

# Marriage Law Digest

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## DECEMBER 2009 CASE SUMMARIES

William C. Duncan, Editor

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### MCFARLANE V. RELATE

Appeal No. UKEAT/0106/09/DA

Employment Appeal Tribunal

November 30, 2009

[http://www.employmentappeals.gov.uk/Public/Upload/09\\_0106rjfhJODA.doc](http://www.employmentappeals.gov.uk/Public/Upload/09_0106rjfhJODA.doc)

A Christian "relationship counselor" who had successfully counseled same-sex couples in the past would not "unequivocally consent" to providing "psychosexual therapy" to same-sex couples though no specific problem arose. He was subsequently dismissed and appealed the dismissal claiming religious discrimination resulted in his wrongful dismissal.

The court said he was "treated as he was not because of his Christian faith but because of his perceived unwillingness to provide PST counselling to same-sex couples, and thus—this being the other side of the same coin—that he was treated in the same way as any non-Christian who had evinced such an unwillingness" would have been. The court said an employee does not have "an unqualified right to manifest his religion" and that his employer "could legitimately refuse to accommodate views which contradicted its fundamental declared principles."

### BOISSON V. LUND

2009 ABQB592

Court of Queen's Bench of Alberta

December 3, 2009

<http://www.canadianconstitutionfoundation.ca/files/21/Boissoin%20v.%20Lund%20QB%20Judgement%20-%203%20December%202009.pdf>

A complaint for hate speech was filed against the author of a letter to a local paper criticizing the "homosexual machine." The provincial human rights tribunal found that the writer had violated the law.

On appeal to a court of general jurisdiction, the court said the province had authority to enact the law prohibiting hate speech as long as the law was interpreted to require a "causal link between publication of the message and the infringement of rights" of that such infringement is "likely to ensue." In this case, however, the court said the letter could not be interpreted as "some sort of call for discriminatory practices prohibited by provincial law." The judge said the letter was "not of the extreme nature" contemplated by the law though it was "jarring, offensive, bewildering, puerile, nonsensical and insulting." In regards to the remedies ordered by the tribunal, the court said the prohibition of "disparaging remarks" was inappropriate because they are "much less serious than hateful and contemptuous remarks and are quite lawful to make." Also, since the complainant (a university professor not directly affected by the letter) "suffered no loss of any kind" the tribunal was wrong to order an apology to him. The court also held the tribunal had no authority to order the newspaper to publish an apology.

**J. MCD. V. P.L. & B.M.**  
**Record No. 186/2008**  
**Ireland Supreme Court**  
**December 10, 2009**

<http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/CE14854BE09476C880257688003A0313>

A sperm donor sought visitation with his child against the wishes of the child's mother and her partner. They had previously made an agreement that the father would be treated as a "favourite uncle" of the child but no more.

The court held the agreement unenforceable. It said that contact with the father was in the best interests of the child and that "such an agreement may not per se exclude the father." The court also noted the Irish Constitution contemplates "family" to mean "a family based on marriage, the marriage of a man and a woman." The court finally held that Irish law does not recognize a "de facto" family.

**LADELE V. LONDON BOROUGH OF ISLINGTON**  
**[2009] EWCA Civ 1357**  
**England and Wales Court of Appeal**  
**December 15, 2009**

<http://www.bailii.org/ew/cases/EWCA/Civ/2009/1357.html>

An Islington registrar alleged religious discrimination when she was threatened with firing for refusing to perform civil partnerships. She objected on religious grounds and had been informally accommodated until two fellow employees complained. The employment tribunal found that there was illegal discrimination but the appeals tribunal reversed.

On appeal, the court agreed with the appeals tribunal that the registrar was complaining not about being treated differently but rather for not getting different treatment because of her religious belief. The court held that the registrar's refusal to

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perform civil partnerships conflicted with Islington's compelling "Dignity for All policy" but that requiring a registrar to implement then policy "did not impinge on her religious beliefs: she remained free to hold those beliefs, and free to worship as she wished." The court concluded that the registrar's "proper and genuine desire to have her religious views relating to marriage respected should not be permitted to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community."

**ELANE PHOTOGRAPHY V. WILLCOCK  
CV-2008-06632**

**New Mexico Second Judicial District Court  
December 11, 2009**

<http://volokh.com/wp/wp-content/uploads/2009/12/elanephotographytrialorder.pdf>

A wedding photographer declined to photograph a same-sex union ceremony and was found to be in violation of the state's anti-discrimination in public accommodations law by a Human Rights Tribunal.

The district court said that a public accommodation under the law included more than just essential services. It distinguished *Boy Scouts of America v. Dale* because it believed a business like the photographer "does not present a particular point of view or association of like-minded people" it just "exists simply to take and sell photographs." The court also found that the refusal to participate in same-sex ceremonies "discriminates, on its face, against gays and lesbians" because "they are the only members of the public who are involved in same-sex marriages or commitment ceremonies" and "a sincerely held religious belief does not justify discrimination based upon sexual orientation." The court felt that the photographer's objection "creates two classes of would-be customers distinguished solely because of their sexual orientation:

heterosexual couples in committed relationships and gay and lesbian couples in equally committed relationships." The court denied that the business could have a "message" saying that it is rather "conveying its client's message of a day well spent" so applying the discrimination law to it "is not an infringement of Plaintiff's right to freedom of expression."

