

Marriage Law Digest

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**COMBS V. HOMER CENTER SCHOOL
DISTRICT**
2006 WL 1453532
U.S. District Court, Western District of
Pennsylvania
May 25, 2006

Parents who home schooled their children based on religious belief, sought an injunction against local school districts to prevent truancy prosecutions. They based their claims on the state's religious liberty law and the First and Fourteenth Amendments, arguing that the school districts had excessive involvement in the home schooling since the districts had complete discretion in approving the work of the home schools.

The court held that the law has had no tangible effect on plaintiffs religious practice, even though the state's authority over the plaintiffs' children is antithetical to the plaintiffs' sincerely held religious belief. The court held that the lack of concrete effect means that the law did not violate Pennsylvania's Religious Freedom Protection Act.

In regards to the First Amendment, the court held that the law was valid as having a neutral application under Employment Division v. Smith. The court rejected plaintiffs' argument that this case involved hybrid rights because courts have routinely upheld restrictions on home schooling. To the court, the law merely infringed beliefs, not conduct so it was constitutional.

FARRELL V. BURKE
Docket No. 05-0169-cv
U.S. Court of Appeals for the Second
Circuit
May 31, 2006

After conviction for sodomy involving underage boys, a man was given parole including a condition that he not possess pornographic material. His parole officers discovered books with sexually explicit pictures and arrested the defendant for violating the parole condition and his parole revoked. He then filed a 1983 action against the parole officers for violation of his First Amendment rights, alleging that the prohibition on pornography was unconstitutionally vague.

The court said the term "pornography" is inherently value but that it clearly applied to the material involved in this case. The court also held that the parole condition had no chilling effect on the plaintiff's speech.

**NOESEN V. MEDICAL STAFFING
NETWORK, INC.**
06-C-071-S
U.S. District Court, Western District of
Wisconsin
June 1, 2006

After a pharmacist refused to provide contraceptives to clients, the Wisconsin Pharmacy Examining Board reprimanded him and required him to notify future employers of his refusal to fill contraception prescriptions. He disclosed this to a temp agency that placed him at Wal-Mart. His supervisor at Wal-Mart agreed to

accommodate his objection but asked him to “signal if a customer was seeking to have a birth control prescription filled.” This led him to begin a dispute with a supervisor resulting in his firing and ejection from the store by police. He was subsequently fired by the temp agency. He filed a 1983 action and a Title VII claim.

The 1983 action was dismissed because when such actions involve private actors, they must allege violations of the right to travel or the Thirteenth Amendment. The court held that, in regards to the Title VII claim, the employer had show valid reasons for the firing (i.e. the dispute with a supervisor) and had accommodated religious belief.

D.E. V. R.D.B.
Case No. 5D05-2032
Florida Court of Appeal, Fifth District
June 2, 2006

After a same-sex couple separated following an eleven-year relationship, the partners disputed visitation with a child born to one of them as a result of artificial insemination. The former partner had no legal standing to seek visitation, so she sought to establish that the mother had “abused and/or neglected the minor child by cutting off all contact between the child” and the former partner. The partner relied on a psychologist’s testimony “that there could be psychological damage inflicted on the child if her primary or secondary attachment figure was abruptly and inappropriately removed from her life.” The trial court said that depriving the child of contact with “someone to whom the child has no legal connection” does not constitute abuse.

On appeal, the court agreed that the charge by the former partner was inadequate to

support a finding that the child was dependent.

IN THE MATTER OF THE MARRIAGE
OF OSBORN
No. 95,015
Kansas Court of Appeals
June 2, 2006

An eleven-year-old child filed a motion to modify parenting time in her parents’ divorce case. The court held that “minor children are subject to the rights of the parents to determine what is in the best interests of their children” and that the child in this case has no “legal right to participate in summer sports and band programs.” The court noted that if her parents were married there would be no forum to allow her to petition for a right to participate in these activities. The child thus had no standing to sue.

HAMIT V. HAMIT
No. S-05-245
Supreme Court of Nebraska
June 2, 2006

After divorce, the husband died and paternal grandparents sought visitation over the mother’s objection. The mother challenged the grandparent visitation statute under the federal and state constitutions. The district court ordered visitation.

From the plurality opinion in *Troxel v. Granville*, the court recognized three principles: (1) fit parents are presumed to act in the best interest of their children, (2) a fit parent’s decision as to grandparent visitation should be given “special weight,” and (3) this presumption is rebuttable. The court held that interferences with parent/child relationships are analyzed under strict scrutiny. The court concluded that the Nebraska statute, unlike the

Washington statute overturned in *Troxel*, does not allow visitation to be awarded if it will adversely interfere with parent/child relationships, so the statute was not unconstitutional on its face. In this case, the relationships of the children with their grandparents was beneficial for the children; the lower court concluded that visitation was in the best interests of children; and visitation would not interfere with parent/child relationships.

