

Marriage Law Digest

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Marriage Law Foundation

April 2007

TYSIAC V. POLAND

Application No. 5410/03

European Court of Human Rights

March 20, 2007

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=31&portal=hbkm&action=html&highlight=&sessionid=12087282&skin=hudoc-en>

A mother of two children with severe myopia received an opinion from a general practitioner that a current pregnancy posed a risk for her eyesight. Two medical specialists disagreed and said that her eyesight did not constitute “grounds for therapeutic termination of the pregnancy.” After the delivery, the mother’s eyesight deteriorated and she lodged a criminal complaint against the obstetrician who had refused to certify that an abortion was medically necessary. The local and regional prosecutors, relying on a panel of three medical experts who found no causal link between the delivery and the worsened eyesight, refused to bring charges. A trial court upheld that decision and the mother appealed to the European Court of Human Rights.

In a 6-1 decision, the court held the European Convention’s provision that “everyone has the right to respect for his private . . . life” creates a “positive obligation” for the state. To the court, Poland’s marriage law could have a “chilling effect” on doctors so Poland’s law “should be formulated in such a way as to alleviate this effect” because “[o]nce the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to

obtain it.” The court said that current Polish law did not have any mechanism for “determining whether the conditions for obtaining a lawful abortion has been met.” So, “the authorities failed to comply with their positive obligations to secure to the applicant the effective respect for her private life.”

The lone dissenter pointed out that numerous specialists had failed to find a link between the pregnancy and the mother’s eyesight but only one general practitioner had taken the opposite position. The dissent charged the court with attaching too much weight to the mother’s “unfounded” fears and discrediting Polish medical specialists. The dissent believed the court’s position “favours ‘abortion on demand.’” Thus, according to the court’s reasoning “there is a Polish child, currently six years old, whose right to be born contradicts the Constitution.” He concludes: “I would never have thought that the Convention would go so far, and I find it frightening.”

BUTLER V. ADOPTION MEDIA, LLC

No. C 04-0135 PJH

U.S. District Court, Northern District of California

March 30, 2007

http://nclrights.org/cases/pdf/butler-adoption_media_decision-033007.pdf

A California same-sex couple sued an Arizona business that operated a website that posted profiles of prospective adoptive parents after the company refused to post the couple’s profile citing company policy

favoring opposite-sex married couples.

On motions for summary judgement, the trial court held that there was a potential conflict between California and Arizona law on sexual orientation discrimination and that the purpose of California's discrimination statute would be undermined in California law was not applied here (although the effect of the California law would only apply to California customers).

The court held that at the time of the company's refusal to post the profile, marital status was not covered by the state's discrimination law so the plaintiffs could only seek an injunction (not damages) but a trial was needed to weigh their sexual orientation discrimination claim.

The court rejected the defendant's claim that their website constituted "expressive speech" holding that it was a commercial enterprise. The court said that publishing "information written by prospective parents does not suffice to transform defendants' discriminatory conduct into 'speech itself.'" Even if it were speech, the court argued, California's "interest in combating discrimination on the basis of sexual orientation is compelling."

GODFREY V. HELVESI

Index No. 5896-06

New York Supreme Court, Albany County

April 5, 2007

<http://www.telladf.org/UserDocs/HevesiMTDdenied.pdf>

The New York Retirement System announced its intent to recognize Canadian same-sex marriages. Taxpayers filed suit as a result and intervenors (a same-sex couple) challenged the taxpayers standing to bring the suit.

The court held that current New York law entitles spouses and widows and widowers to benefits not available to others so if the legislature did not "intend to include in the definition of spouse or widow/widower same-sex partners who attained marital status in a foreign marriage, the determination would cause an unlawful expenditure of state funds" so the taxpayers had standing here

EVANS V. UNITED KINGDOM

Application no. 6339/05

European Court of Human Rights

April 10, 2007

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=5&portal=hbkm&action=html&highlight=&sessionid=12195143&skin=hudoc-en>

A woman stored embryos fertilized by her boyfriend (with his consent) because she had to have her ovaries removed. After the couple broke up, the boyfriend revoked his consent U.K. law required the embryos to be destroyed but the woman challenged the relevant law. The trial court said the boyfriend had a right to withdraw his consent.

