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

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

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2nd Cir. Applies 'Heightened Scrutiny' to Strike Down DOMA

A panel of the U.S. Court of Appeals for the 2nd Circuit ruled on October 18 that Section 3 of the federal Defense of Marriage Act, which mandates that the federal government not recognize lawfully-contracted same-sex marriages, violates the 5th Amendment equal protection rights of same-sex couples. *Windsor v. United States*, 2012 WL 4937310. The vote was 2-1, with Chief Judge Dennis Jacobs, who was appointed to the court by President George H.W. Bush, writing for the majority of himself and Circuit Judge Christopher Droney, an appointee of President Barack Obama. Circuit Judge Chester Straub, who was appointed by President Bill Clinton, dissented from this part of the decision. On October 26, the Solicitor General filed a supplemental brief with the Supreme Court on the pending Petition for Certiorari before Judgment from the district court decision in this

ing that “heightened scrutiny” applied, instead using a more demanding version of “rational basis” review following on the Supreme Court’s decision in *Romer v. Evans*, 517 U.S. 620 (1996), and earlier cases involving discrimination against traditionally disfavored groups. In 1988, a panel of the U.S. Court of Appeals for the 9th Circuit had ruled in *Watkins v. United States Army*, 847 F.2d 1329, that sexual orientation is a “suspect classification” mandating “strict scrutiny” of laws discriminating on that basis, but that decision was vacated for *en banc* review and the expanded 9th Circuit panel ruled for the plaintiff on other grounds, so that panel decision does not stand as a precedent.

The *Windsor* panel majority’s decision to use “heightened scrutiny” in this case can only be considered an interim victory for gay rights, however, given the virtual certainty that the Supreme Court

consideration at the Court’s first conference prior to the opening of its October 2012 Term, but the Solicitor General filed a new petition for certiorari before judgment in *Windsor* on September 11, to which other parties in the case had thirty days to respond, and the Court subsequently made no announcement concerning these petitions when it released a list of actions taken on September 24. (The Court announced its vote to deny certiorari petitions in two other cases of LGBT rights interest on September 24, which we reported in the October issue of *Law Notes*.)

The case was filed by the ACLU Lesbian and Gay Rights Project, with Roberta Kaplan of Paul, Weiss, Rifkind, Wharton & Garrison LLP arguing for the plaintiff, on behalf of Edith Schlain Windsor, seeking a refund of \$363,053.00 in estate tax that she had

This is the first federal appellate decision to hold that sexual orientation is a “quasi-suspect” classification.

case, urging the Court that this decision, rather than the 1st Circuit’s decision noted in the paragraph below, would make the “most appropriate vehicle” for Supreme Court consideration of whether Section 3 is unconstitutional.

The court’s ruling was immediately hailed as particularly significant not only because it was the second federal appellate ruling to hold Section 3 of DOMA unconstitutional, but also because it was the first federal appellate decision to hold that sexual orientation is a “quasi-suspect” classification, such that laws discriminating on that ground are subject to “heightened scrutiny.” Earlier this year, on May 31, the U.S. Court of Appeals for the 1st Circuit held Section 3 unconstitutional in *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, 682 F.3d 1, but did so without hold-

ing that “heightened scrutiny” applied, instead using a more demanding version of “rational basis” review following on the Supreme Court’s decision in *Romer v. Evans*, 517 U.S. 620 (1996), and earlier cases involving discrimination against traditionally disfavored groups. In 1988, a panel of the U.S. Court of Appeals for the 9th Circuit had ruled in *Watkins v. United States Army*, 847 F.2d 1329, that sexual orientation is a “suspect classification” mandating “strict scrutiny” of laws discriminating on that basis, but that decision was vacated for *en banc* review and the expanded 9th Circuit panel ruled for the plaintiff on other grounds, so that panel decision does not stand as a precedent.

The *Windsor* panel majority’s decision to use “heightened scrutiny” in this case can only be considered an interim victory for gay rights, however, given the virtual certainty that the Supreme Court

will grant one or more of the pending petitions for certiorari on the question of Section 3’s constitutionality. For now, however, unless or until a party seeks *en banc* review in the 2nd Circuit, as to which no immediate announcement was made either by the Justice Department or the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) which intervened to defend the statute after the Justice Department announced that it would no longer do so, this ruling will stand as a circuit precedent for any case involving a claim of sexual orientation discrimination by the government. Now pending before the Supreme Court are petitions to review the 1st Circuit decision and the district court decisions in this case, *Pedersen* (D. Conn.) and *Golinski* (N.D.Cal.). These petitions had been listed for con-

to pay because the federal government refused to recognize her marriage to Thea Spyer. *Windsor* and Spyer, New York City residents, had been partners for decades when they married in Canada in 2007. Spyer passed away in 2009. Although New York State had not yet enacted its Marriage Equality Law at that time, several New York Appellate Division rulings had extended recognition to same-sex marriages contracted in Canada or other states under New York’s established marriage recognition rule, and Governor David Paterson and other top state officials, including then Attorney-General Eliot Spitzer in 2004, had taken the same position. Following the usual procedure in such tax cases, *Windsor* paid the disputed estate tax, which would not have been levied were the marriage recognized,

and sued for the refund. (In refusing to refund the money, the Internal Revenue Service stated that it was bound by DOMA, and did not contend that the women's marriage was not recognized under New York law.)

As the time to file an answer or a motion to dismiss in response to Windsor's complaint (and a complaint filed in Connecticut by Gay & Lesbian Advocates and Defenders) approached early in 2011, Attorney General Eric Holder announced that he and President Barack Obama were in agreement that Section 3 was subject to "heightened scrutiny" review, which it could not survive, and that the Justice Department would no longer defend the statute, although the Executive Branch would continue to enforce it until there was a definitive judicial determination as to its constitutionality. As required by federal statute, Holder advised Congress, through a letter to House Speaker John Boehner, that the Justice Department was refusing to defend an act of Congress, and that the Justice Department would take any steps necessary to facilitate intervention in the case by Congress if Congress sought to act. Speaker Boehner con-

vened a "bipartisan" panel of the Republican and Democratic leadership in the House as a Legal Advisory Group, which voted 3-2 to retain former Solicitor General Paul Clement to defend Section 3 in pending litigation. Since then, BLAG has intervened in most of the pending litigation involving DOMA, now more than a dozen cases in many different parts of the country. In response to BLAG's intervention, the Justice Department has moved from non-defense to opposition, filing briefs and arguing in pending cases that Section 3 is unconstitutional.

Chief Judge Jacobs' decision first deals with BLAG's attempt to get the case dismissed on standing grounds. BLAG argued that since neither the New York legislature nor the state's highest court, the Court of Appeals, had acted to recognize same-sex marriages at the time of Spyer's death, the federal government was not

bound to recognize this marriage, regardless of the existence of Section 3, since its validity was not established as a matter of state law. District Judge Barbara Jones had rejected this argument, and the panel majority backed her up. Rejecting BLAG's argument that the court should certify to the New York Court of Appeals the question whether a same-sex marriage performed in Canada in 2007 was recognized in New York in 2009, the court noted that the Court of Appeals had been presented with this question in 2009 but had "signaled its disinclination to decide this very question" by disposing of the appeal in *Godfrey v. Spano*, 13 N.Y.3d 358 (2009), on other grounds. In such circumstances, he wrote, 2nd Circuit precedent supported giving weight to intermediate appellate decisions by the state courts, and several such decisions had granted recognition to out-of-state same-sex marriages by that time. Thus, the court could "pre-

The *Windsor* panel majority's decision to use 'heightened scrutiny' in this case can only be considered an interim victory for gay rights.

dict" that such marriages would be recognized, resolving any standing problem.

BLAG argued that the 2nd Circuit was foreclosed from ruling in favor of Windsor by the Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1971), in which the court dismissed an appeal in a same-sex marriage case from Minnesota "for want of a substantial federal question." At that time, the Supreme Court was obligated by existing law to review on the merits appeals in any case in which a state court had ruled on whether a state law was constitutional. The Supreme Court's practice in many such cases was to "dismiss" the appeal with this cryptic statement, leaving the lower court's ruling standing with the imprimatur of the Supreme Court. The Court has stated that such dismissals should be treated as rulings "on the merits." Judge Jones had rejected BLAG's argument that *Baker* foreclosed Windsor's

suit, pointing out that the question Windsor presented was different from the question decided by the Minnesota Supreme Court (and, *sub silentio*, by the Supreme Court) in *Baker*. At stake in this case is whether the federal government may discriminate on the basis of sexual orientation in determining which legal state marriages it will recognize without violating the 5th Amendment. *Baker* determined, by contrast, that a state's refusal to let same-sex couples marry did not violate the 14th Amendment. Although many of the same arguments might be made in opposition to and support of the governmental policy being challenged in the case, they arise under different constitutional amendments and present different policy concerns, including a federalism issue with respect to recognition of state marriages that was not present in *Baker*. Furthermore, Judge Jacobs pointed out, federal constitutional law has undergone

quite a bit of doctrinal development since 1971. While it might have been possible, given the state of the case law at that time, to dismiss *Baker* as not raising a substantial federal question, it would be difficult to do so today in light of such doctrinal developments as

the Court's subsequent use of "heightened scrutiny" in sex discrimination cases, invalidation of Colorado Amendment 2 in *Romer*, and invalidation of criminal sodomy laws in *Lawrence v. Texas*. Once again, the 2nd Circuit panel agreed with the District Court that Windsor's claim was not precluded.

District Judge Jones had ruled that Section 3 failed to survive "rational basis" review. The Justice Department has continued to argue that Section 3 could survive such review, but that the appropriate level of review is "heightened scrutiny," and that arguments that might pass muster under rational basis review would fail to qualify as substantial enough to meet more demanding scrutiny. Chief Judge Jacobs' opinion seemed to align itself with the Justice Department's argument, saying that "the existence of a rational basis for Section 3 of DOMA is closely

argued. BLAG and its amici proffer several justifications that alone or in tandem are said to constitute sufficient reason for the enactment,” including “protection of the fisc, uniform administration of federal law notwithstanding recognition of same-sex marriage in some states but not others, the protection of traditional marriage generally, and the encouragement of ‘responsible’ procreation.” Jacobs observed that “a party urging the absence of any rational basis takes up a heavy load,” especially in light of the overwhelming bipartisan support for DOMA in Congress in 1996, and that “the definition of marriage it affirms has been long-supported and encouraged.” Noting the various arguments in appellate decisions about different types of “rational basis” review, and BLAG’s criticism of the 1st Circuit’s form of rational basis analysis in the Massachusetts case, Jacobs stated: “Fortunately, no permutation of rational basis review is needed if heightened scrutiny is available, as it is in this case. We therefore decline to join issue with the dissent, which explains why Section 3 of DOMA may withstand rational basis review.”

Judge Jacobs reviewed the various factors that the Supreme Court has used in past cases to determine whether a challenged federal law is subject to heightened scrutiny, and determined that sexual orientation would satisfy all of those factors, including a “history of discrimination” on this basis, no showing that sexual orientation bore any relation to a person’s ability to participate in society, that “homosexuality is a sufficiently discernible characteristic to define a discrete minority class” (thus avoiding the question of “immutability,” noting that the Supreme Court has not insisted on immutability in equal protection cases involving alienage or illegitimacy, for example), and that as to political power, “homosexuals are still significantly encumbered in this respect.” The “political powerlessness” point has received varying treatments in the courts, some pointing out that gay people have won a fair number of politi-

cal battles, including such major victories as repealing the immigration ban and the military service ban and winning anti-discrimination protection in many states and localities. But Judge Jacobs framed the question differently: “The question is not whether homosexuals have achieved political successes over the years,” he wrote; “they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination.” He pointed out that when the Supreme Court first recognized the concept of “heightened scrutiny” for sex discrimination cases in 1973, women had already won the right to vote through the 19th Amendment and a federal ban on employment discrimination in Title VII of the Civil Rights Act of 1964, but “the Court was persuaded nevertheless that women still lacked adequate political power, in part because they were ‘vastly underrepresented in this Nation’s deci-

Judge Jacobs wrote: “The question is not whether homosexuals have achieved political successes over the years, they clearly have.”

sionmaking councils.” A similar observation would apply to gay people. Judge Jacobs found the parallels between the position of women in 1973 and the position of gay people today (and certainly when DOMA was passed in 1996) to be similar. “Analysis of these four factors supports our conclusion that homosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect. While homosexuals have been the target of significant and long-standing discrimination in public and private spheres, this mistreatment ‘is not sufficient to require “our most exact scrutiny,”’” he wrote, quoting from *Trimble v. Gordon*, 430 U.S. 762 (1977).

But “exact scrutiny” was not necessary to decide this case in Windsor’s favor,

since the court found that the arguments in support of Section 3 failed to satisfy the heightened scrutiny test. Based on Supreme Court decisions in sex discrimination cases, that means that Congress’s use of sexual orientation must be “substantially related to an important governmental interest.” BLAG’s arguments here were a retread of the justifications cited by Congress when it passed the law in 1996, and some new make-weight arguments that the Justice Department had advanced before it changed its position in this case. The majority of the 2nd Circuit panel found none of these arguments sufficient to meet the test of heightened scrutiny, in an extended, detailed analysis too lengthy to repeat here.

