Oregon became the first state to pass both a bill banning sexual orientation and gender identity discrimination and a separate measure authorizing civil union-type domestic partnerships for same-sex couples almost simultaneously, setting up a joyous signing ceremony as Governor Ted Kulongoski signed both measures into law on May 9. Then on May 25, governors signed into law LGBT antidiscrimination measures in two more states, Colorado and Iowa, and on May 31, New Hampshire Governor John Lynch signed into law that state’s Civil Union Act.

The Oregon civil rights bill, which adopts a broad definition of sexual orientation that also covers gender identity, was approved by the legislature in April. The measure codified and expanded upon a 1990s ruling by the Oregon Court of Appeals, Tanner v. Oregon Health Sciences University, 971 P.2d 435 (Or. Ct. App. 1998), which had construed the sex discrimination provisions of state law to extend to some aspects of sexual orientation discrimination in a case involving partnership benefits for employees of a state medical school. Much of the legislative haggling surrounding enactment of the bill was devoted to arguments about the wording of the exemption for religious organizations.

The Oregon Senate gave final approval to the domestic partnership measure on May 2, by a vote of 21–9. The measure is effectively a civil union measure, but for political reasons legislators decided to adopt the nomenclature of neighboring California and call it domestic partnership instead, guaranteed to induce some confusion as to the virtually nonexistent differences between Vermont, Connecticut or New Jersey civil unions and California and Oregon domestic partnerships, especially among national corporations seeking to rationalize their employment benefits policies. The domestic partnership measure covers benefits relating to inheritance, child-rearing and custody, state taxes and property ownership, and pretty much all the benefits and responsibilities that state law provides for different-sex couples who marry.

The voters of Oregon had previously amended their constitution to prohibit same-sex marriage, and there were some concerns about whether the law might be vulnerable to legal challenge, even though the amendment does not by its terms apply to other non-marital legal status for same-sex couples. Opponents of the domestic partnership measure quickly organized after the signing ceremony to prepare an initiative campaign to repeal it. They began gathering signatures at the end of May.

In Colorado, Governor Bill Ritter (Dem.) signed S.B. 25 into law on May 25. The measure applies only to employment discrimination, and adds sexual orientation and religion to the existing categories of forbidden grounds for workplace discrimination in state law. (Interestingly to imagine the political trade-offs leading to the enactment of this odd couple in one bill. Could it help to insulate the measure against an effective repeal initiative?) Sexual orientation is broadly defined to protect bisexuals and transsexuals, actual or perceived, as well as everybody else based on their sexual orientation. A provision specifically allows employers to maintain a “reasonable dress code as long as the dress code is applied consistently,” and features a substantial carve-out for religious employers. Interestingly, however, a religious organization or association that is “supported in whole or in part by money raised by taxation or public borrowing” is not exempt from compliance with the statute, and one wonders how that may play out in light of the so-called Faith-Based Initiative that has been championed by the Bush Administration to funnel federal tax money to religious organizations providing social services to the public.

The Colorado legislature evidently anticipates a possible attempt to repeal the measure by referendum, stating in the “effective date” provision that the measure goes into effect the day after the deadline for submitting a referendum petition, but if a petition is filed, the day after the official declaration of the results of “the vote thereon.” Which means this measure goes into effect on August 8 unless opponents are successful in mounting a petition drive within the 90-day period authorized by the state constitution. Similar measures were vetoed in 2005 and 2006 by former-Gov. Bill Owens (Rep.), who said a sexual orientation discrimination law was unnecessary because an intermediate appellate court had ruled in Borquez v. Ozer, 923 P.2d 166 (Colo. Ct. App. 1995), rev’d on other grounds, 940 P.2d 371 (Colo. 1997), that the state’s Off-Duty Conduct Law could be used to combat anti-gay workplace discrimination. Owens was wrong, of course, because the Off-Duty Conduct Law would have no application to many of the issues covered by the bill that was enacted.

The Iowa law, signed by Gov. Chet Culver (Dem.) on May 25, bars sexual orientation or gender identity discrimination in employment, housing, public accommodations, credit and education, but allows religious organizations to discriminate based on sexual orientation or gender identity if required for a “bona fide religious purpose.” But the existing civil rights law, which this law amends by the addition of sexual orientation and gender identity, also states that the religious purpose exception does not apply if the institution owns or operates property for a commercial purpose. The law also specifically provides that it shall not be construed to require same-sex marriage.

New Hampshire’s Civil Union Act passed the legislature after a special commission recommended taking action to provide the rights and responsibilities of marriage to same-sex partners. Under the law, which goes into effect on January 1, 2008, same-sex partners who form civil unions will have all the state law rights and benefits accorded to married couples, and the statute commits New Hampshire to recognize same-sex unions formed in other jurisdictions if they were legal in the state where they were formed. Governor Lynch commented at the signing ceremony: “I’ve listened and I’ve heard all the arguments. I do not believe that this bill threatens marriage. I believe that this is a matter of conscience and fairness.”

Present at the ceremony in Concord was the Episcopal Bishop of Vermont, V. Gene Robinson, whose installation as the first openly gay Bishop in the Episcopal Church has divided the worldwide Anglican Communion. Bishop Robinson indicated that he and his long-time partner plan to have a civil union ceremony next year, but that he would leave it up to the conscience of individual priests in the state as to whether they will bless same-sex unions. (An Associated Press report filed shortly after the ceremony is the source for the above two paragraphs.)

One immediate consequence of the New Hampshire enactment was the state’s decision to drop its appeal in the pending lawsuit by Patricia Bedford and Anne Breen, state employees who were seeking domestic partnership benefits that a lower court held had been un-
constitutionally denied to them. The case was scheduled to be argued in the state supreme court, but instead a settlement took place. Of course, under the new law, state employees who form civil unions with their partners will be eligible for the same spousal benefits as married employees enjoy.

The addition of Oregon, Colorado and Iowa to the list of states banning sexual orientation discrimination clearly extends such protection to a majority of the workplaces in the United States. When these laws all go into effect, for the first time an absolute majority of the states (27) will ban sexual orientation discrimination in employment, and in most of those states the law also extends at least to housing and public accommodations, and sometimes more specifically to issues such as credit and education.

Of those 27, 13 also extend protection on the basis of gender identity, either as a distinct category or as part of the statutory definition of sexual orientation, and among the more recent enactments, it has become routinely expected that gender identity will be part of the overall legislative package, an important sign of progress in the political conversation.

In addition to these states, the District of Columbia bans such discrimination on both grounds.

Ironically, as the issue of gender identity surfaced at a later point in the development momentum for legislation, some of the earlier states to pass non-discrimination laws have yet to catch up with the modern trend and to add gender identity to their laws, although Vermont did so recently (see below), and a proposal to do so is pending in New York.

LESBIAN/GAY LEGAL NEWS

Pennsylvania Superior Court Recognizes Three Parents for Purposes of Child Support

The Superior Court of Pennsylvania, an appellate court, ruled on April 30 that a child can have three legal parents with support obligations. The Dauphin County Common Pleas judge had ruled that although a sperm donor’s status as the biological father entitled him to custody, he would not be made liable for support on the grounds that it would create an untenable situation … never having been anticipated by Pennsylvania law” by mandating support from three parents, but in Jacob v. Shultz-Jacob, 2007 WL 1240885, the Superior Court overturned that ruling. Judge John T. J. Kelly Jr., writing for the panel, held that it was in the best interest of the children to reformulate the support guidelines to account for the family’s unique situation.

Jodilyn Jacob and Jennifer Shultz-Jacob, who had a commitment ceremony and entered a civil union in Vermont, lived together for nine years. They raised four children, two of whom were Jacob’s nephews whom she had adopted, and two of whom were born through donor insemination and are the biological children of Jacob and her long-time friend, Carl Frampton. Frampton was involved in the children’s lives from their birth, as encouraged by Jacob. Jacob and Shultz-Jacob separated in 2006, and Jacob moved to another county. Shultz-Jacob sued for custody, and Jacob soon thereafter sued her for support for the younger two children. During this time she also voluntarily gave custody of one of her nephews to Shultz-Jacob.

The trial court awarded primary physical custody of three of the children to Jacobs and partial custody to Shultz-Jacob, who retained primary physical custody of the one nephew, with partial custody of him similarly going to Jacobs. Frampton received partial physical custody of his two biological children. All three parties were awarded shared legal custody of the four children. The court also ordered Shultz-Jacob to pay $983 a month in child support for the younger two children. She appealed the custody and support orders.

The Superior Court panel ruled that Shultz-Jacob’s objections to the custody order did not merit overturning that order, finding that she did not offer evidence that she would be a better parent than Jacobs nor did she show that the court had abused its discretion in awarding custody as it had.

Shultz-Jacob challenged the support order on the grounds that, since all three individuals had been awarded custody of the children, all three should be liable for support. The court held that the case of L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. 2002), was particularly relevant here. In that case, the trial court held that an “in loco parentis” parent “having asserted custodial rights in relation to [the children], is [I] obligated under an equitable theory to provide for their support.” As the court saw it, if Shultz-Jacob was obligated by her “de facto” parent status to provide support for the children, then Frampton’s biological parent status would obligate him to pay support as well. If anything, the court viewed Frampton’s obligation of support even more well-established, noting that, as a biological parent, Frampton was statutorily obligated to support his children under Pennsylvania law. Moreover, the court noted, “Frampton had himself anticipated his obligation by providing support to [his biological children] since their births ….” Specifically, the court cited Frampton’s contributions in excess of $13,000 over the last four years, with $3,000 of it coming during the six months preceding the custody trial. In addition, the court observed that Frampton borrowed money to provide the women with a vehicle suitable to transporting the children. While recognizing that “these contributions may have been voluntary,” the court found that they “evidence[d] a settled intention to demonstrate parental involvement far beyond the merely biological.”

Under the L.S.K. theory, the court ruled, Frampton was at least equally as obligated to pay support as Shultz-Jacob.

The Court dismissed the trial court’s unease in recognizing three parents as unwarranted. “We are not convinced that the calculus of support arrangements cannot be reformulated” to take into account another obligee, the court wrote. Quoting L.S.K. the court emphasized that although the legislature is best suited to address such issues, “in the absence of legislative mandates, the courts must construct a fair, workable and responsible basis for the protection of children ….” Accordingly, the support order was vacated and remanded to the trial court to require support payments from both Shultz-Jacob and Frampton.

While this case was being decided, Frampton passed away suddenly from a stroke in March, adding another interesting procedural twist to the case. The Associated Press reported on May 10, 2007, that Shultz-Jacob has asked the trial court to award child support from Frampton retroactively, creating a liquidated debt owed by his estate. Anne Gibson & Sharon McGowan

Also interesting is the geographical clustering effect evident from viewing the map of non-discrimination laws available on the National Gay & Lesbian Task Force website (www.theTaskForce.org), which makes plain the geographical regions where major work has yet to be done. The Task Force helpfully points out that about 100 municipalities in jurisdictions lacking state-level protection have enacted antidiscrimination policies with local application.

With the addition of Oregon and New Hampshire, the states that now provide a legal status carrying all the rights of marriage also include Vermont, Connecticut, New Jersey, and California, with lesser forms of recognition available in Maine, Washington State and Hawaii. Massachusetts is the only U.S. jurisdiction that currently allows same-sex marriage. Numerous municipalities make domestic partnership available, with varying menus of rights and privileges under municipal law. A.S.L.
11th Circuit Denies Gay Columbian Asylum Seeker’s Petition for Review

The U.S. Court of Appeals for the 11th Circuit has denied a petition for review of the decision of the Board of Immigration Appeals (BIA) affirming the decision of an immigration judge (IJ) that denied a gay man’s Motion to Reopen his asylum case, in Rico v. Attorney General, 2007 WL 1213225 (Apr. 25, 2007).

Luis Fabriciano Rico claimed that conditions in Columbia had changed, warranting a reopening of his removal proceedings of 2003, when the IJ denied his application for asylum. Rico had claimed that he had received death threats for being a homosexual and was on the “black list” of paramilitary groups in Columbia as a result of his homosexuality. Because his Motion to Reopen was not filed within 90 days of losing his asylum claim, Rico was required to show that conditions in Columbia had worsened significantly for homosexuals since 2003. The IJ denied his motion and Rico appealed to the BIA. The BIA also denied the motion, and Rico appealed to the Court of Appeals for the 11th Circuit.

Speaking for the 11th Circuit, Chief Judge Gerald B. Tjoflat, along with Circuit Judges Edmondson and Hull, held that to meet the exception to the 90–day rule, Rico must have offered “material evidence that was not available and could not have been discovered or presented at the previous hearing.” They stated that the court was limited in its ability to review unless it found that the denial of Rico’s motion was “arbitrary or capricious, or otherwise an abuse of discretion.”

Rico claimed that the IJ had failed to properly consider new evidence that homosexuals are mistreated in Columbia. He claimed that conditions for homosexuals was significantly more dangerous in 2006 than in 2003, when the IJ denied his asylum application. He also claimed that, because he was featured in Florida news coverage that was broadcast in Columbia that described him as a gay Columbian asylum seeker, he would be further persecuted if he were returned to Columbia.

The court found that much of Rico’s new evidence reported “social cleansing” practices against homosexuals in Columbia, but that evidence before the IJ in 2003 including the 2001 State Department Country Report on Columbia's Human Rights Practices, several news reports, and a 1996 article by the International Gay and Lesbian Human Rights Commission, discussed “social cleansing” of homosexuals in Columbia in great detail. Therefore, Rico’s new evidence did not provide additional facts that established changed country conditions. The court also found no merit to Rico’s news coverage claim, without any real explanation.

