

Marriage Law Digest

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PEEL HOTEL PTY LTD (ANTI DISCRIMINATION EXEMPTION)

[2007] VCAT 916

Victorian Civil & Administrative Tribunal

May 24, 2007

<http://www.austlii.edu.au/au/cases/vic/VCA/T/2007/916.html>

A gay bar sought an exemption from a provincial anti-discrimination law so they could allow entry only to gay men and advertise that policy so that the bar could provide a place where gay men will feel safe and comfortable. The human rights tribunal said that allowing lesbian and heterosexual groups into the establishment "would undermine or destroy the unique atmosphere which aims to foster and not frighten or discomfit its gay male patrons." The judge believed the exemption fit the spirit of the law which seeks "to allow special measures to be taken to redress disadvantage suffered by those with a particular attribute." The exemption, to the tribunal, would "give gay men a space in which they may, without inhibition, meet, socialise and express physical attraction to each other in a non-threatening atmosphere." The court further argued that the exemption prevented a situation where gay men are seen as entertainment for other visitors which would "devalue" and "dehumanise" them, a form of "sexuality-based humiliation or discrimination."

WESTBROOK V. PENLEY

No. 04-0838

Supreme Court of Texas

June 29, 2007

<http://www.supreme.courts.state.tx.us/opini>

<ons/HTMLopinion.asp?OpinionID=2000996>

Plaintiff obtained counseling from a professional marriage therapist who subsequently became her pastor. As a member of the church, plaintiff had agreed to the church's constitution that required church leaders to revoke membership on cases of serious sin and notify the congregation of their actions. After admitting adultery to her pastor/counselor, the pastor and other church leaders sent a letter to the congregation telling them to "break fellowship" with the plaintiff until she repents. Plaintiff then sued alleging "defamation, negligence, breach of fiduciary duty and intentional infliction of emotional distress." The defendants (the pastor and church leaders) moved to dismiss, alleging the courts lacked jurisdiction to rule on a "ecclesiastical dispute." The trial court dismissed the case and the appeals court affirmed except as to the claim of professional negligence against the counselor/pastor.

The supreme court began by noting that the First Amendment to the U.S. Constitution "recognizes two spheres of sovereignty when deciding matters of government and religion." The court said that the First Amendment requires courts to "be careful not to intrude upon internal matters of church governance." Here, the "church's decision to discipline members for conduct considered outside of the church's moral code is an inherently religious function with which civil courts should not generally interfere." For the pastor to be subject to liability "for engaging in the disciplinary

process that the church requires would clearly have a 'chilling effect' on churches' ability to discipline members." The court thought it "doubtful" that the dual roles of pastor and counselor in this case could be distinguished since the pastor could not adhere to the standards of one without violating those of the other. Thus, "[a]ny civil liability that might attach for [the pastor's] violation of a secular duty of confidentiality in this context would in effect impose a fine for his decision to follow the religious disciplinary procedures that his role as pastor required and have a concomitant chilling effect on churches' autonomy to manage their own affairs." In this case, the church leader's actions were "based on their interpretation of Matthew 18:15-20, an inherently ecclesiastical matter" so the court should not interfere.

**KNIGHTON V. HEART TO HEART
ADOPTIONS, INC.
No. 07-32-JJB-SCR
U.S. District Court, Middle District of
Louisiana
July 16, 2007**

A birth mother flew to Utah to relinquish her child for adoption. The alleged father received notice of a second Utah proceeding and a Utah judgment was issued terminating his parental rights. Subsequently, he filed suit against the adoption agency in federal court.

The federal district court held that since "the mere existence of a biological link does not merit substantial protection under the due process clause," the father was responsible to develop a relationship with the child. The court found that he had failed (1) to register with the birth father registry, (2) appear on the birth certificate, and (3) initiate paternity proceedings. The court noted that his only participation with the child was filing this

lawsuit after his parental rights had been terminated. Since the facts did not indicate any constitutional violation, the court held the Utah order was entitled to Full Faith and Credit.

