

# Marriage Law Digest

Volume 3, Number 10

Marriage Law Foundation

October 2006

**IN RE T.K.Y.**

**No. M2004-01634-SC-R11-JV**

**Supreme Court of Tennessee**

**August 28, 2006**

<http://caselaw.lp.findlaw.com/data2/tennesseecases/supreme/20063/kyopn.pdf>

Trial court found that biological father of child born to woman married to another man was the legal father only to be reversed on appeal.

The supreme court held that the biological father was the father for purposes of the parentage law because that law is concerned with establishing biological paternity. The court also held the rights of a biological father trumped the rights of any other person asserting paternity and recognized constitutional protection for these rights.

**CADMAN V. HEALTH & SAFETY**

**EXECUTIVE**

**C-17/05**

**European Court of Justice**

**October 3, 2006**

<http://curia.europa.eu/>

A public employee lodged a discrimination claim alleging that the employer's use of length of service in determining pay has a disparate impact on women. The court held that length of service is an appropriate standard for determining pay.

**UNITED STATES V. ECKHARDT**

**No. 05-12211**

**U.S. Court of Appeals, Eleventh Circuit**

**October 5, 2006**

<http://www.ca11.uscourts.gov/opinions/ops/>

[200512211.pdf](#)

Defendant was convicted of violating the Communications Decency Act after leaving obscene messages on a former employer's voice mail. He argued that his comments were not legally obscene. The court held the calls were obscene because they appealed "to the prurient interest," "described sexual activities in a patently offensive way," and "lack[ed] serious value."

**IN RE MARRIAGE CASES**

**A110449**

**California Court of Appeals, First District**

**October 5, 2006**

<http://www.courtinfo.ca.gov/opinions/documents/A110449.PDF>

After the California Supreme Court refused to recognize same-sex marriage licenses issued by the city of California, individuals and advocacy groups challenged the state's marriage law on state constitutional grounds. The trial court ruled the law unconstitutional, holding it lacked any reasonable justification.

The court of appeals reversed. The court began by noting that the plaintiffs are "asking this court to recognize a new right," something the courts "simply do not have the authority" to do. For the court, the core issue was "who gets to define marriage in our democratic society." The court's answer was "the people and their elected representatives" because "courts may not appropriate to themselves the power to change the definition of such a basic social institution."

The court first addressed the question of whether two pro-marriage groups should have been allowed to intervene in the marriage challenge. The court held that the groups did not have standing because they would not be directly affected by a ruling on the validity of marriage.

As to the constitutional claims, the court first noted that all the cases involving a "right to marry" have involved the union of a man and a woman and there is no legal authority for the proposition that "individuals have a fundamental constitutional right to enter the public institution of marriage with someone of the same sex." The court thus characterized the right to marry as "a fundamental right to enter a public union with an opposite-sex partner." The court noted that there is no "historical tradition of same-sex marriage in this country." To the court, the novelty of same-sex marriage is what precludes a finding that it is a fundamental right. The court distinguished the cases allowing interracial marriage because with that issue, there was no such novelty.

As to the claim that marriage is sex discrimination, the court noted that marriage laws "treat men and women exactly the same" and merely mentioning gender does not create a constitutional violation. The court also noted that there was no indication that marriage laws were enacted with the intent to discriminate against either sex.

The court then noted that the laws make no reference to sexual orientation. Although the laws may have a disparate impact on homosexuals, this does not require a strict scrutiny analysis since there was no authority for such a conclusion.

As to the plaintiffs' privacy claim, the court

pointed out that marriage is "much more than a private relationship" and that the marriage laws take away no right enjoyed before. The court takes issue with the dissent: "The right to be let alone from government interference is the polar opposite of insistence that the government acknowledge and regulate a particular relationship, and afford the rights and benefits that have historically been reserved for others."

The court summarily concluded that the marriage laws do not prevent plaintiffs from entering any relationship of their choosing so no expression claim was raised.

In assessing the rationality of the marriage laws, the court said its "role is not to look at interests served by an institution to see if it makes sense to expand the institution. That is policymaking." The court ruled that the marriage laws were supported by the state's interests in preserving the traditional definition of marriage and carrying out the will of its citizens.

The court concluded that the trial judge "essentially redefined marriage to encompass unions that have never before been considered as such in this state." Since such a change must come from the people of the state the trial judge's decision was reversed.

