

CALIFORNIA EXPANDS RIGHTS OF DOMESTIC PARTNERS

In a major legislative advance by the nation's largest state, California has expanded upon its existing domestic partnership law by adding an array of new entitlements. A.B. 25, signed into law by Governor Gray Davis on October 14 after passage by the Senate on September 10 and the Assembly on September 12, adds to or amends provisions of the Civil Code, the Code of Civil Procedure, the Government Code, the Health and Safety Code, the Insurance Code, the Labor Code, the Probate Code, the Revenue and Taxation Code, and the Unemployment Insurance Code, in each case making registered domestic partners eligible to be treated the same as legal spouses for particular purposes.

California's legislative venture, enacted without the threat of any pending lawsuits, sharply contrasts with the Civil Union Law enacted in Vermont more than a year ago in reaction to a ruling by the Vermont Supreme Court in *Baker v. State of Vermont*, 744 A.2d 864 (1999), in which that court held that same-sex couples were entitled to all the rights and benefits of marriage and gave the legislature an opportunity to pass an appropriate law rather than impose an immediate judicial remedy for the state's refusal to allow same-sex marriages. The Civil Union Act accords to same-sex partners in Vermont almost all the rights (and responsibilities) that state law provides for opposite-sex couples who marry. Although the new law leaves California short of the inclusive approach taken by Vermont, it is in some respects more significant, in that it is a voluntary legislative enactment, and that the number of people who potentially can directly benefit is enormous by comparison to the number directly affected by the Vermont legislation.

The chief sponsor of A.B. 24 was San Francisco Assembly Member Carol Migden.

The legislation will do the following things:

Entitle domestic partners to seek the same damages for negligent infliction of emotional distress and wrongful death that spouses can seek.

Expand the legal effect of registration as domestic partners to any provision of law that specifically refers to domestic partners (as opposed to the prior law that sharply limited the effect of registration to a few rights enumerated in the registration statute), and expand the number of opposite-sex couples who can register as domestic partners to include any couple in which at least

one member is over the age of 62 and at least one member meets the specified eligibility criteria for Social Security benefits.

Allow domestic partners to adopt the children of their partners in the same way that stepparents can adopt the children of their spouses.

Allow a domestic partner who is receiving medical and hospital benefits, and the partners' children, to continue receiving such coverage after the death of their public employee domestic partner.

Allow the board of supervisors in San Mateo County to extend survivor's benefit rights to their employees' domestic partners and their children.

Authorize domestic partners to make health care decisions on behalf of their partners in certain circumstances.

Require insurers to include domestic partnership coverage in the hospital, medical, or surgical insurance plans they sell in the state of California.

Require employers who provide sick leave to employees to let the employees use such leave to attend to an ill domestic partner or child of a domestic partner on the same basis that they may now attend to spouses and spouses' children.

Amend the Probate Code in a variety of ways to give domestic partners parity with spouses in matters of guardianship and conservatorship. It would also define a domestic partner as a family member for purposes of rules prohibiting self-dealing by guardians or conservators with respect to the estate of the conservatee or ward. The law revises the existing statutory will form to provide for bequests to domestic partners, and provides that such bequests are automatically revoked upon the termination of a domestic partnership, just as they are revoked upon a divorce. Domestic partners will have all the notification rights that spouses have in probate proceedings, and will have priority for appointment as administrators. The children and parents of domestic partners will also be considered family members for some purposes under the Probate Code.

Amend the state's Personal Income Tax Law to allow taxpayers to exclude from gross income certain expenditures for insurance coverage or health costs of domestic partners, and will make such expenses deductible as business expenses for self-employed individuals.

Amend the Unemployment Insurance Law to include within the definition of good cause for

leaving a job the act of accompanying a domestic partner to a place from which it is not practicable to commute, thus rendering the domestic partner eligible for unemployment insurance benefits.

Allow domestic partners to file disability benefit claims on behalf of their mentally disabled partners. (Present law authorizes a spouse or other qualified person to file such claims.)

According to news reports about the signing of the bill, an anti-gay group called Campaign for California Families charged that the law inappropriately undermines Proposition 22, a ballot measure approved by voters last year that defines marriage as the union of one man and one woman and prohibits the state from recognizing same-sex marriages. Anticipating such criticism, Davis stated at the signing ceremony that "in California a legal marriage is a marriage between a man and a woman" and "that's not going to change." *Los Angeles Times*, *San Francisco Chronicle*, Oct. 15. A.S.L.

LESBIAN/GAY LEGAL NEWS

California Appeals Court Rejects Legitimacy of Second-Parent Adoptions

In a ruling dramatically illustrating why one provision of the new California domestic partnership law is needed, the California Court of Appeal, 4th District, ruled Oct. 25 that under existing state law, the courts may not grant adoptions to co-parents without terminating the parental rights of the child's legal parent. *Sharon S. v. Superior Court of San Diego County*, 2001 WL 1294101. In so ruling, the court opened up the basis for questioning the legitimacy of numerous such adoptions that have already been granted by the trial courts in that state.

Sharon and Annette began their relationship in 1989, and lived together in San Diego beginning in 1990. The court characterizes their relationship as "volatile" and mentions that they sought couples counseling at various times. In 1996, Sharon gave birth to Zachary, conceived through donor insemination, and subsequently Annette adopted Zachary as a co-parent in a procedure approved by the San Diego County Superior Court (despite a negative recommendation from the county Department of Health and Human Services). In 1999, Sharon gave birth to Joshua, similarly conceived through donor insemination, and Annette and Sharon initiated proceedings for Annette to adopt Joshua in the same way. But problems with their relationship led to several postponements of hearings in the adoption case, and ultimately the relationship ended. Annette still wanted to adopt Joshua, and indeed sought custody of Zachary and Joshua, but Sharon sought to

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withdraw her consent to the adoption of Joshua. The Superior Court, reacting to a recommendation from the county Department to approve the adoption based on Annette's relationship with Joshua, refused to let Sharon withdraw her consent, finding that this action came too late under the provision that puts a 90-day cap on such revocation attempts. Sharon sought a writ from the court of appeal to compel the superior court to rescind the adoption ruling and to allow her to withdraw her consent.

At the appellate level, Annette argued in support of the superior court's order that it was consistent with an old California Supreme Court ruling, *Marshall v. Marshall*, 196 Cal. 761 (1925), a case long predating the state law authorizing step-parent adoptions, in which the court found that an adoption by a stepfather would not terminate the parental rights of the natural mother, even though a literal application of the existing adoption statutes would seem to compel such a result. She also pointed out that the state's Social Service department had come around to supporting second-parent adoptions, even facilitating them with special forms to be used. Further, she urged that the court adopt a "liberal interpretation" of the adoption statute in order to effectuate the best interests of Joshua.

Rejecting these arguments, and agreeing with Sharon's argument that second-parent adoptions may not be granted under California law, Justice Kremer wrote for the court that "the concept of liberal interpretation cannot be used to defeat the overall statutory framework and fundamental rules of statutory construction. The role of the courts is to interpret and apply the existing statutes in accordance with the Legislature's expressed intention, not to re-write the statutes or question the Legislature's wisdom in adopting them." Kremer found no ambiguity in the statutory command that a natural parent's rights be terminated upon an adoption by a third party, and found unpersuasive the argument that the second-parent adoption procedure should be validated based on the facts that so many of them have been approved in trial court (i.e., "non-precedential") decisions and that the state's social services agency now approved of them. Although Kremer acknowledged that courts defer to agency interpretations of statutes, the judge asserted that such could not be done when "a contrary legislative purpose is apparent."

Kremer noted that the legislature reacted to the *Marshall* decision by codifying its result, but that the legislature had not reacted to the spate of recent co-parent adoptions by adjusting the adoption statute to end the automatic termination of parental rights feature that was the roadblock in this case (because Sharon had never given consent to have her own rights terminated, a sine qua non of adoption where the natural parent is not unfit). "The issue of whether to allow such adoptions involves important social, economic and other policy considerations... such a matter is ap-

propriately deferred to the Legislature, which is best equipped to address this issue and which has historically provided the framework that defines the scope of permissible adoptions," insisted Kremer, who observed that in 1997 and 1998 the Legislature had failed to adopt bills specifically authorizing second-parent adoption, while this year, in A.B. 25 (see above), the Legislature had enacted a provision that would allow registered same-sex partners to use such a procedure, effective in January 2002. From this Kremer deduced that the Legislature believed that existing law would not authorize such a procedure, necessitating specific legislative authorization for the future.

