

Marriage Law Digest

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AUGUST 2010 CASE SUMMARIES

William C. Duncan, Editor

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ANSIN V. CRAVEN-ANSIN

SJC-10548

Massachusetts Supreme Judicial Court

July 26, 2010

<http://www.socialaw.com/slippf.htm?cid=19996&sid=120>

Two years before divorce, a married couple executed an agreement on terms for property division on divorce. The trial court said the agreement was valid because it (1) "was not the product of fraud or duress", (2) was "based on full financial disclosure", (3) and "the terms of the agreement were fair and reasonable at the time of execution."

The Supreme Judicial Court said these "agreements may be enforced" and "will always be reviewed by a judge to ensure that coercion or fraud played no part in its execution." The court said pre-divorce agreements "must be carefully scrutinized" to "determine at a minimum whether (1) each party has had an opportunity to obtain separate legal counsel of each party's own choosing; (2) there was fraud or coercion in obtaining the agreement; (3) all assets were fully disclosed by both parties before the agreement was executed; (4) each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the event of a divorce; and (5) the terms of the agreement are fair and reasonable at the time of execution and at the time of divorce."

PERRY V. SCHWARZENEGGER

No. 3:09-cv-02292

U.S. District Court, Northern District of
California

August 4, 2010

<https://ecf.cand.uscourts.gov/cand/09cv2292/files/09cv2292-ORDER.pdf>

Same-sex couples challenged Proposition 8, California's marriage amendment on federal constitutional grounds. After conducting a long trial, the court concluded the proponents of Proposition 8 "failed to build a credible factual record to support their claim that Proposition 8 served a legitimate government interest." The court concluded, "Marriage is the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents." The judge also said: "Proposition 8 places the force of law behind stigmas against gays and lesbians" and "[r]eligious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians."

The judge found that the Constitution contains a right to marry and that this right "has been historically and remains the right to choose a spouse and, with mutual consent, join together and form a household." The judge also believed same-sex couples "are

situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage under California law" and "[g]ender no longer form an essential part of marriage." He concluded "plaintiffs' relationships are consistent with the core of the history, tradition and practice of marriage in the United States." Thus, they "do not seek recognition of a new right" but they instead are asking "California to recognize their relationships for what they are: marriages." The court also said domestic partnerships were not enough because they were "created specifically" to prevent same-sex couples from marrying. The court then said same-sex marriage involves a fundamental right so "strict scrutiny" analysis applies. Since the law does not have a rational basis, Proposition 8 violates the Due Process Clause of the Fourteenth Amendment.

Since plaintiffs are prohibited from marrying their partners because of the partners' sex, Proposition 8 is sex discrimination and "operates to restrict Perry's choice of marital partner because of her sexual orientation; her desire to marry another woman arises only because she is a lesbian." Even though Proposition 8 does not refer to orientation, "[h]omosexual conduct and identity together define what it means to be gay or lesbian." Since "Proposition 8 targets gays and lesbians in a manner specific to their sexual orientation and, because of their relationship to one another, Proposition 8 targets them specifically due to sex." The court said the law had no rational basis because none of the proponents proposed justifications are rational. The court characterized the first justification as "maintaining the definition of marriage as the union of a man and a woman for its own sake" and said that Proposition 8 "enshrines" in the California Constitution "a gender restriction that the evidence shows to be nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life" which the court believed

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was based on “antiquated and discredited notions of gender.” The judge also concluded allowing same-sex couples to marry “would benefit the state.” The court also rejected the idea that social change should proceed cautiously because there was no evidence “that allowing same-sex couples to marry will have any negative effects on society or on the institution of marriage.” The court then said “same-sex parents and opposite-sex parents are of equal quality” and “Proposition 8 does not make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents” and “parents’ genders are irrelevant to children’s developmental outcomes.” The court next said “Proposition 8 does not affect any First Amendment right or responsibility of parents to educate their children” and “does not affect the rights of those opposed to homosexuality or to marriage for couples of the same sex.” The judge believed “same-sex and opposite-sex unions are, for all purposes relevant to California law, exactly the same. . . . The evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples.” The court believed the evidence showed Proposition 8 “was premised on the belief that same-sex couples simply are not as good as opposite-sex couples” and “this belief is not a proper basis on which to legislate.” Since the court believed Proposition 8 “enacts a moral view that there is something ‘wrong’ with same-sex couples”, it said “the most likely explanation for its passage a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples.” inst its own citizens in order to receive and retain federal funds.”

