9th CIRCUIT AFFIRMS STATUS QUO INJUNCTION ON ARIZONA PARTNER BENEFITS

In *Diaz v. Brewer*, 2011 WL 3890755 (Sept. 6, 2011), the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's grant of a preliminary injunction blocking implementation of an Arizona law that would have repealed health care benefits for the same-sex domestic partners of state employees. The ruling forces Arizona to continue providing the benefit until the underlying legal question — the constitutionality of repealing the benefits — is resolved on the merits. Circuit Judge Mary Schroeder wrote for the court.

Arizona first extended health benefits to same-sex domestic partners of state employees when it expanded the definition of "dependents" in 2008 by amending its administrative code. In 2009, however, following enactment of a state constitutional amendment banning same-sex marriages, Governor Janice Brewer signed House Bill 2013 into law, which contained a statutory provision that redefined "dependents" to exclude domestic partners of either sex. That law would have gone into effect on January 1, 2011, but it was temporarily enjoined by the district court in response to the filing of a lawsuit by a group of gay and lesbian state employees against the governor and two other state officials charged with implementation of the law, in their official capacities. Upon rejection of the state's motion to dismiss, the court preliminarily enjoined implementation of the law pending trial on the merits.

In issuing the injunction, District Judge John W. Sedwick found that plaintiffs had demonstrated a likelihood of success on the merits based on two points. First: "The law adversely affected a classification of employees on the basis of sexual orientation" without "further[ing] any of the state's claimed justifiable interests." The district court found also that the injunction was justified because the plaintiffs had "established a likelihood of irreparable harm in the event coverage for partners ceased." Each of the plaintiffs convincingly alleged that if their partners lost coverage, they would suffer irreparable harm because they suffered conditions making them uninsurable, and that interruption of treatment or medication would be severely detrimental.

Defendants argued that the law furthered the interest of saving state resources, but plaintiffs presented evidence that "the entire state expenditure for domestic partner benefits represented a tiny fraction of the total employee healthcare benefits." The defendants on the other hand provided "no information…as to the number of same-sex domestic partners participating in the state health plan, nor the total claims of same-sex domestic partners." So, the district court rejected this argument by defendants, and defendants did not seriously challenge it on appeal.

Defendants also argued that barring same-sex domestic partners from state employee health benefits served the important interest of promoting marriage. The district court rejected this argument as well, pointing out that denying benefits to people who cannot marry in the first place does nothing to promote marriage.

Applying rational basis review, the court of appeals held that the law violated the Equal Protection Clause of the Fourteenth Amendment. While the law was not discriminatory on its face (it affected both same-sex and opposite-sex domestic partners of state employees), it had a discriminatory effect because same-sex couples under Arizona law could not retain their health coverage by getting married. "When a state chooses to provide…benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular."

The court of appeals compared the Arizona law to the restrictive food stamp law at issue in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). That law restricted food stamp eligibility to households in which all the adults were related to each other. The goal was to bar "communes" of unrelated adults (and it was understood at the time to be an "anti-hippie" law). Applying rational basis review, the court rejected the government's asserted interests in the law to "prevent fraud" due to the relative instability of these households. The Supreme Court rejected those arguments and held that the law was without any rational basis since, in practice, it would allow those people with the financial means to structure their families in accordance with the law to obtain the benefits and discriminate against those without the means, and had nothing to do with advancing the purposes of the food stamp law, which were to assist the poor in obtaining adequate nutrition while providing additional market demand for American agricultural products.

By comparison, the court pointed out, the Arizona law was even more discriminatory than Moreno. At least under the food stamp law it was theoretically possible to alter one's living situation to protect eligibility. In the issue at hand, however, same-sex couples were barred from marriage under Arizona law, and so couldn't change their status even if they wanted to.

The court also discussed the impact the loss of benefits would have on the domestic partners of these gay and lesbian state employees. The same-sex partner of one plaintiff "would not be able to secure a health plan with equivalent coverage" because

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her chronic asthma made her uninsurable on the private market. Another plaintiff's partner was also barred from private insurance because of pre-existing conditions, including diabetes and high cholesterol. The likelihood of plaintiffs suffering irreparable harm weighed in favor of granting injunctive relief.

In all, the court held that the district court ruling was consistent with the long-standing equal protection rule — articulated in Moreno — that "a bare…desire to harm a politically unpopular group [is] not [a] legitimate state interest[]."

On September 29, 2011, the state petitioned the Ninth Circuit to hear the case *en banc* and overturn the district court's preliminary injunction. Governor Brewer told the Arizona Republic : "This issue isn't about whether the state should provide health benefits to domestic partners… It's about whether the duly elected officials of a state maintain strict authority over its finances or whether that control will be ceded to a court bent on installing a social agenda." The status of the petition was not known at the time of publication.

Tara Borelli of Lambda Legal represents the plaintiffs and Charles A. Grube, Deputy State Attorney General, Phoenix, Arizona, represents the defendants. *Daniel Redman*

[Editor's Note: Surprisingly, the 9th Circuit's opinion quotes the district court's finding that the statute offends the 14th Amendment equal protection clause because of its "discriminatory effect" without any discussion of why this case would constitute an exception to the general rule that the "disparate impact" theory developed under federal discrimination statutes does not apply in constitutional cases, absent a showing that a facially neutral policy having a discriminatory effect was adopted for discriminatory *purposes* or implemented in a discriminatory way. Perhaps the court considered that when viewed against the background of adoption of the anti-same-sex marriage constitutional amendment, the statute was clearly intended to revoke and prevent benefits coverage for same-sex couples, and thus could be shown to have been enacted with the requisite discriminatory intent to support a constitutional claim, even though it also terminates benefits for different-sex couples. A.S.L.]

LESBIAN/GAY LEGAL NEWS AND NOTES

9th Circuit Panel Vacates Log Cabin Republican DADT Decision as Moot

A three-judge panel of the U.S. Court of Appeals for the 9th Circuit, based in San Francisco, ruled *per curiam* on September 29 that the implementation of the Don't Ask Don't Tell Repeal Act of 2010 on September 20, 2011, put an end to the "case or controversy" raised many years ago when Log Cabin Republicans (LCR) sued the federal government for a judicial declaration that the Don't Ask Don't Tell policy was unconstitutional and for an injunction against its enforcement. As such, ruled the panel, the case is "moot," depriving the court of appeals of jurisdiction to determine the government's appeal of District Judge Virginia Phillips' order of a year ago, which had ruled that the anti-gay military policy violated the 5th and 1st Amendments of the Constitution. *Log Cabin Republicans v. United States*, 2011 WL 4494225. LCR's attorney promptly announced that a petition for *en banc* review would be filed.

The status of Judge Phillips' decision has been a much-contested issue ever since Congress passed and President Obama signed the Repeal Act last December 22. Under the Repeal Act, the DADT policy would end if certain conditions were met. First, the President and Secretary of Defense had to consider the recommendations of a Task Force that the Secretary had appointed earlier in 2010 to examine the issues raised by ending the policy, and then the President, the Secretary, and the Chairman of the Joint Chiefs of Staff would have to certify that all necessary steps had been taken to make it possible to end the policy without harming the effectiveness of the military in carrying out its mission.

After Judge Phillips filed her amended opinion last October, the government sought a stay of her injunction against the policy pending an appeal, which the 9th Circuit granted. Then, as briefing and argument deadlines loomed early in 2011, the government moved to put the case "on hold" while the process of implementing the Repeal Act took place. Dan Woods of White & Case, counsel for Log Cabin Republicans, pointed out to the court that the Repeal Act did not specify a target date for implementation, leaving open the possibility that the process of implementation could drag on for a long time (even though President Obama had announced in his State of the Union Address in January that he anticipated implementation would be achieved during 2011). The court refused to put the case "on hold" and directed the parties to submit their briefs.

Thus began the arguments, stretching over the ensuing months, about whether it was appropriate for the court to stay its hand or proceed in the normal course to determine the cross-appeals on the merits. LCR had appealed the district court's decision to dismiss its equal protection challenge, while the government was appealing her decision that DADT violated due process and freedom of speech. The government argued that with the signing of the Repeal Act, the issue whether the original DADT policy was constitutional was no longer in play; instead, argued the Justice Department, the issue was whether the mechanism adopted by Congress for repeal, keeping DADT in place until the relevant officials certified to Congress their readiness to end the policy, was constitutional.

When it appeared in mid-July that the necessary certification for implementation of the Repeal Act was imminent, the court actually briefly lifted the stay on Judge Phillips' injunction, but it was promptly restored upon urgent motion by the government, which argued that the Repeal Act provided for an orderly process of implementation that could be upset by an abrupt mandate to end the policy.

Finally, after the necessary officials had certified that implementation should take place and a target date was fixed as September 20, 2011, the argument of mootness took on immediate salience. The court heard oral arguments on September 1. LCR insisted that even if implementation occurred on September 20, the question whether the DADT policy was constitutional remained significant for several reasons. The Repeal Act merely authorized rescission of the DADT policy, but provided no affirmative authorization for gay people to serve in the military, in essence throwing the policy issues back to the Defense Department and, more generally, the Executive Branch. Repeal of the statutory policy would not by itself prevent the Defense Department from adopting a new service ban, similar to the policies adopted admin-

istratively prior to the passage of DADT in 1993. Also, in default of a precedential ruling on constitutionality, Congress and President could subsequently re-enact DADT. Furthermore, there are various other cases and claims related to injuries suffered by individuals due to the DADT policy that are pending in the courts or that could be brought, as to which the constitutionality of the policy is a salient issue. LCR argued that these considerations kept the issue alive for appeal.

But the government persuaded the court otherwise, by pointing to several very clear Supreme Court precedents. It seems very well established in federal law, or at least the court persuasively explains it to be so, that if Congress repeals a statute that is the subject of constitutional challenge, a lawsuit filed to have the statute declared unconstitutional is moot, and a declaration of unconstitutional from a district court as to which appeal is pending is also rendered moot. The court pointed out that LCR's standing as a plaintiff — much contested and still contested by the government — was, if anything, limited to seeking a declaration that the policy was unconstitutional and an injunction against its enforcement. Now that the policy has been repealed, an injunction against its enforcement would be meaningless as, in effect, it no longer exists. The court deemed it purely speculative that a future Congress would re-enact it, pointing out that the hypothetical prospect of swift re-enactment was speculative.

Furthermore, said the panel, because the government had appealed promptly and had never abandoned its position that the policy was constitutional and that the district court's decision was wrong on the merit, it was not enough to declare the issue moot and just dismiss the appeal. The court found that this would be unfair to the government, which had been deprived of its chance at appellate vindication of its defense. Thus, the panel decided that the appropriate course was to vacate Judge Phillips' decision and return the case to the district court with directions to dismiss the case as moot, thus effectively wiping Judge Phillips' decision off the books.

The court decisively declared that the district court's decision is thus a complete nullity:

"Because Log Cabin has stated its intention to use the district court's judgment collaterally, we will be clear: It may not. Nor may its members or anyone else. We vacate the district court's judgment, injunction, opinions, orders, and factual findings — indeed, all of its past rulings — to clear the path completely for any future litigation. Those now-void legal rulings and factual findings have no precedential, preclusive, or binding effect. The repeal of Don't Ask, Don't Tell provides Log Cabin with all it sought and may have had standing to obtain. (We assume without deciding that Log Cabin had standing to seek a declaration that section 654 is unconstitutional and an injunction barring the United States from applying it to Log Cabin's members. *See Arizonans for Official English,* 520 U.S. at 66-67 (court may assume without deciding that standing exists in order to analyze mootness).) Because the case is moot and the United States may not challenge further the district court's rulings and findings, giving those rulings and findings any effect would wrongly harm the United States."

One member of the panel was clearly disappointed at not having the opportunity to take on and repudiate Judge Phillips' use of *Lawrence v. Texas* in her decision to subject DADT to "heightened scrutiny" and to declare it unconstitutional in the face of prior 9th Circuit rulings upholding it. Circuit Judge Diarmuid F. O'Scannlain wrote a lengthy concurring opinion -- which, in light of the panel's finding that the case is moot, must be considered to be purely dicta -- strenuously arguing that *Lawrence v. Texas* was irrelevant and did nothing to change the Supreme Court's "established" approach to determining whether a challenge law is in violation of the due process clause. Conservative federal circuit judges have continued to cling to the Supreme Court's pre-*Lawrence* ruling, *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997), as requiring that a right be "deeply rooted in our history and tradition" in order that a law abridging that right be subject to heightened scrutiny. Those courts point out that in *Lawrence* the Supreme Court struck down the Texas sodomy law as lacking any rational justification, and did not state that it was applying heightened scrutiny, so that any attempt to use *Lawrence* as a basis to apply heightened scrutiny in a due process challenge to an anti-gay government policy is illegitimate. Such judges normally ignore Justice Kennedy's statements discounting the importance of "history and tradition" in *Lawrence* as being mere rhetoric, in light of their characterization of the way that the Supreme Court ultimately disposed of the sodomy law challenge. (The "history and tradition" requirement and the insistence upon narrow particularity in describing the right at issue seems inconsistent with many important Supreme Court rulings finding long-established discriminatory or intrusive government policies to be unconstitutional.)

Furthermore, as the Republicans who are now vying for the presidential nomination insist that DADT should be reinstated, the question whether the policy was constitutional is not really just academic at this point. Dan Woods will seek *en banc* review of the panel's dismissal decision. A.S.L.

Father Loses Bid to Overturn Custody Order in Favor of His "Adulterous Homosexual" Ex-Wife

On September 21, 2011, the Court of Appeals of Arkansas largely affirmed a trial court decision which granted primary custody of two teenage children to their mother, who had begun a new relationship with another woman before her divorce became final. *Bamburg v. Bamburg*, 2011 Ark. App. 546. While the trial court ordered both parents to refrain from cohabitating with sexual partners prior to a new marriage while the children were present in the home, neither party appealed that aspect of the decision. The only modification to the underlying decision concerned an unremarkable financial distribution made by the trial court.