Because Rico failed to produce evidence showing that conditions in Columbia had worsened significantly for homosexuals, the court held that the BIA had not abused its discretion in denying Rico’s appeal of the IJ’s decision, and Rico’s petition for review was denied. In cases such as this where a motion to reopen is barred by the 90–day rule, a case may still be reopened if the Department of Homeland Security consents to a Joint Motion to Reopen, but their consent is discretionary and cannot be reviewed or challenged. It is unlikely that without extreme and compelling facts that Rico could obtain the consent of the Department to a Joint Motion To Reopen.

3rd Circuit Denies Gay Indonesian Asylum Seeker

The U.S. Court of Appeals for the 3rd Circuit has denied a petition for review of a gay Indonesian’s asylum application in Suherwanto v. Attorney General, available at 2007 WL 1371865 (3rd Cir., May 10, 2007). Suherwanto claimed that he was subjected to persecution on five different occasions; that he was sexually abused as a young child, that his parents committed suicide after their village chief told his family they would have to leave on account of his homosexuality, that ethnic Indonesians set fire to the store run by his ethnic Chinese partner, that a group of ethnic Indonesians attacked him and his partner at the store and burned his chest with a cigarette butt, and that the dean of the law school Mr. Suherwanto attended in 2000 told him he had to leave so as not to “destroy the reputation of the law school.”

Writing for a panel of the court, Circuit Judge Arthur L. Alarcon agreed with the Immigration Judge (IJ) and the Board of Immigration Appeals (BIA) that these five incidents did not amount to persecution, quoting the BIA as stating that Suwerwanto’s testimony “reflects that the physical and sexual assaults he suffered were in the context of civil unrest and/or the behavior of criminal individuals, and thus do not meet the definition of persecution as it has been defined in the context of applications for asylum.”

Suherwanto argued that the BIA had failed to follow its own definition of persecution in denying his claim. Alarcon disagreed, stating that the persecution suffered by Suherwanto was not “on account of” his homosexuality and therefore not within the definition of persecution defined by BIA precedent. Alarcon cited other 3rd Circuit precedent that held “the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.” Additionally, Suherwanto was unable to show that the private individuals who harmed him were government actors or that the Indonesian government was unable or unwilling to protect him.

Accordingly, because Suherwanto failed to establish that he had suffered past persecution on account of his homosexuality, his petition for review of his asylum claim was denied. Suherwanto was granted voluntary departure, which allows him to avoid a 5 or 10 year bar from returning to the United States in the future so long as he leaves the country within 30 days.

9th Circuit Says Roommate Website Not Immune From Civil Rights Suit

The 9th Circuit Court of Appeals ruled on May 15 in Fair Housing Council v. Roommates.com LLC, 2007 WL 1412650, that an internet website for the use of potential roommates may be violating Fair Housing laws by having users fill out an interactive questionnaire about preferences concerning sex, sexual orientation, and family status of potential roommates. Without expressing a final opinion on whether there is a violation of housing discrimination law, the court ruled that the immunity for interactive computer service providers created by section 230(c) of the federal Communications Decency Act (CDA) does not extend to Roommates.com, at least regarding the questionnaires and resulting information published on its website.

Congress passed this provision of the CDA mainly to insulate internet service providers who allow users to post text on their websites from direct liability for defamation, but it could also have the incidental effect of shielding service providers from liability under civil rights laws. According to Judge Alex Kozinski’s opinion for the court, “The touchstone ... is that providers of interactive computer services are immune from liability for content created by third parties,” and, according to an earlier decision by the 9th Circuit, the immunity created by the CDA is “quite robust.”

In this case, groups in California concerned about housing discrimination charged that Roommates.com was violating fair housing laws by requiring those who sought to be listed on its website to indicate their preferences by filling out an on-line questionnaire, as well as writing a free-form statement about their preferences to include with their listing. Those with apartments seeking roommates had to indicate the sex and sexual orientation of everybody living in the household, and whether children would be present. Those seeking living situations also had to indicate the sex, sexual orientation and family status of those with whom they were willing to live as roommates.

Roommates.com defended against the lawsuit by arguing that the content being created for the listings on its site came from the third parties who were filling out the forms, and thus Roommates.com could not be held responsible for their content under the immunity provision of the CDA. U.S. District Judge Percy Anderson of the Central District of California agreed, granting judgment in favor of the defendant.
In reversing, the 9th Circuit found that by providing the questionnaire and requiring that the questions be answered before a person’s listing would be posted on the website, Roommates.com shared the authorship of the content, and thus could be held responsible for it. Judge Kosinski explained that “an entity cannot qualify for CDA immunity when it is responsible, in whole or in part, for the creation or development of the information at issue.” In this case, “Roommate is responsible for these questionnaires because it created or developed the forms and answer choices. As a result, Roommate is a content provider of these questionnaires and does not qualify for CDA immunity for their publication.”

On the other hand, a majority of the three judge panel found that Roommates.com could not be held responsible for what individuals wrote in their free-form profiles, since those were spontaneous statements created solely by the third party individuals, without direct input from Roommates. Dissenting on this point, Judge Stephen Reinhardt argued that because Roommates.com aggregates all the information submitted into a single profile for each member of the service, it has become a publisher of the preferences articulated in those statements as well.

He also pointed out that during the on-line sign-up process, the website states, “We strongly recommend taking a moment to personalize your profile by writing a paragraph or two describing yourself and what you are looking for in a roommate,” a statement that immediately follows the Roommate Preferences form that asks people to state their preferences on the basis of sex, sexual orientation and family status. “Ordinary users would understand the recommendation to constitute a suggestion to expand upon the discriminatory preferences that they have already listed and to list their additional discriminatory preferences in that portion of the profile,” he wrote.

This opinion only decides the immunity question. When the case returns to the District Court, a determination on the merits of the Fair House law charge will have to look into whether those laws were intended to deal with roommate selection. Most fair housing laws are concerned with preventing owners of housing from discrimination in deciding whom to take as tenants or purchasers of their property. Attempts to regulate individual decisions about roommates sharing apartments may be beyond the scope of these laws, and would certainly raise constitutional privacy and liberty issues if they were interpreted to do so. A.S.L.

North Carolina Supreme Court Affirms Teen Sodomy Conviction

Finding Lawrence v. Texas to be irrelevant to a prosecution of a teenage boy for having oral sex with his younger girlfriend in a parked car, the North Carolina Supreme Court voted 5–2 in In the Matter of R.L.C., 643 S.E.2d 920 (May 4, 2007), to affirm an adjudication of delinquency for the boy. The dissenting justices did not disagree with the constitutional ruling, but found that the court should have construed the sodomy law in pari materia with other sex crimes laws the shield teens close in age from criminal prosecution for consensual sexual activity.

According to the opinion for the court by Justice Edward T. Brady, R.L.C., then 14 years old, was dating O.P.M., then 12 years old, during the spring and summer of 2003, the year when Lawrence was decided. The teens had sexual intercourse and oral sex, the latter in the parked car owned by O.P.M.’s parents while the parents were engaged in bowling and the kids were fooling around in the car. A year later this came to light when a police officer investigating a school fight interviewed O.P.M., who was no longer dating R.L.C. at that time. When questioned directly, R.L.C. admitted having had oral sex with O.P.M. under the circumstances described. The Alamance County prosecutor brought a criminal proceeding against R.L.C., seeking an adjudication of delinquency based on the oral sex. Under North Carolina law, consensual sexual intercourse between a 14 year old and a 12 year old would not be considered criminal, even though they are both minors, under a “Romeo and Juliet” type provision in the sex crimes laws, but the old “Crime Against Nature” sodomy law has never been specifically amended to provide that defense.

On the constitutional point, the majority pointed out that in Lawrence the Supreme Court had found that Texas could not criminalize adult, consensual same-sex sodomy, which was the subject of the prosecution that was appealed in that case, and that the Court’s opinion make clear that it was not dealing with issues involving minors, lack of consent, or other facts not raised by the case before it. Acknowledging, however, that the application of the Crime Against Nature law to R.L.C. had to be at least rational to withstand a Due Process challenge, the court found that the state could rationally seek to deter teen oral and anal sex on morality grounds as well as concerns for the health and safety of minors.

This did not explain, or course, how it was rational to achieve these goals by banning oral and anal sex but allowing vaginal intercourse between persons of the age group in question. In her dissent, Justice Patricia Timmons-Goodson argued that the majority’s refusal to subject the Crime Against Nature law to the same defense for consenting sex between minors close in age that was made statutorily available for other sex crimes contravened the legislature’s judgment that such persons should not be prosecuted as criminals for engaging in consensual sex. While agreeing with the majority that a “literal interpretation of the statute” applied to R.L.C.’s conduct, she insisted that “rules of statutory construction articulated by this Court demand a different result,” because that application “conflicts with the intent underlying the more specific statutes governing consensual sexual conduct between minors.”

The ultimate question, of course, is why the state should treat consensual oral or anal sex differently from vaginal intercourse, and whether it is constitutional to do so, merely because the situation involves minors rather than adults. The holding in Lawrence does not dictate a particular outcome, but the methodology of the Supreme Court in Lawrence suggests that it is not enough for the state to have a rational basis to be concerned about sexual conduct of teens as such; rather, it should have to justify differential treatment for different kinds of sex, and the majority’s invocation of “moral disapproval” seems contrary to that methodology, while the invocation of health and safety concerns seems irrational when sexual intercourse is exempted from coverage. A.S.L.

Motherless Child OK’d by Maryland High Court (on Birth Certificate); Neither Gestational Mother nor Egg Donor Need Be Named

The highest court of Maryland has ruled, 4–to-3, that, where both the egg donor and the gestational mother have disclaimed a newborn and wish not to be listed on a birth certificate, and the father so requests, the issuer of a birth certificate may not require placement of a material name on the certificate. In re Roberto d.B., 2007 WL 1427451 (May 16, 2007). The case had only one actual party, Roberto, the father. No party argued the opposing point of view — only the lower court and the dissenters presented any opposing arguments. The gestational mother, who bore twins, is referred to as the “putative” appellee, because her name was placed on the birth certificate by the hospital, despite her not wanting to be so named.

The Maryland statute regarding birth certificates, Md. Code, Health — General, Sec. 4–208, requires that a mother be named on every birth certificate, although, under Sec. 4–211, a court may order that a new certificate be issued in conformity with an “order as to the parentage.” Thus, in the absence of a court order, Holy Cross Hospital in Silver Spring, Maryland, listed both father and mother on the birth certificate. Section 4–208 provides specific options for the father’s name to be included or omitted; if an unmarried woman delivers a child and does not wish for the father’s name to appear on the birth certificate, it is within her power to keep his name from appearing. The court noted that no similar provision exists for omitting the mother’s name. In addition, the statutes include detailed procedures.
for proving or disproving paternity, Md. Family Law, Title 5, subtitle 10, but no similar procedures regarding maternity.

The gestational mother and Roberto d. B. petitioned the Circuit Court for Montgomery County to remove the mother’s name from the birth certificate. The Circuit Court refused, stating that no Maryland case law exists that would give a trial court the power to remove the mother’s name from a birth certificate. In addition, the lower court noted, for “health reasons,” removing the name of the surrogate from the birth certificate is inconsistent with the best-interests-of-the-child standard. Maryland’s high court called this reasoning “spare.”

Roberto contends, and the Maryland Court of Appeals, in an opinion by Chief Judge Robert M. Bell, agrees, that the birth certificate and paternity statutes treat men and women unequally. Under the Maryland Equal Rights Amendment, rights may not be abridged or denied on the basis of sex. If a man, with the consent of a woman, may deny that he is the father, a woman must be allowed, with the consent of the father, to deny that she is the mother, held the court.

The court noted that the Maryland paternity statute did not contemplate the many potential legal issues arising from new technologies, issues that will continue to arise unless the laws are rewritten or construed in light of these new technologies. Because Maryland’s E.R.A. forbids the granting of more rights to one sex than to the other, in order to avoid an equal rights challenge, the paternity statutes must be construed to apply equally to both males and females; thus, the Maryland Court of Appeals will construe the paternity statutes to avoid a conflict with the Constitution. The court held that the language of the paternity statute need not be rewritten, but the statute must be interpreted to extend the same rights to women and maternity as it applies to men and paternity.

As for the best interests of the child, the court found nothing to show that including the name of a gestational mother is in a child’s best interests. Furthermore, the best interest standard is primarily applicable in a dispute between two parents; in a dispute between a parent and a non-parent, the standard only applies if the parent is found unfit. There is no such finding in this case, and the best interest standard is not appropriate, held the court.

Two dissents were filed. One, by Judge Dale Cathell, raised emotional arguments mocking Roberto as one who “went out and arranged for (perhaps hired) two different women and an assembler to help him manufacture a child one woman to donate (or sell) the egg (a genetic mother), a technician (apparently paid) to fertilize the egg in a dish, and another woman (the birth mother) to carry the fetus through the gestation period and then to eject the child in what would normally be considered the birthing process. At the end of this manufacturing process, the result is a child who, according to the majority, is to have no mother at birth.” The idea that a child has no mother is “a concept thought impossible for tens of thousands of years.”

The judge also contends that fathers are discriminated against if both the genetic mother and the birth mother can deny maternity, but a man who is proven to be the father cannot deny paternity. The judge further raises the point that it is in the best interest of a child to have two parents who can be called upon to provide support. Lastly, the judge presents a list of horribles that may occur when the child uses the birth certificate to obtain entry to a foreign country, or admission to a college, and must try to explain the lack of a mother on the document.

