

Marriage Law Digest

Volume 3, Number 3

Marriage Law Foundation

March 2006

KANE V. MARSOLAIS

No. 98151

**New York Appellate Division, Third
Department**

February 16, 2006

Same-sex couples challenged New York's marriage law. Relying on its decision of the same day in *Samuels v. Department of Public Health*, the appellate division affirmed the lower court's dismissal of the case.

SEYMOUR V. HOLCOMB

No. 98204

**New York Appellate Division, Third
Department**

February 16, 2006

Same-sex couples challenged New York's marriage law. Relying on its decision of the same day in *Samuels v. Department of Public Health*, the appellate division affirmed the lower court's dismissal of the case. The court also rejected the additional claim that the state marriage law already allowed the issuance of marriage licenses to same-sex couples.

ADOPTION OF LELAND

No. 05-P-898

**Massachusetts Court of Appeals
February 24, 2006**

A child born to unwed parents alternated between the homes of both parents (in Massachusetts and Connecticut) until, in a proceeding against the mother, the Massachusetts Department of Social Services took the child into custody. Connecticut found the father not to be an appropriate

placement option for the child because too many people were living in his home. This court held that this reason was not sufficient to constitute neglect.

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD V. NIXON

SC86768

Supreme Court of Missouri

February 28, 2006

A Missouri statute required a doctor to obtain informed consent from a woman before performing an abortion and requiring a 24-hour wait before the abortion is performed. Planned Parenthood challenged the law, alleging state and federal constitutional violations (although only state claims were addressed in this case).

The court held that the informed consent requirement merely restated the common law duty of doctors. The court further held that the Missouri Constitution is construed the same as the United States Constitution and, since the U.S. Constitution had already approved the 24-hour wait, this provision is also constitutional under the Missouri Constitution.

FITZGERALD V. CAMDENTON R-III SCHOOL DISTRICT

No. 04-3102

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

March 1, 2006

After a school sought evaluation, under the Individuals with Disabilities in Education Act, for a student for special education

services, the parents refused to let their child participate in the evaluation and began to home school. The school still sought the evaluation, the parents sued and the District Court found in favor of the school.

The court held that although IDEA applies to private schools (and Missouri treats home schooling as a private school), the law also allows parents to decline services. The IDEA says that schools “may” evaluate over parent objection, but an evaluation here (where parents will refuse services) does not comport with Congress’ intent.

WILLIAMS V. KING
No. CV-98-S-1938-NE
U.S. District Court, Northern District of
Alabama
February 28, 2006

Vendors of sexual devices challenged constitutionality of statute banning their sale. The district court twice ruled in their favor and was twice reversed by panels of the Eleventh Circuit.

On remand, for the second time, the court dealt with the application of *Lawrence v. Texas* to the law. The court rejected the idea that a law can be invalidated solely because it is “founded on concerns over public morality.” The court held that the concern expressed in the *Carolene Products*’ footnote is the key to understanding *Lawrence*—“that majorities may, if unchecked by a non-majoritarian institutional balance, ride booted and spurred on the backs of despised or feared minorities.” However, this case affects no targeted class and its’ application is broad. This situation is distinguishable for *Lawrence* because the underlying conduct here is not confined to private actions. The court concluded that “the Alabama statute does not offend the human dignity of a stigmatized class of individuals, nor

implicate equal protection concerns about targeting a ‘discrete and insular minority’ for discrimination or harm out of simple hostility, in a way that requires the court to find the law unconstitutional under *Lawrence*.”

SCHIRMER V. MT. AUBURN
OBSTETRICS & GYNECOLOGICAL
ASSOCIATES, INC
2006-Ohio-942
Supreme Court of Ohio
March 3, 2006

After a boy was born with significant disabilities, his parents claimed negligent prenatal testing prevented them from aborting him and sought damages related to pregnancy and delivery as well as for the costs related to raising a disabled child. The trial court dismissed saying only recovery available was for damages related to pregnancy and delivery. The appeals court reversed in part, saying that the parents could recover only economic damages related to child-raising.

The Ohio supreme court held that there can be no recovery “when the measure of damages requires a valuation of being versus nonbeing.” Thus, there can be no damages for the costs of raising a child. Here, the parents were denied “the opportunity for an informed decisionmaking process during pregnancy because of alleged medical negligence” and damages should be limited to the costs of pregnancy and delivery. The court’s core holding was that parents can bring an action if their child is born as a result of negligent medical testing (as opposed to being aborted before birth).

