

L E S B I A N / G A Y
LAW NOTES
January 2013

SCOTUS

On Marriage Equality
the door is now open; so is the window

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SCOTUS Takes Some Marriage Cases, but Leaves Itself an Out

The Supreme Court announced on December 7 that it would review the 9th Circuit's Proposition 8 ruling and the 2nd Circuit's DOMA Section 3 ruling, but in both cases it indicated that it would hear argument about whether the petitioners had standing to seek review of the decisions. The arguments in both cases will probably take place late in March, with opinions expected by the end of the Court's term in June. The cases are *Hollingsworth v. Perry*, No. 12-144 (California Proposition 8) and *United States v. Windsor*, No. 12-307 (DOMA Section 3). Within days of announcing the grant of certiorari, the Court appointed Professor Vicki Jackson of Harvard Law School as amicus curiae in *Windsor* to argue that neither the Petitioner, the U.S. Department of Justice represented by the Solicitor General, nor the Intervenor, the Bipartisan Legal Advisory Group of the U.S. House of Representatives represented by former Solicitor General Paul Clement, has legal standing to appeal the district court's decision in favor of Edith Windsor's tax refund claim.

The Court made no announcement about the other pending certiorari petitions from DOMA rulings by the 1st Circuit or district courts in California and Connecticut, and also said nothing about a pending petition by Arizona seeking review of a preliminary injunction requiring that state to continue providing domestic partnership benefits while a lawsuit continues challenging the state's rescission of coverage for domestic partners of state workers. Just days before making this announcement, the Court had also received a petition by supporters of the anti-gay-marriage amendment in Nevada, seeking expedited review (by-passing the 9th Circuit) of a district court ruling that had rejected a 14th Amendment challenge to that amendment and the denial of marriage equality in Nevada, a state that has a broad civil union law.

In *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), the 9th Circuit ruled that Proposition 8, which placed a different-sex-only definition of marriage into the California Constitution, violates the constitutional equal protection rights

of same-sex couples because there was no rational basis to rescind the right to marry that had previously been granted by the California Supreme Court. Same-sex couples were marrying in California from mid-June 2008 through electionday of that year when Prop 8 was passed. Although Prop 8's passage was later held by the California Supreme Court to be valid, that court also ruled that the marriages that took place were valid and continued to be recognized, and that its underlying state equal protection ruling required that same-sex domestic partnerships in California be treated by the state as equal to marriage for all legal purposes.

The American Foundation for Equal Rights (AFER) retained noted Supreme Court advocate Ted Olson (a former U.S. Solicitor General) and David Boies to challenge Prop 8 on behalf of two same-sex couples who were denied marriage licenses. In the resulting lawsuit in San Francisco, District Judge Vaughan Walker ruled that same-sex couples have a right to marry under the equal protection and due process clauses of the 14th Amendment, and declared Prop 8 unconstitutional. Judge Walker allowed the Proponents of Prop 8 to intervene as defendants, after Governor Schwarzenegger indicated that the state would not defend Prop 8 in the lawsuit.

The Proponents appealed Judge Walker's ruling to the 9th Circuit, which stayed his order pending the outcome of the case. The 9th Circuit affirmed Walker, but on the narrower theory that no rational basis had been shown for the state to withdraw the right to marry after it had been granted. The 9th Circuit also held that Proponents had standing to appeal Judge Walker's ruling, after obtaining an advisory opinion from the California Supreme Court that initiative proponents have standing to defend their initiatives in the courts under California law.

The petition to the Supreme Court by the Proponents posed the broader question, on which the Supreme Court has now granted review, of whether same-sex couples are entitled by virtue of the 14th Amendment to the same right to marry enjoyed by different sex couples. But the

Court has added back into the case the question whether the Proponents have standing to represent the state of California in defending Prop 8. If the Court rules that Proponents did not have standing to appeal Judge Walker's ruling as a matter of federal law, that would mean that neither the Supreme Court nor the 9th Circuit would have jurisdiction to decide their appeal. As such, Judge Walker's ruling, which was not appealed by any of the named defendants in the case, would be the final ruling, binding in the state of California, and same-sex couples would once again have a right to marry there.

If the Supreme Court finds that Proponents did have standing, it would proceed to consider the merits of the case. It could decide to answer the question on which it granted review -- whether California can reserve the status of marriage to different-sex couples -- or it could, if so inclined, accept the way the 9th Circuit reframed the case and decide that Prop 8 violated the 14th Amendment because no rational grounds exist to rescind the right to marry, especially in a state whose Supreme Court had ruled that same-sex domestic partners were entitled to all the rights of marriage.

In *Windsor v. United States*, 699 F.3d 169, the 2nd Circuit ruled that Section 3 of the Defense of Marriage Act, a federal statute passed in 1996, violates constitutional equal protection rights of married same-sex couples because the court found no important government interest was significantly advanced by treating them unequally to different-sex married couples.

Edith Windsor, the plaintiff represented by the ACLU, is suing for a refund of taxes paid on her inheritance of property from her wife, Thea Spyer, who passed away after they had married in Canada. Surviving spouses don't have to pay taxes in that situation, but the Internal Revenue Service relied on Section 3 of DOMA as authority to demand the taxes and deny the refund. In response to the complaint filed in this case, the Justice Department determined that Section 3 was unconstitutional and declined to defend it on the merits. Paul Clement, a former Solicitor General, was hired by the Republican leadership of the House of Representatives to intervene

and defend Section 3, and he filed a petition in this case on behalf of the Bipartisan Legal Advisory Group of the House of Representatives, after losing the case in the 2nd Circuit. The Solicitor General also filed a petition, stating its agreement with the 2nd Circuit's decision but asking the Court to take the case so there would be a clear ruling on Section 3's constitutionality with nationwide application. The 2nd Circuit's ruling is only binding in the handful of states making up that federal judicial circuit.

In granting the Solicitor General's petition (not Mr. Clement's petition), the Court added two questions: First, in light of the Solicitor General's agreement with the 2nd Circuit's ruling, did the Solicitor General have standing to appeal the case to the Supreme Court, and, second, whether the Bipartisan Legal Advisory Group, represented by Mr. Clement, had standing to appeal the 2nd Circuit's ruling.

Thus, in both cases, the Court added questions to those posed by the petition-

proponents and in the 2nd Circuit on the standing of BLAG and the Justice Department.)

Thus, the Court's actions on these petitions raise all sorts of interesting questions that will keep scholars and commentators busy speculating from now until the Court releases its decisions, most likely in June, 2013. If the Court finds that none of the petitioners have standing, it will dismiss these appeals. Such a disposition would leave in place the district court ruling in Edie Windsor's case, so she would presumably be entitled to her tax refund. But a district court ruling is not a binding precedent on others than the immediate parties. Only an appellate court can issue binding precedential rulings - and rulings by federal courts of appeals only bind the district courts in their circuit. If petitioners in *Windsor* lack standing, the very same parties lacked standing in *Gill*, the 1st Circuit DOMA case, which would mean that the 1st Circuit lacked jurisdiction to hear that case, and District Judge

ed." Greenhouse speculated that this resulted from the failure of a majority to coalesce around a standing opinion that Justice Clarence Thomas was drafting in that case, and that the added questions accompanying the cert grant in *Windsor* and *Hollingsworth* may signal the Court's main interest in these cases.

Ultimately, however it seems unlikely that the Supreme Court will find that the Solicitor General lacks standing to bring the DOMA cases to the Court. The number of federal district courts that have been ruling against the constitutionality of Section 3 is steadily mounting, more lawsuits are in the pipeline, and a nationwide resolution of the constitutionality of this provision is needed. In addition, of course, the Obama Administration's position is that it must continue to enforce Section 3 unless the Supreme Court strikes it down or Congress repeals it, so the government has not responded to the 2nd Circuit's decision by cutting a tax refund check to Edie Windsor. A

The Court's actions on these petitions raise all sorts of questions that will keep scholars and commentators busy speculating from now until the Court releases its decisions.

ers, signaling the possibility that the Court could find that it does not have jurisdiction to rule on the merits in either of the cases. Under the Constitution, the federal courts are limited to deciding actual "cases and controversies," which the Supreme Court has construed to mean that only a party with a distinct personal stake in the outcome of a case has "standing" to bring their case to federal court. Plaintiffs have to have standing to initiate a lawsuit, and Appellants have to have standing to appeal a trial court's ruling. If the petitioners in these two cases don't have standing, then the case is not a real "case or controversy" for constitutional purposes and is technically outside the Supreme Court's jurisdiction. (It would also place it outside the jurisdiction of the circuit courts of appeals that decided these two cases, since in the 9th Circuit jurisdiction would be predicated on the standing of the Prop 8

Joseph Tauro's ruling holding Section 3 unconstitutional, once again, might only be binding on the particular parties in that case on their individual claims for federal benefits.

In an article posted to the *New York Times* website on December 12, Linda Greenhouse, who covered the Supreme Court for the *Times* for many years and remains a keen observer and commentator on the Court, noted that the addition of the jurisdictional questions by the Court may signal that at least four members of the Court are looking at these cases as vehicles to make a new pronouncement about standing, as they were expected to do last term in *First American Financial v. Edwards*. However, at the end of the term, the Court announced that it would not decide that case, which presented a major jurisdictional question, because certiorari had been "improvidently grant-

live controversy remains as to her refund entitlement. Thus, the Court is likely to proceed to the merits in *Windsor*, and there is a good chance it will decide, by at least a vote of 5-4, that the lower courts are correct in holding Section 3 unconstitutional. The progress of the marriage equality movement may help to influence the Court in reaching this conclusion. As of January 1, same-sex marriage will be legal in nine states and the District of Columbia, and if District Judge Walker's Prop 8 ruling eventually goes into effect, in California as well. There is also the possibility that marriage equality bills will advance in several state legislatures early in 2013, perhaps before the Court hears argument in these cases. As the portion of the country living in marriage equality states increases, the "anti-democratic" effect of a Supreme Court ruling on this issue decreases. ■

Montana S.Ct. Remands Challenge on Same-Sex Partner Rights

By a sharply divided 4-3 vote, the Montana Supreme Court ruled that plaintiffs challenging the failure of the state to accord legal recognition to same-sex partners cannot seek a broad declaration and injunctive relief holding that the state's failure to do so violates their state constitutional rights, but remanded the case to allow plaintiffs to replead attaching particular statutes claimed to deny their rights. *Donaldson v. State of Montana*, 2012 MT 288, 2012 WL 6587677 (Dec. 17, 2012). In a brief opinion for the majority of the court, Chief Justice Mike McGrath held that the plaintiffs' claims, in the form stated in their complaint, were not justiciable.

Six Montana same-sex couples sued the state in 2010, challenging the "statu-

cases, in Vermont and New Jersey, resulted in state supreme courts holding that same-sex couples were entitled to a status akin to marriage, and then leaving it to the political branches to resolve the problem (which, in both cases, led to speedy enactment of Civil Union Acts), in none of the marriage cases did plaintiffs specifically seek civil unions or domestic partnerships; their avowed goal was marriage. Chief Justice McGrath's brief opinion does not rehearse any of this history, or explain why the relief granted in Vermont and New Jersey would not be appropriate in Montana. Instead, on behalf of a bare majority of the court he affirmed the District Court's decision that granting the requested relief would "run afoul of the separation of

as to the nature of the State's interest in advancing specific laws as well as the level of constitutional scrutiny that should be applied to those laws by the courts." However, he said, "the Plaintiffs chose to pursue an overly broad request for a declaratory judgment and injunctive relief, without developing a factual record in the District Court and without identifying a specific statute or statutes that impose the discrimination they alleged."

Concurring in the decision to affirm the District Court's refusal to grant summary judgment in favor of the plaintiffs, Justice Jim Rice added his view that the Marriage Amendment itself supported the District Court's ruling, even though the plaintiffs are not seeking the right to marry

What is wanted is not a declaration of the unconstitutionality of a specific statute or set of statutes but rather a direction to the legislature to enact a statutory arrangement.

tory structure" of Montana law under which they cannot access protections and benefits that are available to "similarly-situated different-sex couples who marry under state law." The listed several provisions of the state constitution that they contended were violated by this situation. Because Montana enacted a constitutional amendment providing that only the union of a man and a woman can be valid or recognized as a marriage in Montana, the state constitutional lawsuit did not seek the right to marry. In effect, the plaintiffs were seeking a declaration that they are entitled to have something akin to civil unions or domestic partnerships that would provide the same legal rights under state law as marriage, and a mandate to the legislature to address this inequality.

In this respect, this is a novel lawsuit. Although some past marriage

powers required by Article III, section 1 of the Montana Constitution," as it would "likely impact a large number of statutes in potentially unknown and unintended ways." According to the District Court, "what plaintiffs want here is not a declaration of the unconstitutionality of a specific statute or set of statutes but rather a direction to the legislature to enact a statutory arrangement," which form of relief would be "unprecedented and uncharted in Montana law." The District Court said that the appropriate way to deal with the issues raised by Plaintiffs would be form to file "specific suits directed at specific, identifiable statutes."

Thus, Chief Justice McGrath concluded, "The Plaintiffs should be afforded the opportunity to amend their complaint and to develop an argument

in this litigation, and even though the Montana Marriage Amendment, unlike those in some other states, does not expressly forbid the state from establishing other legal structures similar to marriage for same-sex couples. Justice Rice argued that same-sex couples are not "similarly-situated" to different-sex couples for purposes of Montana constitutional equal protection. "With all due respect to Plaintiffs," he wrote, "I believe their equal protection claim must fail under longstanding and deeply rooted legal principles, in both Montana and national jurisprudence. Under the law, marriage between a man and a woman is a unique relationship, dissimilar to all other relationships and alone essential the nation's foundation and survival, and the State errs neither by recognizing it as such nor by giving it exclusive



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treatment. In sum, it is not discrimination to treat uniquely that which is unique.”