The second dissent, written by Judge Glenn T. Harrell, Jr. and joined by Judge Irma S. Rick, contended that the issues were not fully argued by plaintiffs and defendants before the Court of Appeals heard the case. They felt that the case should be remanded, and that an attorney should be appointed to represent the interests of the children. Without such an attorney, the children give up possible rights to support and inheritance without having any say in the matter. The dissenters also found it objectionable that the majority decided the case on a constitutional equal protection basis when the appellants never even raised this argument until late in the proceedings. Thus, a major issue was decided without counsel briefing the two sides of the issue, and without a lower court’s earlier decision.

Alan J. Jacobs

Ohio Appeals Court Upholds Denial of Custody to Bisexual Mom With Unusual Lifestyle

In Dexter v. Dexter, 2007–Ohio–2568, 2007 WL 1532084 (Oh. Ct. App., 11th Dist., May 25, 2007), the court affirmed a decision by the Portage County Court of Common Pleas to transfer custody of a five-year-old girl from her mother to her remarried father, rejecting the mother’s claim that the trial court erred in its consideration of the mother’s lifestyle and sexual preferences as a factor in the decision.

Judge Mary Jane Trapp’s opinion for the court found many grounds supporting the trial court’s decision, not at least among them that the guardian ad litem appointed by the court reported a friendlier relationship between the child and her father than with her mother, and that when the child was in mother’s custody, mother made it difficult for father to exercise visitation rights, at one point moving and getting an unlisted phone in order to shut father out, but clearly the following findings from the trial record played a role:

“In this case, appellant admitted, both in her testimony and through her writings on on-line blogs, that she practiced sado-masochism, was a bisexual and a pagan. Her boyfriend corroborated these practices and beliefs. Although appellant denied using illicit drugs, her on-line blogs contain several references to drug usage. In her MySpace writings, appellant stated that she was on a hiatus from using illicit drugs during the pendency of these proceedings, but that she planned on using drugs in the future. She also said that she would use drugs in her home if [the child] was sleeping. The court also considered the testimony of appellee, his wife, and the guardian ad litem who expressed their concern over [the child] residing with appellant, considering these lifestyle choices.” In other words, somebody who writes this kind of stuff on MySpace in the midst of a hard-fought custody battle is clearly exercising questionable judgment.

In a footnote, Judge Trapp related: “In her objections, appellant challenged the admissibility of this evidence as well as evidence that one of her babysitters had a criminal record. However, with respect to her MySpace account, appellant admitted in open court that she wrote these on-line blogs and that these writings were open to the public to view. Thus, she can hardly claim an expectation of privacy regarding these writings. Nor are we willing to find the court’s determination was tainted by its consideration of evidence regarding the babysitter’s criminal record since admission of this evidence does not rise to plain error.”

The court found it proper for the trial judge to consider “the probable effect some of appellant’s personal choices would have on [the child]. For instance, with respect to appellant’s drug usage while [the child] was asleep, the court noted the negative consequences or impact such drug usage would have on [the child] if she awoke from her sleep. Based on the evidence presented, the trial court, while recognizing the right of appellant and her boyfriend to engage in this particular lifestyle, nonetheless, found that [the child]’s best interests would be adversely affected by this lifestyle.”

The court of appeals found that in light of the other factors supporting the decision, the trial court’s consideration of these lifestyle issues did not warrant reversal of its ultimate custody decision. We were a bit astonished that the trial court would recognize “the right of appellant and her boyfriend to engage in this particular lifestyle,” when it involved using illicit drugs while having S&M sex. Some jurisdictions find that consensual S&M may nonetheless be illegal activity, depending on how “heavy” it is, and illicit drugs are...well, illegal.

In any event, we are also concerned about the careless of the court, which has used the child’s actual name throughout its opinion. Even if the opinion is not officially published, courts have to be aware that appellate decisions they release do end up in electronic databases that are searchable.
And, this is the first time we’ve seen MySpace cited as a source of evidence about the fitness of a parent in a custody proceeding. A cautionary word to parents about their online revelations is undoubtedly in order. A.S.L.

Charney/Sullivan & Cromwell Cases to Continue; Motions to Dismiss Produce Mixed Results; Charney Files New Complaint

Aaron Brett Charney, the gay former associate from Sullivan & Cromwell, will be able to proceed with his sexual orientation discrimination and retaliation claim against the firm, but Sullivan & Cromwell’s attempt to sue Charney for breach of fiduciary duty suffered a setback when New York State Supreme Court Justice Bernard J. Fried (N.Y. County) issued opinions on motions to dismiss in Charney v. Sullivan & Cromwell, 2007 WL 1240422 (April 30, 2007) and Sullivan & Cromwell v. Charney, 2007 WL 1240437 (April 30, 2007).

Justice Fried granted S&C’s motion to dismiss Charney’s claim against S&C without prejudice, expressing no view on the merits of the case but granting leave to file an amended complaint. He refused to dismiss S&C’s breach of contract and conversion claims against Charney, opining that in the current state of the record before the court, prior to the filing of answers and discovery, these counts would better be addressed at the summary judgment phase. Fried did grant S&C’s request for preliminary injunctive relief, barring Charney and those acting in concert with him from disclosing any firm or client confidences and secrets to the press. His fervent efforts to publicize his claim were intended to keep the firm from communicating with the press. Fried concluded that an openly-gay Florida state prisoner that the judge suspects the plaintiff may have a valid but inadequately articulated constitutional claim. U.S. Magistrate Miles Davis ruled that an openly-gay Florida state prisoner representing himself pro se should have thirty days to file an amended civil rights complaint following the careful instructions set out in Chandler v. Maples, 2007 WL 1482384 (N.D. Fla., May 18, 2007).
The New Jersey Appellate Division ruled in Gruber v. Rixford, 2007 WL 1425498 (May 16, 2007), that Richard L. Gruber should have a share of the property. The New Jersey Court of Appeals in New Jersey denied the dismissal of Gruber's complaint. The court found that the complaint should not have been dismissed because it alleged a contractual agreement concerning the property. However, the court also noted that Gruber had problems with the IRS and had not paid income tax for several years, and there were substantial judgments against him. The per curiam opinion illustrates some of the issues encountered by same-sex couples in jurisdictions that afford no legal status to their relationships, although in some respects it is sui generis due to the unusual situation involving this couple. All the relevant events in this case predate New Jersey’s enactment of a Domestic Partnership statute, followed by the more recent enactment of a Civil Union Law.

According to the court’s opinion, the parties “were a homosexual couple who were in an on-and-off relationship between 1993 and 2002. When they first met in September 1993, plaintiff, an attorney, lived in Fort Lee and defendant, a teacher, lived in an apartment in Manhattan. Initially, plaintiff would spend nights in defendant’s Manhattan apartment. Later, the lease on the Manhattan apartment was amended to add plaintiff’s name. In 2000, they looked at a few properties together and on October 17, 2000, the property on Black Briar Lane in Wayne was purchased in defendant’s sole name.”

Rixford paid the deposit on the property, but Gruber, who was also the attorney at the closing on the purchase, advanced the $55,000 for the downpayment and closing costs, by wiring that sum to Rixford’s father who then wired it to Rixford, ostensibly as a family gift, the same day. Gruber also helped Rixford pay down his credit card balances in order to help him qualify for a mortgage, and helped him out with an outstanding tax bill that showed up after the closing. The mortgage was in Rixford’s name, as was the subsequent refinancing, although Gruber claims he contributed $5,000 to help reduce the principal on the mortgage prior to the refi.

Gruber had problems with the IRS. He had not paid income tax for several years, and there were substantial judgments against him. He claims everything was set up this way to insulate the real estate from any IRS claims against him, and to facilitate getting the mortgage. But Gruber claims that they had an understanding that if he could get everything cleared up in the future, Rixford would take the necessary steps to put Gruber’s name on the deed. Rixford denies any such agreement, and there is no written record of same.

They moved into the house together in 2000 and set up what Gruber claims they considered to be a joint bank account to handle shared expenses and mortgage payments, although as far as the bank was concerned, it was just Rixford’s account. They both contributed funds to that account until about July 2002, when Gruber stopped contributing after the relationship had cooled off and they had begun discussing unraveling their financial interests. At this point, Rixford took the position that the house was his, and that Gruber’s only financial interest was the money he had put in, while Gruber was asserting that it was jointly purchased and paid for and as such upon dissolution of their relationship, he should have his fair share of the appreciation of the value in the property, which was substantial.

This, much simplified, is the dispute that ended up in court. The court heard testimony from Gruber, Rixford as an adverse witness, and a real estate expert testifying about the value of the property, and then at the close of Gruber’s case, granted judgment for Rixford. The trial judge evidently concluded that Gruber, a lawyer, knew how to take care of his interests properly, and had failed to prepare the appropriate documents. Reasoning that traditionally any ownership interest in real property has to be evidenced in writing through written contracts and deeds, the trial judge rejected Gruber’s argument that he should have a legal claim to his share in the absence of such written evidence.

Gruber complained on appeal that this was inappropriate, both as a matter of New Jersey law and as a matter of legal procedure. He argued that there were many contested facts in the case, precluding a grant of summary judgment at mid-trial. And, he argued that New Jersey had modified its real property statutes to allow for cases where an ownership interest could be proved without written documents.

“The testimonies of the two parties to the putative agreement were irreconcilably in conflict and neither the circumstances nor the evidence were so persuasively in favor of either party that judgment could be entered as a matter of law,” wrote the court. “We are convinced the court could not have found in favor of the moving party [Rixford, who had filed a motion for summary judgment prior to the trial] without making credibility assessments that were not permitted at the close of the plaintiff’s case.”

“We also discern that the trial judge attached undue significance to the absence of any signed writing setting forth the understanding and agreement of the parties. Without intending to express a view as to ultimate outcome upon remand, we do note that for centuries the law of this State required that an agreement for the sale of an interest in land had to be reduced to writing, but the New Jersey statute of frauds was amended in 1996. Hence, the applicable statute of frauds... does not now require a signed writing to establish an agreement to transfer an interest in real estate or to hold an interest in real estate.” Instead, the statute requires “clear and convincing evidence” as to ownership, and a writing by itself will not necessarily suffice.

“It is obvious from a review of the transcript of the court’s ruling that the court made credibility findings favoring defendant concerning the nature of the money used for the down payment and plaintiff’s motivation for giving the money, and in his opinion, he discounted plaintiff’s testimony as not credible. Such credibility
determinations are not appropriate at the summary judgment stage or at the close of the plaintiff’s case. Where credibility determinations are required, summary judgment should not be granted,” wrote the court. “Granting all favorable inferences to the plaintiff with regard to the alleged agreement between the parties, when plaintiff gave defendant the down payment on the Wayne home, there was sufficient evidence of unjust enrichment to withstand involuntary dismissal.”

Thus, the court ruled that there should be a trial to complete the evidence in the case. “We recognize that at the time of the court’s ruling, defendant was being non-committal about the pursuit of his asserted counterclaims and that the procedural posture of the court’s ruling is consequently ambiguous,” the court commented. “In order that the factual and procedural basis of the decision may be more clearly delineated, the court ultimately will be required to make clear findings of fact and to state conclusions regarding the plaintiff’s claims.”

A.S.L.

Federal Civil Litigation Notes

Supreme Court — Hope springs eternal, as a certiorari petition has been filed in Williams v. King, No. 06–1501 [2007 WL 444677] (May 14, 2007), the seemingly endless litigation over Alabama’s statute making it a crime to distribute sex toys. The 11th Circuit has repeatedly rebuffed constitutional challenges to this law, rejecting the argument that the broad due process liberty interest identified by the Supreme Court in Lawrence v. Texas has provided a theoretical basis for questioning this criminal law, whose only justification by the state is morality-based.

Supreme Court — On April 30 the Supreme Court denied a petition for certiorari in Miller–Jenkins v. Miller–Jenkins, No. 06–1110, 2007 WL 444487, 75 USLW 3440. Lisa Miller sought review of a Vermont Supreme Court ruling in Miller–Jenkins v. Miller–Jenkins, 912 A.2d 951 (Vt. 2006), requiring her to comply with a child visitation order on behalf of her former same-sex partner, Janet Jenkins. The Virginia Court of Appeals has also ruled that the Vermont order takes priority over Virginia law, Miller–Jenkins v. Miller–Jenkins, 49 Va.App. 88, 637 S.E.2d 330 (Va. App. Nov 28, 2006), and on May 8 the Virginia Supreme Court declined to hear an appeal from that ruling.

California — A settlement has been announced in Butler v. Adoption Media, LLC, 2007 WL 963159 (N.D. Cal., March 30, 2007), in which U.S. District Judge Phyllis J. Hamilton had ruled that California’s public accommodations statute, which forbids sexual orientation discrimination, was applicable to the Adoption.com website, based in Arizona, which categorically refuses to allow LGBT people to use its services, because Californians sue the website. In the settlement, announced May 22 by the National Center for Lesbian Rights, which represents plaintiffs Michael and Rich Butler in the lawsuit, Adoption.com and ParentProfiles.com, websites operated by the defendant Adoption Media, LLC, will either comply with California’s public accommodations law or will cease to provide their services to Californians. The agreement provides that “no Defendant shall post biographical data of California residents seeking to adopt directed to prospective birth parents unless the Service is made equally available to all California residents qualified to adopt in California.” Lawyers from Alliance Defense Fund, the anti-gay litigation group, assisting the defendants, tried to spin this settlement as a victory for defendants, who reportedly intend comply by ceasing doing business with Californians. So, now it is up to those in other states with public accommodations laws that cover sexual orientation to file complaints against Adoption Media LLC, in hopes that ultimately they will decide they have barred from dealing with residents of too many states for their business plan to remain viable...

