

Marriage Law Digest

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IN RE CHILD OF ROBINSON
Docket No. FD-07-6312-05-A
Superior Court of New Jersey, Essex
Vicinage
May 23, 2005

A same-sex couple (married in Canada), one of whom had conceived a child through artificial insemination by an anonymous donor, sought under the New Jersey Parentage Act (which uses the terms "husband" and "wife") to have the partner who was not the biological parent of the child recognized as a legal parent. The donor was not party to an agreement granting him "any birthrights to the child."

Plaintiffs claimed that interpreting the law to allow for a child to have two parents of the same-sex would (1) advance New Jersey's public policy of recognizing nontraditional families (2) ensure two parents with resulting financial benefits to the child. The plaintiffs also raised a constitutional equal protection claim.

The court reviewed the legislative intent of the Parentage Act and the New Jersey domestic partnership law. It held that while New Jersey would not recognize the Canadian marriage, it considered the marriage "significant." The court concluded that the best interests of the child compelled a recognition of parentage for the partner who was not a biological parent.

LEWIS V. HARRIS
Docket No. A-2244-03T5
Superior Court of New Jersey, Appellate
Division

June 14, 2005

Seven same-sex couples sought marriage licenses from the state of New Jersey. Plaintiffs claimed that the refusal of the state to issue licenses violated their due process right of privacy and deprived them of equal protection.

In regards to the due process claim, the court noted the rejection of similar challenges in a number of other states. It also noted that same-sex marriage is also not rooted in the history and tradition of the state. Since plaintiffs had not show anything in the text of the constitution or the history of the state that suggests the constitution mandates a redefinition of marriage, their claim of a fundamental right could not be sustained. Contrary to plaintiffs claim, the law recognizes marriage "as something more than just State recognition of a committed relationship between two adults." It has "a vital role in propagating the species and in providing the ideal environment for raising children."

Plaintiffs had argued that characterizing marriage as inherently opposite-sex is circular but the court held that their argument was circular. Specifically, they say that marriage is just love and commitment then say that same-sex couples can be living and committed so only bigotry is currently keeping them from being allowed to marry.

The court held that the state's position is supported by history, tradition and "our nation's religious and social values."

The court then argued that plaintiffs claims

would also justify a constitutional right to engage in polygamy.

In regards to the equal protection claim, plaintiffs have no constitutional right to marry so the state is not required to show a “public need” justifying the marriage law.

The court rejected plaintiffs proffered analogy to *Loving v. Virginia* since the Loving decision did not call into question the definition of marriage as noted by an early marriage case, *Baker v. Nelson* decided a few years after Loving.

The invocation of *Lawrence v. Texas* was rejected as having no ramifications for marriage laws.

The majority disagreed with the Massachusetts Supreme Judicial Court’s decision in *Goodridge v. Department of Public Health* because it relied on a “normative judgement” that “conflicts with the traditional and still prevailing religious and societal view of marriage as a union between a man and a woman that plays a vital role in propagating the species and provides the ideal setting for raising children.” Thus, *Goodridge* “significantly alters the nature of this social institution.”

New Jersey’s equal protection provision was not meant to give the court a license to create a right to same-sex marriage. If, however, society’s opinion on this issue changes, legislative action can reflect that.

Although joining the majority opinion, one judge wrote separately. He argued that plaintiffs (and the *Goodridge* decision) have adopted a “close personal relationship” theory of marriage but marriage has always meant more than this. The purpose of marriage is not (as the plaintiffs suggest) to “mandate procreation but to control or

ameliorate its consequences.” If marriage were allowed to mean anything it would not be able to perform its social function.

The concurrence believed the anti-miscegenation analogy does not work because race is not intrinsic to the nature of marriage. Contrariwise, the dual-sex requirement *is* intrinsic to marriage. The concurrence also noted that plaintiffs’ logic supported polygamy.

The concurrence concluded that “the judiciary is not in the business of preferring, much less anointing, one value as more valid than another, particularly where, at least in the foreseeable future, the conflict is not susceptible to resolution by scientific or objective means. The choice must come from democratic persuasion, not judicial fiat.”

