

# Marriage Law Digest

Volume 4, Number 11

Marriage Law Foundation

November 2007

## **MORRISON V. BOARD OF EDUCATION OF BOYD COUNTY**

**Nos. 06-5380/5406/5407**

**U.S. Court of Appeals for the Sixth Circuit**

**October 26, 2007**

<http://www.ca6.uscourts.gov/opinions.pdf/07a0431p-06.pdf>

A high school adopted a policy “prohibiting students from making stigmatizing or insulting comments regarding another student’s sexual orientation.” The policy was challenged by a student and some parents who argued the speech policy “prevented students in Boyd County from speaking their convictions that homosexuality is sinful, and the speech codes and training together undermined their ability to practice their Christian faith.”

The court ordered the trial court judge to hold a trial to see if the school’s “actions or policy would deter a person of ordinary firmness from exercising his or her First Amendment liberties in the way that the plaintiff alleges he or she would have, were it not for” the [school’s] conduct or policy.”

**IN RE K.M.H.**

**No. 96102**

**Supreme Court of Kansas**

**October 26, 2007**

<http://www.kscourts.org/Cases-and-Opinions/opinions/supct/2007/20071026/96102.htm>

A mother and father entered into an oral agreement allowing the mother to use the father’s sperm for artificial insemination. The insemination took place at a clinic in Missouri, although the parties were

residents of and all other events took place in Kansas. After the birth of twins, the mother sought “a determination that [the donor] would have no parental rights.” The father then sought a paternity determination. The trial court applied Kansas law and held the artificial insemination statute (“The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman”) was constitutional and that the mother’s petition (which refused to him as the father) was not a written agreement to father’s paternity.

The court first held that Kansas law applies since the state had significant contacts with the underlying events.

The court also noted “the biological differences between females and males and the immutable role over those differences play in conceiving and bearing a child, regardless of whether conception is achieved through sexual intercourse or artificial insemination, we are skeptical that [mother and father] are truly similarly situation.” Even if they were, however, the court believed the paternity law was valid because it promotes “important governmental objectives”: (1) encouraging “men who are able and willing to donate sperm” by “protecting the men from later unwanted claims for support from the mothers of the children,” (2) protecting “women recipients” by “preventing potential claims of donors to parental rights

and responsibilities in the absence of an agreement” (3) “enhanc[ing] predictability, clarity, and enforceability” through the writing requirement and (4) “implicitly encourag[ing] early resolution of the elemental question of whether a donor will have parental rights.”

The court also said that the requirement of a *written* agreement did not create a unique constitutional violation.

The court believed that the legislature can choose to promote the policy that children should have legal ties to two parents but that this was not the business of the court.

The court finally held the mother’s reference to the donor as “father” in her legal petition was written but was not an “agreement” as required by law.

A dissent noted “that the right to parent is a fundamental right protected by the United States Constitution.” Because the statute “permits a donor to waive his right to parent simply by his own inaction rather than through an intentional act relinquishing that right” the statute violates the father’s due process parental rights. Since the facts of this case did not involve an additional party asserting parental rights but rather the biological father, the dissent believed there was less urgency to a determination of parental rights than there would be in the adoption context.

**ALASKA V. PLANNED PARENTHOOD**  
Supreme Court Nos. S-11365/11386  
Supreme Court of Alaska  
November 2, 2007  
<http://www.state.ak.us/courts/ops/sp-6184.pdf>

Planned Parenthood challenges a state law requiring parental consent to a minor

abortion. The law provided for a judicial bypass. The trial court ruled the law unconstitutional. On appeal, the Alaska Supreme Court ordered a trial to determine whether the state had a compelling interest in the law. On remand, the trial court again held the law was unconstitutional and this case followed on appeal.

The court first said that minors have “fundamental reproductive rights guaranteed by the privacy clause” of the Alaska Constitution. The court said the parental consent law “places a burden on minors’ fundamental right to privacy” so it must advance a “compelling state interest using the least restrictive means of achieving that interest.” The state’s interests, as described by the court are “protecting minors from their own immaturity and aiding parents in fulfilling their parental responsibilities” and the court said they were “compelling.” The court concluded that “because the [parental consent law] shifts the right to reproductive choice to minors’ parents, we must conclude that the [law] is, all else being equal, more restrictive than a parental notification statute.” Thus, the law was unconstitutional.

Two justices dissented.

**DUBAY V. WELLS**  
No. 06-2107  
U.S. Court of Appeals, Sixth Circuit  
November 6, 2007  
<http://www.ca6.uscourts.gov/opinions.pdf/07a0442p-06.pdf>

A father of a child born out of wedlock who had expressed a desire not to have children was ordered to pay child support. He challenged the state paternity law, alleging it violated the Constitution’s equal protection clause. He argued that Michigan law allows mothers “a right to disclaim

parenthood after engaging in consensual sex (i.e. through abortion) while denying that right to fathers” and makes “it easier for a woman to place a child in adoption or drop the newborn off at a hospital or other social service agency.”

The court held that neither a father or mother has a fundamental right “to sever his or her financial responsibilities to the child after the child is born.” The court also said that the statute requiring support is gender neutral. The court distinguished *Roe v. Wade* because “[t]he woman’s right to abortion is not solely, or even primarily, based on her right to choose not to be a mother after engaging in consensual sexual intercourse. Rather, the right to abortion, as articulated in *Roe*, derives from the woman’s right to bodily integrity and her privacy interest in protecting her own physical or mental health.” Here, “the child is already in existence and the state therefore has an important interest in providing for his or her support” where with an abortion “the pregnancy does not result in a live birth and there remains no child for the state to have an interest in supporting.

