

Marriage Law Digest

Vol. 7, No. 6, June 2010

JUNE 2010 CASE SUMMARIES

William C. Duncan, Editor

CONTENTS

- 1) LEVINE V. WERBOFF, 24873/09, New York Supreme Court, Westchester County, May 21, 2010 (liability of an adulterer for passing on STD to spouse of partner in adultery).
- 2) S.N. V. M.B., 2010 Ohio 2479, Ohio Court of Appeals, Tenth Appellate District, June 10, 2010 (**).
- 3) SCHALK & KOPF V. AUSTRIA, Application no. 30141/04, European Court of Human Rights, June 24, 2010 (**).
- 4) WENDY M. V. HELEN K., 2009AP720, 2009 AP721, Wisconsin Court of Appeals District IV, June 24, 2010 (**).
- 5) CHRISTIAN LEGAL SOCIETY V. MARTINEZ, No. 08-1371, U.S. Supreme Court, June 28, 2010 (**).
- 6) CHANDLER V. BARKER, No. 16976, Tennessee Court of Appeals, June 29, 2010 (**).
- 7) MCCONKEY V. VAN HOLLEN, 2010 WI 57, Wisconsin Supreme Court, June 30, 2010 (**).
- 8) **NATIONAL ORGANIZATION OF MARRIAGE V. MCKEE, Civil No. 09-538-B-H, U.S. District Court, District of Maine, May 23, 2010 (**).
- 9) **COLE V. ARKANSAS DEPARTMENT OF HUMAN SERVICES, Case Number 60CV-08-14284, Arkansas Circuit Court of Pulaski County, April 16, 2010 (constitutionality of law precluding adoptions by cohabiting couples).
- 10) **MCFARLANE V. RELATE AVON LTD., Case No. A2/2009/2733, England & Wales Court of Appeal, April 29, 2010 (**).
- 11) **COMMONWEALTH V. CHAU, 08-P-2043, Appeals Court of Massachusetts, April 27, 2010 (**).
- 12) **IN RE PARENTAL RESPONSIBILITIES OF A.D., Court of Appeals No. 09CA0765, Colorado Court of Appeals, April 1, 2010 (**).
- 13) Recent Law Review Articles (topics: **).
- 14) News Stories (topics: **)
- 15) Legislation (topics: **)

LEVINE V. WERBOFF

24873/09

New York Supreme Court, Westchester
County

May 21, 2010

<http://www.nylj.com/nylawyer/adgifs/decisions/060710colabella.pdf>

A husband sued his wife's psychiatrist who had committed adultery with the wife and transmitted a sexually transmitted disease that had been passed onto the husband. The psychiatrist motioned to have the claim of "intentional infliction of emotional distress" dismissed. The court said New York law "makes it a misdemeanor for a person, knowing himself to be infected with an infectious sexually transmitted disease, to have sexual intercourse with another" and has treated a violation of this law as "negligence per se." The court concluded that the person passing on the disease "is in the best position . . . to prevent the transmission." The judge also said the "duty to warn a sexual partner or otherwise take precautions to prevent the transmission of a known venereal disease" recognized in New York law should be extended to include a duty to warn a spouse. Though failure to warn a spouse is not negligence per se, it could be found to be negligent so the case should not be dismissed without further fact finding.

S.N. V. M.B.

2010 Ohio 2479

Ohio Court of Appeals, Tenth Appellate
District

June 10, 2010

<http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2010/2010-ohio-2479.pdf>

Children were conceived using donor eggs and sperm and carried by an unrelated woman pursuant to a surrogacy contract. The trial court said there was a presumption that the surrogate was the mother but that this presumption was rebutted by the lack of biological relationship and by the surrogacy contract.

The appeals court said that the state statute that allows a man “to be regarded as the natural father of a child through voluntary acknowledgment of paternity” the state “makes clear than an individual who intends and consents to raising the child shall be treated in law and regarded as the natural parent.” The court said this applies to maternity as well. Here, the surrogacy agreement was sufficient evidence of the intended mother’s “voluntary acknowledgment of paternity” which is “sufficient to rebut the presumption that [surrogate] is the child’s natural mother by reason of her having given birth to the child.”

SCHALK & KOPF V. AUSTRIA

Application no. 30141/04

European Court of Human Rights

June 24, 2010

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionId=55903095&skin=hudoc-en>

A same-sex couple argued that the European Convention for the Protection of Human Rights and Fundamental Freedoms should require Austria to allow them to marry

since “the notion of marriage had evolved” so the “procreation and education of children no longer formed an integral part of marriage” and now “marriage was rather a permanent union encompassing all aspects of life.” Article 12 of the Convention says: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

The court said the language and context of this section clearly presupposed opposite-sex marriages and “there is no European consensus regarding same-sex marriage.” Article 12, the court said, reserves the definition of marriage to each state. The couple also claimed discrimination on the basis of sexual orientation under two other sections of the article (8 and 14). The court said each state has leeway “as regards the exact status conferred by alternative means of recognition” so Austria’s registered partnership law is adequate. The decision on article 12 was unanimous but the sexual orientation decision was 4-3.

