

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

January 2014

# WILD WEST

*Historic Year Ends With Breakthrough Marriage  
Equality Rulings in New Mexico & Utah*

## EXECUTIVE SUMMARY

- 1 Unanimous New Mexico Supreme Court Ruling for Marriage Equality
- 4 Utah May Be the 18th U.S. Marriage Equality State; Petition for Stay Pending before U.S. Supreme Court
- 7 United States Same-Sex Marriage States Doubled in 2013
- 8 Indiana Appeals Court Says Spouse's Gender Change Doesn't Void an Existing Marriage
- 9 Supreme Court of India Upholds as Constitutional the Penal Code Section Banning "Carnal Intercourse against the Order of Nature"
- 11 Early Marriage Licenses Ordered for Illinois Same-Sex Couples with Medical Issues
- 12 Federal Judge Issues Permanent Injunction against Ohio on Marriage Recognition
- 14 Federal Court Refuses to Dismiss HIV-Related Housing Discrimination Claim against LeFrak Realty Organization
- 16 New York Trial Judge Refuses to Dismiss Transgender Woman's Discrimination Claim against Residential Drug Treatment Program
- 17 Houston Mayor's Order Sparks Court Battle on Same-Sex Spousal Benefits
- 18 Colorado Appeals Court Rules on Same-Sex Parents Claim
- 19 Illinois Appeals Court Revives Challenge to Administration of Gay Man's Trust
- 20 Court Denies NYC's Motion to Dismiss Discrimination Suit by Transgender Woman
- 21 Court Rules in Favor of Georgia Man Who Failed to Register as a Sex Offender after Sodomy Conviction
- 22 U.S. Magistrate Whittles down Gay Inmate's Civil Rights Claim
- 23 High Court of Australia Rules Against Capital Territory's Marriage Equality Act
- 24 Rikers Island Inmate States Retaliation Claim for Revealing HIV Status
- 26 Colorado Administrative Court Rules against Discriminatory Baker in Wedding Cake Dispute
- 27 European Court Rules on Equal Benefits Case for Same-Sex Couple

29 Notes    47 Citations

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

### Editor-In-Chief

*Prof. Arthur S. Leonard*  
New York Law School  
185 West Broadway  
New York, NY 10013  
(212) 431-2156  
asleonard@aol.com  
arthur.leonard@nyls.edu

### Contributors

*David Buchanan, SC*  
*Bryan Johnson, Esq.*  
*Gillad Matiteyahu, NYLS '13*  
*Parul Nanavati, NYLS '15*  
*William J. Rold, Esq.*  
*Tara Scavo, Esq.*  
*Matt Skinner, Esq.*  
*Brad Snyder, Esq.*  
*Prof. Robert Wintemute*  
*Stephen E. Woods, Esq.*  
*Eric Wursthorn, Esq.*

### Production Manager

*Leah Harper*

### Circulation Rate Inquiries

LeGaL Foundation  
@ the Centre for Social Innovation  
601 West 26th Street, Suite 325-20  
New York, NY 10001  
(212) 353-9118 / info@le-gal.org  
Inquire for rates.

### Lesbian/Gay Law Notes Archive

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

### Lesbian/Gay Law Notes Podcast

Listen to/download the  
Lesbian/Gay Law Notes Podcast  
on iTunes ("search LGBT Legal"),  
or at <http://legal.podbean.com>.

© 2014

**The LeGaL Foundation**  
of the LGBT Bar Association  
of Greater New York  
<http://le-gal.org>

ISSN

8755-9021

*Lesbian/Gay Law Notes welcomes authors interested in becoming a contributor to the publication to contact [info@le-gal.org](mailto:info@le-gal.org).*

# Unanimous New Mexico Supreme Court Ruling for Marriage Equality

The New Mexico Supreme Court unanimously ruled December 19 in *Greigo v. Oliver*, 2013 WL 6670704, 2013 N.M. LEXIS 414, that the state's marriage law denies same-sex couples the right to marry and thus violates the Equal Protection Clause of the state's constitution. Wrote Justice Edward L. Chavez for the court: "We hold that the State of New Mexico is constitutionally required to allow same-gender couples to marry and must extend to them the rights, protections, and responsibilities that derive from civil marriage under New Mexico law." The court's ruling was generally anticipated in light of the tone of the oral arguments

of marriage equality activity at the county level in the months following the *Windsor* ruling persuaded the court that it was appropriate to grant a motion that had been filed by the New Mexico Association of Counties, asking the court to definitively resolve the question of same-sex marriage and not wait for the issue to percolate up through the normal appeals process. The court, noting that some counties were giving licenses and others were not, characterized the current situation as "chaos statewide", justifying the court stepping in to issue a definitive ruling.

The first question the court had to address was whether New Mexico's

it was necessary to determine whether same-sex couples were entitled to the same rights and benefits and subject to the same responsibilities as different-sex couples for all of those other laws.

The plaintiffs had argued alternatively that denying marriage to same-sex couples violated equal protection and deprived them of a fundamental right. The court decided to begin its analysis with the equal protection argument, and abstained from ruling on the fundamental right argument as "unnecessary."

The first step for equal protection was deciding whether the plaintiff same-sex couples are "similarly

**The court's ruling was generally anticipated in light of the tone of the oral arguments and the rulings by several New Mexico trial courts over the summer directing county clerks to issue marriage licenses to same-sex couples.**

and the rulings by several New Mexico trial courts over the summer directing county clerks to issue marriage licenses to same-sex couples, reflecting the momentum towards marriage equality generated by the U.S. Supreme Court's June 26 decision in *U.S. v. Windsor*, which invalidated Section 3 of the federal Defense of Marriage Act and led the federal government to recognize state-sanctioned same-sex marriages for purposes of federal law.

The New Mexico Constitution gives the state's Supreme Court "superintending control" over the lower courts, which the court has construed as authorizing it to take appeals directly from the trial courts, by-passing the intermediate court of appeals, "where it is deemed to be in the public interest to settle the question involved at the earliest moment." The sudden outbreak

of marriage equality activity at the county level in the months following the *Windsor* ruling persuaded the court that it was appropriate to grant a motion that had been filed by the New Mexico Association of Counties, asking the court to definitively resolve the question of same-sex marriage and not wait for the issue to percolate up through the normal appeals process. The court, noting that some counties were giving licenses and others were not, characterized the current situation as "chaos statewide", justifying the court stepping in to issue a definitive ruling. The first question the court had to address was whether New Mexico's marriage statutes already allow for same-sex marriage. This was actually a serious question, because many of the operative provisions of the statutes are gender neutral, and New Mexico has never enacted either an explicit statutory or constitutional ban on same-sex marriage. However, the court said that statutes must be construed according to the intent of the legislature, and it found that the legislature had not intended to authorize same-sex marriages. This conclusion was bolstered by references to "husband" and "wife" in various other statutes, and by provisions governing the official forms to be used in administering the marriage laws, which use gendered language to describe the parties. The court pointed out that even if the marriage statute itself was gender-neutral, many other statutes and regulations were not, so

situated" to different-sex couples who are allowed to marry. Opponents of same-sex marriage argue that same-sex couples are not similarly situated to different-sex couples because same-sex couples cannot procreate by copulating with each other. Rejecting this argument, Justice Chavez wrote, "Fertility has never been a condition of marriage, nor has infertility ever been a specific ground for divorce." But even if one assumed that "procreation" was "an overriding purpose" of the state's marriage laws, "same-gender and opposite-gender couples are still similarly situated, yet they are treated differently." Different-sex couples who can't procreate are not prohibited from marrying, he pointed out, and they still enjoy all the same rights and benefits of marriage as couples who can. Same-sex couples can adopt or, in some cases, use

alternative reproductive technology to have children, just as some different-sex couples do.

But the court decided that these procreation arguments are a bit beside the point, because, in its view, the purpose of the state's marriage laws "is to bring stability and order to the legal relationships of committed couples by defining their rights and responsibilities as to one another, their property, and their children, if they choose to have children," and the court found this purpose as "self-evident from the structure of our laws." As to this purpose, there could be no question that same-sex and different-sex couples are similarly situated. The court noted that the same conclusion had been reached by the highest courts of California, Connecticut, and Iowa.

The court rejected the plaintiffs' argument that this case was about sex discrimination and thus should invoke "strict scrutiny" under the state's Equal Rights Amendment, which expressly forbids sex discrimination. The court went on at some length distinguishing sex discrimination from sexual orientation discrimination, and accepted the argument that the exclusion of same-sex couples from marrying is not sex discrimination because both men and women are equally prohibited from marrying members of their own sex. Instead, the court focused on sexual orientation as the grounds of discrimination. "Many courts that have considered the issue have applied the equal protection analysis in same-gender marriage cases based upon sexual orientation, not gender," wrote Justice Chavez. "Our analysis of sex discrimination cases has been gender-based, scrutinizing the historical discrimination against women." Focusing on this as a sexual orientation discrimination case, the court had to decide whether sexual orientation discrimination should be subjected to strict scrutiny, intermediate review, or the deferential rational basis standard, and opted for the intermediate approach.

Here the court confronted the argument that gays have now become such a politically powerful group that it

is inappropriate for the courts to presume that a government policy disadvantaging gay people is unconstitutional. While acknowledging the significant progress that gay people have made in winning political battles, the court nonetheless concluded "that effective advocacy for the LGBT community is seriously hindered by their continuing need to overcome the already deep-rooted prejudice against their integration into society, which warrants our application of intermediate scrutiny in this case." The court alluded to the phenomenon of the closet as being an impediment to gay political organizing, and the continuing role of societal prejudice and anti-gay violence in deterring people from coming out. "It is reasonable to expect that the need of LGBTs to keep their sexual orientation private also hinders or suppresses their political activity," he wrote, also referring to gay referendum losses such as Proposition 8 and the Colorado anti-gay Amendment 2, both of which were eventually invalidated by the Supreme Court in *Romer v. Evans* and *Lawrence v. Texas*.

The court summarized recent marriage equality legislative and litigation developments, but from the perspective of showing what a long distance remains to complete equality, in light of the small number of states that have so far legislated for same-sex marriage and the fact that a majority of the states (and the federal government) have not yet passed laws banning discrimination against LGBT people.

The court found "a history of discrimination and political powerlessness based on a characteristic that is relatively beyond their control" to be more salient in determining the appropriate standard for judicial review, and asserted that "whether same-gender couples (the LGBT community) are a discrete group who have been subjected to a history of purposeful unequal treatment is not fairly debatable," and was not questioned by the opponents in this case. That was sufficient for the court to embrace intermediate scrutiny, under which a discriminatory government policy is presumed unconstitutional and the burden is on those who seek to justify the policy to

show that it advances an important state interest.

The court then rejected all the arguments put forward by the opponents, both the state and various organizations that filed briefs supporting the state's position. Those arguments were the usual three: promoting responsible procreation, supporting responsible child-rearing, and preventing "deinstitutionalization of marriage" that opponents predict would occur if same-sex couples are allowed to marry. As to the first, Chavez wrote, "we fail to see how forbidding same-gender marriages will result in the marriages of more opposite-gender couples for the purpose of procreating, or how authorizing same-gender marriages will result in the marriages of fewer opposite-gender couples for the purpose of procreating." Questioning what the opponents mean by "responsible procreation," the court observed that "when same-gender couples decide to have children, they necessarily do so after careful thought and considerable expense, because for them to raise a family requires either lengthy and intrusive adoption procedures or assistive reproduction." Interestingly, this very same observation was cited by the New York Court of Appeals in *Hernandez v. Robles* as justifying *not* extending marriage to same-sex couples because they would not "need" the societal support provided by marriage in order to provide a stable home for their children. To the New Mexico Supreme Court, it was an indication that same-sex couples are likely to take having children much more seriously than different-sex couples, meaning that the responsible procreation argument was ridiculous. In this sense, gays are the ultimate responsible procreators!

As to child-rearing, the court cited voluminous evidence of studies supporting the abilities of same-sex couples to raise children well, and noted that New Mexico law already supports same-sex couples as parents through its interpretation of the Uniform Parentage Act, most recently in the 2012 Chatterjee decision on co-parent custody. "We fail to see how depriving committed same-gender couples, who

want to marry and raise families, of federal and state marital benefits and protections will result in responsible child-rearing by heterosexual married couples,” Chavez commented. “In the final analysis, child-rearing for same-gender couples is made more difficult by denying them the status of being married and depriving them of the rights, protections, and responsibilities that come with civil marriage.” The court also pointed out that the children whom same-sex couples are raising are disadvantaged when their parents are deprived of marital status, and that the associated burdens and ineligibility for government benefits is “inequitable.” “There is nothing rational about a law that penalizes children by depriving them of state and federal benefits because the government disapproves of their parents’ sexual orientation,” he exclaimed.

The court quickly dismissed the argument that allowing same-sex couples to marry will lead to “deinstitutionalization of marriage,” that is the contention that marriage itself will be diminished and fewer different-sex couples will want to get married as a result. There was no evidence introduced that this has been the result in jurisdictions where same-sex marriage has been allowed, and the argument struck the court as akin to saying that the state has a right to exclude same-sex couples from marrying because it disapproves of same-sex couples on grounds that have been ruled out by such U.S. Supreme Court decisions as *Romer* and *Lawrence*.

As a remedy, the court ruled that New Mexico statutes should be interpreted to allow same-sex marriages and to afford such marriages all the rights and benefits given to different-sex marriages. “Whenever reference is made to marriage, husband, wife, spouse, family, immediate family, dependent, next of kin, widow, widower or any other word, which, in context, denotes a marital relationship, the same shall apply to same-gender couples who choose to marry.” The court also ordered that county clerks use “gender neutral language” in the application and marriage certificate forms. Acting

in its superintending role, the court ordered the lower courts “to mandate compliance with the holdings and rationale of this opinion.”

[In one sour response to the ruling, State Senator Bill Sharer (R-Farmington), prefiled Senate Joint Resolution 6 the day after the Supreme Court decision was announced, proposing a constitutional amendment to ban same-sex marriages. Since the court’s decision was based entirely on the state constitution, it could be reversed through an amendment to that document. The language of the proposed amendment is, “Marriage, which is a right, in this state shall consist only of the union between one man and one woman.” Similar amendments have been proposed in the past, but have never made it through the state legislature to be placed on the ballot,

decides upon reconvening in January to move the date up. With the addition of New Mexico, Utah (see below) and, soon, Illinois, the march of marriage equality will embrace about 40% of the nation’s population, building towards the critical mass that will support an eventual U.S. Supreme Court victory when one or more of the several dozen pending marriage equality cases in other states finally gets to the nation’s highest tribunal. Since this case was decided entirely on state constitutional grounds, there is no basis for the state to appeal this ruling any further.

Because several cases ended up getting folded into the appeal to the New Mexico Supreme Court, a small army of lawyers was involved in representing the various plaintiffs, the state, and “friends of the court” who filed numerous briefs. The LGBT organizations directly

## As a remedy, the court ruled that New Mexico statutes should be interpreted to allow same-sex marriages and to afford such marriages all the rights and benefits given to different-sex marriages.

which is why New Mexico is one of the handful of states that had not explicitly banned same-sex marriage. *Santa Fe New Mexican*, Dec. 21.]

So, it’s done. New Mexico is now the 17th state to embrace marriage equality on a statewide level. Since county clerks in 8 counties had been issuing marriage licenses for several months, and about 1,400 marriages had already taken place when the court’s ruling was announced, New Mexico should probably be given pride of place as the 16th state, since the first same-sex marriages in Illinois did not take place until December pursuant to federal court orders to allow some early same-sex marriages due to medical exigencies, with most same-sex couples who want to marry having to wait until either June 1, 2014, or an earlier date if the Illinois legislature

involved in representing plaintiffs include the National Center for Lesbian Rights and ACLU’s national LGBT rights project. The ACLU of New Mexico was involved in representing the local plaintiffs, with several cooperating attorneys from New Mexico. The flood of amicus briefs is too numerous to list, but it is worth giving particular note to briefs filed on behalf of various professional associations that the court cited to support its conclusions about same-sex couples as parents. There were briefs from New Mexico municipalities, professors from the state’s law school, and a wide range of LGBT rights organizations in the state, as well as Gay & Lesbian Advocates & Defenders (GLAD), which was active in the successful marriage equality litigation in several New England states. ■

# Utah May Be the 18th U.S. Marriage Equality State; Petition for Stay Pending before U.S. Supreme Court

Utah may be the 18th marriage equality state, although it is becoming difficult to figure out how to number them. On December 20, U.S. District Judge Robert J. Shelby granted an injunction to the plaintiffs in *Kitchen v. Herbert*, 2013 WL 6697874, 2013 U.S. Dist. LEXIS 179331 (D. Utah), a federal constitutional challenge to Utah's statutory and state constitutional ban on same-sex marriage. Judge Shelby, who was appointed by President Barack Obama on the recommendation of Utah's two Republican Senators, Orrin Hatch and Mike Lee, ruled that the right of same-sex couples to

for the 10th Circuit to stay the ruling, but both the district judge and the 10th Circuit panel repeatedly rebuffed the state, the latter most dramatically late on Christmas Eve, December 24. The state argued repeatedly that same-sex marriage in Utah should not be allowed based merely on the ruling of a single district judge, whose decision it argued should be stayed until the 10th Circuit had a chance to review it on the merits. Judge Shelby rejected the state's argument that there was some kind of "emergency" or "chaos" as a result of his ruling, and found that the state failed to meet the four criteria to stay a trial court ruling pending

directed "expedited consideration of this appeal." The governor reacted to the 10th Circuit's decision by directing the Attorney General to seek a stay from the Supreme Court, where a motion would be directed to Justice Sonya Sotomayor, the Circuit Justice, who could decide it on her own or refer it to the full court.

Despite the alleged emergency, however, the state failed to file its motion until late on December 31, explaining that it was waiting for the new Attorney General, Sean Reyes, to take office, and was "coordinating" its efforts with outside counsel, Monte Stewart, an Idaho lawyer who had filed an amicus brief opposing same-sex marriage in *Windsor* and *Hollingsworth*. Stewart's petition to Justice Sotomayor argued that this case meets the Supreme Court's criteria for a stay, which are slightly different from the criteria used by the 10th Circuit. He argued that it is likely that the Supreme Court would grant review to a 10th Circuit decision affirming Shelby's opinion, likely that the full Court would reverse the 10th Circuit on the merits, and that a failure to stay the ruling would cause irreparable injury to the state and, arguably, same-sex couples who married and then could find their marriages voided. On the first point, he's undoubtedly correct. A 10th Circuit decision affirming Shelby would probably draw at least four votes on the Supreme Court for certiorari, all that is needed for such a grant, especially as this would open up a circuit split with an earlier 8th Circuit decision rejecting a same-sex marriage claim from Nebraska. The second point is more questionable, and depends heavily on trying to repurpose the operative portions of Justice Kennedy's *Windsor* decision as a federalism ruling, as it was hopefully characterized in his dissent by Chief Justice John Roberts but dismissively rejected in his dissent by Justice

## Shelby did not stay his order, and the Salt Lake County Clerk's office began issuing marriage licenses to same-sex couples shortly after the decision was announced.

marry is a "fundamental right" under the 14th Amendment, and that the state had shown no rational basis to deny this right to same-sex couples. Shelby did not stay his order, and the Salt Lake County Clerk's office began issuing marriage licenses to same-sex couples shortly after the decision was announced, although Governor Gary Herbert expressed disappointment in the ruling and an appeal was announced to the U.S. Court of Appeals for the 10th Circuit. Salt Lake City Mayor Ralph Becker went to the county clerk's office and performed several same-sex marriage ceremonies, including that of the state Democratic Party Chair, Jim Dabakis and his partner, Stephen Justesen.

Over the ensuing weekend, lawyers for the state struggled to persuade Judge Shelby and then the motion panel

appeal that are followed in the 10th Circuit. See *Kitchen v. Herbert*, 2013 WL 6834634 (D. Utah, Dec. 23, 2013) (not officially published).

In a concise "Order Denying Emergency Motion for Stay and Temporary Motion for Stay," *Kitchen v. Herbert*, No. 13-4178 (Dec. 24, 2013), Circuit Judges Holmes and Bacharach agreed with Shelby, listing the four factors, describing the first two (the likelihood of success on appeal and the threat of irreparable harm if the stay is not granted) as "most critical, and they require more than a mere possibility of success and irreparable harm, respectively," and announced that "having considered the district court's decision and the parties' arguments concerning the stay factors, we conclude that a stay is not warranted." The motions panel

Antonin Scalia. All Stewart has to do on this point to win a stay, according to the Supreme Court precedents he cited, is to persuade a majority of the Court that there is a “fair prospect” that a majority of the Court would vote to reverse the decision below. His argument on irreparable injury is highly contentious, suggesting that Utah suffers a dignitary injury when a court orders it to let same-sex couples marry against the political will of the state, and arguing that the plaintiffs suffer no injury because they are not being deprived of an “established” constitutional right. In this, of course, he is arguing that the case is not about the right to marry, but rather about a right of “same-sex marriage.” This is the same conceptual error that the Supreme Court embraced in *Bowers v. Hardwick* (1986), and that the majority in *Lawrence v. Texas* (2003) identified as a fatal flaw in the earlier case. He also argued, somewhat perversely, that same-sex couples will suffer an irreparable injury if their marriages are voided by a reversal of Judge Shelby’s ruling, but clearly they are willing to risk such injury and that should not be an issue on this stay request. However, he does note that in the event the district court is reversed, the state could encounter difficulties and costs in “unwinding” the hundreds of same-sex marriages that have taken place, assuming that they would be voided by such a decision. Justice Sotomayor gave plaintiffs (now respondents) until noon on January 3 to submit their response. This issue of *Law Notes* necessarily closed on 2013 without knowing how this would turn out.

Utah lawyers Peggy Tomsic, James E. Magleby and Jennifer F. Parrish filed the underlying lawsuit on behalf of three same-sex couples, two of which had been denied marriage licenses by county clerks, while the third couple was married in Iowa and is seeking recognition of their marriage in their domicile state of Utah. The case moved quickly to summary judgment, the cross-motions being argued just weeks ago. Judge Shelby’s opinion

may be the first ruling to reference the marriage equality ruling by the New Mexico Supreme Court issued the day before, in a footnote listing the states that have adopted marriage equality through court decisions. It is definitely the first federal court ruling since the Supreme Court’s decision in *U.S. v. Windsor* to hold directly that same-sex couples have a federal constitutional right to marry, guaranteed by the 14th Amendment’s due process and equal protection clauses.

Shelby found that *Windsor* made clear, as cumulative to prior Supreme Court decisions, that the Supreme Court’s 1972 ruling in *Baker v. Nelson* holding that the issue of same-sex marriage did not present a substantial federal question was no longer a binding precedent on lower courts. He pointed out that the Supreme Court

Shelby, “The court agrees with Justice Scalia’s interpretation of *Windsor* and finds that the important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law.”

Turning to the plaintiffs’ due process challenge, Shelby traced the history of Supreme Court treatment of marriage, showing that the high court has consistently treated the right to marry as a fundamental right. He pointed out that the state did not deny that all citizens, including gay people, have the fundamental right to marry, but the state had made the absurd argument that gays are not deprived of this right in Utah, because they can marry partners of the opposite sex, so their “liberty” interest in marriage

**It is the first federal court ruling since the Supreme Court’s decision in *U.S. v. Windsor* to hold directly that same-sex couples have a federal constitutional right to marry.**

has said that a disposition on that ground ceases to be binding on lower courts when subsequent developments in case law render it obsolete. Shelby found that many Supreme Court cases decided since the 1970s, considered cumulatively, have created a substantial federal question. He also stated his agreement with Justice Antonin Scalia’s statement, in his dissenting opinion in *Windsor*, that “the view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today’s opinion. As I have said, the real rationale of today’s opinion is that DOMA is motivated by ‘bare desire to harm’ couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.” Wrote

is not impaired. “But this purported liberty is an illusion,” wrote Shelby. “The right to marry is not simply the right to become a married person by signing a contract with someone of the opposite sex. If marriages were planned and arranged by the State, for example, these marriages would violate a person’s right to marry because such arrangements would infringe an individual’s rights to privacy, dignity, and intimate association. A person’s choices about marriage implicate the heart of the right to liberty that is protected by the Fourteenth Amendment. The State’s argument disregards these numerous associated rights because the State focuses on the outward manifestations of the right to marry, and not the inner attributes of marriage that form the core justification for why the

Constitution protects this fundamental right.” By contrast, the plaintiffs had shown that the “right to marry” as framed by the state was, for them, “meaningless.”

Shelby rejected the state’s argument that same-sex couples are not “qualified” to marry because they can’t procreate children, holding that such capacity “is not a defining characteristic of conjugal relationships from a legal and constitutional point of view.” Indeed, he found that such a view of marriage “demeans the dignity not just of same-sex couples, but of the many opposite-sex couples who are unable to reproduce or who choose not to have a children,” but are allowed to marry by Utah. Premising the right to marry on the ability to reproduce “is irreconcilable with the right to liberty that the Constitution guarantees to all citizens,” he wrote.

He also rejected the state’s argument that the plaintiffs were seeking some new right of “same-sex marriage,” as opposed to the simple right to marry that is a well-established fundamental right. “The alleged right to same-sex marriage that the State claims the Plaintiffs are seeking is simply the same right that is currently enjoyed by heterosexual individuals,” he wrote, “the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond.” He also rejected the idea that the right at issue could not be fundamental because it never been construed in the past to extend to same-sex couples, commenting, “The Constitution is not so rigid that it always mandates the same outcome even when its principles operate on a new set of facts that were previously unknown. Here, it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian. The court cannot ignore the fact that the Plaintiffs are able to develop a committed, intimate relationship with a person of the same sex but not with a person of the opposite sex. The

court, and the State, must adapt to this changed understanding.”

Concluding on the due process point, Shelby focused on the Supreme Court’s *Lawrence v. Texas* opinion, where Justice Anthony Kennedy wrote that “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education” and held that “persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.” Justice Scalia’s dissent had seized upon this statement to complain that the decision had opened the door to same-sex marriage, and again Judge Shelby found himself in agreement, writing, “The court therefore agrees with the portion of Justice Scalia’s dissenting opinion in *Lawrence* in which Justice Scalia stated that the Court’s reasoning logically extends to protect an individual’s right to marry a person of the same sex.”

