

Marriage Law Digest

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Marriage Law Foundation

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DIBLE V. CITY OF CHANDLER

No. 05-16577

**U.S. Court of Appeals for the Ninth Circuit
September 5, 2007**

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/B3653728C55546958825734D0053178F/\\$file/0516577.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/B3653728C55546958825734D0053178F/$file/0516577.pdf?openelement)

<http://www.austlii.edu.au/au/cases/vic/VCA/T/2007/916.html> A police officer claimed a violation of his First Amendment rights when he was fired “for participating in (performing in, recording and purveying) a sexually explicit website with his wife.” The district court granted summary judgment for the city.

The majority of the court of appeals panel noted the officer’s activities “did not contribute speech on a matter of public concern” and the officer “was not interested in conveying any message whatsoever and was engaged in the indecent public activity solely for profit.” The court also noted that the public holds police officers to a high standard and that other police officers in the city experienced problems as a result of the activities of the discharged officer. Thus, in discharging the officer, the city had not violated his constitutional rights. The court also rejected the plaintiffs claim that his privacy rights had been violated since the conduct supposedly covered by such a right was public.

One justice concurred in the result because he believed the city could have fired the officer for lying in the course of an investigation into the officer’s activities. This judge disagreed with the majority’s First Amendment activity because “vigorous

enforcement of the free speech guarantee of the First Amendment often requires that we protect speech that many, even a majority, find offensive.” This judge would have adopted “a rule that protects off-duty speech unrelated to employment when the speech itself causes no internal problems, and the only disruption is in the external relations between the police department and the public unhappy with the officer’s expression.”

GODFREY V. HEVESI

Index No. 5896-06

New York Supreme Court

September 5, 2007

<http://www.osc.state.ny.us/press/releases/sept07/marriage3.pdf>

A state employee asked the State Comptroller how his retirement benefits would be affected if he entered a same-sex marriage in Canada. The Comptroller said New York would recognize the marriage. Taxpayers sued, alleging the policy determination would result in an illegal use of state funds.

The trial court said that New York recognizes marriages from other jurisdictions unless the legislature has specifically prohibited recognition or in cases of polygamy or incest. Here, the court said the Comptroller’s decision to recognize Canadian same-sex marriages “is consistent with New York law regarding the recognition of marriages performed elsewhere” because “New York, unlike the majority of States, has not enacted a ‘defense-of-marriage’ act so as to expressly prohibit recognition of same-sex marriages”

and the decision doesn't "concern marriages involving polygamy or incest."

The court distinguished last year's *Hernandez v. Robles* decision because it only ruled on New York's law.

**AN APPLICATION FOR JUDICIAL
REVIEW BY THE CHRISTIAN
INSTITUTE, ET. AL**

[2007] NIQB 66

**High Court of Justice in Northern Ireland
September 11, 2007**

[http://www.courtsni.gov.uk/NR/rdonlyres/E
A5461E1-AE50-42BA-A12D-
B09ACA992B41/0/j_j_WEAC5888Final.htm](http://www.courtsni.gov.uk/NR/rdonlyres/E
A5461E1-AE50-42BA-A12D-
B09ACA992B41/0/j_j_WEAC5888Final.htm)

Representatives of church organizations sought review of government regulations prohibiting sexual orientation discrimination. They alleged there "has not been equality of treatment between the anti-discrimination measures on the ground of sexual orientation on the one hand and orthodox religious beliefs on the other hand."

The court said the government had no obligation to consult with these groups in creating the law, but that if "consultation is embarked upon it must be carried out properly." The court concluded the consultation process was not proper because the final regulations are "fundamentally different" from the proposals made available for consultation. Thus, "[i]t was unfair to the consultees who agreed with the proposed deferral of harassment to induce them not to address their objections to the respondent and then to introduce harassment provisions." The court said the harassment provision might "extend to teaching and the curriculum at the establishment and the articulation of the orthodox religious view on homosexuality." The court thus set aside the provision in the regulations outlawing harassment defined

as "on the ground of sexual orientation, engag[ing] in unwanted conduct which has the purpose or effect of violating [a person's] dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment" for another.