California — In Horowitz v. Tschetter, 2007 WL 1381608 (N.D. Calif., May 8, 2007), U.S. District Judge Charles R. Breyer granted the government’s motion to dismiss an age and sexual orientation discrimination suit brought by Michael G. Horowitz, who had resigned as a Peace Corps volunteer in Tonga after being confronted with allegations that he had made homosexual advances to a Tongan student in a program Horowitz was running. According to the complaint, the Peace Corps director in Tonga told him that he would be “imminently terminated” because his conduct violated Tongan law, and that the director had written an Administrative Separation Report that he would be sending to the Peace Corps. As a result of Horowitz’s resignation, none of these threats were carried out. Horowitz pursued FOIA litigation to try to discover the name of the accusing Tongan and the contents of the Administrative Separation Report, but ultimately lost that battle in the federal courts. Taking up cross-motions in the discrimination case, Judge Breyer rejected the government’s argument that this case was collaterally estopped because of the outcome of the FOIA case, but nonetheless concurred with the government’s argument that Horowitz’s discrimination claims were time-barred because of his delay in filing suit and failure to exhaust administrative remedies within the Peace Corps. The court rejected Horowit’s contention that his time to file suit should have been extended because he was unaware that the Peace Corps had a policy against sexual orientation discrimination.

California — A lesbian claiming sexual orientation discrimination and retaliation on the part of Starbucks will be allowed to proceed with most of her lawsuit as result of pretrial rulings on May 18 by U.S. District Judge Morrison C. England, Jr. In Lux v. Starbucks Corporation, 2007 WL 1470134 (E.D. Cali.), a diversity case arising under California law. England ruled that part of Rux’s allegations had to be excluded from the case, as they were based on incidents occurring more than a year before she filed her discrimination claim, but the remainder of her allegations were sufficient to withstand a motion for summary judgment, mainly because factual disputes had to be resolved before they could be determined as a matter of law. The one exception to this concerned her negligence claim for emotional distress, which the court found invalid upon concluding that Starbucks had not violated any legal duty to the plaintiff with respect to her emotional well-being.

California — In Samuels v. California Dep’t of Corrections and Rehabilitation, 2007 WL 1345701 (E.D. Cali., May 8, 2007), U.S. Magistrate Judge John F. Moulds recommended awarding summary judgment to the defendants on a variety of claims brought by Jack Samuels, a transgender state prison inmate. As summarized by the court, “Plaintiff, a transgender, claims she was improperly denied good time credits, suffered a violation of due process, and was subjected to cruel and unusual punishment and to a hostile work environment because of sexual harassment.” The opinion does not really address the merits of these claims as such, rather finding procedural or jurisdictional bases to reject all of them, not least that Title VII of the Civil Rights Act of 1964, the basis for the hostile environment claim, does not apply to prison inmates as “employees” when they are performing their assigned work in the prison.

Connecticut — Superior Court Judge Prestley rejected an attempt by a wife to evade responsibility for her husband’s unpaid hospital bill on equal protection grounds in Bristol Hospital v. Smith, 2007 WL 1470326 (Ct. Superior Ct., New Britain, May 4, 2007) (unpublished opinion). Laurie Smith argued that since heterosexual non-marital domestic partners and same-sex partners were not liable for their partners’ hospital bills, it was inequitable to impose such liability on a legal spouse. Judge Prestley found that under the state’s Civil Union Act, civil union partners did have such liability, and concluded that a married woman was not “similarly situated” to an unmarried heterosexual partner or a same-sex partner who was not in a civil union. Consequently, she could not make the equal protection argument.

Florida — U.S. Magistrate Judge Frank Lynch (S.D.Fla.) granted the ACLU’s motion for a protective order covering discovery in Gay-
Straight Alliance of Okeechobee High School v. School Board of Okeechobee County, 2007 WL 1246183 (April 25, 2007), a lawsuit seeking to vindicate the rights of students at Okeechobee High School to have a gay-straight alliance at the school. The school board had indicated that its discovery in the case would probe the sexual orientation of participants in the plaintiff organization, the names of anonymous participants, and participants personal lives outside the school. Magistrate Lynch agreed with the ACLU that none of the reasons given by the school board for seeking this information would outweigh the privacy interests of the individuals to be deposed. “Moreover,” wrote Judge Lynch, “this Court does not see why this sensitive information is necessary or even relevant to deciding the Plaintiffs’ rights under the Equal Access Act in light of alternative sources of information regarding the club.”

New York — In Livingston v. Griffin, 2007 WL 1500382 (N.D. N.Y., May 21, 2007), U.S. District Judge James K. Singleton, Jr., found that prison authorities had not unduly burden the religious freedom of the plaintiff by telling him that he would be shackled to a gay/transsexual prisoner while being transported between institutions. Livingston, citing Bible verses and his strict Christian upbringing, objected to being shackled to the other inmate. Accounts differ about the degree to which he was calm or acted out as the drama of his refusal unfolded, and his complaint covers other issues as well. Ultimately, on this issue, Judge Singleton found that forcing him to ride several hours in a prison bus shackled to a transsexual prisoner (a man who dressed as a woman, had false breasts and wore make-up) would not present the kind of burden on religious freedom sufficient to create a constitutional issue, and thus the disciplinary action taken against Livingston for refusing to comply with orders was not actionable (even though it was overturned on appeal within the prison system).

New York — U.S. District Judge Theodore H. Katz (S.D.N.Y.) ruled in Cohen v. Federal Express Corp., NYLJ, May 7, 2007 (decided April 30, 2007), that an attempt by a plaintiff who had been employed by Federal Express in Massachusetts before transferring to New York to add a Massachusetts sexual orientation discrimination claim to his pending civil rights suit in federal court had to be rejected on timeliness grounds. Katz observed that under Massachusetts law in effect during the relevant time, a sexual orientation discrimination charge would have had to be filed with the state agency within 180 days of the employer action giving rise to the complaint, and it wasn’t, so the matter would be time-barred from the federal court. (The Mass. law has since been amended to extend the filing time to 300 days.)

New York — The Sexuality and Gender Law Clinic at Columbia University Law School reports success in obtaining asylum in the U.S. for a Turkmen woman who feared persecution in her native country on grounds that she is a lesbian and holds unpopular political views. The woman remains anonymous because she fears persecution of her family members in Turkmenistan if her name is publicized in connection with the case. Three students worked on the case: Marie-Amelie George, Jonathan A. Lieberman, and John Olsen. The clinic is directed by Professor Suzanne B. Goldberg. The ruling was announced on May 4.

Ohio — In a frustratingly opaque opinion, the Ohio 5th District Court of Appeals upheld a decision by the Common Pleas court to shift custody of a young boy from his mother to his father, since remarried. Clark v. Boals, 2007 WL 1395339, 2007-Ohio-2319 (May 14, 2007). In its decision, the trial court noted that since the parties had separate, the mother had lived with two same-sex partners. The trial court concluded, based on a list of factors, that circumstances had changed sufficiently in the time since the original shared custody award was approved to justify a redetermination of custody, and that the best interest analysis cut in favor of the father. Among the points raised on appeal by the mother was her contention that the trial court erred by its consideration of her lesbian lifestyle. The court of appeals never really addresses this point directly, instead stating, in summary fashion, “We concede any of these facts standing alone are not sufficient to find a change of circumstance. However, taken as a whole, along with the other facts, we find they are sufficient to establish a change of circumstances in this case.” Without any explicit discussion of the role or relevance of mother’s “lesbian lifestyle” in the final decision, the court affirmed the trial court’s conclusion to award custody to the father.

Pennsylvania — In yet another rejection of the argument that individual liberty interests should trump government-mandated restrictions on access to sexually-related material, U.S. District Judge James F. McClure, Jr., granted summary judgment to the government in Ramirez v. Pugh, 2007 WL 1031547 (M.D. Pa., March 29, 2007), a suit challenging the constitutionality of statutory and regulatory restrictions preventing federal prison inmates from receiving pornographic materials. The case was decided on remand from the 3rd Circuit, which reversed a dismissal ruling on the ground that the trial court should first develop a factual record on the constitutional justifications for the restrictions. Judge McClure wrote that after reviewing the “developed factual record,” he found that the restrictions “are rationally related to the legitimate penological interests of rehabilitation and institutional security,” meeting the requires of the Supreme Court’s decision in Turner v. Safley, 482 U.S. 78 (1987), and are thus constitutional. A.S.L.

State Civil Litigation Notes

Connecticut — The Connecticut Supreme Court heard oral argument on May 14 in Kerigan v. Commissioner of Public Health, in which the lower court granted judgment too the state in a suit seeking same-sex marriage rights, reasoning that the recent enactment of a Civil Union Law had reduced any differences between the treatment under state law of same-sex and different-sex couples to a negligible level, eliminating any constitutional equality claim. The argument was webcast live. Two of the justices said nothing during the argument, two were active questioners, and the remainder asked a few questions, but no member of the bench said much to reveal his or her leanings in the case. Bennett Klein of Gay & Lesbian Advocates & Defenders, the Boston-based GLBT public interest law firm that won the Massachusetts marriage case in 2003, argued on behalf of the plaintiffs-appellants. The chief justice recused herself from the case because her husband’s law firm worked on an amicus brief supporting the plaintiffs. A judge from the intermediate appellate court was appointed to sit in her place. Assistant Attorney General Jane Rosenberg presented the argument for the state. Now the wait for a decision begins...

Georgia — The ACLU of Georgia helped Elizabeth Hadaway regain physical custody of the child she had sought to adopt at the behest of the child’s mother and contrary to the wishes of Wilkinson County Superior Court Judge John Lee Parrott, who had ordered the child placed in foster care due to his judgment that a child should not be raised by a lesbian. Ultimately, advocacy by the ACLU convinced the county’s Division of Family and Children Services that the child’s biological mother’s desire to have Ms. Hadaway adopt the child should be respected. According to a May 21 press release from the ACLU describing the case, Judge Parrott was reviewing the application of Hadaway to adopt the child, whom she had been raising for more than a year, when he noted in the home study that Hadaway was living with a same-sex partner. Parrott denied the adoption and ordered that the child be returned to her biological mother. When the mother insisted that Hadaway keep the child, Hadaway took the child to neighboring Bibb County and applied for and received an adoption order there. (This involved breaking up with her partner of many years.) But Parrott, issuing a contempt order against Hadaway, ordered that the child be placed in foster care. Yet to be decided is the validity of Parrott’s contempt order against Hadaway, which was argued to the Georgia Court of Appeals late in May.
Kenneth and LaVerne Richardson are suing Jessica Turner, age 12, and her grandparents, as fairly ridiculous. According to the lawsuit, Turner suffered psychological trauma from viewing a movie containing curse words. The photographic documentary film, which had been shown as part of a French lesson, was traumatizing for Turner and had to receive psychological counseling. The lawsuit seeks to recover any such dispute, and that the failure of the state's governor and his partner, with whom the former governor intended to form a civil union under the recently-enacted New Jersey Civil Union Act after his divorce final. (Parties to a civil union may not be married to anybody else.) Given the tension between the parties, Judge Cassidy assigned a "parenting coordinator" to act as an intermediary in working out custody arrangements. Although much of the proceeding was conducted in chambers, Cassidy did make some comments in open court while announcing her decision, including that McGreevey's sexual orientation would not be a factor in the eventual final custody decision, consistent with state law. The judge also urged that the parties try to reach a settlement on this and other issues rather than having a trial to determine custody and visitation rights.

New York — Irony of ironies... Charney v. Sullivan & Cromwell is not the only gay discrimination employment claim pending before the New York Supreme Court Justice Bernard Fried. On May 17, Fried granted defendant's motion to compel arbitration in Charney v. S.A.C. Capital Management, LLC, 2007 WL 1462246, 2007 N.Y. Slip Op. 27200 (N.Y. Supreme Ct., N.Y. County), Andrew Z. Tong, a 37-year-old Chinese man, has made claims of sexual harassment, hostile work environment, discrimination on the basis of gender, sex, sexual orientation, race and national origin, and a variety of common law contract and torts claims against his employer. Fried found that under the employment contract, Tong had agreed to arbitrate any such dispute, and that the failure of the agreement to authorize an arbitrator to award punitive damages, which might be available in court litigation of some of his claims, did not prevent sending the case to arbitration. Finding the arbitration agreement valid, Fried stayed the lawsuit pending the outcome of the arbitration proceeding.

Wisconsin — Reversing a decision by Patricia D. McMahon of Milwaukee County Circuit Court, a panel of the Wisconsin Court of Appeals ruled in Storms v. Action Wisconsin, Inc., 2007 WL 1545493 (May 30, 2007), that the defendant, a gay rights organization, was not entitled to an attorney fee award in its successful defense against a defamation suit by the Reverend Grant E. Storms. The trial court, finding the suit frivolous, had awarded costs and fees of over $85,000. Storms had given a speech that Action Wisconsin had construed in subsequent written communications as advocating the killing of gay people on Biblical grounds. Action Wisconsin publicized its interpretation of the speech, and did not desist despite two letters from Storms' attorney challenging their interpretation, pointing out that the minister was speaking metaphorically and had not actually called for killing gay people, but just for eliminating homosexuality. In the subsequent suit, Judge McMahon concluded that Storms was a public figure and that he had failed to meet the necessary standard of "actual malice" to surmount the First Amendment protection for the defendant's speech, or the tot law requirement that there be actual injury before speech can become actionable. Dividing 2–1, the court of appeals reversed, the majority finding that the action was not frivolous, although not questioning Judge McMahon's ruling on the summary judgment motion. The court observed that injury is presumed in a case of written defamation (libel), and that there was at least a question of fact whether the actual malice standard could be met in this case, sufficient to remove it from the frivolous category. A.S.L.