The three dissenting judges said the “absence of a legal framework offering them, at least to a certain extent, the same rights or benefits attached to marriage . . . would need robust justification, especially taking into account the growing trend in Europe to offer some means of qualifying for such rights or benefits.” Thus, the dissenters believed Austria was in violation of the Convention.

WENDY M. V. HELEN K.

Nos. 2009 AP720, 2009AP721

Wisconsin Court of Appeals, District IV

June 24, 2010

<http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=51338>

After breakup, the partner of two children’s adoptive mother sought guardianship of the children. The court said precedent requires “a third party who cannot

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.

become the child's guardian over the biological or adoptive parent's objection absent compelling, such as the unfitness of the biological or adoptive parent." The court characterized the partner's argument as follows: the mother "promised her that she would always be an 'equal parent,' and that she relied on this promise to her detriment by not insisting on becoming the adoptive parent of one or both of the children." This would require the mother "not to exercise her rights under the law as the sole, legal adoptive parent of the children to preclude any other person . . . from infringing upon her parental right" which could allow anybody to seek parental rights. The court said there was no compelling reason to grant the third party guardianship because the mother's conduct is not harming the child."

CHRISTIAN LEGAL SOCIETY V.

MARTINEZ

No. 08-1371

U.S. Supreme Court

June 28, 2010

<http://www.supremecourt.gov/opinions/09pdf/08-1371.pdf>

The Christian Legal Society challenged Hastings law school's refusal to grant official recognition of the group because of CLS's policy of requiring members not to "engage[] in 'unrepentant homosexual conduct'" and excluding "students who hold religious convictions different" from CLS's statement of faith. The District Court and Court of Appeals ruled in favor of the law school.

The Supreme Court majority characterized the law school policy as requiring organizations to take "all comers." It believed CLS's claim should be considered as a "limited public forum" case rather than as a right to expressive association so the Court's analysis is more deferential to the school. The majority said the law school's rule is reasonable because it (1) ensures "that no Hastings student is forced to fund a group

that would reject her as a member"; (2) "the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO's motivation for membership restrictions" (since the Court's "decisions have declined to distinguish between status and conduct" in the context of sexual orientation); (3) the policy advances a goal to help students develop "conflict-resolution skills, toleration, and readiness to find common ground"; and (4) it advances the state's policy against discrimination. The Court said CLS was not harmed because it could meet informally. The Court also said the Hastings policy is "viewpoint neutral" since it "aims at the act of rejecting would-be group members without reference to the reasons motivating that behavior."

Justice Stevens concurred separately saying that "[t]hose who hold religious beliefs are not 'singled out' . . . those who engage in discriminatory conduct based on someone else's religious status and belief are singled out." He argued the court should defer to the school on this issue.

Justice Kennedy also concurred, saying the law school's "policy applies equally to all groups and views." This policy, he believed, advances pedagogical objectives because "vibrant dialogue is not possible if students wall themselves off from opposing points of view."

Justice Alito dissented with three others. He said: "Today's decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning." The dissent pointed out CLS was the only group Hastings has ever denied registration. Hastings denied registration not because of a policy to require accepting all members but pursuant to "'the religion and sexual orientation provisions of the Nondiscrimination Policy.'" The dissent argued the school's "accept-all" policy was

adopted in the course of the litigation and has not been written or communicated to students. Since, the “Nondiscrimination Policy proscribes discrimination on a limited number of ground, while the accept-all-comers policy outlaws all selectivity” and “the law school does not follow an accept-all-comers policy in activities such as admitting students and hiring faculty” it is an “implausible position” for Hastings to say that its policy “means one thing as applied to the RSO program and something quite different as applied to all of Hastings’ other activities” though the terms of the policy say it “applies fully to all components of the law school.” The dissent noted other group’s bylaws require a commitment to the group’s message. The dissent charged that Hastings has created significant disadvantages for CLS by refusing registration. The dissent said this case should be controlled by *Healy v. James* where the Court required a university to allow an SDS group on campus over the objections of administrators. The dissent said “the policy singled out one category of expressive associations for disfavored treatment: groups formed to express a religious message. Only religious groups were required to admit students who did not share their views.” The dissent noted that the First Amendment “shields the right of a group to engage in expressive association by limiting membership to persons whose admission does not significantly interfere with the group’s ability to convey its views.” The dissent further said the policy “as interpreted by the law school, also discriminated on the basis of viewpoint regarding sexual morality. The dissent said that in its Supreme Court brief, Hastings, for the first time said organizations can include “conduct requirements” for members. If so, CLS should not be denied registration. The dissent said even the “accept-all-comers” policy would violate the First Amendment by compelling a “group that engages in ‘expressive association’ to admit” a member who doesn’t share the group’s belief.

The dissent said there was evidence that the change in policy from nondiscrimination to “accept-all-comers” was a pretext to win the lawsuit. The dissent also noted that “a true accept-all-comers policy permits small unpopular groups to be taken over by students who wish to change the views that the group expresses.”

