

Marriage Law Digest

Volume 2, Number 11

Marriage Law Foundation

December 2005

MINISTER OF HOME AFFAIRS V. FOURIE

Case CCT 60/04

Constitutional Court of South Africa

December 1, 2005

In two consolidated cases, South Africa's common law and statutory definitions of marriage were challenged. The trial Supreme Court of Appeal held that the common law definition was unconstitutional and the government appealed.

The Constitutional Court issued a decision that was unanimous in all but the remedy (that was an 8-1 decision). The court held that the South African constitution was intended to create a "radical rupture" with the past. The court outlined the principles it was applying: "A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who they are is profoundly disrespectful of the human personality and violatory of equality. . . . Respect for human rights requires the affirmation of self, not the denial of self." For the court, the question was "how to respond to legal arrangements of great social significance under which same-sex couples are made to feel like outsiders who do not fully belong in the universe of equals." The court noted that marriage provides many benefits to individuals and that the "exclusion of same-sex couples from the benefits and responsibilities of marriage" makes them outsiders condemned "to live in a state of legal blankness in which their unions remain unmarked by the showering of

presents and the commemoration of anniversaries so celebrated in our culture." To deny same-sex couples these rights and responsibilities "is to negate their right to self-definition in a most profound way." The court held that the "exclusion of same-sex couples from the status, entitlements and responsibilities accorded to heterosexual couples through marriage" violates their right of equal protection because "[i]t is as if they did not exist as far as the law is concerned. They are implicitly defined out of contemplation as subjects of the law."

The government and amici had given four reasons why the definition of marriage should not be changed. The court held that the first, procreation, cannot be considered central to marriage without demeaning couples who cannot or do not procreate. The court held that religious views are important but that they cannot control legal decisions. The court rejected references to international law which references marriage as an opposite-sex union because they believed these laws merely reflected current realities and "rights by their nature will atrophy if frozen." So, while international law protects marriage, it does not exclude other relationships. The court argued that same-sex marriage would not affect opposite-sex couples' ability to marry and to say that same-sex marriage devalues marriage is "profoundly demeaning" to same-sex couples because it is based on anti-homosexual prejudice. The court concluded that exclusion of same-sex couples from the "same status, entitlements and responsibilities accorded to heterosexual couples through marriage" violated constitutional guarantees of equal protection

and right to dignity.

In determining a remedy, the court felt it was appropriate for the legislature to be given the chance to provide the remedy by “ensuring that same-sex couples are brought in from the legal cold.” The court believed the public had already had its say through the work of the South Africa Law Reform Commission. Parliament was given options for addressing the inequities identified by the court. These include (1) changing the statute to allow for same-sex marriage, (2) adopting the Law Reform Commission proposal of creating two types of marriage—a Conventional Marriage Act and a Reformed Marriage Act (which would include same-sex couples), or (3) creating some other solution. Any solution must “ensure that same-sex couples are not subjected to marginalisation or exclusion by the law, either directly or indirectly” but Parliament cannot abolish marriage. If Parliament does not act within 12 months, the Marriage Act will automatically be amended to use gender neutral language.

One justice concurred except in the remedy which she believed should be an immediate change to the marriage law.

**NORTH COAST WOMEN’S CARE
MEDICAL GROUP, INC V. BENITEZ
D045438
California Court of Appeal, Fourth
Appellate District
December 2, 2005**

Plaintiff sued doctors and medical facility for discrimination on the basis of sexual orientation when the doctors refused to provide her with artificial insemination services. Defendants claimed they had a right to deny services because of their religious beliefs. The trial court granted summary judgement to the plaintiff on the

question of whether the doctors could assert free exercise as an affirmative defense.

On appeal, the court held that there was a possible factual question of whether the doctors refused to perform the service based on the marital status of sexual orientation of the plaintiffs. Since marital status was not grounds for a finding of discrimination when the underlying acts took place, if the doctors had been acting on a concern with the marital status of plaintiff, that fact would defeat plaintiff’s claim. The court concluded that the defendants should be free to present evidence that their religious belief precluded them from artificially inseminating any unmarried person regardless of sexual orientation and remanded to the trial court.

**HERNANDEZ V. ROBLES
2005 NY Slip Op 09436
New York Supreme Court Appellate
Division, First District
December 8, 2005**

A group of same-sex couples challenges New York’s marriage law on constitutional grounds and the trial court accepted their claims, granting summary judgement to the plaintiff.

The appellate division reversed noting that It found “troubling that the court, upon determining the statute to be unconstitutional, proceeded to rewrite it and purportedly create a new constitutional right.” The majority noted that it was not the role of courts to change statutes and that “[d]eprivation of legislative authority, by judicial fiat, to make important, controversial policy decisions prolongs divisiveness and defers settlement of the issue; it is a miscarriage of the political process involved in considering such a policy change.” Marriage regulation is a

legislative power.

