THE MARRIAGE EQUALITY MAP EXPANDS

But Illinois Stalls and SCOTUS Rulings Await
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During May Francois Hollande, the President of France, and Jose Mujica, the President of Uruguay, signed into law the marriage equality measures approved by their legislatures in April, and the House of Commons in Britain took a final (third) vote to approve Prime Minister David Cameron’s proposed Marriage (Same Sex Couples) Bill, sending it on to the House of Lords, where fierce opposition from Conservative peers is expected to delay enactment. In Brazil, a conservative party sought review by the nation’s highest court of an order by the National Council of Justice that notary publics cannot refuse to marry same-sex couples or to convert a same-sex civil union into a marriage if the couple seeks such a change in status. In the United States, marriage equality measures were enacted in Delaware, Minnesota, bringing the number of states authorizing formation and recognition of marriages for same-sex couples to twelve, as Nevada legislators took the first steps towards replacing their state’s constitutional ban on such marriages with a new provision allowing them.

In France there had been a slight delay in final executive approval of the law as conservatives had filed a challenge to the law in the Constitutional Council, contending that the measure was inconsistent with constitutional obligations to protect marriage. (The legislature had given final approval on April 23.) On May 17, the Council rejected this challenge, finding no incompatibility between opening up marriage to same-sex couples and any pertinent constitutional provisions. The challengers had raised the argument that the marriage equality measure was inconsistent with existing rules governing lack of automatic co-parenting rights of same-sex couples in civil partnerships (under the new law, same-sex partners will still have to formally adopt their partner’s children) and donor insemination, which under existing law is limited to women who are married to men. According to a report in Guardian.co.uk (May 19), the government has referred the question of medically-assisted procreation to France’s national ethics council, which is expected to issue a ruling later this year. In the meantime, the Constitutional Council opined that passage of the marriage equality law does not constitutionally mandate the government to treat same-sex couples the same as different-sex couples for purposes of reproductive policy, as they are not “similarly situated” concerning sexual procreation, and the new law does not expressly create a “right” to have children. On May 18, Hollande signed the measure and the country’s official journal published an announcement on-line that it was in effect. The first same-sex marriage was performed on May 29 in Montpellier, as the mayor united Vincent Autin, an employee in the city’s tourist office and a gay rights activist, and Bruno Bioleau, a civil servant, who had carefully planned to be the first to marry by taking immediate steps upon signing of the law to make all necessary arrangements. Guardian (UK), May 30. France became the 14th nation to legalize same-sex marriages. Opponents had staged large, sometimes violent, demonstrations against the bill prior to its passage, and some opponents persisted in protesting, including a major street protest in Paris the least weekend in May that led to some violence and arrests, but some political leaders on the right cautioned that continuing public protests were futile and, to the extent they turned violent, counterproductive to public opinion.

Unlike France’s law, Uruguay’s did not go into effect immediately. It was signed and promulgated on May 6, with the government having until August 1 to make such adjustments as might be needed in official regulations governing such issues as divorce and the surnames to be listed on birth certificates of children born to same-sex couples. The English translation circulated on the internet for the operative provision of the legislation states: “Civil marriage is the permanent union, under the law, of two persons of the opposite or same sex.” El Pais, May 6.

There was some initial speculation that U.K. Prime Minister David Cameron, whose Conservative members in the House of Commons were sharply split over the government’s bill (which was strongly supported by the ruling Coalition partner, the Liberal Democrats, and the opposition Labour...
Party) might be backing away from his promise to enact marriage equality, because the subject was totally missing from the Queen’s Speech opening the parliamentary session – the traditional method for setting out the government’s legislative agenda for the session. However, Cameron quickly disavowed any attempt to abandon the controversial measure, and brought it to a vote on May 21, when it passed 366-161, a slightly greater majority than it had received on second reading when there were 175 votes in opposition. The measure still did not receive approval from a majority of the Conservative MPs, however. It appeared briefly that the measure might be sunk by a proposed amendment to simultaneously open up the civil partnership law to different-sex couples, but Cameron secured withdrawal of that amendment by promising its proponents that the government would study that proposal upon enactment of the marriage equality law. This led Labour leaders to drop their initial support for it, amidst speculation that it could result in an enormous increase in pension costs for the government if large numbers of unmarried different-sex cohabiting couples were to form such partnerships.

The measure now goes to the House of Lords, where a large contingent of Conservatives, including Church of England clergy, are expected to oppose it vociferously, beginning with debate on June 3. If the government is serious about enacting the measure despite the sharp split among Conservatives over its merits, opposition in the Lords can delay but not ultimately defeat it. Cameron expressed hope that same-sex marriage will become a reality in the U.K. by the summer. Daily Mail, May 18; BBC News, May 21; Western Mail, May 22.

In Brazil, Chief Justice Joaquim Barbosa of the Supreme Court, who chairs the National Council of Justice, announced on May 14 the Council’s interpretation of a 2011 Supreme Court ruling that had been widely seen as setting a deadline of June 2013 for the legislature to enact an authorization for same-sex marriages. After that measure failed last month, the Council announced that government officials who administer the marriage laws may not refuse to issue marriage licenses to same-sex couples, or to convert existing civil unions to marriages upon the couple’s request. The vote in the Council was 14-1. The Social Christian Party, which had prevailed in opposing the marriage equality measure in the legislature, filed an appeal with the Supreme Court, arguing that the Council’s action was unconstitutional in light of the legislative rejection of a marriage equality measure. Although the outcome remained in doubt, legal scholars in Brazil suggested that the decision was consistent with the 2011 ruling, and within the Council’s authority as a disciplinary body over judges and notaries who had resisted complying with the law. More than ten Brazilian states had already specifically adopted marriage equality legislation.

Further national developments on marriage equality might occur during the summer in Australia and Scotland (see below under International Notes).

In Delaware, the State Senate took final affirmative action on a marriage equality bill following three hours of debate on May 7, voting 12-9, and the measure was promptly signed into law in a ceremony on the capitol steps by Governor Jack Markell, who had personally lobbied the legislature for its passage. Thus, Delaware became the eleventh state to allow same-sex marriages. Same-sex couples will be eligible to apply for marriage licenses beginning July 1. New York Times, May 7.

In Minnesota, the House of Representatives voted 75-59 on May 9 in favor of a marriage equality measure, and the Senate approved the bill on May 14 on a vote of 37-30. Governor Mark Dayton signed the measure into law in front of the state capitol building on May 15, making Minnesota the twelfth state to embrace marriage quality. The Minnesota action, which was sparked by voters’ decisive rejection last fall of a proposed constitutional amendment to ban same-sex unions, was seen as lending momentum to marriage equality forces in Illinois, where the Senate had approved a measure in February, only to see it stall in the House, where proponents said they would not bring it to a vote until they were certain they had commitments from at least the sixty members necessary to enact it. Although statements were circulating during the last week in May that 60 votes were in sight, on May 31 the lead sponsor in the House, Rep. Harris, announced that there would be no vote in this session, signaling that the 60 votes were not yet committed. Harris vowed to bring the measure back at the next session, in November. Meanwhile, marriage equality lawsuits brought by the ACLU and Lambda Legal are still pending in the state courts.

Also still pending are lawsuits pursuing marriage equality in Hawaii and Nevada. In both states, proponents, having lost in federal district court, are appealing to the 9th Circuit, where the outcome might be dictated by a Supreme Court decision on the merits in Hollingsworth v. Perry, the California Proposition 8 case. In the meanwhile, however, plans were underfoot to reintroduce a marriage equality measure in the Hawaii legislature, as Hawaii’s marriage amendment gives the legislature authority to approve same-sex marriages. In Nevada, as noted above, both houses of the legislature have now approved placing on the ballot a constitutional amendment that would repeal the previously enacted anti-marriage amendment and put in its place a state constitutional guarantee of the right of same-sex couples to marry. In order for that measure to go on the ballot, it must be approved again by both house after a legislative election, so the soonest it could appear on the ballot would be 2016. In New Jersey, efforts continued to secure sufficient legislative support to override Governor Chris Christie’s veto of a marriage equality bill that the legislature had approved, the deadline being the end of the current session in January 2014. Litigation by Lambda Legal is also pending in the state courts, arguing that the existing civil union law does not provide the equality of status mandated by the New Jersey Supreme Court’s decision in Lewis v. Harris.

Overshadowing all the marriage equality legislative and judicial action in the United States was the pendency of Supreme Court rulings in Hollingsworth v. Perry and United States v. Windsor, which were argued during the last week of March.
Iowa Supreme Court Finds Health Department’s Refusal to List Nonbirthing Mother on Birth Certificate Unconstitutional

In Gartner v. Iowa Dep’t of Public Health, 2013 WL 1850789 (May 3, 2013), the Iowa Supreme Court affirmed a district court ruling ordering the public health department to issue a birth certificate listing the non-biological mother as one of the parents of a child born to a married lesbian couple during their marriage. Although the Supreme Court, in an opinion from Justice David S. Wiggins, affirmed the lower court’s ruling, it did so on different grounds. Rather than reading Iowa’s “presumption of parentage” statute in a gender-neutral fashion to reach its determination, the Supreme Court instead held that treating married lesbian couples differently from opposite-sex married couples who similarly used anonymous donor insemination to conceive a child violates the equal protection guarantee of the Iowa Constitution.

Melissa and Heather Gartner have been in a committed relationship since 2003. In 2006, they participated in a commitment ceremony with family and friends. Heather conceived the couple’s first child by anonymous donor insemination. Because Melissa and Heather were not legally married at the time of the first child’s birth, the couple went through the formal adoption procedures to ensure Melissa’s name was on the child’s birth certificate. The Gartners successfully navigated the adoption process, which was described by Heather as expensive, intrusive, and laborious.

Soon after the Iowa Supreme Court decided Varnum v. Brien, 763 NW2d 862 (April 2009), which held Iowa’s Defense of Marriage Act unconstitutional and provided for marriage equality, the Gartners married. Heather was approximately six months pregnant with the couple’s second child, Mackenzie Jean Gartner, at the time of their marriage, having obtained sperm from the same anonymous donor.

Despite the couple’s marriage, the birth certificate issued by the Department after Mackenzie’s birth listed only Heather as Mackenzie’s parent. The space for the second parent’s name was blank, even though the couple had filed papers seeking to have Melissa named on the certificate. The Gartners responded by sending a letter to the Department requesting a birth certificate recognizing both Heather and Melissa as Mackenzie’s parents. The Department denied the request, asserting that it would only place the name of the non-birthing spouse in a lesbian marriage on the birth certificate if that spouse first adopts the child. That is, in the Department’s view, the couples’ legal marriage was irrelevant in this context and the Gartners would be required to go through the same process as they did for their first child who was born prior to their marriage.

That led the Gartners, with the help of Lambda Legal, to file suit. The proceedings in the district court culminated with an order that the Department issue a birth certificate listing both Heather and Melissa as parents. The court effectively read Iowa’s presumption of parentage statute, which refers to “mothers,” “fathers,” and “husbands,” as gender neutral. The Department appealed and sought a stay; the district court denied the stay with respect to the Gartners but granted it for other birth certificates the Department may issue for similar married lesbian couples while the appeal was pending.

On appeal, the Iowa Supreme Court explained that rules of statutory construction under Iowa law did not allow it to interpret a statute using both masculine and feminine terms as gender-neutral: it “would destroy or change” the statute’s plain and unambiguous language. Thus, where the statute referred to adding the name of a “husband” as the “father” of a child, it could not be read more generically as spouse to encompass males and females.

However, because the Gartners also brought constitutional challenges below, the court considered the constitutional concerns on appeal. The court focused exclusively on the equal protection challenge brought by the Gartners and did not reach due process.

The court powerfully concludes: “The only explanation for not listing the nonbirthing lesbian spouse on the birth certificate is stereotype or prejudice.”

On this front the court engaged in a refreshingly straightforward analysis. The first step in the equal protection analysis, said the court, is to determine if the “laws treat all those who are similarly situated with respect to the purposes of the law alike.” Thus, if the Gartners are similarly situated to married opposite-sex couples for the purposes of applying the presumption of parentage, the court proceeds to the second step and decides which level of constitutional scrutiny to apply when conducting its review of the challenged statute.

As summarized by the court: (a) the Gartners are in a legally recognized marriage, just like opposite-sex couples; (b) the official recognition of their child as part of their family provides a basis for identifying and verifying the birth of their child, just as it does for opposite-
sex couples; and (c) married lesbian couples require accurate records of their child’s birth, as do their opposite-sex counterparts. Thus, for the purpose of birth certificates, no material distinction exists between married opposite-sex couples and married lesbian couples, and non-material distinctions cannot defeat an equal protection analysis.

In other words, married lesbian couples are similarly situated to spouses and parents in an opposite-sex marriage with respect to the government’s purpose of identifying a child as part of their family and providing a basis for verifying the birth of a child.

Proceeding to the classification and scrutiny portion of the analysis, the court, citing Varnum, finds that the refusal to list the nonbirthing lesbian spouse on the child’s birth certificate “differentiates implicitly on the basis of sexual orientation.” Under Varnum, says the court, a sexual-orientation classification is subject to heightened scrutiny. The State must show that the statutory classification is substantially related to an important governmental objective.

Yet, there is no doubt the Department would place the husband’s name on the birth certificate for a child born to his wife through anonymous donor insemination. Thus, the statute plainly treats a married lesbian who conceived through the same means differently.

The Department argues that such differing treatment is justified by the government’s interest in the accuracy of birth certificates, the efficiency and effectiveness of government administration, and the determination of paternity.

The court, however, thoroughly dismantles these justifications. For example, the court notes that the present system does not always accurately identify a biological father on a birth certificate, as opposite-sex couples using anonymous donor insemination have no trouble getting the husband’s name on the certificate and are not required to disclose to the Department that their child was conceived through donor insemination. Moreover, it is actually more efficient for the department to list the nonbirthing spouse on the child’s birth, rather than to wait to add the spouse after an adoption is complete. More fundamentally, the rationale behind the presumption of parentage, including the need to determine who is financially responsible for a child, is just as important for the children of married lesbian couples.

