

# Marriage Law Digest

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Marriage Law Foundation

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## **KERRIGAN V. CONNECTICUT**

**cv 04 4001813**

**Connecticut Superior Court, Judicial**

**District of New Haven**

**March 3, 2005**

In a case brought by seven same-sex couples challenging Connecticut's definition of marriage, two motions were filed to intervene. The first on behalf of the Family Institute of Connecticut (FIC, a public policy group) and the second on behalf of a town clerk and registrar.

FIC based its interest on the group's opposition to same-sex marriage. The clerk and registrar's claimed interest arose from their concern that, if the court ruled in favor of plaintiffs, they would have to issue marriage licenses to same-sex couples in violation of their personal religious beliefs.

After reviewing the relevant standards for intervention, the court summarily dismissed both motions. It held that FIC has no interest in the litigation other than what is shared with all citizens who closely follow public issues. The court held that the government employees have no general right to disobey laws they disagree with on religious grounds so they are also in the position of all other citizens.

The proposed intervenors had also argued that they would pursue the case more aggressively than the attorney general (for instance, by seeking discovery) and the court held that this would unnecessarily prolong a resolution of the case. The court further held that the attorney general has not given any indication that it would not

adequately defend the law.

## **COORDINATION PROCEEDING, SPECIAL TITLE: MARRIAGE CASES**

**Proceeding No. 4365**

**San Francisco Superior Court**

**March 14, 2005**

This actions consolidated six cases, four by same-sex couples seeking to invalidate California's marriage law and two by policy organizations seeking to invalidate the issuance of marriage licenses to same-sex couples by the City and County of San Francisco. The cases were consolidated with the intent of securing an appealable ruling on the constitutionality of the state's marriage law.

The court first assessed constitutionality (under the state constitution) of the marriage law using a rational basis test. The decision noted two justifications for the law offered by the state of California. The first was that the state's traditional understanding of marriage has always included an opposite-sex element. The court rejected this interest, holding that tradition is no justification for a law otherwise invalid. The second justification addressed was the fact that California already offers all of the benefits of marriage to same-sex couples so they are not harmed by the definition of marriage. The court rejected this argument , holding instead that since the state already provides marital benefits to same-sex couples it has essentially conceded that there must be no rational basis for not allowing same-sex couples to marry. In addition, the court held that a separate benefits vehicle for same-sex

couples is a "separate but equal" scheme that makes same-sex couples feel inferior.

The court also addressed an asserted state interest in procreation offered by the plaintiffs suing the City and County of San Francisco. The court concluded that California precedent doesn't treat procreation as an essential purpose of marriage and that even if it had, procreation takes place outside of marriage and some married couples have no children (the court noted later that some same sex couples rear children).

The court next turned to the claim that marriage was a form of sex discrimination. It summarily concluded that it was because the marriage law factors in the sex of the spouses in eligibility for marriage licenses. The court held that the equal application of the law to men and women did not save it by analogy to a refutation of the equal application argument in the race discrimination context. Because sex is a suspect classification and marriage is a fundamental right, the law could also be assessed under the strict scrutiny test. However, since the court could not find a rational basis for the law, the court could also not find a compelling government interest justifying the law.

The court rejected another argument for the current definition of marriage, the possibility that a redefinition might lead to striking down other restrictions on marriage (such as incest bans), by concluding that a fundamental right can be limited where there is a legitimate government purpose. The court concluded that there was such a purpose behind age and consanguinity restrictions but did not identify the nature of that interest.

The opinion concludes that the classification

between same and opposite-sex couples in the marriage laws is arbitrary and thus unconstitutional.

**IN RE COUNCIL OF THE CITY OF NEW YORK**  
**2005 WL 589606**  
**New York Supreme Court, Appellate Division, First Department**  
**March 15, 2005**

The New York City Council enacted an ordinance requiring contractors with city contracts to offer domestic partnership benefits to their unmarried employees.

The court held that the ordinance conflicted with state law by excluding some bidders on grounds other than quality or price. It also held that the ordinance was preempted by ERISA.

**OHIO V. BURK**  
**Case No. CR 462510**  
**Court of Common Pleas, Cuyahoga County**  
**March 23, 2005**

Defendant motioned to dismiss domestic violence indictment stemming from assault on partner. He claimed that the domestic violence statute's application to cohabiting couples violated Ohio's newly enacted marriage amendment which prohibits the creation or recognition of "a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."

The court found that the amendment was worded to have the broadest possible effect. The court also held that "cohabiting is a relationship that in all essential respects approximates the significance or effect of marriage.

The State argued that if the marriage amendment were interpreted as broadly as the court does, it could conflict with federal constitutional law—specifically *Romer*. The court shared the concern but concluded that this issue was not properly before the court.

The court dismissed the domestic violence charge but not the lesser-included assault charge.

**T.B. V. L.R.M.**  
**No. 1241 WDA 2004**  
**Superior Court of Pennsylvania**  
**March 28, 2005**

A partner in a same-sex couple conceived a child through artificial insemination. When the child was three years old, the couple separated and in a previous action, the partner of the biological parent gained standing to seek visitation as an adult in loco parentis to the child. On remand for a best interest of the child analysis, the hearing officer made one conclusion of law: “that it would be in the best interest of this child to have another loving person in her life.”

The trial court found that the biological mother had alienated her child against the former partner due to the partner’s “philandering” during their relationship so that visitation would not be in the best interests of the child. This court held that alienation by one adult cannot be the sole basis for a denial of visitation by another adult. In regards to the former partner’s behavior, the court held that “[w]hile it is human nature to want to punish one who has violated a trust, in reality it is not in a child’s best interest to have the offending party estranged from his or her life.”

The court remanded the case again and ordered that visitation “in a structured,

therapeutic setting” begin immediately.