

Marriage Law Digest

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MAY 2009 CASE SUMMARIES

William C. Duncan, Editor

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EMBRY V. RYAN

Case No. 2D08- 1323

District Court of Appeal of Florida, Second District

May 13, 2009

http://www.2dca.org/opinions/Opinion_Page/Opinion_Page_2009/May/May%2013,%202009/2D08-1323.pdf

Same-sex partner of a child's mother sought visitation after breakup of the relationship. She relied on her adoption of the child in Washington. The Florida trial court would not recognize the adoption because it was contrary to Florida public policy which prohibits same-sex couple adoptions.

The appeals court said that under the Full Faith and Credit Clause and Florida's adoption recognition statute, the court had no choice but to recognize the adoption and consider the petitioner a legal parent.

STRAUSS V. HORTON

S168047

California Supreme Court

May 26, 2009

<http://www.courtinfo.ca.gov/opinions/documents/S168047.PDF>

After approval of Proposition 8, amending the California Constitution to define marriage as the union of a man and a woman, municipalities and advocacy organizations sought to have the supreme court rule (1) that the Proposition was a "revision" rather than "amendment" and so should have been approved by the legislature before being voted on and (2) that the same-sex marriages entered into before approval of the

Amendment were legally valid. The attorney general urged the court to rule that Proposition 8 was invalid because voters should not be allowed to approve initiative measures affecting “inalienable rights.”

The supreme court said the amendment was not a revision because it does not have “even a minimal effect on *the governmental plan or framework of California* that existed prior to the amendment.” The court also said Proposition 8 does not “transform or undermine the judicial function.” The court noted there was no legal authority supporting the arguments that an amendment that “conflicts with an assertedly fundamental constitutional principle that protects a minority group from having its constitutional rights diminished *in any respect* by majority vote” is a revision, especially since previous amendments have had this effect. The court also noted that the California Constitution specifically gives voters the power to amend their constitution, thus doing so is not a violation of the constitutional principle of separation of powers. Finally, the court rejected the attorney general’s claim that people can’t vote on “inalienable rights.”

The court also concluded the same-sex marriages that took place before Proposition 8 was enacted were still valid because the amendment could not apply retroactively.

In describing the scope of Proposition 8, the court said it would prohibit recognition of out-of-state same-sex marriages as well as preventing issuance of marriage licenses to

same-sex couples in California. It also would, according to the court, not disturb the court’s holding that “sexual orientation” is a suspect class status.

One justice dissented saying, “requiring discrimination against a minority group on the basis of a suspect classification strikes at the core of the promise of equality that underlies our California Constitution” so Proposition 8 should be considered a revision.

MATTER OF H.M. V. E.T.

2009 Slip Op 04240

New York Appellate Division, Second Department

May 26, 2009

http://www.nycourts.gov/reporter/3dseries/2009/2009_04240.htm

A child’s mother sought to have a former partner “lacking biological and legal ties to the child” declared a parent and ordered to pay child support, relying on an agreement between them. The appeals court noted that family courts are given jurisdiction to establish paternity but that this only applies to determining the male who is the father of a child. Thus, the family courts do not have authority to grant the result sought in this case.

The dissent said the petition should be treated as a request to compel support rather than to establish parentage.

RECENT LAW REVIEW ARTICLES AND BOOKS

Simon Butt, *Polygamy and Mixed Marriage in Indonesia: Islam and the Marriage Law in the Courts* in *INDONESIA: LAW & SOCIETY* (T. Lindsey, ed. 2008) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401135. Describes the struggle over regulation of polygamy by the government of Indonesia.

Andrea Beauchamp Carroll, *Incentivizing Divorce* 30 *CARDOZO LAW REVIEW* 101 (2009).

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Describes marital property rules that create an incentive for spouses to seek divorce.

Anthony C. Infanti, *Dismembering Families* UNIVERSITY OF PITTSBURGH LEGAL STUDIES RESEARCH PAPER No. 2009-11 (April 2009) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374492. Argues that by denying the federal tax deduction for extraordinary medical expenses to costs of assisted reproduction, the law “contributes to the subordination of lesbian and gay families as well as many other nontraditional American families.”

Tanya Washington, *Throwing Black Babies Out With the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans* 6 HASTINGS RACE AND POVERTY LAW JOURNAL 1 (2009). Argues that children have a constitutional right to be adopted and that this right is infringed when same-sex couples are not permitted to adopt.

Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships* 61 RUTGERS LAW REVIEW 101 (2009). Argues that the law ought not to favor marriage.