Since the court was dealing with a fundamental right, strict scrutiny would apply, and the burden would fall on the state to prove that it had a compelling interest in denying same-sex couples the right to marry, but Judge Shelby did not find it necessary to go that route, since he concluded that none of the arguments the state made in seeking to justify the exclusion was rationally related to any of the legitimate interests it mentioned. In this part of the opinion, Shelby’s arguments were strikingly similar to those made by Justice Edward Chavez of the New Mexico Supreme Court the day before. Indeed, Shelby found that some of the interests the state articulated were actually harmed by banning same-sex marriage, especially when it came to child-rearing.

Turning to the equal protection challenge, Shelby said he was bound by 10th Circuit precedent to treat sexual orientation discrimination under the rational basis test, even if an argument could be made for heightened scrutiny on this basis. He noted that this case could be analyzed

as a sex discrimination case, thus meriting heightened scrutiny under the Supreme Court’s precedents. But, having already found in his due process analysis that Utah lacked a rational basis for excluding same-sex couples from marriage, he didn’t have to use any higher standard of review to dispose of the case. He also noted that the Supreme Court in *Romer v. Evans* and *U.S. v. Windsor* seemed to be taking a different approach to equal protection entirely, asking whether a challenged law had the purpose and effect of discriminating in some unusual way, in which case something more demanding than traditional rational basis review would be required, but he said that the Supreme Court had not provided clear guidance to lower courts about how to apply this new method of analysis.

Applying rational basis review, as noted above, Shelby concluded that there was no rational basis. Summarizing his analysis, he wrote, “In its briefing and at oral argument, the State was unable to articulate a specific connection between its prohibition of same-sex marriage and any of its stated legitimate interests. At most, the State asserted: ‘We just simply don’t know.’ This argument is not persuasive. The State’s position appears to be based on the assumption that the availability of same-sex marriage will somehow cause opposite-sex couples to forego marriage. But the State has not presented any evidence that heterosexual individuals will be any less inclined to enter into an opposite-sex marriage simply because their gay and lesbian fellow citizens are able to enter into a same-sex union. Similarly, the State has not shown any effect of the availability of same-sex marriage on the number of children raised by either opposite-sex or same-sex partners.” Shelby also referred to an amicus brief that had been filed by LGBT litigation groups in the 9th Circuit in the Proposition 8 case, in which data from states that had allowed same-sex marriage, beginning with Massachusetts in 2004, had not shown any adverse impact on the rate



of opposite-sex marriage or divorce.

Having concluded that the ban on same-sex marriage is unconstitutional, Shelby found that his disposition of the case rendered the question of recognition of same-sex marriages from other states moot. "Utah's current laws violate the rights of same-sex couples who were married elsewhere not because they discriminate against a subsection of same-sex couples in Utah who were validly married in another state," he wrote, "but because they discriminate against all same-sex couples in Utah."

Shelby granted the plaintiffs' motion for summary judgment, and denied the state's motion. "The court hereby enjoins the State from enforcing Sections 30-1-2 and 30-1-4.1 of the Utah Code and Article I, Section 29 of the Utah Constitution to the extent these laws prohibit a person from marrying another person of the same sex," he concluded. He made no mention of a stay, and having issued his decision on a Friday afternoon, he virtually guaranteed that the state would not be able to get a stay from the 10th Circuit in time to prevent same-sex couples from seeking marriage licenses. Confronting this reality, the clerk's office in Salt Lake City started issuing licenses to same-sex couples shortly after the decision was announced, and other counties began to join in, although some remained holdouts until the 10th Circuit panel had finally rejected the state's motion for a stay. Perhaps Shelby was timing his ruling strategically, as he had indicated at oral argument that he hoped to have a decision by sometime in January. Perhaps the New Mexico Supreme Court's ruling goaded him into hurrying up and getting his opinion out quickly.

Judge Shelby's celerity puts to shame the district judge in Oklahoma who has been sitting on a same-sex marriage case, *Bishop v. United States*, for nine years, and had yet by the end of 2013 to respond to plaintiffs' request for a ruling on their long-pending summary judgment motion in light of *U.S. v. Windsor*. ■

## United States Same-Sex Marriage States Doubled in 2013

As of the end of 2013: In addition to the District of Columbia, the states that have adopted marriage equality either through judicial decision or legislation now include: Massachusetts (2003/2004), California (2008/2013), Connecticut (2008), Iowa (2009), Vermont (2009), New Hampshire (2009), New York (2011), Washington State (2012), Maine (2012), Maryland (2012), Rhode Island (2013), Delaware (2013), Minnesota (2013), New Jersey (2013), Hawaii (2013), Illinois (2013, effective in 2014), New Mexico (2013), and, provisionally, Utah (2013). Counting California, where Proposition 8 stopped same-sex marriage on November 5, 2012, but the Supreme Court's decision in

10th Circuit, on December 31.

A doubling of states again in 2014 is unlikely unless a U.S. Supreme Court ruling in favor of same-sex marriage is issued with unprecedented speed. It seems more likely that the Supreme Court will not address this issue on the merits until 2015, after rulings on the merits by the 10th Circuit in the Utah case and the 9th Circuit in the Nevada case have been issued and certiorari petitions have been filed in the usual course. The Utah case in the 10th Circuit will be on an "expedited" schedule by order of the panel that denied the state's request for a stay. At year's end there were no immediate prospects for the enactment of marriage equality legislation in any

### A doubling of states again in 2014 is unlikely unless a U.S. Supreme Court ruling is issued.

*Hollingsworth v. Perry* revived it at the end of June 2013, the number of states in which same-sex couples could marry, either immediately or in Illinois prospectively (as the law takes effect on June 1, 2014), doubled from nine to eighteen during 2013, and the portion of the U.S. population living in marriage equality jurisdictions had exceeded 38%. At year's end the situation was not finally resolved in Utah, where same-sex couples began marrying pursuant to federal court order on December 20 and continued to be able to marry through the end of the year, as the Attorney General's office, stalled by a change of leadership, uncertainties about how to proceed, and refusals of their requests by the district court and the court of appeals, had not yet secured a stay of the district court's order. Their application for a stay was filed with Justice Sonia Sotomayor, the Supreme Court's Circuit Justice for the

of the remaining states that ban same-sex marriage.

Meanwhile, there are dozens of federal and state trial courts now confronting marriage equality litigation, and there will likely be many decisions issued during 2014 ruling on summary judgment motions in those cases, some of which were pending at year's end. The most likely way that more states will be added to the marriage equality list during 2014 would be by following the examples of New Jersey and Utah during 2013: trial court rulings in favor of marriage equality whose effect is not stayed pending appeal, and refusals by higher appellate courts to stay the rulings pending appeal. But this will crucially depend, at least for federal court litigation, on how the U.S. Supreme Court handles Utah's stay petition, which may be known by the time this issue of *Law Notes* is published. ■

# Indiana Appeals Court Says Spouse's Gender Change Doesn't Void an Existing Marriage

The Court of Appeals of Indiana ruled on December 20 in *Davis v. Summers*, 2013 Ind. App. LEXIS 630, that an existing different-sex marriage is not rendered void when one of the spouses has obtained a legal judgment of gender change. Reversing a ruling by Judge Valeri Haughton of the Monroe Circuit Court, Judge Paul Mathias wrote for the court in *Davis v. Summers* that this construction of the state's ban on same-sex marriage would be "beyond the purview of our constitutional authority to interpret statutes" and "would also result in an untenable situation regarding the parties' child."

David Paul Summers was married to Angela in October 1999, and their

negotiated a proposed dissolution order, which was provisionally approved by the trial court on January 23, 2013, under which Davis was granted custody of the child and Summers was ordered to pay child support.

However, for reasons not explained in Judge Mathias's opinion, Judge Haughton, acting on her own motion, issued a new order on March 8, 2013, citing Indiana's statutory ban on same-sex marriage, and stating: "When the order amending the Petitioner's gender was issued on October 21, 2008, Petitioner's gender designation was legally changed to female. Pursuant to [the provision banning same-sex marriage], Melanie Lauren Artemisia Davis (formally [sic] David Paul Summers) a female was prohibited from being married to

gender is void in Indiana even if the marriage is lawful in the place where it was solemnized." The court agreed with Davis's argument that this provision was intended to prevent the recognition in Indiana of same-sex marriages that were performed in other states, but "does not automatically void a marriage that was initially valid in Indiana simply because one of the parties to the marriage has changed his or her gender." Judge Haughton had not relied on the other provision of the statute, which says: "Only a female may marry a male. Only a male may marry a female."

Judge Mathias found that there was support for Davis's argument in another provision of the Indiana statutes, titled "Void Marriages," which states that a marriage is void if an Indiana couple goes out of state in order to evade Indiana's ban on various kinds of marriages, if they intended to return to Indiana after getting married. "Simply said," wrote Mathias, "there is nothing in the Indiana Code chapter dealing with void marriages that declares that a marriage that was valid when it was entered into becomes void when one of the parties to that marriage has since changed his or her gender. And the section that deals with marriages between Indiana residents solemnized in other states to avoid the application of certain Indiana marital regulations does not mention same-sex marriages. Nor does it need to do so, as these marriages are already void under Indiana Code section 31-11-1-1(b) even if they were solemnized in another state."

Thus, the trial court's reading "has the effect of adding the type of marriage at issue, a marriage between a male and female solemnized pursuant to Indiana law," to the list of marriages that are "void ab initio" under the "Void Marriages" provision. Judge Mathias opined that making such an addition to the list was beyond the authority of the trial court, and would have the undesirable effect of creating an "untenable situation" for the child of Davis and Summers. "To conclude that the parties' marriage somehow became void when the gender was changed on

## After the the birth of their child, one of the spouses had already been diagnosed with gender dysphoria.

child was born in July 2005. By that time, David Summers had already been diagnosed with gender dysphoria, and had filed a petition in the Marion Circuit Court for a name change to Melanie Lauren Artemisia Davis. The court granted the name change petition in May 2005, before the child was born, but did not at that time grant a request to change the gender indication on David Summers' birth certificate. However, the Marion Circuit Court issued an amended order on October 21, 2008, directing that the gender designation on Davis's birth certificate "be amended from Male to Female in order to conform to her identity, legal name and appearance." Melanie Davis, as she now was named, and Angela Summers split up shortly after this amended ruling was issued, and Davis later filed a petition to dissolve their marriage in Monroe Circuit Court on October 25, 2012, which was not opposed by Summers. The parties

Angela Summers, also a female. The marriage became void on October 21, 2008." Judge Haughton went on to hold that because the marriage was "void" as of October 21, 2008, the court "lacks the jurisdiction to dissolve a marriage because no marriage exists," and she denied Davis's petition for dissolution, thus vacating the January 23 action that had approved the dissolution and the custody and child support agreements. This left Davis and Summers without any legally binding order determining parental rights and obligations towards their child.

Davis appealed, without any opposition from Summers. In reversing Judge Haughton, the court of appeals ruled that Judge Haughton had misconstrued the effect of Indiana's same-sex marriage ban on existing marriages. The provision on which Judge Haughton relied states that "a marriage between persons of the same

Davis's birth certificate would permit Davis to effectively abandon her own child, even though the parties were validly married at the time of the child's birth and even though Davis is the child's father. It would also leave the parties' child without the protection afforded by Indiana's dissolution statutes with regard to parenting time and child support. We do not think that our General Assembly intended such a result."

The court concluded that the statutory same-sex marriage ban did not apply to this case, since the parties did not "enter into" a same-sex marriage in Indiana, and they were not in a "same-sex marriage that was solemnized in another state." The court reversed the trial court's ruling and sent the case back "for further proceedings consistent with this opinion." Presumably this means to reinstate Judge Haughton's original order approving the parties' dissolution agreement.

The court's ruling suggests by implication that there is one kind of same-sex marriage that can exist and be legally recognized in Indiana: a marriage between a transgender woman and a person identified as a woman at birth that was solemnized before the transgender woman obtained a legally recognized change of gender designation (and similarly in the case of a transgender man who was married to a woman prior to his legally recognized change of gender designation).

One wonders whether this decision will inspire an urge by the Indiana legislature to amend the statute. The legislature is scheduled to take up the question early in 2014 of putting a measure on the ballot to adopt a constitutional ban on same-sex marriages. Depending how the appeals turn out in pending federal same-sex marriage cases in other states, such an amendment might be rendered unenforceable by a Supreme Court decision finding, consistent with the reasoning of *U.S. v. Windsor*, that same-sex couples enjoy a right to marry under the 14th Amendment.

The appeal in this case was not opposed by Angela Summers. Melanie Davis was represented by Professor Stephen Sanders of Indiana University Maurer School of Law (Bloomington), and Earl R.C. Singleton of the Community Legal Clinic, also in Bloomington. ■

## Supreme Court of India Upholds as Constitutional the Penal Code Section Banning "Carnal Intercourse against the Order of Nature"

On December 11, 2013, in *Koushal v. Naz Foundation*, a two-judge bench of the Supreme Court of India upheld as constitutional, even when applied to private, consensual, adult sexual activity, section 377 of the Indian Penal Code (IPC), which was introduced by India's former British colonial rulers in 1860, and punishes "carnal intercourse against the order of nature" with a maximum penalty of life imprisonment. Unlike "sodomy" in the U.S., section 377 has been judicially interpreted as covering penile-anal or penile-oral penetration, whether male-female or male-male, but not female-

(11th Cir. 1985). Because the Union of India (federal government) did not appeal, the judgment was widely seen as having decriminalized sexual activity between men in India, and as having such a strong foundation in international and comparative human rights law that, despite an appeal by third parties, affirmation by the Supreme Court of India was almost inevitable. The Supreme Court's reversal came as a great shock to LGBT activists in India, as *Bowers v. Hardwick* did for many LGBT activists in the U.S. in 1986.

Before turning to the terse,

### Like "sodomy" in the U.S., the section's social impact has been to stigmatize.

female sexual acts. Like "sodomy" in the U.S., the section's social impact has been to stigmatize all same-sex sexual activity and those LGBT persons who engage in it.

On July 2, 2009, in *Naz Foundation v. Government of the National Capital Territory of Delhi*, the High Court of Delhi (one of 24 superior trial courts in India) had issued a historic judgment declaring that "Section 377 IPC, insofar as it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution [of India]". This judgment, which had considered "global trends in privacy ... rights of homosexuals" (including decisions of the European Court of Human Rights, the United Nations Human Rights Committee, the Constitutional Court of South Africa, and the U.S. Supreme Court's *Lawrence v. Texas*) was the equivalent of the intermediate appellate decision in *Hardwick v. Bowers*, 760 F.2d 1202

unpersuasive and insulting reasons of the Supreme Court, it is important to note that neither the Delhi High Court's judgment, nor that of the Supreme Court, would have been possible in the U.S. India's standing rules are more generous, both with regard to constitutional challenges to criminal laws in the absence of prosecutions, and to appeals by third parties. The Naz Foundation is a non-governmental organization that targets "men who have sex with men" in its work on HIV/AIDS intervention and prevention. The negative effect of section 377 on its work gave it sufficient interest to bring a constitutional challenge, even though it had not been prosecuted. Unfortunately, generous standing also applies to appeals by third parties (unlike in *Hollingsworth v. Perry*, whose petitioners would surely have had standing under Indian law to appeal a lower court's invalidation of their proposed anti-gay initiative).

The lead petitioners, Mr. Koushal and another, were described as “citizens of India who believe they have the moral responsibility and duty in protecting cultural values of Indian society”. Other petitioners or interveners (*amici curiae*) included political parties, charities, a film-maker, parents of LGBTs, mental health professionals, law professors and other academics, and Hindu, Muslim and Christian religious leaders. Although it did not appeal, the federal government was represented as well in the arguments before the Supreme Court.

After noting its “constitutional duty ... to test the laws of the land on the touchstone of the Constitution and provide appropriate remedy,” the Supreme Court referred to “separation of powers,” “deference to the value of democracy that parliamentary acts embody,” judicial “self restraint,” and the “presumption of constitutionality” (para. 26). On the other hand, it noted in its precedents a reference to the International Covenant on Civil and Political Rights, and a statement that “a [pre-constitutional, i.e., pre-1950] statute although ... a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring ... in the domestic as also international arena, such a law can ... be declared invalid” (para. 27). Ignoring these precedents, the Court relied heavily on the fact that the IPC has been amended around 30 times since 1950, including with regard to rape in 2013, but that section 377 had not been amended (even since the Union of India’s decision not to appeal the Delhi High Court’s judgment; para. 32): “This shows that Parliament, which is undisputedly the representative body of the people of India has not thought it proper to delete the provision.”

After a review of case law, the Court concluded (para. 38) that “[s]ection 377 IPC does not criminalize a particular person or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.” There was insufficient evidence in the record, said the Court,

that “homosexuals, gays, etc., are being subjected to discriminatory treatment either by the State or its agencies or the society” (para. 40). Because section 377 classified on the basis of conduct, it did not suffer from “the vice of arbitrariness and irrational classification,” and did not deny “equality before the law” or “equal protection of the laws,” or discriminate on the ground of sex, contrary to Articles 14 and 15 of the Constitution (para. 42). Moreover, the Delhi High Court “overlooked that a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgenders and in [the] last ... 150 years less than 200 persons have been prosecuted ... and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21” (para. 43).

Turning to Article 21 of the Constitution, the Court observed (para. 46) that “[t]he right to privacy has been guaranteed by Article 12 of the Universal Declaration of Human Rights (1948), Article 17 of the International Covenant of Civil and Political Rights[,] and [the] European Convention on Human Rights. It has been read into Article 21 through an expansive reading of the right to life and liberty.” But the Court did not ask itself whether “privacy” includes private sexual activity, and whether criminalization of such activity requires a strong justification. Instead, it merely dismissed the argument that section 377 is used “to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community,” because “this treatment is neither mandated by the section nor condoned by it ... [T]he mere fact that the section is misused by police authorities and others is not a reflection of [its unconstitutionality]” (para. 51).

But what about the international and comparative “privacy” precedents cited by the Delhi High Court? Contradicting its earlier references to international treaties and the “international arena,” the Court concluded, in a manner that would make U.S. Supreme Court Justice Antonin Scalia extremely proud,

that it was interpreting the Constitution of India and would “blindfold itself” to these precedents (para. 52): “In its anxiety to protect the so-called rights of LGBT persons and to declare that [s]ection 377 IPC violates the right to privacy ... , the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments ... are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.” Ignoring all legal developments outside of India, the Court then concluded that section 377 “does not suffer from the vice of unconstitutionality and [that] the declaration made by the [Delhi High Court] is legally unsustainable” (para. 54).

Is *Koushal v. Naz Foundation* as disastrous as *Bowers v. Hardwick* was for the U.S.? Perhaps not, because both the Union of India and Naz Foundation have sought review by a larger five-judge bench, which is procedurally possible (unlike post-*Hardwick*) and could lead to the reversal of the two-judge judgment. It is politically unlikely that the Parliament of India will implement the recommendation of the Law Commission of India, 172nd Report (Review of Rape Laws) (March 25, 2000), para. 3.6, that section 377 be deleted, although it is possible that repeal efforts may be undertaken in the various Indian states, which have concurrent jurisdiction over criminal law issues, with consent from the Union of India which might be forthcoming from the present government. But five judges of the Supreme Court of India might decide that *Koushal v. Naz Foundation* is as ugly a blot on its record and international reputation as *Hardwick* was for the Supreme Court of the United States, and act quickly to remove it. After the bad news of December 11, the good news is that it might take only a year or two, not seventeen, to reverse India’s *Hardwick*.  
– Robert Wintemute

---

*Robert Wintemute is a Professor of Human Rights Law at King’s College, London.*

# Early Marriage Licenses Ordered for Illinois Same-Sex Couples with Medical Issues

U.S. District Judge Sharon Johnson Coleman issued a decision on December 10 in *Edwards v. Orr*, 2013 U.S. Dist. LEXIS 173801, 2013 WL 6490577 (N.D. Ill.), a class action suit brought by Lambda Legal seeking a judicial order allowing “medically critical plaintiffs” in same-sex couples to get marriage licenses in advance of the official June 1, 2014, implementation date for the same-sex marriage amendment signed into law by Governor Pat Quinn on November 20. Because the law was passed during the “veto session” of the legislature, it may not go into effect until June 1 as a matter of Illinois constitutional law, but Lambda Legal argued in its complaint that because Illinois’ ban on same-sex marriage violates the federal 14th Amendment, the court can order county clerks to issue marriage licenses before that date.

Lambda’s argument was persuasive to Judge Coleman, who commented that Illinois Attorney General Lisa Madigan supports Lambda’s request that the court provide injunctive relief for “the named plaintiffs and the putative subclass of medically critical plaintiffs” that would be affected by such an order. Coleman also referenced the earlier decision by District Judge Thomas M. Durkin in *Gray v. Orr*, 2013 WL 6355918 (N.D. Ill., bench ruling, Nov. 25, 2013, written opinion dated Dec. 5, 2013), which authorized similar relief for a same-sex couple with medical issues. Lambda asked the court to certify this as a class action brought on behalf of all similarly-situated same-sex couples who seek to marry in Illinois before June 1.

The two couples who are seeking immediate injunctive relief — Elvie Jordan and Challis Gibbs, and Ronald Dorfman and Kenneth Ilio — presented compelling circumstances to the court. Both couples have been together more than twenty years, and both had already entered Illinois civil

unions when they became available. Gibbs has metastatic cancer and spent November in the hospital. Dorfman suffers congestive heart failure and has uncertain treatment prospects. Both couples argue that they might not make it until June 1 and need to marry before then.

As in all cases seeking immediate relief before the full trial process can be completed, the plaintiffs here have to show that they would be likely to succeed on the merits of their legal claim at trial, that denying them preliminary relief would cause irreparable injury, that money damages after the fact would provide an inadequate remedy,

the recent enactment of same-sex marriage “is an express repudiation of the state’s earlier position and undermines the traditionally invoked justifications for the prohibition on same-sex marriages.” She found that under the Supreme Court’s reasoning in *Windsor*, denying marriage to same-sex couples “serves no constitutionally legitimate purpose.”

It was easy for Judge Coleman to find that denying an early marriage license would cause irreparable injury that could not be compensated by damages awarded after a trial. If these couples don’t get licenses soon, they may not be able to get married at all. Marriage is

**Both couples have been together more than twenty years, and both had already entered Illinois civil unions when they became available.**

and that the balance of harms and the public interest weighs in their favor. Judge Coleman found that all these tests were met.

First, reviewing the U.S. Supreme Court’s treatment of gay rights claims culminating in *U.S. v. Windsor* last June, she found that the plaintiffs “are likely to succeed on the merits of their claim that the provisions of the current Illinois law that deny them the right to marry based solely on their sexual orientation, as applied, violates their constitutional right to equal protection.” She observed that the 1996 amendment to the Illinois marriage law that specifically reserved marriage for different-sex couples “is clearly intended to single out gays and lesbians for disparate treatment based solely on their sexual orientation.” Furthermore, she pointed out that

a prerequisite to federal rights that are particularly important when a member of a couple is facing impending death, including the right to take leave under the Family and Medical Leave Act, the right to file joint income tax returns and enjoy spousal tax benefits, “especially exemptions from certain estate tax obligations,” and eligibility of a surviving spouse for Social Security benefits, all of which would be forfeited if one partner dies before they could get married. “Equally compelling are the intangible personal and emotional benefits that the dignity of equal and official marriage status confers,” wrote Coleman, finding that “unquestionably” the loss of these could not be compensated by monetary damages.

Finally, she found the balance of harms and the public interest clearly

supported granting the requested relief. As Illinois has legislated in favor of same sex marriage, “any erroneous decision here would only result in allowing a relatively few people to marry a short period of time sooner,” and the harm to those individuals in denying them marriage “would be far weightier since a denial of relief could effectively deny them the right to marry at all if one member of the couple passes away before June 1, 2014.” Furthermore, the Illinois legislature has clearly decided that letting same-sex couples marry is in the public interest, or they would not have passed the new law. “This court can conceive of no reason why the public interest would be disserved by allowing a few couples facing terminal illness to wed a few months earlier than the timeline would currently allow,” she concluded.

However, the concern remained that if Judge Coleman certified this as a class action in favor of all similarly-situated couples, there would need to be a manageable mechanism for deciding which couples that apply for this relief would be qualified. Thus, she made her order in favor of plaintiffs “contingent upon an agreement between the parties of a sufficiently delineated subclass or a satisfactory method of implementation of this Order”, and set a status hearing for Monday, December 16, to determine whether such an agreement had been reached. According to the *Windy City Times* (Dec. 15), the two plaintiff couples on whose behalf the motion for temporary relief had been made were afforded relief, and married within days of the ruling.

The named plaintiffs in the case also include two other couples who are not part of this motion for immediate temporary relief, because their medical concerns are not so immediately pressing. A small army of Lambda Legal staff attorneys and Lambda and ACLU cooperating attorneys with various Chicago law firms joined together to bring this case, with lead attorney Camilla Taylor from Lambda Legal’s Midwest Regional Office. ■

## Federal Judge Issues Permanent Injunction against Ohio on Marriage Recognition

U.S. District Judge Timothy S. Black (S.D. Ohio) issued an injunction on December 23 against Ohio officials, mandating that henceforth Ohio death certificates record as married any decedent who had been lawfully married to a same-sex partner in another jurisdiction. *Obergefell v. Wymyslo*, 2013 WL 6726688, 2013 U.S. Dist. LEXIS 179550. Although Judge Black’s order was narrow, the extensive decision he issued to explain it was worded sufficiently broadly to confirm his view that in light of the Supreme Court’s DOMA decision of June 26, same-sex couples probably have the right to marry, and Section 2 of the Defense of Marriage Act, purporting to relieve states of any constitutional obligation to recognize same-sex marriages from other states, is a dead letter.

Black based his ruling, however, on a narrower theory: the right to *remain* married. “Once you get married lawfully in one state,” he wrote, “another state cannot summarily take your marriage away, because the right to remain married is properly recognized as a fundamental liberty interest protected by the Due Process Clause of the United States Constitution.” Furthermore, he wrote, “by treating lawful same-sex marriages differently than it treats lawful opposite sex marriages ( e.g., marriages of first cousins, marriages of certain minors, and common law marriages), Ohio law, as applied to these Plaintiffs, violates the United States Constitution’s guarantee of equal protection.”