Justice McDonald's dissent argued that the *Marshall* case provided a suitable precedent for the view that the existing adoption statute can be construed not to compel termination of parental rights in every case where an adoption is granted. But, more importantly, McDonald emphasized the possible impact of the majority's ruling on existing second-parent adoptions in California. "Finally, this case between Sharon and Annette does not exist in a vacuum. Instead, in addition to imposing upon a procedural statute an overly narrow construction directly contravening the Supreme Court's express interpretation of the statute's predecessor, the majority's apparent sweeping conclusion that courts lack jurisdiction to grant second-parent adoptions under the procedures at issue here calls into question the legitimacy of hundred or perhaps thousands of existing parent-child relationships created through those procedures. Further, the majority opinion undermines the expectations of finality reasonably held by parties to second-parent adoptions effected under such procedures even though those parties used Judicial Council form orders of adoption and employed forms suggested by the California Department of Social Services in accord with CDSS's view of second-parent adoptions as valid under applicable law. The majority opinion invites attempts to nullify completed second-party adoptions in myriad species of litigation including support/ custody/ visitation disputes, inheritance contests and withdrawals of entitlements to previously available health and pension benefits, both governmental and private. The ultimate financial and emotional losers will be children who are the intended beneficiaries of California's adoption laws."

Amici in the case included, among others, the ACLU Foundation of San Diego & Imperial Counties, the ACLU Foundation of Southern California, Lambda Legal Defense and Education Fund, the National Center for Lesbian Rights and Children of Lesbians and Gays Everywhere, and the Family Pride Coalition.

Given the potential impact of this decision on existing second-parent adoptions, one suspects these groups will argue for rehearing and/or appeal. State Assemblymember Carol Migden announced on Oct. 30 that she planned to introduce

a bill to overcome the impact of this decision on existing adoptions, according to the *Los Angeles Times* of Oct. 31. In the meantime, California partners considering second-parent adoptions would be wise to register under the domestic partnership registry and wait until January before initiating their adoption petitions. A.S.L.

Washington Supreme Court Revives Gay Man's Claim To Property Jointly-Owned With His Deceased Partner

In a somewhat elusively-worded opinion, the Supreme Court of the State of Washington ruled on Nov. 1 that Pierce County Superior Court Judge Vicki L. Hogan should not have awarded summary judgment to Frank Vasquez in his suit against the estate of his deceased partner, Robert Schwerzler, using the Washington state common law theory of "meretricious relationship" because there were disputed issues of material fact before the court. *Vasquez v. Hawthorne*, No. 69655-1. In so ruling, the majority vacated and implicitly overruled the decision by the intermediate state court of appeals, reported at 994 P2d 240 (2000), which had ruled that the "meretricious relationship" doctrine was only available for opposite-sex couples. Although the opinion by Justice Charles W. Johnson does not contain a straightforward, affirmative endorsement of the use of this legal doctrine by same-sex couples, this is the logical implication of the ruling, which may set an important precedent for same-sex couples in the state.

Vasquez and Schwerzler had lived together for about three decades when Schwerzler died intestate. Vasquez filed a claim against the estate claiming that he was entitled to an equitable share of the property that was held in Schwerzler's name. (It seems that Schwerzler had an ongoing family business, and, according to Vasquez, the property that the men jointly acquired was held in Schwerzler's name.) The personal representative of the estate, in accordance with the wishes of Schwerzler's surviving legal heirs, denied the claim, asserting that the men had no legal relationship. In the ensuing lawsuit, Vasquez sought to vindicate his claims using a variety of equitable theories, including meretricious relationship, equitable trust, and implied partnership. The estate sharply contested Vasquez's factual allegations, asserting that the men were at best roommates and did not have a quasi-marital status, and arguing that the meretricious relationship concept developed by Washington courts in cases involving the break-up of opposite-sex couples could not be applied to this relationship.

Vasquez moved for partial summary judgment on the meretricious relationship theory. Superior Court Judge Hogan concluded that Vasquez had proved that he and Schwerzler had the kind of relationship that should be covered under the meretricious relationship concept, that property acquired during the relationship was jointly-owned and should pass to Vasquez by analogy to the op-

eration of the intestate succession laws of the state. The estate appealed, and won a reversal from the court of appeals, on the ground that same-sex couples cannot be treated by law as having a “meretricious relationship” because that concept was developed specifically to deal with the situation of couples who could marry but, for whatever reason, had refrained from doing so. Vasquez then appealed.

Justice Johnson found that it was improper for the trial court to have granted summary judgment, because the estate was sharply contesting Vasquez’s factual allegations about the men’s relationship, and such factual disputes cannot be decided on a motion for summary judgment. Given this view, the court of appeals was correct to reverse and remand the summary judgment, but erred by pronouncing on the merits of the legal theory. However, if the meretricious relationship doctrine can never apply to a same-sex couple, this new remand by the Supreme Court would make no sense. Johnson’s brief discussion clearly implies that if, after trial, the court concludes that Vasquez and Schwerzler did have a close, interdependent relationship of the type described in the court’s meretricious relationship cases, then Vasquez would have an equitable right to be awarded title to the property in question. Johnson is careful, however, to avoid stating directly which equitable theory would dictate this result, which leaves the opinion frustratingly short of an outright pronouncement on the question.

Instead, Johnson wrote the following: “Vasquez presented claims for equitable relief under several theories, including meretricious relationship, implied partnership, and equitable trust. When equitable claims are brought, the focus remains on the equities involved between the parties. Equitable claims are not dependent on the ‘legality’ of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties. For example, the use of the term ‘marital-like’ in prior meretricious relationship cases is a mere analogy because defining these relationships as related to marriage would create a de facto common-law marriage, which this court has refused to do. *In re Marriage of Pennington*, 142 Wn. 2d 592, 601, 14 P. 3d 764 (2000). Rather than relying on analogy, equitable claims must be analyzed under the specific facts presented in each case. Even when we recognize ‘factors’ to guide the court’s determination of the equitable issues presented, these considerations are not exclusive, but are intended to reach all relevant evidence. In a situation where the relationship between the parties is both complicated and contested, the determination of which equitable theories apply should seldom be decided by the court on summary judgment. In this case, the trial court must weigh the evidence to determine whether Vasquez has established his claim for equitable relief.”

This passage certainly lends itself to the interpretation that the meretricious relationship con-

cept may apply to the Vasquez claim, but could also be construed to mean that the trial court may resort to general equitable considerations without strictly conforming to the ‘factors’ identified in prior meretricious relationship cases. In any event, the opinion signals a flexibility in approach to achieving equity in cases involving gay relationships that is refreshingly non-doctrinaire.

Two justices filed concurring opinions, neither of which would support the broader reading of equitable principles that Justice Johnson embraced.

Chief Justice Gerry Alexander concurred in the result (i.e., remanding to the trial court) but not in the court’s discussion of the meretricious relationship concept. Alexander observed that the meretricious relationship concept had been adopted to deal with situations where unmarried couples terminated their relationships and were contesting how property acquired during the relationship should be divided between them. According to Alexander, the concept does not apply to disputes involving distribution of property after the death of one of the parties. He insisted that “the laws of intestacy dictate how property is to be distributed when an individual dies without leaving a will. Accordingly, we have held that the meretricious relationship doctrine... does not apply when a relationship between unmarried cohabitants is terminated by death of one cohabitant... Thus, under the circumstances of this case, I would hold that the meretricious relationship doctrine is not an available form of equitable relief. The question of whether the doctrine has application when parties of the same sex separate after having lived together in a long-term stable relationship, we should leave to another day when that issue is properly before us.” Thus, in Justice Alexander’s opinion, the trial court’s role on remand is to resolve factual disputes and determine whether some other equitable theory would apply to this dispute, but not the meretricious relationship theory.

In a separate concurring opinion, Justice Richard Sanders also agrees that the matter should be remanded for factual resolution and consideration of other possible equitable theories, but he argues, along the lines of the court of appeals decision, that in any event the meretricious relationship doctrine is not available for same sex couples, so the court of appeals was correct to reverse the summary judgment on that ground. “I agree with the majority that many of the traditional factors associated with the existence of a meretricious relationship, at least when considered in isolation, are certainly subject to material factual dispute in the record before us,” he wrote. “However there is one fact, that these individuals are of the same sex, which distinguishes this case from others preceding it. The legal consequence of this undisputed fact is central to the briefing of the parties as well as amici Northwest Women’s Law Center and Lambda Legal Defense and Education Fund. Moreover, it is that fact which the Court of Appeals cited as determinative, prompting our

review. Therefore the majority opinion, which avoids meaningful discussion of this issue, provides somewhat less satisfaction than can be obtained from kissing one’s sister: the majority reverses the summary judgment in favor of Vasquez, remands for further proceedings consistent with its opinion, but fails to articulate potentially dispositive legal criteria to aid the trial court in its task.”