The court held the paternity law was “rationally related to a legitimate government purpose . . . To ensure that the minor children born outside a marriage are provided with support and education” by “requiring support from the legal parents, and determining legal fatherhood based on the biological fatherhood—is substantially, let alone rationally, related to this legitimate, and probably important, government purpose.”

The court finally held the Michigan law allowing mothers to abandon newborns were not motivated by discriminatory intent or discriminatory purpose.

**STORMANS, INC. V. SELECKY**  
**Case No. C07-5374RBL**  
**U.S. District Court, Western District of**  
**Washington**

**November 8, 2007**

[http://www.telladf.org/UserDocs/StormansP  
IRuling.pdf](http://www.telladf.org/UserDocs/StormansP<br/>IRuling.pdf)

Pharmacists sought an injunction against a state regulation providing sanctions for pharmacists who refuse to dispense the “Plan B” or “morning after” pill on conscientious grounds, instead referring patients to another provider. They claimed this policy violated the First and Fourteenth Amendments. In this action, they sought a preliminary injunction against the regulation.

The court believed the “overriding objective” of the regulation “was, to the degree possible, to eliminate moral and religious objections from the business of dispensing medicine” by “impos[ing] a Hobson’s choice for the majority of pharmacists who object to Plan B: dispense a drug that ends a life as defined by their religious teachings, or leave their present position in the State of Washington.” Thus, the regulation “targeted the religious practices of some citizens and are therefore not neutral.” The court noted the focus of the debate surrounding adoption of the regulations was on religious objections to dispensing Plan B. The court also noted that there was no evidence that the pill is not widely available, a fact that undercut the state’s claim that the regulations were focused on improving access. Even if the state’s concern was availability of the drug, the court believed the court’s exemption policy “does nothing to increase access to lawful prescription medicines generally” but “appears aimed only at a few drugs and religious people who find them objectionable.” Thus, the “regulations

appear to target religious practice in a way forbidden by the Constitution” because they “appear to intentionally place a significant burden on the free exercise of religion for those who believe life begins at conception, the regulations must be subjected to strict scrutiny.” On the question of whether the regulation advanced a compelling state interest, the court said: “Patients understandably may not want to drive farther than the closest pharmacy and they do not want to be made to feel bad when they get there. These interests are certainly legitimate but they are not compelling interests of the kind necessary to justify the substantial burden placed on the free exercise of religion.”

The court also held the “refusal to participate in an act that one believes terminates a life has nothing to do with gender or gender discrimination” (a purported purpose behind the state’s regulation.

**SHEEHAN V. FLOWER**

**1 CA-CV 06-0781**

**Arizona Court of Appeals, Division One**

**November 13, 2007**

<http://www.cofad1.state.az.us/opinionfiles/CV/CV060781.pdf>

After a divorce, a paternal grandmother was awarded visitation with her grandchild. The mother, who had sole custody told the grandmother she and the child would be going to Indiana. The grandmother then sought a court order to prohibit the move. The trial court said that a grandparent’s visitation rights do not create procedural rights to object to a custodial parent’s move.

The court of appeals held that procedural protections related to moving with a child who is subject to a custody or visitation order only applies to parents. Thus a

grandparent with visitation rights cannot object to a custodial parent’s decision to move a child.

**LAWRENCE V. STATE**

**No. PD-0236-07**

**Court of Criminal Appeals of Texas**

**November 21, 2007**

<http://www.cca.courts.state.tx.us/opinions/HTMLopinionInfo.asp?OpinionID=16213>

A man who killed his girlfriend and their unborn child. He was convicted of double murder and challenged the charging statute as unconstitutional. His argument was that, under *Roe v. Wade*, he could not be charged with killing an embryo that was not “viable.”

The court responded that *Roe* only applies to a mother’s choice to terminate a pregnancy and noted that the U.S. Supreme Court “has emphasized that states may protect human life not only once the fetus has reached viability but ‘from the outset of the pregnancy.’”

**RE C (A CHILD)**

**[2007] EWCA Civ 1206**

**Supreme Court of Judicature Court of Appeal (Civil Division)**

**November 23, 2007**

<http://www.bailii.org/ew/cases/EWCA/Civ/2007/1206.rtf>

An unmarried mother conceived after a single sexual encounter and placed the child for adoption at birth. A trial judge said the Adoption Act required local government officials to determine “as much information about the background of the extended family as they are able to do” and the mother appealed.

The appeals court held that the law creates “no duty to make enquiries which it is not in

the interests in the child to make simply because they will provide more information about the child's background: they must genuinely further the prospect of finding a long-term carer for the child without delay." The court also said the father has "no right to respect for his family life with [the child] because he has no family life" with the mother and father. Thus, "it is not a violation of a Convention right to deprive him of the possibility of obtaining" a relationship with the child.

**FLYNN V. HENKEL**  
**Docket No. 103946**  
**Supreme Court of Illinois**  
**November 29, 2007**

<http://www.state.il.us/court/Opinions/SupremeCourt/2007/November/103946.pdf>

The paternal grandmother of a child born out of wedlock was granted visitation over the objection of the child's mother. The state's court of appeals said that if the grandmother were denied visitation, the child "would be harmed by never knowing a grandparent who loved him and who did not undermine the child's relationship with his mother."

The state supreme court noted "that a fit parent's denial of a grandparent's visitation is not harmful to the child's mental, physical, or emotional health is the embodiment of the fundamental right of parents to make decisions concerning the care, custody, and control of their children which is protected by the fourteenth amendment." Despite the grandmother's testimony that she had a loving relationship with the child, "she did not present any evidence to show that denial of visitation with her would result in harm to [the child's] mental, physical, or emotional health." The court thus rejected both the trial court's ("denial of an opportunity for

grandparent visitation") and the appeals court's ("never knowing a grandparent who loved him") rationale for the visitation award and reversed the decision.