**MS. H. V. COLUMBIA COUNTY
DEPARTMENT OF SOCIAL SERVICES
2007 WL 2128837
New York Family Court, Nassau County
July 18, 2007**

The "former girlfriend" of a biological mother sought custody of the mother's child conceived as a result of artificial insemination. Some time after breakup, the state Department of Social Services took custody of the child who was placed in foster care followed by a court finding that the biological mother had neglected the child.

The court found that while "between a parent and a third person, parental custody of a child may not be displaced absent grievous cause or necessity," in "extraordinary circumstances, such as abandonment, and neglect, the best interest of the child test is sparked, and non-biological parents may be issued standing to seek custody of the minor." Here, the former partner had "demonstrated a prima facie basis for establishing standing" because (1) she had lived with the child for eight months and (2) she had "carried out all of the traditional responsibilities of a parent." The court thus ordered a best interest hearing.

**UNITED STATES V. ROBERTS
Case 2:04-cr-00037-MK
U.S. District Court, Eastern District of
Pennsylvania
July 31, 2007**

http://www.aclu.org/images/asset_upload_file190_31168.pdf

The partners in a same-sex couple were convicted of drug trafficking. The court described their pre-arrest relationship as a “committed relationship” of 18 years where the partners “made a home together and built a life together. They supported one another financially, sharing a joint bank account. They also supported one another emotionally, each caring for the other when he was sick, celebrating successes and sharing sorrows. They considered, and still consider, themselves to be spouses. Defendants were in every way a family.” After their release from prison, the couple were prohibited from any contact with one another because of a condition of each one’s supervised release that they not have association with a convicted felon. The trial court initially denied their request that they be allowed contact but the court of appeals reversed saying the trial court had authority to modify the conditions of the defendants’ supervised release.

In this decision, the trial court ordered the government to allow the defendants to associate based on two legal conclusions. First, under the statute governing probation conditions, the court held there was no evidence that a “supervisory need” existed for their continued separation. The court based this conclusion on (1) the lack of “risk that defendants will engage in any criminal or otherwise harmful conduct” if they were allowed to associate, (2) the fact that one defendant “has AIDS, and that his physical and emotional well-being would improve if he were allowed to rebuild his relationship with his life partner” and (3) since the defendants have turned their lives around, there doesn’t appear to be any more need to deter them from future criminal activity.

The court’s second conclusion was that the probation condition was unconstitutional. The court held the constitution protects “the

right to intimate association” and the U.S. Supreme Court’s decision in *Lawrence v. Texas* extends this protection to same-sex couples. The court said that given the couple’s long term relationship and continued devotion to one another they “have a constitutionally protected liberty interest in their intimate relationship with each other.” The court also held there was no “supervisory need” for the separation that would justify the infringement of the right.

The court also held the separation violated the federal constitution’s equal protection provision because the defendants are denied permission to associate while other “similarly situated individuals in other kinds of family relationships” are granted such permission. The court concluded that since “there is no evidence that association between committed same-sex partners will pose any greater supervisory concern that association between similarly situated family members, this unequal treatment fails any level of constitutional scrutiny.”

FINSTUEN V. CRUTCHER

No. 06-6213

U.S. Court of Appeals for the Tenth Circuit

August 3, 2007

<http://www.ca10.uscourts.gov/opinions/06/06-6213.pdf>

Three same-sex couples and their adopted children challenged an Oklahoma law prohibiting recognition of adoptions of same-sex couples from other states. The trial court ruled the statute was unconstitutional.

The appeals court first held that one couple lacked standing because the only injury they alleged is that they might be hesitant to visit Oklahoma because of the statute and this was not a concrete injury. The court ruled a second couple also lacked standing because

their only claimed injury was a fear that the state might not recognize one of the women as a parent. The final couple had standing, the court ruled, because they were denied a birth certificate listing both partners as parents.

As to the plaintiffs' claims, the court said the U.S. Constitution's Full Faith and Credit Clause "applies unequivocally to the judgments" of other states and "with respect to final judgments entered in a sister state, it is clear there is no 'public policy' exception to the Full Faith and Credit Clause." In this case, a California court had made the judgment of adoption and Oklahoma law provided for supplementary birth certificates in the case of valid adoptions. The court said that Oklahoma retains the authority to determine the rights and responsibilities of adoptive parents within the state but that it must recognize adoption judgments from other states. The court thus held the adoption non-recognition law unconstitutional under the Full Faith and Credit Clause. The court did not rule on plaintiffs' claims that the non-recognition law violated other constitutional provisions.

