

LESBIAN / GAY LAW NOTES

January 2012

**03 11th Circuit
Transgender Ruling**
Equal Protection

**05 Obama
Administration**
Global LGBT Rights

**06 11th Circuit First
Amendment Ruling**
*Anti-Gay
Counseling*

**09 6th Circuit
Lawrence-
Based Challenge**
Incest Conviction

**10 Maine Supreme
Judicial Court**
*Workplace
Discrimination*

**11 Florida Court
of Appeals**
Parental Rights

**14 California
Appellate Court**
*Non-Consensual
Oral Copulation*

**16 Connecticut
Appellate Ruling**
Loss of Consortium

**17 New Jersey
Superior Court**
*Gestational
Surrogacy*

**20 California Court
of Appeal**
*Non-Adoptive
Same-Sex Co-Parents*

**21 Texas U.S. District
Court Ruling**
*High School
"Outing" Case*

DEPARTMENTS

22 Federal Civil Litigation Notes

25 Federal Criminal Litigation Notes

25 State Criminal Litigation Notes

26 State Civil Litigation Notes

28 Legislative Notes

30 Law & Society Notes

33 International Notes

36 HIV/AIDS Legal & Policy Notes

37 Publications Noted

Law Notes welcomes contributions. To explore the possibility of being a contributor please contact info@le-gal.org.

THIS MONTHLY PUBLICATION IS EDITED AND CHIEFLY WRITTEN BY PROFESSOR ARTHUR LEONARD OF NEW YORK LAW SCHOOL, WITH A STAFF OF VOLUNTEER WRITERS CONSISTING OF LAWYERS, LAW SCHOOL GRADUATES, AND CURRENT LAW STUDENTS. PROFESSOR LEONARD, LEGAL'S FOUNDER, HAS WRITTEN NUMEROUS ARTICLES ON EMPLOYMENT LAW, AIDS LAW, AND LESBIAN AND GAY LAW. ART IS A FREQUENT NATIONAL SPOKESPERSON ON SEXUAL ORIENTATION LAW, AND AN EXPERT ON THE RAPIDLY EMERGING AREA OF GAY FAMILY LAW. HE IS ALSO A CONTRIBUTING WRITER FOR GAY CITY NEWS, NEW YORK'S BI-WEEKLY LESBIAN AND GAY NEWSPAPER. TO LEARN MORE ABOUT LEGAL, PLEASE VISIT [HTTP://WWW.LE-GAL.ORG](http://www.le-gal.org).

L E S B I A N / G A Y LAW NOTES

Editor-in-Chief

Prof. Arthur S. Leonard

New York Law School

185 W. Broadway

New York, NY 10013

(212) 431-2156 | arthur.leonard@nyls.edu

Contributors

Bryan Johnson, Esq.

Brad Snyder, Esq.

Stephen E. Woods, Esq.

Eric Wursthorn, Esq.

New York, NY

Kelly Garner

NYLS '12

Art Director

Bacilio Mendez II, MLIS

NYLS '14

Circulation Rate Inquiries

LeGaL Foundation

799 Broadway

Suite 340

New York, NY 10003

(212) 353-9118 | info@le-gal.org

Law Notes Archive

<http://www.nyls.edu/jac>

Law Notes Podcast

To listen to/download the Lesbian/Gay Law Notes Podcast launch iTunes, or point your browser to <http://legal.podbean.com>.

© 2012

The LeGaL Foundation

of the LGBT Bar Association

of Greater New York

<http://www.le-gal.org>

ISSN

8755-9021

11th Circuit Rules that Termination of Transgender Employee for Gender Non-Conformity Violates the Equal Protection Clause

In *Glenn v. Brumby*, 2011 WL 6029978, the U.S. Court of Appeals for the 11th Circuit ruled on December 6 that a government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when firing a transgender or transsexual employee because of his or her gender non-conformity. In reaching its decision, the court, for lack of an appropriate legal term, emphatically demonstrated that it "gets it" when it comes to applying constitutional protections to the transgender community.

The plaintiff, Vandiver Elizabeth Glenn, who was born a biological male, intended to transition from male to female during her tenure as an editor at Georgia Assembly's Office of Legislative Counsel (OLC). The head of the OLC, Sewell Brumby, terminated Glenn soon after learning that Glenn was ready to begin her transition because, according to Brumby, the "intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable." The termination was the culmination of prior disapproval by Glenn's employer of her gender nonconformity and her plans to transition. For example, Brumby had been asked to leave the office when she presented as a woman on Halloween, with Brumby stating that it was "unsettling" and "unnatural" for someone with male sex organs to be dressed in women's clothing.

Glenn alleged two claims of discrimination under the Equal Protection Clause. First, Glenn alleged that Brumby discriminated against her on the basis of her sex and her failure to conform to gender stereotypes. Second, Glenn alleged discrimination on the basis of her medical condition, specifically Gender Identity Disorder, with which she had been diagnosed in 2005. The district court granted Glenn summary judgment on the first claim but granted summary judgment to Brumby on the second. Brumby appealed the court's sex-discrimination ruling and Glenn cross-appealed on her medical condition claim.

On appeal, Circuit Judge Rosemary Barkett noted at the outset that heightened scrutiny applies to legislative classifications based on gender or sex. The court then summed up the relevant question as whether discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause.

The court first considered the case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which the U.S. Supreme Court held that discriminating against a person because of their failure to conform to gender stereotypes can be a form of sex discrimination in violation of Title VII of the Civil Rights Act of 1964. There, the court considered allegations that a senior manager at Price Waterhouse was denied partnership in the firm because she was considered "macho" and "overcom-

pensated for being a woman." The Supreme Court agreed that such comments were indicative of discriminatory intent based on gender, and held that Title VII barred not just discrimination because of biological sex, but also gender stereotyping – that is, failing to act and appear according to expectations defined by gender.

Judge Barkett explained why discrimination based on one's transgender status constitutes discrimination based on gender stereotypes: "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.... Accordingly, discrimination against a transgender individual because of her gender non-conformity is sex discrimination, whether it's described as being on the basis of sex or gender."

The court buttressed its conclusion with citations to several other circuit and district court decisions that likewise determined that discrimination and harassment leveled against transgender individuals was actionable as sex-based discrimination. And in a passage that rings like a clarion call for equality, the court continued: "All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.... An individual cannot be punished because of his or her perceived gender non-conformity. Because these protections are afforded to everyone, they cannot be denied to a transgender individual.

The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause.”

The court then turned to the factual record to determine whether Glenn was, in fact, fired on the basis of gender stereotyping. The court needed to look no further than Brumby’s deposition testimony in which he testified to firing Glenn because he considered it “inappropriate” for her to appear at work dressed as a woman and that he found it “unsettling” and “unnatural” that Glenn would appear wearing women’s clothing while admitting that Glenn’s transition was the reason for her firing. Thus, the court concluded that the testimony provided “ample direct evidence” to support the district court’s conclusion that Brumby acted on the basis of Glenn’s gender non-conformity.

Unlike a Title VII case, where the demonstration of discriminatory intent would end the analysis, the court noted that in an Equal Protection Clause case in which heightened scrutiny applies it was bound to consider whether Brumby had a “sufficiently important governmental interest” for the discriminatory conduct.

On appeal, Brumby offered only one (sadly familiar) justification: his alleged concern that other women might object to Glenn’s rest-room use. However, the court noted that there was insufficient evidence to demonstrate this concern, which rested only on a statement in Brumby’s deposition speculating about lawsuits arising from Glenn’s use of the women’s restroom. Other evidence of

Brumby’s intent overwhelmed that mere speculation. And, moreover, the record indicated that only single-occupancy restrooms existed at the employment location, which is a relatively devastating retort to even fictional concerns about restroom use and related lawsuits.

All told, the court pointed out that Brumby’s entire defense rested on the notion that Glenn was not a member of a protected class and that only a rational basis need be advanced for the discrimination. The court, clearly unimpressed with Brumby’s efforts to demonstrate anything that could qualify as a governmental purpose much

less an “important” government purpose, therefore affirmed the district’s court’s finding on Glenn’s sex discrimination claim.

Because its granting of summary judgment on the sex discrimination claim provided Glenn all the relief that she sought, the court did not address Glenn’s cross-appeal concerning her medical condition claim.

Glenn was represented by Lambda Legal attorneys Cole Thaler, Gregory R. Nevins and M. Dru Levasseur. —Brad Snyder

Mr. Snyder is the Executive Director of the LeGaL Foundation.

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. ... Accordingly, discrimination against a transgender individual because of her gender non-conformity is sex discrimination, whether it’s described as being on the basis of sex or gender.

Obama Administration Launches Diplomatic Strategy for Global LGBT Rights

On December 6, the Obama Administration launched an effort to advance the human rights of lesbian, gay, bisexual and transgender persons with simultaneous actions in Washington, D.C., and Geneva, Switzerland. In Washington, the White House released a Memorandum by President Barack Obama to the heads of Executive Departments and Agencies directing them to take various actions in their dealings with other countries concerning LGBT rights. In Geneva, Secretary of State Hillary Rodham Clinton devoted her Human Rights Day speech at the Palais des Nations under the auspices of the United Nations almost entirely to LGBT human rights issues. This is the first such coordinated effort by the White House and the State Department on an LGBT issue.

The President's Memorandum directed six specific actions: (1) All agencies "engage abroad are directed to strengthen existing effort to effectively combat the criminalization by foreign governments of LGBT status or conduct and to expand efforts to combat discrimination, homophobia, and intolerance on the basis of LGBT status or conduct." (2) Directing the State Department and the Department of Homeland Security to enhance efforts to assist LGBT refugees and asylum seekers. (3) Directing agencies involved with foreign aid and other forms of assistance to foreign governments and private sector entities to "build respect for the human rights of LGBT persons." (4)

Directing formation of a standing group led by the State Department "with appropriate interagency representation to help ensure the Federal Government's swift and meaningful response to serious incidents that threaten the human rights of LGBT persons abroad." (5) Working to enlist international organizations in which the U.S. participates in the effort to protect LGBT rights. (6) Requiring all agencies "engaged abroad" to prepare a report within 180 days and annually thereafter on progress towards advancing these initiatives. The State Department is to compile a report based on the submissions from the various agencies to submit to the President. The memorandum also provides a list of the agencies engaged abroad that are covered by its directives. The President directed that the State Department have the Memorandum published in the Federal Register, so it will be permanently available as an official document.

Secretary Clinton's speech, which is available both in text and video recording on the State Department's website, after an introduction focused on the Universal Declaration of Human Rights, which is commemorated on International Human Rights Day, launched into a stirring invocation of the basic human rights of LGBT peoples. "Today, I want to talk about the work we have left to do to protect one group of people whose human rights are still denied in too many parts of the world today. In many ways, they are an in-

visible minority. They are arrested, beaten, terrorized, even executed. Many are treated with contempt and violence by their fellow citizens while authorities empowered to protect them look the other way or, too often, even join in the abuse. They are denied opportunities to work and learn, driven from their homes and countries, and forced to suppress or deny who they are to protect themselves from harm. I am talking about gay, lesbian, bisexual, and transgender people, human being born free and given bestowed equality and dignity, who have a right to claim that, which is now one of the remaining human rights challenges of our time."

Secretary Clinton conceded that the United States does not have a perfect record on LGBT rights, noting that until 2003 "it was still a crime in parts of our country," and that "we, like all nations, have more work to do to protect human rights at home." She acknowledged that raising LGBT rights as an international human rights issue "is sensitive for many people and that the obstacles in the way of protecting the human rights of LGBT people rest on deeply held personal, political, cultural, and religious beliefs." But, she insisted, gay rights and human rights are "one and the same," even though the governments that drafted and ratified the Universal Declaration 60 years ago "were not thinking about how it applied to the LGBT community." She rejected the notion that homosexuality "arises from a particular part of the world" or is a distinctly "Western phenomenon." "Being gay is not a Western invention," she asserted: "It is a human reality." She continued in this vein for a lengthy address.

This was not without controversy. Some Republican officials and con-

servative media commentators were openly scornful, and some representatives of nations that continue to condemn homosexuality strongly (especially from parts of Africa and the Middle East) were openly resentful. There was also some question, even among gay rights supporters, about whether the Administration was ready to back up the rhetoric of the memo and the speech with concrete action, similar to the doubts expressed about the President's declaration a week earlier that the federal government was recommitting itself to an enhanced effort to

combat HIV/AIDS internationally without committing substantial additional funds. (In addition, as one could have predicted, some academics who actively propound the "social construction" theory of human sexuality were critical of Clinton's assertion that "homosexuality" is not a Western phenomenon.)

The question now will be: where is the follow-up? Having placed the Administration on record as being actively committed to advancing LGBT human rights around the world, the President and the Secretary of State have raised the bar

for themselves, and the LGBT media and political activists will be expecting quicker, more forceful reactions to the anti-gay activities of many governments, including some of our strategic allies who have largely been given a "pass" by U.S. officials. [Clinton Speech on the State Department website: <http://www.state.gov/secretary/rm/2011/12/178368.htm>. The Memorandum can be found on the White House website under "Briefing Room – Presidential Actions – Presidential Memoranda – December 6, 2011".] ■

11th Circuit Rules Against Anti-Gay Counseling Student

A unanimous panel of the U.S. Court of Appeals for the 11th Circuit has upheld a district court's refusal of preliminary injunctive relief to a counseling student who was expelled from the Counselor Education Program at Augusta (Georgia) State University when she refused to participate in a remediation program on LGBTQ issues as a prerequisite to participating in the Program's clinical practicum involving actual one-on-one counseling with students. The Program faculty had concluded from statements made by the student in class and to other students that she was likely to impose her religiously-motivated anti-gay views on counseling clients, in violation of the profession's ethical standards, and thus required "remediation." *Keeton v. Anderson-Wiley*, 2011 Westlaw 6275932 (Dec. 16, 2011).

Jennifer Keeton was seeking a master's degree in school coun-

seling. The Counselor Education Program at Augusta State University complies with the ethical standards of the American Counseling Association (ACA), which require non-discrimination based on gender identity or sexual orientation, among other characteristics, and require that professional counselors not impose their individual beliefs on individuals seeking counseling from them. In her written classwork, comments in class, and comments she made to fellow students that were reported to faculty members, and in her brief supporting her motion for a preliminary injunction, Keeton stated that she believes sexual behavior to be a result of "personal choice for which individuals are accountable, not inevitable deterministic forces; that gender is fixed and binary (i.e., male or female), not a social construct or personal choice subject to individual change; and that homosexuality is a 'life-style,' not a

'state of being.'" She had also expressed the view that sexual orientation can be changed, and that if she were counseling a student who was concerned about his/her sexuality, she would recommend conversion therapy to affirm their heterosexuality. Professional psychological and counseling associations have condemned conversion therapy as harmful to clients.

Faculty members became concerned that Keeton was unable or unwilling to conform her professional behavior to the ethical requirements of the profession, which require counselors to avoid imposing their personal beliefs in such matters on clients, and they required her to participate in a remediation program before they would allow her to participate in the practicum. This program would require her to attend workshops providing diversity sensitivity training toward working with the GLBTQ population, to read peer-reviewed articles in counseling or psychological journals pertaining to "improving counseling effectiveness with the

Since Keeton had indicated by her comments that she would impose her personal religious views on clients, a conflict with the ACA Code of Ethics, it was reasonable for the school to seek remediation.

her exposure and interaction with that population by, for example, attending the local Gay Pride Parade, to familiarize herself with the Association for Lesbian, Gay, Bisexual and Transgender Issues in Counseling Competencies for Counseling Gay and Transgender Clients, and to submit a “two-page reflection” to her faculty advisor every month summarizing what she was learning from the remediation process. At first she agreed to undergo this program, but then she changed her mind and filed the lawsuit, seeking an order from the court that she was entitled to participate in the practicum and earn her degree without undergoing the remediation.

Keeton grounded her lawsuit in the First Amendment of the U.S. Constitution, claiming that requiring her to undergo remediation and, in effect, to comply with the ethical standards of the profession, would violate her first amendment rights of freedom of speech and free exercise

she was seeking relief against required remediation. After she filed suit and was expelled from the Program, she also claimed unconstitutional retaliation and sought an order reinstating her to the Program. The trial court found that she had not met the burden of establishing a likelihood of success on the merits of her claim sufficient to justify preliminary injunctive relief.