**Criminal Litigation Notes**

**Alabama** — Christopher Gains, 22, pled guilty to the 2004 murder of Scotty Joe Weaver, then 18. Weaver was beaten, strangled and cut, and his body set on fire in a rural area of Baldwin County. According to prosecutors, the murder, in which Gains had two accomplices, Robert Porter and Nichole Kelsay, was motivated in part by Weaver's sexual orientation. It was expected that in exchange for his guilty plea Gains would draw a life sentence rather than the death penalty. The other defendants are scheduled to be tried later this year. It was not revealed whether the plea agreement included Gains testifying at the subsequent trials. Although Alabama's legislature has refused to include sexual orientation in the state's hate crime statute, prosecutors stated that they would take the bias aspect into account in deciding whether to seek the death penalty for the remaining defendants. *Charleston Gazette (WV)*, May 2.

**California** — In the ongoing saga of the murder of Diane Whipple by pit bulls under the ownership and control of Marjorie Knoller, the California Supreme Court issued a unanimous decision on May 31 in *People v. Knoller*, 2007 WL 1557336, finding that neither San Fran-
cisco Superior Court Judge James L. Warren (now retired) nor the Court of Appeal had used the correct legal standard on the issue of implied malice, a key point in the prosecution. Warren had set aside Knoller’s conviction by the jury of second degree murder, on the ground that the evidence did not show that Knoller was aware her conduct had a high probability of causing death, but the Court of Appeal had opined that the correct standard was an awareness by the defendant that her conduct could cause either death or serious injury. The Supreme Court, reiterating a 40-year old precedent, found that the correct test was intermediate between these two, holding that “implied malice requires a defendant’s awareness of engaging in conduct that endangers the life of another no more, and no less.” The court remanded the case back to the trial level for reconsideration of the motion to set aside the verdict under this standard. The case will necessarily be assigned to a new trial judge in light of Warren’s retirement. As a result of the publicity surrounding this case, the California legislature changed the law to allow surviving same-sex partners to sue for emotional distress on the same basis as surviving spouses when they observe their partners suffer death or serious injury from the negligent or wrongful acts of another while themselves being in the zone of danger.

Oregon — The Oregon Court of Appeals affirmed the conviction of William Charles Johnson under Or. Rev. Stat. Ann. Sec. 166.065(1)(a)(B) for harassment for making racist, obscene and homophobic insults over an amplified system during stop-and-go traffic for upwards of five minutes. State v. Johnson, 2007 WL 1491815 (May 23, 2007). According to the decision by Judge Schuman, on August 11, 2003, two women driving a car with a rainbow decal on the rear bumper pulled in front of Johnson’s truck as lanes merged on Cornelius Pass Road in Washington County. Johnson’s whose truck had an amplified address system, began berating the driver of the car, using such expressions as “black bitch,” “pussy-licking nigger,” and “lesbian dyke.” (He obviously becomes redundunt when angered!) He kept this up for five minutes in the slow traffic, causing other motorists to take note and provoking the driver to get out of her car and approach him in a confrontational mood, but she retreated when she spotted a youth in the back of the truck swinging a skateboard about. Johnson claimed at trial and on appeal that the statute was unconstitutional on its face and as applied to him, but the court rejected these contentions, finding that the law was focused on the harm caused by Johnson’s statements rather than on their content and has an intent requirement, elements that were missing from a predecessor statute that had been declared unconstitutional in State v. Harrington, 680 P.2d 666 (Or. App.), rev. denied, 685 P.2d 998 (Or. 1984). A.S.L.

Other Legislative Notes

Federal — Lead sponsors Rep. Jerrold Nadler (D-N.Y.), and Senator Patrick Leahy (D-Vt), have reintroduced the Uniting American Families Act in Congress on May 8, intended to amend U.S. immigration law to place committed same-sex partners on the same basis as legal spouses for purposes of family reunification rights under federal immigration policy. Later in May, however, leaders in the House and Senate seemed to have agreed on an immigration reform proposal that reduces the significance of family reunification in determining who can legally immigrate to the U.S., setting off expressions of concern over LGBT immigration advocates. Under the leadership proposal, skills and assets will receive higher priority than family ties in determining who can come in legally, US Federal News, May 8.

Federal — Senator Daniel K. Akaka (D-Hawaii) introduced the Clarification of Federal Employment Protections Act (S. 1345), to “affirm that Federal employees are protected from discrimination on the basis of sexual orientation and to repudiate any assertion to the contrary.” The measure, introduced May 9, was co-sponsored by Senators Lieberman (D-Conn.), Collins (R-Maine), Levin (D-Mich.), Leahy (D-Vt), Feingold (D-Wis.), and Clinton (D-NY). The purpose is to correct the error perpetrated by Scott Bloch, appointed by George W. Bush to head the Office of Special Counsel, which is charged with investigating discrimination complaints by federal employees. Bloch has taken the position that his office lacks jurisdiction to remedy such complaints due to the lack of federal legislation on point. Since about 1980 the federal Office of Personnel Management has taken the position that federal workers are protected against sexual orientation discrimination, first through interpretation of civil service laws and then based on executive orders issued during the Clinton Administration and not formally rescinded by the Bush Administration, Washington Post, May 15, US Federal News, May 9.

Alaska — The state’s House of Representatives failed to attain the 2/3 majority necessary to put a constitutional amendment banning benefits for same-sex partners of state employees on the ballot. The 22–14 vote on May 7 fell five votes short. The amendment was inspired by a state supreme court ruling finding that failing to provide such benefits violated state constitutional equality requirements, Anchorage Daily News, May 8.

Arkansas — The Eureka Springs city council unanimously approved a measure on third reading to establish a domestic partnership registry for the town, although a local minister stated he would seek a referendum repeal. According to a report by The Advocate (May 16), the town calls itself the “wedding capital of the South” and issues about 4,000 wedding licenses a year, although its population is only about 2,300.

California — The State Assembly voted 45–20 to approve the Name Equality Act, under which persons registering as domestic partners will have the same rights as married spouses to change their family names, and also will equalize the rights of married spouses in this regard. Thus, changing existing law, the bill would equalize the right of a husband to take his wife’s surname, and would end the need for domestic partners to undertake costly and time-consuming court procedures in order to adopt the surname of their choice. If the bill becomes law, California would become the first state to afford equal right to all spousal partners to change their names. At present, seven states specifically recognize the right of a husband to take his wife’s surname upon marriage.

Colorado — On May 14, Governor Bill Ritter signed into law H.B. 1330, which allows joint adoption of children by unmarried couples, sweeping into its broad language LGBT couples, unmarried heterosexual partners and relatives seeking to help single mothers. Of course, a court would have to find that such an adoption is suitable for the child in question before approving it. Ritter resisted strong lobby against the bill by religious organizations and some adoption agencies, stating, “This law gives children in a one-parent family a chance to grow up in a two-parent home. We must do all we can to strengthen families and provide children with as stable an environment as possible. This law will give children a better chance to succeed.” The Gazette, May 15.

Connecticut — Advocates for same-sex marriage won a 27–15 vote endorsing their bill from the state legislature’s Judiciary Committee, but decided not to push it on the floor of the legislature after concluded that there were not sufficient votes. Instead, they will wait to see what the state’s Supreme Court does in the pending marriage case, argued during May, before deciding what to do about the bill. New Haven Register, May 14.

Kansas — The Kansas legislature approved a measure requiring school districts to adopt policies prohibiting bullying on school property or vehicles or at school-sponsored activities. The bill passed 36–2 in the Senate and 109–16 in the House. Wichita Eagle, April 29.

Kans — Lawrence — Lawrence, Kansas, city commissioners voted 4–1 on May 22 to give final approval to a plan to create a domestic partnership registry for same-sex couples. The registry is open to same-sex and unmarried different-sex couples who are at least 18 years of age and who “live together in a relationship
of indefinite duration with a mutual commitment in which the partners share the necessities of life and are financially interdependent.” Although the city is not providing any legal rights or benefits to registered partners, it is providing a registration certificate that can be used to provide proof of partnership to private employers and businesses. At the request of the Lawrence commissioners, the state Attorney General had issued a legal opinion that the city could adopt the registry, despite the state’s constitutional ban on same-sex marriage, since the registry did not purport to confer any marital rights. 365Gay.com, May 23.

Maryland — Governor Martin O’Malley issued an executive order on May 15 banning discrimination against state executive branch employees on the basis of sexual orientation, gender, age, ethnicity, marital status, religion or disabilities. The order requires appointment of a statewide equal opportunity commissioner and creation of a unit within the Department of Budget and Management to enforce the policy.

Minnesota — The state Senate voted 43–21 in favor of a bill that would unmarrried domestic partners studing to visit and make health care decisions for each other in the hospital, defining domestic partners as adults in a “committed interdependent relationship” who live together. Its fate in the House was uncertain, and it was widely believed that Republican Governor Tim Pawlenty would refuse to sign the measure. Associated Press, April 30, 2007.

Nebraska — Despite the examples set by neighboring Iowa and Colorado, the Nebraska legislature proved unready to pass a gay rights law, as the Senate voted 24–15 to defeat a proposal that has been pending for fourteen years. A news report by 365Gay.com reported that two Republican legislators led the effort to defeat the bill. Senator Tony Fulton argued that it would give “special rights” to homosexuals and could lead to protection for pedophiles and transvestites. (Not with him minding the store, we suspect....) And Senator Tom Carlson objected that gays could avoid problems at work by staying in the closet. “We’re talking here about values. We’re talking here about behavior. We’re talking here about ethics,” he insisted, carefully removing his wedding band to ensure that nobody could suspect he might actually be... (gasp) a heterosexual. (We imagined that last part, which was not in the 356Gay.com report and should not be attributed to their crack political reporting team.)

Vermont — On May 22, Governor Jim Douglas, a Republican, signed into law a measure making Vermont the ninth state to ban discrimination on the basis of gender identity. This was catch-up, in an important sense, because the inclusion of gender identity in civil rights measures has become the norm in recent years, leaving states that had banned sexual orientation discrimination earlier in their history with archaically limited statutes! The measure enjoyed bipartisan sponsorship and overwhelming support in the state legislature, where it passed the Senate on a vote of 27–1 and the House on a vote of 118–28. A.S.L.

Law & Society Notes

Ohio Executive Order — Ohio Governor Ted Strickland, a Democrat, signed an executive order on May 17 banning discrimination on the basis of sexual orientation or gender identity in the state government’s workplaces, including state agencies, boards and commissions under the authority of the governor. Strickland stated that he would support a state law banning such discrimination in the private sector, but for concerns that it would violate the anti-gay marriage amendment that was recently added to the state constitution. The governor’s legal counsel, Kent Markus, told an Associated Press reporter that there was a possible argument that an opponent of sexual orientation non-discrimination law could make that somehow the state was creating a status that “approximates marriage” by banning such discrimination. The idea seems absurd, and Lynne Bowman, Executive Director of Equality Ohio, said as much, pointing out that her organization is preparing a bill to propose to the legislature and they expect the governor to support it. Associated Press, May 17.

California Conjugal Visits — In California, registered domestic partners are supposed to have virtually the same status and rights as married different-sex couples, but the state Department of Corrections was resisting this until the ACLU pressed the case of Vernon Foeller, a convicted burglar from Sacramento doing time in the state prison system who was denied a conjugal visit from his registered domestic partner. Under pressure from the ACLU, Foeller and his partner enjoyed a conjugal visit a week before Christmas and, after his release, Foeller testified at a public hearing in May on the proposed regulatory change under which registered domestic partners will have the same rights to family visitation as married inmates.

Asylum for Lesbian Turkmen — A lesbian from Turkmenistan won a grant of asylum from the Department of Homeland Security, according to an announcement received from the Columbia Law School Sexuality & Gender Law Clinic. The ruling was issued on December 1, in response to a written and oral presentation on behalf of the women by three Columbia Law students, Marie-Amelie George, Jonathan A. Lieberman and John Olsen. There was no need for a hearing before an Immigration Judge, as the asylum petition was granted by the Department after an initial interview with the applicant. Although such a ruling does not create a precedent, the students had put together a persuasive package of information, which they are sharing with other organizations that provide representation to foreign nationals seeking asylum in the United States. The case was referred to the clinic by Immigration Equality.

Immigration Judges — As we have reported on LGBT and HIV-related asylum rulings over the years, we have noted the frequent inconsistencies in the judgments rendered, and observed the wide variance in quality of Immigration Judge decisions. Thus, a front-page article in the New York Times on May 31 documenting a study showing wide disparities in decision-making in asylum cases did not surprise us. At about the same time, the Justice Department announced an internal investigation into the politicization of Immigration Judge appointments during the Bush Administration, following on testimony from a former high official of the department that she had imposed a political test in vetting candidates for the JJ appointments when she had been delegated personnel functions by Attorney General Alberto Gonzales.

Colorado — On May 8, the Boulder Valley School Board voted to amend its anti-discrimination policy to add gender identity. The 6–1 vote was explained by board member Patti Smith, who said, “The bottom line is we would like all children to feel safe, especially the ones most at risk.” Boulder Daily Camera, May 9.