**M.D.R. V. DEPUTY REGISTRAR
GENERAL FOR THE PROVINCE OF
ONTARIO
05-FA-013357
Ontario Superior Court of Justice
June 6, 2006**

Same-sex couples, in which one partner had conceived a child through artificial insemination, sought to be listed as “co-parents” on the children’s birth certificates.

Plaintiffs argued that “the term ‘father’ in the [law] should be read as a plural and gender neutral term in order to include lesbian co-mothers” to advance the purpose of the law to record “social parentage.” They claimed that “[m]other’, ‘father’ and ‘parent’ are broad legal concepts that are not simply concerned with biology.” The court held that the term “father” couldn’t be construed to mean “mother.”

Using its *parens patriae* authority, however, the court allowed these plaintiffs but not all “co-mothers” to be listed on the children’s birth certificates. The court held that the registration law creates distinctions between two similarly situated groups: (1) fathers who use assisted reproductive technology to plan pregnancy with a spouse and (2) lesbian “co-mothers” who do the same. This, the court believed, was a distinction on the basis of sexual orientation. The court also

believed that the government has no interest that justifies the discrimination.

**CURAY-CRAMER V. THE URSULINE
ACADEMY OF WILMINGTON,
DELAWARE, INC.
No. 04-4628
U.S. Court of Appeals for the Third Circuit
June 7, 2006**

A teacher at a private Catholic school was fired after signing onto a pro-choice advertisement in a local newspaper. The district court granted school’s motion to dismiss.

The court held that signing a pro-abortion statement is not opposition to an allegedly discriminatory employment policy, so it is not protected activity.

The plaintiff had argued that male employees who committed similar offenses were treated differently but to determine this, the court would have to enquire into church doctrine to weigh the relative seriousness of the offenses. Specifically, the court said: “Were we, however, to require Ursuline to treat Jewish males or males who oppose the war in Iraq the same as a Catholic female who publicly advocates pro-choice positions, we would be meddling in matters related to a religious organization’s ability to define the parameters of what constitutes orthodoxy.” Since this would violate the First Amendment, the court rejected plaintiffs’ claims.

**CHARISMA R. V. KRISTINA S.
A108213
California Court of Appeal, First Appellate
District
June 9, 2006**

After breakup, the same-sex partner of a child’s mother sought to establish a legal

parental relationship with the child born as a result of artificial insemination. The court remanded to the trial court to determine whether the partner is a "presumed parent." This could be shown if the partner (1) received the child into her home and (2) held out the child "as her natural child." Then, the court should determine (1) whether the mother planned to raise the child with the partner, (2) whether the partner accepted the rights and obligations of parenthood, and (3) whether there are competing claims for second parent status. Here, the lack of a biological tie cannot rebut the parental presumption. The mother's objection can't be the determining factor and "we note that a rule that allowed the biological mother to unilaterally deny presumed parent status would potentially implicate the constitutional rights of the person seeking such status." The court did not, however, address the mother's claims that shared parenting would interfere with her constitutional rights.

CALIFORNIA V. UNITED STATES
No. 05-17292
U.S. Court of Appeals for the Ninth Circuit
June 9, 2006

California law requires emergency health care providers to provide medical treatment with no exception for abortions. Federal law prevents federal funding to state governments that discriminate against health care providers who refuse to participate in abortions. California sought a declaratory injunction that this federal law was unconstitutional. A Catholic medical group and a pro-life medical association sought to intervene and was denied by the district court. The court noted that the federal law was enacted to protect health care providers like proposed intervenors so they won't have to choose between their beliefs and retaining their professional

licenses. The court also pointed out that "[t]he fact that California brought this lawsuit seeking to invalidate the Amendment, or restrict its sweep, is proof in itself of the efficacy of this congressional enactment and its significance to the proposed intervenors." The court, thus concluded that intervenors do have a protectable interest in the lawsuit. Also, the disposition of this case will affect that interest because "[s]hould California prevail in this lawsuit, it will be free to prosecute health care providers for failure to provide emergency abortion services, however it defines that phrase." The court found that the proposed intervenors will have no alternative forum for raising the issues in this litigation. The court also found that government may not be presumed to defend intervenors' interest because government has already advanced a limited construction of the challenged law that would be less protective of intervenors than the much broader reading proposed by the intervenors. The court concluded that intervention should be allowed.

OHIO V. LOGSDON
2006-Ohio-2938
Ohio Court of Appeals, Third Appellate
District
June 12, 2006

A man charged with domestic violence on cohabiting partner alleged the domestic violence statute conflicted with the state marriage amendment. The court held that the "use of the word 'spouse' in [the statute] recognizes a legal status for relationships of unmarried individuals that intends to approximate the significance or effect of marriage. If the General Assembly did not want to approximate the significance or effect of marriage, it could have used a word other than 'spouse.'" The court noted that its decision conflicts with opinions in six other districts and so certified the question to the

Ohio supreme court.