The court noted a number of state interests served by the marriage law including support of procreation, child welfare and social stability which are “based on innate, complementary, procreative roles, a function of biology, not mere legal rights.”

The court further stated:

The law assumes that a marriage will produce children and affords benefits based on that assumption. It sets up heterosexual marriage as the cultural, social and legal ideal in an effort to discourage unmarried childbearing and to encourage sufficient marital childbearing to sustain the population and society; the entire society, even those who do not marry, depend on a healthy marriage culture for this latter, critical, but presently undervalued, benefit. Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children and society, and such preference constitutes a rational policy decision. Thus, society and government have reasonable, important interests in encouraging heterosexual couples to accept the recognition and regulation of marriage.

The court said that the fact that some married couples do not have children doesn't defeat the state's interest because a legislative classification does not have to fit perfectly.

The majority further held that the right to marry only applies to traditional marriage and that the anti-miscegenation cases relied on the racial nature of the classifications involved.

The majority opinion was joined by three judges.

One judge concurred separately arguing that “[a]ny change in that frequently articulated heterosexual construct [of marriage] would be a revolution in the law rather than evolution.” The concurrence noted that a fundamental right must be rooted in history and tradition and that plaintiffs had not demonstrated that this is the case with same-sex marriage. To this judge, the question raised here is whether the state or federal constitution creates a right to same-sex marriage and he says that no precedent support such a right.

The concurrence believes the equal protection claims are foreclosed by the U.S. Supreme Court's summary dismissal of the *Baker v. Nelson* case which applies to the state claims here since the relevant New York Constitutional provision parallels the federal equal protection provision. The concurrence noted that the definition of marriage does not treat the sexes differently and is not like anti-miscegenation since it is not based on any intent to discriminate. In fact, the logical comparison to anti-miscegenation laws cuts the other way. The opinion charged that the analogy to anti-miscegenation is disrespectful of the civil rights movement.

The concurrence rejected the sexual orientation discrimination claim because the law is neutral as to orientation and disparate impact is not enough to establish discrimination. The opinion noted that the plaintiffs had not even raised an allegation of a discriminatory purpose.

Like the majority, the concurrence believed that “reserving marriage to opposite-sex couples is reasonably related to the State's interests in ensuring a stable legal and

societal framework in which children are procreated and raised, and providing the benefits of dual gender parenting for the children so procreated.” The opinion also noted that same-sex couples cannot procreate without third-party intervention.

One judge dissented, stating that “civil marriage is an institution created by the state.” The dissent felt that the right to marry is actually the right to choose a spouse. The opinion argued that marriage has changed over time. The dissent would have applied heightened scrutiny because the statute applied a sex classification (by taking into consideration the sex of the parties). The dissent would further examine sexual orientation discrimination claims under the heightened scrutiny standard. The dissent did not feel that excluding same-sex couples from marriage advanced any state interests so even the rational basis standard was not satisfied by this law.

**UNITED STATES V. EXTREME
ASSOCIATES, INC.
Case No: 05-1555
U.S. Court of Appeals for the Third Circuit
December 8, 2005**

In a prosecution for obscenity distribution, defendants raised a substantive due process privacy argument which was accepted by the district court resulting in a ruling that the obscenity distribution statute was unconstitutional. Despite previous U.S. Supreme Court case law to the contrary, the trial court relied on *Lawrence v. Texas* to hold that the precedential value of the contrary law was no longer controlling.

The court of appeal reversed, holding simply that the district court should not have ignored Supreme Court precedent based on its view of contrasting decisions in the absence of a specific Supreme Court

decision to overturn the precedent. Here, the court held that *Lawrence* does not definitively overrule the cases upholding obscenity distribution laws.

**OFFICE OF THE PROSECUTOR-
GENERAL V. GREEN
Case No. B 1050-05
Supreme Court of Sweden
November 29, 2005**

The government charged a pastor under a law that forbids dissemination of statements that express contempt for others on various enumerated grounds including sexual orientation. The prosecution was based on statements made in a sermon.

The Swedish Supreme Court dismissed the charges because it believed the sermon did not constitute hate speech as generally understood.

**BUCCIERI V. CAMPAGNA
2005 PA Super 403
Superior Court of Pennsylvania
December 7, 2005**

A man who had been involved in a sexual relationship and was very likely the father of the woman’s child, sought paternity testing to determine the child’s parentage eight years after the baby was born. The trial court granted the petition for testing. The mother appealed, arguing that because father had essentially abandoned the child by not seeking contact for eight years and child has an existing relationship with the mother’s husband, testing would be inappropriate.

The court held that there is no absolute right to paternity testing. It can be overcome for societal and family reasons. Here, the father delayed seeking testing for too long and the child is now in a stable relationship with the

mother's husband that ought not be disturbed.

