The South African government barely met the deadline set last year by the Constitutional Court in *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC), to cure the constitutional violation created by denying same-sex couples access to equal marriage rights. That court had specified that the government had until December 1, 2006, to put in place legislation to cure the violation. Legislative action in mid-to-late November resulted in the enactment of a measure that makes marriage available to same-sex couples, although lingering traces of inequality may give rise to future litigation. The bill, called Civil Union Act, was signed into law November 30 by Acting President Phumzile Mlambo-Ngcuka, acting in the absence of President Thabo Mbeki, who was traveling outside the country.

South Africa becomes the fifth nation to open up full marriage to same-sex couples, following the lead of The Netherlands, Belgium, Spain and Canada. Several other countries provide civil partnerships or registered partnerships carrying almost full marriage rights, such as the United Kingdom and several Scandinavian countries, and some other countries allow for registration and limited rights for same-sex partners, such as Germany and France. In the United States, Massachusetts allows marriage, Vermont and Connecticut provide civil unions, California and New Jersey provide domestic partnerships, and Hawaii makes available reciprocal beneficiary status, but these all fall far short of full marriage rights, not least because a federal statute, the Defense of Marriage Act of 1996, denies same-sex couples all federal law rights of marriage, regardless of their status under state law. In Israel, a recent Supreme Court decision appears to create the opportunity for same-sex couples to be married, in the same way that opposite-sex couples who obtain civil or non-orthodox Jewish marriage abroad can have that status registered in Israel (see story, below).

The South African government spent the better part of 2006 trying to figure out how to comply with the court’s mandate, apparently quickly ruling out the simple method of amending the existing marriage law to allow same-sex couples to marry, and also rejecting the calls by some, both within the government and from outside, to seek to amend the Constitution to preserve the traditional heterosexual basis for marriage.

A “compromise” hashed out in the cabinet involved proposing a Civil Union Act that would make civil unions available for same-sex couples, carrying all the rights, benefits and responsibilities of marriage, and allowing same-sex couples, if they chose to do so, to call themselves married and have that term used in their ceremony, but ultimately this proved a non-starter when the proposal became public. A round of public hearings on the proposed legislation, together with strong opinions that the Constitutional Court would reject such a solution as not affording true equality, resulted in a substitute bill being placed before the Parliament very shortly before debate was scheduled.

The Civil Union Bill defines the term “civil union” as follows: “civil union means the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others.” The bill goes on to say that a civil union partner “means a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of this Act.”

Anyone who is designated as a “marriage officer” under the existing Marriage Act (which is not repealed or displaced, but continues in effect) is authorized to perform solemnisations under the Civil Union Act, and religious denominations or organizations may apply for authority to do so. However, the bill specifically provided — and this became a touchstone of controversy — that “marriage officers” who object on grounds of “conscience, religion and belief” to solemnising same-sex unions may inform the Minister of Home Affairs of their objections and then be relieved of any obligation to perform such ceremonies. This exemption would not apply to ministers of any religious denomination that has applied for authority to conduct ceremonies under this Act. This rather convoluted set of provisions appears calculated to deprive same-sex partners of the possibility of religious union ceremonies under the Act unless there are religious denominations in South Africa that are willing to obligate all their ministers to conduct such ceremonies.

Having defined the term “civil union” to encompass both marriages and civil partnerships formed and registered under the Civil Union Act, the bill then goes on to use the term “civil union” throughout much of the bill, including in the detailed provisions governing requirements for solemnisation and registration. Those provisions include a requirement in Section 7 that each of the parties produce to the marriage officer “his or her identity document issued under the provisions of the Identification Act, or the prescribed affidavit,” but does not further identify what such a prescribed affidavit is. The Identification Act 1997 by its terms applies only to citizens or lawful residents of South Africa. The Marriage Act 1961, as construed on the Ministry of Home Affairs website, does not require that marriage parties be citizens or residents of South Africa. Assuming the equality requirements of the Constitution would apply, one would assume that same-sex couples from other countries would be able to marry in South Africa, either using government-issued identification materials from their own countries, such as a passport, or perhaps by making a declaration under oath on a form prescribed by the Home Affairs ministry. In any event, the Civil Union bill does not provide clarity on whether same-sex couples from outside South Africa can marry there. (To deny such marriages would undercut the tourism benefits of becoming one of the few countries providing same-sex marriages, a sacrifice that the Netherlands and Belgium have been willing to make, evidently.)

The key provision for equality purposes is Section 13, which provides: “(1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union. (2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to — (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.” This provision leaves one guessing as to what “changes” may be “required by the context.” Perhaps this phrase is intended merely to indicate that wording can be modified where the original references are gendered. Whether it has any substantive consequence in terms of rights, benefits or responsi-
On November 21, Israel’s Supreme Court ac-

cepted the petitions of five same-sex Israeli
couples who married in Toronto, Canada, and
who requested to be registered in the Israeli
civil registry based on the person’s notifica-
tion, argued the State. The court ruled by a vote of 6–1 that the couples were entitled to have their marriages registered, but did not ad-

dress the question of their legal status in Israel and
did not use the word “recognition.”

The decision, one of the last to be written by the
Court’s President (retired) Aharon Barak, did not address the question of the validity of the marriage, but rather whether the registration clerk, acting under the Population Registry Law, acted lawfully when he refused to register the marriage. Under Article 3 of the Population Registry Law, a few items registered in the population registry constitute prima facie evi-
dence to the truth of these items. The personal status clause is not one of them.

The leading precedent ruling the case was Funk-Schlesinger v. The Director of the Population Administra-
tion in the Ministry of the Interior, HCJ 3045/05.

The decision does not address at all the question of
the validity of the marriage. The Court added
that the clerk can refuse to write the facts that
are being asked to be registered only when they are
manifestly wrong. The example the Court
provided then, and cited again in the Ben-Ari
decision, is of a person who looks like an adult
but who asks to be registered as a five year old
child.

The decision held that the registration clerk
acted lawfully when he refused to register the marriage. Under Article 3 of the Population Registry Law, a few items registered in the population registry constitute prima facie evi-
dence to the truth of these items. The personal status clause is not one of them.

The Court discussed in detail the history of
Funk-Schlesinger and its expansion beyond
marriage to other matters within the Population
Registry Law, including the Court’s later deci-
sion in Berner-Kadish v. Minister of the Interior,
HCJ 1770/99, which mandated the registration of

two mothers to a child who was adopted by
his mother’s same-sex partner in California.
(Later the Court held in Jaros-Hakak v. Attorney
General, C.A. 10280/01, that second-parent adoption is possible under Israeli law. How-
ever, the Court has since agreed to afford an-
other hearing in Berner-Kadish before an ex-
panded panel of the Court.)

The Court also mentioned criticisms of
Funk-Schlesinger in both academic writings
and dissenting judicial opinions, which pointed
to the fact that the approach of “statistical reg-

istration” ignores the reality where the regis-
tration has broader implications. But in the
current case, the Court was not asked to review Funk-Schlesinger, which, as it stated, was relied upon by all parties. The State, however, argued
that same-sex marriage is a legal formation not
recognized in Israel and thus Funk-Schlesinger
should not apply to this case. “Marriage”
within the population registry, argued the State,
means marriage within the basic “legal forma-
tion” in Israeli law, which is marriage between a
man and a woman. The Court rejected this argu-
ment, and determined that its implications are
that the decisions made by the population
registry, and judicial review of such decisions,
will consider the existence or lack thereof of
“legal formats.” This, held the Court, stands
contrary to current doctrine, and the registra-

The State further argued that the life together of
“homosexual couples” is a “social format with
certain legal ramifications,” and that “the state of Israel recognizes same-sex couples, in
many contexts.” This recognition, said the
State, is given in social-economic aspects and
in the matter of residing legally in Israel. The
Court agreed and cited what it called a “partial list” of such rights recognized by courts, in-
cluding inheritance rights and other social
rights. But it noted that the State’s argument
about a non-recognized “legal format” is actu-
ally an attempt to address the question of per-
sonal status. The implications, held the Court,
would be that the registration clerk would ex-
amine the question of status, and this stands in

The Court rejected the State’s argument that
the registration of “homosexual couples” as
married can be denied as “manifestly wrong,”
saying that the “manifest wrongfulness” that
Funk-Schlesinger addressed is a factual one,
whereas in this case the state argued a legal
wrongfulness. The Court added that the ques-
tion is not whether same-sex couples can marry
in Israel, nor whether Israeli law will recognize
same-sex marriage conducted in a place where
such marriage can be performed. The latter
question, said the Court, is a complex one, and
in any case the decision concerning it should
not be made as part of the registration and judi-
cial review thereof.

The Court further addressed the State’s argu-
ment that the question of recognition of same-
sex marriage is one on which there is no social
agreement in Israel and is a question of values best left to the legislature. The Court agreed, but recalled that the question before it is not whether same-marriage can be conducted in Israel.

The Court thus held that as part of the statistical registration capacity of the population registry, the registration clerk must register in the population registry that the couples are married, in accordance with the public record presented to him. The Court held that it does not hold that same-sex marriages are “recognized” in Israel, it does not recognize a new status of such marriage, and does not take a position about the recognition in Israel of same-sex marriage. The answer to these questions, held the Court, is a complex one, and it should be hoped that the Knesset [Israel’s Parliament] would address them.

The Court’s new President, Ms. Dorit Bein- ish, added a short concurring opinion, where she noted that the fact that the registration and the declaration it entails is meaningful to the petitioners, does not detract from the legal separation between the question of registry and the question of personal status.