**IN RE MATTHEW W.
2006 ME 67
Maine Supreme Judicial Court
June 12, 2006**

The Department of Health and Human Services secured a do not resuscitate order for a child in its custody after abuse by the child's parents resulted in hospitalization. The parents challenged the order and the court held that exercising the DNR over the parents' objection "infringes upon the fundamental rights of parenthood" and "would have the effect of conclusively preventing parents from raising their child or ever again exercising their fundamental rights." The court also said that "due process requires that parents be afforded the same procedural protections before approval of a DNR for their child as they are afforded prior to the termination of their parental rights."

**MCDONALD V. VIRGINIA
Record No. 1180-05-2
Court of Appeals of Virginia
June 13, 2006**

A man convicted of sodomy with 17 and 17 year old girls in incident that was private and consensual, claimed that the charging statute was unconstitutional. The court noted that Virginia considers 16 and 17 year olds to be children and concluded that *Lawrence v. Texas* does not apply to sexual acts involving minors.

**IN RE MARRIAGE OF J.M.H.
04CA0740
Colorado Court of Appeals
June 15, 2006**

A trial court held that a purported common law marriage involving a 15 year old girl

was invalid without judicial permission. The court had reasoned that a marriage was void if the wife was less than 16 as required for a valid statutory marriage.

On appeal, the court held that the age for a valid common law marriage was 14 for men and 12 for women. Since no statute specifically disavows the common law age of consent. Thus, the marriage here was not invalid because of the wife's age and the court remanded for a determination of other elements of a valid common law marriage.

**B.F. V. T.D.
2005-SC-000557-DG
Supreme Court of Kentucky
June 15, 2006**

A partner in a same-sex couple adopted a child. When the child was six years old the couple separated and the partner who had not adopted asserted that she was the child's de facto custodian. The trial court and the court of appeals held that the non-parent partner did not meet the legal requirement for custody.

The supreme court noted that Kentucky law defines "de facto custodian" as a person who (1) is a child's primary caregiver, (2) is the child's primary source of financial support, and (3) has lived with the child for at least one year. The trial court had ruled that the non-parent partner was the primary financial support but not the primary caregiver of the child. Here, the court found that the statutory grounds are controlling and don't allow for the claim.

**LESKUN V. LESKUN
2006 SCC 25
Supreme Court of Canada
June 21, 2006**

A husband abandoned his wife, received a

divorce and married another woman with whom he'd been involved in an adulterous relationship. The ex-wife had difficulty getting work, partly due to depression resulting from her husband's betrayal. The court held that while misconduct cannot be used to make a divorce determination, it may effect a party's circumstance and this can be taken into consideration in spousal support awards. The court also found that achieving self-sufficiency is not a "duty" of an ex-spouse.

UNITED STATES V. HELDER
No. 05-3387
U.S. Court of Appeals for the Eighth
Circuit
June 26, 2006

After a jury found the defendant guilty of enticing a minor to engage in sexual activity, the judge set aside the verdict because the government had not proven that the defendant had communicated with someone under 18 (he'd been corresponding with an undercover police officer). The court reversed, deciding that the intent to engage in conduct with a minor is enough to support a conviction and that an actual minor victim is not necessary.

DEPARTMENT OF HUMAN SERVICES
AND CHILD WELFARE AGENCY
REVIEW BOARD V. HOWARD
No. 05-814
Supreme Court of Arkansas
June 29, 2006

The state Child Welfare Agency Review Board promulgated a rule prohibiting foster placements in homes where homosexual adults are present. The trial court said (1) the rule did not promote the welfare of children and thus is beyond the authority of the agency to issue (under the doctrine of separation of powers), and (2) the law does

not violate state or federal equal protection, privacy and intimate association guarantees.

On appeal, the supreme court held that statute delegates authority to the Board to promote the welfare of children. The court believed that the rule "does not promote the health, safety, or welfare of foster children but rather acts to exclude a set of individuals from becoming foster parents based upon morality and bias." The court further said the facts in the case "demonstrate that there is no correlation between the health, welfare and safety of foster children and the blanket exclusion of any individual who is a homosexual or who resides in a household with a homosexual." Thus to the court, "the driving force behind adoption of the regulation was not to promote the health, safety, and welfare of foster children, but rather based upon the Board's views of morality and its bias against homosexuals." The court held that promotion of morality was not delegated to the Board by statute and affirmed the lower court. The court did not address the other constitutional claims.

A concurrence argued that the regulation was "directed to sexual conduct that occurs in the privacy of the bedroom." Thus, the concurrence believed that the regulation "significantly burdens the privacy rights of couples engaged in sexual conduct in the bedroom which this court has specifically declared to be impermissible as violative of equal-protection and privacy rights." To this judge, the effect of the rule is that "gay and lesbian couples are saddled with an infirmity due to sexual orientation" and children suffer because they "will be forced to reside in youth homes because an insufficient pool of willing foster parents is available." This judge also argued that "[t]here is no rational basis in the form of studies or empirical data that sustains the regulation." He argued that the court should

have found equal protection and privacy violations.

