

Marriage Law Digest

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MARCH 2008 CASE SUMMARIES

William C. Duncan, Editor

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MATTER OF BRITTANY T.

No. 502131

New York Appellate Division, Third Judicial Department

February 28, 2008

<http://decisions.courts.state.ny.us/ad3/Decisions/2008/502131.pdf>

Parents with a severely overweight child consented to a “finding of neglect” and to terms for helping the child under the supervision of their county’s Department of Social Services. Three months later, the court concluded the child had experienced no improvement and removed the child, who was placed with a relative. Subsequently, the child was returned to her parents, then placed in county custody.

The appellate division examined each charge against the parents on which the county had relied to argue that they had not properly met their agreement to help the child with her weight and found that they were not supported by the facts or did not rise to the level of willful violations of the agreement. Thus, the court found that the family court had erred in finding the parents had willfully violated their agreement with the county.

IN RE RACHEL L.

B192878

California Court of Appeal, Second District
February 8, 2008

<http://www.courtinfo.ca.gov/opinions/documents/B192878.PDF>

The Los Angeles County Department of Children and Family Services investigated a

complaint of alleged mistreatment of a child by the father. The investigation disclosed that children “had been home schooled by the mother rather than educated in a public or private school.” An attorney representing two of the children asked the court to “order that the children be enrolled in a public or private school” but the trial court “ruled that the parents have a constitutional right to home school the children.”

The court of appeals cited to a 1953 case that rejected the notion that parents have a right to home school their children that was appealed to the U.S. Supreme Court, which dismissed for want of a substantial federal question. The court adopted this precedent and also held that “education of the children at their home, whatever the quality of that education, does not qualify for the private full-time day school or credentialed tutor exemptions from compulsory education in a public full-time day school.” The court also concluded that there was not enough evidence to conclude that the parents were motivated by belief to home school (so there was no First Amendment issue).

The court remanded the case to the trial court to “order the parents to (1) enroll their children in a public full-time day school, or a legally qualified private full-time day school and (2) see to it that the children receive their education in such school.”

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ZBARAZ V. MADIGAN
No. 84 C 771
U.S. District Court, Northern District of Illinois
February 29, 2008
[http://howappealing.law.com/
ZbarazVsMadigan.pdf](http://howappealing.law.com/ZbarazVsMadigan.pdf)

A statute requiring parental consent to abortion by minors was enjoined while the state supreme court promulgated rules to provide for a judicial bypass provision. The attorney general sought to have the injunction lifted but opponents of the legislation argued the injunction should remain because the bill was unconstitutional. Specifically, they argued that the statute allows courts to “waive parental notification when it is in the ‘best interest’ of the child, but does not authorize a method of consent for the abortion.” The state replied that “it should be assumed that authorization of consent for an abortion is granted when parental notification is waived.”

The court agreed with plaintiffs that the statute does not state that a court can authorize consent for an abortion so even after parental notification is waived, the minor would still be required to seek parental consent, a result the court finds contradictory. The court thus refused to lift the injunction.

**PROCITO V. UNEMPLOYMENT
COMPENSATION BOARD OF REVIEW**
No. 2402 C.D. 2006
Commonwealth Court of Pennsylvania
March 17, 2008
[http://www.aopc.org/OpPosting/CWealth/out/
2402CD06_3-17-08.pdf](http://www.aopc.org/OpPosting/CWealth/out/2402CD06_3-17-08.pdf)

A woman who resigned her job “to follow her domestic partner to Florida” sought unemployment benefits but the Unemployment Compensation Board of Review said the benefits are only available to those who move with a spouse, which would not include a domestic partner. On appeal the claimant argued that providing benefits on the

basis of marital status discriminates against those who cannot marry because of their sexual orientation.

This appellate court refused to consider the constitutional claims because the partner's decision to move "was a matter of personal preference" for the partner, so there could be no "necessitous and compelling cause to follow" for the claimant.

A dissenting opinion argued that the court should have given the claimant a chance to show she was following her partner to Florida for a valid reason. To this judge, since the relevant statute does not specifically exclude same-sex couples, they should be allowed to claim that they are following a partner to another state and therefore access unemployment benefits for quitting their jobs to do so. The dissent argued that because the state supreme court "has recognized the bonds that unite same-sex families, even without the benefit of legal marriage," limiting the type of unemployment benefit sought in this case would violate the equal protection clause.

