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## Rental Denial Is Upheld on Religious Basis

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In a precedent-setting decision with broad ramifications, a state appeals court ruled Wednesday that the constitutionally protected religious rights of a Downey couple would be violated if they were compelled to rent an apartment to an unmarried couple.

The appeals court said that, while landlords John and Agnes Donahue had violated state discrimination laws, they were entitled to an exemption because of their "sincerely held religious belief that fornication and its facilitation are sins."

The Donahues said they are devout Catholics and that if they rented to unmarried couples they would be facilitating out of wedlock sex, which they consider "a mortal sin."

In a 2-1 decision, the court held that the state's "interest in protecting unmarried cohabiting couples from discrimination is not such a paramount and compelling state interest as to outweigh the Donahues' legitimate assertion of their right to the free exercise of religion under the California state Constitution."

The majority opinion went on to say that weighed against the claim that religious freedom was being violated, "marital status discrimination against an unmarried, cohabiting couple simply does not rank very high."

The appeals court overturned a ruling by the California Employment and Fair Housing Commission that the Donahues had violated two state laws in refusing to rent to Verna Terry and Robert Wilder, who were awarded \$7,480 in damages in 1988.

The case had been closely watched by groups advocating conservative family values, as well as by fair housing advocates who feared that a victory by the Donahues could open the door to other forms of discrimination.

Gerald F. Uelmen, dean of the Santa Clara University Law School and a leading expert on the California Constitution, was highly critical of the ruling by the state Court of Appeal in Los Angeles.

"I think the decision is far out, both from the standpoint of Catholic theology and First Amendment jurisprudence," said Uelmen. "I'm a Catholic and I wouldn't think I would be involved in sinful behavior if I complied with a law that says it's none of my business what someone's marital status is when I rent property to them."

Landlord John V. Donahue, 71, said: "We felt we were perfectly within our rights. This thing has dragged on for four years. . . . If it had gone against us, we were prepared to appeal to the state Supreme Court."

Deputy Atty. Gen. Kathleen Mikkelsen said the state is likely to appeal.

Thomas F. Coleman, a lawyer with the Family Diversity Project in Los Angeles, said the case could affect thousands of people. Nearly 8% of the state's residents are unrelated adults living together, according to the most recent census figures. In cities such as Los Angeles, San Diego and San Francisco, the percentages are even higher.

Coleman said the ruling could be felt most severely by gay couples.

"For gay couples there is no legal way to get married," he said. "Therefore, they are locked out by this decision. It is a clear Catch-22."

Representatives of a Washington-based group—Concerned Women of America—that has been supporting challenges similar to the Donahues' could not be reached to comment on the ruling.

The case evolved out of Wilder and Terry's attempt to rent an apartment in the Donahues' five-unit building in Downey in January, 1987.

After seeing a sign advertising the apartment, Terry called Agnes Donahue and asked if the apartment had a garage because her "boyfriend" needed a place for his tools.

According to the appeals court decision, Donahue asked Terry if she was married. Terry said they were not but might do so in the future.

With that, Donahue responded: "Oh, I'm really old-fashioned and I don't approve of that sort of thing. I don't rent apartments to unmarried couples," the opinion stated.

Terry and Wilder filed a complaint with the California Department of Fair Employment and Housing, saying they were "shocked, offended and upset by Donahue's rejection of them." They also said that Donahue's action was particularly upsetting because they already had given notice to their current landlord that they planned to move.

In 1987, the state Fair Employment and Housing Commission ruled that the Donahues had, in fact, violated the state housing laws prohibiting "marital status" discrimination and the Unruh Civil Rights Act, which prohibits arbitrary discrimination.

The commission—which oversees the fair employment and housing department—said it could not rule on the Donahues' religious freedom contention because of a provision of the California Constitution prohibiting state agencies from ruling on constitutional issues.

After the Donahues appealed, a Superior Court judge ordered the commission to reconsider its decision, saying it was not at all clear that the Legislature intended to protect unmarried couples. The commission appealed that decision, leading to Wednesday's ruling.

The commission persuaded the court that the Legislature did intend to include "an unmarried cohabiting couple within the protections" of the fair housing statute. But the appellate panel also decided that the Donahues were entitled to a religious exemption from the anti-discrimination laws.

"The sincerity and depth of the Donahues' religious convictions are unquestioned," wrote Judges Roger W. Boren and Paul Turner in their majority opinion.

The majority opinion said the case was not governed by a 1991 U.S. Supreme Court decision that seems at odds with Wednesday's decision. In that case, the high court ruled that broad statutes that only "incidentally" affect religious practices are constitutional. The issue at the center of that ruling was whether two members of the Native American Church in Oregon could be fired for illegally ingesting peyote during a religious ceremony.

## HOUSING: Rental Denial Upheld by Court

But the appellate judges said that an old California Supreme Court decision allowed the state to provide even greater religious protections than those offered by the federal government. The court said that 1964 decision was still the law in California.

In a vigorous dissent, Judge Margaret M. Grignon criticized the majority for not applying the standard set by the U.S. Supreme Court. Under that standard, she wrote, "the Donahues are clearly not entitled to a religious exemption" from state anti-discrimination laws.

"It is undisputed," she added, "that the state has a compelling state interest in providing its citizens access to housing and employment free from unwarranted discrimination. It is inappropriate for courts to determine on a case-by-case basis that the state has a compelling state interest to prevent certain types of employment and housing discrimination but not others."

Grignon also said that "the burden on religious conduct" from the fair housing law is slight, noting that the law does not prohibit the Donahues from practicing their religion. "They are engaged in secular, commercial conduct performed for profit. . . . The statute does not require the Donahues to aid and abet 'sinners,' it merely requires them to act in a non-discriminatory manner toward all prospective tenants."

Coleman of the Family Diversity Project said he sees a major flaw in the decision. He said the majority of the judges assumed that Terry and Wilder were sexually involved—even though they were never asked the question by the landlord, the housing commission or the court. Therefore, he said, the majority concluded that all cohabiting couples must be sexually involved.

"That is the linchpin of the decision and without that conclusion it falls," Coleman contended, adding that under California law a landlord could not ask a prospective tenant about his sexual relations because that would violate the state's constitutional protection of the right to privacy.