

Marriage Law Digest

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Marriage Law Foundation

May 2006

J.K. V. DEPARTMENT OF CHILDREN
Case No. 5D04-4148
Florida District Court of Appeal, Fifth
District
April 21, 2006

A mother, believing that another man was her child's father, did not tell the actual father of her pregnancy nor the birth of their child. While the Department of Children and Families was in process of terminating the mother's parental rights, the father learned of the possibility of his paternity of the child (which was later established). He sought parental rights and married the mother. His parental rights were, however, terminated for abandonment (because he had not pursued the possibility that he was the father). The court held that there was no evidence of "any willful rejection by Appellant of his parental obligations." thus, the termination was improper.

REES V. STATE OF IDAHO
2006 Opinion No. 46
Supreme Court of Idaho
April 24, 2006

This case involved an action by a father against the state child welfare agency for the wrongful death of his son in which the father alleged negligent investigation of abuse allegations against the mother's boyfriend (who later killed the child). The trial court ruled in favor of the agency.

In addressing the question of whether a tort for negligent investigation exists and was implicated here, the court made three findings. First, that Idaho statutes have

created a specific duty for the state to protect abused children. Second, the Department knew of dangerous conditions to which the child was subjected. Third, the father relied on the Department's assurances. The court held that there was no statutory exemption from the duty to properly investigate abuse allegations. The court noted that it was possible that the social worker involved in this matter failed in her duty, so a trial was necessary to determine if the tort was committed.

IN THE MATTER OF HARVEY
No. 2005-168
Supreme Court of New Hampshire
April 26, 2006

In divorce action involving marriage of more than thirteen years, the wife (who had been the primary caretaker of the children while foregoing paid work outside the home) challenged (1) the court's alimony award (\$3,000 per month for three years) as insufficient, (2) the court's property distribution plan (extended over 23 year period) as too drawn out and (3) the court's order for reimbursement of money husband's parents had contributed to the equity of the marital home.

The trial court had based its alimony award on a finding that the wife could eventually find employment doing legal work (relying in part on testimony from a career services director at a local law school). On appeal, the wife argued that she ought to receive lifetime alimony or alimony until her youngest child is eighteen because (1) she stayed home with the children during the marriage, (2) she will be 44 years old when

the current alimony award expires, (3) she has not been in the paid job market since 1989, (4) she will be raising four children under eighteen years old, and (5) she has mental health conditions that will affect her employability. The court held that alimony is only meant to be "rehabilitative" so the non-working spouse can ease back into the job market. Here, the alimony is sufficient for that goal.

The court then held that the length of time for a payout on the property (23 years) was excessive. The court also concluded that the parties' "moral" obligation to pay parents for a contribution to the equity of their home is not an enforceable legal obligation that can be part of a divorce decree.

E.C. V. SHERMAN
Case No. 05-0726-CV-C-SOW
U.S. District Court, Western District of Missouri
May 1, 2006

A Missouri regulation which caused existing adoption subsidy agreements to expire after one year was challenged on constitutional grounds. The court noted that the regulations would have the effect of requiring a means-test to determine if an adoption subsidy will be given. The court held that those who have to be subject to the means test (determined by income of the biological rather than adoptive parent) will be in foster care longer "violating their fundamental rights to be free from unnecessarily prolonged confinement." the court said there was no rational basis for the rule because there is no necessary relationship between the income of biological and adoptive parents. The court also believed that the government's purpose of saving tax money was "illusory" since the policy will increase overall costs of child welfare. The court also held that the law

violated the Contracts Clause because it abrogates existing agreements and adds new terms to those agreements.

MARSHALL V. MARSHALL
No. 04-1544
Supreme Court of the United States
May 1, 2006

A federal district court awarded damages to decedent's wife in an action for tortious interference in dispute over a will. The Ninth Circuit reversed, holding that the probate exception to federal jurisdiction prevented the district court from hearing the case. The Supreme Court noted that federal courts have long recognized exceptions for federal jurisdiction in cases of domestic relations and probate but these exceptions are very narrow and federal courts will often have jurisdiction.

