

Marriage Law Digest

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**IN RE C.K.G., C.A.G., & C.L.G.
No. M2003-01320-SC-R11-CV
Supreme Court of Tennessee
October 6, 2005**

An unmarried couple obtained eggs from an anonymous donor and the female partner carried the children to term. After the couple separated, the parentage of the children was litigated. The trial court held that the female partner was the children's mother because of the intent of the couple when accessing reproductive technology. The court of appeals agreed with the intent holding and further held that the father was estopped from denying his partner's parenthood because of the partner's reliance on his actions in treating her as the children's mother.

The supreme court held that the partner was not a mother as defined in the statutes because they used genetic connection as the standard for establishing parentage. The court noted that Tennessee statutes do not address the situation involved in this case.

The court rejected the intent test used by the lower courts deciding instead to employ three factors for determining maternity in this case. Thus, the court held that the partner was the children's mother with the same parental status as the father because (1) the couple intended the partner to be the mother, (2) the partner had become pregnant and carried the children to term, and (3) there was no controversy between the genetic mother and the partner who had gestated the children.

Given its decision, the court held that the

estoppel rationale was moot. The court also affirmed the trial court's awards of custody and support.

The dissent would have relied on genetics to determine parentage and thus concluded that the partner is a non-parent under the relevant statutes. The dissent concluded that in the absence of relevant statutory law on this particular situation, the courts are powerless to act.

**HARROLD V. COLLIER
2005 Ohio 5334
Supreme Court of Ohio
October 10, 2005**

A child, born out of wedlock, lived with her mother (who had residential custody) at the maternal grandparents home until the mother passed away. The father subsequently sought custody and the maternal grandparents visitation against the father's wishes. Trial court granted visitation but, ruling on father's objections, held that the U.S. Supreme Court case of *Troxel v Granville* did not allow for visitation of non-parents over a parent's objection absent "overwhelmingly clear circumstances. The court of appeal reversed, ruling that *Troxel* narrowly only the discrete question of the constitutionality of Washington's broad visitation statute. This ruling created a conflict with another Ohio court of appeal on the question of whether a parent's wishes regarding non-parent visitation deserves special weight.

The supreme court held that Ohio's courts are obligated to give special weight to parent wishes regarding visitation by non-parents.

The court assessed Ohio's visitation statute under a strict scrutiny standard. It held that Ohio's visitation statute could be distinguished from the Washington law invalidated in *Troxel* because the Ohio law is limited to cases where a parent is deceased or unmarried and can only be brought by a relative of the parent. It also requires that a parent's wishes, along with other factors, must be considered. Thus, the Ohio statute was constitutional.

The court also concluded that the trial court was correct to place the burden of proving that visitation would be in the best interests of the child on the non-parents and held that there was no need for a remand since the facts clearly indicated that grandparent visitation was in the best interest of the child since the grandparents had raised the child for the first five years of her life.

**LANGAN V. ST. VINCENT'S HOSPITAL
OF NEW YORK
2005 NY Slip Op 07495
New York Appellate Division, Second
Department
October 11, 2005**

A New York couple contracted a civil union in Vermont and subsequently one of the partners died, allegedly as the result of medical malpractice. The surviving partner sued for wrongful death and the trial court held that the partner had standing to bring the suit.

The appellate division noted that a wrongful death action is a creation of statute and that the statute includes surviving spouses. The court held that the use of "spouse" in the statute was clearly intended only to apply to opposite-sex married couples and that the statute was not discriminatory in intent.

In regards to the state and federal

constitutional (equal protection) challenges to the reservation of wrongful death actions to spouses, the court held that the plaintiff had failed to meet his burden of showing no legitimate governmental purpose in the statute. The court said that "it has already been established that confining marriage and all laws pertaining either directly or indirectly to the marital relationship to different sex couples is not offensive to the equal protection clause of either the Federal or State constitutions." For this proposition, the court relied on (1) the U.S. Supreme Court's refusal to review *Baker v. Nelson*, (which no U.S. Supreme Court's opinion had ever questioned), and (2) the appellate division decision in *Matter of Cooper*.

