

Marriage Law Digest

Vol. 7, No. 5, May 2010

MAY 2010 CASE SUMMARIES

William C. Duncan, Editor

CONTENTS

- 1) H.S. V. SUPERIOR COURT OF RIVERSIDE COUNTY, E049923, California Court of Appeal, Fourth District, April 22, 2010 (effect of marital presumption of paternity when child conceived by adultery).
- 2) DEBRA H. V. JANICE R., No. 47, New York Court of Appeals, May 4, 2010 (effect of Vermont civil union on standing for visitation).
- 3) IN THE MATTER OF H.M. V. E.T., No. 48, New York Court of Appeals, May 4, 2010 (same-sex partner as child's second parent).
- 4) SEGAL V. LYNCH, Docket No. A-0805-08T2, New Jersey Appellate Division, May 3, 2010 (parent's right to sue for alienation from children caused by child's other parent).
- 5) IN THE INTEREST OF C.T.H.S. & C.H.R.S., No. 09-09-00004-CV, Texas. Court of Appeals, Ninth District, April 29, 2010 (conservatorship of children raised by same-sex couple).
- 6) T.M.V. B.B., 2010 UT 42, Utah Supreme Court, May 14, 2010 (unwed father's right to object to adoption of child).
- 7) ONTARIO HUMAN RIGHTS COMMISSION V. CHRISTIAN HORIZONS, 2010 ONSC 2105, Ontario Superior Court, Divisional Court, May 14, 2010 (religious organization's right to impose a condition on employees that they not participate in same-sex relationships).
- 8) Recent Law Review Articles (topics: morality, right to marry, surrogacy, bigamy, same-sex marriage litigation, custody awards to same-sex partners, same-sex divorce, cohabitation and evidentiary privilege, alternative legal statuses to marriage).

H.S. V. SUPERIOR COURT OF RIVERSIDE COUNTY

E049923

California Court of Appeal, Fourth District

April 22, 2010

<http://www.courtinfo.ca.gov/opinions/documents/E049923.PDF>

A married mother who was having an affair had a child and agreed to a declaration naming her adulterous partner as the father. She subsequently rescinded her consent and reconciled with her husband. The partner sought genetic testing to establish his paternity and the trial court issued an order for the testing to take place. The mother appealed.

The appeals court said that where, as here, the mother "and her husband have raised the child as his child in a stable family relationship" allowing a paternity test would undermine "the state's interest in preserving marriage." The court also held that the partner had no standing to challenge the husband's "presumption of paternity" since he did not meet the statutory requirement to be considered a "presumed father."

DEBRA H. V. JANICE R.

No. 47

New York Court of Appeals

May 4, 2010

<http://www.courts.state.ny.us/ctapps/decision/s/2010/may10/47opn10.pdf>

A same-sex couple who had contracted a Vermont civil union were raising a child jointly although the partner "repeatedly rebuffed" the mother's request for the partner

to adopt the child. The parties separated and the partner sought visitation.

New York's high court noted New York precedent holding that the state's statutes do "not confer standing on a biological stranger to seek visitation with a child in the custody of a fit parent." This precedent "creates a bright-line rule that promotes certainty in the wake of domestic breakups otherwise fraught with the risk of 'disruptive battles' . . . over parentage as a prelude to further potential combat over custody and visitation." The court believed the alternative of hearings to show functional or de facto parentage would increase the potential for "contentious, costly and lengthy" court proceedings. To the court, the "fundamental right" of a parent to direct her child's upbringing "entitles biological and adoptive parents to refuse to allow a second-parent adoption . . . even if they have permitted or encouraged another adult to become a virtual parent of the child." The court said the legislature should make "any change in the meaning of 'parent' under our law." Under Vermont law, however, parties to a civil union are joint parents so the partner here could be a "parent" under Vermont law and New York will grant comity to the Vermont law. The court said that granting that recognition did not conflict with New York public policy because New York allows second-parent adoptions. The court concluded that since "New York will recognize parentage created by a civil union in Vermont," the trial court will now have to decide whether the

partner's relationship with the child warrants a visitation order.

A concurrence explained that New York visitation precedent "encourages a party who seeks to form a parental relationship with a child but lacks biological ties to pursue a legal adoption as soon as possible" and thus "serves the best interests of New York's children as it is optimal to expeditiously establish legal parenthood especially to protect a child against unforeseen events such as the death of a biological parent." Also, "since the express written consent of the biological parent is a condition precedent to a second-parent adoption, the rule also guarantees that standing to seek visitation or custody will never hinge on an after-the-fact dispute as to whether the other party's relationship with the child was sufficiently close or had been fostered by the biological parent."

A dissent argued that the visitation precedent reflected an "unwarranted hard line stance, fixing biology above all else as the key to determining parentage and thereby foreclosing any examination of a child's best interests." The dissent proposed a rule from a Wisconsin case that would recognize an unrelated adult as a parent if that person could show that the child's parent "consented to and encouraged the formation of a parental relationship," and that the partner "did assume the typical obligations and roles associated with parenting."

