

# Marriage Law Digest

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## AUGUST 2008 CASE SUMMARIES

William C. Duncan, Editor

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### CASSIDY V. WILLIAMS

2008 WL 2930591

Superior Court of Connecticut, Judicial  
District of Lichfield  
July 9, 2008

A same-sex couple entered a surrogacy agreement with a woman who agreed to carry two donor eggs, each inseminated by one of the men. A pregnancy of twins resulted and the men sought a judgment "validating the gestational surrogate contract, affirming the parental rights off the [men], and ordering the department of health to issue a replacement birth certificate" with both men's names on it. The Department of Public Health argued that a genetic test should be used to determine paternity before a modified birth certificate was issued.

Following an earlier decision, the court said the same-sex couples were "the intended parents," the surrogacy agreement was valid, the carrier is not the mother and the Department of Public Health should issue a birth certificate with the men's names listed as the parents.

### OLESKI V. HYNES

2008 WL 2930518

Superior Court of Connecticut, Judicial  
District of New London  
July 10, 2008

Two men who made a surrogacy agreement with a couple sought to compel the Department of Public Health to issue birth certificates with their names as parents.

The court noted that the state's birth certificate statute "never uses the words 'gestational agreement' or 'intended parents.'" The court also noted that "the court is effectively being asked to approve Mrs. Hynes's transfer of the custody of the children to whom she will have given birth to not only their biological father, but also to an individual nor related to them except by his untested declaration that he intends to parent them." The court further notes that if "the children here were one day old, and Mrs. Hynes then turning them over to a stranger, no court in the world would approve that transfer solely on the basis of her contract with a third party, and without any evidence as to whether such a transfer accommodated the children's interests." The court also expressed concern with allowing the partner who was not the child's father establish paternity in a way much easier than stepparents are allowed to in Connecticut and with the possibility of creating an unregulated market in gestational agreements. Thus, the court concluded the biological father can be listed on the birth certificate but the partner cannot be without obtaining an adoption judgment.

**MINTZ V. ZOERING**

No. 27,794

Court of Appeals of New Mexico

July 25, 2008

<http://coa.nmcourts.gov/documents/opinions/Mintz-FO-filed.pdf>

Two women entered an agreement with a man whereby he would donate sperm and

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"serve as a male role model for Child" and "the women would be the primary parents, and he would have no financial obligation for child support." The baby was created through artificial insemination without the participation of a physician. After the mother and her partner broke up, the father and mother had another child through artificial insemination. Three years later, the mother obtained a child support order. Four years after that, she sought more money. The trial court agreed but the father appealed, arguing that he should not be subject to any child support order.

The court held that a sperm donor can disclaim any parental responsibility only if a doctor participated in the insemination procedure. Here, the father "holds himself out to be the children's father and has established a relationship with them," and has "enjoyed regular visitation." So, he is "the natural father of both children and is subject to all responsibilities therein, including the obligation to pay child support." His contract to not pay support was not enforceable.

**IN THE MATTER OF A**

**[2008] EWCA Civ 867**

**England & Wales Supreme Court of  
Judicature Court of Appeal (Civil Division)**

**July 30, 2008**

<http://www.bailii.org/ew/cases/EWCA/Civ/2008/867.html>

A man who lived with a child and its mother for two years only to learn that he was not the child's biological parent sought a "parental responsibility order." The court granted the order and this order was upheld on appeal because, among other things, "there is no limit upon the number of persons who may have parental responsibility for the same child at the same time; nor does any person who has parental responsibility for a child at any time cease to have that responsibility because some other person subsequently acquires parental responsibility."

**JANSSON V. BOWEN**  
**Case Number 34-2008-00017351**  
**Superior Court of California, County of**  
**Sacramento**  
**August 7, 2008**  
<http://www.alliancealert.org/2008/2008080801.pdf>

Proponents of a proposed amendment to the California Constitution that would define marriage challenged the state attorney general's official ballot summary ("Changes the California Constitution to eliminate the right of same-sex couples to marry in California. Provides that only marriage between a man and a woman is valid or recognized in California.") as misleading and argumentative. The court rejected both challenges, holding that the California Supreme Court had recognized a right to same-sex marriage so the summary was correct in saying the amendment would eliminate that "right."

**IN RE ESTATE OF FEINBERG**  
**1-06-2823**  
**Illinois Court of Appeals, Third Division**  
**June 30, 2008**  
<http://www.state.il.us/court/opinions/appellatecourt/2008/1stdistrict/june/1062823.pdf>

A will provided that any "grandchildren who marry outside the Jewish faith, unless the spouse has converted or converts within one year of marriage to the Jewish faith" will be disinherited. The trial judge held this provision invalid as against public policy.

The court of appeals here said that Illinois courts have followed a rule "that testamentary provisions are invalid if they discourage marriage or encourage divorce." Here, the court held the challenged provision "is invalid because it seriously interferes with and limits the right of individuals to marry a person of their own choosing."

A concurring opinion analogized the provision to racial restrictions on land sales.

One judge dissented, distinguishing the past cases relied on by the majority as having involved encouragement of divorce.

**NORTH COAST WOMEN'S CARE**  
**MEDICAL GROUP, INC. V. SAN DIEGO**  
**COUNTY SUPERIOR COURT**  
**S142892**  
**Supreme Court of California**  
**August 18, 2008**  
<http://www.courtinfo.ca.gov/opinions/documents/S142892.PDF>

After a doctor who had treated a woman in a same-sex couple for infertility "refused to prepare donated fresh sperm for [the plaintiff] because of his religious objection" and referred her to another physician, she sued alleging sexual orientation discrimination under the state's anti-discrimination statute. The doctor claimed his actions were "protected by the rights of free speech and freedom of religious set forth in the federal and state Constitutions." The trial court disagreed, but the appeals court ruled the issue should be addressed in a trial.

The California Supreme Court held the U.S. Constitution does not provide for an exemption "from a neutral and valid law of general applicability on the grounds that compliance with that law is contrary to the objector's religious beliefs." The court did say the defendant physicians "remain free to voice their objections, religious or otherwise, to the Act's prohibition against sexual orientation discrimination."

The court did not decide the level of protection the California Constitution provided to religious exercise but said this was unnecessary here because "even under a strict scrutiny standard, defendants' claim fails" because the antidiscrimination law "further California's compelling interest in ensuring full and equal access to medical

treatment to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal." The court said the clinic could refuse to perform the artificial insemination procedure for any clients or provide it "through a North Coast physician lacking defendants' religious objections."

A concurring opinion specified that the state's interest would include ensuring "a right to full medical assistance in establishing a pregnancy." This judge felt, however, that there might be a different result if a sole practitioner were involved if "the patient could be referred with relative ease and convenience to another practice."

### RECENT LAW REVIEW ARTICLES

Margaret Somerville, *Children's Human Rights and Unlinking Child-Parent Biological Bonds with Adoption, Same-Sex Marriage and New Reproductive Technologies* 13 JOURNAL OF FAMILY STUDIES 179 (2007). Examines the impact of new reproductive technologies and same-sex marriage on the right of children to "be born from natural human origins that have not been tampered with by anyone else."