In conclusion, wrote Judge Jacobs: “Our straightforward legal analysis sidesteps the fair point that same-sex marriage is unknown to history and tradition. But law (federal or state) is not concerned with holy matrimony. Government deals with marriage as a civil status – however fundamental – and New York has elected to extend that status to same-sex couples. A state may enforce and dissolve a couple’s marriage, but it cannot sanctify or bless it.

For that, the pair must go next door.” (Perhaps this parting shot was an oblique reference to St. Andrew’s Church, which stands adjacent to the 2nd Circuit Court House.) Thus, the court affirmed District Judge Jones’s grant of summary judgment to Windsor.

Circuit Judge Straub agreed with the majority that Windsor had standing to bring this case, but did not agree about anything else. He viewed *Baker v. Nelson* as binding and dispositive of Windsor’s constitutional claim, opined that rational basis was the appropriate standard of review, and asserted that the plaintiffs had failed to show that there was no rational basis for the statute. He pointed out that eleven federal circuits had taken the position that sexual orientation discrimination claims were to be evaluated under rational basis review. “Subjecting the federal definition of marriage to heightened scrutiny would defy or, at

least, call into question the continued validity of *Baker*, which we are not empowered to do,” he insisted. More to the point, he argued that the question whether same-sex couples could marry should be decided by the people through their elected representatives, not by the courts. “Any such development must come from the elected representatives of the American people. Whatever the merits of doing so in a context other than the marital union, I conclude that, in respect of the unique institution of marriage it would be imprudent to announce a new rule under which sexual orientation is subject to heightened scrutiny.”

Judge Straub’s opinion reads a bit like a draft hastily written and not sufficiently revised. One suspects that it was quickly composed in response to Judge Jacobs’ more smoothly-written product. The speed with which this decision was issued after oral argument (held on September 27th, after the court had refused to delay consideration of this case while the plaintiff’s petition for certiorari without judgment was pending in the Supreme Court) suggests that the majority opinion was being drafted in chambers well before the oral argument occurred, in anticipation of being issued quickly before the Supreme Court might preempt the case through a cert grant.

One is left to speculate about the peculiar procedural posture of this case. Petitions for certiorari from the District Court’s decision are already on file with the Supreme Court, but BLAG now has the normal period from the 2nd Circuit’s entry of judgment to frame its own petition for certiorari from the Court of Appeals’ ruling. BLAG’s cert petition from the 1st Circuit’s ruling has been pending for months, and if the Court were to grant it, it would make sense to grant the pending petitions in this case. Additionally, the opinion released by the 2nd Circuit on October 18 makes no mention of a

stay pending review, so if no new petition for certiorari is filed, Judge Jones’ final order on the summary judgment motion might be binding on the parties, and it would be time for the I.R.S. to cut a check to Ms. Windsor. And it’s about time. After all, Edie Windsor is 83 and not in the best of health, a point raised by the ACLU in its petition for certiorari from the District Court opinion, pressing upon the Supreme Court the urgency for getting a final ruling on her claim. As noted above, the Solicitor General filed a supplemental brief with the Court on October 26, arguing that *Windsor* would make the “most appropriate vehicle” for the Court’s consideration of Section 3, as the 2nd Circuit adopted the Justice Department’s argument that Section 3 was subject to heightened scrutiny. Some observers also suggested that it would be a better case for the Court to review because of the possibility that Justice Elena Kagan, who was serving in the Justice Department as Solicitor General when the Massachusetts case was being litigated in the district court and appealed to the 1st Circuit, might feel moved to recuse herself, leaving a potentially evenly-divided Court. There would be no grounds for recusal in the *Windsor* case. Just before the Solicitor General’s supplemental brief was filed, the Supreme Court’s website indicated that the Court would be considering the pending DOMA cert petitions at its November 20 conference.

**** Meanwhile, a small fiscal drama played out in the House of Representatives in the wake of the 2nd Circuit ruling, as Minority Leader Nancy Pelosi pointed out that the \$1.5 million appropriation to fund Mr. Clement’s defense of Section 3 had been almost exhausted. To date Clement has intervened on behalf of BLAG in 14 pending cases, and has lost rulings on the merits in every one that has been decided. Judge Straub’s *dissent*

in *Windsor* is the first judicial opinion arguing that Section 3 is constitutional in any case in which BLAG is defending the provision. Pelosi issued a press release, stating: “It is time for the Speaker and Congressional Republicans to drop their frivolous, taxpayer-funded lawsuits without any delay. When they do, we will all look forward to the day when DOMA is relegated to the dustbin of history once and for all.” But there was no indication that The Republicans would follow her advice, now betting the House (literally) on a reversal by the Supreme Court.

***** Marcum LLP, an accounting and tax advising firm, put out a press release shortly after the 2nd Circuit’s decision was announced, advising same-sex married couples or surviving spouses to get any refund claims they might have on file with the Internal Revenue Service, pending a final ruling on the constitutionality of Section 3 of DOMA. At this point, such individuals within the jurisdiction of the 1st and 2nd Circuits could theoretically claim that the I.R.S. must recognize their marriages for income and estate tax purposes as a matter of 5th Amendment equal protection rights, although the I.R.S. will not comply with those rulings while petitions for certiorari are pending, on the chance that the Supreme Court might grant one or more petitions and reverse the courts of appeals. But getting the claims on file could be useful for statute of limitations purposes in case the court of appeals opinions are affirmed. Since same-sex couples have been getting married in the United States since May 17, 2004, in Massachusetts, there may be thousands of individuals and couples with potential refund claims. On the other hand, there may be some couples who would have owed more taxes filing jointly had their marriages been recognized, so careful calculations should be done before any filings. ■

A fiscal drama played out in the House of Representatives, as Minority Leader Pelosi pointed out that the \$1.5 million to fund Mr. Clement’s defense of Sect. 3 was nearly exhausted.

10th Cir. Rejects Refugee Status for Gay Mexican

The good news is that, according to the 10th Circuit Court of Appeals, as of October 3, 2012, Mexico is now some sort of gay paradise. The bad news is that not only is that likely not at all true, but one Mexican citizen who entered the United States after being tortured by the government of his home country for being gay will be returned there after his having his appeal of a removal order denied. *Neri-Garcia v. Holder*, 2012 WL 4513201 (Oct. 3, 2012).

Efren Neri-Garcia is an openly gay man, and a citizen of Mexico. He most recently crossed the border into the United States on February 12, 1997. Some time later, he landed on immigration authorities' radar, and Neri-Garcia came before an Immigration Judge (IJ), explaining that he suffered greatly at the hands of the government for his sexual orientation, and was sure that history would repeat itself should he be returned. In his plea for a restriction of removal from the country, Neri-Garcia sought to rely upon 8 U.S.C. §1231(B)(3)(A), which states that if an alien's life or freedom would be threatened in a country because of the alien's status as a member of a particular social group, the Attorney General may not remove the alien to that country. Additionally, Neri-Garcia sought to rely on the Convention Against Torture (CAT).

In support of the inference that he would be persecuted should he be returned to Mexico, the IJ was told how, after being arrested for a crime he did not commit, Neri-Garcia was locked up with psychiatric patients (seemingly because his orientation was considered a mental illness), kept in solitary confinement and regularly beaten. His story of abuse was corroborated by a gay man, Andres Villa Lopez, who worked as a custodian at the penitentiary where Neri-Garcia was housed. In fact, the custodian described his own suffering at the hands of his employers and coworkers.

Neither Neri-Garcia nor Lopez has spent any significant time in Mexico since at least 1994, but in their statements both claimed to be familiar enough with the modern gay community in Mexico to know that homosexuals are still regularly harassed, injured and even killed based on their orientation. The IJ found that there

was sufficient evidence to show that past persecution had taken place, but that – according to two government-commissioned reports – conditions had improved enough so that the Department of Homeland Security had met its burden to rebut the presumption of future persecution based on evidence of persecution in the past.

This determination was reached because the IJ discarded both Neri-Garcia and Lopez's testimony about the current state of gay treatment in Mexico, as neither had been there in recent years. Additionally, the government reports examined by the court pointed to signs that the Mexican government had taken some steps to prevent harassment and improve the qual-

ity of life for homosexual individuals. Neri-Garcia appealed the decision, and the Court of Appeals now looks to the record, weighing whether the facts supported the IJ's determination that the evidence of past persecution was conclusively rebutted by new evidence. The court notes that "we cannot reverse the determination...unless the record compels us to conclude that it was wrong." *Ba v. Mukasey*, 539 F.3d 1265 (10th Cir. 2008). Further, the Court points out that since a member of the Board of Immigration Appeals (BIA) affirmed the IJ's decision, they must review the BIA's opinion rather than that of the IJ directly.

While a country may condone or allow discrimination against homosexuals, the court determined that does not lead to the conclusion that homosexuals there face a threat to life or freedom.

ity of life for homosexual individuals.

According to the Court of Appeals, Neri-Garcia's testimony regarding past persecution adequately established a presumptive entitlement to restriction on removal, as it could be assumed that past

persecution could accurately predict future events. It fell upon the Department of Homeland Security then, to rebut this presumption, which they attempted to do with two Country Reports on Mexico showing that conditions for gays have improved. The reports note that gay pride parades are held in Mexico City, and that in the city gay unions and adoption are legal. However, Neri-Garcia argues in his appeal that legislative and court rulings do not necessarily alter the feelings toward, or treatment of, gay individuals in a country. The court, however, dismisses this argument, stating simply that while a country may be inhospitable for, or even condone or allow discrimination against homosexuals, those facts do not necessarily lead to the conclusion that homosexuals there face a threat to life or freedom.

Neri-Garcia also contends that the BIA did not sufficiently weigh his indi-

vidual circumstances while analyzing the Country Report. It seems that he was attempting to argue that the presence of gay pride parades and legalized gay unions is wholly irrelevant to addressing whether an individual still can be arrested on false charges and subsequently tortured because of the homophobic attitudes of police. However, the court insists his claim fails because he does not adequately explain this point, and instead relies on a broad statement that "the information in the Country Reports was insufficiently applicable to his circumstances." The court even supports the BIA's finding that police attacks on a gay activist in 2007 and 2008 were insufficient – in light of the festive parades allowed to run rampant in Mexico City's streets – to show that the Mexican government had recently failed to protect gay men from violence.

The court uses essentially the same analysis in rejecting Neri-Garcia's arguments based on 8 U.S.C. §1231 and the CAT, as the standards of review under each are quite similar. The final nail in his case, however, comes when the court finds that the BIA did not err in refusing to remand Neri-Garcia's case to the IJ based on the fact the IJ did not take into account a number of news clippings and evidence of the killings of gay activists as recently as July 2011, which Neri-Garcia submitted. The court brushes these aside as "cumulative," reasoning that

if one beating of one gay activist in the last few years by police wasn't enough to persuade the IJ, two additional killings of gay activists wouldn't make any difference.

Again, Neri-Garcia's mistake seems to be in his lack of specificity of his argument. In order to obtain a reversal of the BIA's decision, he is required to show an abuse of discretion. The court determines that, because Neri-Garcia simply contended that "the ongoing killings of gays in Mexico completely undermines the government's position," the IJ and BIA

correctly ignored these facts in light of the legislative and judicial changes cited in the Country Reports.

His appeal lost, Neri-Garcia now must face deportation back to the country that tortured him for his sexual orientation. But, according to the Court, he should take heart. For, as the BIA noted, beatings and killings of three gay men in a populous country is simply statistically irrelevant. —*Stephen Woods*

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Alabama App. Ct. Affirms Denial of Woman's Request to Adopt her Wife's Child

The Court of Civil Appeals of Alabama has affirmed the denial of a woman's request to adopt her wife's child, in *In re Adoption of K.R.S.*, 2012 WL 4841340 (Ala. Civ. App., October 12, 2012). The court's opinion used initials to identify the parties, but an *Associated Press* report of October 12 used the parties' names with their permission.

Alabama residents Cari Searcy and Kimberly McKeand were married in California in September, 2008, during the brief period before same-sex marriages were banned in California by ballot measure Proposition 8. The two have been together for 14 years. Their 6-year-old son was born to McKeand through donor in-

semination. Searcy sought to adopt McKeand's son as her step-child, which is the only form of adoption under Alabama law which would not require McKeand to relinquish parental rights.

The Mobile Probate Court denied Searcy's December 29, 2011, adoption petition after determining that Searcy was not McKeand's "spouse." On appeal, the Court of Civil Appeals of Alabama upheld the judgment, holding that Searcy and McKeand were not married under Alabama law. In holding that same-sex marriages performed elsewhere are not valid in Alabama, the court cited the Alabama Marriage Protection Act and the Sanctity of Marriage Amendment made to the Alabama Consti-

stitution, which both state that Alabama does not recognize any marriage of parties of the same sex. The court further stated that the federal Defense of Marriage Act (DOMA) provides that no state is required to give effect to a marriage of people of the same sex that is valid in another state, but mentioned that DOMA has been found unconstitutional in other jurisdictions.

The court acknowledged that Searcy also made constitutional arguments on appeal, but held that because Searcy had not sought to have the Act or Amendment declared unconstitutional by the probate court, she was not permitted to make these arguments for the first time on appeal.