In sum, the court powerfully concludes: “The only explanation for not listing the nonbirthing lesbian spouse on the birth certificate is stereotype or prejudice.” Accordingly, the court finds the statute as applied to married lesbian couples like the Gartners is unconstitutional. Instead of striking down the statute, the court preserves it as to married opposite-sex couples and requires the Department to apply the statute similarly to married lesbian couples. The court therefore affirms the district court and orders the Department to issue a birth certificate naming Melissa Gartner as the parent of the child, Mackenzie Jean Gartner.

Despite the unanimous ruling from the court, there was some brief but sobering language offered in a special concurrence that serves as a reminder of the political context hovering over many of these judicial decisions.

Justice Edward Mansfield, joined by Justice Thomas Waterman, issued a one-paragraph special occurrence writing. “I agree that if Varnum is the law,” then the result reached by the court is correct. As pointed out in an editorial on the case by the Des Moines Register, both of these justices were among those appointed to replace the three justices voted out in a 2010 retention election after a campaign from marriage equality opponents angered by the Varnum decision. A third justice who was appointed then took no part in the decisions for reasons not explained. The majority noted in passing that as neither the state nor the plaintiffs had asked the court to reconsider the validity of the Varnum ruling, that issue was not before the court. The concurrence reads to this author at best like an invitation for a new case challenging Varnum and at worst like callous political pandering to marriage equality opponents.

Amanda C. Goad (a member of The LGBT Bar Association of Greater New York) and Randall C. Wilson filed a brief for amici curiae ACLU of Iowa Foundation, Inc., Des Moines, for American Civil Liberties Union Foundation and American Civil Liberties Union of Iowa. – Brad Snyder

Brad Snyder is the Executive Director of LeGaL.
In Shaw v. District of Columbia, 2013 WL 1943032 (D.D.C. May 13, 2013), Judge Ellen Segal Huvelle of the U.S. District Court for the District of Columbia considered multiple motions to dismiss a complaint by a transgender woman for discriminatory and unconstitutional treatment by the Metropolitan Police Department (“MPD”) and the United States Marshals Service (“USMS”). This decision is significant because it equates the rights of legally female transgender detainees with all other female detainees. Going one step further, the decision suggests that police department guidelines regarding the treatment of transgender females are evidence of a constitutional right to equal treatment.

Ms. Shaw is a transgender woman. Prior to the arrests in question, she was arrested by the MPD when she was still legally male. As such, MPD records indicated that Ms. Shaw was a man. Ms. Shaw then underwent sex reassignment surgery and had her sex legally changed to female.

Since Ms. Shaw’s surgery and change of legal status to female, she was arrested three times.

The court found that Ms. Shaw pleaded facts sufficient to survive a motion to dismiss on her Fourth Amendment claim on the grounds of qualified immunity. The Fourth Amendment protects individuals from unreasonable searches. Reasonableness in the context of searches requires a balancing of the need for a particular search and the invasion of personal rights. Factors to be considered include the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The crucial questions in evaluating whether qualified immunity applies are: (1) whether a constitutional right would have been violated on the facts alleged, and (2) whether the right was “clearly established” at the time of the violation. “Clearly established” for purposes of qualified immunity means that the right was sufficiently clear so that a reasonable official would understand that his conduct violated that right.

Ms. Shaw’s first constitutional claim was that she was subjected to three unconstitutional searches in violation of the Fourth Amendment while she was in USMS custody. Ms. Shaw seeks to hold the Mr. Kates, Mr. Conboy, and Mr. Musgrove (collectively, the “USMS defendants”) personally liable for those violations. The defendants filed a motion to dismiss Ms. Shaw’s Fourth Amendment claim on the grounds of qualified immunity.
cases involving cross-gender searches between female detainees and male officers to be relevant despite the USMS defendant’s claim of qualified immunity for lack of a “clearly established” constitutional right extending the rights of women to transgender women. Specifically, the USMS defendants argued that, at the time of the searches in June 2009, December 2009, and June 2012, the state of the law was not clearly established as to the classification and searches of transgender female detainees. The court rejected this argument because Ms. Shaw was legally female and, as the complaint alleges, the USMS defendants were aware of this fact. Since she was legally female, the law of cross-gender searches is relevant. Since the law of cross-gender searches is relevant, the USMS defendants next argued that the searches of Ms. Shaw due process rights are violated when: (1) a detainee is incarcerated under conditions posing a substantial risk of serious harm, and (2) the detaining official’s state of mind is one of deliberate indifference to inmate health or safety. “Deliberate indifference” can be demonstrated by the official’s act, or failure to act, despite knowledge of a substantial risk of serious harm. Substantial risk can be shown as obvious from the circumstances. The court found that Ms. Shaw alleged facts sufficient to survive a motion to dismiss on her Fifth Amendment claim. Case precedent regarding the detention of female prisoners establishes that a female detainee has a right not to be sexually harassed, either verbally or physically. The court found cases involving female detainees to be relevant despite the defendants’ claim of qualified immunity for lack of a “clearly established” constitutional right extending the rights of women to transgender women. As with the Fourth Amendment qualified immunity argument, the only support to defendants’ argument is that there is a lack of cases specifically holding that a female transgender detainee has the right to be held separately from men. Again, the court rejected the defendants’ argument because Ms. Shaw is legally female and defendants were aware of this fact.

The court found the remainder of defendants’ arguments to be unpersuasive. Notably, the court recognized that, while they do not articulate clearly established constitutional rights, regulations, reports, and professional guidelines might provide a defendant with notice that conduct is unconstitutional. This is a matter left to a fact finder, but is a significant acknowledgement for future plaintiffs that may now cite law enforcement policies concerning transgender individuals as evidence supporting a claim of a clearly established right.

Second, the court addressed the defendants’ argument that they lacked personal involvement—a requirement to be held individually liable for Ms. Shaw’s constitutional claims. To state an individual capacity claim for damages against a government official, a plaintiff must plead that each defendant, through their own individual actions, violated the Constitution. There are two forms of liability: policymaking liability and supervisory and training liability. For policymaking liability, the plaintiff must allege (1) that the official against whom liability is asserted has the power—vested either formally or as a practical matter—to formulate policy; (2) that the official has exercised that policymaking authority to generate improper practices; and (3) that there is a causal connection between the policy established and the wrong committed. For supervisory and training liability, the plaintiff must demonstrate that the official had an obligation to supervise or train the wrongdoer in the manner alleged, that the duty was breached, and that this breach was the proximate cause of the injury. The duty to supervise is triggered by proof that harm was not merely foreseeable, but was highly likely.

The court dismissed Ms. Shaw’s complaint against Mr. Conboy. Mr. Conboy was the U.S. Marshal for Superior Court until 2008. Since the first arrest in question did not occur until 2009, Mr. Conboy cannot be held liable for failure to supervise or train. As such, only a policymaking claim may be asserted against Mr. Conboy. The court held that the allegations in the complaint could not survive a motion to dismiss because the allegations were conclusory in nature. Ms. Shaw alleged that Mr. Conboy instituted a policy of having male marshals search

The lesson here is that courts will see transgender individuals who have legally changed their gender as simply male or female.

were reasonable cross-gender searches. The court rejected this argument and distinguished the cases cited by the USMS defendants. The court explained that the searches of Ms. Shaw involved intimate physical contact, whereas the cases of reasonable cross-gender searches cited by the USMS defendants were visual only, had female guards present, or involved pat-down only and were conducted in a professional manner.

Ms. Shaw’s second constitutional claim was that her Fifth Amendment right to due process was violated by the conditions of confinement while she was in USMS and MPD custody. Ms. Shaw seeks to hold Mr. Conboy, Mr. Kates, and Mr. Quicksey individually liable for these violations.

Supreme Court precedent provides that

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female transgender detainees and a policy of intentionally disregarding gender information about transgender detainees. Ms. Shaw’s allegations suggest the existence of an unwritten or de facto policy targeting transgender women. But, even assuming that these policies did exist, there is no evidence that Conboy instituted the policies, nor does the complaint suggest that other transgender individuals suffered similar treatment during Mr. Conboy’s tenure.

The court found that Ms. Shaw’s complaint included sufficient facts to survive a motion to dismiss with regard to Mr. Kates’ supervisory liability. The complaint alleges that Mr. Kates engaged in no training or supervision as to the treatment of female transgender detainees despite knowing the harm that was “likely to occur” if plaintiff were treated as if she were male. In response, Mr. Kates argued that he had no duty to train marshals not to treat female transgender detainees as if they were male because there was no history of constitutional violations that suggests the necessity of training and there is no evidence that training was deficient in a manner that would obviously result in the violation of a detainee’s constitutional rights. The court denied Mr. Kates’ motion to dismiss, not because the arguments lacked merit, but because Ms. Shaw pleaded facts sufficient to survive a motion to dismiss.

In conclusion, while the court dismissed several causes of action against certain individual defendants, the heart of the Ms. Shaw’s action will continue to the next stage of litigation. The lesson here is that courts will see transgender individuals who have legally changed their gender as simply male or female. No special case precedent must be created for transgender individuals and courts to rely on the well-established constitutional principles set forth in precedent concerning the treatment of individuals based on their gender.

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3rd Circuit Ruling Shows Limitations of Employment Discrimination Law in a “Temp Agency” Age

As employers increasingly contract with temp agencies to staff significant parts of their business activities, protection of workers under employment discrimination statutes diminishes. A per curiam ruling by the U.S. Court of Appeals for the 3rd Circuit in Scott v. UPS Supply Chain Solutions, 2013 WL 1855726 (May 3, 2013) (unpublished disposition), shows how this works. The court of appeals affirmed a ruling by U.S. District Judge Richard G. Andrews (D. Del.) to dismiss the plaintiff’s employment discrimination claim under Title VII on the grounds that the defendant was not his employer.

Jason Scott was employed by Kelly Services, a temp agency, beginning in 2000. In November 2008, he was assigned by Kelly Services to perform billing and collections work at United Parcel Service’s Newark, Delaware, office, under an agreement between Kelly Services and UPS. Scott signed a document stating that he was an employee of Kelly Services, not of UPS. Kelly Services issued his paycheck, and he reported to a Kelly Services supervisor, who was in charge of his vacation and sick leave requests and oversaw his attendance. Since he was not legally an employee of UPS, he was not given access to the UPS building and had to be admitted by the receptionist when he reported for work. Scott was late or absent several times. After UPS claimed that he had falsified a time entry, Kelly Services notified Scott that his assignment at UPS was terminated, although he continued to receive other assignments from Kelly Services. Convinced that he was terminated from the UPS assignment because of his sexual orientation, Scott filed suit against UPS in federal court, asserting a violation of Title VII of the federal Civil Rights Act of 1964 on the basis of gender stereotyping, and of the Delaware Discrimination in Employment Act, on the basis of sexual orientation. UPS moved for summary judgment, arguing that Scott was not an employee of UPS for purposes of Title VII or Delaware Discrimination in Employment Act coverage. The court of appeals opinion does not report whether UPS bothered to controvert Scott’s allegations of discrimination, but that would be irrelevant for purposes of this motion. Judge Andrews granted the motion and Scott appealed.

The court of appeals panel framed the issue as “whether the facts establish that Scott was, or was not, an employee of UPS as a matter of law.” In a footnote, the court observed, “Scott does not meaningfully dispute the District Court’s conclusion that he was not a UPS employee. He only makes the unsupported assertion that the relationship between Kelly Services and UPS “can be compared to a contractor and subcontractor.” The court proceeded to apply the standard test for employee status under Title VII, using the common law of agency and master-servant doctrine derived from English common law, concepts developed prior to the modern age of temp agency employment, and stated its agreement with Judge Andrews that Scott was not a UPS employee, so Title VII did not apply to any claim he might have against UPS.

In other words, UPS contracted out its billing function to Kelly Services, and effectively contracted away as well any responsibility it might have not to discriminate on grounds specified under Title VII concerning the workers employed by Kelly Services to fulfill its contract with UPS. Clearly, employment discrimination laws are of diminishing help to protect workers against discrimination if a company can effectively insulate itself from discrimination claims by using a temporary agency to staff its business functions. One would think that a concept of “joint employer” would be appropriate to bridge any coverage issues in such a case. Scott was representing himself in this action. Perhaps creative lawyering by experienced plaintiff-side employment counsel could have devised a strategy to overcome this problem, but maybe regulatory or legislative fix is needed.

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Hong Kong Appeals Court Recognizes Marriage Rights for Transgender Woman

The Hong Kong Court of Final Appeal (Hong Kong’s highest court) found on May 13, 2013, that a transsexual woman has the right to marry her male partner, and that such a marriage does not run counter to the Hong Kong statute requiring marriage to be between one male and one female, on the basis that the appellant is now legally female. The court went to great pains, at several points, to make clear that its ruling has no effect on, or relation to the issue of same-sex marriage. W v. Registrar of Marriages, Final Appeal No. 4 of 2012 (on appeal from CACV No. 266 of 2010).

The appellant, identified in the opinion simply as “W,” is a permanent resident of Hong Kong who underwent sex reassignment surgery between 2005 and 2008. In 2008, W’s identity card and passport were updated to indicate that she is now female, but per Hong Kong’s standard practice, her birth certificate was not altered. In November of 2008, W’s counsel contacted the Registrar (dispenser of marriage licenses) to confirm that she would be able to marry her male partner. However, the Registrar responded that “only an individual’s sex at birth counts and any operative intervention is ignored.” W challenged this position, but lost both in the first stage and on appeal. The Court of Final Appeal then took up the question, and determined that the definition of “woman” and “man” in the marriage laws should include transsexual individuals, despite a body of law previously indicating otherwise.

The court reached its decision based on a review of prior cases addressing the issue, as well as its examination of the guarantee of the (heterosexual) right to marry in its constitution.

