Marriage Law Digest

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PARKER V. HURLEY
No. 07-1528
U.S. Court of Appeals, First Circuit
January 31, 2008
http://www.ca1.uscourts.gov/pdf.opinions/07-1528-01A.pdf

Parents "whose religious beliefs are offended by gay marriage and homosexuality" sued their local school district alleging constitutional violations because their first and second grade children were exposed to books promoting acceptance of same-sex marriage without prior notice to the parents. The parents sought a declaration that their constitutional rights had been violated, damages and an injunction: (1) allowing them to exempt children from "classroom presentations or discussion the intent of which is to have children accept the validity of, embrace, affirm, or celebrate view of human sexuality, gender identity, and marriage constructs," (2) allowing them to observe these discussions and (3) "to not present any 'materials graphically depicting homosexual physical contact' to students before the seventh grade." The trial court relied on *Brown v. Hot, Sexy & Safer Productions* to dismiss the case.

On appeal, the court noted that Massachusetts has a statute that requires parents be given notice of curriculum involving "human sexual education or human sexuality issues" but the school argued the challenged books did not involve sexuality so the school had no obligation to the parents.

In response to the parent's religious liberty claims, the court said that under *Employment Division v. Smith* "this case would easily be dismissed" because "the defendants have an interest in promoting tolerance, including for the children (and parents) of gay marriages." The court assumed, however, that another standard applied. Under this standard, the court held that the district's actions did not target any particular religion: "The fact that a school promotes tolerance of different sexual orientations and gay marriage when such tolerance is anathema to some religious groups does not constitute targeting." The court saw no need to address "the level of justification the government must demonstrate" because "while we accept as true plaintiffs' assertion that their sincerely held religious beliefs were deeply offended, we find that they have not described a constitutional burden on their rights, or on those of their children." The court came to this conclusion because "[e]xposure to the materials in dispute here will not automatically and irreversibly prevent the parents from raising Jacob and Joey in the religious belief that gay marriage is immoral. Nor is there a criminal statute involved, or any other punishment imposed on the parents if they choose to educate their children in other ways." The court said it was not aware of any federal case "which has permitted parents to demand an exemption for their children from exposure to certain books used in public schools." The court also concluded that there was no direct coercion of the parents to violate their religious beliefs. The court reiterated that "the mere fact that a child is exposed on occasion in

public school to a concept offensive to a parent's religious beliefs does not inhibit the parent from instructing the child differently."

As to the first child's rights, the court said they were not burdened because he was not required to read the books and the "books do not endorse gay marriage or homosexuality, or even address these topics explicitly, but merely describe how other children might come from families that look different from one's own." The court believed there is "no free exercise right to be free from any reference in public elementary schools to the existence of families in which the parents are of different gender combinations." The second child, the court admitted, "was required to sit through a classroom reading of *King and King* and . . . that book affirmatively endorses homosexuality and gay marriage. It is a fair inference that the reading of *King and King* was precisely *intended* to influence the listening children toward tolerance of gay marriage." The court said, however, that there was "no evidence of systemic indoctrination;. There is no allegation that Joey was asked to affirm gay marriage." the court said: "Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them." Further: "The reading by a teacher of one book, or even three, and even if to a young and impressionable child, does not constitute 'indoctrination.'" The court suggests that "[i]f the school system has been insufficiently sensitive to such religious beliefs, the plaintiffs may seek recourse to the normal political processes for change in the town and state."

CITIZENS FOR A RESPONSIBLE CURRICULUM V. MONTGOMERY COUNTY PUBLIC SCHOOLS
Civil No. 284980
Circuit Court for Montgomery County, Maryland
January 31, 2008
http://www.gazette.net/links/files/Citizens020608.doc

In 2004, a citizens group challenged the health curriculum adopted by Montgomery County Public Schools. A federal court granted an injunction and MCPS revised the curriculum in 2006. When the new curriculum was approved, the groups appealed approval to the Maryland State Board of Education, but the Board sided with MCPS.