The dissent identified marriage as “a creature of State laws” and concluded that the right to marry means the right to marry the person of one’s choice. The dissent criticized the majority’s holding as circular and raised the analogy to the *Loving* decision.

The dissent noted that marriage has changed over time as have social attitudes and legal recognition of same-sex couples. The court endorsed a “functional” view of marriage.

The dissent suggested that procreation was not relevant because married couples are not required to procreate. Further, same-sex couples have children through assisted reproduction or other means.

The court characterized the right of privacy cases as recognizing the “rights of individuals to make fundamental life decisions in the conduct of their lives despite State opposition.” This, the court believes should apply to marriage.

The dissent took issue with the other opinions' invocations of polygamy, saying that it was not at issue in this case.

The dissent said that the right to marry is fundamental and tradition is not a compelling state interest. The opinion also argued that domestic partnership laws are "separate but equal."

**KEMPLING V. BRITISH COLUMBIA
COLLEGE OF TEACHERS
2005 BCCA 327
Court of Appeal for British Columbia
June 13, 2005**

A teacher wrote articles and letters to a local newspaper criticizing homosexual behavior. A panel of the provincial teachers association found these submissions "discriminatory" and suspended the teacher for one month.

The Court of Appeal found that the teacher's "statements about homosexuals are based on stereotypical notions about homosexuality and demonstrate a willingness to judge individuals on the basis of those stereotypes." Since, "[n]on-discrimination is a core value of the public education system" a teacher's "public statements espousing discriminatory views" harms the "integrity of the school system." Further, since the teacher mentioned his profession in his statements, the court concluded that he would fulfill his professional responsibilities "in an intolerant and discriminatory manner." The court further held that there was not enough evidence on the record to weigh the teacher's religious discrimination claim.

The court concluded that the teacher's right of expression was violated but the limitation on his speech was outweighed by the importance of the state interest in providing

students "access to a discrimination-free education environment."

**HEDBERG V. DETTHOW
No. 1789
Court of Special Appeals of Maryland
June 13, 2005**

A father sought to modify a Virginia custody decree which included a condition that he exercise custody only when not cohabiting with his same-sex partner.

The father had suggested that the U.S. Supreme Court's decision in *Lawrence v. Texas* constituted a change in circumstances justifying a modification in custody (relying on an argument that the condition was added in reliance on Virginia's sodomy law). The court held that *Lawrence* does not prohibit the consideration of parental sexual conduct in custody determinations and that it did not have enough evidence to assess the motivations of the Virginia court that created the custody condition.

The court did hold that Maryland courts could modify a Virginia custody order where Virginia no longer retained jurisdiction. Since the court believed a full evidentiary hearing was necessary to determine whether custody is in the best interests of the child, it allowed the father's suit to proceed.

**SMELT V. COUNT OF ORANGE
SA CV 04-1042-GLT(MLGx)
U.S. District Court, Central District of
California
June 16, 2005**

Two men sought marriage licenses in Orange County and, on denial, filed suit challenging California's marriage law on state and federal constitutional grounds and the federal Defense of Marriage Act on

federal constitutional grounds.

The court first addressed the question of whether it should abstain from ruling on the challenges to California's marriage law, relying on the three-part test for abstention. The court noted that marriage was traditionally a state issue and that abstention would not be likely to chill protected activity since it is not clear that getting a marriage license is protected speech under the First Amendment. The court also noted that pending state cases can resolve the plaintiffs claims. Finally, the court noted that the issue raised by plaintiffs is novel.

The court then held that plaintiffs do not have standing to challenge the interjurisdictional recognition portion of the federal DOMA since they are not married and seeking recognition of their marriage across state borders (and do not have definite plans to marry and seek recognition of the marriage). On the other hand, plaintiffs did have standing to challenge the marriage definition provision of DOMA because they had contracted a domestic partnership which cannot be treated as a marriage under federal law.

In regards to the substantive claims, the court first held that the U.S. Supreme Court's dismissal of *Baker v. Nelson* does not control since it addressed state marriage licensing rather than federal benefits. In addition, cases like *Romer* and *Lawrence* suggest that the Court takes claims by homosexuals more seriously than had previously been true and the Court invented the doctrine of heightened scrutiny since *Baker*.