Judge Elyakim Rubinstein dissented. He wrote that we are no longer talking about a mere statistical tool, but of a social-public symbol, which is what the petitioners seek, rather than certain social or “practical” issues. Same-sex marriage, held Rubinstein, is a new issue and is within the domain of the legislature and not the Court. Moreover, the average person does not distinguish between the registration and the recognition of status. Thus, the Court should have left the matter to the legislature. When a couple presents an Israeli ID card in which it is registered as married, the average person does not know to distinguish between registration and recognition of status. Thus the registration has practical and social implications in front of the public, the authorities and the legislature. Rubinstein said that one should distinguish civil marriage, which is recognized in most countries and thus should be registered in Israel, and same-sex marriage, which is recognized in only about 5% of the world’s countries.

The petitioners, said Rubinstein, are worthy of human dignity, and indeed social, economic and human rights of same-sex couples are recognized in Israel. But this petition is not about those issues and not about the maintenance of the petitioners’ rights as citizens and human beings entitled to dignity and equality. This is a question of recognition of a symbol and not of practical effects, he insisted. Rights depend on status, which is in any case not addressed here, and not on registration, which is not even prima facie evidence of its content.

Rubinstein also noted that the Court should be careful about entering issues of public controversy, especially when human rights are not really violated, and in this case there is no violation other than a symbolic one. Rubinstein cited to the Hennefeld decision, where a New Jersey Court rejected a petition to recognize a same-sex marriage held in Canada, even though New Jersey does not have a Defense of Marriage Act. He argued that although that case pertained to recognition (not registration), it is of relevance. He also mentioned the recent Lewis v. Harris decision from the New Jersey Supreme Court, which left the question of how to call the format for recognition of same sex partnerships to the legislature, even if they must be accorded equal rights. The Court’s decision, said Rubinstein, is about giving a public state stamp of approval to a new form of family, recognized only in a small minority of the countries on earth.

In order to understand the implications of the decision, one should consider that tens of thousands of opposite-sex Israeli couples have married abroad (mostly in Cyprus, due to its proximity), and then registered as married in Israel, because they would not or could not marry under Israel’s religious marriage system. In daily life, these couples are treated as married for all practical purposes, and one would expect that the same will be true for same-sex couples who marry in Canada or in other jurisdictions that allow such marriage and then registered as married in Israel, receiving state ID cards to that effect. There is a risk that certain government agencies and third parties will invoke the fact that their marriage is only “registered” and not formally “recognized” in Israel. But in such cases, such couples may argue that they are discriminated against vis-à-vis opposite-sex couples who married abroad. Also, today same-sex couples in Israel enjoy, as both Barak and Rubinstein noted (and this is a positive element in both the majority and dissenting opinions), many if not most of the social-economic rights enjoyed by legally married couples. However, today the burden is usually upon same-sex couples to prove their relationship by means such as an affidavit. A registration as married in the ID card may take this burden off them, at least for those who can and wish to take the burden and expenses entailed in marrying abroad. From this perspective, the decision may widen a gap between same-sex couples who can afford such expenses and those who could not. Notably all five couples who petitioned the Court were male couples, maybe not a surprising fact given that women on average earn less than men in Israel.

Israel’s statutes governing adoption and surrogacy state that only a married husband and wife can adopt a child (other than in special circumstances pertaining to second-parent adoption, as noted above) or to enter a contract with a surrogate mother. At present, opposite-sex couples married outside the country whose marriages are then registered in Israel have been treated as married for this purpose. The implications of the current decision on the interpretation of these statutes for married same-sex couples is unclear.

A question remains about how and where Israeli couples married in Canada can divorce. In a separate decision also announced on November 21, Anonymous v. The Regional Rabbinical Court Tel Aviv, HCJ 2232/03, the Supreme Court held that the Rabbinical Court can end the marriage of an opposite-sex Jewish couple who married in Cyprus. That decision implied that the marriage is also “recognized,” not only “registered,” in Israel. In Ben-Ari the Court did not address these issues.

The distinction between registration and recognition should be understood as a mechanism that has allowed Israel to recognize civil marriage de facto, while not doing so de jure. From this perspective, the established existence of this distinction has opened the door to same-sex couples. The question remains whether this status quo will be maintained after this door has been opened.

Some religious lawmakers quickly announced their intention to initiate legislation that will overturn the Court’s decision. The chances for the passing of such legislation are still unclear, and it could also face challenge as unconstitutional under Israel’s Basic Laws. As the decision was given in an expanded panel of seven judges, a further hearing by the Court is not an option in this case.

The petitioners were represented by Dan Yakir and Yonathan Berman on behalf of the Association for Civil Rights in Israel (ACRI) and by Onn Stock, a private attorney.

Aeyal Gross, Faculty of Law, Tel-Aviv University. Mr. Gross is a member of the board of ACRI, one of the petitioners in this case, but his remarks are personal and not attributable to that organization. [Confirming the view that most Israeli’s would likely treat registered same-sex marriages as marriages, the headline on the article reporting about the decision in the Israeli newspaper Haaretz was translated on its English-language website as “In precedent-setting ruling court says state must recognize gay marriage.” — Editor]

South African Constitutional Court Extends Inheritance Rights to Gay Couples

The Constitutional Court of South Africa ruled on November 23 in Gory v. Kohler, Case CCT 28/06, that surviving same-sex partners should have the same inheritance rights as surviving spouses when a partner dies without a will. Ruling on a claim by Mark Gory to be the sole heir of his long-time domestic partner, Henry Harrison Brooks, the Court said that because the Parliament had failed to respond to the Court’s repeated orders to revise South Africa’s laws to respect the rights of same-sex partners, it would be appropriate to “read in” to the intestate suc-
cession law the following words after every mention of spouse: “Or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support.”

The Court based its decision on the explicit requirement in the South African Constitution, dating from 1994, that the government not discriminate on grounds of sexual orientation.

When Mr. Brooks died in 2005, the Court had not yet ruled on its pending same-sex marriage case. Brooks’s parents, who survived him, petitioned the court to appoint Daniel Kolver as executor, and Kolver quickly took charge, rejecting Mark Gory’s claim to be the sole heir entitled to continue living in the house where he had lived many years with Brooks. Kolver, charged with resolving the debts of Brooks’s estate, put the house on the market and promptly sold it. Also, Brooks’s parents came to the house and took various personal items of their son, claiming to be his heirs to the exclusion of Gory.

Gory filed suit against Kolver and Brooks’s parents in the High Court in Pretoria, winning a ruling from the trial judge that the failure to recognize Gory as sole heir to Brooks violated the constitution. The High Court judge ruled that the Intestate Succession Law was unconstitutional to the extent it excluded surviving same-sex partners, and read in the language quoted above to cure the constitutional infirmity, but the judgment was suspended pending appeal to the Constitutional Court. The High Court judge also ruled that the purchasers of the house, who knew of the controversy, would have to surrender it back to Gory, and the parents would have to return the items they took.

When the case went to the Constitutional Court for review, a petition to intervene was presented by the four sisters of William Starke, a gay man who had died leaving a same-sex partner, Bobby Lee Bell, who was claiming he was entitled to inherit Starke’s property in preference to his sisters. The sisters argued that they had a vital stake in the outcome of the Gory appeal, since an affirmation by the Constitutional Court holding its ruling retroactive would affect their inheritance rights as well. Acknowledging the significance of the retroactivity issue, the Court granted the Starke sisters’ petition to intervene. The government also appeared, not contesting the unconstitutionality of the statute but arguing that retroactivity would be too disruptive.

Of course, the substantive ruling was an easy call for the unanimous Court, in light of its prior rulings as well as the subsequent ruling last December 1 in the marriage case. The issue that consumed most of the Court’s attention in this case was the question of retroactivity. As a logical matter, if the Intestate Succession Act was unconstitutional due to the constitutional ban on sexual orientation discrimination, then it was unconstitutional from the date the post-apartheid interim constitution went into effect in 1994, which could lead to lots of litigation as slighted surviving same-sex partners moved to reopen intestate estate settlements going back a decade or more.

The Court considered various solutions to this problem, including making the matter only retroactive for estates in which no executor had yet been appointed, or retroactive for all estates that had not yet been settled. Ultimately, however, the Court decided on a different course, declaring that the limitation to surviving spouses was unconstitutional effective April 27, 1994, but that its decision “shall not invalidate any transfer of ownership prior to the date of this order of any property pursuant to the distribution of the residue of an estate, unless it is established that when such transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present applicant.”

Practically translated, this appears to mean that if somebody acquired title to property under an intestate estate distribution knowing that there was a surviving same-sex partner with a claim to the property, they might be compelled to give it back, but it’s hard to know at this point how many such cases might exist. In any event, it is clear that the Starke sisters will have to yield to Bobby Lee Bell’s claim if the trial court determines that he and Starke qualified as committed same-sex partners, a point they were contesting vigorously.

Another issue that the Court had to decide was who should have to pay for Gory’s expenses of litigating this matter. The trial court ruled that Kolver, who was being ousted as executor as a result of the Court’s ruling, should have to pay, together with Brooks’s parents, but the Constitutional Court thought this was unfair, since Kolver and the Brookses were acting within the letter of the law as it appeared to exist prior to this ruling. Instead, the Court said, the expense should fall on the government for its failure to act to revise the statute when it became clear, based on the earlier gay rights rulings of the Court, that the Intestate Succession statute was probably unconstitutional.

Another question remains, not directly addressed by the Court, of whether this ruling will have any impact after marriage becomes available to same-sex couples, which at the time of the ruling was likely to occur the following week. (The Parliament passed a Civil Union bill under which same-sex couples can marry or contract civil unions having all the rights of marriage on November 14, which would of course include rights of intestate succession, but the final steps to enactment had not yet occurred when the Court ruled on November 23.)

Since the main logical ground for reading in rights for surviving partners in the Intestate Succession Law was that same-sex couples could not marry, the logical underpinning for the decision would disappear once marriage became available. Once marriage is open to all, why should unmarried same-sex survivors have any greater rights than surviving unmarried opposite-sex surviving partners?