This court was asked to address whether the Board could "properly determine that it is legal to present instruction including the term 'anal intercourse' where instruction of 'erotic techniques' is prohibited under Maryland law?" and whether "it is legal to present instruction that homosexuality is 'innate?'" The court simply deferred to the Board's finding that the local school board could "determine that the lessons did not contain erotic techniques." The court further deferred to MCPS's teaching about sexual orientation because it had been "created by a committee including medical professionals."

MARTINEZ V. COUNTY OF MONROE
1562
New York Appellate Division, Fourth Judicial Department
February 1, 2008
http://www.nycourts.gov/ad4/

After a community college employee married her same-sex partner in Canada, she sought and was denied spousal health care benefits for her partner. The trial court held

the Canadian marriage was not entitled to recognition in New York.

The appellate court ruled that the Canadian same-sex marriage does not fall into the exceptions for marriage recognition in New York because it was not "prohibited by the 'positive law'" and did not involve "incest or polygamy, both of which fall within the prohibitions of 'natural law.'" The court noted the New York Legislature "has not enacted legislation to prohibit the recognition of same-sex marriages validly entered into outside of New York. The court held the *Hernandez v. Robles* decision of the highest state court was not applicable because it only held that the state constitution "does not *compel* recognition of same-sex marriages solemnized in New York."

The court said that the refusal to recognizing the valid Canadian marriage violated state law "which forbids an employer from discriminating an employee 'in compensation or in terms, conditions or privileges of employment' because of the employee's sexual orientation" because the court believed the only reason recognition was refused was the employee's sexual orientation.

HELGELAND V. WISCONSIN MUNICIPALITIES
2008 WI 9
Wisconsin Supreme Court
February 7, 2008
http://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=31775

State employees and "their same-sex domestic partners" sued the Department of Employee Trust Funds challenging the constitutionality of state law defining "dependents" in a way that does not include partners in same-sex couples. Eight municipalities sought to intervene in the case but were denied by the trial and appeals courts.

The cities claimed they should be allowed intervention because they will have to pay for benefits if the court decides for the plaintiffs. The supreme court, however, held the municipalities interest is "too remote and speculative to support a right of intervention." The court also held the federal Defense of Marriage Act was inapplicable because it defines "spouses" not "dependents." The court believed the DETF was adequately representing the municipalities' interests.

A concurring opinion argued that allowing intervention here would allow any interested party to intervene in any case thus driving up the costs of litigation for everyone.

Three judges dissented noting the "sweeping and significant" issues in the case and the broad set of public employers that would be affected. The dissent charged the majority opinion with depriving the municipalities of any "real say about their future ability to determine whether to extend dependent health care benefits to same-sex couples." The court noted that three of the municipalities would "experience the direct costs" of a court decision in favor of plaintiffs and would have their collective bargaining agreement with employees rewritten. The dissent also argued the other municipalities would be effected. The dissent said "courts undermine their legitimacy in making calls that antagonize majority opinion when they slam the door in a full airing of facts and views." The court characterized the majority decision as kicking the municipalities "off the field" and telling them "they have the privilege of cheering for the State from the

bleachers." The dissent continued: "As they prepare to wave their rally towels, they may note the irony of the plaintiffs' importing counsel from Illinois to explain Wisconsin civil procedure to Wisconsin courts, and of the American Civil Liberties Union seeking to vindicate diversity of lifestyles while squashing diversity of views. If the municipalities are disappointed by their remote seats, they will surely get over it once they accept the heartening 'presumption' that the DETF adequately represents the municipalities' interest."

FISHER V. FLORIDA
20087 WL 360780
U.S. District Court, Middle District of Florida
February 8, 2008

Plaintiff argued that the state Department of Children and Families would not give him food stamps because he is gay but the court held his claims did not allege a violation of federal law "because there is no statute which prohibits discrimination on the basis of sexual orientation in relation to the processing of food stamp applications."

