

Marriage Law Digest

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SEPTEMBER 2010 CASE SUMMARIES

William C. Duncan, Editor

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CATHOLIC CARE (DIOCESE OF LEEDS) APPLICATION

**Charity Commission for England and Wales
July 21, 2010**

<http://www.charitycommission.gov.uk/Librar y/about us/catholic care.pdf>

Catholic Care sought to amend its charter to make clear that it would "only provide assistance to persons seeking to act as adoptive parents if they are heterosexuals and such services to heterosexuals shall only be provided in accordance with the tenets of the Church." The Charity Commission refused to allow the change.

The Commission found the "rights of same sex couples to be considered as prospective parents in adoption and not to be discriminated against in their wish to do so fall within Article 8 of the European Convention, the right to respect for private and family life." So, the Commission said it should decide "whether limiting the adoption service to prospective parents who are heterosexual is a proportionate means of achieving the legitimate aim of providing suitable adoptive parents for a significant number of children who would otherwise go un-provided for." The commission believed that the prospective parents Charity Care might help could be served by other agencies and that sometimes children should be placed with a same-sex couple so "for the charity to exclude such couples from its adoption process would prima facie mean that the 'door' was not being opened as widely as possible 'in the best interests of the child.'" The commission noted European Court of Human Rights precedents establish "that

discrimination on the grounds of sexual orientation ‘cannot be tolerated’ unless particularly weighty and convincing reasons exist.” The commission believed that the interests of children required consideration of same-sex couples as prospective parents and the existence of other routes to adoption for these couples did not justify “discrimination against such persons” since sexual orientation discrimination “is in itself generally unacceptable to the community as well as to the individuals directly affected.” The commission also decided that the religious nature of the Charity’s objection to placement with same-sex couples and the fact that it would lose support from donors are not relevant.

**IN THE MATTER OF THE MARRIAGE OF
J.B. & H.B.**

No. 05-09-01170-CV

Texas Court of Appeals, Fifth District

August 31, 2010

<http://www.5thcoa.courts.state.tx.us/files/05/cent/091170F.PDF>

A same-sex couple married in Massachusetts sought a divorce in Texas. The trial court ruled that it had jurisdiction to issue the divorce.

The appeals court Texas courts do not have jurisdiction to grant divorces to same-sex couples married in other states. Because if there is no valid marriage, there can be no divorce. The court noted, however, that the couple can get a declaration that the marriage is void. In response to the federal

constitutional claims of the plaintiffs, the court said that real differences in the classes affected by the marriage laws justified the laws: “The persons singled out and favored by Texas’s marriage laws, namely opposite-sex couples, have such a distinguishing and relevant characteristic: the natural ability to procreate.” The court said the key right to marry case, *Loving v. Virginia* (invalidating an interracial marriage ban), “involved a marriage between a man and woman.” The court also held “the purported ‘right to marry a person of the same sex’” requires first “asserting that marriage includes the union of two persons of the same sex” and concludes: “A fatal flaw in this position is that it assumes the truth of the proposition to be proved.” To the claim that same-sex marriage is rooted in the nation’s history and tradition, the court responded, “Plainly, it is not.” The court also said the state had legitimate interests in its definition of marriage, such as “promoting the raising of children in the optimal familial setting”; “to afford unique legal recognition to that particular social unit in the form of opposite-sex marriage”; “[t]he legislature could reasonably conclude that the institution of civil marriage as it has existed in this country from the beginning has successfully provided this desirable social structure and should be preserved”; “[t]he state also could have rationally concluded that children are benefited by being exposed to and influenced by the beneficial and distinguishing attributes a man and a woman individually and collectively contribute to the relationship.” The court concluded that Texas’ marriage law does not “violate the Equal Protection Clause of the Fourteenth Amendment, a provision never before construed as a charter for restructuring the traditional institution of marriage by judicial legislation.”