In a fascinating opinion that could easily pass as a legal history lesson, the court examined the inception of Hong Kong’s marriage statute (essentially a verbatim adoption of the existing UK law stating that marriage is “a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others”), and noted that historically procreation was a significant justification for marriage. Indeed, it is widely known and accepted in Hong Kong as it is in the United States and other locales that a marriage may be nullified if not consummated. That reasoning came into play in a number of historical cases where it was pointed out that, regardless of whether a transsexual individual cosmetically appears to be their newly acquired sex, they are still unable to procreate in the same manner as other born-members of their acquired sex. The court focused chiefly on the UK 1970 case, Corbett v. Corbett, in which Justice Ormrod held that a transsexual woman is not considered to be a woman under the marriage statute – a position that was reached based on the presumption of marriage as primarily a vehicle for procreation.

While the Hong Kong court gave some weight to this historical mindset, it noted that since many of the cases were decided there has been a huge shift in societal and legal attitudes toward procreation in and out of marriage. The law does not require children to result from a marriage, nor does it require that a couple even try to procreate. Most damning to the Corbett position, however, is that the law does not prevent an infertile man or woman from entering into marriage based on the fact that they cannot procreate. The court also noted that the opinion in Corbett placed all its weight on the physiological factors of what determines gender, while in recent years it has become accepted that transsexuality and indeed gender itself is deeply rooted in both psychological and physical factors. Accordingly, the court found that the Corbett justifications for excluding transsexuals from marrying individuals of the opposite sex (to the transsexual’s acquired sex) are outdated and inconsistent.

The court then examined the constitutional ramifications of excluding transsexuals from marriage, particularly since in effect post-operative transsexuals would be barred from marrying anyone regardless of sex based on the Corbett criteria or reproductive capability. Generally speaking, a post-operative transsexual cannot procreate as either their original or acquired sex, and therefore would fail the Corbett test regardless of what gender partner they wished to marry. Cases such as Goodwin v. UK (United Kingdom) and AG v Otahuhu Family Court (New Zealand) have found similarly – that because a transsexual has by definition rejected their former sex, it is inadequate to say that “they remain able to marry a person of their former opposite sex.” In Goodwin the opinion notes that “the applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court’s view, she may therefore claim that the very essence of her right to marry has been infringed.” It is here that one can begin to see the formulation of an argument for same-sex marriage – but alas, the court declined to go down that road.

Instead the court limited its holding to the case at hand, finding that W is indeed a woman for purposes of the marriage statute, since the justification for finding that she is still a “man” in the context of marriage is based on the outdated and inconsistent idea that marriage is all about procreation. The court also noted in passing that this issue has already been decided in the Republic of China favorably to transsexual plaintiffs, and that as a post-operative transsexual W could have sexual intercourse with her male partner and thus consummate the marriage in that respect. –Stephen Woods

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Does “sexual intercourse,” as the term is used in Florida Stat. 384.24(2) and 384.34(5), include anal or oral intercourse between men? The sections in question make it a crime for a person who knows he is infected with HIV to engage in “sexual intercourse” with another person without disclosing this fact. The 2nd and 5th Florida District Courts of Appeal disagree, and the 5th District has certified the question to the Florida Supreme Court to resolve the conflict, in a ruling announced on May 31 in State of Florida v. D.C., 2013 WL 2359490.

The State filed charges against D.C., a gay HIV-positive man, accusing him of violating the cited statutes. D.C. filed a motion to dismiss, contending that the term “sexual intercourse” used in those statutes referred to vaginal intercourse involving a man and a woman, and thus the statute did not apply to the activity for which he was charged. Marion County Circuit Judge Hale R. Stancil, finding himself bound by the only Florida appellate decision on point, L. A. P. v. State, 62 So.3d 693 (Fla. 2d Dist. Ct. App. 2011), granted the motion to dismiss, and the prosecutor appealed to the 5th District Court of Appeal.

In L. A. P., the trial judge had refused to dismiss the charges, and the gay defendant appealed, convincing the 2nd District Court of Appeal that the term “sexual intercourse,” as used without express definition in the statute, meant exclusively sexual intercourse between a man and a woman involving penile insertion in a vagina. The lucky defendant in the 2nd District case was obviously channeling former President Bill Clinton, when he asserted “I did not have sex with that woman” in reference to allegations that he engaged in oral sex with Monica Lewinsky! At the time, the press was full of comments about how many people did not consider oral sex to be actual “sex,” because it could not lead to pregnancy. By definition, then, many people do not consider gay sex to be real “sex.” The same contention has arisen in litigation about marriage equality, opponents arguing that it is impossible for a same-sex marriage to be “consummated” because “sexual intercourse” as traditionally understood is necessary to consummate a marriage.

D.C. encountered a different response from the 5th District Court of Appeal, in an opinion for the unanimous three-judge panel by Judge William D. Palmer. “Both parties maintain that the Legislature’s intent concerning the meaning of the term ‘sexual intercourse’ is clear from the unambiguous language of the statute and that the statute must be given its plain and obvious meaning,” he wrote, asserting that legislative intent “is the polestar that guides statutory interpretation” and that when the statutory language is “clear and unambiguous,” there is “no occasion for resorting to the rules of statutory interpretation and construction,” because “the statute must be given its plain and obvious meaning.” Under Florida Supreme Court precedents, in such situations courts may have recourse to published dictionaries of the English language to determine the meaning of “clear and unambiguous” statutory language.

Judge Palmer then referred to definitions of “sexual intercourse” in four published hard-copy dictionaries, ranging in date from 1976 through 2012, as well as two on-line dictionaries presumably consulted shortly before the opinion was released. All of them broadly defined sexual intercourse in ways that would extend beyond heterosexual vaginal intercourse to include other sexual contact involving penetration. The earliest dictionary cited, Webster’s Third New International Dictionary, gave the traditional definition of vaginal intercourse as well as “intercourse involving genital contact between individuals other than penetration of the vagina by the penis.” More recent dictionaries, reflecting the more explicit language that has entered public discourse since then, largely in response to the AIDS epidemic one suspects, specifically mention “insertion of the penis into the anus or mouth” as a form of sexual intercourse.

Beyond the dictionary definitions, and tacitly abandoning the idea that consultation of legislative history is
California Appellate Court Rejects Biological Mother’s Claim that a Child Only Has One Mother

In California, a woman lost her appeal of a family court decision finding her former domestic partner the presumed mother of her biological child and denying spousal support. In re Domestic Partnership of C.P. and D.F., 2013 WL 2099156 (Cal. App. 4 Dist., May 16, 2013). The California 4th District Court of Appeal, Division 2, noting that the appellant was proceeding pro se, rejected her argument that, inter alia, “California law recognizes only one mother,” which was based on outdated authority.

The parties were identified by their initials only. In 2003, after living in a committed same-sex relationship for an unspecified period of time, C.P. and D.F. decided to raise a child together. After ruling out adoption because C.P. wanted a child of her “own,” the couple agreed that C.P. would attempt to conceive by donor insemination and that they would raise the child together. D.F. and C.P. jointly selected a fertility clinic and sperm donor. They shared expenses related to the baby equally, jointly prepared the home, and D.F. accompanied C.P. to some of her prenatal medical appointments. Shortly before the child was born, C.P. and D.F. registered their domestic partnership. After ruling out adoption because C.P. wanted a child of her “own,” the couple agreed that C.P. would attempt to conceive by donor insemination and that they would raise the child together. D.F. and C.P. jointly selected a fertility clinic and sperm donor. They shared expenses related to the baby equally, jointly prepared the home, and D.F. accompanied C.P. to some of her prenatal medical appointments. Shortly before the child was born, C.P. and D.F. registered their domestic partnership.

In 2004, C.P. gave birth to H. D.F. was present for the birth and drove them home from the hospital. C.P. asked hospital staff to have D.F. listed on the birth certificate, but her request was denied. The couple sent out birth announcements and chose their best friends to be H’s godparents. D.F. worked the graveyard shift to be with H. when C.P. returned to work from maternity leave. D.F. turned down a position so she could care for H, and turned down overtime for the same reason. The couple also shared childcare and other expenses related to H equally.

In September 2006, C.P. and D.F. decided to end their relationship. On October 19, 2006, C.P. filed a petition for dissolution of the domestic partnership. After trial, the family law court found D.F. to be H’s presumed parent and ordered D.F. to pay $261 in child support to C.P. The judgment terminated both parties’ right to receive spousal support from each other. C.P. then timely appealed, pro se.

On finding that D.F. was a presumptive parent, the appellate court noted that the evidence unquestionably supported the trial court’s conclusion, and that there was no evidence that D.F. was not H’s mother. The appellate court also found that denying spousal support was not an abuse of discretion, given the length of time since the termination of the relationship in relation to the actual length of the domestic partnership, the fact that C.P. had stable employment and C.P.’s failure to show that her salary was insufficient to meet her needs.

The court noted that California precedents had rejected the contention that a child cannot have two mothers beginning in 2005, with the California Supreme Court’s decision in Elisa V. v. Superior Court, 37 Cal.4th 108. – Eric J. Wursthorn

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not necessary to interpret “clear and unambiguous” statutory language, the court cut to the chase and noted that the provisions in question, which specifically refer to transmission of HIV, were obviously enacted with the purpose of outlawing sexual contact that could transmit that virus from an infected person to an uninfected one. “The defendant’s interpretation of the statute as being limited to heterosexual vaginal sex runs counter to the Legislature’s intent to efficiently and effectively reduce the incidence of sexually transmitted diseases in Florida,” concluded Palmer. Thus, the court reversed and remanded the decision for further consistent proceedings in the trial court, and certified to the Florida Supreme Court the conflict of interpretation. Without getting into the issue of whether criminal statutes, even as correctly construed, are an “efficient and effective” way to reduce the incidence of HIV transmission, a highly debatable contention, the 5th District’s decision appears on its face to adopt a more logical construction of the statute than the 2nd District’s construction. It is hard to accept the proposition that a term that receives multiple definitions in the dictionaries and that has multiple meanings among members of the public can be said to be “clear and unambiguous,” when two appellate panels disagree as to its meaning. By definition, a term that has multiple possible meanings in popular discourse cannot be interpreted without recourse to contextual evidence of legislative intent, and this very case could be Exhibit A for the proposition that the idea of “clear and unambiguous language” is frequently delusional, given the malleability of language as it evolves in usage. D.C.’s contention as to the common understanding of the term would probably have been correct, as a matter of common usage among a large portion of the public a generation ago., but is no longer in an age of openly-gay celebrities and sexually explicit discourse in mass media.
Non-Biological, Non-Adoptive Ex-Partner Prevails on Judicial Estoppel Theory in New York Custody Dispute

In Estrellita A. v. Jennifer D., 963 N.Y.S.2d 843 (N.Y., Fam. Ct., Suffolk Co., April 2, 2013), Judge Theresa Whelan denied biological mother Jennifer D.’s motion to dismiss her ex-partner’s application for custody/visitation and held that she is judicially estopped from asserting that her ex-partner is not the child’s parent. Jennifer D. asserted that the custody petition filed by her ex-partner Estrellita A., must be dismissed, arguing that Estrellita A. is not a “parent” for purposes of custody/visitation under the Family Court Act (FCA) Article 6, Domestic Relations Law (DRL) §§70 and 240, and thus has no standing to bring this action. The court here found that Estrellita A. is not precluded from seeking custody and therefore denied Jennifer D.’s motion to dismiss.

The issue in the case was whether a non-biological, non-adoptive parent is precluded by the authority of prior cases, which held that a change to the DRL must be made by the legislature in order to confer standing upon a new class of “non-parents,” namely same sex partners. Alison D. v. Virginia M., 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 (1991) and Debra H. v. Janice R., 14 NY3d 576, 930 NE2d 184, 904 NYS2d 363 (2010). Jennifer D. relied on the above authority in her motion to dismiss Estrellita A.’s custody petition. Jennifer D.’s argument is that Estrellita A. is not the biological nor adoptive parent of the child and therefore is precluded by statute and case-law from maintaining this custody/visitation proceeding. However, the facts in this case are not the same as the facts in the two cases cited above.

Jennifer D. then did a complete turnaround and tried to stop Estrellita A. from seeking custody or visitation. It is extremely hypocritical that Jennifer D. was comfortable with her ex-partner being classified a “parent” and paying child support but then was not comfortable with her ex-partner being classified a “parent” and having custody or visitation with that same child. The court’s position was that Jennifer D. could not have it both ways. Additionally, the attorney representing the child asked the court to look at another case, Matter of Bennett v. Jeffreys, 40 NY2d 543 which stands for the rights of a natural parent to control access to her child absent extraordinary circumstances which would drastically affect the welfare of the child. The attorney for the child contends that here, where the parties intended to raise the child together, did co-parent the child for nearly four years prior to their separation and where the court adjudicated petitioner to be a parent, extraordinary circumstances exist warranting application of Bennett v. Jeffreys, but the court rejected this theory on the facts of the case.

In its decision, the court considered the interest of the biological parent to exercise control over who associates with their child, however, the biological parent in this case specifically sought to involve her ex-partner in her child’s life for financial support. Therefore, she can’t now argue the opposite with regard to custody. Having denied the motion, the court set the case for hearing on the merits at the earliest date convenient to the court, counsel and the parties.

Tara Scavo

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FLORIDA – Maybe word is finally getting through to school boards that resisting student requests to establish gay-straight student alliances in schools is futile? At any rate, one day after Bayli Silberstein filed suit against the Lake County, Florida, School Board, seeking to vindicate her right to establish a GSA at Carver Middle School, the Board folded and agreed to a consent decree. The settlement ended months of delay by the school district. The ACLU of Florida sent a letter to the school board on January 23, 2013, explaining the legal rights of students to form such organizations under the federal Equal Access Act, but the school board voted 4-1 on April 22 to table a proposed club policy, which led to filing of the lawsuit on May 1, asserting EAA and 1st Amendment claims. Under the consent decree, the board will officially recognize the newly-formed GSA on the same basis as other student non-curricular clubs. ACLU Press Release, May 2.

