

Marriage Law Digest

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**ZAMECNIK V. INDIAN PRAIRIE
SCHOOL DISTRICT #204 BOARD OF
EDUCATION
2007 WL 4569720**

**U.S. District Court, Northern District of
Illinois
December 21, 2007**

A "gay/straight alliance" student group at a high school held annual "Day of Silence" activities including wearing t-shirts and labels. Students who "profess sincere Christian religious beliefs which condemn homosexual behavior as immoral" sought an injunction allowing them to wear t-shirts or labels with an alternative message. One student had worn "a t-shirt that had 'Be Happy, Not Gay' on the back" but was required to remove the words "Not Gay." the other student sought "an injunction that would allow him to present his view opposing homosexuality throughout the school year."

The court narrowed the question to whether a school can prohibit the second student from making the statement "Be Happy, Not Gay" on t-shirts or in other ways. The court assumed for this decision "that derogatory and negative statements about homosexuality tend to harm homosexual high school students by lowering their self-esteem and creating related problems." The court said Seventh Circuit precedent allows "public schools to take into consideration pedagogical concerns and the school's basic educational mission when restricting student speech." Here, the students claim is unlikely to succeed and they aren't likely to be harmed of the school's policy is not

enjoined, while the school's educational mission to "promote tolerance" would be harmed by an injunction.

In regards to the student whose t-shirt had been modified, the court said her right to display the message "in a high school that promoted tolerance of differences based on sexual orientation" was not clearly established so the school is not liable for any constitutional violation. The court said the school might be liable, however, if the student could show the school prevented her from changing her t-shirt to read "Be Happy, Be Straight."

**FERGUSON V. MCKIERNAN
J-60-2005**

**Supreme Court of Pennsylvania
December 27, 2007**

<http://www.aopc.org/OpPosting/Supreme/ot/J-60-2005mo.pdf>

"Former paramours" agreed that man would donate sperm but not seek visitation or be liable for child support. Five years after twins were born to the woman as a result of IVF, the mother sought child support from the donor. The trial court said that the best interests of the children made the agreement "unenforceable as contrary to public policy."

On appeal, the supreme court said "the inescapable reality is that all manner of arrangements involving the donation of sperm or eggs abound in contemporary society, many of them couched in contracts of agreements of varying degrees of formality" and "an increasing number of

would-be mothers who find themselves either unable or unwilling to conceive and raise children in the context of marriage are turning to donor arrangements to enable them to enjoy the privilege of raising a child or children” and these practices have not been prohibited in Pennsylvania.

The court noted an apparent “growing consensus” that “clinical, institutional sperm donation neither imposes obligations nor confers privileges upon the sperm donor.” Here, the facts “reveal the parties’ mutual intention to preserve all of the trappings of a conventional sperm donation, including formation of a binding agreement.” Unless this kind of agreement is enforced, the court believed, “a woman who wishes to have a baby but is unable to conceive through intercourse could not seek sperm from a man she knows and admires, while assuring him that he will never be subject to a support order and being herself assured that he will never be able to seek custody of the child” and “a would-be donor cannot trust that he is safe from a future support action, he will be considerably less likely to provide his sperm to a friend or acquaintance who asks, significantly limiting a would-be mother’s reproductive prerogatives.” The court said: “There is simply no basis in law or policy to impose such an unpleasant choice” and would involve inappropriate judicial legislation.

The court noted that its decision would deny a source of support to the children “who did not ask to be born unto this situation” but without the agreement “the twins would not have been born at all.”

Two justices dissented. One of their opinions noted that the terminology of “sperm donor” “does not change his status—he is their father.” The dissent argues that the means of conception of a child

should not change their right to parental support and that “the only difference between this case and any other conception is the intervention of hardware between one identifiable would-be parent and the other.” The dissent believed the legislature should have the choice to “disenfranchise children whose conception utilizes clinical procedures.”

BROWNE V. D’ALLEVA
2007 WL 4636692
Connecticut Superior Court
January 7, 2007

A woman and her female partner asked a friend to act as a sperm donor so she could have a child. The agreement was that the mother and her partner would be the legal parents while the father and his male partner “would have some type of role as co-guardians” and “would have a role as secondary or “fun parents.”” The father claimed “he was told that he would be a legal guardian of the child and that he would have a permanent and significant role in the child’s life.” After the child was born, the father was listed on the birth certificate. When the mother’s partner petitioned to adopt the child, the father objected and this lawsuit ensued with the father seeking custody and visitation over the mother’s objection.

The court held that the parties’ agreement, the fact that the father’s name was listed on the birth certificate and the father’s acknowledgment of paternity all show that the father had standing to bring an application for custody and visitation of his child.

FINLEY V. ASTRUE
No. 07-627
Supreme Court of Arkansas
January 10, 2008

<http://courts.arkansas.gov/opinions/2008a/20080110/07-627.pdf>

A federal district court certified a question to the Arkansas Supreme Court in a dispute over Social Security death benefits. The question was: "Does a child, who was created as an embryo through in vitro fertilization during his parents' marriage, but implanted into his mother's womb after the death of his father, inherit from the father under Arkansas intestacy law as a surviving child?"