The *Associated Press* reports that Alabama's only openly gay legislator expressed his disappointment with the decision, stating: "If we truly care about the welfare of children it's most important that they be in a loving family. It restricts the ability to raise the child if only one parent can have custody." —*Bryan C. Johnson*

'Big Gay Al' Not Actionable in Washington State Court

An employee who objected to being called "Big Gay Al" by a manager in the workplace suffered summary dismissal of his lawsuit on October 23 in *Davis v. Fred's Appliance, Inc.*, 2012 WL 5208505 (Washington Court of Appeals, Div. 3). Most significantly, the court found, in line with evolving precedent, that the plaintiff's failure to plead special damages doomed his claim for defamation.

According to the opinion for the court by Judge Sweeney, Albert Davis was employed as a delivery driver by Fred's Appliance in Spokane between

June 2009 and May 25, 2010. Steve Ellis was the sales manager at the Monroe Street store, but he had no supervisory authority over personnel. Davis delivered appliances to the Spokane store on May 14, 2010. "Mr. Ellis was there. As Mr. Davis came into the room, Mr. Ellis said, 'Hey, there is Big Gay Al,' which prompted laughing from onlookers. Mr. Davis said, 'Excuse me?' and Mr. Ellis replied, 'Hey, Big Gay Al.'" The store manager, Rick Hurd, "just stood there and shook his head." Salesman Brent Steinhauer was present and he was not laughing. Nearby customers looked un-

comfortable. Mr. Davis did not say anything to Mr. Ellis. He made his delivery and left the store. He was "humiliated and embarrassed." He "just wanted to get out of the situation."

Mr. Ellis continued to call Mr. Davis "Big Gay Al" during a delivery the following day. Davis told him to stop, and Mr. Ellis explained, "Well, it's from South Park." Mr. Davis replied, "I don't like that show. I don't think it's funny" and said "Don't call me Big Gay Al anymore." But Ellis just repeated "Hey, Big Gay Al," ultimately provoking Davis to yell and swear at him. Ellis complained to the company's Operations Manager that Davis had yelled and sworn at him. This eventually led to a confrontation during which management tried to get Ellis to apologize to Davis. Davis con-

sidered the ensuing apology to be insincere and exploded, leading to his discharge. Davis sued.

The court found that although Washington law bans sexual orientation discrimination, it would not reach a case brought by an avowedly heterosexual employee for being called "Big Gay Al" by a manager. Davis had alleged hostile work environment and wrongful discharge in violation of the Washington Law Against Discrimination.

The court found that "a hostile work environment claim requires that he be discriminated against because of his sexual orientation. Mr. Davis was not harassed because he is heterosexual. The question raised by the contentions here is whether the WLAD prohibits discrimination based on perceived sexual orientation." The court pointed out that "the statute makes no mention of perception in its definition of 'sexual orientation.' This suggests to us that the legislature intended percep-

Moving to the defamation claim, the court said that Ellis's comments "were apparently intended to be comical or pejorative, or both," but that it was unlikely that bystanders would take the comments to indicate that Davis was gay. "His co-workers were likely familiar enough with Mr. Davis to know that he was not gay," wrote Sweeney. "Customers could not have known whether Mr. Davis was gay, but would not have gathered that Mr. Davis was gay from Mr. Ellis's comments. In the first incident, customers looked uncomfortable after Mr. Ellis made his comments. Mr. Davis presumes that they were uncomfortable because they thought that Mr. Davis was gay. But in context it is more likely that they looked uncomfortable because they recognized that calling a co-worker 'Big Gay Al' is inappropriate. In the second incident, Mr. Ellis explained that 'Big Gay Al' is from a television program, *South Park*. Overhearing

unless the statement itself is treated as defamatory per se. Although old common law precedents held that false imputation of homosexuality is defamatory per se, the modern trend is the other way. The court cited Florida and Ohio cases for the proposition that "imputation of homosexuality is not defamatory per se; defamation per se generally requires imputation of a crime or communicable disease."

Judge Siddoway dissented from this part of the holding in a lengthy opinion. Although he did not differ from the majority in its holding that calling somebody gay is not defamatory per se, he argued that Fred's Appliance had only mentioned the damages issue in passing, and it had not been directly addressed in Davis's response to the summary judgment motion. If this were to be the basis for dismissing the claim, Siddoway argued, Fred's Appliance had an evidentiary burden that it had not met. Furthermore, Siddoway departed from the

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tion to come into play only in gender identity discrimination, but not in discrimination based upon homosexuality or heterosexuality." The court rejected an analogy to disability discrimination claims that include the concept of "perceived" disabilities, noting differences in statutory interpretation.

The court also found that the alleged harassment, a few incidents of Ellis calling Davis "Big Gay Al," were not sufficiently severe or pervasive to constitute hostile environment harassment. "We are led to conclude that the utterances were only casual, isolated, and trivial." The court also found that the company's reaction to Davis's complaints satisfied its obligations, so any hostility expressed by Ellis was not imputed to the employer for purposes of liability. Having found no direct violation of the statute, the court also concluded that there was no basis for a retaliation claim by Davis.

customers would have understood the statement as a joke or popular cultural reference and not necessarily a reflection on Mr. Davis's sexual orientation. In the third incident, Mr. Ellis against said, 'Hey, Big Gay Al,' and Mr. Davis replied, 'Hey, I thought I asked you to stop?' In that situation, a customer overhearing it would have perceived that Mr. Davis was the object of some teasing and not necessarily gay." The court found that bystanders were most likely to perceive that the statement was just joking or teasing.

In addition, said the court, Davis "failed to make a sufficient showing of damages." He sought "general damages for 'mental distress, anguish, humiliation, and loss of enjoyment of life," but such damages are not available in the absence of proof of economic injury caused by the defamatory statement,

court's conclusion that bystanders would not have concluded that Davis was gay based on Ellis's statements.

"Even contemporary cases that reject imputations of homosexuality as defamatory per se recognize that the imputation presents enough potential for harm to reputation to be actionable with proof of special damages," Siddoway argued. "Such claims must be allowed to go to juries, so that redress is available in cases of proven special harm. As societal norms evolve, false imputations of homosexuality will present a diminishing risk of harm and slander cases arising from them can be expected to produce smaller awards, or perhaps no award, of general damages. . . It oversteps our role to accept Fred's Appliance's invitation and hold, as a matter of law, that an imputation of homosexuality is no longer defamatory." ■

Kentucky Appeals Court Rejects Sexual Orientation as a Factor in Custody Dispute

In *Maxwell v. Maxwell*, 2012 WL 5050588 (Ky.App., Oct. 19, 2012), the Court of Appeals of Kentucky reversed a trial court's ruling awarding sole custody of three children to a father based primarily upon his former wife being involved in a lesbian relationship.

In the ruling, Judge Denise Clayton makes plain that the sexual orientation of a parent cannot alone be a determining factor in a custody decision absent a clear showing of a "direct negative impact" on the children. Additionally, the court characterized the trial court's determination that being involved in a same-sex relationship constituted "sexual misconduct" as amounting to disparate treatment prohibited by the federal constitution.

Angela and Robert Maxwell married in 1994 in Arkansas. Three children were born during the marriage. Robert filed the petition for dissolution of the marriage in 2010 and moved for sole custody of the children.

A custody dispute ensued in which Robert lodged a variety of complaints against Angela, including Angela's involvement in a same-sex relationship, her use of medication for mental health issues, her alleged lack of involvement with the children, and her use of tobacco even though two children have allergies and one has asthma. (Note that being in a gay relationship appears to Robert to be on par with the threat of second-hand smoke).

After a hearing -- in which two of the children testified to their happiness with the existing shared custody arrangement, and a teacher described the improvement in the behavior of the youngest child who had faced difficulty since the parents' separation -- the trial court awarded Robert sole custody of the children; Angela was permitted visitation under a schedule set by the court.

However, the parenting time allotted for Angela was less than the minimum guidelines provided under local family court rules. In addition, the trial court prohibited both parties from cohabitating with another adult *unless they were married to that person* during the time that they had physical possession of the children. (The trial court, well aware that Kentucky statutory law and its constitution prohibit same-sex marriage, seemed resolute in its hostility towards gay parents.) Angela, who was involved with a woman, Angel, at the time of dispute, appealed from this judgment.

The Court of Appeals starts its review from the familiar proposition that the "best interests of the child" shall

govern all custody determinations. The court also notes at the outset that the trial court failed to reference the statutory factors used to make such a determination. Such factors, which are outlined in Kentucky Revised Statutes 403.270(2), include, among others: the wishes of the child's parent or parents, and any de facto custodian, as to his custody; the wishes of the child as to his custodian; the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests.

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It is a violation of Angela's due process and equal protection rights to determine her parental rights using her sexual orientation as the determinative factor.

In buttressing its reasoning, the court cites to *Romer v. Evans* and additional federal and local precedent prohibiting the state from allowing private bias to infringe on the fundamental rights enjoyed by parents.

In sum, it is a violation of Angela's due process and equal protection rights to determine her parental rights using her sexual orientation as the determinative factor. This is especially true, says the court, where no evidence was provided that demonstrated the relationship between Angela and Angel had any negative impact on the children.

Rather, the only issue specifically mentioned by the family court is that the children might be teased about their mother's same-sex relationship and that it might cause difficulty with the parents' communication.

The court easily rejects this "but the children will be teased" argument: "If the children are subject to teasing, it will likely occur whether their mother has custody or not. The harm from removing them from a positive and loving relationship with their mother seems much more consequential."

The appeals court, which remands the case to the trial court for further proceedings, does not address Angela's argument that the family court abused its discretion by restricting the parties from cohabitating with a person that he or she is not married to during parenting time. Nonetheless, it concludes its opinion with a bit of a guidepost for a trial court that it plainly does not trust, at least on the issue of treating the LGBT community fairly when it comes to child custody determinations. It says: "This retrial must be done with the understanding that the cohabitation of any party, while a factor, is not dispositive on its own. It must be ascertained with the children's best interests in mind. Clearly, changes in moral standards and the inability of same-sex couples to legally marry are also relevant. Consequently, the family court must determine the efficacy of the prohibition based on the best interests of the children."

It is as if the court is making clear to the trial court that if it attempts to be clever on remand by pointing to the ban on same-sex marriage, it will once again find itself reversed. —Brad Snyder

Brad Snyder is the Executive Director of LeGaL — The LGBT Bar Association of Greater New York.

Constitutional Challenge to Federal Hate Crimes Act Fails, But Defendants are Acquitted of Hate Crime Charge by Jury

Congress passed the Hate Crimes Prevention Act, which provides special federal protections against designated "hate crimes" (18 USC Sec 249[a][2]), the Matthew Shepherd and James Bird Hate Crime Prevention Act [HCPA]), in 2009. On October 15, 2012, U.S. District Judge Gregory F. Van Tatenhove rejected a constitutional challenge to the HCPA in *U.S. v. Jenkins*, 2012 WL 4887389 (E.D.Ky.). The defendants argued in part that the HCPA was outside the scope of the Commerce Clause, and otherwise violates the equal protection and substantive due process guarantees under the Fifth Amendment, as well as the First. Defendants David Jason Jenkins and Anthony Ray Jenkins would later be acquitted of the hate crime charges following a jury trial. This case is claimed to be the first U.S. prosecution of an anti-gay hate crime under the HCPA.

The Prosecution alleged that David and Anthony, cousins, made plans to kidnap and assault Kevin Pennington because they knew he was gay. This plan included enlisting Mable Ashley Jenkins and Alexis Leeann Jenkins to lure Pennington from his home in order to obtain drugs. Mable is Anthony Jenkins' sister and Alexis is Anthony's wife. The two women led Pennington to Anthony's pickup truck, where the cousins concealed their identities. The Jenkinsons drove Pennington along US Highway 119 to a secluded area of Kingdom Come State Park, where they restrained and "brutally beat Pennington while yelling anti-homosexual comments." Pennington testified that he managed to escape while the cousins were looking in the pickup truck for a tire tool with which to kill him.

The Jenkinsons were charged with attempted murder. The State prosecution was dismissed on March 26, 2012, as defendants "had been charged by federal authorities under the same facts." On April 9, the Office of the Attorney General certified the case for federal prosecution because "the State has requested that the Federal Government assume jurisdiction, and because it is in the public interest and necessary to secure substantial justice." On April 11, the government filed its indictment against, charging the Jen-

kins cousins with conspiring to kidnap Pennington in violation of 18 USC Sec. 1201(c), kidnapping him in violation of 18 USC Sec 1201, and willfully causing bodily injury to Pennington because of his actual or perceived sexual orientation in violation of 18 USC Sec 249(a)(2).

In their motion to dismiss, defendants argued that federal jurisdiction cannot rest on the commerce clause, but that if it does, the HCPA violates the equal protection and substantive due process components of the Fifth Amendment, and the First Amendment prohibition against vague and overbroad statutes. They also raised a double jeopardy argument based on being charged with kidnapping and hate crime for the same offense.

As described in *U.S. v. Lopez*, 514 US 549, 558 (1995), federal crimes arise from Congress's ability to regulate under the Commerce Clause three broad categories of activity: [1] the use of channels of interstate commerce; [2] the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may only come from intrastate activities; and [3] those activities having a substantial relation to interstate commerce.

