

# Marriage Law Digest

Vol. 7, No. 7, July 2010

## JULY 2010 CASE SUMMARIES

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### GILL V. OFFICE OF PERSONNEL MANAGEMENT

**Civil Action No. 09-10309-JLT**  
**U.S. District Court, District of Massachusetts**  
**July 8, 2010**

<http://hunterforjustice.typepad.com/files/gill-v-opm-070810.pdf>

Partners in same-sex couples challenged the provision of the federal Defense of Marriage Act that defines marriage as the union of a man and a woman for purposes of all federal laws.

The court said it had no reason to apply heightened scrutiny because the law could be supported by no rational basis. The court said DOMA's marriage definition lacked a rational basis because the government conceded that DOMA "bears no rational relationship" to "encourag[ing] responsible procreation." Also the court believed "a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents." Additionally, "a desire to encourage heterosexual couples to procreate and rear their own children more responsibly" is not a rational basis because "denying federal recognition to same-sex marriage" and "does nothing to promote stability in heterosexual parenting" while children of same-sex couples do not get benefits. The court also held "the ability to procreate" is not "a precondition to marriage in any state in the country" and "Congress' asserted interest in defending and nurturing heterosexual marriage" is not rational because "DOMA cannot possibly encourage Plaintiffs to marry members of the

opposite-sex” and “the Constitution does not permit” Congress to “punish[] same-sex couples” to make “heterosexual marriage appear more valuable or desirable.” The court further said “defending traditional notions of morality” is not a rational state interest. Referring to a companion decision, the court said the federal government cannot “have a legitimate interest in disregarding those family status determinations properly made by the states.” Finally, the court concluded that since there’s no rational basis for DOMA’s marriage definition, “this court may conclude that it is only irrational prejudice that motivates the challenged classification” and “irrational prejudice plainly never constitutes a legitimate government interest.”

**MASSACHUSETTS V. U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES**  
**Civil Action No. 09-11156-JLT**  
**U.S. District Court, District of Massachusetts**  
**July 8, 2010**  
<http://hunterforjustice.typepad.com/files/mass-v-hhs-070810.pdf>

Massachusetts challenged the federal DOMA’s definition of marriage for federal purposes, arguing it violated the Tenth Amendment “by intruding on areas of exclusive state authority” and violated the “Spending Clause by forcing the Commonwealth to engage in invidious discrimination against its own citizens in order to receive and retain federal funds.”

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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.”

**JACKSON V. D.C. BOARD OF ELECTIONS & ETHICS**  
**No. 10-CV-20**  
**D.C. Court of Appeals**  
**July 15, 2010**

[http://www.dcappeals.gov/dccourts/appeals/pdf/10-CV-20\\_JACKSON\\_MTD.PDF](http://www.dcappeals.gov/dccourts/appeals/pdf/10-CV-20_JACKSON_MTD.PDF)

After the D.C. Council redefined marriage, citizens proposed ballot initiatives to define marriage as the union of a man and a woman. The D.C. Board of Elections refused to certify claiming it authorized “discrimination” in violation of the District’s Human Rights Act. The superior court ruled against the citizens group.

The appeals court addressed the questions of whether the Council could add a substantive limitation to the Charter right of initiative that a proposed initiative may not conflict with the District’s Human Rights Act and whether, if it could, the proposed marriage initiative would authorize discrimination in violation of the limitation. The court first said the D.C. Council had authority to put a substantive limit on the District’s Charter right of popular initiative. Second, the court said that although a previous appeals court decision had held that defining marriage as the union of a man and a woman “did not amount to discrimination prohibited by the [District’s] Human Rights Act . . . the Council has both acknowledged and endorsed an expanded definition of marriage to include same-sex union.” Thus, the

proposed initiative “would take away from those individuals a civil right that the Council has seen fit to recognize and expressly allow, and its effect would be to authorize discrimination on the basis of sexual orientation” since “there can be no dispute that the impact of District agencies’ refusal to recognize same-sex marriage would fall most heavily on gay and lesbian residents.”

