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Marriage Rights; Homosexuals and Transsexuals; B. v. B.,

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was garnisheed; the garnishment was invalidated on the basis of *Fuentes* and *Sniadach* in that there was no opportunity for early hearing and no participation in the obtaining of an affidavit by a judicial officer. The *Mitchell* case was used as a buttress for the *Fuentes* and *Snaidach* holdings, upon which the decision rested. 43 U.S.L.W. at 4194. Justice Stewart concurred at 43 U.S.L.W. 4194, celebrating the reincarnation of *Fuentes*. Also concurring was Justice Powell, 43 U.S.L.W. at 4194-4195, who stated that prejudgment remedy statutes should contain (1) posting of adequate security bond by the creditor, (2) establishment before a neutral officer of a factual basis for resorting to prejudgment seizure, (3) prompt post-garnishment judicial hearing, and (4) provisions for the debtor to post security bond for return of the goods seized.

However, a bitter dissent by Justices Blackmun and Rehnquist, 43 U.S.L.W. at 4196, complains that this matter has been before the Court three times in the past three years and no adequate standard has been set. The Justices contend that *Fuentes* was decided by a "bob-tailed court" and should have been reargued, rather than leaving the apparent standard of a case-by-case determination. Justice Burger also objected, 43 U.S.L.W. at 4198, to the case-by-case determination.

CONSTITUTIONAL LAW

Marriage Rights · Homosexuals and Transsexuals

B. v. B., 78 Misc. 2d 112, 355 N.Y.S.2d 712 (1974)

WHAT IS A MARRIAGE? Although there are several definitions,[1] they all contain one common element: the union of one man and one woman. However, if a particular state had no statute which specifically required that marriage be between a man and a woman would the courts uphold a marriage between members of the same sex? The New York Supreme Court, in *B. v. B.*,[2] answered that question in the negative. In that case the wife brought an action for annulment on the ground that her husband was a female,[3] and the husband attempted to amend his answer and counterclaim for a divorce on the ground of abandonment.[4] The court

1 "... the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex." BLACK'S LAW DICTIONARY 1123 (4th rev. ed. 1968); "The institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 518 (1966).

2 78 Misc. 2d 112, 335 N.Y.S.2d 712 (Sup. Ct. 1974).

3 *Id.*

4 *Id.*

ruled that the husband's counterclaim must fail,[5] as there was in fact no valid marriage between the two parties.[6]

An examination of the record shows that the husband is a transsexual[7] who underwent a sexchange operation to change into the body of a male.[8] The rationale of the court was that since the husband could not function as a male for the purpose of fulfilling the marriage relationship,[9] no valid marriage was entered into. This holding was based in part on the same court's earlier decision in *Anonymous v. Anonymous*,[10] where it was held that marriage between males was a nullity, nothwithstanding the fact that the "husband" believed the "wife" was a female at the time of the ceremony, and notwithstanding that she may subsequently have become one.[11] Yet there is no New York statutory law or case authority that defines male and female.[12] Also, while there is no New York law which expressly prohibits marriage between people of the same sex,[13] there is case law which states that marriage is a contract between a man and a woman.[14] It should be noted at this point that the *B. v. B.* decision was technically a denial of an amendment to the "husband's" answer, and a denial of the wife's crosss motion for a physical examination of the "husband."[15] Yet, although the decision was grounded on a rule of procedure, the language used by the court to decide the procedural question is significant, since the court could have just as easily decided the procedural issue without going into its lengthy discussion about marriage. Hence, the main thrust of the holding was that two people could not legally be married unless they were of the opposite sex, even if they desired to do so. Is such a holding proper when examined in the light of constitutional considerations?

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[5] *Id.* at 116, 335 N.Y.S.2d at 716. *See* N.Y. CIV. PRAC. 3025 § 15(b) (McKinney 1974). When matter to be added by the amended pleading is palpably insufficient or immaterial, the court need not employ its discretion to grant the amendment and the leave should be denied; *accord*, Norton v. Norton, 12 App. Div. 2d 1003, 211 N.Y.S.2d 458 (1961), where the proposed counterclaim attacking the validity of the annulment of a former marriage was palpably insufficient.

[6] 78 Misc. 2d at 116, 355 N.Y.S.2d at 716.