These issues will have to be worked out. As no legislation had been enacted, the Constitutional Court was not willing to predict what might happen. As a matter of practicality, of course, it will take some time for all those same-sex couples who desire to marry to actually apply for licenses and have the ceremonies. Weddings can be quick, but they can also take some planning, depending upon the scale of the celebration that is desired. In the interim, should people who would have married had the option been available sooner be penalized if they suffer the tragedy of one dying before the knot can be legally tied? More details to be worked out. A.S.L.

Virginia Appeals Court Says Parental Kidnapping Prevention Act Prevails Over Virginia Law or DOMA in Interstate Visitation Dispute

A unanimous three-judge panel of the Court of Appeals of Virginia ruled in Miller-Jenkins v. Miller-Jenkins, 2006 WL 3407834 (November 28), that Virginia courts must give “full faith and credit” to a child visitation order in favor of a lesbian co-parent and former civil union partner made earlier by a Vermont court. According to the opinion for the court by Judge Jere M.H. Willis, Jr., a federal statute, the Parental Kidnapping Prevention Act, 28 USC 1738A (PKPA), takes priority over any Virginia law to the contrary and is not affected by the Defense of Marriage Act (DOMA).

The Virginia ruling recognizes the finality of the Vermont Supreme Court’s August 4 ruling, 2006 Vt. LEXIS 159, in which that court stated that the Virginia courts did not have jurisdiction to make any decisions about the rights of the co-parent, a resident of Vermont. However, Lisa’s attorney promptly announced that she would seek an en banc rehearing by the full court of appeals and would appeal the case as far as necessary to avoid allowing visitation for Janet. (Lisa has said she no longer regards herself as a lesbian.)

This complicated case traces back to December 19, 2000, when Janet and Lisa, then residents of Virginia, traveled to Vermont to have a civil union ceremony. They combined their last names as Miller-Jenkins, and returned to Virginia after the ceremony. They decided to have a child together, and Lisa became pregnant through donor insemination, giving birth to IMJ in April 2002. A few months later, they moved to Vermont and established residence there, but just over a year later came to a parting of the ways. Lisa moved back to Virginia with IMJ, and Janet remained in Vermont.
After settling back in Virginia, Lisa filed a lawsuit in the Vermont courts to dissolve her civil union with Janet. In her complaint, she described IMJ as the “biological or adoptive” child of the civil union and asked the Vermont court to dissolve the civil union, to award her custody, to award Janet “suitable parent/child contact” (supervised)70 and to require Janet to pay “suitable child support money.”

The Vermont court issued a temporary order in June 2004, giving Lisa temporary custody and awarding Janet temporary “parent-child contact” rights. In describing the terms of contact, the court used the word “visitation” three times in its order.

On July 1, 2004, a new Virginia statute went into effect, the Marriage Affirmation Act (MAA), which provided that Virginia would not recognize same-sex marriages, civil unions or any other legal status for same-sex partners. That day, Lisa filed a lawsuit in Virginia, seeking a declaration that she was the sole legal parent of IMJ and that Janet was not entitled to any parental rights (including visitation). Early in August of that year, the Virginia trial judge entered an order providing that Janet’s visitation with IMJ be limited to supervised visitation until the case was resolved, and asking the parties to file memoranda addressing the question whether the Virginia court had jurisdiction of the case.

The Virginia court decided that it had jurisdiction, but Janet had not been standing still, going back to the Vermont court and getting an order holding Lisa in contempt for refusing to comply with the prior visitation order. Shortly after that, the Virginia judge, John R. Prosser of Frederick County Circuit Court, issued his final order, finding that Lisa was the sole parent and Janet had no parental rights, including no visitation rights. Janet promptly appealed this ruling, and Lisa appealed the Vermont ruling, resulting in the Vermont Supreme Court’s decision this August in Janet’s favor.

The Virginia court of appeals decided that the entire case turned on the question whether the Virginia courts had jurisdiction to do anything other than enforce the Vermont visitation order. As to this, the court found the command of the PKPA to be quite clear. Despite its name, the Act applies not only to situations where a non-custodial parent kidnaps his or her child and takes her to another state, but to all situations involving the enforceability of lawful custody or visitation orders across state lines.

In this case, said Judge Willis, as the Vermont courts clearly had authority under the laws of that state to award visitation to Janet, federal law required the Virginia courts to enforce that visitation order. Federal law always takes priority over state law, due to the Supremacy Clause of the U.S. Constitution.

Lisa argued that the federal Defense of Marriage Act (DOMA), which authorizes states to decline to afford full faith and credit to same-sex marriages from other states, effectively overrode the requirements of the PKPA, an earlier statute, but the Virginia appeals court disagreed, finding that DOMA only applies to marriage recognition, and has no apparent application to custody or visitation orders.

“Nothing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation determinations,” wrote Willis. “Simply put, DOMA allows a state to deny recognition to same-sex marriages entered into in another state. This case does not place before us the question whether Virginia recognizes the civil union entered into by the parties in Vermont. Rather, the only question before us is whether, considering the PKPA, Virginia can deny full faith and credit to the orders of the Vermont court regarding IMJ’s custody and visitation. It cannot.”

“The law of Vermont granted the Vermont court jurisdiction to render those decisions,” Willis continued. “By filing her complaint in Vermont, Lisa invoked the jurisdiction of the Vermont court. She placed herself and the child before that court and laid before it the assertions and prayers that formed the bases of its orders. By operation of the PKPA, her choice of forum precluded the courts of this Commonwealth from entertaining countervailing assertions and prayers.” Of course, Lisa had to file her case in Vermont in order to dissolve her civil union, as it is unlikely that a Virginia court would find that it has jurisdiction to dissolve a civil union.

Although this ruling is technically only binding on the Virginia courts, it is potentially significant as one of the first rulings in which a court has rejected a broad interpretation of DOMA and asserted that custody or visitation orders in favor of same-sex co-parents should be accorded full faith and credit by the courts of other states by operation of federal law. As such, it should prove quite useful for co-parents confronted by these issues as a result of interstate moves by themselves or their former partners.

Janet was represented in the Virginia appeal by Virginia attorney Joseph R. Price and attorneys from Arent Fox PLLC, Lambda Legal, the ACLU, and the Virginia Education Fund, with amicus assistance from several Virginia professional associations. A.S.L.

Maryland Appeals Court Rules in Visitation Case

In a custody and visitation dispute between a lesbian adoptive mother and her former domestic partner, a five-judge panel of the Maryland Court of Special Appeals (an intermediate appellate court) ruled in Janice M. v. Margaret K., 2006 WL 3114248 (Nov. 3, 2006), that the adoptive parent would normally take priority over the co-parent for an award of custody as a matter of constitutional law, but the co-parent would normally be entitled to visitation if she could establish that she was a “de facto parent” to the satisfaction of the court. Writing for the unanimous court, Chief Judge Joseph F. Murphy upheld both the award of visitation and the denial of custody by the Baltimore County Circuit Court.

The mothers in this case, Janice M. and Margaret K., had a domestic partnership relationship from 1987 until 2004. In 2000, Janice M. adopted Maya, a one-year-old child from India. From the time Janice returned to the States with Maya, Margaret alleges, the women acted as equal parents to the child, sharing all responsibilities and forming parental bonds. When the women terminated their relationship, Margaret found an apartment nearby to facilitate her ability to maintain her relationship with Maya. When Janice placed limits on her contact and threatened to cut off all contact, Margaret sued for custody and visitation.

In her petition, Margaret alleged that due to “international laws related to children being adopted by gay parents,” Janice adopted Maya as an individual. The court’s opinion does not mention any attempt by Margaret to initiate a second-parent adoption, or whether Maryland allows such proceedings for same-sex partners.

The trial court found that Margaret qualified as a de facto parent under existing Maryland precedents. Since 2000, Maryland courts dealing with this kind of situation have followed the lead of courts from Wisconsin and New Jersey that had pioneered the concept of de facto parents in cases involving lesbian co-parents. This involves a four-part test: “The legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most importantly, a parent-child bond must be forged.”

The trial court found that all these factors were met in Margaret’s case, although Janice sought to challenge that finding on appeal, so a visitation order naturally followed. However, Maryland courts had not previously been asked to award custody to a de facto parent in a lesbian co-parent case involving an adoptive child, so here the court was breaking new ground.

Chief Judge Murphy referred to a 2005 decision by the Maryland Court of Appeals that stated that in a custody dispute between legal parents, each of the parents had an equal constitutional right to custody, so the court’s determination would be based on its judgment of the best interest of the child, but that in a case between a legal parent and a third party, the constitutional right would be the deciding factor unless the legal parent was shown to be unfit or
there were exceptional circumstances to justify overriding the constitutional right.

Since an adoptive parent stands in the same footing as a birth parent in terms of legal status, Janice came to the proceeding with the same rights as a de facto parent for purposes of custody unless Janice was shown to be unfit or Margaret could prove that exceptional circumstances existed. The court was unwilling to treat these circumstances as exceptional, and Margaret never argued that Janice was an unfit parent, so the appeals court upheld the trial court’s denial of Margaret’s custody petition.

The case dramatically illustrates how the right to marry, or to acquire the rights of marriage through a civil union or parallel status, might make a big difference in custody cases involving same-sex partners. If Margaret and Janice were married, there would presumably be no question that Margaret would be allowed by a Maryland court to become an adoptive parent of a child whom Janice had adopted from a foreign country, and that upon a later break-up of the partnership, both women would be considered to have equal constitutional custody claims, leaving a court to award custody based on the best interest of the child rather than to apply a constitutional approach that eschews consideration of the child’s best interest if the legal parent is not shown to be unfit...

 Ironically, the Baltimore Circuit Court has ruled in another case that same-sex partners are entitled to marry in Maryland, but that decision has been stayed pending an appeal to the state’s highest court, the Court of Appeals, which will be argued during December.