Justice Stevens concurred but wrote separately to suggest abolishing the probate exception entirely.

BEDFORD V. NEW HAMPSHIRE COMMUNITY TECHNICAL COLLEGE SYSTEM
04-E-229
New Hampshire Superior Court, Merrimack
May 3, 2006

Two public employees in relationships with persons of the same-sex sought to have employment benefits extended to their partners. They claimed that failure to provide the benefits was employment discrimination on the basis of sexual orientation.

The court noted that New Hampshire's employment discrimination statute prohibits sexual orientation discrimination. Agreeing with decisions from New York

and Alaska, the court held that since same-sex couples cannot marry, they “have no ability to ever qualify for the same employment benefits unmarried heterosexual couples may avail themselves of by deciding to legally commit to each other through marriage. For this reason, unmarried, heterosexual employees are not similarly situated to unmarried, gay and lesbian employees for purposes of receiving employee benefits.” Thus, plaintiffs had established a facial case of sexual orientation discrimination. The state argued that it did not have authority to give the benefits to same-sex couples. The court disagreed, holding that the relevant statute allowing benefits to go to employees was not exhaustive (since it uses the word “including”) and can apply to domestic partners.

Although not necessary to its conclusion, the court also held that the statute had a disparate impact based on sexual orientation: “it is apparent that the policy adversely impacts lesbians and gay men by using a criterion for eligibility which is predicated upon heterosexuality. Because marriage is legal only between opposite-sex partners, and employment benefits for domestic partners are derived only through marriage, lesbians and gay men are disparately impacted in that they are effectively excluded from certain benefits of their employment.”

KUNZ V. KUNZ
Case No. 20050374-CA
Utah Court of Appeals
May 4, 2006

A man married one woman, divorced her (but still lived wither her as if married) so as to practice polygamy. He married another woman who died then took another “wife” without a ceremony and yet another with a

ceremony (this one as a favor to the woman’s polygamous husband) so she could avoid deportation. He did not, however, live with this last woman or act as her “husband.” The husband died and the wife who’d been divorced sought a judicial declaration of common law marriage. The third and fourth “wives” objected. A domestic commissioner held the licensed marriage (to the fourth “wife”) valid, so the first “wife” was not recognized. The trial court agreed.

The first “wife” appealed, seeking an opportunity to prove that she had a common law marriage which would make the decedent husband’s licensed marriage void. She also alleged that the licensed marriage was invalid because it was a sham for immigration purposes. The court held that after a valued licensed marriage, a husband cannot enter into a common law marriage. The court noted that the Utah statute does not list sham immigration marriages as “void” so they are “voidable. Thus, the licensed marriage was valid and the first “wife” cannot be a common law spouse.

ALPHA IOTA OMEGA V. MOESER
Civil No. 1:04CV00765
U.S. District Court, Middle District of
North Carolina
May 4, 2006

After being denied official recognition from their university due to a refusal to comply with the university’s non-discrimination policy (which forbids organizations from setting membership standards that might exclude individuals based on religion or sexual orientation), a Christian fraternity sued seeking a declaration that the non-discrimination policy was unconstitutional. The court issued a preliminary injunction ordering the university to allow recognition

to groups that require members to adhere to standards. The university subsequently changed its policy to reflect the court ruling and motioned to dismiss the case as moot. The fraternity, however, argued that the court should retain jurisdiction to rule on the constitutionality of the policy and issue a permanent injunction. The court held that the university was unlikely to revert to its previous decision and since the fraternity was now recognized a new policy was in place, the lawsuit was moot.

SMELT V. COUNTY OF ORANGE
No. 05-56040
U.S. Court of Appeals for the Ninth Circuit
May 5, 2006

Two men who wished to marry in California brought a wide-ranging challenge to the state marriage law and the federal Defense of Marriage Act (DOMA). The district court (1) abstained from deciding the state law issues because they were being addressed in ongoing state court litigation, (2) held the plaintiffs did not have standing to challenge the marriage recognition portion of DOMA, and (3) upheld DOMA's definition of marriage. A group of mainstream advocacy groups involved in other cases attempting to change the definition of marriage filed an amicus brief asking the court not to decide the substantive issues raised by the case.