The original plaintiffs in the case before Black were James Obergefell and John Arthur, a same-sex couple who had recently married out-of-state, hoping to tie the knot legally

before Arthur, seriously ill with Lou Gehrig’s disease, died, and David Michener, a surviving spouse who had married his partner, William Herbert Ives, just weeks before, only to lose him suddenly and unexpectedly. Judge Black allowed Robert Grunn, a gay funeral director who handled Mr. Arthur’s funeral in October, to join as a plaintiff. Under Ohio law, funeral directors have direct responsibility for accessing the state’s database to submit the facts for death certificates, and must attest to their accuracy, placing Grunn in the position of risking prosecution under state law if he listed as married somebody whose marriage would not be recognized under state law. Judge Black issued preliminary relief in July, directing state officials to designate Arthur and Ives as married on their death certificates. The December 23 ruling made that relief permanent and prospective, requiring Ohio officials to list similarly situated decedents on death certificates as married.

In explaining his ruling, Judge Black recounted the many ways that Ohio’s refusal to recognize validly-entered same-sex marriages of its gay citizens imposed substantial injuries and complications. He found that the right to remain married and have one’s state of domicile honor that marriage was a fundamental right, and that at least heightened scrutiny should apply to require the state to prove an important policy reason for refusing to recognize such a marriage when it recognized many other kinds of different-sex marriages contracted out-of-state that could not be contracted within the state. He found that Ohio failed to meet that burden.

“Defendants cite “‘Ohioans’ desire to retain the right to define marriage through the democratic process,’

‘avoiding judicial intrusion upon a historically legislative function,’ ‘Ohio’s interest in approaching social change with deliberation and due care,’ ‘the desire not to alter the definition of marriage without evaluating steps to safeguard the religious rights and beliefs of others,’ and ‘[p] reserving the traditional definition of marriage,’ although they raise these interests in the context of a rational basis equal protection analysis,” he wrote. “In the intermediate scrutiny context, however, these vague, speculative, and unsubstantiated state interests do not rise anywhere near the level necessary to counterbalance the specific, quantifiable, and particularized injuries evidenced here and suffered by same-sex couples when their existing legal marriages and the attendant protections and benefits are taken from them by the state.”

While he conceded that the Supreme Court in *U.S. v. Windsor* had acknowledged the traditional interest of states in controlling the institution of marriage, he noted that the Supreme Court had intervened in the past to strike down state marriage provisions that violated federal constitutional rights. That Ohio voters had adopted an anti-gay marriage amendment did not matter, in his view, because federal constitutional rights cannot be abridged by a popular vote.

“The fact that each state has the exclusive power to create marriages within its territory does not logically lead to the conclusion that states can nullify already-established marriages from other co-equal states absent due process of law. Perhaps the interests raised by Defendants may be more compelling in the context of marriage creation than they are in the context of marriages that have already taken place and same-sex relationships that already exist, i.e., marriage recognition.” This recognition that the state’s interests might be different in a more wide-ranging case undoubtedly led Judge Black to frame his order narrowly, rather than

broadly ordering Ohio to recognize same-sex marriages contracted elsewhere for all purposes. But he clearly signaled that the logic of *Windsor* led in that direction, quoting (as had Judge Shelby in Utah) Justice Antonin Scalia’s dissenting opinion to that effect.

Having concluded that Ohio’s refusal to recognize these marriages violated the due process clause by abridging a fundamental right without sufficient justification, Black could have ended his decision, but instead, picking up on the themes of his original ruling in July when he granted temporary relief to Obergefell and Arthur, he wrote a lengthy equal protection analysis, reaffirming his earlier conclusion that Ohio’s treatment of same-sex marriages differently from first-cousin marriages and other marriages

mentioned in his July ruling, only to dismiss its relevance and to intimate that after *Windsor* it probably could not withstand judicial review. He wrote, “This Court states affirmatively that Section 2 of DOMA does not provide a legitimate basis for otherwise constitutionally invalid state laws, like Ohio’s marriage recognition bans, no matter what the level of scrutiny. Although Section 2 of DOMA is not specifically before this Court, the implications of today’s ruling speak for themselves.”

Black extensively considered the appropriate level of judicial review for an equal protection challenge to Ohio’s refusal to recognize same-sex marriages, and concluded that sexual orientation discrimination met all the requirements for a suspect classification meriting heightened or strict scrutiny, but concluded that the

## U.S. District Judge Timothy S. Black based his ruling on a theory of the right to remain married.

that might be contracted in other states violated the equal protection rights of same-sex couples. “Here, in derogation of law,” he wrote, “the Ohio scheme has unjustifiably created two tiers of couples: (1) opposite-sex married couples legally married in other states; and (2) same-sex married couples legally married in other states. This lack of equal protection of law is fatal.” This language was drawn from Justice Anthony Kennedy’s *Windsor* opinion, in which he said that the federal government could not create “two tiers” of couples, recognizing the marriages of one and not the other, without some rational justification, and the Supreme Court found that the state failed this test.

In a footnote, Black referenced Section 2 of the Defense of Marriage Act (DOMA), which he had not

Ohio policy would not even survive rational basis review.

“Because there is no rational connection between Ohio’s marriage recognition bans and the asserted state interests, this Court can conclude that the ban violates equal protection even without considering whether it is motivated by an impermissible purpose,” he wrote. “In this case, however, the lack of any connection between Ohio’s marriage recognition bans and any legitimate state interest also leads to the conclusion that it was passed because of, not in spite of, its burden on same-sex couples.” Citing the *Windsor* case as his authority on this point, he wrote further, “Even if it were possible to hypothesize regarding a rational connection between Ohio’s marriage recognition bans and some

legitimate governmental interest, no hypothetical justification can overcome the clear primary purpose and practical effect of the marriage bans ... to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community. When the primary purpose and effect of a law is to harm an identifiable group, the fact that the law may also incidentally serve some other neutral governmental interest cannot save it from unconstitutionality.”

Finally, Judge Black concluded that granting the injunction would inflict no harm on the state of Ohio or its citizens, while denying it would clearly cause harm to the plaintiffs. For one thing, it would require amending the death certificates of Arthur and Ives and depriving their surviving spouses of the protections and benefits of the law that Ohio extends to surviving spouses. For another, it might require the exhumation of Arthur, since he had expressed the wish to be buried next to his husband, and restrictions on his family’s cemetery plots would exclude Obergfell if the marriage were not legally recognized. And, of course, with the prospective relief sought by Grunn, the funeral director, similar married couples would suffer the same deprivation of rights in the future.

For Black, the conclusion was clear, and he granted the injunctive relief. Governor Kasich announced that the state would appeal the ruling to the U.S. Court of Appeals for the 6th Circuit, in order to preserve the state’s right to continue excluding same-sex couples from marriage. It will be interesting to hear the state’s argument about how it is grievously harmed by recognizing out-of-state same-sex marriages in the narrow context of death certificates.

Plaintiffs are represented by a team of Cincinnati lawyers including Alphonse Gerhardstein, Jacklyn Gonzales Martin and Jennifer Lynn Branch of Gerhardstein & Branch Co. LPA, and Lisa Talmadge Meeks, of Newman & Meeks Co. LPA. ■

## Federal Court Refuses to Dismiss HIV-Related Housing Discrimination Claim against LeFrak Realty Organization

U.S. District Judge Denise Cote has refused to dismiss a discrimination case brought by a person living with HIV, identified in court papers as L.C., and the Fair Housing Justice Center against a major New York City realtor, LeFrak Organization and its subsidiary, Estates NY Real Estate Services, Inc. Judge Cote’s ruling found that that plaintiffs had successfully alleged facts supporting a claim that LeFrak’s rental practices at its LeFrak City apartments in Queens discriminate against people living with HIV who are clients of New York City’s HIV/AIDS Services Administration (HASA), a division of the City’s Human Resources Agency. *L.C. v. LeFrak Organization, Inc.*, 2013 U.S. Dist. LEXIS 175756 (S.D.N.Y., Dec. 13, 2013).

According to the complaint, L.C. was notified by HASA that she would be entitled to economic support to rent an apartment up to a monthly rent of \$1,100. Under HASA’s policies, L.C. was supposed to locate and apply to rent a suitable apartment and, upon approval by HASA, the agency would issue a check to the landlord for the first month’s rent and a voucher to cover an equal amount as a security deposit, and HASA would subsequently issue monthly checks to the landlord to cover the rent. HASA also covers any necessary broker fees.

Thus notified by HASA, L.C. went to the LeFrak City website, determined that apartments were available there within the specified price range, and called the rental office. When she identified herself as a HASA client, she was referred to “an office on Queens Boulevard that deals with applicants who will be using government benefits programs to pay their rent,” according to Judge Cote’s opinion. There, L.C. encountered the Catch-22 in this situation. LeFrak’s agents would not show L.C. an apartment until she provided a letter from HASA confirming that they would pay a specific amount for the rent, but HASA does not issue such letters before a client has actually been approved to rent a

particular apartment. L.C. explained to the LeFrak agent that she needed to apply for the particular apartment and have it approved by HASA before HASA would issue a letter, but the LeFrak people said they would not process L.C.’s application until they had a letter from HASA.

L.C. then met with her HASA case manager, who confirmed with her supervisor that HASA does not issue such letters. L.C. then visited Housing Works, and a Housing Works manager called LeFrak. The LeFrak representative confirmed at that time that they had apartments available for around \$1,100 a month, but that a letter from HASA had to be submitted before they would process L.C.’s application.

The other plaintiff in the case, Fair Housing Justice Center, sent “testers” to LeFrak to confirm what their policies are. LeFrak was then listing three apartments at LeFrak City within the \$1,100 price range. One tester told the LeFrak staff that she was employed, earning \$46,000 a year, and looking for a studio or one-bedroom in LeFrak City in that price range. She was promptly shown a floor plan and given an application to complete, and no request for documentation of her income was made at that time. Two other testers told the LeFrak people that they were inquiring for a brother who was living with AIDS and would be receiving a housing subsidy from HASA, and in both cases they were referred to the special office for renters using government program subsidies. They confronted the same response as L.C.. They could not submit an application or see an apartment until they submitted the requested “papers” including a HASA commitment letter. They were also required to wait for LeFrak to do a criminal and credit background check. (This had not been requested of the tester who said she was employed.) The testers also noted that the office to which they were referred had a glass window separating the applicants from the LeFrak staff, unlike the regular rental office.



L.C. and FHJC filed their federal discrimination lawsuit on April 25, 2013, asserting claims under the federal Fair Housing Act (FHA), which forbids housing discrimination against people with disabilities, and the New York City Human Rights Law, which forbids discrimination not only against people with disabilities but also discrimination based on a potential renter's source of income. The complaint claimed both intentional discrimination (disparate treatment) and maintenance of procedures that had a disproportionate adverse effect on people with disabilities (disparate impact).

LeFrak moved to dismiss the case, claiming that it did not intentionally discriminate against people with HIV. LeFrak argued that the FHA claims had to be dismissed because they failed to allege that LeFrak had discriminated because of HIV status. They asserted that the story told in the complaint was one of treating people differently depending upon their source of income to pay rent, and that this did not violate the FHA. Rejecting this argument, Judge Cote wrote that the complaint "alleges that LeFrak understood that HASA clients, alone of all persons requiring government housing subsidies, would be unable to produce a source-of-income letter at the application stage of the rental process. This is sufficient to give the defendants fair notice of the plaintiffs' theory that LeFrak intentionally discriminated against L.C."

Judge Cote also found that plaintiffs could maintain an action under another provision of the FHA which refers not only to the actual rental of housing but also to the "terms, conditions or privileges" attached to housing. For example, refusing to let L.C. see an available apartment or floor plan can itself be the basis of a discrimination claim, so the case is not solely based on a denial of a rental application.

Judge Cote found that the complaint could also qualify under the disparate impact theory, by showing that LeFrak maintained procedures that made it particularly difficult for HASA clients to rent apartments, thus having a "disparate impact" against persons with HIV. LeFrak objected that the plaintiffs failed to provide statistics showing

the disparate impact, but Judge Cote found that they had alleged that out of 8 million New Yorkers, 67,000 are living with HIV and almost half of them are HASA clients, the "vast majority" of whom are using the HASA housing subsidy program. "This adequately puts the defendants on notice that plaintiffs' alleged basis for disparate impact is that the percentage of the HIV population in New York City on housing subsidies exceeds the percentage of non-HIV New York City population on housing subsidies."

LeFrak argued that L.C. should be challenging HASA's refusal to provide the necessary commitment letters, rather than LeFrak's refusal to process rental applications without receiving such letters. Judge Cote rejected this argument as well, pointing out that LeFrak had not argued that HASA was a "necessary party" to this case, so this argument did not entitle LeFrak to get the claims against itself dismissed.

the plaintiffs were not denying that, but rather were challenging LeFrak's refusal to show apartments or accept rental applications before documentation of income was presented, because this policy "served as an impediment that prevented L.C. from 'securing' an apartment." Judge Cote observed that the complaint makes the claim that LeFrak's differential approach on documentation between applicants of means and applicants who are relying on government programs establishes "a prima facie case of disparate treatment based on source of income," a direct violation of the city law. Judge Cote also found that the plaintiffs had alleged necessary facts to put their city law case in play, by showing that if LeFrak had processed L.C.'s application and conditionally approved her as a tenant, HASA would have provided the documentation necessary to complete the rental process.

Finally, Cote rejected LeFrak's

## The complaint claimed both disparate treatment and disparate impact.

The judge's analysis of the New York City Human Rights Law claims was straightforward. Since the city law outlaws the same kind of housing discrimination based on disability that is outlawed by the FHA, the same factual allegations supported the city law discrimination claim. That the city law also forbids housing discrimination based on source-of-income, a relatively recent addition to the law, makes the city law claim even stronger in this case, especially since LeFrak argued in opposition to the federal claim that its policies discriminated based on source-of-income, not disability. In fact, LeFrak's argument sounds like a concession that its policy violates the city law.

LeFrak argued that its policy of requiring rental applicants to provide income documentation before renting an apartment was "legitimate and applied to all applicants." Cote pointed out that

argument that because the city law applies to discrimination in rentals but doesn't mention any right for a member of the public to "inspect" an apartment before applying for it, LeFrak could not be held liable for a violation merely because it refused to allow inspections of vacant apartments by public housing subsidy applicants who had not yet presented written confirmation of their housing benefits. Cote pointed out that the city law has a provision mandating "liberal construction," and found that any obstruction put in the way of a potential client could come within the ambit of the anti-discrimination law.

Attorneys Armen Merjian from Housing Works and Diane Lee Houk from the law firm Emery Celli Brinckerhoff and Abady represent the plaintiffs L.C. and FHJC. LeFrak is represented by Randy Mastro and other attorneys from Gibson, Dunn & Crutcher. ■

# New York Trial Judge Refuses to Dismiss Transgender Woman's Discrimination Claim against Drug Treatment Program

Finding that a transgender woman who was sent to a residential drug treatment program under a plea agreement had sufficiently alleged that she encountered discrimination there, New York Acting Supreme Court Justice Debra Silber denied a motion to dismiss Sabire Wilson's housing discrimination claims under state and New York City law against Phoenix House and Sydney Hargrove, the director of Phoenix's induction unit. *Wilson v. Phoenix House*, 2013 N.Y. Misc. LEXIS 5657 (Supreme Ct., Kings Co., Dec. 10, 2013).

Silber's opinion commented that "there has been a considerable lack of understanding in the courts with regard to issues of concern" to transgender people, and she provided a lengthy summary of the developing law of

bathroom accommodations with men, but she claims that Hargrove denied her complaint, telling her "you should adjust." Wilson eventually persuaded the other women in the women's support group to consent to let her attend their meetings, but Hargrove insisted that she not do so.

Wilson alleged that during her fourth week in the program, another counselor told her that Hargrove believed she should be transferred to another program because Phoenix House could not meet her needs as a transgender person and, if a suitable facility was not found, she would most likely be sent to jail. When Wilson told other residents about this, they got up a petition asking Hargrove to reconsider his decision, which was signed by thirty-eight residents, but

Phoenix House and Hargrove, U.S. District Judge Denise Cote found that none of the federal claims were valid, but that Wilson might pursue her state and local law claims. Wilson then got her federal case dismissed and filed her new lawsuit in New York Supreme Court in Brooklyn, where it was assigned to Justice Silber.

Phoenix House argued that as a residential treatment facility, it was not subject to the state and local laws forbidding housing discrimination. It also claimed that Wilson did not qualify for protection as a person with a disability, and that even if she could pursue her claims, she was limited in the relief she could seek to ordinary damages, but not punitive damages or an injunction. In her complaint, Wilson sought to have the court order Phoenix House to take various steps altering its policies and training its staff, which would be the subject of injunctive relief. Wilson also argued that since Judge Cote had already found that Wilson's state and local law discrimination claims could be pursued, Phoenix House should be precluded from seeking dismissal of those claims.

Justice Silber found that because Wilson had her federal case dismissed, Judge Cote's findings did not automatically block Phoenix House from seeking dismissal of state claims on the same grounds. However, she found that Wilson had alleged potentially valid claims under the state and city laws.

Prior cases make clear that a person who encounters discrimination in New York due to their gender identity disorder can seek relief under the disability discrimination provisions. State courts had also ruled in prior cases, even before the New York City Council amended the city's human rights ordinance to include "gender identity" within the definition of "gender," that transgender people who encounter discrimination can seek relief under both the state and city laws, because the concept of sex and gender under these laws is broadly construed. Furthermore, Justice Silber found that residential programs operated

## Prior cases make clear that a person with GID in New York can seek relief under the disability discrimination provisions.

gender identity discrimination before turning to address the specific issues raised by the motions to dismiss.

Wilson claims that she told Hargrove during her intake interview that she was transgender (male to female). Hargrove asked whether her hair was "real." When Wilson told him that she was wearing a wig, he told her that this was not allowed at Phoenix House, although it appears that other women were allowed to wear wigs. A month later, Wilson claims, a counselor told her that she would have to stop wearing high heel shoes, although some other women were allowed to wear high heels. When Wilson attended group therapy meetings, she was required to sit with the men rather than with the women, and when some women objected to her attendance at a women's support meeting, she was asked to leave. Wilson complained to Hargrove about being required to share sleeping or

Hargrove made no formal response and did not tell Wilson where she might be transferred. When Phoenix House failed to find an alternative program for Wilson, she gave up hope and, frustrated, left Phoenix House without permission. She was resentenced to 2-1/2 years in prison.

Wilson filed suit first in federal court, claiming violations of her federal constitutional equal protection rights. She also charged Phoenix House with violating a federal law against false advertising, because it states on its website that it accepts lesbians and gay men. She also asserted New York State and New York City disability discrimination claims. She could not assert a federal disability claim, because the Americans With Disabilities Act specifically excludes gender identity disorder from its definition of disability. Ruling on a motion to dismiss by

by contract with the government had in the past been considered to come under the provision of the state and local laws banning housing discrimination. Although Wilson was at Phoenix House for treatment, she was required to live there, and thus for the duration of her stay it was her dwelling place. Under both the state and local laws, found the judge, an operator of a residential facility has an obligation to make reasonable accommodations for people with disabilities in order to provide them with equal opportunity to benefit from the housing and services that are provided.

Thus, it was clear that Wilson's allegations were sufficient basis for a discrimination claim. Justice Silber also found that although the state law was more limited in this respect, Wilson could seek punitive damages and injunctive relief under the city's human rights ordinance. Thus, while dismissing the claims for punitive damages and injunctive relief under state law, Silber denied the motion to dismiss those claims under the city ordinance.

Sydney Hargrove, who was also named as a defendant, had moved to be dismissed from the case. Wilson's complaint charged him with aiding and abetting Phoenix House's discrimination against her, in violation of the state human rights law, which goes beyond federal law to authorize claims against employees of a defendant company who played a personal role in discriminating against a plaintiff. Hargrove's argument, tracking Phoenix House's motion to dismiss, was that because there was no valid discrimination claim against Phoenix House, Hargrove could not be liable for "aiding and abetting" discrimination. However, since Justice Silber found that Wilson had alleged sufficient facts to maintain her claim against Phoenix House, she also rejected Hargrove's motion.

Having refused to dismiss Wilson's discrimination case, Silber ordered the defendants to file their answer within thirty days, and then discovery will begin unless a settlement is negotiated. Wilson is represented by Armen Merjian of Housing Works. Justice Silber is a member of the International Association of Lesbian and Gay Judges and the LGBT Bar Association of Greater New York. ■

## Houston Mayor's Order Sparks Court Battle on Same-Sex Spousal Benefits

In November, recently re-elected openly lesbian Mayor Annise Parker of Houston, Texas, directed the city's Human Resources department to recognize the out-of-state same-sex marriages of city employees for benefits purposes, to be effective January 1, 2014. Harris County Republican Chair Jared Woodfill found two taxpayers willing to be plaintiffs in an action challenging Parker's directive, which was filed on December 17 in Harris County District Court. District Judge Lisa Millard issued an order blocking Parker's directive from going into effect, pending a hearing scheduled for January 6. Mayor Parker premised her directive on the recent conclusion by a federal district judge in Ohio that a state's refusal to recognize a same-sex marriage performed out-of-state would violate the equal protection rights of the couple in question, assuming that a different-sex marriage would have been recognized, and that the state's own policy against recognizing same-sex marriages was overcome by federal equal protection requirements. See *Obergefell v. Kasich*, 2013 WL 3814262 (S.D. Ohio July 22, 2013).

In his lawsuit, *Pidgeon v. Parker*, No. 2013-75301/Court 310 (Harris Co. Dist. Ct.), Woodfill raises the state's DOMA and anti-gay marriage constitutional amendment, as well as a Houston initiative charter amendment that provided that only legal spouses and dependent children of city employees could receive employee benefits. The court confronts questions about the plaintiffs' standing to sue, in addition to the question whether federal supremacy compels the city to recognize same-sex marriages contracted elsewhere. Interestingly, the complaint never mentions Section 2 of DOMA, which purports to relieve states of any obligation to extend full-faith-and-credit to same-sex marriages contracted in other states. Perhaps

there is an emerging recognition that Section 2 of DOMA is not the ground on which the same-sex marriage recognition issue will be fought.

According to a local news report, Millard's brief order found that plaintiffs had sufficiently alleged "irreparable injury" should Parker's directive go into effect to qualify for immediate injunctive relief. A spokesperson for Mayor Parker said that the city would immediately appeal Judge Millard's order. The spokesperson, Janice Evans-Davis, also stated that the charter amendment, by its wording, allows benefits for "legal spouses" of city employees, and that Parker's directive merely requires that the city comply with federal equal protection requirements by treating same-sex couples who married in jurisdictions that allow such marriages as "legal spouses." Thus, the charter amendment would not be an impediment to the directive. Since the federal constitution takes priority over state laws, the Texas Marriage Amendment and Defense of Marriage Act would be overridden in this case.

Of course, this ultimately turns on whether the courts in Texas agree with the reasoning of the *Obergefell* case. An adverse determination by the Texas courts could be appealed to the U.S. Supreme Court, which would give that court another opportunity to take a bite out of the marriage equality issue without the need for a direct ruling on whether same-sex couples enjoy a federal constitutional right to marry.

Same-sex partners of municipal employees enjoyed benefits participation in Austin, Dallas, El Paso, Fort Worth and San Antonio, but had been blocked from benefits eligibility in Houston by the charter amendment. City Attorney David Feldman advised Parker that the charter amendment could be construed to allow benefits for legal same-sex spouses. ■

# Colorado Appeals Court Rules on Same-Sex Parents Claim

The Colorado Court of Appeals ruled in *In re A.R.L. (Limberis v. Havens)*, 2013 COA 170, 2013 Colo. App. LEXIS 1879, 2013 WL 6354606 (Colo. Ct. App., Div. IV, Dec. 5, 2013), that a child may have two parents of the same sex under the state's version of the Uniform Parentage Act.

This dispute concerned a same-sex couple in yet another unfortunate parentage battle after a breakup. Elizabeth Limberis and Sabrina Havens were together for several years before attempting to have a child via artificial insemination to raise together. When that did not work, Havens' friend, Marc Bolt agreed to "inseminate her through sexual intercourse," but neither Havens nor Bolt informed Limberis of this decision. After the birth of the child in 2008, at which Limberis was present, the women agreed to give the

life, and had stated that he only acted as a sperm donor. However, Havens successfully argued that Limberis could not be a presumed parent under the UPA because the child already had a biological mother and a known biological father. The trial court agreed, stating that it was "not willing to create a new legal category" of parenthood, and dismissed Limberis' claim. However, the trial court granted Bolt's petition to relinquish parental rights 12 days later. Limberis appealed.

The court of appeals considered the issue of whether Limberis could file as a second legal mother under the UPA under a *de novo* review. Under this statutory consideration, the appeals court looked directly at the language and purpose of the UPA to determine its holding. The court stated that because the purpose of the UPA was to

life. Havens' argument that Limberis cannot be a substitute for a legal/biological father is also flawed because the court was never asked to "substitute" a parent, and it was therefore never an issue.

Finally, the biggest issue is whether or not a child can have two legal parents of the same sex under the UPA. The appeals court held that it could. The court looked again to the language and purpose of the act, and given that the words "mother" and "father" are used interchangeably and the statute provides for gender-neutral interpretation, the court holds that the legislature intended for it to allow same-sex parents. Because of these interpretations, the court is not willing to "engraft such a limitation" in the statute that was not put there or intended by the legislature.

Interestingly, and sadly, Havens still attempted to argue otherwise, citing the Colorado Constitution, which "defines marriage as a union between one man and one woman" to indicated a "preference for one mother and one father, rather than two parents of the same-sex." But the court denied this argument as well, because the definition of marriage is separate from the issues of the UPA, which "expressly does not require parents to be married to establish a parent-child relationship."

Ultimately, the court concluded that there is nothing in the UPA that prevents two same-sex parents from having presumed parenthood, and that the sexual orientation of a couple is irrelevant in determining presumed parenthood. The court therefore reversed the trial court decision, holding that Limberis may be a presumed parent, and remanded the case back to the trial court to determine whether or not Limberis actually is a presumed parent. This will be an interesting case to monitor, as Havens seems particularly relentless in her desire to prevent Limberis from being a presumed parent, but now that the court has officially declared that Limberis can qualify to be declared a parent, it seems that Limberis' case is quite strong. – *Parul Nanavati*

---

*Nanavati studies at N.Y. Law School ('15).*

## A child may have two parents of the same sex under the state's version of the UPA.

child Limberis' last name, but Havens was listed as the mother on the birth certificate. In 2009, the couple began to experience difficulties and split up, but gradually began to share equal parenting time, although Havens was initially the primary caregiver of the child.

