

Marriage Law Digest

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APRIL 2010 CASE SUMMARIES

William C. Duncan, Editor

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HALL V. MAAL

Case No. 1D08-4776

Florida Court of Appeal, First District

March 30, 2010

<http://opinions.1dca.org/written/opinions2010/03-30-2010/08-4776.pdf>

A couple participated in a wedding ceremony without getting a license (because they had a disagreement about their prenuptial contract). They later got a license but did not solemnize the marriage or return the license. Four years after the wedding, the wife sought a divorce and the husband argued that they had no marriage. The trial court said there was no marriage because there was no license.

The appeals court held that Florida statutes require a license for a marriage to be valid. Here, therefore, there was no marriage and could be no divorce.

A dissenting judge accused the majority of misreading the statute to require a marriage license and thus denies "the parties who engaged in a solemn, religious and public marriage ceremony . . . the fundamental right to be married." This opinion noted that unlike "same-sex and incestuous marriages" the statute did not specifically prohibit "unlicensed marriages." Here, the ceremony adequately distinguishes it from a common law marriage."

MYERS V. MYERS

2010 UT App 74

Utah Court of Appeals

April 1, 2010

<http://www.utcourts.gov/opinions/appopin/mvers040110.pdf>

After divorce and an award of alimony, an ex-wife lived intermittently with her parents and the trial court found she had a sexual relationship with a foster son of her parents living in the home. Finding, the ex-wife had cohabited, the trial court terminated the alimony award.

The court of appeals held that cohabitation, in Utah law, must include not only living together and having a sexual relationship, but also having "a relationship 'akin to that generally existing between husband and wife.'" Here, the ex-wife and her parents' foster son "did not establish a common household" characterized by "shared expenses, shared decision-making, shared space, or shared meals. So, the alimony award should not have been terminated.

ERICSON V. BARON

Index No. 350065/09

**New York Supreme Court, County of
New York**

March 23, 2010

<http://www.nylj.com/nylawyer/adgifs/decisions/032610gesmer.pdf>

A couple lived and worked together for thirteen years and had a child together. On breakup the wife sought a division of property owned by the husband that they had used together.

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The court said the statements of the male partner did not become legally enforceable just because the female partner believed in them. The court added that "even if he had made an explicit promise that, upon separation, she would have been entitled to 'equitable distribution' of their assets, it would be unenforceable, as it would be contrary to the long-standing law and policy in New York that unmarried partners are not entitled to the same property and financial rights upon termination of the relationship as married people."

**STARLING V. BOARD OF COUNTY
COMMISSIONERS**

No. 09-11168

U.S. Court of Appeals, Eleventh Circuit

April 6, 2010

<http://www.ca11.uscourts.gov/opinions/ops/200911168.pdf>

A captain of firefighters began a sexual relationship with another firefighter while he was still married. He was subsequently demoted on the grounds that the relationship was interfering with his work. He sued alleging a violation of his "First Amendment right to intimate association."

The court of appeals said that even if the court assumed the captain's "right to intimate, extramarital association with Smith is fundamental" the County's "interest in discouraging intimate association between supervisors and subordinates is so critical to the effective functioning of its Fire Department that it outweighed Starling's interest in his relationship with [the girlfriend] in the workplace." This interest is heightened in a "para-military" setting like the fire department since "extramarital relationships between subordinates and supervisors in this environment can be particularly destructive to the chain of command by weakening trust and discipline and threatening harmonious interpersonal relationships."

D.D. V. IDANT LABORATORIES

No. 09-3460

U.S. Court of Appeals, Third Circuit

April 1, 2010

<http://www.ca3.uscourts.gov/opinarch/093460np.pdf>

A child born as a result of artificial insemination from donor sperm showed symptoms of a syndrome probably inherited from the sperm donor. The mother sued alleging the laboratory from which she procured the donation was liable for the child's condition. The trial court dismissed the suit on procedural and substantive grounds.

The court of appeals agreed. It noted that New York law does not recognize a cause for "wrongful life." The court characterized the mother's argument as "essentially saying that [the child's] genetic makeup is her injury" but said New York Law "states that she 'like any other [child], does not have a protected right to be born free of genetic defects.'"

FLEISHMAN REALTY CORP. V.

GARRISON

2010 NY Slip Op 50527U

New York Civil Court, Bronx County

March 25, 2010

A man lived with his partner and the partner's mother until both died. He then sought to be allowed to stay in the apartment they had lived in. The court found that the man was the "soulmate" of his deceased partner and also "as much as a loving son" to the partner's mother as the partner was. Thus, based on either relationship, the claimant had the right to succeed to the tenancy. The court said "such loving, committed, long-term relationships are the very types of non-traditional families that [New York law] sought to protect."