The dissent argued the only Charter limitation on the initiative power is that “voters may not propose ‘laws appropriating funds.’” The dissent further claimed the Council’s authority only extended to “implementing legislation” and “did not grant any license to restrict those rights, which had been established through the painstaking process of amending the Charter” as noted by the Corporation Counsel and the Council’s own attorney at the time the substantive limitation was imposed. To the dissent, “[i]f a Charter amendment was necessary to create the right of initiative, an amendment is equally necessary to limit that right” and “by restricting the subject matter which an initiative may address, the Human Rights Act limitation unmistakably alters (and reduces) the right of initiative.”

**IN RE ADOPTION OF A.M.  
No. 53A05-1002-AD-71  
Court of Appeals of Indiana  
July 21, 2010**

<http://www.in.gov/judiciary/opinions/pdf/07211001ebb.pdf>

A trial court concluded it lacked authority to allow a grandfather to adopt his grandchild without terminating the mother’s rights.

The court of appeals held that since the adoption statute’s statement of purpose mentions “family” and the grandfather is family, not allowing the grandfather to adopt without terminating the mother’s rights (although required by the language of statute)

“would cause an absurd result not intended by the legislature.”

The dissent said there was “no statutory authority for a biological parent to maintain her parental rights after the adoption by a grandparent.” In fact, the dissent argued, Indiana law “requires that the biological parent and the adoptive parent be married to each other” except when the adoption is by a single person and there is no “grandparent exception” to this requirement. The dissent argued the legislature should have the “prerogative to establish what policies are to be furthered under the adoption statutes, including whether an unmarried couple may adopt.”

**S.D. V. M.J.R.**

**Docket No. A-6107-08T2**

**Superior Court of New Jersey Appellate**

**Division**

**July 23, 2010**

<http://www.judiciary.state.nj.us/opinions/a6107-08.pdf>

The trial court denied a restraining order to a woman who alleged domestic violence against her husband. Both were Muslim and from Morocco. The trial court judge “did not find sexual assault or criminal sexual conduct to have been proven” because the “court does not feel that, under the circumstances, that this defendant had a criminal desire” since “he was operating under his belief that it is, as the husband, his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited.”

The appellate court said the husband’s “conduct in engaging in nonconsensual sexual intercourse was unquestionably knowing, regardless of his view that his religion permitted him to act as he did.” The court held that the husband’s religious beliefs did not preclude him from being held accountable under the domestic violence law. Thus, the court remanded to the trial court for issuance of a restraining order.

**COLLINS V. BREWER**

**2:09-cv-02402 JWS**

**U.S. District Court, District of Arizona**

**July 23, 2010**

[http://data.lambdalegal.org/in-court/downloads/collins\\_az\\_20100723\\_order-and-opinion-us-district-court.pdf](http://data.lambdalegal.org/in-court/downloads/collins_az_20100723_order-and-opinion-us-district-court.pdf)

Arizona provides “subsidized health care benefits” to domestic partners of public employees. In 2009, the legislature enacted a new definition of “dependent” that limited the benefits to spouses of employees. State employees challenged this decision alleging the legislation violates the federal constitution.

The court held that though the law is “not discriminatory on its face”, it “makes benefits available on terms that are a legal impossibility for gay and lesbian couples” and “denies lesbian and gay State employees in a qualifying domestic partnership a valuable form of compensation on the basis of sexual orientation.” The court determined it must scrutinize the state interests in the law to determine if they have a rational basis. It found the cost savings interest was not a rational basis for the law because it was based on invidious distinctions. The court made the same conclusion regarding the state interests in “administrative efficiency.” The court then said the state’s assertion that “‘scarce funds for employee benefits are better spent on employees and dependents as defined in the new statute’” is not rational under the *Romer v. Evans* holding “that a simple desire to treat gays and lesbians differently is not, in and of itself, a proper justification for government actions.” The court said the law “cannot promote marriage because gays and lesbians are ineligible to marry” so “only by defining benefits to heterosexual domestic partners that marriage might be promoted” and “denying benefits to heterosexual partners (who can marry to obtain benefits) does not require denial of those benefits to homosexual partners (who cannot marry).” Thus, the court concluded the equal protection clause

required the state to continue offering the employment benefits to same-sex partners. The court rejected the plaintiffs due process claim, though, because “there is no fundamental right to” employment benefits.