Writing for the panel, Circuit Judge Rosemary Barkett provided an extensive analysis of Keeton’s First Amendment claims. On the free speech claims, she pointed out that the record before the court did not support Keeton’s contention that the school was trying to force her to change her views of homosexuality, was discriminating against her anti-gay viewpoint, or was compelling her to express beliefs with which she disagrees. Instead, Barkett found, the School was trying to get her to comply with its curriculum, which is intended to maintain the school’s accredita-

tion by ACA, a prerequisite to its graduates receiving professional licensure and being able to practice as professional counselors in a public school setting.

An individual counselor can believe whatever he or she wants to believe. That’s not the point, as the court’s decision shows. The issue is what the counselor says to clients in the context of a professional relationship. “We conclude,” wrote Judge Barkett, “that the evidence in this record does not support Keeton’s claim that ASU’s officials imposed the remediation plan because of her views on homosexuality. Rather, as the district court found, the evidence shows that the remediation plan was imposed because she expressed an intent to impose her personal religious views on her clients, in violation of the ACA Code of Ethics, and that the objective of the remediation plan was to teach her how to effectively counsel GLBTQ clients in accordance with the ACA Code of Ethics.”

While conceding that this places a “burden” on Keeton, the court was unwilling to find that such a burden was unreasonable in the context of a professional training program governed by an ethical code. The court drew an analogy to the Supreme Court’s ruling in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), rejecting a First Amendment challenge to censorship of a high school student newspaper by school administrators. The 11th Circuit panel found *Hazelwood* applicable on two grounds. First, the clinical practicum is a “school-sponsored expressive activity,” which means the school gets to control what is

said within that activity. Also, as in *Hazelwood*, where the Court found that the school newspaper was part of the curriculum, here the practicum is part of the Program's curriculum, and enjoining ASU from requiring Keeton to undergo remediation before participating in the practicum would "interfere with ASU's control over its curriculum," something the Supreme Court has cautioned federal courts against doing.

Concluding on this point, Judge Barkett wrote that "we find that ASU has a legitimate pedagogical concern in teaching its students to comply with the ACA Code of Ethics. ASU must adopt and follow the ACA Code of Ethics in order to offer an accredited program, and the entire mission of its counseling program is to produce ethical and effective counselors in accordance with the professional requirements of the ACA." Since Keeton had indicated by her comments that she would impose her personal religious views on clients, a conflict with the ACA Code of Ethics, it was reasonable for the school to seek remediation. "Keeton does not have a constitutional right to disregard the limits ASU has established for its clinical practicum and set her own standards for counseling clients in the clinical practicum."

Based on this reasoning, the court also rejected Keeton's retaliation claim, asserting that the school was not acting against her based on her religious views, but rather based on her professed unwillingness to comply with the ACA Code of Ethics. Furthermore, the court found no support for Keeton's claim that ASU was trying to unconstitutionally

compel her to express views with which she disagrees. Enrollment in the Program is a voluntary activity. "Keeton may choose not to attend ASU, and indeed may choose a different career." Thus, this was not like the famous Supreme Court flag salute case, *Barnett*, where public school students were unconstitutionally disciplined for refusing to engage in the salute to the flag and the pledge of allegiance. Those students were governed by mandatory public school attendance laws, making that "compelled speech" precedent, upon which Keeton heavily relied, distinguishable and inapplicable to her situation.

The court pointed out once again that ASU was not mandating that Keeton abandon her beliefs, but merely that she learn to separate her personal beliefs from her work if she wanted to function as a professionally licensed counselor. "Every profession has its own ethical codes and dictates," observed Judge Barkett. "When someone voluntarily chooses to enter a profession, he or she must comply with its rules and ethical requirements." She analogized with a law school, which said would "no doubt... be permitted to require a student who expressed an intent to indiscriminately disclose her client's secrets or violate another of the state's bar rules to take extra ethics classes before letting the student participate in a school-run clinic in which the student would be representing actual clients."

As to the free exercise of religion claim, the court found that the requirement that students comply with the ACA Code of Ethics was "neutral and gener-

ally applicable" and thus could be upheld if the school had a rational basis for requiring it. "It easily satisfies this test," wrote Barkett, "as it is rationally related to ASU's legitimate interest in offering an accredited counseling program. Thus, Keeton is unlikely to prevail on the merits of her claim that ASU violated her free exercise rights by requiring her to comply with the ACA Code of Ethics."

Since likelihood of success on the merits is "the first requirement for a preliminary injunction," the court ruled that the district court "did not abuse its discretion in denying her motion for a preliminary injunction." While this is not an ultimate ruling on the merits, the decision sends a strong message to the district judge that is unlikely to be misinterpreted.

Circuit Judge William H. Pryor, Jr., filed a concurring opinion, focusing on the context of the appeal, and emphasizing the restraint that federal courts are supposed to show when it comes to issues of curriculum design by professional educators. Senior Judge Phyllis Kravitch was the third member of the panel. The list of amicus curiae briefs filed in the case indicates its significance in the "culture wars" over the treatment of sexuality issues in public education. Supporting the ASU authorities were PFLAG, the Georgia Safe Schools Coalition, the ACLU, and the American School Counselor Association and related organizations. Amici for the plaintiff included the Foundation for Individual Rights in Education and the National Association of Scholars. ■

6th Circuit Rejects *Lawrence*-Based Challenge to Incest Conviction

In a decision filed December 8, 2011, *Lowe v. Swanson*, 2011 WL 6091318, the U.S. Court of Appeals for the 6th Circuit affirmed denial of a petition for habeas corpus filed by a man convicted of having had consensual sex with his 22 year-old stepdaughter in violation of Ohio Rev. Code s 2907.03(A)(5), which criminalizes engaging “in sexual conduct with another, not the spouse of the offender, when...[t]he offender is the other person’s natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person.” The Ohio courts had ruled that Lowe did not have a fundamental right to engage in consensual sex with his adult step-daughter, despite the Supreme Court’s ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003). Circuit Judge Griffin wrote for the panel.

Judge Griffin begins by noting that it will not disturb a district court’s habeas decision unless the decision involved an unreasonable application of clear Federal law or was contrary to established Federal law as determined by the Supreme Court of the U.S. , pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, which sharply restricts the availability of habeas corpus. Lowe argued that the Supreme Court in *Lawrence* found a fundamental right to be free from governmental intrusion regarding consensual sex between adults, and that the level of review required should a law seek to restrict that right is

strict scrutiny. Therefore, Lowe maintained, the Ohio Supreme Court unreasonably applied the U.S. Supreme Court’s ruling in *Lawrence*, by applying a rational basis review and finding that the law was reasonably related to the government’s interest in protecting families from this type of potentially dangerous sexual relationship. Lowe instead argues that the question should have been framed as whether he had a right to engage in consensual sex with another adult.

The 6th Circuit panel observes that there are cases, such as *Cook v Gates*, 528 F.3d 42 (1st Cir.2008) (discussing the Don’t Ask, Don’t Tell policy), which agree with Lowe’s stance on whether *Lawrence* established a right for adults to engage in consensual sex. Indeed, the conclusion of *Reliable Consultants, Inc. v Earle*, 517 F.3d 730 (5th Cir. 2008), was that “the right the Court recognized [in *Lawrence*] was not simply a right to engage in the sexual act itself, but instead a right to be free from governmental intrusion regarding the most private human contact, sexual behavior.”

However, the court finds that even though *Lawrence* has been found to establish a right to be free from governmental intrusion into private sexual lives, it is unclear as to whether this is a fundamental right, and regardless, the ruling in *Lawrence* does not prohibit the regulation of legitimate government interests such as protecting minors or easily coerced individuals from those who

might take advantage of them.

The court looks to cases like *Muth v. Frank*, 412 F.3d 808 (7th Cir.), cert. denied, 546 U.S. 988 (2005), in which the defendant unsuccessfully argued that Wisconsin’s incest statute was unconstitutional insofar as it sought to criminalize sexual behavior between consenting adults. In that case, also ruling on a habeas petition, the Seventh Circuit did not overturn the ruling because the lower court’s ruling was not contrary to any established Federal law. *Lawrence*, it held, did not clearly establish a fundamental right to engage in incest without governmental intrusion, and rather focused its ruling narrowly on homosexual sodomy between consenting adults. In fact, as *Muth* pointed out, *Lawrence* specifically distinguished statutes like the one barring homosexual sodomy from laws such as the incest statute involved in that case, and the one under which Lowe was convicted, which serve a legitimate state interest in protecting the family, and shielding individuals from being coerced into sexual relationships due to the inherent influence of a family member, parent or stepparent.

Lowe also argued that *Lawrence* requires a strict scrutiny review of his conviction, which would require the government to show a compelling interest in order to uphold the lower court’s findings. The court notes that a number of decisions, such as *Witt v. Dep’t of the Air Force*, 527 F.3d 806 (9th Cir. 2008), have found that *Lawrence* must have used a form of scrutiny higher than rational basis, since it looked to whether the government had a legitimate interest, rather than

just any interest, in its holding. However, cases like *Lofton v. Sec'y of Dep't of Children & Family Services*, 358 F.3d 804 (11th Cir.2004) and *Seegmiller v. LaVerkin City*, 528 F.3d 762 (10th Cir.2008), have found the exact opposite. Each of those cases finds that *Lawrence* applied nothing more than a rational basis review.

Because of this ongoing disagreement among the circuit court,

the court determined, it would be improper to overturn the lower court's ruling, as it did not run afoul of any "established" Federal law, and rather interprets a widely divergent body of cases in a reasonable way. Furthermore, considering the split in cases, it would be difficult to argue that the law is "established" at all.

This is a troubling thought – that in review of habeas petitions involving the law set out

by *Lawrence*, a higher court essentially must defer to the lower court's ruling, since it can only overturn decisions contrary to "established" law. Until a case makes it clear exactly what *Lawrence* established, it seems the circuit courts' hands are largely tied. While the decision in this particular case may be widely viewed as the correct one, in the future we may not be so lucky.

—Stephen Woods

Maine Supreme Judicial Court Affirms \$500,000 Work Discrimination Verdict for Gay Airline Employee

The Maine Supreme Judicial Court has affirmed a Superior Court jury verdict against ExpressJet Airlines awarding \$500,000 in compensatory damages to former employee Edward Russell, who claimed he was discriminated against due to his sexual orientation when he was refused a general management position. *Russell v. ExpressJet Airlines Inc.*, 2011 ME 123 (Dec. 6, 2011).

Russell, an openly gay man, joined ExpressJet as a supervisor when it opened its Portland Station in 2002. At the time, the general manager of the station was a gay man. Russell learned in 2003 that three women had filed a complaint against the company alleging that ExpressJet only hired gay men for management positions. He indicated his desire for a management position on numerous occasions but was told it was "not going to happen" and he should not waste his time. Despite be-

ing told by supervisors that he did a "fantastic job" and despite having acted as general manager on several occasions while the company sought to fill the position, Russell was discouraged from applying for the position. In 2007 Russell overheard a conversation between the then-manager with another coworker in which he stated the office needed to "clean house" and that homosexuals are "an abomination in God's eyes." One month later, Russell resigned without ever having formally applied for a manager position and filed an employment discrimination claim against ExpressJet pursuant to the Maine Human Rights Act.

After a jury trial, ExpressJet moved for a judgment as a matter of law. The trial court judge denied the motion and instructed the jury that Russell could prevail if he proved: 1) that ExpressJet prevented him from applying for the position of general manager; 2) that he would have applied but for ExpressJet's ac-

tions; 3) that he was otherwise qualified for the position; and 4) that his sexual orientation was a motivating factor for ExpressJet's adverse action. The jury awarded \$47,000 in lost income, \$500,000 in compensatory damages, and \$500,000 in punitive damages; however, the court applied a \$500,000 statutory cap. ExpressJet appealed the verdict.

On appeal, the ExpressJet argued that Russell couldn't bring his claim since he never formally applied; however, the court explained that under U.S. Supreme Court precedent on the same question under Title VII of the federal Civil Rights Act, "when a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." The court held that although there was "conflicting evidence regarding the futility issue," the record contained sufficient evidence to support the jury's finding that it would have been futile for Russell to apply for a manager position.

The court further held that the correct statutory cap was applied in this case to ExpressJet as an employer with more than 500 employees even though it had fewer than 101 employees in Maine, stating: “a plain language reading of the statute leads to the conclusion that the Legislature did not intend to

distinguish between the number of employees in Maine and the number of employees nationwide; rather, the clear intent of the graduated caps is to protect smaller employers from large damage judgments that could potentially devastate them.”

Finally, the court held that ExpressJet’s claim that the dam-

ages award was excessive was without merit, stating that Russell’s testimony at trial that he was forced to take a leave of absence and seek treatment for stress, anxiety, and depression “provided the Jury with sufficient evidence to support its compensatory damages award.”

—Bryan Johnson

Florida Court of Appeal Holds Child Has Two Mothers

In a case of first impression in Florida, the Court of Appeal for the Fifth District found that both the biological mother and the birth mother of a child born to the couple through reproductive medical assistance have parental rights to their daughter. *T.M.H. v. D.M.T.*, 2011 WL 6437247 (Dec. 23, 2011). The Court of Appeal, in a 2-1 decision with Judge C. Alan Lawson dissenting, reversed the trial court’s finding that T.M.H., the biological mother, had no parental rights to the child under Section 742.14, Florida Statute (“Section 742.12”), which eliminates the parental rights of an egg donor, and remanded the case to the lower court to determine issues of child custody and visitation. In the majority opinion, written by Judge Thomas D. Sawaya, the court held that Section 742.14 does not apply to T.M.H., and the trial court’s interpretation of the statute would violate her equal protection and privacy rights under both the federal and state constitutions. In its opinion, the Court of Appeal also certified to the Florida Supreme Court the question of Section 742.14’s constitutionality.

In 1995, T.M.H. and D.M.T. entered into a committed relationship in which the couple owned

real property as joint tenants and opened a joint bank account. Several years into their relationship, the women decided to have a child together. Evidence presented at trial, including the fact that the couple attended parenting counseling together, indicated that they intended to raise the child as joint parents and form a family unit. Upon seeking reproductive medical assistance, the couple discovered that D.M.T., whom the couple had decided would be the birth mother, was infertile. Deciding to go forward with having a child, the couple had a physician extract an egg from T.M.H. and, following the egg’s fertilization, had the embryo implanted in D.M.T. The procedure was successful and in 2004 D.M.T. gave birth to the couple’s daughter. The couple raised the child together until their separation in 2006.

At first, the couple remained on amicable terms and continued to share in the responsibilities of raising their child, including sharing, for a time, joint physical custody. However, in December 2007, following the deterioration of the women’s relationship, D.M.T. ended all communication between the couple’s daughter and T.M.H. by moving “to an undisclosed loca-

tion.” T.M.H. finally located D.M.T. and her daughter in Australia and brought a claim requesting that she be named as one of the child’s parents. In her claim, T.M.H. also argued that Section 742.14 violates her privacy and equal protection rights. The statute at issue states that “the donor of any egg, sperm, or preembryo . . . shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children.” The only two exceptions to the rule are situations where genetic material is donated within a commissioning couple or by “a father who has executed a preplanned adoption agreement.” Here, T.M.H. and D.M.T. do not fall within the commissioning couple exception as it is defined in the statute as a couple consisting of a man and a woman.

In reaction to T.M.H.’s claims, D.M.T. filed a verified motion for summary judgment, asserting that under Section 742.14, T.M.H. does not have any parental rights to the child. The trial court agreed and granted the motion. However, the trial court’s opinion indicates that the court “felt constrained by the state of the law.” In his decision, Judge Charles Crawford states that as a commissioning party is defined in Section 742.14 as being a woman and a man and Florida law currently prohibits adoption by gay parents, “there really is no protection

for [T.M.H.] under Florida law.” While Judge Crawford admitted that he did “not agree with the current state of the law,” he felt that he “must uphold it.”

On appeal, T.M.H. asserted that Section 742.14 does not apply to her, and that the statute cannot be read in a way to include her because it “does not contemplate the situation of a dispute between a biological mother and a birth mother.” She further asserted that Section 742.14, as interpreted by the trial court, is unconstitutional on equal protection and privacy grounds. In defense of the trial court’s decision, D.M.T. argued that under Section 742.14, T.M.H., as an egg donor, is denied any parental rights to the child, and even if T.M.H. is not a donor within the terms of the statute, she waived all parental rights when she signed a consent form at the physician’s office prior to having her eggs extracted. Additionally, D.M.T. contended that T.M.H. could not have legally adopted the child under Florida state law. Furthermore, since the couple has separated, D.M.T. is the sole parent as she is the birth mother.