ILLINOIS – ExxonMobil, one of the world’s largest energy companies and among the ten largest corporations in the United States, is a prominent holdout against the trend to include sexual orientation in corporate non-discrimination policies. Indeed, when Exxon merged with Mobil, it rescinded Mobil’s corporate non-discrimination policy covering sexual orientation, and corporate management has firmly opposed changing the policy through several rounds of shareholder proposals, none of which has garnered as much as 40% of the vote. ExxonMobil even asked the Security & Exchange Commission if it could refuse to continue affording shareholders the opportunity to vote on such proposals, but was told it must place them on the proxy statements. ExxonMobil has contended that there is no need to add sexual orientation, because it does not discriminate on that basis. Seeking to test that proposition, Freedom to Work, an organization that advocates for gay rights in the workplace, set up a testing situation in response to a job-posting by ExxonMobil for an administrative position in one of its Illinois operations. Freedom to Work, partnering with the Equal Rights Center, which has used such testing methods in other contexts, sent in two resume applications, both very well qualified, one obviously emanating from a gay candidate and slightly better qualified than an almost identical application from a candidate whose sexual orientation would not be deducible from the application. The better qualified gay candidate was never contacted for an interview. The lesser-qualified candidate was contacted multiple times, and even told that the job would be held open for them if they responded by a certain date. Based on this testing experience, Freedom to Marry and volunteer attorneys from Cohen Milstein Sellers & Toll PLLC filed a complaint against ExxonMobil with the Illinois Department of Human Rights, alleging a violation of the sexual orientation provisions of the Illinois Human Rights Act, on May 22.

IOWA – The Iowa Supreme Court affirmed the Polk County District Court’s ruling that a life insurance company’s professional liability insurer had effectively excluded coverage for the life insurance company’s wrongful failure to notify applicants of their HIV status, and thus the life insurance company’s broker could not be held liable for failing to provide timely notification to the professional liability insurance company about the applicants’ claim. Farm Bureau Life Ins. Co. v. Holmes Murphy & Associates, Inc., 2013 WL 2127573 (May 17, 2013). The applicants applied to purchase life insurance policies from Farm Bureau Life in 1999. As part of underwriting the policy, Farm Bureau did HIV testing, and denied the applications “due to blood profile results,” requesting authorization from the applicants to reveal the test results to their physician. The applicants did not respond to this notice and did not learn their HIV-positive status until 2001. In 2002, they filed an action in federal district court in Wyoming against Farm Bureau, which was ultimately settled after the 10th Circuit upheld their cause of action, in Pehle v. Farm Bureau Life Ins. Co., 397 F.3d 897 (2005). Farm Bureau then sought indemnity from their professional liability insurer, Federal Insurance Co., which declined to indemnify on the ground that the claim was not presented to them in a timely manner. It seems that Farm Bureau’s broker did not notify Federal within the time limit of the indemnity insurance
contract. In this current litigation by Farm Bureau against its broker, Holmes Murphy, and Federal, the district court, affirmed by the Iowa Supreme Court, held that Holmes Murphy would not be liable to Farm Bureau unless it was shown that the indemnity policy would have covered this claim. The court found that the professional liability policy expressly excluded claims for “bodily injury” (defined to include emotional distress) and for claims “based upon, arising from, or in consequence of the underwriting of insurance.” The court concluded that this claim fell under these exclusions, since the blood test was performed as part of the underwriting process and the claim was essentially a personal injury claim for emotional distress and lost treatment opportunities. Thus, the broker was off the hook.

MAINE – The Maine Supreme Judicial Court has unanimously rejected the National Organization for Marriage’s contention that its First Amendment rights would be violated by enforcement of subpoenas from the state’s Commission on Governmental Ethics and Election Practices seeking the identity of donors to NOM’s 2009 campaign in favor of a ballot question blocking a marriage equality law from taking effect. National Organization for Marriage v. Commission on Governmental Ethics and Election Practices, 2013 ME 53 (May 30, 2013). This was, in effect, a last-ditch effort by NOM to re-litigate the question, which had been addressed in extensive federal litigation, culminating in two 1st Circuit decision denied review by the U.S. Supreme Court. Simply put, the Court affirmed the Superior Court’s conclusion that requiring NOM and its Executive Director, Brian Brown, to respond to the subpoenas would not inevitably chill political association rights. Indeed, this conclusion is a no-brainer in light of the U.S. Supreme Court’s rejection of a similar argument in Doe #1 v. Reed, 130 S.Ct. 2811 (2010), rejecting the same argument in a dispute over public disclosure of the names of signers of petitions to put a measure on the ballot blocking the Washington State Domestic Partnership Law from going into effect. Absent convincing proof that revealing the information would subject the donors to actual physical danger, the state’s legitimate interest in enforcing its campaign finance laws took priority over any speculative “chill.”

MICHIGAN – In an inscrutable order issued on May 1, 403 Mich. 974, 2013 WL 1847028, the Michigan Supreme Court refused to review the Court of Appeals decision in Attorney General v. Civil Service Commission, 2013 WL 85805 (Mich. Ct. App. Jan. 8, 2013), which held that the Civil Service Commission had not violated the state constitutional ban on marriage when it extended eligibility of health insurance coverage to non-marital partners (both same-sex and different-sex) of state employees, over the protest of the governor and the attorney general. The Supreme Court granted the Attorney General’s motion for immediate consideration, but denied the A.G.’s application for leave to appeal the Court of Appeals decision. The reason stated for denying leave to appeal? “We are not persuaded that the question presented should be reviewed by this Court.” The Court of Appeals had ruled that state statutes placed the decision of how to define benefits eligibility for state employees within the discretion of the Civil Service Commission, and that the marriage amendment had no application to the issue concerning this gender-neutral eligibility rule.

MINNESOTA – A Republican activist in Crow Wing County, Doug Kern, was outraged that Representatives Joe Radinovich and John Ward had voted in favor of the marriage equality bill, in light of the votes in their districts to support the anti-gay-marriage amendment last November, so he circulated a petition seeking a referendum vote to recall the two legislators from office. Having secured the necessary signatures, he submitted his petition to the Secretary of State’s office, which forwarded it to the state supreme court as required by state law. Chief Justice Lori Gildea, who had been appointed to the court by Republican Governor Tim Pawlenty, dismissed the petitions, stating that the votes on same-sex marriage did not meet the state standard for a recall, which is that a legislator be guilty of “serious malfeasance or nonfeasance” of his office. According to press reports, Gildea wrote, “Constituent disagreement with votes taken by their elected representative does not equate to malfeasance by the representative.” A constituent does not have a right to secure his representative’s vote in line with the presumed views of the constituency. PoliticsinMinnesota.com, May 21. Furthermore, we might add, it is unclear that the votes cast on November 5, 2012, necessarily reflected the view of a majority of the registered voters in those districts as of the date in May 2013 when the legislature approved the marriage equality bill. The most that can be said for the November 5 vote is that it recorded the views of those who turned out to vote on that date, far short of 100% of the registered voters in those districts.

NEW JERSEY – U.S. District Judge Stanley R. Chesler dismissed a pro se complaint filed by two male state civil commitment inmates at the Special Treatment Unit under the N.J. Sexually Violent Predator Act, who claimed that their federal constitutional rights were violated because they were not allowed to form a N.J. civil union and were subjected to homophobic comments by the Unit’s staff. Cortez v. Main, 2013 WL 1815422 (D.N.J., April 29, 2013)
(not certified for publication). Based on the allegations of the plaintiffs, Judge Chesler found that the Unit’s officials had not refused to allow the plaintiffs to form a civil union, but had instead sought to dissuade them from doing so as being incompatible with their treatment in the Unit. Thus, he saw no need to rule on the question whether an outright refusal to allow the inmates to form a civil union would violate their federal constitutional rights. Further, the court noted precedents holding that use of homophobic epithets by Unit personnel did not rise to the level of an equal protection violation. The court’s opinion includes a formulaic and incorrect citation of the Supreme Court’s decision in Romer v. Evans (1996) for the proposition that sexual orientation is not a “suspect classification” for purposes of equal protection analysis. The Supreme Court made no express ruling on that question in Romer, deciding that the measure it was asked to review, a Colorado anti-gay constitutional amendment, “defied” traditional equal protection analysis and was unconstitutional for lack of any rational justification. It is unclear why Judge Chesler felt it necessary to make this incorrect assertion in support of his decision to dismiss the equal protection claim, since he cited cases holding that racial epithets by correctional officers did not violate the equal protection rights of prisoners, and race is indisputably a suspect classification. It would have been sufficient for him to have asserted that verbal abuse does not violate the 14th Amendment.

NEW JERSEY – Deciding a complex issue of disability benefits law, the New Jersey Appellate Division ruled in Caminiti v. Board of Trustees, Police and Firemen’s Retirement System, 2013 WL 2338505 (May 30, 2013), that the Retirement Board erred in rejecting a disability retirement benefits claim by the Appellant police officer, who suffered a needle stick injury while apprehending an IV drug-abuser in the course of his duties. Presiding Justice Fuentes wrote the opinion for the unanimous panel. The Appellant, who was promptly brought to the hospital by his work partner, was prescribed HIV prophylactic medication due to the unknown HIV status of the prisoner and was told that this might prevent his contracting HIV/AIDS. He alleged that he suffered both psychological and physical side effects from the incident, most notably that it became impossible for him to perform routine duties that put him in fear of renewed exposure to HIV, leading him to retire and seek disability benefits. The Board reasoned that after six months had gone by and he had not tested HIV positive, it was no longer reasonable for him to fear HIV infection. The court found that this was not the correct test to apply, and that his permanent psychological injuries as a result of the work-related incident could qualify him for the benefits. “As a threshold issue,” wrote the court, “we disagree with the Board’s characterization of what appellant experienced as merely ‘being pricked by a needle.’” The court noted the “extensive medical treatment” that Caminiti underwent, and the “harsh effects on his body” that he experienced as a result of the treatment. “Indeed, appellant eventually was proscribed the same ameliorative drugs given to patients undergoing chemotherapy treatment” to help him deal with the severe side-effects of HIV prophylaxis that he experienced. The court found that in light of this, the Board’s characterization of the officer’s injury as “minor” was incorrect, and that the Board had misinterpreted a series of New Jersey Supreme Court decisions that were intended to clarify the appropriate standards to use in evaluating applications by public safety officers for disability retirements. “This was a singular event that occurred at a specific time and place by an external force; it occurred within the context of appellant’s regular duties, it was not the result of appellant’s negligence, and all of the experts, including the Board’s own witnesses, found him to be mentally incapacitated from performing his duties as a result of the event,” concluded the court.

NEW YORK – U.S. District Judge John G. Koeltl ruled in Davis v. Commissioner of Social Security, 2013 WL 2152568 (S.D.N.Y., May 20, 2013), against the plaintiff’s appeal of a denial of social security disability benefits. The plaintiff, a man living with AIDS, was found by an administrative law judge to have ability to work and thus not to be qualified for social security disability benefits, which are only available for those who are too disabled to hold down a job. “The plaintiff now claims that he lied at his hearing, and originally said he did not need governmental assistance, because he was ashamed of his illness,” observed Judge Koeltl. “However, the ALJ was required to base his decision on the evidence in the record before him. The plaintiff’s current claim that his conditions were much more severe than he represented are not supported by the medical records showing that he sought treatment only sporadically. Rather, the evidence in the record before the ALJ—which included ample medical evidence in addition to the plaintiff’s hearing testimony—indeed established that the plaintiff was capable of performing unskilled sedentary work.”

PENNSYLVANIA – The City of Philadelphia and the Cradle of Liberty Council of the Boy Scouts of America reached a settlement of long-pending litigation over a city-owned building that the Scouts have occupied as their headquarters since 1928. The City had long rented the building to the Scouts for a token amount, until protests were raised due to the Scout’s anti-gay membership
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and employment policies. When the City sought a rent more reflective of market rates, the Scouts screamed foul and went to court, ultimately winning a jury verdict on 2010 that included a massive legal fee award to the Scouts. The City filed an appeal, which was pending as settlement talks finally concluded. As part of the settlement announced on May 3, the Scouts will vacate the building, and the City will compensate the Scouts for improvements they had made to the building over the years in the amount of $825,000. Administrative offices are to be vacated by June 30, and remaining operations to leave by October 31. The City had not yet determined what use to make of the building. For details of the legal issue in the case, see Cradle of Liberty Council, Inc. v. City of Philadelphia, 851 F.Supp.2d 936 (E.D.Pa. 2012) (No. CIV.A. 08-2429) (trial pleadings and numerous intermediate decisions are available on-line).

SOUTH CAROLINA – The South Carolina Supreme Court ruled on May 22 that the state violated the constitutional rights of Jennifer Rayanne Dykes, who pled guilty to “lewd act on a minor” and then placed on lifetime satellite monitoring after she violated the terms of her probation. State v. Dykes, 2013 WL 2242768. According to the opinion for the court by Justice Kittredge, Dykes was 26 when she was indicted upon discovery of her sexual relationship with a 14-year-old female. Upon her guilty plea, she was sentenced to 15 years imprisonment, suspended upon service of three years in prison and five years’ probation. “Because her offense predated the satellite monitoring statute,” explained the court, “she was not subject to monitoring at the time of her plea.” When she was released from prison, she was notified that under Sec. 23-3-540 of the South Carolina Code, commonly referred to as “Jessica’s Law,” she would be subject to satellite monitoring for life without possibility of judicial review if she violated the terms of her five year probation. She subsequently violated probation, but none of the incidents appear to have involved sexual contact with a minor. Nonetheless, the trial court considered itself bound by the statute and upheld the imposition of lifetime satellite monitoring. The majority of the Supreme Court found that Dykes had a liberty interest at stake protected by Due Process; while it found no fault with the initial imposition of satellite monitoring, it held that lifetime imposition without any judicial determination of the likelihood that Dykes would re-offend was unconstitutional. The decision was 3-2, the dissenting justices arguing that in fact a fundamental right was involved and that the satellite monitoring provision was not narrowly tailored to achieve a compelling interest. According to the dissenters, no satellite monitoring should be imposed in the absence of a judicial determination of likelihood of reoffending.