A concurring opinion said that "marriage has historically stood for the principle that men and women who may, without planning or intending to do so, give life to a child should raise that child in a bonded, cooperative, and enduring relationship" and that the law's recognition of this function of marriage "is hardly irrational." This judge argued that the process of determining appropriate rights for same-sex couples should be able to continue in society and the

legislature.

There was also a dissent. This judge accuses the majority of inadvertently “diminish[ing] the humanity of the lesbians and gay men whose rights are defeated” and denying them “individual autonomy and dignity.” The dissent argued that the right to privacy should be understood as a right of “individual autonomy and personhood” and that these rights are implicit in the earlier right to marry cases. He believed the *Lawrence v. Texas* decision supports the plaintiffs’ claim. He concludes that the right to marry should be extended to same-sex couples. He also spends some time pressing the analogy to anti-miscegenation laws. The dissent also believes that sexual orientation should be treated as a suspect class status because (1) homosexuality is an immutable characteristic, (2) that is unrelated to a person’s ability to contribute to society and (3) there is a long history of discrimination against homosexuals. The dissent also argued that the marriage law was irrational because the domestic partner law does not treat same-sex couples the same as married couples and is thus similar to the racial policy of “separate but equal.”

**DR. JOHN’S INC. V. CITY OF ROY  
No. 04-4270**

**U.S. Court of Appeals, Tenth Circuit  
October 10, 2006**

[http://www.ck10.uscourts.gov/opinions/this\\_week/pdf/04-4270.pdf](http://www.ck10.uscourts.gov/opinions/this_week/pdf/04-4270.pdf)

An adult business challenged city regulation requiring it to register as a sexually oriented business rather than a regular business because SOB registration entailed burdens on business operations. The trial court upheld the ordinance.

The court of appeals relied on past precedent to reject the argument that

defining an SOB as a business with “significant or substantial” portion of its product devoted to sexual items was vague. Since the ordinance did not foreclose the business, only requiring that it be operated under a different license if it was an SOB, the court found no prior restraint on plaintiff’s speech. The court upheld the ordinance’s provision preventing convicted sex criminals from working at an SOB for a period of time, relying on evidence presented by the city and the failure of the plaintiff to counter this evidence. The court also held that if there were some privacy right implicated by the ordinance, it was not violated by the ordinance because the private materials can be sold by a business that gets an SOB license. Finally, the court remanded to the lower court for a determination of whether the city had established that the ordinance furthered the state’s interest in curbing secondary effects of SOBs.

**ANDY’S RESTAURANT & LOUNGE,  
INC. V. CITY OF GARY**

**Nos. 05-2225, 05-2287 & 05-2288**

**U.S. Court of Appeals, Seventh Circuit  
October 11, 2006**

[http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=showbr&shofile=05-2225\\_022.pdf](http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=showbr&shofile=05-2225_022.pdf)

Adult businesses challenged a city ordinance regulating sexually oriented businesses. The court held the ordinance applied only to secondary effects of adult businesses and so assessed the constitutionality of the statute using intermediate scrutiny. The city met this standard, for the court, by citing to studies showing secondary effects of adult businesses.

**HINSHAW V. HINSHAW**

**No. 2005-CA-000834-ME**

**Kentucky Court of Appeals**

October 13, 2006

<http://162.114.92.72/COA/2005-CA-000834.pdf>

After divorce, wife alleged (later proved through DNA testing) for the first time that ex-husband was not her child's father. When the ex-husband was granted child custody, the mother appealed.

The court held that the doctrine of equitable estoppel prevented the mother from denying the husband's paternity after she had treated him as the father and encouraged a parent-child relationship between the husband and child.

**SYLVESTER V. FOGLEY**

**No. 05-3492**

**U.S. Court of Appeals, Eighth Circuit**

**October 18, 2006**

<http://www.ca8.uscourts.gov/opndir/06/10/053492P.pdf>

A criminal investigator challenged an investigation by the state police into allegations the investigator had engaged in sexual relations with a crime victim during an investigation. The district court granted summary judgement to the police.

Plaintiff alleged a deprivation of his right to privacy. The court of appeals did not decide but assumed for argument a fundamental right to engage in the conduct despite any specific precedent supporting this result. The court, however, concluded that the state had a compelling interest in the investigation because of the need to ensure public trust in the criminal investigation process and to preserve the impartiality of the administration of justice. Since the conduct at issue occurred during the performance of the investigator's duties, he was not entitled to the same expectation of privacy as he would be if the conduct had

no relation to his responsibilities.

