

Marriage Law Digest

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MAY 2008 CASE SUMMARIES

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BURDEN V. UNITED KINGDOM

Application no. 13378/05

European Court of Human Rights

April 29, 2008

<http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=69890&sessionId=7389035&skin=hudoc-en&attachment=true>

Two sisters argued that national law requiring the surviving sister to pay inheritance tax on their shared home when the other dies violates the European Convention for the Protection of Human Rights and Fundamental Freedoms because couples in a marriage or civil partnership do not have to pay the tax.

The court held that Article 14 of the Convention prohibits different treatment of people in similar situations unless the state has a reasonable justification for the difference. The sisters said they were similarly situated with married couples or couples in a civil partnership. The government's proposed distinction was that they "are connected by birth rather than by a decision to enter into a formal relationship recognized by law." The court held that the "very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members." Thus, the sisters are not comparable to these groups so there's no discrimination.

One dissenting opinion argued that if the state decides "to extend a tax exemption to one extra-marital group, it should employ at

least a minimum of reasonableness while deciding not to apply the benefit to other groups of people in relationship of similar or close proximity” and that “making consanguinity an impediment is simply arbitrary.”

MASON V. DWINELL

No. COA07-176

North Carolina Court of Appeals

May 6, 2008

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/pdf/070176-1.pdf>

In a dispute between a biological mother and her former partner over child custody, a trial court ordered shared custody based on application of the best interests of the child standard.

On appeal, the court of appeals said the state legislature “has determined that it is the public policy of this State that the ‘best interest of the child’ standard shall apply whenever custody is sought regardless of the relationship of the recipient of custody to the child.” The court said parents have a constitutional right to control their children’s upbringing unless the parent “has acted inconsistent with her paramount parental right.” Here, the partner has standing to seek custody because she had raised the child with the mother and entered into an agreement to do so with the mother. The mother, the court believed, had “intentionally” created “a family unit composed of herself, her child” and a “de facto parent.” The mother had a constitutionally-protected right to ‘maintain a zone of privacy’ around her and her child” but she “voluntarily chose to invite [the partner] into that relationship and function as a parent.” The court said a parent acts “inconsistent with his or her constitutionally-protected status” by “volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party.” This, the court believed, had occurred in this case so shared custody was appropriate.

IN RE DOMESTIC PARTNERSHIP OF

ELLIS & ARRIAGA

G03847

California Court of Appeals, Fourth

Appellate District

May 6, 2008

<http://www.courtinfo.ca.gov/opinions/documents/G038437.PDF>

A domestic partner petitioned for dissolution of the partnership and the other partner moved to dismiss because their declaration of domestic partnership had never been filed. The trial court dismissed the case.

The court said that since the Domestic Partnership Act intends to give all of the benefits of marriage to domestic partners, the “putative spouse” doctrine (whereby a good faith belief in the validity of a marriage entitles the spouse to the benefits of the marriage even if the marriage is not technically valid) should be applied to domestic partners. Thus, “a person’s reasonable good faith belief that his or her domestic partnership was validly registered with the California Secretary of State entitles that person to the rights and responsibilities of a registered domestic partner, even if that registration never took place.”

NATIONAL PRIDE AT WORK V.

GOVERNOR OF MICHIGAN

No. 133429

Michigan Supreme Court

May 7, 2008

<http://courts.michigan.gov/supremecourt/Clerk/11-07/133429/133429-Opinion.pdf>

An advocacy organization and public employees sought a declaration that the Michigan “marriage amendment does not bar public employers from providing health-insurance benefits to their employees’ qualified same-sex domestic partners.” The trial court found no conflict but the court of appeals reversed.

On appeal, the supreme court interpreted the word “union” in the amendment as meaning “two people join[ed] together for a common purpose and legal consequences arises from that relationship.” The court thus believed a domestic partnership was a “union” for purposes of the amendment.