S.H. V. AUSTRIA

Application no. 57813/00

European Court of Human Rights

April 1, 2010

<http://www.bailii.org/eu/cases/ECHR/2010/427.html>

Two married couples who were infertile challenged Austrian law preventing the use of donated eggs and sperm in *in vitro* fertilization. Austria's constitutional court held the impugned law aimed "to avoid the forming of unusual personal relations such as a child having more than one biological mother (a genetic mother and one carrying the child) and to avoid the risk of exploitation of women" and reflected concerns about the health and rights of children conceived by IVF as well as "ethical and moral values of society" and the risks "or commercialization and selective reproduction." The constitutional court deferred to the legislature to determine the balance between different forms of assisted reproduction.

The European Court of Human Rights construed the treaty protection of "private life" broadly and held it included "the right of a couple to conceive a child and to make use of medically assisted procreation for that end." In regards to the Austrian law, the court believed "the prohibition of ova and sperm donation for *in vitro* fertilization cannot be considered the only or the least intrusive means of achieving the aim pursued." The court said the fact that egg donation is allowed in other contexts undercuts the claim that the challenged law is needed to prevent health risks. In response to Austria's concerns with complicated family relationships, the court said "unusual family relations in a broad sense are well known to the legal orders" of European states and "there are no insurmountable obstacles to bringing family relations which would result from a successful use of the artificial procreation techniques at issue into the general framework of family law and other related fields of law." The court also held the child's right to know his or her biological mother and father is "not an absolute one" and the legislature could have

found another way of balancing this interest with the interest in adults of having access to assisted reproduction. In regards to the ban on sperm donation in IVF, the court noted both sperm donations and IVF are legal. The court said Austria was required to demonstrate “particularly persuasive arguments” for the ban.

A separate opinion agreed with the majority’s holding on sperm donation but believed “the splitting of motherhood between a genetic mother and one carrying out the child significantly differs from relations based on adoption and has added a new quality to this problem.” This judge said that even if a different solution than what Austria has done is possible, there was no reason not to defer to Austria’s solution.

Another dissenter expressed “doubt that the decision of spouses or a cohabiting couple to conceive a child falls within the ambit of Article 8, regardless of whether that can only be fulfilled by the use of medically assisted procreation techniques.” Because, however, “the case concerns a very sensitive issue, the State should in my opinion be afforded a wide margin of appreciation” and it is not “for the Court to interfere” with the decision Austrian lawmakers have made.

PERRY V. SCHWARZENEGGER

No. 10-15649

U.S. Court of Appeals, Ninth Circuit

April 12, 2010

http://www.ca9.uscourts.gov/datastore/opinions/2010/04/12/10-15649_WritDenyOrder_Filed.pdf

Third parties to a lawsuit asked the Ninth Circuit to prevent them from having to disclose internal communication related to the campaign opposing California’s Proposition 8. The court held these groups needed to defy the trial court’s order to disclose, then be found in contempt and then appeal.

**IN THE MATTER OF THE PARENTAGE OF
M.F.**

No. 81043-5

Supreme Court of Washington

April 1, 2010

<http://www.courts.wa.gov/opinions/pdf/810435.opn.pdf>

A stepfather sought custody of his ex-wife’s child as a “*de facto*” parent. The court distinguished its earlier *de facto* parenthood decision because that case had involved a same-sex couple and the statutes provided no way for the mother’s partner to gain “legal parental rights.” Thus, in that case, the court had to fill in the statutory void. Here, an “avenue already exists for a stepparent seeking a legal, custodial relationship with a child” because a stepparent can petition for custody. The court noted that it had created the “*de facto* parentage doctrine to correct a specific statutory shortcoming: the lack of remedy available to the [partner in the earlier case], who was a ‘parent’ in every way but legally.” The doctrine was “a common law method to establish parentage where, had the respondent been able to participate in traditional family formation, parentage would have or could have been established by statutory means.” In this case, the stepparent “is a third-party to the two already existing parents, which placed him in a different position” than the partner of a child’s parent.

A dissenting opinion argued that the majority had based its decision on the mistaken notion that “a child can have no more than two parents.” The dissent said the earlier *de facto* case did not require that a parent be unfit since there was no finding that the natural father in that case was unfit. The dissent believed the stepfather in this case satisfies all of the standards to be designated as a *de facto* parent.

**COLE V. ARKANSAS DEPARTMENT
OF HUMAN SERVICES**

Case Number 60CV-08-14284

**Arkansas Circuit Court of Pulaski
County**

April 16, 2010

<http://showtime.arkansasonline.com/e2/news/documents/2010/04/16/DOC041610.pdf>

The citizens of Arkansas approved a ballot initiative preventing adoption placements with cohabiting couples. Same-sex couples challenged the law on federal and state constitutional grounds. The state trial court found there were no federal constitutional problems with the initiative because the “involves no fundamental right and no suspect class is implicated” and the “State has argued several legitimate governmental purposes including the theory that cohabiting environments, on average, facilitate poorer child performance outcomes and expose children to higher risks of abuse than do home environments where the parents are married or single.” On the Arkansas constitutional grounds the court said the initiative “significantly burdens non-marital relationships and acts of sexual intimacy between adults because it forces them to choose between becoming a parent and having any meaningful type of intimate relationship outside of marriage.” The court believed this “infringes upon the fundamental right to privacy.” The court added that “one politically unpopular group has been specifically targeted by exclusion” by the initiative because opposite-sex cohabiting couples can marry and same-sex couples cannot.