On appeal, the court noted that federal court abstention is appropriate where (1) there is a sensitive public policy issue, (2) a state ruling would end the controversy, and (3) the outcome of a state decision is in doubt. In regards to the first issue the court said "it is difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve themselves if there is an alternative." (The court noted that the case did not raise a free speech issue which would argue against

abstention.) On the second part of the abstention test, the court noted that an ongoing California case could decide the issue under the state constitution. On point three, the court concluded that it could not determine how the California Supreme Court would rule on the issue. Thus, the district court was right to abstain from the challenge to the state marriage statute.

On the matter of standing to challenge, the marriage recognition portion of DOMA, the court noted that plaintiffs had not been legally married in any state. Thus, they have not been affected by a denial of recognition of such a marriage allowable under DOMA and therefore lack standing to challenge that part of the law.

The court noted that section three of DOMA defines marriage; "[i]t does not purport to preclude Congress or anyone else in the federal system from extending benefits to those who are not included within that definition." Since plaintiffs are not married, the panel concluded it could "not see how they can claim standing to object to Congress's definition of marriage for federal statutory and regulatory purposes." Particularly since "[i]t certainly is not a question of Congress's refusal to recognize *their* status." That plaintiffs might someday marry and be denied federal benefits is not enough to establish standing. A California domestic partnership also would not provide standing since it is not a marriage. The court also said that prudential considerations (specifically, the extremely general nature of the harm alleged by plaintiffs) also suggested the wisdom of avoiding a finding of standing here.

One judge wrote a separate opinion in concurrence which read in its entirety: "I concur in the result."

MEECE V. MEADE
No. 2005-CA-001510-ME
Kentucky Court of Appeals
May 5, 2006

After a father's incarceration, his ex-wife refused to allow his children to have visitation with him. He sued to compel the visitation. The trial court decided that visitation would not be in the best interests of the children.

The court held that the burden of proving visitation would harm the children is on the person seeking to deny visitation. Here, there is no finding by the court that visitation would "seriously endanger the child's physical, mental, moral, or emotional health." In addition, the father had a right to examine witnesses who made submissions to the court. The court concluded that incarceration is not a per se bar to visitation and remanded to the trial court with an order to grant visitation.

One judge wrote separately to argue that the remand should have been for a hearing on whether visitation was proper.

RALPH V. CITY OF NEW ORLEANS
No. 06-C-0153
Supreme Court of Louisiana
May 5, 2006

After New Orleans enacted a domestic partnership ordinance for same-sex couples and funded benefits to partners of municipal employees, a group of taxpayers sought an injunction. The trial court held that the plaintiffs lacked standing.

The supreme court reversed, holding that a decision that requires spending of even a small amount of tax money affects the public, so taxpayers have an interest that confers standing to challenge the ordinance.

V.S. V. COMMONWEALTH OF
KENTUCKY CABINET FOR HEALTH
AND FAMILY SERVICES
No. 2005-CA-001338-ME
Kentucky Court of Appeals
May 5, 2006

After a fifteen minute hearing involving very little evidence, a parent's rights were terminated on the basis of allegations of medical and educational neglect.

As to medical neglect, the court noted that the Cabinet had just shown that one child had catheterized another but had not shown any resulting harm. In regards to educational neglect, the Cabinet had shown that the parent allegedly said could not get up early enough to take children to school, but had not shown specific evidence of absences (this is also hearsay). The court also held that the fact that a child is having reading difficulties is not per se evidence of neglect. Here, the court noted that the state had the burden of proof to prove by clear and convincing evidence that parental rights should be terminated and did not meet it.