A separate concurring opinion (concurring only in the judgement) argued that the defendants breached a duty by negligent

genetic testing. The injury was the loss of an informed decision on abortion. The concurrence noted that “Ohio’s public policy is that the birth of a human being is not an injury to parents” so parents can’t recover for post-birth damages.

A concurring and dissenting opinion argued that the court should have allowed recovery for post-birth damages.

A dissent argued that “life, in any form, cannot constitute an injury at law.” Here, there was no causal connection between the breach (negligent counseling) and the loss of opportunity for abortion or the cause of the genetic defect. To this dissent, the case presented a policy matter that should be left to the legislature.

Another dissent charged that an “action for lost opportunity to terminate a pregnancy is an unwarranted judicial creation.” Its recognition could lead doctors to overstate negative prenatal findings. The dissent wondered how this recognition could be limited to the birth of disabled children and not to sex selection. This dissent also suggested that the underlying question should be left to the legislature.

**RUMSFELD V. FORUM FOR ACADEMIC
AND INSTITUTIONAL RIGHTS, INC.**

No. 04-1152

Supreme Court of the United States

March 6, 2006

Law schools sued to enjoin law (Solomon Amendment) requiring institutions receiving federal funds to allow military recruiters on campus. The District Court ruled for the government and the Third Circuit reversed, holding that the Solomon Amendment forced law schools to choose between funding and their First

Amendment rights (an unconstitutional condition).

The U.S. Supreme Court unanimously reversed. It held that the Solomon Amendment’s provision requiring equal access for military recruiters cannot be satisfied merely by applying non-discrimination policies to military recruiters in the same way they are applied to other employers. Rather, under the statute, schools must give actual access to the military. Congress “has broad authority to legislate on matters of military recruiting. The Court held that the statute does not limit what schools may say or require them to say anything—it affects conduct not speech. Unlike *Dale v. Boy Scouts of America*, the Court noted that schools are only required to interact with military recruiters, not make them a part of the law school.

PEOPLE V. HOFSCHEIER

S124636

Supreme Court of California

March 6, 2006

Defendant pled guilty to oral copulation with a minor which resulted in mandatory sex offender registration for life. He argued that the registration requirement violated equal protection guarantees because sexual intercourse with a minor does not trigger mandatory registration. The court of appeals agreed.

The supreme court held that the class convicted under the oral copulation statute are similarly situated to those convicted under the sexual intercourse statute. The court noted that the law no longer treats oral copulation and sexual intercourse differently in other contexts and that the retention of the distinction here is “a historical atavism.” The differentiation is thus, unconstitutional and while the court

may still require registration if appropriate, it is no longer required to.

One justice dissented, arguing that intercourse and oral copulation are different acts entirely and that the legislature can treat them differently. The key difference is that a child may result from one and the legislature could conclude that the registration requirement would place an unfair stigma on the father and thus endanger the resulting child.

EVANS V. CITY OF BERKELEY
S112621
Supreme Court of California
March 9, 2006

The city of Berkeley asked the Sea Scouts, an affiliate of the Boy Scouts of America, to give an assurance that the Scouts would not discriminate against homosexuals in order for the city to continue its decades-long practice of providing free berths at its marina (as it does to other non-profits). The Sea Scouts, in conjunction with the local BSA council, assured the city of non-discrimination in regards to the other specified groups and said it did not inquire into sexual orientation. The city attorney said this assurance did not satisfy the legal requirement and the city council revoked the subsidy accusing the Scouts of discriminating against "gays and atheists." The Scouts alleged violations of their speech and association rights, specifically that they were being punished for associating with the BSA. The trial court found for the city, saying the Sea Scouts had been denied their berth because they did not comply with city law. The court of appeals affirmed.

The supreme court agreed that "a governmental entity may constitutionally require a recipient of funding or subsidy to provide written, unambiguous assurances of

compliance with a generally applicable nondiscrimination policy." The court held that nondiscrimination laws do not require espousing or denouncing a particular viewpoint. The city is merely refusing to fund activities of which it disapproved. The court said that "[a] government that requires aid recipients to conform their actions to its laws does not thereby enforce adherence to the philosophy or values behind those laws." Thus, the city is not making an unconstitutional condition for reception of funds. The city was also not punishing the Scouts for their affiliation with the BSA, since because the Scouts reserved the right to discriminate, the city reasonably believed denying a free berth to the Scouts effectuated the city's non-discrimination policy. Finally, the court held that individual city council members' hostility to the BSA does not taint the collective decision of the council.