Bob and Lisa Bamburg were married in 1988 and separated sometime in 2009. They had two children during the course of their marriage: a sixteen year old teenage daughter, EB, and a fifteen year old son, JB, who is "severely autistic." Both parents played an active role in the children's lives, but Lisa "took the primary role in day-to-day activities for them." Bob is an attorney and Lisa owns a small gift shop which was open two months a year. She also occasionally did some contract work on the side, but her notable income came from her ownership interest in a family business which existed prior to the marriage.

At the hearing before the trial court, Lisa routinely lied about the nature of her relationship with Mary Alice, another woman who had been friends with both

parties during their marriage. At the last hearing before the trial court, Lisa finally admitted to her relationship with Mary Alice, stating that it began in the summer of 2009. Her explanation for lying about the relationship was that she was waiting to tell her daughter first.

Although Mary Alice did not live with Lisa and the children, she did spend a lot of time with them, spent nights at their home and traveled with them. At the conclusion of the trial court hearing, the judge "told the parties that Mary Alice was not to 'be around' the children." However, Mary Alice kept in touch with the children despite not physically seeing them. She explained that she thought that "it was okay" to do so.

The testimony established that Lisa "was a steady, balanced person" and that JB "was demonstratively secure with his mother." EB testified that JB's behavior and responsiveness deteriorated when they stayed at their father's house for a few days and that their father was "very strict."

As for Lisa's new relationship, Bob expressed his "strong reservations about Lisa having custody of their children because Lisa was in an adulterous homosexual relationship." He was also bothered by the fact that Mary Alice spent the night at Lisa's while the children were present. He claimed that this was "a sign of poor judgment and morals", and that Lisa and Mary Alice's relationship was "detrimental to the children's welfare and embarrassing for them." Unsurprisingly, he also didn't like the fact that Lisa had removed pictures of him from the marital home, and put up pictures of her and Mary Alice.

Otherwise, the couple had numerous financial disputes concerning the distribution of their marital property. Notably, Bob wanted reimbursement for any monies Lisa spent on Mary Alice, which Bob estimated was approximately $24,000, which he calculated based upon "things that [he] kn[e] w were not expenses for [him] and were not expenses on behalf of the kids."

At the conclusion of the hearing, the trial judge issued an order which awarded the divorce to Bob against Lisa. The trial judge concluded that both Bob and Lisa were "good and loving parents" and that their approaches were not contrary to the children's best interests.

Of Lisa's relationship to Mary Alice, the trial judge stated that "[a]lthough the Court does not condone [Lisa] introducing a romantic partner to the children, in the present case, that fact alone does not negate the fact that [Lisa] has been the primary caregiver of the children from the date of birth to the present time." Lisa was awarded primary custody of the children, and both parties were ordered to refrain from having romantic partners from staying overnight so long as they were not married when the children were present, at home or on vacation. Bob was awarded liberal visitation, and ordered to pay child support and maintain health insurance.

As for the marital funds that Lisa spent on Mary Alice, the judge awarded Bob reimbursement of $2,500 because while he couldn't prove the total amount he claimed Lisa spent, some trips and entertainment were undeniable. Otherwise, Bob was awarded $8,864.80 in attorney fees, arguing that, inter alia, Lisa's lies about her relationship with Mary Alice caused unnecessary litigation.

On appeal, Bob claimed that granting Lisa primary custody was erroneous and against the children's best interest because Lisa "is an adulterous liar who disobeys court orders and is a 'friend' instead of a parent." The appellate court rejected this argument, noting that the trial court clearly addressed Bob's concerns about the children's exposure to unmarried cohabitation with a romantic partner by ordering that neither parent have overnight visits by romantic partners. Otherwise, the appellate court largely affirmed the trial court's financial distributions with one small exception. *Eric J. Wursthorn*.

[Editor's Note: Although the court's restriction on both parents having a non-marital romantic partner stay overnight when the children are present sounds even-handed, it is ultimately discriminatory in that Arkansas does not allow or recognize same-sex marriages.]

Alaska Court Rules That Tax Exemption Unconstitutionally Discriminates Against Same-Sex Couples

The Superior Court of Alaska for the Third District recently granted summary judgment on behalf of three same-sex couples who brought a suit challenging the constitutionality of an Alaskan real property tax exemption ("Tax Exemption"). *Schmidt v. State*, No. 3AN-10-9519 CI (Sept. 19, 2011). In the opinion, written by Judge Frank A. Pfiffner, the court held that the Tax Exemption violates the Alaska Constitution's Equal Protection Clause on its face by granting tax benefits based upon a marital classification. As the Marriage Amendment to the state's constitution recognizes only those marriages between a man and a woman, the court held that the marital classification in the Tax Exemption constitutes unlawful sexual orientation discrimination.

The Tax Exemption allows disabled veterans and persons over the age of sixty-five to exclude the first $150,000 of the assessed value of their residence from their real property taxes. If an otherwise eligible person is cohabiting with someone to whom they are not married, then that person can only be granted a tax exemption for the value of the residence proportionate to his or her interest in the property. In contrast, a married person who is eligible to receive the exemption can exclude the total value of their residence (up to the stated $150,000). The exemption applies even if the residence is solely in the name of the eligible person's spouse. Due to the Marriage Amendment to the Alaska Constitution, cohabiting same-sex couples do not have the option to marry and thus cannot receive the full exemption available to married couples.

Three same-sex couples brought this action against the state and the Municipality of Anchorage, asserting that they received fewer benefits under the Tax Exemption than they are otherwise qualified to receive, only because they are not married. Of the three couples included in the suit, one couple currently cannot receive any benefit under the Tax Exemption. Although the couple shares a condominium, the property is under the name of the non-eligible partner. Since the couple is not married, the eligible partner cannot exclude the residence from his property taxes since he has no interest in the property. In their suit, the plaintiffs argued that the Tax Exemption denies them equal protection under the law, discriminates based on sex and impedes on their right to privacy. The court declined to address the sex discrimination and privacy claims, and focused solely on the equal protection claim.

In its decision, the Superior Court relied heavily on the Alaska Supreme Court's holding in *American Civil Liberties Union v. State,* 122 P.3d 781 (2005). In that case, the court held that a state employment

benefits plan that did not offer domestic partners the same benefits available to married couples violated the state constitution's Equal Protection Clause. As the classification here is "constitutionally similar to the employment benefits scheme challenged in ACLU," Judge Pfiffner concludes that "the Tax Exemption is similarly unconstitutional."

In defense of the statute, the state argued that the Marriage Amendment to the Alaska Constitution precludes the court from considering the plaintiffs' equal protection claim. The court rejects this argument because the Marriage Amendment only defines marriage. The amendment in no way addresses benefits conferred to people because of marriage. The state also argued that the plaintiffs are not similarly situated to married couples because they do not have the same property ownership status as married couples, and therefore do not meet one of the required elements of an equal protection claim. While people who cohabit with a non-married partner are only tenants-in-common, it is presumed under Alaska state law that married couples own property as tenants-in-entirety. The Tax Exemption, the state argues, is meant to apply only to tenants-in-entirety. The court finds that this conclusion regarding the statute's intent is not based on the plain language of the statute, which makes no mention of either ownership category. The statute draws a classification based on marital status, not ownership status. Judge Pfiffner finds, therefore, that the Equal Protection Clause applies in this case as cohabiting same-sex couples make the same "commitment to co-own or co-occupy a home" as married different-sex couples.

The majority of Judge Pfiffner's opinion, however, focuses on applying the state supreme court's reasoning in ACLU to the state's contention here that the statute is not discriminatory on its face. Firstly, the state argues that the Tax Exemption cannot be facially discriminatory because the statute makes no reference to sexual orientation. Judge Pfiffner addresses this claim briefly, stating that in ACLU the court held that Alaska's Marriage Amendment creates a marital classification by defining marriage only in terms of different sex-couples. As the regulation implementing the Tax Exemption uses the term spouse, given the Marriage Amendment, the statute discriminates on its face based on sexual orientation. The court rejects the state's argument that the term spouse is only used in an implementing regulation, not in the statute itself, and should be read separately from the Tax Exemption. Judge Pfiffner stated that here it is "appropriate to read the statute in combination with the implementing regulation," and therefore the marital classification contained in the regulation should be understood as creating this classification within the statute.

The State also argued that only a statute that under no set of circumstances can be applied constitutionally can be found to be facially discriminatory, and that the Tax Exemption can be applied constitutionally in some situations. The statute applies not only to cohabiting same-sex couples, but also to cohabiting different-sex couples, and as this application does not create discrimination based on sexual orientation, the statute is not always unconstitutional. In response, the Superior Court asserts that the statute, to be found facially discriminatory, need only be unconstitutional in all circumstances in which "the marital classification is relevant." While the Tax Exemption does bar cohabiting different-sex couples from receiving the greater tax benefit available to married couples, different-sex couples have the option of marrying. In contrast, this option is permanently closed to same-sex couples in Alaska so there is no situation in which the marital classification created by the statute can be applied constitutionally to same-sex couples.

Turning to the issue of what level of scrutiny should apply to classifications based on sexual orientation, Judge Pfiffner sidesteps the actual question of whether heightened scrutiny is appropriate. In ACLU, the court did not examine if sexual orientation is a classification that should be given a higher level of scrutiny, as the court found that the statute did not even survive minimal scrutiny. Following the state supreme court's approach, the Superior Court holds only that the Tax Exemption fails even the most minimal level of scrutiny, and therefore an inquiry into whether a higher level of scrutiny applies is unnecessary. To satisfy this lower level of scrutiny, "the State must show that the challenged classification fairly and substantially advances the legislation's legitimate objectives." Here, the court held that the state failed to establish that the marital classification in the Tax Exemption fairly advances the government interest in assisting senior citizens and disabled veterans financially. While the court agrees with the state that assisting these groups is a legitimate government objective, the court finds that excluding cohabiting same-sex couples from the exemption does not in any way further this interest. The state argues that any greater benefit the plaintiffs would receive under the full exception, as granted to marriage couples, would be minimal. Judge Pfiffner states that this reasoning, however, better supports the plaintiffs' assertion that the Tax Exemption does little to further the state's interest in financially assisting seniors and disabled veterans. If the benefits that would be received by cohabiting couples are only minor, then it is more than likely that the state interest in helping seniors and disabled veterans keep their homes outweighs this minimal expense to the government.

Additionally, the state argues that the marital classification furthers this government interest in assisting seniors and disabled veterans as a person's spouse is the most likely person to become their caretaker during illness and if a married couple can remain in their home together, it is more likely that one spouse can care for the other. Again, Judge Pfiffner finds the state's argument to be more supportive of the plaintiffs' position. In fact, the state admits that partners in cohabiting, same-sex couples are just as likely to care for each other as married couples, and offered no explanation for this contradiction, except that "the means-to-end fit of law to its objective can be somewhat loose." The state offers no explanation as to why granting the benefit to one group of long-term committed couples and not another furthers Alaska's interest in assisting seniors and veterans in staying in their homes with the person that likely cares the most about their well-being. The Superior Court found the State's reasoning that the classification does not have to be a perfect "fit" in furthering the government interest to be an unconvincing excuse. *Kelly Garner*

District Court Unseals Digital Record of Prop 8 Hearings

In an opinion filed September 19, 2011, addressing a cross-appeal by the Plaintiffs in Perry v. Schwarzenegger, the U.S. District Court for the Northern District of California unsealed the digital recordings

of the highly publicized — but until now unavailable except as a paper transcript — proceedings of the hearing that invalidated California's Proposition 8. *Perry v Schwarzenegger*, No. 09-02292 JW.

The video recording of the trial, created pursuant to a policy implemented by the Ninth Circuit in 2009 allowing tapings of court proceedings in non-jury civil matters, was used by the judge and the parties during closing arguments, and was entered into the trial's formal record under seal.

The history of the recording's existence itself is a long and complicated one: After several media outlets requested that the trial be broadcast, Chief District Judge Vaughn Walker, who presided over the proceeding, ruled that an audio and video feed would be recorded and broadcast over the internet as well as streamed to other courthouses. It was planned that the trial would be included in a "pilot program" launched by the Ninth Circuit to record and transmit non-jury trials for educational and other purposes.

However, this was not to be, as the Supreme Court issued a stay of Judge Walker's ruling allowing the broadcast, because it appeared that the process which the Ninth Circuit followed to amend its rules in order to implement the pilot program was not correct. Judge Walker withdrew the trial from the pilot program and did not broadcast the tape, but notified the parties that a digital recording of the proceeding would be made for use in chambers. He further noted that either party to the trial could request a copy of the recording for use during closing arguments, but that the recording would remain confidential and under seal as part of the trial's official record.

Walker's ruling to keep the documents confidential was appealed by the Plaintiffs, but before that appeal was decided the Defendants filed an action to ensure that Walker did not disseminate his own copy of the trial, which he had taken with him as part of his judicial papers upon his retirement. In response, Plaintiffs and a coalition of media companies filed this cross-appeal to unseal the recording.

Much significance is made in the opinion of the fact that the recording is part of the judicial record. In considering the cross-appeal, the court notes that while there is no Ninth Circuit precedent indicating there is a First Amendment right of access to court proceedings and records, there is a very strong common law right to do just that. In fact, the presumption in favor of the right of access to court records is so strong that a party seeking to overcome that presumption faces a "compelling reasons" standard supported by "specific factual findings" in order to defeat it.

To combat the Plaintiff's cross-motion to unseal the record, Defendants rely on four so-called compelling justifications: 1) that the recording was intended to be kept confidential when it was made, 2) that an injunction was issued by the U.S. Supreme Court to stop the broadcast of the recording, 3) that a local civil law barring photography and television broadcast of judicial proceedings would be violated, and 4) that unsealing the record would have a "chilling effect" on those who may testify in trials.

