

Marriage Law Digest

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NOVEMBER 2008 CASE SUMMARIES

William C. Duncan, Editor

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CUNNINGHAM V. TARDIFF

2008 WL 4779641

Superior Court of Connecticut

October 14, 2008

A same-sex couple married in Canada and living in Texas sued a Connecticut couple with whom they'd entered into a surrogacy contract. The men sought a declaration of paternity while the surrogate disclaimed any natural rights including having her name on the birth certificate.

The court said that previous cases suggest Connecticut public policy favors the recognition of surrogacy contracts. The court said the state assisted reproduction statutes "in conjunction with the plaintiff's legally recognized marriage [the court here cites last month's Connecticut case on same-sex marriage] lend additional support" to placing the men's names on the child's birth certificate. In the wake of the state's redefinition of marriage in Kerrigan, "any children born as a result of these procedures acquire in all respects the status of a legitimate child." Thus, the court ordered a replacement birth certificate with the names of the men who had contracted with a surrogate.

IN THE MATTER OF THE ADOPTION OF DOE & DOE

Case No. Redacted

Florida Circuit Court, Eleventh Judicial
Circuit

November 25, 2008

http://www.aclu.org/images/asset_upload_file_16_37906.pdf

A man and his partner sought to adopt two foster children and challenged Florida law prohibiting adoption by homosexual persons.

The court held that “public policy favors permanent family life rather than a mere indefinite length of protective custody.” The court argued the current adoption law “violates the Children’s rights by burdening liberty interests by unduly restraining them in State custody on one hand and simultaneously operating to deny them a permanent adoptive placement that is in their best interests on the other.” The court also held “the blanket exclusion of gay applicants defeats Florida’s goal of providing dependent children of a family through adoption” and “causes some children to be deprived of a permanent replacement with a family that is best suited to meet their needs.” The court said that no governmental interest justifies the adoption prohibition because evidence “proves” that “homosexuals are no more susceptible to mental health or psychological disorders, substance or alcohol abuse or relationship instability than their heterosexual counterparts”; professional organizations agree “there is a well established and accepted consensus in the field that there is no optimal gender combination of parents”; and “public morality per se, disconnected from any separate legitimate interest” cannot “justify unequal treatment.” In regards to this last point, the court adds that “[e]lecting to parent and assume full responsibility for a child not one’s own is one of the most noble decisions made in a lifetime; it is respected by many,

considered by some, made by few and approved for fewer still.”

RECENT LAW REVIEW ARTICLES

Cort I. Walker, *The Defense of Marriage Act as an Efficacious Expression of Public Policy: Towards a Resolution of Miller v. Jenkins and the Emerging Conflict Between States Over Same-Sex Parenting* 20 REGENT UNIVERSITY LAW REVIEW 363 (2007-2008). Argues that DOMA protects state public policies in regards to parenting as well as marriage.

Jason N.W. Plowman, *When Second Parent Adoption is the Second Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality* 11 SCHOLAR: ST. MARY’S LAW REVIEW ON MINORITY ISSUES 57 (2008). Argues that in the absence of same-sex marriage, state legislatures should enact laws allowing for joint adoption by same-sex couples.

Brenda Cossman, *Between and Between Recognition: Migrating Same-Sex Marriages and the Turn Toward the Private* 71 LAW & CONTEMPORARY PROBLEMS 153 (2008). Argues that traditional conflicts law may not adequately address the concerns of same-sex couples who move from jurisdictions where they may marry to state where such marriages are not recognized.

Perry Dane, *A Holy Secular Institution* 58 EMORY LAW JOURNAL __ (forthcoming) at <http://ssrn.com/abstract=1293946>. Argues that secular and religious aspects of marriage are intertwined and that “believers are legitimate stakeholders in any debate over the meaning of civil marriage.”

John Witte Jr. & Joel A. Nichols, *More Than a Mere Contract: Marriage as a Contract and Covenant in Law and Theology* 5 UNIVERSITY OF ST. THOMAS LAW JOURNAL 595 (2008). Details the history of the common law notion that marriage is more than a contract.

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Andrew F. March, *Is There a Right to Polygamy and Incest? Should a Liberal State Replace "Marriage" with "Registered Domestic Partnerships"?* (November 3, 2008) at <http://ssrn.com/abstract=1294783>. Argues that "the most justifiable policy on liberal grounds" is not marriage but registered partnerships and that polygamy and incest should not be bars to such partnerships although incestuous acts could still be criminalized if indicative of abuse or negligence.

Sharon Elizabeth Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect* 16 WILLIAM & MARY BILL OF RIGHTS JOURNAL 685 (2008). Argues that constitutional review of challenges to marriage laws ought not ask whether "gay marriage" is a fundamental right but whether sexual orientation is a suspect class and whether marriage is a fundamental right.