WORLD WIDE STREET PREACHERS'
FELLOWSHIP V. REED
Civil No. 1:CV-04-1127
U.S. District Court, Middle District of
Pennsylvania
May 8, 2006

A "gay pride" festival obtained a permit to use park and fenced in parts of the permitted area for its festival. A street preacher who wanted to express opposition to homosexual behavior, asked permission to do so within the permitted area but outside the area that was fenced. He was denied. In addition, the police created a fifty foot buffer zone around the permitted area.

The court held that since the preachers'

presence would not interfere with the festival there was no justification for the exclusion or buffer and the restrictions impinged in plaintiffs' right of free speech.

**CHRISTIAN CIVIC LEAGUE OF MAINE
V. FEDERAL ELECTION COMMISSION
Civil Action No. 06-0614
U.S. District Court, District of Columbia
May 9, 2006**

A group supporting the proposed federal Marriage Protection Amendment planned to use a radio ad asking supporters to contact senators mentioned by name (one of whom is a candidate in an upcoming primary election) and to ask the senators to change their vote on the amendment. Campaign finance law, however, prohibits ads (funded by corporations rather than political action committees) that identify candidates run on television or radio within 30 days before a primary election. The League sued the FEC to enjoin enforcement of the law as applied to the proposed advertisement.

The court held that an injunction was not necessary since the League was unlikely to win the case. The court noted that the League could run ads if they funded them through a PAC or disseminated them through some means other than television or radio or by not mentioning the senator's name. The court also held that the law was supported by a compelling state interest in preventing a monetary influence on politics. The court said that the proposed ad is a "veiled" attack on a candidate, that "may improperly influence an election" by encouraging others to withdraw support or run as primary challengers. The court also held that an injunction would harm the FEC by preventing it from enforcing the campaign finance law.

**ARIZONA V. BERGER
No. CR-05-0101-PR
Supreme Court of Arizona
May 10, 2006**

A defendant was convicted of twenty counts of possession of child pornography and sentenced to twenty 10-year terms. He argued that this constituted cruel and unusual punishment, violating the Eighth Amendment.

The court held that a prison sentence does not violate the Eighth Amendment unless there is no reasonable basis for assuming the law will advance legitimate penological goals. Here, the court concludes that Arizona had a reasonable basis for believing that lengthy prison sentences would advance the goal of stopping child pornography. The court then turned to the question of whether the sentence was grossly disproportionate to the crime. The court examined only the single-count term (ten years) and concluded that it was not disproportionate, so the concurrent terms were also not disproportionate.

One judge concurred, noting that the sentence seemed harsh but "reluctantly" concluding that the majority decision is in conformity with U.S. Supreme Court precedent.

A concurring/dissenting opinion noted that a comparison with other states discloses that Arizona's sentence for this crime is the longest. Thus, it was disproportionate especially since the defendant in this case had not directly harmed anyone.

**IN THE MATTER OF THE
GUARDIANSHIP OF NICHOLAS C.L.
2005 AP1754
Wisconsin Court of Appeals, District II
May 10, 2006**

After divorce, the wife received custody of two of her three children. The third was left in the father's custody and the child and father lived with the paternal grandparents. The mother continued to be involved in this child's life and was particularly concerned about rumors of behavioral problems. After the father was killed in an accident, the child elected to live with his grandparents, but the mother enrolled him in a special school to address his behavioral problems. The grandparents sought guardianship and the trial court denied their claim.

On appeal, the court held that when there is a fit parent, there's no need for a guardian even if the child expresses a preference for a non-parent. The court noted, "[w]ere we to conclude otherwise, parents would routinely have their parental rights stripped from them simply because a third party might be better situated to tend to the needs of the child." Here, no compelling circumstances exist that would require ignoring the presumption in favor of the child's mother as the appropriate custody placement.

**IN THE MATTER OF THE UTAH STATE
RETIREMENT BOARD'S TRUSTEE
DUTIES
Civil No. 050916879
Utah Third District Court
May 11, 2006**

An ordinance approved by Salt Lake City attempted to provide benefits to public employees' dependents including "Adult Designees" "defined as a person, not the spouse of the employee, who has resided in

the domicile of the eligible employee for not less than twelve consecutive months and intends to continue to do so, is at least eighteen years old, and is economically dependent on or interdependent with the eligible employee." The Utah State Retirement Board asked the court whether their action to provide the benefits court whether the benefits conflicted with any other Utah law including the state marriage amendment.