The court held that DOMA creates a sexual orientation classification because it has a disparate impact on homosexuals. It rejected the claim that DOMA discriminated on the

basis of sex since it has no disparate impact on either men or women.

In regards to plaintiffs' due process claims, the court noted that *Loving v. Virginia* recognized, rather than created, a new fundamental right and held that the fundamental right to marry was not a fundamental right to same-sex marriage.

The sexual orientation classification identified by the court was supported by a rational basis in "encourag[ing] the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents." To the court, it was unimportant that same sex couples may not harm children since that question is properly legislative.

ALONS V. IOWA DISTRICT COURT
No. 19/03-1982
Supreme Court of Iowa
June 17, 2005

The District Court dissolved a Vermont civil union and plaintiffs (legislators, a married couple, a pastor and a church) challenged that decision. After this action was filed, the district court amended its decree to note that it does not have subject matter jurisdiction over a Vermont civil union (effectively denying recognition to the status) but make the same order on equitable grounds.

The court only addressed the issue of standing. The court noted a general rule that non-parties lack standing to bring a certiorari action but also noted an exception when standing would be in the public interest

The court held that members of the general public do not have a specific injury that would give them standing. The court then

held that recognition of a civil union would not hurt married couples. Since the order did not increase or decrease a fund to which plaintiffs had contributed, taxpayer standing was not available. The pastor was denied standing because he has no fear of prosecution for solemnizing a marriage where one party is also party to a Vermont civil union. (The court added that the pastor could refuse to solemnize any marriage). The court rejected the church's argument that it had standing since its teaching message was hurt by the lower court's decision. Finally, the court held that the legislators' disagreement with the district court's interpretation does not, by itself, confer standing.

TINA B. V. PAUL S.
Civil Action No. 02-D-100
Supreme Court of Appeals of West
Virginia
June 17, 2005

After a child's mother died, the mother's former partner and the maternal grandfather disputed custody. The child had been conceived with "help" from the father, who did not seek custody on appeal. The family court had given temporary custody to the grandfather and visitation to the partner and the father. At the suggestion of a guardian ad litem, full custody was given to the partner as a "psychological parent." The circuit court reversed, holding that the partner did not have standing to seek custody.

The court held that the partner was not a legal parent as defined by statute. However, another statutory provision allowed discretionary intervention in custody disputes if it would be in the best interest of a child. Applying the statute, the court said that the case at issue involved an "exceptional case."

The court outlined the components for a finding that a non-parent was a "psychological parent": (1) formation of a significant relationship with the child, (2) substantial temporal duration of the relationship, (3) the adult taking on caretaking responsibilities, and (4) "most importantly, the fostering of and encouragement of, and consent to, such relationship by the by the child's legal parent or guardian." The court concluded that "a psychological parent may intervene in a custody proceeding . . . when such intervention is likely to serve the best interests" of the child involved. The court decided that the partner had met the test of a "psychological parent" and thus could intervene in the custody dispute.

MUTH V. FRANK
No. 03-3984
United States Court of Appeals for the
Seventh Circuit
June 22, 2005

A brother and sister who had married one another were convicted of violating Wisconsin's incest statute. After failing to obtain a reversal in state court, they sought a writ of habeas corpus in federal court, arguing that the incest statute was unconstitutional in that it criminalized consensual sexual behavior (relying on *Lawrence v. Texas*).

The court held that the *Lawrence* decision was focused on homosexual sodomy, did not mention incest and did not identify a fundamental right or apply strict scrutiny. As a result, the decision does not create a constitutional right to any sexual conduct.

The concurrence characterized *Lawrence* as holding that states cannot demean homosexuals by making their sexual behavior criminal but did not reach other

kinds of sexual behavior including incest (the concurrence suggested that the distinction might be that incest is “a condition universally subject to criminal prohibitions”). In a testy paragraph, the concurrence also objected to the majority’s citation to the *Lawrence* dissent and its use of the term “homosexual sodomy” (although it had been used in the *Lawrence* majority opinion), a term the judge believes should be “scrubbed from court decisions in the future.”