IN RE ERIC E.
B173908
California Court of Appeal, Second
Appellate District
March 2, 2006

A mother's husband and her child's father both sought presumed father status after a the mother's child was removed from the mother's custody because of the mother's substance abuse. The father tested positive for drug use during the reunification process but the husband tested drug-free and received good reports on his parenting. The father's argument was that he had signed a voluntary declaration of paternity which must be treated as a judgement of paternity. The court noted that "[a] court may not terminate the parental rights of an unwed father who promptly demonstrates a full commitment to his parental rights absent a showing of his unfitness as a parent." In this case, however, the father had

a chance for reunification but did not take advantage of that by curbing his drug use. The husband of the child's mother was thus given presumed father status.

**BLUE MOON ENTERTAINMENT V. CITY
OF BATES
No. 05-2793
U.S. Court of Appeals for the Eighth
Circuit
March 10, 2006**

A semi-nude dancing establishment was required to get a conditional use permit before a business license could be issued. The business did not seek the permit but filed a constitutional challenge to the ordinance requiring the permit. The District Court denied an injunction because the business had not sought a permit before filing suit.

The court held that the business could bring a facial challenge to permit requirements because it is a prior restraint on protected speech. The panel thus remanded for a finding of the constitutionality of the ordinance.

**SMITH V. SMITH
No. 232, 2005
Supreme Court of Delaware
March 7, 2006**

This case involved a custody dispute over triplets born to a woman in a same-sex relationship. The Family Court granted standing to seek custody to the mother's former partner and gave joint custody and visitation to the non-parent. The mother challenged this finding but also secured a support order from her former partner.

The court held that since the mother's arguments contradicted one another (i.e. the partner has no legal relationship with the

children versus partner has a legal duty to support the children). The court decided that the mother could not take advantage of the benefits of a judgement then seek to escape the other consequences of that judgement. The court declined to address the substantive issues regarding de facto parenting status.

**ESCOBEDO V. NICKITA
05-315
Supreme Court of Arkansas
March 9, 2006**

An unwed father learned of paternity when notified pursuant to adoption action. He then sought to establish paternity and prevent the adoption of his child. He was denied and appealed the denial and argued that the adoption statute which allowed adoption without his consent was unconstitutional.

The court noted that the relevant statute only requires consent of a married father or a father who has "legitimated" the child. Notice is only required for persons in the putative father registry at the time an adoption petition is filed. The father argued that he had legitimated the child by (1) submitting to DNA testing, (2) contesting the adoption, and (3) establishing paternity. He did not, however, file with the putative father registry in time. The court, however, held that establishing a biological ties is merely the first step toward legitimation. The court noted that the father had not taken steps to prepare to care for the child so he did not legitimate the child. The court said that U.S. Supreme Court precedent holds that mere biology only gives a father the "opportunity" to grasp in order to merit constitutional protection. The precedent distinguishes between mere biological ties and an established relationship. In this case, the court did not believe the father had

established a relationship with the child. Since the father had notice and attended an adoption hearing, he got his opportunity and no other steps were constitutionally required.

A concurring opinion argued that whether a father acts “promptly” to legitimate a child should be measured by the child’s need for permanence.

Another concurrence said that the father was not even entitled to notice because he did not file with the putative father registry.

A dissent argued that the majority’s ruling did not adequately protect the rights of natural parents.

J.F. V. D.B.
C.A. No. 22709
Ohio Court of Appeals, Ninth Judicial
District
March 15, 2006

A couple signed a surrogacy contract whereby the wife would be implanted with fertilized embryos from eggs harvested from another woman and the sperm of the other party to the contract, in exchange for \$20,000. Triplets were born as the result of the arrangement but the couple decided to keep the children without returning the money paid them. Four lawsuits commenced: (1) a Pennsylvania court held that the father and the surrogate are the legal parents, (2) an Ohio court held that the father and the egg donor are the parents, (3) a Pennsylvania court gave custody to the surrogate and her husband and ordered the sperm donor to pay child support, and (4) the current action for recovery of the money paid by the sperm donor under the contract and as child support. The trial court declared the contract void as against public policy.