The court held that expanding the beneficiaries of employment benefits is not specifically prohibited by the state's employment benefits statute. The court also held that these benefits do not violate the state statute prohibiting marriage equivalent statuses because health benefits are not "a perquisite of marriage" but are "simply a perquisite of employment." The court said: "such benefits ultimately result from the relationship between employer and employee, whether defined by contract or ordinance, and only secondarily because of marriage, if the employer provides such benefits to spouses." To the court the ordinance did not "make the relationship between employee and an adult designee 'substantially equivalent' in 'legal effect' to marriage between a man and a woman."

**J V. C
[2006] EWCA Civ 551
England and Wales Court of Appeal (Civil
Division)
May 15, 2006**

A woman married another woman who had changed her appearance so she could look like a man, under the impression that she was marrying a man. Through artificial insemination, she had children. At divorce, she learned that her spouse was a woman so the marriage was annulled. The court denied custody to the "husband." This

woman later received a Gender Recognition Certificate, identifying her as a man. She again sought custody.

The court noted that the artificial insemination statute treats the husband in a void marriage as the father only if the parties did not know the marriage was void. Here, the “husband” knew the marriage was void so this presumption did not apply. Although “he” has gotten a certificate since, “he” was a woman when “he” married so the marriage was void when it was entered into. Thus, “he” had no standing to seek custody as a parent.

O’KELLEY V. PERDUE
2004CV93494
Georgia Superior Court, Fulton County
May 16, 2006

After the Georgia marriage amendment was overwhelmingly approved by voters in November 2004, a group of citizens opposed to the amendment sued alleging that the amendment (1) used ballot language that misled voters and (2) contained two subjects in violation of the state constitution.

In regards to the first claim, the court held that ballot language need only identify which amendment voters are voting on and the language for this amendment accomplished that result.

On the single-subject challenge, defendants had argued that the four sentences of the amendment were all “germane to the same subject.” The court identified the purpose of the amendment as “the acknowledgment of the union of man and woman as the only valid form of marriage in Georgia.” The court noted that an amendment addressing multiple topics does not violate the single subject rule as long as it has one objectives and all topics are germane to the

accomplishment of that objective. The court believed that the first, third and fourth sentences were germane to the amendment’s purpose. The first, because it defined marriage and the third and fourth because they “serve to invalidate other forms of marriage [which] furthers the public policy if acknowledging only one form of marriage as legitimate and valid.” The court then turned to the second sentence which provides: “No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage.” The court assumed from the use of the word “union” that the legislature must have intended to address the status of “civil unions.” The objective of this sentence, to the court, was “to ensure that unions between persons of the same-sex–without restriction–are not afforded any of the advantages, rights or privileges afforded to married same-sex couples under state law.” Thus, the court believed this sentence would “preclude future legislatures from creating or recognizing civil union as a valid legal status.” The court believed that individuals could support a specification of the definition of marriage but that doing so did not require “a decision as to the treatment of same-sex relationships within the state.” Since “deciding that same sex relationships should be given some form of legal recognition in Georgia would have no effect on the state’s recognition of the union of a man and a woman as the only valid form of civil marriage” the benefits portion of the amendment is a separate subject. Since “union” as used in the amendment is not limited to a legal status, “[a]sking voters to decide how the law should treat same sex relationships in the context of a law that has as its intended objective the validation or privileging of marriage between men and women creates precisely the dilemma the single subject rule was adopted to avoid.”

UTAH V. HOLM
No. 20030847
Supreme Court of Utah
May 16, 2006

After a legal marriage, the defendant participated in two religious “marriages,” the second of these with a sixteen-year old girl. He was convicted on counts of bigamy and unlawful sexual conduct with a minor.

