring separation) had been flouted. The plaintiff argued that the evidence does not show a correlation between proximity and secondary effects, but the court said the question is whether there is a government interest and it has already established that there was. The plaintiffs also said the city’s rationale for the ordinance was “shoddy.” The court, however, said it was not the role of the court to second guess the city’s assessment of the problem. The court also held that the ordinance was not directed at suppression of expression. Finally, the court held the ordinance was narrowly tailored because its effect on any expressions is *de minimis*.

**IN RE THE ADOPTION OF M.W.  
No. 49A05-0507-CV-395  
Indiana Supreme Court  
August 3, 2006**

The supreme court denied transfer of an appeals court decision allowing adoption by a same-sex couple. One justice dissented, noting that the court had dealt with a similar case (joint custody of same-sex couple) and reserved decision of issues related to adoption by same-sex couples. The dissent here agreed with the dissent in the court of appeals that the legal issues raised in this case are for the legislature to decide and the legislature has already indicated support for adoption only by married couples. The dissent concluded: “I would prefer for this Court to grant transfer to uphold the legislature’s exclusive authority to regulate adoption eligibility and procedure and to apply Indiana’s existing adoption statutes as prohibiting adoptions by unmarried couples.”

**MILLER-JENKINS V. MILLER-JENKINS  
2006 VT 78  
Vermont Supreme Court  
August 4, 2006**

A same-sex couple from Virginia contracted a civil union in Vermont. One of the partners had a child as a result of artificial insemination. They lived in Vermont for one year, then the mother moved with the child to Virginia. The mother filed for dissolution of the civil union in a Vermont court and listed the child as a “child of the civil union.” The court ordered visitation for the non-parent partner. The mother then sought declaration of parentage in a Virginia court. The Vermont court said it would not defer to another court. When the mother refused to allow visitation, the Vermont court found her in contempt. The Virginia court, however, held that the civil union was null and void so the mother is the only parent. Vermont subsequently denied full faith and credit to the Virginia court’s parentage decision.

On appeal, the supreme court noted that under the federal Parental Kidnaping Prevention Act, the first court to make a valid custody determination has jurisdiction over the matter. Here the Vermont court’s determination was valid because (in conformity with statute) the couple lived in Vermont for six months prior to the proceeding so the Vermont court had jurisdiction and the Virginia court did not. The mother argued that the federal Defense of Marriage Act supersedes the PKPA but the court said the question here is whether Vermont will give full faith and credit to the Virginia court and DOMA does not require a state to give full faith and credit to another.

The mother also argued that the civil union was void because the couple were Virginia

residents when the union was contracted. The court held, however, that Vermont's interstate marriage statute does not apply to civil unions.

Here, the court found the partner is analogous to a stepparent and acted in loco parentis so the best interest of the child test applied to determine custody. If biology were the controlling factor, a child born of artificial insemination would only ever have one parent if in a same-sex couple. The court held that the intent of the civil union law was to create equality with marriage so treating same-sex couples differently in establishing parentage in cases of artificial insemination. Here, the partner is a "parent" because (1) she was in a legal union at time of birth, (2) parties intended both to be parents, and (3) no other claimant for "parent" status exists, so in the absence of recognition of the partner as a "parent," the child would only have one parent.

In regards to interstate recognition, the court held that because of the first court holding, Vermont had the most significant relationship with the dispute, so its law applies.

**KERRIGAN V. COMMISSIONER OF  
PUBLIC HEALTH  
SC 17563  
Connecticut Supreme Court  
August 7, 2006**

The Family Institute of Connecticut was denied intervention in a lawsuit by same-sex couples challenging Connecticut's marriage law. The proposed intervenors alleged the participation was necessary so they could defend the ideal of marriage as the union of a man and a woman and because the state had failed to move to strike plaintiff's complaint (a failure the proposed intervenors believes showed the attorney

general's office would not zealously defend the law). The trial court denied intervention.

The court noted that the motion to intervene was timely but that there was no prospect of gain or loss to the Institute as a result of this case. To the court, "all the institute has established in this case is its strong and capable commitment to championing a particular cause" which is "insufficient to require its intervention as a matter of right." This court observed that the lower court could have believed that the attorney general would adequately defend the law and noted that the Institute's expertise was still available to the court through *amicus* participation.

**ARIZONA TOGETHER V. BREWER  
CV 2006-010505  
Superior Court of Arizona, Maricopa  
County  
August 10, 2006**

When a proposed marriage amendment was certified for the November 2006 ballot, an advocacy group challenged certification alleging violation of the state's single-subject rule. Plaintiffs said the amendment involved three subjects: (1) prohibiting same-sex marriage, (2) prohibiting civil unions and (3) prohibiting local domestic partnership ordinances. Defendant alleged the amendment's "first clause protects marriage from redefinition and the second clause protects marriage by prohibiting extension of official status to marriage imitations." The also conceded that the amendment "will ban the government from providing domestic partner benefits."