Chief Judge James Ware, who took over responsibility for the case upon Judge Walker's retirement, makes surprisingly swift and easy work of each of the justifications. The opinion first notes that, in relation to point 1, Judge Walker's statement that the recording would not be made public was not binding, and not a justification to keep the record sealed. Even if the Judge's statement was considered some sort of promise or guarantee, that promise would not be binding on any other court or party.

Moving on to point 2, that the Supreme Court issued an injunction stopping the broadcast of the trial, the opinion points out that the injunction was issued based on the narrow legal issue of whether the District Court had properly amended its local rules in order to broadcast the trial. The Supreme Court specifically stated, in fact, that it was solely addressing the procedural issues of amending the rules rather than whether the broadcast of the trial was appropriate.

The Defendants' third justification for maintaining the seal on the record is that Civil Local Rule 77-3, which prohibits "the taking of photographs, public broadcasting, televising, or recording for those purposes in the courtroom…in connection with any judicial proceeding" bars the dissemination of the recording. However, the court underscores that no objection to the recording was made during the trial by either party, and the recording was used in closing arguments. Furthermore, the Rule is open to a number of interpretations by the court, none of which would defeat the common law right of access in any case.

Finally, the court disposes of the fourth argument, that unsealing the record would have a chilling effect on witnesses. To this, the court responds that there is no evidence that this may be the case, and that it is insufficient to simply allege that the dissemination of the record may have negative consequences. The court highlights the lack of any evidentiary support in favor of the Defendant's position and notes that, on the contrary, the Ninth Circuit actually went out of its way to allow broadcast of recordings taken at civil non-jury trials, and would have certainly considered this chilling effect in making their decision to allow that activity. Additionally, since the Supreme Court injunction that barred broadcast of this particular trial did not invalidate the Ninth Circuit's policy to record and broadcast trials, rather stated that the Circuit's process in revising its local rules likely did not adhere to federal law, the policy was valid at the time the recording was made.

After handily disarming of all the arguments against the unsealing of the record, the court makes absolutely clear that it is not ruling generally on whether trials should be broadcast, or whether the prior trial was fair. The opinion goes to great pains to emphasize that its conclusion rests solely on the fact that the common law right of access to records outweighs any arguments for keeping the record sealed in this particular case. That said, this will likely be viewed as a win for the opponents of Proposition 8 who have continuously fought to show the world the testimony, statistics, and, presumably, bias, shown during the trial.

Judge Ware stayed the order until September 30, after which, barring any action by a higher court, the record would be unsealed. Counsel for the Proponents of Prop 8 announced that they would file an immediate appeal with the Ninth Circuit and seek a stay from that court. [A 9th circuit panel issued an order on September 26 temporarily staying the district court's order to give the parties time to file briefs on a pending motion by Proponents of Prop 8 for a stay pending appeal.] *Stephen E. Woods*

Federal Judge Rejects DOMA Challenge in Immigration Context

In a decision released on September 28, 2011, U.S. District Judge Stephen V. Wilson of the Central District of California ruled that binding 9th Circuit precedent requires him to dismiss a lawsuit challenging the U.S. Customs and Immigration Service's refusal to recognize a same-sex marriage between a U.S. citizen and a citizen of Indonesia. Judge Wilson relied on a nearly-thirty-year-old ruling that predates positive advances in gay rights in the Supreme Court. *Lui v. Holder*, No:2:11-CV-01267-SVW.

The plaintiffs, Lui and Roberts, married in Massachusetts on April 9, 2009. That same day, Roberts, the U.S. citizen, filed a petition on behalf of his husband with the California Service Center of the US Customs and Immigration Service, seeking recognition of his husband's spousal status through an I-130 Petition. The Service denied the petition and was upheld by the Board of Immigration Appeals on January 20, 2011. The men then filed an action with the district court, claiming that the government's refusal to recognize their marriage constitutes "sex discrimination" in violation of the Immigration & Nationality Act's anti-discrimination provision, as well as violating their 5th Amendment rights to due process and equal protection. In effect, then, they are challenging Section 3 of DOMA, which bars federal agencies from recognizing same-sex marriages. They hopefully cited in support of their case *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D. Mass. 2010), appeal pending in the 1st Circuit, in which the court held Section 3 unconstitutional in a case involving claims for various federal benefits.

This is one of the cases in which the House of Representatives has intervened to defend DOMA, while the Justice Department, nominally the defendant, has switched sides and argued, in support of the plaintiffs, that Section 3 is unconstitutional.

Unfortunately, in the 9th Circuit, anybody seeking recognition of a same-sex marriage in the immigration context faces the precedent of *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), in which the court upheld the Immigration Service's denial of an I-130 petition on behalf of a same-sex couple who married in Colorado. (A county clerk issued a marriage license to this same-sex couple; at the time, the state had a gender-neutral marriage statute which had not been definitely construed by any court to ban same-sex marriages.) The court in *Adams* rejected all arguments by the petitioners, including the claim of sex discrimination and the claim of 5th Amendment (due process and equal protection) violations. *Adams* has never been overruled or disavowed by the 9th Circuit, and is thus technically binding on all trial judges in that circuit. The circuit court's decision was, ironically enough, written by Anthony Kennedy, who later wrote the gay rights decisions in *Romer v. Evans* and *Lawrence v. Texas* on the Supreme Court, which laid the foundation for current attacks on DOMA!

"In *Adams*, the Ninth Circuit held that 'Congress's decision to confer spousal status . . . only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements,'" wrote Judge Wilson. "The fact that DOMA was enacted years after the Ninth Circuit's decision in *Adams* is not persuasive given that marriage as defined in Section 3 of DOMA is consistent with *Adams*. While Plaintiffs and Defendants point out the alleged deficiencies in the reasoning in *Adams*, this Court is not in a position to decline to follow *Adams* or critique its reasoning simply because Plaintiffs and Defendants believe that *Adams* is poorly reasoned."

Judge Wilson pointed out that the prerogative to overturn a 9th Circuit precedent "rests not with this District Court, but with the *en banc* Ninth Circuit and the Supreme Court." Judge Wilson signalled his awareness of the case pending in the 1st Circuit, but noted that "the plaintiffs in *Gill* were spouses of federal employees who brought suit on the basis of denial of certain federal marriage-based benefits, thus the context of that case was somewhat different from the present case, which arose in the context of immigration law. More importantly, the court's decision in *Gill* does not affect this Court's obligation to follow binding Ninth Circuit precedent."

In other words, if this case is to be won by plaintiffs, it needs to be won at the appellate level, as trial courts are bound to follow any precedent on point. The only real distinction between *Adams* and this case is that in *Adams*, the validity of the marriage under Colorado state law was dubious, whereas the validity of the plaintiffs' marriage in this case is, as a matter of Massachusetts law, unquestioned. A.S.L.

California Transgender Inmate Loses Bid for Sex-Reassignment Surgery

A transgender California state prison inmate serving a 50-years-to-life sentence for murder has lost her appeal of a ruling denying her request for sex reassignment surgery and transfer to a women's prison. The California 1st District Court of Appeal denied Lyralisa Stevens' appeal in a brief order on September 21, 2011, that gave no reasons for the decision, apart from commenting that she was receiving adequate security at the all-male California Medical Facility in Vacaville, where she stays in her single cell to avoid possible harm from other prisoners. *Stevens v. State*.

According to press reports about the ruling, Stevens began taking hormones to feminize her body in 1993, had her name legally changed to Lyralisa the next year, and had begun some surgical procedures to reshape her body prior to being incarcerated. She was convicted of killing another woman with a shotgun during a dispute about some clothing. When she was incarcerated in 2003, she had been living as a woman for a decade, but prison officials sent her to a male facility because she still had male genitals. Her recent bid for surgical removal of her genitals and transfer to a female prison ran into the fact that to date no court has ever ordered a state prison system to provide gender reassignment surgery for an inmate.

Courts have ruled that under the 8th Amendment, which forbids cruel and unusual punishment, prison authorities are required to provide appropriate medical treatment for serious medical conditions of inmates. Courts have come to recognize that "gender identity disorder" is a serious medical condition for which inmates are entitled to treatment. Courts within the 9th federal circuit (including California) are bound by a decade-old precedent mandating that they make hormone treatments available in appropriate cases, and Stevens has been able to maintain her hormone treatments in prison, and to dress and groom herself as a woman. However, due to

threats of violence from male inmates, she stays in her cell, does not make use of time in the prison yard, and avoids showering when other inmates are using the facilities. Her request to be transfered to a female prison has been denied, however, as prison authorities will not house an inmate with male genitalia in a female prison.

A similar lawsuit brought by an inmate seeking sex reassignment surgery is pending in Massachusetts. Recently, in *Fields v. Smith*, 2011 WL 3436875 (Aug. 5, 2011), the 7th Circuit Court of Appeals held unconstitutional a Wisconsin statute that prohibited the use of state funds to provide hormones or surgery for transgender inmates, finding that the state prohibition violated the constitutional obligation to provide appropriate medical treatment for serious conditions. In its decision, the 7th Circuit at least theoretically rejected the argument that state payment for sex reassignment surgery for inmates could be categorically ruled out, but that case was brought by inmates seeking to maintain their hormone treatment, so the issue of surgery did not have to be decided.

Stevens is described in press reports as having a slight build and thus being quite vulnerable to physical attack. The court of appeal indicated that if her living arrangements change or her safety is "otherwise compromised," she can reapply to the court for relief. Otherwise, she continues to be sentenced to living in isolation for her own safety, and to be unable to complete her physical gender transition so long as her incarceration continues. (Based in part on reports by the Associated Press, the Los Angeles Times, and the HuffingtonPost.com.) A.S.L.

Federal Court Refuses to Dismiss Sex Discrimination Claim Concerning Yearbook Photo

In *Sturgis v. Copiah County School District*, 2011 WL 4351355 (Sept. 15, 2011), the U.S. District Court, Southern District of Mississippi (Judge Daniel Jordan), denied a school district's motion to dismiss the sex-discrimination claims brought by a high school senior after school officials excluded her yearbook photo because she sat for her portrait wearing a tuxedo rather than a dress.

The Copiah County School District, located in Mississippi, requires for yearbook portraits that female students wear a "drape" and male students wear a "tuxedo." The plaintiff, Ceara Lynn Sturgis, identifies as a female but prefers conventionally masculine clothing. As a result, she was uncomfortable with the drape and opted instead to wear a tuxedo for her portrait.

In response, the district excluded Sturgis's portrait (and her name) from the yearbook. After the district denied Sturgis's written appeal of the decision, she filed a § 1983 suit, alleging that the district engaged in sex-based discrimination in violation of the Equal Protection Clause of the U.S. Constitution and Title IX of the Federal Education Amendments of 1972.

At the outset, Judge Jordan noted that the applicable level of scrutiny for this and all equal protection cases would prove central. Though appearance in a yearbook does not involve fundamental rights for which strict scrutiny would apply, Sturgis urged intermediate scrutiny because the "women-must-wear-drapes" requirement constitutes sexual stereotyping that is facially discriminatory. The school district countered that the policy is sex neutral because both sexes were required to wear specific clothing (boys were not allowed to wear drapes).

The court noted that both arguments have "some appeal" but found that the decision should be made on a more complete record.

Indeed, the court emphasized that the school district failed to provide any justifications for the requirement ,even after providing additional materials in an effort, rejected by the court, to convert its motion to dismiss into a motion for summary judgment. Assuming the parties do not reach a settlement, this sets the stage for discovery and for the school district having to provide specific reasons for the rule and the purposes it is intended to serve.

In considering the appropriate level of scrutiny that may ultimately apply, the court contrasted the issues involved in the present case with those presented in a case decided by the U.S. Court of Appeals for the 5th Circuit, *Karr v. Schmidt*, 460 F.2d 609 (1972).

Karr involved a public school's hair-length regulations and the court there determined that such regulations were subject to only a minimum standard of review. However, Karr, according to Judge Jordan, could be contrasted with the present case for at least three reasons: (1) Karr did not involve claims of sex discrimination in that the equal protection claim advanced there involved the regulation's application as between male students only; (2) the court in Karr reached it decision only after considering the school board's justifications presented during a four-day trial; and (3) the justifications offered for grooming standards in a classroom simply may not be the same as those that would justify a dress code for a senior yearbook portrait.

In sum: "Whether a rational-basis or intermediate-scrutiny test ultimately applies, the Court still needs to hear and consider the justifications before deciding, as a matter of law, whether the District's justifications survive the applicable level of scrutiny."

In rejecting the school district's motion to dismiss, the court also rejected its argument that Sturgis failed to allege an official school-board policy or custom or that an official policy maker was involved as required to establish § 1983 liability. The court noted that the complaint refers to the decisions of the principal, assistant superintendent and the school board and Sturgis therefore sufficiently pleaded the § 1983 elements.

The court likewise refused to dismiss plaintiff's Title IX claims for the same reasons that the equal protections claims survive (i.e., defendants sought dismissal of the Title IX claims on the basis that it required the finding of an equal protection violation, which will now be determined on the basis of a more complete record).

The case was brought by the ACLU (LGBT & AIDS Project) with pro bono assistance provided by the firm of Kramer Levin Naftalis & Frankel LLP. *Brad Snyder*

Equal Protection Challenge to Louisiana Sex Offender Registry May Proceed

Rejecting in part a motion to dismiss by the State of Louisiana, U.S. District Judge Martin L.C. Feldman found that a group of individuals who are required to maintain registration as sex offenders upon their conviction under Louisiana's Crime Against Nature by Solicitation Act can sue for a violation of their rights to Equal Protection of the Laws under the 14th Amendment of the U.S. Constitution. The ruling in *Doe v. Jindal*, 2011 Westlaw 2935042 (E.D. La., Sept. 7, 2011), granted the State's motion

to dismiss substantive due process and 8th Amendment cruel and unusual punishment claims, however, as well as dismissing Governor Bobby Jindal as an individual defendant under the sovereign immunity doctrine.