The court said DOMA was not within Congress’ spending power because it “imposes an unconstitutional condition on the receipt of federal funding” by “condition[ing] the receipt of federal funding on the denial of marriage-based benefits to same-sex married

couples, though the same benefits are provided to similarly-situated heterosexual couples.” The court also said “DOMA plainly intrudes on a core area of state sovereignty—the ability to define the marital status of its citizens.”

MATTER OF H.M. V. E.T.

2007-09323

New York Appellate Division, Second Department

August 3, 2010

<http://www.courts.state.ny.us/courts/ad2/calendar/webcal/decisions/2010/D28260.pdf>

A biological mother sought child support from her former same-sex partner. The trial court scheduled a hearing and the partner appealed.

The appellate division held that “where the same-sex partner of a child’s biological mother consciously chooses, together with the biological mother, to bring that child into the world through AID, and where the child is conceived in reliance upon the partner’s implied promise to support the child, a cause of action for child support” under New York law “has been sufficiently alleged.”

P.B. & J.S. V. AUSTRIA

Application No. 18984/02

European Court of Human Rights

June 22, 2010

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=60&portal=hbkm&action=html&source=tkp&highlight=&sessionid=57967424&skin=hu doc-en>

The same-sex partner of a civil servant sought to be covered by public employee insurance and was denied because the policy was only available to opposite-sex couples. An administrative court said there was no discrimination because where opposite-sex couples live together “it was, as a rule, safe to conclude that they were cohabiting in a partnership” but this is not true of same-sex couples and “it would have been necessary to

undertake delicate enquiries into the most intimate sphere of the person concerned.”

The European Court of Human Rights said that Article 8 of the European Convention protects “a cohabiting same-sex couple living in a stable de facto partnership” and “very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention.” The same, the court said, applied to sexual orientation classifications. While there was discrimination during the period when opposite-sex cohabiting couples and not same-sex couples could get benefits, when only relatives were covered the court said the “Convention only guarantees a right to equal treatment of persons in relatively similar situations but does not guarantee access to specific benefits.” So, Austria was ordered to pay benefits to the couple for the period before the policy was changed only to cover relatives.

IN RE LAPLIANA

2010-Ohio-3606

Ohio Court of Appeals, Eighth Appellate District

August 5, 2010

http://data.lambdalegal.org/in-court/downloads/in-re-sjl-jkl_oh_20100805_decision-oh-court-of-appeals.pdf

The former partner of children’s biological mother (through artificial insemination) received a court order for visitation with the children after the mother denied the partner custody because she was in a relationship with another man.

The appeals court said the juvenile court had jurisdiction “to determine (1) whether [the mother] contractually relinquished sole custody of the children to [her former partner], (2) whether it would be in the children’s best interest to have companionship

with [the partner], and further, (3) what that companionship should entail.” The court said “if a trial court finds that a parent contractually relinquished custody of the child, then the parent is ‘unsuitable’ for purposes of custody determinations between a parent and a nonparent.” The court said a written contract was not necessary and that “a parent may relinquish custody by conduct.” Here, since the couple “deliberately planned to have children together” and entered into a written agreement to raise one of the children jointly, the trial court could have conceived that the mother “contractually relinquished sole custody” of the children. The court also said the mother’s “conduct as a whole” indicates she intended joint parenting for both children. The court laid down a rule that “if a trial court finds that a parent contractually relinquished sole custody to a nonparent, then in a subsequent custody proceeding between the parent and nonparent, the court must determine what would be in the child’s best interests” and the trial court here did not abuse its discretion in determining the visitation was in the best interests of the child.

A dissenting opinion noted that “Ohio does not recognize the relationship between unmarried partners in its domestic relations laws” so “the partners and their families cannot be considered to be ‘related’ to one another by affinity” in order for the nonparent to gain visitation. The dissent said: “I cannot in good conscience approve the mistaken analysis the majority has followed to reach its more humane result. This is [a] government of laws, and not of men.’ We are limited by the statutory authority granted to us by the legislature.”

KEETON V. ANDERSON-WILEY

CV 110-099

U.S. District Court, Southern District of Georgia

August 20, 2010

http://chronicle.augusta.com/sites/default/files/SKMBT_60110082017270.pdf

A counseling student was put on “remediation status” because the faculty believed she could not “separate her personal, religious-based morality from her professional counseling duties, in violation of the [American Counseling Association’s] Code of Ethics” and that “some of [her] views on sexual behavior depart from psychological research.” On threat of expulsion, the faculty ordered the student to participate in a plan requiring participation in workshops, readings, “increase[d] exposure and interaction with gay populations” by doing things like attending “the Gay Pride Parade in Augusta” and submitting written reflections. The student believed she could not “successfully complete” the program “given her personally-held convictions on sexual morality.”

