

# Marriage Law Digest

Volume 3, Number 12

Marriage Law Foundation

December 2006

**IN THE MATTER OF T.H.  
No. 49A02-0606-JV-447  
Court of Appeals of Indiana  
November 20, 2006**

<http://www.in.gov/judiciary/opinions/pdf/1200601mpb.pdf>

A father entered a voluntary agreement with the state's child welfare officials that he undergo parental assessment and counseling after an unsecured gun was found (it was later disposed of) on top of the his refrigerator. When the father did not comply with the counseling program, the state removed the child from his home and a trial court held the children should be wards of the state.

The state's court of appeals reversed. The panel noted that a parent's right of family integrity can only be interfered with "when parents neglect, abuse, or abandon their children." Here, there was no evidence of serious parental shortcomings that are harming children so the trial court's determination was not supported by the facts.

**LAFFIN V. LAFFIN  
2006 WL 3445613  
Supreme Court of Michigan  
November 29, 2006**

<http://courtofappeals.mijud.net/resources/asp/viewdocket.asp?casenumber=131593&inqtype=sdoc&yr=0&SubmitBtn=Search>

In this case, the Michigan Supreme Court refused to hear a case that challenged an agreement between parties to a divorce that any future child support would have to

come from the mother's alimony.

One justice dissented from the denial of appeal arguing that the supreme court should have examined the issue raised by this case because the agreement could be contrary to public policy if it leaves children without support.

**CATHOLIC LEAGUE FOR RELIGIOUS &  
CIVIL RIGHTS V. CITY AND COUNTY  
OF SAN FRANCISCO  
2006 WL 3462879  
U.S. District Court, Northern District of  
California  
November 30, 2006**

After the Congregation for the Doctrine of the Faith issued a directive to the Archdiocese of San Francisco telling it not to place children in need of adoption with same-sex couples, the San Francisco Board of Supervisors adopted a resolution attacking the directive. The Catholic League challenged the resolution as a violation of the Establishment Clause and sought an injunction to prevent any other attacks in religious beliefs.

The district court rejected the claim. It held that the purpose of the resolution was to "denounce discrimination against same-sex couples" and that the attacks on Cardinal Levada (head of the Congregation) are incidental to the resolution's main purpose. Although the resolution is hostile to a religious view, the court believed this hostility was not the resolution's primary effect. Rather, the primary effect was fostering non-discrimination in adoption.

The court concluded that political bodies are allowed to respond to debates provoked by religious organizations.

**SCHUMACHER V. ARGOSY  
EDUCATION GROUP**

**2006 WL 3511759**

**U.S. District Court, District of Minnesota  
December 6, 2006**

<http://www.nysd.uscourts.gov/courtweb/pdf/D08MNXC/06-05020.PDF>

A student at a private university was dismissed from its Doctor of Psychology program at least partly because he was perceived to be insensitive to homosexual persons. He filed suit alleging, among other things, religious discrimination.

The district court rejected his claims. The court held that there could be no constitutional claim because the private school was not a state actor. The court also ruled that there was no evidence that the school dismissed the student because of the student's religious belief. Rather, the court believed he was dismissed for academic reasons including "concerns regarding his social awareness and social sensitivity."

**HANSEN V. MCCLELLAN**

**2006 WL 3524059**

**Court of Appeals of Michigan  
December 7, 2006**

[http://courtofappeals.mjud.net/documents/OPINIONS/FINAL/COA/20061207\\_C269618\\_61\\_269618.OPN.PDF](http://courtofappeals.mjud.net/documents/OPINIONS/FINAL/COA/20061207_C269618_61_269618.OPN.PDF)

A mother of twins relinquished her parental rights, then jointly adopted the children with her same-sex partner. After the couple broke up, the mother sought to set aside the adoption arguing that the court granting the adoption lacked jurisdiction.

The court of appeals held that even if joint

adoptions by unmarried couples were not authorized by the law this would have been a legal error to be corrected on appeal rather than a jurisdictional problem.

One judge dissented, arguing that nothing in the state's adoption law provided for joint adoptions for unmarried couples so the court lacked subject matter jurisdiction to grant such adoptions.

**A.H. v. M.P.**

**SJC-09815**

**Supreme Judicial Court of Massachusetts  
December 8, 2006**

<http://www.massreports.com/slipops/>

The former same-sex partner of an 18-month old child's mother sought visitation with the child. Although the partner could have adopted the child, she did not. The mother was the child's primary caretaker and the partner was largely absent from the home due to work responsibilities. The trial court held (1) that the partner was not a de facto parent because of her limited involvement in childrearing and (2) that visitation was not in the child's best interests because the partner ignored the mother's directions for the child.

On appeal, the supreme court relied on the ALI Principles of Family Dissolution to conclude that the trial court judge was correct in deciding that the partner's performance of caretaking functions was limited and she was thus not a de facto parent. The court did not adopt the concept of parenthood by estoppel, relying on precedent disfavoring "parenthood by contract."

**BURDEN V. UNITED KINGDOM**

**Application no. 13378/05**

**European Court of Human Rights  
December 12, 2006**

<http://cmiskp.echr.coe.int////tkp197/viewhbk m.asp?action=open&table=1132746FF1FE2A468ACBCD1763D4D8149&key=59795&sessionId=9826502&skin=hudoc-en&attachment =true>

Sisters who had lived together all their lives, had never married and who had lived on property inherited from their parents for three decades pointed out that if one were to die, the other would have to sell their mutual home to pay the inheritance tax. They argued that the difference in their treatment from that provided to same-sex civil partners was unlawful discrimination under the Convention for the Protection of Human Rights and Fundamental Freedoms.

