

# Marriage Law Digest

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## OCTOBER 2009 CASE SUMMARIES

William C. Duncan, Editor

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### KULSTAD V. MANIACI

2009 MT 326

Supreme Court of Montana

October 6, 2009

<http://fnweb1.isd.doa.state.mt.us/idmws/docContent.dll?Library=CISDOCSVR01^doaisd510&ID=003819572>

On breakup of a relationship, the former partner of children's adoptive mother sought a parental interest in the children. The trial court granted that interest and ordered preparation of a "parenting plan."

The supreme court distinguished *Troxel v. Granville* because the relevant Montana law "provides that a party first must establish a child-parent relationship" and parental wishes are given "consideration." The court said the mother acted in a way that showed she did not consider her parent/child relationship exclusive of her partner acting as a parent. The court said the partner could have been acting in loco parentis because that status does not require the legal parent to step aside in favor of the person alleged to have that status. The court said there was also adequate evidence to support the trial court finding that a parent-child relationship existed between the partner and the children.

The court also concluded that equitable principles allowed the court to divide the property of the couple as would take place with divorcing spouses.

One justice concurred and said: "Lesbians and gay Montanans must not be forced to fight to marry, to raise their children, and to live with the same dignity that is accorded heterosexuals. That lesbian and gay people

still must fight for their fundamental rights is antithetical to the core values of Article II and speaks, in unfortunate clarity, of a prevalent societal cancer grounded in bigotry and hate.”

Another justice dissented, arguing that the majority’s decision would “open a Pandora’s Box of potential attacks upon the right of fit and capable parents to raise their own children.”

**DOE V. REED**  
**No. 09-35818**

**U.S. Court of Appeals, Ninth Circuit**  
**October 22, 2009**

<http://www.ca9.uscourts.gov/datastore/opinions/2009/10/22/0935818.pdf>

Proponents of a referendum on Washington’s civil unions law sought an injunction to prevent public disclosure of the petition signers’ names and addresses to groups that wanted to make those names available to facilitate confrontations with signers. The District Court granted the injunction.

The court said that since the signatures are gathered publicly, the state does not promise confidentiality to signers, and since both sides can view the signature verification process; and because the court believed the government has an interest in “preserving the integrity of the election by promoting government transparency and accountability” and in “providing Washington voters with information about who supports placing a referendum on the ballot.”

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**RECENT LAW REVIEW ARTICLES AND BOOKS**

Adrienne D. Davis, *The Game of Love: Polygamy, Default Rules and Bargaining for Equality*, WASHINGTON UNIVERSITY SCHOOL OF LAW WORKING PAPER No. 09-09-1, September 30, 2009 at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1480906](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480906). Argues that regulating polygamy might be possible by borrowing concepts from commercial partnership law.

Joseph F. Morrissey, *Taking Lochner Out of the Closet or Liberty of Contract as a Basis for Gay Rights*, October 5, 2009 at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1483280](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483280). Argues that an older concept of substantive due process would support a “presumption that restrictions denying individuals the liberty to pursue and have a family should be evaluated and, most likely, be found unconstitutional.”

Ian C. Bartrum, *Same-Sex Marriage in the Heartland: The Case for Legislative Minimalism in Crafting Religious Exemptions* 108 MICHIGAN LAW REVIEW FIRST IMPRESSIONS \_\_ (2009). Argues that religious exemptions to same-sex marriage laws should be very narrow so that the exact contours of religious liberty can be determined by the courts rather than the legislature.

Zvi H. Triger, *The Gendered Racial Formation: Foreign Men, “Our” Women, and the Law* 30 WOMEN’S RIGHTS LAW REPORTER 1 (2009). “Patriarchy led to the development of a cultural taboo on local women marrying foreign men while ignoring the case of men marrying foreign women.”

Martin Guggenheim, *Texas Polygamy and Child Welfare* 46 HOUSTON LAW REVIEW 101 (2009). Argues that the raid on the polygamist communities in Texas threaten to shift child welfare concerns toward adult misbehavior and away from child endangerment.

Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom* GWU LEGAL STUDIES RESEARCH PAPER No., 478 at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1492168#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1492168#). Describes categories of religious liberty conflicts likely to accompany redefinition of marriage and suggests that religious groups begin to seek accommodation in laws redefining marriage rather than seeking to prevent redefinition outright.

Adam Candeub & Mae Kuykendall, *E-Marriage: Breaking the Marriage Monopoly*, October 20, 2009 at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1491704#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491704#). Advocated allowing couples to marry online and to choose the state law that will apply to their marriage.

48-20 in Assembly; 30-3 in Senate; 58-17 Assembly concurs; signed by Governor October 11, 2009. Would require all advertisements soliciting for egg donors to include "in a clear and conspicuous manner," the notice: "Egg donation involves a screening process. Not all potential egg donors are selected. Not all selected egg donors receive the monetary amounts or compensation advertised. As with any medical procedure, there may be risks associated with human egg donation. Before an egg donor agrees to begin the egg donation process, and signs a legally binding contract, she is required to receive specific information on the known risks of egg donation. Consultation with your doctor prior to entering into a donor contract is advised."

### NEWS STORIES

Caroline Overington, *Gay Men Seek Access to Friend's Daughter Through Family Court* THE AUSTRALIAN, October 15, 2009 at <http://www.theaustralian.news.com.au/story/0,25197,26212098-601,00.html>. Reporting that a family court in Australia has given two men (who are not related to the child) the ability to prevent a child's mother from leaving the area so they can continue a relationship with the child.

Kristin M. Hall, *Proxy Wedding Means Marine's Widow, Baby Unwelcome* KNOXNEWS.COM, September 17, 2009 at <http://www.knoxnews.com/news/2009/sep/17/proxy-wedding-means-marines-widow-baby-unwelcome/>. Reporting that a Japanese woman who had married a Marine by proxy after she'd become pregnant with his child has been denied permanent residency in the United States because the marriage was not consummated as required by U.S. law.

### RECENT LEGISLATION

California 2009 Statutes Chapter 523 (Assembly Bill 1317) at [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_1301-1350/ab\\_1317\\_bill\\_20091011\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1301-1350/ab_1317_bill_20091011_chaptered.pdf):