NJ FAMILY LEGAL BLOG
PERTINENT INFORMATION AS IT RELATES TO NEW JERSEY FAMILY LAW
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NJ Family Legal Blog

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FLORIDA CIRCUIT COURT FINDS GAY ADOPTION BAN UNCONSTITUTIONAL

Declaring unconstitutional a 30-year old state law prohibiting gay men and women from adopting children in Florida, a Circuit Court there recently concluded that Florida should no longer be the only state with a blanket ban of this kind. **In the Matter of the Adoption of John Doe and James Doe** came before the Court on a petition for adoption of two foster children by a gay man who had raised the children since 2004.

The second Florida Court this year to declare the law unconstitutional, the Court declared that the law violated both the petitioner's and the children's equal protection rights guaranteed by the Florida Constitution without setting forth a rational basis. The Court also declared that the law unlawfully prevented a child's right to permanency as provided by federal and state law pursuant to the Adoption and Safe Families Act of 1997. In so doing, the Court rejected the State's arguments that the law served the best interests of children because homosexuals allegedly experienced higher levels of stressors detrimental to children; that such adoptions did not minimize children's social stigmatization; and that the law protected a child's societal moral interests.

Notably, Florida Attorney General Bill McCollum stated shortly after the decision's release that it would be appealed, on behalf of the Department of Children & Families, to the Third District Court of Appeal in Miami.

Relatedly, nearly 57% of voters in Arkansas just approved Proposed Initiative Act No. 1, which strictly bans people who are "cohabitating outside a valid marriage" from serving as foster parents or adopting children. Despite its non-sex specific language, the law effectively achieves that which was declared unconstitutional in Florida – namely, banning gay people from acting as foster parents or adopting children despite the need for such parenting of children in the state system. This new law is similar in nature to one in Utah, as well as a similar one in Mississippi that bans gay couples, but not single gay people from adopting children.

In New Jersey, the Appellate Division has held that adoptions by gay individuals can be in a child's best interests. In **Adoption of Two Children by H.N.R.**, 285 N.J. Super. 1 (App. Div. 1995), the Appellate Division expressly held that New Jersey's adoption laws permit the adoption of children by the same-sex cohabitating partner of their natural mother without terminating the mother's parental rights and that such adoption was in the children's best interest in the matter before it. In so holding, the Appellate Division noted that the adoption statute is to be liberally construed to promote the best interest of children pursuant to N.J.S.A. 9:3-37 and that the statute is silent as to joint adoption by unmarried persons or adoption by an unmarried cohabitant of his or her partner's child

with the partner's consent. It also noted that the couple, who had been in a committed relationship for more than ten years, and the children at issue functioned together as a family and that it would be against the children's best interests to deny them the legal and financial benefits that a legally recognized adoption would provide.

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Montana

J.C. v. Dist. Court, 2008 WL 4648315 (Mont.). TERMINATION OF PARENTAL RIGHTS, IMPROPER PURPOSE

Although aunt and uncle who filed petition to terminate parental rights against incarcerated mother did not have standing to file as custodians, Rule 11 sanctions were not appropriate because they had filed the petition in good faith and desired to ensure child's best interests.

New York

In re Angelica VV., 2008 WL 2609189 (N.Y. App. Div.).

TERMINATION OF PARENTAL RIGHTS, REPRESENTATION

Failure of mother's counsel to call her siblings as witnesses in termination hearing did not deprive mother of meaningful representation where termination was based on mother's refusal to address substance abuse issues and mother testified that she did not have a substance abuse problem but that she smoked marijuana on a weekly basis.

North Carolina

In re N.A.L., 666 S.E.2d 768 (N.C. Ct. App. 2008). TERMINATION OF PARENTAL RIGHTS, REPRESENTATION

Trial court should have considered appointing a guardian ad litem for mother in termination of parental rights proceeding where allegations in the petition showed the mother had a personality disorder and significantly below average intellectual functioning; state statute requires the court on a party's or its own motion to make such a determination when there is a reasonable basis to believe the parent has a diminished capacity and cannot adequately act in her own interest.