Justices Patricia O. Cotter, Michael E. Wheat and James C. Nelson dissented. Justice Nelson’s dissent, running on for well over one-hundred pages in the court’s slip opinion release, was the parting shot of a long-time judicial advocate of LGBT equality, shortly before he is to retire from the court, and Nelson explicitly states that this is his last opportunity to argue for such equality from the bench so, in effect, he throws in everything but the kitchen sink.... Well, maybe also the kitchen sink. Justice Cotter’s brief opinion, joined by Justice Wheat, says that she would “concur with virtually all of Justice Nelson’s well-written and comprehensive Dissent,” but wrote separately to distance herself from Nelson’s assertion that

as to declaratory relief, stating that the plaintiffs have presented a justiciable question about the appropriate method of constitutional analysis of gay equality and dignity claims under the Montana Constitution. He argues that what the court should be doing in this case is determining the appropriate level of judicial review for gay equality claims in Montana. He contends that sexual orientation should be a suspect classification under the state constitution, and that exclusion from the benefits and rights identified with marriage under state law offends the requirements of equality and human dignity. He develops these themes at considerable length, as well as devoting a significant part of his opinion to explaining how a ruling on the merits of those claims would be appropriate under the Declaratory Judgment Act. Nelson also develops an argument

This is his last opportunity to argue for equality from the bench so, in effect, he throws in everything but the kitchen sink. Well, maybe also the kitchen sink.

the court’s approach in this case was like old cases “sanctioning slavery and racial segregation,” and she disagreed with Nelson’s charge that the court was taking this approach in order “to avoid a socially divisive issue.” She also refused to join Part V of Nelson’s opinion, which challenged the constitutionality of the state’s Marriage Amendment on state constitutional grounds. “Plaintiffs do not challenge the Marriage Amendment, and I agree that the relief Plaintiffs seek does not offend the Marriage Amendment in the slightest.”

Nelson’s lengthy, eloquent opinion should be read in its entirety. To begin to report on it in detail here would overwhelm the January issue of *Law Notes*. Briefly put, Nelson agrees with court that injunctive relief is not yet appropriate in this case, but disagrees

that the Marriage Amendment itself violates Montana constitutional principles. Nelson also points out that the plaintiffs did, in their pleadings, identify an exhaustive list of Montana statutes that they claim offend the equality and dignity principles that they seek to vindicate in this case, making inaccurate the majority’s assertion that plaintiffs had brought some sort of amorphous claim against the “structure” of Montana law without identify specific statutes. He attached to his dissent an appendix listing the laws identified by the plaintiffs.

The strategic question for the plaintiffs now is whether to replead in a lengthy complaint naming individually each challenged law and arguing why each of them violates the state’s constitutional principles of equality and human dignity. ■

9th Cir. Reverses District Court in San Diego Boy Scouts Case

A panel of the U.S. Court of Appeals for the 9th Circuit ruled on December 20 that the U.S. District Court (S.D.Cal.) erred when it held that the City of San Diego had violated the constitutional rights of two sets of parents with its “sweetheart” leases of city parkland to the Desert Pacific Council of the Boy Scouts of America. *Barnes-Wallace v. City of San Diego*, 2012 WL 6621341. The court found that the leases did not violate a California constitutional provision forbidding the state from providing aid to religion or showing any preferences to religion, and did not violate the state or federal establishment clauses, and that the plaintiffs had not alleged any specific acts of dis-

crimination that would violate state or local laws or the leases (which themselves include non-discrimination requirements). The Scout oath incorporates references to God, and membership requires attesting to religious belief, although the Scouts maintain that they are non-denominational. The Scouts’ right to maintain such policies in the face of state laws banning discrimination in public accommodations on the basis of sexual orientation and state and federal bans on religious discrimination have been upheld on 1st Amendment grounds, most famously by the U.S. Supreme Court in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

The plaintiffs contend that essentially giving over control of city-owned parkland to the Scouts to operate, in light of their God-centered membership require-

or anti-religious stances, they would be excluded from membership in the Scouts. The majority of the panel reiterated that this gave the plaintiffs standing to raise the case, but not a basis to win it. Indeed, the court found that plaintiffs failed to state discrimination claims because they had never applied to make a reservation to use the facilities and been turned down.

As to assistance and aid to religion, the court found that the city was receiving an administrative fee from the Scouts for the Camp Balboa property, and was receiving the benefit that both leases required the Scouts to spend significant money on improvement and maintenance of the properties, as a result of which the facilities were enhanced for the use of San Diegans. Benefit to religion was seen as incidental, not a primary purpose of these leases, and minimal in comparison to the other purposes and benefits of the leases. The court saw as significant that the city entered so many leases with so many different organizations, providing a basis for rejecting the plaintiffs’ argument that the leases with the Scouts were some kind of special deal. It seems that most of these leases involved either no rent or nominal amounts similar to the Scouts’ \$1 a year deal at Balboa Park. Concluding that the leases involved, at most, “indirect or incidental aid by the City” to an organization that includes a religious purpose, the court found no constitutional violation and reversed the district court’s ruling.

The case attracted widespread attention and participation. Mark W. Danis of Morrison & Foerster (San Francisco) and M. Andrew Woodmansee of Morrison & Foerster (San Diego) represent the plaintiffs. Scott H. Christensen of Hughes Hubbard & Reed (Washington) and George A. Davidson and Carla A. Kerr of Hughes Hubbard & Reed (New York) represent the defendants – most particularly, the Boy Scouts of America. Amicus briefs were submitted by the U.S. Department of Justice, the American Legion, a group of state Attorneys General, and various progressive and religious organizations, the bulk of them from right-wing organizations supporting the Boy Scouts’ position. ■

The court found that the CA ban on aid-to-religion required much more in the way of direct financial assistance than could be found in this case.

crimination that would violate state or local laws or the leases (which themselves include non-discrimination requirements). Circuit Judge William C. Canby, Jr., wrote for the court, and Circuit Judge Andrew J. Kleinfeld, in a brief concurrence, opined that the court had erred at an earlier stage of the case in finding that the plaintiffs had standing to bring this case, citing his prior dissent from the court’s standing decision, *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 794 (9th Cir. 2008).

The court noted that the city of San Diego has lease or contractual arrangements with some 123 non-profit groups involving use of city property or facilities, some of them religious groups but most of them not. This lawsuit was brought by a lesbian couple and an atheist couple in the wake of controversy over the Boy Scouts of America’s membership policies that exclude gays and atheists from positions as members or

leaders. The Scout oath incorporates references to God, and membership requires attesting to religious belief, although the Scouts maintain that they are non-denominational. The Scouts’ right to maintain such policies in the face of state laws banning discrimination in public accommodations on the basis of sexual orientation and state and federal bans on religious discrimination have been upheld on 1st Amendment grounds, most famously by the U.S. Supreme Court in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The plaintiffs contend that essentially giving over control of city-owned parkland to the Scouts to operate, in light of their God-centered membership require-

Univ. Admin.'s Op-Ed Rejecting Gay & Civil Rights Comparisons Not Protected Speech

On December 17, the U.S. Court of Appeals for the 6th Circuit affirmed the District Court's grant of summary judgment to the University of Toledo in a case brought by a human resources administrator who was fired because of comments she made in an op-ed piece distinguishing gay rights from the African American civil rights struggle. *Dixon v. University of Toledo*, 2012 WL 6554693.

On April 18, 2008, Crystal Dixon, an African American woman and then-interim Associate Vice President for Human Resources at the University of Toledo, wrote an op-ed column in the *Toledo Free Press* responding to an editorial titled "Gay rights and wrongs". The piece, "Gay rights and wrongs", was written by the newspaper's editor, Michael Miller. In it, he compared the civil rights movement with the gay-rights movement: "As a middle-aged, overweight white guy with graying facial hair, I am

America's ruling demographic, so the gay rights struggle is something I experience secondhand, like my black friends' struggles and my wheelchair-bound friend's struggles."

Dixon responded to Miller's editorial as follows: "As a Black woman who happens to be an alumnus of University of Toledo's Graduate School, an employee and business owner, I take great umbrage at the notion that those choosing the homosexual lifestyle are 'civil rights victims.' Here's why. I cannot wake up tomorrow and not be a Black woman. I am genetically and biologically a Black woman and very pleased to be so as my Creator intended. Daily, thousands of homosexuals make a life decision to leave the gay lifestyle evidenced by the growing population of PFOX (Parents and Friends of Ex Gays) and Exodus

International just to name a few..." There was also a discussion of the denial of healthcare benefits to same-sex couples at the University of Toledo in Miller's editorial, and a rebuttal to the same by Dixon in her op-ed.

On April 21, 2008, Dixon received a letter placing her on paid administrative leave as a result of her op-ed column. On May 4, 2008, Lloyd Jacobs, President of the University, wrote a response to Dixon's op-ed: "[a]lthough it is common knowledge that Crystal Dixon is associate vice president for Human Resources at the University of Toledo, her comments do not accord with the values of the University of Toledo." Jacobs went on to "highlight

"As a middle-aged, overweight white guy with graying facial hair, I am the ruling demographic ... I experience the gay rights struggle secondhand."

the various programs instituted at the University aimed at expanding and supporting diversity on campus."

At a hearing held on May 5, 2008, Dixon read a prepared statement wherein she reaffirmed the beliefs she expressed in her op-ed. She also claimed she was speaking as a private citizen. On May 8, 2008, Dixon was terminated. On December 1, 2008, she sued in the U.S. District Court for the Northern District of Ohio against, *inter alia*, the University and Jacobs. Dixon asserted First Amendment retaliation and equal protection claims. The parties moved for summary judgment, and the District Court granted summary judgment to the defendants. On appeal, the Sixth Circuit affirmed.

The Sixth Circuit found that Dixon's speech was not protected³³, given her significant discretionary

authority in hiring and firing as well as making policy regarding hiring practices. Dixon testified that she was responsible for answering grievances, issuing disciplinary and corrective action, serving on various task forces, supervising approximately forty employees, overseeing benefits administration, setting compensation, and making presentations at town-hall meetings. The court found that this testimony established that Dixon was "delegated appointing authority and was responsible for recommending, implementing and overseeing policy." Because Dixon spoke about a policy issue (see *Rose v. Stephens*, 291 F3d 917, 923 [6th Cir 2002]), specifically the issue

that LGBT community members do not possess an immutable characteristic in the way she does as an African American woman, and therefore are not entitled to civil rights protections, even though the University provides for them,

her speech was not protected.

Dixon also argued that the University violated equal protection guarantees by punishing her for expressing a "less favored" viewpoint. The District Court rejected this claim because Dixon failed to present any evidence of someone similarly situated who had engaged in similar conduct. At the appellate level, Dixon made comparisons to Jacobs and other faculty members. However, the 6th Circuit highlighted that the comparisons were unavailing because, even though these individuals engaged in speech on the issue of LGBT rights and protections without penalty, they were not similarly situated to Dixon. A hallmark of equal protection arguments is proof of disparate treatment. Without such, her argument necessarily failed. —Eric J. Wursthorn

Dueling District Court Decisions in First Amendment Gay Therapy Lawsuits

Two Federal judges in California issued dueling decisions on the state's new gay conversion therapy law, Senate Bill (SB) 1172, which was to go into effect on January 1, 2013. SB 1172 prohibits mental health providers from engaging in sexual orientation change efforts (SOCE) with minors. SB 1172 defines SOCE as "any practices by mental health providers that seek to change an individual's sexual orientation." The California Legislature, in passing the bill, was trying to protect the physical and psychological well-being of minors, including gay youth.

In *Welch v. Brown*, 2012 WL 6020122 (E.D.Cal., December 3, 2012), two therapist plaintiffs and a man hoping to become a therapist filed a motion for preliminary injunction seeking to enjoin enforcement of SB 1172 before it went into effect on the first of the new year. The plaintiffs argued that SB 1172 violates their First Amendment rights because it would restrict the content of their speech, arguing that they engage in SOCE

through their speech. In reaching the decision, U.S. District Court Judge William Shubb examined whether the plaintiffs met the test for a preliminary injunction, using the analysis of *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). For the plaintiffs to prevail, they must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. See *Winter*, 555 U.S. at 20.

Judge Shubb granted the plaintiff's request for a preliminary injunction after a lengthy discussion analyzing the First Amendment rights to free speech under a strict scrutiny analysis. SB 1172 regulates a particular kind of speech; that was Judge Shubb's reasoning why the speech would have to pass the strict scrutiny standard.

In this case, the court found that the plaintiffs had shown they were likely to succeed on a First Amendment challenge to the bill. Judge Shubb's decision stated the therapists' First Amendment rights could be violated by the new law and given the limited scope and duration of a preliminary injunction in this case, the court had no difficulty concluding that First Amendment rights outweighed other arguments of public interest in enforcing the law. However, it should be noted that the December 3rd preliminary injunction enjoining enforcement of SB 1172 only applied to the three plaintiffs named in the case.

In *Pickup v. Brown*, 2012 WL 6021465 (E.D.Cal., December 4, 2012), the plaintiffs included four therapists, the Nation-

al Association for Research and Therapy of Homosexuality, a Christian counselors group, and two minor "Doe" plaintiffs. The plaintiffs in this case, according to U.S. District Court Judge Kimberly Mueller, failed to demonstrate that therapy is expressive speech within the purview of the First Amendment. Judge Mueller expressed that nothing in SB 1172 prohibits therapists from mentioning SOCE methods or recommending books about SOCE. Judge Mueller denied the plaintiffs request for a preliminary injunction and at the same time found that the state has broad powers to regulate professions, including mental health professionals. However, in response to an emergency appeal by the plaintiffs, a panel of the U.S. Court of Appeals for the 9th Circuit issued a preliminary injunction pending appeal on December 21, No. 12-17681, so the law will not be in effect pending a

ruling by the merits by a different panel of the 9th Circuit. In both *Welch* and *Pickup*, each judge opined on the issue of whether or not SOCE therapy is speech under the First Amendment; and expressed very different opinions. In *Welch*, Judge Shubb, applied strict scrutiny, ruled against SB 1172 because speech that occurs during therapy is entitled to First Amendment protection, and cited the Ninth Circuit cases on the subject to support his proposition. In *Pickup*, Judge Mueller found that SB 1172 prohibits acts not speech and used the much lesser scrutiny of rational basis. Judge Shubb believed his plaintiffs were likely to prevail against SB 1172 on the merits of a First Amendment challenge, while Judge Mueller does not believe her plaintiffs could prevail challenging SB 1172. Two days, two different decisions about the same legislation.