The court said that if a proposed amendment has more than one provision, these must be related by a common purpose or principle. The defendants alleged this amendment did not because polling showed

that voters would support an amendment defining marriage but less would support an amendment denying domestic partner benefits. The court rejected this evidence since it was not an objective factor demonstrating a lack of common purpose. The court “narrowly conclude[d]” that the amendment involved only one subject: “the protection of marriage by preventing redefinition and extension of official status to marriage substitutes.”

**MACDONALD V. GRACE CHURCH  
SEATTLE  
No. 04-35984  
U.S. Court of Appeals for the Ninth Circuit  
August 11, 2006**

Plaintiff sued religious organizations alleging sexual harassment and retaliation. The court held that the Washington Human Rights Commission did not have subject matter jurisdiction over a non-profit religious organization because these organizations are exempt from the state law against discrimination.

**CONCHATTA INC. V. MILLER  
No. 05-1803  
U.S. Court of Appeals for the Third Circuit  
August 15, 2006**

A nude dancing establishment and “dancers” challenged the state liquor code that prohibits “lewd” entertainment at establishments with liquor licenses. The district court said the law’s use of the terms “immoral” and “improper” was unconstitutionally vague but the use of “lewd” was not.

The panel reversed. They said that the fact that the liquor board does not intend to apply law to “legitimate” theater or concert performances there were no obvious limitations on the law so it could apply to a

wide range of activities beyond nude dancing. The court also found the government interest in preventing the combination of nudity and alcohol doesn’t apply to “ordinary theater and ballet performances, concerts and other similar forms of entertainment.” Since the potential scope of the law was so broad, the statute was unconstitutionally vague.

**BALCOF V. BALCOF  
G035868  
California Court of Appeal, Fourth  
Appellate District Division Three  
August 15, 2006**

A few months before divorce, a husband signed an agreement to give the family home and 20 percent of outside stock to wife. The trial court held the agreement “unenforceable due to duress and undue influence.”

The appeals court held that because of fiduciary relationship between the husband and wife, the assumption is that the benefitting party exercised undue influence. The trial court also found evidence of undue influence such as the wife’s striking of the husband, her threats to disrupt his relationship with the children, and her yelling and screaming. Also, the husband wrote as dictated without consultation with an attorney. Here, the husband’s free will was constrained by threats to deny his access to children, so the agreement was invalid.

**BILIOURIS V. BILIOURIS  
05-P-933  
Massachusetts Appeals Court  
August 17, 2006**

A man agreed to marry his pregnant girlfriend only on condition that she sign an antenuptial agreement heavily favorable to

him. The husband filed for divorce after ten years. In the divorce judgement, the trial court held the agreement valid.

The wife appealed, arguing that she agreed to contract under duress because the parties had an oral agreement that the husband would marry her only if she became pregnant. Thus, she argued, the antenuptial contract was a new condition after she had already performed her side of the bargain that should have resulted in marriage. The appeals court rejected this claim because the trial court had not found any oral agreement. The wife also argued that as a pregnant single woman close to her wedding, the condition of an antenuptial agreement constituted coercion. The court said that even if she saw the contract a week before the wedding (as she alleged) and the husband insisted on her signing there's still no coercion. The court also found that even though the wife had stayed at home with the children, she had demonstrated her earning capacity at the time the antenuptial agreement was signed so her waiver of alimony in the agreement was not invalid.

**PASSIONS VIDEO INC. V. NIXON**  
**No. 05-3847**  
**U.S. Court of Appeals for the Eighth**  
**Circuit**  
**August 21, 2006**

Missouri criminal law prohibits billboard advertising within one mile of state highways by sexually oriented businesses.

The court interpreted the statute as prohibiting any advertising by an covered businesses regardless of the nature of the advertising. The court applied intermediate scrutiny since this is commercial speech. The court held that although the interest in lessening secondary effects of sexually oriented businesses is substantial, the law's

"prohibition is directed at speech beyond that which would lead to the stated secondary effects, and is not narrowly tailored to achieve Missouri's stated goal."

**PARISH OF ST. PAUL'S EPISCOPAL**  
**CHURCH V. THE EPISCOPAL DIOCESE**  
**OF CONNECTICUT DONATIONS &**  
**BEQUESTS FOR CHURCH PURPOSES,**  
**INC.**  
**Civil No. 3:05cv1505**  
**U.S. District Court, District of Connecticut**  
**August 21, 2006**

Six local Episcopal churches who disagreed with their denomination's decision to ordain homosexual persons sought to leave the oversight of the Connecticut presiding bishop. In response, the local priests were disciplined by the bishop, the property of the local churches was taken and officials of the churches were removed. The plaintiff sued, alleging state action because the defendant was assisted by its tax exempt status, limitation on corporate liability and the bishop's use of such things as the postal service. The court said there was no state action because (1) the use of corporate organization law and the post office don't constitute state endorsement of the diocese's activities, (2) the diocese's charitable services were not exclusively public functions, and (3) the tax exemption of the diocese did not entwine the diocese with government. The court further held that it could not enter theological debates such as would be called for by the arguments in this case.