In a sad follow-up to this decision, the Washington Times reported on Nov. 22 that Baltimore trial judges on demand have delayed further rulings in the case, based on a report by a Baltimore social worker that the child was suffering “acute underlying turmoil” from the forced visitation schedule, including separation anxiety from her Janice while with Margaret. The case has been transferred to Judge Michael J. Finifter, who has scheduled a hearing for January 28.

Massachusetts High Court to Consider Putting Marriage Amendment on 2008 Ballot

After a brief hearing in chambers on November 30 in response to a suit filed directly in the Massachusetts Supreme Judicial Court by Governor Mitt Romney (acting in his capacity as a private citizen who signed a petition) and several other state residents, Justice Judith A. Cowin announced that the full court would hear oral arguments on December 20 on the plaintiffs’ claim that the Constitutional Convention held on November 9 violated its constitutional duty by adjourning without voting on the proposed amendment to ban same-sex marriages in the state.

Governor Romney, a Republican who is retiring from office, had reacted with outrage to the Convention’s action. The legislative leaders, who oppose the proposed amendment, knew that they had enough votes to win an adjournment motion, but that supporters of the amendment had enough votes to overturn the state constitution’s requirement that an amendment proposed by petition receive the approval of at least 25% of the Convention delegates (50 votes) to progress through the process to the ballot. The vote to adjourn was 109–87. Had the amendment been approved, it would still have to come up for a second vote at another Convention held after the state legislators who were elected on November 7 take office in January. The adjournment was to January 2, the last day of the outgoing legislature.

Romney contends that when the Convention receives a petition signed by sufficient signatures (in this case, about 170,000 validated signatures) in support of a constitutional amendment, it is the Convention’s obligation to hold a vote on the proposed amendment. The Convention’s adjournment to January 2 was widely believed to have effectively “killed” the amendment for now. Romney seeks an order from the court commanding the legislators to vote on the amendment when they reconvene as a Constitutional Convention on January 2, with the remedy of the Convention does not vote being an order from the court to the Secretary of State to put the proposed amendment on the ballot in 2008 without a Convention vote.

After the legislative session ends, the new legislature elected on November 7 (together with the new governor, Democrat Deval Patrick, a same-sex marriage supporter), will take office, and if a subsequent Convention approved the amendment for the first time, it would not be able to go through the entire process and be placed on the general election ballot until 2009.

In his complaint, Romney asserts that Massachusetts Constitutional Conventions have used the adjournment tactic repeatedly over the years when faced with popular initiative proposals opposed by a majority of the members but supported by a large enough minority to meet the 25% threshold, and urges the court to put a halt to this practice, which he claims deprives the people of Massachusetts of their constitutional right to seek amendments to the state constitution. But observers predicted the court would refuse to act on what is essentially a political question.

Romney filed suit as a private citizen, whose standing to sue was presumably premised on his having signed one of the petitions, and he did not request the state attorney general to represent him. Recently, Attorney General Thomas F. Reilly had refused to appeal a trial court ruling holding that same-sex couples from Rhode Island could marry in Massachusetts since there was no explicit constitutional or statutory ban in Rhode Island on recognizing same-sex marriages contracted in other states. Press reports on the November 30 hearing noted that Justice Cowin had been part of the majority in Goodridge, the same-sex marriage case. Boston Globe, Nov. 30. A.S.L.

Anti-Gay School Board Members Held to Account

Several homophobic members of the Morgan County, Tennessee, Board of Education may have to answer in damages for voting against Paul Scarborough to be the Director of Schools for Morgan County, according to a unanimous ruling by a three-judge panel of the U.S. 6th Circuit Court of Appeals in Scarborough v. Morgan County Board of Education, 2006 WL 3375340 on November 22. The court found that Scarborough’s constitutional rights may have been violated when several board members dropped their support for his appointment after an article appeared in a local paper stating that he would be speaking to a convention of the Metropolitan Community Church being held in Knoxville, Tennessee.

According to the opinion for the court by Judge Eugene E. Siler, Jr., Scarborough had been the elected school superintendent for Morgan County since 1996. A new Tennessee law replaced elected school superintendents with a new appointive position of Director of Schools, beginning August 31, 2000. In preparation for this change, the Morgan County Board of Education announced that it would take applications for the position, but it appeared that Scarborough had a “lock” on the position as the incumbent superintendent who enjoyed the support of most board members.

Everything changed, however, when a friend asked Scarborough if he would say a prayer at a convention being hosted by the MCC of Knoxville. According to Scarborough, he was not aware at the time that MCC was a predominantly gay denomination. He was just doing a favor for a friend when he said yes. When he consulted his calendar and realized he had a conflicting engagement, he called his friend to back out. The friend then asked if he could speak at the convention at a different time, which Scarborough agreed to consider, but ultimately he found he could not accept the invitation.

Unfortunately for Scarborough, however, MCC had sent a news release to the Knoxville News-Sentinel, the local newspaper, about its convention plans, announcing that Scarborough, the Morgan County Superintendent, would be a speaker at the conference. When this appeared in the newspaper, Scarborough sent a correction, stating that he had declined the engagement. Evidently the story informed
Scarborough about the gay presence at MCC, and he included in his statement that he did not “endorse, uphold, or understand homosexuality” (this last a peculiar assertion for a superintendent of schools, presumably an educated man), but that he would not refuse to associate with gay people or refuse the opportunity to share with them his beliefs.

After the article ran, various outraged homosexuals in the Knoxville area communicated their distress to members of the school board, and several members of the board who had been Scarborough supporters changed their minds, deciding that he was putting the public schools’ “stamp of approval” on homosexuality by his actions and had exhibited poor judgment by accepting the invitation in the first place. This was unacceptable to them, and when it came to pick a Director of Schools, they voted instead for the person who had been serving as Scarborough’s deputy, and that person was selected.

Scarborough claimed a violation of his constitutional rights of freedom of speech, association, religion and equal protection of the laws. The district court judge, Thomas W. Phillips, dismissed the case, finding no basis for a constitutional claim against either the board or the board members as individuals.

The court of appeals mostly reversed this decision, upholding it only regarding those individual members of the board who were not Scarborough supporters to begin with. As to the others, and the board as a whole, the court found that Scarborough had stated plausible constitutional claims and was entitled to a trial.

Under Supreme Court precedents, a public employee’s right to free speech is protected when he is speaking on matters of public concern as a private citizen, if his speech is not preventing his employer from carrying out its governmental functions. The appeals court found that Scarborough was protected under these established constitutional doctrines, and having presented evidence that several members of the board had abandoned their support for him as a result of reading the article and disapproving of his statements about willingness to associate with gay people or refuse the opportunity to himself to the money and cocaine he found in Brown’s bedroom. Jackson also testified that, following a struggle. Jackson also testified that, following a struggle.

The case will be sent back to the trial court in Knoxville to give Scarborough an opportunity to prove his claims, unless, of course, the school board wisens up and authorizes a settlement acceptable to him. A.S.L.

**Split Within Ohio District Courts of Appeal on Effect of State Marriage Amendment on Domestic Violence Statute**

The Ohio Supreme Court has recognized the split of opinion within the state courts of appeal on the constitutionality of domestic violence statutes as applied to unmarried cohabitants (gay or straight) and has accepted a case for review from Ohio’s Twelfth District Court of Appeal. State v. Carswell, 109 Ohio St. 3d 1423; 2006 Ohio 1967; 846 N.E.2d 533 (April 26, 2006). In the mean time, the Fifth District recently joined the majority of the state’s appellate courts in upholding the constitutionality of the domestic violence statute. State v. Hampton, 2006 WL 3290799 (Ohio App. 5 Dist. Nov. 13, 2006).

Aaron Hampton and the female victim were living together as an unmarried, heterosexual couple for almost two years until one violent evening that left the victim with severe bruises to her arms, neck and face. In 2005, a jury found Hampton guilty of domestic violence in violation of R.C. 2919.25. In his appeal, Hampton challenged the statute, claiming that it unconstitutionally attempts to approximate marriage by recognizing a marital status between cohabiting couples. The domestic violence statute carries stiffer sentencing provisions than the state’s assault statute, thus many defendants convicted of domestic violence against their live-in partners have attempted to appeal their convictions since the passage of Ohio’s marriage amendment in 2004.

This issue has created a division in the Ohio courts of appeal, with the Fifth, Seventh and Twelfth Districts finding that the intent of the statute is to broadly protect gay or straight individuals from violence in the home, while a minority of courts, in the Third and Sixth Districts, have found that the amendment renders the domestic violence statute unconstitutional when applied to unmarried cohabitants by extending legal recognition to their relationships.

The *Hampton* court determined that the amendment “has no application to criminal statutes in general.” Ohio’s domestic violence statutes have historically been applied broadly, according to the court, and the legislature has long been aware of their application to unmarried individuals. Therefore, if they had intended to restrict the application of the statute, the legislature would have made their intentions clear in the amendment. Litigation on this issue will undoubtedly continue until the Supreme Court of Ohio resolves the matter, but the Fifth District’s decision tips the scales in favor of upholding the constitutionality of the statute.

Ruth Uelesson

**Murderer of Gay Man Gets New Trial**

A Florida defendant will get a second opportunity to convince a jury that his killing of a gay man was self-defense, a Florida District Court of Appeal ruled in Jackson v. State of Florida, 2006 WL 3209922 (Fla. App. 3d Dist. Nov. 8, 2006). The defendant, Jeffery Jackson, claimed that his victim had become enraged and attacked him after Jackson rebuffed his sexual advances. Jackson was convicted by a jury of first-degree murder and sentenced to life imprisonment by the Miami-Dade County Circuit Court, but the appeals court vacated the conviction and remanded for a new trial based on the lower court’s erroneous evidentiary rulings.