Until August 15, 2011, when the governor signed a reform measure into law, Louisiana statutes provided that those convicted of solicitation for prostitution in general were guilty of a misdemeanor that did not require registration as a sex offender, but a special statute, Crime Against Nature by Solicitation, imposed longer prison sentences, larger fines, and a sex offender registration requirement. The statute was clearly a lingering remnant of the tradition of criminalizing oral and anal sex. After Lawrence v. Texas, such activity may not be penalized when engaged in privately by consenting adults, but the Supreme Court pointed out in that case that it was not ruling on the constitutionality of laws on commercial sex.

At the heart of the argument in this case is the contention that there is no rational basis for imposing a more draconian punishment on solicitation for compensated sex when it involves oral or anal sex than for when it involves vaginal intercourse. Indeed, the misdemeanor law concerning solicitation for prostitution clearly covers the same conduct, but oral or anal sex have been singled out for harsher treatment. The plaintiffs argued that the main purpose for the sex offender registry was to protect children from sexual assaults, but that the crime covered by this solicitation statute bore no rational relationship to that purpose.

The court found persuasive as applied to this case the rationale of *Eisenstadt v. Baird*, 405 U.S. 438 (1972), which struck down a Massachusetts law that prohibited distribution of contraceptives to single people while allowing it (as required by the Supreme Court's decision in *Griswold v. Connecticut*) for married persons. The Supreme Court found that there was no rationale to support the challenged law that would not also be advanced by penalizing the distribution to married couples, which is constitutionally foreclosed.

More directly on point, the court noted, was a California Supreme Court decision in *People v. Hofsheir*, 129 P.3d 29 (Cal. 2006), striking down on Equal Protection grounds a law that imposed higher penalties on those who engaged in oral sex with a teenager than those who engaged in vaginal intercourse with a teenager, requiring only the former to register as sex offenders. The court found both groups of defendants to be "similarly situated in terms of the nature of their misconduct," so imposing a greater penalty on one than the other offended equal protection of the laws.

Judge Feldman pointed out the absurd lengths to which the state's counsel went in trying to justify having essentially the same conduct treated differently. "In fact, when asked during oral argument why the legislature has two statutes on the books if the sex acts of the Prostitution statute consume all of the acts of the Crime Against Nature by Solicitation statute, counsel persisted in advancing the fiction that bestiality was an act not covered by the Prostitution statute but is covered by the Crime Against Nature statute. That comment defies credulity. Its absurdity is betrayed by the statutory text, the Louisiana Supreme Court's pronouncements, and common sense."

Judge Feldman rejected the argument that the distinction could be justified out of public morality and public safety concerns, and said that plaintiffs "have alleged a facially plausible Equal Protection claim that at this stage of the case is sufficient to withstand dismissal for failure to state a claim." Whether the state can justify the differential treatment "must await a merits-inquiry."

However, the court did not see a right to privacy claim here under the Due Process Clause, pointing out that every attempt to challenge the constitutionality of sex offender registry laws under the Due Process Clause has been unsuccessful, including in a persuasive 11th Circuit decision cited by the court. Furthermore, it found that the Supreme Court had upheld such laws against procedural due process claims. Rejecting an 8th Amendment claim, the court clung to the absurd contention -- which courts have accepted -- that requiring somebody to register as a sex offender is not "punishment." Go tell that to the people who find their ability to carry on a normal life severely undermined by being listed in one of those on-line sex offender registries. But the myth of the "non-punitive" registry lives on for now, at least in this case.

Students at Loyola Law School's Clinic in New Orleans are working on this case, as well as pro bono attorneys from Cleary Gottlieb in New York and Brooklyn attorney Andrea J. Ritchie. The plaintiffs are suing as "Doe" to preserve anonymity. The judge decided that the state's demand to know the identity of the plaintiffs need not be decided at this stage of the proceeding. A.S.L.

N.Y. County Surrogate Rejects New Challenge to Probate of Ranftle Estate

New York County Surrogate Court Judge Kristin Booth Glen ruled on September 14, 2011, that the late H. Kenneth Ranftle was domiciled in New York at the time of his death and rejected a challenge to probate of his will brought by his brother, Ronald Ranftle, who argued that Ken was a Florida domiciliary. Ranftle's domicile at death was important because his marriage to J. Craig Leiby is recognized under New York law, but would not be recognized under Florida law. Thus, the designation of Leiby as sole distributee and as executor of the estate theoretically hinges on a determination of his deceased husband's state of domicile. *In the Matter of Ranftle*, 2008-4585, NYLJ 1202515287643 (Surr., N.Y., decided September 14, 2011).

The matter is complicated because Ranftle owned a house in Ft. Lauderdale and took steps in 2003 to establish domicile there, primarily for tax purposes. Unlike New York, Florida does not have a personal income tax, and, observed Judge Glen, "there are capital gains and property tax advantages and a significant homestead exemption" available to Florida domiciliaries. Although Ranftle and Leiby spent a large part of the year living together in the apartment they jointly owned on West 13th Street in New York City's Greenwich Village, as well as property on Fire Island and an apartment they bought in Montreal, Ranftle had been careful to maintain his Florida domiciliary status by documenting his presence in the state for at least 183 days in each tax year, as required by Florida law.

However, when he was diagnosed with terminal lung cancer in March 2008, he decided to remain in New York City and actually never spent another day in the Florida house between then and his death on November 1, 2008. That was a memorable year for same-sex marriage in New York. Early in the year, an upstate appeals

court ruled that same-sex marriages contracted elsewhere must be recognized in New York, and shortly thereafter Governor David Paterson issued a directive to state agencies about compliance with the court's ruling. Reacting to these events, Ranftle proposed marriage to Leiby, his long-time partner, and they traveled to their Montreal apartment and made the necessary arrangements, marrying there on June 7, and then returning to New York.

Ranftle also arranged to make a new will, now that he was getting married. At this point there was an unfortunate slip-up, as the attorney who prepared the new will cut-and-pasted provisions from his prior will and overlooked the statement in the prior will that Ranftle was domiciled in Florida, so that provision was transferred to the new will intact. Both the lawyer and Ranftle were focused on the provisions that were changed and paid no attention to this provision. Ranftle did not bother to change his driver's license, and actually cast an absentee ballot in the 2008 general election in November before he died. (A bit of irony here, as Election Day was November 5 and Ranftle passed away on November 1.)

After Ranftl died, Leiby presented the will for probate and Surrogate Glen concluded that as Leiby was a surviving spouse, he was the sole distributee at law and there was no need to notify other surviving relatives. Leiby was the executor and main beneficiary under the will. But another one of Ranftle's brothers, Richard, sought to intervene in the case, challenging Leiby's spousal status, and took that challenge to the Appellate Division, which affirmed Surrogate Glen's ruling that the marriage would be recognized in the probate context in New York. See *In re Estate of Ranftle*, 81 App. Div. 3d 566 (1st Dept. 2011). Ranftle's other brother, Ronald, then brought this new challenge, contending that Leiby was not qualifed under Florida law to be sole distributee and executor, seeking to vacate the probate decree.

After a hearing, Surrogate Glen signed a detailed opinion reviewing all the evidence on September 14, which was published by the New York Law Journal on September 23. Taking into account all the evidence presented on both sides of the question, Glen concluded that Ranftle was a New York domiciliary at his death. "Based on the testimony of the witnesses," she wrote, "especially Craig, Ken's accountant, and Ken's attorney, I find by clear and convincing evidence that some time in 2008, probably at or around the time of his terminal diagnosis, but no later than his marriage, Ken formed the intent to abandon his Florida domicile and to re-establish his domicile in New York where his friends, family and beloved spouse were located. He did so for two reasons: to be with those he loved, in the city where he had lived and prospered, in the commodious apartment he and his husband owned together, and had lived in since 1999; and because New York, unlike Florida, had expressed its willingness to recognize and respect his relationship with -- and marriage to -- Craig. It is significant that, following his diagnosis, Ken never returned to Florida, even while taking steps to protect Craig's interest in the only property he owned there."

Glen found that the reference in the last will executed by Ranftle to being a Florida domiciliary was something courts refer to as a "scrivener's error," not representative of Ranftle's actual intent, and actually overlooked by Ken. Further, she characterized his voting by Florida absentee ballot as "an anomaly insufficient to overcome the otherwise compelling evidence that Ken chose to become, became, and died a domiciliary of New York."

"In considering the 'association and interests'" that courts are supposed to consider in determining issues of domicile, wrote the judge, "there is one additional compelling fact. Ken was a proud gay man who treasured -- and sought in every way available to protect -- his husband Craig, and Craig's rights upon his death. He named Craig executor in his will, and it was obviously his intent that Craig should not only be the primary beneficiary of his estate, but also that he be permitted 'to serve as a fiduciary [because to do so] is one of the last services a family member can perform for a loved one who has passed away.' Had Ken died a domiciliary of Florida, under Florida law Craig could not have served as his executor. Florida law requires that only a spouse, certain close relations or a Florida resident may serve as a personal representative and since, as Ken well knew, Florida would not recognize his marriage (and of course, Craig was clearly not a Florida resident) failing to change his domicile would have 'thwarted his wish' to have Craig serve as his executor."

The judge also noted many instances during those final months of his life when Ken had declared himself a New Yorker, including in a separate Canadian will executed to deal with their Canadian real estate holdings, "on all the official documents surrounding his marriage, his application for Social Security and Medicare, and his preliminary efforts to file income tax returns as a New York resident."

Having resolved the domicile issue against Ronald Ranftle, Surrogate Glen dismissed the petition to vacate the probate decree.

The case certainly illustrates the difficulties faced by same-sex partners in our mobile society as they travel from state to state or invest in property in different jurisdictions against a legal framework (encouraged by Section 2 of the federal Defense of Marriage Act) where some states will recognize same-sex marriages and others do not. This continuing patchwork system of marriage recognition is intolerable, which helps to explain why the effort to repeal DOMA continues to pick up support in Congress, including the recent addition of the first Republican co-sponsor in the House of Representatives.

Leiby was represented in defending probate of the will by attorneys Kevin J. Farrelly and Erica Bell (of the firm of Weiss, Buell & Bell). A.S.L.

Federal Civil Litigation Notes

First Circuit — The Justice Department and the House of Representatives filed their briefs in the pending appeals of *Gill v. Office of Personnel Management* and *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, Case No. 10-2204, in which the District Court in Massachusetts ruled last year that Section 3 of the Defense of Marriage Act violates the equal protection component of the 5th Amendment, the Spending Clause, and the 10th Amendment separation of powers as between the states and the federal government. [Section 3 provides that for all purposes of federal law only the union of a man and a woman will be deemed a "marriage" and only the parties to such a union would be deemed "spouses."] The Justice Department, which originally filed the appeals on behalf of the federal government

defendants, has drastically changed its position in the case. Its original brief, which was filed before President Obama and Attorney General Holder announced their view that Section 3 was unconstitutional and would no longer be defended in the courts by DOJ, had urged the 1st Circuit to reverse *Gill* on the argument that Section 3 survives rational basis review, and to reverse *Commonwealth* on the ground that Section 3 was within the power of Congress to enact. In its new superseding brief, filed on September 22, DOJ argues that the 1st Circuit should reconsider its precedent on the level of scrutiny for sexual orientation discrimination claims, adopt a heightened scrutiny test, and find Section 3 deficient under that test. The Bipartisan Legal Advisory Group of the House of Representatives, which by a totally partisan vote of 3 Republicans to 2 Democrats resolved to defend Section 3, is an intervenor-appellant in the case, and also filed a brief on September 22, arguing that the 1st Circuit should stick with its rational basis approach to sexual orientation discrimination claims, that Section 3 easily passes the rational basis test (contrary to the conclusion reached by the District Court), and that the decisions below should be reversed. The court should be announcing the argument date shortly.

Third Circuit — In an unpublished decision released on June 9, 2011, *Pagan v. Gonzalez*, 2011 WL 2260977, the U.S. Court of Appeals for the 3rd Circuit affirmed a decision by District Judge Joseph E. Irenas (D.N.J.) to grant summary judgment for defendants on a Title VII claim by a lesbian federal employee that she was subjected to unlawful gender stereotyping and had suffered adverse employment action by denial of entry into a training program she sought to enter. The circuit court found that Pagan was actually making a sexual orientation discrimination claim, not cognizable under Title VII, and that in any event the failure to provide the training in question was not an adverse employment action, since she had not suffered a negative change in employment status or terms.

Court of Claims — The repeal of the "don't ask, don't tell" military policy, which took effect September 20, left some unfinished business. Among other things, there is the lawsuit brought in the U.S. Court of Claims by the ACLU on behalf of Richard Collins and other former military personnel whose separation pay was cut in half because their honorable discharges were due to homosexuality. The repealed statute says nothing about this. The Defense Department provides "separation pay" for personnel who are honorably discharged after a specified period of service. The Department decided as a matter of policy to halve the separate pay of those discharged under DADT. (Service members discharged for engaging in gay sex would not receive honorable discharges, because they would have violated the Uniform Code of Military Justice, and would not be entitled to separation pay. The repeal of DADT has not affected the UCMJ provision on sexual conduct.) On September 22, Joshua Block, a staff attorney at the ACLU, argued to the U.S. Court of Federal Claims that the Defense Department policy violates 5th Amendment, which imposes an obligation of equal protection of the laws on the federal government.

Connecticut — Briefs were filed September 14 on the pending summary judgment motions in *Pedersen v. Office of Personnel Management*, No. 3:10-cv-01750-VLB (D. Conn.), a pending challenge to Section 3 of the Defense of Marriage Act. As has now become expected, the Justice Department, nominally defending the Office of Personnel Management in the lawsuit, filed a brief arguing that Section 3 should be held unconstitutional as a violation of the Equal Protection Clause. The DOJ brief reiterates the now-familiar argument that sexual orientation discrimination claims should merit heightened scrutiny, and that Section 3, which forbids the federal government from recognizing lawfully contracted same-sex marriages for any purpose, fails the test of significantly advancing any important governmental interest. Also as expected, the brief filed on behalf of the so-called Bipartisan Legal Advisory Committee of the House of Representatives, which voted 3 Republicans to 2 Democrats to hire former Solicitor General Paul Clement to defend Section 3 in the courts, argues that sexual orientation discrimination claims do not merit heightened scrutiny and that it is rational for the federal government to continue discriminating against same-sex couples because doing so is necessary to help the Republican Representatives who control the House win re-election from their fervently anti-gay religious base of voters. Oops! That's not their official argument. Their official argument is incomprehensible, seeking to turn back the clock to the days before *Lawrence v. Texas* and *Romer v. Evans*.