**UTAH V. JEFFS**

**2010 UT 49**

**Utah Supreme Court**

**July 27, 2010**

<http://www.canlii.org/en/on/onsc/doc/2010/2010onsc2105/2010onsc2105.pdf>

The leader of a polygamist community “was convicted of two counts of rape as an accomplice for his role in the compelled marriage of fourteen-year-old Elissa Wall to her nineteen-year-old first cousin, Allen Steed, and the resulting sexual intercourse between them.”

On appeal, the supreme court held the trial court had given the wrong instructions to the jury about accomplice liability. The court said the jury should have determined whether the leader had intended not just that the marriage exist but that the rape occur.

**WARD V. WILBANKS**

**Case No. 09-CV-11237**

**U.S. District Court, Eastern District of**

**Michigan**

**July 26, 2010**

<http://www.telladf.org/UserDocs/WardOpinion.pdf>

A master’s counseling student asked “whether she could refer [a gay] client to another counselor because she could not affirm the client’s homosexual behavior.” She was subsequently subject to an “informal review . . . as to whether she had violated University and [American Counseling Association] policies prohibiting ‘unethical, threatening, or unprofessional conduct,’ an ‘inability to tolerate different points of view,’ ‘imposing values that are inconsistent with counseling goals,’ and ‘discrimination based

on . . . sexual orientation.” At a later formal hearing she “said that while she objected to counseling homosexual clients on their same-sex relationships, she would counsel them on any other issue.” She was nevertheless dismissed from the program for violating the ACA ethical prohibitions on sexual orientation discrimination. She sued, making various constitutional claims.

In response to her due process claim, the court held the “University’s disciplinary policy is not a speech code but is an integral part of the curriculum.” The court said the student was not disciplined only because of the one referral but rather for her “refusal to counsel an entire class of people that resulted in her discipline.” The court also said the university could “define its own curriculum, and it has given sufficient rational reasons for including the ACA Code of Ethics in its curriculum.” The court concluded the “dismissal was entirely due to plaintiff’s refusal to change her behavior not her beliefs.” In regards to the free speech claims, the court reiterated that the school had a legitimate purpose to ensure students deal with clinical experiences “in a non-harmful, ethically appropriate manner.” In response to the religious liberty claim, the court conceded the university officials “may have been indelicate in their inquiry into Ms. Ward’s beliefs they never demonstrated a purpose to change her religious beliefs.” Rather, they were “concerned with plaintiff’s refusal to counsel an entire class of people whose values she did not share.” The court concluded the university’s “nondiscrimination policy is generally applicable and does not apply differently to different categories of students” and thus not a violation of her free exercise rights. The court said the university’s disciplinary policy “has a secular purpose, as it is based upon national accreditation standards, professional codes of ethics, and State licensing requirements,” that “no reasonable person could conclude that the

Program curriculum, as written or as enforced, conveys a message endorsing or disapproving or religion”, and that the university officials “disrespectful comments were directed at plaintiff, herself, rather than at the practice of religion.” All of these factors led the court to conclude the university had not violated the Establishment Clause. Finally, the court ruled the “curriculum regulations are religiously neutral and do not contain a particularized system of exemptions” and are “reasonably related to the legitimate pedagogical goal of maintaining a rigorous counseling program” so they did not deprive the student of the equal protection of the laws.

### RECENT LAW REVIEW ARTICLES AND BOOKS

Marissa Wiley, *Redefining the Legal Family: Protecting the Rights of Coparents and the Best Interests of Their Children* 38 HOFSTRA LAW REVIEW 319 (2009). Argues that New York law needs to recognize second-parent adoption, parenting agreements, de facto parenthood, in loco parentis status, parenthood by estoppel, and same-sex marriage.

Laura Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy* 59 EMORY LAW JOURNAL 809 (2010). Argues that the courts should independently protect intimate relations and sexual relations even when the latter do not promote lasting intimacy.