

# Marriage Law Digest

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## JANUARY 2009 CASE SUMMARIES

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### GODFREY V. SPANO

2008 NY Slip Op 10584

Supreme Court of New York, Appellate  
Division, Second Judicial Department  
December 30, 2008

[http://www.nycourts.gov/reporter/3dseries/2008/2008\\_10584.htm](http://www.nycourts.gov/reporter/3dseries/2008/2008_10584.htm)

Taxpayers challenged their county executive's executive order requiring the county to recognize same-sex marriages contracted in other states. The trial court said the order was valid.

The appellate division said the order was invalid because it included language saying the marriages would be recognized to "the maximum extent allowed by law" thus insulating the order from challenge of illegality. The court also said the plaintiffs had to show the order had some effect on them other than the general effect on all taxpayers. They had not done so, so the court did not consider their state constitutional claims.

### ADULTERY CASE

2008 Hun-Ka 7.26

Constitutional Court of Korea

October 30, 2008

[http://www.court.go.kr/home/english/decisions/recentdecisions/rent\\_decision\\_view.jsp](http://www.court.go.kr/home/english/decisions/recentdecisions/rent_decision_view.jsp)

A series of cases questioning the constitutionality of adultery prosecutions were consolidated. Six members of the court must agree that a statute is unconstitutional for it to be invalidated. In this case, five ruled for invalidity and four against so the law is retained.

Three of the judges voting for constitutionality said the restriction on adultery protected the marital relationship and preserved social order. Any interest of an individual infringed by the law is outweighed by the public interest.

The other judge voting for constitutionality believed the law was appropriately used in this case but felt there might be settings where prosecution would cause a constitutional harm.

Three judges who believed the law was unconstitutional pointed to an evolution in ideas about sexuality in the public mind and suggested criminal punishment does not effectively promote the purposes of the anti-adultery law. They believed the law excessively constrained the exercise of rights to sexual autonomy.

Another judge voting for unconstitutionality did so because he thought the law so broad that it could apply to trivial actions open only to moral criticism.

The final judge opposing the law argued that the mandatory sentences associated with the anti-adultery laws unnecessarily prevented consideration of specific circumstances.

**MONSON V. ROCHESTER ATHLETIC CLUB**

**A07-2433**

**State of Minnesota Court of Appeals**

**January 6, 2009**

<http://www.alliancealert.org/2009/20090107.pdf>

A same-sex couple sought to be members of a club at a family rate. The club said family rates were only available to married couples. The trial court ruled in favor of the club.

The appeals court decided the policy “does not discriminate on the basis of sexual orientation” because it denies membership to any unmarried couple, same or opposite-sex.

The court noted the policy was facially neutral even though it had a “disparate impact” on same-sex couples since they could not marry. The court held that the non-discrimination law as it related to public accommodations only focuses on the conduct of the accommodation and not “the effects of the provider’s contact caused by other factors.” So, the disparate impact theory was not available in this case. The court thus concluded there was no basis for the lawsuit.

**IN THE MATTER OF DONNA S.  
2009 N.Y. Slip. Op. 29009  
New York Family Court, Monroe County  
January 6, 2009**

A partner in a same-sex couple, who had been married in Canada, sought to be certified as a qualified adoptive parent so she could adopt her partner’s child to be born a few months later. Since recent New York cases suggest the state will recognize same-sex marriages from other jurisdictions, the partner “will at the very least be considered a step-parent” and step-parents are not required to be certified to adopt the children of their spouses under New York law. Similarly, New York law presumes a husband of a wife who bears a child by artificial insemination is the father so “it would seem that by simple execution of a consent, [the partner] could become the baby’s legal parent without the necessity of an adoption.” The court decided to grant the petition to certify, however.

**RALPH V. CITY OF NEW ORLEANS**

**No. 2008-CA-0767**

**Louisiana Court of Appeal, Fourth Circuit**

**January 15, 2009**

<http://www.la4th.org/pdf/20080767OP%201.pdf>

Taxpayers challenged the City of New Orleans’ domestic partner registry, arguing it violated a State law prohibiting municipalities

from “enact[ing] an ordinance governing private or civil relationships” and that the registry violates Louisiana public policy “favoring marriage over unmarried cohabitation.”

The court rejected this argument, holding the ordinance did not create, but rather recognized the existence of domestic partnerships. The court said the “ordinance does not control the making and administration of domestic partnerships; it merely provides a mechanism whereby persons may register these partnerships in the City.” Since the court believed the registry did not “regulate the creation, maintenance or termination of the partnerships” and since the registry is voluntary and “confers no legal rights and obligations” it did not exceed the City’s statutory authority.