Sanders concluded that existing precedents must lead the trial court inexorably to conclude that the meretricious relationship claim must be dismissed, because the Court of Appeals was correct in holding that this theory applies only to couples who are capable of being legally married but for whatever reason have not entered into legal marriage.

The remand means that if the case goes to trial Vasquez will need to present detailed evidence on the nature of his relationship with Schwerzler, a process that will undoubtedly be quite invasive, and which could simply be avoided had the state adopted a registered partnership system or, better yet, opened up legal marriage to same-sex partners.

Vasquez is represented by Terry J. Barnett of Tacoma, with amicus assistance from the organizations mentioned above as well as the ACLU. The estate’s attorney, Ross E. Tayler, had amicus assistance from the Marriage Law Project at Catholic University law school, an organization opposed to legal recognition of same-sex partners. A.S.L.

Massachusetts Commission Finds State Discrimination Law Covers Transgendered Persons

In a pair of decisions issued on October 10, the Massachusetts Commission Against Discrimination found that individuals who encounter discrimination because of their gender identity (transgender) can be protected by provisions of state law forbidding discrimination on the basis of sex or disability, but rejected the argument that such individuals would be protected by the state’s ban on sexual orientation discrimination. *Millett v. Lutco, Inc.*, 98 BRM 3695; *Jette v. Honey Farms Mini Market*, 95 SEM 0421 (news report in BNA Daily Labor Report No. 202, 10/22/2001, pp. A-3/4).

In *Millett*, the complainant is a male-to-female transgendered person who claimed she was pre-emptively issued written warnings by her supervisor for insubordination and threatened with termination after she complained about her supervisor’s harassing behavior. The complainant framed her complaint in terms of discrimination on the basis of sex or sexual orientation. The employer moved to dismiss the charges, asserting that the statute, which does not specify gender identity as a forbidden ground for discrimination, does not cover these charges. First addressing the sexual orientation claim, the Commission found that the definition of “sexual orientation” within

the statute (“having an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality”) is “unambiguous on its face: only heterosexuals, bisexuals and homosexuals are protected under the provisions of the statute,” and cited by contrast the Minnesota civil rights statute, which specifically includes gender identity issues within its definition of sexual orientation. Consequently, the Commission concluded that the motion to dismiss the sexual orientation claim should be granted.

However, turning to the sex discrimination claim, the Commission found that there was room for more flexible interpretation of this term, opining that “the legal understanding of sex discrimination has been in a state of continual evolution and expansion. Sex discrimination is a concept that is read broadly; in other words, illegal ‘sex discrimination’ takes into account non-anatomical concepts, like gender.” After viewing a range of cases that have applied the sex discrimination ban in differing contexts, the Commission said, “The issue for us, then, is whether transsexuality is sufficiently sex-linked to bring it within the ambit of the sex discrimination laws. We believe that it is.” The Commission relied heavily on the U.S. Supreme Court’s ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which had accepted the argument that gender stereotyping was evidence of discriminatory intent violative of the ban on sex discrimination in Title VII of the federal Civil Rights Act of 1964. “Sex discrimination is a result of stereotypes of women and men, mandating conformity with society’s expectations of each sex; discrimination against transsexual people is, oftentimes, because the individual is well outside these expectations,” wrote the Commission, then quoting a law review article that expands on the point. “In this way,” the Commission asserted, “discrimination against complainant on account of her transsexuality is completely about her current sex, in light of her former sex.” The court reviewed cases from other jurisdictions, most of which have refused to find coverage, but particularly emphasized and quoted from *Enriquez v. West Jersey Health Systems*, 2001 N.J. Super. LEXIS 283 (July 3, 2001), in which the N.J. Appellate Division ruled this summer that a transgendered complainant could sue under that state’s ban on sex discrimination. The Commission also found “unsatisfying to us” the analysis of some federal cases rejecting coverage for transsexuals.

The opinion, like its companion discussed below, was rendered in response to a reference from the Investigating Commissioner, seeking guidance on how to process the charge, so it does not lead to a particular result in the case, but signals that the case can be filed, investigated and pursued.

In the second opinion, *Jette v. Honey Farms Mini Market*, the complainant is a transgendered store clerk whose employer insisted that she use her masculine birth name and comply with the

company’s dress code for male dress. Jette, who invoked the ban on disability discrimination as well as sex and sexual orientation discrimination, claimed that the employer had done nothing to reasonably accommodate her gender dysphoria condition by allowing her to identify by name and otherwise as a woman.

The Commission noted that in its companion ruling of the same date it had established that a transsexual complaint can bring a sex discrimination claim, but not a sexual orientation discrimination claim. The Commission then discussed the further theory of disability discrimination, noting that this is an issue of first impression for the Massachusetts courts. The Commission found that coverage for transsexuality was not expressly excluded from the statute, unlike the situation with the federal Rehabilitation Act and the Americans With Disabilities Act, both of which specifically list transsexuality as not being covered under the law. This was deemed particularly significant because the disability provisions of the state law were modeled on the Rehabilitation Act, so the Commission thought it significant that Massachusetts broke from that model by not specifically listing transsexuality as a condition not covered by the law. Indeed, the Commission concluded that “since the legislature was *aware* of the exemptions for coverage of transsexuals [in the federal law] and did not include such in M.G.L.C. 151B, it must have *intended* to include such coverage.” This, taken together with the tradition of “liberal construction” of civil rights laws, argued for the Commission being receptive to a disability claim brought by a transsexual, provided the complainant “can establish that she is substantially impaired in a major life activity and can perform the essential functions of her position with reasonable accommodation.” The Commission again cited *Enriquez* on this point, and ordered the matter remanded to the Investigating Commissioner for further investigation of the facts necessary to support such a claim.

Special thanks to Gay & Lesbians Advocates & Defenders, who have been very involved in developing the legally principles governing transsexuals in New England, and who made available copies of the Commission’s decisions for this report. A.S.L.

Ohio Appeals Court Finds Unwritten Surrogacy Agreement Between Two Gay Men and One’s Sister Unenforceable on Public Policy Grounds

An Ohio appellate court has ruled that an oral surrogacy agreement entered into between a woman, her brother and her brother’s same-sex partner was against public policy and void under state law. *Decker (Lowd) v. Decker*, 2001 WL 1167475 (Sept. 28). The court ordered that the child, who was conceived through donor insemination, be returned to her mother, notwithstanding that the mother had signed a declaration renouncing her parental rights prior to the birth of the child.

Robert Decker and his “lifetime companion” David Pope wanted to raise a child, but did not think that adoption was a viable option for them because they are both HIV+. In early 1998, Linda Lowd, Robert’s sister, agreed to be artificially inseminated with sperm from an anonymous donor and to allow Robert and David to raise the child. Robert agreed to pay for all expenses related to the insemination, as well as all of Linda’s medical expenses related to the pregnancy and childbirth. The three also agreed that Robert and David would not attempt to adopt the child formally, that Linda would always be known as the child’s mother, and that Linda’s three children would be known as the child’s full siblings. The agreement was never put into writing.

In October of 1999, Linda was inseminated with sperm from a donor chosen by David. Soon afterwards, the parties began to realize that they disagreed about the terms of their agreement. The three attended joint counseling briefly, but Linda stopped attending when Robert and David began to refer to Linda as a “surrogate.”

On July 6, 1999, the day before the baby was born, Robert delivered a document entitled “Custody Declaration” to Linda and asked her to sign it. The declaration stated that Linda “unconditionally relinquished” custody of the unborn child to the child’s “father,” David. Linda signed the document, but later claimed that she was on medication at the time for an abscessed tooth, and did not understand the crucial terms of the document. She claimed she that never intended to relinquish her custody rights.

On July 7, 1999, Linda gave birth to a baby girl, and named her Lillian Andrea, a name chosen by Robert and David. However, Linda refused to name David as Lillian’s father on her birth certificate. According to Linda, the three agreed to refer to David as the baby’s father only for insurance purposes. After meeting with a social worker, Linda listed her own last name on Lillian’s birth certificate, and named her fiancé, as Lillian’s father. She also directed that her own insurance company be billed for all of her and Lillian’s medical care.

During July and August 1999, Linda and Robert shared custody of Lillian through a mutually agreed time schedule. But on September 7, Robert picked up Lillian from Linda’s home to take her to a doctor appointment, and then refused to return her to Linda. Linda filed a complaint for custody with the Juvenile Division of the Hancock County Court of Pleas. The matter was referred to a magistrate, who determined that Linda intended to give Lillian to Robert and David. The magistrate also found that the parties had agreed that David would be listed as the baby’s legal father and that David’s surname would appear on Lillian’s birth certificate. The magistrate recommended to the trial court that the parties continue shared parenting responsibilities. In May of 2001, the trial court affirmed the magistrate’s decision over Linda’s objections, and issued an or-

der creating a legal relationship between Lillian and David. The order directed shared parenting between Linda and David, and directed that Lillian's birth certificate be amended to contain David's last name. Linda appealed the court's order.