Ohio

In re B.G., 2008 WL 4409464 (Ohio Ct. App.). CUSTODY, BEST INTERESTS

Trial court properly found it was in child's best interests to be placed with father in proceeding on parents' competing custody petitions; although court mistakenly purported to rely on best interest criteria in statutory section regarding termination of parental rights rather than section on legal custody, it did consider many of the factors in the legal custody section in reaching its decision.

Oregon

In re R.J.T., 194 P.3d 845 (Or. Ct. App. 2008). DEPENDENCY, CONTINUANCES

Trial court was not required to deny the agency's request for a continuance and order it to file for termination because the child had been in custody 15 out of 22 months; mother's recent move to other end of the state to leave an abusive relationship, short period of sobriety, increased participation in services, and agency's request to continue working toward reunification provided a compelling reason and exception to the requirement that the agency file a petition.

Pennsylvania

Staub v. Staub, 2008 WL 4635641 (Pa. Super. Ct.). CUSTODY, EDUCATION

In custody case involving parents who shared custody and could not agree whether children should be home schooled, trial court properly applied case-by-case best interests analysis in determining the issue; father did not provide evidence that public schooling was always in children's best interests such that a bright line rule favoring public education should be established.

Washington

Costanich v. Dep't of Social and Health Servs., 194 P.3d 988 (Wash. 2008). FOSTER PARENTS, ATTORNEY FEES

When foster parent successfully appeals decision to revoke her foster care license, state statute allows award of attorney fees to foster parent for prevailing against agency action with a cap of $25,000 for each level of judicial review not a cumulative cap; although the statute is ambiguous, use of singular 'a' court rather than 'the' court shows legislative intent to allow each court to make an award, not the highest court in the process.

IN THE TRIAL COURTS

Florida Trial Court Strikes Down State's Law Blocking Adoptions Based on Sexual Orientation

A Florida circuit court has ruled Florida's statute banning homosexuals from adopting children is unconstitutional. The court ruled the statute violates the equal protection rights of children who are awaiting permanent homes and of prospective adoptive parents who are homosexual. It further held the statute denies children's right to permanency as guaranteed by the federal Adoption and Safe Families Act of 1997. *In re Doe,* 2008 WL 5006172 (Fla. Cir. Ct.).

In the underlying case, a man who had served as the foster parent for two brothers for four years petitioned to adopt them after their parents' rights were terminated. His petition was denied because of his sexual orientation. He then sought a legal determination that the statute banning homosexual adoptions be declared unconstitutional.

The court heard extensive expert testimony and reviewed the growing body of research and professional policies showing no differences in parenting quality by homosexuals or in the adjustment and quality of life of their children. The court also considered evidence showing the petitioner's parenting was exceptional and that the children thrived in his care and had bonded with him and his partner.

In finding the statute unconstitutional, the court found the statute was not rationally related to any legitimate government interests. The state argued the statute promoted the well-being of children, minimized social stigma children may experience when placed in dual-gender homes, and promoted public morality. However, the court found all of these interests lacked support.

In finding the statute violated the child's right to permanency, the court cited public policies and federal and state laws favoring permanency for children in state custody. It found Florida's blanket exclusion of prospective adoptive parents based on their sexual orientation deprives children of permanent placements with suitable caregivers. In this case, it denied two children the opportunity to be adopted by a caregiver with whom they were strongly bonded and denied them the benefits of adoption. (*Editor's Note:* An appeal is expected in the case. Also see last month's *CLP* for an article offering advocacy strategies to support foster and adoptive placements with same-gender parents.)

Marriage Law Digest

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NOVEMBER 2008 CASE SUMMARIES

William C. Duncan, Editor

CONTENTS

1) CUNNINGHAM V. TARDIFF, 2008 WL 4779641, Superior Court of Connecticut, October 14, 2008.