Ohio — U.S. District Judge James S. Gwin (N.D. Ohio) ruled on September 26 in *Hutchinson v. Cuyahoga County Board of County Commissioners*, Case No. 1:08-CV-2966, that Shari Hutchinson may proceed with her Section 1983 equal protection claim against the County based on allegations that the county, despite its official non-discrimination policy, had a practice of rejecting gay applicants for promotion. Hutchinson, who had excellent job ratings, applied for promotion to several positions for which she was qualified, but was turned down for all of them. Based on statements attributed to various county officials, she claims that they were rejecting her applications because she is a lesbian. The court granted summary judgment to the county as to one claim, because the county showed that it had promoted the two highest scoring applicants from an evaluation procedure in which Hutchinson ranked fifth, and she had not made any allegations that the point-allocating selection procedure for that job was biased. A.S.L.

State Civil Litigation Notes

Illinois — Sangamon County Circuit Judge John Schmidt ruled on September 26 that he would not stay his earlier ruling against Catholic Charities' argument that state officials violated the First Amendment by non-renewing foster care and adoption contracts with the plaintiffs because of their policy of refusing to provide services to same-sex couples. The issue came to a head after Illinois adopted a civil union law mandating that civil union partners have the same rights under state law as married couples. Catholic Charities indicated that it would seek a stay from the 4th District Appellate Court, claiming that irreparable injury would occur if children whose cases were being handled by Catholic Charities were switched to other agencies. *State Journal-Register.com*, Sept. 26.

Illinois — *Windy City Times* reported that the Illinois Human Rights Commission awarded $104,711 in damages to Venessa Fitzsimmons, a transsexual who en-

countered discrimination due to her gender identity from her employer, Universal Taxi Dispatch, Inc. Her boss reportedly called her a "freak," a "queer," and an "abomination," and made her pay for repairs to her cab that were not normally charged to other drivers. She alleged that the boss threatened to fire her, claiming that customers did not want a transsexual driver, and refused to aid her when her cab broke down. Fitzsimmons' attorney, Joanie Rae Wimmer, asserted that this may be the first damage award for gender identity discrimination under the Illinois law, which was amended to include this category in 2006.

Indiana — Alisha Brennon has filed a wrongful death claim in Marion County Superior Court, seeking compensation for the death of her Illinois civil union partner, Christina Santiago, one of those killed when a wind gust at the Indiana State Fair on August 13 triggered the collapse of a stage's rigging and lighting system into the crowd. Brennon also suffered serious injuries in the incident, which she attributes in her lawsuit to negligence by the state. Indiana law does not allow or recognize civil unions or same-sex marriages, so Brennon's suit faces long odds. She has simultaneously filed a suit in federal court challenging various aspects of the Indiana Torts Claims Act, which provides a small sum for accident victims, placing a low cap on damages for negligence claims against the state. *Chicago Sun Times*, *Chicago Tribune*, Sept. 27.

Indiana — The Court of Appeals of Indiana ruled on September 28 that the former boyfriend of a married woman was not entitled to an order awarding him visitation with the child he had been raising with her before she got married. K.*S. v. B.W.*, 2011 WL 4478319. K.S. was not married to the child's biological father, who died about six months after the child was born. She subsequently became involved with B.W., who lived together with her and the child in West Virginia. The child referred to B.W. as "dad" and "daddy," and he was listed as the father on her school records. After the non-marital relationship between K.S. and B.W. ended, K.S. continued to allow B.W. to have regular visitation with the child. But a few years later K.S. got married and moved to Indiana with her new spouse and the child. Although occasional visitation with the child continued, evidently B.W. was concerned about protecting his relationship with the child and sought an Indiana court order designating him as a de facto parent with visitation rights. K.S. responded to the lawsuit by cutting off visitation. The trial court would not declare B.W. a de facto parent, but did order limited visitation for him. The court of appeals reversed the visitation order, finding no basis in Indiana statutes for it. The court also rejected B.W.'s attempt to analogize to a case involving same-sex domestic partners, *King v. S.B.*, 837 N.E.2d 965 (Ind. Supreme Ct. 2005), pointing out that the court's ruling in that case concerned a custody contest and a domestic partner claiming to have been a primary caregiver, and by contrast B.W. was not seeking custody of the child in this case.

New Jersey — Correcting the actions of a lawless motion judge, the New Jersey Appellate Division has reversed a summary judgment issued in *Stephenson v. Rutgers University*, 2011 WL 4388287 (September 22, 2011). Kimi Stephenson, who had worked part-time as a student manager of a Rutgers University athletic time, filed a harassment and discrimination complaint on March 30, 2009, alleging that she suffered discrimination on account of sexual orientation and disability. Defendants filed an answer, denying her material allegations. With issue joined, defendants filed a motion for summary judgment requesting oral argument. Stephenson filed an opposition to the motion, to which defendants replied. But the motion judge issued an order granting the motion without scheduling a hearing. "The judge handwrote a nine-line explanation of his decision, which did not contain any findings of fact and contained only cursory conclusions of law," wrote the Appellate Division, which then went on to point out that a request for oral argument on a civil motion for summary judgment "shall be granted as of right." The decision was vacated and remanded for oral argument. Wrote the court, "The judge should address both the statute of limitations issue, which was apparently the basis for his decision, and the substantive-law issues raised in the motion."

New York — In two pending cases, New York Attorney General Eric Schneiderman is defending the recently-enacted Marriage Equality Act against claims that it was improperly passed by the legislature. *New Yorkers for Constitutional Freedoms v. State Senate*, No. 807-2011 (N.Y.Sup. Ct., Livingston Co.), was filed by a group contending that the Republican Caucus of the State Senate improperly met behind closed doors with New York City Mayor Michael Bloomberg, a supporter of the bill to legalize same-sex marriage in New York, while not affording the same access to opponents. This conveniently overlooks the fact that most of the Republican senators were staunch opponents of the bill and not open to contrary argument; its passage was ultimately achieved with only a handful of Republican votes. This suit also argues that Governor Andrew Cuomo improperly issued a "message of necessity" to facilitate passage of the bill the same day the final text was released in the Senate, rather than requiring the normal three days to allow legislators to study the proposal. Schneiderman filed the state's opposition to the lawsuit on September 19, arguing that the Open Meetings Law does not apply to party caucuses, only to official legislative meetings, and that the "message of necessity" issue is not amenable to judicial review, being an internal matter to the State Senate. Schneiderman argued that the plaintiffs' assertion of some sort of First Amendment right to have access to the Republican caucus was without merit, relying on several U.S. Supreme court decisions. A copycat suit was also filed in the U.S. District Court for the Northern District of New York by an upstate couple who are opposed to the law, Margaret and Tomas Zavalidroga, who named Governor Cuomo as their lead defendant (*Zavalidroga v. Cuomo*, 11-CV-831). In addition to the arguments advanced in the state court case, the Zavalidrogas argued that there is a "gay marriage confederacy… [that has] unconstitutionally foisted its demented social programs upon an invariably unwilling populace." They contended that "the major media in New York were working in collusion to censure viewpoints in opposition to same-sex marriage just prior to its being voted on by the legislature." If they have a lawyer representing them, we would be

New York — Shades of "The Man Without a Country"…. In *Debi R.-C. v. Danica P.*, NYLJ 1202512952412 (N.Y. Fam. Ct., Kings Co., July 28, 2011) (published in NYLJ 9/1/2011), Family Court Judge Michael L. Katz ruled that the court was without jurisdiction to entertain a custody proceeding concerning a child born to a lesbian couple through donor insemination because New York was not the "home

state" of the child. Indeed, due to the birth mother's frequent moves since the child was born, at the time this suit was filed the child had no "home state" since it had not resided in any one state for the six months before the filing! The respondent, Danica P., had signed a Donor Insemination Agreement on February 26, 2009, which was also signed in India by the semen donor and his wife, under which Danica and her same-sex partner, Debi, agreed that "Danica and Debi shall have absolute and complete legal and physical custody of the child" and that the women "intend to raise said child together." A co-parenting agreement was also prepared but never executed, an subsequently the relationship between the women soured. Danica and the child moved out of their home to Danica's aunt's home in New Jersey in September 2009, then she moved to Maine in 2010 to live with her mother, then she moved to Massachusetts in October 2010. Debi sued for custody in Maine in September 2010, but the Maine court applied the "home state" rule and concluded it lacked jurisdiction, noting that suit could be filed in New York, New Jersey or Massachusetts. However, Judge Katz found that at the time Debi filed the subsequent suit in New York (arguing that as the child was born and lived for a substantial time in New York, it should be considered the home state), the child had not lived anywhere for long enough to have an established home state. By now, however, the child has resided in Massachusetts long enough, so Debi's next step may be to file a custody action in Massachusetts. Actually, in light of the lack of an adoption or a legal status for the women's former relationship, she might not have fared very well under New York precedents in any event.

Washington — The Supreme Court of Washington ruled in *Federal Way School District No. 210 v. Vinson*, 2011 WL 4485950 (Sept. 29, 2011), that a school district does not have a right under applicable state law to statutory judicial review of a hearing officer's decision that a teacher was discharged without sufficient cause. The court also upheld the hearing officer's decision in this case involving David Vinson, an openly-gay high school teacher who was discharged after a brief, vulgar shouting match with a former student at a fast food restaurant. The decision for the court by Justice Charles Wiggins sets out a detailed account of the struggles of an openly-gay teacher who, according to the court, was "by all accounts….an inspiring and incredibly effective teacher." The court's account of what happened to Mr. Vinson suggests that he was a victim of homophobia, administrative bias and retaliation. One member of the court, James Johnson, dissented, painting a completely different picture of a teacher in frequent trouble with the school administration. During the course of the case, Vinson obtained a position teaching at a private school and dropped his claim for reinstatement, but his claim for damages kept the case alive. The court majority, in reversing a decision by the court of appeals that had granted review and reversed the hearing officer's decision, scolded the court of appeals for attempting to modify the standards governing dismissal of tenured faculty in such a way as to provide little if any protection to them, as well as for granting judicial review that was not authorized by statute. (The court pointed out that the school district could seek a constitutional review, as opposed to statutory review, but had not sought such a review and did not appear to have constitutional grounds for attacking the hearing officer's decision. By contrast, the dissenter argued the district must have a right to statutory review and that the hearing officer's decision was plainly wrong.) The court said that "sufficient cause" for terminating a "certificated teacher" may be found, "as a matter of law… in only the most egregious cases." The *Tacoma News Tribune* reported September 30 that Vinson has a separate lawsuit pending against the school district, claiming he suffered discrimination due to his sexual orientation, but did not indicate whether that suit is in state or federal court. A.S.L.

Criminal Litigation Notes

U.S. Army Court of Criminal Appeals — The Army Court of Criminal Appeals affirmed a court-martial verdict convicting a young Army private of sodomy under Article 125 of the Uniform Code of Military Justice (UCMJ), rejected his argument on appeal that his conviction for having sex with another man in his unit in the barracks late at night violated his constitutional rights under *Lawrence v. Texas*. *U.S. v. Truss*, 2011 WL 3891821 (Aug. 31, 2011) (not reported in M.J.). The summary of the facts presented in the opinion by the court by Appellate Military Judge Gallagher indicated that the sexual activity followed a social event that involved considerable alcohol consumption. Later in the night, the appellant staggered drunkenly into the victim's room and prevailed on him to engage in oral and anal sex, over mild protests. The court martial found that the specification "by force and without the consent" of the victim had not been proved beyond a reasonable doubt, but that neither had the appellant proved that the sex was consensual. Finding support in the record for the court martial's factual finding, the appeals court further agreed with the court martial judges that Lawrence v. Texas would not shelter this case, distinguishing the facts and, most pertinently, observing: "The military has a unique need for unit cohesion and discipline that does not necessarily exist outside of the military environment. The nonconsensual nature of the prohibited sexual contact occurring in the barracks between two young intoxicated members of th same company remove this case from the nature and reach of the *Lawrence* liberty interest. Appellant's act of sodomizing PFC LY in PFC LY's barracks room, without PFC LY's consent, not only violates the trust between soldiers, but also compromises unit cohesion and discipline." The appeals panel upheld the sanctions imposed by the military judge of a bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances and reduction to the grade of E1, with a notation that he had "adjudged the maximum sentence authorized for Charge III [assault consummated by battery[and its specification." As Article 125 is not affected by the DADT Repeal Act of 2010, the military sodomy law remains fully in place and potentially applicable to openly gay individuals who will be allowed to serve after September 20.

California — A Ventura County jury failed to reach a verdict in *State v. McInerney*, the prosecution of a young man who murdered a gay classmate at E.O. Green School three years ago in a case that immediately received national media attention as an extreme form of anti-gay violence. Ironically, it seems that the hate crime element of the case and the prosecution's decision to charge Brandon McInerney as an adult for a crime he committed at age 14 resulted in splitting the jury, all of whose members resisted the hate crime charge and most of

whom would not convict on a homicide charge. Afterwards there were reports that jurors were upset that this was not handled as a juvenile case, reflecting the prevalent view that young teens are not sufficiently developed to be chargeable with the mens rea of serious adult crimes. All the jurors agreed that McInerney was guilty of something, but they failed to achieve the necessary unanimity around a particular verdict. *Ventura County Star*, Sept. 2.