The court said the student could not show a substantial likelihood of success on her constitutional claims so as to justify a preliminary injunction due to the lack of evidence that the plan was required “because the faculty personally disagree with [her] expressed personal views, or that the goal of the Plan itself was to alter any of [her] personally held views.” Instead, the court believed the “Plan was imposed because [she] exhibited an inability to *counsel* in a professionally ethical manner—that is, an inability to resist imposing her moral viewpoint on counselees” and the faculty determined she needed to “separate her personal beliefs in the judgment-free zone of a professional counseling situation.” Since “educators, not federal judges, are the ones that choose among pedagogical approaches” and the program “has both a legitimate pedagogical interest in maintaining accreditation with the Council for Accreditation of Counseling and Related Educational Programs and in producing counselors with an ability to counsel vast segments of the population, consistent with the ethical standards adopted by the

program.” The court said this same analysis applied to the student’s claim that the requirement to “submit monthly updates as to how the Remediation Plan has influenced her beliefs” compels speech. The court said “the belief” the plan is trying to change is “that plaintiff’s moral view is preferable to a homosexual counselee’s moral view, and that therefore Plaintiff ought to tell the counselee as much in a counseling setting.” Finally, the court held that the “curricular requirement is generally applicable and applies equally to all students enrolled in the program, regardless of religion” so there was no free exercise violation.

UNITED STATES V. DI PIETRO

No. 09-13726

U.S. Court of Appeals, Eleventh Circuit

August 27, 2010

<http://www.ca11.uscourts.gov/opinions/ops/200913726.pdf>

The owner of a business that “arranged marriages in Florida between illegal aliens and United States citizens solely for the purpose of helping those aliens obtain permanent legal status” was convicted of aiding and abetting four people to “knowingly enter[] into a marriage for the purpose of evading federal immigration laws.”

The defendant claimed the federal law “unconstitutionally preempts Florida’s marriage laws . . . “which presumably permit those marriages as marriages of convenience.” She believes “the conflict should be resolved in favor of Florida because the regulation of marriage traditionally falls within the province of the states, not the federal government.” The court rejected this argument holding that if there were a conflict between federal immigration law and Florida marriage law, the latter would have to yield.

RECENT LAW REVIEW ARTICLES
AND BOOKS

Amy Fry, *Polygamy in America: How the Varying Legal Standards Fail to Protect Mothers and Children from Polygamy's Abuses* 54 ST. LOUIS UNIVERSITY LAW JOURNAL 967 (2010). Argues that courts should be stricter in applying polygamy laws and that parent's rights ought to yield to concerns about children's rights to be free of the effects of polygamy.

Chiara Favilli & Nuno Ferreira, *Different Treatment of Married and Unmarried Couples in the European Union* in FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION 325 (G. Brugemeier, et al., editors, Cambridge University Press 2010). Survey of European law on cohabiting couples.

Allison L. Collins, *"I Now Pronounce You Husband and Husband": Justice and the Justice of the Peace* 61 ALABAMA LAW REVIEW 847 (2010). Argues that the state has policy reasons to demand public employees perform actions which may conflict with their religious beliefs.

Bernardo Cuadra, *Maternal and Joint Custody Presumptions for Unmarried Parents: Constitutional and Policy Considerations in Massachusetts and Beyond* 35 WESTERN NEW ENGLAND LAW REVIEW 599 (2010). Argues that Massachusetts law should be amended so that unwed fathers and unwed fathers are treated the same.

NEWS STORIES

Siobhan Dowling, *"Child Need Both a Mother and a Father"* DER SPIEGEL, August 4, 2010 at <http://www.spiegel.de/international/germany/0,1518,710114,00.html>. Reporting a German Constitutional Court decision that mothers cannot veto a father's effort to gain joint custody of their children.

NM Judge Rules Same-Sex Marriage License Valid, EL PASO TIMES, August 10, 2010 at http://www.elpasotimes.com/newupdated/ci_15729810. Reporting a trial court decision treating a marriage license issued by a New

Mexico county was valid for purposes of giving the court jurisdiction over the couple's divorce petition.

LEGISLATION

New York Bill A1793/S3890 (signed by governor August 15, 2010). Allows New York couples to file for divorce without alleging a fault ground.