SOUTH CAROLINA – Was it a violation of 14th amendment substantive and procedural due process for doctors at the Medical University of South Carolina to perform irreversible surgery on a 16-month-old infant whose reproductive or sexual anatomy was ambiguous as to gender? The child, identified as “M.C.” in a complaint filed on May 14, was under the state’s care but living with guardians, after his mother was found “unfit” and his father had been found to have “abandoned” him. State social welfare officials allegedly made the decision to subject M.C. to the surgery, instructing his foster family to deliver him to the hospital, and retained decision-making authority with respect to his medical treatment until his subsequent adoption in 2006 by different couple, after the surgery had been performed. The adoptive parents disagreed with the treatment, but it had been completed before they gained custody and adopted the child. The doctors sought to render M.C. female by removing the underdeveloped phallus and constructing a vagina. According to the complaint, the doctors, identified at birth as male due to external genitalia, was subsequently found to have “ambiguous genitals” and both male and female internal reproductive structures. The doctors concluded that the child “was a true hermaphrodite but there was no compelling reason that she should either be male or female.” The child is now eight years old and, despite being initially raised as a girl, has shown signs of developing a male gender and self-identifying as a boy despite the anatomical alterations, which are normally supplemented in such cases by hormone treatments as the child nears puberty to reinforce feminine development and appearance. Now his parents and family are supporting him in living as a boy. In other words, such operations could be characterized as involuntary gender reassignment surgery, performed at a time when the individual is too young to have any discernible gender identity. At the time the surgery was performed, there was an emerging consensus among advocates in the field that irreversible surgery should not be performed in such cases, giving the individual the right to determine his or her own gender identity without any irrevocable choice having been made for them. U.S. case law is lacking, but there are already some decisions in other countries supporting the idea that performance of such surgery may violate the rights of the infant to personal self-determination of gender identity, an idea that seems consistent with the U.S. Supreme Court’s ruling in Lawrence v. Texas as it pertains to individual liberty in matters of sexual identity and expression. M.C. is represented in the litigation by the Southern Poverty Law Center, Advocates for Informed Choice, and pro bono counsel from Janet Jenner & Suggs and Steptoe &
Johnson LLP. The defendants also include the South Carolina Department of Social Services, Greenville Hospital System, and individual doctors and other employees involved in the surgery. *M.C. v. Aaronson*, Civ. Action No. 2:13-cv-01303-DCN (U.S. Dist. Ct., D. South Carolina, Charleston Division). The case has been assigned to District Judge David C. Norton.

**TEXAS** – Collin County, Texas, District Court Judge John Roach, Jr., decided that a “morality clause” contained in divorce papers required that the mother’s same-sex partner cease to live with her and her children. Such clauses are standard in divorce decrees in Collin County and generally in Texas. Carolyn Compton’s divorce from Joshua, her ex-husband and the father of her children, was finalized in 2011, when Compton had already been living for some time with Page Price, her same-sex partner. Compton’s ex-husband raised the “morality clause” as part of a custody dispute, and Judge Roach concluded that under its terms, which provide that anyone not related “by blood or marriage” may not be in Compton’s home after 9 pm when the children are present, Price must move out. The judge gave Price 30 days to do so, according to Price’s posting on her Facebook.com page, rejecting Carolyn Compton’s argument that enforcement of the clause is discriminatory, but at the same time rejecting Joshua’s argument that Carolyn should be held in contempt, jailed and fined for each violation of the clause. “It’s a general provision for the benefit of the children,” said Roach, who added, “It’s applied equally to everybody.” Texas law forbids recognition of same-sex marriages, so even if Compton and Page were to marry in another jurisdiction they could not live together in Texas together with the children without violating the “morality clause.” Joshua Compton’s attorney, Paul Key, said that he wanted the clause enforced for his children’s benefit, and “The fact that they can’t get married in Texas is a legislative issue; it’s not really our issue.” *Dallas Morning News*, May 21. An appeal of Judge Roach’s order might attempt to raise due process arguments, noting that under *Lawrence v. Texas*, the U.S. Supreme Court ruling from 2003 that invalidated Texas’s Homosexual Conduct Law, the right of same-sex couples to live together is arguably protected as a liberty interest under the 14th Amendment.

**WASHINGTON STATE** – Attorney General Bob Ferguson filed suit in April against Arlene’s Flowers and its owner, Barronelle Stutzman, alleging a violation of the state’s public accommodations law when Stutzman refused to provide floral arrangements for a long-time customer’s same-sex wedding. In May, Stutzman struck back with a countersuit, claiming a violation of her 1st Amendment rights of freedom of speech and association. Her counsel, Dale Schowengerdt, stated, “Everyone knows that plenty of florists are willing to assist in same-sex ceremonies, so the state has no reason to force Barronelle to violate her deeply held beliefs.” Responding to the countersuit, Ferguson stated, “As an individual, she is free to hold religious beliefs, but as a business owner, she may not violate our state’s laws against discrimination.” The same-sex couple, Robert Ingersoll and Curt Freed, had not filed any kind of complaint against Stutzman, but they made known their unhappiness and Ferguson, picking up on news reports, initiated the lawsuit on behalf of the state. The legislature enacted a marriage equality law last year, but its effect was stayed until the public ratified it in the general election in November. *Los Angeles Times*, May 23. ***Willamette Week***, a newspaper in Oregon, reported that a lesbian couple seeking a cake for their same-sex ceremony were turned down by some bakeries. The newspaper, curious about this phenomenon, called the bakeries to find out what other cakes they would refuse to provide, but encountered no discouragement from ordering cases to celebrate divorces, unmarried parents, stem-cell research, non-kosher barbecues and pagan solstice parties, according to a second-hand report published in an online blog May 30 by the *Milwaukee Journal Sentinel*. The Willamette newspaper referred to the issue as “Cake Wars.”

**LABOR ARBITRATION** – In United Government of Wyandotte County/Kansas City and Wyandotte County Sheriff’s Dept. and Fraternal Order of Police, Lodge 40, FMCS Case No. 12/01414-T, 131 Lab. Arb. (BNA) 1209, 2013 WL 1924629 (April 3, 2013), Arbitrator Douglas Bonney considered a protest against discipline imposed on a male deputy sheriff for engaging in sex with female former inmates of the city jail. The grievant sought to assert a constitutional due process claim, relying on *Lawrence v. Texas* (2003). The arbitrator suggested that the constitutional protection recognized in *Lawrence* did not apply to the “fleeting” sexual activities at issue in this case, noting the rhetoric of the decision about intimate personal relationships. “The Court repeatedly couched the right to sexual privacy at stake in *Lawrence* in terms of intimate, enduring personal relationships,” wrote Bonney. “Based on this and similar language in the majority opinion, some courts have read *Lawrence* to protect only sexual intimacy in the context of enduring relationships. In addition, even scholars who favor the broadest possible right to sexual privacy have observed that *Lawrence* ‘can be read as protecting sex only when it promotes emotional intimacy and the potential for a long-term bond between two people.’ Laura A. Rosenbury & Jennifer E. Rothman, “Sex In and Out of Intimacy,” 59 Emory L.J. 809, 824 (2010). Thus, there is a very substantial legal question
whether Lawrence protects the kind of fleeting, sex-only conduct at issue in this case.” Ultimately, the arbitrator resolved the issue by reference to the compelling interest of the Sheriff’s Department in ensuring untainted criminal investigations and prosecutions and protecting crime victims from sexual exploitation by police officers.

CRIMINAL LITIGATION NOTES

ARMS Forces COURT OF APPEALS – Now that gay and lesbian people can serve openly in the military, the difficulties of navigating around Article 125 of the Uniform Code of Military Justice (the military sodomy ban) become more complicated. After the Supreme Court decided Lawrence v. Texas in 2003, military courts concluded that private, adult consensual “sodomy” in the military was constitutionally protected unless there was some element in addition to the commission of consensual sodomy that made the conduct at issue “prejudicial to good order and discipline.” See United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004). Since most military sodomy prosecutions, similar to civilian criminal prosecutions, result in guilty pleas, the military appeals courts have become consumed with the question of “improvident pleas” entered by members who are not adequately advised of the fine distinctions between protected and unprotected sexual conduct in a military context. Such is the issue in United States v. Medina, 2013 WL 1858421 (C.A.A.F., May 2, 2013), where the court affirmed a ruling by the U.S. Coast Guard Court of Criminal Appeals, holding that Gunner’s Mate First Class Wilson Medina had not been adequately advised prior to entering his guilty plea. Referring to one of its prior decisions, the court said, “Because the inquiry did not establish the accused’s personal understanding of the relationship between the facts he was admitting and why his plea to voluntary sexual activity with an adult could nonetheless be subjected to criminal sanction, we held that the plea was improvident.” In Medina’s case, wrote the court, “the military judge and Appellee engaged in a dialogue during which the military judge elicited facts in an attempt to demonstrate that Appellee’s sexual activity was subject to criminal sanction. However, the dialogue did not meet the requirements [of prior cases], which are different from the standard for legal sufficiency, because the military judge failed to ensure Appellee’s personal understanding of matters critical to his guilt; namely, why these additional facts removed his sexual activity from the protection recognized in Lawrence and Marcum and subjected that activity to criminal sanction.”

ARMS Forces COURT OF APPEALS – In another case concerning the application of Lawrence in the context of a military sodomy prosecution, the Court of Appeals ruled in United States v. Castellano, 2013 WL 2319345 (May 23, 2013), that the question whether the prosecution has established the necessary factors to make consensual sodomy criminal under UCMJ 125 involved factual determinations for the jury. Mr. Castellano, married marine Lance Corporal, was charged, among other things, with committing sodomy with a female neighbor, also a Marine lance corporal. The charge was forcible sodomy, but Castellano defended on grounds that the act was consensual and performed in private. The military judge left to the jury whether the conduct was forcible or consensual, but did not charge the jury as to the Marcum factors, finding as a matter of law that “the additional factors that were relevant strictly in a military environment which would put this beyond the Lawrence liberty interest would be the fact of the accused being married to a fellow service member living next door principally and therefore that these actions between neighbors when all three of these individuals belonged to the military had the potential to be prejudicial to good order and discipline or service discrediting certainly put this outside the Lawrence liberty interest.” The appeals court, in an opinion by Judge Ryan, found that this violated the due process rights of the defendant. “We hold that whether a Marcum factor exists is a determination to be made by the trier of fact based on the military judge’s instructions identifying facts or factors that are relevant to the constitution context presented,” wrote the court. “Accordingly, there, the military judge’s decision to determine the existence of the Marcum factor himself, and his failure to appropriately instruct the members, violated Appellant’s right to due process.” The court ordered a retrial on the sodomy charge. A concurring judge differed with the majority’s characterization of post-Lawrence military case law on whether conduct is “open and notorious” for purposes of determining the Marcum factors, noting that the majority had unquestioningly cited a pre-Lawrence case as authority.

“I do not believe that the broad holding of United States v. Berry, 6 C.M.A. 609, 20 C.M.R. 325, 1956 WL 4521 (1956), remains good law after Lawrence,” wrote Judge Stucky. “Similarly, I question the majority’s suggestion that the type of ‘public conduct’ the Supreme Court envisioned as a possible exception to the liberty interest in Lawrence is equivalent to the conduct this Court deemed ‘open and notorious’ prior to Lawrence.”

ARMS Forces COURT OF APPEALS – In yet another case, decided the same date as Castellano, supra, United States v. Goings, 2013 WL 2319327 (May 23, 2013), the Court of Appeals held that Lawrence would not insulate from prosecution a situation where a male
military member engaged in sexual intercourse in his off-post apartment with a woman while another man filmed them. Regardless whether the sexual activity was private and involved only adults, Judge Ryan wrote for the 4-1 panel, having another man present to film the encounter made it “open and notorious” and thus prejudicial to good order and discipline. Ryan cited Berry (see above) on this point, drawing the expected dissenting opinion from Judge Stucky! Stucky argued that “the record shows that Appellant’s conduct falls within Lawrence’s privacy interest, and that none of the factors listed in Lawrence or the military-specific factors suggest in Marcum disturb this privacy interest.” Stucky would have found Goings’ conduct to be constitutionally protected. While both Castellanos and Goings involve heterosexual conduct, the rulings are significant in light of the repeal of Don’t Ask, Don’t Tell and service by openly gay members, who may find themselves the subject of prosecutions for conduct that they consider private and consensual.

FLORIDA – National media attention focused on the prosecution of Kaitlyn Hunt, an 18-year-old high school senior who is accused of two felony counts of “lewd and lascivious battery” on a child between the ages of 12 and 16 because of her consensual sexual relationship with a fellow student at Sebastian River High School in Indian River County, identified in news reports as C.S., age 14, who she had been dating since November. According to news reports, C.S.’s parents became aware of the relationship and waited until Kaitlyn reached age 18 to contact law enforcement, so as to bring the relationship within the felony statute. Kaitlyn could face up to 15 years in prison and classification as a sex offender with lifelong ramifications for her future education and employment if she is convicted. On-line petitions quickly began to circulate calling for the prosecutor to exercise discretion to allow Kaitlyn to plead to a misdemeanor, but no such offer was placed on the table and Kaitlyn rejected a felony plea offer that would have involved two years of house arrest and sex offender registration on May 24. Miami Herald, May 24. * * * The Hillsborough County prosecutor has charged Tavares Spencer, 16, with a hate crime for shooting Terrence McDonald, a cross-dresser. According to a May 31 report in the Tampa Bay Times, McDonald, 22, agreed to meet “Vares” at a designated address after first meeting him at a party a week earlier. Police said that the house at that address was vacant. When McDonald showed up at the appointed time, Spencer drew a gun and ordered him to the ground, then shot him. “McDonald pretended like he was dead,” said the newspaper account, “but was Spencer walked away, he got up and ran. Spencer saw him running and fired again,” but missed. “Spencer also stole McDonald’s purse and cellphone,” and later bragged in text messages, using “graphic language to describe McDonald’s sexual orientation.” He is charged with attempted murder, robbery and aggravated battery with a deadly weapon. Spencer is being held without bail and will be tried as an adult. He has a lengthy arrest record, and was already in custody on an unrelated robbery charge when McDonald identified him for police based on a photograph.

MISSISSIPPI – An autopsy report on the death of Marco McMillian on February 27 indicated that Lawrence Reed admitted killing McMillian, who was an openly-gay candidate for mayor of Clarksdale, Mississippi. McMillian was considered to be the first viable openly gay candidate for public office in Mississippi. Reed is being held for trial on murder charges, amidst speculation that the crime was bias-related. Mississippi hate crime law does not include sexual orientation, but does include race. McMillian was African-American, as is Reed, so race is not likely to have been a motivating factor in this case. However, there is a possibility that federal prosecutors could get involved under the federal law hate crimes amendments that added sexual orientation, if the necessary basis could be found for federal jurisdiction. Washington Post, May 4.