California — The 2nd District Court of Appeal upheld a Los Angeles County jury's verdict of second degree murder in *People v. Garcia*, 2011 WL 4347861 (Sept. 19, 2011) (not reported in Cal. Rptr. 3d). Garcia had been hired by the victim, Jose, a gay man, to assist with his business, and Garcia had lived with Jose for a time. Garcia, who testified at trial that he is heterosexual, beat Jose to death. He claims tohave been acting in self-defense, warding off sexual attacks. There was some evidence that Garcia had submitted to Jose's sexual advances on several occasions prior to the fatal incident. He was charged with first degree murder, but the jury convicted on the lesser offense, and he was sentenced to 15 years to life. Garcia testified in his own defense. On appeal, among other things, he unsuccessfully challenged the prosecutor's cross-examination concerning his own sexuality and whether he had enjoyed sex with Jose, asserting that it was intended to undermine his defense. The court found that the questions were proper in light of the arguments Garcia was making on defense.

Maryland — Teonna Brown, who pled guilty to first-degree assault and hate crime charges for beating a transgender woman inside a McDonald's restaurant, was sentenced on September 13 to 10 years in prison, with five suspended, plus three years of supervised probation. While Brown's attorney argued that the sentence was excessive in light of his client's age (18) and expressed contrition, advocates for transgender rights criticized the sentence as too lenient in light of the serious injuries sustained by the victim, Chrissy Polis, 22. In a letter to the court, Polis said, "While being beaten, I felt like I was going to die that day." The attack included spitting, kicking, hair pulling, and name-calling. *The Advocate.com*, Sept. 14.

New York — Matthew Francis, 22, was sentence to two years in prison after pleading guilty to the charges of assault as a hate crime and attempted robbery stemming from an incident at the Stonewall Inn on Christopher Street in Greenwich Village in October 2010. From press reports, it sounds like Francis stopped in to the bar to use the restroom. While using the urinal, he asked the man at the next urinal about the bar and, upon being told it was a gay bar, Francis used an anti-gay slur, told the victim to get away from him, demanded money, punched the victim as another man who stopped in with Francis held the door closed, tackled the victim and held him down. The victim required hospital treatment. Francis's confederate, one Christopher Orlando, has also pled guilty to similar charges and will be sentenced in January. Francis's attorney claims his misconduct was due to abuse of prescription pills and alcohol, and that he has no malice towards gay people, including his lesbian sister. *Wall Street Journal*, Sept. 27. A.S.L.

Legislative Notes

Federal — U.S. Senator Kay Hagan of North Carolina has announced that she will add her name as a co-sponsor of the pending Employment Non-Discrimination Act, a bill that would enact a federal ban on employment discrimination based on sexual orientation or gender identity. Hagan's addition to the bill brings the number of Senate sponsors to 41. The current version of ENDA was introduced in the Senate by Senator Jeff Merkley of Oregon. A prior version of the bill, which lacked coverage for gender identity, passed the House in 2007 but was not brought to a vote in the Senate. A much earlier version of the bill came within one vote of passing the Senate in 1996.

Federal — Senator John Kerry (D-Mass) and Rep. Jerrold Nadler (D-N.Y.) have introduced companion bills in the Senate and House known as the Housing Opportunities Made Equal Act (or HOME Act), to amend the Fair Housing Act to ban discrimination in housing and lending based on sexual orientation, gender identity, source of income and marital status. In January the Department of Housing and Urban Development proposed regulations to ban anti-LGBT housing and lending discrimination where there is a financial nexus with HUD, through financing or insurances, but the proposed legislation would cast a wider net beyond federally-funded or subsidized housing programs into the general residential housing sector. The bills were introduced with co-sponsors in each House on September 22.

California — Citing the U.S. Supreme Court's ruling in *Snyder v. Phelps*, holding that anti-gay demonstrators had a constitutional right to engage in anti-gay picketing near a military funeral, Governor Jerry Brown vetoed S.B. 888, which would have imposed a ban on any picketing within 1,000 feet of a funeral. The ACLU had opposed the bill as overly broad. Senator Ted Lieu (D-Torrance), the bill's principal sponsor, said that he would come back with a new bill of more limited geographical scope, perhaps 500 feet. *San Francisco Chronicle*, Sept. 9.

California — Governor Jerry Brown has signed into law S.B. 117, a bill requiring businesses that have state contracts valued at $100,000 or more to provide equality of spousal benefits to same-sex partners. Under the bill, that state would be precluded from entering into such contract unless any benefits afforded to different-sex partners of employees are offered equally to same-sex partners of employees. Advocate.com, Sept. 7.

California — On September 2, the California Senate approved Seth's Law, AB9, a bill previously approved by the Assembly that would mandate that California schools adopt anti-bullying policies and programs. It is named for Seth Walsh, a 13-year-old boy who hanged himself after being the victim of intense bullying that federal officials later concluded had not been properly addressed by the Tehachapi Unified School District.

New Hampshire — The future of same-sex marriage in New Hampshire will be put to the test, as Republicans, who now control the legislature, have begun the process of repealing the law authorizing same-sex marriages that went into effect on January 1, 2010. The House Judiciary Committee voted to support a bill that would repeal the marriage law, although same-sex couples who have married in the state since the law went into effect would still be regarded as married. Prior to passing the marriage law, New Hampshire had enacted a civil union law for same-sex couples. The proposal approved in committee would revive that law with a twist — making civil unions available to any two adults regardless of sex. *Manchester Union Leader*, September 14.

Talk about being "anti-marriage"…. When the younger generation of heterosexuals is given the option of civil unions instead of marriage, a surprising number may take it, as France has experienced with its civil solidarity pacts. * * * As a result of the 2010 legislative elections, control of both houses passed to Republicans by veto-proof majorities, so a veto by the state's Democratic governor would not necessarily stop the proposed bill from being enacted. However, there is some question whether both houses of the legislature would ultimately agree by supermajority to an option that includes civil unions available to everybody.

New York — The *New York Post* (Sept. 29) reported that an advisory panel on changes to New York's Medicaid program is considering recommending that gender reassignment surgery be covered under Medicaid. A reporter seeking reactions to this story elicited the expected outrage from the head of the state's Conservative Party and more polite opposition from a Republican state senator. Ross Levi, of Empire Pride Agenda, pointed out that two other states, California and Minnesota, cover such procedures under their versions of Medicaid. It is worth noting in this connection that at least one federal appeals court, the 7th Circuit, opined recently in striking down a Wisconsin ban on the state funding sex reassignment surgery for prison inmates that such procedures may in some cases be "medically necessary," and of course the mandate of Medicaid is to fund medically necessary procedures for poor people who lack the means to pay for them. Private health insurance policies and employer-sponsored group policies generally don't cover sex reassignment surgery.

North Carolina — The legislature has placed a measure on the ballot to amend the state constitution to ban same-sex marriages, even though state statutory law already does so. At present, North Carolina is the only state in the southeast that lacks such a constitutional amendment, and the legislature is concerned that the ultra-progressive left-wing radicals on the North Carolina Supreme Court might be tempted to risk summary execution by spontaneously ruling that same-sex couples are entitled to be married in the state. (That's the only way it could happen, since nobody has filed any lawsuit in the North Carolina courts seeking the right to marry for same-sex couples.) To ensure that the measure will pass overwhelmingly, the legislature scheduled the vote to take place on the statewide primary ballot next spring rather than the general election in November, just to ensure that the voters most receptive to the proposal will be most likely to turn out and vote. (It was reported that this scheduling was at the instance of legislative Democrats who were concerned that the amendment might jeopardize their re-election chances next fall.) The text of the proposed amendment states: "Sec. 6. Marriage. Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts." Fears were expressed that passage of this amendment would invalidate existing domestic partnership policies in some municipalities and public institutions in the state.

Pennsylvania — On September 14, Springfield Township (in Montgomery County) became the 22nd Pennsylvania municipality to ban discrimination based on sexual orientation or gender identity. This illustrates an interesting phenomenon that has occurred across the country in jurisdictions where the state legislature has refused to amend state law to cover these categories. Such states in some parts of the country have seen a proliferation of municipal and county ordinances passed in default of state action, so that a substantial portion of the citizens are covered by such policies. In Pennsylvania, for example, the major cities all ban such discrimination, but residents of rural and suburban areas are less well protected. A similar phenomenon can be seen in Texas, Georgia, Utah, and a few other states where the legislatures remain resistant to joining the national trend. Equality Pennsylvania hailed the enactment in a September 15 press release.

Wisconsin — The Appleton Common Council voted 10-6 to approve a plan that extends health benefits to same-sex domestic partners of non-union municipal employees. Mayor Tim Hanna, arguing for the measure, asserted that it would make the city's recruitment efforts more competitive, in light of the large and growing number of municipal governments that provide such benefits to their employees. *Post-Crescent*, Sept. 8.

Texas — The San Antonio City Council approved a budget that includes domestic partner benefits for municipal workers. The vote was 8-3 on September 15, even though most of the public session held before the vote involved impassioned arguments against partnership benefits by religious speakers. *The Advocate*, September 20. A.S.L.

Law & Society Notes

Leader of the Free World — During his speech to the opening session of the United Nations General Assembly on September 21, United States President Barack Obama stated: "[N]o country should deny people their rights because of who they love, which is why we must stand up for the rights of gays and lesbians everywhere." This was reportedly the first time a U.S. President has spoken out in support of LGBT rights before the General Assembly of the United Nations.

DADT Repeal Implementation — Not even worth a headline? As scheduled, the DADT policy requiring the discharge of gay military personnel (if they failed adequately to conceal their sexual orientation) expired on September 20. Apart from some news accounts about joyful celebrations near various military bases, the event went off without newsworthy incident, despite last-minute unsuccessful attempts by some Republican House members to persuade the Defense Department to put off implementation until they had actually published new regulations. On September 30, revisiting an issue that had caused some consternation during the run-up to certification last spring and summer, the Defense Department announced that it would be up to individual military chaplains whether to conduct same-sex marriage ceremonies for service personnel in states where such ceremonies were legal. The disposition of the Pentagon at this point is to say that lesbian, gay and bisexual personnel are to have the same rights and privileges as non-gay personnel — apart, of course, from those benefits that depend on federally-recognized marriage status, which must be limited to different sex married couples on account of the unconstitutional Section 3 of DOMA, which the Obama Administration continues to enforce while arguing to federal courts that it should be struck down. Every

announced Republican presidential candidate has stated disagreement with the repeal of DADT, and some have vowed to reinstate it if elected. (The Repeal Act passed last year probably would not be a barrier to that, because it essentially removed the DADT policy from federal statute books but left it to the President and leaders of the Defense Department to determine what policy to put in its place. The mooting of the pending Log Cabin Republicans case [see above] means that the string of almost a dozen federal circuit decisions upholding the constitutionality of DADT remains unbroken.) * * * One side effect to DADT repeal is the potential to upgrade unfair discharges. The *Associated Press* reported on September 16 that the Navy has agreed to upgrade the discharge of Melvin Dwork from "undesirable" to "honorable." Dwork, an 89-year-old veteran of World War II who was expelled from the Navy for being gay more almost 70 years ago, will now be eligible for benefits that have long been denied to him, including medical care and military burial. The Board for Corrections of Naval Records informed Dwork that a decision was made to upgrade his discharge on August 17, premising its ruling on his "exemplary period of active duty."

White House LGBT Liaison — MetroWeekly reported on September 23 that the White House was planning to name Gautam Raghavan, currently the deputy White House liaison at the Defense Department, to be the LGBT liaison in the White House Office of Public Engagement, the office that addresses the concerns of various minority groups. Raghavan played an active role within the Defense Department in implementation of the DADT Repeal Act, which became final on September 20. Raghavan's predecessor in the White House job, Brian Bond, left that post to become director of constituency outreach for the Democratic National Committee.

Revised Census Figures — Revised and updated figures from the U.S. Census reduced the national count of same-sex couples who self-identified as married to 131,729. According to the revised data breakdown, the Census Bureau counted 646,464 same-sex couples nationwide, of whom 131,729 described themselves as spouses and 514,735 described themselves as unmarried partners. The District of Columbia had the greatest population density of same-sex couples of any "state," with 18.08 per thousand households. The municipality with the greatest density of same-sex couples was — surprise!! — San Francisco, with 30.25 per thousand households. Nationwide, 31% of the same-sex couples who self-identified as spouses are raising children together, as are 14% of unmarried same-sex partners. For detailed census information about same-sex couples, visit the website of the Williams Institute at UCLA Law School. The Institute has taken the lead in analyzing and disseminating census data about same-sex couples.

Federal Employee Travel and Relocation Allowances — On September 28, the federal General Services Administration published its final rule adding new definitions of "dependent," "domestic partner," and "domestic partnership" and "immediate family" to regulations pertaining to travel and relocation allowances for same-sex domestic partners of federal employees. See 76 Fed. Reg. 59,914. The rule adopts as final an interim ruled that was issued last November, and is immediately effective. These rules only apply to travel and relocation allowances. The definitions were derived from those that have been used by the Office of Personnel Management in extending eligibility for the Federal Long Term Care Insurance Program to same-sex domestic partners of federal employees. This is a part of the general Obama Administrative initiative to recognize same-sex domestic partners of U.S. government employees to the extent possible through administrative action, in recognition of the likelihood that any legislative action to this end would get nowhere in the Republican-controlled House of Representatives and could not achieve cloture even if favored by a majority of Democrats in the Senate. See BNA Daily Labor Report, 188 DLR A-15 (September 28, 2011).