**CATHOLIC CHARITIES V. SERIO**

**No. 110**

**New York Court of Appeals**

**October 19, 2006**

<http://www.nycourts.gov/ctapps/decisions/oct06/110opn06.pdf>

New York law requires employers to offer contraceptive coverage to employees but exempts "religious employers" defined as (1) having purpose of inculcating religion, (2) employing mostly people who share the faith, (3) typically serve those of the same faith, and (4) are religious non-profits. This law was challenged by faith-based agencies that do not qualify for the religious exemption.

The court held that under *Smith v. Employment Division*, the law is of neutral and general application and does not target religion so there was no First Amendment violation. The court further held the law did not interfere with church autonomy because it does not constitute choosing sides in internal doctrinal disagreements.

The court then said that under the New York Constitution, the burden is on the challenger to show that a statute unreasonably interferes with religious liberty—strict scrutiny is thus not the appropriate test. The court said the test should not be insurmountable but that plaintiffs had not done so in this case. Here, the plaintiffs are not literally required to offer prescription coverage to employees. The court emphasized that the plaintiffs don't hire only their own members and the state often legislates on employment matters. The court finally held that the plaintiffs religious liberty would need to be balanced with the state's interests in achieving equality between the sexes and

improving women's health care.

**LEWIS V. HARRIS**

**A-68-05**

**New Jersey Supreme Court**

**October 25, 2006**

<http://www.judiciary.state.nj.us/opinions/supreme/a-68-05.pdf>

Both the trial and appellate courts rejected a constitutional challenge to New Jersey's marriage law.

On appeal, the New Jersey Supreme Court announced that "denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee" of the state constitution. So, "the Legislature must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples." The "democratic process" is left with the decision as to what to call the status.

The court noted the state's concession that New Jersey law does not "support the argument that limiting marriage to heterosexual couples is necessary for either procreative purposes of providing the optimal environment for raising children." (In a footnote, the court said it would not consider arguments to the contrary made by amici.) The court rejected the plaintiff's argument for a broad right of marriage that would encompass same-sex marriage relying on the fact that such a right is not rooted in the history and tradition of New Jersey. The court rejected plaintiffs' reliance on previous right to marry cases since each of these involves opposite-sex couples.

In its equal protection analysis, the court

distinguished between the statutory incidents of marriage and the name "marriage." The court relied heavily on state sexual orientation discrimination and domestic partnership laws to decide that same-sex couples have a "strong interest" in treatment equal to that given to opposite sex couples. The court noted the difference between marriage and domestic partnership in terms of benefits provided and ease of entrance. Since the state had not offered any justifications for the marriage law other than "sustaining the traditional definition of marriage," the court found that there was no justification for the differentiation in benefits between married couples and domestic partners. The court rejected the state's proffered interest in preserving unity with the marriage laws of other states.

The court believed, however, that "our democratically elected representatives should be given a chance to address the issue under the constitutional mandate set forth in this opinion." The court thus orders the legislature to either (1) redefine marriage to include same-sex couples or (2) create a "parallel" institution to marriage that provides the incidents of marriage to same-sex couples within 180 days.

Three justices concurred in the opinion that the denial of benefits was unconstitutional but rejected the differentiation between the name and incidents of marriage. These judges felt that the label of "marriage" is itself of constitutional significance. They would have found a fundamental right to marry that included same-sex marriage.

**ADOPTION OF P.N.**

**No. 20050986**

**Utah Supreme Court**

**October 27, 2006**

<http://www.utcourts.gov/opinions/supopin/PN102706.pdf>

A man contracted with a woman to serve as a surrogate to be inseminated with his sperm and relinquish the baby. After birth and relinquishment, the father was arrested and the mother took custody. She began arranging an open adoption with a married couple. After signing a second relinquishment, the mother changed her mind and eventually both parents opposed the adoption petition. The trial court allowed the parents to intervene but granted permanent custody to the couple with no visitation for either parent.

The Utah Supreme Court reversed. They held the trial court could have decided the married couple were suitable as temporary custodians but could not grant permanent custody unless the parents were found unfit. The court thus ordered the trial judge to hold hearings to determine which biological parent should be given custody.