LESKOVAR V. NICKELS

No. 54354-7-I

Court of Appeal of Washington

September 17, 2007

<http://www.courts.wa.gov/opinions/pdf/54354-7.pub.doc.pdf>

The mayor of Seattle issued an executive order requiring the city to give spousal benefits to public employees in same-sex marriages. Citizens challenged the order, arguing the order conflicted with state marriage law. The trial court dismissed the case.

The court of appeals, said that the "field of employee benefits for city employees" was not preempted by state law, so it remains a local issue. Thus, the executive order affecting city employee benefits was within the right of the city. The court held the order does not create legal marriages or give "legal effect to same-sex marriages" in contradiction of state law.

CONAWAY V. DEANE

No. 44

Court of Appeals of Maryland

September 18, 2007

<http://mdcourts.gov/opinions/coa/2007/44a06.pdf>

Nine same-sex couples and others sued alleging the state's definition of marriage was unconstitutional. The trial court held that the definition of marriage was a form of sex discrimination.

On appeal, the state's highest court reversed. The court first held that the

legislative history of the Maryland Equal Rights Amendment indicates the amendment was meant to end discrimination against men or women as a class and “to remedy the long history of subordination of women in this country.” The court noted that nearly every Maryland case addressing sex discrimination “has dealt with situations where the distinction drawn by a particular governmental enactment or action singled-out for disparate treatment men and women as discrete classes.” Here, the court concluded that the marriage laws “do not separate men and women into discrete classes for the purpose of granting to one class of persons benefits at the expense of the other class. Nor does the statute, facially or in its application, place men and women on an uneven playing field. Rather, the statute prohibits equally both men and women from the same conduct.” The court distinguished the anti-miscegenation decision *Loving v. Virginia* because there was no evidence the current Maryland marriage law was meant “to differentiate between men and women as classes on the basis of some misconception regarding gender roles in our society.”

The court said that the marriage law “draws a distinction based on sexual orientation” but that orientation is not a suspect or quasi-suspect class status. The court noted that homosexuals have been subject to prejudice and legal disabilities but that they are not “so politically powerless that they are entitled to ‘extraordinary protection from the majoritarian political process.’” The court noted, in support of this conclusion, that the Maryland legislature has enacted a number of measures favorable to homosexual interests. The court also held: “Based on the scientific and sociological evidence currently available to the public, we are unable to take judicial notice that gay, lesbian, and bisexual persons display

readily recognizable, immutable characteristics that define the group such that they may be deemed a suspect class for purposes of determining the appropriate level of scrutiny to be accorded the statute in the present case.”

The court then turned to plaintiffs’ due process claims to determine whether the right claimed “is deeply rooted in the traditions, history, and conscience of the people of Maryland and the Nation as a whole.” The court said the specific issue was “whether the right to choose same-sex marriage is fundamental.” The court recognized that U.S. Supreme Court precedent had established a fundamental right to marry but noted that “they do not represent a compelling basis to extend the fundamental right to include same-sex marriage.” The court said “the cases infer that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species.” In fact, the court said that virtually all of the cases “indicate[] as the basis for the conclusion the institution’s inextricable link to procreation, which necessarily and biologically involves participation (in ways either intimate or remote) by a man and a woman.” The court said that the decisions in *Romer v. Evans* and *Lawrence v. Texas* do not establish “as deeply rooted the concept of same-sex marriage.” The court rejected the idea “that a right to same-sex marriage has taken hold to the point that it is implicit in the concept of ordered liberty or deeply rooted in history and tradition of Maryland.”