The majority of Judge Sawaya’s opinion focuses on the question of whether Section 742.14 applies to T.M.H., the primary issue being who exactly qualifies as a “donor” within the meaning the statute. As the statute never actually defines the word, the Court of Appeal looks to how it has been defined by previous courts. One case which Judge Sawaya relies heavily on in interpreting what the legislative meant by “donor,” is *K.M. v. E.G.*, 117 P.3d 673 (Cal., Oct. 19, 2005). In *K.M.*, the California Supreme Court faced similar facts to those presented here. In that case, a lesbian couple had the ova of one part-

ner implanted into the other partner so that when the couple separated, there were two mothers, a biological mother and birth mother, vying for parental rights. The court held that the biological mother did not donate her egg to her partner, but rather “provided” her egg to her partner with the intention that both women would serve as the child’s parents and would raise the child together. The word “donor,” as interpreted by the California Supreme Court in *K.M.*, is vested with the connotation that a person donating an egg has no intent to serve as a parent to the child and is actively waiving her parental rights. In contrast to that scenario, the court found that, although the birth mother contended that her partner donated her egg to her without any intent to serve as the child’s parent, evidence of the couple building a life together, including sharing a home,

indicated that the women intended to raise the child with both of them serving as parents.

Applying this concept of a donor as someone who “intend[s] to give her ova away” to this case, the Court of Appeal held that T.M.H. is not a donor within the meaning of the statute. Rather, the evidence presented at trial indicates that both women intended to raise the child as co-parents, and in fact did raise their daughter together for the first few years of her life. The majority rejects the meaning of “donor” that the trial court adopted, and which the dissent would have the court uphold. In his dissenting opinion, Judge Lawson states that the term “donor” simply refers to anyone who transfers an egg or sperm, to another person. Judge Lawson asserts that the word “donor” does not contain any intent element, arguing that if the meaning of the

... although the birth mother contended that her partner donated her egg to her without any intent to serve as the child’s parent, evidence of the couple building a life together, including sharing a home, indicated that both intended to raise the child.

word includes an intent element, then the two exceptions to the statute which allow commissioning couples and adoptive fathers to maintain parental rights would be rendered meaningless as these two situations concern the intent of the parties to become parents.

Not only does the majority reject this interpretation of the statute, but it goes on to state that by adopting this interpretation, the trial court violated T.M.H.'s constitutional rights to equal protection and privacy. As the statute's commissioning party exception applies only to different-sex couples and the adoption exception only applies to a father, removing the intent element from the word "donor" leaves lesbian couples with no way to ensure that the child's biological mother can maintain parental rights. Effectively the trial court's interpretation and application of Section 742.14 limits a lesbian couple's choices for procreation and eliminates a biological mother's parental rights to her children. As both the right to procreation and a parent's right to their children are fundamental rights under both the state and federal constitutions, the statute is subject to strict scrutiny. In order to survive strict scrutiny, the "proponent of the statute" must establish that it "furthers a compelling government interest through the least intrusive means." Here, the Court of Appeal found that Section 742.14, as interpreted and applied by the trial court to T.M.H., fails strict scrutiny. In reaching this conclusion, the majority relies largely on D.M.T.'s failure, as the proponent of this interpretation of the statute, to establish that the statute withstands strict scrutiny. Also, Judge Sawaya reiterates throughout his opinion the importance of the parental rights of a bio-

logical mother who formed a parental relationship with her child and that these rights are constitutionally protected.

In his opinion, Judge Sawaya focuses more on establishing that T.M.H. does have parental rights to her child than on explicitly applying strict scrutiny to determine if there is a compelling government interest behind the statute. Specifically, he addresses the arguments the dissent presents against finding that any of T.M.H.'s fundamental rights are threatened by the trial court's interpretation of Section 742.14. First, the dissent states that Section 742.14 waives a donor's parental rights from the moment of donation, therefore T.M.H. never had parental rights to be denied. Without ever having parental rights in the first place, her fundamental right to parent her child could never be implicated. The majority rejects this argument, pointing out that a person must have rights in order to waive them.

Additionally, the majority refuses to accept Judge Lawson's contention that the right to procreate does not extend to the right to use assisted reproductive technology to have a child. Judge Sawaya does not address this argument in great detail, but does state that as the right to procreate has already been held to extend to the use of contraceptives and abortion technology, it is reasonable that the right includes other forms of medical technology, such as in vitro fertilization.

The dissent further asserts that as the birth mother, D.M.T. has sole parental rights to the child under common law. Judge Sawaya finds that this interpretation of parental rights ignores not only T.M.H.'s biological connection to her daughter, but also the parental relation-

ship she has formed with the child. T.M.H.'s actions following the birth of the child do not indicate that she in any way relinquished her rights to the child, as prior to their separation, D.M.T. and T.M.H. served as co-parents, with T.M.H. helping to care for her daughter and forming the same parental bond with her that any other parent raising their child would form. Judge Sawaya also questions if a common law rule that was "established during a time so far removed in history when the science of in vitro fertilization was a remote thought in the minds of scientists of the times[,] has much currency today."

D.M.T. argues that, even if the trial court's interpretation and application of Section 742.14 to T.M.H. is in error, T.M.H. still waived her parental rights when she signed the informed consent form in the physician's office releasing her egg to D.M.T. The consent form states that the person signing the document "relinquish[es] any claim to . . . the offspring that might result from [the] donation." Although T.M.H. did voluntarily sign the consent form, the Court of Appeal held that the waiver was not intended to apply to the situation in this case. Applying the same meaning of "donor" and "donation" that the court used to interpret Section 742.14, that it implies intent to give one's egg away to another person without retaining any rights, the court found that T.M.H. was not a "donor" for purposes of the consent form. In support of its conclusion that the form simply was not meant to apply to T.M.H., the court also relies on the affidavit submitted to the trial court by the physician who treated both women at the reproductive center where the couple sought reproductive assistance. In

his affidavit, the doctor stated “that the waiver provisions were simply part of a standard form he has all patients sign and that those provisions were inapplicable to [T.M.H.] and [D.M.T.]”

The majority only briefly addresses D.M.T.’s arguments that T.M.H. could never adopt the child due to Florida’s then-current adoption laws and that T.M.H.’s parental rights only lasted the duration of the relationship. First, Judge Sawaya states that the legislature did not intend for the prohibition on adoptions by lesbian couples to apply to situations in which a lesbian parent is biologically related to the child. He also makes note of the Florida 3rd District Court of Appeal’s decision in *Florida Department of Children & Families v. X.X.G.*, which held that the portion of the adoption statute prohibiting adoptions by “homosexuals” violates

equal protection as provided for in the state constitution (45 So.3d 79 (Sept. 22, 2010)).

As to the contention that a person’s parental rights do not extend past the ending of a relationship, the court states that by making this argument, D.M.T. essentially asked the court to pick which woman should be the child’s parent. The court refuses to make such a choice, finding that “parental rights. . . transcend the relationship between two consenting adults.” The court again makes a point to state that T.M.H.’s claims to parental rights are not based solely on a de facto parental relationship with the child, but also on the fact that she is the biological mother. Both women, through birth or biology, have a parental right to the child, and these rights are not exclusive of each other. The court found no legal reason why the child cannot have two mothers.

In his dissenting opinion, Judge Lawson, in addition to the arguments discussed above, asserts that the Court of Appeal erred in even hearing T.M.H.’s claims, stating that she did not adequately raise either her constitutional claims or theories of how the word ‘donor’ should be interpreted, to the trial court or on appeal, and therefore the Court of Appeals had no jurisdiction to address either issue. The majority briefly addresses this assertion, and just as quickly dismisses it. Adequacy, Judge Sawaya states, is subjective, and while T.H.M.’s claims may not have been as detailed as would be preferred, her claims were, for purposes of appeal, adequately pled.

The court of appeal remanded the case for the trial court to apply the traditional “best interest of the child” test to determine issues of custody, visitation and support.

— Kelly Garner

California Appellate Court Denies Appeal of Man Convicted of Orally Copulating His Sleeping Neighbor

In *People v. Wiidanen*, 2011 WL 6020163 (Cal.App. 3 Dist., December 5, 2011), the California 3rd District Court of Appeal denied the appeal of a defendant who was found guilty of orally copulating an unconscious person. In reaching the decision, Justice Ronald Robie turned aside a kitchen sink defense and appellate strategy that meandered from outright denials to the notion that the parties were too blitzed to know what was happening to theories about how the defendant’s DNA could have wound up on the victim’s penis in the absence of any sexual act and a

final theory of the case offered during the trial’s closing argument that the acts were consensual.

The defendant, Ladd Douglas Wiidanen, and the victim, referred to as John Doe, were friends and neighbors who both attended a New Years’ Eve party in December 2007. After a night of extended drinking—defendant estimated he consumed approximately 24 beers from noon on New Year’s Eve until 2:00 A.M. the next day—Doe testified that, as was his practice, he went to sleep naked after believing that everyone had left the party or gone to bed. Doe awoke feeling

a “wet mouth” around his penis, which he assumed was his girlfriend’s as she had also attended the party. When Doe reached down he felt a beard and pushed the man’s face away; defendant then began using his hand until Doe grabbed his arm and threw it away.

After a confrontation with Doe and a denial by defendant, the police were called. Defendant offered conflicting versions of what he could and could not remember, but adamantly denied that he had performed the act. Defendant, who was married to a woman at the time of the incident, provided police a DNA sample from the inside of his cheek while Doe provided swab samples from his penis shaft and tip. The results indicated a high level of the enzyme in defendant’s saliva on the penis shaft swab, and

a moderate level on the penis tip swab. (News reports indicate that these tests were completed long after the incident due to a backlog at the crime lab and defendant was not arrested until nearly two years later).

Defendant was charged with orally copulating an unconscious person. The elements of the crime are: (1) the defendant committed an act of oral copulation with another person; (2) the other person was unable to resist because he was unconscious of the nature of the act; and (3) the defendant knew that the other person was unable to resist because he was unconscious of the nature of the act. Defendant was found guilty at trial and placed on three years' probation.

On appeal, defendant offered a hodgepodge of objections, arguing that: the court erred in its jury instructions; an *in limine* ruling improperly excluded evidence of defendant's intoxication as a defense; the court erred when it failed to give instructions on the lesser included offense of assault and battery; the prosecutor committed misconduct that should have been objected to by arguing facts outside the record; and appellant's right to an impartial jury was violated by the presence of an alternate juror whose son was the current boyfriend of Doe's former girlfriend, who had testified at trial.

Defendant also speculated on appeal that his DNA could have ended up on Doe's penis because they were playing darts and pool together. Though this theory was not spelled out in the decision, it could go something like this: defendant uses the billiard bridge stick for knocking a stripe in the right corner pocket; two turns later, Doe uses that same stick for reaching a solid

and, in the process, picks up defendant's DNA from the stick. Doe, frustrated from missing his shot and having to urinate again because of all the beers he's been drinking, goes to the bathroom, and, as speculated by defendant, transfers defendant's DNA from his "hand to his penis during urination."

The court, however, found that the assertions were unsupported by the record. Indeed, during closing argument, defense counsel admitted that it was "obvious" why defendant had initially denied the act – he was a heterosexual married man. This admission largely negated the persuasiveness of the pool-stick defense.

With respect to the jury instructions, defendant argued that the trial court erred by pairing an instruction that his intoxication could only be considered for the purposes of his knowledge of whether the victim was unconscious (as opposed to it serving as a defense to the crime) with an instruction that a false or misleading statement made by defendant could show awareness of his guilt of the crime. The court agreed that it was error to pair these instructions, because it prohibited the jury from considering the possibility that his intoxication could mean that he lacked knowledge that he was, in fact, making a false or misleading statement to police.

However, the court found that the instructions did not violate due process and were harmless under state law, because other facts before the jury supported the conclusion that defendant was aware of his guilt at the time he made the false statements to police. In short, the record showed that defendant had the uncanny ability to "selectively remember" portions of the events that would exculpate him (i.e., that

he did not orally copulate anybody), while showing a "hazy memory" about facts that would not be helpful to his cause (i.e., whether he was at the house at the time the events unfolded).

Likewise, the court found harmless error with the trial court's instructing on the concurrence of act and general intent rather than on the concurrence of act and specific intent. Given the nature of the alleged crime, the instruction should have been focused on the specific intent/mental state of the defendant. The court ruled that other instructions provided by the court covered this point adequately so as not to prejudice the defendant.

The court also upheld the trial court's ruling with respect to evidence of defendant's intoxication. The *in limine* ruling at issue, according to the court, had been correctly decided to allow for introducing evidence of intoxication on the issue of defendant's ability to perceive but not as a defense to the crime itself. Put another way, the trial court correctly allowed defendant the chance to show he was drunk to the extent it showed he could not perceive that his victim was unconscious, but not so he could argue, "Hey, I was so drunk, I could not have possibly intended to perform oral sex on my neighbor." The defense, however, never even called the witness who would have been permitted to testify on this issue.

Finally, the court upheld the lower court's refusal to provide instructions on the allegedly lesser included offense of assault and battery, because the court is only bound to do so where it finds substantial support in the evidence for such offense. Here, the record overwhelmingly indicated that defendant was

aware (and not too drunk to realize) that Doe was unconscious, waited for such a moment to commit the crime, and was able to perceive well enough to lie about the events soon after Doe's awakening.

The court also easily disposed of arguments that the prosecutor

went outside the record and that defendant's counsel was ineffective for failing to object with respect to the prosecutor's alleged use of data from the National Weather Service concerning the timing of sunrise on the day of incident. The prosecutor never used

such data and, in any event, it was irrelevant given that the defense was premised on the act being consensual rather than on defendant having an alibi. Other arguments about the alternative juror's presence and cumulative error were turned aside. —BS

Connecticut Appellate Court Rejects Loss-of-Consortium Claim by Long-Time Domestic Partner

Upholding the Superior Court's grant of a motion to strike a loss of consortium claim brought by a surviving civil union partner in *Mueller v. Tepler*, 2011 WL 6347880 (Dec. 27, 2011), the Appellate Court of Connecticut faulted the plaintiff for failing to include in her complaint an allegation that she and the decedent would have formed their civil union prior to the alleged acts of medical malpractice were it possible to do so under Connecticut law. The court held that the complaint did not put into issue whether the civil union should be applied retro-actively to create the necessary legal relationship upon which to ground a loss of consortium claim under Connecticut law, since the trial court's factual basis for ruling on a motion to strike a claim is limited to the allegations of the complaint.

According to the opinion for the court by Judge Barry R. Schaller, plaintiff Charlotte Stacey alleged that she and Margaret A. Mueller had been domestic partners since June 1985. Within weeks of civil unions becoming available by statute in Connecticut, the women had a civil union ceremony on November 12, 2005. But that was more than a year after Mueller left the care of the defendant, Dr. Iris

Wertheim, who was alleged in the complaint to have committed malpractice in failing to properly diagnose and treat Mueller's cancer. (Mueller was a patient of Wertheim from 2001 through 2004.) Mueller filed the malpractice action before she died, and her estate was substituted as plaintiff. The defendant moved to strike Stacey's claim for loss of consortium, arguing that as the women had no legally recognized relationship at the time that Mueller was under the defendant's care, the defendant could not be liable to Stacey for loss of consortium as a matter of law. The trial court granted the motion to strike on August 20, 2008. Mueller died on January 10, 2009. The case subsequently went to trial, and on July 2, 2010, the jury returned a verdict in favor of the estate of Mueller against Dr. Wertheim on the malpractice claim. A few weeks later, Stacey appealed the trial court's ruling striking her claim.

Connecticut courts first recognized a loss of consortium claim in *Hopson v. St. Mary's Hospital*, 408 A.2d 260 (Conn. 1979), the claim being allowed for the legal spouse of a tort victim. In *Gurliacci v. Mayer*, 590 A.2d 914 (Conn. 1991), the court refused to extend the loss

of consortium cause of action to a cohabitant who was engaged to be married to the tort victim, stating that "the formal marriage relation forms the necessary touchstone to determine the strength of commitment between the two individuals which gives rise to the existence of consortium between them in the first instance. A cause of action for loss of consortium does not exist where the injury occurred prior to the marriage of the parties." The Connecticut Civil Union Act, which has since been superseded by the opening of marriage to same-sex couples pursuant to the Connecticut Supreme Court's ruling in *Kerigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008), extended to civil union partners all the state law rights and duties of married couples effective October 1, 2005, including the right to sue for loss of consortium.

Stacey argued in her appeal that she and Mueller would have formed a civil union much earlier had it been possible to do so under Connecticut law, stressing that the women had lived together as partners since 1985 and had formed a civil union shortly after the law went into effect. However, she had not made such an allegation in her complaint, and the court was responsive to the defendant's argument that the pre-trial motion to strike should be based on the allegations of the complaint. The allegations of the complaint were based on the argu-

ment that the court should allow a loss of consortium suit to domestic partners who “have supported each other both financially and emotionally” for many years prior to the alleged malpractice was committed by the defendant, without directly placing before the court the issue of whether the civil union should be applied retroactively for this purpose. The court found that the absence of an allegation in the complaint that the women would have formed a civil union prior to the acts of malpractice had it been legally possible left this case in the same posture as *Gurliacci, supra*, with the same result.