The State’s theory was that Jackson had killed the victim, Anthony Brown, in the course of Jackson’s attempt to rob Brown in his home. Jackson, however, contended that he had not gone to Brown’s home to rob him, but rather to buy cocaine from Brown. During the course of the transaction, Jackson testified, Brown made sexual advances toward him; when Jackson attempted to leave, Brown came at him with a knife. Jackson claimed that he then obtained a knife from the kitchen and killed Brown during a struggle. Jackson also testified that, following this struggle, he looked for the keys to let himself out of the house and, in the process, helped himself to the money and cocaine he found in Brown’s bedroom.

The decision does not discuss what may be termed the “gay predator” aspect of Jackson's
otherwise conventional self-defense claim. That the victim was gay does not appear to have been contested, as State witnesses also testified to that fact.

The appeals court found reversible error in two evidentiary rulings by the lower court: first, that the lower court had incorrectly precluded the defendant from testifying to the nonviolent nature of his thirteen prior felonies; and second, that the trial court erred in refusing to allow defense witnesses to testify that Brown was a drug dealer. Such testimony was not, said the appeals court, inadmissible victim character evidence but rather served to corroborate Jackson's version of events; moreover, the State had opened the door to such evidence by eliciting testimony from its own witnesses to the effect that Brown was not a dealer. Glenn C. Edwards

Federal Civil Litigation Notes

Ninth Circuit — In Smbatyan v. Gonzales, 2006 WL 3326937 (9th Cir., Nov. 15, 2006) (unpublished disposition), a 9th Circuit panel affirmed a decision by the Board of Immigration Appeals rejecting applications for asylum, withholding of removal or protection under the Convention Against Torture by a gay Armenia. The court found that the denial of Milran Smbatyan’s claims was based on an adverse credibility determination, found on “significant inconsistencies between Smbatyan’s testimony and his declaration regarding the only claimed incident of abuse at the hands of the Armenian police due to his sexual orientation.” Finding that these inconsistencies “go to the heart of his claim,” the court found that substantial evidence supported the agency’s determination.

Smbatyan had also challenged the Immigration Judge’s failure in his case to consider proffered expert testimony, but the court found that the IJ had considered it and explained why it was of limited weight in the proceeding. The brief opinion by the court provides none of the factual details of the case.

Seventh Circuit — A unanimous panel has affirmed a ruling by District Judge John C. Shabaz (W.D. Wis.), that the city of Madison did not violate the constitutional rights of Rev. Ralph Ovadal when it refused to allow him to hold anti-gay demonstrations on highway overpasses. Ovadal v. City of Madison, 2006 WL 3346152 (Nov. 20, 2006). Shortly after the trial in the case, the city passed an ordinance adopting a general prohibition on conducting demonstrations on highway overpasses on safety grounds, based on concerns about diverting the attention of motorists from the road. The appeals court found the aspects of Ovadal’s case had been rendered moot by the adoption of the ordinance, and that in any event the city had sufficient grounds for the actions of its police to avoid First Amendment liability.

Arizona — U.S. District Judge Frederick J. Martone ruled in Cole v. Kone Elevators, Inc., 2006 WL 3313707 (D. Arizona, Nov. 14, 2006), that a self-described non-gay male construction work had not suffered sexual harassment under Title VII when a presumably non-gay co-worker subjected him harassing conduct involving imputations of homosexuality, such as writing gay slogans on Cole’s lunchbox, asking him if he “engaged in sodomy,” and otherwise taunting him. Judge Martone found that the described conduct did not fit into any of the categories actionable under Title VII in light of the Supreme Court’s O’Conal decision, because there was no evidence the harassing employee was gay or acting out of sexual desire or that Cole was selected for harassment because of his sex. Martone also found the described conduct insufficiently severe to create a hostile environment in any event. Cole had also brought a retaliation claim, asserting that he was discharged after he complained about this conduct to a supervisor, but the company successfully defended by showing that the management official who decided to discharge Cole was not his supervisor and was unaware of Cole’s complaints. Arizona state law does not forbid sexual orientation discrimination. The court’s opinion does not indicate whether Cole was employed within a municipality that forbids such discrimination, and does not mention any claim or evidence concerning gender non-conformity on the part of Cole. Proceeding in federal court under Title VII in this kind of case is usually a non-starter in the absence of gender non-conformity evidence, or some sort of evidence that a harassing employee is a sexually-motivated gay person, but perhaps Cole’s attorney thought it was the only available avenue for a claim.

Delaware — U.S. District Judge Sleet has dismissed as frivolous an action brought by two individuals against the American Civil Liberties Union and its principal officers, D’Alessandro & Franklin v. ACLU, 2006 WL 3253422 (D. Del., Nov. 8, 2006). Joseph L. D’Alessandro and John A. Franklin, proceeding pro se and in forma pauperis, alleged that the ACLU has violated their constitutional rights by using the federal courts to achieve its “radical agenda which undermines our nation’s moral and religious heritage.” More specifically, they alleged that the ACLU’s policies and actions “strip faith in God from the public square while promoting anti-family and pro-homosexual initiatives.” Plaintiffs cited examples as the litigation over the Pledge of Allegiance (which, of course, was brought by an individual pro se, not by the ACLU). They sought punitive and exemplary damages and asked that anything awarded in the litigation be donated to the Salvation Army and other institutions “damaged” by the ACLU’s efforts. Judge Sleet found that they had not stated a cause of action, most particularly noting that the ACLU was not a state actor and thus not bound by or amenable to suit under the various provisions of the Bill of Rights cited by the plaintiffs. Sleet dismissed the case as part of the process of screening pro se claims, not on the basis of any motion by the ACLU, which may well not have even been aware of the lawsuit. (At least, its president, one of the named defendants, was not aware of it when this writer brought it the decision to her attention.) A.S.L.

State Civil Litigation Notes

California — Settling a First Amendment lawsuit, Kern School District conceded that student journalists at Bakersfield East High School have a right to exercise freedom of speech and of the press. The case of Paramo v. Kern High School District, No. S–1500–CV–255519 (Kern Superior Court), was filed on behalf of high school journalists who were forbidden by the school to publish a series in the East High student paper about sexual orientation and gender identity. Plaintiffs were represented by the ACLU of Southern California, the ACLU’s national LGBT Rights Project, and pro bono attorneys from Milbank, Tweed, Hadley & McCloy LLP. Under the terms of the consent agreement that was approved on Nov. 16 by Superior Court Judge Sidney P. Chapin, “Prior to any restriction of student speech, school officials will consider all practical alternative options, and, where feasible, will implement any such practical alternative options instead of restricting speech.” While the case was pending, the school backed down from its position that the series had to be blocked because of unspecified threats that had been made against gay students, and allowed the series to be published, but the students decided to persist with the suit in order to obtain a formal policy statement from the school district. Our account is based on a press release from the ACLU announcing the settlement.

Colorado — BNA’s Daily Labor Report No. 229 (11/29/2006) reported a settlement in Cornwell v. Intermountain Testing Company, Colorado Civ. Rts. Div., No. E20060305 (settlement announced Nov. 21, 2006). The complainant, born David Cornwell, announced to her termination was part of a layoff due to business fluctuations. However, at a conciliation conference held by the Colorado Civil Rights Division after it had issued a finding of probable cause under the state’s sex discrimination law, the employer agreed to reinstate Cornwell. Other terms of the settlement are confidential, attorney John C. Hummel of the Gay, Lesbian, Bisexual and Transgender Community Center
(who represented Cornell together with Mari Newman of Killmer, Lane & Newman, a Denver law firm) told BNA. This was the first cases in which the Colorado agency found an allegation of gender identity discrimination to state a claim for sex discrimination under the state law. Some federal courts have reached a similar doctrinal conclusion in construing Title VII of the Civil Rights Act in recent years.

Missouri — Missouri State University settled a lawsuit by a graduate student in social work who alleged that her constitutional rights had been violated by a mandatory assignment concerning support for gay people serving as a foster parents and degree requirements that conflicted with her religiously-based disapproval of homosexuality. Rather than file the case brought by Emily Brooker go to trial, the University agreed to a cash settlement and to cleaning up her disciplinary record, now clouded by a grievance that had been filed against her due to her questioning of the National Association of Social Workers code of ethics, which prohibits sexual orientation discrimination. She stated religious objections to the code. Her complaint alleged that she was forced to sign the code in order to earn her social work degree, in violation of her constitutional rights... Kansas City Star, Nov. 11.

New Jersey — The New York Times reported on Nov. 16 that a Burlington County Family Court Judge had granted approval to have a birth certificate list the names of both members of a lesbian couple, where one of the women was to give birth as a result of donor insemination. The child was born the day after the agreement was reached in a closed Family Court proceeding, the names of the women being kept anonymous to protect their privacy and the privacy rights of their child. This was the first time, reportedly, that the state attorney general’s office sided with the applicants, having opposed such applications in prior cases, sometimes successfully. The assistant attorney general who handled the Burlington County case, Patrick DeAlmeida, said that the state would issue birth certificates without state funds. The judge wrote in the unpublished decision that “Brinkman has not shown the kind of individual, concrete damages required to have taxpayer standing, nor can those damages be presumed.” Lambda had intervened in the case on behalf of professors whose partners would have lost benefits had Brinkman succeeded in the case.

Oklahoma — Tulsa County Special District Judge C. Michael Zacharias granted a divorce to a same-sex couple who were married in Toronto, Canada, without knowing that the petitioners were a same-sex couple, but then set the divorce decree aside when he learned the truth. Tulsa World, Nov. 21. The divorce petition was filed in July by C. O’Darling, a Tulsa County resident, and identified the respondent as S. O’Darling. In the verification attached to the complaint, the petitioner is identified as Cait O’Darling next to her signature, but the gender of the respondent is never specifically mentioned in the court papers. Only C. O’Darling showed up at the hearing, S. O’Darling having signed a waiver allowing judgment to be entered without her appearance in a document that did not specify her gender. (One wonders whether it is customary in Oklahoma legal papers to omit the given names of parties and use initials?) In vacating the divorce decree, Zacharias also dismissed the underlying petition for dissolution, noting that the petition “is premised on a marriage which is not recognized by Oklahoma law.”