Limberis applied for second-parent adoption in 2010, but was denied by the court because her application predated the Colorado Civil Union Act, which allowed couples with a civil union to benefit from the same rights regarding their children as if they were married. Limberis and Havens officially separated in 2011, and while they initially continued to share parental responsibilities, Havens closed off all contact between Limberis and the child.

Limberis filed for a declaration of maternity under the Uniform Parentage Act (UPA), claiming that she was a presumed parent because she received the child into her home and especially because Bolt, the biological father, had no desire to be a part of the child's

"protect the parent-child relationship," the statutory language allows for any interested party, man or woman, to "prove paternity or maternity based upon considerations other than biology or adoption." The court specifically focused on the "holding out" provision of the UPA, which basically states that a man is the presumed father if he receives the child into his home and holds out that the child is his. The key interpretation is that this applies equally to women as it does to men, because in the UPA, the terms mother and father are interchangeable. Havens argued that despite these facts, a child cannot have two legal mothers, or three legal parents (including Bolt), and that a court "may not substitute a second legal mother in place of a child's biological father."

The appeals court easily dismissed the argument that the child would have three legal parents, because even though Bolt admits to being a biological father, he had relinquished all legal ties and had no desire to have any part in the child's

# Illinois Appeals Court Revives Challenge to Administration of Gay Man's Trust

The Appellate Court of Illinois, reversing a dismissal by the Cook County Circuit Court, has revived a challenge by birth family members of a deceased gay man to modifications he had made in a trust he had established, originally to benefit mainly nieces and nephews, which had resulted in substituting as a beneficiary the man's late-in-life second same-sex partner. *In re Estate of Drewry (Drewry v. Keltz)*, 2013 WL 6687255, 2013 Ill. App. Unpub. LEXIS 2850 (Dec. 17, 2013). The court found that plaintiffs had alleged sufficient facts to sustain their claims of undue influence, tortious interference with an expectancy, request for a constructive trust in favor of the plaintiffs, and removal of the true for breach of fiduciary duties, and that contested issues of material fact as to all the necessary allegations precluded disposition by summary judgment.

The decedent in this case, William P. Drewry, passed away in October 2009. He had a 40-year relationship with Thomas Matier, dating back to the 1960s. Matier was evidently well-liked and respected as a family member by Drewry's birth family. In 1988, Drewry established a trust to provide for Matier in the event Drewry pre-deceased him, with the trust estate to be distributed after Matier's death to Drewry's five nieces and nephews and Matier's brother. But Matier died in 2002. Early in 2003, Drewry amended the trust to eliminate references to Matier and to authorize outright distributions upon his death to his five nieces and nephews. A few months later, Drewry, then 79, met Marshall Keltz, then 64. Keltz was also a gay widower. The two men began living together, and informed Drewry's birth family about their relationship. Keltz contends that a Drewry family member made religiously and sexually biased remarks to him at a family event in 2004, which he later reported to Drewry. Drewry then revoked a power of attorney he had given to one of his nephews, and named Keltz instead as power of attorney over his financial and health matters, and amended the trust to designate Keltz as trustee and sole beneficiary. In June

2005, Drewry again amended the trust to cut out his nieces and all but one of his nephews as a contingent beneficiary. A few months later, Drewry and Keltz went to Canada to get married, only informing Drewry's family after the fact. Drewry amended the trust again in January 2006 to reduce the percentage left to contingent beneficiaries, and again in May 2007 to include Keltz's son and daughter as contingent beneficiaries. In January 2008, he amended the trust for the last time, to restrict those entitled to an accounting of trust assets to the vested beneficiaries, and removed Paul Drewry as a successor trustee. Drewry died in 2009 at the age of 89, and his attorney promptly filed his will, made in 2003, which nominated a bank as executor. There were not enough assets in the estate to require probate, as his assets had been almost entirely put into the trust.

Within months, the nephews and nieces initiated litigation, seeking their share of the trust assets. Their main argument is that Keltz had taken over Drewry's life, isolated him from his family by inventing the alleged offensive remarks from the 2004 family event, and exerted undue influence to get Keltz to amend the trust. In effect, they accuse Keltz, the much younger man, of having moved in to appropriate the assets of his elderly partner to the prejudice of the partner's legal heirs.

Writing for the court, Judge Patrick Quinn found the allegations in the complaint, all contested in relevant particulars by Keltz, to be sufficient to support all the legal theories advanced by the plaintiffs. Judge Quinn noted that once Keltz was designated with Drewry's power of attorney, he was in a fiduciary relationship. "Sufficient facts were alleged that although Drewry and Keltz knew each other for less than a year, Drewry made Keltz sole beneficiary of his trust and placed the trust in his hands as trustee upon his death. The facts outlining Drewry's ever-deteriorating health coupled with his advanced age and Keltz's position to intercept postal mail, e-mail and telephone calls from family members,

coupled with the cessation of Drewry's family activities he was previously so fond of, are sufficient allegations to show Keltz had quickly gained significant influence over Drewry and was in a position to dominate him," wrote Quinn, who noted that the allegations about Keltz fabricating offensive statements by a relative coincided with Drewry's initial amendments to the trust. "After Keltz's efforts to isolate Drewry from his family members was implemented," Quinn wrote, "the amendments to Drewry's trust continued, all to benefit Keltz and his family to the detriment of Drewry's family. These allegations are sufficient at the pleading stage to state a cause of action."

The court noted that prior Illinois cases describing similar factual scenarios provided precedent for this ruling. "The allegations of active agency by the new, sole beneficiary, Keltz, in procuring amendments to the trust to benefit him and his family, especially in the absence of those who had an interest and a testator who is increasingly debilitated by age and illness who is ever more dependent on the defendant for daily living, is a circumstance indicating a probable exercise of undue influence," wrote Quinn. At this stage of the case, plaintiffs can introduce circumstantial evidence, from which the court can draw an inference of undue influence even in the absence of direct evidence. The court found that the plaintiffs' factual allegations, if proven, could also support claims that Keltz had tortiously interfered with their expected benefits under the original trust, that an accounting of trust assets should be compelled and constructive trust should be placed on the assets to restore them to the original beneficiaries, and that Keltz may have breached his fiduciary duties as trustee, particularly during the early part of this saga when he failed to notify the original beneficiaries about the changes that were being made at a time when they could have questioned their uncle about what was going on.

Of course, all the plaintiffs' allegations are subject to proof. The complaint paints a picture of Keltz

moving in, taking over Drewry's life, and, taking advantage of his increasing frailty, unfairly influencing him to change his estate plan so as to redirect his assets from his birth family to his new partner. That's one side of the story. Keltz contests the factual allegations, contending that Drewry was competent to make these changes and made them without any undue influence by Keltz. Indeed, Keltz's denials had persuaded the Cook County Circuit Judge, Susan M. Coleman, to dismiss all of these claims. The revival of the case will probably lead to a negotiated settlement over distribution of the assets unless Keltz decides to hang tough – a decision that would tie up the assets in litigation for years, and risk losing everything. The court makes nothing of the Canadian marriage, which might not have been recognized by Illinois at the time of Drewry's death, as the state did not put into effect a civil union law until 2011 and its marriage equality law does not go into effect until June 1, 2014.

Keltz was also sued separately by the Drewry trust contingent beneficiaries in a federal lawsuit, *Downey v. Keltz*, which sought to remove Keltz as trustee and obtain an accounting of the trust assets. U.S. District Judge Robert M. Dow, Jr., ruling in that case on Keltz's motion to dismiss on January 31, 2012, found dismissal appropriate on the removal issue, which is pending in the Illinois state court proceeding, but refused to dismiss the petition for an accounting. The plaintiffs in this federal case appear to be a Drewry great nephew and great niece, who were among those designated as contingent beneficiaries to receive the remainder of the trust assets upon Keltz's death. On March 6, 2013, U.S. District Judge Thomas M. Durkin granted a motion for injunctive relief and an accounting, in *Drewry v. Keltz*, 2013 WL 855725 (D. Ill.).

According to a paid death notice published in the *Chicago Tribune* on October 20, 2009, Drewry was survived by three nephews and two nieces, in addition to his spouse. Drewry had worked for National Can Corporation, and after retirement volunteered with Executive Service Corps of Chicago, Howard Brown Health Center, and Lambda Legal's Chicago office, as well as supporting arts, community and health organizations. ■

## Court Denies NYC's Motion to Dismiss Discrimination Suit by Transgender Woman

The Supreme Court of New York, New York County has denied New York City's motion to dismiss a gender and disability discrimination case filed against it by a transgender woman in *Doe v City of New York*, 2013 N.Y. Misc. LEXIS 5491 (December 2, 2013).

The plaintiff, a transgender woman who was born in Puerto Rico, is a client of the New York City Human Resources Administration's HIV/AIDS Services Administration (HASA). She alleged that she had requested HASA to update its records to reflect her legal name change and change of gender

arguing that plaintiff had failed to state a cause of action.

In her opinion, Justice Margaret A. Chan noted that "the court must accept not only the material allegations of the complaint, but also whatever can be reasonably inferred therefrom in favor of the pleader." She rejected the City's argument that the benefit card itself was not a HASA benefit but merely "a means for clients to obtain tangible benefits such as food, housing, financial assistance, and healthcare," especially since plaintiff had claimed that "every time she used the benefits card, she was subjected to embarrassment,

### She alleged that HASA refused to give her a benefits card to reflect her legal change of gender.

information, and to obtain a benefits card to reflect the same. However, HASA employees embarrassed her by using her birth name and incorrect gender pronouns, and refused to make the change without being presented with a new birth certificate reflecting the corrected gender. Unfortunately, the gender listed on birth certificates from Puerto Rico cannot be changed, and therefore plaintiff was unable to obtain and present a corrected birth certificate. She brought suit for gender and disability discrimination under both the New York State Human Rights Law (disability discrimination) and under the New York City Human Rights Law (gender identity discrimination), claiming she had been mistreated by HASA and encountered difficulty obtaining benefits using the card with her former name which listed her as male. The City moved to dismiss,

humiliation, discrimination, accusations, and denial of services because the card indicated the holder to be male while plaintiff presented as female with a female name."

Justice Chan ruled that while HASA's policy "appears to be equal across the board," in that everyone eligible for a benefits card was issued a card listing a gender in accordance with their birth certificate, "its practical impact for the transgender community is not." She further held that "the purposeful use of masculine pronouns in addressing plaintiff... is not a light matter, but one which is laden with discriminatory intent." Finding that "it cannot be said that plaintiff felt demeaned for any reason other than abject discriminatory reasons," Justice Chan ruled that plaintiff had sufficiently stated a cause of action and denied the City's motion to dismiss. – *Bryan C. Johnson*

# Court Rules in Favor of Georgia Man Who Failed to Register as a Sex Offender after Sodomy Conviction

On December 9, 2013, District Court Judge Amy Totenberg held that Charlton Paul Green was entitled to habeas review challenging the constitutionality of his conviction for failing to register as a sex offender. Part of the review focuses on Mr. Green's assertion that his first attorney was ineffective for failing to challenge the use of a predicate conviction under an unconstitutional anti-sodomy statute to prove the crime of failing to register as a sex offender. Judge Totenberg reasoned that prosecuting Mr. Green for failing to register as a sex offender based on a conviction under an unconstitutional sodomy law was not logical. *Green v. State of Georgia*, 2013 WL 6512056 (N.D. Ga., Dec. 9, 2013).

Mr. Green raised two questions. First, whether a 1999 conviction for private consensual sodomy between two consenting men could be used in 2009 to prove a violation of a Georgia statute that requires registration as a sex offender. Second, whether the District Court has jurisdiction to provide relief to him under the terms of 28 U.S.C. 2254. Judge Totenberg ruled that this case falls within an established avenue authorizing relief.

By way of background, in 1997 Mr. Green pled guilty to committing sodomy in violation of Georgia law. The charge arose out of consensual sex with another man in a private hotel room while two female friends were also present. Initially, Mr. Green was sentenced to probation because he was a first time offender. However, Mr. Green later violated his probation and was convicted of sodomy in 1999.

The Georgia sodomy statute that Mr. Green was convicted of violating survived an attack under the Federal constitution in 1986. (*Bowers v. Hardwick*, 478 U.S. 186 (1986)). However, twelve long years later the Georgia Supreme Court held the sodomy statute unconstitutional because it criminalizes private consensual sex. *Powell v. State*, 270 Ga. 327 (1998). *Powell* changed the law in Georgia, but it was not until 2003

that the United States Supreme Court weighed in and overturned the *Bowers* case, holding that a Texas statute that criminalized private consensual sodomy between adults violated the Due Process Clause of the Constitution. *Lawrence v. Texas*, 539 U.S. 558. The Supreme Court went as far as to say that *Bowers*, "was not correct when it was decided, and it is not correct today."

As a result of his 1999 sodomy conviction, Mr. Green was required to register as a sex offender. Mr. Green failed to do this because of a move to care for his ill mother. This oversight led to a conviction for failing to register as a sex offender and it is that conviction that Mr. Green challenges here. With the 2009 conviction came a 30-year sentence. Mr. Green was sentenced to two years in prison and 28 years of probation. Mr. Green now argues that because the sodomy statute is unconstitutional, it cannot be used to support his conviction for failure to register as a sex offender.

Mr. Green hired a new attorney after his 2009 conviction and filed for a new trial. He argued his first attorney was ineffective for not challenging the use of the sodomy conviction as the underlying crime that required registration. Unfortunately for Mr. Green, he was denied the motion for a new trial. The Georgia trial court did not believe that Mr. Green demonstrated the requisite prejudice for ineffective assistance of counsel. The trial court also held that because Mr. Green pled guilty he had waived his defenses.

In an attempt to fight his battle on all fronts, Mr. Green sought to have the sodomy conviction invalidated while his appeal from the denial of his motion for a new trial was pending. Superior Court Judge Brenda Weaver granted his motion and decided to vacate the sodomy conviction. Judge Weaver decided that Mr. Green should be afforded the protections of recent decisions like *Powell* and *Lawrence* because the sexual activity was private.

But for Mr. Green, that was not the

happy end for which he hoped. In 2011, the Georgia Court of Appeals reversed Judge Weaver's decision on procedural grounds and said she had neither authority nor established procedure to grant the motion to vacate the sodomy conviction. Therefore, again Mr. Green was subject to the sex offender reporting requirement and right back where he started litigating his claims.

Finally, on December 28, 2011, Mr. Green filed his Petition for Habeas Corpus relief. Mr. Green is not seeking to vacate the 1999 sodomy conviction in this action. U.S. District Court Judge Totenberg stated that Mr. Green is entitled to habeas relief because he is directly challenging one of the elements of the crime of which he was convicted, violation of the reporting requirement, and argues that the sodomy statute under which he was convicted criminalized conduct beyond the power of the state to punish.

In order to succeed on a claim of ineffective assistance of counsel, Mr. Green will have to show that his counsel's representation fell below an objective standard of reasonableness. Judge Totenberg held that the Georgia Court of Appeals erroneously determined that Green had not shown prejudice. The court pointed to three comments made by the Georgia Superior Court on Mr. Green's motion for new trial, suggesting that even if trial counsel had challenged the use of the sodomy conviction during the trial, this would not have made a difference in the trial court's ultimate decision.

First, the Court of Appeals referenced the Superior Court's comment that Mr. Green "had a conviction on his record that required him to register and that no constitutional challenge to that conviction had been made." Second, the trial court noted that Green waived his defenses when he pled guilty to the sodomy charge. This is a ridiculous ruling by the trial court. Third, the Superior Court "acknowledged that *Powell* and *Lawrence* had changed the law, but concluded that those changes

did not apply to this factual situation because the conduct was not ‘private.’” Judge Totenberg believed this was a flawed argument because a hotel room is not a public place.

Although this decision was reversed on procedural grounds, it demonstrates that Mr. Green’s first attorney was ineffective and inadequate because of his failure to give the Superior Court an opportunity to consider similar issues of privacy based on an objection to the use of the sodomy conviction at the 2009 failure to register trial. This conduct was prejudicial to Mr. Green because the failure of his first attorney to challenge the use of a conviction pursuant to a statute that purported to criminalize private consensual sodomy between two persons above the age of consent, and an indictment that alleged only private consensual sodomy, was deficient and fell below an objective standard of reasonableness. The attorney should have made that argument on behalf of Mr. Green.

Lastly, Judge Totenberg makes an analogy between Mr. Green’s case and the case of *Loving v. Virginia*, 388 U.S. 1 (1967), because to her both underlying charges are unthinkable. It is unthinkable that a conviction based on constitutionally protected private consensual sex occurring before Powell or Lawrence was decided could be still used to convict Mr. Green. Judge Totenberg held that since Mr. Green did not have effective representation at his 2009 trial, his conviction had to be vacated. Therefore, the Judge ordered that the conviction be vacated and that Mr. Green be free from serving the remainder of his 28-year probation sentence.

This is an extremely unfortunate case. Mr. Green endured lengthy litigation over a conviction based on a sodomy statute that is now unconstitutional. For an individual who engaged in private consensual sex to be punished by our courts is unconscionable for many of the younger generation. This case highlights some of the antiquated laws still present in our country. It is disappointing that it took so long for Mr. Green to find some justice. – Tara Scavo

---

*Tara Scavo is an attorney in Wash., D.C.*

## U.S. Magistrate Whittles down Gay Inmate’s Civil Rights Claim

A gay inmate who claimed Riker’s Island officers harassed and assaulted him and destroyed his legal work was left with only one defendant after the Report & Recommendation (R & R) of U. S. Magistrate Judge James C. Francis in *Toliver v. City of New York*, 2013 U.S. Dist. LEXIS 175670; 2013 WL 6476791 (S.D.N.Y., December 10, 2013). Pro se plaintiff Michael Toliver originally sued two officers (Burton and McArdle), two captains (Pressley and Banks), the warden, the Commissioner of Corrections, and the City of New York under 42 U.S.C. § 1983 about a single incident, alleging excessive force, deliberate indifference to his need for medical treatment after the use of force, and retaliatory destruction of property, in violation of federal and state law. U. S. District Judge Sidney H. Stein previously dismissed claims against the City, the agency, and the executive defendants; and the remaining defendants moved for summary judgment, which Judge Francis addressed in the R & R.

According to the complaint, the captains and officers were present for a “routine search” of Toliver’s cell, during which Officer Burton “tore up” most of Toliver’s legal paperwork (including affidavits of witnesses in his criminal case, copies of government letters, notices of claim, and others documents) and “flushed it down the toilet” or left it to be destroyed. When Toliver protested, Officer McArdle allegedly threatened him, saying: “I will drop your fucking Homo faggottay [sic] snitching Ass on the floor [if you] say one more word.” At the end, a captain ordered Burton to uncuff Toliver, whereupon Burton punched and slapped Toliver in the face twice without warning or provocation and in quick succession. None of the others present (Officer McArdle and the two captains) responded to the assault. The City conceded the existence of disputed material facts concerning the use of excessive force by Officer Burton.

As a result of the incident, Toliver

suffered “significant bruises” to his jaw and face, but Captains Banks and Pressley denied his request for immediate medical attention. He received treatment three days later, consisting of pain relievers and ointment, after he spoke with investigators. Toliver claimed that the incident was discriminatory: “because I am an overt homosexual and because of my sexual orientation this was done to me along with my filing complaints and grievances.”

Toliver conceded that actual force was used only by Officer Burton. Judge Francis recited standards of liability for correctional personnel who are present but do not prevent excessive force by another officer, which requires that the bystander officers have knowledge and opportunity to prevent the assault. While this issue is usually a jury question, Judge Francis ruled that “no reasonable jury” could find bystander liability on these facts, since the other officers “did not have reasonable opportunity to intercede.” Judge Francis relied on *O’Neill v. Kreminski*, 938 F.2d 9, 11-12 (2d Cir. 1988), which found that a bystander officer was not liable as a “tacit collaborator” where the blows were unexpected and of too short a duration to intervene. In *O’Neill*, however, the issue was sufficient to go to a jury, and the court of appeals ordered a new trial on the issue of notice and time to intervene, not entry of summary judgment. The bystander officer in *O’Neill* witnessed two assaults, and the court found that a jury could find that the first put him on notice of the need to intervene to protect against the second. Judge Francis did not provide any discussion about the highly charged homophobic atmosphere that was allowed to develop in Toliver’s cell prior to the assault. If the complaint is to be credited, as it must be unless there is a dispute of material facts, the two captains did nothing while one officer wantonly destroyed legal property and the other threatened excessive force and shouted homophobic slurs. It is easy to see how the scenario, uncorrected by



supervision, escalated into an officer's striking the gay inmate. It is difficult to believe that the court would have taken bystander liability from the jury had the penultimate events been filled with tolerated racial or ethnic animus.

The court found that Toliver's medical needs were not serious (a predicate to liability for "deliberate indifference" under the Eighth Amendment) because his bruising, broken skin, bloody nose, and swollen jaw required only "minimal treatment" after three days. The court granted summary judgment to all defendants.

Similarly, the court granted summary judgment against Toliver on his claims involving seizure of his property. He failed to show specifically how destruction of his legal documents denied him access to court. His allegations that defendants retaliated against him because of his grievances or sexual orientation were too conclusory, but the court's analysis addressed only First Amendment retaliation and not Equal Protection. Finally, the court found that any claim of due process violation caused by the taking of his property was defeated by state law post-deprivation remedies.

The defendants sought dismissal of state law claims, arguing that Toliver did not file a notice of claim under New York's General Municipal Law within 90 days of the incident. The court noted that whether a notice of claim was filed is a disputed issue of fact, but it failed to connect this with the alleged destruction of copies of Toliver's notices of claim along with his legal materials. The R & R allows supplemental jurisdiction only as to those claims related to Officer Burton's excessive force.

Judge Francis' balkanized R & R is difficult to parse, even for an experienced lawyer. Toliver remained pro se, and he had 14 days to submit written objections to the district judge or risk waiving appellate review.

– *William J. Rold*

---

*William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.*

## High Court of Australia Rules Against Capital Territory's Marriage Equality Act

In *Commonwealth v. Australian Capital Territory*, [2013] HCA 55 (December 12), the High Court of Australia (Australia's final court) unanimously declared the Marriage Equality Act of the Australian Capital Territory to be inconsistent with the Commonwealth (national) Marriage Act and thus invalid under the Australian Constitution. The Marriage Act defines marriage as between a man and a woman. The High Court found that that definition set the bounds of the legal status within the

classification as the Marriage Act, but with different bounds. That is, even though the Commonwealth statute was a complete statement on the subject and confined marriage to opposite sex unions, the territory statute provided that marriage of almost exactly the same kind as was provided for by the Commonwealth statute could be between same sex partners, with the intention that it be equal to a marriage under the Commonwealth statute.

To arrive at the primary decision, however, the High Court also decided

**The court held that the ACT statute would alter, impair or detract from the Marriage Act and thus could not operate concurrently with it.**

topic of juristic classification with which the Act dealt. As it presently stands, the Commonwealth statute was a comprehensive and exhaustive statement of the law with respect to the creation and recognition of the legal status of marriage. This necessarily carried with it an implicit negative implication that heterosexual marriage was the only kind of marriage that may be formed or recognized in Australia.

The ACT's recently-enacted Marriage Equality Act provided for marriage between same sex couples. The court held that the ACT statute would alter, impair or detract from the Marriage Act and thus could not operate concurrently with it. This was because the ACT statute provided for practically the same legal status within the same topic of juristic

that the "marriage" power under the Australian constitution includes the power to legislate for same sex marriage. The court undertook an interesting analysis of the historical development of the legal concept of marriage, concluding that "the status, the rights and obligations which attach to the status and the social institution reflected in the status are not, and never have been, immutable" and thus "there is no warrant for reading the legislative power [to legislate for marriage] as tied to the state of the law with respect to marriage at federation" (in 1901). As one commentator said, the judges unanimously declared that in 2013 old notions of Christian matrimony don't decide the meaning of marriage in the Australian Constitution.

In this case, as it has done before,

the High Court rejected the approach of constitutional originalism which resonates in the US, saying, “it is necessary to construe the Constitution remembering that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.” “Debates cast in terms like ‘originalism’ or ‘original intent’ (evidently intended to stand in opposition to ‘contemporary meaning’) with their echoes of very different debates in other jurisdictions are not to the point and serve only to obscure much more than they illuminate.”

The key passage in the judgment is a definition of marriage blind to gender: “Marriage is to be understood in ... the Constitution as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements ...” While knocking out state or territory-based same sex marriage, the High Court has paved the way for a national marriage equality law.

Although there have been marriage equality bills in other Australian states, none have passed and it is difficult to see how they could survive High Court scrutiny after this decision. Marriage equality bills in the Commonwealth Parliament have been defeated, although by lessening margins each time. The next achievable political hurdle is to have the conservative government parties agree to a conscience vote rather than a binding party vote against the bills. However, it is considered that even with a conscience vote, and despite the polls showing a majority of public opinion in favor, there is not a majority for equality in the present parliament.

The High Court’s decision can be accessed at <http://www.austlii.edu.au/au/cases/cth/HCA/2013/55.html>.

–David Buchanan

---

*David Buchanan is a Senior Counsel Barrister for Forbes Chambers in Sydney, Australia.*

## Rikers Island Inmate States Retaliation Claim for Revealing HIV Status

A federal district court magistrate judge upheld a jail inmate’s retaliation claim against a mental health clinician who revealed his HIV status to others after he filed a grievance against her. U.S. Magistrate Judge Frank Maas sustained a First Amendment retaliation claim and actions for non-monetary relief under the Americans with Disabilities and Rehabilitation Acts, plus state law causes of action, in his Report and Recommendation in *Rosado v. Herard*, 2013 WL 6170631,

anguish, panic attacks, and somatic symptoms, and he alleged he was a target of harassment that might lead to violence.

Although Judge Maas dismissed most of the counts, he sustained Rosado’s retaliation claim, writing: “retaliation against a prisoner for pursuing a grievance violates the right to petition government for the redress of grievances guaranteed by the First and Fourteenth Amendments and is actionable under [42 U.S.C. § 1983],” quoting *Graham v. Henderson*, 89

### Rosado claimed mental anguish, panic attacks, and somatic symptoms, and he alleged he was a target of harassment that might lead to violence.

