Marriage Law Digest

Vol. 8, No. 12, December 2011

DECEMBER 2011 CASE SUMMARIES

William C. Duncan, Editor

CONTENTS

1) BANZHAF V. GARVEY, Docket No: 11-343-EI, District of Columbia Office of Human Rights, November 29, 2011 (application of discrimination laws to single-sex dorms).

2) MUSSA V. PALMER-MUSSA, No. COA11-209, North Carolina Court of Appeals, December 6, 2011 (validity of marriage in light of previous ceremonial marriage).

3) LOWE V. STARK COUNTY SHERIFF, No. 09-3942, U.S. Court of Appeals, Ninth Circuit, December 8, 2011 (validity of incest laws).

4) HENRY V. RED HILL EVANGELICAL LUTHERAN CHURCH OF TUSTIN, G044556, California Court of Appeals, Fourth District, December 9, 2011 (religious school firing employee for cohabitation).

5) S.Y. V. S.B., C065700, California Court of Appeals, Third Appellate District, December 9, 2011 (presumed parenthood status).

6) IN RE ADOPTION OFJ.P., 2011 Ark. 535, Supreme Court of Arkansas, December 15, 2011 (stepparent adoption).

7) KEETON V. ANDERSON-WILEY, No. 10-13925, U.S. Court of Appeals, Eleventh Circuit, December 16, 2011 (counseling student removed from program for moral objections).

8) A.G.R. V. D.R.H., Docket #FD-09-001838-07, Superior Court of New Jersey Hudson Vicinage, December 13, 2011 (custody dispute from surrogacy arrangement).

9) IN THE MATTER OF Q, [2011] EWCA Civ 1610, England & Wales Court of Appeal (Civil Division), December 21, 2011 (adoption of child born as result of affair).

10) LOWY V. LOWY, A-0472-10T4, New Jersey Appellate Division, December 21, 2011 (constitutionality of mandated *get*).

11) T.M.H. V. D.M.T., Case No. 5D09-3559, Florida District Court of Appeal, Fifth District, December 23, 2011 (parentage claim for two mothers).

12) IN THE INTEREST OF S.N.V., No. 10CA1302, Colorado Court of Appeals, December 22, 2011 (presumption of maternity in adultery).

13) Recent Law Review Articles (topics: Jewish marriage law, marriage in public schools, presumption of parentage, Islamic marriage law, Proposition 8).

14) News Stories (topics: alienation of affections)

15) Legislation (topics: weddings by military chaplains)

BANZHAF V. GARVEY
Docket No: 11-343-EI
District of Columbia Office of Human Rights
November 29, 2011

http://www.scribd.com/doc/74330776/Cath-Univ-Opinion-DC-OHR

An individual filed a complaint with the District of Columbia Office of Human Rights after the president of the Catholic University of America announced school housing would be separated by sex. He argued the new policy discriminated on the basis of sex since students would not be able to live where they wanted because of their sex.

The Director of the Office dismissed the complaint. He found the District's discrimination law "does not forbid colleges and universities from making sex-based distinctions between students." To hold otherwise, the opinion noted would adopt reasoning which "would include a prohibition on same-sex bathrooms, locker rooms, and sports teams, which would lead to absurd results." The director found the sex distinction in the dorm policy "'is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.'" The office pointed to the application of Title IX, the federal sex discrimination in education statute which states "that same-sex housing policies on college campuses do not constitute 'discrimination' on 'the basis of sex.'" The director also rejected the argument that the university was motivated by animus to women in enacting the policy, noting that both men and women are treated equally under the

policy and that the university president had "express[ed] concern for women when he point[ed] to the rate of depression suffered by women who engage in" drinking and hooking up in the dorms.

MUSSA V. PALMER-MUSSA
No. COA11-209
North Carolina Court of Appeals
December 6, 2011
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yMDktMS5wZGY=

A woman participated in an Islamic ceremonial marriage but did not seek a marriage license. She later got a divorce in accordance with Islamic law but did not go to court. Subsequently she was married for twelve years. She then sought a divorce and the husband sought "annulment based on bigamy" since the wife "had never obtained an annulment or divorcement from [the first husband] and [he] was still living." The trial court refused the annulment but found the marriage void anyway.