Pennsylvania — The state supreme court denied review in Jones v. Jones, 884 A.2d 915 (Pa. Super., Sept. 30, 2005), in which a Superior Court panel had ruled that a biological mother’s former same-sex partner should have custody of their child, because it was in the best interest of the child to live with the former partner, in the light of the biological mother’s attitude towards visitation. Lambda Legal represents the former partner. Lambda press advisory, Nov. 29.

Rhode Island — Although a Massachusetts Superior Court has ruled that there is no affirmative policy against same-sex marriage in Rhode Island that would disqualify gay Rhode Islanders from tying the knot in Massachusetts, that ruling is, of course, not binding on Rhode Island courts, which now have to deal with the next logical question: whether Rhode Island courts have jurisdiction to rule on divorce petitions from same-sex couples married in Massachusetts. A lesbian couple who married in Massachusetts in 2004, then moved to live in Providence, Rhode Island, filed a divorce petition in October 23. A preliminary hearing has been set for December 5 before Rhode Island Family Court Chief Judge Jeremiah Jeremiah, Jr., to determine whether the court has jurisdiction over the petition by Margaret Chambers and Cassandra Ormiston to dissolve their marriage. New Jersey Record, Nov. 23.

Virginia — A strategic retreat by the Arlington Human Rights Commission prevented the Virginia Circuit Court from having to decide whether Arlington County’s ban on sexual orientation discrimination by places of public accommodation is lawful. Bono Film and Video, Inc. v. Arlington County Human Rights Commission, 2006 WL 3334994 (Va. Cir. Ct., Nov. 16, 2006) (not reported in S.F.2d), Bono Film and Video, which provides video duplication services to the public, refused an order for four VHS copies of two gay documentaries, “Second Largest Minority,” and “Gay and Proud,” on the ground that the “material is questionable value” and that Bono Film was not “interested in providing services” to Lilli Vincenz, who had submitted the order. Tim Bono, proprietor of the business, stated that he would not produce the duplicates because the films involved the “gay agenda.” Ms. Vincenz complained to the country human rights commission, which threat-
ened to publicize the complaint to the press if Bono would not settle the complaint; when Bono hung tough, the Commission issued a decision finding unlawful sexual orientation discrimination. A few weeks later, Bono filed this lawsuit, claiming the county ordinance was invalid under a Virginia doctrine that arguably precludes local jurisdictions from forbidding discrimination on grounds not enumerated in the state’s anti-discrimination law, which does not cover sexual orientation. He also made First Amendment claims of free exercise of religion and free speech under the state and federal constitutions. The Commission beat a hasty retreat, voting the day after the lawsuit was filed to dismiss the case on the ground that the county ordinance “protects individuals from discrimination based on their sexual orientation, and does not prohibit content based discrimination.” In effect, the Commission decided that Bono was not discriminating against Ms. Vincenz based on her sexual orientation, but was refusing to duplicate certain movies based on their content, a fine distinction. On that basis, Judge Benjamin N.A. Kendrick concluded that Bono no longer had standing to challenge the statute since he no longer had a personal stake in its validity. A.S.L.

**Criminal Litigation Notes**

*Federal—Massachusetts — District Judge Gorton rejected a petition for a writ of habeas corpus from Timothy Duguay, who was convicted of murdering his former boyfriend, Robert Madera. *Duguay v. Spencer*, 2006 WL 3114247 (D. Mass., Nov. 3, 2006). The two men began their relationship when Duguay was 17 and Madera 12. The relationship continued for about five years, but Madera became less enthused about Duguay, who, according to prosecutors, murdered Madera after he stood up Duguay on a Sunday date, going out with a girlfriend instead. Duguay was convicted based largely on circumstantial evidence, as there was no eye-witness to the crime, and no DNA confirmation of his presence at the murder site. Prosecutors did present evidence based on a screening test that is widely believed to be trustworthy. A.S.L.

**Legislative Notes**

*Alaska — Defying an order by the state’s Supreme Court, the legislature in November passed a bill prohibiting the state’s commissioner of administration from implementing regulations to extend employee benefits to same-sex partners of state employees, and also approved a measure favoring an advisory ballot question next spring asking voters whether to place a constitutional amendment banning such benefits on the general election ballot in 2008. Alaska voters amended their constitution to ban same-sex marriages a decade ago, but that amendment does not affect the issue of domestic partnership, and the Supreme Court had ruled last year that failing to extend such benefits violated state constitutional equality requirements. Earlier this year, the commissioner proposed regulations to extend the benefits, but a trial judge to whom the case had been remanded by the Supreme Court opined that the proposed amendments violated the state constitution’s equality requirement by imposing qualifications on same-sex couples that are not imposed on married couples, such as joint residency before they can qualify for benefits. Governor Frank Murkowski indicated that the question whether to comply with the court’s order would be left to his successor, Governor-elect Sarah Palin, like Murkowski a conservative Republican who opposes same-sex marriage. Palin takes office December 22. *Anchorage Daily News*, Nov. 22; *Seats of Power*, Nov. 23, 2006.*

**Election Notes**

*Marriage Amendments Post-Mortem — For the first time, the voters of a state have rejected a proposed amendment that would have banned same-sex marriages and other forms of legal recognition for unmarried couples. A clear majority of Arizona voters rejected the proposed amendment in balloting on November 7. Success in this campaign was attributed to a campaign strategy emphasizing that unmarried heterosexual couples would be disadvantaged under the policy, as well as to the independent-mindedness of Arizona voters. All of the other ballot measures passed by comfortable margins, but observers noted that in some of the states the margins were slimmer than the usual 2/3 or 3/4 of the voters, several winning less than 60% of the vote.*

*State Supreme Court Breakthrough — For the first time, a state supreme court will have two openly-gay members. Oregon voters elected Virginia Linder, an openly lesbian candidate, who will join openly-gay Rives Kistler on the state supreme court. Actually, there are no other openly-gay state supreme court justices in the United States, and there never have been, so Oregon is blazing quite a trail. The state House of Representatives changed to Democratic control as a result of the election, which bodes well for Oregon becoming the next state to enact civil unions for same-sex partners, as well as an express sexual orientation*
congregants. The statement was intended to be within the Catholic Church in the U.S. seeking Persons with a Homosexual Inclination." 194–37 to approve a statement titled "Ministry to Persons with a Homosexual Inclination." This was intended to provide guidance to those within the Catholic Church in the U.S. seeking to reach out to gay people as current or potential congregants. The statement was intended to be welcoming, but reiterated the Church’s position that gay people suffer from “disordered” sexuality and must not act on their feelings of same-sex attraction. Members of the Conference described the policy as “welcoming” and “pastoral,” while spokespersons for gay Catholic organization characterized it as “harshful” and “spiritually violent.” The president of DignityUSA, Sam Sinnett, said that the statement damages gay people by recommending that they “stay emotionally and spiritually in the closet.” Chicago Tribune, Nov. 15. Few would seriously contest that the closet in question is already crowded with Catholic priests.

Freedom of Gender Identity in NYC — The New York Times reported on Nov. 7 that the New York City Board of Health is contemplating a change of the rules governing alterations of birth certificates so as to allow for changes of sex designation without evidence of surgical alteration of the genitals. The city’s health commissioner, Dr. Thomas Frieden, said that “surgery versus nonsurgery can be arbitrary… Somebody with a beard may have had breast-implant surgery. It’s the permanence of the transition that matters most.” The article noted that although a few states allow birth certificate alterations based on a gender dysphoria diagnosis without evidence of surgery, most have insisted on evidence of surgical alteration. The board of health planned to vote on the proposed rules in December, after having held public hearings on the proposals during November.

Presbyterian Marriage Trial — Finding that charges against Rev. Janet Edwards for performing a marriage ceremony for a lesbian couple had been filed four days too late under the denomination’s statute of limitations, the Presbyterian Church’s permanent judicial commission decided that lacked jurisdiction to hear the case. Which means that the issue of same-sex marriage will remain unresolved in the Pittsburgh Presbytery, where Edwards works. Edwards has taken the position that church doctrine does not forbid what she did. Pittsburgh Post-Gazette, Nov. 16.

Gay Rabbis? — The Committee on Jewish Law and Standards, a policy-making body for Conservative Jews, will meet early in December to consider conflicting proposals on whether the movement should end its ban on the ordination of openly lesbian or gay rabbincial candidates. Among the five proposals the Committee will consider are one firmly sup- porting the status quo under which all gay sex is deemed improper and openly gay people cannot be ordained, another calling for gay Jews to undergo treatment to “cure” their homosexual- ity, another that would allow for ordination with no restrictions on the private consensual sexual activity of rabbis, and a “compromise” proposal put forward by Rabbi Elliot Dorff, rector of the University of Judaism in Bel-Air, California, the Conservative movement’s west coast rabbinical seminary, that would allow for ordina- tion but require that Conservative rabbis abstain from engaging in anal sex. Dorff finds the Biblical text specifically prohibiting anal sex for men to be inescapable in a movement bound to the observance of religious law explicitly stated in scripture, but believes that the prohibi- tion of that specific practice should not be ex- tended to all gay sexual contact and that gay rabbis should not be expected to be celibate, since he believes sexual orientation is not a choice. Under the rules governing movement decision-making, the Committee can adopt more than one position if a sufficient number of members vote for them, which would leave the ordination decision up to particular movement institutions. There was some indication that some traditionalist U.S. conservative congregations might break away from the move- ment over this issue as well. Los Angeles Times, Nov. 30, 2006.

