

# Marriage Law Digest

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## APRIL 2009 CASE SUMMARIES

William C. Duncan, Editor

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### VARNUM V. BRIEN

No. 07-1499

Iowa Supreme Court

April 3, 2009

[http://www.judicial.state.ia.us/Supreme Court/Recent Opinions/20090403/07-1499.pdf](http://www.judicial.state.ia.us/Supreme_Court/Recent_Opinions/20090403/07-1499.pdf)

Twelve plaintiffs challenged Iowa's marriage law because it does not allow same-sex couples to marry. The trial court ruled that the statute was unconstitutional.

The supreme court unanimously affirmed. The court said the definition of marriage as the union of a man and a woman resulted in the denial of marriage benefits to same-sex couples, particularly, "the personal and public affirmation that accompanies marriage." The court analyzed the statute solely on equal protection grounds, arguing that "equal protection can only be defined by the standards of each generation."

The court first held that same-sex couples are similarly situated with opposite-sex married couples even though they cannot have children together because they "are in committed and loving relationships, many raising families" and "official recognition of their status provides an institutional basis for defining their fundamental relational rights and responsibilities." The court believed society would benefit "from providing same-sex couples a stable framework within which to raise their children and the power to make health care and end-of-life decisions for loved ones, just as it does when that framework is provided for opposite-sex couples." Since marriage is "designed to bring a sense of order to the legal relationships of committed couples

and their families” the court believed the only reason the law could treat same and opposite-sex couples differently is their “sexual orientation.” The court held the statute classifies on this basis even though the statute does not mention orientation because “civil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual.” The current law, the court said, prevents gay or lesbian people from “simultaneously fulfill[ing] their deeply felt need for a committed personal relationship, as influenced by their sexual orientation, and gain[ing] the civil status and attendant benefits granted” by the marriage law.

The court held that sexual orientation discrimination should be subject to heightened scrutiny because (1) gays and lesbians have been the victims of discrimination; (2) no other state courts have found orientation relevant to a person’s ability to contribute to society and other state statutes treat sexual orientation as irrelevant; (3) sexual orientation is “central to personal identity” and “highly resistant to change”; (4) and gays and lesbians lack political power as evidenced by their failure to convince a legislature to redefine marriage.

The court also rejected the County’s proffered justifications for the marriage law. It said that maintenance of the tradition of marriage is not a justification. It believed there was “an abundance of evidence and research” showing “the interests of children are served equally by same-sex parents and opposite-sex

parents” and opinions to the contrary “were largely unsupported by reliable scientific studies.” The court said the statute did not promote the welfare of children because (1) it does not exclude all bad parents from marriage which “tends to demonstrate that the sexual-orientation-based classification is grounded in prejudice,” (2) same-sex couples are already raising children, (3) the statute will not result in fewer children being raised in same-sex relationships, (4) some couples who don’t have children can marry, and (5) excluding same-sex couples from marriage does not “encourage stability in opposite-sex relationships.”

The court suggests that “religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage” but religion is not a proper basis for legal distinctions.

The court thus struck the current marriage definition from the statute and said its decision would go into effect in 21 days.

**ADOPTION OF INFANTS H.**

**No. 29S02-0904-CV-140**

**Indiana Supreme Court**

**April 8, 2009**

<http://www.in.gov/judiciary/opinions/pdf/04080901rts.pdf>

An Indiana trial court granted an adoption of twin babies by a petitioner from New Jersey. The children were born to a woman from South Carolina “inseminated with biological material from California.” While the adoption proceedings were ongoing, nurses at the hospital where the babies were staying expressed concern with the appropriateness of petitioner’s behavior and called in Child Protective Services which initiated an investigation. The pending investigation and the court’s recognition that the Interstate Compact on the Placement of Children (ICPC). The court vacated the adoption but eventually held a final hearing and

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allowed the adoption to take place in the absence of a home study and other safeguards.

The supreme court reversed. It said courts should not approve adoptions without allowing the State department of Child Services its statutory role in conducting a home study. The court also said an adoption by a non-resident must comply completely with the ICPC. Since that had not happened here, the court remanded to the trial court with an order to comply with these requirements.

**DEBRA H. V. JANICE R.**

**2009 Slip Op 02723**

**New York Appellate Division, First  
Department**

**April 6, 2009**

[http://www.nycourts.gov/reporter/3dseries/2009/2009\\_02723.htm](http://www.nycourts.gov/reporter/3dseries/2009/2009_02723.htm)

The former Vermont civil union partner of a child's biological mother sought custody of the child, asserting that she had grounds to do so because she stood *in loco parentis* to the child or that the mother should be stopped from denying the partner's status as a parent. The court noted an earlier decision of the Court of Appeals rejecting standing for an adult who is neither the adoptive or biological parents of a child despite the existence of a relationship between the person seeking custody and the child's parent. The court held this decision controlled and dismissed the petition.

**MATTER OF SEBASTIAN**

**File No. 38-08**

**New York Surrogate's Court  
April 9, 2009**

<http://www.nylj.com/nylawyer/adgifs/decisions/041009glen.pdf>

A Dutch citizen working in New York and a U.N. employee were legally married in the Netherlands. The same sex couple created a child by fertilizing one partner's ova with

donor sperm and the fertilized egg was carried to term by the other partner. The partner who had not carried the child sought a second parent adoption.

The court noted that there is no New York law or court decision controlling the determination of parentage in cases of gestational surrogacy. The court said New York would recognize the marriage from the Netherlands as valid. Thus, the partner would be a legal parent by virtue of her marriage to the mother listed on the birth certificate. Any other result for the court would be unconstitutional because, to the court, "it is clear that provisions permitting the biological ('putative') *father* of a child born out of wedlock to establish parental status while excluding the genetic *mother* from the same opportunity is a constitutionally prohibited gender-based classification" and "the consistent purpose of serving children's best interests by providing them with two responsible parents, rather than one, requires that paternity proceedings and acknowledgment of paternity should be made available to lesbian genetic co-mothers." The court concluded, however, that although an adoption was unnecessary, granting one would make recognition of the parental relationship more likely in states that would not recognize a same-sex marriage.

### **RECENT LAW REVIEW ARTICLES AND BOOKS**

Candice A. Garcia-Rodrigo, *An Analysis of and Alternative to the Radical Feminist Position on the Institution of Marriage* 11 JOURNAL OF LAW & FAMILY STUDIES 113 (2008). Critiques a radical feminist argument that marriage is inherently undesirable.

Lauren C. Miele, *Big Love or Big Problem: Should Polygamous Relationships Be a Factor in Determining Child Custody?* 43 NEW ENGLAND LAW REVIEW 105 (2009). Argues that polygamy of a parent will "almost always" be a factor in determining custody.

Patrick Joseph Borchers, *The Coming Collision: Romer and State Defense of Marriage Acts* 2008 BYU LAW REVIEW 1635. Describes potential conflicts between applications of state laws preventing recognition of interjurisdictional same-sex marriages and the *Romer v. Evans* decision.

Patricia A. Cain, *DOMA and the Internal Revenue Code* \_\_ CHICAGO KENT LAW REVIEW \_\_ (forthcoming) at <http://ssrn.com/abstract=1354564>. Argues that DOMA is unconstitutional because there is no justification for treating same-sex couples differently for tax purposes since the only purpose of tax law is measuring taxable income fairly.