NEW YORK – The N.Y. Appellate Division, 2nd Department, upheld the conviction of Hakim B. Scott, one of the defendants in a hate crime prosecution concerning the murder of Jose Sucuzhaney, wrongly perceived by his assailants to be gay, to judge by the epithets they used when attacking him and his brother in the early morning hours of December 7, 2008, in Brooklyn. While finding no error in the trial and that the evidence was legally sufficient to sustain Scott’s conviction of manslaughter in the first degree, the court did reduce his consecutive sentence on conviction for attempted assault in the first degree from a determinate term of 12 years to a determinate term of 4 years, while sustaining the determinate term of 25 years for the manslaughter conviction. People v. Scott, 2013 WL 2233912, 2013 N.Y. Slip Op. 03695 (May 22, 2013).

NEW YORK – The New York County District Attorney’s office secured the indictment of Elliot Morales, 33, for the bias-related murder of Mark Carson, a gay man, in Greenwich Village on May 18. Carson’s murder was one of half a dozen bias-related crimes against gay men in Manhattan during May, setting off protests and demonstrations by the community, and anguished proclamations that Manhattan no longer felt like a safe place for openly-gay men. * * * In another case, Cornell Roman surrendered to the NYPD after Commissioner Ray Kelly publicly
identified him as a suspect in an attack against a homeless gay man, Dan Contarino. Roman lived in the same homeless shelter as Contarino, and reportedly “snapped” after Contarino disclosed his sexual orientation. Roman will be charged with assault as a hate crime. Newsday, May 23.

LEGISLATIVE NOTES

FEDERAL – IMMIGRATION - Although Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) had proposed amendments to the pending comprehensive immigration reform legislation that would have allowed same-sex couples to enjoy the same rights as different-sex married couples, other Democratic senators on the Committee prevailed upon him (with behind-the-scenes urging of the White House, it was reported) to withdraw his amendments due to assertions by Republicans on the Committee that any such amendments would split the coalition of groups supporting immigration reform, thus doomning the legislation. Leahy stated that he was withdrawing his amendments with a “heavy heart,” and New York Senator Charles Schumer, among those Democrats on the Committee who urged withdrawal of the amendments, called LGBT supporters in New York seeking to rationalize his position. LGBT political groups issued scornful denunciations of the action as “selling out” the LGBT constituency, while at the same time recognizing that even without these amendments the proposal as it finally passed the Judiciary Committee would be helpful to LGBT immigrants in many respects. The measure as it cleared Committee would provide a path to citizenship for thousands of immigrants who were brought to the U.S. as children by their parents, and would do away with the one-year statute of limitations to file asylum claims that has tripped up so many individuals who arrive in the U.S. unaware of the legal possibilities to assert asylum claims based on their sexual orientation. It would also liberalize provisions governing occupational visas for non-citizens. Of course, depending how the Supreme Court rules in United States v. Windsor on Section 3 of the Defense of Marriage Act, it may turn out that at least one of the amendments would be unnecessary to assist same-sex couples, since those who were legally married under state law might be able to claim recognition under federal law if DOMA is invalidated. * * * Prior to Senator Leahy’s announcement that he was withdrawing his amendments, the New York City Bar Association sent a letter to the members of the Committee endorsing the amendments, co-signed by chairs of the Association’s Immigration & Nationality, Sex & the Law, LGBT Rights, and Civil Rights Committees. The letter pointed out that failure by the U.S. to recognize legal same-sex marriages for immigration purposes could open up U.S. married couples to reciprocal discrimination by other countries. “New Yorkers who have entered into valid same sex marriages may find themselves barred from temporary and permanent immigration opportunities abroad due to our nation’s failure to recognize these couples,” wrote the Association. This struck home with us, having recently learned that a former student and his foreign national same-sex spouse (married in New York), are being transferred to London as part of his spouse’s promotion by a European-based international business, and are counting on their legal same-sex marriage to smooth matters for immigration purposes.

FEDERAL – EMPLOYMENT DISCRIMINATION - Senator Tom Harkin announced that hearings and mark-up on the current version of the Employment Non-Discrimination Act (ENDA) would probably take place during the summer. The current, inclusive version of ENDA would prohibit discrimination on the basis of sexual orientation and gender identity or expression by employers who are covered by the Title VII of the Civil Rights Act of 1964. This would include both state government workers and private sector employees of companies with 15 or more people on their payroll. Prior to 1993, the “gay rights bill” introduced repeatedly in Congress over a period of twenty years was targeted at amending a variety of federal civil rights laws to add “sexual orientation” to prohibited grounds of discrimination in employment, housing, public accommodations, and public benefits. However, in response to the public uproar over the initial proposal by the Clinton Administration to end the ban on gay military service, that bill was refashioned as a narrow stand-alone employment discrimination measure that would ban only disparate treatment and eschew affirmative action claims. As recrafted, it came within one vote of passage in the Senate in October 1996, but was not brought to a vote in the House. At that time, Republicans controlled both houses of Congress, and the vote on ENDA was part of a deal to bring the Defense of Marriage Act (DOMA) to a vote in the Senate without consideration of amendments that had been proposed by the small band of anti-DOMA Democrats led by Senator Ted Kennedy of Massachusetts. Congressional consideration of sexual orientation discrimination then became dormant through the years of Republican control in both Houses, until Democrats retook the House in 2006 and passed ENDA in 2007, amidst some controversy over the omission of gender identity or expression from the bill. After Democrats won control of both houses in 2008, a new version of ENDA was introduced, similar to the current version, which added gender identity or expression. However, ENDA remains
narrowly focused on employment, continues to eschew affirmative action or disparate impact claims, and also disclaims imposing any requirement that employers provide domestic partnership benefits. Indeed, the version introduced during the first Obama term incorporated by reference the strictures of DOMA. There were no house votes on ENDA during the first Obama term because the administration determined to pursue gay rights legislation one measure at a time, targeting hate crimes and repeal of Don’t Ask, Don’t Tell as the highest priorities. Both of those were achieved before Republicans won control of the House in the midterm elections. Although ENDA has been introduced in both houses in the current session, nobody expects it to go anywhere in the Republican-controlled House, but passage by the Senate of the inclusive current version of ENDA would be a major step, particularly since enactment requires the cooperation of a least a handful of Republican senators in a chamber where nothing of significance can pass without at least a 60% majority. Depending how the Supreme Court rules in U.S. v. Windsor, the pending challenge to Section 3 of DOMA, ENDA might get more tweaking in committee.

**ARIZONA** – At the end of April the legislature enacted and Governor Jan Brewer signed into law H.B. 2280, which preempts the authority of county and municipal governments to legislate on employee benefits other than those of their own employees. The measure passed the Senate 17-11 and the House 32-27. The clear intent of the legislation is to prevent municipal governments in Arizona’s cities, some of which tend to be more liberal than the state legislature, to require private sector employers to extend any benefits to same-sex partners of their employees. While federal law, ERISA, already preempts state or local regulation of employee benefit plans, this law would extend to all employer benefits, whether embodied in ERISA-governed plans or not. *Bloomberg BNA Daily Labor Report*, 84 DLR A-13, May 1, 2013. * * * After the Attorney General opined that Bisbee, population 5,600, was in violation of state law when it passed an ordinance to establish civil unions, the city’s government “tweaked” the ordinance to substitute contractual terminology and re-enacted it. *Christian Science Monitor*, May 22.

**CALIFORNIA** – The Assembly has approved A.B. 1266, which clarifies existing law prohibiting discrimination against transgender students. The bill takes on two of the more controversial aspects of school life – restrooms and sports – providing that students are to be allowed to use facilities and participate in activities in accord with their gender identity. The measure passed without any votes from Assembly Republicans. School districts in Los Angeles and San Francisco already adopted such policies in response to the general ban on gender identity discrimination in public facilities that was adopted years ago, showing other districts that it is possible to adopt such policies and implement them successfully. In a news report about the measure, the *Los Angeles Times* (May 10) quoted spokespersons from both of those districts to the effect that the policies had been implemented successfully. Judy Chiasson, program coordinator for the LA schools, said, “It’s resolved problems, not caused them.” Gentle Blythe, speaking for the SF district, said that there had been no complaints from students or their families, and that students had not abused the rules. “It’s not something where one day a student can identify as a boy and another day identify as a girl,” Blythe said. * * * The California Senate approved S.B. 323, which would eliminate non-profit youth groups’ exemption from state sales, use and corporate taxes if they discriminate on the ground of sexual orientation, according to a May 30 report in the *Los Angeles Times*. The measure was specifically aimed at California units of the Boy Scouts of America. Despite the recent vote by the Scouts to allow gay boys to participate beginning January 1, 2014, the organization continues to ban gay adults from leadership roles.

**CONNECTICUT** – Governor Dannel Malloy signed into law Public Act 13-48 (S. 70), which, according to a report in *CCH Workday*, May 30, “restores state benefits for military veterans who were previously denied federal benefits based solely on their sexual orientation pursuant to a federal policy prohibiting homosexuals from serving in the armed forces, which has since been repealed.” The law takes effect October 1, 2013.

**COLORADO** – On May 3, Governor John Hickenlooper signed into law a measure that expands the scope of family for whom Colorado employees are entitled to take leave from work under the federal Family and Medical Leave Act. The new law goes into effect early in August, unless a referendum petition succeeds in placing it on the general election ballot, in which case implementation would be delayed until after a vote. Under HB 13-1222, an employee can take FMLA leave to care for a person who is the employee’s civil union partner under state law or a domestic partner who has registered their partnership with the municipality or the state or is recognized by the employer as a domestic partner without such documentation. The Colorado Civil Union Act, passed earlier this year, went into effect on March 21, authorizing state-registered civil unions beginning May 1. This new employee leave statute was seen as a necessary step to implement the Civil Union Law’s intent to provide equal rights to same-sex couples. (It is an example
of how civil union laws in some other jurisdictions fall short of conferring full equality.) CCH Workday, May 14 (2013 WLNR 11840168).

ILLINOIS – The West Aurora School Board voted to revise the Student Handbook to add “gender-related identity” as a prohibited ground of discrimination against students. The Board also approved a social media policy, providing: “Statements made through social media that are of threatening nature or disruptive to the educational process, whether on or off campus, will be subject to disciplinary actions.” The Beacon News (Aurora, IL), May 10.

MICHIGAN – At the end of May, several Democrats in the State Senate introduced four bills intended to advance recognition of same-gender marriages in the state, according to a May 29 news release from Equality Michigan. One, Senate Joint Resolution W, would place on the ballot a proposal to repeal the anti-gay-marriage constitutional amendment adopted by voters in 2004. Sen. Res. 64 calls on the federal government to repeal DOMA. S.B. 405 would repeal statutory limits on same-gender relationships that predated passage of the constitutional amendment. Finally, S.B. 406 would provide for recognition of same-gender marriages performed in other states. ** Suburban government leaders from Meridian, Delhi and Delta townships have announced that they planned to introduce measures for consideration by local governing boards in their communities to ban sexual orientation discrimination through local ordinances. The Michigan legislature has been resistant to statewide legislation on this topic. Such votes may take place during June. Lansing State Journal, May 9.

NEVADA – The legislature passed and Governor Sandoval signed into law S.B. 139, which adds gender identity and expression to the state’s hate crime law. The bill achieve near-unanimous approval in the state senate (only one dissenter) and passed the assembly by a comfortable margin of 30-11. Legal Monitor Worldwide, May 22, 2013 (2013 WLNR 12555146). ** The Assembly voted 27-14 in favor of a resolution to repeal the state’s constitutional ban on same-sex marriages and replace it with a measure authorizing same-sex marriages. The same resolution was approved in April by the State Senate. If both houses of the legislature approve the resolution again in the next legislative session, it would be placed on the general election ballot, most likely in 2016. At the rate support for same-sex marriage is growing, it would be likely to pass by then, but the necessity for considering it could be short-cut by pending litigation, both a direct challenge to the anti-marriage amendment now pending before the 9th Circuit Court of Appeals, and the possible impact of a broad ruling on the merits by the U.S. Supreme Court in Hollingsworth v. Perry, the case in which the 9th Circuit ruled that California Proposition 8 was unconstitutional. However, most observers were discounting the likelihood of such a ruling in Hollingsworth.

PUERTO RICO – The legislature passed two important LGBT rights measures during May, which were signed into law by Governor Alejandro García Padilla on May 29. One prohibits employment discrimination on the basis of sexual orientation or gender identity. The other includes same-sex couples in the state’s domestic violence law. Lambda Legal News Release, May 29.

LAW & SOCIETY NOTES

BOY SCOUTS OF AMERICA - On May 23, a national assembly of 1400 volunteer leaders in the Boy Scouts of America voted to approve a proposal by the organization’s executive officers to allow openly-gay boys to participate in the Cub Scouts and Boy Scouts. Over 60% of the leaders voted to support the recommendation, which was made after a wide-ranging survey of opinion within the organization showed that there was majority support for such a change, but not for allowing openly-gay adults to serve as volunteer leaders. The executive leadership presented no recommendation concerning the existing policy against gay adult participation, and the assembly took no action on that question. Gay pundits and observers were divided in assessing the action. While some hailed it as progress, others emphasized the continuing discrimination against adults, now compounded by the reality that openly-gay Scouts will be told at age 18 that
their participation is no longer welcome. It seemed that the organization now had two policies at war with themselves, with the likelihood of renewed litigation reopening the issue purportedly settled by the Supreme Court in the Boy Scouts of America v. Dale, 530 U.S. 640 (2000). New York Times, May 24. In Dale, the Supreme Court ruled 5-4 that the First Amendment expressive association rights of the Scouts must take priority over a New Jersey statutory ban of sexual orientation discrimination by places of public accommodation, overruling a 4-3 decision to the contrary by the New Jersey Supreme Court. At the heart of the Supreme Court ruling was the BSA's assertion that allowing openly-gay James Dale to serve as an assistant Scoutmaster while he was president of the Rutgers University Gay Student organization would compromise the BSA's message of disapproval of homosexuality to its youth members. Presumably the new youth membership policy means that BSA no longer considers disapproval of homosexuality to be part of what it tries to communicate to its members. As such, the question of non-discrimination concerning adult participation recurs, and more litigation is likely. In the immediate aftermath of the vote, some religious bodies that sponsor Scout troops indicated that they would discontinue their sponsorship when the policy takes effect January 1, and there was some talk about forming a new, “gay-free” Scouting organization.