The court of appeals noted that in North Carolina, "only bigamous marriages are void and all other marriages are voidable." So, even though the wife and her first husband "did not have a marriage license and the ceremony failed to meet statutory requirements, the marriage is merely voidable" meaning it was valid until there was a court action to end it. The court said there was "no authority supporting the dissolution of a marriage by religious means that can be deemed to be 'the equivalent of a judicial determination' regarding the validity of a marriage." This means that at the time of the second marriage, the wife was still married and the second marriage "was bigamous, and consequently void."

The Marriage Law Digest
is jointly published by the

Marriage Law Foundation
(801) 367-4570
www.marriagelawfoundation.org

and the

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

LOWE V. STARK COUNTY SHERIFF
No. 09-3942
U.S. Court of Appeals, Ninth Circuit
December 8, 2011
http://www.ca6.uscourts.gov/opinions.pdf/11a0307p-06.pdf

A man pled no contest to a criminal incest charge for "sexual intercourse with his 22-year-old stepdaughter of" after the court rejected his claim that the incest "statute was unconstitutional as applied to him because the government had no legitimate interest in regulating sexual activity between consenting adults." The state appeals court and supreme court affirmed. The defendant then sought a writ of habeas corpus in federal court and the district court said "the Ohio Supreme Court decision was not unreasonable because, as evidenced by a split among the federal circuits, *Lawrence [v. Texas]* was not clear as to the nature of the right it considered or the standard of review."

A panel of the Seventh Circuit held the Ohio Supreme Court's interpretation of federal law was not unreasonable given the failure of federal courts to reach consensus on the meaning of the right recognized when the U.S. Supreme Court struck down Texas' sodomy law. The court further decided that even if the *Lawrence* decision had established "a fundamental right and/or a higher standard of review" it "did not address or clearly establish federal law regarding state incest statutes." The court said: "Unlike sexual relationships between unrelated same-sex adults, the stepparent-stepchild relationship is the kind of relationship in which a person might be injured or coerced or where consent might not easily be refused, regardless of age,

because of the inherent influence of the stepparent over the stepchild." The court said Ohio had "an important state interest" in "protecting the family from the destructive influence of intra-family, extra-marital sexual contact." The court also rejected the stepfather's claim that the incest law was unconstitutional "because it is morality based" since "the state has a legitimate interest and important interest in protecting families" and *Lawrence* "did not categorically invalidate criminal laws that are based in part on morality." The fact that his only relationship to the victim was stepfather was not relevant because "Ohio has an interest in protecting all families against destructive sexual contacts irrespective of the particular family dynamic."

HENRY V. RED HILL EVANGELICAL LUTHERAN CHURCH OF TUSTIN
G044556
California Court of Appeals, Fourth Appellate District
December 9, 2011
http://www.courtinfo.ca.gov/opinions/documents/G044556.PDF

A preschool teacher at a school that was part of a church "gave birth to a child fathered by her boyfriend and "lived with her boyfriend prior to having the baby." The school terminated her employment "for *living with* her boyfriend and raising their son together without being married." She sued, alleging marital status discrimination. The trial court rejected the claim, holding the church is a religious institution not covered by the anti-discrimination law and her "employment was terminated because she violated a church precept."

The appeals court agreed that the church was not covered by the law. The court noted the church fired the teacher because it could not have "its face and representative to the students who attend its school, to continue living in what it considered a sinful manner" and that she could have continued her job if she had stopped living with her boyfriend. Thus, the firing was "based upon a matter of religion, not her sex and not having had a baby out of wedlock." Since the teacher "introduced her students to Christianity" and "led the children in prayer" which were "ministerial functions" the ministerial exception applied and the court would not assess the church's hiring decision.

S.Y. V. S.B.
C65700
California Court of Appeals, Third Appellate Disrict
December 9, 2011
http://www.courtinfo.ca.gov/opinions/documents/C065700.PDF

The partner of a child's adoptive mother sought "to be declared the second, same-sex parent" of two children. The trial court ruled she was the presumed parent of the children because she "received the children into her home and held them out as her own" even though "the parties maintained separate residences" since the partner was often in the mother's home and took care of the children."

