

Marriage Law Digest

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JUNE 2008 CASE SUMMARIES

William C. Duncan, Editor

CONTENTS

- 1) STADTER V. SIPERKO, Record No. 1494-07-2, Virginia Court of Appeals, June 3, 2008.
- 2) MILLER-JENKINS V. MILLER-JENKINS, Record No. 070933, Virginia Supreme Court, June 6, 2008.
- 3) LUND V. BOISSOIN, S2002/08/0137, Human Rights Panel of Alberta, May 30, 2008.
- 4) DEVANEY V. L'ESPERANCE, A-20-2007, New Jersey Supreme Court, June 17, 2008.
- 5) Recent Law Review Articles.

STADTER V. SIPERKO

Record No. 1494-07-2

Virginia Court of Appeals

June 3, 2008

<http://www.courts.state.va.us/opinions/opncavwp/1494072.pdf>

A trial court denied child visitation for the former partner of a child's mother. The child was conceived through artificial insemination.

The court of appeals noted that under Virginia law "courts may grant visitation to a non-parent in contravention of a fit parent's expressed wishes only when justified by a compelling state interest." The court also pointed out that no Virginia decision has recognized the idea of *de facto* parenthood and declined to do so in this case. The court noted that the exception to the general rule that exists where a parent has relinquished a child does not apply here because the exception does not apply to "partial relinquishment" "by which a non-parent who is permitted to perform child-rearing functions may assert the right of a parent for purposes of visitation." If it did, the court argued, it could lead to visitation rights for babysitters.

On justice concurred, stressing that "the decision to adopt such a *de facto* parent doctrine in Virginia, in my view, is clearly that of the General Assembly, the people's elected representatives, rather than the responsibility of the judicial branch."

MILLER-JENKINS V. MILLER-JENKINS

Record No. 070933

Virginia Supreme Court

June 6, 2008

<http://www.courts.state.va.us/opinions/opnscvwp/1070933.pdf>

After dissolving a civil union, a Vermont court ordered child custody and visitation to the former partner of a child's mother. The mother subsequently sought a Virginia court order that she was the sole parent. After a series of contrary trial court decisions in Vermont and Virginia, the Virginia Court of appeals twice decided that the Vermont courts had jurisdiction over the custody and visitation dispute pursuant to the federal Parental Kidnapping Prevention Act. The mother did not appeal the first appellate decision in time but did appeal the second, resulting in this decision of the Virginia Supreme Court.

The court noted a legal rule that "when two cases involve identical parties and issues, and one case has been resolved finally on appeal, we will not re-examine the merits of issues necessarily involved in the first appeal, because those issues have been resolved as part of the 'same litigation' and have become the 'law of the case.'" The court would thus not consider an argument based on the "effect of the Virginia Marriage Amendment" because the mother had not asked the court of appeals to address this argument before its second decision (the amendment was approved while the case was pending). The court believed all the issues raised by the mother in this appeal were decided in the first court of appeals decision.

The court specified that the first court of

appeals decision will only apply to the parties in this case and not have precedential effect.

The chief justice concurred, but wrote a separate opinion to stress his belief that the first court of appeals decision was wrongly decided. He agreed with the rest of the court that the failure of the mother to perfect her appeal from that decision made it final.

LUND V. BOISSOIN

S2002/08/0137

Human Rights Panel of Alberta

May 30, 2008

http://albertahumanrights.ab.ca/Lund_Darren_Remedies053008.pdf

The Concerned Christian Coalition and its chairman were found in a previous case to have violated provincial human rights law by writing a letter to a local newspaper about the "homosexual agenda."

In this decision, the Human Rights Panel ordered Mr. Boissoin to (1) "cease publishing in newspapers, by email, on the radio, in public speeches, or on the internet, in future, disparaging remarks about gays and homosexuals" and removing "all disparaging remarks versus homosexuals . . . from current web sites and publications"; (2) cease "committing the same or similar contraventions" of the law; (3) provide a written apology to the person filing the complaint; (4) "request the Red Deer Advocate [to] publish a copy [sic] this Order" and their apology; (5) pay \$5,000 to the person making the complaint; and (6) pay expenses for a witness in the proceedings.

DEVANEY V. L'ESPERANCE

A-20-2007

New Jersey Supreme Court

June 17, 2008

<http://www.judiciary.state.nj.us/opinions/supreme/A-20-07%20Devaney%20v%20Lesperance.pdf>

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A woman in a twenty year affair with a married man with whom she never lived, filed a palimony complaint (“a claim for support between unmarried persons”) alleging he had breached a promise to support her for life. The trial court denied the claim saying that the relationship was similar to “dating” rather than the “marital-type” relationship required for a palimony claim. The appellate division said that a palimony claim required that a couple actually live together.

The supreme court held that cohabitation is not “a necessary requirement to a successful claim for palimony.” Instead, a claim requires showing a “promise to support, expressed or implied, coupled with a marital-type relationship.” Here, the lack of cohabitation was not conclusive, but the trial court had also found that the couple did not spend much time together, did not “commingle their property or share living expenses” and “did not hold themselves out to the public as husband and wife.”

A concurring opinion notes that very few states allow for a palimony claim in the absence of evidence of an express agreement. The concurrence suggested that palimony claims should be allowed only in exceptional circumstances and should always require a showing of cohabitation.

RECENT LAW REVIEW ARTICLES

Reverend John J. Coughlin, *The Goods of Marriage in Canon Law* NOTRE DAME LEGAL STUDIES PAPER No. 07-28, May 2007. Provides an overview of the goods of marriage as understood in canon law.

Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages* 76 FORDHAM LAW REVIEW 2733 (2008). Posits an analogy between arguments against interracial marriage and against same-sex marriage based on the idea that each are based on concerns about children.

S. J. Barrett, *For the Sake of the Children: A New Approach to Securing Same-Sex Marriage Rights?* 73 BROOKLYN LAW REVIEW 695 (2008). Argues that a child born in a same-sex couple household could sue to challenge state marriages laws under Equal Protection principles.