Military Policy — The fatuous nature of the “Don’t Ask, Don’t Tell” policy on homosexuality and the military was dramatically illustrated during May in the case of Jason Knight, an openly gay sailor who left the Navy in 2005 when his commander made it clear that he would not be allowed to re-enlist when his four-year commitment imminently expired. Although his records showed that he was gay, the formal paperwork for a discharge under the policy was not completed. Knight, a graduate of the Defense Language Institute, was recalled with the pressing need for interpreters and translators as a result of the current “surge,” and assigned to duty in Kuwait. According to a Navy spokesperson, those responsible for recalling him were unaware that he was gay. Finding his recall a strange contradiction of the policy, Knight, who was eager to serve, made his situation public, and it was seized upon by Service-members Legal Defense Network and publicized in the press. Abashed, the Navy informed him that he would be discharged for violating the policy by saying he was gay. Knight plans to join SLDN in lobbying Congress to change the policy.

New York — Shortly after Governor Eliot Spitzer proposed a bill legalizing same-sex marriage in New York, it was announced that the State Department of Civil Service had been instructed to respect out-of-state marriages of same-sex couples for purposes of spousal insurance benefits eligibility of current and re-
tired state and local government employees. A special enrollment period for the benefits began May 1 and extended to the end of May. Buffalo News, April 28; Newsday, May 3.

Texas — Attorneys Jerry Simoneaux, Jr., and Phyllis Frye of Houston successfully negotiated an agreement under which Rochelle Evans, a transgender teen, was able to return to Fort Worth’s Eastern Hills High School with appropriate respect for her gender identity. According to a May 3 article in the Dallas Voice, Rochelle, 15, had been suspended when she responded with the epithet “bullshit” after being instructed to remove her wig and high heels. School officials insisted on calling her by her birth name of Rodney in a statement they issued after meeting with the lawyers, but agreed that she could be identified in school as Rochelle and with feminine pronouns, and that she would have access to a single-stall bathroom in the nurse’s office rather than using a boy’s or girl’s room. Frye advised Rochelle to wear flat shoes to school and avoid wigs in order to prevent further confrontations, treating as a moral victory the school’s family leave policy. The article quoted Rodriguez sales in 2006 of nearly $5 billion.

Philly — Last week, the Food & Drug Administration reiterated on its website its determination to continue its policy of deferring from donating blood any man who has had sex with another man even once since 1977, on grounds of protecting the blood supply from contamination with HIV. On May 30, Comptroller Thompson issued a press release noting that 34.6% of shares at the ExxonMobil annual meeting had been cast in favor of the adoption of a non-discrimination policy that would include sexual orientation, an increase from the 29.4% vote the last time this proposal was placed before shareholders. ExxonMobil has refused to follow the example of its peers in the international oil industry who ban such discrimination in their employment practices. U.S. State News, May 30, A.S.L.

International Notes

Australia — The Victorian Civil and Administrative Tribunal ruled that the owner of an establishment intended to be a gay male bar can keep out straights and lesbians in order to preserve the gay male tone of the place. Needless to say, this decision concerning Melbourne’s Peel Hotel, operated by Tom McFeely, has generated considerable discussion and some controversy in the Australian press and in the gay rights movement there. Wrote the Tribunal’s deputy president in her findings in the case, “Sometimes heterosexual groups and lesbian groups insult and deride and are even physically violent towards the gay male patrons,” and found lawful McFeely’s desire to preserve the intended character of his establishment. Quoth McFeely: “I want the Peel to be a gay men’s pub. If there are too many lesbians it makes me uncomfortable and makes the gay men who come to my bar uncomfortable. To be honest, they tend to be more aggressive than not. I own the joint and I felt extremely intimidated last Friday walking through the dozens of lesbians playing pool.” Militant lesbians with pool cues in hand!!! This guy wouldn’t last a minute in Hotlanta, not to mention Hell’s Kitchen (the new Chelsea)?... The Victorian Gay & Lesbian Rights Lobby’s female co-convenor said the group supported the decision, while bemoaning the lack of lesbian venues in Melbourne resulting in many of the women heading to Peel’s to play pool. McFeely was not sympathetic on this point, saying “It’s not my concern. There are plenty of lesbians with plenty of money. They can open a venue.” But he also said that unruly heterosexuals had become his main concern. (Numerous press reports; see The Australian, May 29, under the headline “Bar bans lesbians, straight “.

Canada/India — The Canadian High Commission has requested that the Indian government recognize the Canadian same-sex marriages of two Canadian diplomats to be posted to India. According to a report in The Telegraph (May 7), Indian foreign ministry sources, citing the nation’s sodomy law and ban on same-sex marriage, had indicated that the requests could not be granted. An official at the Canadian mission explained their understanding that various international conventions on diplomatic relations led them to believe that the Indian government should accord domestic spousal privileges to the diplomats, but the Indian foreign ministry officials indicated that the relevant conventions only protected against criminal prosecution, leaving diplomatic personnel otherwise subject to the law of the nation where they are stationed. The Delhi High Court is considering a constitutional challenge to the validity of the country’s Victorian colonial era sodomy law, which is still in effect as part of the Indian Penal Code.

Iran — It was reported that Iranian police staged a May 10 raid on a birthday party in Esfahan that they suspected was a gay gathering. Some guests were beaten, and 87 were arrested. About 80 made bail or were released immediately, but 17 are reportedly imprisoned awaiting trial on charges of homosexual conduct and/or consumption of alcohol, both serious offenses in the Islamic state. Some individuals...
have been executed in Iran on sodomy charges. The raid as seen as part of a general campaign against homosexuality being carried out by the government. Gay City News, May 24.

Pakistan — The Lahore High Court sentenced a couple to three years in prison for perjury on May 28, after determining that the husband of the woman who had petitioned for protection against harassment by her family had been born female. Shumail Raj had operations to remove her breasts and uterus and married Shahzina Tariq, but the court determined that Raj was still female and by presenting themselves to the court as a married couple, they had perjured themselves. The court will resume hearings in June on whether to annul the marriage, which Tariq’s family criticizes as contrary to Islam as well as national law against same-sex marriage. According to an Associated Press report: “The couple initially said that they wed to protect Tariq from being sold into marriage to pay off her uncle’s gambling debts. They later acknowledged that they had lied about Raj’s gender because they were in love and wanted to live together.” The court also ordered police to open a criminal investigation of the surgeons who performed Raj’s operations.

Russia — An attempt by a group of gay protesters to petition the mayor of Moscow to reverse his decision against allowing a gay pride parade turned nasty as anti-gay protesters and police ganged up on the gays, throwing punches and arresting several, including some European politicians who came along to show their support for the gay protestors. Among the wounded and/or arrested were Peter Tatchell, a member of the German Parliament, Marco Cappato, a European Parliament member, and Volker Beck, a member of the German Parliament. New York Times, May 27.

South Africa — The South African Union for Progressive Judaism decided at its National Assembly meeting on May 6 that the denomination would allow same-sex marriages of its congregants. The chairperson, Steve Lurie, stated: “This decision was arrived at after long and thoughtful deliberation and in the spirit of what Progressive Judaism is about inclusion of all Jews regardless of gender, sexual orientation, race or ethnicity.” He also said that the denomination would make “no distinction in the status of religious marriages of same-sex partners and heterosexual couples.” iafrica.com, May 28.

Spain — The Council of the Judiciary has fined Judge Laura Alabau 350 Euros for refusing to perform same-sex marriage ceremonies, and improperly turning away same-sex couples from outside Spain on the spurious ground that their home countries do not recognize same-sex marriage, which is not a ground for refusing to perform such a ceremony in Spain. The Council said, according to a report in the English-language version of El País (May 31), that the judge was fined “for censoring authorities from her position as a judge.” Her response was that she was suffering “a persecution by the government’s propaganda apparatus.”

Switzerland — Voters in the canton of Geneva brought their jurisdiction in line with the rest of the country by approving a ballot measure on May 20 that will extend equal inheritance rights and benefits to same-sex couples. The principal benefit is that couples will be exempt from steep inheritance taxes if one dies and the other inherits. The measure was approved with 83% of the vote, being supported by all political parties except the right-wing Swiss People’s Party, PinkNews.co.uk, May 21.

United Kingdom — Two nurses who charged that they had been discharged because they are lesbians prevailed before a Labor Tribunal, which awarded at last 350,000 pounds compensation to Margaret Durman and Penny Smith against Barchester Healthcare, the organization that operates the Cornwall nursing home where they were employed. Daily Mail, May 16. A.S.L.

Professional Notes

The New York firm of Outten & Golden, which specializes in workplace law representing employees, has announced the formation of an LGBT Workplace Rights Practice Group within the firm, co-chaired by Ann Golden and Carmelyn P. Malalis. The other members of this group are Justin M. Swartz, Allegra L. Fishel, Stephanie M. Marinin, Tammy Marzigliano, Katherine Olshansky, Anjana Samant, and Rita M. Farmer.

Wisconsin Governor Jennifer Granholm has appointed William Baillargeon, a member of the Triangle Foundation Board of Advisors, to a seat on the 48th Circuit Court in Allegan County. The judge earned his law degree from the University of Wisconsin Law School and has been working as a magistrate in the Kalamazoo Workers’ Compensation Bureau. The Triangle Foundation is an LGBT rights service and advocacy organization. Kalamazoo Gazette, May 1.

Human Rights Watch announced the appointment of Boris Dittrich as the new Advocacy Director for its LGBT Rights Program. Dittrich has been a member of the Dutch Parliament, where he was a leader in the legislative battle to make the Netherlands the first country to accord marriage rights to same-sex couples by legislation. He is also a lawyer and former judge.


**AIDS & RELATED LEGAL NOTES**

11th Circuit Rules Police Department Discrimination Against HIV+ Complainant Not Actionable

A Florida man who claimed that the City of Fort Lauderdale took actions against him due to his HIV status found an unresponsive audience in the Eleventh Circuit, which on April 25, 2007 affirmed the district court’s dismissal of his complaint. Albra v. City of Fort Lauderdale, 2007 WL 1213230 (11th Cir. 2007). The appeals court, in an unpublished per curiam opinion, found that the pro se plaintiff, Adem A. Albra, had failed to allege any cognizable state or federal cause of action stemming from Fort Lauderdale’s alleged failure to investigate a criminal complaint.

Albra’s complaint, filed in the Southern District of Florida, alleged that the Fort Lauderdale police had, due to Albra’s HIV status, refused to investigate a crime of which he claimed to be a victim. Further, Albra alleged, when he complained to city officials about this failure by the police, the city retaliated against him by denying him services. Albra asserted claims under both the Americans with Disabilities Act (ADA) and the Rehabilitation Act as well as state-law claims for negligence and violation of Florida’s statute providing protection against HIV discrimination. The district court dismissed the complaint without prejudice, and Albra appealed. (Research into case filings shows that Albra also sued, unsuccessfully so far, the district judge who dismissed his case.)

Beginning with Albra’s claims under Florida law, the court held that the city could not be liable for negligent investigation because, absent a special relationship between the police and Albra, the police department’s duty of care, if any, was to the public at large and not to plaintiff specifically. Moreover, investigation of crime is a discretionary function and thus not an act with respect to which Florida has waived its sovereign immunity. Lacking a duty for its police officers to investigate, said the court, the city likewise lacked any duty to supervise its officers with respect to investigations, and thus Albra’s negligent supervision claim likewise fell. Finally, although Albra could state a claim under Florida’s prohibition on HIV discrimination, Fla. Stat. Sec. 760.50, that count was also dismissed for Albra’s failure to comply with Florida’s statutory notice provisions, which require written notice to the state or its subdivisions as a condition precedent to any claim.

Albra’s federal claims fared no better before the court. He asserted claims under 42 U.S.C.
sec. 1983, namely, that the city’s failure to investigate its criminal complaint was due to his HIV status, thus violating his rights under the ADA and the Rehabilitation Act. The court held that he had failed to state a prima facie claim under either act. First, while the court acknowledged that infection with HIV could, under Braggdon v. Abbott, 524 U.S. 624 (1998), be considered in some cases a disability under the two statutes, Albra had failed to plead that he was, in fact, disabled as defined in those statutes. (Apparently he mistakenly assumed that identifying himself as HIV+ in the complaint was sufficient.) Second, because Fort Lauderdale had no duty to investigate his complaint in the first place, he was not denied any public benefits, according to the court. Finally, the court stated, plaintiff had failed to allege that the city and its officers were aware of his HIV status and thus had not sufficiently pled that any of the city’s actions were taken because of that status.

Albra’s other sec. 1983 claims for negligent training and conspiracy likewise were found wanting. His claim for negligent training failed, the court said, to properly allege that the city was aware of a need for training in handling investigations or of the alleged “custom” among the police of refusing to investigate claims. Further, the court held that the complaint failed to meet the Eleventh Circuit’s “higher pleading standard” for civil rights claims. Albra’s conspiracy claim likewise was criticized for lack of specificity and, moreover, because the intra-corporate conspiracy doctrine, by which a corporation (including a municipal one) cannot conspire with its employees, barred the claim.

The court also affirmed dismissal of Albra’s claims, under the ADA and Rehabilitation Act, that the city had retaliated against him by denying services in response to his complaint about the police department’s alleged failure to investigate his claim. The court held, without explanation, that Albra had failed to allege that he had engaged in protected activity under either act. The court stated, further, that the alleged retaliatory actions “seem[ed]” wholly unrelated to Albra’s complaints. Glenn C. Edwards

Florida Court Upholds PWA’s Will Against Capacity and Undue Influence Charges

In Diaz v. Ashworth, 2007 WL 1484550 (Fla. Dist. Ct. App., 3rd Dist., May 23, 2007), the court of appeals ruling per curiam affirmed a decision by Miami-Dade County Circuit Judge Herbert Stettin to reject a will challenge in a case involving an HIV+ testator. The appellant, a Catholic priest named Francisco Gerardo Diaz, claimed that the testator, Jorge Mesa, had meant to leave his property to Diaz in a prior will, and that a will executed a month prior to Mesa’s death in favor of the defendant, Frank Ashworth, was invalid.