The appeals court said there was "ample evidence to support the trial court's finding" that the mother's home "served as the family home, and that [the partner] received the children into their joint home." The court said the partner had remained active in the children's lives and had "entered into a familial relationship with [mother] and the children and demonstrated a commitment to the children over the course of their lives." Because the partner had encouraged the adoption, had taken on parental responsibilities and the state's "public policy favors children having two parents" the court concluded there was no reason not to apply the presumption of parentage. The court also distinguished the U.S. Supreme Court decision in *Troxel v. Granville* because that case involved a "nonparental visitation statute" not a "parentage claim." The court further held

that parental rights do not have to arise simultaneously for both to be constitutionally protected.

IN RE ADOPTION OF J.P.
2011 Ark. 535
Supreme Court of Arkansas
December 15, 2011
http://opinions.aoc.arkansas.gov/WebLink8/ElectronicFile.aspx?docid=252563&&dbid=0

A stepparent sought to adopt a child after the mother's death (not long before the marriage). The maternal grandmother and great-grandmother petitioned to intervene in the adoption and sought increased visitation. The trial court granted increased visitation and rejected the petition to adopt because the adoption would interfere with the child's relationship with his "maternal family."

The supreme court said the grandparents had not provided enough evidence that the loss of their relationship with the child was likely to harm the child and held that since the father had not entirely ended their visitation with the child, they could not seek more visitation. The court also deferred to the trial judge in holding the adoption "was not currently in [the child's] best interest" since "tension existed between [the stepmother] and [the child's] maternal family."

KEETON V. ANDERSON-WILEY
No. 10-13925
U.S. Court of Appeals, Eleventh Circuit
December 16, 2011
http://www.ca11.uscourts.gov/opinions/ops/201013925.pdf

A young woman studying school counseling at Augusta State University in Georgia was required "to participate in a remediation plan addressing what the faculty perceived as deficiencies in her 'ability to be a multiculturally competent counselor, particularly with regard to working with gay, lesbian, bisexual, transgender, and queer/questioning (GLBTQ) populations.'" The school objected specifically to comments she made in class discussions and assignments in which she expressed that "she believes GLBTQ 'lifestyles' to be identity confusion" and noted "unsolicited reports from another student that she related her interest in conversion therapy for GLBTQ populations, and she has tried to convince other students to support and *believe* her views." The remediation plan included assignments the school believed would help the student to separate her personal beliefs from her work as a counselor which they argued was required by the American Counseling Association's ethics rules.

The student sued the school to and sought a court order to prevent the remediation plan from being enforced before her constitutional claims could be made. The federal district court denied the injunction and she appealed to the Eleventh Circuit. That court affirmed the lower court ruling because it believed she was unlikely to win on her constitutional claims so an injunction was not necessary.

The court characterized the school's remediation plan not as targeting the student's religious beliefs. Rather, the court said the plan "was imposed because she expressed an intent to impose her personal religious views on her clients, in violation of the ACA Code of Ethics" and was needed "to teach her how to effectively counsel GLBTQ clients." The court said the school was "not asking her to change her beliefs" and credited testimony from school officials that she "could still hold her personal religious beliefs and become an effective counselor as long as she separated those beliefs from her work."

Since the court determined the plan was "viewpoint neutral" and the school has "a legitimate pedagogical concern in teaching its students to comply with the ACA Code of

Ethics," it concluded the school had not violated the student's First Amendment rights of speech or free exercise.

A.G.R. V. D.R.H.
Docket #FD-09-001838-07
Superior Court of New Jersey Hudson Vicinage
December 13, 2011
http://www.docstoc.com/docs/document-preview.aspx?doc_id=108833252

A woman who carried twins, conceived through IVF involving a donor egg, for her brother and his same-sex partner who was the biological father sued to seek custody of the twins. In 2009, the court ruled the woman was the mother of the children and had standing to seek custody.