The Third District of the Ohio Court of Appeals unanimously reversed, and directed that the Common Pleas Court enter an order restoring exclusive custody of Lillian to Linda. According to the court, there are only two ways that a parental relationship can be established in Ohio between a father and child: acknowledgment of biological paternity or proof of adoption. Neither situation applied to David. Although the parties arguably entered into an oral agreement through which David was to be named as Lillian's father, and through which Robert and David were to raise Lillian, the appellate court reiterated Ohio's policy against the validity of such agreements: "It has long been recognized that, as a matter of public policy, the state will not enforce or encourage private agreements or contracts to give up parental rights." Judge Bryant explained on behalf of the three-judge panel that adoption of a child requires supervision by proper authorities in order to "prevent 'black market' adoptions that may not be in the best interest of the child."

The court's decision raises fundamental policy issues concerning the validity of surrogacy agreements, and the rights of blood relatives such as brother and sister to take advantage of such agreements. Even proponents of surrogacy arrangements would be hard pressed to find fault with the appellate court's decision, since the parties' agreement was never put in writing.

Linda Decker Lowd was represented by David W. Cliffe. Robert Decker was represented by Teresa Glover and Andrew Van Horn. *Ian Chesir-Teran*

Delaware Family Court Approves Second Parent Adoption for Gay Male Couple

In an opinion released on September 28, Delaware Family Court Judge Vincent J. Poppiti of New Castle County approved the adoption of two young boys by a gay man who is the domestic partner of the children's adoptive father. This is reportedly the first judicial approval of a second-parent adoption by a same-sex couple in Delaware. All of the parties are referred to in the opinion by pseudonyms. *In the Interest of Peter Hart and George Hart*.

According to the lengthy opinion by Judge Poppiti, both of the boys were born to the same cocaine-addicted mother, and were adopted seriatim by Gene Hart, a gay man, after state officials had moved to terminate the parental rights of the natural parents. The social services report on Mr. Hart's household noted the presence of his domestic partner, Burke Shiri, and mentioned that Mr. Shiri would assist Mr. Hart in raising these boys. After each of the adoptions by Mr. Hart

was final, Mr. Shiri petitioned to adopt the two boys without cutting off Mr. Hart's parental rights. Social service reports indicated that the boys had thrived in the Hart-Shiri household and had bonded with both of the men, who have a long-term committed relationship and are financially interdependent.

Judge Poppiti began his opinion with a quotation from the Biblical Book of Ruth, the famous lines in which the widow Ruth vows to accompany her mother-in-law, Naomi, back to the home of Naomi's ancestors and be forever faithful to her, and used the quotation to describe the depth of attachment of Shiri and Hart and the two boys living in their household. After reviewing the facts of the case, the judge noted that the Delaware adoption statute has been given a liberal interpretation to effectuate the overriding purpose of achieving the best interest of the child, and on this basis found that the statute could be construed to allow Mr. Shiri to adopt the two boys without affecting Mr. Hart's parental rights. He treated Mr. Shiri as having the same status as a step-parent who adopts the children of a spouse. "Although the Delaware General Assembly may not have specifically contemplated adoption by a 'second parent' when enacting the adoption laws of this state," wrote Poppiti, "it is inconceivable to conclude, given the statutory mandate to read the statute in the best interest of children, that our Legislature would have meant to exclude loving and nurturing two parent homes as a resource for the some of the state's most needy children... For the Court to ignore what exists in fact in the best interests of children would ignore logic; be antithetical to the needs and best interest of children who are being cared for, raised and nurtured in a home where two adults are committed and dedicated to their welfare; and produce an absurd and unacceptable social result. In short, to rule otherwise would violate the clear mandate of the statute to 'resolve all questions of interpretation' in the children's best interest."

Judge Poppiti also rejected the suggestion that the adoptive parent's sexual orientation should have anything to do with the case. "Clearly the relationship between the persons who have been and will be parenting Peter and George is a factor that is of critical importance to the Court. The fact that Mr. Hart and Mr. Shiri are gay men in and of itself is of no concern to the Court... In fact and therefore in law, what does matter in the best interests of both Peter and George is that Gene Hart and Burke Shiri live in a loving and long lasting committed relationship. In fact and in law what does matter in their best interests is that Peter and George have already begun to reap the benefits of the love of these two men and have even in their tender years returned it in kind. In fact and in law what does matter in the best interests of Peter and George is that they are thriving in the environment created by Gene Hart and Burke Shiri.

The adoption petition had actually been granted from the bench on June 27, 2001, but

Judge Poppiti took extra time to write an opinion (an unusual procedure in an adoption case where the petition is granted) to place on record the legal reasoning and factual analysis behind the decision as a matter of first impression.

Norman C. Simon of the New York-based firm Kramer Levin Naftalis & Frankel was lead counsel for the petitioning parent as a cooperating attorney for Lambda Legal Defense & Education Fund, with local counsel Ellen S. Meyer and Sha-kuutla L. Bhaya, and Lambda legal director Ruth Harlow as co-counsel on the case. As Chief Judge of the Family Court, Judge Poppiti is very respected in Delaware, according to Harlow's comment on the case reported in the *Washington Blade* of Oct. 19. The report also indicated that Delaware is the 22nd state in which a second-parent adoption has been approved. A.S.L.

Discharged Gay Manager Entitled To Discrimination Trial

Ruling on a motion for summary judgment by the employer, U.S. District Judge Richard Berman (S.D.N.Y.) found that Lawrence B. Lane is entitled to a trial of his sexual orientation discrimination claims against Collins & Aikman Floorcoverings, Inc., but not to his claims of hostile environment harassment. *Lane v. Collins & Aikman Floorcoverings, Inc.*, 2001 WL 1338918 (Oct. 31).

Lane was hired in June 1997 as New York Regional Manager by Collins & Aikman, a Georgia-based producer of commercial flooring systems. He was discharged on September 1, 1999. Lane alleges that he received mainly positive performance reviews until those who made the decision to discharge him learned that he was gay, shortly before the end of his employment. He also alleges a variety of anti-gay remarks by relevant personnel, and a particular falling out with an Account Manager who subsequently "outed" him to other employees and members of management. The company countered with allegations that Lane was deficient in performing his job, did not meet sales quotas, and did not effectively establish a well-functioning sales team in the New York office.

Lane filed suit in state court, alleging a violation of New York City's ordinance banning sexual orientation discrimination. The employer removed the case to federal court on diversity grounds, and moved for summary judgment, asserting that Lane had failed to establish a prima facie case either of discriminatory discharge or hostile environment, which were the two theories he had advanced.

Judge Berman found that there were disputed issues of fact on key points that precluded a grant of summary judgement to the employer on the discrimination claim. To establish a prima facie case, Lane would have to show that "(1) he is a member of a protected class; (2) he was performing his duties satisfactorily; (3) he was discharged; and (4) his discharge occurred under circumstances giving rise to an inference of discrimination. The em-

ployer claimed that Lane failed to establish the second and fourth elements, arguing that his failure to meet quotas showed that his work was unsatisfactory, and that the senior managers who made the discharge decision had become critical of Lane's performance before they knew he was gay.

Judge Berman found that there was factual contention as to both these issues. In a deposition, one of the named co-defendant managers admitted that somebody could be a successful manager without hitting the quotas, and that other managers who had not achieved their sales quotas had been retained. And there was conflicting evidence in the record as to when various individuals learned that Lane was gay, including Lane's assertions that there were aspects of his dress and behavior that would have led various individuals to certain conclusions about his sexuality prior to the time he was "outed." This, and the coincidence that his discharge followed so closely on top officials having their suspicions confirmed, together with the various incidents of homophobic statements in the workplace, were enough to create a disputed issue on circumstantial inferences of motivation.

However, Judge Berman agreed with the employer that Lane failed to allege a prima facie case of hostile environment. Although he worked for Collins & Aikman for over two years, he alleged only half a dozen incidents of homophobic speech, none of which struck the court as extreme or hostile enough to have affected Lane's working conditions sufficiently to meet the stiff test set by the case law for hostile environment claims.

Judge Berman ordered the parties to attempt in good faith to achieve a settlement of the discrimination claim before the next scheduled conference with the judge on November 30.

Lane is represented by LeGaL member Lee Bantle.