2013 U.S. Dist. LEXIS 169068 (S.D.N.Y., November 25, 2013).

Pro se plaintiff Tyrone Rosado, a pre-trial detainee at Rikers Island, filed a grievance after he was denied group therapy services, claiming the jail was discriminating against Hispanic inmates. Less than a week later, mental health clinician Daphnee Herard confronted Rosado about the grievance. According to the complaint, Herard became angry and belligerent and said out loud that Rosado was “just mad” when he filed his grievance because he was “on the verge of dying” from HIV. She repeated her disclosure to other inmates on the following days; as a result, Rosado’s medical condition “became known throughout the prison.” Rosado claimed mental

F.3d 75, 80 (2d Cir. 1996). Rosado demonstrated that he was engaging in protected conduct (filing the grievance); that the defendant took adverse action against him (revealing his HIV status); and that there was a causal connection (retaliating closely in time and linking it to the grievance).

The court upheld violation of privacy as retaliation, even as it denied separate claims about violation of his privacy itself, noting that retaliatory actions “need not be egregious or constitute stand-alone constitutional violations to state a claim for relief.” The court noted that, although Rosado had publicly revealed his HIV status previously in other contexts, there was “no indication that this information was public

knowledge at [his cell block] prior to the events giving rise to this claim.” “The disclosure of this information, in the very location where Rosado was lodged, consequently might well have deterred a similarly situated individual of ordinary firmness from exercising his constitutional rights.” Judge Maas found a First Amendment claim under the Petition Clause when the mental health worker disclosed Rosado’s HIV status in his cell block, even though Rosado had already publicly revealed the information in other contexts and settings.

Herard, represented by the New York City Corporation Counsel, sought dismissal of Rosado’s claims under the Prison Litigation Reform Act [PLRA], because he did not allege “physical injury” as required by 42 U.S.C. § 1997e(e), which provides: “No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.” The court found that compensatory damages may be awarded for violation of a constitutional protection itself. “Herard’s motion mistakenly assumes that, where no physical injury is alleged, the only injury that a plaintiff may suffer as a result of retaliation is mental or emotional harm.... The Second Circuit has held, however, that intangible deprivations of liberty and personal rights are distinct from claims for pain and suffering, mental anguish, and mental trauma.” The court relied on *Kerman v. City of N.Y.*, 374 F.3d 93, 125 (2d Cir. 2004) (allowing damages for Fourth Amendment violation “distinct from any accompanying physical or emotional injury”); and on authority on the PLRA and the First Amendment from other circuits and district courts.

Furthermore, Judge Maas found that, even when a claim potentially

is subject to the PLRA, the confined plaintiff need not plead physical injury in his complaint, thereby allowing events to unfold that may establish physical injury from the retaliatory disclosure. He wrote that the court “cannot, and need not, conclusively resolve the factual question of whether or not the plaintiff suffered physical injury in addition to his claimed mental and emotional injury.... Herard’s application to foreclose Rosado from receiving any compensatory damages therefore is premature.”

In contrast to its First Amendment rulings, the court denied most of Rosado’s other claims. Although the court reaffirmed a Fourteenth Amendment right to privacy in HIV information, citing *Doe v. City of N.Y.*, 15 F.3d 264, 267 (2d Cir. 1994), it found that it extended only to “previously undisclosed medical information.” Rosado had publicly filed court papers in Florida about his HIV status, thereby waiving his constitutional privacy claim.

The court also rejected Fourteenth Amendment claims under the Equal Protection and Due Process Clauses. While Hispanic inmates satisfy Equal Protection “suspect class” criteria, Rosado failed to allege facts from which the court could infer the necessary element of discriminatory intent. The court also dismissed his Due Process claim -- which it calls a “stigma plus” allegation, citing *Velez v. Levy*, 401 F.3d 75, 87 (2d Cir. 2005) – because the statements made about him were true.

Rosado’s claim that Herard denied him medical care in deliberate indifference to his serious medical needs also failed. The court analyzed it under the Fourteenth Amendment because Rosado is a pretrial detainee, not a prisoner, but it uses Eighth Amendment standards. The court found that Rosado’s only issue was participation in group therapy, which was a disagreement about treatment

modalities and not a serious denial of treatment; that he received ongoing treatment and care by his own submission of Progress Notes; that he had not shown that Herard was aware of any medical risk; that his allegations about the consequences of denial of group therapy were “conclusory”; and that he had not alleged any cognizable damages.

The Report recommended dismissal of several statutory claims: under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320, et seq., (because courts “overwhelmingly” hold that “a patient does not have a private right of action under HIPAA”); under the Privacy Act, 5 U.S.C. § 552A(E)(9) (because only agencies and not individual officers are proper parties under the Privacy Act); and under the Americans with Disabilities and Rehabilitation Acts (since they do not provide for money damages against natural persons in either their individual or official capacities). The court allowed ADA and Rehabilitation Acts claims to proceed for injunctive and declaratory relief.

Rosado also sued under New York State law for damages for negligence, intentional infliction of emotional distress, defamation and violation of New York Corrections Law § 137(5) and New York Public Health Law § 2782(3). The Corporation Counsel did not contest the sufficiency of these claims. Judge Mass’ Report found that the court had discretionary authority to hear these claims under supplemental jurisdiction, as they arose “from the same events as his federal claims.” – *William J. Rold*

---

*William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.*

# Colorado Administrative Court Rules against Discriminatory Baker in Wedding Cake Dispute

On December 6, 2013, Administrative Law Judge Robert Spencer held that a bakery, located in Lakewood, Colorado, just outside Denver, violated Colorado's anti-discrimination law, CRS Sec. 24-34-601(2), when it refused to sell a wedding cake to Charlie Craig and David Mullins. *Craig v. Masterpiece Cakeshop, Inc.*, Case No. CR 2013-0008 (Colo. Off. of Admin. Cts.).

On July 19, 2012, Craig and Mullins, along with Craig Mullins' mother, Deborah, met with the owner of the bakery, Jack C. Phillips, to order a wedding cake. The couple planned to get married in Massachusetts and hold

sex weddings by creating a wedding cake, he will be displeasing God and acting contrary to the teachings of the Bible."

Both parties moved for summary judgment. Judge Spencer denied respondent's motion and granted claimant's motion. Masterpiece Cakeshop is a place of public accommodation within the meaning of CRS Sec. 24-34-601(1). Further, under the Colorado Public Accommodation Law, "it is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to any individual or a group because of ... sexual orientation ... the full and equal enjoyment of the

application of the anti-discrimination law in this case violates their constitutional right to free speech and/or free exercise of religion. Judge Spencer rejected this argument, refusing to find that "preparing a wedding case is necessarily a medium of expression amounting to protected 'speech.'" Judge Spencer rationalized that compelling respondents to treat same-sex and heterosexual couples equally is not the equivalent of forcing them to adhere to "an ideological point of view" because the finished product is distinguishable from saluting a flag, marching in a parade, or displaying a motto. Nor could respondents argue that the cake itself would convey a message since they declined to make the cake before there was any discussion about what the cake would look like. Importantly, "Phillips was not asked to apply any message or symbol to the cake, or to construct the cake in any fashion that could be reasonably understood as advocating same-sex marriage."

Respondent's analogies to a black baker being forced to make a cake for a member of the Aryan Nation containing a white supremacist message or an Islamic baker being forced to make a cake denigrating the Koran for the Westboro Baptist Church predictably failed since the parties never discussed the styling of the cake. Rather, respondents plainly refused to make any cake for claimant's same-sex wedding.

Nor did the law, as applied, impact respondents' free exercise of religion, because it merely regulated conduct and not respondents' beliefs. Rather, respondents' conduct adversely affected complainants' rights to be free from discrimination in the marketplace, and the impact on respondents by the State's regulation is incidental to Colorado's legitimate regulation of commercial activity.

Finally, Judge Spencer likened

## Respondents argued that their refusal to make the wedding cake was based upon their objection to same-sex weddings, and not because of claimants' sexual orientation.

a celebration for family and friends in Colorado, which does not permit same-sex marriages. Phillips refused to make the cake, saying: "I'll make you birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same-sex weddings."

The next day, Deborah called the bakery and spoke to Phillips again. He explained to her that "he does not create wedding cakes for same-sex weddings because of his religious beliefs, and because Colorado does not recognize same-sex marriages." According to Judge Spencer's decision, Phillips, a Christian, believes that "the Bible commands him to avoid doing anything that would displease God, and not encourage sin in any way. ... Phillips believes that if he uses his artistic talents to participate in same-

goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." (CRS Sec 24-34-601[2]).

Respondents argued that their refusal to make the wedding cake was based upon their objection to same-sex weddings, and not because of claimants' sexual orientation. Judge Spencer noted that this was essentially a distinction without a difference, because "[t]he salient feature distinguishing same-sex weddings from heterosexual ones is the sexual orientation of its participants ... [t] herefore, it makes little sense to argue that refusal to provide a cake to a same-sex couple for use at their wedding is not 'because of' their sexual orientation."

Respondents also argued that

respondents' religious exemption arguments to that interposed in *Bob Jones Univ. v. United States*, 461 US 574 (1983), where plaintiff University denied admission to interracial couples, but otherwise admitted all races. In that case, the Supreme Court held that the University's conduct amounted to impermissible racial discrimination.

Judge Spencer ordered respondents to cease and desist discriminating against complainants and other same-sex couples by refusing to sell same-sex wedding cakes. Although claimants have since been married, David Mullins hopes that the "decision will help ensure that no one else will experience this kind of discrimination again in Colorado." (<http://gawker.com/judge-orders-bakery-to-serve-gay-couple-1478639088>, last accessed 12/29/13).

Complainants were represented by Paula Greisen, Esq., and Dana Menzel, Esq., King & Greisen, LLC; Amanda Goad, Esq., American Civil Liberties Union Foundation LGBT & AIDS Project; and Sara Rich, Esq., and Mark Silverstein, Esq., American Civil Liberties Union Foundation of Colorado.

The lawyer for the cake shop tried to paint the owner in a positive light. "He can't violate his conscience in order to collect a paycheck," the lawyer, Nicolle Martin, said. "If Jack can't make wedding cakes, he can't continue to support his family. And in order to make wedding cakes, Jack must violate his belief system. That is a reprehensible choice. It is antithetical to everything America stands for."

The judge addressed a store owner's right to refuse service: "At first blush, it may seem reasonable that a private business should be able to refuse service to anyone it chooses. This view, however, fails to take into account the cost to society and the hurt caused to persons who are denied service simply because of who they are." – *Eric J. Wursthorn*

*Eric J. Wursthorn is a Senior Court Attorney in the New York State Unified Court System.*

## European Court Rules on Equal Benefits Case for Same-Sex Couple

Responding to a request from a French court for an interpretation of European law, the 5th Chamber of the European Court of Justice ruled on December 12 that an employee of a French bank who requested leave and a marriage bonus under the employer's policy on the occasion of his entering into a pact civil (the French equivalent of a civil union) with his same-sex partner in 2007 had suffered direct discrimination on the basis of sexual orientation by the employer's denial of the benefit under Article 2(2) of Council Directive 2000/78/EC, which implements the obligation

thus were not intended to be an equivalent status to marriage, unlike, for example, the civil partnerships presently authorized under British law for same-sex couples. (Effective March 29, 2014, same-sex couples will be able to enter into civil marriage in Britain.) Finding that these differences were significant, the Tribunal and the Court of Appeal found that any discrimination here was indirect on the part of the employer, and justified by the French national policy of providing a different and lesser status open to same-sex couples.

The Court of Cassation referred

**An employee who requested leave and a marriage bonus suffered direct discrimination on the basis of sexual orientation by the employer's denial of the benefit.**

for Member States to prohibit sexual orientation discrimination in employment. The unanimous decision in *Hay v. Credit agricole*, Case C-267/12, constitutes a preliminary ruling which returns the case to the French Court of Cassation that is now considering Frederic Hay's appeal from an adverse ruling by a local Labor Tribunal in Saintes and the Court of Appeal in Poitiers.

The Labor Tribunal and the Court of Appeal had focused on the differences between marriage and the PACS under French law at the time these events occurred. The PACS, which are open to both different-sex and same-sex couples, provide a limited list of rights and

to the European Court the following question: "Must Article 2(2)(b) . . . be interpreted as meaning that the choice of the national legislature to allow only persons of different sexes to marry can constitute a legitimate, appropriate and necessary aim such as to justify indirect discrimination resulting from the fact that a collective agreement which restricts an advantage in respect of pay and working conditions to employees who marry, thereby necessarily excluding from the benefit of that advantage same-sex partners who have entered into a [PACS]?"

Chamber 5 of the European Court, a five-member panel made up of judges from five different member countries of the European

Union, unanimously concluded that the Council Directive did apply to this kind of employee benefit, but dismissed the relevance of the difference between marriages and the PACS, writing “it is required not that the situations be identical, but only that they be comparable and, on the other hand, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned.” The court referred to a prior ruling involving Germany’s registered life partnerships open to same-sex couples, and comparisons could be drawn to other national laws, such as the civil unions provided for same-sex couples in Austria.

“As regards the days of paid leave and the bonus which the provisions at issue in the main proceedings grant to employees on the occasion of marriage,” wrote the court, “it is necessary to examine whether persons who enter into a marriage and persons who, being unable to marry a person of their own sex, enter into a PACS, are in comparable situations.” The court found that the PACS is “a form of civil union under French law which places the couple within a specific legal framework entailing rights and obligations in respect of each other and vis-à-vis third parties. Although the PACS may also be concluded by persons of different sexes, and although there may be general differences between the systems governing marriage and the PACS arrangement, the latter was, at the time of the facts in the main proceedings, the only possibility under French law for same-sex couples to procure legal status for their relationship which could be certain and effective against third parties.”

Thus, the court found that entering into a PACS by a same-sex couple was comparable to entering into a marriage for a different-

sex couple. In the court’s view, this meant that Credit agricole’s marriage leave and bonus policy was a form of direct discrimination because of sexual orientation, not indirect discrimination. This was important, because indirect discrimination may be defended by reference to legitimate government aims, but direct discrimination may only be justified by grounds listed in Article 2(5) of the Directive: public security, maintenance of public order, prevention of criminal offenses, protection of health, and protection of the rights and freedoms of others. The court found that none of these grounds would justify excluding same-sex couples from enjoying the benefit when they enter into a PACS. Consequently, the court advised the French Court of Cassation that Article 2(2) (a) of the directive, the provision concerning direct discrimination, “must be interpreted as precluding a provision in a collective bargaining agreement . . . under which an employee who concludes a civil solidarity pact with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules of the Member State concerned do not allow persons of the same sex to marry, in so far as, in the light of the objective of the conditions relating to the grant of those benefits, that employee is in a comparable situation to an employee who marries.”

The court’s decision is very narrowly focused on the situation pertaining when Mr. Hay concluded his PACS with his partner. The following year (perhaps in response to Mr. Hay’s complaint?) Credit agricole and the unions representing its employees amended its collective bargaining agreement to extend the marriage benefits to employees who entered into PACS, and in 2010 a

general agreement to this effect was included in the bank’s national collective bargaining agreement, and the French Ministry for Labor Employment and Health extended this throughout the banking sector in France. And, of course, since then France has legislatively opened up marriage to same-sex couples, making this controversy moot as to the future IN FRANCE. But the opinion is significant because there are many Member nations subject to the Council Directive that do not provide same-sex marriage at present but do authorize some equivalent, such as a registered partnership or civil union, for same-sex couples, so the interpretive principle established in this opinion would carry over to them.

It may also be worth noting that the Chamber phrased its ruling in terms of a country that does not provide for same-sex marriages. Presumably this means that the ruling no longer pertains to France going forward, even though PACS are still available for same-sex couples who do not desire to embrace the full legal status of marriage. The court’s finding of discrimination was premised on the denial of marriage to same-sex couples, leaving the PACS the only way they could form a legally recognized relationship. Although now the banking sector of France is working under a policy of treating those who enter into a PACS as equivalent to marriage for purposes of this type of benefit, it is not clear from this opinion how the matter will be handled in other sectors that might not be subject to the same policies.

Mr. Hay’s lawyer for this appeal is A. Lamamra. The court received submissions from lawyers for Credit agricole, the governments of France and Belgium and the European Commission, as well as the Advocate General for the Council of Europe. ■

# MARRIAGE EQUALITY

**FEDERAL** – By mid-December the Defense Department had worked out arrangements so that National Guard members with same-sex spouses would be able to enroll their spouses for benefits in any state in which they were living, regardless of local law. In some of the last hold-out states, this was effectuated by designating federal personnel who could administer the registration process to avoid confrontations over state officials' determination that state facilities and personnel not be used in a way that would recognize same-sex marriages in violation of state law. It was also reported by mid-December that the Social Security Administration had begun paying out survivor's benefits for same-sex widows and widowers, and the Internal Revenue Service had issued additional detailed guidance on how employee benefits plans should deal with same-sex marriages of employees in order to maintain their compliance with federal tax laws.

**U.S. DEPARTMENT OF LABOR** – The Labor Department's Employees' Compensation Appeals Board, recognizing the effect of *U.S. v. Windsor* declaring unconstitutional Section 3 of DOMA, ruled in *J.T. and U.S. Postal Service, Post Office, Portland, ME*, Docket No. 13-1580, 2013 WL 6529449 (Nov. 8, 2013), that a prior decision in the case, denying recognition of J.T.'s marriage to a same-sex spouse in Vermont, should be reversed. Consequently, J.T. is entitled to augmented benefits available to married employees who suffer work-related injuries. The opinion contains no facts other than reference to J.T.'s Vermont same-sex marriage.

**NAVAHO NATION** – Although eight Native American tribes have moved to allow same-sex marriages within their jurisdictions, the Navaho Nation has

rejected that step for now. In June 2005, the Navajo Nation Council adopted a marriage act to recognize marriages "contracted" outside the tribe but specifically stated that same-sex marriages were "void and prohibited." A spokesperson for the tribe, which is located in New Mexico, said that the recent New Mexico Supreme Court decision made no difference for tribal marriage recognition, and will remain the same unless the Council reconsiders it. *Farmington Daily Times*, Dec. 20.

**RAILROADS** – The National Railway Labor Conference, which represents the larger railroad companies in their dealings with labor organizations, issued a statement on December 4 announcing that beginning January 1, 2014, the carriers will provide dependent health coverage to same-sex spouses of railroad employees, although the Conference did not believe that this policy was required by law or the existing collective bargaining agreements. This announcement came one day after two railroad engineers in Washington State filed suit against their employer, BNSF Railway, alleging that denial of same-sex spousal benefits was unlawful. Counsel for the two engineers, Cleveland Stockmeyer, hailed this as a "step in the right direction" but said the lawsuit in U.S. District Court in Seattle would continue in pursuit of retroactive benefits and punitive damages for emotional distress suffered by his clients when they applied to enroll their spouses and were told by a BNSF representative that the carrier's "stated policy" was that "marriage is between one man and one woman." *Hall v. BNSF Railway* (filed Dec. 3, 2013). *Seattle Times*, Dec. 5; *New York Times*, Dec. 4.

**ARIZONA** – Lambda Legal's lawsuit seeking restoration of partner benefits rights for Arizona state employees has been certified as a class action.

In an order issued on December 23 in *Diaz v. Brewer*, No. CV09-02402-PHX-JWS (D. Ariz.), District Judge John W. Sedwick certified a class of "All lesbian and gay employees of the State who are now, or will in the future, be eligible under the criteria specified in former Ariz. Admin. Code Sec. R2-5-101 to obtain State health insurance benefits for their committed same-sex partners and their partners' dependents," and appointed Lambda's clients as class representatives. The court also appointed Lambda Legal and cooperating counsel Perkins Coie LLP as class counsel. Former Governor Janet Napolitano had extended the benefits through executive action; they were rescinded under Governor Janice Brewer as part of a program of budget-cutting instituted in response to declining tax revenue in the Great Recession. Plaintiffs achieved pre-trial relief to restore the benefits as litigation proceeds, which was upheld by the 9th Circuit, and are now pursuing the case on the merits on the contention that withdrawing benefits from unmarried partners violates Equal Protection as benefits are still provided to spouses of employees, and Arizona neither allows same-sex marriage nor recognizes same-sex marriages contracted elsewhere.

**ARKANSAS** – The trial judge in one of the pending lawsuits challenging the Arkansas laws against same-sex marriage has both refused to dismiss the case and declined to issue a preliminary injunction against enforcement of the laws. In a brief Order that provided no analysis or discussion, Pulaski Circuit Judge Chris Piazza merely stated that all pending pretrial motions were denied. *Wright v. State of Arkansas*, 60CV-13-2662 (Dec. 20, 2013). Another marriage equality lawsuit involving different plaintiffs and counsel is pending in federal district court. *Arkansas Daily Weblog*, Dec. 20.

# MARRIAGE EQUALITY

**HAWAII** – With the Hawaii marriage equality law going into effect on December 2, the pending appeal before the 9th Circuit of a federal district judge’s dismissal of marriage equality litigation appeared likely to be moot, so the Clerk of the Court sent an Order to the parties directing them to move for voluntary dismissal of the appeal within 21 days or to show cause why the case should not be dismissed. If the parties fail to respond to this order, the Clerk is directed to dismiss the appeals under 9th Circuit Rule 42-1. *Jackson v. Abercrombie*, No. 12-16995 (9th Circuit, Nov. 26, 2013). This does not deprive the 9th Circuit of the opportunity to rule on marriage equality, since it has an active appeal of the Nevada marriage equality litigation pending for argument in 2014.

**KANSAS** – Kansas law provides that taxpayers in the state are to file their state tax returns using the same status as their federal returns. A similar statute in Missouri led that state’s governor to direct state tax authorities to allow same-sex couples married in other states to file their Missouri taxes as “married.” Kansas has pursued the opposite course, instructing that married same-sex couples residing in Kansas file their state tax returns as “single.” Equality Kansas, an organization working for marriage equality in that state, filed suit on December 30 in Shawnee County District Court on behalf of two same-sex couples – Michael Nelson and Charles Dedmon, and Roberta and Julia Woodrick – who were married in California and seek to file their Kansas taxes as “married.” They are asking the court to rule, consistent with the Kansas tax statute, that they be allowed to file their state taxes in the same “married” status as their federal taxes. *Nelson v. Kansas Department of Revenue*, No. 13-C1465 (Kansas, Shawnee Co. Dist. Ct., filed Dec. 30, 2013). Department of Revenue officials have stated that they must comply with the Kansas

Constitution’s provision limiting marriage in the state to the union of a man and a woman, and barring recognition of same-sex marriages from other jurisdictions. *cjonline.com*, Jan. 2.

**MASSACHUSETTS** – On October 2, U.S. District Judge Richard Stearns had entered an order ruling for the plaintiffs in *McLaughlin v. Hagel*, 2013 WL 6622898 (D. Mass.), a case brought by Servicemembers Legal Defense Network (SLDN) challenging the refusal by the Defense Department to provide benefits for the same-sex spouses of military personnel. The court had stayed the lawsuit, which was filed on October 27, 2011, while previously-filed anti-DOMA litigation was pending in the 1st Circuit, and ultimately held up determining the case when it appeared that the Supreme Court would be ruling on DOMA Section 3. “This court immediately responded [to *Windsor*] with an Order to the parties to show cause why, in light of *Windsor*, judgment should not enter for plaintiffs. On October 2, 2013, the court adopted and entered the parties’ proposed form of final judgment declaring DOMA unconstitutional as applied to plaintiffs.” Then SLDN applied for attorneys fees of more than \$170,000 as the prevailing party. In a civil rights action against the government, the prevailing party can be awarded fees if it shows that the government’s position in the case lacked “substantial justification.” In this case, the government had announced eight months before this lawsuit was filed that the Attorney General and the President considered DOMA Section 3 to be unconstitutional but would continue to enforce it until a definitive court ruling striking it down. Judge Stearns found plaintiffs had not met the burden, opining that the government’s position of continuing to enforce Section 3 while conceding its unconstitutionality in the courts did not lack “substantial justification,” because this position

supported the government’s standing to take the question to the Supreme Court in the *Windsor* case. In the majority opinion in *Windsor*, Justice Kennedy found that the government’s continued enforcement of Section 3 preserved the necessary “case or controversy” to provide the Supreme Court with jurisdiction to rule on the government’s appeal. “It is not that the President could not have ended all enforcement of Section 3 by executive fiat,” wrote Stearns. “The government is careful to make the point that it was among his prerogatives to do so – the issue is whether under the circumstances to do so would have been constitutionally reasonable. It is clear from *Windsor* that the Supreme Court would have thought not.” Concluded Stearns, “In sum, this court would be loath to deem unjustified by any substantial measure a litigating position that has its roots in the very fundamentals of our constitutional form of government.” This is unfortunate for SLDN, which has found fundraising difficult as the community’s attention has shifted from the issue of gay military service to the issue of marriage equality. Perhaps SLDN can find pro bono representation to appeal this.

**MISSISSIPPI** – DeSoto County Chancery Court Judge Mitchell Lundy has ruled in *Czekala-Chatham v. Melancon* that the court does not have jurisdiction to grant a divorce to a same-sex couple resident in Mississippi that married in California in 2008. Lauren Czekala-Chatham filed a divorce petition to terminate her marriage with Dana Melancon. Melancon is not opposing, the women having separated and agreed to end their marriage. But Justin Matheny, a Special Assistant with the Mississippi Attorney General’s office, showed up at the oral argument on December 2 and contended that Mississippi is not required to accept public policy decisions of other states about marriage, and the court could



# MARRIAGE EQUALITY

not rule on a divorce. Judge Lundy dismissed the case, saying, “I can’t grant a legal divorce if there’s no legal marriage.” Czekala-Chatham, represented by attorney J. Wesley Hisaw, vowed to appeal. Melancon cheered her on, telling the *DeSoto Times-Tribune* (Dec. 3), “I wish her the best. I have nothing bad to say about her. She will pursue this, I know she will. She’s that kind of person.”

---

**NORTH DAKOTA** – Responding to a rather bizarre question (a staged hypothetical) from Burleigh County State’s Attorney Richard Riha, North Dakota Attorney General Wayne Stenehjem issued Letter Opinion No. 2013-L-06, opining that it would not violate North Dakota’s laws against polygamy for somebody who was party to a same-sex marriage in another state that had not been dissolved to come to North Dakota and apply for a marriage license, identifying themselves as “single/never married.” Stenehjem said that because North Dakota by law does not recognize same-sex marriages, that person would be treated as unmarried and could apply for a marriage license – but only, of course, to marry somebody of the opposite sex. Stenehjem declined to answer Riha’s further question whether such an individual, who then married in North Dakota, would be guilty of polygamy under the laws of the state where the individual had entered into a same-sex marriage. Is Riha planning to run for Attorney General and hoped to trap Stenehjem into issuing an opinion that could then be used against him as campaign fodder? Inquiring minds want to know.