The court held that there was no question that the surrogate and her spouse had breached the contract. Further, the court held that the Ohio legislature has the responsibility to set public policy and that they have not acted to prohibit surrogacy. Under Ohio law, genetic parents are the natural parents, so the father and egg donor, not the surrogate, are the children’s parents, but this court did not address the issue of custody. The surrogate and spouse are liable for the monies paid by the father and by gaining custody, the surrogate and her spouse triggered an indemnification clause in the contract and must pay the sperm donor for court-ordered expenses.

NHS TRUST V. MB
Case No. FD5P02589
U.K. High Court of Justice, Family
Division
March 15, 2006

This case involves a child suffering from spinal muscular atrophy in a very severe form (he can move very, very little and must be fed and helped to breathe artificially though he is probably aware of his surroundings). The National Health Services sought a judgement that it could legally withdraw artificial supports despite the child’s parents’ refusal to consent.

The court specifically refused to consider the parents’ religious beliefs relevant to the matter. The court noted that the child can hear, has great parents who give him their time, and that the parents believe he can feel pleasure, a belief the court believed it was appropriate to defer to. He also noted that the parents “firmly and sincerely believe and argue that despite the pain and suffering M still has value from his life and a quality of life which outweighs the burdens and which should be preserved and, if possible, prolonged. The court

concluded that it is in the best interests of this child to allowed to live. To the court, despite “a helpless and sad life . . . his life does still have benefits, and is his life, it should be able to continue.”

UNITED STATES V. COIL

No. 04-51110

U.S. Court of Appeals for the Fifth Circuit

March 14, 2006

Defendants was convicted for transportation of obscenity in interstate commerce. He claimed the obscenity statute was unconstitutional under *Lawrence v. Texas*. The court noted that the U.S. Supreme Court has not overruled precedent upholding obscenity laws, so *Lawrence* doesn't make an obscenity statute unconstitutional.

AID FOR WOMEN V. FOULSTON

No. 04-3310

U.S. Court of Appeals for the Tenth Circuit

January 27, 2006

A Kansas statute required reporting of suspected sexual abuse. A Kansas attorney general opinion specified that sexual activity involving minors under 16 is inherently injurious so the duty to report applies to it even if consensual. A group of professionals brought suit arguing that mandatory reporting infringes minors privacy rights. The District Court issued an injunction against reporting of voluntary sexual activity between adolescents.

On appeal, the court held that plaintiffs have standing because (1) they have clients under 16 who are sexual activity so the plaintiffs could be subject to prosecution for failing to report and (2) the attorney general's opinion is the source of the potential injury, and (3) enforcement could violate the minor clients' rights.

The court also held that minors have a right to privacy including a right not to disclose personal matters to the government. The privacy rights, however, do not extend to criminal conduct. Since Kansas law criminalizes all sexual activity with a minor, the privacy right does not apply to the activities that were the subject of this case. Additionally, the court found that the reporting policy advanced government interests in (1) enforcement of criminal laws, (2) exercise of the *parens patriae* power to protect minors, (3) promoting the health of minors.

A dissent argued that the reporting requirement should not apply to sexual conduct between “agemates.” Further, he argues that criminalization should not per se remove privacy rights from conduct.

STATE V. FREITAG

2006 WL 618864

Court of Appeals for Arizona

March 14, 2006

The defendant challenged his conviction for solicitation of prostitution, citing *Lawrence v. Texas* as evidence that the ordinance under which he was convicted was unconstitutional. He claimed that *Lawrence* recognized a “right to engage in adult consensual conduct.” The court held that *Lawrence* did not create a fundamental right. The court noted that the *Lawrence* majority did not extend its holding “to all private consensual sexual activity” and rather, expressly limited its holding so as not to reach public conduct and prostitution. Here, the court found the challenged ordinance advanced state interest in (1) prevention of disease, (2) prevention of sexual exploitation, and (3) reduction of related criminal activity.

**ADVISORY OPINION TO THE
ATTORNEY GENERAL RE: FLORIDA
MARRIAGE PROTECTION
AMENDMENT**

Nos. SC05-1563 & SC05-1831

Supreme Court of Florida

March 23, 2006

Pursuant to state law, the court was asked by the Florida attorney general to determine whether a proposed state marriage amendment satisfies the single-subject requirement and whether its ballot title and summary are clear and unambiguous.

The ACLU opposed the amendment, arguing that it has two subjects: (1) a definition of marriage and (2) a prohibition of alternative forms of legal recognition for same-sex couples. The court disagreed, holding that the amendment, read as a whole, has one subject—"the restriction of the exclusive rights and obligations traditionally associated with marriage to legal unions consisting of one man and one woman as husband and wife." Also, "[t]he plain language of the proposed amendment is clear that the legal union of a same-sex couple that is not the 'substantial equivalent' of marriage is not within the ambit of this constitutional provision."