Mesa and his partner, Silvio Segarra, had lived in a house originally owned by Segarra. Both men were living with AIDS. Segarra arranged to place his home in joint ownership with Mesa with right of survival. Mesa then had a will made, leaving any property he owned at his death to his aunt, Hipolita Benetiz, with her daughter as alternate. He had no blood relatives in the U.S. Mesa and Segarra had been referred to Diaz for spiritual counseling, and he became close to Mesa, especially after Segarra died. Diaz drove Mesa to medical appointments, took him food, covered some of his expenses, and visited frequently. Mesa spontaneously changed his will to leave everything to Diaz, referring to it at Christmas-time as a gift to Diaz. However, their relationship subsequently cooled off, and Mesa became closer to some of his neighbors, especially Frank and Cecilia Ashworth.

By the spring of 2003, Mesa’s condition led to hospitalization. He realized he was dying, but was awake, alert and oriented to his surroundings, according to hospital records. He didn’t want to die in the hospital. While Mrs. Ashworth was visiting him, he indicated his desire to be taken home and to make a new will. She contacted her husband, who recommended his lawyer. The lawyer and Mesa had a phone conversation in which Mesa expressed his wishes to make Ashworth his beneficiary. Against medical advice, the Ashworth’s helped Mesa check out of the hospital, took him to his doctor, who persuaded him to accept hospice care at home and observed that he was alert and capable of making decisions. They then went to the attorney’s office where Mesa executed the will, with Mrs. Ashworth and the lawyer’s secretary as witnesses. Then the Ashworth’s took him home where, according to them, he requested to be shielded from visitors. He passed away about a month later, and Diaz contested the will.

Based on the trial record, the court found that Mesa had the capacity to make the will. As to the issue of undue influence, the court found that Diaz had made out a prima facie case in light of the relationship that had sprung up between the Ashworths and Mesa and their role in “procuring” the will, but concluded, with the concurrence of the court of appeal, that Ashworth had sufficiently shown that the resulting will was the product of Mesa’s intention and free will and was not the product of undue influence by the Ashworth’s. The appellate court essentially adopted and quoted at length from Judge Stettin’s opinion. A.S.L.

Dissenting New York Appellate Judge Continues Campaign Against Judicial Limitation on Emotional Distress Damages in HIV Exposure Cases

In Sims v. Comprehensive Community Development Corp., 2007 WL 1288377 (N.Y. App. Div., 1st Dept., May 3, 2007), the court vacated a plaintiff’s award for post-traumatic stress disorder arising from possible infection with HIV from a contaminated needle. The court, applying recent precedents, held that it was unreasonable to compensate a victim for emotional injury that occurred following six months of constantly testing negative for the virus. Justice Catterson wrote a blistering dissent, over three times longer than the majority opinion, accusing the majority of following illogical precedent that disregarded established common-law principles and criticizing the First Department’s adoption of the rule embraced by the 2nd Department setting a six-month limit on HIV exposure emotional distress claims for plaintiffs who test negative for HIV.

In November 2005, Vanessa Sims was awarded a little under $600,000 by a jury in Bronx County. Sims, an extern at a hospital owned by the defendant, had been pricked by a needle that was previously used to withdraw blood from an HIV+ baby. The jury found that although Sims herself acted in a negligent fashion, both Sims’s medical school and the hospital bore some responsibility for her injury. After the medical school settled out of court, the hospital was required to pay compensation in the amount of $437,500 for Sims’s fear of developing AIDS (for the period of six months after the incident) and $75,000 for post-traumatic stress disorder (for the period following six months).

The Appellate Division vacated and remanded the larger judgment for a new trial solely on the amount to be awarded for damages, having found that $487,500 “deviate[d] materially from what would be reasonable compensation,” unless Sims would agree to a reduced award of $250,000. The court also vacated the award for post-traumatic stress disorder, citing precedent that recovery after six months of testing negative for HIV was improper and unreasonable.

Judge Catterson, joined by a colleague, dissented, calling the majority opinion a “departure from common-law principles” that did nothing to elucidate the “obfuscation” and “imprecise language” concerning emotional and psychological injuries. The three-judge majority opinion did little to address Catterson’s criticism and seemingly solid explication of jurisprudence.

According to the history laid out by Catterson, the New York Court of Appeals first announced recovery for emotional injuries in Ferrara v. Galluchio, where the Court, quoting Prosser’s torts treatise, stated that the only limiting factor to recovery is a factual question of “genuineness.” 5 N.Y.2d 16, 21 (1958). The Court of Appeals later extended recovery for emotional injury attending physical injury to recovery for all emotional injuries regardless of the presence of physical injury or even fear of physical injury. In 1977, the Court of Appeals
reiterated that compensation may be given for emotional harm absent physical injury, provided that the emotional harm is “genuine, substantial and proximately caused by the defendant’s conduct.” *Howard v. Lechner,* 42 N.Y.2d 109, 111–12. Last year, the First Department adopted a Second Department case that limits recovery for fear of contracting HIV to the first six months following exposure if the plaintiff tested negative for HIV. *Ornstein v. New York City Health & Hosps. Corp.*, 27 A.D.3d 180 (2006), following *Brown v. New York City Health & Hosps. Corp.*, 225 A.D.2d 36 (1996).

In *Brown,* the court took notice that 95% of HIV carriers test positive for antibodies within the first six months of infection. The court then held that a plaintiff’s “initial, reasonable fear of contracting AIDS” becomes “unreasonable” after six months of negative tests. The majority in *Sims* followed this precedent when it vacated Sims’s award for post-traumatic stress disorder.

In his dissent, Catterson takes pains to point out that the analysis the Court of Appeals established in 1958 is a factual determination of genuineness, not a question of law concerning reasonableness as set out in *Brown.* The majority’s “slavish adherence” to *Brown’s* “complete disregard of the common law”, Catterson claims, has improperly imposed a judicial statute of limitations on HIV emotional harm cases. Catterson points to the Supreme Court’s decision in *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532 (1994), which rejected temporal limitations of this kind, noting that emotional injury may occur far after the triggering incident and the common law already imposes limitations by requiring proximate cause and a breach of duty.

The majority does not respond to Catterson’s charge that its decision in *Sims* improperly takes determination of damages away from the jury by following a “judicially imposed reasonableness period”. Instead, the majority only mentions, in a footnote, that Catterson had already raised the same objections when the First Department adopted *Brown* the year before, “repeating verbatim” assertions he made then.

**Chris Benecchi**

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**New York Court of Claims Rejects Emotional Distress Claim Absent Proof of Exposure**

New York Court of Claims Judge Walter Brooks Debow, granting summary judgment for the state, ruled in *Siegrist v. State,* 2007 WL 1289540, 2007 N.Y. Slip Op. 50909 (U) (April 23, 2007) (unpublished disposition), that a surgical patient notified that she should undergo HIV testing because the ventilator used during her surgery had some blood from a prior patient in the “expiratory limb” of the machine, was not entitled to pursue emotional distress damages because she could not allege that she had actually been exposed to HIV.

New York courts have allowed claims for emotional distress on behalf of plaintiff who have not tested positive for HIV infection, provided they show that they were actually exposed to the virus through a means that could result in transmission. Damages are limited to a six month period based on data showing that all but a very tiny percentage of those who test negative six months after exposure are free of infection, so a claim for emotional distress loses credibility after that period of time a point sharply disputed in another decision reported in this issue of *Law Notes* by a dissenting judge.

In this case, because neither the prior patient (who died before giving consent for testing) nor the blood in the ventilator was tested, it is not possible to know whether the plaintiff was actually exposed to HIV. She argued that this case presented a “special circumstance” where the requirement of showing actual exposure should be dispensed with, relying heavily on the hospital’s advice to her to be tested as supporting the genuineness of her fear of developing AIDS.

But Judge Debow rejected this contention, noting that the “special circumstances” exception had been allowed in only one case, *Foxby v. Albany Memorial Hospital,* 252 A.D.2d 606 (3rd Dept. 1998), from which this case was distinguishable. Although the hospital may have been negligent in not testing the blood in the ventilator after Siegrist’s exposure, Judge Debow pointed out, she could have sought a court order compelling testing of the prior patient’s blood. The court seemed to fear that even the slightest widening of the “special circumstances” exception to the actual exposure rule could result in a floodgate of litigation. A.S.L.

**AIDS Litigation Notes**

**Federal — Second Circuit — In Mazarriego v. Gonzales,** 2007 WL 1548940 (May 29, 2007), a 2nd Circuit panel issued a summary order denying a petition for review of an asylum claim by an HIV+ man from El Salvador. Summary orders provide few facts. The court rejected the petitioner’s argument that the Immigration Judge had failed to take into account the petitioner’s HIV+ status in analyzing his asylum claim, and found that his allegations were too general to provide the basis for a substantive review of the decision denying asylum. Without summarizing the evidence in the record, the court said that “if we were to reach the issue, we would be required to conclude that petitioner’s evidence does not compel a reasonable adjudicator to find that petitioner has established a well-founded fear of persecution.”

**Federal — Arkansas —** For a demonstration of how the onerous paperwork and documentation requirements characteristic of some private employment-related disability plans can result in people living with AIDS “falling through the cracks,” see *Taylor v. SBC Communication,* Inc., 2007 WL 1546003 (E.D. Ark., May 25, 2007), in which U.S. District Judge J. Leon Holmes granted defendants’ motion for summary judgment on a long-term disability benefits claim by such a person. There is little doubt, from reading the lengthy account of the chronology of the case, that the plaintiff was eligible for the long-term disability benefits he sought, but the combination of bureaucracy, the possible deficiencies of his doctors in keeping up with the constant paperwork demands of the insurer, and the inability of the plaintiff due to his medical condition (especially its mental and emotional component) and the side-effects of his medications to keep up with those same paperwork demands, resulted in his benefits being terminated at a time when it seems likely he was entitled to continue receiving them as a matter of fact. The problem with private sector plans, of course, is that eligibility for benefits is a matter of contract, and the contract predicates eligibility on compliance with the information requests of the insurer. In this case, although it seems clear to the casual reader that this individual’s situation was well-established and documented and unlikely to have changed very much over time, the insurer required frequent re-documentation of his medical status in order to maintain his benefits eligibility, and compliance counted not only on the plaintiff but also on the ability of his doctors to respond quickly to information requests. In the event, the judge reluctantly concluded, there was no basis under ERISA for his lawsuit, because he had technically failed to maintain his eligibility by timely submission of responses to all the information requests. This decision is incredibly frustrating to read, and shows the severe limitations of a disability insurance system based on private for-profit insurance providers.

**Federal — Illinois —** U.S. District Judge Stiehl rejected a motion by an employer to dismiss an ERISA lawsuit filed by a former employee who was formally terminated after his HIV-related disability benefits were discontinued and he was unable to resume working. *Jenkins v. Price Waterhouse Long Term Disability Plan,* 2007 WL 1431863 (S.D. Ill., May 14, 2007). Jenkins became disabled from HIV-related complications at the end of 1993, when he had been employed by defendant for four years. He was awarded benefits under the company’s long-term disability plan, and was paid benefits monthly from June 1994 through the end of 2005. Then the plan stopped paying benefits, and on August 1, 2006, he was terminated as an employee. Jenkins claimed this violated his rights and sued under ERISA. The employer moved to dismiss, claiming his only remedy for benefits was against the plan and he lacked standing to sue for benefits because he was no longer an employee and had not exhausted administrative remedies. Judge Stiehl found that under federal notice-pleading stan-
factual issues that precluded a dismissal. The employer’s grounds for dismissal all raised standards the complaint should not be dismissed. Lesbian/Gay Law Notes June 2007 113

setting out treatment goals. Judge Camp

tion came to light from W ells' private physician tor resumed the treatment after a communica-

tance programs. However, due to his habitual

tention to get him into treatment assis-

tment was not sufficiently severe, and had given inadequate weight to medical evidence presented in support of the claim. The magistrate’s decision contains a useful discussion of criteria for evaluating impairment in the context of HIV infection, with particular note to the relevance and/or significance of the applicant’s CD–4 count. Judge Brown adopted Reid’s conclusion that the Commissioner’s denial of benefits should be reversed and the case remanded for further proceedings.

Federal — Nebraska — U.S. District Judge Laurie Smith Camp ruled in Wells v. Fisher, 2007 WL 1362697 (D. Neb., April 17, 2007), that the plaintiff, an HIV + man who was intermittently incarcerated at the Lancaster County Jail on a variety of petty offenses, did not have a valid 8th Amendment claim concerning his treatment or lack of same for his HIV infection. Wells first learned that he was HIV + while incarcerated, after he requested testing. A nurse employed by the jail counseled him and arranged for educational information and referrals for medical care. The evidence showed that Wells was generally non-compliant with treatment protocols and rarely sought treatment during his period so of release from jail, not least because he seems to have been without financial resources. At some point, jail staff took the initiative to get him into treatment assistance programs. However, due to his habitual non-compliance, at one point a jail doctor refused to provide certain medications he requested, on the ground that his intermittent compliance could lead to the development of a drug-resistant strain of HIV. However, this doctor resumed the treatment after a communication came to light from Wells’ private physician setting out treatment goals. Judge Camp

pointed out that the issue in an 8th Amendment case is whether jail officials were deliberately indifferent to an inmate’s serious medical condition. While she found that Wells had a serious condition, she said that the record would not support a finding of deliberate indifference. Indeed, from reading the court’s opinion, it sounds like the jail authorities were very concerned about his condition and trying hard to help him as much as possible. Disagreement about the nature of treatment is not a basis for 8th Amendment liability.