**LEWIS V. NEW YORK STATE  
DEPARTMENT OF CIVIL SERVICE  
504900  
New York Supreme Court Appellate  
Division, Third Judicial Department  
January 22, 2009  
<http://decisions.courts.state.ny.us/ad3/Decisions/2009/504900.pdf>**

Taxpayers challenged the Department of Civil Service policy of recognizing same-sex marriages contracted in other jurisdictions. The court said the longstanding New York rule is that a marriage valid where contracted is valid everywhere with only narrow exceptions. The court said that although same-sex marriages are novel and cannot be contracted in New York, doesn’t mean the State won’t recognize a marriage valid in another State. The court said same-sex marriages don’t fall within the exceptions to recognition because no statute prohibits recognition and the policy exception to recognition only applies to incest and polygamy.

**MAGDALIN V. COMMISSIONER OF  
INTERNAL REVENUE  
T.C. Memo 2008-293  
United States Tax Court  
December 23, 3008**

<http://www.ustaxcourt.gov/InOpHistoric/Magdalin.TCM.WPD.pdf>

A taxpayer tried to deduct from his taxes expenses “incurred in fathering children through unrelated gestational carriers via the in vitro fertilization of an anonymous donor’s eggs using [his] sperm.” The taxpayer argues that “it was his civil right to reproduce, that he should have the freedom to choose the method of reproduction, and that it is sex discrimination to allow women but not men to choose how he will reproduce.”

The court said that since the taxpayer did not have a medical condition, like infertility, that required IVF, so the expenses were not deductible. The court said there was no constitutional issue because the taxpayer’s “gender, marital status, and sexual orientation do not bear on whether he can deduct the expenses at issue.”

#### RECENT LAW REVIEW ARTICLES

Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of Alison D. v. Virginia M.* 17 COLUMBIA JOURNAL OF GENDER & LAW 307 (2008). Describes an early New York case rejecting a claim for co-parenting by a same-sex couple.

Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy* 17 COLUMBIA JOURNAL OF GENDER & LAW 343 (2008). Lays out a way of understanding traditionalist objections to redefining marriage as a misappropriation of the cultural property of the marriage institution.

Jacob Larson, *It’s About Time, Or is It?: Iowa District Court’s Invalidation of Iowa’s Mini-DOMA* 12 JOURNAL OF GENDER, RACE AND JUSTICE 153 (2008). Defends the Iowa District

Court decision in *Varnum v. Brien* striking down Iowa's statutory definition of marriage as the union of a man and a woman.

Steven P. Wieland, *Gambling, Greyhounds and Gay Marriage: How the Iowa Supreme Court Can Use the Rational-Basis Test to Address Varnum v. Brien* 94 IOWA LAW REVIEW 413 (2008). Argues that using the rational basis test as developed in Iowa cases, the state supreme court can mandate a redefinition of marriage.

Rena M. Lindevaldsen, *Sacrificing Motherhood on the Altar of Political Correctness: Declaring a Legal Stranger to be a Parent Over the Objection of the Child's Biological Parent* 21 REGENT UNIVERSITY LAW REVIEW 1 (2009). Argues that unless a parent is unfit, courts should not take their child's custody from them in order to grant custody to a former same-sex partner.

Amanda Alquist, *The Migration of Same-Sex Marriage from Canada to the United States: An Incremental Approach* 30 UNIVERSITY OF LAVERNE LAW REVIEW 200 (2008). Argues that the U.S. should follow the example of Canada and adopt an incremental strategy to secure a redefinition of marriage by promoting sexual orientation nondiscrimination laws, then civil unions, then marriage redefinition.

Barbara J. Cox, *"A Painful Process of Waiting": The New York, Washington, New Jersey, and Maryland Dissenting Justices Understand That "Same Sex Marriage" is Not What Same-Sex Couples are Seeking* 45 CALIFORNIA WESTERN LAW REVIEW 139 (2008). This essay argues that the "same sex marriage" cases should really be understood as seeking the "freedom to marry" and finds support in dissents in recent marriage cases.

Jamie L. Zuckerman, *Extreme Makeover—Surrogacy Edition: Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right to Revoke Consent in Traditional Surrogacy Agreements* 32 NOVA LAW REVIEW 661 (2008). Argues that Florida should not

remove its marriage requirement from the law recognizing surrogacy arrangements.

Randall P. Ewing, Jr., *Same-Sex Marriage: A Threat to Tiered Equal Protection Doctrine?* 82 ST. JOHN'S LAW REVIEW 1409 (2008). Argues that the same-sex marriage cases illustrate a need for discarding the traditional levels of scrutiny in constitutional cases, in favor of a "flexible" approach that increases judges' discretion to inquire into legislative motives in approving marriage laws.

Prashina J. Gagoomal, *A "Margin of Appreciation" for "Marriages of Appreciation": Reconciling South Asian Adult Arranged Marriages with the Matrimonial Consent Requirement in International Human Rights Law* 97 GEORGETOWN LAW JOURNAL 589 (2009). Argues that arranged marriages are not necessarily in violation of international human rights documents.

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