

2016

We'll Always Be Bosom Buddies

Arthur S. Leonard

New York Law School, arthur.leonard@nyls.edu

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_other_pubs

 Part of the [Civil Rights and Discrimination Commons](#), [Law and Gender Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Leonard, Arthur S., "We'll Always Be Bosom Buddies" (2016). *Other Publications*. 182.
https://digitalcommons.nyls.edu/fac_other_pubs/182

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Other Publications by an authorized administrator of DigitalCommons@NYLS.

We'll Always Be Bosom Buddies

Added by **Gay City News** on December 21, 2006.

Saved under **Legal**

Share This Post

BY ARTHUR S. LEONARD | Elderly English sisters living together in their family home and fearing that inheritance taxes might force the survivor to sell if one dies have narrowly lost their claim that this situation violates their basic human rights under the European Convention.

On December 14, a seven-member chamber of the European Court of Human Rights, voting 4-3, ruled that the United Kingdom had not violated their rights when it legislated to provide same-sex couples with relief from this inheritance tax by registering as civil partners, but refused to extend similar relief to cohabiting siblings.

The Burdens have vowed to appeal to a full chamber of the court.

Joyce and Sybil Burden, age 88 and 80 respectively, have been living together in a home built on land inherited from their parents for the past 30 years. The land and house have so appreciated in value that they fear if one died first the other would have to sell in order to meet the rather stiff tax that the U.K. imposes on inherited property. Surviving legal spouses and civil partners are not subject to inheritance tax in such circumstances.

Until December 2005, the Burden sisters had no grounds for a discrimination complaint, since all unmarried cohabitants faced the same concern and the European Convention allows governments to grant special rights and exemptions to married couples. But on December 5 of last year, the U.K.'s new Civil Partnership Law went into effect, allowing same-sex couples to form partnerships having the same inheritance and tax status as married couples, providing a basis for the Burden sisters to mount a discrimination claim.

When the new law was pending in Parliament, the issue of fairness for elderly unmarried couples living together was forcefully raised. In fact, the House of Lords approved an amendment to deal with the situation, which Tony Blair's Labour government opposed because it was not in line with the bill's aim-to offer same-sex partners legal status for their marriage-like relationships. When the legislation was returned to the House of Commons, the amendment was deleted and did not become part of the final bill. The government said it would address the issue separately, but has not done so.

In their argument to the European Court, the Burden sisters contended that this posed a fundamental unfairness that violated the ban on discrimination in the Convention. The British government argued that the Burdens did not have standing to make their claim because they had not yet suffered any of the consequences they feared, and it was possible the government would address this problem before either of them died. But given the advanced ages of the sisters and the fact that the House of Commons had specifically rejected the House of Lords' effort to address the problem, the Court did not credit the government's objection. All seven members of the Court agreed that the case was properly before them.

However, a bare majority of the court concluded that in matters of taxation, government parties to the Convention have a wide "margin of appreciation," a term meaning the right of member governments to exercise discretion in managing their own affairs. Without engaging in any real analysis, the court majority treated this as a matter beyond the reach of the Convention.

"A government may often have to strike a balance between the need to raise revenue and the need to reflect other social objectives in its taxation policies," wrote the Court. "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds."

The court stated that it would not second-guess the government unless its policy choices are “manifestly without reasonable foundation.”

In a line of reasoning strikingly analogous to that used by the New York Court of Appeals this summer in rejecting the same-sex marriage case, the court found that the government had good reason to extend the marital privileges on inheritance tax to same-sex couples, and thus could not be criticized since the same rationale does not apply to cohabiting elderly siblings. Just as the New York Court failed to state why the goal of promoting marriage for heterosexuals who have offspring precluded same-sex couples from marrying, the European Court did not explain how giving an inheritance break to gay and lesbian couples was at odds with doing the same for elderly, cohabiting siblings.

“In the present case,” the court said, it “accepts the Government’s submission that the inheritance tax exemption for married and civil partnership couples likewise pursues a legitimate aim, namely to promote stable, committed heterosexual and homosexual relationships by providing the survivor with a measure of financial security after the death of the spouse or partner.”

The court pointed to Convention principles protecting marriage and effectively banning sexual orientation discrimination as supporting the Civil Partnership Act’s focus solely on same-sex couples.

“The State cannot be criticized for pursuing, through its taxation system, policies designed to promote marriage; nor can it be criticized for making available the fiscal advantages attendant on marriage to committed homosexual couples,” it concluded.

But three dissenters were not persuaded. Judges Giovanni Bonello of Malta and Lech Garlicki of Poland criticized the majority for failing to provide a “full explanation” for why it gave the British policy the discretion it did. They criticized the British government’s failure to articulate any logical reason other than loss of revenue for failing to account for situations like the Burden sisters, arguing that “once the legislature decides that a permanent union of two persons could or should enjoy tax privileges, it must be able to justify why such a possibility has been offered to some unions while continuing to be denied to others.”

And the dissenters pointed out that many of the justifications for recognizing same-sex couples also applied to cohabiting elderly siblings.

“It is very important to protect such unions,” wrote Bonello and Garlicki, “like any other union of two persons, from financial disaster resulting from the death of one of the partners.”

The other dissenting judge, Stanislav Pavlovschi of Moldova, was even harsher in condemning the court’s judgment. Exhibiting striking empathy for the Burden sisters, he wrote, “The case concerns the applicants’ family house, in which they have spent all their lives and which they built on land inherited from their late parents. This house is not simply a piece of property—this house is something with which they have a special emotional bond, this house is their home.”

“It strike me as absolutely awful,” he continued, “that, once one of the two sisters dies, the surviving sister’s sufferings on account of her closest relative’s death should be multiplied by the risk of losing her family home because she cannot afford to pay inheritance tax in respect of the deceased sister’s share of it. I find such a situation fundamentally unfair and unjust. It is impossible for me to agree with the majority that, as a matter of principle, such treatment can be considered reasonable and objectively justified. I am firmly convinced that in modern society there is no ‘pressing need’ to cause people all this additional suffering.”