

Marriage Law Digest

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GOUGH V. TRINER

2006 WL 1868330

Ohio Court of Appeals, Seventh District

June 28, 2006

[http://www.supremecourtsohio.gov/rod/ne
wpdf/7/2006/2006-ohio-3522.pdf](http://www.supremecourtsohio.gov/rod/ne
wpdf/7/2006/2006-ohio-3522.pdf)

In an action for a domestic violence protection order involving a cohabiting couple, the defendant moved to dismiss because of an alleged conflict between the charging statute and the Ohio marriage amendment. The trial court granted the motion. The court said the domestic violence law created a status for cohabiting couples but that this status is far short of the significance of marriage as the amendment prohibits.

HOBBS V. PENDER COUNTY

File No. 05 CVS 267

North Carolina Superior Court

August 25, 2006

<http://www.ncfamily.org/pdf/files/HobbsvSmith.pdf>

Plaintiff challenged state law criminalizing unmarried cohabitation because it was used as the basis for her firing from a municipal job. The court ruled that the statute "violates plaintiff's substantive due process right to liberty as explained in *Lawrence v. Texas*."

SENSATIONS, INC. V. CITY OF GRAND RAPIDS

File No. 1:06-CV-300

U.S. District Court, Western Michigan

August 28, 2006

<http://www.alliancealert.org/2006/2006090101.pdf>

Adult business challenged a city ordinance prohibiting nude dancing and imposing additional requirements (such as hour restrictions, requirements of open booths, and buffer zones). The court held that the plaintiffs could not rebut the state's asserted interest in the regulations by showing that plaintiffs' expert criticized the findings of fact relied on by the city. The court also held that the plaintiffs could not show that the ordinance was addressed to speech rather than secondary effects. The court noted that other cases have upheld regulations similar to this law and refused to enjoin its enforcement.

CONNECTICUT V. SCRUGGS

SC 17857

Connecticut Supreme Court

September 5, 2006

[http://www.jud.state.ct.us/external/supapp/
Cases/AROCr/CR279/279cr131.pdf](http://www.jud.state.ct.us/external/supapp/Cases/AROCr/CR279/279cr131.pdf)

A jury convicted a mother of "risk of injury to a child" because it believed that the mother's behavior in keeping a cluttered and unclean residence caused a situation likely to injure the child's mental health (he took his own life possibly as a result of severe bullying at school). The defendant challenged the charging statute as applied as unconstitutional because (1) she did not know poor housekeeping was criminal and (2) no expert testimony had established that home conditions were likely to have caused mental health injury to the child.

The court held that no evidence indicates that the defendant should have known that conditions in her home created an unlawful

risk to the child. To the court, the fact that the state child welfare agency had not taken action regarding the home conditions (despite their awareness of them) is evidence that the risk was not obvious. Also, the court noted that the child's home conditions were not the only possible factor in the boy's suicide.

**IN RE R.L.C.
No. COA05-1120
North Carolina Court of Appeals
September 5, 2006**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2006/pdf/051120-1.pdf>

Juvenile adjudicated delinquent for two counts of "crime against nature" involving 13 year old girl (the young man was no more than three years her senior) that took place in a car outside a bowling alley. He argues that the law is unconstitutional as applied because the legislature could not have intended to criminalize consensual non-procreative sexual relations but not procreative sexual relations. The court noted at the outset that *Lawrence v. Texas* only applies to adults' private conduct out of public view. The court rejected the constitutional claim because "the crimes against nature statute remains applicable in cases involving minors and public conduct."

A dissent noted that most statutes involving minors' sexual conduct involves age differentials of at least three years and suggests that this should be understood to be part of the requirement of the crimes against nature statute.

**PROTECT MARRIAGE ILLINOIS V. ORR
No. 06-3111
U.S. Court of Appeals for the Seventh
Circuit
September 6, 2006**

<http://www.ca7.uscourts.gov/tmp/WA11U7>

[AQ.pdf](#)

An advocacy group tried to place an "advisory question" of whether the legislature should amend the state constitution to define marriage on the ballot. Since more than five percent of the supporting petitions were invalidated, the question was not placed on the ballot. The group subsequently sued alleging unconstitutionality of the petition requirements. The court held that there is no constitutional requirement that advisory questions have to appear on the ballot. It noted that as long as the requirements meant to prevent ballot clutter are not skewed against certain advocates or viewpoints, there is no constitutional violation. The court held the state could enact regulations aimed at preventing overlong ballots and the resulting confusion. The court also found that different requirements for candidates for office are justified because the primary aim of ballots is the selection of candidates.