In *Lopez*, the Supreme Court considered a challenge to the Gun-Free School Zones Act, 18 USC Sec 922(q)(1)(A) (GFZA), finding that the law bore no substantial relation to interstate commerce. Judge Tatenhove also compared the instant case to *U.S. v. Morrison*, 529 US 598 (2001), where the Supreme Court struck down part of the Violence Against Women Act, 42 USC Sec 13981 (VAWA). The VAWA provides that, "a person ... who commits a crime of violence motivated by gender ... shall be liable to the party injured." The Supreme Court also considered this regulation under the third category defined in *Lopez*.

Judge Tatenhove found that the HCPA fell within the third category because it punishes bias-motivated violence, like VAWA, and otherwise regulates violent activity rather than channels or instrumentalities of commerce. The court rejected the government's argument that because the HCPA contains jurisdictional language requiring the use of a "channel,

facility, or instrumentality of interstate or foreign commerce,” it also falls under the first two categories or regulation described in *Lopez*. Judge Tatenhove found that “the relevance of a jurisdictional element is not related to which category to apply, but to whether activities that are already classified under Category Three have been properly limited by Congress so as to only regulate activity having a substantial impact on interstate commerce.”

Thus, for the HCPA to be a valid exercise of congressional power, it must regulate an activity that substantially affects interstate commerce. The framework for this analysis was also set forth in *Lopez*. First, a reviewing court must determine whether the prohibited activity is economic in nature or an essential part of a larger regulation of economic activity. Second, the statute reviewed must contain a jurisdictional element. Third, the court must consider congressional findings as to the effects of the prohibited activity on commerce. And finally, a determination must be made as to how closely linked are the activity and its effect on commerce.

Both *Lopez* and *Morrison* found that the prohibited activities therein were not economic in nature or part of a larger regulatory scheme of economic activity. Judge Tatenhove likewise held that bias-motivated violence also fails this first factor. Judge Tatenhove then looked at congressional findings and the link between bias-motivated violence and its effect on interstate commerce. He found that there were inadequate findings made by Congress as to the effect of the HCPA on commerce, and that under *Morrison*, the link between violent crime and commerce is necessarily too attenuated.

But the HCPA clearly contains a limiting jurisdictional element, meeting the second factor. “The jurisdictional element in HCPA Sec. 249(a)(2)(B) attempts to capture situations involving channels, facilities, and instrumentalities in interstate commerce; people, places, and things in interstate commerce; conduct substantially affecting interstate commerce; and any other activity of interstate commerce,

but without capturing any conduct beyond those categories.” This provision is in stark contrast to the GFZA in *Lopez*. The Supreme Court indicated that if the GFZA had this type of limiting factor, the statute would have the “requisite nexus to interstate commerce.” Likewise, the VAWA did not contain such jurisdictional component.

Judge Tatenhove found that the HCPA, when applied to the facts in this case, regulates conduct with a sufficient nexus to interstate commerce. The Jenkinses used a motor vehicle to kidnap Pennington via US Highway 119 to the remote location where they beat him. Because the defendants used a vehicle and traveled on the interstate, they used an instrumentality and channel of interstate commerce. Because the HCPA contains a jurisdictional limiting factor, even though it failed all of the other factors outlined in *Lopez*, through case-by-case inquiry, the HCPA can still be a valid exercise of congressional power under the Commerce Clause.

impermissibly creates special protection for a class of individuals based on sexual orientation. Judge Tatenhove rejected this claim, as the HCPA protects all persons who are the victim of bodily injury on the basis of sexual orientation, and does not provide preferential treatment to homosexuals. The defendants’ substantive due process argument also received short shrift, as they failed to identify a fundamental right being burdened by the HCPA.

The defendants also claimed that the HCPA is overbroad and void for vagueness. The overbreadth challenge fails because the HCPA does not encroach on conduct that is protected by the First Amendment. The law provides that bodily injury must be an actual physical injury, and the First Amendment does not protect violence (*N.A.A.C.P. v. Claiborne Hardware Co.*, 458 US 886, 916 [1982]).

Having found that the HCPA is not overbroad, the court considered the vagueness challenge. The defendants

argued that the phrase “actual or perceived sexual orientation” is unconstitutionally vague. However, because their alleged conduct fell squarely within the statute’s terms -- they knew Pennington was gay, they had seen him

engage in conduct that would suggest he was gay, and they assaulted him while shouting anti-gay slurs -- they “may not generally complain of its vagueness.”

Because criminal sanctions are involved, the court engaged in a stricter vagueness analysis; the statute “must define the proscribed behavior with sufficient particularity to provide a person of ordinary intelligence with reasonable notice of the proscribed conduct and to encourage non-arbitrary enforcement of the provision” (citing *Belle Maer Harbor v. Charter Tp. Of Harrison*, 170 F3d 553, 559 [6th Cir 1999]). On this point, the defendants argued that men of ordinary intelligence cannot understand what it would mean to willfully cause bodily injury to someone because of “actual or perceived sexual orientation.” They presented results of an Internet search which apparently revealed as

This case is claimed to be the first U.S. prosecution of an anti-gay hate crime under the Hate Crime Prevention Act.

The Jenkinses also raised a federalism argument: The Attorney General certified this case for federal prosecution pursuant to HCPA Sec. 249(b)(1), and defendants asked the court to review the certification process to determine “if the federal government is rightly involved in this case.” The court declined, stating: “The decision to prosecute is ill-suited for judicial review because ‘the strength of the case, the prosecutor’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to make.’” Judge Tatenhove found that Congress did not “intend for the general presumption in favor of judicial review to give way to the traditional deference given to prosecutorial discretion.”

The defendants’ Equal Protection argument was that, on its face, the HCPA

many as 30 different categories of sexual orientation, but Judge Tatenhove reasoned that the term “sexual orientation” is not “too nebulous for comprehension” and rejected this argument.

The Jenkinses’ last argument was that because proof of the kidnapping charges was the same as proof of the hate crime charge, the indictment was multiplicitous and violated the prohibition of double jeopardy under the Fifth Amendment. Their argument rested on the HCPA’s enhanced penalty if “death results from the offence” or “the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill” (HCPA Sec. 249[a][2][A][ii]). The court applied the Blockburger test framework (*Blockburger v. U.S.*, 284 US 299, 304 [1932]) and found that because the defendants could be convicted under the HCPA without proof of the kidnapping (albeit with a shorter sentence) and/or could be convicted under the HCPA, while qualifying for the longer sentence, based on proof that the defendants attempted to kill Pennington, the counts of the indictment are not inherently multiplicitous.

Shortly after this opinion was issued, the defendants were acquitted of the HCPA charge after a jury trial, but found guilty of kidnapping. According to an *Associated Press* report on October 25, attorney Willis Coffey said that the jurors didn’t find Pennington’s account of the events credible, in spite of the testimony against Anthony and David Jenkins by Anthony’s sister, his wife and his younger brother, Alex Jenkins. The wife and sister pled guilty to aiding and abetting the kidnapping and aiding and abetting a hate crime. Alex Jenkins testified that his cousin David seemed “kind of cocky” about assaulting a gay man, according to an Oct. 23 report in the *Lexington Herald-Leader*. The government presented other evidence, such as a 911 tape which recorded Pennington’s phone call: “They’re trying to kill me,” Pennington told the 911 operator on April 4, 2011. “I didn’t know what they were going to do. I think it’s because I’m gay.” —Eric J. Wursthorn

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Court Rejects HIV Discrimination Claim by Nursing Assistant

U.S. District Judge Schiller ruled in *Wengert v. Phoebe Ministries*, 2012 WL 5199363 (E.D.Pa., Oct. 22, 2012), that a gay HIV+ nursing assistant discharged by Wyncote Church Home, a residential facility, had not alleged a prima facie case of discrimination under the Americans with Disabilities Act (ADA), and granted the employer’s motion for summary judgment.

William Wengert claims that numerous co-workers knew he was gay and that he was HIV+, although he had not spoken about it with co-workers. Wengert and another nursing assistant were involved in assisting a resident who suffered a fall. Rather than getting a nurse to check on her, they got her back into her wheel chair and into bed. It subsequently developed that the resident suffered a broken fibula. The employer investigated, and a supervisor determined based on the results of the investigation to discharge both Wengert, who had worked there for 18 years, and the other nursing assistant. The supervisor who made the discharge decision was relatively new and unacquainted with Wengert.

The court determined that Wengert failed to make out a prima facie case. The employer conceded that an HIV+ individual such as Wengert is protected from discrimination by the ADA, but argued that Wengert failed to show facts from which any inference could be drawn that his HIV+ status had anything to do with the discharge. “Plaintiff presents no evidence that anybody other than Schlener [the supervisor] made the decision to fire Wengert. Indeed, Wengert produced no evidence that any individual responsible for his termination knew, or even perceived, that he was disabled. He thus cannot make out a discrimination claim. It is undisputed that Schlener concluded that Wengert and Washington had violated Wyncote policy, that the misconduct ‘constituted resident neglect’ and that she ‘discharged both Wengert and Washington on July 19, 2011.’” Although others participated in the investigation, the court found that the individuals who allegedly knew about Wengert’s HIV-status “played no role in the decision to terminate Wengert.”

Wengert had argued that certain individuals who knew he was gay had made

derogatory comments about him. To this, Judge Schiller responded, “Finally, if derogatory comments about Wengert’s sexual orientation were made, that is inappropriate and unprofessional behavior. In 2012, it should go without saying that one’s sexual orientation is not synonymous with his or her HIV status. The Court cannot make the numerous inferential jumps that because some of Wengert’s co-workers knew he was gay, they knew he had HIV and that the person who decided to fire him did so because he was HIV-positive, even though there is no evidence that she knew of either his HIV-positive [sic] or his sexual orientation.”

The court also found that the reason given for Wengert’s discharge was not a pretext for discrimination. The employer’s policy was that if a resident suffered a fall, they should not be moved until a registered nurse checks them out. Wengert and Washington failed to get a nurse to check out the resident before they improvised a way to move her, which might have contributed to her injury. Since “credible evidence demonstrated that Washington and Wengert violated Wyncote policy in their care for the resident,” in the absence of any evidence of discrimination it “is not the job of this Court to second-guess the employer’s decision. Thus, even if a neutral arbiter determined that the incident unfolded exactly as Wengert described and that he did not violate policy on the date in question, he would not make out a discrimination case.” It is one thing to prove that an employer’s decision is incorrect; quite another to prove that it is discriminatory. In this case, since both Wengert and the non-gay woman working with were discharged for their identical alleged rules violation, it would be difficult to claim that this was a pretext for discrimination, especially as the discharged co-worker testified that “they should have had a nurse make a proper assessment prior to lifting [the resident] with a sheet. Wyncote’s decision to terminate both individuals, particularly after one individual credibly admitted that proper procedures were not followed, support’s Wyncote’s contention that Wengert’s termination was not pretext for discrimination.” ■

CIVIL LITIGATION NOTES

SUPREME COURT – The Supreme Court has listed the pending certiorari petitions in the California Proposition 8 case, various DOMA cases, and the Arizona domestic partnership benefits case for consideration at its November 20 conference. If the Court decides to grant certiorari on any of these cases, oral argument would probably be held during the winter with opinions due sometime in the spring. In recent years, the Court’s term has usually ended during June. The Solicitor General’s position on the DOMA cases would change if there is a change of administration, which would likely result in a motion to delay that argument. In a brief anticipating the 2nd Circuit’s Oct. 18 decision in *Windsor v. United States* (see above), the Solicitor General filed a brief in support of the cert petition pending in *Pedersen v. Office of Personnel Management*, No. 12-231 (Brief filed October 19), seeking review of the U.S. District Court for Connecticut’s ruling in that case, 2012 WL 3113883, in which the court ruled that DOMA Section 3 should be subjected to heightened scrutiny, a level of judicial review that it failed to survive.

SUPREME COURT – In a long-shot petition for a writ of certiorari to the state of Washington Court of Appeals, Dylan Thompson Wood, known as Tom, is asking the U.S. Supreme Court to intervene in an inheritance dispute involving the estate of his mother. Jody Wood died at age 84 on December 25, 2007, leaving a purported will under which Mary Whealan, then 48, her long-time partner would inherit almost all of her \$600,000 estate. Tom claims the will is a fake and that Mary allowed his mother to die rather than summoning medical assistance because she wanted to inherit the estate. His attempt to contest Mary’s appointment as personal representative of the estate and to have the will set aside were unavailing in the state courts, and he filed this cert petition after the Washington Supreme Court refused to review a decision against him by the state’s court of appeals. His claim is that the court that ruled against him were biased on account of sex, violating his 14th Amendment rights. We will be very surprised if

the Supreme Court grants this one. The court of appeals decision is not published. The cert petition can be found on Westlaw: *Wood v. Whealan*, 2012 WL 4790415. No. 12-421 (Petition filed October 3, 2012).

