

Marriage Law Digest

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MICHIGAN V. WALTONEN

No. 270229

Michigan Court of Appeals

November 7, 2006

<http://courtofappeals.mijud.net/resources/opinions.htm>

Defendant was charged with first-degree criminal sexual conduct (CSC) under statute prohibiting sexual penetration in circumstances connected to commission of a felony after he gave drugs to a woman in exchange for sexual favors. The trial court quashed the charge and the prosecution appealed.

The court of appeals first held that a victim's consent was not a defense to the CSC charge but the sexual conduct has to be connected to the felony. In a footnote, the court questioned whether the Legislature intended this result and noted that the statute would have the effect of making adultery a first-degree CSC since adultery is a felony.

GONZALEZ V. GREEN

2006 WL 3849128

Supreme Court, New York County

December 28, 2006

http://www.courts.state.ny.us/REPORTER/3dseries/2006/2006_26523.htm

A same-sex couple living in New York, traveled to Massachusetts to marry. Later, they broke up after both signing a "separation agreement" sorting out property and financial assets between the partners. The impecunious partner subsequently sought a divorce and the defendant argued

that since their marriage was invalid, the agreement should be rescinded.

The trial court held that the marriage was void since New York defines marriage as the union of a man and a woman and Massachusetts does not allow out-of-state same-sex couples to contract marriages if the couples' home state will not recognize the marriage. Thus, the divorce action was dismissed. The court, however, held the agreement valid since New York law allows cohabitants to enter binding agreements.

A.A. V. B.B.

2007 ONCA 2

Court of Appeal for Ontario

January 3, 2007

<http://www.ontariocourts.on.ca/decisions/2007/january/C39998.pdf>

A partner in a same-sex couple had a child with the "assistance" of a "friend" and is raising the child with the help of her partner. The partner with no biological relationship to the child sought a declaration that she is the child's parent without extinguishing the parental rights of either the father or mother. The trial court decided that it lacked the authority to make such a declaration.

The court of appeals agreed that the relevant statute only allows for a legal finding of one mother and one father, but held the court's *parens patriae* authority applies where there's a gap caused by legislation. Here, the court found such a gap because the current statute does not deal with relationships made possible by reproductive technology. The

court said “[p]resent social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the [Children’s Law Reform Act’s] legislative scheme.” For instance, now “the parents of a child can be two women or two men.” Since the CLRA “does not recognize these forms of parenting . . . the children of these relationships are deprived of the equality of status that declarations of parentage provide.”

**HOLLINS V. METHODIST
HEALTHCARE, INC.**

No. 05-6301

**U.S. Court of Appeals for the Sixth Circuit
January 10, 2007**

<http://www.ca6.uscourts.gov/opinions.pdf/07a0012p-06.pdf>

The plaintiff, a resident in a “pastoral education program” at a religious hospital sued the hospital for disability discrimination after she was dismissed. The trial court dismissed, holding it did not have jurisdiction in the case because of the ministerial exception to such claims. The exception, meant to protect constitutional religious liberty values, applies to disputes between a religious organization and its ministerial employees.

A panel of the court of appeals held that the exemption applies to an organization with a clear religious mission and to employees who are primarily involved in religious teaching or practices. Thus, the exemption applied to the hospital here. The court further held that the hospital had not waived the exemption by its membership in an outside accrediting body that required the hospital to assent to a non-discrimination policy.

LAURA G. V. PETER G.

2007 WL 102332

**New York Supreme Court, Delaware
County**

January 10, 2007

This case involved a divorce agreement that freed the husband from support of a child born to the wife as a result of artificial insemination. The husband had not given his consent in writing as required by law but the wife argued that he had consented nonetheless. An earlier decision had established that an agreement that absolved a divorcing party of the duty for child support violated public policy and was void.

In the recent decision, the court held that since the child was born during the marriage, the husband was presumed to be the father. In addition, strict compliance with the parentage statute (that requires written consent for a husband of a recipient of artificial insemination to be considered the resulting child’s parent) was not necessary so since there was evidence that the husband agreed with the procedure, the husband could still be considered the father. The court also held that the husband was legally prohibited from denying his parentage because he had established a relationship with the child and severing that relationship could be harmful to the child.

The key paragraph in the court’s paragraph says: “The bottom line is that Defendant may have been reluctant to have another child, but he vacillated and never clearly and unequivocally said ‘no’ to his wife. In her testimony she said he said ‘yes,’ and the Court finds that testimony believable. Defendant has now made a commitment to his wife and child Alyssa. That commitment must be honored. Since he participated in bringing Alyssa into this world, however

reluctantly, he should be held responsible as her father for child support.”

**ARIZONA TOGETHER V. BREWER
CV-06-0277-AP/EL**

Arizona Supreme Court

January 12, 2007

<http://www.supreme.state.az.us/opin/pdf2007/CV060277APEL.pdf>

A proposed state marriage amendment was challenged pre-election by opponents who said the amendment dealt with more than one subject (a practice prohibited by the state constitution) because it affected (1) marriage, (2) civil unions and domestic partnerships, and (3) rights and benefits. The trial court said the amendment complied with the single-subject rule.