DP Benefits for Gay Cops? — In Pinellas County, Florida, Sheriff Jim Coats announced that employees of his office who are in same- sex relationships can sign up to get health insurance for their domestic partners. The coverage will become effective in 2007. Coats had promised to study this issue after he took office in 2004 and was approached by LGBT employ- ees of the office. City employees in Tampa, which is in Pinellas County, have enjoyed domes- tic partnership benefits since March 2004. An employee benefits manager for Pinellas County said that the question of domestic partner- ship benefits for all county employees was under study. St. Petersburg Times, Nov. 22.

Minneapolis Fire Chief — The national press reported late in November that Bonnie Bleskachek, the openly-lesbian firefighter who had attained the distinction of being the first openly lesbian big-city fire chief, was being forced out of office, although there were conflicting reports about whether she was re- signing under fire or being terminated from the position by the mayor and/or city council. Several lawsuits were identified as the cause, some from women in the department alleging sexual harassment by the chief and one from a self- described heterosexual male claiming he had been discriminated against by the chief. The two harassment suits were settled by the city. Associated Press stories published in several newspapers, Nov. 28 & 29.

Houston Landscapers — Should private businesses be required to provide services to potential customers who happen to be gay? Garden Guy, Inc., a Houston landscaping company, declined to provide landscaping services to a gay couple, stating in an email canceling an appointment made on the phone, “I am appreciative of your time on the phone today and glad you contacted us. I need to tell you that we can-

Law & Society Notes

U.S. Military Policy — Responding to criticism about a retirement regulation that classified homosexuality as a mental disorder, the Pentagon has reclassified it as one among a list of condi- tions or “circumstances” justifying separation from the service that include such things as bedwetting or fear of flying. The change aroused new criticism, according to a report by the Associated Press, which quoted a spokes- person for the American Psychiatric Associa- tion, James H. Scully: “We remain concerned because we believe that the revised document lacks the clarity necessary to resolve the issue.” U.S. Rep. Martin Meehan (D-Mass.), sponsor of a measure to end the military service ban against gay people, was more blunt in his criticism: “More than 30 years after the mental health community declassified homosexuality as a mental disorder, it is disappointing that the Pentagon still continues to mischaracterize it as a ‘defect.’” During the recently concluded fed- eral fiscal year, the A.P. reported, 726 military members were discharged under the “don’t ask, don’t tell” policy. Associated Press, as reported in New Jersey Record, Nov. 17.

The latest from the American branch of the Roman Catholic Church — On November 14, the U.S. Conference of Catholic Bishops voted 194–37 to approve a statement titled “Ministry to Persons with a Homosexual Inclination.” This was intended to provide guidance to those within the Catholic Church in the U.S. seeking to reach out to gay people as current or potential congregants. The statement was intended to be
not meet with you because we choose not to work for homosexuals.” This response to an inquiry from Michael Lord and Gary Lackey because infamous when word of it spread on the internet. Garden Guy is owned by Sabrina and Todd Farber, who claim to have been bombarded by nasty emails and phone calls as a result of the publicity given to their discriminatory service policy, but there is no federal, state or local law applicable to their business forbidding such discrimination. In many other jurisdictions, however, it would be considered unlawful. New York Times, Nov. 11; Chicago Tribune, Nov. 7.

Wal-Mart — The world’s largest retailer has been working hard in recent years to build a good reputation in the gay community, adopting a non-discrimination policy and extending employee benefits to same-sex couples, as well as providing financial sponsorship to gay organizations and events. This aroused the ire of the so-called American Family Association, an organization heavily devoted to war against gay families and gay rights, which called for a two-day boycott of Wal-Mart to occur during the Thanksgiving holiday weekend, the newly-traditional start of the Christmas shopping season. Now there are news reports that Wal-Mart has rethought some of its gay-targeted philanthropy, in order to get the AFA to call off its boycott. In response to an alleged pledge by Wal-Mart to avoid sponsoring controversial causes, AFA announced shortly before Thanksgiving that its boycott was called off. A Wal-Mart spokesperson said that the retailing giant would continue to work with the Gay and Lesbian Chamber of Commerce and other groups on specific issues of workplace equality, but would be cautious about its sponsorship decisions. Albany Times Union, Nov. 22. A.S.L.

International Notes

Argentina — Reversing decisions by government administrators, the Supreme Court of Argentina on November 21 ruled that official legal recognition as a registered non-governmental organization must be extended to the Association for the Struggle of the Travesti and Transsexual Identity (ALITT). The court rejected the position of the national Justice Department that ALITT’s goals were unacceptable as “going against the common good,” according to a news release issued on Nov. 22 by the International Gay and Lesbian Human Rights Commission. This ruling, in effect, acknowledges that an organization advocating for transsexual rights can qualify as a public interest organization in Argentina, IGLHRC filed an amicus brief with the court in support of ALITT’s appeal.

Australia — The city of Melbourne’s Council voted Nov. 28 to established a “relationship register” for same-sex couples to record declarations of partnership. Although the registration will not afford legal rights, it will produce evidence of a relationship recognized by the city that might be helpful in various circumstances. The council also voted to voice concern to the government over its failure to take up seriously the issue of civil unions for same-sex partners. Herald Sun, Australia, Nov. 29.

Brazil — BBC News reported that a judge in Sao Paulo, Brazil, had granted a gay male couple an adoption of a five-year-old girl, who has been living with the men, Junior de Carvalho and Vasco Pedro da Gama, for the past year. Prior to this new ruling, da Gama was the child’s sole legal adoptive parent. The allowance of a second-parent adoption was a decision of first impression in Brazil, according to the news report. Although hope was expressed that the decision would set a national precedent, for now it appears to be binding only within the state of Sao Paulo.

Canada — Prime Minister Stephen Harper’s office announced that the PM would keep his campaign pledge to put the issue of same-sex marriage before the Parliament in December. Parliament passed a bill opening up marriage to same-sex partners in 2005 during the prior Liberal government, in the face of rulings from many provincial courts holding that same-sex couples had a right to marry under constitutional equality principles. Harper’s Conservative Party received the largest vote from among the four major parties in the ensuing elections, but required a coalition with the other parties to form a government, and the other parties support same-sex marriage rights on the whole. Most observers expected Harper to present a resolution asking members of Parliament whether they want to reopen the marriage question, with debate most likely to begin on Dec. 6 and a vote expected before the Christmas recess. Since all of the other parties are opposed to reopening the marriage question, the measure is considered likely to fail. 365Gay.com, Nov. 29; Reuters, Nov. 21.

Canada — Raymond Gravel, an openly-gay Roman Catholic priest who had worked as a gay prostitute prior to entering the priesthood, overwhelmingly won election to the Parliament as a Bloc Quebecois candidate in a by-election necessitated by the death of the incumbent member, easily defeating candidates from the Liberal, New Democrat and Green parties. Gravel supports same-sex marriage and opposes criminal penalties for abortion. He received permission from his bishop to run for office, but has pledged to abstain from voting on some morality-related issues where his views conflict with the official position of the church. However, he has stated he will vote against reopening the issue of marriage when it is proposed in December by the Conservative government. Canada.com, Nov. 27.

Canada — A coroner’s jury in Hamilton has ruled that the death of a transsexual IV drug-user in police custody was accidental. The jury found that Chevranna (whose legal name was Abdurrahman Ali Abdi) had choked to death due to vomiting brought on by cocaine poisoning. Hamilton Spectator, Nov. 29.

India — The Economic Times (Nov. 11) reported a setback for the campaign against Article 377 of the Indian Penal Code, a sodomy law dating back to colonial times, when the Supreme Court recently reversed a lower court acquittal under Article 377 of a man who had been charged with forced intercourse under that provision, commenting, “We have to deal with those who violate social norms.” Critics of Article 377 point out that other provisions against non-consensual sex could have been used in preference to the sodomy law, and saw this as contradictory to a recent order by the Supreme Court to the Delhi High Court to give serious consideration to a petition by the Naza Foundation, an India gay rights group, to invalidate the law against consensual sodomy.

Iran — The situation remains perilous for gay people in Iran, as the International Gay and Lesbian Human Rights Commission publicized a report by the Iranian state-run news agency, IRNA, on November 14, of a public execution for sodomy (and other related crimes) held in Kermanshah’s town square before a large crowd. The facts of the case are not fully known, but Paula Eitelbrink, Executive Director of IGLHRC, commented that capital punishment for the crimes in question raised concerns of “gross human rights violations” and noted that IGLHRC continues to work closely with the Iranian Queer Organization (IRQO) to document cases of anti-gay oppression in the country.

Ireland — Justice Minister Michael McDowell announced a government proposal to allow same-sex couples to register their relationships as civil unions, a status that will carry some but by no means all of the rights of marriage. A Working Party on Domestic Partnerships gave approval to the proposals, while suggesting that any legislative attempt to open up marriage for same-sex couples would be vulnerable to constitutional challenge. The Working Group proposed that any couple cohabiting for three years or raising children together be presumed to be in a legal partnership that would carry some rights. The Group also considered the status of non-conjugal relationships, but decided they had insufficient information to make a recommendation as to those. Irish Independent, Nov. 29.