MCFARLANE V. RELATE AVON LTD.

Case No. A2/2009/2733

England & Wales Court of Appeal

April 29, 2010

<http://www.bailii.org/ew/cases/EWCA/Civ/2010/B1.html>

A relationship counselor declined to participate in “psycho-sexual therapy” with same-sex couples and was fired. The court said it was bound by an earlier decision which held that there was no discrimination where an employee was fired for the *conduct* of refusing to participate in civil partnership ceremonies rather than for her religious beliefs. The court also disavowed a submission from the former Archbishop of Canterbury, arguing that English law offers “vigorous protection of the Christian’s right (and every other person’s right) to hold and express his or her beliefs” but it should not “offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts.”

COMMONWEALTH V. CHAU

08-P-2043

Appeals Court of Massachusetts

April 27, 2010

Two brothers were convicted of incest because of a sexual relationship with their sister. They challenged the constitutionality of the statute because it only applied to sexual relationships between persons of the opposite-sex, saying it constituted sex and sexual orientation discrimination. The court said the “statute’s purpose is to prevent biological and genetic abnormalities, a compelling government interest, and its prohibition of certain procreative sexual acts by consanguineous relations is a narrowly tailored means to further that interest.” The court concluded that the legislature could rationally decide to further this “legislative intent to prevent birth defects” by limiting the “prohibition to conduct most likely to result in offspring” even though “such conduct may more often be engaged in by persons of heterosexual than homosexual orientation does not in these circumstances render the prohibition impermissibly discriminatory.”

IN RE PARENTAL RESPONSIBILITIES OF A.D.

Court of Appeals No. 09CA0756
Colorado Court of Appeals
April 1, 2010

http://www.courts.state.co.us/Courts/Court_of_Appeals/opinion/2010/09CA0756.pdf

The former boyfriend of a child's mother sought to be declared the child's "presumptive father" in order to get child visitation. The court noted Colorado law says a man is a presumptive father if "he received the child, while a minor, into his home and openly held the child out as his natural child" unless there's another father established by law. Here, the court held there was no finding of paternity for the biological father and just because the former boyfriend admitted he was not the biological father does not mean he can't be a "presumptive father."

RECENT LAW REVIEW ARTICLES AND BOOKS

Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty* 95 IOWA LAW REVIEW 747 (2010). Proposes a mediation model for addressing competing claims between gay rights and religious liberty.

Thomas Berg, *What Same-Sex Marriage and Religious Liberty Have in Common* UNIVERSITY OF ST. THOMAS SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER No. 10-12 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1584965. Advocates strong religious liberty accommodations in laws redefining marriage.

NEWS STORIES

Lisa Donovan, *Chicago Dad Can Take Daughter to Church, Judge Rules in Interfaith Divorce* CHICAGO SUN-TIMES, April 13, 2010 at http://www.suntimes.com/news/metro/215646-0_judge-dad-OK-church-interfaith-divorce-041310.article. Reporting on a trial court decision to allow a man to take his child to a

Catholic Church over the objections of the man's Jewish ex-wife.

Same-Sex Marriage Suits Rejected AGENZIA NAZIONALE STAMPA ASSOCIATA, April 14, 2010 at http://www.ansa.it/web/notizie/rubriche/english/2010/04/14/visualizza_new.html_176254046_0.html. Reporting on a decision by the Italian Constitutional Court rejecting a claim that marriage must be redefined in that nation.

A Judge in Tierra del Fuego Has Rejected the Marriage Between Freyre and Di Bello, MOMENTO24, April 15, 2010 at <http://momento24.com/en/2010/04/15/un-juez-de-tierra-del-fuego-habria-impugnado-el-matrimonio-entre-freyre-y-di-bello/>. Reporting that a same-sex marriage in Argentina has been ruled void by a court.

David Ashenfelter, *A Landmark Gay Custody Battle*, DETROIT FREE PRESS, April 17, 2010, 3A at <http://www.freep.com/article/20100417/NEWS/06/4170332/-1/WEATHER0701/A-landmark-gay-custody-battle>. Reporting a trial court decision to allow a nonparent partner of a child's mother to seek custody of the child.

Jennifer Sullivan, *Jury Rules Nurse Didn't Violate Rights of Woman Barred From Partner's Room*, SEATTLE TIMES, April 21, 2010 at http://seattletimes.nwsourc.com/html/localnews/2011668363_reed22m.html. Reporting a jury verdict that a nurse who had kept the same-sex partner of a patient out of the patient's room was not sexual orientation discrimination.

Brooke Adams, *Order Bars Dad from Discussing Polygamy*, SALT LAKE TRIBUNE, April 26, 2010 at http://www.sltrib.com/ci_14959418. Reporting on a court order in a divorce case prohibiting the ex-husband from talking about polygamy or taking his children to a polygamist compound.