**PETRUSKA V. GANNON UNIVERSITY
Case No. 05-1222
U.S. Court of Appeals for the Third Circuit
September 6, 2006**

<http://www.ca3.uscourts.gov/opinarch/051222pa.pdf>

The plaintiff was a university chaplain at a Catholic school. After she was fired, she sued alleging sex discrimination and various related claims. The district court dismissed, saying that the ministerial exception to employment discrimination claims applied.

On appeal, the panel did not accept the district court's finding that the court did not have jurisdiction to hear the claim. The court did, however, adopt the ministerial exception and held that Title VII does not apply to clergy employment in order to

avoid constitutional problems. In support the court held that “the process of selecting a minister is *per se* a religious exercise.” To the court the “ministerial exception, as we conceive of it, operates to bar any claim, the resolution of which would limit a religious institution’s right to select who will perform particular spiritual functions.” Since the action here was a decision about who would perform “spiritual functions,” to interfere would, the court believed, violate the college’s Free Exercise right. The court thought that the plaintiffs breach of contract claim, however, would not entangle the court in religion in violation of the Establishment Clause, but remanded for a determination on this point.

POWELL V. BUNN
S52657

Supreme Court of Oregon
September 8, 2006

<http://www.publications.ojd.state.or.us/S52657.htm>

Along with other groups, the Boy Scouts were allowed by a school to make presentations to students on campus during school time. An atheist mother said allowing the Scouts to do so involved the school in discriminatory conduct since the Scouts do not allow atheist members.

Here, the court found the Boy Scouts treated everyone the same in disseminating information. The Scouts only make distinctions later in the enrollment process conducted away from school. Thus, the school was not involved in a discriminatory practice.

The dissent conceded the offer of membership presented at the school was neutral but argued the operation of the presentation was discriminatory because only religious boys could actually join.

ARREDONDO V. LOCKLEAR

No. 05-2237

U.S. Court of Appeals for the Tenth Circuit
September 12, 2006

<http://laws.lp.findlaw.com/10th/052237.html>

The state’s child welfare agency removed two children based partly on mistaken explanation of a child’s injury by a doctor. The parents sued under 42 U.S.C. §1983 alleging deprivation of procedural due process because removal took place without notice and a hearing. The defendants argued that it was responding to an emergency situation. The district court agreed.

The court held that defendants could reasonably have believed the child was in danger even if later, there was a change in their understanding of the circumstance.

SPIERING V. HEINEMAN
4:04CV3385

U.S. District Court, District of Nebraska
September 12, 2006

<http://howappealing.law.com/SpieringVsHeineman.pdf>

Nebraska requires testing of newborns for metabolic diseases within 48 hours of birth. Parents (Scientologists) have religious objections to testing until the child is seven days old. The parents challenged the requirement alleging First, Fourth and Fourteenth Amendment violations. The court noted that the law was not specifically targeted at religious conduct and does not implicate a hybrid right because (1) it doesn’t involve parent’s rights to control their children’s education, and (2) the parents rights are balanced by the child’s need. The court held the state has a legitimate interest in safeguarding children’s health. This analysis, according to the court, also defeats the Fourteenth Amendment parental rights claim.

VELEZ V. SMITH

A110868

Court of Appeal of California, First

Appellate District

September 12, 2006

<http://www.courtinfo.ca.gov/opinions/documents/A110868.PDF>

A same-sex couple registered a domestic partnership with the city and county of San Francisco. Eventually one of the partners ended the registered partnership and one sought dissolution in state court. The court, however, held that it lacked jurisdiction since the couple had never registered with the state of California.

On appeal, the court held that the state domestic partnership law requires registration. Here the couple did not file for a domestic partnership with the state so they could not access the courts under the terms of the statute. The court also held that the putative spouse doctrine doesn't apply to domestic partnerships. The court did find that the partner is free to make contractual and similar claims, though not in the family court.