The issue of mental health providers ability to serve gay clients is not new and does not seem to be going away. In July 2010, Federal Judge George Caram Steeh of the U.S. District Court for the Eastern District of Michigan ruled against an Eastern Michigan University counseling student who was removed from her graduate program in school counseling for refusing, on religious grounds, to affirm homosexual behavior in serving clients. In *Ward v. Wilbanks*, 2010 WL3026428 (E.D. Mich. July 26, 2010), Judge Steeh, in granting summary judgment for the university, articulated that the university "had a right and duty to enforce compliance" with policies that every student must serve people who are gay and lesbian. Furthermore, the court found such policies do not in any way convey "a message endorsing or disapproving of religion." In her case, Ms. Ward also argued first amendment rights; however, in this

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WI's Evolving Perspective on Domestic Partnerships; Will the SCOTUS Follow Suit?

In *Appling v. Doyle*, 2012 WL 6633863 (Wis. Ct. App. Dec. 20, 2012), the Court of Appeals of Wisconsin, District Four, held that the domestic partnership law passed by the Wisconsin legislature in 2009 did not violate section 13 of article XIII of the Wisconsin Constitution, which prohibits the creation of a “legal status” for same-sex couples that is “substantially similar” to that of marriage for opposite-sex couples.

It is important to preface this discussion. As the court aptly stated: “This case is not about whether the Wisconsin or United States Constitutions require, on equal protection or other grounds, that same-sex couples have the right to a legally recognized relationship that is identical or substantially similar to marriage.” This case is simply about whether the domestic partnership law enacted by the Wisconsin legislature violates the marriage amendment to the Wisconsin constitution. As such, its relevance to the national discussion on granting rights to same-sex couples might be seen as minimal.

In 2006, the majority of voters in Wisconsin voted to pass an amendment to the Wisconsin Constitution that states: “Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.”

In 2009, the Wisconsin legislature passed a statute creating domestic partnerships for same-sex couples. The statute provides the eligibility, formation, and termination requirements for domestic partnerships and, in addition, certain statutes

were amended to confer rights and obligations granted to married individuals in different-sex relationships to unmarried individuals in a domestic partnership.

The plaintiffs brought an action challenging the constitutionality of the domestic partnership law under the marriage amendment. The parties involved in this case have varied. Suffice to say that the plaintiffs are proponents of the marriage amendment and opponents of the domestic partnership law, while the defendants are opponents of the marriage amendment and proponents of the domestic partnership law. The circuit court granted summary judgment in favor of the defendants and the plaintiffs appealed.

The issue before the court is whether the domestic partnership law violates the marriage amendment. In resolving this issue, the court was required to construe the marriage amendment to give effect to the voters’ intent in its adoption. Specifically, the meaning of “legal status,” and whether it refers to the rights and obligations of the parties, is the focus of the inquiry. The court analyzed three sources in construing the meaning of “legal status”:

First, the court examined the plain meaning of the statute. The plaintiffs argued that “legal status” refers solely to eligibility and formation requirements of marriages and domestic partnerships. But the court sided with the defendants, stating that the reasonable conclusion is that voters thought that “legal status” refers to the eligibility, formation, termination, and rights and obligations of marriages and domestic partnerships.

One of the reasons cited by the court for this determination is that the plain-

tiff’s construction of the term “legal status” would permit marriage by another name. Meaning, if the marriage amendment does not refer to all of the incidents of marriage, but rather only to the eligibility and formation requirements, then the legislature can enact a statute that grants same-sex couples identical rights granted to opposite-sex couples, but simply call it by some other name. The court appropriately concluded that this result is unreasonable and does not comport with the voters’ intent.

Second, the court examined the constitutional debates, statements made by proponent legislators, and statements made by proponents who were not legislators. After discussing a sampling of relevant statements, the court concluded that the voters understood that the marriage amendment would not ban legally recognized domestic partnerships conferring a limited subset of rights and obligations of marriage. Rather, the marriage amendment was intended to ban the Vermont-style civil unions that gave same-sex couples all of the state law rights and obligations of married couples. As such, the statements by proponents of the marriage amendment indicate that the voters understood “legal status” to include “rights and obligations.”

Third, the court examined the earliest interpretations of the provision by the legislature. The earliest and only interpretation of the marriage amendment is, in fact, the domestic partnership law. However, the court chose not to rely on this source to ascertain voter intent because the result — that the “legal status” of a domestic partnership is not substantially similar to that of marriage — would be the same even if the court ignored the domestic partnership law.

Throughout the course of its interpretive analysis, the court addressed several arguments by the plaintiffs with no relevance to the issue of whether the domestic partnership law violated the marriage amendment of the Wisconsin constitution. In light of the sensitivity of the issue, the court saw fit to carefully discuss every argument with the slightest merit and resolve every issue with minute probative

“A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.”

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Fed. Dist.Ct. Finds AL Prison Segregation of HIV+ Inmates Violates Fed. Law

U.S. District Judge Myron H. Thompson ruled on December 21 that the Alabama Department of Corrections is violating the Americans with Disabilities Act by continuing to maintain categorical policies regarding HIV-positive inmates, including strict housing segregation and exclusion from various prison programs and rehabilitation opportunities, especially addiction treatment programs and work release programs. *Henderson v. Thomas*, Civil Action No. 2:11cv224-MHT (M.D.Ala.). Although attorneys for the state represented to the court at the end of trial that the state would be revising its policies, Judge Thompson found that the case was not moot, but acceded to the state's request that it be afforded the opportunity to "propose appropriate relief to the court and that this opportunity would include time for both sides to meet and attempt to agree upon relief."

Judge Thompson's lengthy opinion provides a thorough discussion of the history of HIV-positive inmates in the Alabama prison system, showing that policies adopted in response to the new phenomenon of HIV/AIDS in the 1980s had failed to keep up with the advance of medical knowledge and treatment. Although the 11th Circuit rejected a challenge to the Alabama prison policies in the 1990s, the court at that time indicated that it was ruling based on the state of medical art at the time that lawsuit was filed, so Judge Thompson concluded that he was not precluded from reconsidering the matter in light of current knowledge and treatment. Most significantly, he pointed out, at the time the earlier case was filed, HIV was considered "a death sentence" and fear of transmission in prisons was high. Many states adopted segregation policies. With the advance of medical knowledge and treatment, most states have abandoned some or all of such policies, leaving only a handful of states, among them Alabama, that retained policies formulated during the early, panic-ridden stages of the HIV/AIDS epidemic. Once Alabama's policies are reformed to comply with the court's ruling, only South Carolina will be left among states maintaining strict prison segregation policies for HIV-positive inmates.

Thompson observed that the transmission issue has been transformed by modern therapies that reduce viral load to the point where transmission is rare, and that HIV infection has become in most cases where therapy is available a manageable condition such that individuals with HIV may live a "normal" lifespan. As such, the deprivation of rehabilitative programs and programs designed to prepare inmates for re-entry to the civilian population looms much more significant than when the courts had earlier confronted these issues.

This case was brought as a class action by the ACLU National Prison Project, with Margaret Winter, associate director of the Project, now serving as lead counsel for the plaintiffs. Judge Thompson found that various named class representatives presented claims sufficient to cover the variety of issues raised in the complaint and at trial. He reviewed the extensive expert testimony, concluding that the grounds upon which the policies had previously been upheld were no longer valid, and that the violations of federal disability discrimination law were clear. He found it "evident" that the "segregation policy has been an unnecessary tool for preventing the transmission of HIV," but "it has been an effective one for humiliating and isolating prisoners living with the disease." Part of this humiliation has involved requiring HIV-positive inmates to wear white armbands, so that even in those programs where they have been allowed to participate, they are instantly marked for all other participants to see.

Judge Thompson concluded with three essential points: "First, the court finds that the segregation policy is based on

outdated and unsupported assumptions about HIV and the prison system's ability to deal with HIV-positive prisoners. The policy is also infected, and the reasons the ADOC has proffered for its continued existence undermined, by an intentional bias against HIV-positive people, as reflected in a bias from those in charge (for example, with the white-armband policy) and in a system-wide tolerance for a culture of bias, rooted in large measure in ignorance about HIV, from among not only prisoners but employees in general (for example, with the food-service policy and the fear that guards will not protect HIV-positive prisoners).

"More specifically, in response to the question of why the ADOC continued to exclude HIV-positive prisoners from food-service jobs in the prison kitchens and in the work-release program when it was clear that HIV was not transmitted by handling food and when there had been no complaints from employers about HIV-positive prisoners having food-service jobs, Associated Commissioner DeLoach responded: '[W]e live in Alabama, and there are a lot of prejudices. . . . [I]t doesn't sound nice. It doesn't sound . . . chic Prejudices . . . die hard in Alabama.' Therefore, any remedy the defendants might propose to the court must be based not only on a willingness to revisit assumptions and to look at all reasonably available and untapped resources; and must not only be uninfected by bias against those with HIV, but it must also address the lack of education and ignorance among both prisoners and prison

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We live in Alabama and there are a lot of prejudices here. It doesn't sound nice. It doesn't sound chic, but prejudices die hard in Alabama, said a Prison Official.

Federal Court Finds Real Estate Brokers Discriminated Against Persons Living With AIDS

U.S. District Judge Samuel Conti ruled on December 3 that two New York City realtors, Manhattan Apartments, Inc., and Abba Realty Associates, violated a city law when dealing with a person living with AIDS who was seeking to rent an apartment with financial support from the NYC HIV/AIDS Services Administration (HASA). The *New York Law Journal* published the court's opinion in *Short v. Manhattan Apartments, Inc.*, No. 11-cv-5989 (S.D.N.Y.) on December 12.

Judge Conti awarded the plaintiff, Keith Short, \$20,000 in damages, and also awarded \$5,000 to the Fair Housing Justice Center, Inc. (FHJC), the agency to which Short complained about discrimination. FHJC undertook an investigation of the two realtors, which generated some of the evidence considered by the court, and the court granted FHJC's request for reimbursement for its investigative expenses. The court also issued expansive injunctive relief against the defendants. Attorneys Armen Merjian, a senior staff attorney at Housing Works, and Diane Houk of Emery, Celli Brinckerhoff & Abady, represent the plaintiffs.

Short and FHJC contended that the defendants violated the federal Fair Housing Act, which prohibits discrimination by landlords and brokers against persons with disabilities, and the New York City Human Rights Law, which forbids housing discrimination based on disability or on a prospective tenant's source of income. Judge Conti ruled for the defendants on the disability discrimination claims, finding that these brokers did not discriminate against clients living with AIDS as such. Rather, the evidence showed that the discrimination was against people who were seeking apartments that would be financed through housing grants from HASA. (By definition, all such tenants are people with AIDS, but of course not

all people with AIDS seek or obtain HASA funding to pay their rent.)

Short, who was diagnosed HIV-positive in 1989 and soon progressed to symptomatic AIDS, moved to New York from Washington, D.C., in the late summer of 2010. He applied to HASA for housing support and moved into a single-room-occupancy facility (SRO) funded by HASA. He was unsatisfied with the substandard SRO and began looking for a real apartment in the fall of 2010.

He first approached Abba Realty. Abba has placed many PWA clients receiving HASA funding in apartments, but, as Short discovered, not all the apartments listed by Abba within his price range were available

The court awarded \$20K in damages to the plaintiff and \$5K to the Fair Housing Justice Center, Inc., which took on the investigation into the discrimination.

to him. Abba accepts listings from landlords who will not accept tenants that receive HASA funding. The court received testimony that HASA funding is reliable, and that delays while HASA inspects and approves apartments are minimal. Although the court made no finding to this effect, lacking evidence, one might speculate in light of HASA's dependable payment history that these landlords use HASA funding as a proxy for avoiding taking unemployed PWAs as tenants, but the court doesn't go there in its opinion.

Abba identified several possible apartments for Short, while telling him that certain apartments (including some in which he was interested) were not available to "program people." One apartment became unavailable after Short provisionally accepted it, as the landlord rented to somebody who could pay immediately. Short accepted a second apartment, but when he showed up to move in he

found the condition of the apartment unacceptable due to filth, dead roaches, exposed wires and other problems. Short claimed that when he summoned the building's superintendent to complain, the super was hostile to him. So that apartment didn't work out, either.

Discouraged by his experience with Abba, Short went to Manhattan Apartments (MA), only to encounter a real stonewall. He was told that none of the landlords who listed apartments with MA would rent to HASA clients.

After Short took his complaints to FHJC, they employed "testers", actors trained to pose as prospective tenants, to confirm Short's story and gather evidence. Confirmation was easy to get, because the brokers at both companies were very open about not being able to show certain apartments to people who would be paying for them with HASA assistance. At neither company was there any awareness that the New York City council had passed a law prohibiting housing discrimination against

people because of their sources of income, and the individual agents also professed ignorance about housing discrimination laws generally, reflecting the lack of training by these companies.

FHJC argued to the court that the realtors were engaging in dis-

ability discrimination because the refusal to show particular apartments due to source of income had a "disparate impact" on people with disabilities. The court pointed out that plaintiffs making disparate impact arguments are required to provide some statistical proof, and noted that there are a variety of housing support programs, only some of which assist people with disabilities, so it was not a necessary conclusion that people with disabilities are more disadvantaged by such a practice than nondisabled housing assistance recipients.

