

Marriage Law Digest

Volume 4, Number 12

Marriage Law Foundation

December 2007

LUND V. BOISSION

S2002/08/0137

Human Rights Panel of Alberta

November 30, 2007

http://www.albertahumanrights.ab.ca/legislation/Panel_Decisions/panel_decis_Lund.pdf

After a local newspaper “published a letter to the editor entitled ‘Homosexual Agenda Wicked,’” a university professor filed a complaint with the provincial Human Rights Commission alleging sexual orientation discrimination. The newspaper settled the complaint by adopting a new policy: “The Advocate will not publish statements that indicate unlawful discrimination or intent to discriminate against a person or class or persons, or are likely to expose people to hatred or contempt because of . . . sexual orientation.” The letter writer contested the complaint.

The professor alleged the letter “crossed the line of free speech thus inciting hatred against homosexuals and in particular causes young gay, lesbian, trans-gender, bisexual young people in central Alberta to be especially vulnerable.” The provincial attorney general argued that “legitimate political and religious expression is conceptually distinct from discriminatory expression” and “if people were allowed to simply hide behind the rubric of political and religious opinion, they would defeat the entire purpose of the human rights legislation.”

The panel concluded that “the letter expresses hatred or contempt for a group of

persons on the basis of their sexual preference. It is also my view that any persons on the basis of sexual preference. It is also my view that any person of reasonable intelligence informed about the context of this statement would understand the message is expressing hatred and/or contempt.” The panel further believed “the effect of the communication would make it more acceptable to others to manifest hatred against homosexuals.” The panel said: “The fact that the letter is written by a ‘Reverend’ who is a ‘chairman’ on behalf of a ‘Coalition’ tends to give the letter credibility. Further, the polemic references to the Bible gives the message an air of credibility, given the ancient nature of the text.”

The panel rejected the argument of the letter writer that his expression was protected by the rights of free speech and religious expression. The panel said it was “nonsensical to enact broad and paramount and remedial legislation, such as human rights legislation, to protect the dignity and human rights of Albertans, only to have it overridden by the expression of opinion in all forms.” The panel believed “the views of individuals expressing their opinions or expressing political statements must be made in a responsible manner.”

The panel thus concluded that religious freedom did not trump the human rights legislation’s speech code because “[i]t cannot be the case that any speech wrapped in the ‘guise’ of politics or religion is beyond reproach by any legislation but the Criminal Code.”

CHAMBERS V. ORMISTON
No. 2006-340
Rhode Island Supreme Court
December 7, 2007

<http://www.courts.state.ri.us/Supreme/pdf-files/06-340-12-07-07.pdf>

After marrying in Massachusetts, a same-sex couple from Rhode Island sought a divorce in a Rhode Island Family Court. Unsure of jurisdiction, the Family Court asked the Rhode Island Supreme Court whether it had jurisdiction to entertain a divorce petition.

The supreme court identified the issue in the case as the “meaning of the word ‘marriage’ within the Rhode Island statute that empowers the Family Court to grant divorces” and, more specifically, what did that word mean when the statute was enacted. The court held it was unambiguous that when the statute was enacted in 1961, marriage meant the union of a man and a woman. The court looked at dictionary definitions as evidence. Even if the term were ambiguous, though, the court held the context provided by other statutes in the same section of the law suggests that marriage was understood to be an opposite-sex relationship.

The court said the “role of the judicial branch is not to make policy, but simply to determine the legislative intent as expressed in the statutes enacted by the General Assembly” and since the legislature “had in mind only marriages between people of different sexes” when it gave jurisdiction to the Rhode Island Family courts, the same-sex couple in this case have “no remedy for their predicament.”

A dissenting opinion said the case could have been settled merely by noting that the parties were validly married in Massachusetts. The dissent reasoned that

Rhode Island Family Courts have jurisdiction where there is a marriage so they can grant a divorce in this case.

P.G.M. V. J.M.A.
A07-452

Minnesota Court of Appeals
December 11, 2007

<http://www.mncourts.gov/opinions/coa/current/opa070452-1211.htm>

A gay man who wanted to have a child entered an agreement with his niece whereby she would carry a child created with his sperm and a donor egg. The agreement included a provision that the surrogate would “disclaim any right to the child.” For performing the agreement she would receive \$20,000. During pregnancy, the parties had a disagreement and the surrogate gave birth to the child without telling the father. He filed a paternity claim and the trial court ruled the surrogate lacked any parental rights.

On appeal, the court found the surrogacy agreement valid since no Minnesota law prohibits such agreements and it was not procured by coercion. The court said state law against transferring a child from a parent to another person without adoption did not apply because a gestational surrogate is not a parent. The court said surrogacy agreements did not violate the state’s public policy.

DOE V. DOE
No. 26471

Supreme Court of Hawaii
December 13, 2007

<http://www.state.hi.us/jud/opinions/sct/2007/26471.pdf>

After divorce, paternal grandparents sought visitation of their grandchild who was in the custody of his mother. The family court

ruled that Hawaii's grandparent visitation statute, which allows visitation "if it is in the best interest of the child(ren)," is unconstitutional.

The state supreme court held that the grandparent visitation statute meets the U.S. Supreme Court's standard set forth in *Troxel v. Granville* because it can be interpreted as requiring "the family court to give 'special weight' to (i.e. uphold a rebuttable presumption in favor of) the visitation decisions of a custodial parent whose fitness has not been challenged."