On appeal to the European Court of Human Rights, that court ruled 13-4 in favor of the U.K. law. The court noted that the case involved a conflict between the woman's right to be a genetic parent and the man's right to consent to parenthood. The court ruled that the U.K. deserved significant deference in balancing these conflicting issue because of the sensitive nature of the issues involved and the swift changes in technology. So, the court concluded that the "applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than [the boyfriend's] right to respect for his decision not to have a genetically-related child with her."

The four dissenters argued that the applicant's "right to decide to become a genetically related parent weighs heavier than that of J's decision not to become a parent in the present case" because U.K. law doesn't allow for flexibility in instances of special medical conditions and the applicant's right is totally foreclosed by this decision. Thus, the dissenters believe the specific facts of this case should compel a holding that the woman's interests weighed more heavily than the man's.

HOLMES V. HOLMES

CA06-110

Arkansas Court of Appeals

April 11, 2007

<http://courts.state.ar.us/opinions/2007a/20070411/ca06-110.pdf>

Subsequent to divorce and custody decree, the ex-husband sought a change in custody. The court ordered the ex-wife not to cohabit with any adult while the child was in the home but did not change custody. Three years later, the ex-husband again sought a change in custody. This time, the trial court granted the change of custody based on the mother being involved in a series of relationships and other concerns about the stability of her situation as it affected the child.

On appeal, the mother said the court had inappropriately considered her sexual orientation in making its decision. The court of appeals noted, however, that the trial court's order was not based on sexual orientation but on cohabitation in defiance of court order and other stability issues. Thus, it concluded that the trial court decision was not clearly erroneous.

**ZAMECNIK V. INDIAN PRAIRIE
SCHOOL DISTRICT
No. 07 C 1586**

**U.S. District Court, Northern District of
Illinois**

April 17, 2007

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

A student challenged his school's prohibition on wearing a t-shirt that said "Be Happy, Not Gay" on a day marked by teachers and students as a day for protesting sexual orientation discrimination. The court refused to enjoin the school's prohibition because although the shirt "does not contain invectives as strong as those" in a similar 9th Circuit case, "it is still a negative statement disparaging of gays" and the school has a right to "prohibit such negative statements about gays and limit plaintiffs to expressing their views in a positive manner that does not directly disparage gays." The court noted that the school promotes "policies of tolerance toward and respect for differences among students" that are "a legitimate pedagogical interest." The court also held that the school has a "legitimate interest in protecting gay students at its school from being harmed, both physically and psychologically." In balancing the results of a failure to enjoin the school policy, the court said that the plaintiff "will still be permitted to do their silent protest and to wear or display messages positively expressing support for heterosexuality" but "it is an uncontested fact that derogatory statements about being gay have a tendency to harm gay youth. So, "there is a significant likelihood of public harm if the court errs in favor of granting a preliminary injunction."

JACOB V. SHULTZ-JACOB

2007 PA Super 118

Superior Court of Pennsylvania

April 30, 2007

http://www.superior.court.state.pa.us/opinions/S15032_07.PDF

Mother of children (two adopted and two conceived by artificial insemination involving a friend as the sperm donor) involved in custody dispute with her former same-sex partner, sought child support from former partner who sought to have the known donor also contribute support. The trial court awarded primary custody of one of the adopted children to the former partner, primary custody of the other children to their mother and visitation to the mother and partner for the children not in their primary care. The trial court did not order support from the donor.

On appeal, the superior court noted that a third party does not have the same position as a parent in a custody dispute and thus accepted the trial court's custody awards in favor of the mother. The court held also that the donor father was obligated to provide child support