CALIFORNIA – The California 1st District Court of Appeal affirmed a grant of summary judgment to the defendant in *Parks v. Port of Oakland*, 2102 WL 5199618 (Oct. 22, 2012) (not officially published). Sherri “Jean” Parks, a plumber employed by the Port, asserted claims of harassment based on sex and sexual orientation, failure to prevent such harassment, and retaliation for her internal complaints and her subsequent filing of a lawsuit. Judge Ruvolo’s opinion for the court of appeal reviews the factual allegations in excruciating detail, showing how they amounted to little that would be probative of the legal claims Parks made. Parks was described as “strident” and “militant,” and not seeking to conform to gender stereotypes. The court ultimately found it too much of a stretch to build a harassment case out of the ways her co-workers and supervisors related to her, in light of these personal characteristics. Wrote the court, “In short, even viewing the personnel actions taken against Parks in light of her direct evidence as to the existence of sexism and homophobia in the Port workplace, we are not persuaded that a reasonable jury could have found that the Port’s stated reasons for those actions were pretexts for gender or sexual orientation discrimination. Nor are we convinced that the direct evidence of sexism and homophobia, standing alone, was sufficient to convince a reasonable jury that the Port created or tolerated a hostile work environment for women or for lesbians. Accordingly, Parks has failed to show that she raised triable issues of material fact as to whether the Port’s personnel harassed her on the basis of her gender or sexual orientation. The trial court’s order granting the Port’s motion as to Parks’s first three causes of action must, therefore, be affirmed.” A jury ruled against Parks on her retaliation claims, which were not the subject of this appeal.

CALIFORNIA – The anti-LGBT “conversion movement” has initiated litigation

challenging the recently enacted California law that bans conversion therapy for minors. Governor Jerry Brown signed S.B. 1172 into law on September 29. Within days, lawsuits had been filed claiming that the law violated the constitutional rights of individuals who practice such “therapeutic” methods. Among the plaintiffs are the so-called National Association for Research & Therapy of Homosexuality (NARTH), the American Association of Christian Counselors, NARTH President Christopher Rosik and NARTH co-founder Joseph Nicolosi, therapist David Pickup, and two California Couples who have teenage sons undergoing “conversion therapy.” Liberty Counsel, a right-wing “public interest” law firm that frequently participates in anti-gay litigation, represents the plaintiffs, according to a press release from the National Center for Lesbian Rights. Another lawsuit was filed challenging S.B. 1172 by the Pacific Justice Institute, a conservative litigation outfit, representing counselors and a “converted” man who wants to become a conversion therapist. Both suits were filed in U.S. District Court in Sacramento, the Eastern District of California. *Washington Times*, Oct. 5.

HAWAII – U.S. District Judge Michael Seabright (D. Hawaii) dismissed without prejudice a lawsuit brought by two Oahu churches, which contended that their rights to free exercise of religion were violated by the enactment of the civil union law in that state. *Lighthouse Outreach Center Assembly of God v. State of Hawaii*. They specifically asserted fears that they might be prosecuted if they rejected a request by a same-sex couple to rent their premises for a civil union ceremony. Seabright found to be “highly speculative” any contention that the state would seek to enforce the civil union law against churches in this manner, accepting the state’s contention that the plaintiffs lack standing to challenge the law. It sounds to us like the kind of lawsuit filed to make a point rather than to assert any sort of viable legal claim. Unless these churches are operating banquet halls that are generally open to the public as commercial enterprises, one suspects that the occasion for prosecution would

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not arise, given the prudence of prosecutors. *Honolulu Star-Advertiser*, Oct. 28.

NEW JERSEY – Craig Sashihara, the Director of the New Jersey Division on Civil Rights, issued an opinion on October 23 affirming a decision by Administrative Law Judge Solomon Metzger that Ocean Grove Camp Meeting Association violated the state’s Law Against Discrimination when it refused an application by Harriet Bernstein and Luisa Paster to use the Boardwalk Pavilion in Ocean Grove as the location for their New Jersey civil union ceremony. Filled out with lengthy quotes from ALJ Metzger’s opinion, the new ruling in *Bernstein v. Ocean Grove Camp Meeting Association*, OAL Dkt. No. CRT 6145-09; DCR Dkt. No. PN34XB-03008, reiterates the finding that although the Boardwalk Pavilion is owned by the Association, and is thus not literally “public property,” it does come within the scope of the public accommodations law because at the time this case arose it was promoted by the Association as a place where people could hold weddings for a fee. The opinion emphasizes that the Association received favorable tax treatment for its real property holdings in Ocean Grove in response to the Association’s assurance that the property would be open to the public without discrimination. In this case, the Director found that the refusal to let the complainants use the space for their civil union ceremony violated the ban on discrimination against civil unions as well as the ban on sexual orientation discrimination. The Director also rejected the Association’s argument that requiring it to allow use of the space for that purpose was a violation of 1st Amendment rights, asserting that “the element of forced inclusion or forced speech that characterize associational rights cases is simply not present. Respondent is not being compelled to accept an unwanted candidate as a leader, or even a member, in its organization. Nor are Respondent’s members being forced to associate with Complainants on any level. Respondent is not being forced to include or adopt any message of the Complainants. Unlike the parade in *Hurley*, there is nothing inherently expressive in the secular business activity of renting a boardwalk pa-

vilion, particularly where, as here, Respondent ordinarily approved all applications without questioning whether the use would conform to Respondent’s religious tenets. As the ALJ found, the mere act of renting the Pavilion to the public for secular and non-secular weddings when Respondent ‘did not inquire into religious beliefs or practices because it did not sponsor, or otherwise control, these weddings,’ was an ‘activity largely detached from associational expression or speech.’” The Director noted that the Association “specifically elected to distinguish the Pavilion from its chapels and other religious buildings” in order to receive public subsidies and tax advantages. Promising equal access and denying access for civil union ceremonies was inconsistent “when such action clearly violates the settled laws of this State.” The Director concurred with the ALJ’s conclusion that a declaration of violation of the Act was sufficient remedy in this case, inasmuch as the Complainants had long since held their civil union ceremony elsewhere and were not looking for damages. Considering the attention that has been focused on this case as an artifact of the “culture wars,” it would not be surprising if any appeal were filed to the New Jersey courts.

NEW YORK – The New York Court of Appeals announced on October 23 that it would not review a ruling by the Appellate Division, 4th Department, rejecting a constitutional challenge to the enactment of the Marriage Equality Law. *New Yorkers for Constitutional Freedoms v. New York State Senate*, 98 App.Div.3d 285, 948 N.Y.Supp.2d 787 (App. Div., 4th Dep’t, July 6, 2012), *motion for leave to appeal denied*, No. 2012-914 (N.Y.Ct.App., Oct. 23, 2012). The plaintiffs, opponents of the Marriage Equality Law, asserted that the measure was unconstitutionally enacted because Governor Andrew Cuomo was invited into a closed meeting of the Republican Senate Caucus to discuss the measure before the State Senate went into public session to vote about it. Plaintiffs argued that this violated the state’s open meeting law, invalidating the enactment. They also challenged the governor’s “message of necessity” that cleared the way for the mat-

ter to be voted upon shortly after the final negotiated version of the bill was introduced, without waiting for the prescribed period of time. An upstate trial judge rejected the “message of necessity” argument on the ground that the governor’s discretion to issue such a notice was not subject to judicial review, but credited the open meeting law argument. The Appellate Division rejected that argument, finding that the Caucus could invite a guest – including the governor, a member of the other party – without losing the exemption under the law for party caucus meetings. The Court of Appeals’ decision not to review this case, issued as customary without any comment, puts to rest the only pending direct challenge to enactment of the law. Future litigation is likely, however, on the scope of the public accommodations exemption granted on religious grounds and claims by business owners of a right to deny services for same-sex marriage ceremonies based on their individual religious views (see below).

NEW YORK – Melisa Erwin and Jennie McCarthy of Albany, New York, inquired about holding their wedding at Liberty Ridge Farm, but the proprietors, Robert and Cynthia Gifford, rejected them on the ground that the Giffords object to same-sex marriage on personal and religious grounds. Erwin and McCarthy made other plans, but filed a complaint on October 11 with the New York State Division of Human Rights, alleging unlawful discrimination by a place of public accommodation and setting up the possibility of a precedent-setting case. Lambda Legal is assisting Erwin and McCarthy on their discrimination claim, which will give the Division and possibly the courts an opportunity to determine the scope of the exemption written into the law for religiously-oriented organizations. Jason McGuire, executive director of the group that lost its challenge to the enactment of the Marriage Equality Law when the Court of Appeals denied review of their case, is now acting as spokesperson for the Giffords, arguing that the religious exemption should be broadly construed to protect them as a matter of free exercise of religion. *New York Law Journal*, Oct. 23.

CIVIL & CRIMINAL LITIGATION NOTES

NEW YORK – Lambda Legal filed suit in the U.S. District Court, Southern District of New York, on October 11 on behalf of Joseph Teevan, a man who was arrested in a “sting operation” by Westchester County Police. Teevan was one of several men arrested by undercover police officers staking out Saxon Woods Park. Charges against some of the individuals, including Teevan, were dismissed; in other cases, the defendants pled to lesser charges. The state trial court ordering that the record in Teevan’s case was to be sealed, and mug shots and fingerprints destroyed. In apparent defiance of the court’s order, charges Lambda’s complaint, the county Department of Public Safety then sent press releases to about 200 media email addresses boasting about the arrests, including arrestees’ names, mug shots, towns of residence, and original arrest charges, as a “warning” against sexual activity in the park. Teevan woke up the next day to find his picture in the local newspaper. According to Lambda, “Public Safety’s unlawful release of the information sent shock waves through Mr. Teevan’s life, harming his reputation, causing adverse employment consequences, and causing him even to contemplate suicide. He continues to be subjected to derisive and hurtful comments at work and in his community.” Although shunning publicity, Teevan decided to come forward and file a lawsuit to try to prevent the defendants, who include Commissioner George Longworth and other high-level county police officers, from engaging in similar conduct in the future. The lawsuit claims that defendants violated Equal Protection guarantees of the federal and state constitutions by “singling out gay men for harsher treatment and illegally identifying them to the media.” The suit also charges defendants with having violated the trial court’s order to destroy Teevan’s mug shot and fingerprints after criminal charges against him were dismissed. *Teevan v. Westchester County Department of Public Safety*.

TENNESSEE – This sounds like something out of the Victorian Age: Suzann Savage Davis, former wife of Southaven Mayor Greg Davis, has filed a \$1 million alienation of affections lawsuit against Jan-

sen Fair, a 26-year-old man who she says destroyed her marriage by luring Davis away from her into a homosexual relationship. The case was filed in DeSoto County Circuit Court on October 18. Ms. Davis claims to have found a note to her ex-husband from Mr. Fair, telling Mr. Davis that Fair was looking forward to a trip to Las Vegas “locked away in bed in each other’s arms.” On October 19, the *Memphis Commercial Appeal* set out the factual allegations of the complaint in gory detail. In addition to the alienation of affections claim (a cause of action abolished in most American jurisdictions), the suit asserts claims of intentional and negligent infliction of emotional distress and invasion of privacy. According to the complaint, “Defendant’s conduct is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and said conduct should be regarded as atrocious and utterly intolerable in a civilized society.”

WASHINGTON – The *Daily Herald* in Everett, Washington, reported on Oct. 26 that the state’s Public Disclosure Commission, which monitors compliance with state laws requiring that political groups disclose their finances, had ruled that Family PAC, an organization originally formed to oppose the state’s domestic partnership law and which is now campaigning against Referendum 74, under which state voters will decide whether the Marriage Equality Law will go into effect, violated the disclosure law by failing to report legal expenses it incurred over the past three years from an Indiana law firm. Family PAC has been embroiled in litigation over the state’s law restricting the size of last-minute contributions to ballot measure campaigns, and actually succeeded in getting a court order striking down the restriction as a violation of free speech rights.