On appeal, the defendant argued that he can’t have “purported to marry” a plural wife (the underlying action supporting the bigamy conviction) because that phrase only refers to legal marriages and here the parties knew the “marriage” was not legal. He also argued that the bigamy statute violates the right to practice religion guaranteed in the state constitution and that the bigamy and sexual conduct with minor statutes violated numerous provisions of the federal constitution.

The majority concluded that the bigamy statute prohibits not only legal marriages, but also religious ceremonies approximating a marriage. The court further held that the Utah Constitution’s specific prohibition of polygamy undercuts the argument that the state constitution’s religious liberty provision protects a right to polygamy. In regard to defendant’s federal Free Exercise claim, the court held that Utah’s bigamy statute is a neutral law of general applicability. Unlike the sodomy law struck down in *Lawrence v. Texas*, the court noted that this case involves the “public institution of marriage” and a minor. To the court *Lawrence* doesn’t apply because “[t]he distinction between private, intimate sexual conduct between consenting adults and the public nature of polygamists’ attempts to extralegally redefine the acceptable parameters of a fundamental social institution like marriage is plain.” Thus,

there was no basis for the defendant’s due process claim. The defendant had also argued that the bigamy statute violated equal protection by discriminating against those who practice polygamy for religious persons. The court responded that the bigamy statute is neutral as to religion. The court held that since there is not constitutional right to polygamy, the bigamy statute does not implicate the right to intimate association. Also, since the defendant is free to join a group advocating polygamy, the law had no effect on his right to expressive association. The court held that the term “marry” is unconstitutionally. Since the defendants engaged in a marriage ceremony and acted as if married, he could not claim he did not know whether he was married.

In regards to the sexual conduct with a minor conviction, the defendant challenged the charging statute as an equal protection violation because it treats sexual conduct between a man and a 16-year old girl (where the man is ten years older) differently depending on whether the two are legally married. The court held that a private agreement can’t be equivalent to the legal effect of marriage so the differential treatment of married and unmarried people has a basis in law and is not unconstitutional.

Justice Nehring concurred in a separate opinion to “distance myself from assertions by the majority that may be interpreted to invite, in the name of protecting marriage, unconstitutional governmental intrusions into consensual private relationships.” The concurrence argued that the definition of marriage in the law that suggested marriage was only a legal relationship can be read as separate from the legal provisions related to polygamy. Thus, it is not necessarily appropriate to compare laws that define

marriage (which require a legal union) with laws that define criminal conduct (which include non-legal marriages). The opinion noted that the void marriages statute calls certain relationships marriage while denying them legal recognition. It also argued that the historical record makes clear that Utah's enabling act was meant to prohibit any polygamy, not merely legal recognition of the practice. To Justice Nehring, the *United States v. Reynolds* decision is enough to establish the constitutionality of a polygamy prohibition. He concluded that the state can prohibit same-sex marriage and polygamy not because these serve compelling state interests but because there is constitutional authority allowing the prohibitions.

Chief Justice Durham concurred with the holding regarding the sexual conduct with a minor conviction, but dissents from the bigamy conviction. She believed it is "the legislature's intent that the concept of marriage in Utah law be confined to a legally recognized union." Thus, the bigamy statute's "purporting to marriage" provision can only refer to legal marriages. Chief Justice Durham believed that historical analysis is not relevant since the bigamy statute was enacted in 1973. In regards to the state constitutional claims, Chief Justice Durham argued that since state law only considers legal unions to be marriages, constitutional prohibitions of polygamy cannot reach private behavior. She said that the Utah Constitution's religious liberty provision protects conduct and belief and that government burdens on religiously motivated conduct should be subject to heightened scrutiny. Under the heightened scrutiny standard, criminalizing religiously motivated entry into religious marriage violates the Utah Constitution. She argued that the belief that polygamy threatened democratic society was rooted in religious

bias. She also argued that the state interest in protecting marriage only applies when the bigamous marriage purports to be a legal marriage, not merely a religious marriage. Chief Justice Durham said that "criminal penalties are simply unnecessary to further the state's interest in protecting marriage." There is no concern with fraud here since the parties knew it wasn't a legal marriage. The state does not need to bring a bigamy prosecution to get at related harms like abuse. She said that defendant's actions do not threaten the institution of marriage. She believed *Lawrence* "prevents governmental interference with what happens inside, as long as it does not involve injury or coercion or some other form of harm to individuals or to society."