[7] *See* W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 148 (1973) [hereinafter cited as BARNETT] "Transsexuals are people who somehow learned a gender identity in complete contradiction to their actual and apparent biological gender." *See also* H. BENJAMIN, THE TRANSSEXUAL PHENOMENON (1966); R. J. STOLLER, SEX AND GENDER (1968); G. TURTLE, OVER THE SEX BORDER (1963); J. WALINDER, TRANSSEXUALISM (1967).

[8] 78 Misc. 2d at 117, 355 N.Y.S.2d at 717.

[9] The court found that the husband does not have a normal penis and in fact does not have a penis which would enable the husband to perform as a man for the purpose of procreation.

[10] 67 Misc. 2d 982, 325 N.Y.S.2d 499 (Sup. Ct. 1971).

[11] *Id.* at 984, 325 N.Y.S.2d at 500.

[12] B. v. B., 78 Misc. 2d 112, 116, 355 N.Y.S.2d 712, 716 (Sup. Ct. 1974).

[13] *Id. See* N.Y. DOM. REL. §§ 1-7 (McKinney 1964).

[14] *E.g.*, Morris v. Morris, 31 Misc. 2d 548, 220 N.Y.S.2d 590 (1961).

[15] 78 Misc. 2d at 112, 355 N.Y.S.2d at 712.

The concept of marriage as a bond between one man and one woman was strongly fashioned by the early Church in an age which knew nothing of modern behavioral science.[16] It was believed that God made man and woman in order to procreate,[17] and that each was endowed with an instinctual attraction to members of the opposite sex.[18] Accordingly, all laws and restrictions[19] on marriage have presupposed that the parties to a marriage would be of the opposite sex. This being the case, people of the same sex or transsexuals who desire to marry, and who are prohibited from doing so, may be denied equal protection under these laws.[20]

The courts have laid down two major tests when applying the equal protection clause: the rational basis test,[21] and the compelling state interest test.[22] The former test, which is the traditional one, requires that when the law treats people differently, this distinction must rest on some rational relationship to a legitimate state purpose.[23] The compelling state interest test is usually applied where there has been an infringement of a fundamental interest by a rule, policy, or statute.[24] Only where there is a compelling state interest shown for the classification or distinction will the courts allow classes of people to be treated differently.[25] No rational

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16 BARNETT, *supra* note 7, at 138.

17 Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (marriage as the union of one man and one woman is as old as Genesis).

18 BARNETT, *supra* note 7, at 138.

19 *See* 29 OHIO ST. L.J. 358, 369 (1968), wherein it is stated:

> Restrictions imposed by law on the freedom to marry fall into the following categories: 1) restrictions based on affinity or consanguinity precluding whole classes of persons from intermarrying; 2) restrictions based on the presumed incompetency of one of the parties to a marriage such as the lack of mental competence; 3) restrictions based on the opposition of the parents of minor children; 4) restrictions based on a policy requiring a mandatory waiting period of six months or a year before a divorced person may remarry.

All these restrictions have policy reasons behind them, yet a restriction based on the sex of the parties is not even mentioned nor is a policy reason for including such a restriction mentioned.

20 U.S. CONST. amend. XIV, § 1, "... [nor shall any State] deny to any person within its jurisdiction the equal protection of the laws." *Compare with* N.Y. CONST. art. 1, § 11, "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."

21 *See e.g.*, San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973).

22 Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

23 San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973). *See also* Harper v. Mayor and City Council of Baltimore, 359 F. Supp. 1187 (D. Md. 1973).

24 Dunn v. Blumstein, 405 U.S. 330, 333 (1972).

25 *Id.* at 339. When the court decides that a classification is a "suspect" classification, a compelling state interest must be shown by the state in order to uphold the discriminatory state action. Sex is not a suspect classification, although four members of the Supreme Court have declared it so. Frontiero v. Richardson, 411 U.S. 677 (1973). Other classifications which the courts have labeled as suspect are: race, Loving v. Virginia, 388 U.S. 1 (1967); alienage, Graham v. Richardson, 403 U.S. 365 (1971), and national origin, Oyama v. California, 332 U.S. 633 (1948). *See also* Comment, *Toward Sexual Equality? An Analysis of Frontiero v. Richardson*, 59 IA. L. REV. 377 (1973).