WEST VIRGINIA – Kanawha County Circuit Judge Carrie Webster, ruling on a pretrial motion to dismiss in *Hudson v. Bob Burdette Center*, held that a claim of sexual orientation was not cognizable under the West Virginia Human Rights Law, but that Jessica A. Hudson can proceed to trial on her claim of sex discrimina-

tion, wrongful discharge in violation of public policy and intentional infliction of emotional distress. Hudson had accepted an offer to be executive director of the defendant community center, and had given two weeks’ notice to her employer, but she was then told that the offer was “rescinded.” Hudson charges that board members of the center discharged her after visiting her facebook page, discovered that she was dating a woman, from which they deduced that she was a lesbian. The West Virginia Human Rights Law does not ban sexual orientation discrimination, but Judge Webster ruled that Hudson can pursue her Human Rights Act claim on a theory of gender stereotyping in violation of the ban on sex discrimination. The additional tort claims provide the basis for Hudson’s demand for punitive damages. The trial was scheduled to begin on November 7, assuming jury selection – which is to start on November 5 – was completed by then. The center’s defense is that Hudson misrepresented her education and other accomplishments on her resume, a charge that Hudson denies. *Charleston Daily Mail* (Oct. 26). ■

SEVENTH CIRCUIT – A panel of the U.S. Court of Appeals, 7th Circuit, reinstated the conviction of William White for soliciting the commission of a violent federal crime against a gay person who served as foreman of a jury that convicted white supremacist Matt Hale of a similar federal offense. *United States v. White*, 2012 WL 5275248 (Oct. 26). A jury had convicted White, but U.S. District Judge Lynn Adelman (N.D.Ill.) had granted a motion to set aside the verdict, finding that “the government failed to present sufficient evidence for a reasonable juror to conclude that White was guilty of criminal solicitation, and that White’s speech was protected by the First Amendment.” The panel of Circuit Judges Posner, Flaum, and Williams, reversed per curiam and remanded for sentencing. They found that the postings by White on his white supremacist website could support the criminal charges. White’s September 11, 2008, posting was titled “The Juror Who Convicted Matt Hale,” stating “Gay anti-racist [Juror A] was a juror who played a key role in convicting Matt Hale. Born [date], [he/

CRIMINAL LITIGATION NOTES

she] lives at [address] with [his/her] gay black lover and [his/her] cat [name]. [His/her] phone number is [phone number], cell phone [phone number], and [his/her] office is [phone number].” The post further stated that the ‘gay Jewish [Juror A], who has a gay black lover and ties to professional anti-racist groups, and who also personally knew [an individual] killed by Ben Smith, a follower of Hale, was allowed to sit on [his/her] jury without challenge and played a leading role in inciting both the conviction and harsh sentence that followed.” This followed a prior post stating that everybody involved in the prosecution and conviction of Hale should be “assassinated.” The post included a color photo taken from the juror’s employer’s website; White substituted another photo after the juror’s employer blocked access to the website. In a prior ruling, the 7th Circuit had reversed the district court’s dismissal of White’s indictment, see *United States v. White*, 610 F.3d 956 (2010), crediting the government’s argument that it had evidence to show that the posting was a solicitation to readers of the website to commit violent acts against the juror, not “merely electronic or verbal harassment.” There was testimony at trial that juror A received threatening phone calls after the internet posting, but there was no evidence of stalking or an actual attempt to injure or kill him. “White rightfully emphasizes that the First Amendment protects even speech that is loathsome,” wrote the panel. “But criminal solicitations are simply not protected by the First Amendment. A reasonable jury could have found that White’s posts constitute ‘a proposal to engage in illegal activity’ and not merely ‘the abstract advocacy of illegality. Accordingly, the First Amendment provides no shelter for White’s criminal behavior.”

DISTRICT OF COLUMBIA COURT OF APPEALS

– A unanimous panel of the D.C. Court of Appeals upheld a murder conviction in *Mason v. United States*, 2012 WL 4661368 (Oct. 4, 2012), finding that it was harmless error for the trial court to have limited cross-examination of a government witness about the possibility that his testimony concerning the defendant was tainted by anti-gay bias. The court

pointed out that the potential bias of a witness was always a proper subject for cross-examination if there was any hint of the same on direct; in this case, in response to a prosecution question, the witness indicated that one nickname on the street for the defendant, Andre Mason, was “Faggy Dre” because of his “effeminate ways.” The trial judge did not allow further exploration of the witness’s attitude on cross-examination. The appellate panel found this harmless because there were so many other bases for a jury to find the witness to be biased against the defendant that this would have been merely cumulative. “If those powerful reasons, born of self-interest, did not undermine Kevin’s credibility with the jury,” wrote Judge Ruiz for the panel, “it is doubtful that additional cross-examination for anti-homosexual bias in a murder case that does not in any way implicate homophobia would have significantly diminished the jury’s perception of Kevin’s credibility.”

MONTANA - In the course of ruling on a domestic violence case involving accusations that a man had assaulted his girlfriend, two Montana judges have opined that the state’s law against partner or family member assault is undoubtedly unconstitutional to the extent that it excludes coverage for same-sex partners at the same time that it extends coverage to unmarried opposite-sex partners. Accepting this argument by counsel for Dale Miller, Justice of the Peace Stormy Langston ruled that the charges against Miller must be dismissed, but the prosecutor appealed this ruling to District Judge James Wheelis, who rejected the argument as a basis for terminating the case against Miller. Judge Langston wrote: “The court does not believe that there is any rational basis for the distinction of ‘opposite sex’ in the partner definition,” Langston wrote in her ruling. “It appears that while the legislature was trying to preserve its traditional and historical views of opposite sex relationships, it instead created a gross flaw in the statute.” But Judge Wheelis wrote, “Even without a severability clause, the offending words may be excised without transgressing the underlying purpose of the statute, which was to punish and discourage domestic abuse.” *Daily Inter Lake* (Kalispell, MT, Oct. 28).

NEW YORK – Justice Deborah A. Kaplan issued a ruling on October 1 rejecting a motion to quash subpoenas served in the ongoing litigation concerning custody of a child conceived through donor insemination by a lesbian couple who became Vermont civil union partners while one of them was pregnant. *Debra H. v. Janice R.*, No. 106569/2008, NYLJ 1202575976688 (published Oct. 25, 2012). In *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010), the New York Court of Appeals ruled that New York would recognize the Vermont civil union status to the extent of holding that both women were legal parents of the child born after their civil union ceremony was performed. Now the case is back in Supreme Court, New York County, on remand to determine custody issues. Petitioner issued fifteen subpoenas to various individuals and institutions seeking records, documents and testimony assertedly relevant to the court’s determination of custody issues, and demanded that respondent sign a release of her medical records as part of the discovery process. Respondent sought to quash the subpoenas as to a wide variety of topics, including anything predating the Court of Appeals’ determination on parental status, arguing that all such matter was irrelevant as the issue of parentage had been fully litigated. Justice Kaplan agreed with Plaintiff that the information sought remained potentially relevant on the issue of custody, as the determination of the child’s best interest turns on an evaluation of all the circumstances related to the qualifications of both parents. Justice Kaplan noted that as to the Respondent’s medical records, “there shall be no disclosure of any of the subject hospital records to adverse parties except to the extent that the court shall direct in light of the circumstances then existing. Before allowing disclosure of any of the subpoenaed St. Barnabas records, the court shall examine the records in camera and determine whether the records are material and necessary for the purpose of determine custody, or whether the court and the parties have sufficient information to determine custody without such disclosure.”

CRIMINAL LITIGATION & LEGISLATIVE NOTES

TEXAS COURT OF CRIMINAL APPEALS

– Reversing a ruling by the 13th Court of Appeals in Gonzales County, the Texas Court of Criminal Appeals voted 5-4 to adopt a reading of Rule 606(b) of the Texas Rules of Evidence that will allow the trial court to inquire into the impact of a juror having done internet research and having brought the results of that research into the jury deliberations. *McQuarrie v. State*, 2012 WL 4796001 (Oct. 10, 2012). Thomas McQuarrie was convicted of sexually assaulting Lisetta Camarillo, a lesbian who is his brother's step-daughter. McQuarrie claimed that they had consensual sex. Camarillo asserted that she was drugged and unconscious during the sexual intercourse, and would not have consented to having sex with McQuarrie. The jury was deadlocked 9-3 for conviction at the end of the first day of deliberations, and the judge gave them the option of continuing deliberating into the night or taking a recess and resuming deliberations in the morning. The jury decided to take the recess, and was instructed not to talk with anybody about the case or consider any evidence not in the record. When they reconvened the next day, they found McQuarrie guilty after about an hour, and he was sentenced to four years in prison. McQuarrie's attorney learned that a juror had done internet research about date rape drugs during the recess, and informed the jury about the results of her research, which persuaded the three hold-outs to vote for conviction. McQuarrie moved for a new trial, claiming a violation of his constitutional rights under the confrontation clause of the 6th Amendment. The Texas evidentiary rule provides that a juror may not be required to testify about the content of deliberations, but makes an exception for testimony about "whether any outside influence was improperly brought to bear upon any juror." The trial court and court of appeals rejected McQuarrie's motion, saying that so long as the information was learned by and then communicated by the juror, it was not an outside influence, which could only come from a non-juror. The majority of the Court of Criminal Appeals disagreed, finding that the rule should have a broader construction, over vociferous dissents. Jurors are not supposed to do independent research, period.

The court remanded the case to the trial court "for a new hearing on Appellant's motion for new trial consistent with this opinion."

WASHINGTON – A young man who yelled anti-gay slurs at a lesbian couple standing outside a Bellingham, Washington, bar and then "punched out" a window in their car has been sentenced to a year in jail after pleading guilty to a misdemeanor charge. The man in question, William Adam Lane, says that he was drunk at the time and doesn't remember anything that happened. He claims that he awakened in a jail cell and didn't even know that he had been charged with a hate crime until several days later. Lane claims that he is not anti-gay, has gay family members who are embarrassed by what happened, and has written to both women to apologize for his conduct. *Bellingham Herald*, Oct. 30. ■

CALIFORNIA – Governor Jerry Brown vetoed a measure that would have allowed for the possibility that a child could have more than two legal parents at the same time. Brown said he was sympathetic concerning such situations, but needed more time to consider the issue than was given under state law, which sets a deadline after passage of a bill for the governor to approve or veto it. Senator Mark Leno had introduced the measure in response to a California Court of Appeal decision, *In re M.C.*, in which the court applied the longstanding legal limitation but called on the legislature to address the issue. Leno indicated he would continue to work with the governor to find a solution to the issue. *The Advocate*, Oct. 1.

COLORADO – The Pueblo City Council voted 6-1 on October 9 to allow city workers to add same-sex domestic partners to their insurance coverage. Opponents of the measure cited the 2001 state referendum vote against legalizing domestic partnerships, and argued that the measure should be put to a public vote, not adopted by the Council. Council President Chris Kaufman, the sole dissenter, said he had to side with the voters, arguing that gay employees are "not a minority group, this is not about equal rights." *The Pueblo Chieftain*, Oct. 10.

FLORIDA – Oakland Park city commissioners gave tentative approval during October to a measure that would require many city contractors to provide benefits to domestic partners equal to those they provided to married employees. A final vote on the measure will be taken in November. *Sun Sentinel*, Oct. 22.

ILLINOIS – On and off? First the East Aurora Board of Education voted on October 15 to approve a policy for protecting the rights of transgender students. Then a public outcry fueled by the anti-gay-family Illinois Family Institute prompted an "emergency meeting" on October 19 during which the Board revoked the policy. The "emergency" was undoubtedly that school board members feared political retribution from the forces of reaction if they did not immediately signal their repudiation of the policy they had adopted just days earlier. *The Beacon News*, Oct. 16; *Windy City Times*, Oct. 20.

NEBRASKA – The Grand Island City Council voted 8-2 on October 9 to reject a proposed civil rights ordinance that would have banned sexual orientation discrimination in employment, housing, and places of business. *World Herald News Service*, Oct. 10.

TENNESSEE – The Memphis City Council voted 9-4 on October 16 to add "sexual orientation" and "gender identity" to the list of prohibited grounds for discrimination in city government, according to an on-line posting by *Memphis Gaydar*.

TEXAS – A 3-2 party-line vote by Dallas County Commissioners authorized the county government to subsidize insurance coverage for unmarried same-sex and opposite-sex partners of county employees. Republican council members criticized the measure as creating "special rights" for a class of citizens. Of course, part of that class, gay people, are prohibited by state constitutional amendment from marrying, which would qualify them for health care coverage. *Dallas Morning News*, Oct. 31. ■

LAW & SOCIETY / INTERNATIONAL NOTES

WHEN AND WHERE? – By the time *Law Notes* readers receive this issue, voters in Maine, Maryland, Minnesota and Washington State may have cast their ballots on the question of same-sex marriage. In Maine, the ballot question is an initiative affirmatively seeking to amend the state’s marriage law to allow same-sex marriages. In Maryland and Washington, the measures seek voter approval for marriage equality bills passed earlier in the year by the legislatures of those states. In Minnesota, voters will consider a constitutional amendment to ban same-sex marriage proposed by the legislature. In all four states, pre-election polling suggested a closely contested issue. So far, bans on same-sex marriage have carried the day in 32 elections, suffering only a temporary setback in Arizona when voters rejected a measure that would have broadly denied any legal recognition to unmarried couples; subsequently, Arizona voters enacted a constitutional ban on same-sex marriage. If any one of the pending ballot questions is resolved in favor of same-sex marriage, a historic barrier will have been broken, particularly in Maine, Maryland or Washington where affirmative marriage rights are at stake. The questions of “when” and “where” will probably be answered by the time you read this.

HOW MANY? – The Williams Institute at UCLA Law School reported on a new Gallup Special Report, co-authored by Williams Distinguished Scholar Gary Gates and Gallup Editor-in-Chief Frank Newport, finding that 3.4% of U.S. adults identify as lesbian, gay, bisexual or transgender. The demographic group with the highest self-identified percentage of gay, lesbian, bisexual or transgendered individuals consists of non-white, younger, less educated individuals. The study found that 4.6% of African-Americans, 4.0% of Hispanics, and 4.3% of Asians self-identify as LGBT, while only 3.2% of Caucasians do so. 6.4% of young adults self-identify as LGBT, as against 2.6% of older adults. In another very interesting finding, the report says that Lesbian, bisexual and transgender women are as likely as non-LBT women to be raising children. Also, contrary

to the stereotype of wealthy gay people, the study found that fewer LGBT-identified people earned over \$90,000 a year than the “general population,” and that the proportion of LGBT people who made less than \$24,000 was greater than the proportion for the “general population.”