In a footnote, Judge Schaller commented, “Although not reached in the present case, we note that the merits of this issue were addressed by the Massachusetts Supreme Ju-

dicial Court in *Charron v. Amaral*, 451 Mass. 767, 889 N.E.2d 946 (2008). In that case, the court concluded that its recognition of same sex marriage in *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003), was not to be applied retroactively and, accordingly, affirmed the trial court’s award of summary judgment to the defendants on the plaintiff’s loss of consortium claim.” The Massachusetts court ruled, in effect, that anything other than a bright-line test of a legal relationship would be unworkable and might lead to “promoting litigation,” so as to “permit judges to select from among marital benefits to which quasi marital couples might or might not be entitled, create uncertainty in the private as well as the public sphere about who is (or was) quasi married

and for what purpose, and undercut the legislature’s role in defining the qualifications and characteristics of civil marriage.” Although Schaller said nothing to indicate whether Connecticut courts would follow this ruling as a persuasive precedent, his citation to and discussion of the case in a lengthy footnote implies that likelihood.

The court also noted that its ruling upholding the motion to strike foreclosed the plaintiff’s argument that denying her standing to assert a loss of consortium claim violated her equal protection rights under the Connecticut constitution. Since her factual allegations did not distinguish her case from *Gurliacci*, she couldn’t complain she was being treated differently due to her sexual orientation, Schaller asserted. ■

NJ Court Awards Custody in Gestational Surrogacy Dispute

Facing legal questions of first impression for the state, New Jersey Superior Court Judge Francis B. Schultz ruled on December 13 that the father of twin girls conceived through gestational surrogacy should be awarded sole custody of the now-5-year-old girls, despite the court having earlier ruled that the surrogacy contract signed by the parties was void as a matter of New Jersey law and that the gestational surrogate, although not genetically related to the twins, is their legal mother. The court’s decision in *Robinson v. Hollingsworth*, Docket # FD-09-001838-07 (N.J. Superior Court, Hudson County), was transmitted to the parties in a letter ruling using initials to identify the parties, but it has been reported in the Newark Star-Ledger using the names of the parties, which

will be used here. (If the opinion gets published, it will be titled *A.G.R. v. D.R.H. & S.H.*) Lowenstein Sandler PC (Karim J. Kaspar, Natalie J. Kranner, and Jennifer L. Fiorica) represent the fathers, and Harold J. Cassidy represents the mother.

Donald Robinson and Sean Hollingsworth, then New Jersey registered domestic partners, entered into a surrogacy agreement with Donald’s sister, Angelia Robinson, for Angelia to bear children for the two men. Although the parties originally intended that Angelia’s own ova would be inseminated with sperm from Sean, so that the children would be genetically related to both men, it turned out that Angelia’s ova were not suitable for the purpose, so ova donated anonymously were fertilized in vitro and implanted in Angelia, making her

a gestational surrogate rather than a traditional surrogate.

In December 2005, Angelia signed a document titled “Informational Summary and Consent Form - Gestational Surrogacy,” signifying her understanding of the process and agreement to participate. All three parties signed a document titled “Contract Between a Genetic Father, an Intended Father, and a Gestational Carrier” on February 28, 2006. Under this agreement, the parties signalled their intent that children conceived through the process would be the legal children of Sean and Donald, and that Angelia did not intend to be a parent to the children. The fertilized embryos were implanted by a doctor on March 1, 2006. Angelia gave birth to twin girls on October 4, 2006, and on October 15, 2006, she signed a “Consent to Judgment of Adoption,” under which she authorized termination of any parental rights she had and gave consent to the

girls' adoption by her brother, Donald, so that both men would be legal fathers of the twins.

However, as sometimes happens in surrogacy situations, Angelia changed her mind and decided that she wanted to be a mother to the children, not just, as the parties had contemplated, their aunt. Disputes about visitation arose, the adoption did not go forward, and Angelia filed suit early in 2007, seeking custody. This all played out against various life changes, most significantly for Angelia, who had at one time had her own same-sex partner, but later, in the course of this litigation, reverted to the conservative Baptist faith in which she (and her brother) had been raised in Texas, renounced homosexuality, and became morally opposed to the surrogacy arrangement in which she had participated.

The initial response by Donald and Sean to the lawsuit was to contest Angelia's standing to seek custody. Arguing that as a gestational surrogate she had no genetic relationship to the children and should not be deemed their legal mother, they filed a pre-trial motion for summary judgment. Judge Schultz rejected their motion in an opinion issued on December 23, 2009, finding that under controlling New Jersey law, the surrogacy agreement and the consent to adoption that Angelia had signed were both unenforceable, and that Angelia was the legal mother of the twins.

Judge Schultz relied on the famous decision in *In re Baby M*, 109 N.J. 396 (1988), in which the New Jersey Supreme Court, dealing with a traditional surrogate situation, ruled that a surrogate is the legal mother of the child born to her, and that any contractual agreement made prior to the birth concerning parental status or custody is unenforceable as a matter of public policy. Sean and Donald had argued

that Baby M was not precedential for this case because it involved a traditional surrogate who was the genetic as well as the gestational parent, but Judge Schultz rejected the distinction. He observed that in *Baby M*, the New Jersey Supreme Court had placed no significance on genetic relationships, instead focusing on more general public concerns about surrogacy.

Judge Schultz found that "the public policy considerations" cited by the New Jersey Supreme Court in *Baby M* "are far reaching and unrelated to a strict genetic connection. The lack of plaintiff's genetic link to the twins is, under the circumstances, a distinction without a difference significant enough to take the instant matter out of *Baby M*." Judge Schultz acknowledged that courts in some other states had treated the matter differently, distinguishing sharply between traditional and gestational surrogates, but he found himself bound to follow New Jersey precedent on this. California courts, for example, have embraced a concept of "intended parenthood" under which a surrogate who agrees to participate in the process on the understanding that she will not be a legal parent to the child is bound by that agreement, and the spouse of the genetic father will be the legal parent of the child.

Having rejected the summary judgment motion, Judge Schultz set

for trial what had now become a controversy between two legal parents, Angelia and Sean, who are not married to each other. Each of them theoretically has an equal claim to custody, and in some circumstances courts will grant joint legal custody, but that is really not a viable option when the parties are hostile to each other, and in this case there was considerable hostility, arising from a variety of circumstances.

The background is a complex story told in great detail in the December 13 decision, drawing in the parents of Angelia and Donald, who now live with Angelia and are religiously opposed to surrogacy and homosexuality. An additional complication is that Sean's mother is Caucasian and his father is African-American, so the twins are part African-American. Courts normally treat mixed-race children as being "special needs" children in the sense that they may have particular identity issues growing up in a society that thinks in racial terms, and need parental support in establishing their own identity. Another complicating factor: when same-sex marriage was available during 2008 in California, Sean and Donald went there to get married, and Donald took Sean's surname, so the couple are now Sean Hollingsworth and Donald Robinson Hollingsworth. Another complicating factor, which helps to explain why it

The court found that the surrogacy agreement and consent to adoption ... were both unenforceable.

took so long for a case filed in 2007 to be decided, was that despite frequent requests by the court, counsel for Angelia never submitted proposed findings of fact after the trial that was held in several non-consecutive hearing dates between June 2010 and July 2011, and there seems to have been protracted pre-trial wrangling between the parties.

Each side in the litigation presented expert testimony, and there was also a neutral expert who had been appointed by a different judge who had been handling the initial stages of the case before it was assigned to Judge Schultz. The December 13 opinion provides detailed discussion of the experts' testimony, and gives most weight to the "neutral" expert appointed by the court, who "strongly recommended sole custody with the defendants and that it be done as quickly as possible." According to Judge Schultz, this expert, Dr. Alex Weintrob, "was passionate about this."

Dr. Weintrob strongly contended that it would be harmful to the girls for Angelia to be awarded custody, in light of her attitudes towards homosexuality and her dismissal of the particular issues the girls would face as mixed-race children. He found that Sean would be a superior parent in terms of affirming the girls' identity. In addition, Donald is the breadwinner in the family and Sean the stay-at-home parent (who only works part-time), whereas Angelia works full-time, so the children if in her custody would end up spending considerable time with the mother of Donald and Angelia, whose religious objections to her son's homosexuality and relationship to Sean, the child's legal father, would be difficult to mask.

Ruling out joint custody, Judge Schultz observed that "the parents'

ability to agree, communicate and cooperate in matters relating to the children is nonexistent here," and that is a prerequisite to a successful joint custody arrangement.

"The needs of the children are the most important factor in this case," wrote Schultz, who found that when all the relevant factors were considered, it was in the best interest of the girls to live with Sean and Donald, provided that Angelia had sufficient regular visitation rights to preserve her parental relationship with the children. He found that Sean and Donald were in a better position to be supportive of the girls' identity issues relating to having been conceived through in vitro fertilization and gestational surrogacy, having a gay father living in a same-sex relationship, and being of mixed race. He also found that "the stability of the home environment offered and the quality and continuity of the children's education" were also important factors that weighed in favor of Sean as custodian. The children are enrolled in a Montessori school in Jersey City, and Angelia was planning to place them in a religious school if she obtained custody. The court weighed many factors, and found that virtually all the relevant factors weighed in favor of a custody award to Sean.

The court set out a detailed schedule for visitation rights for Angelia, under which the children would spend alternate weekends with her, from after school on Fridays until Sunday evenings, with some exceptions carved out for various holidays and some full weeks during summer vacations from school.

The result of this ruling is that the children have two legal parents, Sean and Angelia, and an uncle, Donald, who also happens to be their father's New Jersey registered domestic partner and California husband, but who

has no legal parental status towards the twins, even though they consider him to be one of their fathers.

Due to the strange patchwork of recognition of same-sex marriages in the U.S., this marriage is not recognized as such in New Jersey, but is treated by the state government as a "civil union" as that term is defined in New Jersey law, and, due to the federal Defense of Marriage Act, their marriage is not recognized by the federal government. Due to the hostility between Angelia and the two men, a second-parent adoption by Donald seems out of the question, since Angelia is unlikely having litigated this issue for almost five years to suddenly agree to a termination of her parental rights, and New Jersey law does not recognize that a child can have three legal parents -- at least, not yet. Theoretically, if Sean become incapacitated or died while the twins were still minors, Donald might have no standing for maintaining legal custody of them if Angelia insisted on asserting her parental rights, leaving their family relationship in a tenuous situation.

The story of this case presents a cautionary tale for gay male couples who are interested in having children through a surrogacy arrangement. Doing this kind of a thing in a state such as New Jersey that has no statutory or judicial recognition and enforcement of surrogacy agreements is a risky business, as the written agreements may have no weight in a legal dispute. Things are even worse in New York, where a criminal statute condemns surrogacy agreements, both traditional and gestational. By contrast, surrogacy is legally recognized and such agreements are enforced in Connecticut. ■

California Court of Appeal Affirms Parental Rights for Non-Adoptive Same-Sex Co-Parent

The California 3rd District Court of Appeal has affirmed a ruling by Sacramento Superior Court Judge Helena Gweon that a woman who had not attempted to adopt her former same-sex partner's adoptive children, due to the woman's fear of jeopardizing her military career under the "Don't Ask Don't Tell" policy, was the second parent of those children even though the women did not share the same residence. *S.Y. v. S.B.*, 2011 WL 6129594 (Dec. 9, 2011). Writing for the court, Justice Cole Blease found that Judge Gweon had correctly concluded based on the evidence in the record that S.Y. was a parent of the children under California's construction of the Uniform Parentage Act.

S.Y. and S.B. met in 1993 and were in a committed relationship that ultimately ended in 2009. They maintained separate residences, but S.B. spent several nights a week and most weekend's at S.Y.'s home. S.Y. worked as a senior planner in the Community Development Department for the City of Sacramento and served as a Colonel in the U.S. Air Force Reserves, having been a member of the second class of women to graduate from the Air Force Academy having served in the Air Force for almost 30 years. S.B. worked as a kindergarten teacher. S.B. initiated the idea of having children. While this had not been a goal of S.Y., she said she would support S.B. in this and would be a co-parent. At first S.B. wanted to have children through donor insemination or in vitro, but ultimately decided to adopt. She adopted G.B. in 1999, shortly after his birth, and S.Y. participated actively in a parental role from the time G.B. was born. The parties broke up in June 2003, but got together again two and a half years later. During the interim period S.Y. attempted

to maintain her contact with G.B. and visited regularly except when S.B. prevented it. During the break-up, S.B. decided to adopt another child, and adopted M.B. in 2004. S.Y. continued to visit the home frequently and also co-parented M.B. to the extent possible. After the parties reconciled, S.Y. resumed the co-parental role. (She testified that her relationship to the children was the main reason she resumed her relationship with S.B.) However, in July 2009, S.Y. decided to end the relationship with S.B., who advised S.Y. that she could no longer have contact with the children. S.Y. immediately consulted counsel and filed suit shortly thereafter.

According to Justice Blease's opinion, "S.Y. believed her position in the military precluded her from adopting the children or formalizing her relationship with S.B. She also believed that under the military's "Don't Ask, Don't Tell" policy (10 U.S.C. sec. 654), doing any of those things would have jeopardized her 30 year career in the military and could have resulted in her being court marshaled and going to prison. In addition, S.Y. testified that S.B. would never have allowed her to adopt the children, and until recently, she believed the law precluded her from adopting the children and would not otherwise recognize her parental rights." Evidently, it was not until she consulted counsel that she learned that California courts have recognized parental rights of same-sex co-parents in the absence of formal adoption or same-sex registered domestic partners or marriages.

The issue for the court, under California precedents, was whether S.Y. had "received the children into her home" and "openly held G.B. and M.B. out as her natural children," thus raising the presumption under the UPA that she

was a parent to the children. The court found that Judge Gweon had not abused her discretion in ruling based on the trial record that these requirements had been met and that there was no basis in the record to rebut the presumption of parental status. The court concluded that the separate residences maintained by the two women did not defeat the requirement that S.Y. "received the children into her home," since she spent so much time at S.B.'s house with the children that it qualified as her "home" for this purpose. Also, given the fears about her military career, the court found that her conduct sufficient met the "openly held out" requirement in light of the number of people who were aware of the situation and testified to S.Y.'s parental relationship with the children. In common with prior cases, wrote Justice Blease, "here, S.Y. encouraged S.B. to adopt a child with the understanding she would co-parent the child; S.Y. voluntarily accepted the rights and obligations of parenthood since the children were born; there are no competing claims to her being the children's second parent; and public policy favors children having two parents. The trial court acted well within its discretion in concluding S.B. failed to rebut the parentage presumption."

The court also rejected S.B.'s due process argument based on *Troxel v. Granville*, 530 U.S. 57 (2000), observing that California courts have rejected the contention that *Troxel* applies to a situation in which a court determines that a person is a parent under the UPA. (*Troxel* was a case where the Supreme Court reversed a state court ruling requiring a fit parent to allow her deceased spouse's parents continue contact with the children over her objections.) A person determined to be a parent pursuant to the UPA is not a "third party" for this purpose.

Finally, the court rejected S.B.'s argument that "a woman's right to assert visitation rights—much less parental rights—to her former partner's children, is not

widely protected by society even today.” The court reproduced a string-cite from S.Y.’s brief from 19 different jurisdictions in which appellate courts recognized

such rights for former same-sex partners who were co-parenting children.

In addition to affirming Judge Gweon’s declaration that S.Y. is a parent

of the two children, the court awarded costs on appeal to S.Y. S.Y. is represented by Wald & Thorndal and the National Center for Lesbian Rights. ■

U.S. Magistrate Denies Summary Judgment in H.S. “Outing” Case

On November 30, 2011, US Magistrate Judge John D. Love issued a decision denying summary judgment to the Kilgore Independent School District (KISD) and its softball team’s coaching staff. The defendants were sued by Barbara Wyatt, S.W.’s mother, on S.W.’s behalf, who was sixteen at the time when allegedly “outed” by the KISD coaching staff, namely Rhonda Fletcher and Cassandra Newell. *Wyatt v. Kilgore Independent School District*, 2011 WL 6016467 (E.D.Tex.).

