

Marriage Law Digest

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**FIELDS V. PALMDALE SCHOOL
DISTRICT
No. 03-56499**

**U.S. Court of Appeals for the Ninth Circuit
November 2, 2005**

A public elementary school gave students a survey asking the children about explicit sexual matters. Parents sued the school district alleging violations of the right of privacy and the right “to control the upbringing of their children by introducing them to matters of and relating to sex.” Before administering the survey, the school had sought parental consent but without mentioning the sexual content in the survey, which came to the parents’ attention only after the survey had been conducted.

As to the parents’ claim of a right to control the education of their children as to sexual matters, the court held that “no such specific right can be found in the deep roots of the nation’s history and tradition or implied in the concept of ordered liberty.” The court held that the parental right recognized in *Meyer v. Nebraska and Pierce v. Society of Sisters* was subject to “reasonable regulation” by the state. The court relied on *Brown v. Hot, Sexy and Safer Productions* which upheld mandatory attendance at a sexually explicit school program where parents were deprived of an opportunity to opt out. To the court, *Brown* stands for the proposition that parents have only a negative right to not have particular schooling options foreclosed to them.

The court specifically held that “[p]arents have a right to inform their children when and as they wish on the subject of sex ; they

have no constitutional right, however, to prevent a public school from providing its students with whatever information it wishes to provide, sexual and otherwise, when and as the school determines that it is appropriate to do so.” Also, “once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished.” Thus, “the *Meyer-Pierce* right does not extend beyond the threshold of the school door.”

The court decided that the right to privacy only extends to making intimate decisions not “controlling the state’s determination of information regarding intimate matters.”

The court applied rational basis scrutiny to the action and concluded it was justified by legitimate interests in (1) “[p]rotecting the mental health of children,” (2) improving educational environment to facilitate learning, and (3) *parens patriae* power to promote the well-being of children. So, the survey was a “reasonable state action pursuant to legitimate educational as well as health and welfare interests of the state.”

**IN RE THE PARENTAGE OF L.B.
75626-1
Supreme Court of Washington
November 3, 2005**

Mother, a partner in a same-sex couple, conceived with sperm donated by a friend and the couple separated when the child was six. The former partner sought to be declared a legal parent and given visitation. The trial court said that there could be no order of visitation to a non-parent unless the

parent was unfit. The appeals court recognized a common law right for a non-parent to establish de facto parenthood and that there was no need for the non-parent to show unfitness if severing contact with the child and the non-parent would be "detrimental."

The court noted that no statute applies, but that it could make a determination of parentage under its common law authority. The court relied on cases where a stepparent and aunt (respectively) were given custody over parents objections. The court also concluded that the legislature's failure to create a de facto parentage status was not controlling. Thus, the court followed other state courts in recognizing de facto parent status. Such a status requires a showing that (1) the natural parent consented to the de facto parent relationship between the child and the non-parent, (2) the non-parent and child lived together, (3) the non-parent acted like a parent without financial remuneration (the babysitter/nanny exception), and (4) the relationship between the child and non-parent has been of sufficient duration to allow for bonding. The court held that de facto parents are legally equivalent to "legal parents" (rather than "natural and adoptive parents") but the rights of the de facto parent require a best interest of the child analysis.

Since this dispute is between "parents," the rule of *Troxel* that a fit parent can legitimately exclude non-parents does not apply.

The dissent argued that since the mother was fit, the court must assume that she acts in the best interest of her child. Thus, creation of a de facto parenthood status that is equivalent to parental status is itself unconstitutional since it is created over the objection of a fit parent. The dissent believed

that the statute controls all determinations of parentage, so exclusion of a particular relationship in the statute should be dispositive. The majority easily evaded the *Troxel* rule by saying it does not apply to de facto parents, a category it created. Especially where, as here, the legislature was on notice that de facto parent claims would arise and they chose not to extend recognition to such relationships.

The dissent charged that the majority usurped the legislative role in a decision "crafted to suit these facts and current notions of political correctness. It is doubly unfortunate that this court, and the court below, has determined to pursue such ad hoc decision making with respect to poor little L.B.—a most vulnerable subject." Further, "The majority wishes to act with the wisdom of Solomon in not only implementing but making the law in this sensitive family law area. Solomon's famous case with two women claiming the same baby had a different point, however, badly misinterpreted by the majority. Solomon threatened to cut the baby in half in order to determine the real mother, to whom he restored full custody. 1 Kings 3:16-38. The court today holds an actual division more wise and sends the case and the child to lower courts for that division. Poor little L.B."

MARTINEZ V. KULONGOSKI
Case #05C-11023
Circuit Court of Oregon, Marion County
November 4, 2005

Challenge to constitutionality of Oregon marriage amendment based on arguments that (1) the amendment is a revision, not an amendment of the state constitution; (2) the amendment would effect multiple parts of the constitution; and (3) the amendment is a statement of policy, not an amendment, so

not proper for popular vote.

Plaintiffs argued that the amendment “alters the fundamental concept of ‘justice’” in the Oregon constitution, so it is a revision. The court rejected this argument, relying on previous court decisions that an initiative measure defining marriage was not a revision.

The court also held that the amendment affects how could can interpret two different part of the constitution but the changes are related so there was no need for two separate votes on the amendment.

Finally, the court held that the Oregon Supreme Court recognized that the amendment would affect substantive law so it is not just a policy change. Given these conclusions, the court found the amendment valid.

SINGSON V. COMMONWEALTH
Record No. 0646-04-1
Court of Appeals of Virginia
November 8, 2005

Defendant was convicted for solicitation of sodomy in a public bathroom at a mall. The trial court rejected a constitutional challenge to the sodomy solicitation law because of the public nature of the offense.

The defendant made three claims: (1) the law was facially unconstitutional under *Lawrence v. Texas*, (2) the law was overbroad because it affected protected speech, and (3) the law constituted cruel and unusual punishment under the Eighth Amendment.

The court held that *Lawrence* and Virginia precedent do not apply the privacy right to public conduct. The court also rejected the claim that the solicitation law affects protected speech “‘requesting legal acts’”

because solicitation is conduct not speech. The court also suggested that the statute would not likely have a broad effect on protected speech. The court then held that the Eighth Amendment claim had not properly been raised below so it could not be addressed here.

SMITH & CHYMYSHYN V. KNIGHTS OF COLUMBUS
2005 BCHRT 544
British Columbia Human Rights Tribunal
November 29, 2005

A same-sex couple who were refused the use of a hall owned by the Knights of Columbus for a wedding reception filed a complaint with the British Columbia Human Rights Tribunal alleging sexual orientation discrimination. The Knights defended their decision citing religious objections to even indirectly endorsing same-sex marriage.

The Tribunal decided that the complainants had stated a prima facie case of “injury to [their] human dignity.” The Tribunal noted that the Knights’ failure to have a written policy does not affect their claim to a bona fide religious purpose for the policy. The Knights’ policy was justified by the fact that use of its hall for a same-sex wedding reception could undermine its relationship to the Catholic Church. The Tribunal concluded, however, that the Knights could have done more (in accordance with their policy) to accommodate the couple (like apologize). The Tribunal thus ordered the Knights to pay the cost for the couple to get a new building and to pay a \$2,000 fine for injury to the couples’ “dignity, feelings and self-respect.”