WHO AND HOW MUCH? – Despite losing successive appeals in 1st Circuit and the U.S. Supreme Court, the National Organization for Marriage (which should more properly be called the Faux-National Organization Against Same-Sex Marriage) is refusing to disclose donors supporting its campaign to defeat the Maine pro-same-sex marriage initiative. NOM claims that donations given to its “general fund” need not be disclosed, even though the general fund then spends money on the initiative campaign. This kind of loophole would make the reporting requirement meaningless, of course, but meanwhile the identity of NOM’s financial supporters is unlikely to be disclosed before the November 6 election.

INSURANCE FOR SEX REASSIGNMENT SURGERY – The Transgender Legal Defense & Education Fund announced on October 3 that it had resolved a claim on behalf of Ida Hammer, a transgender New York City resident who sought reassignment surgery but was denied coverage by MVP Health Care on the ground that the treatment was “cosmetic,” a characterization that has been rejected by the Internal Revenue Service (for purposes of medical expenses deductions) and a recent federal district court ruling (in the context of transgender prisoner litigation). After TLDEF threatened a lawsuit, MVP backed down and issued the authorization for the procedure, stating that “the requested surgery is medically necessary.” The legal team representing Hammer, in addition to TLDEF, included Robert Goodman, Brandon Burkart, Katherine Kriegman, Ariel Meyerstein, and Susan Reagan of Debevoise & Plimpton LLP. ■

AUSTRALIA – The government announced that a new Dad and Partner Pay policy, going into effect January 1, will ap-

ply to same-sex couples. Under the law, the primary carer for a newly born or adopted child can get up to 18 weeks parental leave with pay, and the other parent can have up to two weeks paid parental leave. The new measure would extend the leave to lesbian couples as well as gay male couples. Only one parent, designated as the primary carer, is eligible for the longer 18 weeks parental leave. *News.com.au* (Oct. 1).

CANADA – The Court of Appeal of Alberta ruled in *Lund v. Boissoin*, 2012 ABCA 300 (Oct. 17, 2012), that Rev. Stephen Boissoin, the Central Alberta Chairman of Concerned Christian Coalition, had not violated Alberta’s Human Rights, Multiculturalism and Citizenship Act’s ban on the publication of hate speech by having published in a local newspaper a letter urging citizens to rise up against the homosexual “machine” that was seeking to teach the normality of homosexuality in the public schools. The letter was published in the *Red Deer Advocate* on June 17, 2002. Shortly thereafter, the newspaper published a report about a gay teenager having been assaulted in downtown Red Deer, and stating that he “doesn’t feel safe reading the anti-gay statements like the ones in the Red Deer Advocate’s June 17 letter to the editor from Stephen Boissoin,” about which the teen said, “I feel the letter was just encouragement for people to go out and stop the gay rights movement.” This article prompted Darren Lund, then a University of Calgary faculty member, to file a complaint with the Human Rights and Citizenship Commission, invoking Sec. 3(1)(b) of the statute, prohibiting publication of a statement that “is likely to expose a person or a class of persons to hatred or contempt.” A panel of the Commission ruled in Lund’s favor and awarded damages, but a reviewing judge, applying a narrow construction to the statute, overturned the panel’s conclusion. Lund appealed to the court, which ruled that the letter, when viewed in context, was part of an ongoing public discussion about the appropriateness of teaching about homosexuality in the public schools and despite its crude and offensive wording was political speech, protected under Sec. 3(2) of the statute, which states: “Nothing

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in this section shall be deemed to interfere with the free expression of opinion on any subject.” Furthermore, Justice Clifton O’Brien, writing for the unanimous three-judge panel of the court, found that the latter, against viewed in context and judged from the perspective of a reasonable person, was unlikely to incite hatred or contempt against gay people. Indeed, he wrote, “It would be understood more as an overstated and intemperate opinion of a writer whose extreme and insensitive language undermines whatever credibility he might otherwise have hoped to have. It is not necessary to agree with the content of the letter to acknowledge the writer’s freedom to express his views.” Thus, the court found that even without the protection of Sec. 3(2), the letter’s publication did not violate Sec. 3(1)(b). The court pointed out the inherent tension between Secs. 3(1)(b) and 3(2) and called for clarification from the legislature.

FRANCE – After the Socialists won an overwhelming parliamentary majority on a platform that included support for same-sex marriage, it seemed that it would be an easy lift to enact the necessary legislation and the government planned to introduce its bill at the end of October, scheduling a short debate preparatory to a vote early in 2013. But religious leaders and social conservatives mounted fierce opposition, causing the government to pull back. Introduction of the legislation has been delayed, and the government will schedule a longer debate than originally planned. Also scaled back was the plan for the bill to include rights to assisted reproduction for same-sex couples, according to press reports during October. Although the government remained publicly committed to introducing a marriage equality measure, the fervent opposition campaign seemed to have moved public support modestly lower, according to public opinion polling, although marriage equality still enjoyed majority support as of the end of October.

IRELAND – Mr. Justice Treacy of the High Court of Justice in Northern Ireland has ruled that statutory law excluding unmarried couples from jointly adopting a child is unjust and discriminatory. Ruling

in *The Northern Ireland Human Rights Commission’s Application*, [2012] NIQB 77 (Oct. 18, 2012), the court noted the incongruity that same-sex couples who enter a civil partnership, under which they are supposed to enjoy almost all the rights of civil marriage, cannot adopt at all! This is because Irish law at present says that only single persons or married couples can adopt, and once same-sex partners unite in a civil partnership, neither of them is considered to be single and they are not considered as a couple to be married. The court found no justification for this state of affairs, especially considering a House of Lords decision in *Re P*, [2008] UKHL 38, which held that an unmarried different-sex couple could adopt the child of one of them. The Health Ministry responded angrily to the ruling, announcing that an appeal would be sought. Edwin Poots stated, “My department’s position on adoption is unchanged by this judgment. A decision to place a child for adoption should be made on the basis that it is in the best interests of the child to be adopted and following a process of thorough assessment to determine that this is the case.” A bill had been introduced to reform the adoption law in Northern Ireland in light of *Re P*, but the measure stalled and unmarried couples (including same-sex couples seeking to form civil partnerships) have been stymied, as they can’t even apply to adopt. This would likely violate the European Convention on Human Rights, to which the U.K. (including Northern Ireland) is bound as a party. *Belfast Telegraph*, Oct. 19.

JAMAICA – *The Guardian* (Oct. 27) reported that Gareth Henry and Dane Lewis, gay citizens of Jamaica, have filed an action in the Inter-American Commission on Human Rights, seeking a declaration that Jamaica’s sodomy law violates the human rights of gay Jamaicans. Since Jamaica is not a full member of the Commission, any ruling would be merely advisory. However, the plaintiffs hope that a ruling will increase pressure on Jamaica to reform its criminal laws to come into conformity with other countries that have decriminalized consensual gay sex. The existing law, the Offences Against Persons Act, pro-

vides up to ten years’ imprisonment, with or without hard labor, for any person convicted of the “abominable crime of buggery committed either with mankind or any animal.” Other provisions outlaw “attempted buggery” and “gross indecency” between men. By their wording, these laws clearly derive from British colonial laws that are no longer applicable to consensual gay sex in the mother country. At present, however, 42 of the 54 nations in the British Commonwealth, consisting of the U.K. and its former colonies, still maintain criminal penalties for same-sex relations, even though many of them are signatories to the United Nations’ International Covenant on Civil and Political Rights, which has been held in other cases by U.N. bodies to protect private, adult consensual sexual activity against the application of criminal law.

MALAYSIA – Four transgender Malaysians expressed disappointment that the Negeri Sembilan High Court ruled against their challenge to the application of Shariah law banning cross-dressing under which they have been prosecuted. According to an October 11 report in *The New York Times*, Malaysia has a dual legal system, in which secular laws apply to all citizens, but Muslims are bound by Shariah law as applied by religious courts. Since the plaintiffs in this case were born to Muslim families and were registered as male at birth, the court ruled that they are bound by Shariah law and forbidden to dress or appear as women, and the Malaysian Constitution, which bans discrimination based on gender and protects freedom of expression, does not supplant Shariah as to those born as Muslims. In the state of Negeri Sembilan where the case was heard, the religious law subjects offenders to up to six months in prison in addition to fines.

PAKISTAN – *The Express Tribune* (Sept. 26) reported that the Supreme Court of Pakistan had ruled on September 25 that members of the transgender community are “entitled to every rights enjoyed by other citizens,” including voting, freedom from employment discrimination, and the right of inheritance, all of which have been disputed in various instances. The court was

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responding to a petition filed by Dr. Mohammad Aslam Khaki, identified in the article as an “Islamic jurist and human rights activist” who had taken up the cause upon learning that there were no human rights groups working on the issue in his country.

RUSSIA – *Edgeonthenet* reported (Oct. 8) that Russia’s Supreme Court rejected a constitutional challenge to St. Petersburg’s law that bans “gay propaganda,” but the court gave a limiting construction to the law, saying that it can be enforced only “against direct appeals to minors to engage in homosexual activity.” Under that reading of the measure, gay rights demonstrations and parades should be lawful if appropriate care is taken about the messages on signs and publications. However, local authorities have been upheld in denying licenses for public gay rights actions, despite past rulings by the European Court of Human Rights on the political rights of gay people in Russia, and several arrests have been made of peaceful demonstrators against these local ordinances in St. Petersburg and Moscow. * * * On October 30, the Moscow City Court upheld a decision by the municipality to ban a gay pride parade that was to be held next May 27. Parade organizers indicated they would appeal the ruling, taking the case to the European Court of Human Rights if necessary. *Moscow Times*, Oct. 30.

SERBIA – The Ministry of the Interior announced on Oct. 3, just three days before a scheduled gay pride march in Belgrade, that the event would not be allowed to go ahead, due to fears about public safety from anticipated violent reactions to the event. The ban was enacted by the National Security Council. Serbia’s application to join the European Union is still pending, and this decision is likely to generate adverse comment about the country’s willingness to accept the human rights principles to which members are supposed to subscribe.

TURKEY – A chamber of the European Court of Human Rights ruled on October 9 that Turkey had violated the European Convention on Human Rights by its treatment of a gay prison inmate. Ruling in *X*

v. Turkey, Application No. 24626/09, which is a preliminary ruling, the chamber found violations of Article 3 (prohibition of torture and inhuman or degrading treatment) and Article 14 taken together with Article 3 (prohibition of discrimination). In 2008, at age 19, the applicant was given a ten-year prison sentence for various offences including forgery, deception, credit-card fraud and misrepresentation in official documents. He was placed in a cell with heterosexual prisoners, who bullied and intimidated him, leading him to ask prison administration to transfer him for safety reasons. Their response was to put him in an isolation cell normally used for punitive detention, which had no washbasin, was dirty and poorly lit, and was regularly visited by rats. He was excluded from all social activity in the prison. “He had no access to outdoor exercise and was allowed out only to see his lawyer or to attend hearings.” After he made several unsuccessful complaints about these conditions, he was sent to a psychiatric hospital for evaluation, where he was diagnosed as being depressive. He also presented evidence about another gay inmate being subjected to similar conditions. In February 2010 the applicant was finally transferred to a different prison and placed with three other inmates in a standard cell where he enjoyed the rights normally accorded to prisoners. The chamber of seven judges unanimously found that this treatment violated the prohibition on inhuman or degrading treatment of prisoners, and by vote of 6-1 that the applicant had been subjected to discrimination in violation of his Convention rights. The opinion was rendered in French, and this summary is based on the court’s press release in English.

UKRAINE – Following the example of several Russian cities and a measure introduced into the Russian parliament, the Ukraine parliament approved on first reading a measure to ban “promotion of homosexuality.” Supporters of the measure stated that the bill was intended to bolster national security by limiting a “lifestyle choice” associated with the spread of HIV/AIDS. They also argued that homosexuality would destroy the institution of the family and lead to a shortage of children,

resulting in a demographic crisis for the nation. The bill would authorize punishment up to five years in jail for anybody guilty of “promoting homosexuality.” *Radio Free Europe Documents*, Oct. 2.

UNITED KINGDOM – *The Guardian* (Oct. 27) reported that the Child Support Agency had gone after Mark Langridge, a gay man who donated sperm to a lesbian couple to help them have two children thirteen years, for child support payments. Langridge, who is in a civil partnership with a same-sex partner, has had no contact with the women and children since 2004, but the agency’s position is that he must either prove that he is not the biological father of the children through a DNA test or begin making monthly support payments. Changes in the law since Langridge agreed to donate sperm in 1997 would insulate him from liability today, but the legal changes were not made retroactive. A spokesperson for the agency, responding to an inquiry by *The Guardian*, said, “The law covering unlicensed sperm donation has always been very clear. Only anonymous sperm donors, at licensed centers, are exempt from being treated as the legal father of a child born as a result of their donation.” If the donation had taken place after April 2009, or had been done through a clinic, the donor would not have been deemed a parent of the child.