The plaintiffs’ alleged: According to S.W., coaches Newell and Fletcher called an unscheduled softball team meeting on March 3, 2009, on campus. After the coaches dismissed the team, they led S.W. into an empty locker room and locked the door. They then questioned S.W. about her relationship with an 18-year-old girl named Hillary Nutt. Fletcher accused S.W. of spreading a rumor that Nutt was “Coach Newell’s ex-girlfriend.” S.W. initially denied the accusations, which “angered” the coaches. The coaches then intimidated S.W., threatening to sue her for slander and calling her a liar. Eventually, S.W. admitted to dating Nutt though, “at the time of the confrontation, S.W. and Nutt had arranged a date but were not ‘dating.’”

The coaches revealed this information to S.W.’s mother. Newell even offered her Nutt’s contact information. S.W.’s mother claims that she did not know that her daughter was homosexual prior to this outing, but she had previously asked S.W. if she was gay, which S.W. had consistently denied.

S.W.’s mother went through proper channels to file a grievance with the school and with the school district. Ultimately, administrators found no problem with the way the coaches handled, and Wyatt’s administrative remedies were exhausted (as the court ruled).

According to the defendants, though, they claim that S.W. was openly gay for a number of years prior to the incident and never attempted to keep secret her sexuality. They also claim that S.W. was never a serious athlete and regularly disregarded team rules, which made her difficult to coach.

Defendants claim S.W. spread a rumor that she was dating Nutt, who she claimed was Newell’s ex-girlfriend. When the coaches heard the rumor, they confronted S.W. because: “[1] they believed that Ms. Nutt was a bad influence on S.W. because Ms. Nutt had previously talked about drinking and smoking marijuana; [2] they believed the fact that Ms. Nutt was eighteen-years-old and S.W. was sixteen ‘made any physical relationship between them a potential crime’; and [3] the rumors were causing dissension on the softball team.”

During the March 3, 2009, confrontation defendants claim they did not stand over S.W. and did not try to intimidate or threaten her. The reason coaches contacted S.W.’s mother was to inform her of S.W.’s inappropriate and potentially illegal relationship with Nutt. They also claimed they did not use the terms gay or lesbian with S.W.’s mother, and that she already knew that S.W. was homosexual. Defendants maintain they did not disclose confidential information

and complied with KISD’s policy of disclosing to parents potentially illegal relationships involving students.

The plaintiffs allege that the coaches violated S.W.’s right to privacy, that KISD promulgates policies facilitating the unauthorized disclosure of information concerning students’ sexual orientation, and that KISD failed to train its employees how to handle the confidentiality of its students’ sexual orientation. Defendants move for summary judgment, primarily, on two separate grounds: qualified immunity and municipal liability.

Defendants argue that the coaches acted in an objectively reasonable manner and did not knowingly violate S.W.’s right to privacy. The defendants also argue that KISD properly trained its employees and did not have a policy of disclosing a student’s sexual orientation.

The court rejected the defendants’ arguments concerning the coaches’ qualified immunity defense, pretty much out-of-hand, due to the overwhelming issues of fact in this case.

Otherwise, the court clearly held that: [1] there is a constitutional right to prevent the unauthorized disclosure of one’s sexual orientation; and [2] that S.W. has a reasonable expectation of privacy in her sexual orientation. Insofar as the court looked at the record before it and found that there are material issues of fact as to whether or not KISD had a policy requiring disclosure of students’ sexual orientation, summary judgment relief was unavailable for the defendants. The court also held that the plaintiffs had established sufficient evidence that KISD failed to train its employees relating to the confidentiality of its students to survive the summary judgment motion. —*Eric J. Wursthorn*

FEDERAL CIVIL LITIGATION NOTES

8TH CIRCUIT — The U.S. Court of Appeals for the 8th Circuit announced on December 7 that it will reconsider en banc the panel decision in *Phelps-Roper v. City of Manchester*, 658 F.3d 813 (8th Cir., Oct. 5, 2011). The 3-judge panel upheld a ruling by Chief Judge Catherine D. Perry of the U.S. District Court for the Eastern District of Missouri, who found unconstitutional a local ordinance in Manchester, Missouri, limiting picketing or protest activities within 300 feet of any “residence, cemetery, funeral home, church, synagogue or other establishment” while a funeral or burial service is going on, for a period up to an hour before and an hour after such funeral or burial service. Judge Perry found the ordinance to be a content-based regulation of speech that failed to meet strict scrutiny. The three-judge panel found that it was not a content-based speech regulation, since it was non-specific as to what the subject matter of the picketing or protest might be. Nonetheless, the panel also found it unconstitutional, finding Judge Perry’s conclusion that the local government had no “significant governmental interest” in shielding those attending funerals or burial services from “unwanted communications” to be consistent with existing 8th Circuit precedent, as expressed in *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008). *Phelps-Roper v. Nixon* predates the Supreme Court’s ruling last term in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), where the Court barred tort damages for emotional distress to a father whose claim was based on picketing/protest by the Phelps family (under the name

of Westboro Baptist Church, founded by pater-familias Fred Phelps) at the funeral of his son, a combat veteran of the Iraq war, but indicated in dicta that protesters’ “choice of where and when to conduct [their] picketing is not beyond the Government’s regulatory reach – it is ‘subject to reasonable time, place, or manner restrictions’...” One of the judges on the three-judge panel in the Manchester case, concurring in the result, highlighted the Supreme Court’s comment on regulation of picketing, and one suspects that the Circuit’s decision to grant en banc review at the request of Manchester is prompted by the need to reconsider Circuit precedent on funeral picketing laws in light of *Snyder v. Phelps*. The nature of the picketing/protest involved in these cases brings it within the sphere of interest of *Law Notes*; Westboro Baptist Church promotes the view that the deity is punishing the United States for being too permissive regarding homosexuality (the foregoing puts their theology in more respectful language than they customarily use on their signs and in their chants) by causing the death of U.S. soldiers. One suspects their protest activity will escalate now that lesbians, gay men and bisexuals are allowed to serve openly in the U.S. armed forces. * * * It is possible that this issue is headed back to the Supreme Court, as the Phelps family has brought preemptive challenges against local laws barring such picketing in several different parts of the country, resulting in a variety of rulings. The Manchester panel noted that the 6th Circuit upheld a similar ordinance against a 1st Amendment

challenge in *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008). * * * Anyone seeking to become better-acquainted with the agenda and activities of the Westboro Baptist Church should consult their website, <http://www.godhatesfags.com>.

DEPARTMENT OF HOMELAND SECURITY

— Deportation Cases – Immigration Equality reported two cases in which pending deportation proceedings against undocumented aliens who are spouses of American citizens have been dropped by the Immigration and Customs Enforcement (ICE) agency under a policy announced in November focused on reorientation immigration enforcement to focus on lawbreakers and other undesirables and to consider such circumstances as close family ties. Although the policy does not expressly address LGBT partnerships and marriages, the Department had explained that such relationships were among those to be considered in its implementation. On November 30, an immigration judge in New York agreed, at the behest of government attorneys, to close the deportation case of Monica Alcota, an Argentinian national married to Cristina Ojeda, a U.S. citizen. Alcota is represented by LeGal member Lavi Soloway. In mid-December, government attorneys in Hartford, Connecticut, moved to drop deportation proceedings against Michael Thomoas, a citizen of Trinidad & Tobago who married John Brandoli, a U.S. citizen, last year in Massachusetts. *Advocate.com*, Dec. 15.

FEDERAL CIVIL LITIGATION NOTES

DISTRICT OF COLUMBIA — Cleaning up one of the loose ends dangling from the improper hiring practices of the U.S. Department of Justice during the Bush Administration, U.S. District Judge John D. Bates granted DOJ's motion for summary judgment in *Gerlich v. U.S. Department of Justice*, CA No. 08-1134, on December 15. The lawsuit was filed in 2008 by several individuals who had applied through the Department's Honors Program, under which new law school graduates are hired for beginning staff positions in DOJ. The individual plaintiffs remaining in the case were not interviewed and did not receive offers. The lawsuit was filed in response to news reports and testimony before Congress revealing that the "screening committee" within the Justice Department in 2006 had disqualified candidates who had been recommended for interviews by various components within the Department, based on a political litmus test that "de-selected" people who might be seen as civil libertarians, environmentalists, or otherwise "liberal." Testimony revealed that members of the screening committee did Internet research to uncover "liberal" associations of candidates, and annotated their applications accordingly. The scope of the case and the number of plaintiffs had been whittled down substantially through motion practice prior to the cross-motions for summary judgment upon which Judge Bates ruled on December 15. In this ruling, Bates found that none of the three remaining plaintiffs (James Saul, Matthew Faiella and Daniel Herber) could present evidence that their individual

applications were wrongly processed, or that records had been created concerning their applications that would violate any federal law. One of the plaintiffs' problems is that the Justice Department had destroyed the records that might have provided such evidence, in the normal course of disposing of applications material for the Honors Program. "The Court agrees with plaintiffs that misconduct from senior government officials should not be condoned," wrote Bates. "Nonetheless, as much as the Court might disapprove of certain conduct, the evidence before it must be objectively analyzed under the law. As explained below, the Court finds that destruction of the relevant files did not constitute spoliation. Without a spoliation inference, plaintiffs have failed to offer evidence on which a finder of fact could reasonably hold the Department liable under the Privacy Act. Hence, the Court will deny plaintiffs' motions for spoliation sanctions and summary judgment and grant the Justice Department's motion for summary judgment." One of the plaintiffs, Matt Faiella, went on to be a staff attorney working on LGBT issues for the New York Civil Liberties Union, and now works in the Office for Civil Rights of the U.S. Department of Education.

HAWAII — On December 7, Natasha Jackson and Janin Kleid filed suit in U.S. District Court against Governor Neil Abercrombie, alleging that the refusal of the state's Department of Health to issue them a marriage license violated their federal constitutional rights to due process and equal protection. They are repre-

mented by attorney John D'Amato, and did not seek representation or assistance from any of the LGBT legal organizations. Hawaii passed a civil union law last year that went into effect on January 1, 2012, but Jackson and Kleid point out that civil unions are not equal to marriages, and argue they are entitled to the same right to marry as any different-sex Hawaii couple enjoys. Gov. Abercrombie, a Democrat, reportedly responded to the filing of the lawsuit with the following statement: "If they want to pursue that through the legal channels that's fine, but I work through the legislative channels. I think that everyone is very very happy with our civil unions law. I'm going to put it into effect. I signed it. We're moving forward as quickly as we can and this January we'll be putting it into effect. If there are changes to be made we'll take it up in the course of the legislative sessions to come." *HawaiiNewsNow.com*, Dec. 8. * * * However, it appears that Gov. Abercrombie is perhaps too optimistic when he says that "everyone is very very happy with our civil unions law," as it was reported on Dec. 30 that two Christian churches have filed an action in the U.S. District Court in Hawaii, seeking judicial protection from discrimination charges that have allegedly been filed by individuals who are planning same-sex civil union ceremonies under a state law that goes into effect on January 1. The discrimination charges, filed with the Hawaii Civil Rights Commission, allege that the churches refused to rent their facilities for same-sex civil union ceremonies, in violation of the public accommodations law,

FEDERAL CIVIL LITIGATION NOTES

which prohibits sexual orientation discrimination. The case, filed Dec. 28, is titled *Emmanuel Temple, The House of Praise v. Abercrombie*.

MISSISSIPPI — The ACLU LGBT Rights Project and the ACLU of Mississippi announced a settlement agreement in *Sturgis v. Copiah County School District* (D. Miss.), a lawsuit sparked by the exclusion of Ceara Sturgis's photo from the senior portrait section of the annual high school yearbook because she posed in a tuxedo instead of the "drape" prescribed by the school for female members of the class. According to the ACLU's Dec. 7 press release about the settlement, Sturgis is an honor student who had always preferred to dress in clothing traditionally associated with boys rather than girls, and had never previously encountered any discrimination on this account from fellow students or classroom teachers. Under the settlement, all students will be pictured in academic gowns in future editions of the yearbook, and Sturgis's photo (in tuxedo) will be included in a school library display of senior class photos. The press release also states: "The School will also amend its anti-discrimination policy to add language affirming its commitment to following the equal protection clause of the U.S. Constitution." Is this a euphemistic way of saying that they refused to agree to an explicit policy banning gender identity or sexual orientation discrimination, so they compromised on acknowledging what is no more than a fact — that all public schools, as governmental entities, are bound to comply with

the Equal Protection Clause? Well, one takes victories where one can. ... ACLU LGBT Rights Project staff attorneys Joshua Block and Christine Sun worked on the case, together with Bear Atwood, legal director of the ACLU of Mississippi, and Kramer Levin Naftalis & Frankel LLP attorneys Norman C. Simon, Joshua Glick, Jason Moff and Lee Strock.

NEW YORK — On December 6, Immigration Judge Terry Bain granted a Joint Motion to Administratively Close Removal Proceedings in the case of Monica Alcota, an Argentinean-born lesbian who is married to U.S. citizen Cristina Ojeda. The couple lives in Queens, N.Y., and was represented in the proceeding by Lavi Soloway, who claimed this was the first case since a Nov. 17 announcement that the Department of Homeland Security would undertake a nationwide review of pending removal cases in which the government has asked an immigration court to close removal proceedings involving a married same-sex couple.

OHIO — A settlement has been reached in *Hutchinson v. Cuyahoga County Board of County Commissioners*, Case No. 1:08-CV-2966 (U.S. Dist. Ct., N.D. Ohio), a sexual orientation discrimination case, according to a report in the *Cleveland Plain Dealer* (Dec. 8). Shari Hutchinson, a lesbian, sued the county in 2008 on a claim that she had been denied promotions by the county's child support enforcement agency because of her sexual orientation. She said that she had applied

for promotions more than 25 times over her eight years with the agency, but all were denied despite her qualifications and less qualified non-gay persons were promoted. The county had sought to have the case dismissed, arguing absurdly that because sexual orientation discrimination claims are not actionable under Title VII of the Civil Rights Act, they are similarly not actionable under the Equal Protection Clause, but U.S. District Judge James Gwin correctly rejected this argument in a ruling on April 28, 2011, 2011 WL 1563874, criticizing the defendant for its totally unsupported legal proposition, and pointing out that the sole case they relied upon was "misrepresented" in the defendants' argument. The judge also rejected most of a summary judgment motion by the county in a September 26 ruling, 2011 WL 4452394, 113 Fair Empl. Prac. Cas. (BNA) 884, concluding that disputes over material facts required a trial by jury as to several of Hutchinson's specific refusal-of-promotion claims as well as her allegation that there was an official practice of discrimination based on sexual orientation by the county. Thus informed, the county finally woke up to the reality that county officials would have to testify under oath in court, and proceeded to negotiate a settlement, under which Hutchinson will receive \$100,000. The money should come in hand, reports the *Plain Dealer*, because she is currently unemployed, and as part of the settlement she is barred from working for any county department "except for judicial offices." ■

FEDERAL / STATE CRIMINAL LITIGATION NOTES

ARMY COURT OF CRIMINAL APPEALS

— When a military defendant is going to enter a provident plea to a charge of violating Article 125 of the Uniform Code of Military Justice (the sodomy provision), there must be a “colloquy between the military judge and the accuse establishing an acknowledgment by the accused ‘of the critical distinction between permissible and prohibited behavior,’” according to a per curiam ruling by the Army Court of Criminal Appeals in *U.S. v. McInnish*, 2011 WL 6088635 (Nov. 30, 2011), because certain conduct is sheltered from prosecution under *Lawrence v. Texas*. In this case, found the court, “the discussion between the military judge and the appellant did not establish an understanding by the appellant as to the relationship between these facts and the criminal nature of his conduct in light of *Lawrence*. Accordingly, appellant’s pleas of guilty to Charge III and its specifications are not provident and the findings of guilt are set aside.” Unfortunately, the opinion – designated as unpublished – does not directly reveal the facts of the case, although from comments as to other aspects of the appeal, it appears that the male defendant engaged in adulterous sex with a woman that probably included oral sex, and thus the sodomy count. It also appears that the defendant is of higher military rank than the other party, which would bring the conduct outside the protection of *Lawrence* as that precedent has been construed in military appeals courts. ■

ALABAMA — In *Whatley v. State of Alabama*, 2011 WL 6278296 (Dec. 16, 2011), the Court of Criminal Appeals of Alabama affirmed the conviction of Donald Dwayne Whatley on a capital murder charge in the death of “Pete” Patel, a gay man who Whatley had picked up at a bar with the intention of robbery, according to his voluntary confession. Years later, Whatley, claiming to have “found Christ” and wanting to get this crime off his chest, went to the police and dictated the story of what had happened. At the end of December 2003, he went to a gay bar seeking a possible robbery victim. He encountered Patel outside the bar and they left in Patel’s car, parked at a bridge, and got out to smoke cigarettes while sitting on the hood of the car. When Patel put his hand on Whatley’s knee, Whatley claims that this “freaked” him out, so he punched Patel and then beat him until he thought Patel was dead. But Patel started moaning so Whatley jumped into the car and ran over Patel’s head several times, stole several hundred dollars from his wallet, then drove off in the car, eventually setting it on fire far from the scene. Whatley had been identified with the crime scene by police due to his DNA on a cigarette butt found at the scene, but was not charged with the murder at that time due to the lack of any other evidence. The appeals court rejected all of Whatley’s objections to the trial, upholding the death sentence in this case.