The court then held that a union “does not have to possess all the same legal rights and responsibilities that result from a marriage in order to constitute a union ‘similar’ to marriage” for purposes of the amendment. The court held the dissimilarities between the domestic partnership benefit plans and marriage were “dissimilarities pertaining to the legal effects that are accorded these relationships” and the amendment “prohibits the recognition of unions similar to marriage ‘for any purpose.’” The court said both marriage and domestic partnerships “require the partners to be of a certain sex” and can’t involve blood relations. Thus, the statuses “resembl[e] one another ‘in a general way’ and are “similar.”

The court then held that when “a public employer attaches legal consequences to a relationship, that employer is clearly ‘recognizing’ that relationship” for purposes of the marriage amendment.

In regards to other parts of the amendment, the court held that a domestic partnership was an “agreement” and that providing health-insurance benefits was a “purpose” prohibited by the amendment.

The court thus found that the benefits plans covering domestic partners were precluded by the marriage amendment. The court noted that Michigan’s amendment was unique because of its language covering not only marriage but also “similar unions.”

The dissent noted that proponents of the amendment had made statements suggesting the amendment was not meant to have this effect. The dissent argued employer benefit programs “do not grant same-sex couples the

rights, responsibilities, or benefits of marriage” because “health coverage is not a benefit of marriage,” rather it is a “benefit of employment” offered to other dependents such as children. The dissent believed the benefits plans were not similar to marriage and thus not in conflict with the amendment. The opinion also accuses the proponents of the amendment of misrepresenting the effect of the amendment by telling voters it would not affect public employment benefits but telling the court (as *amici*) that it would.

ALLEM V. ALLEM

No. 108

Court of Appeals of Maryland

May 6, 2008

<http://mdcourts.gov/opinions/coa/2008/108a07.pdf>

A wife filed suit for divorce in Maryland circuit court and the husband subsequently went to Pakistan’s Embassy and performed a *talaq* (Islamic divorce) then argued that this deprived the circuit court of jurisdiction.

The court held that the enforcement of this kind of divorce provision, where the husband may initiate the *talaq* but the wife may not do so without his permission, is contrary to Maryland’s Equal Rights Amendment and violates the state’s public policy. The court also faulted the *talaq* process for providing no “due process” for the wife. Given that a *talaq* divorce is contrary to Maryland’s public policy, it will not be granted recognition and the circuit court has jurisdiction over the divorce suit filed by the wife.

ESTROFF V. CHATTERJEE

No. COA07-384

North Carolina Court of Appeals

May 6, 2008

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/pdf/070384-1.pdf>

The former partner of a child's biological mother was denied joint custody of the child by a trial court.

On appeal, the appellate court held the trial court could have properly concluded the mother did not intend to create a co-parenting relationship with her partner and thus did not act inconsistently "with [her] constitutionally protected status as a parent." The court supported this conclusion by noting that the parties had "never entered into any written or verbal agreement" and that the trial court found that the mother "did not intend that [the partner] would be a *'de facto parent'*" and did not allow the partner "to function fully as a parent."

IN RE MARRIAGE CASES

S147999

California Supreme Court

May 15, 2008

<http://www.courtinfo.ca.gov/opinions/documents/S147999.PDF>

After ruling that local officials could not issue marriage licenses in contravention of state law, the supreme court left to a state trial court the responsibility to decide whether current California marriage law was constitutional. The trial court ruled it was not but was reversed by the court of appeals.

On appeal, the supreme court said the right to marry guaranteed by the California Constitution means "the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as a marriage." The right includes, for the court, "a 'positive' right to have the state take at least some affirmative action to acknowledge and support the family unit." The court said this right must be given

to all "without regard to their sexual orientation."

The court rejected the idea that procreation was central to marriage because people who cannot have children are allowed to marry and the right to marry is as important "to responsible individuals who can be counted upon to take appropriate precautions in planning for parenthood" as to those who might have children without specifically intending to do so. In addition, the court said marriage was important because of the "personal enrichment" it offers to those who marry. The court said "a stable two-parent family relationship, supported by the state's official recognition and protection" would benefit children raised by same-sex couples.

The court held the marriage laws "directly classify[] and prescrib[e] distinct treatment on the basis of sexual orientation" since only homosexual persons would be "inclined to enter a marriage relationship" with someone of the same sex. The court then held that sexual orientation should be treated as a suspect class, like race or sex because "a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."