2) IN THE MATTER OF THE ADOPTION OF DOE & DOE, Case No. Redacted, Florida Circuit Court, Eleventh Judicial Circuit, November 25, 2008.

3) Recent Law Review Articles.

CUNNINGHAM V. TARDIFF
2008 WL 4779641
Superior Court of Connecticut
October 14, 2008

A same-sex couple married in Canada and living in Texas sued a Connecticut couple with whom they'd entered into a surrogacy contract. The men sought a declaration of paternity while the surrogate disclaimed any natural rights including having her name on the birth certificate.

The court said that previous cases suggest Connecticut public policy favors the recognition of surrogacy contracts. The court said the state assisted reproduction statutes "in conjunction with the plaintiff's legally recognized marriage [the court here cites last month's Connecticut case on same-sex marriage] lend additional support" to placing the men's names on the child's birth certificate. In the wake of the state's redefinition of marriage in Kerrigan, "any children born as a result of these procedures acquire in all respects the states of a legitimate child." Thus, the court ordered a replacement birth certificate with the names of the men who had contracted with a surrogate.

IN THE MATTER OF THE ADOPTION OF DOE & DOE
Case No. Redacted
Florida Circuit Court, Eleventh Judicial Circuit
November 25, 2008
http://www.aclu.org/images/asset_upload_file16_37906.pdf

A man and his partner sought to adopt two foster children and challenged Florida law prohibiting adoption by homosexual persons.

The court held that "public policy favors permanent family life rather than a mere indefinite length of protective custody." The court argued the current adoption law "violates the Children's rights by burdening liberty interests by unduly restraining them in state custody on one hand and simultaneously operating to deny them a permanent adoptive placement that is in their best interests on the other." The court also held "the blanket exclusion of gay applicants defeats Florida's goal of providing dependent children of a family through adoption" and "causes some children to be deprived of a permanent placement with a family that is best suited to meet their needs." The court said that no governmental interest justifies the adoption prohibition because evidence "proves" that "homosexuals are no more susceptible to mental health or psychological disorders, substance or alcohol abuse or relationship instability than their heterosexual counterparts"; professional organizations agree "there is a well established and accepted consensus in the field that there is no optimal gender combination of parents"; and "public morality per se, disconnected from any separate legitimate interest" cannot "justify unequal treatment." In regards to this last point, the court adds that "[e]llecting to parent and assume full responsibility for a child not one's own is one of the most noble decisions made in a lifetime; it is respected by many, considered by some, made by few and approved for fewer still."

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RECENT LAW REVIEW ARTICLES

Cort I. Walker, *The Defense of Marriage Act as an Efficacious Expression of Public Policy: Towards a Resolution of Miller v. Jenkins and the Emerging Conflict Between States Over Same-Sex Parenting* 20 REGENT UNIVERSITY LAW REVIEW 363 (2007-2008). Argues that DOMA protects state public policies in regards to parenting as well as marriage.

Jason N.W. Plowman, *When Second Parent Adoption is the Second Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality* 11 SCHOLAR: ST. MARY'S LAW REVIEW ON MINORITY ISSUES 57 (2008). Argues that in the absence of same-sex marriage, state legislatures should enact laws allowing for joint adoption by same-sex couples.

Brenda Cossman, *Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Toward the Private* 71 LAW & CONTEMPORARY PROBLEMS 153 (2008). Argues that traditional conflicts law may not adequately address the concerns of same-sex couples who move from jurisdictions where they may marry to state where such marriages are not recognized.

Perry Dane, *A Holy Secular Institution* 58 EMORY LAW JOURNAL __ (forthcoming) at http://ssrn.com/abstract=1293946. Argues that secular and religious aspects of marriage are intertwined and that "believers are legitimate stakeholders in any debate over the meaning of civil marriage."

John Witte Jr. & Joel A. Nichols, *More Than a Mere Contract: Marriage as a Contract and Covenant in Law and Theology* 5 UNIVERSITY OF ST. THOMAS LAW JOURNAL 595 (2008). Details the history of the common law notion that marriage is more than a contract.