Tennessee Appeals Court Denies Custody to Lesbian Mother, Claiming Her Conduct Was Inappropriate

Citing the best interests of the child, the Court of Appeals of Tennessee unanimously upheld an order granting custody of a 7-year old girl to the father. Rejecting the mothers appeal claiming she was denied custody due to being a lesbian. *Rieder v. Rieder*, 2001 WL 1173279 (Oct. 5).

Patricia Ann Crawley Rieder and Timothy Dale Rieder married in 1990 and had a child in 1993. They separated in November 1999, when Patricia "began spending an excessive amount of time with a female companion." Finding that the mother's relationship interfered with raising the girl, the court cited "public displays of affection," and that "homosexual literature" as well as "sex toys passed between the lovers without much of an attempt to hide them."

Presiding Judge Cantrell wrote that the child was confused "over who her family was," and

noted that in 1999 Patricia's companion attempted suicide, as did Patricia in May, 2000, after writing a suicide note to her daughter.

The Court of Appeals denied the mother's claim that this was "a case about her sexual preferences and the role that factor plays in the custody of children." The court stated that sexual orientation is not listed as a factor affecting custody under Tenn.Code Ann. §§ 36-6-106. While rejecting the mother's claim, the court wrote "we have not seen any indication that sexual preferences are linked to the love and affection a parent has for a child. We do find that sexual activity, whether heterosexual or homosexual, may occur in inappropriate times and places and reflect on the parent's ability to serve the best interests of a child." *Daniel R Schaffer*

Michigan Appeals Court Sustains Conviction of Gay Man Who Murdered His Ex-Lover

In an unpublished *per curiam* opinion, the Court of Appeals of Michigan upheld the first degree murder conviction of a man who believed the victim had infected him with HIV. *People v. Summerville*, 2001 WL 1198932 (Oct. 9).

James Summerville killed his former boyfriend, Mikael Ellis, by stabbing him forty-six times. The prosecutor argued that Summerville killed Ellis because he believed Ellis had infected him with HIV. According to the prosecutor, this motive, which was on Summerville's mind as he walked towards Ellis's house on the night of the killing, supported a finding of premeditated murder. Summerville did not deny killing Ellis, but claimed that he "snapped" while in a rage, and, therefore, was guilty only of voluntary manslaughter. The jury agreed with the prosecutor; Ellis was sentenced to life in prison.

On appeal, Summerville claimed there was insufficient evidence of premeditation and deliberation. According to the court, premeditation and deliberation may be established by evidence of (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. *People v. Abraham*, 234 Mich.App 640, 656 (1999). The court went on to list evidence in each of the four categories that, in its view, supported the verdict.

As for (1), the prior relationship of the parties, the court cited both Summerville's belief that he had contracted HIV from Ellis and "the fact that the victim had recently begun dating someone new" as evidence of motive — which suggests planning. As for (2), defendant's actions before the killings, the court noted that on the evening of the crime "defendant left work early after thinking about his HIV status, the money he was spending to treat his condition, and the fact that his job was in jeopardy. Defendant then walked 6.9 miles to the victim's apartment in the middle of the night. Defendant admitted that he was angry as he walked to the victim's apartment." As for

(3), the circumstances of the killing, the court noted that Summerville first struck Ellis with a vase, then left the room to find a knife, and eventually retrieved two more knives during the attack. Thus "it took some time to inflict the forty-six stab wounds, giving defendant time to consider what was occurring." Finally, the court noted — somewhat less convincingly — that the "location of the wounds, primarily in the area of the heart, also suggests that the killing was premeditated and deliberate." As for (4), defendant's conduct after the homicide, the court found the fact that Summerville threw his bloody work shirt into a washing machine — "a methodical and deliberate attempt to dispose of evidence that could implicate" him — to be further evidence of premeditation and deliberation.

Summerville also claimed ineffective assistance of counsel — specifically, that his attorney erred in failing to pursue a motion to suppress notes found during a search of his bedroom. But the court noted that Summerville had agreed to his attorney's strategy — of not objecting to the evidence — at trial. "Defendant may not assign error on appeal to something he and his own counsel deemed proper," the court said. "To do so would allow a defendant to harbor error as an appellate parachute." Whether Summerville was in a position to assess the wisdom of his attorney's trial strategy is not addressed.

Summerville also claimed that his attorney failed to properly cross examine a witness and improperly conceded that Summerville was guilty of several lesser crimes, and that the prosecutor improperly appealed to the jury's sympathies during closing argument.

The court made short work of these claims, in an opinion whose conciseness (a quality common in "unpublished" opinions) makes it difficult to gauge the strength of its reasoning. *Fred Bernstein*

Massachusetts Court Holds Harmless Failure to Inquire Into Jury Bias on Sexual Orientation

Although "the better practice would have been to ask the question," the Appeals Court of Massachusetts held that a judge's refusal to ask a civil jury venire about any bias against homosexuals was not an abuse of discretion. *Toney v. Zarynoff's, Inc.*, 52 Mass.App.Ct. 554, 755 N.E.2d 301 (Sept. 20).

On September 29, 1991, off-duty Worcester police officer Albert Toney was in a restaurant with his significant other Robert Domiano and some friends. Toney observed a heated argument between the restaurateur and three men being refused service. One of them, Curtis Johnson, spat in the restaurateur's face. Toney displayed his badge, identified himself as a police officer, then asked the three men to leave the restaurant. Johnson responded by yelling profanities at Toney. Toney got Johnson's companions to persuade Johnson to leave with them. Later, when Toney, Domiano and friends left the restaurant, John-

son's group confronted them on the sidewalk. Toney told his friends to ignore them. As Toney's party walked away, Johnson pulled a gun and shot Toney, Domiano, and a third member of Toney's group. Domiano died at the hospital; Johnson was convicted of Domiano's murder and the assaults on Toney and their friend.

The vicinity of the restaurant had been the scene of many past crimes. Domiano's father and Officer Toney brought a negligence and wrongful death action against the restaurant owner for alleged failure to provide adequate security to protect patrons against the intentional acts of third persons. Before jury empanelment, plaintiffs asked Superior Court Judge Fremont-Smith to question the jury as a whole (plaintiffs did not assert their right to ask for individual voir dire) regarding any anti-gay bias, on the ground that at trial it would become obvious that Toney and Domiano were a couple. Toney's testimony included the facts that he held Domiano in his arms and told him that he loved him as Domiano lay dying outside the restaurant, and that Toney did volunteer work for the Gay and Lesbian Community Coalition and an AIDS organization.

Identifying Toney and Domiano's homosexuality as a "totally extraneous issue" which he would "hate to inject," Judge Fremont-Smith declined the jury question. The judge instead instructed the jury "not to be swayed by ... sympathy, bias or ... whether they approved or disapproved of someone's lifestyle" over plaintiffs' argument that a curative instruction would come too late and would not alleviate the concern about a biased jury. The jury ruled for the defendants. Affirming Fremont-Smith's decision to refuse the voir dire question, the Appeals Court noted that while there is no question that some people "harbor prejudice against homosexuals," the Massachusetts Supreme Judicial Court had not determined the existence of an "indurated and pervasive prejudice" requiring a jury question even in those cases where the homosexuality of one of the parties may be a central issue in the case. The opinion recognizes that appellate decisions have consistently encouraged trial judges to respond generously to motions that they question jurors individually about possible prejudice.

It also states that a judge may assume that the party requesting the inquiry has evaluated the risk that the inquiry may activate latent bias in some jurors and insult others, without uncovering bias in jurors who refuse to acknowledge their bias. Ultimately the court concluded that, had the inquiry been made, the outcome of the present case would have been no different. *Mark Major*

Parents Have No Case Against Daughter's Gay Fiancee Who Backed Out of Wedding

Relying on Maryland's so-called "anti-heart balm" statute, a federal district court has dismissed a lawsuit brought by the parents of a woman whose engagement was called off after her

fiancee divulged his gay past. *Yang v. Lee*, 163 F. Supp. 2d 554 (D.Md. Aug. 24).

When Holden Lee asked Edward and Helen Yang for their daughter's hand in marriage, they agreed even though it meant their daughter would have to leave her high-paying job in Hong Kong. But two weeks shy of the big day, the Yangs summoned Lee to their Maryland home in order to confront him about their suspicion that he might be gay. Lee confirmed their fears.

The Yangs, however, said the wedding could go forward so long as Lee put up \$500,000. This money was to be held for their daughter in case Lee should prove unfit as a husband. Although he initially agreed, Lee pulled the plug on the wedding the following day.