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

No. 48

New York Court of Appeals

May 4, 2010

<http://www.courts.state.ny.us/ctapps/decisions/2010/may10/48opn10.pdf>

A former same-sex partner of a child's mother sought to be declared the parent of the child who had been conceived by artificial insemination. The trial court said it had

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.

jurisdiction to hear the claim and the appellate division disagreed.

The state's high court reversed. The court said that since family courts are statutorily granted authority to determine support obligations of "parents," the "Family Court also has the inherent authority to ascertain in certain cases whether a female respondent is, in fact, a child's parent." The majority decided the family court should be able to determine whether the partner is in fact the child's parent.

One judge concurred but would have held "that where a child is conceived through [artificial donor insemination] by one member of a same-sex couple living together, with the knowledge and consent of the other, the child is as a matter of law—at least in the absence of extraordinary circumstances—the child of both." So here, the judge would hold the partner is the parent of the child.

The dissent noted that the partner has "no biological or other legal connection to the child" and only lived with the child three months. This judge proposed a rule that "a known stranger to a child—i.e. one with no biological, adoptive or other legal relationship—cannot assert that he/she is a parent for visitation purposes."

SEGAL V. LYNCH

Docket No. A-0805-08T2

New Jersey Appellate Division

May 3, 2010

<http://pdfserver.amlaw.com/nj/Segal-a0805-08.pdf>

A father sued alleging the mother "intentionally or recklessly engaged in extreme and outrageous conduct designed to poison his relationship with his children, which alienated the natural bond and affection that should exist between them and caused both he and the children emotional distress." The trial court dismissed saying the abolition

of the tort of alienation of affection meant this kind of action too would be prohibited.

The appeals court said the abolition of marital torts is not relevant here because the issue is the parent-child relationship. The court noted that the litigation contemplated here would require children to be witnesses in the legal dispute between their parents. While a custody proceeding is governed by the best interest of a child, an alienation of a child's affection suit causes a child to take sides. Thus, to the court, the facts alleged here should be addressed in a custody action rather than a tort case. Although there could be facts that are so outrageous that a cause may be brought (like prolonged abduction "or intentional false accusations of parent/child sexual abuse") they do not exist in this case.

IN THE INTEREST OF C.T.H.S. & C.H.R.S.

No. 09-09-00004-CV

Texas Court of Appeals, Ninth District

April 29, 2010

<http://www.9thcoa.courts.state.tx.us/opinions/PDFOpinion.asp?OpinionId=10759>

A woman sought to be appointed conservator of the children of her partner. The trial court said she lacked standing.

The court of appeals said the "power of a trial court to adjudicate disputes between a parent and a non-parent, and to enforce its own orders contrary to a parent's decisions concerning her children, constitutes state involvement that implicates the parent's fundamental liberty interests in the care, custody, and control of her children." The court held the "standing statutes should be construed in a manner consistent with the constitutional principles stated" by the U.S. Supreme Court in *Troxel v. Granville*. Thus, standing should not "turn on whether a trial court agrees or disagrees with a parent's decision concerning the best interest of her children, or a parent's decision regarding who may associate with her children" but rather on

“whether the parent is adequately caring for her children.” Since here the mother and partner had both lived with the children and the mother was not unfit, the partner did not have standing to seek to be the children’s custodian.

T.M. V. B.B.

2010 UT 42

Utah Supreme Court

May 14, 2010

<http://www.utcourts.gov/opinions/supopin/TB051410.pdf>

A biological father who had some involvement in the child’s life before the child’s adoption without his consent challenged the constitutionality of the adoption statute as applied to him. The supreme court said Utah adoption law requires unwed fathers to (1) “initiate paternity proceedings” (2) file notice with the state registrar, (3) file an affidavit with the district court “stating that he is willing and able to take full custody of the child, setting forth his plans to care for the child, and agreeing to a court order of child support and payment of medical expenses” and (4) “offer to assist, and actually assist, with expenses associated with the pregnancy and birth.” The father argued that his interactions with the child “in between her birth and when she was adopted, he obtained fundamental parental rights—including the right to consent to her adoption—which cannot be taken away by statute absent a compelling state interest.” The court noted the U.S. Supreme Court has said the Constitution requires an unwed father to have an “‘opportunity’ to develop a relationship by taking a responsible role in the life of his child” but held that nothing in U.S. or Utah law suggests that “less than two months of interaction between an unwed natural father and his child is sufficient to confer full-blown constitutionally protected parental rights.” The court also held the Constitution does not provide an adoption to be postponed to give an unwed father time to

establish “a substantial relationship with his child.” The court noted that the unwed father “risks the possibility that the natural mother’s relinquishment of the child may eliminate his opportunity to acquire constitutionally protectable parental rights before he has been able to obtain them.” Here, the court noted, the father could have complied with statutory scheme for protecting his parental rights and did not. The father also argued that the statute makes an unfair distinction based on the age of the child. The court, though, said the state “has a strong interest in placing children with adoptive parents who will take responsibility for their care and custody” and “in making these proceedings speedy and final and in mitigating the contentiousness and uncertainty that might undermine an adoptive placement.”