Tax Policy — Seventy-four members of the United States Congress sent a letter to the Commissioner of Internal Revenue, Douglas H. Shulman, urging that the Internal Revenue Service issue a formal guidance to assist same-sex couples whose relationships are legally recognized in their states of residence through the difficulties of complying with diverging tax laws, inasmuch as the I.R.S. is precluded from recognizing such relationships by the Defense of Marriage Act. The letter notes that fifteen states now recognize same-sex marriages or other formal relationships (domestic partners, civil union partners), and that "the absence of federal recognition for these couples has created ambiguity and complexity in the tax law that can, in part, be mitigated through IRS action." Of course, the letter, concludes, "legislative action should be taken to fully address the inequities experienced by same-sex couples," but in the meantime, the IRS should "take immediate action within its authority to reduce unnecessary burdens and ensure our tax law is applied fairly and equitably to all taxpayers." Almost all of the signers of this letter are Democrats. The Republicans in the House undoubtedly have a better solution to this problem: repeal the Internal Revenue Code and substitute a "value added tax" or national sales tax as the principal source of federal tax revenue. * * * The I.R.S. has published on its website a set of "Questions and Answers for Registered Domestic Partners in Community Property States and Same-Sex Spouses in California," specifically addressing issues concerning tax treatment of community property in the handful of community property states that have afforded a legal status to same-sex relationships.

Bi-Partisanship — U.S. Rep. Ileana Ros-Lehtinen, who represents a district in the Miami municipal area, has become the first Republican member of the House of Representatives to formally co-sponsor the Respect for Marriage Act, a pending bill that would repeal the Defense of Marriage Act and put in its place a federal policy of recognizing all marriages that are legally contracted under state law, regardless of the genders of the couple. *Miami Herald*, Sept. 23.

Immigration Policy — Sixty-nine members of Congress, led by Rep. Jerrold Nadler (D-NY), ranking Democrat on the Judiciary Subcommittee on the Constitution and lead sponsor of the Uniting American Families Act, sent letters to Homeland Security Secretary Janet Napolitano and Attorney General Eric Holder on September 27 asking that LGBT family ties be considered in pending deportation cases involving binational same-sex couples.

Patients' Rights — The Department of Health and Human Services has issued a guidance document to assist in enforcement of new rules protecting the rights of hospital patients to designate visitors, including same-sex partners, and to require

respect for advance treatment directives. The guidance, announced on September 7, is available on the HHS website. Hospitals that receive any funds under Medicaid or Medicare are subject to the rules (i.e., just about every health care institution in the U.S.), and the Center for Medicare & Medicaid Services (CMS) sent a letter on September 7 to State Survey Agencies that conduct inspections on behalf of CMS, reminding them to check for these policies when they evaluate health care institutions' compliance with federal regulations.

Federal Bureau of Prisons Transgender Medical Policy — The Federal Bureau of Prisons has changed its policy concerning medical treatment for transgender inmates in the face of a lawsuit by Vanessa Adams, who has been diagnosed in prison with gender identity order but has been denied hormone therapy. The Bureau's policy has been to maintain inmates at the level of treatment they were receiving upon incarceration, but not to start inmates on new therapies. This flies in the face of 8th Amendment case law that has been construed to require prison authorities to provide medically necessary treatment for serious medical conditions and to consider hormone therapy as potentially medically necessary treatment for inmates with gender identity disorder, which most courts now classify as a serious medical condition. In memoranda promulgated by the Bureau's Medical Director on May 31 and June 15 of this year, the new policy is described as follows: "In summary, inmates in the custody of the Bureau with a possible diagnosis of GID will receive a current individualized assessment and evaluation. Treatment options will not be precluded solely due to level of services received, or lack of services, prior to incarceration." The memo also states that "current, accepted standards of care will be used as a reference for developing the treatment plan." Thus, the categorical refusal of hormone therapy to inmates who were not already receiving it prior to incarceration is abandoned, according to a joint press release (Sept. 30) hailing the policy change by GLAD, NCLR, and the Florida Institute of Legal Services, who collaborated on the Adams case, in which U.S. District Judge Joseph L. Tauro had sent the case to a mediation process that produced this new policy. Others involved in the representation include Bingham McCutchen LLP and Allyson Kurker.

Social Security Administration to Stop "Outing" Transsexuals — On September 15, the National Center for Transgender Equality announced that the Social Security Administration has agreed to end the practice of allowing gender to be matched in its Number Verification System, which will end the practice of SSA sending notifications to inform employers that the gender marker on an employee's W-2 does not match Social Security records. NCTE had learned through a Freedom of Information Act request that 711,488 gender no-match letters were sent to employers in 2010. The ostensible purpose for sending these letters is to uncover people who are using fake Social Security numbers to conceal their identity as undocumented workers, but they have had the effect of "outing" transsexual employees which has led to loss of employment in some instances. *MetroWeekly*, Sept. 15.

Wisconsin — U.S. Representative Tammy Baldwin, the openly lesbian member of Congress representing Madison, has announced her candidacy for the United States Senate in the 2012 general election. If elected, Rep. Baldwin would be the first openly lesbian or gay member of the U.S. Senate. There have been prior unsuccessful openly LGBT U.S. Senate candidates. She would be the first such candidate to have previously won federal elective office.

Sex Offender Registration Laws — A new study by J.J. Prescott of the University of Michigan and Jonah Rockoff of Columbia University, published in the *Journal of Law and Economics*, contends that a law requiring that sex offenders register and that their presence in the community be communicated to local residents does not actually reduce sex crimes. The study maintains that registration is helpful because it facilitates monitoring by the police, but that notification increases the risk that offenders will offend again because it places many obstacles in the way of an offender readjusting to civil society, leaving them hopeless and isolated. *Slate*, Aug. 31. See Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, J. L. & Econ., http://www.jstor.org/stable/10.1086/658485.

National Football League — An Ohio State University law student, Peter Olsen, who was doing research on collective bargaining in professional sports, noted on his blog that the 2011 collective bargaining agreement between the National Football League and the union representing professional football players has added "sexual orientation" to the list of forbidden grounds of discrimination spelled out in the labor agreement. This may be the first time a major professional sports league has agreed to include a sexual orientation non-discrimination policy in its collective bargaining agreement. Although some retired pro football players have become open about being gay, there are no openly gay athletes who are active participants as of now in major professional team sports. The non-discrimination policy in the NFL collective bargaining agreement is enforceable as a contract under Section 301 of the federal Labor-Management Relations Act of 1947. (Noted on PrawfsBlawg on September 24 by Ari Ezra Waldman.)

Private Sector Policy Breakthrough — It was widely reported late in September that Wal-Mart, the nation's largest retail employer, has amended its anti-discrimination policy to include gender identity. The policy was amended to include sexual orientation several years ago. Wal-Mart is headquartered in Arkansas, a state in which such discrimination is completely lawful.

The Church Speaks — Writing on behalf of the U.S. Conference of Catholic Bishops, of which he is the President, Archbishop Timothy M. Dolan of New York sent a letter to President Obama on September 20, protesting the Obama Administration's decision to file briefs in pending cases calling on federal courts to declare Section 3 of the Defense of Marriage Act unconstitutional. The letter characterizes the Administration's actions as "upsetting," "harmful to marriage, the laws defending it, and religious freedom." The letter urges that the Obama Administration "end its campaign against DOMA, the institution of marriage it protects, and religious freedom." The letter contends that the Bishops "recognize the immeasurable personal dignity and equal worth of all individuals, including those with same-sex attraction, and we reject all hatred and unjust treatment against any person," but argues that the law should reflect the "reality" that "no other relationships provide for the common good what marriage between husband and wife provides."

Conscientious Objectors — Do town clerks with religious objections to issuing marriage licenses to same-sex couples have a right to reassign those tasks to other employers to avoid offending their own consciences? The *New York Times* (Sept. 28) focused on this issue in a report about Rose Marie Belforti, the elected town clerk in Ledyard, New York, who declined to provide a license for Katie Carmichael and Deirdre DiBiaggio on August 30, telling them to come back when her designated deputy clerk was on duty. Alliance Defense Fund has promised to represent such "conscientious objectors" if they get into trouble for refusing to do their jobs in this respect. Under New York law, a public employee who "knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office" has committed a misdemeanor, and *Gay City News* reported, in following up on this story, that at least one New York district attorney, Kathleen Rice of Nassau County, anticipating the effective date of the Marriage Equality Law had written to town clerks in that county to instruct them that they could not deny licenses to same-sex couples based on their personal objections. As we went to press, there was no indication whether the Cayuga County District Attorney would take any action against Ms. Belforti, whose attitude, as reported in the *Times*, was that she could do what she wanted and if the local electorate didn't like it, they could vote her out.

It Gets Better — On September 28, NORC (formerly known as National Opinion Research Center), a University of Chicago based research center that conducts and publishes research based on the General Social Survey (the largest continuing survey of public opinion trends in the U.S.), published "Public Attitudes Towards Homosexuality." According to news reports, the Survey, based on 2010 data, reports that 46% of adults surveyed support same-sex marriage, compared to only 11 percent in 1998. The percentage of adults who believe that sexual relations between same-sex adults are "always wrong" has declined from 70% in 1973 to 44% in 2010. Support for gay teachers has increased dramatically, as has support for having books about homosexuality in public libraries. The author of the report, Tom W. Smith, said that the data showed a generation gap, as support for pro-gay positions was significantly larger among respondents under 30 years of age, according to an article about the report by Dana Rudolph available on keennewsservice.com (Sept. 29). A.S.L.

International Notes

Australia — The government announced new guidelines to remove discrimination against transgender and intersex individuals on September 15. Among the changes in policy announced in the guidelines is a new option for indicating gender on passports. Those who do not fully identify as either male or female can have an "X" marked for gender. Transgender people will be put to a choice of male or female, but will need to have a doctor's statement to support their choice if it differs from their recorded sex at birth. Surgery will not be required as a prerequisite to listing a gender different from birth gender. CBSnews.com, Sept. 19.

Iran — The Iranian Student News Agency reported that three men were hanged in Karoun Prison in Ahvaz for sodomy. Reports of criminal executions out of Iran tend to be a bit sketchy, especially about the particular charges in cases. The UK newspaper, *The Independent*, picked up the story for its September 7 issue. This report indicated that the case seems not to have involved charges of rape or sexual assault, but pertained to consensual sex between adult males.

Ireland — Senator David Norris will be the openly-gay candidate on the ballot when Ireland votes for its ninth president on October 27. Norris had been seen as a likely victor if he could win nomination, as he has topped several public opinion polls, but political support for the nomination had appeared to collapse with press reports that he had attempted to intervene in defense of his then-boyfriend who was being prosecuted for having sex with an underage male. The implication that Norris approved of pedophilia made him untouchable by the elected legislators whose support he would have needed to win a place on the ballot. However, he fought back in the press and was able to win the endorsement of local councils in Dublin, Fingal, Laois and Waterford, an alternative route to the ballot. There will be seven candidates in the race. *Irish Times*, Sept. 27. Norris is famous in LGBT legal history for having brought the case that led to Ireland's sodomy law being declared in violation of the European Convention of Human Rights by the European Court of Human Rights. His victory was cited by U.S. Justice Anthony Kennedy in *Lawrence v. Texas* to support the proposition that sodomy laws were no longer universally supported on the international stage.

Great Britain — Health Ministers in England, Scotland and Wales have agreed that scientific evidence no longer justifies a lifetime ban on blood donations by gay men, and have settled on a voluntary deferral of donation by gay men who have had sex within the past twelve-months period. The lifetime ban dates from the 1980s, when it was determined that HIV could be transmitted through blood donations and no accurate mass screening test for infected blood was available. After various tests were introduced, the ban became less defensible; it rested on the "window period" theory, under which it was posited that an person might donate blood to soon after having become infected to have generated detectible antibodies to HIV. As advances in test accuracy have tightened the window period, the Health Ministers are now convinced that a one-year ban after sexual activity should be sufficient. *BBC News*, September 8. News reports made no mention of whether the ban would only apply to those who engaged in unprotected sex, or whether it was also intended to apply to those who consistently used barrier contraception to avoid exposing themselves to STDs. Thus, even the one-year ban might be criticized as unscientific.

Great Britain — Gary McFarlane, a marriage counselor from Bristol, was dismissed by the marriage guidance service Relate in 2008 after he stated that for religious reasons he could not provide marriage counseling for same-sex couples. He is appealing the dismissal of his discrimination claim to the European Court of Human Rights, claiming that he is suffering unlawful discrimination on account of his Christian beliefs. His unfair dismissal appeal was rejected in April 2010. *Brisbane News*, Sept. 27.

Great Britain — LGBT Asylum News reported on September 27 that a gay man from Burundi had won a grant of asylum in the United Kingdom after an eleven-year struggle. Alvin Gahimbaze fled Burundi as a teenager in the wake of ethnic classes in which members of his family were killed.

He is currently a law student in England. His attempts at gaining asylum were initially rebuffed by British authorities who doubted his claim to be gay. Eventually, LGBT political groups stepped up to bat for him. Despite extensive pro-gay developments in British law over the past decade, asylum claims are still treated with intense skepticism by British authorities, who frequently claims that applicants are merely claiming to be gay to gain asylum in the U.K.

Great Britain — The ruling coalition of the Conservatives and the Liberal Democrats has signaled that legislation to allow same-sex marriages in the U.K. will be on the table during the current government. Press reports on September 17 indicated that "a consultation will begin next March on allowing homosexuals to get married. A change in the law will follow the consultation." At present, same-sex couples can form civil partnerships that carry the legal rights of marriage, but are not authorized to use the term "marriage" to describe their relationships. Same-sex marriages, according to current proposals, would be strictly civil events at Registry offices, with no authorization for religious officiants to perform the ceremonies, even though some denominations in the U.K. would be willing to do so. According to a report in the *Daily Mail*, government ministers are "determined to enact the change before the next election," presumably to deprive Labor from being able to make anything out of the issue. (It seems inconceivable that Labor would criticize the other parties for enacting a same-sex marriage bill, but they might criticize them for failing to do so.) The newspaper reports indicated that Prime Minister David Cameron was firmly behind the proposal, as was Equalities Minister Lynne Featherstone, a Liberal Democrat, who made the public announcement about the proposal.

