

# Marriage Law Digest

Vol. 5, No. 9, September 2008

## SEPTEMBER 2008 CASE SUMMARIES

William C. Duncan, Editor

### CONTENTS

- 1) ALMELOR V. REGIONAL TRIAL COURT OF LAS PINAS CITY, G.R. No. 179620, Republic of the Philippines Supreme Court, August 26, 2008.
- 2) MATTER OF THE ADOPTION OF DOE, Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida, August 29, 2008.
- 3) GOLDEN V. PATERSON, Index No. 260148/2008, Supreme Court of the State of New York, County of Bronx, September 2, 2008.
- 4) S.J.L.S. V. T.L.S., No. 2006-CA-001730-ME, Kentucky Court of Appeals, September 12, 2008.
- 5) HALDEMAN V. DEPARTMENT OF REVENUE, TC-MD 070773C, Oregon Tax Court Magistrate Division, September 24, 2008.
- 6) KULSTAD V. MANIACI, Cause No. 1, Montana Fourth Judicial District Court, Missoula County, September 29, 2008.
- 7) Recent Law Review Articles.

### ALMELOR V. REGIONAL TRIAL COURT OF LAS PINAS CITY

G.R. No. 179620

Republic of the Philippines Supreme Court

August 26, 2008

<http://www.supremecourt.gov.ph/jurisprudence/2008/august2008/179620.htm>

A wife sought annulment on the grounds that her husband was “psychologically incapacitated to perform his marital obligations” because he was a homosexual. The trial court nullified the marriage.

The supreme court said there it had not been proven that the husband “was a homosexual at the onset of his marriage and that he deliberately hid such fact from his wife.” The court said the “State and the public have vital interest in the maintenance and preservation of these social institutions against desecration by fabricated interest” so “any doubt should be resolved in favor of the validity of marriage” and the order of annulment was reversed.

### MATTER OF THE ADOPTION OF DOE

Circuit Court of the Sixteenth Judicial

Circuit in and for Monroe County, Florida

August 29, 2008

[http://media.miamiherald.com/smedia/2008/09/19/16/Audlin\\_Final\\_Judgment\\_of\\_Adoption\\_2\\_source.prod\\_affiliate.56.pdf](http://media.miamiherald.com/smedia/2008/09/19/16/Audlin_Final_Judgment_of_Adoption_2_source.prod_affiliate.56.pdf)

A prospective adoptive parent in a same-sex couple challenged Florida’s ban on adoptions by homosexual persons. The court found the applicant’s homosexuality “is irrelevant to his skills and his fitness to adopt”

and that “there was no non-punitive purpose” for his exclusion from eligibility to adopt.

The court noted that the Florida constitution prohibits “special laws” that single out or classifies a person without a reason related to a legitimate state interest. The court said the law at issue here “arbitrarily and oppressively prejudge[es] all gays as incapable of parenting” on the basis of sexual orientation, a characteristic protected by the Constitution under *Lawrence v. Texas*, so the law is a prohibited “special law.”

The court said the law was also a bill of attainder because “every Floridian who is gay or lesbian was found guilty by the legislature of being unfit to parent an adopted child without the benefit and protection of a judicial trial.” The court finally held that the law takes away the power of courts to “allow a petitioner to prove what is in the best interests of an adoptee” if “grounded in established fact” so the law infringed on the separation of governmental powers.

The court thus found the law unconstitutional and granted the adoption.

**GOLDEN V. PATERSON**

**Index No. 260148/2008**

**Supreme Court of the State of New York,  
County of Bronx  
September 2, 2008**

<http://www.domawatch.org/cases/newyork/GoldenvPatersen/golden%20decision%20and%20order%209%202%2008.pdf>

The Marriage Law Digest  
is jointly published by the

**Marriage Law Foundation**  
1426 East 820 North, Orem, UT 84097  
(801) 227-7878, [www.marriagelawfoundation.org](http://www.marriagelawfoundation.org)

and the

**Institute for Marriage and Public Policy**  
P.O. Box 1231, Manassas, VA 20108  
(202) 216-9430, [www.marriagedebate.com](http://www.marriagedebate.com).

