

Marriage Law Digest

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BROWN V. YANA

S131030

Supreme Court of California

February 2, 2006

A father with visitation rights but not custody sought to restrain the mother (who had custody of their child) from moving out-of-state. The father sought an evidentiary hearing to show that the move would be bad for the child. The trial court held that there was no need for such a hearing unless there is an assertion of detriment to a child and a move is not a detriment. The court of appeals reversed, holding that a non-custodial parent is entitled to a hearing in a move away case.

The supreme court held that a custodial parent does not have an absolute right to relocate with a child because the relevant statute allows curtailment of the custodial parent's right if the move would be detrimental to the child. In this case, there was no need for an evidentiary hearing, though, unless there's an indication that some detriment might occur. Here, the court believed that the reviewing courts should defer to the trial court.

ALPHA MEDICAL CLINIC V.

ANDERSON

No. 93,383

Supreme Court of Kansas

February 3, 2006

Kansas' attorney general sought abortion records from clinics pursuant to an investigation into possible legal violations related to (1) late-term abortions, (2)

pregnancies resulting from child abuse and statutory rape, and (3) mandatory reporting of suspected child abuse. The clinics sought mandamus to prevent enforcement of the subpoenas. The supreme court held that the clinics should be allowed to retract files before delivering them to the judge.

WOMANCARE OF ORLANDO V.

AGWUNOBI

Case 4:05-cv-00222-WS-WCS

U.S. District Court for the Northern

District of Florida

February 10, 2006

This case involved a facial challenge to Florida's parental notice of abortion law enacted pursuant to a citizen initiated constitutional amendment. The law contains exceptions for notification where (1) a minor is mature, (2) there is evidence of parental abuse of the minor, and (3) notice would not be in the best interest of the child.

The court relied on the recent *Ayotte* decision which it believed suggested there was no constitutional concern with parental involvement statutes like Florida's. The court employed *Casey's* standard to determine if the law creates a "substantial" obstacle to abortion. The court concluded that the legislature had enacted the statute for proper reasons (i.e. welfare of families and children, mandate of the citizens, recognition of parental rights) and that the medical emergency exception provided in the statute was not vague. Finally, the court held that the statute properly provides for the privacy of minors so there was no substantial burden on the abortion right.

**COUNCIL OF THE CITY OF NEW YORK
V. BLOOMBERG
No. 6
New York Court of Appeals
February 14, 2006**

The mayor challenged a New York City law that prohibited the city from entering into substantial contracts with contractors who do not offer domestic partnership benefits to employees. The City Council then sought mandamus to compel the mayor's compliance with the ordinance. The appellate division held that the state and federal law (ERISA) preempted the ordinance.

In affirming, the court of appeals noted that state law directs municipalities to award contracts to the "lowest responsible bidder" but the challenged ordinance excludes "responsible bidders" who do not offer domestic partnership benefits. Therefore the ordinance conflicts with state law and is preempted. Additionally, the benefits affected by the city law which are covered by ERISA are also preempted.

One justice dissented, arguing that the mayor should have enforced the law until it was declared invalid.

**SAMUELS V. NEW YORK STATE
DEPARTMENT OF HEALTH
No. 98084
New York Supreme Court Appellate
Division, Third Department
February 16, 2006**

Same-sex couples sought marriage licenses from a town clerk and were denied, precipitating this suit. The trial court granted summary judgement for the state.

The court unanimously (5-0) voted to affirm the lower court. In regards to the plaintiffs

due process claim, the court said that this case "is not simply about the right to marry the person of one's choice but represents a significant expansion into new territory which is, in reality, a redefinition of marriage." The court noted that past right to marry cases recognized the nature of marriage as an opposite-sex institution and held that the "definitional component" of marriage as the union of a man and a woman predates the state and the country so there can be no right to redefine it consistent with history and tradition.

In regards to the equal protection argument, the court held that sexual orientation is not a suspect class and that the law is neutral as to gender. Thus, the state's proffered interests in the marriage law were analyzed under a rational basis standard. The court concluded that it was not irrational for the Legislature to act to "preserve the historic legal and cultural understanding of marriage." In so concluding, the court distinguished *Loving v. Virginia* as involving primarily a racial classification. The court then held that "[i]t is an undisputed biological fact that the vast majority of procreation still occurs as a result of sexual intercourse between a male and a female" so the state could conclude that encouraging opposite-sex couples to marry would provide children with opportunities to be raised by their parents in a committed relationship.

Finally, the court rejected the argument that the marriage law was targeted at speech or expressive conduct.