KONRAD V. GERMANY

Application no. 35504/03

European Court of Human Rights

September 18, 2006

<http://www.alliancealert.org/2006/20060926.pdf>

Parents of two children were denied their request to home school their children based on religious convictions. The German Constitutional Court upheld the refusal because the State's obligation to educate children includes (1) "social competence in dealing with other persons who hold different views" which required school attendance and (2) "integration of minorities" that required that minorities

"should not exclude themselves."

The court said that "respect is only due to convictions on the part of the parents which do not conflict with the right of the child to education" which "means that parents may not refuse the right to education of a child on the basis of their convictions." The court concluded that the German court's decision was not clearly erroneous.

PIGGEE V. CARL SANDBURG COLLEGE

No. 05-3228

U.S. Court of Appeals for the Seventh Circuit

September 19, 2006

<http://www.ca7.uscourts.gov/tmp/WH0MMBDX.pdf>

A part-time college instructor gave religious tract to a gay student who complained to the administration resulting in a finding of sexual harassment. The teacher was not rehired at the end of the semester and sued alleging deprivation of free speech, free exercise and equal protection.

The court held that since the salon where the literature was given was an instructional area, the college had a right to "insist on a professional relationship between the students and the instructors." The court therefore rejected all of plaintiffs' claims.

AMUNRUD V. BOARD OF APPEALS

76590-1

Supreme Court of Washington

September 21, 2006

<http://www.courts.wa.gov/opinions/?fa=opinions.opindisp&docid=765901MAJ>

A taxi-driver whose commercial drivers license was suspended for nonpayment of child support arguing that he had been denied (1) procedural due process because he had received no "meaningful hearing"

and (2) substantive due process because he had lost the fundamental right to pursue an occupation.

The court held that here the father was given the right to appeal the suspension as well as the order increasing support. The court believed the right to pursue employment was only subject to rational basis. To the court, enforcement of support is a legitimate state interest and suspension is an incentive to pay support. The majority charged the dissent with trying to return to the *Lochner* era.

The dissent argued that since the revocation was entirely unrelated to the purpose of the license, it violated due process. He said: "it is up to us to protect the constitutional rights of our citizens, we should not be concerned that the legislature will love its federal bribe money—certainly I'm not" (referring to federal subsidy for child support enforcement efforts). The dissent believed "the right to pursue an occupation free from governmental interference" fundamental. Since there is no association between unsafe driving and failure to pay child support payments, the revocation denies the father of the right to pursue an occupation (and ability to make the support payments).

**STANLEY V. CARRIER MILLS-
STONEFORT SCHOOL DISTRICT
2006 WL 2710672
U.S. District Court, Southern District of
Illinois
September 21, 2006**

A mother had religious objections to a school's "Opposite Sex Day" that rewarded students for dressing in the clothing of the opposite-sex and sued alleging deprivation of free exercise and due process. The school motioned to dismiss. The court, however,

held that the mother should be allowed to try and prove that the school policy coerced students to violate their beliefs. The court also held that the mother should be allowed to present evidence that the school's actions constituted sexual harassment.

**DAVEY V. DOLAN
2006 WL 2730017
U.S. District Court, Southern District of
New York
September 26, 2006**

After divorce, a husband filed numerous lawsuits against his former wife, her relatives and even his own son in state courts. After all these were dismissed, he filed a federal lawsuit. The court dismissed all of his claims as unclear and not stating legal claims. The court then enjoined the plaintiff from filing any further lawsuits and sanctioned him by requiring he pay the defendants' legal fees.

**MOSES V. KING
A06A1249
Georgia Court of Appeals
September 27, 2006**

http://www.lambdalegal.org/binary-data/LA_MBDA_PDF/pdf/720.pdf

The father of a twelve year old girl whose custody he shared with the mother whom he had not married. The husband moved for modification of custody based partly on the mother's same-sex sexual relationships. The trial court gave the father physical custody based on the mother's cohabitation with another woman.

The appeals court held cohabitation was not a proper basis for denying custody absent harm to a child. Here, the court believed, there was no evidence of a material change in the mother's circumstance or of harm to the child, so the change in custody was

reversed.

MOTTE V. MOTTE
Appeal No. 2005Ap2776
Wisconsin Court of Appeals
September 27, 2006

<http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=26566>

Parties to a divorce agreed to waive the portion of the husband's child support that was in arrears and make permanent the amount of payment regardless of with which parent the children lived. The court rejected the agreement, holding that to "permanently waive or set a ceiling on child support is contrary to public policy."