---

**PENNSYLVANIA** – U.S. District Judge John E. Jones III, presiding in *Whitewood v. Corbett*, the ACLU’s marriage equality lawsuit pending in the Middle District of Pennsylvania, rejected a motion by defendants for an

interlocutory appeal of his refusal to dismiss the case. Attorneys for the state argued that the federal district judge is bound to dismiss the case based on *Baker v. Nelson*, the Supreme Court’s summary affirmation in 1972 of a Minnesota Supreme Court decision denying a same-sex marriage claim. At the time, the Supreme Court explained its action with the cryptic formulation that the case did not raise a “substantial federal question.” But Judge Jones ruled that *Baker* is not now relevant in light of Supreme Court rulings in the interim, from *Romer* to *Windsor*. It would be quite difficult today to argue with a “straight face” that the issue of same-sex marriage does not raise a “substantial federal question.” So Jones has rejected the state’s suggestion that the case go directly up to the 3rd Circuit Court of Appeal to consider the precedential effect of *Baker*. “Although defendants arguably present a controlling question of law,” said Jones in his denial of the petition to certify the appeal, “we disagree that substantial grounds for a difference of opinion exist on that question.” *The Legal Intelligencer*, Dec. 17. \* \* \* Montgomery County Clerk D. Bruce Hanes has asked the Pennsylvania Supreme Court to rule on whether Pennsylvania’s DOMA is unconstitutional, in an appeal of a ruling by the Commonwealth Court barring him from continuing to issue marriage licenses to same-sex couples. *Commonwealth of Pennsylvania v. Hanes*, No. 379 M.D. 2013 (Commonwealth Court) (unpublished opinion), appeal pending. *The Legal Intelligencer*, Dec. 5.

---

**TEXAS** – After she was re-elected in November, Mayor Annise Parker of Houston extended spousal benefits eligibility to the same-sex spouses of city employees who were married out of state. (Texas does not authorize or recognize same-sex marriages.) Some political opponents filed suit against the

Mayor and the City in Family Court, arguing that the benefits were illegal due to the state’s marriage amendment and related statutes, and obtained a temporary restraining order, as a result of which the City sent notices to the employees who had enlisted their spouses, indicating that unfortunately the benefits could not go into effect. Lambda Legal filed suit in federal court on behalf of employees who had received the notices, alleging that the failure to provide these benefits constitutes a deprivation under color of state law of rights secured by the U.S. Constitution. *Freeman v. Parker*, Case No. 4:13-cv-3755 (S.D. Texas, filed Dec. 26, 2013). Now that the federal government recognizes lawfully contracted same-sex marriages as a result of the *Windsor* decision regardless of the domicile of the married couple, public employees are emboldened to assert their 14th Amendment rights, even in states such as Texas that have constitutional amendments barring same-sex marriage. Now there is the beginning of a body of case law suggesting that a state’s refusal to recognize a marriage lawfully contracted out of state violates the 14th Amendment, with the ruling in Ohio in *Obergefell v. Wymyslo*, 2013 WL 6726688, 2013 U.S. Dist. LEXIS 179550 (S.D. Ohio, Dec. 23, 2013), as Exhibit A. It is ironic that the lead defendant in the case is Mayor Parker, the nation’s most prominent openly-lesbian big city mayor, but her administration sent the notices in response to the lawsuit and she would be an appropriate official who could execute a court order to restore the benefits.

---

**VIRGINIA** – U.S. District Judge Michael F. Urbanski agreed with defendants that Governor Robert F. McDonnell should be dismissed as a named defendant in the pending marriage equality lawsuit in the Western District of Virginia, but refused to dismiss the other defendants and found that the plaintiffs had

# MARRIAGE / CIVIL LITIGATION

standing to move the case forward. *Harris v. McDonnell*, 2013 U.S. Dist. LEXIS 179449 (W.D. Va., Dec. 23, 2013). Urbanski found that McDonnell enjoyed 11th Amendment immunity because he played no direct role in enforcing Virginia's ban on same-sex marriage, but that Janet M. Rainey, the State Registrar of Vital Records, and Thomas E. Roberts, the Staunton County Clerk, could be sued in their official capacities. (There was actually no dispute between the parties that Rainey is a proper defendant in the case.) As to standing of the plaintiffs, Urbanski found that it was irrelevant that none of the plaintiffs had actually applied for a marriage license. It was enough that Joanne Harris and Jessica Duff had inquired at the clerk's office and been told that an application from them would not be accepted, to establish that they had standing to sue Roberts, the county clerk. The other part of the case, dealing with recognition of out-of-state marriages, did not require that Christy Berghoff and Victoria Kidd, who were married in D.C. and lived in Virginia, had not actually applied for and been denied some state benefit available to married couples; it was enough to give them standing that Virginia has on its books laws forbidding recognition of their marriage. Urbanski found the controversy ripe for judicial resolution, without tipping his hand as to any view on the merits.

---

**WEST VIRGINIA** – Lambda Legal filed a motion for summary judgment in *McGee v. Cole* (U.S. Dist. Ct., S.D. W. Va.), a pending federal court challenge to West Virginia's refusal to allow or recognize same sex marriages, on December 31, 2013. The lawsuit was filed on October 1, 2013. Lambda argued that in light of developments in other states since then, including several federal court rulings in favor of marriage equality, there was no need for the court to delay reaching the merits

of the case. The defendants responded with a request for more than the usual time to formulate their response, pointing out that Lambda Legal, a national organization that has litigated this issue in several jurisdictions, has all the materials they need already prepared to file in support of their motion, but that defendants, who have not previously litigated this issue, are essentially starting from scratch. This overlooks the fact that plenty of briefs filed in opposition to such motions are readily available on-line in a variety of free databases. A status conference with the judge is scheduled for January 3, 2014.

---

## CIVIL LITIGATION NOTES

**ILLINOIS** – The Appellate Court of Illinois, First District, affirmed a ruling by Cook County Circuit Judge Lisa Ruble Murphy on a dispute between former lesbian partners about the financial obligations of each during the teen years of their three children, now all emancipated. *In re J.M.B. & D.; E.M.B. v. J.E.B.*, 2013 Ill. App (1st) 1221-42-U, 2013 Ill App. Unpub. LEXIS 2868 (Dec. 19, 2013). The published decision contains nothing that turns on the sexual orientation of the parties or the nature of their domestic partnership. Both are high-earning professionals, and the trial court decided that in light of this and the evidence that the children continued to enjoy the same standard of living after the couple broke up as previously, there was no need to require one woman to compensate the other for alleged inequality in the amounts of money each contributed toward the support of the children after the women had split up. The unpublished opinion for the court by Justice Epstein is largely devoted to reviewing the evidence and concluding that the trial judge did not abuse her discretion in reaching her final decision.

**LOUISIANA** – U.S. District Judge Shelley D. Dick granted summary judgment to the employer in a same-sex harassment case involving a female hotel laundry attendant and the female General Manager of the hotel. *Hawkins v. Avalon Hotel Group*, 2013 U.S. Dist. LEXUS 171170 (M.D. La., Dec. 4, 2013). Peggy Hawkins claimed that G.M. Stephanie Ehrhard approached her from behind while she was standing in the lobby getting coffee and propositioned her explicitly for a sexual relationship. Hawkins alleges that she informed Ehrhard that she was straight, and Ehrhard dropped it, looking disappointed. She was off work the next day; when she came back, she was told that her job title and duties had changed, becoming in her view more onerous. She suffered emotional distress and physical symptoms as a result, she claims, and then missed several days of work, failing to call in consistent with the hotel's attendance policy, and was discharged. She filed a grievance about Ehrhard's solicitation prior to her discharge. Ehrhard denies ever having propositioned Hawkins, or even being present in the hotel on the date the incident was alleged to have happened. In granting the employer's summary judgment motion on the Title VII claims, Judge Dick found that Hawkins failed to show that Ehrhard is a lesbian, which under 5th Circuit precedent applying the Supreme Court's *Oncale* decision, would be necessary for such a cause of action unless plaintiff could show that a harassing supervisor is anti-woman or treats men and women differently. Ehrhard, a mother with a male fiancé, stoutly denies being a lesbian, and Hawkins presented no evidence in support of her claim. The court also rejected Hawkins' retaliation claim, finding that the hotel presented credible evidence that Hawkins' duties were not changed due to this incident and that her failure to comply with attendance policy was a legitimate justification for the discharge, the decision having been

# CIVIL LITIGATION

made by the human resources director who was unaware of the harassment claim at the time.

---

**MICHIGAN** – A unanimous three-judge panel of the Court of Appeals of Michigan rejected a gay law professor’s appeal from the trial court’s order directing a verdict for defendant in his tenure dispute with the University of Michigan Law School. *Hammer v. University of Michigan Board of Regents*, 2013 Mich. App. LEXIS 1972 (Dec. 3, 2013). Peter Hammer was informed in writing by then-dean Jeffrey Lehmann in February 2000 that Hammer had failed to achieve the necessary 2/3 vote by the tenured faculty, due to concerns about his scholarship, but that the faculty would give him an unprecedented two years “to allow you sufficient time to do significant additional writing” before a new tenure vote would be taken, rather than treat the following academic year as his terminal year. Lehmann then acceded to Hammer’s request for an extension of one more year, so that he would have time to look for a new job if the next vote went against him, thus extending his faculty status until May 2003. When the tenured faculty voted in 2002, Hammer again fell short of 2/3, and ultimately his employment ended in 2003. He sued the law school in state court, contending that some of the faculty voted against him because he is gay, in violation of the school’s non-discrimination policy. He also claimed that he had received tenure by default, since the extension to May 2003 for his appointment brought him within a university rule that a faculty member employed for eight years would receive tenure, and he had not specifically been given notice of termination. At first the law school contended that its non-discrimination policy was not contractually binding, but that position stirred controversy among the faculty and students, the school backed away from it, and Hammer got discovery

and a hearing on his discrimination charge. The trial judge ultimately ruled that Hammer received adequate notice, had not acquired tenure automatically, and that he had failed to show that bias against Hammer because of his sexual orientation was behind the tenure denial. Indeed, the trial judge noted that at least one of the other gay members of the faculty had voted against Hammer’s tenure application. In backing up the trial court, the court of appeals, per curiam, reviewed in detail the evidence Hammer presented as to each faculty member he accused of being anti-gay, and discounted much of it on grounds of hearsay or, in effect, reading too much into stray remarks or views on particular legal issues. The court found that at best Hammer had put in possible question the fairness of votes by two faculty members, an insufficient number to bring him above the 2/3 requirement if those two votes were ignored. The opinion is full of fascinating detail, and one suspects Hammer may seek review in the Michigan Supreme Court.

---

**NEW JERSEY** – U.S. Magistrate Ann Marie Donio granted an employer’s motion to send to arbitration a sexual orientation discrimination claim that had been filed in state court and removed by the employer to federal court. *Cook v. Nordstrom*, 2013 WL 6633522, 2013 U.S. Dist. LEXIS 176832 (D.N.J., Dec. 17, 2013). Micah Cook filed his claim alleging sexual orientation harassment, hostile work environment, race discrimination, and retaliation in N.J. Superior Court, citing only the N.J. Law against Discrimination. Defendant removed the action, presumably on diversity grounds and filed a motion to stay pending arbitration. (The opinion does not specify the basis of removal.) It seems that Nordstrom conditions employment on employees agreeing to submit all disputes “regarding the employment relationship” including “termination, discrimination, retaliation

or harassment claims arising under state or federal status” to arbitration. Magistrate Donio found that the arbitration provision was valid and enforceable under New Jersey contract law, and squarely applied to this dispute, so ordered that the case be administratively terminated, “without prejudice to the parties’ right to reopen by way of letter application following completion of arbitration.”

---

**NEW JERSEY** – Is a Mohawk-style haircut so “extreme” that an airline would be justified in not allowing a male flight attendant to work a flight when he reported for duty thus groomed? In *Falcon v. Continental Airlines*, 2013 U.S. Dist. LEXIS 171349 (D. N.J., Dec. 4, 2013), U.S. District Judge Jose L. Linares ruled that if gay flight attendant Ray Falcon can prove that Continental’s supervisors on duty at Newark Airport on September 23, 2010, knew he was gay and applied its grooming standards to him discriminatorily, he may have a sexual orientation discrimination claim under New Jersey’s Law Against Discrimination, denying summary judgment to the defendant on this count. A material fact in dispute is whether the supervisors involved in the incident knew that Falcon was gay. He claims he was “out” and known to his supervisors as such, while they deny it, so there is a credibility issue there. He also claims, evidently, that he was subjected to this indignity because he is gay. When the supervisors were adamant about not letting Falcon work with the alleged Mohawk (Falcon maintains it was just a standard military cut, short at the sides and a bit longer on top), Falcon asked another attendant who had hair clippers to trim his top sufficiently to satisfy the supervisors, and was allowed to work his scheduled flight to Paris. Falcon asserts that the incident caused him significant emotional distress, requiring psychological treatment and causing him to miss some subsequent flights.

# CIVIL LITIGATION

Falcon supplemented his discrimination claim with a battery claim (the haircut) and a claim of intentional infliction of emotional distress. Judge Linares granted summary judgment to Continental on these two tort claims, finding that Falcon could not assert battery when he had requested the other attendant to give him the haircut, and that this incident failed to come anywhere close to the high standard of outrageous conduct set by New Jersey courts in emotional distress claims arising from workplace incidents.

---

**NEW YORK** – Lambda Legal announced on December 4 a settlement of its lawsuit on behalf of a married lesbian couple whose request to have their lease amended to list both of them as tenants after they married in 2011 in Iowa was denied by their landlord. *Weinstein v. Weinreb Management LLC* (N.Y. Supreme Ct., N.Y. County). Although New York courts had by 2009 established that the state recognized same-sex marriages lawfully contracted elsewhere, and the state adopted a marriage equality law in June 2011, Weinreb Management insisted that New York did not recognize same-sex marriages so Dava Weinstein could not have Dorothy Calvani added to her lease, despite her presentation of a marriage certificate from Iowa. After fruitless negotiations, Lambda filed a lawsuit on December 2 and, evidently, the defendant's lawyer immediately advised them that they had a losing case under the N.Y. Rent Stabilization Code and the New York State and City Human Rights Laws, so a quick settlement ensued. According to Lambda Legal, the case settled for \$20,000 and, presumably, the requested amended lease. *Lambda Legal News Release*, Dec. 4.

---

**NEW YORK** – Here is a sad story that illustrates the point that proceeding pro

se in complex civil litigation is rarely a good idea. Taking the allegations of the complaint in *Dumont v. United States*, 2013 WL 6240468, 2013 U.S. Dist. LEXIS 170058 (N.D. N.Y., Dec. 3, 2013), as true pro se plaintiff Daniel Dumont is the surviving domestic partner of Walter L. McIntosh, having lived with McIntosh in McIntosh's house in Chenango County for many years. A 1998 will and powers of attorney sought to protect Dumont in the event of McIntosh's death. Dumont nursed McIntosh through an extensive illness until his death in January 2013, at which time Dumont was astonished to discover that a new will had been executed in 2007, cutting him out entirely. Dumont did not retain counsel but went into court himself to oppose the executors in Surrogate Court and also filed a federal action seeking some kind of relief, which was previously dismissed by a different judge. He filed this new action after his experiences in Surrogate's Court (including being held in contempt and briefly jailed, as well as having the house in which he had lived with McIntosh become the subject of an eviction proceeding after the executors took advantage of his incarceration to enter the premises and photograph the contents. In granting the motion to dismiss in favor of all defendants, District Judge Glenn T. Suddaby ran through a litany of reasons why the case was not properly in federal court, the legal theories being propounded by Dumont being frivolous. One reads this opinion with a sinking heart. If the allegations of the complaint were true, Dumont was a victim of the failure of New York law to recognize same-sex families until the recent passage of the Marriage Equality Act opened up the possibility of legal marriage to same-sex couples. He may have also been the victim of an unsympathetic upstate Surrogate's Court. His entire case really turned on the allegation that attorneys conspired to get an incompetent McIntosh to execute a new will so that

McIntosh's property could be stolen from Dumont, the rightful heir, but his complaint in federal court was bereft of legitimate federal causes of action. Without knowing more about the situation, one hesitates to suggest that competent representation for Dumont in the Surrogate's Court might have saved the day, but given the state of the law in New York concerning unmarried same-sex couples, one hesitates to speculate further.

---

**NEW YORK** – New York County Surrogate Rita Mella ruled in *Matter of the Adoption of a Child Whose First Name is G* (Dec. 27, 2013) in favor of a second-parent adoption by a gay man of a child who had been adopted by his close heterosexual female friend, finding that their continuing relationship could be construed to come within the meaning of "two unmarried adult intimate partners" under New York Domestic Relations Law Section 110, which specifies the classes of people authorized to adopt another person in New York. The two adults, identified by the court as KAL (the straight woman) and LEL (the gay man) were close friends who decided to have and raise a child together using alternative insemination, but when the woman failed to become pregnant after several tries, they agreed that she would adopt a child from Ethiopia and he would eventually petition for second-parent adoption. They shared parenting duties, including financial support, even though they did not live together, the child rotating between the two households. A social worker performed a home study and recommended approving the adoption. Surrogate Mella pointed out that the statute explicitly does not require that a couple have a sexual relationship in order to be considered "unmarried adult intimate partners," and found that it was in the best interest of the child to approve this adoption. Long-time LeGaL member

# CIVIL LITIGATION

Judith Turkel represented the couple in seeking the adoption ruling. If the decision is published, it will be noted again in a future issue of *Law Notes*.

---

**OHIO** – In *Caparanis v. Ford Motor Company*, 2013 WL 6626839, 2013 U.S. Dist. LEXIS 175955 (N.D. Ohio, Dec. 16, 2013), U.S. District Judge James S. Gwin denied the employer’s motion for summary judgment in a same-sex hostile environment harassment case brought under Title VII of the Civil Rights Act of 1964. Plaintiff Robert Caparanis, according to Judge Gwin’s summary of the complaint, “had habits and attributes not usually found among male workers of Ford’s plant. . . His co-workers told him that they thought this behavior was outside of the norm, saying he ‘did the queerest things’ and asked him why he couldn’t ‘just work and be like normal people.’ At times, Caparanis engaged in behaviors that pushed him farther from the male stereotype, like pretending to be pregnant and rocking a fake baby while wearing his work apron.” I feel a gender-stereotyping case coming on. Sure enough, Caparanis was targeted for harassment by co-workers, the situation was made known to management, and he was eventually terminated from his job. Although Gwin granted judgment to the company on some of Caparanis’s other claims, he refused to grant judgment on the hostile environment claim. “The vulgar acts mimed toward Plaintiff; the threats made while he faced harassment about needing Vaseline for anal sex; the crude text messages Defendant Kemplin sent; the catalogues of women’s clothing and lingerie; and the sexually-explicit wooden box that could be interpreted to suggest Caparanis should give (or gave) fellatio in the area near his workspace all could support the conclusion that – at least from early 2010 until Plaintiff Caparanis’s termination – there was an environment that was ‘both objectively and subjectively offensive. . . hostile or

abusive.” Gwin found contested material facts and denied summary judgment on Caparanis’s “sex-stereotype theory.”

---

**OHIO** – The lesson of this case, *In re L.B.*, 2013-Ohio-5648, 2013 Ohio App. LEXIS 5912 (Ohio, 11th Dist. Ct. App., Dec. 23, 2013), is “pay attention to deadlines.” Michelle Comstock filed a complaint in the trial court in October 2010, alleging that she and Kelly Burk had been in a committed relationship in which they had agreed to raise a child together. Burk became pregnant through donor insemination and gave birth to L.B. on July 24, 2003. Evidently there was some falling out, and Comstock’s complaint sought relief, in the alternative, of designation as legal parent, the status of shared parent, or award of contact and companionship rights. Burk moved to dismiss or for summary judgment; while the motion was pending, and before a response was filed, Comstock’s counsel withdrew from the case. Comstock did not locate new counsel or file a response prior to the deadline, and the trial court essentially defaulted her. This appeal arises from her repeated and frantic attempts to get the trial court’s judgment set aside. The opinion for the court by Judge Timothy P. Cannon says nothing about the underlying merits of the case, running on for several pages about various procedural statutes and doctrines of Ohio law that boil down to rejecting Comstock’s efforts, finding that her failure to respond to the summary judgment motion was not “excusable” merely because her counsel had withdrawn without doing it. Judge Colleen Mary O’Toole, concurring, agrees with the court’s procedural disposition, but, she wrote, “I find it disturbing that the entire case, both in the trial court, and on appeal, has necessarily revolved around procedure,” and the “best interest of L.B.” has never been considered by the court. “I am encouraged by the fact that the juvenile

court retains jurisdiction, and a new case can be filed,” she wrote. “As the questions of whether a shared custody agreement between Ms. Burk and Ms. Comstock actually existed, whether Ms. Comstock was a suitable custodian for L.B., or whether a shared custody agreement is in L.B.’s best interest, were never actually litigated or decided, collateral estoppel does not apply.” Back to square one for Comstock.

---

**OKLAHOMA** – In *Coates v. Fallin*, 2013 OK 108, 2013 WL 6670585, 2013 Okla. LEXIS 145 (Dec. 16, 2013), the Oklahoma Supreme Court rejected various constitutional challenges to the new workers’ compensation law that the legislature had enacted in place of the old statute. One of the justices, John F. Reif, dissented in part, arguing, among other things, that a provision of the new code specifically denying workers compensation death benefits to the same-sex spouses of deceased employees, “even in cases where their spouse is killed in Oklahoma in the course of his or her work requiring interstate travel through Oklahoma,” was unconstitutional and should be severed from the statute. Characterizing this as “egregious,” he wrote that “this restriction denies the equal protection component of due process under Article 2, sec. 7 of the Oklahoma Constitution. It also violates the Interstate Commerce Clause as well as the Privileges and Immunities Clause of the United States Constitution.” Apparently, none of the other justices had any problem with this provision, and it is not even mentioned in the Order for the court dismissing the challenge.

---

**PENNSYLVANIA** – The *Philadelphia Inquirer* (Dec. 19) reported that students at Villanova University law school had represented a gay man from Russia, S.R., in his successful application for asylum in the United States. There

# CIVIL / CRIMINAL LITIGATION

were news reports that the enactment of anti-gay measure in Russia had led to a sharp increase in asylum applications by Russian gays who manage to get to the U.S.A. on tourist, student or business visas, or who enter the country from Canada or Mexico without documentation. As the article noted, the main issue in these cases is whether the applicant can prove to the satisfaction of immigration officials that they are actually gay, and government counsel tend to focus on discrepancies in testimony to cast doubt on the credibility of applicants. At this point, immigration officials do not contest that gay people from Russia would normally qualify for asylum in the U.S., in light of ample documentation that skinhead gangs routinely attack gay people and the government threatens to imprison them for being open about being gay, despite unbelievable verbal disclaimers by President Putin that the government does not discriminate or persecute gays.

---

**UTAH** – U.S. District Judge Clark Waddoups ruled on December 13 that the part of Utah’s polygamy law that prohibits unmarried cohabitation violates the 14th Amendment, relying on the Supreme Court’s 2003 decision invalidating the Texas Homosexual Conduct Law, *Lawrence v. Texas*. *Brown v. Buhman*, 2013 U.S. Dist. LEXIS 175443, 2013 WL 6568756 (D. Utah). The action was brought by a man and his four wives, seeking to avoid possible prosecution stirred up by their participation in a reality television program about their family by obtaining a declaration that the provision was unconstitutional. Kody Brown is legally married to only one of his “wives,” but has gone through religious ceremonies with the other three and they consider themselves to be married, but he does not hold out their marriages to be sanctioned by the state, and argued that any attempt by the state to enforce the cohabitation ban against him would violate his liberty interest in

intimate association, as enunciated in *Lawrence*. Agreeing, Judge Waddoups pointed out that, if literally applied, the statute could be used to prosecute any cohabiting adults in the state, including all same-sex couples, since they are not allowed to marry. He also noted the discriminatory enforcement problem – i.e., the state’s failure to actively pursue enforcement of this provision – as undermining any argument that the state has a legitimate interest in outlawing cohabitation. The statute dates back to early days in the state’s history, when Congress had insisted on Utah outlawing polygamy as a condition of its admission to the Union as a state, and the cohabitation ban was enacted to prevent Mormons from evading the polygamy ban by contracting multiple religious marriages. This decision was issued a week before Waddoups’ colleague on the federal District Court in Utah, Judge Robert Shelby, ruled that same-sex couples in Utah have a right to marry. Upon taking office on December 30, newly appointed Attorney General Sean Reyes announced that an appeal of this ruling to the 10th Circuit was on his agenda.

---

## CRIMINAL LITIGATION NOTES

**CALIFORNIA** – The 6th District Court of Appeal has stricken an HIV-test requirement that a Monterey County Superior Court judge had ordered at sentencing on a guilty plea to a charge of willful child endangerment. *People v. Soliz*, 2013 WL 6667660, 2013 Cal. App. Unpub. LEXIS 9096 (Dec. 18, 2013) (not officially reported). The California Penal Code specifically authorizes HIV testing for a defendant convicted of crimes specified in Section 1202.1, including crimes with which the defendant was charged, but he ultimately pleaded to a lesser charge that is not among those listed in that section. Another section authorizes a victim

to request testing of the defendant, but the victim in this case, a seven-year-old girl who was accusing her mother’s boyfriend of attempting to have vaginal intercourse with her, never requested testing. Trying to use a mechanism that prosecutors have employed in some other cases, the prosecutor argued on appeal for a remand to give the victim an opportunity to request testing, but the court was unwilling to order this, finding that the victim had adequate time to make such a request prior to sentencing, and citing in reliance *People v. Guardado*, 40 Cal.App.4th 757 (1995). Presumably this new opinion was not released for publication because the court saw it as a straightforward application of the *Guardado* precedent.