**JOHNSTON V. MISSOURI
DEPARTMENT OF SOCIAL SERVICES
Case No. 0516CV09517
Circuit Court of Jackson County, Missouri
February 17, 2006**

A woman and her same-sex partner were

denied a foster care license because of their sexual orientation. The placing agency's policy was not to place foster children in the homes of homosexuals because homosexual activity is illegal in Missouri. The court held, however, that the agency's reliance on the state's sodomy statute is misplaced because the *Lawrence v. Texas* decision made the statute unenforceable and therefore that law cannot be used to show immoral character. Rather, the court held that "there is only evidence that would support the excellent character and professional reputation of the Petitioner." The court further held that nothing in Missouri law precludes custody orders in favor of homosexuals and the state cannot rely on the possibility of parental objections to placement in the homes of homosexual persons since it is not permissible to rely on societal disapproval and the resulting stigma to a child.

LEVINE V. KONVITZ
Docket No. A-6449-03T5
Superior Court of New Jersey Appellate
Division
February 6, 2006

The parties had a seventy-year relationship (even though both parties were married to other people at times) but never cohabited. Near the end of defendant's life, plaintiff sought palimony. The court noted the test for palimony: (1) cohabitation, (2) a "marriage-type relationship," (3) a promise of lifetime support and (4) valid consideration. The court held that cohabitation was needed as a bright line to avoid manipulation of concept of a "marital-type" relationship. Cohabitation provides notice and warning to potential parties affected like "the innocent spouse and dependent children." Cohabitation is indispensable because "it provides concrete proof that the plaintiff's devotion was significantly induced by a promise of

support." Here there was no cohabitation and this no palimony could be awarded.

ROSKA V. SNEDDON
No. 04-4086
U.S. Court of Appeals for the Tenth Circuit
February 9, 2006

This was a §1983 action based on the removal of a child without a warrant or pre-deprivation hearing. School officials had expressed concerns over the child's health and DCFS began an investigation based on undocumented suspicion of Munchausen Syndrome by Proxy (MSBP). After consultation with an assistant attorney general, DCFS decided to remove the child without a warrant or hearing. In a previous decision in this case, the court had established that the plaintiff had "alleged a violation of their clearly established constitutional right to maintain a family relationship" and rejected a claim that the defendants had qualified immunity since the statute relied on for removal did not allow removal without process. The court in that decision had remanded to determine if the defendants' reliance on other statutes or counsel's advice made their conduct objectively reasonable and thus entitled to qualified immunity. The district court held that the actions were not objectively reasonable because they did not follow the statute and had not informed counsel of the child's doctor's opposition to removal.

Here, the court held that the agency failed to offer non-removal services as required by statute. The court noted that MSBP was not substantiated despite significant medical investigations. Thus, there was no qualified immunity for the actions.

The dissent argued that the social workers' actions were not unreasonable because the peculiar nature of MSBP made it difficult to

know how to respond to the child's situation.

**WOMEN'S MEDICAL PROFESSIONAL
CORP. V. BAIRD
Nos. 03-4249; 04-3060
U.S. Court of Appeals for the Sixth Circuit
February 17, 2006**

Ohio law requiring all medical facilities, including abortion clinics, to be licensed. A Dayton abortion clinic was unable to find a hospital to enter transfer agreement necessary to get such a license. The Ohio Department of Health denied the waiver of the license requirement and sought to shut the clinic. The clinic then sought an injunction that was granted because (1) the refusal to license would cause loss of business to the doctor, (2) the denial would injure women in Dayton seeking abortions, and (3) the denial created an undue burden on the abortion right.

The court applied the undue burden test from *Casey v. Planned Parenthood*. It concluded that the distance to a clinic in another city did not create an undue burden and the services were still available in Cleveland. The court noted that there was no intent to create a burden because the licensing statute was neutral as to the type of facility. There was also no evidence that the license was denied to create an obstruction to abortions.

The court held, though, that the doctor and clinic have a property interest in their business. Thus, their procedural due process rights were violated when there was no hearing before the deprivation of the license. The case was remanded to allow for a pre-deprivation hearing.

A concurring/dissenting opinion argued that the clinic and the doctor had already

received plenty of process.

**IN THE MATTER OF RAMADAN
No. 2004-727
Supreme Court of New Hampshire
February 14, 2006**

A couple married in Lebanon and eventually settled in New Hampshire where they lived for three years. The wife sought a divorce but the husband claimed to have initiated a divorce under Islamic law the day before. The husband eventually secured a religious divorce in Lebanon and motioned to dismiss the New Hampshire action which was denied. The court issued a divorce decree and order which the husband (now living in Lebanon) decided to ignore, alleging subject matter jurisdiction.