Given what the court had already concluded, it applied rational basis scrutiny to the marriage law. The court held Maryland’s “asserted interest in fostering procreation is a legitimate government interest.” The court again noted that

“marriage enjoys its fundamental status due, in large part, to its link to procreation.” “This ‘inextricable link’ between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding).” The court held “the fundamental right to marriage and its ensuing benefits are conferred on opposite-sex couples not because of a distinction between whether various opposite-sex couples actually procreate, but rather because of the *possibility* of procreation.” The court also deferred to the legislature’s authority over marriage “even though [the law] may be under- or over-inclusive.”

One justice concurred in the majority’s decision as to the definition of marriage but believed the question of marriage benefits created a separate issue. This judge endorsed the New Jersey Supreme Court’s decision in *Lewis v. Harris* that the state should offer all benefits of marriage to same-sex couples. This judge said there “is no doubt that the State has a legitimate interest in promoting procreation and child rearing, but it cannot rationally further this interest by only granting the full rights of marriage to opposite-sex couples when it has *already* provides some legal protections regarding procreation and child rearing to same-sex couples.” The judge believed there could be a “legitimate basis for retaining the definition of marriage as one between a man and a woman” but none for denying same-sex couples the benefits of marriage.

Another dissenting opinion focused on the sex discrimination claim, arguing the majority should have held that a law making any distinction on the basis of sex should be subject to strict scrutiny and that

the state had not provided any compelling justifications for the marriage law.

A final dissenting opinion endorsed the conclusions of Chief Justice Kaye of the New York Court of Appeals in *Hernandez v. Robles*.

MARRIAGE OF KINLEY

A06-865

Minnesota Court of Appeals

September 18, 2007

<http://www.mncourts.gov/opinions/coa/current/opa060865-0918.htm>

An ex-wife sought an injunction against her ex-husband to prevent him “from discussing ‘inappropriate’ religious topics with the children.” The trial court had “ordered [the father] to refrain ‘from discussing inappropriate religious ideas with the children and/or forcing them to compete Bible lessons or listen to religious stories whenever the children do not want to do so.’”

On appeal, the court said “freedom of religion is a fundamental right” but that “the object of the [trial court’s] order is not to restrict appellant’s religious beliefs or practices. Rather, it is intended to protect [the mother’s] legal right to determine the children’s upbringing.” The court said the trial judge could “place restrictions on [father’s] religious discussions with his children” but that the judge should have made findings of fact to support the restriction and place specific limits “on the scope and duration of these restrictions.” Since the judge did not, the order “impermissibly burdens” the father’s right to free exercise of religion. The court said that “[p]rotecting children from bitter disputes over religious upbringing is essential to their mental and emotional well being” and that the potential for such disputes are evident here because the father

did not agree with the mother's choice of religion and the father's "pervasive religious focus." The problem with the order was that it did not address "the children's interest in avoiding conflict over their religious upbringing" but rather concentrates on the father's "teachings from the Bible." The court said the order should "focus on speech that is intended to cause the children to reject respondent's choice of religious upbringing or allow appellant to impose his religious views on the children." The court ordered the district court to make specific findings on how the father's communications with the children harms the children or "forces the children to take part in any religious practice, including listening to religious stories from the Bible or any other source, that is intended to influence the religious thinking or beliefs of the children; is meant to criticize to the children [mother's] parenting on religious grounds, or is unwanted by the children." and to make any restrictions "narrowly tailored to prohibit speech or conduct intended to cause the children to reject [mother's] choice of religious upbringing or to allow [father] to impose his religious views on the children."

COOK V. COOK

No. 42,587 CA

**Louisiana Court of Appeals, Second
Circuit**

September 19, 2007

<http://www.lacoa2.org/Opinions%20PDF/42587ca.pdf>

A separation agreement between divorcing parents prevented the children from associating with the mother's female girlfriend. The father alleged mother violated the agreement and he sought a contempt order. The mother, conversely, sought to have the clause in the agreement related to her partner set aside. The trial

court found for the husband and gave him primary custody.