**HILLER V. FAUSEY**  
**J-53-2005**  
**Supreme Court of Pennsylvania**  
**August 22, 2006**

After mother's death, a child's father denied the maternal grandmother time with the

child. The grandmother sought partial custody. The trial court gave grandmother partial custody and the father appealed.

The court held that since the right of parents to control their children's upbringing is fundamental. Strict scrutiny is the appropriate standard for assessing the grandparent visitation law. The court believed the law advanced a compelling state interest "in protecting the health and emotional welfare of children." Here, the statute is limited to situations involving grandparents whose children have died. This court believed the court below properly applied a presumption in favor of the parent but a showing of harm resulting from denying visitation was not necessary. Since the trial court found the child would benefit from time with a grandmother and that the child and the grandmother have a close relationship, the application of the law satisfies strict scrutiny.

A concurrence argued that "it is time to regard the best interests of the child as fundamental." This judge said the court should "finally legitimize the right of the child to have his or her best interests considered as a fundamental right" and that many cases "provide support for the view that a child has a due process right to maintain relationships with individuals other than his or her parents." The opinions suggests a balance among parents' rights, children's rights and state interests in protecting the "emotional and physical" health of children. The state interest, for the concurrence, tips the balance in favor of the child's rights.

A dissent argued that "unless a court finds that a fit parent's decisions regarding a child's contact with a grandparent is causing or will cause harm to the child, the state's interest in protecting the child's welfare."

Here, the dissent argues, the court injected its ideas of the child's best interests even though the state had no compelling interest that would justify interfering with a fit parent's fundamental right "simply because the grandparent or anyone else, including a state court, thinks that a different decision is better or more desirable for the child." The dissent would have required "clear and convincing evidence" that without grandparent visitation "the child is being or will be harmed." This approach would, he noted, promote the best interest of the child.

**MCCULLOUGH V. MCCULLOUGH**  
**No. 03-05-00558-CV**  
**Texas Court of Appeals, Third District**  
**August 25, 2006**

Open ended contract to provide alimony was incorporated in a divorce decree. The husband sought to end alimony relying on a statutory prohibition of alimony when supported spouse cohabits. The court held, however, that the statute does not modify a contractual obligation so the alimony obligation remains.

**UZELAC V. THURGOOD**  
**2006 UT 46**  
**Supreme Court of Utah**  
**August 25, 2006**

After divorce and a mother's death, the maternal grandparents sought visitation with a child with whom they had had significant contact. The trial court granted custody to the father who did not allow visitation even after a court order in its favor. After the father relocated to another state, the court ordered telephone visitation. The expert evaluator said that grandparent visitation was in the best interest of the child. The court accepted this testimony.

The court concluded that Utah's

grandparent visitation statute was constitutional because it recognizes a presumption that parents will act in the best interest of the child, even though parents' wishes can be superceded. Here, the court gave special weight to the father's preference. The evidence here, however, "rebutted the parental presumption" and grandparent visitation was in the best interest of the child.

**NOVA HEALTH SYSTEMS V.  
EDMONDSON  
No. 05-5085  
U.S. Court of Appeals for the Tenth Circuit  
August 25, 2006**

An abortion clinic challenged Oklahoma's law requiring parental notification of a minor's abortion which requires 48 hour notice of a proposed abortion unless (1) there is a medical emergency, or (2) there is judicial bypass. The clinic argued that the lack of a specific time limit for the bypass to be decided might create a delay that increases the medical risk to the minor. Here, the challenge was a facial one and there was no evidence presented of an impermissible delay in the bypass proceedings. The court also presumed that Oklahoma would follow the law by ensuring quick response to bypass petitions. Therefore, the court refused to enjoin the ordinance.

**DADDIO V. O'BARA  
AC 26931  
Connecticut Court of Appeals  
August 29, 2006**

After divorce and judgement incorporating agreements as to custody, father obtained two modifications of custody to increase his time with the child. On the third attempt at modification (this time including a petition to end child support payments), the mother

asked for sole custody. Relying on the testimony of a counselor, psychologist and guardian ad litem, the trial court held that the father's consistent litigation was harmful to the child and justified sole custody for the mother.

On appeal, the court also relied on the expert testimony that constant litigation has resulted in significant stress for the child and evidence that showed the parties could not work together. Here, the court found the trial court decision to deny more parenting time was reasonable because the father had shown a pattern of consistently seeking more time even though this harmed the child.