On appeal, the court noted New Hampshire statutes giving New Hampshire courts when both parties domiciled in the state when the action is commenced. State law also provides that divorce judgements from other jurisdictions are not valid where the parties are domiciled in New Hampshire. The husband appealed to the principle of comity but the court, noting the discretionary nature of comity, held that allowing one party to go to another country to secure a divorce would frustrate the point of making state law to govern family law.

**PLANNED PARENTHOOD CINCINNATI
V. TAFT
No. 04-4371
U.S. Court of Appeals for the Sixth Circuit
February 24, 2006**

Ohio passed a law limiting the use of the RU-486 abortifacient to specific uses outlined in federal regulations. Doctors and Planned Parenthood chapters sued alleging (1) vagueness, (2) violation of a right to bodily integrity, (3) lack of a health

exception, and (4) undue burden on the right to abortion. The district court enjoined in the basis of the health exception.

On appeal, the court held that there is no constitutional requirement that every abortion law must have a health exception since some laws will not pose a risk to life or health. Laws must, however, contain an exception where there is an adequate showing of a significant health risk even if the risk is highly unlikely. Here, the evidence indicated that RU-486 may be safer than surgical abortions in some cases so a health exception was necessary. Following *Ayotte*, a court must enjoin the problematic portions of a statute, so the court remanded for a determination of the parts that should be enjoined.

**CASANOVA ENTERTAINMENT GROUP,
INC. V. CITY OF NEW ROCHELLE**
2006 WL 238434
**U.S. Court of Appeals for the Second
Circuit**
January 31, 2006

A club with topless dancing sought an injunction against any local ordinances or zoning laws prohibiting its business in its current location. The court held that since there are alternative sites for the business, there is no constitutional violation if zoning laws prohibit topless dancing at its current location.

IN RE INQUIRY OF A JUDGE
2006 UT 10
Supreme Court of Utah
February 24, 2006

The state judicial conduct commission sought removal to a judge married to three women in violation of state statute and constitutional provisions. The Utah Supreme Court held that judges have to

obey the laws they swear to apply so the removal was ordered.

**MORRISON V. BOARD OF EDUCATION
OF BOYD COUNTY, KENTUCKY**
No. 05-38-DLB
**U.S. District Court, Eastern District of
Kentucky**
February 17, 2006

A previous case sought to require a high school to recognize a student "gay" club. The parties entered into a consent decree including adoption by the school of "mandatory staff and student diversity training, a significant portion of which would be devoted to issues of sexual orientation and gender harassment." Several students opted out of the training and received an unexcused absence. Parents and students with religious objections to homosexuality sued alleging that the Board policy prevents them from conveying their views about homosexuality.

The court held that the videos used in student training do not favor one opinion more than others and students are given blank cards after the training to express their viewpoint, so the policy cannot be said to have a chilling effect on contrary speech. The court further held that offense to religious beliefs does not establish a violation of the free exercise clause and argued that there was no evidence that students had to disavow their beliefs of endorse homosexuality. To the court, parental rights do not extend to control of the curriculum if the government can demonstrate a legitimate educational goal (here, the goal is maintaining a safe environment).

**AMERICAN CIVIL LIBERTIES UNION
OF TENNESSEE V. DARNELL
No. 05-1010-IV (III)
Tennessee Chancery Court Twentieth
Judicial District
February 23, 2006**

In approving a state marriage amendment to be voted on in November 2006, the Tennessee legislature failed to provide formal publication (six months before the next election) of the proposed amendment as allegedly required by the state constitution. The ACLU sued, seeking to prevent a vote on the amendment. The state argued that since the amendment was never changed since introduction and was widely publicized, the constitutional publication requirement was satisfied. The ACLU claimed it was injured because it could not educate the electorate regarding the amendment before the legislative elections subsequent to the first approval of the amendment.

The court held that a challenge to a proposed amendment must show (1) irreparable prejudice to the challenger, and (2) only one reasonable interpretation of the requirement relied on by the challenger. Here, the publication requirement could be satisfied by final publication by the legislature or making the text public in some other way. In addition, plaintiffs were not prejudiced by the lack of publication.

The court found that the literal text of the amendment was widely published online and in the media since it was introduced. Specifically, the ACLU knew about it previous to the legislative elections as evidenced by their lobbying efforts in opposition. The amendment was a subject of legislative campaigns.

To prevent voting in this case would be to

interfere with the people's opportunity to cast a vote on the issue. The court thus did not believe it was empowered to withdraw the amendment.