JOHNSON V. UNIVERSITY OF IOWA
No. 05-1184
U.S. Court fo Appeals for the Eighth
Circuit
December 15, 2005

An employee of the university challenged a policy of giving paid leave to mothers but not fathers when children are born. He further relied on a policy of allowing either parent to take paid leave when they adopt a child.

The court held that since paid leave is granted to mothers based on physical incapacity related to childbirth, it is reasonable to not provide fathers with the same opportunity. Adoptive parents have demands different from biological fathers so the university is justified in treating them differently as well. The court decided that there was no fundamental right to paid leave from work to bond with a child. Also, biological fathers are not a suspect class so rational basis review is all that is necessary in this case. Given the reasons for the differential treatment, the court noted, it upheld the policy.

PROPOSITION 22 LEGAL DEFENSE &
EDUCATION FUND V. GONZALEZ
Case No. 1-04-CV-019549
Superior Court of California, County of
Santa Clara
December 16, 2005

City of San Jose declared it would recognize same-sex marriages contracted by city employees in other jurisdictions. In a challenge by an advocacy organization, the trial court granted summary judgement to the plaintiff, holding the policy invalid as conflicting with state law on marriage.

LABAYE V. REGINA
2005 SCC 80
Supreme Court of Canada
December 21, 2005

Owners of group-sex club convicted for running a bawdy house. The trial court concluded that their actions were indecent and the Quebec Court of Appeal affirmed, citing health risks of the activities that took place at the club and the degrading and dehumanizing acts. The dissent at the appeals level felt that participants "retained their full autonomy" and their acts "reflected their personal choice and view of sexuality."

The supreme court identified the question as whether the acts that took place at the club were indecent. The court held that such a finding must be based on an objective showing of harm. The court identified three kinds of harm that could support a finding of indecency: (1) observation by unwilling observers, (2) encouraging anti-social acts and attitudes (which will only apply if the conduct is public), and (3) harm to the individuals involves (with the key principle being consent). The conduct must be "incompatible with the proper functioning of society," a finding which would require expert testimony. Here the acts were private, consensual and caused no harm to participants. The court concluded that "[c]onsensual conduct behind code-locked doors can hardly be supposed to jeopardize a society as vigorous and tolerant as Canadian society."

The dissent noted that the establishment was in a commercial building and advertised to the general public. The appropriate test, to the dissenters, should have been whether the acts violated the community standard. The dissenters believed that the majority should have established social harm as the

sole test.

PETERS V. COSTELLO
J-147-2004
Supreme Court of Pennsylvania
December 30, 2005

After the death of her mother, an infant child was left in the custody of a couple who babysat her and with whom she had lived for twelve years (and who had entered into a custody agreement with her biological father). She lived with this couple until adulthood when she had a child out-of-wedlock. After four years, the father of this child sought and received primary physical custody and denied access to the child to the couple who had raised the child's mother. The couple filed a petition for visitation which was granted by the trial court since the court held that the couple had stood in loco parentis to the child's mother and were therefore entitled to grandparent visitation standing. This finding was supported by the fact that she had lived with them for four years and the court believed visitation was in the best interests of the child.

The supreme court noted that there was no statutory definition of grandparent and that the term's plain meaning could be extended to individuals who had stood in loco parentis to a parent. Thus, visitation was justified.

One justice concurred, stressing that the decision should apply only to the compelling facts of this case.

Another justice dissented, arguing that the term "grandparent" had a clear and unambiguous meaning (the parent of a parent through biology or adoption) and acting as a grandparent alone cannot give statutory standing. The dissent noted that in loco parentis status has never been applied

to create a grandparent relationship and that an expansive definition of "parent" and "grandparent" opens the door to conflict with the right of parents to control their children's upbringing recognized by the U.S. Supreme Court in *Troxel v. Granville*. Further, since other statutes specify that "parent" will include those standing in loco parentis, the grandparent visitation statute should have done so as well if that result was intended. The dissent argues that there is no such status as "in loco grandparentis" and that, additionally, in loco parentis ends when the child is at the age of majority. The dissent also argued that the majority opinion could open the door to more litigation from non-parents.

STATE V. CARSWELL
2005-Ohio-6547
Court of Appeals Twelfth Appellate
District of Ohio
December 12, 2005

The trial court held that the state domestic violence statute was unconstitutional because it conflicted with Ohio's marriage amendment by creating a marriage-like status for the unmarried.

The court of appeal reversed, holding that the amendment did not expressly overrule the domestic violence statute. It also held that it was not overruled by implication since the statute does not create a legal status for unmarried individuals. The statute merely sets forth potential victims, as opposed to creating a status. Even if it had created a status, though, the court said that it clearly does not intend to create a marriage equivalent which is what would be required to conflict with the amendment. The court concluded that the statute's intent is merely to protect all household members from domestic violence, and is therefore valid under the new amendment.