One judge agreed on the standing questions but argued that the court should not have addressed constitutional issues since the agency had conceded during litigation that it could issue the amended birth certificate in this case.

**IN THE MATTER OF THE CHANGE OF
NAME OF L.M.G.**

2007 SD 83

Supreme Court of South Dakota

August 8, 2007

<http://www.sdjudicial.com/opinions/downloads/y2007/24093.pdf>

A child was conceived as the result of adultery but the mother reconciled with her

husband who was named as the father on the birth certificate. The biological father, who had visitation with the child, sought a court order that the child be given his last name and this was granted by the trial court.

The state supreme court ruled that it was in the child's best interest to keep the surname she'd had for two years "because it is the name of 'her family unit'" and she "socializes with them, will go to school with them and live with them the majority of the time." The court suggested it would be unwise to make her explain why her surname is different from the other members of her family. The supreme court believed the trial court had unduly stressed "the supposed instability of Mother and Husband's marital relationship" and "failed to consider the potential embarrassment [the child] may suffer by having a different surname that her immediate family unit."

Two justices dissented, arguing that the high rate of divorce and an increase of blended families have made different surnames in a family "not unusual." The dissent believed the trial court had appropriately given most weight to "fostering a good father-daughter relationship." The dissent charged the majority with second-guessing the trial court based only on the "family unit" concern, which the dissent believed should have been balanced with other concerns and with deference to the trial court.

**IN THE MARRIAGE OF JOY AND JOHN
R.**

E039132

Court of Appeal of California, Fourth

Appellate District, Division Two

August 15, 2007

<http://www.courtinfo.ca.gov/opinions/nonpub/E039132A.PDF>

A woman who married another woman who

“presented herself as a male” got an annulment but sought to be designated a “putative spouse” for purposes of property division of a house in the other woman’s name (this arrangement was made to avoid the plaintiff’s loss of welfare benefits). The trial court held that since the woman had known that her “husband” was actually a woman before the property was purchased, she could not be a putative spouse and had no property interest in the home.

The court of appeals held that to be a putative spouse, the facts must cause “a reasonable person to believe in good faith that she was married *and* that the marriage was valid under California law.” Here, the evidence indicated the woman knew her “husband” was a woman, so since marriage in California is the union of a man and a woman, she must have know the “marriage” was invalid and she was not a “spouse.”

BRINKMAN V. MIAMI UNIVERSITY
2007-Ohio-4372
Court of Appeals of Ohio, Twelfth
Appellate District
August 27, 2007

<http://www.sconet.state.oh.us/rod/newpdf/12/2007/2007-ohio-4372.pdf>

A citizen sued Miami University alleging the university’s domestic partnership benefits program for same-sex couples conflicts with the state’s marriage amendment. The trial court ruled that he lacked standing.

The plaintiff argued that he had standing as a taxpayer and a tuition-paying parent. The court held that since the university reimburses the cost of domestic partner benefits with private donations, there was no injury to this taxpayer. The fact that the university itself, which is alleged to be violating the amendment, is supported by

tax funds does not confer standing since the benefits are paid from a fund to which the plaintiff does not contribute.

VARNUM V. BRIEN
Case No. CV5965
Iowa District Court for Polk County
August 30, 2007

<http://www.domawatch.org/cases/iowa/Varnum%20v.%20Brien/varnum-d-08302007-ia-district.pdf>

Six same-sex couples (and children being raised by some of the couples) challenged the constitutionality of Iowa’s marriage statute. After disqualifying a number of proposed expert witnesses in the case, the court turned to a recitation of what it considered the relevant facts.