FINSTUEN V. EDMONDSON
No. CIV-04-1152-C
U.S. District Court, Western District of
Oklahoma
May 19, 2006

Three same-sex couples who had jointly adopted children in other states challenged an Oklahoma statute refusing recognition to out-of-state adoptions by same-sex couples. Plaintiffs alleged four constitutional provisions were violated by the law: (1) the full faith and credit clause, (2) the guarantee of equal protection, (3) the guarantee of due process and (4) protection of the right to travel.

The court first addressed the matter of standing. The court held that two of the couples had experienced an injury as a result of the statute that justified standing. For one couple, the injury was their inability to get an amended Oklahoma birth certificate, listing both women as "parents." For the other couple, the injury was that one woman could not sign permission slips or give medical authorization as a "parent."

The third couple, however, had only alleged speculative injuries and their case was dismissed.

In regards to the full faith and credit claim, the court noted that the couples had adoption judgements from other states. The court held that adoption judgements are not to be treated differently from other judgements since they require judicial sanction. The court concluded that while states don't have to apply other state's statutes, there is no public policy exception to the requirement that they recognize judgements.

The court made two rulings related to the equal protection claim based on the conclusion that the statute "attempts to strip away the parental status of at least one of the adult Plaintiffs, from each family unit." This, the court held, denies the children a right to one of their parents (a right which vested at the time of adoption). The court believed the statute here "has the same effect as statutes which affected an illegitimate child's rights" so it applied intermediate scrutiny in assessing the statute. This shifted the burden to the state to justify the law. The state had offered two interests served by the statute: (1) promoting the best interests of the child and (2) protecting the definition of family. The court said that here, the courts issuing the adoption judgement had already found that the adoptions were in the best interests of the children. The court also held that the statute "does little if anything to promote the traditional family unit" because it doesn't prohibit adoption by single people or require adoptive parents to marry. Thus, to the court, the statute "attempts to penalize the Plaintiff children for the acts of their parents," which (by analogy to illegitimacy cases) is inappropriate.

As to the adoptive parent plaintiffs, the court held that the statute will have a greater impact on homosexuals even though it is facially neutral as to orientation. The court said that the statute "was intended by the Oklahoma Legislature to have an adverse impact on an identifiable group." This, to the court, was analogous to the situation in *Romer v. Evans*. The court concluded that the challenged statute "has the effect of closing access to the government to plaintiffs" because "Plaintiffs cannot obtain the assistance of the state in obtaining legal recognition of established parental rights . . . solely because of the adult Plaintiffs' sexual orientation." The court said the statute "was passed to halt the erosion of the mainstream definition of the family unit and to protect Oklahoma children from being targeted for adoption by gay couples across the nation and to ensure that children are raised in traditional family environments. That is, the Amendment targets an unpopular group and singles them out for disparate treatment." The court concluded that, under *Romer*, the law must be struck down.

On the due process claim, the court held that the law "clearly infringes on the fundamental right to the care, custody and rearing of the child." The court then repeated its conclusions rebutting the state's proffered interests in the statute and concluded that the law served no compelling interests. The court also held that the statute attempts to break up families "only because the Plaintiff adults are of the same sex."

In regards to the right to travel claim, the court noted that plaintiffs were treated like all other Oklahoma citizens (because Oklahoma does not allow joint adoption by same-sex couples) so the right is not implicated by the statute.