Scotland — Terry Porter, a 19-year-old soldier in the 2nd Battalion of the Royal Regiment of Scotland, was fined 350 pounds by Sheriff Michael Fletcher for targeting Chloe Dow, a transsexual, with verbal abuse and threats of violence. The normal breach of the peace fine would be 150 pounds, but was enhanced because of the manifested prejudice against transsexuals. Porter had conceded that his conduct was motivated by Dow's transgender status. A law enacted in March 2010 authorized the penalty enhancement in such cases. This ws reportedly the first case in which the law was applied. BBC News, Sept. 6.

Serbia — A confrontation over a planned Gay Pride demonstration in Belgrade was heating up at the end of September, as the National Security Council of the Parliament banned all public demonstrations during the first weekend of October, on purported grounds of "national security" that probably reflected the violent anti-gay protesters who materialized at last year's Gay Pride demonstration, the first ever held in the country. The mayor of Belgrade also released an appeal through the media for the event to be called off, but Pride organizers vowed to hold their event as scheduled, pointing out that Serbia, as a party to the European Convention on Human Rights, is obligated to protect freedom of speech.

Slovenia — Slovenia recently adopted a new Family Code that provided some recognition and support for LGB families, sparking fervent opposition from a group calling itself Catholic Civil Initiative for Family and Children's Rights, which gather signatures in support of a repeal referendum. The Parliament voted to submit to the Constitutional Court the question whether such an initiative would be lawful in the event the Catholic organization gathered enough signatures. The Catholic organization threatened that if not allowed its repeal initiative, it would start a new initiative campaign to amend the Slovenia constitution to embed anti-gay family principles in the nation's fundamental laws, according to a report from Slovenia posted by ILGA-Europe.

Thailand — The Office of National Human Rights Commission and the Sexual Diversity Network are endorsing draft legislation to afford marital status to same-sex relationships, and made a public proposal to that end at the Asia Pacific Forum (of national human rights groups) held in Bangkok on Sept. 6. *Nation* (Thailand), Sept. 6. A.S.L.

Professional Notes

The National LGBT Bar Association is honoring the legal department of **Microsoft** and Deputy General Counsel **Nancy Herman** of UnitedHealth Group with their Out & Proud Corporate Counsel Awards at events in Seattle and Washington, D.C. in the coming weeks. NLGBTBA holds Out & Proud Corporate Counsel Receptions to give LGBT legal professionals a mechanism for honoring colleagues who are working to increase diversity in the corporate office and the community.

Robert Lee Pitman, an openly-gay U.S. Magistrate Judge in Texas, has been confirmed by the Senate to be the United States Attorney for the Western District of Texas.

The New York City Anti-Violence Project honored **Virginia Goggin**, Coordinator of the LGBT Law Project at the New York Legal Assistant Group, at its 15th Annual Courage Awards on Sept. 22. The Courage Awards were established in 1997 to honor outstanding individuals and organizations whose work on behalf of lesbian, gay, bisexual and transgender communities has made a profound impact.

Shelbi Day, who has worked as a staff attorney for the LGBT Advocacy Project of the ACLU of Florida, is moving to the Western Regional Office of Lambda Legal in Los Angeles. Her relocation opens up a staff attorney position at ACLU of Florida, which is actively seeking applications. Those interested should submit a cover letter, c.v., and brief writing sample, preferably by email addressed to Randall C. Marshall, the Legal Director, at rmarshall@aclufl.org. Snail mail (not preferred) should be address to 4500 Biscayne Boulevard, Suite 340, Miami FL 33137-3227. A.S.L.

HIV/AIDS Legal Notes

United Kingdom — Health ministers in England, Scotland, and Wales are agreed that the existing policy banning blood donations by gay men should be relaxed in light of scientific advances in testing and knowledge about HIV. Under the existing rule, which closely followed a rule promulgated for the United States by the Food and Drug Administration, sexually active gay men who had engaged in sex with another man since 1977 were disqualified from donating blood for fear of HIV transmission. Under the new regime, only men who have had sex within a year of the blood collection drive would be disqualified. The new rule is to take effect on November 7. BBC News, Sept. 8.

United States — U.S. Representative Barbara Lee has introduced the Repeal HIV Discrimination Act, a measure calling for review of all federal and state laws, policies, and regulations regarding the criminal prosecution of individuals for HIV-related offenses. The measure is intended to prompt rethinking of laws in 34 states and 2 U.S. territories that make exposure to HIV or non-disclosure of HIV status a crime and, in some cases, impose draconian prison sentences for violations.

United States — In the ongoing federal budget wars between the Democrat-controlled Senate and the Republican-controlled House, the Senate Appropriations Committee has thrown down the gauntlet to House Republicans on HIV-related funding, voting to maintain the level of funding for domestic HIV/AIDS program and even provide a small increase to the AIDS Drug Assistance Program (ADAP), which assists people living with HIV without means to purchase drugs to obtain medication. This effort evoked mainly disappointment from the AIDS Institute, which found in a Sept. 22 press release that existing funding levels are inadequate given the scope of the epidemic and the public education challenges of trying to stem the spread of new infections. On the other hand, it is expected that House Republicans will propose cuts in HIV/AIDS programs to help fund continuing tax breaks for corporations and the wealthy, so perhaps little more could have been expected from Senate Democrats. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

CLE on Defense of Marriage Act Litigation — The NYC Bar Association and LeGaL are cosponsoring a CLE program titled "Defense of Marriage Act Litigation: Strategy, Tactics & Theory," on Thursday, October 20, 2011, from 6 to 8 pm at the City Bar. The panel will inclue Roberta Kaplan and James Esseks, counsel for Edith Windsor in her pending DOMA challenge in the S.D.N.Y. court, Paul Smith, who argued Lawrence v. Texas in the Supreme Court, and Kenji Yoshino, NYU Law Professor and leading theorist on LGBT constitutional issues. The program qualifies for CLE credit in New York, California, Illinois, and New Jersey. For question or to register by phone, call 212-382-6663.

CLE on The Impact of Marriage Equality in New York — LeGaL presents a CLE program at the LGBT Community Center in New York on Tuesday, November 1, 2011, from 6 to 8 pm, providing a discussion by experience practitioners in fields affected by the advent of legal same-sex marriage in New York: Erica Bell, Carol Buell, Joyce Kauffman, Eric Wrubel, and Gregory L. Matalon. For information about registration, call 212-353-9118.

LGBT & RELATED ISSUES

Besunder, Alison Arden, *Closing the Gap: Same-Sex Estate Planning Following the Marriage Equality Act*, New York Law Journal, September 19, 2011, S2 (part of special section on estate planning).

Bosse, Kary, Book Review, *A Review of Brock Thompson's The Un-Natural State: Arkansas and the Queer South*, 7 Modern American 59 (Spring 2011).

Brodzinsky, David M., and Adam Pertman, *Adoption by Lesbians and Gay Men: A New Dimension in Family Diversity* (2011: Oxford University Press) (anthology on historical, legal, sociological, psychological, social casework and personal issues realted to adoption by sexual-minority individuals and couples).

Candeub, Adam, and Mae Kuykendall, *Modernizing Marriage*, 44 Univ. Mich. J. L. Reform 735 (Summer 2011).

Carleton, Jennifer Lynn, *Life, Liberty, and the Pursuit of Matrimony: The Constitutional Implications of Arkansas's "Amendment Concerning Marriage,"* 64 Ark. L. Rev. 383 (2011).

Cullinane, Karen, *Protecting Anonymous Expression: The Internet's Role in Washington State's Disclosure Laws and the Direct Democracy Process*, 44 Univ. Mich. J. L. Reform 947 (Summer 2011).

Curtis, Skylar, *Reproductive Organs and Differences of Sex Development: The Constitutional Issues Created by the Surgical Treatment of Intersex Children*, 42 McGeorge L. Rev. 841 (2011).

Dempsey, Brian, *Gender Neutral Laws and Heterocentric Policies: "Domestic Abuse as Gender-Based Abuse" and Same-Sex Couples*, 15 Edinburgh L. Rev. 381 (2011).

Dolovich, Sharon, *Strategic Segregation in the Modern Prison*, 48 Amer. Crim. L. Rev. 1 (Winter 2011).

Fetter-Harrott, Allison, *Recognition of Same-Sex Marriage and Public Schools: Implications, Challenges, and Opportunities*, 2011 B.Y.U. Educ. & L.J. 237 (2011).

Holtzman, Mellisa, *Family Definitions and Children's Rights in Custody Decision Making: The Importance of a Changing Litigation Context*, 49 Fam. Ct. Rev. 591 (July 2011).

Kindregan, Charles P., Jr., *Learning From History: The Federal Union and Marriage*, 20 S. Cal. Rev. L. & Soc. Just. 67 (Winter 2011).

Kubasek, Nancy, Christy Glass & Kate Cook, *Amending the Defense of Marriage Act: A Necessary Step Toward Gaining Full Legal Rights for Same-Sex Couples*, 19 Am. U. J. Gender Soc. Pol'y & L. 959 (2011).

Lwin, Michael, *Big Love: Perry v. Schwarzenegger and Polygamous Marriage*, 9 Georgetown J. L. & Pub. Pol'y 393 (Summer 2011).

Monjeau, Caitlin J., *All Politics Is Local: State Preemption and Municipal Sex Offender Residency Restrictions in New York State*, 91 Boston Univ. L. Rev. 1569 (July 2011).

Nelson, Marisa, *The IRS Moves Toward Income Tax Equality for Same-Sex Couples Despite DOMA*, 45 U.S.F. L. Rev. 1145 (Spring 2011).

Palmer, Vernon Valentine, *Three Milestones in the History of Privacy in the United States*, 26 Tul. Euro. & Civ. L Forum 67 (2011) (The last milestone is the constitutionalization of privacy through the Due Process Clause).

Raj, Shannon, *Deliberately Strengthening Our Raeding of "Deliberate Indifference": A Call to Re-Interpret School Liability for Peer Bullying Under Title IX*, 10 The Dukeminier Awards 123 (2011).

Randall, E. Vance, *Same-Sex Marriage and Education: Implications for Schools, Students, and Parents*, 2011 B.Y.U. Educ. & L.J. 385 (2011).

Russo, Charles J., *Respect for Me But Not for Thee: Reflections on the Impact of Same-Sex Marriage on Education*, 2011 B.Y.U. Educ. & L.J. 471 (2011).

Southam, Keith, *Who Am I and Who Do You Want Me To Be? Effectively Defining a Lesbian, Gay, Bisexual, and Transgender Social Group in Asylum Applications*, 86 Chi.-Kent L. Rev. 1363 (2011).

Stern, Nat, *The Subordinate Status of Negative Speech Rights*, 59 Buff. L. Rev. 847 (Aug. 2011)(considers status of right not to be compelled by government to speak, in the wake of *Christian Legal Society v. Martinez*).

Strasser, Mark, *Parents, Religious Convictions, and Public School Curricula*, 2011 Brigham Young Univ. Ed. & L. J. 547.

Terry, Keeva, *Same-Sex Relationships, DOMA, and the Tax Code: Rethinking the Relevance of DOMA to Straight Couples*, 20 Colum. J. Gender & L. 383 (2011).

Thro, William E., *The Heart of the Constitutional Enterprise: Affirming Equality and Freedom in Public Education*, 2011 B.Y.U. Educ. & L.J. 571 (2011).

Weddle, Daniel B., and Kathryn E. New, *What Did Jesus Do? Answering Religious Conservatives Who Oppose Bullying Prevention Legislation*, 37 New Eng. J. on Crim. & Civ. Confinement 325 (Summer 2011).

Specially Noted:

Michael Kirby, formerly a justice of the High Court of Australia and the first openly gay man in the world to serve as a justice of the highest court of a nation, has written his memoirs. The book, titled "A Private Life: Fragments, Memories, Friends," is published by Allen & Unwin, an Australian publisher, released at the beginning of October. A lengthy excerpt concerning Justice Kirby's relationship with his longtime partner, Johan van Vloten, was excerpted in the September 24 issue of *Australian Magazine*, which is available on Westlaw, 2011 WLNR 19197431.

The Spring 2011 issue of *Human Rights* (Vol. 38, No. 2), the journal published by the Section of Individual Rights and Responsibilities of the American Bar Association, focuses on Sex and the Law, includes the following articles of particular interest with regard to sexuality law: Nancy Northup, *Estranged Bedfellows: Sexual Rights and Reproductive Rights in U.S. Constitutional Law*; Patrick Malone & Monica Rodriguez, *Comprehensive Sex Education vs. Abstinence-Only-Until-Marriage Programs*; Clay Calvert, *Evolving Technologies Challenge Laws Regarding Sexually Explicit Speech*; Aziza Ahmed & Beri Hull, *Sex and HIV Disclosure*; Bethany Stevens, *Structural Barriers to Sexual Autonomy for Disabled People*; Heather Doyle, *What You Can't Say Might Hurt You* (concerning adverse impact on public health efforts to stop the spread of sexually-transmitted diseases of laws restricting discussion of prostitution); Susan Deller Ross, *Should Polygamy Be Permitted in the United States?*; David J. Garrow, *The Legal Legacy of Griswold v. Connecticut*.

The annual publication of the Dukeminier Awards selects "Best Sexual Orientation and Gender Identity Law Review Articles" each year. The volume for 2010 has been released, collecting three articles published during 2010: Sharon M. McGowan, *Working With Clients to Develop Compatible Visions of What It Means to "Win" a Case: Reflections on Schroer v. Billington*, originally published in 45 Harv. C.R.-C.L. L. Rev. 205 (2010); Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, originally published in 83 S. Cal. L. Rev. 1177 (2010); Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion — Legitimacy, Dual-Gender Parenting, and Biology*, originally published in 28 Law & Ineq. 307 (2010). The publication also includes a UCLA law student note: Shannon Raj, *Deliberately Strengthening Our Raeding of "Deliberate Indifference": A Call to Re-Interpret School Liability for Peer Bullying Under Title IX*, 10 The Dukeminier Awards 123 (2011).

EDITOR'S NOTE:

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