In this section, the court outlined what it termed “harms from the denial of marriage rights.” The court specifically held that the marriage laws “stigmatize” plaintiffs “their relationships and their families” and “devalues and de-legitimizes relationships at the very core of the adult Plaintiffs’ sexual orientation.” Thus, the plaintiffs “suffer great dignitary harm” which “amounts to a badge or inferiority” and “second-class status.” It also subjects the children raised by these couples to “the historical stigma of ‘illegitimacy’ or ‘bastardy.’” The court then held that, without being able to marry, plaintiffs “are unable instantly or adequately to communicate the depth and permanence of their commitment to others, or to obtain respect for that commitment, as others do simply by invoking their married status.” The court also held that, by not being able to marry, plaintiffs can’t access “obligations, benefits and privileges of marriage” including those related to parentage.

Also in its “factual” section, the court said

there was no evidence that being raised by same-sex couples would create any harm for children and in fact, changing the definition of marriage would help children being raised by same-sex couples.

The court then argues that marriage has “evolved over time” and that the current definition of marriage reflects “lingering sex and gender discrimination in marriage” by promoting “sex-role conformity.”

The court finally held that there is a long history of discrimination against gays and lesbians and that they are relatively politically powerless.

In its state constitutional analysis, the court first held that the right to marry means the right to “marry a person of their choosing” and thus the statute requires strict scrutiny. The state’s proposed rationales for the marriage law were (1) “promoting procreation, child rearing by a mother and father in a marriage relationship, (2) “promoting stability in opposite sex relationships,” (3) conserving state resources, and (4) “promoting the concept or integrity or traditional marriage.” The court held that the state had not met its burden of proof in “articulating compelling reasons” for the marriage law. The court also held that the law is not narrowly tailored to advance any of these purposes because the state did not provide evidence “that precluding gay and lesbian individuals from marrying other gay and lesbian individuals” will advance any of the state’s identified interests. Thus, to the court, the law is over- and under-inclusive and is a violation of the fundamental right to marry.

The court then said the statute created a sex-based classification. The court rejected the claim that the law could not constitute sex discrimination because it applied to men

and women equally because the U.S. Supreme Court had rejected an equal application argument regarding race in *Loving v. Virginia*. As with the right to marry analysis, the court held the state had not met its burden of showing any important state interests served by the law.

The court then turned to the state’s proposed interests in the marriage law to determine whether they even passed the rational basis test. One interest, “promoting the concept of fundamental marriage or the integrity of traditional marriage,” the court believed, was just a way of promoting morality and the U.S. Supreme Court’s decision in *Lawrence v. Texas* makes such a purpose illegitimate.

In regards to the state’s interest in promoting “responsible procreation” the court said it “has yet to hear any convincing argument as to how excluding same-sex couples from getting married promotes responsible reproduction in general or by different-sex couples in particular. So far as this Court can tell, [the marriage law] operates only to harm same-sex couples and their children.” The court said that sexual orientation has no effect on child-rearing ability and gays and lesbians have adoption, custody and visitation rights. The court said that “if responsible procreation is the goal, then the institution of marriage should be made available to all couples who can responsibly procreate, regardless of whether the couple is a traditionally recognized one. The traditional make-up of the family has changed.” The court believed the law actually harmed the state’s interest and hurt children raised by same-sex couples. Plus, the court noted that couples unwilling or unable to have children are allowed to marry.

The court finally held that the state had

provided no evidence that changing marriage would require greater public expenditures.

The court concluded that the Iowa marriage statute must now be read as gender-neutral.

ADOPTION OF M.A.

2007 ME 123

Maine Supreme Judicial Court

August 30, 2007

<http://www.courts.state.me.us/opinions/2007%20documents/07me123ma.pdf>

A trial court refused to grant a joint adoption of a foster child to a same-sex couple because the court believed it lacked jurisdiction

Maine's highest court held that since the relevant adoption statute does not specifically prohibit joint adoptions by unmarried persons, the statute is at least ambiguous so the history and purpose of the law must be considered. The history, according to the court, yielded no information and to promote the statute's objective of "protecting the welfare of children," it must be interpreted expansively. The court believed this would give children the benefits of two legal parents, make it easier for the courts to conduct a single proceeding (as opposed to separate petitions by each member of the same-sex couple), and promote permanency. Thus, the court concludes the statute "does not prohibit a joint adoption petition by two unmarried persons."