The court said that providing a separate status for same-sex couples constitutes "significantly unequal treatment," that the distinction in name could be understood "as a mark of second-class citizenship," that the "unfamiliarity" of the term domestic partner could cause "significant difficulties and problems" for same-sex couples, and the constitutional right to privacy "would protect an individual from having to disclose his or her sexual orientation" but the separate status would require divulging orientation and "expose gay individuals to detrimental treatment by those who continue to harbor

prejudices that have been rejected by California society at large.”

The court concluded the part of the state’s marriage statute limiting marriage to a man and a woman “is unconstitutional and must be stricken from the statute” and Proposition 22 “cannot stand.”

A dissenting opinion (joined by another justice) said that a “sea change in the social and legal understanding of marriage” should come by the democratic process but that the majority’s opinion “forestalls that process and substitutes, by judicial fiat, its own social policy views for those expressed by the People themselves.”

Another dissent expressed approval for the idea of same-sex marriage but said the constitution did not mandate that result. The opinion said the people of the state “are entitled to preserve this traditional understanding [of marriage] in the terminology of the law” as long as the law does not treat same- and opposite-sex couples differently.

MC D. V. L.
[2008] IEHC 96
High Court of Ireland
April 16, 2008

<http://www.bailii.org/ie/cases/IEHC/2008/H96.html>

A sperm donor sought to be appointed the guardian of his son who was being raised by the mother and the mother’s domestic partner. The parties (except the child) had signed an agreement giving the women parental roles and treating the donor as a “favourite uncle” but the father wanted a more active role in the child’s life.

The court said “where a lesbian couple live together in a long term committed relationship of mutual support involving close ties of a personal nature which, were it a heterosexual relationship, would be regarded

as a *de facto* family, they must be regarded as themselves constituting a *de facto* family enjoying rights as such under” the European Convention on Human Rights. A child raised by such a couple would also be considered part of the *de facto* family. The court also found the father had “misled the [mother and her partner] as to the role which he saw himself playing in” his son’s life. The court agreed with an expert witness that the relationship between the father and the mother and her partner was “so poor that only conflict of a psychologically damaging kind to the child is likely to occur” if he is allowed to play a significant role in the child’s life. These findings, combined with the court’s belief that “the State has a strong interest in the recognition, maintenance and protection of all *de facto* families that exist since they are inherently supportive units albeit unrecognized by the Constitution” of Ireland, led the court to hold that the father should not be appointed guardian.

JANICE M. V. MARGARET K.
No. 122
Court of Appeals of Maryland
May 19, 2008

<http://mdcourts.gov/opinions/coa/2008/122a06.pdf>

The partner of an adoptive mother sought custody and visitation of the adopted child after the couple broke up. The trial and appeals courts found in favor of the partner.

The highest court noted that Maryland under law “parental unfitness and exceptional circumstances are threshold considerations in third party” custody and visitation disputes. The court declined to “recognize *de facto* parent status” because “to recognize such a status, short-circuiting the requirement to show unfitness or exceptional circumstances is contrary to Maryland jurisprudence.” The court noted that the question of the best interests of the child does not come into play

unless parental unfitness or exceptional circumstances are involved. The court thus held that the former partner should not be given visitation without first showing that the mother was unfit or that exceptional circumstances were involved. The court remanded to the trial court to find if exceptional circumstances exist.

One justice dissented, arguing, "a de facto parent is different from 'third parties' and should be treated as the equivalent of a legal parent, with the same rights and obligations."

MARTINEZ V. KULONGOSKI

A130818

Oregon Court of Appeals

May 21, 2008

<http://www.publications.ojd.state.or.us/A130818.htm>

A group of plaintiffs sought to have Oregon's marriage amendment declared invalid, arguing that it was a prohibited "revision" of the Constitution and that it "effected multiple amendments to the Oregon Constitution that are not 'closely related.'"

The court conclude the "constitutional changes wrought by [the marriage amendment] were not so 'fundamental' and 'far reaching' as to effect a 'revision.'"