The dissent accused the majority of requiring years of commitment before parental rights could vest in an unwed father but argued that this is not a requirement of the case law. The dissent believed the father should be given a chance even though he did not comply with the statute because he’d done all he could under the circumstances.

**ONTARIO HUMAN RIGHTS
COMMISSION V. CHRISTIAN HORIZONS
2010 ONSC 2105**

Ontario Superior Court of Justice,

Divisional Court

May 14, 2010

<http://www.canlii.org/en/on/onsc/doc/2010/2010onsc2105/2010onsc2105.pdf>

Evangelical Christian organization that operated residential homes for the developmentally disabled had a lifestyle code for employees that prohibited participating in same-sex relationships. An employee after being confronted about her own same-sex relationship and she sued alleging sexual orientation discrimination. The Human Rights Tribunal held that although the organization

was Christian it did not primarily serve the interests of a particular religious group and that the organization had made no effort to determine if its lifestyle policy was “reasonably necessary of whether the employment could be performed without the discriminatory restrictions.” The Tribunal required the organization to pay fined, “develop and adopt an anti-discrimination and an anti-harassment policy as well as a human rights training program for all employees and managers” and to “cease and desist from imposing the Lifestyle and Morality Statement as a condition of employment.”

The superior court said the requirement to serve the interests of a religious community is met by the religious purpose of the organization. It also held, however, that the employee “was not engaged in actively promoting an Evangelical Christian way of life and that services were provided to the people with developmental disabilities of all faiths and those without any faith” and that the employee’s tasks did not require “an adherence by the support workers to a lifestyle that precludes same-sex relationships.” In regards to the remedy, the court held the order to train should be limited to sexual orientation discrimination and the order to not impose the Lifestyle policy should be modified so as to delete “the reference to same-sex relationships” since “it is discriminatory.”

RECENT LAW REVIEW ARTICLES AND BOOKS

Nelson Tebbe & Deborah A. Widwiss, *Equal Access and the Right to Marry* 158 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1375 (2010). Proposes understanding the right to marry as a right to access to a government created institution on terms equal with everyone else.

Carlos A. Ball, *Gay is Good: Morality and the LGBT Rights Movement* 34 NEW YORK

UNIVERSITY REVIEW OF LAW & SOCIAL CHANGE __ (2010). Argues that a moral case can be made for gay rights.

Jacob Richards, *Autonomy, Imperfect Consent, and Polygamist Sex Rights Claims* 98 CALIFORNIA LAW REVIEW 197 (2010). Proposes a statutory framework for dealing with polygamy that either provides a consent defense to bigamy prosecution or that decriminalizes polygamy, replacing it with a crime of coerced marriage.

Christine Metteer Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA’s Self-Enforcing Model to Ensure Successful Surrogacy Arrangements* 16 CARDOZO JOURNAL OF LAW & GENDER 237 (2010). Proposes the states adopt laws that make the intended parents in a surrogacy agreement the legal parents from conception.

D’Arcy L. Reinhard, *Recognition of Non-Biological, Non-Adoptive Parents in Arkansas, Florida, Mississippi, and Utah: A De Facto Doctrine to Protect the Best Interests of the Child* 13 JOURNAL OF GENDER, RACE & JUSTICE 441 (2010). Argues that a “non-biological, non-adoptive parent” in a same-sex couple should be granted standing to see child custody by court action in the four states mentioned in the title.

Scott Cummings & Douglas NeJaime, *Lawyering for Marriage Equality* UCLA SCHOOL OF LAW RESEARCH PAPER No. 10-09 at [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604641#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604641). Argues that the effort to secure same-sex marriage through litigation has not created a backlash but instead has advanced the cause of gay rights.

Colleen McNichols Ramais, *‘Til Death Do You Part . . . And This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples* 2010 UNIVERSITY OF ILLINOIS LAW REVIEW 1013 (2010). Argues that states have an obligation to provide a forum for divorce for same-sex couples even if they do not recognize the validity of a same-sex marriage.

Mark Glover, *Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage* 70 LOUISIANA LAW REVIEW 751 (2010). Proposes extending the evidentiary privilege to couples who are cohabiting and their children.

Jeff Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage* 75 BROOKLYN LAW REVIEW 791 (2010). Describes possible benefits of legal regimes which extend legal recognition to same-sex couples without redefining marriage suggesting that these alternative statuses might be "'separate and better' alternatives to (heterosexually-authored) 'majoritarian marriage.'"