PEACE CORPS – Reflecting the determination of the Obama Administration to expand the rights of same-sex couples to the extent permissible under existing law, the Peace Corps announced on May 21 that it would start accepting applications from same-sex couples who want to volunteer to serve together in overseas assignments. The application process will open to same sex couples starting on June 3. According to a report on Out Traveler, married different-sex couples have been serving together on Peace Corps overseas assignments since the program began in 1961, and currently 7 percent of Peace Corps assignments are filled by married volunteers serving together.

UNIVERSITY OF GEORGIA – The University announced in May that it will begin offering “soft benefits” – voluntary dental, vision, and life insurance – to domestic partners of employees, expecting that about a third of the couples who apply will be same-sex couples. The employees will have to pay for their partners to receive the benefits. Because of a state Defense of Marriage constitutional amendment, the University cannot provide “hard benefits” – those that involve expenditure of state funds – for same-sex partners. Several other state schools in Georgia have similar programs, according to a May 23 report by InsideHigherEd.com. The University’s spokesperson said that the decision was a “competitive” one, because “the majority of our peers do it, it’s the ability to compete for talent.”

PUBLIC OPINION – Another source heard from. The National Geographic Channel released the results of a survey on Americans’ attitudes towards marriage. Not surprisingly, the survey found that almost 90% of respondents were opposed to allowing polygamous marriages. But the survey reflected the evolving public support for same-sex marriage, showing that 61% were in favor of allowing same-sex couples to marry, and 59% said that they would support a constitutional amendment allowing same-sex marriages. Newsfile via NewsRx.com, 2013 WLNR 12690453 (May 27, 2013).

PROFESSIONAL SPORTS – Who’s first? Professional soccer player Robbie Rogers “came out” earlier this year, at the same time announcing he had retired from Major League Soccer. Then Jason Collins, a veteran National Basketball Association player, “came out” after his team’s season had ended and, as a free agent, wanting to continue playing but uncertain whether he would be signed by a team for next season. Then Rogers changed his mind about retiring and signed on with the Los Angeles Galaxy, playing as a substitute in a game on May 26, thus becoming the first openly gay man to play in regularly scheduled a major league sports game, albeit one that does not have quite the cachet of baseball, basketball, football or hockey in the U.S. In the “annals” of “gays in sports,” who gets the designation of “first man out?” This is now a subject of debate.

EXXON MOBIL – A shareholder proposal for Exxon Mobl to add sexual orientation to its company’s formal non-discrimination policy went down to defeat by a 4-1. All of the company’s major international competitors formally ban such discrimination. Management opposed the proposal, asserting that Exxon Mobil does not discriminate and the measure was unnecessary. Management made this

INSURANCE COVERAGE FOR GENDER TRANSITION – Trustees of the University of Illinois voted May 29 to approve a student health insurance plan for the Chicago campus of the university that will cover gender reassignment surgery for the first time. There is a growing recognition that such treatment is not merely “cosmetic” but is becoming accepted as appropriate treatment for a serious medical condition. In reporting on the action, the Chicago Tribune (May 30) mentioned that “about three dozen other colleges” have added such coverage in recent years. This step is logically consistent with the growing body of precedent involving transgender prison inmates and the recent U.S. Tax Court ruling that such expenses of such procedures are deductible from income tax similar to other medical treatments, and are no longer characterized as non-deductible cosmetic procedures.

INTERNATIONAL NOTES

EUROPEAN COURT OF HUMAN RIGHTS – The Grand Chamber (full court) of the European Court of Human Rights has rejected a petition to review a ruling issued on January 15, 2013, in Eweida and Others v. the United Kingdom, CHR Fourth Section (Application Nos. 48420/10, 59842/10, 51671/10, and 36516/10), which dealt with religious freedom claims asserted by British citizens, some of whom objected to complying with sexual orientation non-discrimination requirements. The litigant who didn’t appeal was Nadia Eweida, a British Airways employee who won a ruling that her employer had to accommodate her desire to wear a crucifix while on duty, the court determining that her religious freedom claim trumped the employer’s concern about offending customers. Her “victory” was overshadowed in media accounts by the defeats of Shirley Chaplin, Gary McFarlane and Lillian Ladele. Chaplin, a geriatrics nurse, sued over her transfer to an administrative job when she refused to remove a crucifix hanging from her neck. The court found that the hospital had voiced legitimate safety concerns about hanging jewelry, regardless of its religious symbolism, in a patient treatment job. McFarlane was dismissed as a relationship counselor by the charity Relate in Bristol, because of his objection to providing counseling to same-sex couples, and Ladele, a local authority registrar in Islington, was dismissed for refusing to conduct civil partnership ceremonies, a part of the job for registrars in local government offices. In both of these cases, the court held that the employer’s goal of providing equal, non-discriminatory service to the public outweighed the individual’s religious objections. The denial of review makes the Chamber decision the final ruling of the Court on the matter. Guardian (UK), May 29. Some religious leaders in the UK decried the ECHR’s refusal of further review, claiming that the ruling would have a “chilling effect” on the right of religious observers to maintain their beliefs in their daily lives.

ALBANIA – Gay rights organizations in Albania reported to the International Lesbian and Gay Organization that the Parliament has approved a law that will treat as an aggravating circumstance that crimes were motivated by the sexual orientation or gender identity of the victim. The legislature also approved establishing a new crime of “providing to the public or distribution of deliberate materials containing racist, homophobic or xenophobic content, through the communication and information technology.”

AUSTRALIA – The issue of same-sex marriage continued to receive daily press mention in Australia, as proposals to force a vote in Parliament prior to national elections mounted, and there was significant debate within the Labor Party, whose leader, Prime Minister Julia Gillard, is personally opposed but reportedly willing to not to enforce party discipline, thus allowing Labor members to vote their conscience. At the same time, the P.M. was opposed to voting on pending proposals prior to the elections. Just to roil the waters, former Prime Minister Kevin Rudd, who had opposed same-sex marriage while in office, announced that he had a change of heart and was now a supporter for marriage equality. * * * Grappling with sexual diversity, the Court of Appeal of New South Wales ruled on May 31, 2013, that the Administrative Decisions Tribunal erred in asserting that a person must be designated either male or female on official documents. Ruling in the case of Norrie v. NSW Registrar of Births, Deaths and Marriages, [2013] NSWCA 145, the court faced a contention by a post-operative transgender person who uses only the first name “Norrie” that the individual was neither male nor female and sought an alternative designation of gender. The court held that as a matter of construction, the word “sex” used in the statute concerning vital records documents “does not bear a binary meaning of ‘male’ or ‘female’,” and thus when a person undergoes a surgical gender transition and seeks a change on their birth certificate, the Registrar does have authority to register an individual in a category that is neither male nor female. The court remanded the matter to The Administrative Decisions Tribunal “to determine if it is satisfied that a person’s sex may be registered as

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‘non-specific’.” The appellant was born in Scotland in 1989, classified as male, and subsequently underwent “sexual reassignment surgery,” testifying that she undertook the surgery “to eliminate the ambiguity in relation to her sex,” such ambiguity being that she identified as having a non-specific gender identity. At first the Registrar agreed to so identify her, but then some weeks later informed her that although her change of name was approved, the term “not specified” was changed to “not stated,” and Norrie brought the matter to the Tribunal, which agreed with the Registrar that he had no authority to register somebody as other than male or female. The ruling appears to leave open the question how intersex individuals can be registered; at present, they are registered in their preferred gender. The court’s lengthy opinion, replete with extensive consideration of statutory interpretation, legislative history, case law dealing with sexual minorities, and scientific evidence, is available on its website.

CANADA – Health Canada has changed the rules on blood donations by gay men. Instead of a lifetime ban on donations by men who have had sex with men anytime since 1983, the agency has adopted a five-year rule. Gay men will be allowed to donate blood if they have not had sexual contact with another man in the past five years. A coalition of groups that has formed to oppose the categorical blood donation ban pointed out that this rule will not make any difference for “a vast majority of people who are affected by the ban,” in effect stating that only celibate gay men can donate blood. The coalition argues that any ban should be based on whether the individual has engaged in conduct likely to transmit HIV or other sexually-transmitted infections, not whether they have had any sexual contact. It points out that a heterosexual man who has had unprotected sex with multiple women poses a greater threat to the blood supply than a gay man who has been in a monogamous same-sex relationship during the past five years. The policy change comes in response to a 2010 Ontario Superior Court ruling that upheld the existing ban, but opined that there was insufficient evidence to support an “indefinite deferral period.” A spokesperson for Canadian Blood Services suggested that the new policy would give the organization time to collect data to be sued in reviewing the policy. *Globe and Mail*, May 23.

GEORGIA – The Georgian Orthodox Church encouraged anti-gay individuals to attack a gay rights rally in Tbilisi, resulting in a riot and several injuries. The police subsequently arrested four men who had been identified from video recordings as participants in the mob that attacked the rally. The men face up to 90 days in prison for hooliganism and disobeying police orders to disperse. Although press reported that members of the clergy were prominent among the attackers, none of those arrested was a priest. *New York Times*, May 22.

GIBRALTAR – Gibraltar Equality Rights Group reports that the Supreme Court of Gibraltar issued a ruling on April 10, 2013, holding that an adoption statute providing that only a married different-sex couple or a single person can adopt a child was unconstitutional to the extent it precluded adoption by a same-sex couple who had produced a child through donor insemination. The case involved a lesbian couple, one of whom donated the ovum that was fertilized and then implanted in the other, so that one woman was the genetic mother and the other was the birth mother. They then filed an adoption petition to secure recognized legal parental status of the child for both of them, which was denied by the lower court. The Gibraltar court noted rulings by British appellate courts requiring equal treatment as between same-sex and different-sex couples as a basis for its ruling. We were unsuccessful in locating a copy of the opinion on the Gibraltar courts website, which appears not to be updated on a timely basis. The Government indicated it would take appropriate steps to modify the adoption law to comply with this ruling.

NIGERIA – The *Associated Press* (May 30) reported that the House of Representatives approved legislation that would ban gay marriage and outlaw the establishment of any organization supporting gay rights, authorizing prison terms up to 14 years for offenders (who could include anybody who facilitated or participated as witnesses in gay marriages, although their prison sentences would be capped at 10 years). A previous version of the bill had been passed several years ago by the Senate, and changes may have to be reconciled before it is sent to President Goodluck Jonathan. Both U.S. and U.K. diplomatic officials have pressured the president not to sign it, observing that it would violated international human rights standards. Gay sex has been criminal in Nigeria since the days of British colonial rule, and there is, of course, no protection against discrimination based on sexual orientation in Nigeria, a country where gays are routinely targeted for violent attack. Nigeria is relatively impervious to threats of cutting of financial aid from Western countries, due to its oil-based economy.

PORTUGAL – The *Associated Press* reported May 17 that Portugal’s parliament had enacted a law allowing second-parent adoptions for married same-sex couples, but resisted extending to married same-sex couples equal adoption rights to those enjoyed by married different-sex couples. The
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measure, proposed by the Social Party, which had enacted the right of same-sex couples to marry when it was in power, was passed with a slim margin of 5 votes in the 230-seat body.

ROMANIA – Ruling on a case referred by the Romanian courts, the European Court of Justice (Third Chamber) announced in Asociata ACCEPT v. Consiliul National pentru Combaterea Discriminarii, Case C-81/12 (April 25, 2013), that a statement by a shareholder identified by the public and mass media as having a significant role in a professional athletic team that the team would never hire a gay player could be considered evidence of a policy of sexual orientation discrimination, placing a burden on the team to show that they did not have such a discriminatory policy. The court also opined that it would be insufficient under European law for the only redress for such a situation to be a warning and advice to comply with the law, but that it was up to the Romanian courts to determine what an appropriate remedy should be. A gay rights organization in Romania filed a complaint with the national civil rights agency after Mr. Becali, a shareholder prominently identified with FC Steaua, a professional soccer team, stated in a press interview where the topic of gay athletes was broached, “Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. . . There’s no room for gays in my family and [FC Steaua] is my family. It would be better to play with a junior rather than someone who was gay. No one can force me to work with anyone. I have rights just as they do and I have the right to work with whomever I choose.” The complaint is also filed against the team, for failing to disavow Becali’s remarks or disassociate itself from them. Shortly after making these remarks, Becali reported sold his shares in the team, but that fact was not made public for some months thereafter. There was some argument about whether, in the absence of an actual case of refusal to hire a particular individual, such statement could be held to violate either Romania’s own civil rights law – which forbids sexual orientation discrimination in employment – or European Union law, and whether a warning concerning the club’s employment policies would be sufficient remedy under European law. The European court opined that the facts presented would be sufficient to show a violation of European law, and that more than a warning would be required for a remedy. In a case where such a statement was made, the burden would shift to the employer to show that it does not maintain a discriminatory policy.

RUSSIA – A small gay pride demonstration in front of Moscow city hall led to several arrests, according to a May 25 report on Metronews. Ru. Despite rulings by European human rights tribunals holding that Russian authorities are violating the European Convention on Human Rights by refusing to authorize such events, municipal officials in Russia continue to deny permits for any public demonstration by gay rights proponents (see, e.g., “Moscow Rejects Bid to Hold Gay Rights Parade”, NYTimes, May 15) and the Russian Parliament continues to consider a measure that would effectively outlaw such activities as a form of “propaganda of homosexuality” aimed at minors.