Judge Peter J. Messitte held that all of the Yangs' claims arising from this "undeniably sorry episode in their lives" were barred by a 1945 Maryland law that abolished the common-law cause of action for breach of promise to marry. The Yangs had claimed that, among other tortious acts, Lee intentionally misrepresented himself when he asked for permission to wed their daughter. But were the Yangs' claims not barred by statute, the court believed that they would nevertheless be estopped because of the Yangs' willingness to proceed with the marriage even after learning of Lee's sexual history.

The court was likewise dismissive of the Yangs' other claims that certain letters from Lee's attorney amounted to defamation and extortion. These letters, according to the court, amounted to "nothing more than a prototypical, sabre-rattling attorney demand letter."

Moreover, the court found that it could not entertain an extortion claim since no civil remedies for extortion exist in Maryland. In a separate lawsuit, Janet Yang, the jilted bride, sued for reliance damages incurred when she quit her job and moved to the United States. But just as the court stated in her parents' case, "no remedies are available to ease the pain or embarrassment of [such] affairs." Lee's suit to recover the engagement ring he had given Janet Yang is still pending. *T.J.Tu*

Civil Litigation Notes

U.S. Supreme Court — Religious Discrimination — The U.S. Supreme Court has refused to review the 5th Circuit's decision in *Bruff v. North Mississippi Health Services*, 244 F.3d 495 (5th Cir., March 28, 2001), in which the court of appeals overturned a \$300,000 damage award to an employee who was discharged when she refused to perform assigned counseling functions for gay employees of her employer's clients due to her religious objections to homosexuality. The employer had offered to accommodate her religious beliefs, but, according to the court of appeals, she was inflexible and not cooperative in that effort.

Federal, E.D. Pennsylvania Infliction of Emotional Distress In Taylor v. City of Philadelphia,

2001 WL 1251454 (E.D.Pa. Sept. 24, 2001), Senior District Judge Fullam found that plaintiff Taylor, who has brought an employment discrimination claim against the city's Free Library, could not maintain supplementary state law claims of intentional infliction of emotional distress against the city and the individual defendants. Taylor claimed he was discriminated against on account of his race (white), disability (depression caused by his employer's discrimination against him), and sexual orientation. His factual allegations were that he was passed over for promotion, criticized by his supervisors in front of other employees, often on a pretext; was insulted and belittled; was disciplined for infractions for which other employees received only warnings, and was not permitted to take vacation days around certain holidays which were afforded to others. The city and named defendants moved to dismiss the emotional distress claims, on grounds that such tort claims are covered by Workers Compensation. While holding that Workers Compensation would be the exclusive remedy for any injury suffered by Taylor as a result of workplace negligence, the court observed that Taylor's allegations "do not rise to the level of outrageousness required to support a claim for intentional infliction of emotional distress."

Federal, N.D. Illinois Same-Sex Harassment An allegedly non-gay employee who resents being called gay by others in the workplace does not have a claim of discrimination under Title VII of the Civil Rights Act of 1964, according to a ruling granting summary judgment for the employer in *Jones v. Pacific Rail Services*, 2001 WL 1223533 (U.S. Dist. Ct., N.D. Ill., Oct. 12, 2001). While off-duty, Terrence Jones went with two male co-workers to a hotel room with a woman "Jones knew only as 'Mutt Face.'" All three men had sex with the woman, but Jones was unable to achieve orgasm. While he was showering, the other two men burst in on the bathroom and videotaped Jones washing his genitals. A few days later, when the supervisor was away, one of the other employees brought the video to work and exhibited it in the employee lounge. This led to an employee of another company that shared office space with Jones's employer, one "Fred," to begin verbally harassing Jones, stating that Jones "liked dick." When a company supervisor subsequently referred to Jones as "gay boy," Jones complained and management required the supervisor to apologize, but the company took no action in response to Jones's complaint about being harassed by Fred. District Judge Kennelly decided that being called gay is not actionable sexual harassment under Title VII, and rejected Jones's attempt in response to the company's summary judgment motion to recharacterize Fred's conduct as a "sexual advance" to be insupportable on the record. Judge Kennelly also found that Fred's remarks did not create an "objectively offense" situation sufficient to constitute actionable harassment.

Federal, Tax Court Filing Status of Same-Sex Couple Robert Mueller attempted to file a joint tax return for himself and his domestic partner, Todd Bates, for tax year 1996. The Internal Revenue Service decided that Mueller, who is not legally married, was not entitled to claim joint filing status, and thus owed more money. Mueller has a track record in the tax court, having previously been denied joint filing status with his partner in a published Tax Court decision covering earlier tax years, *Mueller v. Commissioner*, T.C. Memo.2000-132, aff'd without published opinion, 87 AFTR 2d 2001-2052, 2001-1 USTC para. 50,391 (7th Cir. 2001). In this new opinion, the Tax Court merely amplifies that its earlier decision denying joint filing status is bolstered by the Defense of Marriage Act, enacted during the 1996 tax year, which provides that in determining the meaning of federal legislation, the word "marriage" means only a union between persons of the opposite sex, and "spouse" means only a marital partner. Nothing new here. *Mueller v. Commissioner of Internal Revenue*, T.C. Memo.2001-274, 2001 WL 1195744 (Oct. 10, 2001).

Massachusetts — Ballot Question on Same-Sex Marriages — Gay & Lesbian Advocates & Defenders, New England's public interest lesbian and gay law firm, has filed an action in the Massachusetts Supreme Judicial Court seeking to block a referendum vote on a measure that would effectively moot GLAD's lawsuit seeking same-sex marriage licenses in Massachusetts. The proposed ballot measures, which have been initially certified by the Attorney General as appropriate questions, would improperly restrict the jurisdiction of the courts, according to GLAD, and thus run afoul of state constitutional limits on the subject matter of ballot questions. Meanwhile, proponents of the question must collect 57,100 signatures on petitions by Dec. 1, and an additional 9,517 signatures by July 5, in order to place the question on the November 2002 ballot. *Washington Blade*, Oct. 12.

Mississippi Refusal to Issue New Birth Certificate Alleging a violation of equal protection under the Mississippi state constitution, Lambda Legal Defense Fund has filed a lawsuit against the state of Mississippi on behalf of a 4-year-old native of the state who is now living as the adoptive son of a lesbian couple in Vermont. According to a Lambda press release, Cheri Goldstein and Holly Perdue took the child into their Vermont home when he was discharged from a Mississippi hospital eight days after his birth. In April 2000, an adoption was finalized in Vermont and the child given the new last name of Perdue, and application was made to Mississippi authorities to issue a new birth certificate to include his adoptive parents' name and his new name. Mississippi has specifically legislated against adoptions by same-sex couples, which is presumably behind the state's refusal to issue the birth certificate, even though it is routine for states to issue new birth certificates on behalf of children who are

lawfully adopted elsewhere. *Lambda Legal Defense Fund* press release, Oct. 25.

Connecticut Lesbian Foster Parents Connecticut Superior Court Judge Rubinow ruled Sept. 21 in favor of a petition by the state's Department of Children and Families for termination of parental rights of the biological parents of young Jacob, who is now living with a lesbian couple who wish to adopt him. *In re Jacob*, 2001 WL 1231673. The court found that the biological parents had effectively abandoned the child, and had a variety of disqualifying problems, including drug addiction, criminal activity and the like. The court noted that one factor in such a decision is the satisfactory quality of the state's foster placement. Without going into any detail other than mentioning that the child was with a same-sex couple, and merely citing their testimony about the quality of Jacob's current family life, the court found that it would be in Jacob's best interest to terminate parental rights so he will be free for adoption by his foster parents.

Nebraska Damages for Police Misconduct - Transgender Issues In *Brandon v. County of Richardson*, 261 Neb. 236, 624 N.W.2d 604 (Neb., April 29, 2001), the Nebraska Supreme Court upheld a cause of action by Teena Brandon's mother for the failure of local police to respond appropriately to the plight of her daughter. But on remand, the judge awarded considerably less in damages than would seem to be indicated by the spirit and dictate of the high court's decision, according to Lambda Legal Defense & Education Fund, which is representing Mrs. Brandon and which vowed to appeal the damage amount. *Lambda Press Release*, Oct. 5; *NY Times*, Oct. 6. Although the trial judge abided by the Supreme Court's order to award the cost of Brandon's funeral expenses as well as \$80,000 for the county's negligence, it basically left to the trial court the discretion to determine damages for Brandon's emotional distress during the final week of her life and Mrs. Brandon's damages for the wrongful death of Teena. District Judge Orville Coady decided to award only \$7,000 for the emotional distress and \$5,000 for wrongful death, a tiny fraction of the amount sought in the lawsuit. *Omaha World-Herald*, Oct. 6.