SHEPP V. SHEPP
J-97-2004
Supreme Court of Pennsylvania
September 27, 2006

<http://www.aopc.org/OpPosting/Supreme/out/1-97-2004mo.pdf>

A father who believes in polygamy and wants to teach that to his daughter sought to invalidate a custody restriction that prohibited him from teaching his daughter about polygamy while she was in his custody.

The court found the facts of this case implicated a hybrid right (both free exercise and parental rights). The court held that since the trial court found the father's beliefs posed no grave threat to the daughter, they cannot be subject to the restriction imposed even though the beliefs endorsed criminal conduct.

A concurrence argued that the two conflicting parents rights should effectively cancel each other out and that applying strict scrutiny unfairly advantages the father here.

The dissent believed the father had gone beyond discussing polygamy towards coercing the daughter's acceptance of it. The opinion also believed that since polygamy represents a threat to society, even if the father's rights were implicated, they could be overcome by the state's interest in prohibiting polygamy.

HELGELAND V. WISCONSIN MUNICIPALITIES
Appeal No. 2005AP2540
Wisconsin Court of Appeals
September 28, 2006

<http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=26598>

State employees challenged a statute defining "dependant" for purposes of allowing family members of public employees to gain health insurance coverage. They allege the statute is unconstitutional because it does not include same-sex domestic partners as dependants. The legislature and a number of municipalities sought to intervene in the case but were denied by the trial court.

In regards to the legislature, the court held that the legislative authority over setting public policy is limited to creating constitutional legislation, therefore if the legislation they approve is not constitutional they have not lost any of their valid authority. The court also believed the legislative interest in defending the constitutionality of the law conflates the role of the legislature with that of the judiciary. In this case, the court also held, if the result increases the state budget, the legislature still has the "ability to enact and balance the budget."

In regards to municipalities, the court said they have an interest in the litigation because they will have to spend more

money if the plaintiffs win. The court did not believe, however, that the attorney general would not adequately defend their interest. The court said that the attorney general's statements supporting the principle of civil unions in a political debate and a "gay pride" parade do not involve the statute at issue in this case and so do not indicate an inability to be impartial.

As to permissive intervention, the court held the legislature merely wanted to use different arguments and this was not a reason for intervention. As to the municipalities, the court held the trial court could have concluded that allowing intervention would delay the case.

A concurring/dissenting opinion noted that the attorney general has broad discretion on how to defend a statute, so the proposed intervenors could be concerned about how that defense will take place. To this judge, allowing intervenors in "just does not hurt anything." The opinion said: "A good way to create mistrust is to deny participation in government" and "there is a reasonable perception that the attorney general has taken a position contrary to the one she advocates on the merits of this litigation." The judge agreed with the denial of intervention of the legislature because the legislature has no responsibility to litigate.

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

No. 04-2656

**Massachusetts Superior Court, Suffolk
County**

September 29, 2006

http://www.glad.org/marriage/Cote-Whitacre/9_29_06.pdf

Nonresident same-sex couples challenged Massachusetts law allowing only state residents to contract same-sex marriages in

Massachusetts. Plaintiffs' claim was initially rejected in trial court and then heard by the Supreme Judicial Court. There, the court affirmed the denial of the claims of plaintiffs from Connecticut, Maine, New Hampshire and Vermont because those states' laws clearly defined marriage as the union of a man and a woman. The court, however, remanded for the trial court to determine whether the plaintiffs from New York and Rhode Island were prohibited by the laws of their state of residence.

On remand, the court first relied on the recent decision of the New York Court of Appeals in *Hernandez v. Robles* to determine that same-sex marriages are prohibited in New York.

For the Rhode Island plaintiffs, the court had to determine the appropriate standard since there was no majority opinion in the SJC decision. The court, thus, used the narrowest construction of the nonrecognition statute (Chief Justice Marshall's opinion) to determine that Rhode Island same-sex couples can seek marriage licenses only if same-sex marriages are not "explicitly deemed void or otherwise expressly forbidden by a Rhode Island constitutional amendment, by a Rhode Island statute, or by a Rhode Island Supreme Court decision." No such amendment, statute, or decision exists so Rhode Island couples, the court held, can contract same-sex unions in Rhode Island.