Since the basis for the federal court having jurisdiction over this case is the federal Fair Housing Act, that could have been the end of the lawsuit. However, federal courts have "supplementary" jurisdiction over state and local law claims that arise out of the same set of facts, and in this case Judge Conti decided that it made sense to retain jurisdiction and

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IA Ct. Orders Dept. of Public Health to Modify Certif. of Fetal Death to List Both Mothers

The Iowa District Court for Polk County ordered the Iowa Department of Public Health (DPH) to modify the Certificate of Fetal Death of the child of Jessica Marie Buntmeyer to identify her wife, Jennifer Lee Buntmeyer, as the other parent, in *Buntmeyer v. Iowa Department of Public Health*, Case No. CV 9041 (Dist. Court Polk County, Iowa, December 12, 2012).

Petitioners Jessica and Jennifer Buntmeyer are a married same-sex couple. On October 21, 2011, Jessica gave birth to a stillborn infant. On October 31, 2012, both women filed a Certificate with the DPH, which entered Jessica's information as the "mother" and Jennifer's information as the "father." On November 3, 2011, DPH staff removed Jennifer's information, left the "father" section blank, and registered the Certificate.

Represented by Lambda Legal, on February 28, 2012, the Buntmeyers filed a Petition for

Judicial Review arguing that the refusal to list Jennifer as a parent was inconsistent with DPH's prior practice, based on improper purposes, based on an erroneous interpretation of law, in violation of a provision of law, and unconstitutional. To defend DPH's actions, the Bureau Chief within DPH submitted an affidavit to the court explaining DPH procedure, stating that DPH maintains "accurate and complete records of all vital events in Iowa to provide public access for vital event records, monitor and educate about public health, disclose data to researcher, and share data with other agencies." According to the affidavit, DPH registers approximately 100,000 events each year, including about 200 Certificates of Fetal Death.

Judge Robert A. Hutchinson, Fifth Judicial District of Iowa, rejected the Buntmeyers' argument that DPH was inconsistent with prior practice, relying on the

DPH affidavit stating that "the 'father' on a Certificate must be male, that DPH has never knowingly registered a mother's wife as a parent," and that "therefore, DPH's refusal to register a mother's wife on a Certificate was not inconsistent with prior DPH practice."

Judge Hutchinson also rejected the Buntmeyers' argument that DPH acted with improper purpose because they had failed this argument to the DPH; however, he held in dicta that "regardless of any inferences the Buntmeyers may draw from DPH's policy, these inferences cannot satisfy the Buntmeyers' burden to show the DPH acted erroneously."

DPH stated that it defines "father" as "male parent" & that DPH accepts the mother's attestation without verification of any biological or legal relationship.

With regard to the argument that DPH violated a provision of law, Judge Hutchinson stated, "Iowa law simply requires the filing and registration of a Certificate 'for each fetal death which occurs in this state... the statute does not prescribe the content of a Certificate.'" Judge Hutchinson held that DPH was entitled to agency deference in its content of the Certificate, which accordingly could only be disturbed if it was "based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law." Judge Hutchinson noted that DPH stated that it only defines "father" as the "male parent," and that DPH will accept the mother's attestation without verification of any biological or legal relationship. He held that "the commonality across all accepted paternal relationships is that the 'father' must be male," and that therefore DPH's interpretation of "father" on a certification "is not an

irrational, illogical, or wholly unjustifiable interpretation of a provision of law."

Judge Hutchinson also rejected the Buntmeyers' argument that the presumption that a mother's husband at conception or birth is the father of her child must be extended to same-sex spouses, stating that "assuming -- without deciding -- the Buntmeyers' modified presumption of paternity exists, this presumption of parentage arises only when a party seeks a determination of parental rights and obligations" in relation to birth certificates, support of dependents, and dissolution of marriage. He therefore held that DPH is free to interpret "father" within the deference provided by the Iowa Code for purposes of a Certificate of Fetal Death.

Finally addressing the Buntmeyers' Equal Protection argument, Judge Hutchinson noted that, unlike the above reviews of agency action, the court must re-

view constitutional claims *de novo*. Judge Hutchinson stated that the Iowa Constitution guarantees equal protection of the law, and that the Iowa Supreme Court held in 2009 that "denying same-sex couples the benefits of marriage violates equal protection unless the

state can justify its action under heightened scrutiny."

While DPH argued that a mother's wife is not similarly situated to a mother's husband, Judge Hutchinson held that "a mother's wife and a mother's husband are both parents in the ordinary and common sense... in every common and ordinary sense except for biology." Judge Hutchinson further held that the two purposes of the Certificate were to provide statistical information about a stillbirth and to be a documentary record of a fetal death. He further noted that a Certificate could have several uses for parents, including commemorative value or insurance purposes. Finding that DPH admitted that their policy permits registration of non-biological fathers on Certificates, Judge Hutching held that "biology is only

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CA Ct. Enforces DPA Against Estate Claim by Surviving Same-Sex Spouse

In a decision filed December 13, 2012, Judge Mary Wiss of the San Francisco Superior Court upheld a probate court's ruling that the domestic partnership agreement between two men under which neither would be entitled to the other's assets was not invalidated by their legal marriage during the short window in which gay marriages were legal in California. *Konou v. Wilson*, 2012 WL 6216869 (Cal. App. 1 Dist.)

Philip Wilson and Antipas Konou met and began a relationship in 2005, and on May 17, 2006 registered as domestic partners. Before registering, however, they entered into a written domestic partnership agreement, similar to a pre-nuptial agreement, "to define [the parties'] respective property rights and support rights, both prior to and during the course of their domestic partnership as well as in the event of termination of the domestic partnership by either death, dissolution or legal separation." Under the agreement, both Wilson and Konou waived any right "in law or equity" in the property, income, or estate of the other, whether then existing or existing in the future. The document also stated that should either wish to change the terms of the agreement, a new and separate written agreement would be required, executed by both parties.

After same-sex marriage was legalized in California, the couple was issued a marriage certificate on July 29, 2008, and was married the next day, although the domestic partnership agreement was not altered in any way by either party. Proposition 8, which barred same-sex marriage in California, was passed in early November, 2008, and just days later Wilson committed suicide. Though the law now banned new marriages, later court rulings would determine that any marriages entered into during the time in which the unions were legalized would remain valid, and accordingly Wilson and Konou were legally married at the time of Wilson's death.

Wilson had executed a will many years earlier, giving a portion of his estate to his then-partner. However, the relationship dissolved and after Wilson's death the former partner disclaimed his interest in Wilson's estate. Konou origi-

nally disclaimed any interest as well, but then petitioned for determination of entitlement to estate distribution, arguing that the marriage between him and Wilson invalidated the written domestic partnership agreement and that he should be treated as a pretermitted spouse entitled to a statutory claim against the estate. The probate court found that 1) the marriage did not invalidate the domestic partnership agreement, and 2) the domestic partnership agreement served as a valid waiver of Konou's rights as a pretermitted spouse. Konou appealed the probate court's decision, which the Superior Court reviewed de novo.

Judge Wiss begins with a brief overview of the history of the status of and laws affecting same-sex unions in California, noting that nothing in *In re Marriage Cases*, 43 Cal. 4th 757 (2008), that granted the right to marry to gays and lesbians, spoke to its effect on existing domestic partnerships. In fact, after *In re Marriage Cases*, for a significant length of time in order to dissolve a same-sex marriage where the couple had previously been registered as domestic partners, two separate actions had to be brought – one to dissolve each institution. Further, nothing in the cases invalidated any statutes or laws regarding domestic partnerships.

As to the specifics of Konou's appeal, Wiss first points out that Konou did not contest the domestic partnership agreement as invalid (as this would be a losing claim in any event), but instead relies on the argument that the marriage certificate served as a subsequent writing constituting a new agreement regarding their property disposition.

This argument fails for a number of reasons, chiefly that the domestic partnership was never dissolved and was therefore still valid throughout the couple's marriage. As Wiss noted, both the marriage and domestic partnership would have to be dissolved through legal action to sever the ties between the couple. Additionally, a marriage license does not invalidate a prenuptial agreement. Couples often enter into a contract regarding their property rights prior to obtaining a marriage license, and the subsequent license does not "reset" the stage so that both

parties are thereafter entitled to their statutory benefits as spouses. Perhaps most damning to Konou's appeal, however, is the inclusion of language in the domestic partnership agreement reading "any subsequent changes in California or federal law that create or give rise to additional or altered rights and obligations of the parties shall not affect this agreement." Further, the document states that both Wilson and Konou entered into the agreement with the express desire that "the terms set forth in this agreement apply to any termination of their relationship...and to control their ownership of property during the relationship and...in the event of termination of the relationship by dissolution, death or legal separation."

Nothing in the domestic partnership agreement, Wiss notes, indicates that either party wished for a future change in law or advance in same-sex rights to invalidate the agreement. The court does acknowledge, however, that domestic partnerships and marriages differ in a number of ways. Critically, though, the state law property rights under both domestic partnerships and marriages do not differ in any significant way. Accordingly, the property rights under a marriage were not so different as to invalidate the agreement that contemplated a domestic partnership.

Wiss affirms the probate court's decision on the issue of the validity of the domestic partnership agreement, and subsequently makes quick work of Konou's appeal on the issue of waiver of rights as a pretermitted spouse. Quite simply, the court states, the Probate Code section 21610 provides that a pretermitted spouse is not entitled to a share of the estate if, among other things, "the spouse made a valid agreement waiving the right to share in the decedent's estate."

As the domestic partnership agreement has been deemed valid, and therefore acts as a waiver of Konou's rights as a pretermitted spouse, Konou is entitled to nothing under statutory estate law. However, the case does serve as a reminder of the challenges and pitfalls of a multi-tiered system of partnerships, unions and marriages in a country that treats same sex couples differently in each state, and in some cases, grants and revokes rights to them on a nearly month-to-month basis.

—Stephen E. Woods

Israeli Family Court in Tel Aviv Orders Dissolution of Same-Sex Marriage

On November 21, 2012, the Tel Aviv Family Court decided to “dissolve” the marriage of an Israeli same sex couple who married in Canada and registered as married in Israel. *Anonymous v. Ministry of Interior*, Family Case 11264-09-12. Israel has only religious marriage and divorce, but case law dating to the 1960s determined that couples who married abroad should be registered in Israel’s population registry as married, even if their marriage could not have been performed in Israel. In spite of legal doubts about the implication of this “registration,” de facto this allows couples who married abroad to present themselves as married in daily life and in reality have access to most if not all rights enjoyed by married couples. In *Ben-Ari v. Director of the Population Registry*, HCJ 3045/05, the Israeli Supreme Court applied the same logic to same-sex couples, holding that same sex couples who married in Canada should be registered in Israel as married.

Ben-Ari thus opened to same-sex couples one of the two channels of alternatives to marriage, used in Israel by couples who do not want to or cannot marry religiously. The other channel is that of gaining rights akin to that of married couples by cohabitation, which has also been extended by case law, since the 1990s, to same sex couples. The use of both channels by same sex couples in Israel illustrates the claim that same sex couples actually benefit from the fact that Israel formally has only religious marriage. When they started making legal claims for partner recognition, Israeli law already had two institutions developed as a result of pressure from different sex couples who did not or could not want to go through religious marriage. They could fit in the models which were originally developed for different sex couples as alternatives to religious marriage.

The current case reflected a problem that was anticipated ever since Israeli same-sex couples started getting married abroad and having their marriages registered in Israel: although many countries (including some that allow same sex marriages) allow for couples to marry without posing a residency requirement, they pose such a requirement for divorce,

which is a judicial proceeding. Under Israeli law, marriage and divorce of Jewish couples is conducted by religious courts based on Jewish law, and is controlled by the orthodox-monopolized rabbinate, which does not recognize same-sex marriage. Thus, the question of divorce was looming ever since same-sex couples married abroad won their right to be registered as married in Israel.

The Tel-Aviv Family Court judge framed the question before him as what is the judicial instance authorized to dissolve the marriage of two men who married in Canada and who registered in the Ministry of the Interior in Israel as married. When the couple separated, they approached the Family Court, which approved their separation agreement, and recommended that the Ministry of Interior “delete” their registration as married, but the Ministry refused to do so. Then the couple approached the Rabbinical Court, which refused to hear the case. Considering these facts, Judge Yehzkel Eliyahu accepted the couple’s argument that when the Rabbinical Court does not recognize a certain claim, based on religious law, it loses jurisdiction to deal with it. It accepted the “non-recognition thesis” advanced by Professor Ruth Halperin-Kadari, according to which when the religious court does not recognize a certain institution or relationship, it does not have the jurisdiction to deal with it.

Thus, the Family Court rejected the Ministry of the Interior’s argument that the couple should approach the Rabbinical Court, holding that given the non-recognition by religious courts on one hand, and the growing recognition of same-sex couples by Israeli civil courts on the other, the Family Court was the proper and natural forum to deal with the case. The court emphasized that it would be unacceptable to keep the two men, who have separated, legally tied to each other in bonds of marriage, and that doing so would amount to violating their civil liberties, violating Israel’s Basic Laws, and negating justice and equality. The Family Court would use its “inherent jurisdiction” and order the marriage dissolved. (Existing legislation that granted the Family Court jurisdiction to dissolve marriage in some cases that may fall out

of the jurisdiction of the religious courts operating in Israel, did not apply in this case, as it explicitly stated it will not apply if both partners are Jewish, as the two men are in this case).

The order issued by the Family Court may be the first time in Israel’s history that a civil family (i.e. not religious rabbinical) court ordered the dissolution of a marriage conducted between two Jews. Following the order, the Ministry of Interior agreed to change the registration of the couple in the population registry to “divorced”, indicating that it probably does not plan to appeal the judgment.

Some implications of the case are yet unclear: Does the dissolution order actually point to a substantive recognition (rather than mere “registration”) of the same-sex marriage in Israel? Judge Eliyahu stated that his decision is the “other side of the coin” of *Ben-Ari*, however recall that *Ben-Ari* only dealt with the registration, not taking a position regarding the recognition of the marriage. Additionally, could the judgments have any implications for opposite-sex couples as well? These questions are not expected to gain an answer in the foreseeable future, especially given that the judgment is not likely to be appealed.