The court noted that Vermont did not consider plaintiff married so full faith and credit considerations did not apply. In conclusion, the majority noted that the legislature is the forum for working out the benefits that should be extended to same-sex couples, otherwise the court would be endorsing same-sex marriage.

The dissent disclaimed any relevance of the case to marriage. Instead, the dissent believed the real issue was whether the wrongful death statute was sexual orientation discrimination without a rational relationship to a government purpose. The dissent agreed with the majority's construction of the wrongful death statute but felt that another question should have been addressed. To set up the question, the dissent suggested that the relevant comparison was between same-sex couples with a state-sanctioned relationships and married couples. Since New York wrongful death law applied only to married couples and same-sex couples can't marry, the refusal to give a partner in a civil union a right to sue for wrongful death creates a differentiation based on sexual orientation.

Thus, the question for the dissent was whether the state's interest in "fostering traditional marriage" was advanced by not allowing partners in civil unions to bring wrongful death actions. The dissent concluded that there was no "reasonably conceivable rational basis for classifying similarly-situated wrongful death plaintiffs on the basis of their sexual orientation" partly because the classification doesn't promote traditional marriage. (The dissent supported this conclusion with references to U.S. Supreme Court decisions allowing wrongful death actions involving illegitimate children).

**LISA I. V. SUPERIOR COURT OF LOS ANGELES COUNTY
B182219
California Court of Appeal, Second Appellate District
October 18, 2005**

Plaintiff, sexually linked with mother, asserted standing to establish paternity of child born within 300 days of divorce from another man. Mother disputed paternity, saying that her ex-husband should be presumed to be father of the child. The court ordered blood testing for the asserted father and the mother appealed.

The court noted that the statute gives standing to "presumed fathers" to establish paternity which can be established by showing, among other things, that (1) a man is married to mother or was within 300 days of the child's birth, or (2) the man openly holds out the child as his own. Thus, the plaintiff has no standing to assert paternity.

The court then turned to plaintiff's claim that if he had no statutory standing, the statute was unconstitutional on due process grounds. The court held that the precedent denying standing where a mother was still

married apply even where there is a divorce. Here, the lack of marriage was not important since there is an existing relationship between the ex-husband, mother and child.

The court concluded that "biological fathers who have developed an existing relationship with a child have a protected liberty interest" but that "[t]he interest claimed . . . here, the so-called 'opportunity interest,' is significantly limited, if it exists at all, to those situations where the marital parents are either dead or have relinquished an interest in the child by placing the child for adoption by third persons."

**KANSAS V. LIMON
No. 85898
Supreme Court of Kansas
October 21, 2005**

Defendant was convicted of sexual conduct with minor. The criminal statute provided for a longer sentence because the victim was of the same-sex as the perpetrator. The Kansas Court of Appeal affirmed the conviction and the Kansas Supreme Court denied review. The U.S. Supreme Court granted cert, vacated and remanded the case one day after its decision in *Lawrence v. Texas*. On remand, the court of appeal affirmed the conviction, distinguishing *Lawrence* because (1) this case involved minors and (2) *Lawrence* decided on due process, not equal protection grounds asserted by the defendant in this case. Employing the rational basis standard, one judge found four state interests advanced by the challenged statute: (1) protection of children from non-traditional sexual mores, (2) advancing the family as the recognized unit for procreation, (3) a possible need to release an offender in opposite sex relationship because that might result in pregnancy and (4) increased risk of sexually

transmitted diseases with homosexual behavior. The concurrence only agreed with the interest related to health risk. The dissent argued that the only purpose of the statute was to punish homosexuals more than heterosexuals.

The Kansas Supreme Court held that although both criminal statutes (proscribing heterosexual and homosexual sexual conduct with minors) impose stigma, the same-sex statute is much greater, this there is a discriminatory classification at issue. The court noted that sexual orientation is not a suspect class and that *Lawrence* implied rational basis was the appropriate standard in weighing sexual orientation discrimination, so it should be applied here.