The court held the state legislature "did not intend for the statute to permit a child, created through in vitro fertilization and implanted after the father's death, to inherit under intestate succession" especially since the statute was enacted in 1969 before such technology was available.

**WHATCOTT V. SASKATCHEWAN
ASSOCIATION OF LICENSED
PRACTICAL NURSES
2008 SKCA 006
Court of Appeal for Saskatchewan
January 16, 2008**

<http://www.mydatabus.com/public/Billwhatcott/Whatcottwinsappealtohavenursinglicensereinstated.pdf>

After a nurse participated in an anti-abortion demonstration, the Saskatchewan Association of Licensed Practical Nurses found him guilty of professional misconduct and fined him, also suspending his membership. The Court of Queen's Bench rejected his appeal.

The appeals court noted that the discipline imposed on the nurse infringed his freedom of expression. The court noted that the Association had a substantial interest in ensuring "respect for the status and standing of the licensed practical nurse."

The court believed, however, that "there is no evidence that any member of the public thinks or will think less of nurses because of Mr. Whatcott's behaviour." Since the nurse's conduct was not "professional misconduct during office hours or on hospital property," did not affect the health of the public and the link between his conduct and profession is "tangential" the court concluded that the Association's decision was unconstitutional.

SCHOTT V. SCHOTT

No. 110/07-0610

Supreme Court of Iowa

January 18, 2008

http://www.judicial.state.ia.us/Supreme_Court/Recent_Opinions/20080118/07-0610.pdf

When a same-sex couple who were raising children together broke up, the former partner of the children's mother (one of the children was born in a previous relationship and the other was acquired using artificial insemination) sought custody. The trial court held the partner's adoptions "were contrary to Iowa's adoption statute and therefore invalid" so it did not have jurisdiction to hear the custody matter.

The Iowa Supreme Court said that since the court that had granted the adoptions had jurisdiction, the adoptions could not be attacked by another court. The court expressly declined to "decide whether second parent adoptions are permissible in Iowa for purposes of this appeal." The court said: "Even if the district court who issued the adoption decrees misinterpreted Iowa's adoption statute, the adoptions are not void."

E.B. V. FRANCE

Application no. 43546/02

European Court of Human Rights

January 22, 2008

<http://cmiskp.echr.coe.int////tkp197/viewhbk.m.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=67683&sessionId=4858528&skin=hudoc-en&attachment=true>

A woman in a same-sex relationship sought authorization from a local government agency to adopt a child. A Grand Chamber of the European Court of Human Rights said the European Convention's "right to respect for 'family life' does not safeguard the mere desire to found a family; it presupposes the existence of a family" but "the notion of 'private life' within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to establish and develop relationships with other human beings."

Since French law allows single persons to adopt, the Convention requires that right to be applied without discrimination. The court said that to deny the adoption because of "the lack of a paternal . . . referent in the household" creates a risk that a single person can't adopt without establishing "the presence of a referent of the other sex among her immediate circle of family and friends, thereby running the risk of rendering ineffective the right of single persons to apply for authorization." Despite the findings of the lower courts "the inescapable conclusion is that [the applicant's] sexual orientation was consistently at the centre of deliberations in her regard and omnipresent at every stage of the administrative and judicial proceedings." Thus, the applicant must be allowed to adopt.

A dissenting opinion argued that here authorization was refused because "there would be no male or 'paternal' referent among [applicant's] circle of family and friends and "the woman with whom [applicant] was in a stable relationship at the

time of her application did not feel concerned by her partner's plan to adopt; although she might not have been actually opposed or hostile to it, she was certainly indifferent." The first reason is irrelevant, to these dissenters, since single people can adopt in France and a "single person cannot be required to artificially rebuild a 'home' for the purpose of being able to exercise a statutory subjective right." The dissent, however, believed that the failure of the partner to support the adoption makes it likely the adoption would not be in the best interests of the child.

Another dissent disagreed with the majority because there was no evidence of "a general discriminatory attitude against homosexuals wishing to adopt a child" in France.

Yet another dissent argued the relevant government authorities "could legitimately take into account the sexual orientation and lifestyle fo the applicant as practised in the particular circumstances" here, specifically, the fact that the applicant's partner "was not even interested in being a party to the adoption plan." This judge believed that the in the circumstances here there was "a real risk that the model and image of a family in the context of which the child would have to live and develop his/her personality would be distorted."

BOLDT V. BOLDT
SC S054714
Supreme Court of Oregon
January 25, 2008

<http://www.publications.ojd.state.or.us/S054714.htm>

After divorce and related legal proceedings, a mother sought custody to prevent the custodial father from circumcising their child "as part of [the child's] conversion to the Jewish faith." The mother argued that

the child's opinion had not yet been made known in the court proceedings and that, in any case, even the son's desire to undergo circumcision should be denied. The father argued that he had a constitutional right to circumcise his child.

The supreme court said that since the boy was twelve, his attitude should be known to make a ruling on the mother's effort to gain custody because "forcing [him] at age 12 to undergo the circumcision against his will could seriously affect the relationship between [the child] and father, and could have a pronounced effect on father's capability to properly care for" the son. Thus, the court remanded the case to the trial court to ascertain the son's attitude.