CALIFORNIA — Brandon McInerney has pleaded guilty to charges of

second-degree murder and manslaughter for shooting his gay class-mate Lawrence King in a computer class at E.O. Green Middle School in Oxnard. He was prosecuted in Ventura County Superior Court as an adult on murder charges, which split the jury and led Judge Charles Campbell to declare a mistrial. After the prosecution indicated that it would retry McInerney, he agreed to plead guilty, and was sentenced to 21 years in jail. He was 14 when he shot King. If he serves his entire term, he will be 38 when he is released from prison, having been incarcerated since the February 2008 murder.

MINNESOTA — In *State of Minnesota v. Muchow*, 2011 WL 6757423 (Dec. 27, 2011) (unpublished opinion), the Court of Appeals of Minnesota affirmed the felony conviction of Jeneice Alisha Muchow for domestic assault of her “live-in girlfriend,” referred to in the opinion as T.S. Although the court of appeals found that the trial court had made several errors, it concluded that they were not prejudicial, except for entering two convictions – for felony domestic assault and misdemeanor domestic assault – arising from the same acts. Among the issues Jeneice Muchow raised on appeal were references by the prosecutor to her sexual orientation and life-style, references to her past criminal convictions, and references to her also being charged with similar conduct subsequent to her arrest in this case. The court concluded that part of the prosecutor’s error focusing on sexual orientation and Muchow’s “lifestyle” (i.e., excessive alcohol use) was “plain error,” but that in light of all the evidence in the record and that the references were a “small por-

STATE CRIMINAL / CIVIL LITIGATION NOTES

tion” of the prosecutor’s argument, “the prosecutor’s error in drawing the jury’s attention to improper considerations did not impair Muchow’s substantial rights.” The reference to pending charges for subsequent conduct that was very similar to the conduct at issue, as well as reference to prior criminal convictions, was deemed by the court to be relevant to Muchow’s credibility, since the trial focused on her testimony and T.S.’s testimony. The court did not indicate in its opinion whether the reversal of the misdemeanor conviction and remand would result in resentencing. The sentence passed by the trial court was 32 months imprisonment on the felony conviction.

NEW YORK — New York Supreme Court Justice Neil J. Firetop sentenced John Katehis to the maximum sentence of 25 years to life in prison for the murder of gay journalist George Weber at a sentencing hearing on December 13. Katehis had been convicted of second-degree murder by a Brooklyn jury on November 15. Weber had responded to Katehis’s posting on Craigslist offering oral sex for money. According to trial testimony, Katehis and Weber had agreed in email correspondence that Katehis would tie up Weber and smother him. They met in Weber’s apartment. Katehis stabbed Weber 50 times, later posting a picture on his MySpace page posing with his knife. Blood tests performed shortly after the event belied Katehis’ claim that he was high on cocaine and alcohol given to him by Weber when he committed the murder. *Gay City News*, Dec. 16.

OHIO — The *Columbus Dispatch* reported Nov. 30 that Levi Sever was

sentenced on Nov. 29 by Ross County Juvenile Court Judge Richard Ward to serve 90 days in juvenile detention after pleading guilty to a delinquency account of assault. Sever attained international notoriety after a cellphone video of his attack on gay classmate Zach Huston in a classroom in Unioto High School went viral on youtube. He was ordered to undergo mental health counseling and to continue his education during his detention. Huston and his mother have complained that school authorities did not respond appropriately to their complaints that Huston was a target of bullying due to his sexual orientation, and the ACLU of Ohio threatened to sue the school district if it did not enact some sort of policy to deal with the bullying problem faced by gay students. ■

COLORADO — This is one of the most complicated case names we’ve seen: *In the Interest of S.N.V., a Child and Concerning C.A.T.C., Petitioner-Appellee, and N.M.V., Respondent-Appellee, and B.V., Intervenor-Appellant*, 2011 WL 6425562 (Colo.App., Dec. 22, 2011). According to Judge Russel, writing for Division V of the Colorado Court of Appeals, S.N.V. was born in 2007 to an unmarried woman, but was claimed as the son of N.M.V. and taken into the home of N.M.V. and his wife, who assert that birth mother was a surrogate and the child was conceived to be raised by them. Contrarily, birth mother argues that S.N.V. was the result of her “intimate personal relationship” with N.M.V., and that she is the child’s mother. B.V. seeks a declaration that she is the mother. Writes Russel: “This case is a modern version of the difficult problem presented to King Solomon: two women claim to be the mother

of the same child. Here, one of the women is the biological mother, while the other claims legal motherhood under presumptions set forth in the Colorado Uniform Parentage Act... Unlike Solomon, we are not free to devise our own solution. We are bound by the UPA, as interpreted by the Colorado Supreme Court in *N.A.H. v. S.L.S.*, 9 P.3d 354, 357 (Colo.2000).” According to the court, B.V. has standing to see to prove maternity, reading the UPA, as an increasing number of courts have done, to be gender neutral, such that the paternity provisions also govern maternity claims. As a result, B.V. has standing to assert maternity. “Under section 19-4-105,” says the court, “a woman may gain the status of a child’s natural mother even if she has no biological tie to the child. A woman’s proof of marriage to the child’s father, or her proof of receiving the child into her home and holding the child out as her own, also may establish the mother-child relationship. It follows that the magistrate erred in concluding that birth mother’s claim automatically prevails over that of wife. We therefore direct the court to determine the mother-child relationship according to the standards set forth in *N.A.H.*” Her is yet another in a growing body of precedent construing the U.P.A. to de-emphasize genetic ties and to stress the realities of family life in modern society, a trend that is helpful to same-sex couples in the myriad ways they come to have children.

NEW JERSEY — The Emerson Board of Education has agreed to pay \$130,000 to a former student to settle charges that the school district failed to address verbal, physical and cyber harassment of the former student

STATE CIVIL LITIGATION NOTES

on the basis of his sexual orientation. He is referred to in a news report in the *New Jersey Record* (Dec. 24) as “J.C.” The settlement agreement also calls for the school district to establish “clear protocols for the reporting and investigation of harassment, intimidation and bullying complaints.” The N.J. Division on Civil Rights had found in 2010 that there was probable cause that the Board of Education violated the NJ Law Against Discrimination by failing to take appropriate action in the case. The attorney general’s office represented the Division in its action against the Board of Education.

TEXAS — A Dallas judge has ruled that a pending case concerning the marriage of James Allan Scott, a transgender man, and Rebecca Robertson, a woman, will proceed as a divorce case. Scott, who was identified as female at birth but went through gender transition and has a corrected birth certificate and legal name change identifying him as male, was married to Robertson in 1998. Scott’s transition did not include phalloplasty; that is, he does not have constructed male genitals. Scott and Robertson ceased living together in 2010, and Robertson filed an action seeking to have their marriage declared void, arguing that under Texas law it was an invalid same-sex marriage. She asserted that Scott’s gender transition was never “completed” due to his lack of male genitals, and thus should be declared void. Scott counter-sued for divorce, arguing that this was not a same-sex marriage, as he had obtained official legal recognition of his gender transition with a legal name change and new birth certificate, thus making him

male as a matter of law, and therefore the marriage could be legally terminated only under the divorce law. Robertson reacted by withdrawing her petition, leaving only the divorce action pending before the court, but she then filed an amended petition once again seeking to have the marriage declared void. Robertson then moved for summary judgment on her petition, but Judge Lori Chrisman Hockett denied the motion on November 21, 2011, and set the case for trial as a divorce action. Looming over the case is the Texas case of *Littleton v. Prange*, 9 S.W.3d 223 (Tex.App. – San Antonio 1999, petition for review denied), in which an intermediate appellate court ruled that one’s sex at birth is permanent for purposes of Texas law, thus finding that a transgender widow was not the legal heir to her husband as their marriage was void at its inception. The Littleton ruling from San Antonio is not binding on a Dallas trial court. *In the Matter of the Marriage of Rebecca Louise Robertson and James Allan Scott*, NO. DF-10-16083 (255th Judicial Dist., Dallas County, Texas). Scott is represented by Eric Gormly of The Gormly Law Firm PLLC, Dallas. Robertson is represented by Thomas A. Nicol, also of Dallas.

VIRGINIA — Wilhelm von Himmel and Robert Payne filed a lawsuit in Charlottesville Circuit Court on December 12, seeking an order that they be granted a marriage license. The two men attempted to apply for a marriage license in Charlottesville on December 6, but were turned down by the clerk, who would not give them an application to fill out. An article in the *Daily Progress* (Charlottesville) (Dec. 13),

reporting on the lawsuit, said that Von Himmel moved to Charlottesville in May from Denver, and is unemployed. Payne is a full-time information technology student at National College. The men had been dating for about three and a half months, and apparently are representing themselves in the lawsuit, which asserts a 14th Amendment claim. Von Himmel told the newspaper that he expects to lose in the Virginia courts, but to appeal the case to the U.S. Supreme Court. The article reports that the men are bringing their case pro se. We will refrain from expressing any opinions here about the wisdom of this venture.

WISCONSIN — The Milwaukee Journal Sentinel reported (Dec. 21) that Waukesha County Circuit Judge J. Mac Davis ruled in favor of the Episcopal Diocese of Milwaukee in a church property dispute with a congregation in Elm Grove, St. Edmund’s Parish, that had broken from the Diocese due to theological differences with the church over homosexuality. The decision of the church to ordain openly gay clergy has caused dissension in the ranks and the secession of some local congregations, some of whom assert a claim on the property of their local church. But the way things are usually set up, the church property normally belongs to the Episcopal Diocese that has jurisdiction over the local congregation, and there have been several lawsuits around the country concerning whether break-away congregations have a continued right to the property. Judge Davis’s ruling means that the break-away group must vacate the property at 15625 Watertown Plank Road. ■

LEGISLATIVE NOTES

DEFENSE AUTHORIZATION BILL

— As members of Congress negotiated over the contents of the annual National Defense Authorization Bill, various provisions of interest to LGBT military members were discussed. Republicans had proposed including provisions requiring the Defense Department to comply with Section 3 of DOMA (denying any recognition or benefits to same-sex spouses of military members), in reaction to announcements by the Department that with the demise of “don’t ask don’t tell” it was adjusting various policies to account for same-sex partners of openly LGBT Servicemembers. There is now a lawsuit pending against the Pentagon seeking equal benefits for partners as an Equal Protection matter. There was also a proposal to shield military chaplains from having to perform same-sex marriage ceremonies against their will. The Pentagon had asked for an amendment to the Uniform Code of Military Justice to repeal Article 125, the military sodomy law, which Democrats were inclined to agree to but conservative groups, such as the Family Research Council, a staunchly anti-gay outfit, raised a hue and cry, as did People for the Ethical Treatment of Animals, who noted that Article 125 also makes bestiality a crime. The amendment was then dropped, even though the Pentagon insisted that other provisions of the UCMJ could be used to deal with bestiality or other inappropriate sexual conduct by service personnel and that it would be appropriate to remove a provision

that was, on its face, contrary to Supreme Court precedent (*Lawrence v. Texas*). As the conference committee worked through December trying to reconcile House and Senate versions of the measure, a threatened presidential veto loomed due to provisions requiring that suspected terrorists be dealt with through the military justice system – even U.S. citizens apprehended in within the territorial U.S. So it was uncertain which version of the authorization bill would eventually be enacted. Ultimately, the president signed the final version of the bill, releasing a statement about portions he deemed unconstitutional.

FLORIDA — Orlando’s City Council approved a domestic partnership registry by unanimous vote, to go into effect on January 12, 2012. There is no residency requirement, and registration carries a handful of rights of recognition for a relationship in the context of visitation in hospitals and jails, and being able to make health care decisions or funeral arrangements. *Orlando Sentinel*, Dec. 13.

ILLINOIS — The Evansville City Council amended the municipal code to add sexual orientation and gender identity to the list of forbidden grounds of discrimination in education, employment, access to public conveniences and accommodations, and purchase or rental of real property. The amendment also replaced the word “handicap” with “disability,” modernizing the code to use more acceptable terminology, and also added age to the

list of forbidden grounds. *Evansville Courier Press*, November 29.

MARYLAND — Howard County amended its anti-discrimination ordinance to include protection against discrimination based on gender identity. The move came in response to a widely-reported incident in which a transgender woman was assaulted at a McDonald’s restaurant in Rosedale. The County’s policy already covered sexual orientation. *Baltimore Sun*, Dec. 12. * * * Baltimore County announced on December 15 that it will extend spousal benefits to all county employees who are married to a same-sex spouse, effective January 1, 2012. This action comes in response to an arbitrator’s ruling in a case brought by Lambda Legal on behalf of Baltimore County police officers who had been denied benefits for their same-sex spouses. Now that marriage is available for same-sex couples in Washington, D.C., residents of neighboring Maryland have been taking advantage of the lack of a residency requirement for D.C. marriages to get married, and the state’s attorney general has opined that such marriages should be recognized in Maryland. The next step to recognition, of course, is benefits eligibility. *Lambda Legal News Release*, Dec. 15.

MICHIGAN — On December 22, Governor Rick Snyder, a Republican, signed into law a measure that will bar domestic partner benefits for many public employees in the state of Michigan. Originally, the legislature intended to complete

LEGISLATIVE NOTES

ban, but doubts were expressed about the state constitutionality of such a broad ban in light of constitutional provisions giving the civil service commission the responsibility for setting terms of employment for classified civil service employees and another provision giving state institutions of higher education autonomy with respect to their employment policies. In his letter to the legislature announcing his signing of the bill, Snyder wrote, "I am gratified that the Legislature removed the definition of public employer from the bill, which included institutions of higher education, in favor of a definition of public employees that makes no specific reference to university employees," citing Art. VIII, sections 5 and 6 of the state constitution and a Michigan Supreme Court ruling construing it. He also cited Art. XI, section 5, which gives the Civil Service Commission the sole responsibility for regulating conditions of employment in the classified service. This means that the ban will apply only to non-classified public employees. Snyder's letter characterized the bill as preventing public employers from providing "medical or other fringe benefits to certain unrelated individuals who reside with public employees," thus denying the reality of modern family life in which many people have committed cohabiting relationships with same-sex or different-sex partners. The Michigan chapter of the ACLU promptly announced that it would file a lawsuit challenging the measure, presumably on federal and state equal protec-

tion grounds. * * * Earlier in the month, Gov. Snyder signed into law a measure to deal with bullying in the schools. The measure had stirred national controversy, after the Senate included in its version of the bill a provision exempting religiously-motivated bullying from the ban. In effect, the Senate version said that if bullying took place out of religious conviction, it would not violate the law. But the Senate backed down and approved a House version of the bill without the religious exemption. The bill is a rather weak form of an anti-bullying bill, in that it does not describe the specific behavior that is outlawed and does not list forbidden grounds or motivations, but merely requires that every school district adopt and enforce a policy against bullying. Whether such a weak measure will have any discernible effect on the problem is a matter of great speculation. *Detroit Free Press*, Dec. 6.

MISSOURI — The city of Clayton has added sexual orientation and gender identity to its anti-discrimination ordinance, and Mayor Linda Goldstein stated that she expected the Board of Aldermen to take up the issue of a domestic partnership registry soon. *St. Louis Post-Dispatch*, Dec. 4. On Dec. 6, the *Associated Press* reported that the City Council of Columbia had voted to add gender identity to its local law against discrimination, which has included sexual orientation since 1992. According to the AP report, the Missouri jurisdictions banning such discrimination now include Kansas City (MO),

St. Louis, Clayton, University City, and Olivette, as well as Columbia.

PENNSYLVANIA — Equality Pennsylvania reported on December 9 that Susquehanna Township (in Dauphin County) has become the 26th jurisdiction in the state to add sexual orientation and gender identity to a local ordinance prohibiting discrimination in employment, housing and public accommodations.