---

**KENTUCKY** – Upholding a forcible sodomy conviction and 35 year prison sentence in *Minter v. Commonwealth*, 2013 Ky. LEXIS 635 (Kentucky Sup. Ct., Dec. 19, 2013), the court held that the trial court did not err by excluding the defendant’s testimony that the victim’s girlfriend had told another person that she had caught the victim having sex with a man in the past. Defendant Sotoy Minter was charged with first-degree sodomy, the anal rape of Larry Griffin. Minter, Griffin and Griffin’s girlfriend had attended a party together, at which many including Griffin became intoxicated, and Griffin’s girlfriend asked Minter to help her get Griffin home. According to Griffin, he fell asleep in his apartment, only to awaken finding Minter on top of him; that he resisted but Minter forced him to have anal intercourse. Minter claimed that the activity was consensual. He couldn’t dispute that it happened, because DNA results showed that he had ejaculated in Griffin. At trial, Minter was excluded from introducing evidence that Griffin had sex with other men in the past, the court relying on both the hearsay rule and the state’s rape shield statute. The appellate court held that reliance on

# CRIMINAL LITIGATION

the rape shield statute was appropriate, because this case did not come within any of the exceptions to the statute, such as evidence of a past sexual relationship between the defendant and the victim. Testimony showing that Griffin was bisexual or gay or had engaged in anal intercourse in the past was not relevant to the issue whether he consented to sex on this occasion. “Appellant implies that because the victim said that he was ‘straight,’ that is, he claimed he was not predisposed toward gay sexual relations, evidence that he had voluntarily engaged in other homosexual conduct acquired a unique relevance,” wrote Justice Venters for the court. “We disagree. There is no doubt that [the rape shield law] operates to shield putative victims from disclosure of prior sexual behaviors that have no relevant to the offense in trial except to cast a negative light upon the alleged victim. The purpose of the rule and the language of the rule allow for no differentiation between heterosexual behavior and homosexual behavior. Accordingly, the testimony was inadmissible under [the statute] because it is evidence of ‘other sexual behavior’ that is offered to cast doubt on Larry’s testimony with evidence of his alleged prior sexual behavior and his alleged sexual predisposition.” The court also rejected the argument that exclusion of this evidence prevented Minter from presenting a “complete defense,” since he was allowed to testify that the sex was consensual and it was up to the jury to judge his credibility. The court noted that the right to cross-examine is not absolute and “may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process,” and commented that whether Griffin had engaged in such conduct in the past, and whether his girlfriend knew and was angry about it, “adds little credence to Appellant’s defense.”

---

**MICHIGAN** – Affirming a sentence of life without parole and extensive

concurrent sentences, the Court of Appeals of Michigan rejected defendant Andrew Terrell Clark’s argument that the prosecutor improperly sought to evoke sympathy for his victim, Robert Miller, by describing arguing that Clark lured Miller into a set-up because Miller was gay. *People v. Clark*, 2013 Mich. App. LEXIS 2055 (Dec. 17, 2013). Among his affirmative defenses evidently rejected by the jury, Clark argued that he killed Miller in self-defense after Miller “made unwanted sexual advances toward him.” Miller, whose body was discovered in his apartment, was stabbed 132 times and also suffered other blunt force injuries. Clark ransacked the apartment for valuables and stole Miller’s car. Phone records showed numerous calls between the two men prior to the murder. The prosecution’s theory of the case was that Clark targeted gay men to rob. Clark argued on appeal that this was improper argument intended to evoke sympathy for his victim, focusing on the following statement by the prosecutor: “The evidence shows how he set it up. He was targeting gay males. And we know the stereotypes and we know that stereotypes aren’t true, but nevertheless they exist. And we know the stereotypes of gay males. Stereotypes being that they are feminine and they are weak, easy to control. That is what he was doing. He was trying to get an easy target.” The court said that it “is apparent from the context of these remarks that the prosecutor was not attempting to evoke sympathy for Miller because he was gay, but rather was arguing that Miller’s status was relevant to defendant’s selection of him as a victim. Thus, there was no plain error.” The court also noted that Clark failed to object to the prosecutor’s statement when it was made.

---

**TENNESSEE** – The Court of Criminal Appeals of Tennessee rejected an appeal by Robert Brown, Sr., of his

conviction on one count of child rape and one count of criminal exposure to HIV. *State of Tennessee v. Brown*, 2013 WL 6730101, 2013 Tenn. Crim. App. LEXIS 1119 (Dec. 19, 2013). The victim was the defendant’s then 8-year-old granddaughter, who told police officers about what her grandfather had done. More than a year earlier, Brown had tested positive for HIV and had been informed about safer sex practices by a health investigator for the state Health Department. The victim, 11-years-old at the time of trial, also testified quite clearly that her grandfather had inserted his penis into her during sexual play, and explained why her statements to police had been contradictory. The appellate court rejected Brown’s argument that this testimony was insufficient to sustain a conviction, when backed up by medical proof offered to show that the victim had been sexually penetrated, and when the defendant had admitted his act to the police when they arrested him. As to the conviction on the charge of exposure to HIV, the court found the evidence sufficient. “The proof also established that the Defendant had been informed of his HIV-positive status in May 2009, over a year prior to the night in question. Moreover, the medical proof in this case established that the victim was HIV positive.” It’s hard to understand why anybody thought they should appeal this case.

---

**WISCONSIN** – Rejecting an inmate’s bid for downward resentencing, the 3rd District Court of Appeals of Wisconsin noted that the trial judge was aware of the defendant’s gender identity issues when deciding on the appropriate sentence, and that the defendant had presented no new evidence on this account as part of his appeal of the sentences imposed after he pled guilty to sexual assault of younger cousins left in his care. *State v. Gustafson*, 2013 Wisc. App. LEXIS 1069 (Dec. 27, 2013).

# PRISONER LITIGATION

---

## PRISONER LITIGATION NOTES

**CALIFORNIA** – A bisexual prisoner failed to plead a claim of deliberate indifference to his safety in *Taylor v. Beard*, 2013 WL 6491524, 2013 U.S. Dist. LEXIS 173265 (E.D. Calif., December 10, 2013). Pro se plaintiff Tracy Taylor sued Jeffrey Heard, the Secretary of the California Department of Corrections and Rehabilitation [CDRC], and R. Briggs, a CDRC Appeals Examiner who denied his grievance for special housing “in a facility... where other bisexual and homosexual inmates are housed.” Upon Prison Litigation Reform Act screening, U.S. Magistrate Judge Dale A. Drozd denied all relief. Taylor’s claim against the Secretary failed to allege personal involvement or knowledge; the Secretary’s statutory duty to classify inmates was not itself enough. Taylor’s claim against Appeals Examiner Briggs was insufficiently particular; Taylor claimed fear and “constant danger” of assault because of his sexuality. He failed to plead either prong of the protection from harm tests in *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), which requires a serious risk and official knowledge of it. His safety “score” did not justify special housing, he had no prior assaults or specific threats, and he could not identify any enemies. Judge Drozd dismissed the case, but he assessed the full \$350 filing fee, to be paid in installments whenever Taylor’s inmate account exceeds \$10.

---

**GEORGIA** – A Georgia prisoner’s pro se lawsuit alleging that officials denied him all treatment for gender identity disorder and post traumatic stress following multiple sexual assaults stated claims under 42 U.S.C. § 1983 and the Americans with Disabilities Act in *Diamond v. Silver*, 2013 WL 6584037, 2013 U.S. Dist. LEXIS 176049 (M.D. Ga., December 16, 2013). Ashley

Diamond claimed he requested hormone treatment and psychotherapy, but prison doctors and the warden told him he “would not be receiving any treatment for his conditions.” U.S. Magistrate Judge Stephen Hyles found Diamond’s claims to be sufficiently “colorable” to survive Prison Litigation Reform Act (PLRA) screening. The opinion is light on facts; it does not specify the nature of Diamond’s gender identity or state whether the assaults occurred in the prison. As the mental health community expands its recognition of sexual identity, with less reliance on “disorder” nomenclature such as “Gender Identify Disorder,” transgender prisoners often still find themselves barely able to sustain claims based on definitions in the old DSM. Two other inmates made similar claims by filing declarations in Diamond’s suit. Although the court construed the pro se plaintiff’s papers “liberally,” it did not do the same for the other prisoners. Without commenting on F.R.C.P. 20’s broad allowance of permissive joinder, it ruled they had to commence their own actions (and presumably pay separate filing fees under the PLRA).

---

**MASSACHUSETTS** – A Massachusetts prisoner’s complaint that he was being denied adequate treatment for HIV/AIDS at an alcohol and substance abuse center survived initial scrutiny under the Prison Litigation Reform Act in *Clark v. Spencer*, 2013 U.S. Dist. LEXIS 180147 (D. Mass., December 26, 2013). Most of U.S. District Judge F. Dennis Saylor IV’s discussion of the substance of the pro se complaint concerns whether the claims are sufficiently complex to warrant appointment of “scarce” pro bono counsel, which the court denies without prejudice. Plaintiff Richard Clark alleged that his circumstances warrant a lower level security classification and transfer to a facility where he could receive adequate medical treatment for his HIV/AIDS. Noting that prisoners

bear a significant burden to overcome broad administrative discretion in classification and placement, Judge Saylor directed defendants to answer the complaint, which he said, without elaborating, “raises potentially serious allegations concerning his medical care... that cannot be decided on this record.” Judge Saylor denied preliminary relief, including “immediate transfer,” finding, in addition to other procedural failings, that Clark “has not shown sufficiently that he has a likelihood of success on the merits.”

---

**MISSISSIPPI** – Relying on case law about segregating HIV+ prisoners that is more than twenty years old, U. S. Magistrate Judge Linda R. Anderson summarily dismissed claims of pro se inmate Willie B. Gaines that the Rankin County, Mississippi jail violated his rights by placing him in a conspicuously empty cell while his cohorts were crowded to the point of sleeping on the floor. *Gaines v. Sheriff Bryan Bailey*, 2013 WL 6191349, 2013 U.S. Dist. LEXIS 167809 (S.D. Miss., Nov. 26, 2013). The court noted that the jail provided Gaines, a state prisoner in a county jail for two weeks, with “extra food” and “more space than others” and that he suffered “no negative consequences.” Although assuming “that Gaines was not housed with another inmate solely due to his HIV status,” the court nevertheless found no Equal Protection violation because HIV-infected people are “not a suspect class,” and “the identification and segregation of HIV-positive prisoners obviously serves a legitimate penological interest,” citing *Moore v. Mabus*, 976 F.2d 268, 271 (5th Cir. 1992). *Moore* relied on the notorious *Thigpen* litigation upholding segregation of HIV+ prisoners in Alabama – see *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991). In the intervening years, the legal community (Judge Anderson excluded) has recognized the sea change in medical



# PRISONER / LEGISLATIVE

reality for people with HIV, to the point that the district court in Alabama has itself held that ongoing discrimination against HIV+ inmates in housing and programs violate the American with Disabilities and Rehabilitation Acts. The settlement of the *Thigpen* litigation, reported in the November 2013 issue of *Law Notes* at p. 355, prohibits actions that identify inmates as HIV+. Gaines also challenged the jail's denial of his HIV and mental health medication for the duration of his two weeks in jail because he was allowed to take the sinus medicine he brought with him and the jail sent his "consent" for his meds to the state prison. Assuming he was denied his medications for two weeks, the court further "assumes that it would be impossible to prevent two week delays in medications in many cases where prisoners are being transported." The court cites no legal or factual justifications for the broad latter assumption – and there are none.

---

**TENNESSEE** – A Tennessee prisoner's pro se claim that she was treated more harshly for a rules infraction than other inmates involved in the same incident because she is a lesbian states an equal protection claim under rational basis scrutiny in *Gadson v. Fuson*, 2013 WL 6498069, 2013 U.S. Dist. LEXIS 173431 (M. D. Tenn., December 11, 2103). Plaintiff Romaniaann Gadson was one of five women to whom a sixth inmate exhibited a tattoo while they were in the shower, albeit dressed. Gadson received 120 hours lock down time (versus 72 hours for the others), which was later reduced; and she alone was moved to stricter housing, which deprived her of time outside her cell and of work, which in turn caused loss of "good time" and longer incarceration. Gadson claimed that her disparate treatment was based on her sexual orientation, in violation of the Equal Protection Clause. Reviewing the sufficiency of her complaint under the Prison Litigation Reform Act, U. S.

District Judge Aleta A. Trauger found that Gadson stated a "colorable" Equal Protection Claim because she alleged alleges facts "from which it might be inferred that she was subjected to disparate treatment by [officers], insofar as similarly situated inmates who engaged in the same behavior were treated more favorably than she was, and that there was no rational basis for the disparate treatment." The court specifically eschewed reliance on heightened scrutiny or suspect class theory, while also noting that Gadson, as a prisoner, had no right to received the privileges or work she was denied. Reasoning backwards from the relief sought, the court inferred that two of the defendants had personal involvement since Gadson sought training in discrimination for one and her job back from the other. Judge Trauger dismissed claims against the sheriff for lack of personal knowledge or involvement. This case bears following for the court's willingness to apply rational basis scrutiny with some teeth because the plaintiff, as a lesbian, belonged to an "identifiable group," in a context in which the underlying circumstances were otherwise trivial.

---

## LEGISLATIVE & ADMINISTRATIVE NOTES

**FEDERAL** – The 2014 Defense Authorization Bill approved by Congress and signed into law on December 27 by President Obama revised Article 125 of the Uniform Code of Military Justice in light of *Lawrence v. Texas* to reform the military sodomy law. Amazingly, it took ten years to accomplish this, but it was not politically feasible until after Congress had agreed to end the "don't ask, don't tell" military policy and the new policy allowing military service by openly gay and lesbian individuals had been implemented successfully. The provision has been retitled to cover

"forcible sodomy" and "bestiality," and as revised Article 125 states: (a) **FORCIBLE SODOMY.** – Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex by force or without the consent of the other person is guilty of forcible sodomy and shall be punished as a court-martial may direct. (b) **BESTIALITY.** – Any person subject to this chapter who engages in unnatural carnal copulation with an animal is guilty of bestiality and shall be punished as a court-martial may direct. (c) **SCOPE OF OFFENSES.**—Penetration, however slight, is sufficient to complete an offense under subsection (a) or (b)." (See Section 1707 of the Defense Authorization Act.) We could poke fun at Congress for using the antiquarian phrase "unnatural carnal copulation," which was rendered obsolete by the Model Penal Code half a century ago and which appears in Section 377 of the Indian Penal Code and criminal laws of many other British Commonwealth nations, and we could also poke fun at the idea that the word "unnatural" is necessary in the bestiality provision, but we will refrain! (Oops, we just did...) The measure also includes an expanded "conscience" provision to protect military personnel from discipline for stating their homophobic views out loud, insisted upon by Senate Republicans and inserted in the bill by Sen. Mike Lee (R-Utah) during the Senate Armed Service Committee mark-up. Another provision requires the Inspector General of the Defense Department to report to Congress no later than 18 months after the measure was signed on incidents of adverse personnel actions or discrimination against personnel based on their "moral beliefs." DoD is also instructed to report to Congress in six months about its personnel policies regarding service members with HIV or HBV, to give Congress an opportunity to decide whether current restrictive policies should be continued. The

# LEGISLATIVE

bill also makes changes in how the military handles sexual assault cases by criminalizing retaliation against those who report sexual assaults, preventing commanders from overturning jury convictions, and protecting victims from abusive treatment during pre-trial proceedings. *Washington Blade*, December 20.

---

**FEDERAL** – The Department of Health & Human Services is actively reconsidering the existing rule under which Medicare does not provide coverage for surgery for “sex reassignment of transsexuals.” In a ruling announced on December 2 by the DHHS Departmental Appeals Board, Docket NO. A-13-47, NCD Ruling No.2, the Board determined, based on evidence presented by a complainant, that the existing record “is not complete and adequate to support the validity of the existing determination to deny such coverage. The Board found that the “premises” for the existing policy, “which was based on a 1981 review of medical and scientific sources published between 1966 and 1980, are not reasonable in light of subsequent developments.” As a result, there will be a discovery process, presentation of evidence, and a determination whether “the existing NCD record on which the NCD was based is complete and adequate to support its validity.” In other words, the wheels are turning for reconsideration of this policy. The Board comments, in its extended analysis, “The unrebutted submissions of the aggrieved party and the amici demonstrate that the rationale for the NCD is not adequately supported by the existing NCD record.” This is not surprising, given the legal developments since 1981, particularly the Tax Court’s ruling that expenditures for such procedures are deductible as necessary medical expenses, and rulings by some courts that denial of such treatment to transgender prison inmates may

violate the 8th Amendment as a denial of necessary medical treatment for a serious condition. *Washington Blade*, Dec. 11.

---

**FEDERAL** – U.S. Customs and Border Patrol will recognize same-sex couples as families during the customs declaration process under a Final Rule submitted to the Federal Register on December 13.

---

**FEDERAL** – The U.S. Department of Education announced on December 13 that students in same-sex marriages will be treated the same as their heterosexual married classmates for purposes of federal college loan applications, as a result of the federal recognition of same-sex marriages pursuant to *U.S. v. Windsor*. USDE, Office of the Assistant Secretary, GEN 13-25 (Dec. 13, 2013). The Department will use the place of celebration rule in determining whether a student is married. The same standards will apply to parents, so a child being raised by a married same-sex couple will be considered to have married parents, and their income will be treated the same way that all married parent income is treated. *Huffington Post*, Dec. 13.

---

**FEDERAL** – The U.S. Centers for Disease Control and Prevention announced on December 20 that it would no longer exclude transgender women from participating in the National Breast and Cervical Cancer Early Detection Program, acknowledging that transgender women can benefit from early detection of breast cancer. *Advocate.com*, Dec. 23.

---

**CALIFORNIA** – The Sacramento City Unified School District trustees voted unanimously on December 19 to adopt guidelines establishing rights and

protections for transgender students, providing direction to administrators on how to accommodate such students on issues such as restroom and locker room use. The policy is consistent with a state law going into effect on January 1 that is threatened with a referendum repeal vote, but this school district’s policy will remain in effect regardless of such a vote. *Sacramento Bee*, Dec. 20.

---

**CONNECTICUT** – The state’s Insurance Department has issued a bulletin to all health insurance companies authorized to sell policies in the state that they should provide coverage of mental health counseling, hormone therapy, surgery and other treatments related to a patient’s gender transition. The bulletin states that the state seeks to ensure that “individuals with gender dysphoria are not denied access to medically necessary care because of the individual’s gender identity or gender expression.” The department relied for authority to issue this bulletin on two state statutes: the law prohibiting discrimination based on gender identity and expression, and the law requiring that health insurance policies cover diagnosis and treatment of mental health disorders. It relies on the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM), which classifies gender dysphoria as such. *Hartford Courant*, Dec. 26.

---

**FLORIDA** – The City Council in Pensacola voted 8-1 to establish a domestic partnership registry and grant a small list of rights to unmarried couples who register their partnerships. The rights covered will be making medical and funeral decisions, visiting in hospitals and prisons, and participating in educational decisions for children raised by the partners, who would also automatically be notified in

# LEGISLATIVE

case of an emergency and designated as “pre-need” guardians. The sole dissenter was Council President Jewel Cannada-Wynn, who said that she thought the registry undermined the institution of marriage. *Pensacola News Journal*, Dec. 13.

---

**INDIANA** – Faced with the possibility that the legislature will propose a constitutional amendment against same-sex marriage during 2014, LGBT activists in the state have been encouraging local governments to go on record in opposition. On December 4, the Bloomington City Council voted unanimously to pass a resolution in support of marriage equality and opposing the proposed ballot measure. *Bloomington Herald-Times*, Dec. 5.

---

**KENTUCKY** – The Morehead City Council voted unanimously on December 9 to adopt an ordinance prohibiting discrimination in employment, housing and public accommodations because of sexual orientation or gender identity. The other cities and towns in Kentucky that have such ordinances include Lexington, Louisville, Covington, Frankfort, and Vicco. *Lexington Herald-Leader*, Dec. 10.

---

**LOUISIANA** – The Shreveport City Council voted 6-1 to adopt an ordinance banning discrimination in housing, employment and public accommodations on December 10. Prohibited grounds for discrimination include race or color, sex, disability, age, ancestry, national origin, political or religious identification, sexual orientation and gender identity. The only other city in Louisiana with a civil rights law covering these categories is New Orleans, which also covers disability and marital status. *nola.com*, Dec. 11.

---

**MARYLAND** – The City Council of Hyattsville voted unanimously to adopt an ordinance banning discrimination because of sexual orientation and gender identity, becoming the first jurisdiction in Prince George’s County to ban gender identity discrimination. State law covers sexual orientation but not gender identity, but Baltimore City and Baltimore, Howard and Montgomery Counties have ordinances banning both sexual orientation and gender identity discrimination. The ordinance took effect on Dec. 22. *Washington Blade*, Dec. 3.

---

**NEBRASKA** – The Douglas County Board voted on December 3 to extend public employee benefits to same-sex spouses of employees who married in other states. Nebraska prohibits same-sex marriage by constitutional amendment and statute. The vote changes the definition of eligible spouse in the city’s benefits policy to state “the person to whom the employee is legally married, regardless of whether that person is of the same gender or opposite gender of the employee.” The vote was 6-1, the dissenter stating that she believed the county should track federal policy under the Family and Medical Leave Act, which uses state of domicile rather than state of celebration in determining whether an employee is married. The county, which is self-insured, reopened its open enrollment period to allow eligible spouses to enroll, with benefits to begin January 1, 2014. The county revised its policy to require all employees who seek spousal benefits to show their marriage certificates. The City of Omaha, which has a unionized workforce, has not yet extended health and dental benefits, pending negotiations with municipal unions, but has opened pension and flexible benefits plan coverage to same-sex spouses of employees. Some governmental bodies in Nebraska are deferring to decisions by their insurance

vendors about how to define spousal eligibility, in light of uncertainty raised by inconsistencies between state and federal law. *Omaha.com*, Dec. 3.

---

**NEW JERSEY** – The state legislature approved a bill to revise the procedure for changing sex designations on birth certificates. The bill would allow a person to register a court-approved name change and a form from the health care provider individual that the person has undergone gender-based treatment, but, unlike present law, would not require proof of surgical alteration. The measure was sent to Governor Chris Christie, who had not announced whether he would sign or veto it by press time for this issue of *Law Notes*.

---

**PENNSYLVANIA** – Governor Tom Corbett, a Republican, announced in December that he supports a pending legislative proposal to add sexual orientation and gender identity to the state’s statute outlawing discrimination in employment, housing and public accommodations. His spokesperson stated that the governor had never been opposed the law, but had just never announced his position on it. Proponents of the bill say they have 93 co-sponsors out of 203 members of the Pennsylvania House, and 25 co-sponsors in the 50 member Senate. It was hoped that the governor’s support might shake loose a few more votes in each house. However, the Republican chair of the House State Government Committee (which has jurisdiction over the bill), Daryl Metcalf, is a firm opponent who has refused to hold hearings, and he stated that the governor’s support would make no difference to him. Metcalf’s stated objection is that the bill would require “people of faith” to accept a “homosexual agenda,” and he raised the “bathroom issue” about the gender identity provision. *New York Times*, Dec. 19.

# LEGISLATIVE / LAW & SOCIETY

**TENNESSEE** – Hamilton County Election Commission officials announced December 3 that opponents of Chattanooga’s recently-adopted domestic partner benefits law had submitted sufficient signatures to require the City Council to reconsider its adoption or allow a referendum of the public on whether it will go into effect. Certification of the petition suspends the ordinance until the council decides what to do about it. The measure had been approved 5-4 on first reading, and 5-3 on second reading during November. *Times Free Press*, Dec. 4.

**UTAH** – After U.S. District Judge Robert Shelby ruled in *Kitchen v. Herbert* on December 20 that same-sex couples have a constitutional right to marry in Utah, the legal counsel for the Public Employees Health Program that provides health insurance coverage to Utah state employees announced that Utah same-sex marriages would be recognized for insurance purposes. Counsel Dee Larsen told the *Salt Lake Tribune* (Dec. 27), “If a benefit was spouse-dependent and they have a new legal spouse, they can no make those changes just as anyone could before who was legally married.” The agency was still considering how to deal with marriages contracted in other jurisdictions, an issue not directly addressed by Judge Shelby’s decision.

**WEST VIRGINIA** – The Huntington City Council unanimously approved an ordinance updating the city’s “fairness policy” to including “sexual orientation” and “military service record” as prohibited grounds for discriminating in housing and employment. The December 23 vote by the Council was unanimous, and nobody spoke against the proposal at the public hearing. *Herald-Dispatch*, Dec. 24.

---

---

## LAW & SOCIETY NOTES

### FEDERAL OFFICE OF LEGAL COUNSEL

– The Federal Office of Legal Counsel, an executive branch agency that investigates charges of improper personnel practices by federal agencies and enforces non-discrimination requirements within the federal service, was headed from December 2003 until November 2008 by Scott J. Bloch, who was appointed by President George W. Bush. Upon taking office, Bloch questioned existing policy banning sexual orientation discrimination in the federal executive service, which had been established by President Bill Clinton through an executive order. In 2005, grievances were filed charging Bloch with reassigning staff members from Washington to a newly-established Detroit office of OLC, purportedly to remove gay staff members from the D.C. office, and other grievances alleged discrimination based on religion and political affiliation against career civil service staff within the Office. On December 18, 2013, OCL issued a news release announcing that the federal Office of Personnel Management, to which the grievances had been referred for investigation, had issued a report on December 5, finding Bloch’s change of policy concerning sexual orientation was implemented through a process that “involved a substantial degree of inefficiency and disorganization,” although the OPM investigation disclaimed finding that Bloch had refused to enforce federal personnel law, since the question whether the non-discrimination policy was legally established at the time was open to debate, according to a transmittal letter to OCL by OPM Inspector-General Patrick E. McFarland. On the other hand, OPM found evidence supported the charge that Bloch reassigned staff

because of their sexual orientation. The evidence included a statement by Lt. General Richard Trefry, a former Inspector General of the Army, who said that Bloch had told him at the time of his intention to “ship out” homosexual employees. This report was delayed substantially because of other enforcement actions that were taking place in the interim, including the conclusion of a federal criminal case against Bloch for impeding the investigation, which had generated a request from law enforcement authorities to put this administrative investigation on hold, which it was until after Bloch was sentenced on the criminal charges on June 24, 2013. OLC has previously entered into a settlement with employees aggrieved by personnel actions directed by Bloch.

---

### FEDERAL DELEGATION TO WINTER OLYMPICS

– President Obama designated openly-lesbian tennis great Billie Jean King and openly lesbian hockey player Caitlin Cahow, a past Olympic team member, to be part of the official U.S. delegation to the Winter Olympic Games in Sochi, Russia, amidst the controversy over Russia’s recent spate of anti-gay legislation. The president also designated Olympic gold medalist figure skater Brian Boitano, who came out publicly as gay a few days after being designated. The move, together with the absence of any current high U.S. government officials from the delegation, was widely seen as sending a message to Russian President Vladimir Putin about U.S. disapproval of the recent actions by his government. This was the first time that openly-gay athletes have been designated as part of the official U.S. delegation to the opening and closing ceremonies of the games. In addition to President Obama, several prominent government heads of other

# LAW & SOCIETY / INTERNATIONAL

western countries have announced they will not attend the ceremonies in Sochi, including the top officials in Canada, France, Britain, and Israel.