The court additionally held that the proposed amendment would not alter or perform the function of more than one branch of government.

The court noted that the language in the ballot summary and the text of the amendment are "essentially identical" and here, the legal terms used are not "undefined legal terminology." The ACLU argued that the use of "protect" in the title invites an emotional response rather than giving a synopsis of the amendment's content. The court, by contrast, believed that

the title reflects the chief purpose of the amendment—"preserving the current concept of marriage in Florida as the legal union of one man and one woman."

OHIO V. WARD

2006-Ohio-1407

Ohio Court of Appeals for Greene County

March 24, 2006

Woman allegedly assaulted cohabiting boyfriend. When charged with domestic violence, she said the statute violated the state's marriage amendment.

The court rejected the ACLU argument that the amendment must be construed not to conflict with a statute. In determining the meaning of the marriage amendment, the court identified the "general principles evident in the Defense of Marriage amendment" as "a legal status of a de facto marital relationship shall neither be created nor recognized in Ohio as having the same effect as the legal status of a de jure marital relationship." The court believed that the statute's use of "'person living as a spouse,' for purposes of the Domestic Violence statute, is the sort of quasi-marital relationship that the Defense of Marriage amendment was concerned with." The court held that if the domestic violence statute covered all persons sharing a residence it would not conflict with the amendment. To the court, the current identification of "persons living as a spouse" in the statute is, however, inconsistent with the amendment.

The dissent characterize the majority opinion as "the rhetorical equivalent of a building inspector knocking a house off its foundation and 'only then' declaring the structure unsound." The dissent noted that a legal status prohibited by the marriage amendment is a question of law, not of fact.

In contrast, the use of the term “living as a spouse” is not a legal status, it is a factual determination.

**COTE-WHITACRE V. DEPARTMENT OF
PUBLIC HEALTH**

SJC-09436

Massachusetts Supreme Judicial Court

March 30, 2006

This case involved a challenge by eight nonresident same-sex couples and thirteen municipal clerks to Massachusetts statutes which prevents clerks from providing marriage licenses to couples who would be prohibited from marrying in their home states. The trial court rejected plaintiffs’ claims that the law violated state due process and equal protection as well as federal privileges and immunities guarantees. The opinion of the court is very brief and merely affirms the trial court while allowing couples to present evidence that their marriage would not be prohibited in their home state.

The first concurring opinion of Justice Spina (joined by Justices Cowin and Sosman) rejected plaintiffs construction of the law which would have limited its application only to couples whose home state specifically deems a marriage between persons of the same-sex as “void” (rather than “prohibited” or simply not allowed). Rather, the statute should be understood as preventing any nonresident couple from securing a marriage license if the marriage would be prohibited in the home state. The concurrence notes that in *Goodridge*, the majority stated it was leaving intact the legislature’s ability to regulate marriage and allowing other states to decide the issue for themselves. The concurrence also noted that the law does have a disproportionate impact on nonresident same-sex couples but would be reviewed under rational basis scrutiny.

Since the statute was enacted in 19193, it was clearly not intended to discriminate against same-sex couples. The concurrence argued that “a lack of detailed statutory enforcement in the past, to the extent that it was necessary, does not preclude more vigorous statutory enforcement in the present.” Since marriage is so important, the concurrence believed that the state has an interest in ensuring that any marriage relationships it creates will be recognized and supported in the parties’ home state. In addition, the concurrence identified a valid state interest in not interfering with the marriage policies of other states. The concurrence argued that the plaintiff clerks have no standing to challenge the law in their official position because government entities generally do not have constitutional rights. They could, however, challenge in their individual capacity since they could be subject to fines or imprisonment if they knowingly violated the statutes at issue. The concurrence concluded, though, that the clerks had not shown that nonresident same-sex couples are treated differently from opposite-sex couples. Couples not of the same-sex who are prohibited from marrying in their home state are also to be denied licenses (i.e. underage couples). In regards to the privileges and immunities claim, the court applied a two part test, whether (1) the right affected was fundamental to the development of a single nation and (2) was supported by a substantial reason. Here, the concurrence believed the statute did not discriminate on the basis of residency but differentiated among nonresidents whose marriages would or would not be prohibited in their home states. The concurrence further argued that the Massachusetts law promotes interstate harmony.