The appeals court found no "material change of circumstances" that would require a change of custody. The court said there was "not a scintilla of evidence that the children have been embarrassed or treated badly by their peers on account of their mother's relationship." The court also reversed the contempt order because it believed the mother's "evasiveness and reluctant testimony do not satisfy the constitutional burden of proof beyond reasonable doubt that she committed perjury." The court also found that "the circumstantial evidence that [mother's girlfriend] lived next door is simply not sufficient to prove a violation" of the separation agreement.

A dissent argued that "common sense dictates that [girlfriend's] presence at school events is an association with the children whether she turns away while [mother] speaks with any of them." The dissent said "it is open and well-known in the community in which the children reside." This judge argued that mother's "deceptions and continued involvement with her paramour in the presence of the children, e.g., by attending school functions with Shannon in tow, maintaining neighboring abodes where Shannon is often at Ms. Cook's trailer and lives there at times, and involving the children in concealing her living arrangements from their father, show her efforts and intent to have Shannon associated and involved in the children's lives contrary to what she agreed to with her father. Her testimony regarding the discretion she exercises in her relationship with Shannon in the children's presence is simply unbelievable." The dissent further argued that the "adverse impacts this relationship has had and will likely have on

the children, in light of the social mores of their town, should not be discounted.”

Another judge agreed with the custody finding but believed the contempt order should stand because the “mother’s deceit and abuse of process before the court was contemptible.”

ANSPACH V. CITY OF PHILADELPHIA

No. 05-3632

U.S. Court of Appeals, Third Circuit

September 21, 2007

<http://caselaw.lp.findlaw.com/data2/circs/3rd/053632p.pdf>

After engaging in a sexual relationship, a sixteen year old girl went to a city health center to get “emergency contraception.” After a ten-minute talk with a social worker, the girl received some pills from a nurse. She took them but later became sick and parents learned of the prescription. The suit claimed the city had violated the parents’ rights to provide parental guidance, the girl’s “right to bodily integrity and parental guidance” and her and her parents’ right to free exercise of religion. The trial court dismissed all claims.

The court said if it were to find the city had interfered with the parents rights it would “impose a *constitutional* obligation on state actors to contact parents of a minor or encourage minors to contact their parents” that “would undermine the minor’s right to privacy and exceed the scope of the familial liberty interest protected under the Constitution.” The court said there was no coercion in this case since the girl had asked for the pills so there was no constitutional violation. The court said the state actors “did not assist” the parents “or affirmatively foster the parent/child relationship” but that the parents’ “are not entitled to that assistance under the Due Process Clause.” The court further held “there is no

constitutional right to parental notification of a minor child’s exercise of reproductive privacy rights” and “duties under state law can not create constitutional rights.” The court concluded that the “Constitution is designed to protect individuals from unwarranted governmental interference, not to require intervention under the circumstances here.”

STRAIGHTS & GAYS FOR EQUALITY

(SAGE) V. OSSEO ARE SCHOOLS–

DISTRICT NO. 279

Civ. No. 05-2100 (JNE/FLN)

U.S. District Court, District of Minnesota

September 25, 2007

A high school allowed “curricular” student groups to use certain school facilities and funding not available to “noncurricular” groups including a gay student group. Gay group sued saying their inability to get school advantages as do other groups violated the federal Equal Access Act and First Amendment.

The court held that since some groups the school had designated as “curricular” are not “directly related” to school course offerings as required by the U.S. Supreme Court’s interpretation of the Equal Access Act. The court held the connection of some student groups to curriculum is “too attenuated,” such as cheerleading, swimming, “Spirit Council” and “Black Achievers.” The court concluded that some groups “deemed ‘curricular’ under the Framework are actually noncurriculum related student groups. By denying SAGE equal access to the same avenues of communication afforded other noncurriculum related student groups, the District violates the Equal Access Act.” The court did not address the First Amendment claim.

