

Marriage Law Digest

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MARCH 2010 CASE SUMMARIES

William C. Duncan, Editor

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TODD V. COPELAND

Record No. 0823-09-3

Court of Appeals of Virginia

March 9, 2010

http://www.courts.state.va.us/opinions/opnca_vwp/0823093.pdf

A mother gave birth while incarcerated and agreed to let two friends have custody of the child. This arrangement was approved by a court order which also granted visitation to the mother which she exercised intermittently over the next few years during and after imprisonment. Eventually, one of the guardians sought to adopt the child and the trial court granted the adoption over the mother's objection. The court relied on Virginia statutes that had been amended to require only a showing of best interests of the child in terminating parental rights rather than detriment to the child of a continued relationship with the parent.

The court held that regardless of statutory language, the constitution requires a finding that a relationship with his or her parent is detrimental to the child before parental rights can be terminated. Thus, even though the statute had been changed to remove the parental unfitness requirement for termination of parental rights, the constitution requires it be retained. Thus, the mother here cannot lose her parental rights without a showing that having a continuing relationship with her child would harm the child.

COYOTE PUBLISHING, INC. V. MILLER

No. 07-16633

U.S. Court of Appeals, Ninth Circuit

March 11, 2010

<http://www.ca9.uscourts.gov/datastore/opinions/2010/03/11/07-16633.pdf>

Nevada law prohibits advertising of brothels in counties where prostitution is prohibited and its advertisement in public theaters or on billboards. Newspaper and brothel owners challenge the restrictions as a violation of the First Amendment. The District Court held the advertising ban was unconstitutional under a strict scrutiny standard.

The appeals court noted the Nevada law targets “pure commercial speech” so strict scrutiny is not required. The court noted that Nevada’s “interest in preventing the commodification of sex is substantial” and that “an advertisement for sex itself creates the commodification harm that Nevada seeks to limit.” Since “[i]ncreased advertising of commercial sex throughout the state of Nevada would increase the extent to which sex is presented to the public as a commodity for sale” restricting advertising advances the state’s interest by eliminating the commodifying ads and by redressing market demand.

A concurring opinion argued that the “network of laws setting off married couples from unmarried individuals testifies to the central role of sexual intercourse in civil society in Nevada as elsewhere in the United States. Nevada’s interest in preventing advertisements for the sale of an activity central to the domestic life of its inhabitants” is evident in its statutes.

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O’DARLING V. O’DARLING

No. 106,732

**Court of Civil Appeals of Oklahoma,
Division 1**

March 11, 2010

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

A trial court granted a divorce but vacated it when it learned the parties were both women who had been married in Canada.

The appeals court noted there “is no constitutional right to divorce.” Since, “the existence of a valid marriage is an essential element of a claim for dissolution of that marriage” and the plaintiffs did not show a valid marriage, the trial court was correct to vacate the divorce.

**CATHOLIC CARE V. THE CHARITY
COMMISSION FOR ENGLAND AND
WALES**

[2010] EWHC 520 (Ch)

**U.K. High Court of Justice Chancery
Division**

March 17, 2010

<http://www.bailii.org/ew/cases/EWHC/Ch/2010/520.html>

After U.K. law required adoption agencies to comply with sexual orientation discrimination provisions, a Catholic agency sought to amend its Charter to specify that it would offer its services only to opposite-sex couples in order to take advantage of a statutory exception for organizations whose purpose was to serve a specific population. The Charities Commission would not allow the amendment.

The High Court reversed and ordered the Commission to reconsider because the court believed the relevant statutory language allowed the kind of amendment the charity sought and that the agency could provide a bona fide public benefit to the population it primarily served, had to place children, even if it did not place with same-sex couples.

KOZAC V. POLAND

Application No. 13102/02

European Court of Human Rights

March 2, 2010

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=863720&portal=hbkm&source=externalbydocnumber&tabl>

A man evicted after the death of his partner sued the government to gain succession in the apartment. The trial and appellate courts held that the legal ability to succeed based on “de facto marital cohabitation” only applied “solely to cohabitation of a man and a woman.”

The court of human rights held the European Convention “affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations.” It said the state’s prerogative are “narrow” where “a difference of treatment is based on sex or sexual orientation.” Here, the applicant was denied succession because of “the homosexual nature of [his] relationship.” The government’s justification, “the protection of the family founded on a ‘union of a man and a woman’ as stipulated in Article 18 of the Polish Constitution”, is “a weighty and legitimate reason” but “the Convention is a living instrument, to be interpreted in the light of present-day conditions”, so “respect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one’s family or private life.” The court concluded that “a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted by the Court as necessary for the protection of the family viewed in its traditional sense.”

DICKERSON V. THOMPSON

507892

New York Appellate Division, Third

Department

March 18, 2010

<http://decisions.courts.state.ny.us/ad3/Decisions/2010/507892.pdf>

A New York couple contracted a civil union in Vermont. On breakup, one party sought a dissolution in New York court which dismissed, saying it did not have jurisdiction since New York public policy does not recognize same-sex unions.

The appeals court said New York public policy has recognized same-sex unions as reflected in various statements, executive orders and court decisions. With no public policy barrier to recognition of the civil union for purposes of dissolving the court concluded that, absent statutory direction to the contrary, the trial court can consider the petition.