HARPER V. POWAY UNIFIED SCHOOL DISTRICT
Case 3:04-cv-01103-JAH-POR
U.S. District Court, Southern District of California
February 12, 2008
http://www.alliancealert.org/2008/20080213.pdf

A high school student challenged the school's refusal to allo her to wear a t-shirt that said "Homosexuality is shameful. Romans 1:27" and "Be ashamed. Our school has embraced what God has condemned." After a series of previous decisions, the case was remanded to the trial court.

The court held that "a school's interest in protecting homosexual students from harassment is a legitimate pedagogical concern that allows a school to restrict speech expressing damaging statements about sexual orientation and limiting students to expressing their view in a positive manner." The court had "no doubt" "that the phrase 'Homosexuality is shameful' is disparaging of, and emotionally and psychologically damaging to, homosexual students and students in the midst of developing their sexual orientation in a ninth through twelfth grade, public school setting." Thus, the school district was justified in restricting the speech "for the legitimate pedagogical concern of promoting tolerance and respect for differences among students." The court also reiterated an earlier Ninth Circuit holding that there was no evidence that the school's decision advanced a religious purpose because "the School acted in order to maintain a secure and healthy learning environment for all its students, not to advance religion."

RELIABLE CONSULTANTS V. EARLE
No. 06-51067
U.S. Court of Appeals, Fifth Circuit
February 12, 2008
http://www.ca5.uscourts.gov/opinions/pub/06/06-51067-CV0.wpd.pdf

Retailers of "sexual devices" challenged a Texas law forbidding their promotion. The trial court held that "the statute does not violate the Fourteenth Amendment because there is no constitutionally protected right to publicly promote obscene devices."

On appeal, a panel said that in *Lawrence v. Texas*, the U.S. Supreme Court recognized "a right to be free from governmental intrusion regarding 'the most private human contact, sexual behavior.'" The court held the Texas

law burdens this constitutional right because "[a]n individual who wants to legally use a safe sexual device during private intimate moments alone or with another is unable to legally purchase a device in Texas, which heavily burdens a constitutional right."

The court characterized the state's justifications for the law as "morality based" and said that under *Lawrence*, such interests are not enough to sustain the statute. To do so would "allow the government t o burden consensual private intimate conduct simply by deeming it morally offensive." The state had argued that the statute protects minors and unwilling adults "from exposure to sexual devices and their advertisement" but the court could not see any "rational connection between the statute and the protection of children."

The court concluded by characterizing the case as "about controlling what people do in the privacy of their own homes because the State is morally opposed to a certain type of consensual private intimate conduct" and saying this was "an insufficient justification for the statute after *Lawrence*."

The dissent said Lawrence "declined to employ a fundamental-rights analysis, choosing instead to apply rational-basis review." The dissent argued that the statute only applied to conduct that "is both public and commercial" and so was not affected by *Lawrence*.

BETH R. V. DONNA M.
Index No. 350284/07
Supreme Court of New York, County of New York
February 25, 2008

http://data.lambdalegal.org/pdf/legal/robinson/beth-r-v-donna-m-decision.pdf

One partner in a same-sex couple married in Canada sought a divorce in New York. The other partner claimed the marriage was void in New York. The plaintiff seeking a divorce also sought custody of two children of the defendant conceived through artificial insemination. This court refused defendant's motion to dismiss the case.

The court said the New York Court of Appeals' decision in Hernandez v. Robles only meant "that no constitutional imperative required the court to interfere with [the state's marriage law] as enacted by the legislature" and had no effect on out-of-state marriages. The court said the general rule is that New York will recognize a marriage valid where contracted unless the marriage is "prohibited by positive law" or "abhorrent to New York public policy." In support of its decision, the court pointed to the recent Appellate Division decision in Martinez v. Monroe County, two attorney general opinions arguing that New York could recognize out-of-state same-sex marriages, and similar opinions from the New York Comptroller, New York City attorney and the New York Department of Civil Service. The court also held that the plaintiff could seek visitation because the defendant had treated her as a "parent" and the couple had been married in Canada. The court said the exclusion of the plaintiff from the lives of the infant and three-year-old children could cause damage to the "emotional we–being" of the children. The court thus ordered a trial regarding custody and child support.