

MARRIAGE LAW DIGEST

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MORRISON V. SADLER
No. 49A02-0305-CV-447
Court of Appeals of Indiana
January 20, 2005

In this case, three same-sex couples challenged Indiana's marriage law on state constitutional grounds.

The first claim invoked the Indiana Constitution's Privileges and Immunities Clause. The court noted the deferential nature of the analysis of such a claim and concluded that plaintiffs had failed to demonstrate that the state interest in marital procreation was invalid. The opinion identifies the "key question" as "whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including the interest in marital procreation." The court concludes that redefining marriage would not have that result despite plaintiffs claim that same-sex couples have children. The essential difference noted by the court is that same-sex couples must intend to have children while opposite-sex couples may have children without intending to. The state has an interest in promoting marriage where children may result without being intended and need not recognize situations where there is intent (since there will presumably be some protection for children whose birth is intentional).

The court addressed other state court decisions to the contrary. It declined to follow Vermont because (1) that cases did not involve a claim for same-sex marriage, (2) the Vermont Constitution is less

deferential to legislative discretion than Indiana's, and (3) the Vermont court did not address the intentionality of same-sex child-rearing.

The court also declined to follow Massachusetts since (1) its Constitution was also not deferential to legislative rationales, and (2) the Massachusetts opinion did not address state interests in marriage.

On the plaintiffs second claim (analogous to federal due process), the court decided that there was no constitutional "core value" that would support a right to marry a person of the same-sex. The court was willing to believe that the Indiana Constitution might recognize a right to be free of government interference but that such a right would not extend to the provision of government benefits based on personal choices.

The court summarily dismissed the plaintiffs' open court claim noting that while it did not likely apply to the case, it would be precluded since the marriage statute advanced a "legitimate legislative goal."

The court thus affirmed the lower court decision dismissing the case.

One judge wrote a separate concurring opinion which expressed some misgivings about the state interest in marital procreation (specifically whether it could be invoked to prevent sterile couples from marrying) but concluded that the legislature must make the final decision about the definition of marriage.

WILSON V. AKE
No. 8:04-cv-1680-T-30TBM
U.S. District Court, Middle District of
Florida
January 19, 2005

A same-sex couple who had contracted a same-sex marriage in Massachusetts sought to have their marriage recognized in Florida. When the recognition was refused they filed suit against the county clerk and the U.S. Attorney General alleging the unconstitutionality of the Florida marriage statute and the federal Defense of Marriage Act (DOMA). Plaintiffs claimed that these laws violated the Full Faith and Credit, Equal Protection, Due Process, Privileges and Immunities and Commerce Clauses of the U.S. Constitution. The plaintiffs theory was that a string of U.S. Supreme Court cases (the "Dynamite Dozen") demonstrated an expansion of "the fundamental liberty of personal autonomy in connection with one's intimate affairs and family relations." The attorney general motioned for dismissal.

The court held that DOMA was fully consistent with Congress' power under the Full Faith and Credit Clause and concluded that Florida was not required to recognize a Massachusetts marriage that conflicted with Florida public policy.

The court further held that its decision was controlled by an earlier decision of the U.S. Supreme Court to dismiss a same-sex marriage case for want of a substantial question, which is a decision on the merits.

Plaintiffs had argued that the U.S. Supreme Court decision in *Lawrence v. Texas* created a fundamental right to same-sex marriage but the court rejected the claim relying on (1) contrary Eleventh Circuit precedent which held that *Lawrence* did not recognize any new fundamental right, (2) the *Lawrence*

majority disavowals of an effect on marriage and (3) the prudential consideration that recognizing a fundamental right removes a question from the political debate.

In regards to the equal protection claims, the court held that no suspect class was effected by the marriage law so the statute would receive rational basis scrutiny. Since the Eleventh Circuit recognized that "encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest," the statute survived that scrutiny.

FORUM FOR EQUALITY V. MCKEITHEN
No. 04-CA-2523
Supreme Court of Louisiana
January 19, 2005

Voters in Louisiana enacted a state marriage amendment with 78% of the vote. The amendment was challenged with plaintiffs alleging that the amendment violated the state's single subject rule for state amendments. The trial court held that since the amendment prohibited both same-sex marriage and functional equivalents it addressed more than one subject.

The supreme court identified the relevant test as whether "every provision [of an amendment] relates or is germane to the main purpose or object of the amendment." The court concluded that the amendment "contains a single plan to defend our civil tradition of marriage" and that all elements of the amendment advanced that purpose: "In effect, the amendment provides the only contract or legal instrument whereby the state is mandated to bestow the rights, civil effects, and legal incidents of marriage upon the parties in recognition of the legal status created or established by said contract or

instrument is the contract of marriage between one man and one woman.”

MARTIN V. ZIHERL
No. 040804
Virginia Supreme Court
January 14, 2005

Plaintiff alleged that defendant gave her a sexually transmitted disease and sought recovery in tort. Defendant invoked a common law rule precluding damages for injuries inflicted during commission of a crime. The crime alleged was fornication. Plaintiff argued that the fornication statute was unconstitutional after *Lawrence v. Texas*. The trial court found that *Lawrence* did not apply.

The Virginia Supreme Court held that there was no relevant distinction between the sodomy statute struck down in *Lawrence* and the fornication statute invoked here. The court rejected the claim that the fornication statute was justified by (1) the need to protect public health and (2) the need to encourage childbearing by married couples. In doing so, the court suggested that the U.S. Supreme Court had found such rationales "insufficient" in *Lawrence*.

United States v. Extreme Associates
Criminal No. 03-0203
U.S. District Court, Western District of Pennsylvania
January 20, 2005

This case involved the prosecution of producers of sexually explicit films under federal obscenity law. The defendants motioned for a dismissal on the grounds that the obscenity law was unconstitutional and did not dispute that the materials for which they were being prosecuted were obscene.

The court assessed the constitutionality of federal obscenity law, not under the First Amendment, but rather under the Fourteenth Amendment's due process clause. The court held that the state's asserted interest in protecting public morality could not justify the obscenity law after the U.S. Supreme Court's decision in *Lawrence v. Texas*. The court also held that *Stanley v. Georgia* established a fundamental right to look at obscenity in one's home, so the statute must be subjected to strict scrutiny. Thus, the law was unconstitutional as applied to these defendants.