Federal — Veterans Claims Appeal Court — For a fascinating (and disgusting) look at the military bureaucracy hard at work in the game of denying benefits, see Griffin v. Nicholson, 2007 WL 1544592 (Vet. App., April 16, 2007) (designated for electronic publication only). Douglas Griffin, on active Naval Duty from July 1985 through July 1991, claims to have been diagnosed HIV + when the entire crew of his ship was tested in April 1991, his evidence being a note he received dated June 31, 1991, shortly before he left the service. In April 1999, after receiving a confirmed HIV + test result at a VA medical center the previous summer, Griffin filed a claim for VA compensation for HIV, stating he was infected in 1990. Then the game began, as the VA regional office requested confirmatory information from the National Personnel Records Center and the bureaucrats apparently went into full gear to see that Griffiths was denied his benefits by refusing to produce the relevant records. But Griffith didn’t take it lying down and kept appealing until he reached the special federal appeals court for Veterans Claims, which has now called a halt to the games and directed the Secretary of Veterans Affairs to secure the necessary records. While Griffith doesn’t get his benefits solely on his own assertion that he tested positive, the Department doesn’t get to duck its responsibility by asserting that the Navy failed to disgorge the necessary records. (This sounds eerily like an article we recently read in The Nation documenting the lengths that the Defense Department will go to deny benefits to military personnel recently returned from Iraq, in some cases by allegedly manufacturing diagnoses of pre-existing psychiatric conditions in order to get out of providing treatment and benefits for post-traumatic stress disorder by claiming that the psychological problems are due to underlying abnormalities rather than caused by stress from military service.)

Federal — New York — An HIV + executive who failed to communicate with his employer about the reasons why he was not reporting for work could not claim relief under the ADA or state disability discrimination laws, ruled U.S. District Judge Robert Sweet on May 21 in granting a motion to dismiss the complaint in Brown v. The Pension Boards, United Church of Christ, 2007 WL 1484124 (S.D.N.Y.). Plaintiff Brown was already under treatment for HIV-infection when he was hired to be Comptroller of the defendant non-profit agency in 1999. In January 2004 his T-cell level fell low enough that his doctor told him he should go on retroviral therapy, leading him to experience some kind of breakdown. A cryptic doctor’s note got him two weeks leave. He didn’t contact the employer or show up on the day he was scheduled to resume work, and there is no indication that the employer knew he was under treatment for HIV-infection. Repeated attempts by the employer’s human resources director to contact him directly or through his family did not turn up any solid information until several days later, by which time the employer had determined to terminate him. Published employment policies which he had acknowledged receiving made clear the employees’ obligation to call in concerning medical issues requiring absence from work. Judge Sweet concluded that Brown was not discharged because of his disability and that the employer had not failed to accommodate the disability, pointing out that an employee must request an accommodation or at least reveal information to the employer sufficient to trigger the employer’s responsibility to accommodate. The case depicts an incredibly unfortunate situation, since it is clear that this employer, well-known for its gay-friendly and humane employment policies, would have acted supportively had the employee kept the employer informed about his medical status and the reasons for his absences.

Federal — Virginia — An HIV + man who has been diagnosed as paranoid-schizophrenic will get a second shot at trying to escape liability for student loans under the “undue hardship” exception as a result of a ruling by U.S. District Judge Samuel G. Wilson in Hooker v. Educational Credit Management Corporation, 2007 WL 1388821 (W.D. Va., May 8, 2007). Hooker obtained 11 students loans between 1989 and 1997, which he consolidated in July 2001, a few years after he learned of both his HIV + status and was diagnosed with his mental problems. He has been seasonally employed as a waiter, but has had significant periods of unemployment, requires expensive AIDS medications, and filed for bankruptcy. He regularly paid his student loans until 2001, when he claims he became financially unable to make payments. Under the bankruptcy law, student loan debt may not be discharged unless paying it would “impose an undue hardship on the debtor.” The bankruptcy court decided that Hooker did not qualify for the exception, noting particularly his failure to explore alternatives under which he might stretch out his payments and questioning his good faith in meeting his obligations. Judge Wilson was inclined to be more sympathetic to his situation. “Hooker has only meager earnings, appears to have a very
modest lifestyle, has a serious mental disorder and is fighting a terminal disease that requires him to receive assistance and medications in order to survive,” he wrote. “An HIV-positive, paranoid schizophrenic does not have to juggle the burdens of his illness, the cost of his medical care, and his student loan debt to satisfy the good faith requirement of Branner’s ‘undue harshness’ test. Against the backdrop of a disease that looms largely in his future and his meager earnings, Hooker’s failure to investigate or enroll in the income contingent repayment plan should not be dispositive.” The case was remanded to the bankruptcy court for reconsideration in light of these circumstances.

Minnesota — A pregnant juvenile who spat at a St. Paul police offer while being arrested could not be subjected to HIV testing at the officers request, according to a May 8 ruling by a unanimous panel of the Minnesota Court of Appeals in In the Matter of the Welfare of E.S.C., 2007 WL 1322346. The juvenile was charged with committing a fourth-degree assault on peace officer and a fourth-degree assault on a corrections agent and admitted the charges. At the disposition hearing, the state requested HIV testing for the benefit of the police officer. The district court granted the state’s order over the juvenile’s protest; blood was drawn, but the test result was reported only to the court and sealed pending appeal. On appeal, the state argued mootness on the ground that the blood had been drawn, an argument rejected by the court of appeals, since the test result had not been revealed. As to the district court’s authority to order the test, the court found that the juvenile offenses law under which E.S.C. was charged did not specifically authorize HIV testing, and that the state law concerning HIV testing listed specific offenses for which such testing was authorized, and the list did not include 4th degree assault. As a consequence, the court found no statutory authority for the test, and ordered the result destroyed. Writing for the court, Judge Willis commented, “We are not without sympathy for the probation officer, and if the legislature agrees with the district court that ‘the protection [accorded to] public employees and taxpayers by ordering a test outweighs the minimal intrusion that E.S.C. suffered as a result of the test, it can amend [the statute] to include [the charged offenses] in the list of qualifying offenses.’ However, the court held, without such statutory authorization, the test could not be required.

New York — Unanimously reversing a ruling by State Supreme Court Justice Joan B. Carey, a panel of the N.Y. Appellate Division, First Department, ruled that discovery requests of medical records containing HIV-related information must be evaluated by the court under a “compelling need” standard, rather than the usual “material and necessary standard.” Plaintiffs in Deriesthal v. Judy, 832 N.Y.S.2d 154 (March 8, 2007), are suing their dentist for malpractice, and the dentist sought discovery of their medical records. Plaintiffs sought a protective order, citing HIV-related information in the records. The trial court denied the order and directed disclosure of the records. The Appellate Division pointed out that the state’s AIDS confidentiality statute, Pub. Health L. Sec. 2785, provides that a court may grant an order to disclose confidential HIV-related information when the party seeking disclosure demonstrates “a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding.”

New York — The defendants claimed that the police interrupted them in a consensual “bondage-style sexual intercourse” scene, but the victim claimed she was tied up against her will while asleep. When one of the defendants saw a police officer standing in the doorway, he said “Oh, shit! Who are you going to believe? The full story is at once terrifying and laugh-out-loud funny, and too long in light of the slight legal significance of the case to relate in detail here. Those interested (or looking for a good set of facts for a crim law exam or a possible episode of Boston Legal) are directed to People v. Taylor, 2007 WL 1365748 (N.Y. App. Div., 2nd Dept., May 8, 2007), upholding the conviction of Ernest Taylor on charges of second degree burglary and attempted robbery. Among the claims rejected by the court was that the victim’s struggles were due to a co-defendant revealing to her putative consensual sexual partner that she was HIV+, information he purportedly learned as her drug counselor. No, we’re not making this up....

Texas — After rehearing, the Texas Court of Appeals has issued a new decision in Christus Health/St. Joseph Hospital v. Price, 207 WL 1500854 (May 24, 2007) (not reported in S.W.3d). We reported on the prior decision in the March issue of Law Notes. The outcome is the same, the court affirming the trial court’s decision upholding a determination by the Texas Workers’ Compensation Commission (TWCC) that defendant Price had sustained a compensable injury, HIV infection, from a needle-stick injury incurred in the course of her employment. The case was vigorously litigated over the proof that Price’s infection was actually contracted at work. A.S.L.

AIDS Legislative Notes

On May 14, Colorado Governor Bill Ritter signed into law H.B. 1292, which requires that school districts use scientific-based standards in their sex education courses. On the issue of abstinence instruction, the bill would require that sex education courses also teach about contraception and sexually-transmitted diseases if they are teaching about abstinence as a method of preventing pregnancy or disease transmission. The Gazette, May 15. This measure effectively disqualifies Colorado from federal AIDS education grant money that requires such education to follow the abstinence-only rule, which Congress insisted upon because its own members who voted to impose these restrictions were virgins when they married and they want to set a high moral standard for the nation in emulation of themselves not! A.S.L.

International AIDS Notes

World Health Organization — The World Health Organization has called for a change in emphasis in HIV testing programs in countries where the epidemic is raging most strongly. During a news conference on May 30, Kevin De Cock, head of the WHO’s AIDS efforts, called for routine HIV testing whenever people come in contact with the health care system, as opposed to the current emphasis on offering testing at the option of the patient. Concerns about informed consent, proper counseling, and follow-up treatment for those testing positive have been cited as reasons to avoid mass, routine testing programs, both in the U.S. and abroad. The WHO argues that effective countermeasures to the epidemic will be impossible if large numbers of people remain uninformed about their HIV status. New York Times, May 31.

United States — On May 30, George W. Bush called for a doubling of the U.S. financial commitment to HIV prevention and treatment activities overseas. In 2003, he initiated a program for the U.S. to spend $15 billion over the federal fiscal years 2003–2008, with a goal of subsidizing treatment for two million patients in Africa and Asia. That goal fell short, and now Bush proposes that $30 billion be spent during the federal fiscal years 2009–2013. New York Times, May 31. The devil will be in the details. U.S. money does not come with strings, and there are been litigation over the restrictions Congress and federal regulators have imposed on the use of that money, particularly in terms of restriction on recipients who engage in family planning activities that include abortion or that work with sex workers. Congressional and administrative moralists generally oppose HIV prevention programs that emphasize safer sex for prostitutes and distribution of clean IV works to drug users, and such restrictions tend to undercut prevention efforts.

Brazil — Valuing life over commerce, the government of Brazil decided to override the patent held by the international pharmaceutical company, Merck, on the drug efavirenz, so that the government can obtain a generic version of the drug from India in affordable quantities necessary to meet the urgent demand in Brazil, where a quarter of the AIDS patients in treatment are using the drug. The cost from Merck has been $580 annually per patient.
Merk offered a 30% discount to try to head off this action, but the government determined it could obtain the drug from India for less than $170 per patient, making Merck’s offer non-competitive. Thailand overrode Merck’s patent on the same drug last November, for the same reason.

China — The South China Morning Post (May 30) reported that the Department of Health is concerned by a study of gay men showing a drastic increase in the spread of HIV in China due to gay sex. The concern is based on the discovery of a cluster of gay men who met through the internet, twenty of whom were found to be infected. In a matter of six months the cluster increased to 34 infected men, and to 53 after a further six months, of whom 79 percent were confirmed to have had gay activity. Experts are urging the government to undertake a campaign to encourage gay men to use condoms. A.S.L.

**PUBLICATIONS NOTED**

**LESBIAN & GAY & RELATED LEGAL ISSUES:**


Fowler, Kristen H., *Constitutional Challenges to Indiana’s Third-Party Custody Statutes*, 82 Indiana L.J. 499 (Spring 2007).


Scaperlanda, Michael, Rehabilitating the “Mystery Passage”: An Examination of the Supreme Court’s Anthropology Using the Person-alistic Norm Explicit in the Philosophy of Karol Wojtyla, 45 J. Cath. Legal Stud. 631 (2006) (Was Justice Kennedy inspired by the writings of the late Pope John Paul II when he penned the immortal lines underlying his famous abortion and sodomy decisions — to the consternation of the Church?).

Shaman, Jeffrey M., The Right of Privacy in State Constitutional Law, 37 Rutgers L.J. 971 (Summer 2006).

Sigman, Shayna M., Everything Lawyers Know About Polygamy is Wrong, 16 Cornell J. L. & Pub. Pol'y 101 (Fall 2006).


Viscarra, Jeniffer, Langan v. St. Vincent Hospital: A Fearful Court or a Properly Measured Response?, 13 Cardozo J. L. & Gender 439 (Spring 2007).


Wimberly, Rethinking Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment, 60 Vand. L. Rev. 283 (January 2007).


Specially Noted:
Volume 16 of Law & Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues (2007) has been published by students of Tulane Law School. In addition to the articles individually noted above, the issue contains the 2006 Dan Bradley Award Acceptance Speech, by Urvashi Vaid, and the text of the introductory remarks delivered by Anthony D. Romero, Executive Director of the ACLU, prior to the conferment of the Award on Ms. Vaid.

AIDS & RELATED LEGAL ISSUES:

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