Although the case was published without the couple’s names, the Israeli press reported that the couple in question is Professor Uzi Even and Amit Kama, both veteran gay rights activists. Professor Even was Israel’s first openly gay member of Knesset (parliament) and Even and Kama have been protagonists in a few previous gay rights precedents, sometimes separately and sometimes together as in this case. It was further reported that Professor Even sought the divorce mostly so he can marry his current partner, who is a Dutch citizen, in order to facilitate immigration issues for his partner and allow him to stay in Israel. (See: <http://www.haaretz.com/news/features/where-are-they-now/where-are-they-now-the-israeli-man-who-divorced-his-husband-premium-1.486360>).

The couple was represented by Judith Meisels and Hofit Ben-Ezra Cohen. For further reading on the judgment see <http://ohrh.law.ox.ac.uk/?p=868>.

—Aeyal Gross

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CIVIL LITIGATION

SUPREME COURT – In a rush to get into the line for Supreme Court consideration of whether same-sex couples have a constitutional right to marry, the Defendant-Intervenors in the Nevada marriage equality case filed a petition for certiorari with the Supreme Court on December 5, asking the Court to by-pass the 9th Circuit Court of Appeals and to review on the merits the district court’s ruling *in their favor*. They argued that the urgency of settling this underlying constitutional question – even in advance of ruling on DOMA or California Proposition 8 – would justify the Court in taking up their case “out of order,” since how the Court answered the underlying question could in effect answer the questions posed by the other cases. Perhaps they were inspired by trial counsel in *Golinski*, *Pedersen* and *Windsor*, three trial court rulings against the constitutionality of Section 3 of DOMA, who asked the Supreme Court to let them by-pass the 9th and 2nd Circuits, but those requests made some sense because the Court had already received a petition for review of the 1st Circuit’s ruling striking down Section 3. But this attempt to end-run the 9th Circuit does not seem well calculated to win the endorsement of the Court, especially in light of the grant of certiorari in *Hollingsworth*, the Proposition 8 case (see above), and the *Windsor* case, in which the Court granted the Solicitor General’s petition to review a ruling on DOMA Section 3 emanating from the 2nd Circuit. In addition, the standing of Intervenors to petition the Court independently of the state (which is actively defending the lawsuit in Lambda Legal’s appeal to the 9th Circuit) is subject to question. As noted in our lead story above, the Supreme Court has added in its certiorari grant in *Hollingsworth* the question whether the Defendant-Intervenors in that case had standing to seek review of the district court’s opinion. *Coalition for the Protection of Marriage v. Sevcik*, No. 12-689, 2012 WL 6054793 (U.S., petition filed Dec. 5, 2012).

SUPREME COURT – Lambda Legal has filed an amicus brief in *Millbrook v. United States*, No. 11-10362 (certiorari

granted September 25, 2012). The case concerns a federal prison inmate in Pennsylvania who alleges that after he complained about a violent cellmate, he was taken by some prison guards to a cameraless area in the basement of the prison and forced to perform oral sex on one of the guards. He filed an internal prison grievance about this incident and exhausted his remedies unsuccessfully, then filed suit against the government under the Federal Tort Claims Act, which waives sovereign immunity for intentional torts (including assault) committed by on-duty law enforcement officers. Unlike other circuits, however, the 3rd Circuit has construed the FTCA immunity waiver narrowly, and held that the lawsuit was barred. The Supreme Court granted cert on the following question: “Whether 28 U.S.C. Sec. 1346(b) and 2680 (h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to ‘execute searches, to seize evidence, or to make arrests for violations of Federal law.’” Explaining the LGBT interest in this case prompting its decision to file an amicus brief, Lambda Legal Attorney Susan Sommer stated: “Incarcerated members of the LGBT community and of other vulnerable groups are especially targeted for sexual assault. If prisons fail to protect vulnerable inmates, the inmates must have access to the courts.” From the Court’s docket list, it looks like this is a case where the Solicitor General may have changed his position. Originally filing a brief in opposition to the cert petition, on November 30 the Solicitor General filed a brief supporting reversal of the 3rd Circuit and remand for trial. Subsequently, the Court appointed Jeffrey S. Buchholtz of Washington, D.C., to argue the case as amicus curiae in support of the 3rd Circuit’s ruling. The Court has also confirmed the appointment of Christopher J. Paoletta of New York, who filed the cert petition on behalf of Millwood, to represent him before the Court.

8TH CIRCUIT – In an opinion that is quite frustrating to read, a panel of the

8th Circuit denied a petition to review a ruling by the Board of Immigration Appeals on a claim for asylum by an HIV+ man from Kenya. *R.K.N. v. Holder*, 2012 WL 5990286 (8th Cir., Dec. 3, 2012). R.K.N., who had been in the U.S. under a student visa in 1998. In the summer of 2001 he went back to Kenya, allegedly to attend his father’s funeral, and was denied re-entry to the U.S. in October 2001, because his visa had expired. He sought to remain in the country, filing for asylum, withholding of removal, and protection under the Convention Against Torture. He claimed membership in a disfavored political group, and asserted that his HIV+ status had led to him being beaten while in Kenya and would subject him to danger if he returned. An Immigration Judge (IJ) rejected his claims in a ruling initially upheld by the BIA, finding inconsistencies in his story that undermined his credibility. Then a member of the BIA reopened the case and directed a rehearing, and R.K.N. was given additional time to supplement his medical records, which could confirm his account of being treated in the hospital after he was beaten. Upon rehearing, however, the IJ excluded some proffered medical records and reaffirmed the credibility determination, again denying R.K.N.’s petitions. On appeal, he argued to the 8th Circuit that the IJ and the BIA had failed to address his HIV-related claim, but the court found that the credibility determination was sufficient to sustain the administrative ruling. It is somewhat difficult to figure out what was going on in this case based on the rather convoluted opinion released by the court, and the whole process seems quite frustrating. If R.K.N. is, as he says, HIV+, and there is evidence that this would present great danger to him if he is removed back to Kenya, that should be confronted and explicitly discussed by the IJ and the BIA, regardless of any inconsistencies in evidence concerning the date of his father’s funeral.

9TH CIRCUIT – A unanimous panel ruled in *Martinez v. Napolitano*, 2012 WL 5995444 (9th Cir., Dec. 3, 2012), that the district court lacked jurisdiction to hear a

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claim that the BIA had violated the due process rights of a man from Guatemala who sought refuge in the United States due to fear that he would be endangered in Guatemala due to his sexual orientation. The plaintiff filed his initial application for asylum and withholding of removal based on his alleged political opinions in 1992. An asylum officer denied the application, and at the subsequent hearing the plaintiff admitted to the IJ that his initial application was false, but submitted a new application based on his sexual orientation. The IJ found that the application lacked credibility due to the earlier false application, and denied it, and the BIA affirmed this ruling without explanation. The 9th Circuit granted a petition for review and sent the case back to the BIA for an explanation of its ruling. The BIA again affirmed the IJ, this time in a “more detailed” decision. The BIA also declined to reopen the case based on a new argument invoking the Convention against Torture, finding that plaintiff failed to establish that he would be tortured if returned to Guatemala. Plaintiff’s appeal of this ruling to the 9th Circuit was rebuffed in 2009. Then he filed suit in district court, alleging a due process violation of the Administrative Procedure Act, but the court ruled that under the REAL ID Act, it did not have jurisdiction over such an action. The 9th Circuit upheld this ruling, finding that federal law limits judicial review in asylum and CAT cases to the prescribed process of administrative appeals culminating in a petition for review to the courts of appeals. The district courts are not part of this process, and the courts do not have jurisdiction to consider “indirect attacks” on the merits of a BIA ruling. “After previously failing to convince this Court that the BIA erred,” wrote Circuit Judge Murguia, “Martinez has repackaged his rejected arguments (and added a few others) as reasons why the BIA decided his case in an arbitrary and capricious manner in violation of the APA. However, none of these arguments survive as independent claims not inextricably linked to his order of removal. Nor does this action avoid the clear language of 8 U.S.C. sec. 1252(a)(5), which

eliminates jurisdiction over such claims. Because the substance of the relief that Martinez is seeking (asylum, withholding of removal, and CAT) would negate his order of removal, the district court properly determined that it lacked jurisdiction.”

INDIANA – Granting summary judgment against the plaintiff, U.S. District Judge Robert L. Miller, Jr., ruled in *Norington v. Mitcheff*, 2012 WL 6600101 (N.D.Ind., Dec. 18, 2012), that an HIV+ inmate claiming to be transgender and wrongfully denied hormone therapy by Indiana prison medical staff failed to state an 8th Amendment claim. The inmate is serving an aggregate term of 60 years in prison having pleaded guilty to counts of robbery, burglary and voluntary manslaughter. The inmate, born male, identifies as female and has been persistently seeking hormone therapy since 2007, but had never sought or obtained treatment for gender dysphoria prior to her guilty plea in 2004. Judge Miller’s decision details the history of the inmate’s interaction with prison medical staff over the intervening years, showing that she has consistently sought hormone treatment, and has expressed a goal of obtaining sex reassignment surgery, but that medical staff has resisted her requests for a variety of reasons, including the inmate’s prison disciplinary record and inconsistent compliance with prison rules. Although some of her medical records include notations of a GID diagnosis and a few instances where particular medical personnel referred her treatment requests to higher authority, ultimately a psychiatrist responsible for her treatment decided against recommending treatment, stating “when he can get his interpersonal violence and otherwise disruptive behavior under control, clinicians working with him can then re-evaluate his appropriateness for psychotherapy focused on transgender issues.” Observing that a difference of opinion with medical personnel as to appropriate treatment will not by itself sustain an 8th Amendment claim, Miller commented: “It is abundantly clear from the record that Ms. Norington wants hormone therapy and sex reassignment sur-

gery, and that she has been persistent in her request for this treatment over the course of several years. Her desire for this treatment, standing alone, does not mean that the United States Constitution entitles her to it.” The court acknowledged that binding precedent precludes the Indiana prison system from categorically denying hormone therapy, but accepts the defendants’ evidence that in this case there is no such categorical rule, but rather a difference of opinion between the inmate and medical personnel about whether such treatment is appropriate for her at the present time.

MICHIGAN – Ingham County Judge Paula Manderfield has rejected a motion by the state Attorney General’s Office and the Unemployment Agency for reconsideration of a decision she issued in October that overturned a decision by the Agency and awarded unemployment benefits to Andrew Shirvell, an attorney who had been discharged by the Attorney General’s Office after it came to light that he had carried on a personal and on-line vendetta against Christopher Armstrong, the openly-gay student body president at the University of Michigan. Shirvell, a U. Mich. Alumnus, was outraged at Armstrong’s election and began a campaign against him that was tinged with anti-gay animus. Armstrong maintained that Shirvell had “stalked” him on campus as well as making untrue allegations about him on Shirvell’s website, and for a time the University barred Shirvell from the campus. The Attorney General’s Office announced that it would appeal the benefits ruling, a spokesperson stating, “Shirvell was terminated for misconduct and is not eligible for unemployment benefits.” Shirvell, who now lives in North Babylon, N.Y., stated he was shocked by the A.G.’s position, as he continues to maintain that his activities were protected by the First Amendment, and did not constitute misconduct. *Detroit Free Press*, Dec. 28.

MICHIGAN – After the 6th Circuit reversed and remanded in *Ward v. Polite*, 667 F.3d 727 (6th Cir., Jan.27, 2012), Eastern

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Michigan University was facing a potential trial on the claim that they violated the constitutional rights of graduate counseling student Julea Ward by dismissing her from the master's degree counseling program after she refused to counsel a gay client because of her religious beliefs. The University decided to settle, which Ward agreed to do for a payment of \$75,000. "EMU has made the decision that it is in the best interests of its students and the taxpayers of the state of Michigan to resolve the litigation rather than continue to spend money on a costly trial," said EMU's Vice President for Communications, Walter Kraft, in a statement released to the press, which indicated that the university's insurer would pay the costs of the settlement. Kraft indicated that the settlement did not require the University to change any of the policies, programs and curricular requirements of the graduate counseling program. Such a change had been the avowed goal of the anti-gay litigation organization that represented Ward in this case, according to a report about the settlement on *Freep.com* (Dec. 12).

NEW YORK – U.S. District Judge Laura Taylor Swain refused to grant summary judgment against Michel Toliver, a pro se New York City pre-trial detainee who alleged a violation of his federal civil rights by Corrections Officer Remy while Toliver was detained at Riker's Island. *Toliver v. City of New York*, 2012 WL 6103098 (S.D.N.Y., Dec. 3, 2012). Toliver alleges that Remy physically assaulted him when Toliver did not move as quickly as Remy wanted, when Remy took over escorting him to an intake area from Office Schiano. Remy had allegedly said to Schiano, "Drag his faggot ass down to the room." Toliver claims to have incurred serious physical injury as a result of this assault. Judge Swain found that Toliver's allegations, if true, would make out a claim against the officer under 42 USC 1983 for use of excessive force. However, she concluded that Toliver's allegations were insufficient to state a valid claim against Remy's superiors or the City of New York, as he failed to submit allegations or potential evidence regarding an alleged "policy" of allowing

officers to assault inmates or "covering up" a recurring problem of such assaults, so she granted summary judgment to the City and other named defendants as to those claims.