Chief Justice Marshall’s concurrence (joined by Justice Cordy and partially by Justice Greaney) argued that the first concurrence’s

reading of the statute as treating a marriage not allowed in the home state as prohibited by that state was too broad. This opinion accused the first concurrence of applying this standard only to same-sex couple, which the opinion felt was “troubling.” This opinion argued that the statute should be interpreted to prevent licensing only when the marriage is clearly prohibited by the settled law of the home state. It further argued “[i]t is neither arbitrary nor capricious for the Legislature to decide as a matter of public policy to restrict the Massachusetts marriages of out-of-state residents” as provide by Massachusetts statutes. The concurrence believed that the state can decide to direct its resources only to nonresident marriages that will be recognized in the parties’ home state. The disparate impact of these statutes is caused not by the neutral Massachusetts law but by the laws of other states. The concurrence concluded, though, that nonresidents must be allowed to show that their home state does not prohibit same-sex marriages and the plaintiffs in this case from New York and Rhode Island will be allowed to do this on remand.

Justice Greaney concurred separately to say that he did not believe the statues here were supported by compelling reasons, but that plaintiffs have not shown that the law is not supported by any conceivable rational basis and, under *Goodridge*, the rational basis standard is the appropriate one.

Justice Ireland dissented. He argued that the *Goodridge* decision stands for the proposition that marriage laws cannot take gender into consideration in any way including in state marriage recognition laws. He argued that since Massachusetts’ public policy forbids discrimination it should not give effect to the discriminatory laws of other states. He also believed that since Massachusetts

doesn’t know how other states will treat a Massachusetts same-sex marriage, it should rely on possible nonrecognition in its policy towards nonresidents. The dissent further argued that the statutes are being selectively enforced and that the enforcement is based on animus which offends the “spirit” of *Goodridge*.

SCHROER V. BILLINGTON
Civil Action No. 05-1090
U.S. District Court for the District of
Columbia
March 31, 2006

A man who had changed his appearance so he could present himself as a woman brought suit against the library of Congress under Title VII of the Civil Rights Act, alleging that the Library of Congress had offered him a job and then revoked that offer when they learned that the person they interviewed would be changing his appearance to that of a woman.

The court noted that the U.S. Supreme Court has recognized that disparate treatment based on sex stereotyping creates a Title VII cause of action. Thus, Title VII prohibition of sex stereotyping “creates space for people of both sexes to express their sexual identity in non-conforming ways.” The court suggested that a “transsexual plaintiff might successfully state a Price Waterhouse-type claim if the claim is that he or she has been discriminated against because of a failure to act or appear masculine or feminine enough for an employer.” This, however, is not the situation in this case.

In this case, the refusal to hire someone solely because of sexual identity may be discrimination “because of sex” so there was a need for a trial to allow evidence on the scientific basis of sexual identity and “gender dysphoria.”

PEARSON V. PEARSON
Case No. 20040677-CA
Utah Court of Appeals
March 30, 2006

A child was born to a married woman who suspected the child's biological father was not her husband. The purported biological father did not support the child or have significant contact for more than one year. The husband treated the child as his and the mother agreed to treat the husband as the father. When the husband filed for divorce, the purported father moved to intervene and the mother motioned to have the husband's paternity denied along with visitation and custody. A commissioner said that the purported father lacked standing to contest the husband's paternity. A doctor appointed to see if the purported father's suit for paternity would have hurt the child's relationship with the husband concluded that it would not. The trial court concluded that the husband was not the father after allowing the purported father to intervene. The court further held that allowing the purported father's effort to establish paternity would not interfere with a marriage because the marriage eventually broke down.

The court of appeals identified a two-part test for intervention in such a case. First, the attempt to intervene must not interfere with the preservation of the stability of a marriage. Here, even though the marriage eventually ended, the purported father's attempt to establish paternity was initiated pre-divorce and thus did interfere with a marriage. The second part of test asked whether allowing intervention would create disruptive attacks on existing assumptions of paternity. Since the husband in this case was the child's "psychological father" and the purported father claim would disrupt the child's sense of who his father was. The

relevant legal rule in such cases is that "in the hopefully rare instance where a child born into a marriage is fathered by another man, the husband is nevertheless deemed the father of the child, with all concomitant rights and responsibilities, unless and until his paternity is successfully challenged under the Utah Uniform Parentage Act. Thus, in this case, the husband is the father of the child.