

Marriage Law Digest

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FEBRUARY 2009 CASE SUMMARIES

William C. Duncan, Editor

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SMITH V. GORDON

No. 94, 2008

Supreme Court of Delaware

February 3, 2009

[http://courts.delaware.gov/opinions/\(dko5qp552bthcc55eorc5n45\)/download.aspx?ID=116890](http://courts.delaware.gov/opinions/(dko5qp552bthcc55eorc5n45)/download.aspx?ID=116890)

A trial court said the former partner of a child's adoptive mother had standing to seek child custody because she was a "de facto" parent.

The court said that only a parent can seek custody unless the child is "dependent or neglected." The court said that under a gender neutral reading of the State's paternity statute if the partner had lived with the child for at least two years and held the child out as hers she would have been considered a legal parent, but she had not. The court also held that Delaware law does not recognize de facto parents. Since the legislature had enacted a comprehensive law that only recognizes legal parents, the court needed to defer to that judgment. Thus, the partner lacked standing to seek custody.

IN THE MATTER OF LEVINSON

Order

U.S. Court of Appeals for the Ninth Circuit

February 2, 2009

http://lc.org/media/9980/attachments/February_2_2009_Final_FPD_EDR_ORDER.pdf

A court employee sought family coverage for a same-sex spouse and was denied because of the Federal Defense of Marriage Act's definition of marriage. The employee argued that the denial violates the Ninth Circuit's

employment discrimination policy and the Federal Constitution.

A single judge, as chair of the committee for public defenders, said the application of DOMA in this case was sex discrimination (because the denial would not have happened if the spouse was of another sex) and sexual orientation discrimination (relying on the California Supreme Court's decision in *In re Marriage Cases*). Thus, the denial violated the Court's public employment plan's nondiscrimination policy. The judge also concluded that the Federal DOMA violates the Due Process Clause of the Fifth Amendment. Although he believed the sex and sexual orientation discrimination inherent in the measure required heightened scrutiny, he decided the law had no rational basis because the law would do nothing to prevent same-sex couples from wanting to marry and that it punishes same-sex couples. He said disapproval of same-sex marriage of homosexual behavior were not adequate justifications for a law and that government savings was also not an adequate justification. Thus, he ordered the application in this case to be processed and "future beneficiary requests are also to be processed without regard to the sex of a listed spouse."

COMMONWEALTH V. BERNARDO B.
SJC-10293
Supreme Judicial Court of Massachusetts
February 6, 2009
<http://www.sociallaw.com/slip.htm?cid=18779&sid=120>

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A juvenile was charged with sexual offenses including statutory rape that occurred when the boy was fourteen and the girls with whom he'd engaged in sexual activities were twelve and eleven. The boy's attorney unsuccessfully tried to have the girls charged with statutory rape and sought to establish that the boy had been selectively prosecuted because of his gender. The trial court did not allow the attorney to seek additional information from the prosecutor to establish the selective prosecution claim and the boy appealed.

The Supreme Judicial Court said that since the sexual behavior at issue was not forcible, the boy had demonstrated enough to allow him to seek evidence supporting his selective prosecution claim.

In dissent, two justices argued that the boy should have been required to show evidence of selective prosecution rather than demanding such evidence from the prosecutor.

ESTATE OF RANTFLE
4585-2008

New York Surrogate's Court
January 26, 2009

<http://lawprofessors.typepad.com/familylaw/files/opinion.png>

A partner in a Canadian same-sex marriage died and the court sought to identify his heirs. The surrogate noted the general rule that a marriage valid where contracted is valid everywhere. She also said the exceptions for a marriage proscribed by natural law only applied to incest and polygamy. In support of recognition, the court noted the governor's executive order to State agencies to recognize out-of-state same-sex marriages. Since the court held the marriage was valid and the spouse is the sole distributee.

GIANCASPRO V. CONGLETON
No. 283267

Michigan Court of Appeals February 19, 2009

<http://www.aclumich.org/sites/default/files/file/09-02-19%20Ct%20of%20Apps%20Decision.pdf>

A same-sex couple, one of whom had adopted three children in China and the other who had adopted the children in Illinois later as a “second parent” broke up and the second parent sought custody in Michigan. The woman who had initially adopted said the recognition of the Illinois adoption would conflict with Michigan public policy. The trial court said the Full Faith and Credit Clause of the U.S. Constitution mandated recognition so the Illinois adoption but that enforcing the status created thereby would conflict with Michigan law.

The appeals court followed the U.S. Court of Appeals for the 10th Circuit (*Finstuen v. Crutcher*) in holding that Full Faith and Credit mandated recognition but said the trial court was incorrect to assume that the second parent was seeking to “enforce” that judgment. Rather, the court said the Illinois adoption gave the child two legal parents and Michigan law allowed its courts to determine custody for each.

RECENT LAW REVIEW ARTICLES AND BOOKS

Bryan K. Fair, *The Ultimate Association: Same-Sex Marriage and the Battle Against Jim Crow's Other Cousin* 63 UNIVERSITY OF MIAMI LAW REVIEW 269 (2008). Argues that the effort to redefine marriage is an “epic” Civil Rights struggle.

COURTNEY LARSEN, *THE ALASKA SUPREME COURT: SUPREME JUDGES OR SUPREME LEGISLATORS* (2008). Describes the Alaska Supreme Court's interpretation of the Alaska Marriage Amendment.

Amanda Alquist, *The Honeymoon is Over, Maybe for Good: The same-Sex Marriage Issue Before the California Supreme Court* 12

CHAPMAN LAW REVIEW 23 (2008). Argues that the California Supreme Court should overturn the California Court of Appeals decision in *In re Marriage Cases* (as that court did in May 2008).

Jay Michaelson, *Chaos, Law and God: The Religious Meanings of Homosexuality* 15 MICHIGAN JOURNAL OF GENDER & LAW 41 (2008). Argues that acceptance of homosexual behavior poses a challenge to the very nature of religious belief but that religion can develop so as to accept nonmarital sexual behavior.

Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right* 16 DUKE JOURNAL OF GENDER LAW & POLICY 1 (2009). Argues that the right to visitation ought not extend from parenthood but rather should be based on relationships.

Andrew F. March, *Marriage, Equality and Subsidizing Families in Liberal Public Justification: Is There a Right to Polygamy?* (February 20, 2009) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1346900. Argues that polygamy does not constitute gender discrimination.

James L. Musselman, *What's Love Got to Do With It? A Proposal for Elevating the Status of Marriage By Narrowing Its Definition, While Universally Extending the Rights and Benefits Enjoyed By Married Couples* 16 DUKE JOURNAL OF GENDER LAW & POLICY 37 (2009). Proposes a covenant marriage status for opposite-sex couples that would be “traditional marriage” and all other couples could have a marriage similar to that generally recognized in current law.