SCOTLAND – Scottish Health Secretary Alex Neil announced that the Marriage and Civil Partnership (Scotland) Bill would be introduced in the current parliamentary session, prior to the summer recess. The bill would make marriage available to same-sex couples, and would relieve church or religious celebrants from any requirement to conduct same-sex marriages. Talks are continuing with the UK government about whether an amendment would be needed to UK equality legislation to protect individual marriage celebrants who may object to conducting same-sex marriage ceremonies. Daily Telegraph (UK), May 29.

SLOVENIA – ILGA-Europe reported that the Constitutional Court of the Republic of Slovenia issued a decision on April 9 holding that the Inheritance Act violates the nation’s constitution because of unequal treatment of same-sex partners. The decision gives the parliament six months to modify the law, holding the unregistered same-sex partners living in a long-term relationship are entitled to the same rights as unmarried different-sex partners. In common with many countries in Europe, Slovenia accords substantial legal recognition to unmarried different-sex cohabiting couples. While this appeal was pending, a public referendum rejected a proposed Family Code revision that would have cured this problem in March 2012.

UKRAINE – A court in Kiev agreed with city authorities that a gay pride demonstration should not be allowed in central part of the city. City authorities argued that the proposed event could lead to violence, pointing to the recent violence against gay rights demonstrators in Georgia that was apparently sparked by religious leaders from the Orthodox Church. Associated Press, May 24. In any event, Ukraine’s first public gay pride event was held May 25 at an alternative location that organizers publicized to those who had registered in advance to participate, and a large police presence provided security, eventually arresting some anti-gay protesters who attempted to infiltrate the small parade. The small contingent of marchers was bussed to a safe location.

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United Kingdom – Legal Monitor Worldwide, 2013 WLN 12895339, reported May 25 on a decision by Mr. Justice Stephen Cobb, High Court in London, Family Division, concerning a parentage claim by the lesbian former partner of a mother who had conceived using donor insemination during their relationship. Justice Cobb found that as “necessary paperwork” had not been submitted to the fertility clinic staff before assisted reproduction treatment began, the ex-partner could not be declared the child’s legal parent under current fertilization and embryology legislation. The decision was announced on May 24. Justice Cobb stated that his ruling was likely to be “devastating” for the ex-partner, but nonetheless “legal duties” must be rigorously observed. According to the news report, the women had begun their relationship in 1997, and began living together in 1998. In 2008 they contacted a fertility clinic and selected a donor, resulting in the birth of twins in 2010, with the birth mother and her partner both being recorded as “parent” in the registration of the births. The women separate in 2011, and the partner applied to the High Court for an order allowing her to maintain contact with the boys, but the birth mother objected, contesting her claim to be a legal parent. Justice Cobb found that under the 2008 Human Fertilisation and Embryology Act, the “second woman” in a same-sex relationship could be deemed a parent but only if “consents to parenthood” were executed and submitted to the clinic prior to the performance of treatment. Justice Cobb said that he would schedule another hearing to consider other possible grounds for a contact order. “This judgment discusses the serious implications for the patients, and the child born to those patients, when the legal duties, procedural requirements and regulatory principles are not observed rigorously,” he wrote. “Had they been so applied, when the parties to this case had purported to achieve the grant of ‘parental’ status to the ‘second woman,’ a great deal of distress, and this part of this litigation, would almost certainly have been avoided.” The judge found that the women had not been properly advised about the importance of complying with the paperwork requirements at the time.

United Kingdom – Two former University of Birmingham students from Pakistan are seeking asylum after having become the first Muslim couple to become civil partners in the U.K. According to British press reports, Rehana Kausar and Sobia Kamar “tied the knot at a registration office in front of their solicitors and two Pakistani friends” early in May. They then filed for political asylum in the U.K., asserting that their lives would be endanger were they required to return to Pakistan. There were reports that the women had received death threats from Muslims in the U.K. as well as from Pakistan. Gay sex is illegal in Pakistan, there is no protection against discrimination based on sexual orientation, a honor killings are carried out by family members when individuals are discovered to be gay. Sunday Mercury, Birmingham, May 26.

Zambia – The Guardian (UK) reported on May 8 that two men had been arrested and charged with sodomy after relatives of one of them contacted the police. They were released pending trial, but then arrested again and denied bail after “they were found in the act again,” according to Zambia Central Province Police Chief Standwell Lungu. The prisoners, James Mwape and Philip Mubiana, were reported to have been living together for some time. Lungu claimed that medical tests proved that they had sex “against the order of nature contrary to the laws of Zambia.” Judging by his comments in speeches and judicial opinions, U.S. Supreme Court Justice Antonin Scalia would approve of this prosecution. Scalia, dissenting upon the majority’s statement about changing attitudes in international law by emphasizing the many countries – mainly in Africa and Asia – that continue to impose criminal penalties for private acts of consensual sodomy between adults.

Professional Notes

On May 20 the Senate by voice vote confirmed President Obama’s nomination of Michael McShane to the U.S. District Court in Oregon. Judge McShane will be the first openly-gay person to serve in that district. He previously served on the Multnomah County (Oregon) Circuit Court. McShane was first nominated in September 2012, then was re-nominated after the new session of Congress convened in January. According to the Washington Blade (May 21), there are several other federal judicial nominations pending of openly-gay or lesbian appointees, including Nitza Quinones Alejandro (E.D. Pa.), Todd Hughes (U.S. Court of Appeals, Federal Circuit), Elaine Kaplan (Court of Federal Claims), and William Thomas (S.D. Fla.).

President Obama has nominated Chai Feldblum to a second term as a commissioner of the Equal Employment Opportunity Commission. Feldblum is an openly-lesbian attorney and Georgetown University law professor who played a key role as an ACLU Staff Attorney and lobbyist in the drafting and enactment of the Americans with Disabilities Act and started the nation’s...
first law school clinical program on legislative lawyering. Prior to joining the ACLU she clerked for U.S. Supreme Court Justice Harry Blackmun. She has taken a leading role at the EEOC in getting the Commission to broaden its understanding of sex discrimination to extend to sexual minorities. Her current term ends on July 1.

The New York City Bar Association honored longtime LeGaL member LARRY CHANEN with its 2013 Diversity & Inclusion Champion Award. Chanen, who is Senior Vice President and Associate General Counsel for JPMorganChase, is the senior sponsor of the JPMorganChase Pride LGBT employee networking group, and is a leader of the bank’s legal department’s Diversity Committee. New York Law Journal, May 10, 2013.

The American Bar Association’s Section of Litigation has presented its Diversity Leadership Award to LARRY SMITH, an openly-gay lawyer practicing in Orlando, Florida, to recognize his work in promoting diversity in the legal profession. In 1999, according to the Florida Bar News (June 1, 2013), he became “the first openly-gay member of Supreme Court Commission of Florida with the goal of promoting diversity and inclusion of all people.” He is a co-founder of the Central Florida Gay and Lesbian Law Association, and successfully led efforts in several central Florida jurisdictions to get sexual orientation added to nondiscrimination policies.

We note the passing of prominent civil rights lawyer and advocate BARBARA BRENNER, leader of Breast Cancer Action, who died May 10 in San Francisco. Brenner, a graduate of University of California at Berkeley Law School, is survived by her partner of 38 years, Suzanne Lampert. New York Times, May 23.

As part of a series to introduce readers to the presidents of Bar Associations in the NYC metropolitan area, the New York Law Journal published a brief profile of LeGaL President KARL RIEHL on May 24. Riehl took office as president of LeGaL on January 9. Other officers of LeGaL noted in the Law Journal piece include First Vice President FRANK MARTINEZ, Secretary and Second Vice President MATTHEW SKINNER, and Treasurer CAPRICE BELLEFLEUR.

New members of the Board of Directors of LAMBDA LEGAL elected at the board’s May meeting include VADIM SCHICK (Senior Counsel, John Hopkins Health System, of Washington, D.C.), ROBERTA CONROY (retired Senior Vice President of Capital International and Capital Guardian Trust Company, of Los Angeles), and LAURA MAECHTLLEN (Partner in the San Francisco office of Seyfarth Shaw LLP).

WORLDPRIDE HUMAN RIGHTS CONFERENCE 2014 will be held June 25-27, 2014, in Toronto, Canada, in conjunction with WorldPride 2014 Toronto, an international event incorporating activism, education, and the history and culture of LGBTTIQQ2SA communities, which will be held June 20-29, 2014. June 15, 2013, is the deadline to submit proposals for workshops, panels and presentations as part of the Human Rights Conference. The online application form is available at http://bit.ly/10UXK7j. Applications can also be submitted by surface mail to: Bonham Centre for Sexual Diversity Studies, University College, University of Toronto, 15 King’s College Circle, Toronto, ON CANADA M5S 3H7. All applications must be received by June 15, 2013. There will be a registration process for the conference and attendance will be limited to registrants. More information about potential subject matter for the program can be found at the conference website: http://www.uc.utoronto.ca/worldpride-human-rights-conference-2014/.

LAMBDA LEGAL is accepting applications for a Senior Staff Attorney or Staff Attorney to engaged in “cutting-edge impact litigation, public policy advocacy, and education furthering Lambda Legal’s mission,” to be located in Lambda’s national headquarters office in New York. “A key component of the position will be further development of Lambda Legal’s work with LGBT communities of color. The attorney will focus on the intersection of HIV, sexual orientation, and gender identity with other characteristics such as race, immigration status and class, in the context of civil rights advocacy.” Qualifications include a minimum of five years’ experience as a practicing attorney, including litigation experience. The position is open until filled, with interviews beginning May 20. For more details, see the Lambda website. Send resume, brief legal writing sample (preferably including discussion of a constitutional, discrimination, or other complex issue) and a letter or email explaining your interest in the position and how you learned of the job opening to: Katy Tokieda, Legal Administrative Manager, Lambda Legal, 120 Wall Street, 19th Floor, New York NY 10005, ktokieda@lambdalegal.org, mail to jfjarnsworth@lambdalegal.org. Include the words “Senior Staff Attorney/Staff Attorney position” on the first line of the address of the envelope or the subject line of the email. No telephone calls, please. Lambda is an equal opportunity employer.

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26. Engel, Stephen M., Frame Spillover: Media Framing and Public Opinion of a Multifaceted LGBT Rights Agenda, 38 Law & Soc. Inquiry 403 (Spring 2013) (Fascinating account of how the media coverage of Lawrence v. Texas, which tended to highlight Justice Scalia’s dissenting assertion that the Court’s ruling opened the way to same-sex marriage, produced an adverse effect on public opinion in the short term by associating the ruling with same-sex marriage in the eyes of the public, which at that time was heavily opposed to same-sex marriage).


35. Gee, Graham, Same-Sex Marriage and Perry: A Case for Judicial Minimalism,
PUBLICATIONS NOTED

42. Huntington, Clare, Staging the Family, 88 N.Y.U. L. Rev. 589 (May 2013) (notes how proponents of marriage equality emphasize conformity of same-sex families to traditional images of family life).
43. Iyama, Karri, “We Have Tolled the Bell for Him”: An Analysis of the Prison Rape Elimination Act and California’s Compliance as It Applies to Transgender Inmates, 21 Tulane J. L. & Sexuality 23 (2012).
44. James, Seymour W., Jr., Working Toward Fundamental Human, Civil Rights for All, NY L.J., May 1, 2013, at 10 (President of NY State Bar Association highlights the Association’s work on marriage equality).
49. Kissel, Adam, Victims as Victimizers%, 26 Academic Questions 106 (Spring 2013) (review of Bruce Bawer’s %The Victims’ Revolution: The Rise of Identity Studies and the Closing of the Liberal Mind%).
61. Nix, Jesse, and Chris Wharton, More Than Marriage: Utah’s System of De Jure Denigration Goes Before the U.S. Supreme Court, 26-JUN Utah B.J. 24 (May/June 2013) (summarizes amicus brief filed with U.S. Supreme Court in Hollingsworth v. Perry to show how Utah’s exclusion of same-sex couples from marriage denigrates their family relationships).
69. Repole, Lauren E., Direct Tyranny: The Human Rights Act as a Safeguard Against Harmful Majoritarianism in Jackson v. District of Columbia Board
of Elections and Ethics, 43 Seton Hall L. Rev. 685 (2013) (How same-sex marriage was saved from a referendum in the District of Columbia).


73. Rose, Kristian Bryant, Looking for Love in All the Wrong Places: A Call to Reform State Law on Sex Trafficking, 65 Okla. L. Rev. 303 (Winter 2013).


80. Snyder, Brad, Aiming for Equal Treatment, NY L.J., May 1, 2013, at 10 (Executive Director of LeGaL comments on the struggle for marriage equality in light of pending Supreme Court cases).


88. Thomas, Curtis, Substantive Due Process: The Power to Grant Monopolies in the Federalist Marketplace of Experimentation, 2013 B.Y.U. L. Rev. 393 (2013) (argues that Supreme Court’s substantive due process jurisprudence should be limited to “natural rights,” and that Lawrence v. Texas was an inappropriate use of substantive due process to interfere with state law).


98. Wardle, Lynn D., Marriage and Other Domestic Relationships: Comparative and Critical Equality Analysis of Differences in Form and Substance, 26 J. Civ. Rts. & Econ. Dev. 663 (Spring 2012) (We’ve heard this before, of course).


SPECIALY NOTED
Vol. 37, No. 1 of the New York University Review of Law & Social Change (2013) is devoted to an extensive symposium, titled “The Past, Present, and Future Role of Hollingsworth v. Perry,” considering the constitutional challenge to Section 3 of the Defense of Marriage Act pending before the U.S. Supreme Court as we go to press. A few articles from the symposium were listed in last month’s issue of Lesbian/Gay Law Notes when they showed up on our programmed Westlaw search, but we will list all of the symposium articles in this month’s Publications Noted. ** Vol. 26, No. 3 of the Journal of Civil Rights and Economic Development published by students of St. John’s University Law School contains a symposium titled “Legal, Secular, and Religious Perspectives on Marriage Equality/Marriage Protection/Same-Sex Marriage.” Individual articles are noted above.

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

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

All comments in Publications Noted are attributable to the Editor.

Correspondence pertinent to issues covered in Lesbian/Gay Law Notes is welcome and will be published subject to editing. Please address all correspondence electronically to info@le-gal.org.

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