In a challenge to a governor’s directive to state agencies to provide recognition to same-sex marriages contracted in other jurisdictions, the court characterized the directive as “an incremental but important step toward equality long denied, even if, according to the New York Court of Appeals, full equality is not constitutionally mandated.”

The court said the governor’s action does not conflict with the legislature’s prerogative because the legislature’s current default rule is that a marriage valid where contracted is valid in New York. The court noted that no specific statute prohibits recognition. It also said that a number of recent enactments favorable to same-sex couples are “expressions of New York’s public policy [that] are only consistent with a tradition of affording equal rights to all New Yorkers, a tradition not to be abandoned lightly, without an unmistakable expression of legislative purpose.” The court further said the importance of marriage to the individuals marrying “establishes a strong presumption in favor of the marriage’s continued validity.” The court invoked an “evolution” of marriage “from an institution of women’s subordination to men, to a more equal partnership, without gender based rules.”

**S.J.L.S. V. T.L.S.**

**No. 2006-CA-001730-ME**

**Kentucky Court of Appeals**

**September 12, 2008**

<http://162.114.92.72/COA/2006-CA-001730.pdf>

After a same-sex couple broke up, the partner who was not a biological parent sought to adopt the mother’s child. The trial court granted the adoption as a stepparent adoption although it ultimately noted it did so without legal authority.

The court of appeals said the partner was not a stepparent because there was no marriage and the trial court should not have created a “legal fiction” to find she was (the trial court had believed the fiction necessary because the

legislature had not caught up with reality). The court further said the trial court cannot grant a non-stepparent adoption without terminating a biological parent's rights and that Kentucky law does not allow "stepparent-like" adoptions. The court noted however, that an adoption cannot be challenged after one year. The court said "this case should never have proceeded as far as it has" and that it trusted "that no others will." The court allowed the biological mother to retain parental rights and instructed the trial court to assign visitation. The court concluded that the question of whether "stepparent-like" adoptions should be granted is political, not legal.

**HALDEMAN V. DEPT. OF REVENUE  
TC-MD 070773C**

**Oregon Tax Court Magistrate Division  
September 24, 2008**

[http://www.ojd.state.or.us/Tax/taxdocs.nsf/\(\\$All\)/32755EE491C2BC79882574D0005C2DBB/\\$File/070773CDECHaldeman.pdf](http://www.ojd.state.or.us/Tax/taxdocs.nsf/($All)/32755EE491C2BC79882574D0005C2DBB/$File/070773CDECHaldeman.pdf)

A woman sought a tax exemption for the value of the health care benefits her employer provided to her opposite-sex domestic partner. The court was faced with the question of whether offering the exemption to same-sex but not opposite-sex partners, as required by Oregon law, violated the Oregon Constitution.

The court held that opposite-sex couples were a "true class" under the Oregon Constitution (meaning an identifiable group rather than a group made solely by legal classification) but were not a suspect class because prejudice and discrimination against them has been decreasing. The court also said the exemption policy had a rational basis because it promotes marriage by treating those who can marry but don't differently than those who want to marry but can't.

**KULSTAD V. MANIACI  
Cause No. 1**

**Montana Fourth Judicial District Court,  
Missoula County**

**September 29, 2008**

<http://www.aclumontana.org/LegalProgram/Documents/Kulstad%20Decision%2009-28-08.pdf>

The former partner of an adoptive parent sought joint custody of the mother's children. The court said evidence showed the children would be harmed if they did not have contact with the partner and that the mother was hurting the children by "indoctrinating" them against her former partner. The court accepted evidence that children of same-sex parents develop just as well as their peers. The court also distinguished the U.S. Supreme Court's decision in *Troxel v. Granville* because it said that case only dealt with the constitutional interest of parents not those of children as this case did. The court said the adoptive mother "voluntarily relinquished her role as an exclusive parent" and that the partner should be considered a "de facto" parent. The partner was thus given a parental interest in the children and liberal visitation.