PEARSON V. PEARSON
2008 UT 24
Utah Supreme Court
March 18, 2008

<http://www.utcourts.gov/opinions/supopin/Pearson2031808.pdf>

An adulterer who had fathered a child born to a married woman challenged the paternity of the mother's husband (the mother and her husband had subsequently reconciled and the husband was named as the child's father on the birth certificate) who had raised the child as his own for two years despite his knowledge of the child's paternity. The trial court applied a two-part test to determine whether to allow the adulterer standing to contest the child's paternity when the couple was divorcing. The court asked (1) whether the contest would disrupt a marriage and (2)

whether the contest would constitute a "disruptive and unnecessary attack" against the child's paternity. The trial court said there was no marriage to preserve and relied on an expert witness who suggested the child's relationship with the biological father needed to be fostered. The court of appeals reversed because the child had established a bond with the husband.

The supreme court held that where a "marital father" has accepted responsibility for a child born during his marriage any challenge to his paternity "is disruptive and unnecessary." Even if the marriage ends in divorce the parent-child relationship created in the marriage will "last beyond the dissolution of the individual marriage" and the state can appropriately encourage "the acceptance of parental responsibility and the formation of relationships between marital fathers and children who are born into their marriage."

**KLOUDA V. SOUTHWESTERN BAPTIST
THEOLOGICAL SEMINARY**

No. 4:07-CV-161-A

U.S. District Court, Northern District of
Texas

March 19, 2008

[http://www.alliancealert.org/2008/
2008032401.pdf](http://www.alliancealert.org/2008/2008032401.pdf)

A professor at a seminary was terminated because she was a woman after the new president enacted a policy that "all persons teaching future pastors within the School of Theology be qualified to serve as the pastor of a local church" and women could not meet this requirement.

The court noted that the Fifth Circuit Court of Appeals accepts "the broad 'ecclesiastical abstention doctrine' and the narrower 'ministerial exception' in challenges to a religious institution's employment decisions." Thus, if a "claim challenges a religious institution's employment decision"

and “the employee is a member of the clergy or otherwise serves a ministerial function” the courts will not exercise jurisdiction over the claim. Here, the seminary is a church and the plaintiff is a minister as required for the exemption doctrine to apply. The court held that “mere inquiry into” the decision-making process of the seminary in the case “would be an unconstitutional intrusion into the affairs of Seminary as a religious organization.” The decision, to the court, was clearly “religiously motivated” and the seminary “must be free to decide for itself, free of interference of the courts, matters of church governance, such as the identities of those who will be permitted to teach courses in the preparation of students for church ministry.”

**NOESEN V. STATE OF WISCONSIN
DEPARTMENT OF REGULATION &
LICENSING**

2006 AP 001110

**Wisconsin Court of Appeals, District III
March 25, 2008**

<http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=32233>

A pharmacist, who had conscientious objections to dispersing contraceptives, was the subject of a complaint to the Department of Regulation and Licensing when he refused to fill a contraception prescription or transfer the patient to another pharmacy. An administrative law judge found that the pharmacist should have given information on how to fill the prescription. The pharmacist was given a reprimand and required to notify any pharmacy of the practices he would not perform in detail. The trial court agreed that the pharmacist “had engaged in unprofessional conduct.”

On appeal, the court held that because the pharmacist had “prevented all efforts [the patient] made to obtain her medication elsewhere when he refused to complete the transfer and gave her no option for obtaining her legally prescribed medication elsewhere” it was reasonable for the Board to conclude he had violated a standard of care.

In response to the pharmacist’s state constitutional claim of a violation of his freedom of conscience, the court admitted his religious convictions were sincere but accepted the trial court’s holding that the discipline requiring him to disclose his objections did not burden his constitutional rights.

**FUNDERBURKE V. NEW YORK STATE
DEPARTMENT OF CIVIL SERVICE**

2008 NY Slip Op. 02789

New York Appellate Division,

Second Department

March 25, 2008

http://www.nycourts.gov/reporter/3dseries/2008/2008_02789.htm

A retired schoolteacher sought employment benefits for his same-sex partner whom he had married in Canada. The trial court held there was no obligation for the school district to provide the benefits but while the case was being appealed, the district decided to offer the benefits sought.

The appellate division held that the case was now moot and specifically vacated the lower court decision so as to prevent any confusion about the rights of same-sex couples married in other jurisdictions in light of ongoing litigation on that question in other cases.