UNITED KINGDOM – A Reading County Court ruled that Susanne Wilkinson, the owner of the Swiss B&B in Cookham, Berkshire, violated the Equality Act by denying a room to Michael Black and John Morgan, who had booked a reservation at her establishment. Ms. Wilkinson, the wife of an evangelical church leader, cited religious objections to homosexual conduct as the reason for her action, and argued to the court that she should be protected in the practice of her religious beliefs. The judge found direct discrimination, but commented that she would have found indirect discrimination based on the establishment’s policy that limited rental of double rooms to married different-sex couples. The court found that the Equality Act’s requirement that service providers not discriminate based on sexual ori-

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entation did not unfairly limit the religious beliefs of the business owner. An appeal will likely be sought, and the leader of the right-wing British National Party, Nick Griffin, is being investigated by police after he posted to Twitter the address of Black and Morgan with the comment, "A British Justice team will come up to Huntington & give you a bit of drama by way of reminding you that an English couple's home is their castle." *Daily Telegraph*, Oct. 19; *Hunts Post*, Oct. 24.

UNITED KINGDOM – The *Daily Telegraph* (Oct. 17) reports that a three-judge appellate panel has rejected a woman's attempt to block the placement of her children with a gay couple. A trial court had ruled that the woman, an alcoholic, was incapable of looking after her boys, aged 4 and 6. She did not object to the ruling until after she learned that the local council planned to place the boys with two gay men. Speaking for the court of appeal, Dame Janet Smith said, "The evidence was all one way; this couple are suitable adoptive parents and there is no specific reason to think that the placement might fail." The children had been freed for adoption in September 2011. In dismissing the appeal, Dame Janet said that the matter had to be concluded quickly, since time was of the essence for the children, but the Camden Council agreed not to finalize the placement while the mother seeks further appeal to the Supreme Court.

UNITED KINGDOM – Stonewall, the U.K.'s leading LGBT rights organization, named Roman Catholic Cardinal Keith O'Brien as "bigot of the year" for his offensively phrased opposition to pending legislation on same-sex marriage. The organization also designated as "hero of the year" Anglican Reverend Giles Fraser, a heterosexual who has strongly advocated for LGBT equality, including same-sex marriage. Ruth Davidson MSP, leader of the Scottish Conservatives, and a supporter of same-sex marriage legislation pending in the Scottish parliament, was named politician of the year. Roman Catholic officials responded with outrage. One might think that they would glory in the designation of their senior leader as an outstand-

ing foe of equality for gay people. Some corporate sponsors of the annual Stonewall awards event threatened to withdraw their sponsorship over the "bigot of the year" designation. Cardinal O'Brien did not show up at the awards event to accept his accolade. *The Independent*, Nov. 2. ■

New York Governor Andrew Cuomo has appointed Supreme Court Justice **Paul Feinman** to the Appellate Division, 1st Department on October 2. Justice Feinman is the first openly-gay man to sit in the Appellate Division in New York, and the third openly gay or lesbian appellate judge, joining Justice Rosalyn Richter, also on the 1st Department, and Justice Elizabeth Garry, on the 3rd Department. Justices Richter and Garry were appointed to the Appellate Division by Governor David Paterson in 2008. Justice Feinman, a graduate of the University of Michigan Law School and Columbia University, began his career with the Legal Aid Society of Nassau County in the Criminal Appeals Bureau, then becoming a senior staff attorney at the Legal Aid Society of New York's Criminal Defense Division in Manhattan. He left practice to become Principal Law Clerk to Justice Angela M. Mazzaelli, then was elected to the New York City Civil Court and, in 2007, the New York State Supreme Court in New York County. In New York, only elected Supreme Court justices are eligible for appointment to the Appellate Division of the Supreme Court. Justice Feinman is a longtime member of LeGaL, immediate past president of the International Association of LGBT Judges, and Presiding Member of the New York State Bar Association's Judicial Section.

Equality Forum, an international LGBT civil rights organization, will honor **Mary L. Bonauto**, Gay & Lesbian Advocates & Defenders' Civil Rights Project Attorney, as an "icon" during National LGBT History Month, according to an October 4 news release by GLAD. Bonauto was co-counsel in GLAD's historic victories in *Baker v. Vermont* and *Kerrigan v. Dep't of Public Health*, cases that are landmark rulings in the historic struggle for legal recognition of same-sex couples, and is among

the most respected (and feared) gay rights litigators in New England and the nation.

Jennifer C. Pizer will rejoin Lambda Legal as Senior Counsel and Director of Lambda's new Law & Public Policy Project. After a fifteen-year career with Lambda, Pizer left in 2011 to become Legal Director of the Williams Institute at UCLA Law School. Her new position at Lambda will enable her to continue and expand the kind of public policy work that she was doing at the Williams Institute, with the resources of a national public interest law firm.

Going international with their Out & Proud Corporate Counsel awards program, the National LGBT Bar Association announced that on Nov. 15 they will honor **Timothy Hailes**, Managing Director and Associate General Counsel of JPMorgan Chase & Co., with a reception at Shoreditch House in London, England. The awards are intended to recognize the achievements of "out and proud" LGBT lawyers in the corporate world.

Lambda Legal has announced two staff attorney positions for which they are soliciting applicants. One is for Youth in Out-of-Homecare Staff or Senior Staff Attorney in the New York City office. The other is for a Staff Attorney or Senior Staff Attorney (depending upon experience) who could be based either in the New York City office or the Dallas, Texas, office. Details about the positions can be found on Lambda Legal's website. The positions are open until filled, and interviewing will start November 8. Applicants should send a resume, brief legal writing sample (preferably including discussion of a constitutional, discrimination, or other complex issue), and a letter or email explaining their interest and how they learned of the opening, either by surface mail or email, to: Katy Tokieda, Legal Administrative Manager, Lambda Legal, 120 Wall St., 19th Fl., NY, NY 10005, ktokieda@lambdalegal.org. Include words describing the position sought in the first line of the address on the envelope or the subject line of the email transmitting application materials. Lambda is an equal opportunity employer. ■

PUBLICATIONS NOTED

LGBT & RELATED ISSUES

1. Anthony, Deborah J., *Caught in the Middle: Transsexual Marriage and the Disconnect between Sex and Legal Sex*, 21 Tex. J. Women & L. 153 (Spring 2012).
2. Arshagouni, Paul G., *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DePaul L. Rev. 799 (Spring 2012).
3. Cardinale, Jessie R., *The Injustice of Infertility Insurance Coverage: An Examination of Marital Status Restrictions Under State Law*, 75 Albany L. Rev. 2133 (2011/12).
4. Carlino, Veronica, *Fairness Considerations: The Impact of Sexual Orientation on Asylum, Refugee Status, and Persecution*, 18 N. Eng. J. Int'l & Comp. L. 477 (2012).
5. David, Ted, and Scott H. Novak, *IRS Tap Traps: Advising Your Married or Soon-to-be Married Clients*, 26 Practical Tax Lawyer 11 (Summer 2012).
6. El Menyawi, Hassan, *Activism from the Closet: Gay Rights Strategising in Egypt*, 7 Melb. J. Int'l L. 28 (May 2006) (Symposium: The Cultures of Human Rights).
7. Eskridge, William N., Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 Georgetown L.J. 1881 (Aug. 2012)(mini-symposium on same-sex marriage).
8. Espinoza-Madrigal, Ivan, *Sexual Orientation, Gender Identity, and Diversity in the Workplace*, 58 Practical Lawyer 39 (Aug. 2012).
9. Fileff, Meredith, *Hospital Visitation: The Forgotten Gay Rights Struggle*, 45 J. Marshall L. Rev. 939 (Spring 2012) (Symposium: The Past, Present and Future of Supreme Court Jurisprudence on ERISA).
10. Flum, Nora, *Constituting Status: An Analysis of the Operation of Status in Perry v. Schwarzenegger*, 33 Women's Rts. L. Rep. 58 (Fall 2011).
11. Forman, David M., *A Room for "Adam and Steve" at Mrs. Murphy's Bed and Breakfast: Avoiding the Sin of Inhospitality in Places of Public Accommodation*, 23 Colum. J. Gender & L. 326 (2012).
12. Gould, David Scott, *Funeral Protests: The Death of Free Speech?*,

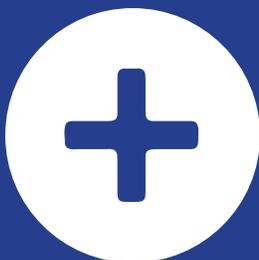
Specially Noted

Symposium, The Uniform Probate Code: Remaking American Succession Law, 45 U. Mich. J. L. Reform No. 4 (Summer 2012), includes several articles that raise issues of interest to people doing estate planning for LGBT couples. Article not separately noted here.

Editor's Notes

- All points of view expressed in Lesbian/Gay Law Notes are those of identified writers, and are not official positions of LeGaL 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 correspondence to the Editor or send via e-mail.

13. NY Law Journal, Oct. 4, 2012, at 4.
13. Groshoff, David, *Child, Please – Stop the Anti-Queer School Bullycides: A Modest Proposal to Hoist Social Conservatives by their own "God, Guns, and Gays"* Petard, 11 U. Md. L.J. of Race, Religion, Gender & Class 151 (Fall 2011).
14. Hunter, Nan D., *Introduction: The Future Impact of Same-Sex Marriage: More Questions Than Answers*, 100 Georgetown L.J. 1855 (Aug. 2012) (mini-symposium on same-sex marriage).
15. Infanti, Anthony C., *LGBT Taxpayers: A Collision of "Others"*, 13 Georgetown J. Gender & L. 1 (2012).
16. Lombardo, Lauren, *Does Heather Have Two Mommies?: The Importance of Full Faith and Credit Recognition for Adoptions by Same-Sex Couples*, 39 Fordham Urban L.J. 1301 (May 2012).
17. Mayer, Lloyd Hitoshi, *Nonprofits, Politics, and Privacy*, 62 Case W. Res. L. Rev. 801 (Spring 2012).
18. Milne, Elijah L., *Marriage and the Religion Clauses*, 85 St. John's L. Rev. 1451 (Fall 2011).
19. Mortazavi, Sarah, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 Georgetown L.J. 2249 (Aug. 2012).
20. Nejaime, Douglas, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 Cal. L. Rev. 1169 (Oct. 2012).
21. Nordberg, Erica, *Ignoring Human Rights for Homosexuals: Gross Violations of International Obligations in Cameroon*, 27 Am. U. Int'l L. Rev. 439 (2012).
22. Nosanchuk, Mathew S., *Response: No Substitutions, Please*, 100 Georgetown L.J. 1989 (Aug. 2012) (mini-symposium on same-sex marriage; response to Eskridge, above).
23. Pasek, Daniel, *Love and War: An Argument for Extending Dependent Benefits to Same-Sex Partners of Military Service Members*, 6 Harv. L. & Pol'y Rev. 459 (Summer 2012).
24. Piar, Daniel F., *Morality as a Legitimate Government Interest*, 117 Penn St. L. Rev. 139 (Summer 2012).
25. Pines, Daniel, *The Extraordinary Restrictions on the Constitutional Rights of Central Intelligence Agency Employees: How National Security Concerns Legally Trump*



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PUBLICATIONS NOTED

LGBT & RELATED ISSUES

- Individual Rights*, 21 J. Transnat'l L. & Pol'y 105 (2011-12).
26. Polikoff, Nancy D., *Response: And Baby Makes . . . How Many? Using In re M.C. To Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple*, 100 Georgetown L.J. 2015 (Aug. 2012) (mini-symposium on same-sex marriage; Response to Eskridge, above).
 27. Rains, Robert E., *A Minimalist Approach to Same-Sex Divorce: Respecting States that Permit Same-Sex Marriages and States that Refuse to Recognize Them*, 2012 Utah L. Rev. 393.
 28. Schwartz, Justin, *It Ain't Necessarily So: The Misuse of "Human Nature" in Law and Social Policy and the Bankruptcy of the "Nature-Nurture" Debate*, 21 Tex. J. Women & L. 187 (Spring 2012).
 29. Segrist, Peter J., *The Gradual, Constitutional Destruction of Intentional Infliction of Emotional Distress and Why the Supreme Court Made the Right Call in Snyder v. Phelps*, 57 Loyola L. Rev. 899 (Winter 2011).
 30. Stinson, Judith M., *The Right to (Same-Sex) Divorce*, 62 Case W. Res. L. Rev. 447 (Winter 2011).
 31. Travis, Michelle A., *Impairment as Protected Status: A New Universality for Disability Rights*, 46 Ga. L. Rev. 937 (Summer 2012).
 32. Tuerkheimer, Deborah, *Judging Sex*, 97 Cornell L. Rev. 1461 (Sept. 2012).
 33. Turner, January, *Tinkering With Tinker: Applying a New Test to Peer on Peer Bullying in Social Media*, 8 Okla. J. L. & Tech. 59 (2012).
 34. VanWormer, Chelsea, *Outdated and Ineffective: An Analysis of Michigan's Gestational Surrogacy Law and the Need for Validation of Surrogate Pregnancy Contracts*, 61 DePaul L. Rev. 911 (Spring 2012).
 35. Vestal, Allan, *To Soften Their Obdurate Hearts: The Southern Baptist Convention and Marriage Equality*, 21 Tulane J. L. & Sexuality 49 (2012).
 36. Wilson, Robin Fretwell, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C.L. Rev. 1417 (2012).
 37. Zimmerman, Shosana, *Pushing the Boundaries?: Equal Protection, Rational Basis, and Rational Decision Making by District Courts in Cases Challenging Legislative Classifications on the Basis of Sexual Orientation*, 21 S. Cal. Interdisc. L.J. 727 (Spring 2012).