The state supreme court said that to comply with the single-subject rule. An amendment’s provisions must address the same topic and be interrelated. Here, the amendment’s provisions are “topically related” since “[t]he first provision adopts an exclusive definition of marriage, while the second emphasizes that the state cannot circumvent the definition by conferring any other marriage-like legal status upon unmarried individuals.” The amendment provisions are interrelated because (1) the purpose of both provisions is to preserve and protect marriage,” (2) both provisions “involve a single subject of the constitution,” (3) other states have treated marriage and domestic partnerships as interrelated (i.e. California and Vermont referring to “spouse” in determining benefits), and (4) “both provisions affect substantive law in the same way . . . [t]he first provision sets forth a definitional framework of marriage, which the second provision makes exclusive in terms of ‘legal status.’”

**DOE V. CANADA (ATTORNEY
GENERAL)**

2007 ONCA 11

Court of Appeal for Ontario

January 12, 2007

<http://www.ontariocourts.on.ca/decisions/2007/january/2007ONCA0011.pdf>

A woman in a same-sex relationship wanted to access artificial insemination using a known donor (a gay man). The relevant government regulations only allow unscreened sperm donations where the donor is the spouse or sexual partner of the person to be inseminated. In addition, since the prospective donor fit into a risk category (men who have sex with men), the donation would have to be stored for six months before use to allow for testing. This condition was not acceptable to the donor. The prospective mother challenged the regulation alleging that since lesbians cannot get sperm donations from their partner or spouse, the regulations’ requirement of screening violated the Canadian Charter. (The mother believed there should be an exception to the screening requirement where a partner in a same-sex couple seeks to use the sperm of a known donor.) The court held the regulation was based on valid health considerations. Also, that there was no Charter right to artificial insemination without screening for disease.

KOSHKO V. HAINING

No. 35

Maryland Court of Appeals

January 12, 2007

<http://www.courts.state.md.us/opinions/coa/2007/35a06.pdf>

After estrangement from their daughter and her husband, grandparents sought visitation with the daughter’s children. The trial court held the grandparents had rebutted the

presumption in favor of the parents and visitation would be in the best interests of the children. An appeals court affirmed and the parents appealed to the state's highest court.

The highest court held the parents have a fundamental right "to direct and control the upbringing of their children." The grandparents, though, have no constitutional right to visitation. So, the parents and grandparents are unequal in visitation disputes. The parents right, said the court, leads to the presumption that parents act in the best interests of their children. Although the grandparent visitation statute does not give special weight to parent's visitation decisions, this court construed it to include the presumption in favor of parental decisions.

The court pointed out that visitation is a limited form of custody that intrudes on parental rights and has a direct and substantial effect on these fundamental rights. Thus, the court applied strict scrutiny to assess the constitutionality of the application of the statute in this case. The court concluded that, under this analysis, third parties must show parental unfitness before the best interest of children standard can be invoked. So, "parental unfitness and exceptional circumstances shall be threshold considerations . . . in third party visitation disputes."

A dissent argued the court should not have relied on the U.S. Supreme Court decision in *Troxel v. Granville*, because it was only a plurality opinion.

**DOE V. ARPAIO
CA-CV 05-0835**

**Arizona Court of Appeals, Division One
January 23, 2007**

<http://www.cofad1.state.az.us/opinionfiles/>

[CV/CV050835.pdf](#)

Prison policy required an inmate to obtain a court order before going off premises to secure an abortion. An inmate sought the order, which was obtained, but the trial court ruled the policy unconstitutional.

On appeal, the court applied a test from the prisoner marriage case, *Turner v. Safley*, to determine whether the policy unduly burdened the inmate's abortion right. The court first decided the policy was not reasonable related to penological interests in security, money-saving, avoiding liability, compliance with state law (i.e. the law prohibiting state funding for abortions since here the prisoner would pay costs). The court held that the alternative means for securing the abortion (the court order) was not sufficient since it allows courts nearly unfettered ability to prevent an abortion. The court also believed the request would have minimal impact on prison resources. Finally, an alternative to the existing policy (administrative request) exists. The court concluded the policy was an "exaggerated response" to penological concerns.

**FLORES V. TEXAS
No. 09-05-292 CR**

**Court of Appeals Ninth District of Texas
January 24, 2007**

<http://www.9thcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=8715>

A man charged with the murder of his two unborn children (he had stepped on the abdomen of his pregnant girlfriend, allegedly because she did not want the children) challenged the constitutionality of the charging statute because it treats biological mothers and fathers differently (because the mother can choose an abortion).

The court rejected his claims because the father has no fundamental right to abortion and the statute applies to both sexes equally. The court further held that the statute has a rational basis of protecting life and that “[a] statute does not violate the Establishment Clause merely because it is consistent with religious views.

HENDRICKS V. SWAN

2007 SKQB 36

Queen’s Bench for Saskatchewan

January 29, 2007

<http://www.lawsociety.sk.ca/judgments/2007/OB2007/0A0SK.pdf>

An unwed birth mother relinquished her child to prospective adoptive parents. The biological father who had long since broken up with the mother sought custody after a long search to determine the child’s whereabouts.

The court gave long descriptions of the father and the couple who currently had custody. The court characterized the father’s previous relationships as all having “ended somewhere between badly and very badly,” his “experience with employment” as “somewhat eclectic.” The court noted that the father had not filed income tax returns in three years and had only recently discharged a bankruptcy. The court also noted the father’s past alcohol and drug use. The child’s current custodians were older, married, had no similar past problems and gainfully employed. The husband was at home with the child.

The court said that its primary interest was the best interest of the child and that blood ties are a factor only relevant as they impact this interest. Here, the court believed the child’s best interest were served by allowing the prospective adoptive parents to continue custody, but after a year, the father could

have “intermittent” visitation.