**ROBERTSON V. GOERTZEN
Files 17-09R & 18-09R**

**Northwest Territories Human Rights
Adjudication Panel**

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September 5, 2010

<http://hrap.nt.ca/paneldecisions/documents/Robertsondecisionsignedanddated.doc>

A landlord ended a lease with a same-sex couple because he believed this was his religious duty. The court concluded the landlord had discriminated on the basis of sexual orientation, did nothing to accommodate the renters, and that there was no justification for his actions since the law ensures “certain protected individuals and groups, including those who have a sexual orientation different than some other people, are not to be harmed by the exercise of religious freedom.” The court found no mitigating factors because it had not been presented with “evidence that God’s word included ignoring his legal obligation to treat other people—even people with different beliefs and different lifestyle choices than his own—with respect.” The court levied a \$5,000 for “injury to dignity, feelings and self-respect,” a \$1,500 fine for punitive damages, and \$400 for lost wages.

**IN RE: MATTER OF ADOPTION OF
X.X.G. & N.R.G.**

No. 3D08-3044

Florida Third District Court of Appeal

September 22, 2010

<http://www.3dca.flcourts.org/opinions/3D08-3044.pdf>

In a petition to adopt children by a gay man, the trial court ruled that Florida’s law prohibiting adoption by homosexuals was unconstitutional.

The appeals court noted the parties and trial court agreed to application of “rational basis” analysis and that the parties had stipulated “that gay people and heterosexuals make equally good parents.” The court reviewed the expert testimony offered and concluded that the witnesses for the petitioner were more convincing than those for the state. The court specifically rejected the idea that

placement with homosexual persons would subject children to “societal stigma” because the state “already allows placement of children in foster care and guardianships with homosexual parents.”

OBST V. GERMANY

Application No. 425/03

European Court of Human Rights

September 23, 2010

<http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=59753112&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=84963&highlight=>

An employee of the LDS Church was fired after he admitted to an extramarital affair. He challenged his firing in Labor Court but the court said Labor Courts could be bound by a religious employers’ “religious and moral principles” as long as they “did not conflict with the fundamental legal principles of the legal order of the state.” Here, “the requirements of the Mormon Church regarding marital fidelity did not conflict” with these principles since “marriage was also of pre-eminent importance under German Basic Law.” Also, the firing was necessary for the “Church to keep its credibility.”

The court of human rights concluded the Labor Court had appropriately balanced the interests involved. The court held that the lower court decision was reasonable because the employee’s long experience in the church was such that “he had been or should have been aware when signing the employment contract of the importance of marital fidelity for his employer.”

SCHUTH V. GERMANY

Application No. 1620/03

European Court of Human Rights

September 23, 2010

<http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=59753112&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=84963&highlight=>

A Catholic church organist was fired after his parish learned he was going to have a child with another woman. The Labor Court held that “the parish could not continue employing him as an organist without losing all credibility.”

The court of human rights found that since the labor court had “made no mention” of the employee’s “de facto family life or of the legal protection afforded to it,” the “interests of the Church employer had thus not been balanced against [his] right to respect for his private and family life.” The court said the employment contract “could not be interpreted as an unequivocal undertaking to live a life of abstinence in the event of separation or divorce.” Thus, the employment decision had violated Article 8 of the European Convention and the court ordered the parties to agree to a settlement.

RECENT LAW REVIEW ARTICLES AND BOOKS

Jeff Redding, *Queer/Religious Friendship in the Obama Era* 33 WASHINGTON UNIVERSITY JOURNAL OF LAW & PUBLIC POLICY 211 (2010). Argues that “queer,” as opposed to gay and lesbian, activists should pursue alliances with religious people and uses the Proposition 8 case as an illustration.

Helen M. Alvare, *Communion or Suspicion: Which Way for Woman and Man?* 8 AVE MARIA LAW REVIEW 167 (2009). Compares models of male-female relationships of communion and mutual giving on the one hand and suspicion on the other and provides examples of legal treatment of both.

NEWS STORIES

Paul Thompson, *Wife Wins Suit Against Woman Who Broke Up Her Marriage* DAILY TELEGRAPH, September 9, 2010 at http://www.vancouversun.com/story_print.html?id=3499062&sponsor=. Reporting a \$5.8 million damage award to a woman who sued the woman who had seduced her husband.

LEGISLATION

New York Senate Bill 1523-A/Assembly Bill 5652-B (signed by governor September 18, 2010). Provides for joint adoptions by unmarried couples and replaced the term “husband and wife” in the adoption law with “married couple.”