WEST VIRGINIA — The West Virginia Board of Education directed that "sexual orientation" and "gender identity or expression" be added to the state's anti-bullying policies for public schools on Dec. 14. The move came in response to a U.S. Department of Education report, *Analysis of State Bullying Laws and Policies*, which observed that 41 states have anti-bullying policies, among which 29 states enumerate protected groups while the remainder have a general policy statement that is non-specific. Many of the 29 states include sexual orientation and gender identity among the enumerated groups. *Poliglot: A Queer Spin on Politics* (Chris Geidner), Dec. 14. We have not heard of any study showing whether the incidence of bullying in a particular jurisdiction declines after the adoption of such policies. We see fertile ground for social science research...

VIRGINIA — Bowing to political pressure from the governor, attorney general, and other elected officials, the Virginia Board of Social Ser-

LEGISLATIVE / LAW & SOCIETY NOTES

vices voted on Dec. 14 to approve final regulations on adoption that will leave it open to state-licensed private agencies to refuse to assist same-sex couples in adopting children. At an earlier point in the process, the Board had been considering banning discrimination against same-sex couples in the adoption process, which proved very controversial in a state whose legislature has adopted a ban on any sort of legal recognition for same-sex couples – a ban so broad that when it was under consideration, opponents contended that it might even render unenforceable contracts between same-sex partners under the state’s public policy. Governor Bob McDonnell stated that he supported allowing single gay people to adopt children, but he was opposed to expanding the adoptive-parent pool to unmarried couples, whether same-sex or different sex. An important source of opposition to any kind of state ban on discriminating against same-sex couples in the adoption process was religiously-affiliated adoption agencies, which state a desire to be able to comply with their religious beliefs by refusing to serve same-sex couples. *Richmond Times-Dispatch*, Dec. 15. ■

ANTI-DISCRIMINATION IN PROFESSIONAL SPORTS —

Although gay athletes in professional team sports are still reluctant to “come out,” collective bargaining protection against anti-gay discrimination has been spreading. The recently concluded National Basketball Association contract will include a provision adding sexual orientation to the non-

discrimination policy, following the recent lead of Major League Baseball. In reporting on this development in a story posted on December 13, *The Advocate* referenced similar policies now in place at the National Hockey League, the National Football League, and Major League Soccer. Now that all these official policies are in place, perhaps some brave souls will inch their toes out of the closet?

ANNIVERSARY CELEBRATION OF DADT REPEAL SEALED WITH A KISS —

On the one-year anniversary of enactment of the DADT Repeal Act, the White House posted a commemorative statement on its website, and newspapers reported the general view of military commanders that the actual lifting of the anti-gay military service ban known informally as “don’t ask, don’t tell” in September 2010 had ultimately been “no big deal.” But the media coverage that most clearly showed the human impact of the new rules was a photograph showing a passionate homecoming kiss as Naval Petty Officer 2nd Class Marissa Gaeta came off the ship and embraced her partner, Citlalic Snell (also a sailor, but in off-duty civilian dress on this occasion). According to a report published on *HamptonRoads.com*, local media for the homecoming location, Gaeta won the right to be the first sailor off the ship in a raffle, and thus she became the one most likely to be photographed for the news. * * * Of course, the statements by all the leading Republican candidates for their party’s presidential nomination in 2012 that they would favor reinstating DADT gives some ground for concern, due to the way the policy

ended. The DADT Repeal Act of 2010 removes the statutory requirement that the Defense Department exclude openly gay people from service, but leaves to the discretion of the Department how to deal with LGBT recruits and members. This means that a new Administration could theoretically reinstate DADT administratively by having the Defense Department rethink its position, and it helps to explain why the 9th Circuit Court of Ap-peals erred in September when it vacated the decision in *Log Cabin Republicans v U.S.*, 716 F.Supp.2d 884 (C.D. Cal. 2010) as moot. See 658 F.3d 1162 (9th Cir., Sept. 29, 2011). In fact, the question whether DADT was unconstitutional, as declared by the trial court in that case, remains important and potentially relevant to the policy of any future Administration that disagrees with the Defense Department’s decision to rescind the policy. It is noteworthy in this connection that the DADT Repeal Act did not include a ban on sexual orientation discrimination in the military, and did not mandate that gay people be allowed to serve, either openly or in the closet.

NEW HAMPSHIRE VOTE ON MARRIAGE REPEAL EXPECTED —

Legislative leaders in New Hampshire announced that the legislature would take up a proposal to repeal the state’s same-sex marriage law later in January, after the Republican Presidential Primary has taken place on January 10. The same-sex marriage law was enacted by the previous legislature, which was controlled by the Democrats. The most recent election resulted in substantial Republican majorities in both houses,

LAW & SOCIETY NOTES

sufficient to override a veto by the state's Democratic governor if the Republicans stick together, and the leaders in both houses have pledge to repeal the marriage law. The proposal is to replace it with a less comprehensive version of the Civil Union law that it replaced. Same-sex couples who married while the marriage equality law was in effect would still be deemed to be married, but henceforth new civil union couples would have a lesser status. According to the University of New Hampshire Survey Center, 62 percent of state voters oppose repealing the marriage act. If New Hampshire repeals the marriage act, it would be the third state in which same-sex marriage was approved and then withdrawn (Maine and California being the others), but only the second state in which actual marriages will have taken place and will remain valid after repeal (California is the other). *The Telegraph* (Nashua, NH), Dec. 30.

TYLER CLEMENTI FOUNDATION ANNOUNCED

— The family of Tyler Clementi, the Rutgers University freshman who committed suicide by jumping off the George Washington Bridge, has announced the launch of the Tyler Clementi Foundation, which aims to promote acceptance of LGBT teens, reduce suicide among young people and discourage cyberbullying. Criminal charges are pending against Dahrin Ravi, a Rutgers classmate who was Clementi's dorm roommate, who is alleged to have used a webcam to spy on Clementi's intimate meeting with another man. Ravi recently rejected a plea bargain and insists on standing trial, asserting that he committed no crime.

Clementi's father, Joe Clementi, announced the new foundation as a memorial to his son, stating "One statistic I just can't get my head around is that LGBT teens are seven times more likely" to have thoughts about suicide than non-gay teens. *Asbury Park Press*, Dec. 12. For more information about the Foundation, go to <http://www.thetylerclementi-foundation.org>.

ILLINOIS CATHOLIC CHARITIES SPINNING OFF SOME ADOPTION SERVICES

— Having given up on litigation seeking an exemption from the requirements of Illinois law that their adoption services not discriminate against same-sex couples, some dioceses have decided to terminate their adoption services, while others are spinning off their services to newly-organized non-profits that will not be affiliated with the church. *The New York Times* (Dec. 29) reported the story as a clash between the First Amendment rights of the church-affiliated organization and the non-discrimination rights of couples seeking adoption services, and pointed out that Catholic Charities in Illinois had become heavily dependent on state funding, raising the issue whether state funds should be provided to an organization that practices discrimination based on its religious convictions.

MISSISSIPPI MAYOR "OUTED" BY RECEIPT INVESTIGATION

— An investigation into the financial accounts of Southaven, Mississippi, Mayor Greg Davis has led to Davis announcing that he is gay on December 15. Among the receipts that surfaced was one for purchases

at an adult store in Toronto, Priape, described on its website as "Canada's premiere gay lifestyle store and sex shop." Mayor Davis has not disclosed what he purchased for \$67 during his visit to Priape while on a business trip to Canada, saying he doesn't remember what he bought. Davis, a conservative Republican, gave an interview to the *Commercial Appeal* (Memphis, Tennessee) (Dec. 16), in which he said that he had tried to "maintain separation between my personal and public life" but "It is obvious that this can no longer remain the case." Southaven is Mississippi's third most populous city.

ANCHORAGE TO VOTE ON GAY RIGHTS

— An initiative that would add sexual orientation and gender identity to the Anchorage, Alaska, city anti-discrimination ordinance will be on the ballot on April 3, as the city clerk's office verified that sufficient valid signatures had been submitted. The question for the ballot is: "Shall the current Municipal Code sections providing legal protections against discrimination on the basis of race, color, sex, religion, national origin, marital status, age, physical disability, and mental disability be amended to include protections on the basis of sexual orientation or transgender identity?" The initiative seeks to accomplish what Mayor Dan Sullivan prevented by vetoing a measure enacted by the Anchorage Assembly in 2009. *Anchorage Daily News*, Dec. 15.

STRAIGHT CIVIL UNIONS IN ILLINOIS

— The Illinois Civil Union Law, which went into effect on June 1, 2011, differs from such laws in other states by permitting both different-sex

LAW & SOCIETY NOTES

and same-sex partners to register for civil unions, which essentially provide the state law rights associated with marriage. The *Chicago Sun-Times* reported on December 21 that from June 1 to November 30, the Cook County (Chicago) Clerk's Office had issued 1,856 civil union licenses, of which 138 went to different-sex couples. The County Clerk's office was curious to know why different sex couples who were eligible to marry would apply for civil unions, and sent out a survey earlier in the fall to the 87 different-sex couples who had received licenses up to that time. Forty-six responded to the survey. The most frequently identified reason was "fairness" and "solidarity with the gay community." The second most identified reason was "obtaining benefits."

NEW YORK DOMESTIC PARTNERS LOSING BENEFITS — For some New York state public and private sector employees with same-sex partners, December 31, 2011, was the deadline to document that they had married so that they could retain employee benefits. Some employers that adopted partner benefits plans for same-sex partners of employees premised the program on the inability of same-sex partners to marry, and have advised employees receiving such benefits that they would have to get married to retain them, now that New York has enacted a Marriage Equality Law (which went into effect on July 24, 2011). The *Rochester Democrat & Chronicle* (Dec. 30) reported this development at the Rochester City School District, where 24 of the 33 domestic partners receiving benefits have documented their marriages for the District. The

University of Rochester is giving couples a full year from the date the law went into effect to marry if they want to retain benefits. Some employers, going in the other direction, decided to expand their domestic partnership benefits plans to cover both different-sex and same-sex cohabiting couples, on the theory that the employer should not be forcing people to make a choice whether to marry and failing to expand the program would be discriminatory.

DUELING INITIATIVES MAY BE ON CALIFORNIA BALLOT

— The general election ballot in California in 2012 may turn out to be heavy with gay-related initiatives. Signatures are being solicited to place several measures on the ballot seeking to amend or eliminate the recently-enacted law, just going into effect in January, requiring public schools to incorporate into their curricula LGBT-related historical materials, and there is a new attempt under way to put a measure on the ballot to amend the state constitution so as to overrule Proposition 8, which amended the state constitution in 2008 to provide that same-sex marriages would be neither valid nor recognized in California.

LAWRENCE (OF LAWRENCE V. TEXAS) DIES

— John Geddes Lawrence, Jr., co-petitioner with the late Tyron Garner in *Lawrence v. Texas*, 539 U.S. 558 (2003), the case in which the United States Supreme Court ruled that a law making it a crime for consenting adult same-sex couples to have sex violated their right to Due Process of Law under the 14th Amendment of the U.S. Constitution, thus invalidating the application of

all remaining U.S. federal and state criminal sodomy laws to private consensual gay sex. Mr. Lawrence, who had been ill with a heart condition for a long time, passed away on November 20 in Houston at age 68, but it took a month for the word to spread beyond the immediate family. A Naval veteran, Lawrence found himself arrested in his own apartment for a "crime" that he likely didn't commit, according to the forthcoming book about the case by Professor Dale Carpenter of the University of Minnesota School of Law, *Flagrant Conduct* (W.W.Norton & Co., 2012), and he overcame initial reluctance to fight the case (as he was not really "out" to extended family) upon being persuaded by local activists in Houston that history was calling and his case could be the one to invalidate anti-gay sodomy laws. His name is now a major part of LGBT legal history, memorializing his courage as a "test case" client. (Most people arrested under such a law would plead "no contest" and let it go, given the minor fine involved and the natural reluctance of most people to draw public attention to their sexual activities, so the willingness of Lawrence and the other man arrested with him, Tyron Garner, who passed away in 2006, to go public with an appeal was extraordinary, and essential to getting an appellate ruling on the merits. Prior attempts to challenge the Texas law directly through test case litigation had failed when the Texas Supreme Court ruled that only a person actually prosecuted under the law could contest its constitutionality in the context of a criminal court appeal.) Lawrence is survived by his partner, Jose Garcia. ■

INTERNATIONAL NOTES

UNITED NATIONS — On June 17, 2011, the U.N. Human Rights Council adopted a resolution on “Human Rights, Sexual Orientation and Gender Identity,” which among other things called upon the UN High Commissioner for Human Rights to commission a study documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. The report thus compiled was submitted to the U.N.’s Human Rights Council on November 17, and was released publicly on December 15. It is available on the Human Rights Council’s website. The 25-page report provides the first officially documented summary and over-view of the mistreatment of LGBT people around the world by the world’s largest international body, and should prove a useful resource for, among other things, documenting asylum claims and summoning political and diplomatic pressure to improve conditions for LGBT people.

ARGENTINA — It was reported that Argentina’s House of Deputies overwhelmingly approved a national Gender Identity Bill late in November, and that the bill would be considered by the Senate in the spring of 2012. Prior to the vote, Argentina’s Security Minister announced that “transsexual members of the federal police and security forces will be recognized under the gender they adopted.”

AUSTRALIA — The Australia Capitol Territory (ACT) govern-

ment has introduced a bill to allow same-sex couples to enter into a civil union at a ceremony conducted by a celebrant, according to a Dec. 7 report by *ABC Premium News*. The measure is similar to 2006 legislation that was overturned by the Howard Administration. Since 2008, same-sex couples in the ACT jurisdiction have been able to register as civil partners, but are not entitled to have any sort of official ceremony. Since the earlier measure was vetoed, the Territory Self-Government Act was revised so that ACT laws can only be vetoed by an act of Parliament, not by individual government ministers, as was the case previously. ACT Attorney General Simon Corbell stated that now that the Labor Party has affirmed support for same-sex marriage, it was time to take steps to remove discrimination against gay couples. There are press predictions that Australia’s federal Parliament may legislate in favor of same-sex marriage during 2012.

AUSTRIA — The Supreme Court, affirming judgments by the Regional Court for Civil Affairs of Graz and the Upper Regional Court of Graz, upheld a dismissal of a discrimination and retaliation claim by a lesbian who claims she was forced to resign her job after complaining about anti-gay discrimination by a colleague. The court seized upon the facts that the woman had been exploring a possible job change before the incident arose, and that she received a month’s severance pay, and concluded that this was a “consensual” employment termina-

tion that was not actionable under the nation’s legislative ban on sexual orientation discrimination in employment. OGH 25.10.2011, 9 ObA 113/11z. * * * Responding to lobbying to include homosexuals among the groups protected from incitement to hatred, the Parliament amended the existing law, but at the same time watered-down the protection provided to all groups by stating that the law applies only to promoting hatred of the entire group, not directed at any particular member, and also the incitement must be to the broad public, as for example through mass media and the like, according to a summary posted to the internet by Dr. Helmut Graupner of the Austrian Gay Rights movement. Thus, while including gays “in” to protection, the protection for all groups has been drastically watered down.

BELGIUM — Elio di Rupo, an openly gay politician, was named Prime Minister of Belgium on December 5, thus becoming the first openly gay head of a national government in the European Union. Having been requested by King Albert II to attempt to form a government coalition that would command a majority in the Parliament after an 18-month gap following indecisive national elections, Di Rupo was seen as a national savior of a country that threatened to splinter along ethnic lines between the Dutch-speaking Flemish majority and the French-speaking Walloons. Di Rupo “came out” in 1996, and the fact that he was gay did not arouse any particular com-

INTERNATIONAL NOTES

ment in the Belgian media. In reporting on Di Rupo's appointment, *Gay City News* (Dec. 21) spoke with a leading French journalist, Jean Quatremer, who said, "Belgium is a Catholic country, but even the more conservative Flemish are fairly tolerant about people's private lives, and Di Rupo's been out of the closet for so long everybody knows he's gay. Di Rupo will show up at sporting events or concerts or the like with his boyfriend, but nobody even bothers to notice if it's the same one or a new one — there's been absolutely nothing in the Belgian press about his companion." The executive director the federation of LGBT organizations in the French-speaking part of the country, Zirlaene Berger, told *Gay City News*, "There was absolutely no negative comment in the press here or attacks by his opponents," and his homosexuality "went almost completely unmentioned." To the extent there is controversy, it is that Di Rupo, who comes from the French-speaking (minority) part of the country does not speak Dutch very well, leading to some adverse comments about his public speaking by the Flemish majority. But evidently his political skills did the trick in forming a coalition sufficient to install a new government.

