

Marriage Law Digest

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NOVEMBER 2011 CASE SUMMARIES

William C. Duncan, Editor

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S.H. V. AUSTRIA

Application No. 57813/00

European Court of Human Rights

November 3, 2011

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=894729&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

Austrian law prohibits the use of donor sperm of eggs in *in vitro* fertilization. Three couples who desired to conceive through IVF with donor sperm or eggs challenged the law as a violation of the European Convention for the Protection of Rights and Freedoms.

The court said that while there is a trend in member states to allow such donations to be used in IVF, it is not "based on settled and long-standing principles established in the law of the member States" so the court should continue to give significant deference to member state's policies. The court found it "understandable that the States find it necessary to act with particular caution in the field of artificial procreation." The court (in a 13-4 vote) concluded that the controversial nature of the issue, the lack of consensus and the need to "take into account human dignity, the well-being of children thus conceived and the prevention of negative repercussions or potential misuse" justified allowing Austria's policy to stand pending further consensus.

A concurring opinion argued "the recognition of the value and dignity of every person may require the prohibition of certain acts in order to bear witness to the inalienable value and intrinsic dignity of every human being" and that such a prohibition "is not a

denial of fundamental human rights but a positive acknowledgment and advancement of the same.”

JONES V. KERNOTT

[2011] UKSC 53

United Kingdom Supreme Court

November 9, 2011

<http://www.bailii.org/uk/cases/UKSC/2011/53.pdf>

A cohabiting couple who jointly owned a home in which the man had lived eight years before leaving the woman who lived alone for more than fourteen more years disputed the respective property interests of each party in the home. The trial court split the value of the home based on the respective contributions of the partners to the mortgage on the home. The woman argued the intention of the partner to jointly own the home had changed as evidenced by the action of the man in leaving the home.

The supreme court agreed. It said that while the partners began as joint owners the continuance of that status could be “deduced objectively from their conduct.” Since the actions of the man in moving out indicated there was no longer an intention for the partners to be joint owners of the home, “each is entitled to that share which the court considers fair.”

MOON V. MICHIGAN REPRODUCTIVE & IVF CENTER

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No. 299623

Michigan Court of Appeals

September 29, 2011

http://coa.courts.mi.gov/documents/OPINION/S/FINAL/COA/20110929_C299623_40_299623.OPN.PDF

A single woman approached two fertility clinics about obtaining IVF services but the clinics chose not to assist her because of fear that the doctors involved could incur the obligations of paternity given the lack of law on the subject in Michigan. The trial court said the doctors could not be held liable because “under common law, a doctor could refuse to enter into a doctor-patient relationship with any individual for any reason or for no reason at all.”

The appeals court disagreed, holding state antidiscrimination laws “serve to prohibit doctors and medical facilities from refusing to form a doctor-patient relationship based solely on a protected status.” Here, the plaintiff had presented “direct evidence of potential discrimination” on the basis of marital status. The court thus sent the case back to the trial court to determine the credibility of the clinics’ claimed motives for refusing the treatment.

PERRY V. BROWN

S189476

California Supreme Court

November 17, 2011

<http://www.courtinfo.ca.gov/opinions/documents/S189476.PDF>

After California voters approved an amendment to the state constitution defining marriage as the union of a man and a woman, same-sex couples challenged the law on U.S. Constitutional grounds. A decision on the measure in the trial court was appealed to the U.S. Court of Appeals which referred to the California Supreme Court the question of whether the proponents of the measure could defend it in court since the attorney general declined to do so.

The California Supreme Court decided that official proponents of an initiative measure have standing to defend the law in the absence of a defense by the attorney general. The court noted that California courts have consistently allowed "official proponents" of an initiative to "to defend a challenged voter-approved initiative measure in order 'to guard the people's right to exercise initiative power.'" The court explained that doing this "(1) assures voters who supported the measure and enacted it into law that any residual hostility or indifference of current public officials to the substance of the initiative measure will not prevent a full and robust defense of the measure to be mounted in court on the people's behalf, and (2) ensures a court faced with the responsibility of reviewing and resolving a legal challenge to an initiative measure that it is aware of and addresses the full range of legal arguments that reasonably may be proffered in the measure's defense." The court explained that since executive officials have no authority to veto an initiative measure it would not be appropriate to "permit these public officials to indirectly achieve such a result by denying the official initiative proponents the authority to step in to assert the state's interest in the validity of the measure or to appeal a lower court judgment invalidating the measure when those public officials decline to assert that interest or to appeal an adverse judgment." The court concluded that when "public officials totally decline to defend a challenged initiative measure, the state's interest in the initiative's validity would go completely undefended, and the voters who enacted the initiative measure into law would be entirely deprived of having the state's interest in the initiative's validity asserted on their behalf, unless some private individual or entity is permitted to assert that interest on the voters', that is to say, the people's, behalf."

**REFERENCE RE: SECTION 293 OF THE
CRIMINAL CODE OF CANADA
2011 BCSC 1588**

**British Columbia Supreme Court
November 23, 2011**

[http://www.adfmedia.org/files/Polygamy
DecisionBC.pdf](http://www.adfmedia.org/files/PolygamyDecisionBC.pdf)

In 2009, the government of British Columbia asked the provincial supreme court whether Canada's prohibition of polygamy was consistent with the Canadian Charter of Rights and Freedoms and whether the law could be construed to only prohibit polygamy where there were some additional factors such as involvement of a minor or abuse.

The court concluded the polygamy law "prohibits practicing or entering into a 'marriage' with more than one person at the same time, whether sanctioned by civil, religious or other means, and whether or not it is by law recognized as a binding form of marriage." The court said that the law did not infringe on the religious freedom because the law did not target a religious practice and "polygamy gives rise to harms, or at least the risk of significant harm, and thus this is a case where arguably there are limits on the religious freedom claimed by the challengers." The court concluded the law only "minimally impairs religious freedom" and deferred to Parliament "as better positioned than the Court to choose among a range of alternatives to address the harms" of polygamy. The court also concluded the ban did not infringe a right of association because it did not single out conduct because it involved an association but "because of the physical, psychological and social harms perceived to be associated with the practice." The court said the government had "demonstrated a reasoned basis for the apprehension that polygamy (especially polygyny) is inherently harmful to the participants, to their offspring and to society generally." The court did hold, however, that the statute was overbroad: "with respect to its

application to children between the ages of 12 and 17" because the children in these situations are victims rather than offenders. The court thus concluded banning polygamy was consistent with the constitution as long as the minor victims were not prosecuted.

RECENT LAW REVIEW ARTICLES AND BOOKS

Lynn D. Wardle, *Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions* 12 JOURNAL OF LAW & FAMILY STUDIES 315 (2010). Proposing a rule for accommodating conflicts between religious liberty and marriage laws.