---

## ALBANY (NEW YORK) POLICE DEPARTMENT

– The Albany Police Department has adopted new policies concerning dealings with transgender individuals. The new rules, created in collaboration with the NY Civil Liberties Union, allow transgender suspects to request an officer of a particular sex to conduct a strip-search, and provides that transgender suspects can use a preferred name or title without being charged with the crime of “false impersonation.” The NY Civil Liberties Union gave an award to Police Chief Steven Krokoff and the Department for their work in developing new procedures for the police interacting with transgender people in the criminal justice system, according to a Dec. 3 report by the *Albany Times Union*.

---

## UNITED METHODIST CHURCH

– Church authorities rescinded the clerical credentials of Rev. Frank Schaefer, who performed a same-sex wedding ceremony for one of his gay sons (in Massachusetts, where it is legal) a few years ago. Schaefer was told that if did not promise to refrain from conducting such ceremonies in the future, he would not be allowed to continue as a minister, but he has another gay son and refused to make that commitment. In the wake of national media attention, Bishop Minerva G. Carcano, who heads the church’s Southern California and Hawaii region, invited Schaefer, who had been minister of a UMC church in Pennsylvania, to minister in her region as a licensed local pastor. Schaefer said he would give serious consideration to making the move. *Boston Globe*, December 24.

---

## INTERNATIONAL NOTES

**BELARUS** – A gay pride march on Dec. 11 and rally on Dec. 12 were prohibited by authorities on “technical grounds,” according to a Dec. 11 report by Radio Free Europe. LGBT activists in Minsk said that they might go ahead with the events, despite the official ban.

---

**CANADA** – The Supreme Court of Canada has unanimously ruled that various criminal laws relating to prostitution violate the Charter of Rights because they unduly restrict the ability of prostitutes to safely conduct their business (which is not itself illegal in Canada) and unduly interfere with their freedom of speech. *Attorney General of Canada v. Bedford*, 2013 SCC 72 (Dec. 20, 2013). The challenged laws made it a crime to keep or be in a bawdy house (i.e., a brothel), to live “on the avails of prostitution” (i.e., to derive income from the activities of a prostitute), and to solicit for prostitution in a public place. The Ontario Superior Court of Justice had declared that each of these provisions violated the Canadian Charter of Rights. The Ontario Court of Appeal agreed as to the first two laws, but held that the law against public solicitation did not violate the Charter. The Supreme Court agreed with the Superior Court of Justice, but suspended the effect of its ruling for a year to give the Parliament an opportunity to revise existing legislation in conformity with the decision. Because the Supreme Court had upheld these laws about twenty years ago, it devoted some of its decision to explaining why stare decisis did not govern this ruling. “The regulation of prostitution is a complex and delicate matter,” said the Court. “It will be for Parliament, if it choose to do so, to devise a new approach, reflecting different elements of the existing

regime. Considering all the interests at stake, the declaration of invalidity [of the existing laws] should be suspended for one year.” In the United States, every state has criminal statutes prohibiting prostitution, although Nevada allows regulated prostitution in licenses brothels at the election of individual county governments. The Supreme Court of Canada has generally construed the nation’s Charter of Rights to provide broader protection for individual rights than the United States Supreme Court has found in similar provisions in the U.S. Constitution. \* \* \* Controversy was sparked as Trinity Western University in British Columbia continued through the process of obtaining official approval for its proposed law school, which would enforce on its students, staff and faculty a conduct code that would absolutely exclude gay sex or any other “sexual intimacy that violates the sacredness of marriage between a man and a woman.” Canada has not had religiously-affiliated law schools heretofore, so this kind of institutional control over the sex lives of faculty, staff and students has not previously been an issue. There were threats of lawsuit if the school actually opens and enforces such a policy. The province’s Ministry of Advanced Education gave its approval on December 18. The Council of Canadian Law Deans had previously stated that Trinity Western’s conduct code is “fundamentally at odds with the core values of all Canadian law schools,” and its president, William Flanagan, criticized a ruling by a quality assessment board that there was “no public interest reason to exclude future graduates of the TWU program” from law practice, even though LGBT students “would legitimately feel unwelcome at a TWO law school.” *Globe and Mail*, Dec. 17 & 19.

---

**CROATIA** – After a majority of voters approved a referendum that effectively

# INTERNATIONAL

bans same-sex marriages in Croatia by adopting a constitutional definition of marriage limited to the union of one man and one woman, the government announced that it would propose a bill to provide civil unions for same-sex couples that would provide many of the rights enjoyed by heterosexual couples, although it would not include a right to adopt children. The state electoral commission certified that 66% of voters answered yes to the question “Do you agree that marriage is matrimony between a man and a woman?” We are working from an English translation published by the *New York Times*, but that language strikes us as ambiguous for voters who might not have been clued in as to what was at stake. Surely, in a country where same-sex marriage does not presently exist, one could simply answer that question “yes” as a factual matter. But maybe the official ballot question loses something in translation. *New York Times*, Dec. 3.

---

**GREAT BRITAIN** – The Department for Culture, Media and Sport announced that the government is ready to implement the Same-Sex Marriage law earlier than anticipated. When the measure was enacted last summer without including a firm date for implementation, it was widely anticipated that it would go into effect sometime during the summer of 2014. But on December 10 the government said March 29 was now the date when couples can begin to marry. Culture Secretary Maria Miller stated: “Marriage is one of our most important institutions, and from March 29, 2014, it will be open to everyone, irrespective of whether they fall in love with someone of the same sex or opposite sex.” Deputy Prime Minister Nick Clegg said it was a “wonderful step forward for equality,” according to a report in the *Daily Telegraph*, but the Coalition for Marriage (which should actually be called the Coalition

Against Marriage Equality) mourned the announcement as “sad” and accused the Cameron government of “putting the rights of one minority group above the rights and beliefs of the majority.” No controversy here!

---

**IRELAND** – With unanimous support in the House, the government of the Republic of Ireland made plans to hold a national referendum in 2015 on the question of authorizing same-sex marriages, thus implementing a suggestion from the recent constitutional convention. *Irish Times*, Dec. 18.

---

**ISRAEL** – President Shimon Peres, speaking during a state visit to Mexico, responding to questions about a legislative proposal in Israel to amend the tax laws in a way that would grant same-sex couples with children the same tax exemptions enjoyed by different-sex couples with children, stated his support for the proposal. He said that “even a person who is a homosexual is a human being, and he has rights. We have no power to take away rights. We cannot take away someone’s rights because they are different. We cannot take away their right to breathe, right to eat or right to start a family. We must allow everyone to live as is natural to them.” *ynetnews.com*, Dec. 3. Peres’s comments came after a measure to establish civil marriage in Israel, including for same-sex couples, failed to make it through committee. And subsequently, action on the tax measure was deferred in the complex horse-trading that goes on in a parliamentary system with multiple parties having overlapping agendas in which governing coalitions – including the present government – only survive by compromising party positions. The more secular parties either favor same-sex marriage or some civil equivalent for gay couples or at least don’t

actively oppose it, but the political divisions of voters leave secular parties in the position of having to bargain with religious parties that are strongly opposed. \* \* \* The Cabinet and the Knesset were presented with various measures concerning same-sex couples. Although none of the proposals was enacted, some progress was seen when an agreement emerged that the Finance Minister will extend to same-sex couples raising children the same tax breaks that are provided for unmarried different-sex couples raising children. Although a committee had approved a bill to this effect, its enactment in the legislature was blocked by opposition from religious parties, which were willing to see the policy adopted so long as it was not put into actual legislation. At the same time, the Cabinet did not approve a proposal to protect LGBT Israelis from employment discrimination. *Jerusalem Post* (Dec. 26); *Israel National News*, Dec. 25 & Dec. 18; *Advocate.com*, Dec. 9.

---

**LUXEMBOURG** – Xavier Bettel was sworn in as the first openly gay prime minister in Europe on December 4, having announced his intention to push for legislation allowing same-sex marriage. Bettel’s Deputy Prime Minister, Etienne Schneider, is also openly gay. Bettel previously served as the mayor of Luxembourg City, and heads a coalition government made up of his Democratic Party, the Socialist Party, and the Green Party. This put the right-wing Christian Social People’s Party out of power for the first time since 1979. *Reuters.com*, Dec. 5; 12/5/13 Country Rep. 1, 2013 WLNR 30568251.

---

**NIGERIA** – The parliament approved a bill banning same-sex marriages, registration of gay clubs, and any depiction of gay relationships in

# INTERNATIONAL

media on December 17. Some hope was expressed that the measure would be rejected by President Goodluck Jonathan. Publicity surrounding earlier versions of the bill, which imposed a maximum prison sentence of 14 years, had drawn adverse comment from international human rights organizations and world leaders, including U.S. President Obama and British Prime Minister David Cameron. Although the final text approved by the parliament in December was not made public immediately, it was reported that the maximum penalty had been reduced to five years in prison. *BuzzFeed.com*, Dec. 19.

---

**NORTHERN IRELAND** – The Department of Health has announced that in light of the U.K. Supreme Court’s refusal to review a ruling by the Court of Appeal from June, gay and unmarried couples may now apply to adopt children in Northern Ireland. *BBC News Northern Ireland*, Dec. 11.

---

**PHILIPPINES** – *Pacific Daily News* (Dec. 10) reported that the U.S. embassy in the Philippines had issued its first two fiancé visas to same-sex couples, pursuant to the State Department’s new policy adopted after *U.S. v. Windsor* of providing equal treatment to same-sex and different-sex couples. A fiancé visa allows a U.S. citizen to bring a fiancé to the United States. A State Department press release announcing this development quoted Secretary of State John Kerry as saying that one of the “most important exports by far is America’s belief in the equality of all people.”

---

**RUSSIA** – Russia’s Constitutional Court rejected a challenge to the constitutionality of nationwide and local laws banning “gay propaganda,” holding that legislators had a duty to

“take measures to protect children from information, propaganda and campaigns that can harm their health and moral and spiritual development,” according to a report by RIA Novosti, the news agency that was subsequently unilaterally dismantled by President Vladimir Putin. The court said that the Russian Constitution required the state “to protect motherhood, childhood and the family,” and rejected the claim that the laws were discriminatory, pointing out that they applied to anybody who might spread such propaganda, regardless of the defendant’s sexual orientation. The case had been filed by LGBT rights activist Nikolai Alexeyev, who attached the laws as being based on prejudice and having a discriminatory effect. Alexeyev was himself fined under one of the local laws for a May 12 demonstration in which he participated holding a sign that declared that homosexuality is “not a perversion.” Although the decision was made in October, it was not published until December 3. *Advocate.com*, Dec. 4. The *New York Times* (Dec. 29) reported that a regional court in Kazan had convicted Dmitri Isakov, a gay rights advocate, of violating the “gay propaganda” law by standing in the city’s central square holding a sign that read “Being gay and loving gays is normal. Beating gays and killing gays is criminal.” This is seditious language in Russia now. According to the news report, Isakov was the third person to be convicted under the law. In a telephone interview, Isakov said that his conviction would not deter him from demonstrating for gay rights in the future.

---

**RUSSIA** – Deputy Foreign Minister Gennady Gatilov stated that Russia will oppose using the term “sexual orientation” in international law, claiming that the term is “nebulous” in its meaning and could be construed as encompassing pedophilia. “The

term ‘sexual orientation’ does not have an international legal definition and permits the most varied interpretations,” Gatilov contended, according to a December 11 report in the *Moscow Times*, reporting on comments published on the Foreign Ministry’s website. “Lately, for example, the idea is being actively promoted that pedophilia is also a sexual orientation. For us this sounds blasphemous.” There was no indication who was “actively promoting” this definition, other than Gatilov (presumably as a proxy for his boss, Vladimir Putin). Gatilov indicated that Russia would oppose use of the phrase in international documents and U.N. resolutions. He also asserted that media, politicians and activists who raised “human rights” issues were trying to advance unrelated political goals, and were actual discrediting important human rights work by politicizing it. Perhaps he was referring to Putin’s decision to appoint an outspoken homophobe to be the head of a new government press agency that was created by Putin’s fiat.

---

**TAIWAN** – The Ministry of Health and Welfare decided to abandon the requirement that transgender persons undergo surgery in order to change their legal gender. The Interior Ministry will devise relevant policies to determine criteria for making such legal changes in official documents, but ultimately it will be a matter of choice for the individual to determine their gender designation, according to a December 9 report by *GayStarNews.com*.

---

**UGANDA** – The parliament has given final approval to the draconian anti-homosexuality bill that has been pending for several years, although the death penalty for “aggravated homosexuality” has been reduced to life imprisonment under the version that finally passed on December 20.

Are you reading this in the stacks of your law library?  
Wouldn't you rather be reading it at your desk?  
LeGaL Members enjoy current issues from the comfort  
of their browsers. Join today at the new [le-gal.org](http://le-gal.org)!



## INT'L / PROFESSIONAL

The bill prohibits “any form of sexual relations between persons of the same sex,” and also criminalizes “promotion or recognition” of gay relationships “through or with the support of any government entity in Uganda or any other nongovernmental organization inside or outside the country.” The bill specifies a 14 year jail term for first offenders. An official announcement quoted a government committee as stating, “The bill aims at strengthening the nation’s capacity to deal with emerging internal and external threats to the traditional heterosexual family.”

However, there was some hope that President Yomeri Museveni might veto it, as he commented publicly that it was “rushed through” without his input and he would study it seriously before deciding what to do. The U.N. High Commissioner for Human Rights asked Museveni to veto the measure, and it was denounced by various western leaders, including U.S. President Obama. *New York Times*, Dec. 21; *Daily Telegraph*, Dec. 21; *Los Angeles Times*, Dec. 27; *Africa Review*, Dec. 27

**UNITED KINGDOM**—When a marriage equality bill was finally approved during July 2013, it was expected to go into effect sometime during the summer of 2014. On December 9, however, a government spokesperson announced that the necessary arrangements to facilitate enactment had gone faster than expected, and that same-sex couples wishing to marry could initiate the process by giving notice of their intention beginning on March 13, with the first marriages to take place on March 29. *Sky News*, Dec. 10.

---

---

### PROFESSIONAL NOTES

**LAMBDA LEGAL** announced that a bequest from the estates of Dr. John Eden and Robert Rushing are being

used to endow the organization’s Legal Director position as the **EDEN/RUSHING CHAIR**. The first occupant of the chair is current Legal Director **JON W. DAVIDSON**, who is based in the organization’s Western Regional Office in Los Angeles. Davidson has been with Lambda for 18 years, the last nine as Legal Director. The bequests from the longtime Lambda donors came to nearly \$3 million, according to a December 3 news release from Lambda.

On December 12 the Senate voted 54-41 to confirm President Obama’s reappointment of openly-lesbian **CHAI FELDBLUM** for a full term as a Commissioner of the Equal Employment Opportunity Commission. Feldblum had previously been appointed, first on a recess appointment and then on a confirmed appointment, to fill out the uncompleted term of her predecessor. Feldblum is the first openly LGBT person to serve in that position, where she has taken a leading role in getting EEOC to adopt a broad view of the prohibition of “sex” discrimination under Title VII of the Civil Rights Act of 1964 to protect transgender Americans from employment discrimination and to extend greater protection to all LGBT people in circumstances where that may be possible through liberal interpretation of the statute. Prior to her government service, Feldblum took a leading role as director of a legislative clinic at Georgetown University Law Centre (and before that as a legislative lobbyist for the ACLU) in drafting and lobbying for passage of the Americans with Disabilities Act, the ADA Amendments Act, and the Employment Non-Discrimination Act (which was recently approved by the Senate). A Harvard Law School graduate, Feldblum clerked for U.S. Supreme Court Justice Harry J. Blackmun.



# PUBLICATIONS NOTED

1. Araiza, William D., Flunking the Class-of-One/Failing Equal Protection, 55 Wm. & Mary L. Rev. 435 (Nov. 2013).
2. Arkles, Gabriel, Gun Control, Mental Illness, and Black Trans and Lesbian Survival, 42 Sw. L. Rev. 855 (2013).
3. Berall, Frank S., Same-Sex Couples, 40 Est. Plan 23 (Nov. 2013) (Estate planning in light of Windsor and Perry Cases).
4. Borgmann, Caitlin E., Appellate Review of Social Facts in Constitutional Rights Cases, 101 Calif. L. Rev. 1185 (Oct. 2013).
5. Bowers, Grant, and Wendy Lopez, Which Way to the Restroom? – Respecting the Rights of Transgender Youth in the School System: A North American Perspective, 22 Educ. & L.J. 243 (Nov. 2013).
6. Clarke, Jessica A., Inferring Desire, 63 Duke L.J. 525 (Dec. 2013) (critiques the bizarre inferences concerning sexual orientation of alleged workplace harassers as a by-product of the Supreme Court's *Oncale* decision).
7. Cohen, Bradford S., and Elizabeth R. Glasgow, Tax and Estate Guidance for California Same-Sex Couples Post-*Windsor*, 36-DEC L.A. Law. 14 (Dec. 2013).
8. Couzo, Veronica, Sotomayor's Empathy Moves the Court a Step Closer to Equitable Adjudication, 89 Notre Dame L. Rev. 403 (November 2013).
9. Dixon, Rosalind, The Supreme Court of Canada and Constitutional (Equality) Baselines, 50 Osgoode Hall L.J. 637 (Winter 2013).
10. Flynn, Danielle, All the Kids Are Doing It: The Unconstitutionality of Enforcing Statutory Rape Laws Against Children and Teenagers, 47 New Eng. L. Rev. 681 (Spring 2013).
11. Gendron, Jay W., Musing on a Studio Career: Oscar's Niche, 42 Sw. L. Rev. 771 (2013) (being openly gay in the business side of the entertainment industry).
12. Goodwin, Michele, and Naomi Duke, Parent Civil Unions: Rethinking the Nature of Family, 2013 U. Ill. L. Rev. 1337.
13. Gross, Aeyal, Post/Colonial Queer Globalisation and International Human Rights: Images of LGBT Rights, 4 Jindal Global L. Rev. No. 2 (Nov. 2013).
14. Harner, Benjamin S., Cloaking a Challenge to Missouri's Marriage Amendment With a Challenge for Survivor Benefits, 77 Mo. L. Rev. 1201 (Fall 2012) (sometimes a law review takes so long to publish a Note or Comment that it is outflanked by events; in this case, the Missouri Supreme Court did recently what the author says it should have done: deny benefits to the surviving same-sex partner of a Missouri state trooper).
15. Hart, Danielle, Gowri Ramachandran, and Kelly Strader, Introduction: Symposium on 40 Years of LGBT Legal Activism: Taking Stock and Looking Ahead, 42 Sw. L. Rev. 761 (2013).
16. Herzig, David, Same-Sex Marriage and Estate Taxes: Why *Windsor* is Still at Issue, 141 Tax Notes No. 1 (2013).
17. Kim, Andrew Tae-Hyun, Rethinking Review Standards in Asylum, 55 Wm. & Mary L. Rev. 581 (Nov. 2013).
18. Knauer, Nancy J., Bullying Across the Life Course: Redefining Boundaries, Responsibility, and Harm, 22 Temple Pol. & Civ. Rts. L. Rev. No. 2 (2013).
19. Lain, Corinna Barrett, Passive-Aggressive Executive Power, 73 Md. L. Rev. 227 (2013) (uses Obama Administration's non-defense of Sec. 3 of DOMA and the Immigration Services period of effectively not enforcing the ban of gay immigration as examples of a theory of passive-aggressive executive power).
20. Lee, Cynthia, Masculinity on Trial: Gay Panic in the Criminal Courtroom, 42 Sw. L. Rev. 817 (2013).
21. Leipold, James G., Stand and Be Recognized: The Emergence of a Visible LGBT Lawyer Demographic, 42 Sw. L. Rev. 777 (2013).
22. McClain, Linda, From *Romer v. Evans* to *United States v. Windsor*: Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act, 20 Duke J. Gender L. & Pol'y 351 (2013).
23. McNicholas, Edward R., Autonomy: The Key Theory for Understanding the Evolution of U.S. Privacy Law, Aspatore, 2014 WL 10438 (January 1, 2014).
24. Mukoski, Kristian R., The Constraint of Dignity: *Lawrence v. Texas* and Public Morality, 89 Notre Dame L. Rev. 451 (Nov. 2013).
25. Newcomer, Meghan, Can Condoms be Compelling? Examining the State Interest in Confiscating Condoms from Suspected Sex Workers, 82 Fordham L. Rev. 1053 (Nov. 2013).
26. Penrose, Meg, Something to [Lex Loci] Celebrationis?: Federal Marriage Benefits Following *United States v. Windsor*, 41 Hastings Const. L.Q. 41 (Fall 2013).
27. Perkiss, David Alan, Boy or Girl: Who Gets to Decide? Gender-Nonconforming Children in Child Custody Cases, 25 Hastings Women's L.J. 57 (Winter 2014).
28. Pitt, Gwyneth, Taking Religion Seriously, 42 Indus. L.J. (UK) 398 (Dec. 2013) (commentary on European Court of Human Rights ruling in cases where employees' religiously-inspired homophobia led to loss of their jobs).
29. Pollvogt, Susannah W., *Windsor*, Animus, and the Future of Marriage Equality, 113 Colum. L. Rev. Sidebar 204 (Nov. 20, 2013).
30. Reed, Alex, A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act, 50 Am. Bus. L.J. 835 (Winter 2013).
31. Richman, Kimberly D., License to Wed: What Legal Marriage Means to Same-Sex Couples (New York: New York University Press, 2014) (book-length study of the practical effect of extending same-sex marriage in Massachusetts since 2004 and California in 2008, by sociology professor from University of San Francisco).
32. Rosky, Clifford J., No Promo Hetero: Children's Right to be Queer, 35 Cardozo L. Rev. 425 (December 2013).
33. Saltzman, Robert M., LAPD+LGBTQ: Taking Stock of Progress Made, 42 Sw. L. Rev. 795 (2013) (how the LGBT community went from an adversary to a collaborative relationship with the Los Angeles Police Department).
34. Shay, Giovanna, [Including but not Limited to] Violence Against Women, 42 Sw. L. Rev. 801 (2013) (on the expansion to a gender neutral concept of domestic violence).
35. Shmueli, Mark J., and Tina R. Goel, The Post-DOMA Immigration Law Landscape, 60-DEC Fed. Law. 15 (Dec. 2013).
36. Smoth, Eddy R., The Winds(or) of Change Are Blowing: Estate Planning for Same-Sex Couples in Tennessee, 49-DEC Tenn. B.J. 32 (Dec. 2013).
37. Strasser, Mark, On DOMA, Proposition 8, and the Implications of Their Potential Unconstitutionality for Equal Protection and Substantive Due Process Jurisprudence, 22 Temple Pol. & Civ. Rts. L. Rev. No. 2 (2013).
38. Strasser, Mark, *Windsor*, Federalism, and the Future of Marriage Litigation, 37 Harv. J. L. & Gender Online 1 (2013).
39. Tebbe, Nelson, Government Nonendorsement, 98 Minn. L. Rev. 648 (Dec. 2013) (exclusion of same-sex couples from marriage by states that provide civil unions or domestic partnership is a form of expressive conduct by government that violates equal protection under the 5th Amendment).
40. Testy, Kellye Y., Being a Dean is a Drag. . . But Not for the Reasons You Might Expect, 42 Sw. L. Rev. 765 (2013) (ruminations by a gay law school dean about being a gay law school dean).
41. Thompson, Karen D., More Than Same-Sex Marriage: Law, Health, and Defining Family, 25 Hastings Women's L.J. 13 (Winter 2014).
42. Tipler, Kathleen, Obama Administration's Non-Defense of DOMA and Executive Duty to Represent, 73 Md. L. Rev. 287 (2013).
43. Tygesson, Nicholas K., Cracking Open the Classroom Door: Developing a First Amendment Standard for Curricular Speech, 107 Nw. U. L. Rev. 1917 (Summer 2013).
44. Waldman, Ari Ezra, All Those Like You: Identity Aggression and Student Speech, 77

- Mo. L. Rev. 653 (Summer 2012).
45. Wallace, E. Gregory, *The Sky Didn't Fall: The Meaning and Legal Effects of the North Carolina Marriage Amendment*, 22 Am. U. J. Gender Soc. Pol'y & L. 1 (2013).
  46. Weisberg, D. Kelly, *Karen Thompson's Role in the Movement for Marriage Equality*, 25 Hastings Women's L.J. 3 (Winter 2014).
  47. Wintemute, Robert, *Smug Marrieds? Does the "Married Couples Only" Rule Count as Direct or Indirect Discrimination*, www.newlawjournal.co.uk, 25 Oct. 2013 (commentary on *Bull & Bull v. Hall & Preddy* written prior to UK S.Ct. decision, critiquing approach of court of appeal).
  48. Wydra, Elizabeth B., *Reading the Opinions – and the Tea Leaves – in United States v. Windsor*, 2013 Cato Sup. Ct. Rev. 95 (2012-13) (confidently predicts an ultimate Supreme Court 14th amendment marriage equality decision).
  49. Youn, Monica, *Proposition 8 and the Mormon Church: A Case Study in Donor Disclosure*, 81 Geo. Wash. L. Rev. 2108 (Nov. 2013).
  50. Young, Ernest A., and Eric C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2013 Cato Sup. Ct. Rev. 117 (2012-13) (asserts that majority opinion in *Windsor* is a brilliant exposition of how federalism and equality doctrine are intertwined).
  51. Zylan, Yvonne, *Soldiers and Mothers Revisited*, 42 Sw. L. Rev. 833 (2013) (how the centrality of family and the military stimulated recent advances in LGBT rights).

## EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Professor Arthur Leonard of New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers.

All points of view expressed in *Lesbian/Gay Law Notes* are those of the author, and are not official positions of LeGaL - The LGBT Bar Association of Greater New York or the LeGaL Foundation.

All comments in Publications Noted are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please submit all correspondence to [info@le-gal.org](mailto:info@le-gal.org).

# Lesbian/Gay Law Notes Podcast

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

**Listen through iTunes or at [legal.podbean.com](http://legal.podbean.com)!**