This decision concluded that national governments should receive great deference in matters of tax policy and that this particular policy was justified by the government's aim to "promote stable, committed heterosexual and homosexual relationships by providing the survivor with a measure of financial security after the death of the spouse of partner."

Two judges dissented saying the government should have made provision for this type of situation. Another judge dissented saying it was "absolutely awful" that one sister's death could result in the other having to sell their home and that this result is "fundamentally unfair and unjust."

**ZAPPONE V. REVENUE  
COMMISSIONERS  
Ireland High Court  
December 14, 2006**

[http://www.kalcase.org/KAL%20Zappone\\_v\\_Rev\\_Commrs\\_Judgement.doc](http://www.kalcase.org/KAL%20Zappone_v_Rev_Commrs_Judgement.doc)

An Irish same-sex couple married in Canada but were denied the married couple tax allowance in Ireland. They sued the

Revenue Commissioners attempting to establish that Canadian same-sex marriages would be recognized in Ireland. After a long discussion of the testimony, evidence and competing arguments, the High Court judge ruled in favor of the Commissioners.

The court noted that it was "being asked to redefine marriage to mean something it has never done to date." The court rejected the couple's claim of "changing consensus" about the meaning of marriage, saying "[t]he consensus around the world does not support a widespread move towards same-sex marriage." This conclusion, to the court, was bolstered by the reaffirmation of the male-female definition of marriage in the 2004 Civil Registration Act.

The court held the distinction between same and opposite-sex couples was justified by the Irish Constitution's clear right of opposite-sex marriage. The marriage law was further justified by concerns with the "welfare of children" since in the absence of good research, "the State is entitled to adopt a cautious approach to changing the capacity to marry."

Because the European Convention on Human Rights does not create a duty for states to create a legal status for those unable to marry and marriage's link to procreation makes it inapposite for same-sex couples, the ECHR does not require Ireland to recognize the Canadian same-sex marriage.

In its review of the evidence on parenting by same-sex couples, the court said: "It also seems to me having regard to the criticism of the methodology used in the majority of the studies involving much larger samples that it will be difficult to reach firm conclusions on this topic."

**GIOVANI CARANDOLA LTD V. FOX**

**No. 05-2308**

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

**December 15, 2006**

<http://pacer.ca4.uscourts.gov/opinion.pdf/052308.P.pdf>

An adult business initiated a series of challenges to state statutes prohibiting certain sexual conduct at businesses with a liquor license. After a trial court invalidated the law, the court of appeals held that the statute's prohibitions on "simulated sexual activity" and "fondling" were not unconstitutionally broad.

**ALASKA V. ALASKA CIVIL LIBERTIES  
UNION**

**S-12480**

**Alaska Supreme Court**

**December 20, 2006**

<http://www.state.ak.us/courts/ops/sp-ord12480.pdf>

In October 2005, the Alaska Supreme Court ruled that (under the state constitution) the state must give the benefits afforded spouses of state employees to same-sex domestic partners of state employees. In October 2006, the relevant state agency promulgated regulations for providing these benefits. A trial court ruled the agency's plan was insufficient and the agency appealed to the Alaska Supreme Court.

The supreme court held that the trial court did not have authority to subject the agency's plan to "constitutional scrutiny," so unless the plan was arbitrary or irrational, any challenges to it must come in a separate action.

The supreme court also refused the legislature's request (as *amicus curiae*) for an extension of the supreme court's deadline

for implementing the benefits scheme. The court reasoned that the extension was not necessary because the agency had not asked for it.

**FLECK & ASSOCIATES V. PHOENIX**

**No. 05-15293**

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

**December 22, 2006**

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/28AF2992A70DD0B18825724C0059FD84/\\$file/0515293.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/28AF2992A70DD0B18825724C0059FD84/$file/0515293.pdf?openelement)

A gay club challenged a Phoenix law prohibiting "live sex act businesses" alleging deprivation of their customers' and the corporation's right to privacy. The trial court ruled against them on both counts.

A panel of the court of appeals held that a corporation does not have a privacy right involving consensual sexual relations under *Lawrence v. Texas*. The court further held the business did not have standing to assert the rights of its customers.

**STRAIGHTS & GAYS FOR EQUALITY V.  
OSSEO AREA SCHOOLS**

**No. 06-1942**

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

**December 22, 2006**

<http://www.ca8.uscourts.gov/opndir/06/12/061942P.pdf>

A gay student group sought an injunction to force a school district to give them access to facilities and communication options equivalent to those extended to student groups classified as "curricular" by the district. The district court granted the injunction.

On appeal, the panel affirmed. The court held that under the federal Equal Access Act, a club is required equal access to the

same facilities and communications fora as similar groups. Here, the gay club was similar to “curricular” clubs such as cheerleading, so the gay club must be given the access afforded curricular clubs.

**DOYLE V. SECRETARY OF  
COMMONWEALTH  
SJC-09887**

**Supreme Judicial Court of Massachusetts  
December 27, 2006**

<http://www.massreports.com/slipops/>

Signers of petition proposing marriage amendment to the Massachusetts Constitution sought an order that either (1) the legislature hold a vote on the proposed amendment or (2) the Secretary of the Commonwealth place the proposed amendment on the ballot in the next general election.

The Supreme Judicial Court ruled that the state constitutional “requirement [for the legislature] to vote on the merits” of an initiative amendment is “beyond serious debate.” The court further held, however, that the constitution “relies on the presumptive good faith of elected representatives” and that “there is no presently articulated judicial remedy for the Legislature’s indifference to, or defiance of, its constitutional duties.” The court also rejected the idea that a procedural vote on the amendment would suffice to satisfy the constitutional requirement.