LOUISIANA – The 3rd Circuit Court of Appeal of Louisiana rejected a claim that a sentence of 8 years imprisonment at hard labor was unconstitutionally excessive in the case of a man who pled guilty to the felony charge of exposing a sexual partner to HIV. *State v. Turner*, 2012 WL 6028868 (Dec. 5, 2012). The defendant came to the attention of law enforcement authorities in Sabine Parish when a woman with whom he was in a sexual relationship discovered papers revealing his HIV status and reported him to the police. It subsequently developed that he had unprotected sex with several women, and four felony charges were brought against him in Sabine County. He agreed to plead guilty to one charge in exchange for dismissal of the three others and was released on bail awaiting sentencing, but bail was revoked when the court learned that he was wanted on a similar charge from Natchitoches Parish, and there was also another possible charge that could be brought in Sabine Parish. The court sentenced him to 8 years, which was within the statutory guideline of up to 10 years for this offense. Rejecting his appeal, Judge Marc T. Amy observed that it was consistent with other Louisiana rulings on similar charges, and rejected the claim that it was disproportionate to the seriousness of the offense.

NEW YORK – New York Supreme Court Justice Daniel P. FitzGerald (Supreme Court, New York County), has sentenced Renato Seabra to 25-years-to-life after Seabra's conviction of the murder of Carlos Castro, reported *Gay City News* on December 21. A jury rejected the defense of insanity in the light of evidence that Seabra strangled, beat, castrated and then mutilated the body of Castro in a Manhattan hotel room after Castro told Seabra that he was ending their relationship. Castro, then 65, had promoted Seabra's modeling career in Portugal and formed an attachment to the younger man, but decided to end their

relationship during a vacation trip to New York. Under the terms of the sentence, Seabra will not be eligible to apply for parole until he serves at least 25 years of his sentence. Castro was described as "a TV personality and writer, active in the gay rights movement, and well-traveled." At the sentencing, Seabra expressed remorse, claimed he had never previously been aggressive, and said "That day I don't know what took over me." The jury verdict was rendered after trial on November 30.

CALIFORNIA – On January 1, A.B. 2356 goes into effect, providing a state law definition for the term "sexually intimate partner" in the context of regulations governing procedures for donor insemination using known-donor sperm. The legislation was passed in response to a situation faced by Maya Scott-Chung and her same-sex partner, whose attempt to use sperm donated by their friend Daniel Bao was stymied by federal FDA rules concerning health screening of known donors. They already have a child who was conceived more than eight years ago with sperm donated by Bao in ignorance of the rule as part of a do-it-yourself home insemination process. Now they want another, but they needed medical assistance to carry out the procedure, which drew into play the FDA regulations. California legislators hope that the state law definition will make the process simpler and less expensive. *San Francisco Chronicle*, Dec. 28.

FLORIDA – The *Orlando Sentinel* reported on Dec. 13 that the Orange County School Board voted 6-2 to add sexual orientation, gender identity and gender expression to the school district's non-discrimination policy.

IDAHO – On December 3 the Boise City Council unanimously approved a measure banning discrimination in employment, housing or public accommodations on the basis of sexual orientation, according to a report by KBOI 2 News. The report was unclear about whether the measure expressly

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extended to gender identity discrimination, although it asserted that the measure would protect people who identify as transgender. The measure goes into effect in January 2013. Boise will be the largest municipality in Idaho that bans such discrimination. Attempts to pass a state law banning sexual orientation have thus far failed, but several other local governments have taken that step in the past year or so.

ILLINOIS – Governor Pat Quinn told reporters on December 10 that he hoped the lame-duck session of the legislature would pass a marriage equality bill that he could sign in January before the newly-elected legislature is sworn in on January 9. The state's civil union bill, passed two years ago by a lame-duck legislature, is now in effect, providing civil unions for same-sex and different-sex couples that provide the state law rights and responsibilities of marriage. Passage of gay rights legislation during lame-duck sessions is a way to reduce fears of legislators, although growing public support for same-sex marriage may make also assuage such fears. *Chicago Tribune*, Dec. 10. Late in December, a coalition of more than 250 clergy issued a joint letter urging passage of a marriage equality bill, and co-sponsors Rep. Greg Harris and Sen. Heather Steans indicated that they would push forward for a vote in the lame duck session if they thought they would get enough votes for passage. *Chicago Sun Times*, Dec. 24. * * * The cowardly East Aurora School Board has truckled under to loud-mouthed religious bigots and backed away from their initial impulse to include protection for transgender youth explicitly under the School District's anti-bullying policy. Board members apologetically stated that they thought that their broad policy would be sufficient to provide adequate protection. The bigots whipped up public agitation over the idea that the policy would allow transgender students to use the restroom of their choice. *Beacon News*, Dec. 19.

KANSAS – Implementing the will of the local electorate, which voted to overturn local legislation banning sexual ori-

entation discrimination, the Salina City Commissioners voted 3-2 to remove language embodying such protection from the city's employment manual on Dec. 17. The measure had been enacted in May, and no sexual orientation discrimination complaints had been filed prior to the repeal vote on November 6. The reported count on the public vote was 9,097 to 7,686. *Salina Journal*, Dec. 18.

MINNESOTA – Same-sex marriage supporters in Minnesota, buoyed by the electorate's rejection of an anti-marriage constitutional amendment on November 6, are hoping to present a marriage equality bill for passage in the legislative session starting on January 8. Democrats control the legislature, and Governor Mark Dayton is a supporter of marriage equality. However, the margin of defeat for the marriage amendment was not huge, and questions remain whether its rejection signals a willingness by the electorate to support an affirmative grant of equal marriage rights to gay Minnesotans. *erstarnews.com*, Dec. 19.

MONTANA – The Helena City Council unanimously voted to enact an ordinance prohibiting discrimination in housing, employment and many kinds of public accommodations on account of sexual orientation on December 17. Fears expressed by some members of the public about restroom and locker room issues led to an amendment during deliberations that in any place where people "ordinarily appear in the nude" users may be required to use facilities designated for their anatomical sex, regardless of gender identity. Under the new ordinance, people may bring claims to Municipal Court, but must first show that the Montana Human Rights Bureau – which technically does not have jurisdiction to consider sexual orientation claims – will not pursue the case. Once being turned down by the state bureau, complainants will have 90 days to file a claim in the Municipal Court. The maximum damage penalty authorized for a discrimination claim is \$12,000, but at-

torney fees can be awarded to prevailing plaintiffs. In cases deemed frivolous by the court, attorney fees can be awarded to defendants. *Independent Record*, Dec. 18.

NEW JERSEY – Responding to gay constituents who were buoyed by the passage of state-wide ballot questions in Maine, Maryland and Washington in November, New Jersey's openly-gay state legislator, Assemblyman Reed Cusciora (D-Mercer), announced on December 10 that he would introduce a bill in the legislature pattern on the Maine ballot question, seeking to place the enactment of marriage equality in the hands of the voters. He anticipates that Governor Chris Christie, an opponent of same-sex marriage, would sign the measure, clearing the way for its inclusion on the ballot. Christie vetoed a marriage equality bill passed by the legislature during 2011, stating that he believed the question of same-sex marriage should be decided by the voters, and indicated at that time that he would sign a measure to place such a question on the ballot. Legislators have until January 2014 to attempt to override Christie's veto, an uphill battle since the measure passed with fewer than the votes necessary for an override, and Democratic majorities in the legislature are not large enough to accomplish this without Republican help. *NJ.com*, Dec. 11. Mr. Cusciora's proposal was denounced by Democratic legislative leaders as well as those who have been working patiently on trying to put together the votes for a veto override. One question immediately posed: where was the political structure and fund-raising that would be needed to wage an all-out electoral battle to pass such an initiative? In the *Specially Noted* section of this month's *Publications Noted*, below, we recommend an in-depth article about the 2012 marriage ballot question battles, which ends with a caution about anybody trying to follow-up with the apparatus in place to run the same kind of well-funded, sophisticated campaigns.

RHODE ISLAND – Senate President M. Teresa Paiva Weed has stated that a marriage equality bill will be brought to a vote

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in the Senate Judiciary Committee during 2013. She expected there would be much discussion about whether to submit the issue of marriage equality to a referendum, similar to the vote that enacted marriage equality in Maine on November 6, 2012, and the votes on approving marriage equality legislation in Maryland and Washington State on the same date. Openly-gay House Speaker Gordon Fox has already indicated that the House will vote on a marriage equality bill in 2013. Passage in the House is widely anticipated, but the Senate could be more of an uphill struggle. Rhode Island is now the only New England state that does not provide marriage for same-sex couples. The state enacted a Civil Union law, over protests by LGBT lobbying groups who insisted on holding out for full marriage rights. *Advocate.com*, Dec. 18.

AMERICAN PSYCHIATRIC ASSOCIATION

– The APA’s board of trustees voted on December 1 to approve changes in the latest edition of the *Diagnostic & Statistical Manual of Mental Disorders* (DSM-V), including the removal of “Gender Identity Disorder” as an officially recognized diagnosis as a mental disorder. The term “Gender Dysphoria” will be used in DSM-V to describe emotional distress over “a marked incongruence between one’s experienced/expressed gender and assigned gender.” This change provoked divided views among transgender rights advocates. On the one hand, it signifies that transgender individuals will not have a lifetime stigma of having a “disorder,” signifying that one’s gender identity does not by itself say anything about one’s mental health. On the other hand, some raised the concern that removal of “gender identity disorder” from the DSM-V will create obstacles to obtaining insurance coverage for trans-related medical care, and might, at a minimum, cause confusion in applying existing legal precedents protective of trans rights, some of which use the phrase “gender identity disorder” as part of their legal analysis.

UNIVERSITY OF IOWA – *InsideHigherEd.com* reported on Dec. 12 that the

University of Iowa is modifying its application form to give applicants the option to identify as LGBT and to select “transgender” as one of the options on the gender question. Iowa is the first major research university to take this route. Attempts to add such questions to the standard application form that is widely used by many different colleges and universities had foundered on the belief that this might cause undue anxiety to gay applicants who might have difficulty deciding whether they wanted to “come out” on their application. A gay member of the admissions staff at Iowa (who is an alumnus of the school) rejected this argument, noting the question will be optional, and championed the change as a way to help the student to recruit and enroll more openly LGBT students. He commented that he found Iowa to be a supportive and nurturing place when he arrived, but that potential students would not naturally deduce this from the application form. Adding these questions will send a signal that the university welcomes LGBT applicants. Leaders of the on-campus LGBT student group strongly supported the change.

RICHARD ADAMS – National media paid attention to the death of Richard Adams, 65, who married his same-sex partner, Australian Anthony Sullivan, in a Boulder County, Colorado, ceremony in April 1975. The Boulder County Clerk’s office granted marriage licenses to a handful of same-sex couples until state authorities told them to stop. Adams and Sullivan, who were living in California at the time, rushed to Boulder to wed in hopes that a lawful marriage would make it possible for Sullivan to assert spousal immigration rights, but both the Immigration Service and the 9th Circuit Court of Appeals refused to recognize the marriage. (The first written response they received from the Immigration Service stated: “You have failed to establish that a bona fide marital relationship can exist between two faggots.”) Nonetheless, Adams and Sullivan, who spent some time together outside the United States due to the adverse immigra-

tion rulings, considered themselves married up to the date of Adams’ death, and they became vocal about it in recent years as marriage equality – especially for binational couples – came to the fore as a major issue. A documentary has been filmed about the two men, titled “Limited Partnership,” and is scheduled for release during 2013. *New York Times*, December 27.

WESTBORO BAPTIST CHURCH

– The most popular petition submitted to the White House website, judging by the number of signatures (already over 280,000) asks the Obama Administration to revoke the tax-exempt status of Westboro Baptist Church, a small family-dominated institution founded by Rev. Fred Phelps, whose main public activity appears to be picketing and protesting at funerals using signs denouncing homosexuality, and maintaining a website called *Godhatesfags.com*, loaded with anti-gay vitriol. The petition asserts that WBC fails to meet the standards for tax exempt church status under federal tax regulations. *Digital Journal*, Dec. 28.

TD BANK EQUALIZES BENEFITS

– The *New York Times* Bucks blog reported on Dec. 5 that TD Bank, a large U.S. bank with about 1300 branches in the Northeast and Mid-Atlantic regions, had announced that it would cover the extra taxes that employees must pay if they take advantage of the company’s domestic partner insurance benefits for same-sex partners of employees. TD Bank said the new policy would go into effect on January 1, 2013. Several large employers have adopted such “grossing up” policies as a matter of compensation fairness to their LGBT employees. If the Supreme Court affirms lower court rulings invalidating Section 3 of the Defense of Marriage Act in the months ahead, such policies might become unnecessary, as the refusal of the federal Internal Revenue Service to recognize same-sex marriages validly performed under state law has been premised by the IRS on DOMA, not on a construction of the Internal Revenue Code.

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UNITED NATIONS – On December 11 the United Nations hosted a special event on the need for leadership in the international fight against homophobia, according to a press release issued by the world organization. Secretary General Ban Ki-Moon stated: “Let me say this loud and clear: lesbian, gay, bisexual and transgender people are entitled to the same rights as everyone else. They, too, are born free and equal. It is an outrage that in our modern world, so many countries continue to criminalize people simply for loving another human being of the same sex. In most cases, these laws are not home-grown. They were inherited from former colonial powers.” He asserted that “these laws must go.” These comments sound unexceptionable coming from the head of a major international organization in 2012, but in an important sense they constitute a major landmark in the struggle for LGBT rights, when compared with the attitudes of governments and world organizations just a few decades ago.

INTER-AMERICAN COURT OF HUMAN RIGHTS – *AfterMarriage* blog reported on Dec. 29 that it is possible that the Inter-American Court of Human Rights will issue a ruling soon on same-sex marriage that could be binding on the many western hemisphere countries that recognize the authority of that court (not including the United States, whose congressional majorities are allergic to international law). A suit is pending from three couples in Chile, and marriage equality activists from Costa Rica have indicated that they will file suit after a proposed civil union bill failed to gain legislative approval recently. In addition, Mexican attorney Alex Ali Mendez Diaz, who represented three couples who won a ruling from the Supreme Court of Mexico (see below) on behalf of three same-sex couples from Oaxaca State, is thinking of filing suit in the Inter-American Court to expedite the process of having that ruling take nationwide effect.