KERN V. TANEY

No. 09-10738

Court of Common Pleas of Pennsylvania,

Berks County

March 15, 2010

<http://www.alliancealert.org/2010/2010032601.pdf>

A same-sex couple married in Massachusetts sought a divorce and the court held a hearing to determine whether it could hear the case. It concluded a divorce can only be granted where there’s a legal marriage. Since Pennsylvania statutes provide that out-of-state same-sex marriages are “void” and the federal Defense of Marriage Act prevents any contrary application of the U.S. Constitution’s Full Faith and Credit Clause this marriage was void so no divorce could be granted. In response to a privacy claim, the court held “the right of consenting adults to engage in intimate conduct, without governmental interference, does not involve or guarantee the right to require a government to grant the

parties a marriage.” The court said “the fundamental right to be married does not contemplate same-sex marriages” because “a same-sex relationship deviates from this traditional concept, for the principals are like beings, without physical complement. They cannot foster offspring, except through artificial or adoptive means.” The court also concluded that same-sex marriage does not pass “the test of a fundamental right” —that is “the type of right ‘inherent in man’s nature,’ among the ‘basic rights of human beings,’ and among the ‘Hallmarks of Western Civilization.’” The court rejected the plaintiff’s proposed analogy to *Loving v. Virginia* because the plea for same-sex marriage “is a plea for social change, which plea implicitly recognizes that same-sex relationships cannot fall within the purview of a traditional marriage.” The court said that if “homosexuals had a fundamental right to be married to each other, this plea would be unnecessary.” The court conclude that the judiciary should generally not designate a fundamental right “when not clearly required by the Constitution or established precedent” because doing so would bypass the legislative process and deny “the people a voice in effecting social policy, in essence, trumping democracy by judicial fiat.” Thus, since the challenged statutes “are based on a legitimate state interest” the marriage law is constitutional. The court noted, however that the plaintiff could seek to have the marriage declared void.

**WALDEN V. CENTERS FOR DISEASE
CONTROL**

Case No. 1:08-cv-02278-JEC

**U.S. District Court, Northern District of
Georgia**

March 18, 2010

[http://www.telladf.org/UserDocs/WaldenSfor
der.pdf](http://www.telladf.org/UserDocs/WaldenSfor
der.pdf)

A contract counselor with the Centers for Disease Control referred an employee in a same-sex relationship to another counselor

because of the counselor’s religious objection to facilitating a same-sex relationship. although the second counselor was satisfactory, the employee “felt ‘judged and condemned’” and “that plaintiff’s nonverbal communication also indicated disapproval of her relationship.” After investigating the complaint, plaintiff was laid off. She sued, alleging (1) a violation of free exercise, (2) a violation of the Religious Freedom Restoration Act, and (3) a violation of Title VII’s prohibition of religious discrimination.

The court said that because the CDC was acting as an employer, the standard of review is more deferential to its decision. Here, the court said “there is no evidence in the record to suggest that the CDC removed plaintiff from the contract because of her religiously based need to refer clients seeking same-sex relationship counseling”; rather “the CDC removed plaintiff from the contract because of the manner in which plaintiff handled the situation involving [client], and the CDC’s reasonable concern about how plaintiff would handle similar situations in the future.” Thus, the firing created no substantial burden on the plaintiff’s free exercise of religion. Since the CDC’s decision was “not based upon plaintiff’s religiously based refusal to provide same-sex relationship counseling” but on “the manner in which plaintiff handled the situation, there was no RFRA violation. For the same reason, the Title VII claim failed. Additionally, the employer’s offer of employment reassignment services is a reasonable accommodation of the plaintiff’s religious objection.

**RECENT LAW REVIEW ARTICLES
AND BOOKS**

Edward Stein, *The “Accidental Procreation” Argument for Withholding Legal Recognition for Same-Sex Relationships* 84 CHICAGO-KENT LAW REVIEW 403 (2009). Argues that the fact that same-sex couples cannot have children without the participation of a third party is not relevant to the state interests in marriage.

William N. Eskridge, *The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy* 97 CALIFORNIA LAW REVIEW 1785 (2010). Proposes a theory by which state high courts can make their states' constitutions less easy to amend.

Alice Ristroph & Melissa E. Murray, *Disestablishing the Family* 119 YALE LAW JOURNAL 101 (2010). Proposes an analogy to disestablishment of religion to propose that the law no longer privilege some family arrangements over others.

Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now* 82 SOUTHERN CALIFORNIA LAW REVIEW 1153 (2009). Compares the lack of political backlash following the interracial marriage court decisions to the presence of backlash to the same-sex marriage decisions.

Courtney Megan Cahill, *Celebrating the Differences That Could Make a Difference: United States v. Virginia and a New Vision of Sexual Equality* 70 OHIO STATE LAW JOURNAL 943 (2009). Describes how public perceptions and activist arguments present same-sex relationships as being essentially no different from opposite-sex relationships and explains that this is a mistaken approach since there are real differences based on the gender of participants.

Joanna L. Grossman, *Civil Rites: The Gay Marriage Controversy in Historical Perspective* in LAW SOCIETY AND HISTORY: ESSAYS ON THEMES IN THE LEGAL HISTORY AND LEGAL SOCIOLOGY OF LAWRENCE M. FRIEDMAN (Robert Gordon, ed. 2010). Proposes an historic analogy between the debate over same-sex marriage and previous changes to state family laws based on the idea that reactions to easy divorce or same-sex marriage are unsustainable responses to unreasonable panic over changes in family life.

NEWS STORIES

Ken MacQueen, *Making Their Bed: Some 16 Groups Take Sides on Polygamy in a Landmark Case*, MACLEANS, March 17, 2010 at <http://www2.macleans.ca/2010/03/17/making-their-bed/>. Describing range of groups becoming involved in a lawsuit to test the constitutionality of Canada's prohibition of polygamy.

Debra Cassens Weiss, *Lawyer's Lover Ordered to Pay \$9M in Alienation of Affection Case*, ABA JOURNAL, March 19, 2010 at <http://www.abajournal.com/news/article/lawyers-lover-ordered-to-pay-9m-in-alienation-of-affection-case/>. Describing a recent jury verdict in one of the 200 such cases a year.