The court, however, noted that the mother had argued "that the 'best interest of the child' standard is insufficient in nonparent visitation proceedings" and "only a showing of 'harm' will satisfy the compelling governmental interest inquiry." The court held the "grandparent visitation statute implicates parents' right to raise their children as protected under the right to privacy" and "must be strictly scrutinized." The court decided that "proper recognition of parental autonomy in child-rearing decisions requires that the party petitioning for visitation demonstrate that the child will suffer significant harm in the absence of visitation before the family court may consider what degree of visitation is in the child's best interests." Thus, the grandparent visitation statute is unconstitutional.

WEST V. WEST

Unpublished Opinion No. 2007-UP-555

South Carolina Court of Appeals

December 14, 2007

<http://www.judicial.state.sc.us/opinions/unpublishedopinions/HTMLFiles/COA/2007-UP-555.htm>

In a divorce decree, husband was given visitation but ordered not to take the children from the state and was "restrained

from exposing the children to any non-spouse romantic companion or relationship."

On appeal, the husband argued the trial court imposed its travel requirement solely based "on the judge's moral condemnation" of the husband's homosexual lifestyle. The trial court had held the husband "chose an inappropriate relationship over his marriage" and based on this decision his visitation should be confined to the state. Thus, to the appeals court "the judge imposed a visitation restriction based on moral considerations and his disapproval of Husband's adulterous conduct." The court believed "it was proper for the judge to consider Husband's morality as a factor in determining visitation rights" but only "to the extent it was shown to adversely impact upon the welfare of the children." The appeals court found there was "no evidence that Husband's conduct endangered or adversely affected the welfare of the children."

BRUKER V. MARCOVITZ

2007 SCC 54

Supreme Court of Canada

December 14, 2007

<http://scc.lexum.umontreal.ca/en/2007/2007scc54/2007scc54.pdf>

As part of a consent decree in a divorce, the husband agreed to obtain a Jewish divorce (a get) but he did not do so for fifteen years. His wife then sued and sought damages for breach of the agreement. The trial court found the agreement valid but the court of appeal found "that because the substance of the obligation was religious in nature, the obligation was a moral one and was therefore unenforceable by the courts."

A majority (seven justices) of the supreme court held that "[r]ecognizing the

enforceability by civil courts of agreements to discourage religious barriers to remarriage, addresses the gender discrimination those barriers may represent and alleviates the effects they may have on extracting unfair concessions in a civil divorce." The court also said the husband's failure to obtain a get intrudes "into our constitutionally and statutorily articulated commitments to equality, religious freedom and autonomous choice in marriage and divorce." The court also believed the husband's conduct had harmed "the right of Canadians to decide for themselves whether their marriage has irretrievably broken down and we attempt to facilitate, rather than impede their ability to continue with their lives, including with new families." The impairment of the husband's religious freedom, to the court, was "significantly outweighed by the harm both to the wife personally and to the public's interest in protecting fundamental values such as equality rights and autonomous choice in marriage and divorce."

Two justices dissented, arguing that the issue is purely a religious divorce which is not an issue for the state to address.

J.F. V. D.B.
2007-Ohio-6750
Supreme Court of Ohio
December 20, 2007

<http://www.sconet.state.oh.us/rod/newpdf/0/2007/2007-Ohio-6750.pdf>

A surrogate and her husband entered an agreement to relinquish children born as a result of a purchased donor egg being inseminated by a man and implanted in the surrogate in exchange for \$20,000. Triplets were born and a custody dispute ensued. The trial court said surrogacy contracts violate Ohio's public policy but the appeals court reversed.

The supreme court held "that Ohio does not have an articulated public policy against gestational-surrogacy contracts" so the court remanded to the trial court to find whether the surrogate had breached the contract by refusing to relinquish the children and any damages.

Three judges dissented. They noted that Ohio law "prohibits any person from offering 'inducements to parents to part with their offspring'" and, in adoption, prohibits "payment for the termination of parental rights." Here, the contract "is an agreement among unrelated persons for the creation of a child for the payment of money" and "it is impossible to so precisely separate the conduct of the parties and the object of the payment of the money." The dissent further said that for the contract to be valid, "it would be necessary to legally declare that the children do not have a mother. Such a position is untenable." Plus, the agreement "purports to indemnify [the father] from any support obligations" if he does not get custody which, the dissent believed would violate state law requiring a parent to provide for their children. Finally, the dissent argued the contract would "permit parties to such a pact to override and to write out the state's traditional oversight role." The dissent warned the majority's ruling could create a surrogacy market in Ohio.

**LANGAN V. STATE FARM FIRE &
CASUALTY**
502266

**New York Supreme Court, Appellate
Division Third Judicial Department
December 27, 2007**

<http://decisions.courts.state.ny.us/ad3/Decisions/2007/502266.pdf>

Two men contracted a civil union in Vermont. After the death of one, the

surviving partner sought Worker's Compensation for death benefits but an administrative law judge said a civil union partner was not a spouse as required by the Worker's Compensation statute.

The appeals court said that for purposes of Worker's Compensation, "spouse" requires a legal marriage so a civil union would not create a "spousal" relationship. The court also said the doctrine of comity (a state's decision to voluntarily defer to another state's law) does not require a recognition of Vermont civil unions.

The surviving partner argued that a failure to recognize the civil union would violate the Equal Protection Clause of the U.S. Constitution. The court said that "[i]t would not be unreasonable to conclude that the Worker's Compensation Law was enacted, in part, to encourage and protect the traditional family constellation of husband, wife and children." The court noted that the state's highest court had "already determined that the Legislature's decision to limit marriage to opposite-sex couples is rationally related to this legitimate interest and withstands rational basis scrutiny."

One judge dissented argued that since Vermont civil unions "are formal spousal relationships between same-sex couples," New York should recognize them as a matter of comity and, if not recognized, would violate the Equal Protection Clause.