ALBANIA – Blogger Michael Petrelis relayed news that Albania’s Commissioner

for Protection from Discrimination (CPD), an office established under a recently adopted law banning discrimination, has responded affirmatively to complaints about anti-gay language in texts used in the country’s medical and law faculties. According to the report relayed from local activists, the Commissioner found that a text titled “Legal Medicine” should be revised to remove prejudicial references to homosexuality as a perversion or fetish.

AUSTRALIA – The government has published a draft of a new bill consolidating existing civil rights laws into one statute and including for the first time at the federal level a ban on discrimination based on sexual orientation and gender identity. The measure would give a federal commission authority to receive and attempt to conciliate claims of discrimination, and would put the onus on alleged discriminators to prove that their actions are lawful once complainants have alleged facts supporting a claim of discrimination. *Mondaq*, Dec. 22.

CAMBODIA – Prime Minister Hun Sen, speaking at a public ceremony on December 11, stated that the people of Cambodia should not discriminate against gay countrymen. Reporting on this, *The Cortez Journal* (Dec. 11) indicated that Hun Sen may have been inspired to address the subject by local television discussions on International Human Rights Day, which included requests for equal rights by gay Cambodians.

CAMEROON – A reminder of the oppressive legal situation for gay people in many African countries: The Associated Press reported on Dec. 17 that the Court of Appeal in Cameroon affirmed a felony conviction for “homosexual conduct” against a man whose offense was sending a text message to another man saying “I’m very much in love with you.” The defendant was sentenced to three years in prison. He had been out on bail after serving 18 months while his appeal was

pending. The court indicated that he must return to prison to serve the remainder of his term. The man told the AP that he had been subjected to anti-gay attacks and harassment while in prison. The AP reported that Cameroon is “widely viewed as the most repressive in Africa when it comes to prosecuting same-sex couples.”

INDIA – The *Times of India* (Dec. 26) reported that private companies in India have been introducing inclusive human resources policies for the LGBT community in response to the growing agitation for equal rights by the emerging Indian LGBT movement, as signified in recent litigation over the colonial-era sodomy law and the growing ties between the private sector in India and major international corporations that maintain such policies. The Indian press is increasingly covering LGBT issues, with a particular interest in reporting equality demands from transgender citizens.

MEXICO – The Supreme Court of Mexico issued a unanimous ruling in favor of three same-sex couples from the southern Oaxaca state seeking the right to marry on December 6. The court indicated that it would issue a written opinion explaining its ruling in January. (Evidently it is customary for this court to announce its rulings as soon as the justices agree, before they have drafted an explanatory opinion.) Under Mexican constitutional jurisprudence, this ruling is not binding outside the state of Oaxaca, whose particular marriage statute was being challenged, and only applies to the three couples who brought suit. However, based on prior rulings concerning the effect of same-sex marriages contracted in Mexico City (where the legislature approved same-sex marriages), such marriages performed in Oaxaca will have nationwide effect. According to Mexican legal experts posting commentary to the internet, if more same-sex couples initiate lawsuits seeking same-sex marriage and take them to the Supreme Court, the same result would follow, and at some tipping point there will be enough such decisions that a nationwide precedent

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will result and same-sex marriage would be available throughout Mexico. According to one source, same-sex marriages are now available in the state of Quintana Roo. The road to a nationwide precedent may be shortened, however, as the attorney representing the Oaxaca couples indicated he is considering filing a case in the Inter-American Court of Human Rights, which recently ruled favorably in a gay parentage case that was mentioned by the Mexican Supreme Court as a factor in its decision. Meanwhile, there were news reports that couples were readying suits in several different states, encouraged that if their cases need to go to the Supreme Court, they will be crowned with success.

MEXICO – When new regulations went into effect on December 25 ending a categorical ban on blood donations by gay or bisexual men, Mexico may have become the first nation in the Americas to rationalize its blood donation policy to reflect current medical knowledge and reality. The new rule, as reported on the blog Blabbeando, “bans blood donations from people with HIV or hepatitis and their partners and people who engage in ‘risky sexual practices’ regardless of their sexual identity. In the new blood donor norms ‘risky sexual practices’ are defined as those that may include ‘contact or exchange of blood, sexual secretions or other bodily secretions between someone who might have a transmittable disease and areas of another person’s body through which an infectious agent might be able to penetrate.’”

PHILIPPINES – The *Philippine Daily Inquirer* reported on Dec. 15 that the Davao City Council had unanimously approved an ordinance that bans discrimination “against members of the third sex, minority groups and differently-abled persons.” The measure awaited approval from Mayor Sara Duterte. According to the news report, “Under the ordinance, people discriminating against individuals because they are lesbians, gay, lumad, Muslim or have disabilities or deformities can be criminally charged.”

SABA – The local legislature in Saba, a Dutch Caribbean island, enacted a marriage equality bill, making their tiny island a Caribbean mecca for same-sex couples seeking to marry. The Saba Civil Registry Office reported that news accounts of the first same-sex marriage there have produced a flood of calls from throughout the region. The Netherlands, which was the world’s first country to legislate for same-sex marriage, continues to have colonial dominion over some small Caribbean islands, including Saba, Bonaire, and St. Eustatius. Dutch law requires that these colonies recognize same-sex marriages valid under Dutch law, but has not required that the islands allow the performance and registration of such marriages locally. An openly gay member of the Saba Council, Carl Buncamper, stated that the measure was seen locally as a “human rights issue.” Bonaire and St. Eustatius are expected to follow Saba’s legislature lead eventually. *Washington Post*, Dec. 14. Frankly, prior to seeing this news report, we had never heard of Saba!

SCOTLAND – The Scottish government issued a draft marriage equality bill on Dec. 13, calling for public comments. The Church of Scotland, the Catholic Church and the Scottish Episcopal Church are already on record opposing the measure, although some individuals ministers and priests have indicated their willingness to perform marriage ceremonies for same-sex couples. The draft bill explicitly protects religious organizations from having to participate in or perform marriage ceremonies for same-sex couples. According to a report in the *Edinburgh Evening News* (Dec. 13), “The proposed legislation says religious bodies who decide to opt in to gay marriages must either declare that all celebrants are willing to conduct ceremonies or authorize designated celebrants to do so.”

UGANDA – International pressure appears to have persuaded political leaders in Uganda to move the so-called “kill the gays” bill to a low point on the Parliament’s agenda. When the Parliament

adjourned for 2012 in mid-December, the bill had not been taken up for a vote. There was talk that it might be taken up when the Parliament reconvenes in January. The bill is named for provisions that make sodomy a capital offense in certain cases.

UNITED KINGDOM – The UK Government announced on December 11 the result of its “consultation” on equal civil marriage rights. Although many opponents submitted statements to the government opposing the proposal, Prime Minister David Cameron indicated that the government intended to go forward with a marriage equality proposal in 2013. New controversy erupted, however, with the proposed treatment of religious groups. The government is proposing that the established church, the Church of England, be barred from performing same-sex marriage ceremonies, but that other religious denominations be free to decide whether they would perform such ceremonies, neither compelled to do so nor prohibited from doing so. Supporters of marriage equality within the Church of England protested this different treatment, noting that many ministers of the Church would likely be willing to perform such ceremonies if asked, even if the hierarchy of the Church was generally opposed to the marriage equality legislation. Given the division among Tory members of the House of Commons over the civil marriage equality issue, the measure can only pass with support from coalition partners and members of the opposition Labour Party, many of whom are marriage equality supporters. Thus, a free conscience vote from all parties is deemed likely to result in passage through the Commons, but the House of Lords, sharply divided as well, may be another matter. There was speculation at the end of December that the government might resort to special devices to enact the measure despite the anticipated opposition of the Lords.

UNITED KINGDOM – An employment tribunal has ruled that companies must treat surviving same-sex civil partners the

INTERNATIONAL / PROFESSIONAL

same as spouses for purposes of spousal pension entitlements, reported *The Mail on Sunday* on Dec. 23. John Walker sued chemical company Innospec to establish pension rights for his same-sex partner of 19 years, with whom he entered into a legal civil partnership, which in Britain is the legal equivalent of marriage. The tribunal said failing to accord equal pension rights to Walker's partner would violate equality principles of the European Convention on Human Rights. This position by the tribunal goes beyond the position of the government, which had opined when passing the civil partnership measure a few years ago that private companies would not be bound to provide equal benefits. The newspaper report estimated that the opinion, applying broadly to private businesses in the U.K., could add 90 million pounds of unfunded pension liabilities.

URUGUAY – The lower house of Congress approved a marriage equality bill on a vote of 81-18, the *Advocate* reported on Dec. 12. The bill both opens up marriage to same-sex couples and reforms the divorce law to provide equal rights to women to initiate a divorce. The bill also allows all couples, both same-sex and different-sex, to decide which surname they will use as a married couple. The measure follows a progressive trend in Uruguay's legislation, including a 2007 law offering civil unions to same-sex couples, and a 2009 law legalizing joint adoption of children by same-sex couples and gender reassignment surgery for transgender citizens. Although the marriage reform law passed the lower house easily, it ran into opposition in the Senate later in the month, and further action was deferred to 2013.

TAIWAN - *France24* international news reported on Dec. 20 that the Taipei High Administrative Court announced that it would pass a lawsuit filed by a same-sex couple seeking marriage rights up to the Grand Justices, the country's highest appellate tribunal, rather than issuing an administrative ruling. The court will meet on January 15 to finalize its

decision to pass the matter directly to the appellate tribunal. According to the news report, "More than 50,000 gays and lesbians and their supporters marched through downtown Taipei in October to push for the legalization of same-sex marriage in Taiwan." There have also been same-sex religious marriage ceremonies performed by Buddhist masters, but these are not recognized by the state.

Connecticut Governor Dannel P. Malloy has nominated **ANDREW McDONALD**, an openly gay attorney who is Malloy's legal counsel as well as a long-time friend, to a vacancy on the Connecticut Supreme Court. McDonald served as director of legal affairs and corporation counsel for the city of Stamford from 1999 to 2002, while Malloy was mayor of the city. He represented the area in the state's General Assembly for eight years, and led the fight for passage of a civil union law that was subsequently replaced by a marriage equality law after a decision by the state's Supreme Court. After the December 27 announcement of the nomination, Republican leaders in the State Senate announced their support for McDonald. According to a Dec. 28 report in the *Boston Globe*, Said Senate Minority Leader John McKenney, "While Andrew and I have had considerable political differences over the years, I have always respected his commitment to public service and the law. He is qualified, and I am confident he will uphold the state constitution and carry out his responsibilities as a Supreme Court justice with the highest degree of impartiality and integrity." McDonald has a long affiliation as a litigation partner at the firm of Pullman & Comley LLC, where he was chair of the firm's appellate practice. He will replace retiring Justice Lubbie Harper, Jr. Governor Malloy officiated at McDonald's marriage to Charles Gray three years ago. McDonald will be the first openly gay appellate judge in Connecticut, according to Gov. Malloy's announcement.

On December 1, the New York Commission on Judicial Nominations sent its list of seven candidates to Governor Andrew

Cuomo, a Democrat, who must select one of these individuals to take the opening on the New York Court of Appeals created by the imminent retirement of Judge Carmen Ciparick (also a Democrat, who was first appointed by the governor's father, Mario Cuomo). The governor is supposed to submit his nomination to the New York State Senate between January 1 and January 15, 2013. Among those on the list is **DAVID SCHULZ**, an openly-gay partner at the law firm Levine Sullivan Koch & Schulz. Schulz is a Yale Law School graduate (1978) who practiced at Rogers & Wills and Clifford Chance before joining as a name partner in his current firm. If appointed, Schulz would be the first openly gay member of New York's highest court. At present, there are three openly gay justices of the Appellate Division and numerous openly gay trial judges in New York. The list of seven candidates is very diverse in terms of ethnicity, sexual orientation, and gender, but not diverse as to political party – all seven candidates are identified as Democrats. Because Judge Ciparick is the only Hispanic member of the court, smart money was betting that the governor would select one of the three Hispanic candidates on the list. But due to the sudden, unexpected death of Judge Theodore Jones, Jr., there is a second opening on the court for which the Commission is also seeking applications. The Commission's Chair, former Chief Judge Judith Kaye, indicated that most of the applicants for Judge Ciparick's seat would also be considered for the Jones seat.

A study survey of over 100 LGBT leaders and movement activists ranked **LAMBDA LEGAL** as the #1 LGBT equality non-profit organization. The survey results were released late in December on the Philanthropedia website.

Openly lesbian law professor **ELIZABETH HILLMAN** has been announced as the new Dean of Academic Affairs at California Hastings College of the Law, according to an internet announcement carried by *shewired.com* on December 13.

HIV/AIDS

FLORIDA – In *M.J. v. Department of Children and Families*, 2012 WL 6163174 (Fla.App., 4th Dist., Dec. 12, 2012), the court affirmed a decision by the Indian River County Circuit Court to terminate the parental rights of M.J. to her HIV+ daughter, having already, in a separate opinion, terminated the father's parental rights, on the ground that the parents had proved incapable of providing appropriate care to the child. "As was the case with the father," wrote the per curiam court, "the evidence indicated that the child would not receive proper, timely, and regular administration of the HIV medications she required while in the care of the mother," this despite the "reasonable efforts" made by DCF to assist the mother. The court concluded that termination was the child's "manifest best interest" and provided the "least restrictive means of protecting the child from harm." ■

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case it was religion, not SOCE. Ms. Ward appealed the decision to the Sixth Circuit Court of Appeals and in January 2012, the Circuit Court remanded the case back to District Court for a jury trial, noting that its decision did not constitute a statement that Ms. Ward should prevail, but that the case merited a jury trial rather than summary judgment. *Ward v. Polite*, 667 F.3d 727 (6th Cir., Jan.27, 2012). During December, Eastern Michigan University and Ms. Ward came to a settlement and an order of dismissal was issued.