After reviewing trial evidence and three expert reports, the court assigned sole custody to the biological father because his home was more stable than the gestational carrier's and because the court believed the two men would be more helpful to the children as they dealt with issues of identity than the mother who had experienced a religious conversion and was openly critical of homosexual practice. She was allowed to have visitation.

IN THE MATTER OF Q
[2011] EWCA Civ 1610
England & Wales Court of Appeal (Civil Division)
December 21, 2011
http://www.bailii.org/ew/cases/EWCA/Civ/2011/1610.html

A mother and father conceived a child while the father was married to someone else. The child was placed with child welfare authorities and placed for adoption because the mother feared repercussions from her own father and the child's grandmother had told Social Services that if the grandfather learned of the birth, "he would consider himself honour bound to kill the child", the mother, the grandmother and the mother's siblings. The father sought custody while the adoption petition was pending. The trial court found a high risk of harm to the child from the grandfather and his "community" and that the father and his wife would not be a good placement for the child. The court thus granted the adoption and ruled "out anything other than letterbox contact with the natural family."

The appeals court said the trial "judge rightly regarded the risk of physical harm to [the baby and mother] as being of major importance. The court said the evidence or threatened harm was "compelling" because the baby "was conceived in a relationship which was unacceptable to [mother's] traditional Muslim family and conducted in secrecy." The court also believed the evidence supported the finding that the father and his wife would "feel differently about [the child] than their own child" and they were not really prepared to integrate the child into their home. The court said that "under Islamic law and tradition there would be no long term harmful consequence in adoption." Thus, the adoption and custody rulings were affirmed.

LOWY V. LOWY
A-0472-10T4
New Jersey Appellate Division
December 21, 2011
http://www.judiciary.state.nj.us/opinions/a0472-10.pdf

In granting a divorce, the court adopted the parties agreement to incorporate the "decision of a Bais Din (rabbinical court)" which referenced the possibility of husband providing a *Get* to his ex-wife. The wife sought "to compel [husband] to cooperate with providing her a Get." The court ordered the husband to provide the *Get*.

The appeals court said the rabbinical court order did not include an order of a *Get* and so

for the court to do so "cannot be sustained because it constitutes impermissible judicial involvement in a matter of religious practice."

T.M.H. V. D.M.T.
Case No. 5D09-3559
Florida District Court of Appeal, Fifth District
December 23, 2011
http://www.5dca.org/Opinions/Opin2011/121911/09-3559.op.pdf

A partner in a same-sex couple had ova withdrawn and IVF performed, and the embryo implanted in the other partner who carried the child to term. (In the opinion, the appeals court referred to the egg donor as the "biological mother" and the surrogate as the "birth mother.") The birth mother took the child to Australia after the couple split up. The biological mother sought to be decreed a parent but the trial court judge declined, saying "he felt constrained by the state of the law and expressed his hope that [the appeals] court would reverse the ruling" because the judge did not "'agree with the current state of the law but I must uphold it. I believe the law is not caught up with science nor the state of same-sex marriages.'"

The appeals court noted that no statute "addresses the situation where the child has both a biological mother and a birth mother who were engaged in a committed relationship for many years and who decided to have a child to love and raise together as equal parental partners." The court said the biological mother was not a donor whose parental rights would be extinguished "because she did not intend to give her ova away" but rather "always intended to be a mother to the child born from her ova and was a mother to the child for several years after its birth." The court said not allowing the biological mother to have "parental rights to her child cannot withstand strict scrutiny and violates [the biological mother's] constitutional rights to equal protection and privacy under the United States and Florida Constitutions." Specifically, the court held the biological mother "has constitutionally protected rights as a genetic parent who has established a parental relationship with her genetic offspring." The court also said a waiver signed by the biological mother did not extinguish her rights, though it clearly said it did, because the waiver only applied to "donors." The court thus remanded to the trial court "to determine, based on the best interests of the child, such issues as custody, visitation, and child support."

One judge in the majority concurred to say that although the best interest of the child is not the usual legal standard for determining whether an adult is a child's parent "I cannot help but think that it should be."

