

# Marriage Law Digest

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## OCTOBER 2008 CASE SUMMARIES

William C. Duncan, Editor

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### KERRIGAN V. DEPARTMENT OF PUBLIC HEALTH

SC 17716

Supreme Court of Connecticut

October 10, 2008

<http://www.jud.ct.gov/external/supapp/Cases/AROCr/CR289/289CR152.pdf>

Eight same-sex couples challenged the state's definition of marriage but the trial court said that the essential equivalence between the state's civil union status and marriage meant there was no constitutional deprivation in not allowing same-sex couples to marry.

The supreme court disagreed, holding that by creating civil unions, the legislature had relegated same-sex couples "to an inferior status, in essence, declaring them to be unworthy of the institution of marriage." The majority believed civil unions are not equal because marriage "is an institution of transcendent historical, cultural and social significance."

The court also held that the laws classified on the basis of sexual orientation and that this is a "quasi-suspect" classification because (1) there has been a history of discrimination against homosexual persons, (2) their identifying characteristic (same-sex attraction) is not related to their "ability to perform in society", (3) it would be "unacceptable" to require them to alter their preference and (4) they are in a minority.

The state had argued that the marriage law was justified by the state's interest in maintaining uniformity with other state's laws and in preserving the traditional definition of

marriage. The majority said the first interest was not a justification for the discriminatory law because it was unsupported by precedent. The court then noted the state had not argued that marriage promotes the best interests of children or responsible procreation. The court said that beliefs in the importance of traditional marriage, tradition and moral disapproval are not justifications for the marriage law.

Two justices dissented, arguing that the success of same-sex couples in securing rights in Connecticut showed they were not politically powerless so the majority's conclusion that they deserved quasi-suspect class status was not justified. This dissent also argued that because marriage was a fundamental social institution it should only be changed by democratic processes.

One of these dissenting justices also wrote separately to say the strong presumption in favor of the constitutionality of laws enacted by the legislature required a higher burden of proof than the court required here.

Another judge dissented arguing that the majority opinion was premised on a presumption "that the essence of marriage is a loving, committed relationship between two adults" but the actual purpose "is to privilege and regulate procreative conduct." The dissent also said "a couple that is incapable of engaging in the type of sexual conduct that can result in children is not similarly situated to a couple that is capable of engaging in such conduct."

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**GHASSEMI V. GHASSEMI**  
**2007 CA 1927**  
**Louisiana Court of Appeal, First Circuit**  
**October 15, 2008**  
<http://www.la-fcca.org/Opinions/Pub2008/2008-10/2007CA1927Oct2008.Pub.11.pdf>

A woman married in Iran sought a divorce in Louisiana. The husband argued the marriage was invalid because he and his wife are first cousins. The trial court refused to recognize the marriage.

The court of appeals noted that Louisiana law favors recognizing the validity of a marriage. The court held that Louisiana does not have a strong public policy against recognizing first cousin marriages, a conclusion supported by the fact that when this marriage was contracted such marriages were valid in Louisiana and by the lack of a law in Louisiana specifically refusing recognition of such marriages contracted in other jurisdictions.

**C.M. V. C.C.**  
**2008 WL 4602300**  
**Supreme Court of the State of New York,**  
**New York County**  
**October 14, 2008**

A same-sex couple married in Massachusetts sought a divorce in New York. The court held that same-sex marriages do not fit within the narrow public policy exception to the general rule that a marriage valid where contracted is valid everywhere. The court based its decision on an earlier appellate division case and on the fact that the state legislature had not specifically prohibited recognition.

**BAYNE V. JOHNSON**  
**Docket No. A-0974-06T1**  
**New Jersey Appellate Division**  
**October 27, 2008**

<http://www.judiciary.state.nj.us/opinions/a0974-06.pdf>

After a long relationship in which she lived with a married man and sometimes with both he and his wife, a woman sought “palimony” from her former boyfriend. The trial court ordered the man to pay alimony.

The appellate division reversed. It described the test for palimony as whether the couple lived in a marriage-type relationship and whether one promised the other to support him or her. Here, the court found a marital type relationship but that there was no promise of support. Thus, the palimony award was reversed.

### RECENT LAW REVIEW ARTICLES

Stephen D. Sugarman, *What is a “Family”?* *Conflicting Messages from Our Public Programs* 42 FAMILY LAW QUARTERLY 231 (2008). Describes how some public programs (like welfare) recognize many different arrangements as “families” while others (like taxes and social security) still use marriage and argues that the small amounts of money given in welfare treats nontraditional families as “second class.”

Andrew Bruck, *Equality in the Garden State: Litigation and Social Activism* 2 HARVARD LAW & POLICY REVIEW 419 (2008). Describes the litigation to redefine marriage in New Jersey.

Penelope E. Andrews, *Who’s Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa* 2009 UTAH LAW REVIEW \_\_ (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1284457](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1284457)). Describes the effort to balance a recognition of existing polygamy in South Africa with constitutional guarantees of women’s equality.

Elizabeth S. Scott, *Surrogacy and the Politics of Commodification* \_\_ JOURNAL OF LAW AND CONTEMPORARY PROBLEMS \_\_ (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1282330](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1282330)). Discusses reasons for the shift

in legal thinking about surrogacy contracts from concerns about commodification of women and children to concerns about maximizing certainty and efficiency in such contracts).

Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism is Not the Main Event* 17 TEMPLE POLITICAL AND CIVIL RIGHTS LAW REVIEW 287 (2008). Argues that the debate over same-sex marriage is not primarily about federalism concerns but is rather a cultural struggle in which federalism is merely tactical.

Nancy J. Knauer, *Same-Sex Marriage and Federalism* 17 TEMPLE POLITICAL AND CIVIL RIGHTS LAW REVIEW 421 (2008). Argues that the patchwork of legal statuses for same-sex couples in various states creates hardships for these couples as they travel.

Thomas Ryan Lane, *Rational Basis Review Irrationally Applied: The Legalization of Same-Sex Marriage by the Supreme Judicial Court of Massachusetts in Goodridge v. Department of Public Health* 1 LIBERTY UNIVERSITY LAW REVIEW 155 (2008). Argues that the Massachusetts Supreme Judicial Court majority in *Goodridge* harmed the principle of the rule of law by applying a different standard than it said it was using in that case.

John Tuskey, *And They Became One Flesh: One Catholic’s Response to Victor Romero’s “Other” Christian Perspective on Lawrence v. Texas* 35 SOUTHERN UNIVERSITY LAW REVIEW 631 (2008). Provides a counter to another article arguing that Christians should embrace the *Lawrence* decision and the idea of same-sex marriage.

Marsha Garrison, *Reviving Marriage: Could We? Should We?* 10 JOURNAL OF LAW & FAMILY STUDIES 279 (2008). Argues that the state should accompany marriage promotion efforts with efforts to ameliorate the conditions that seem to promote decisions not to marry or to rear children out of wedlock.

Margaret F. Brinig, *The Effects of Integrated and Intentional Parenthood on Children* NOTRE DAME LEGAL STUDIES PAPER No. 08-34 (October 22, 2008) at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1288046](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1288046). Provides research data suggesting that family structure matters for children and that children benefit from being raised by their parents.