Federal San Antonio, Texas, City Funding of Arts Responding to the decision last spring in *Esperanza Peace & Justice Center v. City of San Antonio*, 2001 WL 685795 (W.D. Tex., May 15, 2001), the City Council has negotiated a settlement of \$550,000 in payments by the city to Esperanza Peace & Justice Center and two other arts organizations. The court had determined that the city violated the 1st Amendment by eliminating continued funding for these organizations because of the pro-gay nature of their arts programming. *San Antonio Express-News*, Oct. 19. A.S.L.

Criminal Litigation Notes

Michigan Objection to Testimony About Defendant's Sexual Orientation In an unpublished opinion that focused on various grounds for appeal of a murder conviction, the Court of Appeals of Michigan rejected the contention that Kelly Strader's conviction should be set aside because a prosecution witness had testified that she thought Strader was homosexual. *People of Michigan v. Strader*, 2001 WL 1256113 (Oct. 19). Prosecution witness Misti Clark testified about a telephone conversation she had with Strader during which he mentioned that he had a woman (possibly the murder victim) with him at a significant time for purposes of the case. Clark testified that she remembered the phone call because it struck her as unusual; she had assumed Strader was gay and was surprised he had a woman with him. On cross-examination, the defense attorney returned to this subject, asking why Clark had thought Strader was gay, and elicited the fact that Strader used to talk to her mother about homosexual conduct in prison. During closing arguments, the prosecutor emphasized that Clark's reference to homosexuality had nothing to do with whether Strader was gay, and was only mentioned to explain why she had remembered the crucial phone conversation. Rejecting Strader's argument on appeal that this testimony prejudiced him in the eyes of the jury and required setting aside the verdict, the court found that "the challenged testimony was relevant and necessary to explain Clark's recollection," and noted that not only was no objection made by Strader's counsel at the time, but that counsel raised the issue repeatedly on cross-examination, and that the prosecution's mention of it during summation was entirely proper.

Louisiana — Conviction of Gay Man For Raping Woman — In *State of Louisiana v. Vicks*, 2001 WL 1219196 (La. App., 4th Cir., Sept. 26) (not officially published), the court upheld a sentence of life imprisonment running concurrently with 20 years at hard labor for a gay man convicted of kidnapping and raping a 10-year-old girl. Alan Vicks, age 19 at the time of the offense, offered considerable evidence that he was gay and engaged in a relationship with another man, presumably hoping to sway the trial court to believe that he could not be sexually interested in a prepubescent girl, but to no avail. The court of appeals rejected his argument that his identification by the victim at the hospital, shortly after the alleged rape, while he was handcuffed and shirtless and not lined up with any other suspects, was constitutionally flawed. It also rejected his argument that there was insufficient evidence of actual penetration, where the only evidence was the victim's testimony and the medical examination produced no definite evidence of penetration, and it rejected his contention that a life sentence for aggravated rape is excessive.

Texas — Murderous Sex — In *Rouchon v. State of Texas*, 2001 WL 1265550 (Oct. 24), the Texas Court of Appeals in San Antonio rejected challenges to the capital murder conviction of Jason Michael Rouchon in the death of Brandon Shank, a 16-year-old whose nude body, discovered in a wooded area of Selma, Texas, showed signs of strangulation and forcible anal rape. According to Rouchon, he met Shank and a group of Shank's friends while hanging out in the North Star Mall food court. Rouchon invited the group to come back to his apartment, but Shank was the only one to accept the invitation. Rouchon claimed that he and Shank had voluntary, consensual sex, during which Shank, who had been drinking and taking drugs, began to exhibit signs of overdosing. Rouchon claimed that he helped Shank into his car and while driving, believed that Shank had died from the overdose and dumped his body in a wooded area. Rouchon claimed that the evidence of strangulation could have arisen from his efforts to remove the body from his car. Rouchon was convicted of murder and sentenced to life in prison. Among the points he challenged on appeal was the trial court's refusal to allow him to introduce evidence, via a friend of Shank, that Shank was bisexual, this to support Rouchon's assertion that they had consensual sex. Upholding the trial court's ruling, the court of appeals found that the witness's "speculation as to Brandon's bisexuality constitutes 'reputation or opinion' evidence." The trial court was held similarly correct for excluding testimony that Shank had been attracted to another male classmate. "The trial court properly ruled that Brandon's finding another male attractive was not relevant to whether Brandon consented to sex with Rouchon."

Indiana Murder and Theft From Gay Man In the early morning hours of Aug. 26, 2000, William Hornbostel met Andrew Sneed in Someplace Else, a gay bar in Evansville, Indiana. Hornbostel went home with Sneed and choked him to death, and stole electronic equipment and his car. When Hornbostel was apprehended for drunk driving, a police investigation of ownership of the car led back to Sneed's apartment and the discovery of his body. Hornbostel testified at trial that Sneed had made sexual advances, Hornbostel "freaked out" and choked him in self-defense. The jury gave this testimony the credence it deserved and convicted Hornbostel of murder, theft and auto theft, and the court sentenced him to a total of 96 years in prison. On Oct. 19, the Court of Appeals of Indiana upheld the conviction and sentence. *Hornbostel v. State of Indiana*, 2001 WL 1249767. The court wasn't buying Hornbostel's argument that you can go home to sleep overnight in the apartment of somebody you just met in a gay bar and be shocked and surprised when they try to initiate sex with you.

Nebraska Murder An Omaha jury convicted Alonzo Neal of first-degree murder and use of a deadly weapon in the death of Garry W. Morris. Neal claimed that Morris sexually assaulted him

before he beat Morris to death with a hammer. The jury wasn't buying the story. Prosecutors didn't dispute Neal's description of Morris as a homosexual, but argued there was no evidence that he had ever sexually assaulted anyone, including Neal. The prosecution theory was that Neal took advantage of Morris's generosity and hospitality and then killed him for money to support Neal's crack habit. *Omaha World-Herald*, Oct. 16.

Georgia Murderous Response to Sexual Overtures The Georgia Supreme Court ruled in *Harris v. State of Georgia*, 2001 WL1258955 (Oct. 22), that Preston Lewis Harris, who admitted stabbing Tyrone Gay to death and taking his car, was not entitled to a manslaughter jury charge based on his story that he stabbed Gay because Gay was trying to initiate sex with him. Harris met Gay in Atlanta and accepted an invitation to spend the night at Gay's apartment. Harris testified that although Gay engaged in some sexual innuendos, the night passed without incident. A few days later, Harris contacted Gay and asked to be allowed to stay at Gay's place for a while. Gay agreed and came to pick up Harris. After Gay brought Harris to his apartment, the men had consensual sex, and Gay went out to buy some cocaine for Harris. After Gay returned, the men began to have sex again, but something set off Harris and he went to the living room to smoke some more cocaine and have some beer. When Gay continued to push Harris to resume the sex, Harris grabbed a kitchen knife and stabbed Gay, who died from massive bleeding from heart and lung wounds. Harris took Gay's car and fled to Tennessee, where he was apprehended by police. Harris asserted that he was entitled to a manslaughter charge on these facts, but the court disagreed, and also found no error in the trial court's exclusion of cumulative evidence that Gay was gay, noting that Harris had admitted having voluntary sex with Gay.

Florida Hate Crime Murder A three-judge panel of the Florida 4th District Court of Appeal has reversed the murder conviction of Bryan Donahue in the death of Steven Goedereis. Donahue and William Dodge were charged in separate trials of attacking Goedereis because he is gay and stomping him to death on the street. Dodge was convicted of murder, and his conviction was upheld by a different panel of the court. Donahue's conviction was reversed because the trial judge refused to admit evidence that the paramedics who treated Goedereis bungled the treatment, causing his death. However, the panel upheld Donahue's conviction and lengthy prison sentence for robbery arising from the same incident. State Attorney Barry Krischer, who prosecuted the case, was critical of the opinion: "The legal effect of the opinion is to move the focus from the defendant onto the paramedics for appropriately or inappropriately intubating the victim. The only reason the victim needed to be intubated was because of the severe beating given by the defendant. I don't feel justice was served by this deci-

sion. *State v. Donahue*, Oct. 31, reported Nov. 1 in the *South Florida Sun-Sentinel*. A.S.L.

School Superintendent Who Disciplined Pro-Gay Teacher For Classroom Discussion Is Immune From Suit

U.S. District Judge Walker (N.D. Cal.) ruled Oct. 11 in *Debro v. San Leandro Unified School District*, 2001 WL 1329605, that School Superintendent Thomas Himmelberg was entitled to immunity from personal liability for issuing a disciplinary letter to Karl Debro, a high school English teacher who spoke in the classroom about a controversial school board meeting centered on Debro's classroom promotion of tolerance for gay people.