B.B. V. P.J.M.
Case No. 1D05-0510
Florida District Court of Appeal, First
District
May 22, 2006

A child was born to an unmarried mother while the father was in prison. Later, the mother tested positive for drug use and the Department of Children and Families sought custody. All DCF proceedings listed the father as the father without contest. The mother subsequently consented to an adoption by the maternal grandparents and the father objected. The trial court held that the father's consent to the adoption was not required because he had not register as a putative father.

On appeal, the court held that the putative father registry was only one way to establish paternity. It could also be established through a court proceeding. The court held that the listing of the father as father on the documents in the dependency proceeding counted for this purpose. Here, since no one disputed the identification in the dependency proceedings, paternity was established and the father's consent to the adoption was necessary. Any other result would violate the father's due process rights.

The dissent noted that the record doesn't show any judicial findings as to paternity and that the records of the dependency proceedings contain a number of errors of fact (such as saying that the father's name was on the birth certificate when it was not). Here, the father had played no role in the child's life. The dissent argued that the intent of the legislature in creating the putative father registry was to facilitate and bring certainty to adoption proceedings. It recognized that unmarried biological fathers only have an "inchoate" interest in their

parental relationship until he takes steps to demonstrate his willingness to be a responsible parent. The dissent believed the Florida statute was clear that a father waives his right to consent to an adoption if he doesn't comply with the statute. Thus, the majority's broad reading of the statute conflicts with legislative intent.

C.C. V. IRELAND
[2006] IESC 33
Supreme Court of Ireland
May 23, 2006

A nineteen year old man was charged with statutory rape after engaging in a consensual sexual relationship believing that his partner was sixteen. The court held that since the law does not allow a defense of mistaken belief that the partner was not a minor, some who are "mentally blameless" could still be found guilty. Even if the sentence is light, the court argued, the conviction still brings stigma and registration as a sex offender. The court held the law was invalid because of the lack of a requirement of specific intent to commit the crime.

PETRUSKA V. GANNON UNIVERSITY
No. 05-1222
U.S. Court of Appeals for the Third Circuit
May 24, 2006

Plaintiff sued a Catholic university for sex discrimination alleging demotion because she is a woman and retribution for opposition to sexual harassment. The trial court dismissed the case, relying on a ministerial exception to employment discrimination cases for religious employers.

The court noted that the majority of circuit courts apply the ministerial exception if "the employee's 'primary functions' serve the 'spiritual and pastoral mission' of a church."

Courts explain the constitutional bases of the ministerial exception: (1) avoiding government probing into church affairs under the Establishment Clause, (2) avoiding government selection of clergy under the Free Exercise and Establishment Clauses, and (3) to prevent “inquiry into religious doctrine” under both Clauses. Here, the court noted that the plaintiff’s complaint alleged her discharge was solely motivated by gender unrelated to religious motives. The court held that since the allegations do not involve religious matters, the ministerial exception doesn’t apply and “we decline to turn the Free Exercise Clause into the license for the free exercise of discrimination unmoored from religious principle.” The court also held that no policy rationales underlying the ministerial exception affected by allowing the suit here. The court remanded the case to the trial court with the instruction that the court must avoid religious issues that arise.

In dissent, one judge thought the decision of “who will perform spiritual functions” should be a per se invocation of the ministerial exception regardless of whether the religious employer “articulates an independent justification based on ‘religious belief, religious doctrine, or internal regulation.’” The dissent argued that “the process of selecting a minister is per se a religious exercise. A minister is not merely an employee of the church; she is the embodiment of its message.” Here, the positions plaintiff held served spiritual functions. Thus, for the court to examine the employment action involved “asking whether the church can justify its employment decision with reference to church doctrine” which “excessively entangles the court.”

**THAETER V. PALM BEACH COUNTY
SHERIFF’S OFFICE
No. 03-13197
U.S. Court of Appeals for the Eleventh
Circuit
May 26, 2006**

Police officers who participated in sexually explicit conduct for dissemination on the internet. After the officers were identified by an anonymous complaint, the officers were terminated for violating a policy requiring officers to always provide an “unsullied” example.

The court held that government employers can impose restraints on the speech of employees and the rule requiring prior permission was clear and not unreasonable.