COLOMBIA — On-line journalist Rex Wockner reported on December 14, that gay author/scholar Chandler Burr has become the first openly gay man to be allowed to adopt children from Colombia. In an email to Wockner, Burr related the warm reception he had received

after local television broadcast the story about the initial approval by a local court. Burr's adoption case, together with an adoption case involving a lesbian couple from Medellin, are widely expected to be affirmed by the Constitutional Court.

CROATIA — On December 1 the European Parliament adopted a resolution concerning the accession of Croatia to the European Union, which is to be finalized in July 2013. The resolution noted violence against an LGBT pride march on June 11, 2011, and called on Croatian authorities to "investigate and prosecute the crimes committed and to developed strategies for preventing similar incidents in the future." The resolution also "calls on the Croatian authorities quickly to adopt and implement an action plan against homophobia." Press release from *European Parliament Intergroup on LGBT Rights*.

FRANCE — A court in Brest has denied a petition by a transsexual woman to be recognized in her preferred gender because she remains married to the woman with whom she had three sons prior to her gender transition. According to a report by Agence France-Presse published Dec. 16 in the *Ottawa Citizen*, Chloe Avrillon sought judicial recognition as a woman in order to obtain new state identity papers reissued in her current gender. Her identity papers still show her birth name of Wilfred and male gender. Unmarried French trans-sexuals have successfully petitioned courts in

the past for such judicial gender recognition in order to obtain appropriate identity papers. But the court found Avrillon's marriage an insuperable barrier, writing, "Marriage is the union between a man and a woman. The court cannot, in judicially modifying the sex of a married person, create a legal situation forbidden by law. To modify the sex mentioned on a birth certificate of a married person would result not in taking note of but in creating a situation of marriage between persons of the same sex." Avrillon's lawyer indicated that an appeal will follow, seeking a constitutional ruling. "Of course," said Emmanuel Ludot, "a change of identity would be allowed him if he had just got divorced. What kind of blackmail is this, where we're putting pressure on a man that has become a woman, telling him: 'If you don't divorce you'll just have to stay a woman.'" The Avrillons have been married for 15 years. Had they not been married, they could have entered into a civil solidarity pact as a same-sex couple, enjoying many of the same legal and tax protections of married couples under French law.

IRELAND — Minister of Justice Alan Shatter announced that registered relationship of same-sex couples from 32 other jurisdictions would be treated as equivalent to civil partnerships under Ireland's new Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Under a new order, effective December 25, such recognition would also apply to same-sex

INTERNATIONAL NOTES

marriages, domestic partner-ships, civil unions, and civil partnerships – whatever a jurisdiction chose to call it, if it was deemed fairly equivalent to Irish civil partner-ships, it would be recognized in Ireland. Thus, such couples traveling in Ireland can be confident that their relationships (suitably docu-mented) will be recognized by the Irish government, and the nation’s tourist industry can make a strong pitch for gay tourism to Ireland. *Irish Times*, Dec. 20.

MEXICO — Expecting an influx of tourist dollars, various Mexican Caribbean resorts, including Cancun, are said to be preparing for the performance of same-sex marriages. It seems that the Civil Code in these localities is sufficiently ambiguous that local authorities are prepared to sanction same-sex marriages – without any residency requirement, and without seeking any legislative clarification, according to a Dec. 29 report on Foxnews.com. Tour groups have been promoting package deals for international tourists, with at least eight couples having been “confirmed” to marry in January 2012. Mexico City specifically legislated in favor of same-sex marriage several years ago, and the country’s highest court ruled that same-sex marriages lawfully contracted in Mexico City must be recognized throughout the country, as Mexico does not have any statute analogous to the U.S. Defense of Marriage Act, and none has been passed in response to the court’s ruling.

NIGERIA — Yaba Magistrate’s Court has dismissed charges of

theft and indecent assault against Peter Chinenye and Elijah Michael. The world press had reported that the two men were charged with committing “homosexual acts” on Fayankunnu Bosun, the complainant. But Mr. Bosun has failed to come forward as a prosecuting witness, leading the court to grant the motion to dismiss the charges. According to their attorney, Mrs. Adora Ochubili, Bosun had met Chinenye through Facebook and made a date to meet him in Chinenye’s home. During that date, Ochubili says, Bosun initiated sexual contact with Chinenye, then brought charges against him in revenge for Chinenye calling his friend Elijah into the room and taunting Bosun as a penalty. *Daily Champion* (Lagos, Nigeria), Dec. 16.

SOUTH KOREA — Late in December, the Seoul Metropolitan Council voted 54-28 in favor of a Student Rights Ordinance that, inter alia, includes protection against discrimination for LGBT students. The vote came after protests staged by LGBT students after it appeared that sexual orientation and gender identity, included in the original draft of the bill, might be deleted in the Education Committee of the Council, whose chair was opposed to including these categories. However, the original version went through by a Committee vote of 8-6 with one abstention, according to a letter from Korean LGBT activists circulated on December 20 by LGBT on-line journalist Rex Wockner.

UGANDA — In an act of extraordinary bravery, Frank Mugisha, the Executive Director of Sexual Minorities Uganda, an organization within Uganda advocating for the civil and human rights of gay people, published an op-ed article in *The New York Times* on December 23 describing the oppressive situation for gay people in his country and calling upon the political leaders of the world to stand in solidarity with LGBT people in Uganda. One suspects that the recent public statements by the Obama Administration in support of LGBT human rights may have prompted this and similar acts; one hopes that the Obama Administration is ready to back up its stirring words with actual support for those fighting for LGBT human rights amidst hostility and repression from governmental and social forces in their countries.

UNITED KINGDOM — The year-end British New Year Honors List this year includes Jeffrey Dudgeon, a gay rights activist, who was awarded an MBE for services to the lesbian, gay, bisexual and transgender community in Northern Ireland. Mr. Dudgeon’s lawsuit before the European Court of Human Rights in 1982, which was cited by the U.S. Supreme Court in *Lawrence v. Texas*, led to decriminalization of gay sex in Northern Ireland. It also includes Ms. Jess Wood, for service to LGBT youth in Brighton and Hove, and Ms. Alice Purnell for service to transgender people. ■

HIV/AIDS LEGAL & POLICY NOTES

LEGISLATION — Amidst the end-of-year passage of appropriations bills, Congress reversed course and reinstated the ban on use of federal money for needle-exchange programs. Such a ban had been instituted during the Bush Administration, but was reversed in the first round of appropriations bills passed in the Obama Administration when both houses of Congress and the White House returned to Democratic control. However, defunding needle exchange has been a part of the Republican platform, and appropriations bills originate in the House, where Republicans were restored to control by the 2010 mid-term elections. There was insufficient support for needle exchange in the Senate to keep this amendment out of the appropriations bills, as the Republicans hold sufficient seats to block legislation in that house. The science is clear that needle exchange programs save lives and save money (that would otherwise be expended on treatment of HIV infection), without leading to increased addiction, but the Republican majority in the House is not concerned with science, after all, and their alleged concern about federal spending and budget deficits easily yields to ideology.

OBAMA ADMINISTRATION — In a World AIDS Day statement issued at the beginning of December, President Obama announced a goal of securing HIV-related treatment for six million people by the end of 2013 and urged other countries to increase their commitment to funding HIV treatment. The President announced the goal of an “AIDS-free generation.” But cynics noted that his proposal mainly involved re-allocating existing funding rather than

proposing a significant total increase in funding for HIV-related projects.

2ND CIRCUIT COURT OF APPEALS

— On December 13, 2011, a panel of the U.S. Court of Appeals for the 2nd Circuit issued a summary order upholding a decision by District Judge Scullin (N.D.N.Y.) to reject the 8th Amendment claim of an HIV+ NY State prison inmate, who had alleged deliberate indifference by the prison physician and prison superintendent concerning his medical treatment. The court found that the superintendent had no direct role in the inmate’s medical treatment, and that the doctor had monitored the inmate’s CD4 count and had begun anti-retroviral therapy when the count fell below 350 cells/mm³. Thus, the court concurred with the district court judge, who had adopted the magistrate’s report and recommendation that the 8th Amendment claim be denied. A difference of opinion between the inmate and the prison doctor about when to start therapy does not justify a claim of deliberate indifference, under settled 8th Amendment precedents. *Concepcion v. Pickles*, 2011 WL 6157010 (Dec. 13, 2011).

U.S. DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN

— U.S. Magistrate Judge R. Steven Whelan has denied a motion by the Equal Employment Opportunity Commission to amend its complaint in *EEOC v. The Gap, Inc.*, Case No. 10-14559 (Dec. 27, 2011), finding that the EEOC knew from early in the case that the plaintiff’s disability was HIV-related but failed to assert that from the outset, thus prejudicing the defendant. The charging party, a former GAP store manager, filed a charge with the

EEOC in October 28, alleging that he was terminated due to a physical disability. It seems that he was going to the bathroom too frequently, identified in the EEOC’s court complaint of Nov. 16, 2010, as a result of glomerulonephritis. There had been an unsuccessful attempt at conciliation in the case prior to the filing of the complaint, as required by the ADA. After The Gap filed its response to the complaint, EEOC moved to amend, reporting that after consulting its retained nephrology expert and conducting a document review, it had concluded that the charging party’s frequent need to visit the bathroom was actually due to side-effects of his HIV-related medication. Magistrate Whelan found that allowing an amended complaint focused on HIV rather than the originally-identified condition would be prejudicial to The Gap because of the The Gap’s marketing to the LGBT community. Implicit in his ruling is the belief that had The Gap faced an HIV-discrimination charge from the outset, conciliation might have been successful, as the retailer would be wary of alienating an important retail constituency should a lawsuit be filed against it for HIV-related discrimination. Thus, concluded Whelan, the EEOC must continue litigating based on its original theory. While the ruling is very sensitive about the politics of the case, it seems odd that a judge is denying a motion to amend on the ground that the truth would be too uncomfortable for the defendant to deal with in the course of litigation – as the ruling implicitly holds. In any event, now that Magistrate Whelan’s ruling has become a news story, that genie is out of the bottle. Time for The Gap to make the next move... ■

PUBLICATIONS NOTED

LGBT & RELATED ISSUES (28)

1. Bamforth, Nicholas, *New Natural Law, Religion, and Same-Sex Marriage: Current Constitutional Issues*, 1 Wake Forest J.L. & Pol'y 207 (May 2011).
2. Bayer, Peter Brandon, *Sacrifice and Sacred Honor: Why the Constitution Is a Suicide Pact*, 20 Wm. & Mary Bill Rts. J. 287 (Dec. 2011).
3. Bender, Erin, *Until Death (or Sex Change) Do Us Part: Advocating for Adoption of the European Legal Approach to Validating Marriages Involving Post-Operative Transsexuals*, 18 Cardozo J.L. & Gender 35 (Fall 2011).
4. Benecke, Michelle, *Turning Points: Challenges and Successes in Ending Don't Ask, Don't Tell*, 18 Wm. & Mary J. Women & L. 35 (Fall 2011).
5. Bernstein, Anita, *Toward More Parsimony and Transparency in the Essentials of Marriage*, 2011 Mich. St. L. Rev. 83.
6. Carbone, June, *Marriage as a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 Mich. St. L. Rev. 49.
7. Carbone, June, *Out of the Channel and Into the Swamp: How Family Law Fails in a New Era of Class*, 39 Hofstra L. Rev. 859 (Summer 2011).
8. Dempsey, Brian, *Gender Neutral Laws and Heterocentric Policies: "Domestic Abuse as Gender-Based Abuse" and Same-Sex Couples*, 15 Edinburgh L. Rev.

Editor's Notes

- All points of view expressed in *Lesbian/Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc.
- All comments in *Publications Noted* are attributable to the Editor.
- Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.

9. Frohnen, Bruce P., and George W. Carey, *Constitutional Morality and the Rule of Law*, XXVI J. L. & Politics 497 (Summer 2011).
10. Gilreath, Shannon, *Why Gays Should Not Serve in the United States Armed Forces: A Gay Liberationist Statement of Principle*, 18 Wm. & Mary J. Women & L. 7 (Fall 2011).

11. Green, Jamal, *The Anticanon*, 125 Harv. L. Rev. 379 (Dec. 2011) (How does a case come to be part of the "anticanon" – the catalogue of cases frequently cited as having been egregiously wrong, such as *Dred Scott* or *Plessy v. Ferguson* – and should *Bowers v. Hardwick* be part of it?).
12. Hafemeister, Thomas L., *If All You Have is a Hammer: Society's Ineffective Response to Intimate Partner Violence*, 60 Cath. U. L. Rev. 919 (Fall 2011).
13. Halley, Janet, *What is Family Law?: A Genealogy Part II*, 23 Yale J. L. & the Humanities 189 (Summer 2011).
14. Hanna, Cheryl, *State Constitutional Decision-Making and Principles of Equality: Revisiting Baker v. State and the Question of Gender in the Marriage Equality Debate*, 74 Alb. L. Rev. 1683 (2010-11).
15. Ittelson, Alesdair H., *Trapped in the Wrong Phraseology: O'Donnabhain v. Commissioner – Consequences for Federal Tax Policy and the Transgender Community*, 26 Berkeley J. Gender L. & Jus. 356 (Summer 2011).
16. Johnson, Paul, *Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights: Alekseyev v. Russia*, 11 Hum. Rts. L. Rev. 578 (2011).
17. Kahn, Liza, *Transgender*

PUBLICATIONS NOTED

LGBT & RELATED ISSUES — HIV/AIDS & RELATED ISSUES (1)

Health at the Crossroads: Legal Norms, Insurance Markets, and the Threat of Healthcare Reform, XI Yale J. Health Pol'y, L. & Ethics 375 (Summer 2011).

18. Mazzochi, Sarah, *The Great Debate: Lessons To Be Learned From an International Comparative Analysis on Same-Sex Marriage*, 16 Roger Williams U. L. Rev. 577 (Fall 2011).
19. Oppenheimer, Elisabeth, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. Rev. 73 (Dec. 2011).
20. Panel Discussion, *Don't Ask Don't Tell: Beyond the Log Cabin Republicans Injunction and the Defense Authorization Act*, 1 Am. U. Lab. & Emp. L.F. 127 (Winter 2011) (Edited Transcript of Panel Discussion).
21. Ramakrishnan, Kavita B., *Inconsistent Legal Treatment of Unwanted Sexual Advances: A Study of the Homosexual Advance Defense, Street Harassment, and Sexual Harassment in the Workplace*, 26 Berkeley J. Gender L. & Jus. 291 (Summer 2011).
22. Recent Case, *Constitutional Law – Eighth Amendment – Seventh Circuit Invalidates Wisconsin Inmate Sex Change Prevention Act – Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011), 125 Harv. L. Rev. 650 (Dec. 2011).
23. Roosevelt, Kermit, III, *What if Slaughter-House Had Been Decided Differently?*, 45 Ind.

Specially Noted

- New York University Press has published *Intersexuality and the Law: Why Sex Matters*, by Prof. Julie A. Greenberg of Thomas Jefferson School of Law. Prof. Greenberg is a leading authority on the law related to sex and sexuality, and has written pioneering law review articles about intersexuality. This is apparently the first book-length publication to deal with the topic of intersexuality and law. It will be available both in hard cover and as an ebook.
- West has published the second edition of *Sexual Identity Law in Context: Cases and Materials*, by Shannon Gilreath (Wake Forest University) and Lydia E. Lavelle (North Carolina Central University) (2012). The book is organized to provide interdisciplinary materials to support a 2 or 3 credit-hour discussion seminar.

L. Rev. 61 (2011) (Counterfactual speculation: What if the Privileges and Immunities Clause of the 14th Amendment had received a liberal interpretation by the Supreme Court in the 19th century? Would our current Due Process and Equal Protection jurisprudence be any different?)

24. Rosenberg, Lee, *Matrimonial Representation and Same-Gender Newlyweds-to-Be*, New York Law Journal, Dec. 5, 2011, p. 4.
25. Spann, Girardeau A., *Constitutional Hypocrisy*, 27 Const. Comment. 557 (Winter 2011) (Symposium: The United States Constitution (Rev. Ed.): How Would you Rewrite the United States Constitution?).
26. Strauss, Marcy, *Reevaluating Suspect Classifications*, 35 Seattle U. L. Rev. 135 (Fall 2011).
27. Strozdas, Jay, *Trendlines: Court Decisions, Proposed Legislation, and Their Likely Impact on Binational Same-Sex Families*, 44 Loy. L.A. L. Rev. 1339 (Summer 2011).
28. Waltman, Max, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, 33 Mich. J. Int'l L. 133 (2011).

1. Grant, Isabel, *The Prosecution of Non-Disclosure of HIV in Canada: Time to Re-think Cuerrier*, 5 McGill J. L. & Health 7 (2011).