The court then weighed six possible state interests: (1) protecting traditional sexual mores, (2) preserving traditional notions of sexual development for minors, (3) protecting teenagers from coercive relationships, (4) protecting from increased health risks, (5) promoting parental responsibility, (6) protecting individuals in group homes.

In regards to the first point, the court said that under *Lawrence* moral disapproval cannot be a legitimate government interest. To the next point, the court held that there was no evidence that same-sex sexuality is more harmful to minors than adults (and amici argue that sexual orientation is settled by age 14). For the third interest, the court said there was no reason to distinguish between coerciveness of same and opposite sex relations. On the health question, the court said that *Lawrence* didn't address health risks, the conduct at issue here was unlikely to transmit HIV and the statute seemed focused on teen pregnancy rather than STDs. The court further argued that the statute was overinclusive because it affects

people who may have no disease but may give a lighter sentence to those engaging in risky behavior because of the sex of the participants. On the fifth point, the court said the statute was overinclusive because it gives a lesser sentence to conduct that may not result in pregnancy (i.e. opposite-sex sodomy). To the final point, the court held that the statute was overbroad since it applies to individuals outside of group homes.

The court concluded that the statute was without rational basis and struck down the language that provided a greater penalty for same-sex sexual relations. The court did not address the sex discrimination claim.

HEBEL V. WEST
No. 97432 & 97433
New York Supreme Court, Appellate
Division, Third Judicial Department
October 27, 2005

Mayor of New Paltz created a marriage licensing form for same-sex couples. A member of the Town's Board of Trustees sought a temporary restraining order to stop issuance of these forms. The trial court issued the TRO and eventually a permanent injunction.

The court held that the plaintiff had standing to challenge the mayor's decision here because (1) the question of whether a local official can change state marriage laws is of great public importance and (2) the mayor contravened a clear law.

The city urged, in its defense, that the marriage laws are unconstitutional. The court held that this was not an issue here. Rather, the only issue was the authority of a local executive to change state law. Here, the mayor exceeded his role, taking on judicial and legislative functions. The mayor should

have sought a judicial resolution if he believed the law was unconstitutional.

**ALASKA CIVIL LIBERTIES UNION V.
STATE OF ALASKA
No. 5950
Alaska Supreme Court
October 28, 2005**

Plaintiffs challenged the public employee benefits policies of the state of Alaska and city of Anchorage since they offer benefits only to spouses and same-sex couples cannot marry. They alleged a violation of the state constitution's equal protection guarantee. The trial court granted summary judgement for defendants because the policy only implicated marital status (not a suspect classification) and there is no fundamental right to employment benefits. The court also held that the policy advanced legitimate state interests in (1) reducing costs, (2) increasing administrative efficiency and (3) promoting marriage.

The supreme court noted that Alaska's marriage amendment does not address benefits (and said, in a footnote, that if it had, it would "arguably" conflict with *Romer v. Evans*) and certainly does not preclude offering benefits. The court held that the Alaska's Constitution's equal protection clause provides more protection than the federal constitution.

In analyzing the benefits policy, the court said the proper comparison is between same and opposite-sex couples rather than unmarried or married employees since same-sex couple's can't marry. Thus, the court concluded the policy creates a disparate impact on same-sex couples. The court ruled that the benefits program was discriminatory on its face so there was no need to show discriminatory intent. Given these conclusions, the court felt no need to

address plaintiffs' sexual orientation and sex discrimination arguments.

The court held that the economic interests at issue merited only minimal scrutiny. The court dismissed the state's proffered interest in cost savings by limiting benefits to people in close relationships, saying that while cost savings is legitimate, same-sex couples can be just as close as married couples. Similarly, the state's interest in administrative efficiency using marriage as a bright line for eligibility was legitimate, but since other governmental bodies and municipalities in Alaska have given benefits and created rules for domestic partners, using marriage as the bright line is not necessary. Finally, the court held that promoting marriage is a valid state interest and not "irrational" because marriage "encourages family stability." However, denying benefits to same-sex couples doesn't promote marriage because domestic partners won't be motivated by the benefits program to end their domestic partnerships and marry someone of the opposite-sex.

The court disavowed the idea that its decision would require benefits to polygamists or individuals in incestuous relationships.