BARKER V. CHANDLER
No. 16976

Tennessee Court of Appeals
June 29, 2010

<http://www.tsc.state.tn.us/OPINIONS/TC/A/PDF/102/Joseph%20Marion%20Barker%20v.%20Angel%20Chandler%20OPN.pdf>

In a divorce decree, the judge included a restriction on the children staying overnight with the mother when a “paramour” is present, saying such a restriction was required by Tennessee law. The court of appeals said the restriction was not required. On remand, the trial judge retained the provision pointing to a “clearly common sense understanding that children can be adversely affected by such exposure, as found from the legions of cases in the state of Tennessee.”

On appeal the second time, the appeals court said the trial judge abused his discretion since “the record [is] completely devoid of any evidence demonstrating that the paramour provision is in the best interests of the children or at the presence of Mother’s partner in the home has any harmful effect on the children.”

MCCONKEY V. VAN HOLLEN
2010 WI 57

Wisconsin Supreme Court
June 30, 2010

<http://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=51544>

A taxpayer challenged the Wisconsin marriage amendment alleging it violated the single subject rule. The trial said “the two sentences of the amendment related to the

same subject and furthered the same general purpose.”

The supreme court said the Wisconsin Constitution requires different amendments to the constitution be voted on separately. The court this means “the separate amendment rule is implicated only when the substance of an amendment cannot be said to constitute a single amendment.” Thus, the rule is “that the constitution grants the legislature considerable discretion in the manner in which amendments are drafted and submitted to the people” so “[a]n otherwise valid amendment will therefore be construed as more than one amendment only in exceedingly rare circumstances.” Thus, the “propositions, then, need only relate to the same subject and tend to effect or carry out one general purpose.” The court said the purpose of the marriage amendment “may be deduced from the text of the amendment itself and from the historical context in which the amendment was adopted” and “the general subject of the amendment is marriage.” The court construed the first sentence of the amendment as preserving “the one man-one woman character of marriage by so limiting marriages entered into or recognized in Wisconsin” and the second “ensures that no legislature, court, or any other government entity can get around the first sentence by creating or recognizing” another similar legal status. So, the “purpose of the marriage amendment, then, was to preserve the legal status of marriage in Wisconsin as between only one man and one woman” and both parts of the amendment “tend to effect or carry out this general purpose.”

RECENT LAW REVIEW ARTICLES AND BOOKS

Ariela R. Dubler, *Sexing Skinner: History and the Politics of the Right to Marry* 110 COLUMBIA LAW REVIEW 1348 (2010). Argues that the key procreation decision of the U.S. Supreme Court bolstered a link between marriage, sex and procreation.

Susan Rutten, *Protection of Spouses in Informal Marriages by Human Rights* 6 UTRECHT LAW REVIEW 77 (June 2010). Describes the way human rights law could be applied to marriages that are contracted through religious or cultural, rather than legal, routes.

Prakash Shah, *Inconvenient Marriages, of What Happens When Ethnic Minorities Marry Trans-Jurisdictionally* 6 UTRECHT LAW REVIEW 17 (2010). Describes a trend in England of refusing recognition to marriages contracted across national and continental boundaries.

Adriaan Bedner & Stijn Van Huis, *Plurality of Marriage Law and Marriage Recognition for Muslims in Indonesia: A Plea for Pragmatism* 6 UTRECHT LAW REVIEW 175 (June 2010). Describes the use of informal local practices protect the rights of poor Indonesian women in marriage.

Aude Mirkovic, *La partenaire de la mere ne peut pretendre au conge de paternite car elle n'est pas le pere de l'enfant* 22 RECUEIL DALLOZ 1394 (June 10, 2010). Analyzing a decision of the French Court of Cassation holding the partner of a child's mother cannot claim paternity leave.

Patricia A. Cain & Jean C. Love, *Six Cases in Search of a Decision: The Story of In re Marriage Cases* in WOMEN AND THE LAW STORIES (Elizabeth Schneider & Stephanie M. Wildman, eds. 2010). Describes the history of the California Constitution as it relates to the litigation to define marriage in that state.

Anna Marie Smith, *Reproductive Technology, Family Law, and the Post-Welfare State: The California Same-Sex Parents' Rights 'Victories' of 2005* 34 SIGNS: JOURNAL OF WOMEN & CULTURE 827 (2009). Discusses three cases in which the California Supreme Court recognized two women as joint parents of a child.

Gordon E. Finley & Seth J. Schwartz, *The Divided World of the Child: Divorce and Long-Term Psychosocial Adjustment* 48 FAMILY COURT

REVIEW 516 (2010). Reporting large study on children's perceptions of their relationship with parents as a result of divorce and their current psychosocial experience.

NEWS STORIES

Melissa Eddy, *German Court: Gay Marriage is Only 'Partnership'* WASHINGTON POST, June 15, 2010 at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/15/AR2010061501065.html>. Reporting on a trial court decision that a Canadian same-sex marriage will be treated as a civil partnership in Germany.