In regards to the photographer's claim that the application of the law to her business violated the state's Religious Freedom Restoration Act, the court said the discrimination statute was a "law of general applicability" and "not directed at a particular religion or practice" so the state need not show a "compelling interest" in the law to override any infringement on religious exercise. The court also held, though, that the state had "a compelling interest in reducing, if not eradicating, acts of discrimination." At any rate, the court also held that RFRA does not apply to a business and that it cannot be raised in suits between private parties.

**PERRY V. SCHWARZENEGGER  
No. 09-17241**

**U.S. Court of Appeals, Ninth Circuit  
December 11, 2009**

<http://www.ca9.uscourts.gov/datastore/geral/2009/12/11/09-17241.pdf>

In a challenge to Proposition 8, plaintiffs sought "[a]ll versions of any documents that constitute communications referring to Proposition 8, between [proponents] and any third party, including, without limitation, members of the public and the media." The Proponents sought a protective order because the information requested was "irrelevant, privileged under the First Amendment and unduly burdensome." The trial court ordered disclosure of the documents the plaintiffs' requested.

On appeal, the court noted the First Amendment protects political association as a fundamental right and that "disclosure of

political affiliations and activities can impose” a “substantial” burden on First Amendment rights. The court said it had “little difficulty concluding that disclosure of internal campaign communications *can* have” a “deterrent effect on the exercise of [constitutionally] protected activities.” Specifically it could deter “participation in campaigns” and “the free flow of information within campaigns.” In regards to this latter, the court said: “Implicit in the right to associate with others to advance one’s shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private.” While the material requested here might be relevant to the case, the court believed the plaintiffs “can obtain much of the information they seek from other sources, without intruding on protected activities.” Since the proponents “have shown that discovery would likely have a chilling effect on political association and the formulation of political expression” these other sources of information demonstrate there is no “sufficiently compelling need” for disclosure of the internal communications plaintiffs sought.

### RECENT LAW REVIEW ARTICLES AND BOOKS

Craig J. Konnoth, *Created In Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s-1970s* 119 YALE LAW JOURNAL 316 (2009). Describes the use of analogies to racial minorities in gay rights cases during the period surveyed and arguing that such analogies should continue to be used.

Fredric J. Bold, Jr., *Vows to Collide: The Burgeoning Conflict Between Religious Institutions and Same-Sex “Marriage” Antidiscrimination Laws* 158 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 179 (2009). Argues that the right of expressive association is most likely to provide a successful defense to efforts to require religious organizations to facilitate same-sex marriages.

Kathryn Harvey, *The Rights of Divorced Lesbians: Interstate Recognition of Child Custody Judgments in the Context of Same-Sex Divorce* 78 FORDHAM LAW REVIEW 101 (2009). Argues that states should recognize divorces between same-sex couples from other states.

Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children* 2009 UTAH LAW REVIEW 381. “I want to vindicate something I have come to call feminist fundamentalism, by which I mean an uncompromising commitment to the equality of the sexes as intense and at least as worthy of respect as, for example, a religiously or culturally based commitment to female subordination or fixed sex roles.”

Danielle Johnson, *Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce is an Incident of Marriage That Should Be Uniformly Recognized Throughout the States* 50 SANTA CLARA LAW REVIEW 225 (2009). Argues that divorces between same-sex couples should be treated as incidents of marriage and recognized in every state.

Stephanie B. Hoffman, *Behind Closed Doors: Impotence Trials and the Trans-Historical Right to Marital Privacy* 89 BOSTON UNIVERSITY LAW REVIEW 1725 (2009). Examines historical trials regarding whether a spouse is impotent for purposes of determining the validity of a marriage.

### NEWS STORIES

*Lessons on Homosexuality Needed for All* DUTCH NEWS (Dec. 10, 2009) at [http://www.dutchnews.nl/news/archives/2009/12/lessons\\_on\\_homosexuality\\_neede.php](http://www.dutchnews.nl/news/archives/2009/12/lessons_on_homosexuality_neede.php). Reporting Dutch legislator’s proposal that Christian and Muslim schools be required to teach about homosexuality.

Patrick B. Craine, *U.K. Church Could Face Prosecution for Refusing to Ordain Women, Homosexuals* LIFESITE NEWS (Dec. 10, 2009) at

<http://www.lifesitenews.com/ldn/2009/dec/09121005.html>. Describing a proposed bill that would allegedly make it illegal to require priests to not be in a civil partnership.

### RECENT LEGISLATION

DISTRICT OF COLUMBIA RELIGIOUS FREEDOM AND CIVIL MARRIAGE EQUALITY AMENDMENT ACT OF 2009 (Bill 18-0482). Defines marriage as “the legally recognized union of 2 persons” and mandates the construction of all gender-specific terms related to marriage as gender-neutral. Provides that “No priest, imam, rabbi, minister, or other official of any religious society who is authorized to solemnize or celebrate marriages shall be required to solemnize or celebrate any marriage” and that “a religious society, or a nonprofit organization that is operated, supervised, or controlled by or in conjunction with a religious society, shall not be required to provide services, accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a marriage, or the promotion of marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society’s beliefs.”