Another judge dissented, arguing Florida common law and statutes have always recognized "the birth mother of the child to whom she gave birth." The dissent disputed the majority's use of the term "biological mother" because both women had a biological connection to the child. The dissent urged treatment of the birth mother as the legal mother since at common law, the woman who gave birth to the child is the mother. Thus, "as the natural and legal mother of the child [the birth mother] enjoys protection under both the United States Constitution and the Florida Constitution against interference with her parental rights." The dissent pointed out that Florida law also does not recognize a status of psychological or de facto parenthood or create parenthood by agreement. Since Florida statutes say egg and sperm donors relinquish parental rights, the dissent would have found that the birth mother was the only legal mother of the child. The dissent argued that the majority's analysis could put other donor agreements at risk. In regards to the constitutional claims, the dissent argued that there were no "coherent legal theory, analysis

or argument" provided by the biological mother in support. The dissent accused the majority of making a circular argument that because the biological mother is a parent, the court must respect her parental rights. The dissent further argued that the court could not say the biological mother must be allowed to order "her life in a family unit consisting of two legally recognized mothers—as a fundamental substantive due process right guaranteed by the Fourteenth Amendment—unless we are also willing to invalidate laws prohibiting same-sex marriage, bigamy, polygamy, or adult incestuous relationships on the same basis." The dissent concluded that by "framing the issue as broadly as possible, the majority avoids the obvious: that neither procreation through assisted reproductive technology nor the recognition of two legal mothers to a single child implicate any interest that could even remotely be described as objectively deeply rooted in this nation's history and tradition."

IN THE INTEREST OF S.N.V.
No. 10CA1302
Colorado Court of Appeals
December 22, 2011
http://www.cobar.org/opinions/opinion.cfm?opinionid=8329&courtid=1

A wife sought an order of legal parentage status for a child conceived by her husband and another woman. The father and wife claimed "they arranged with the birth mother to act as a surrogate" while the mother claimed she and the husband had had an affair. The trial court found the wife cannot "seek a declaration of maternity" because she was not the child's "biological mother."

The appeals court reversed, holding the wife is the presumed mother of the child because "she was married to husband and the time of [the child's] conception and birth" and "she accepted [the child] into her home and has held him out to her family and community as her own." Relying on a gender-neutral application of the paternity presumption, the court concluded "a woman may gain the status of a child's natural mother even if she has no biological tie to the child."

RECENT LAW REVIEW ARTICLES AND BOOKS

Avishalom Westreich, *The 'Gatekeepers' of Jewish Marriage Law: Marriage Annulment as a Test Case* 27 JOURNAL OF LAW & RELIGION forthcoming (2012). Describes recent developments in the Jewish law of annulments.

Mark Strasser, *Parents, Religious Convictions and Public School Curricula* 2011 BYU EDUCATION AND LAW JOURNAL 547. Argues that a state's failure to provide legal status to same-sex unions should not prevent its public schools from teaching students about them even over the objections of religious parents.

Jeffrey A. Parness, *Statutory Parenthood for Same-Sex Partners* 99 ILLINOIS BAR JOURNAL 636 (December 2011). Proposes a presumption of parentage for children born to couple in a civil union.

Nathan B. Oman, *How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts* 2011 UTAH LAW REVIEW 287. Reviews the concept of mahr contracts in Islamic marriage law and discusses their treatment in traditional U.S. law.

George W. Dent Jr., *Perry v. Schwarzenegger: Is Traditional Marriage Unconstitutional?* 12 ENGAGE No. 3 (November 2011). Argues that Proposition 8 is consistent with the Constitution.

NEWS STORIES

Janelle Stecklein, "Wife's Lover Ruined Marriage, Says Husband Who Sues for $1.5 Million" *Salt Lake Tribune*, December 22, 2011 at

http://www.sltrib.com/sltrib/news/53171545-78/lover-wife-husband-affair.html.csp. Reporting a alienation of affection lawsuit filed in Utah.

LEGISLATION

United States House Resolution 1540 (signed by president December 31, 2011) at http://religionclause.blogspot.com/2011/12/defense-authorization-bill-passes-with.html. The defense authorization bill includes, in section 544, that military chaplains do not have to officiate in marriages to which they object on moral grounds.