

Marriage Law Digest

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MARCH 2009 CASE SUMMARIES

William C. Duncan, Editor

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TILLEY V. KILGORE

No. 2008-CA-000925-ME

Kentucky Court of Appeals

February 27, 2009

<http://162.114.92.72/COA/2008-CA-000925.pdf#xml=http://162.114.92.72/dtsearch.asp?cmd=pdfhits&DocId=20095&Index=D%3a%5cInetpub%5cwwwroot%5cIndices%5cBoth%5fCourts%5fIndex&HitCount=23&hits=19+59+5a+6c+a7+e5+f9+105+111+13a+18e+28d+2e2+2ec+62f+67a+6ca+816+81d+84f+851+86b+884+&hc=150&req=tilley>

The same-sex partner of the mother of two children (conceived by IVF) sought custody at breakup. The trial court said the partner did not have standing.

The appeals court said a nonparent can only have standing if they are a "de facto" custodian, if the parent is unfit, or if the parent has waived a right to custody. The court said to be "de facto" a "nonparent must be the primary caregiver." Here, this did not apply to the partner because she did not provide for the children "in place of the biological parent." The partner said a document signed by the mother established a waiver, but the court said that since the mother did not relinquish physical custody. Finally, since the mother had used IVF, the father "contractually had no rights from the very beginning" so the partner could not get his rights waived in her favor.

RECENT LAW REVIEW ARTICLES AND BOOKS

Candice A. Garcia-Rodrigo, *An Analysis of and Alternative to the Radical Feminist Position*

on the Institution of Marriage 11 JOURNAL OF LAW & FAMILY STUDIES 113 (2008). Critiques a radical feminist argument that marriage is inherently undesirable.

Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law* (March 1, 2009) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1351133. Argues the question of the name of a legal status is important, that same-sex couples should be allowed to marry and that the names married women take are also significant.

Shahar Lifshitz, *A Liberal Analysis of Western Cohabitation Law* (February 2, 2009) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352045. Proposes parallel legal statuses for marriage and cohabitation and suggests both same-sex and opposite-sex couples should be able to enter into either.

Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations* 2008 BYU LAW REVIEW 1855. Discusses analogy between interstate recognition of slavery and interstate recognition of same-sex marriages.

Jeffrey L. Rensberger, *Interstate Pluralism: The Role of Federalism in the Same-Sex Marriage Debate* 2008 BYU LAW REVIEW 1703. Argues that States should remain free to decline recognition of same-sex marriages contracted in other States.

Browne C. Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process* CLEVELAND-MARSHALL LEGAL STUDIES PAPER No. 09-168 (March 12, 2009) at <http://ssrn.com/abstract=1358468>. Argues that state legislatures should create a system whereby children conceived through artificial insemination have two legal parents and parent status is designated based on the best interest of the child test.

Robert F. Nagel, *Marriage and Practical Knowledge* 50 SOUTH TEXAS LAW REVIEW 37 (2008). Makes a strong conservative argument against redefining marriage.

Theresa M. Erickson & Megan T. Erickson, *What Happens to Embryos When a Marriage Dissolves? Embryo Disposition and Divorce* 35 WILLIAM MITCHELL LAW REVIEW 469 (2009). Reviews case law on the disposition of embryos at divorce

Jesse H. Choper & John C. Yoo, *Can the Government Prohibit Gay Marriage?* 50 SOUTH TEXAS LAW REVIEW 15 (2008). Argues that a harm principle militates in favor of redefining marriage.

Lindsay J. Rohlf, *The Psychological-Parent and De-Facto-Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?* 94 IOWA LAW REVIEW 691 (2009). Argues that the de facto and psychological parent doctrines should not be adopted because they threaten the constitutional rights of fit biological and adoptive parents.

Ann Laquer Estin, *Unofficial Family Law* 94 IOWA LAW REVIEW 449 (2009). Proposes a collaboration between religious and secular legal authorities in order to allow religious communities to define an identity and the state to guarantee basic rights of citizenship.

Cynthia Ann Helzner, *Gay Marriage Would Not be Sufficient to Protect the Custodial Rights of Homosexual Parents* (December 19, 2008) at <http://ssrn.com/abstract=1369425>. Arguing

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that even if marriage is redefined, courts might still be unwilling to recognize joint parenting by same-sex couples.