Plaintiffs argued that the amendment affects four other constitutional provisions (fundamental rights, remedies, home rule and privileges and immunities) and so impermissibly addressed multiple subjects. The court first noted that the plaintiffs did not explain how the one sentence amendment could have been broken into separate amendments. According to the court, the first provision cited by plaintiffs "does not create any individual fundamental or inalienable natural rights." The "remedy clause" was not applicable because when the Oregon constitution was enacted "any common-law right to marriage" was "limited to marriages between men and women." The "home rule"

provision was not applicable because the Oregon Supreme Court held in *Li v. Oregon* that marriage validity was a question of state, not local, authority. As to the privileges and immunities provision, the court assumed ("without deciding") that the marriage amendment did amend this provision but found that the effect of the marriage amendment on the provision was not complicated and thus, any effects of the amendment were closely related to its main purpose.

TSIRLIN V. TSIRLIN

2008 NY Slip Op 50981(U)

New York Supreme Court, Kings County

May 14, 2008

http://www.courts.state.ny.us/reporter/3dseries/2008/2008_50981.htm

A husband obtained a get (Jewish divorce) in New York and the parties relied on it to get a divorce in Israel. When the husband subsequently filed for divorce in New York, his wife said they were already divorced and the Israeli divorce should be recognized in New York.

This court refused to recognize the divorce, holding that if the court sanctioned "the utilization of a 'Get' to circumvent the constitutional requirement that only the Supreme Court can grant a civil divorce, then a party who obtains a 'Get' in New York could register it in a foreign jurisdiction and potentially, later on, rely on the 'Get' to obtain a civil divorce in New York thereby rendering New York State's Constitutional scheme as to a civil divorce ineffectual" thus amending the state's divorce law "to provide a new grounds for divorce." The court further held the husband should not be punished for "remov[ing] all barriers to remarriage prior to the entry of" the divorce judgment.

BASHAWAY V. CHENEY BROS., INC.

2008 WL 2048279

Court of Appeal of Florida, First District

May 15, 2008

A woman in a same-sex relationship was involved in a car accident. Subsequently, her partner sued for loss of consortium. The partner argued that her claim should be evaluated not on whether she was legally married but on “the seriousness of the relationship of the partners.” Alternatively, she argued that there should be “an exception to the marriage requirement for same-sex partners because they are prohibited in Florida from becoming legally married.”

The court held that Florida’s statute precluding same-sex marriage meant the legislature “has left inescapable the conclusion that such legal rights as would flow from marriage will likewise not be recognized in Florida.” The court noted that “many persons involved in close relationships find themselves without any possibility of a claim for loss of consortium” and held that an “emotional injury, no matter how deeply felt” is not the basis of a claim, but rather “the existence of a legal relationship.”

M.J. V. NICHOLS

Saskatchewan Human Rights Tribunal

May 23, 2008

<http://www.saskhrt.ca/forms/index/Descisions/05232008.htm>

A man filed a complaint with his provincial Human Rights Tribunal after a marriage commissioner refused to perform his same-sex marriage ceremony because of religious objections. The tribunal agreed that a denial of service by a government official was discrimination on the basis of sexual orientation and that a religious exemption for the commissioner was not required, in part because “permitting marriage commissioners to justify refusing their statutory service on religious grounds could lead to as many eligibility tests for civil marriage as there are marriage commissioners.” The commissioner was fined \$2,500 and ordered to perform same-sex marriages in the future.

RECENT LAW REVIEW ARTICLES

Laura Elizabeth Brown, *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act* 39 MCGEORGE LAW REVIEW 267 (2008). Argues that Congress may constitutionally use the Mann Act to regulate polygamy at the federal level.

Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals* 27 CHILDREN LEGAL RIGHTS JOURNAL No. 3, p. 1 (Fall 2007) at http://www.law2.byu.edu/organizations/marriage_family/mar2007/drafts/07-Avila%20Adoption%20Article%20CLJ.pdf.

Narrates the decision of Massachusetts Catholic Charities to end its practice of placing children for adoption to avoid conflicts with state law requiring placements with same-sex couples.

Gary Chartier, *Marriage: A Normative Framework* 9 FLORIDA COASTAL LAW REVIEW 347 (2008). Describes a new model for understanding marriage as an egalitarian life-partnership arising from love.