The American Psychiatric Association (APA) declassified homosexuality as a mental disorder in 1973. This was followed by the World Health Organization in 1990. Allowing therapists who disagree with these decisions to counsel clients, especially underage clients, could result in potentially disastrous outcomes. According to the Human Rights Campaign, rejected Lesbian, Gay, Bisexual and Transgender (LGBT) young people were eight times more likely to have attempted suicide and six times more likely to report high levels of depression than LGBT youth that were supported by family.

Sending a young gay client to a therapist who practices conversation therapy sends a very clear message to the young person that they are not accepted; that their family and the counselor wishes for them to change. Judge Shubb's decision in *Welch* seems misguided considering the weight of evidence that demonstrates that conversation therapy does more harm than good for clients which is an opinion of many mental health providers.

Clearly this is an issue that will continue to be litigated and result in differing opinions. —*Tara Scavo*

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value to arrive at its conclusion that the voters' intended meaning of "legal status" in the marriage amendment was to include eligibility, formation, termination, and rights and obligations.

Finally, the court analyzed the "legal status" of a domestic partnership in comparison to the "legal status" of a marriage and concluded that the two are not "substantially similar." The decision delves into the details of eligibility, formation, rights and obligations, and termination. Some of the more significant differences are: to be eligible for a domestic partnership the parties must share a common residence; to form a domestic partnership the parties must sign a document before a notary, whereas to form a marriage the parties must make oral statements to one another before two competent witnesses; the rights and obligations of same-sex couples under the domestic partnership law are significantly fewer than the rights and obligations of opposite-sex couples in marriage; and to terminate a domestic partnership merely requires a unilateral decision by one party, as opposed to a divorce proceeding required to terminate a marriage. These differences, among others both listed and unlisted, collectively demonstrate that the "legal status" of a domestic partnership is not "substantially similar" to the "legal status" of marriage.

Overall, this decision illustrates that societal perceptions can rapidly change. In 2005 the marriage amendment was passed, but by 2009 the legislature passed a law that granted same-sex couples substantial benefits. This decision may be indicative of how the Supreme Court will ultimately determine similar issues in its upcoming session. —*Gillad Matiteyahu*

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employees about HIV. "We live in Alabama" is not an excuse."

"Second, the court cannot overemphasize that it is not holding that all HIV-positive prisoners are entitled to be co-mingled with HIV-negative prisoners; indeed, the court is not even holding that any particular HIV-positive prisoner is entitled to such. Rather, the court is simply holding that how prisoners should be treated based on their HIV-positive status must depend upon an individual-by-individual assessment of these prisoners that honors each prisoner's rights under the ADA, and the court is convinced that resources are reasonably available to do this. The essential thrust of this court's opinion today is simply that the ADOC must look at each HIV-positive prisoner separately and individually based upon that prisoner's particular circumstances."

"Third and finally, the court will address later and by a separate order how the parties are to proceed as to the unresolved challenge to the ADOC's work release policy." This refers to the court's decision that more information is needed for it to rule on the appropriate circumstances for taking HIV-status into account in the prison work release program criteria.

According to a December 21 report on the decision by Reuters, there are approximately 270 inmates living with HIV in the 26,400 inmate Alabama prison system. None of them has a clinical diagnosis of AIDS. ■

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minimally related to a Certificate's statistical purpose and is completely unrelated to a Certificate's documentary purpose," and that therefore a mother's husband and a mother's wife are similarly situated as non-gestational parents.

In applying Equal Protection, Judge Hutchinson held that DPH failed to prove its policy of refusing to register a mother's wife on a Certificate is substantially related DPH's three proffered important interests: that the policy promotes accuracy on a certificate, that it promotes efficiency, and that registration of a mother's wife muddies the legal determination of paternity. Judge Hutchinson held that DPH could achieve a

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Lesbian/Gay Law Notes Podcast



Featuring LeGaL Founder Prof. Arthur S. Leonard & Executive Director Brad M. Snyder



Check out the **Lesbian/Gay Law Notes Podcast** each month to hear our Editor-In-Chief New York Law School Professor **Art Leonard** and **Brad Snyder**, the Executive Director of LeGaL, weigh-in on contemporary LGBTQ legal issues and news.

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- the impact of the U.S. presidential election and victories at the ballot box for the LGBT community as well as U.S. Supreme Court (non-)developments;
- a setback for marriage equality litigation in Nevada;
- a Canadian case concerning criminal liability for HIV transmission; and
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PUBLICATIONS NOTED

LGBT & RELATED ISSUES

1. Bartlett, Katharine T., *Tradition as Past and Present in Substantive Due Process Analysis*, 62 Duke L.J. 535 (Dec. 2012).
2. Bender, Erin, 'Till Death (or DOMA) Does Us Part: How DOMA Imposes an Unconstitutional Classifying and Coercive Condition on Federal Funding in the Wake of Massachusetts v. United States Department of Health and Human Services, 14 Rich. J.L. & Pub. Int. 611 (Spring 2011).
3. Cintron, Elanie J., *Transformation: The Progression of Immigration Petitions for Transgender Spouses*, 50 Fam. Ct. Rev. 666 (Oct. 2012).
4. Copeland, Charlton C., *Creation Stories: Stanley Hauerwas, Same-Sex Marriage, and Narrative in Law and Theology*, 75 Law & Contemp. Probs. 87 (2012).
5. Cordell, Emily M., *Mrs. Gay Meet Miss Poor: What the Gays Have Done for Poor People*, 47 U.S.F. L. Rev. 133 (Summer 2012)(explores how doctrinal decisions in recent gay rights rulings may advance the interests of poor people more generally).
6. Cossman, Brenda, *Marriage As? A Reply to Marriage As Punishment*, 112 Colum. L. Rev. Sidebar 220 (Oct. 25, 2012).
7. Egger, Jeremiah, *Glucksberg, Lawrence, and the Decline of Loving's Marriage Precedent*, 98 Va. L. Rev. 1825 (Dec. 2012) (argues that Loving v. Virginia has become much less salient as a precedent for same-sex marriage claims due to developments in constitutional law that have changed the legal landscape for cohabitation and private consensual sex since then).
8. Hunter, Nan D., *The Future Impact of Same-Sex Marriage: More Questions Than Answers*, 100 Georgetown L.J. 1855 (2012).
9. Johnston, Josephine, *Normalizing Atypical Genitalia: How a Heated Debate Went Astray*, 42 Hastings Ctr. Rep. No. 6, 32 (Nov-Dec 2012).
10. Juhan, S. Cagle, *Free Speech, Hate Speech, and the Hostile Speech Environment*, 98 Va. L. Rev. 1577 (Nov. 2012).
11. Kravis, Andrew, *Is the Inability to Marry a Marital Status? Levin v. Yeshiva University and the Intersection of Sexual Orientation and Marital Status in Housing Discrimination*, 24.1 Colum. J. Gender & L. 1 (2012).
12. Kuykendall, Mae, *The Converging Logic of Federalism and Equality in Same-Sex Marriage Recognition*, 6 Advance 91 (Fall 2012) (Journal of

Editor's Notes

- This proud, 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, current law students, and legal workers.
- All points of view expressed in *Lesbian/Gay Law Notes* are those of the author, and are not official positions of LeGaL - The LGBT Bar Association of Greater New York or the LeGaL Foundation.
- 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 all correspondence electronically to press@le-gal.org.

Specially Noted

The Supreme Court's grant of certiorari in the Proposition 8 and DOMA cases, following soon on the election returns, prompted the publication of many in-depth articles about the issue of same-sex marriage. Among the most enlightening we saw was a lengthy piece in *The Atlantic* by Molly Ball, titled "The Marriage Plot: Inside This Year's Epic Campaign for Gay Equality," which detailed the strategy for achieving marriage equality at the ballot box and how it was executed by various groups, with Freedom to Marry, headed by Evan Wolfson, in a central role. Of all the "think-piece" articles about same-sex marriage that I've seen over the past month, this is the one that I would most strongly recommend.

—Art Leonard

- the American Constitution Society Issue Groups).
13. Lee, Theresa J., *Democratizing the Economic Sphere: A Case for the Political Boycott*, 115 W. Va. L. Rev. 531 (Winter 2012).
 14. Nordberg, Erica, *Ignoring Human Rights for Homosexuals: Gross Violations of International Obligations in Cameroon*, 27 Amer. U. Int'l L. Rev. 439 (2012).
 15. Parness, Jeffrey A., and Zachary Townsend, *Procreative Sex and Same Sex Parents*, XIII Georgetown J. Gender & L. 591 (2012).
 16. Recent Case, *Equal Protection – Sexual Orientation – First Circuit Invalidates Statute That Defines Marriage as Legal Union Between One Man and One Woman. – Massachusetts v. United States Department of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012), 126 Harv. L. Rev. 611 (Dec. 2012) (explains 1st Circuit's use of equal protection without the usual tiered analysis to strike down Section 3 of DOMA).
 17. Rider-Longmaid, Parker, *Take Care That the Laws Be Faithfully Litigated*, 161 U. Pa. L. Rev. 291 (Dec. 2012)(proposes framework for analyzing situations where the Executive decides not to defend a statute it deems unconstitutional under 5th Amendment equal protection, such as DOMA Section 3).
 18. Rosenthal, Sloane Kuney, *Avoiding a Crisis of Conscience: Toward a New Approach to Religiously Motivated Refusals in the Emergency Room*, XIII Georgetown J. Gender & L. 643 (2012).
 19. Scharf, Rebecca L., *Psychological Parentage, Troxel, and the Best Interests of the Child*, XIII Georgetown J. Gender & L. 615 (2012).
 20. Schutzer, Mathew, *Bringing the Asylum Process Out of the Closet: Promoting the Acknowledgement of LGB Refugees*, XIII Georgetown J. Gender & L. 669 (2012).
 21. Simon-Kerr, Julia Ann, *Moral Turpitude*, 2012 Utah L. Rev. 1001.
 22. Smith, Carlton, and Edward Stein, *Dealing with DOMA: Federal Non-Recognition Complicates State Income Taxation of Same-Sex Relationships*, 24.1 Colum. J. Gender & L. 29 (2012).
 23. Storrow, Richard F., *Marital Status and Sexual Orientation Discrimination in Infertility Care*, 3 L.J. for Soc. Just. 99 (2012).
 24. Yoshino, Kenji, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 Utah L. Rev. 527. ■

rule on the claim under New York City's discrimination law. "Since the parties and the Court have already devoted substantial time, effort, and resources to a four-day bench trial on this matter, declining to exercise jurisdiction and sending the case to state court for additional proceedings would be unfair, inconvenient, and a waste of judicial resources," he wrote.

While the disability discrimination claim was untenable, the source-of-income discrimination claim was crystal clear. The testimony by Short and the FHJC testers, as well as testimony by the real estate brokers themselves, provided direct evidence of discrimination against Short because he would be financing his rental with funds from HASA. The defendants argued that they were merely following the orders of the landlords, and had no intention themselves to discriminate, but the court rejected this argument, pointing out that the realtors engaged in an active function of screening out prospective tenants, thus facilitating the landlords' discrimination. Furthermore, there was no direct evidence that the landlords actually discriminated, merely statements by the real estate brokers that they had instructions from the landlords to do so.

Because Short ultimately did find a satisfactory apartment using another real estate broker, his actual damages in the case were based on compensation for the unsatisfactory conditions in which he had to live in the SRO housing while his apartment search was prolonged. He sought damages of \$50,000 -- \$25,000 from each defendant -- for "lost housing opportunities and for emotional distress caused by Defendants' discrimination." Judge Conti thought that \$10,000 per defendant was "a more reasonable award," noting that throughout the time he was looking for an apartment, he was living in the HASA-funded SRO, so his injury consisted mainly of emotional distress stemming from the severely undesirable living conditions he endured during that time period.

As to that, Judge Conti pointed out that Abba did make efforts to find an apartment for Short, and that the problems with the last apartment were due more to the landlord and the super than to Abba. However, Abba was found liable for emotional distress damages because they had declined to show him apartments that he sought due to his funding source.

Perhaps more significant than the monetary damages is the injunctive relief against the two realty companies. The court orders them to stop their practices of facilitating

discrimination against people who will fund their rentals through HASA grants or other lawful government housing funds, to adopt written non-discrimination policies, posting and distributing them to their employees and agents, and requiring training of everybody from the realty companies' owners to the employees to the "independent contractor" agents with whom they do business. Since MA in particular is a very large rental broker with thousands of listings, this injunctive relief may help to break a logjam for HASA clients conducting apartment searches.

The *New York Law Journal* (Dec. 12) reported that the plaintiffs' attorneys will apply for attorney fees, which are authorized for "prevailing parties" under the NYC Human Rights Law. Since this case involved lots of investigation and a four day trial, the attorney fee award is likely to dwarf the damages awarded to Mr. Short and FHJC. Mr. Merjian told the *Law Journal* that the sum could be "in the hundreds of thousands of dollars." A large portion of the fee award would go towards helping to fund Housing Works in its continuing mission of helping people living with HIV secure appropriate housing. Merjian also stated his belief that this was the first case that had gone to trial since the City adopted the ban on source-of-income discrimination, all previous cases having been resolved through settlements or pretrial dismissals. The court's decision sends a warning to the City's real estate community that discrimination against public housing assistance clients is illegal and will subject them to damages and injunctive relief. ■

more accurate and complete record by registering both parents regardless of gender, that Certificates comprise only 200 of 100,000 events DPH registers per year and therefore would have only a "remote" effect on statistical efficiency, and that since a Certificate does not use any statutory presumption of paternity and does not legally determine paternity it is therefore "wholly unrelated to any government interest in determining paternity."

After concluding that the Buntmeyer's had successfully proved that DPH's refusal to list Jennifer on the Certificate violated Equal Protection, Judge Hutchinson ordered DPH to modify the form to permit registration of both petitioners as parents, and ordered DPH to pay the court costs.

—Bryan C. Johnson