Mexico — The Mexico City assembly voted 43–17 in favor of a measure allowing civil unions for same-sex partners, and the measure was signed on Nov. 13 by Mayor Alejandro Encinas and published in the official gazette on November 16, making it official, although it does not go into effect for 120 days. This is the first civil union law enacted in Mexico, a pre-
AIDS Litigation Notes

California — Ruling on November 7, the 2nd District Court of Appeal rejected a challenge to the determination by the California Medical Assistance Program (Medi-Cal) that a man who has been living with AIDS since 1984 was not entitled to coverage for a course of treatment prescribed by his physician. Paleski v. State Department of Health Services, 2006 WL 3240811. Joseph Paleski was, according to his doctor, suffering from a wasting syndrome associated with AIDS, and was taking a medication approved by Medi-Cal, Serostim. However, during the relevant time, Medi-Cal modified its rules, placing Serostim in the category of drugs requiring pre-authorization review, mainly to crack down on its “misuse” as a steroid supplement by athletes. Paleski evidently got caught up in the midst of this changeover regarding the availability of the medication. Although his doctor wanted him to continue, Medi-Cal decided on review that he didn’t need it, in light of his weight in relation to his height. The court rejected Paleski’s argument that Medi-Cal had failed to comply with applicable statutory and administrative requirements in the case. Writing for the court, Acting Presiding Justice Malano wrote that “neither state nor federal law requires the Department to defer to a treating physician’s determination of medical necessity when the Department’s published drug criteria dictate a contrary conclusion,” although the court acknowledged that the treating physicians’ determination “is a factor that must be considered.” The court concluded that the superior court in Los Angeles County had properly rejected Paleski’s petition for a writ of mandate ordering Medi-Cal to pay for the drug.

California — Magistrate Judge Dennis L. Beck (E.D. Cal.) found that state prison inmate James L. Davis, representing himself, had stated viable 8th Amendment claims against several prison officials and health care personnel in connection with his alleged deprivation of HIV-related medications upon transfer from a medical facility to a prison. In addition to depriving him of his HIV meds when he failed to show up at the dispensary because he was sick in his cell, Davis claims that he is a diabetic and suffered deprivation of his insulin as well, resulting in alarming high blood sugar. Although Judge Beck found that Davis had named too many officials in his complaint who had nothing to do with the decisions concerning his health care, he recommended that the case be allowed to continue against those officials who were plausibly linked to the deprivations, Davis v. Ramen, 2006 WL 3251831 (Nov. 8, 2006).

New Jersey — A corrections officer who suffered a needlestick injury while searching a new inmate at the Essex County jail was not entitled to damages for the resultant emotional distress he suffered due to exposure to HIV and infection with hepatitis C, because his claimed injury did not meet the threshold set by the state’s Tort Claims Act, according to a November 9 ruling by the New Jersey Appellate Division. Pravata v. University of Medicine and Dentistry of New Jersey, 2006 WL 3228624 (not published in A.2d). Thomas Pravata alleged negligence by the defendants in allowing an inmate in possession of a hypodermic needle into the facility. Pravata has consistently tested negative for HIV, but tested positive for hepatitis C after this incident. The inmate was tested the day after the incident and was found to be HIV+, so Pravata was actually exposed. He suffered severe emotional complications as a result of this incident and several doctors concurred in finding that he suffered a permanent psychological disability, but Essex County Superior Court Judge Bernstein found that the lack of a permanent physical injury within the scope of the Torts Claim Act left Pravata out of luck in his civil suit, and the Appellate Division agreed, issuing a per curiam ruling. “In our opinion,” wrote the court, “the emotional distress experienced by a corrections officer after the inadvertent exposure to such a virus is not an ‘aggravating circumstance’ that would allow recovery” under the Tort Claims Act. The court also found that Pravata failed to show that he sustained any compensable monetary losses, because his medical expenses arising from the incident have all been covered by Workers Compensation.

Pennsylvania — Inadequate training of emergency medical technicians and paramedics on how to deal with people with HIV/AIDS is a recurring problem in Philadelphia, according to the AIDS Law Project of Pennsylvania, which recently reported settling a federal ADA lawsuit against the city brought on behalf of a
man who suffered discrimination from an EMT team responding to his 911 call in February 2001. John Gill Smith was suffering severe chest pains; when the EMT personnel learned that he was HIV+, one technician immediately left Smith’s house and another told him to cover his face or he would not receive service. The suit alleged that the EMT’s refused to assist Smith getting into the ambulance or to allow him to lie down during the trip to the hospital. According to a November 15 press release, more than a decade ago ALPA had filed a similar claim in state court, winning a settlement obligating the city to provide proper training, but that settlement had apparently not been complied with. The new settlement includes monitoring provisions to ensure that proper training will be given, as well as a payment of $50,000 in damages to Smith. Officially, the city denies all wrongdoing as part of the settlement.

Virginia — A woman who suffered emotional distress as a result of being given a false positive report on an HIV test was not entitled to damages from the laboratory that generated the false test result, held Senior U.S. District Judge Glen M. Williams in Hickman v. Laboratory Corporation of America, 2006 WL 3240011 (W.D.Va. Nov. 9, 2006). Accepting a magistrate’s report, Judge Williams wrote at length to deal with a purported confusion in Virginia law between the approach to the emotional distress issue taken by two Virginia Supreme Court decisions, Hughes v. Moore, 197 S.E.2d 214 (Va. 1973), and Mysers v. Sissler, 387 S.E.2d 463 (Va. 1990). Williams asserted that the causes were reconcilable, and went into great detail about the facts of each case and how they were to be distinguished. Ultimately, Clara Hickman’s case was resolved against her because although doctors testified that she suffered emotional distress from the false test result, Williams concluded that Virginia law required more than that in the way of firm medical testimony linking the incident to severe emotional distress producing symptoms of physical injury. A.S.L.

International AIDS Notes

The UNAIDS organization announced that despite apparently successful prevention programs in a few places, the HIV epidemic continues to grow worldwide, with an estimated 39.5 million people now living with HIV, of whom about 4.3 million were believed to have been infected during the past year. The number of reported deaths attributed to AIDS is 2.9 million so far during 2006. These figures compare to 36.9 million, 3.9 million, and 2.7 million in 2004. AIDS remains a major cause of death for young and middle-aged adults in large parts of Africa and Asia, and in many parts of the world the drugs that have made HIV infection into a manageable chronic disease in western industrial countries remain inaccessible, in part because of the lack of public health infrastructure to administer them, even if they were made available. New York Times, November 22.

There were news reports late in November, that confronted with these figures, advocates within the Roman Catholic Church for a modification of the Church’s staunch opposition to barrier contraceptives seemed to be gaining ground, as the Pope had called for a review of the Church’s policy. Critical observers have seen the Church’s policy as a major barrier to containing the epidemic in the developing world... ironically so, as the developing world has been the main source of new members for the church, which has been losing adherents in the developed countries where its opposition to contraception has been largely ignored by government policy makers as contrary to sound public health in the face of a sexually-transmitted epidemic. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Movement Positions

Transgender Law Center — The Transgender Law Center, based in California, has announced a full-time opening for a Policy Advocate, who will be primarily assigned to work on expanding the organization’s health care access work on behalf of transgendered individuals in California. The prerequisites for the job include at least two years experience as either a volunteer or paid staffer advocating for the rights of transgender people or other underserved communities, and a degree in law, public policy, public health, social change, or substantial and related real world experience. Spanish proficiency is preferred, as is experience in creating publications and media campaigns. The annual salary range is $37,000–42,000 depending on experience. Cover letters and resumes should be sent as word attachments to: Chris Daley, chris@transgenderlawcenter.org. Interviewing will begin around December 15, with an anticipated starting date for the successful candidate of February 1, 2007. Questions and details can be obtained by email from Chris Daley at the above address.

LESBIAN & GAY & RELATED LEGAL ISSUES:


Bennett, Brent, Jennifer Herbert & Jeanette McClellan, To Grandmother’s House We Go: Examining Troxel, Harrold, and the Future of Third-Party Visitation, 74 U. Cin. L. Rev. 1549 (Summer 2006).


Bourke, Nancy, Heeding the Equal Protection Clause in the Case of State v. Limon and in Other Instances of Discriminatory Romeo and Juliet Statutes, 12 Widener L. Rev. 613 (2006).


Diez, Eric R., “One Click, You’re Gaitly”: A Troubling Precedent for Internet Child Pornography and the Fourth Amendment, 55 Catholic Univ. L. Rev. 759 (Spring 2006).


Greenberg, Julie, and Marybeth Herald, You Can’t Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings, 80 Wash. L. Rev. 819 (Nov. 2005).


Gunnther, Marc, Queer Inc.: How Corporate America Fell in Love With Gays and Lesbians. It’s a Movement, 154 Fortune No. 12 (Dec. 11, 2006) (Extensive newsmagazine article about the progress for same-sex couple rights in corporate America, contrasted to the halting progress in the political sphere).


Johnson, Brandon R., “Emerging Awareness” After the Emergence of Roberts: Reasonable Societal Reliance in Substantive Due Process Inquiry, 71 Brook. L. Rev. 1587 (Summer 2006).


Larcano, Elizabeth, A “Pink” Herring: the Prospect of Polygamy Following the Legalization of Same-Sex Marriage, 38 Conn. L. Rev. 1065 (July 2006).


Rosenfeld, Michel, Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court, 4 Int’l J. Const. L. 618 (Oct. 2006).


Specially Noted:

The Georgetown Journal of Gender and the Law has published its seventh annual Review of Gender and Sexuality Law: 7 Georgetown J. Gender & L. No. 3 (2006). In an op-ed article published in the Chicago Sun-Times on November 18, titled “States Will Have to Recognize Same-Sex Relationships,” Professor Andrew Koppelman of Northwestern University Law School pointed out that once New Jersey has legislated to comply with its Supreme Court’s recent ruling, almost a fifth of the U.S. population will be living in states that provide legal recognition to same-sex couples, either through civil unions or marriages, and that as a practical matter other states are going to have to start recognizing those relationships in order to deal rationally with their ongoing legal business in light of the mobility of Americans. New Jersey’s action will join it to California, the most populous state, Vermont and Connecticut, all allowing same-sex civil unions or domestic partnerships, and Massachusetts, where marriage is available for same-sex partners.

Vol. 51, No. 4 of Villanova Law Review is devoted to a symposium titled “Privacy Law in the New Millennium: A Tribute to Richard C. Tur- kington.” Articles whose titles suggested most significance for our readers are individually noted above.

AIDS & RELATED LEGAL ISSUES:


**EDITOR’S NOTE:**

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