basis or compelling state interest was shown in *B. v. B.*[26] On the contrary, the only reason given for this seemingly invidious discrimination was that marriage has always been thought of as between a man and a woman.[27] This decision, then, would appear to run contrary to the equal protection guarantee, and the court's contention that they were only upholding the status quo would fail in the light of *Williams v. Illinois*,[28] which case said "... Constitutional imperatives of the equal protection clause must have priority over the comfortable convenience of the status quo."[29]

In *Baker v. Nelson*[30] the equal protection argument was applied in an effort to obtain a marriage license by two males in Minnesota.[31] The court held that since the statutes[32] governing marriage do not authorize marriages between persons of the same sex, such marriages are prohibited.[33] They went on to say that the equal protection clause was not violated because one of the objectives of marriage is to procreate and raise children;[34] therefore there was a rational basis for the discrimination. Again, is there such a rational basis for the procreation of children that the state will not permit persons of the same sex or transsexuals to marry?

The *Baker* court did not show why the ability (or inability) to reproduce offspring should be one of the essential characteristics in determining the validity of a marriage. Traditionally, large families were common, since children were needed to work and help support the family. Today these economic conditions have changed, yet according to *Baker*, this ancient concept of the family has not changed with the times.

Another argument not mentioned in the *Baker* decision is that sterility, the inability to bear children, does not affect the validity of the marriage if the partners are capable of performing sexual intercourse.[35] This lends support to the argument that the focal point of the validity of a marriage should be something other than the ability to procreate.

In *Griswold v. Connecticut*[36] the Supreme Court ruled that the first amendment has a penumbra which shades private activities from the glare

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26 B. v. B., 78 Misc. 2d 112, 355 N.Y.S.2d 712 (1974).

27 *Id.* at 116, 355 N.Y.S.2d at 716.

28 399 U.S. 235 (1970).

29 *Id.* at 245.

30 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

31 *Id.*

32 MINN. STAT. ANN. §§ 517.01-517.08 (1969).

33 291 Minn. at 311, 191 N.W.2d at 186. *See generally*, Comment, *Homosexuality and the Law—A Right to be Different*, 38 ALBANY L. REV. 84 (1973); Comment, *The Homosexual's Legal Dilemma*, 27 ARK. L. REV. 687 (1973).

34 291 Minn. at 312, 191 N.W.2d at 186.

35 Stepanek v. Stepanek, 193 Cal. App. 2d 760, 14 Cal. Rptr. 793 (1961); T. v. M., 100 N.J. Super. 530, 542 A.2d 670 (1968); *cf.* Marks v. Marks, 191 Misc. 448, 77 N.Y.S.2d 269 (Sup. Ct. 1948). *But cf.* Godfrey v. Shatwell, 38 N.J. Super. 501, 119 A.2d 479 (1955).

36 381 U.S. 479 (1965).

of governmental intrusion.[37] In so doing, it overruled the Connecticut Supreme Court,[38] which had held that two Connecticut statutes prohibiting the use of contraceptive devices[39] were constitutional. The Supreme Court also expounded a theory of marital privacy.[40] Under this theory the institution of marriage is protected by the Constitution from governmental invasion since it is a sacred association based on the privacy of the parties.[41] It would seem that the New York court in *B. v. B.*[42] has ignored this doctrine by refusing to allow two people who are not of the opposite sex to have a valid marriage. This result appears to be an even greater restriction on the first amendment rights of marital privacy than the Connecticut statute overturned in *Griswold*. Yet, the one case that considered a similar problem, *Jones v. Hallahan*,[43] held that there was no violation of constitutional rights in denying two females a marriage license.[44] The ruling continued by stating that no marriage license could be issued to the appellants, since what the appellants proposed was not a marriage.[45]

The *B. v. B.* decision might have been decided differently had the proposed Equal Rights Amendment been in effect.[46] This proposed amendment is an attempt by Congress to treat the sexes equally under the

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[37] *Id.* at 483.

[38] State v. Griswold, 151 Conn. 554, 200 A.2d 479 (1964).

[39] The Connecticut statutes in question were CONN. GEN. STAT. REV. § 53-32 (1960), "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined...." and CONN. GEN. STAT. REV. § 54-196 (1960), "Any person who assists, abets, counsels, causes, hires, or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." The director of a Planned Parenthood League was convicted of violating these statutes when he gave information and advice about the means and methods of preventing conception to a married couple.