### RECENT LAW REVIEW ARTICLES

Margaret Somerville, *From Homo sapiens to Techno sapiens: Children's Human Rights to Natural Human Origins* PROCEEDINGS, 14<sup>TH</sup> WORLD CONGRESS ON REPRODUCTIVE TECHNOLOGIES, Montreal, 17th-20th September, 2007. Argues that redefining marriage, along with other legal trends, threatens the right of children to know their biological parents.

Robert E. Rodes, Jr., *On Marriage and Metaphysics* NATIONAL CATHOLIC BIOETHICS QUARTERLY 693 (2007). Argues that sex difference is a crucial and salient element in marriage that justifies treating same-sex relationships differently than marriage.

Bijal Shah, *Gay American "Deviance": Using International Comparative Analysis to Argue for a Free Speech and Establishment Clause Approach to Furthering Gay Marriage in the United States* 26 WISCONSIN INTERNATIONAL LAW JOURNAL 1

(2008). Argues that advocacy for same-sex marriage focus on the need to protect gay and lesbian persons from majority moral preferences.

Ben Schuman, *Gods and Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective* 96 GEORGETOWN LAW JOURNAL 2103 (2008). Argues that arguments against same-sex marriage are pretexts for religious motivations and that civil and religious marriage should be legally separated.

R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage* 96 CALIFORNIA LAW REVIEW 839 (2008). Argues that marriage laws shape group identity and can exclude groups from full citizenship.

William C. Duncan, *Does the Family Have a Future?* 83 NORTH DAKOTA LAW REVIEW 1273 (2007). Argues that ideological challenges to inherited understandings of the family may undermine the institution.

Jenni Millbank, *The Limits of the Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family* 22 INTERNATIONAL JOURNAL OF LAW, POLICY & THE FAMILY 149 (2008). Argues that parenthood should be determined by intentionality rather than by whether an adult functions as the parent.

Janet L. Dolgin, *Biological Evaluations: Blood, Genes and Family* 41 AKRON LAW REVIEW 347 (2008). Describes four new forms of family that are vying to replace a "traditional" understanding.

Melissa Neely, *Indiana Proposed Defense of Marriage Amendment: What Will It Do and Why is It Needed* 41 INDIANA LAW REVIEW 245 (2008). Makes the case for an amendment to the Indiana Constitution defining marriage as the union of a man and a woman.

J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage* 21 JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL

LAWYERS 1 (2008). Describes the shift to an understanding of marriage based on the functions it serves rather than a particular family form but notes that many attributes of a more formal understanding remain.

Stephen T. Black, *Same-Sex Marriage and Taxes* 22 BYU JOURNAL OF PUBLIC LAW 327 (2008). Argues that the preference for traditional marriage in the tax code is constitutional.

Shahar Lifshitz, *A Potential Lesson from the Israeli Experience for the American Same-Sex Marriage Debate* 22 BYU JOURNAL OF PUBLIC LAW 359 (2008). Describes the experience of Israel with domestic relations law and suggests that the U.S. should focus on the creation of civil unions.

Bradley S. Smith & J.A. Robinson, *The South African Civil Union Act 17 of 2006: A Good Example of the Dangers of Rushing the Legislative Process* 22 BYU JOURNAL OF PUBLIC LAW 419 (2008). Describes the recent experience of enacting South Africa's civil unions law that redefined marriage.

Lynn D. Wardle, *A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and "The Tragedy of the Commons"* 22 BYU JOURNAL OF PUBLIC LAW 441 (2008). Critiques the "conservative case" for same-sex marriage.

Mark Strasser, *The Future of Marriage* 21 Journal of the AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 87 (2008). Predicts rise in interstate conflicts over marriage recognition and the provision of benefits to unmarried couples.

John G. Culhane, *Beyond Rights and Morality: The Overlooked Public Health Argument for Same-Sex Marriage* 17 LAW & SEXUALITY 7 (2008). Argues that allowing same-sex couples to marry would promote public health since marriage has health benefits for spouses.