[40] 381 U.S. at 486.

[41] *Id; see* Mapp v. Ohio, 367 U.S. 643 (1961). The right of privacy is one of the fundamental rights reserved to the people; Griswold, *The Right to be Let Alone*, 55 NW. U.L. REV. 216 (1960).

[42] 78 Misc. 2d at 117, 355 N.Y.S.2d at 717.

[43] 501 S.W.2d 588 (Ky. App. 1973). Two females were denied a marriage license in Kentucky because of their sex. They asserted that since the Kentucky statutes relating to marriage, KY. REV. STAT. ANN. § 402.02, § 402.210 (1974), do not expressly state that the parties must be of the opposite sex, then they may legally marry. The court ruled that since no qualifications as to the sex of the partners to a marriage were put forth in the statutes, then they would apply common usage and make the parties to a marriage be one man and one woman.

[44] 501 S.W.2d at 588. Besides first amendment rights, the appellants also contended that refusal of the marriage license subjects them to cruel and unusual punishment, U.S. CONST. amend. VIII.

[45] 501 S.W.2d at 590.

[46] U.S. CONST. amend. XXVII [Proposed] "Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex." This was submitted by Congress for ratification on March 22, 1972, and must be ratified by the legislatures of three-fourths of the states. *Compare with* N.Y. CONST. art. I, § 13 [Proposed] "Equality of rights under the law shall not be denied or abridged by the state of New York or any subdivision thereof on account of sex." This is to be referred to the New York legislature of 1975. New York ratified the proposed federal equal rights amendment on May 3, 1972.

laws;[47] therefore if a state only recognizes as valid a marriage between two people of the opposite sex, such may be a form of discrimination based on sex. Pennsylvania, relying on the equal rights provision in its Constitution similar to the proposed federal amendment, has struck down laws which discriminate on the basis of sex. In *Wiegand v. Wiegand*[48] the Pennsylvania court struck down a provision of the Pennsylvania divorce law which gave wives, but not husbands, the right to receive alimony pendente lite and counsel fees. In upholding the supremacy of their constitutional amendment,[49] they stated that to treat individuals or classes of individuals differently on the basis of sex, without having a rational reason to do so, is unconstitutional.[50]

Although there is no real restriction per se upon two people of any sex who wish to live together, the legalization of the living together by the ceremony of marriage does have its advantages. The most practical advantage lies in the area of federal taxes. A married person may save money by filing a joint income tax return with his spouse.[51] Tax savings are also afforded to married individuals under the "gift-splitting" provisions of the federal gift tax.[52] Furthermore, estate tax savings can be realized by application of the "marital deduction" provisions of the federal estate tax.[53] Another advantage is that an association of two people, formally and legally recognized by law and society, gives added security and privacy to both parties of the association.

Sometimes the status quo is deemed by so many people to be the only acceptable way to do or achieve a certain goal that they refuse to look at the consequences or alternatives. The present view of the institution of marriage may be a good example of this. The idea that marriage is to be only between one man and one woman may be too firmly implanted in the minds of the American people to be easily changed. Yet, how can the courts balance this fixed notion about marriage with the interests and rights of two people of the same sex, or transsexuals, who desire to enjoy the associational and legal benefits of marriage? The answer may be to create a separate, legally recognized and approved association which has all the benefits of marriage, but which includes people of the same sex or transsexuals. It seems that since the courts, by their decisions, display a clear reluctance to act, the task of combatting outmoded social ideas in the area of private human relationships may fall on the legislative branch. It is hoped that such action will be soon forthcoming.

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[47] H.R.J. RES. 208, 92 Cong., 1st Sess. (1971); S.J. RES. 8, 92 Cong., 1st Sess. (1971).
[48] 226 Pa. Super. 278, 310 A.2d 426 (1973). The relevant divorce statutes are PA. STAT. ANN. tit. 23, § 11 and § 46 (1955).
[49] PA. CONST. art. 1, § 27; *see* 8 U. AKRON L. REV. 171 (1974).
[50] 226 Pa. Super. 278, 310 A.2d 426 (1973); *cf.* Brown, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).
[51] *Compare* INT. REV. CODE OF 1973, § 1a() *with* § 1(c).
[52] *See* INT. REV. CODE OF 1954, § 2513 and 2523.
[53] *See* INT. REV. CODE OF 1954, § 2056.