In the fall of 1997, Debro became the focus of a community-wide controversy when his advocacy of gay rights was targeted by a group of parents that had formed for this purpose, calling itself Parents Interested in Public Education (PIPE). PIPE wanted to pressure the high school and the teachers to avoid any discussion of homosexuality in the classroom. At a school board meeting on Nov. 18, 1997, PIPE members denounced Debro and other teachers for "promoting social issues in the classroom." The next day, Debro raised the issue of the school board meeting in his English class. When a student whose parents were active in PIPE walked out, Debro commented that the student's parents had instructed him to behave this way. Another student whose parents were in PIPE took notes of Debro's comments, and later complained to school authorities that she felt "targeted" by certain comments he made. The next day, both students' parents filed formal complaints against Debro with the school district, and the Superintendent issued letters of "disciplinary warning" to Debro.

Debro filed suit against the school district and the superintendent, claiming that his constitutional rights of free speech were violated. Debro, who is African-American, also claimed he was unfairly targeted because of his race. In a prior ruling, the court had dismissed Debro's claims against the school district and against the superintendent in his official capacity as barred by the 11th amendment. This action concerned Debro's claims against Superintendent Himmelberg in his personal capacity. Such claims against a public official performing discretionary functions (such as deciding whether to discipline a subordinate) are blocked by qualified immunity unless the claim alleges a violation of well-established right under federal law.

Judge Walker noted that public employees generally have a First Amendment right to comment publicly on matters of public concern without fear of reprisal, but that public employers also have rights to maintain the efficient operation of their agencies, which can be effectuated by properly adopted guidelines. In this case, the school board contended that it had a guideline on avoid-

ance of controversial subjects in the classroom, but this was ruled irrelevant because it was issued after the incident in question. However, Judge Walker focused in on the stated reason for discipline in this case, which was Debro's departure from classroom instruction to comment on non-curricular matters. "While plaintiff is correct that teachers retain free speech rights in the classroom," wrote Walker, "plaintiff does not cite any cases that hold that a teacher may depart from classroom instruction in order to initiate discussion on a matter of public interest. Indeed, based on the court's reading of the case law, the issue whether, pursuant to the First Amendment, a teacher may depart from classroom instruction to discuss a controversial matter of public interest without risk of reprimand would be one of first impression in the Ninth Circuit. This court need not decide this issue now, for the lack of clarity in the law compels a finding that defendant did not violate 'clearly established' statutory or constitutional rights." Consequently, the defendant was entitled to qualified immunity and his motion for summary judgment was granted.

As to the race discrimination claim, Walker found that Debro offered no evidence that he was targeted because of his race. Although Debro had proffered examples of other teachers who had not been disciplined for discussing controversial issues in the classroom, Walker pointed out that in none of the cases cited by Debro had parents filed complaints against the teachers. "Without evidence of similar complaints, plaintiff cannot make a prima facie showing of intentional discrimination," Walker concluded, since he produced no direct evidence of discriminatory intent. A.S.L.

Legislative Notes

Federal Pending Gay-Interest Legislation Congressional sponsors of the Employment Non-Discrimination Act and a gay-inclusive hate-crimes bill have decided to put efforts for these measures on hold for now, in light of shifting legislative priorities stemming from the Sept. 11 terrorist attacks in Washington and New York. Congress has generally put on hold most of the domestic policy agenda, while focusing on national defense and security issues and finishing up work on the budget for the fiscal year that was to have started on Oct. 1. *Washington Blade*, Oct. 5.

Federal - Domestic-Partnership Benefits for D.C. Municipal Employees Although the District of Columbia Council enacted legislation intended to extend eligibility for domestic partnership benefits to same-sex partners of District employees, the benefits have been blocked for many years by Congress, which included language in its D.C. municipal appropriations bills barring the District from spending any money on such benefits. This year the House of Representatives passed the appropriations bill without such an

amendment, and on Oct. 11 the Senate Appropriations Committee passed a similar measure by the narrow margin of 16-13. However, Republicans in the Senate have stated they are prepared to stall passage of the appropriations bill if it contains any money for domestic partnership benefits. Another point of contention is the inclusion of language in the House bill prohibiting D.C. from enforcing a Human Rights Commission decision against the Boy Scouts of America for excluding openly gay men as troop leaders. The Senate bill does not contain such language, and this could be a sticking point in conference committee, even if the bill eventually passes the Senate. *Washington Blade*, Oct. 19.

Federal Education Funding Towards the end of October a bipartisan congressional conference committee began working out differences in versions of the new Education Bill that previously passed the House and Senate. According to an Oct. 30 news report by the *Bergen Record* in New Jersey, it appeared likely that the final bill will include a provision denying federal funding to public schools that deny the Boy Scouts of America access to their premises, and that the bill would also include a provision requiring secondary schools to provide the same access to military recruiters that they provide to college and business recruiters. The Senate Armed Services Committee provided data showing that during 1999 there were 4515 instances in which high schools denied access to Army recruiters, 4364 instances involving Navy recruiters, 4884 instances involving Marine Corps recruiters, and 5465 instances involving Air Force recruiters. In many cases, these bans are a reaction to the "don't ask, don't tell" policy imposed on the military (with their complicity) by Congress in 1993.

Maryland Sexual Orientation Discrimination The battle of the signatures is being waged in Maryland as opponents of the recently passed civil rights law banning sexual orientation discrimination submitted petitions for a repeal referendum, proponents of the law filed a legal challenge that led a special court master to report that there were factual errors with enough signatures to defeat the referendum, and with the opponents then filing exceptions to the special master's report. *Washington Blade*, Oct. 26. Md. Circuit Judge Eugene M. Lerner responded to the master's report by setting a hearing date of Dec. 17 for arguments and decision on the challenge to the referendum. Lerner also ordered that the proponents of the referendum pay 10% of the special master's fee. The case will turn on whether more than 1,602 signatures of the 47,730 collected turn out to be invalid; if that is the case, the statute will go into effect and no referendum will be held. *Baltimore Sun*, Nov. 1.

Minnesota New labor agreements between the state of Minnesota and two unions include domestic partnership benefits for same-sex partners of state workers. The coverage begins Jan. 1, 2002. State agencies will establish procedures by which

couples can provide evidence of their relationships. The benefits include health, dental, and optional life insurance. *Star-Tribune*, Oct. 17.

Florida, Dade County Sexual Orientation Discrimination - A bitter fight is being waged over a possible repeal referendum of the Dade County civil rights ordinance, which was recently amended to ban sexual orientation discrimination. The Supervisor of Elections had rejected some signatures on referendum petitions, finding that they were not the valid signatures of registered voters. But a lawsuit was filed in mid-October by a Boca Raton lawyer, George Sigalos, in federal court, claiming that the Elections Supervisor was violating the constitutional rights of the voters whose signatures were challenged, and attaching affidavits from the individuals he was representing affirming that the signatures were genuine. Where this will all end up is anybody's guess, but the American Family Association Center for Law and Policy, the anti-gay organization that is funding the litigation, is determined to get the repeal question before the voters for a grand re-run of the Anita Bryant campaign of 1977, when the first Dade County gay rights ordinance was repealed by the voters.

Florida, Broward County Sexual Orientation Discrimination A group calling itself Equal Rights Not Special Rights fell thousands of signatures short in its efforts to obtain a public referendum on repeal of a Broward County ordinance forbidding sexual orientation discrimination. According to Broward County Supervisor of Elections Miriam Oliphant, the group submitted 54,291 valid signatures, but needed 62,143 in order to force the referendum. Assistant Supervisor of Elections Joe Cotter stated that most of the disqualified signatures were either duplicates or signed by people who were not registered to vote. *South Florida Sun-Sentinel*, Oct. 19. ••• At a meeting held Oct. 16, the Broward County School Board authorized a \$190,000 payment to the Boy Scouts' South Florida Council to cover legal expense incurred by the Scouts in their winning lawsuit against the school board to overturn a ban on access to the schools. At the same meeting, the Board voted 5-3 to reject a proposed partnership with the Gay, Lesbian Straight Education Network (GLSEN) to formalize an existing relationship under which GLSEN trains educators on gay issues. *South Florida Sun-Sentinel*, Oct. 17.

Normal, Illinois Sexual Orientation Discrimination On October 1, the city council of Normal, Illinois, voted 5-2 for a measure that will add "sexual orientation" to the prohibited bases for discrimination in housing and employment. The ordinance defines "sexual orientation" as "the actual or perceived state of heterosexuality, homosexuality or bisexuality." *Pantagraph*, Oct. 2.

Sedgwick County, Kansas Domestic Partnership Benefits Sedgwick County, Kansas, County Manager William Buchanan approved a change in the county's employee benefits policy to allow unmarried domestic partners of county employees to

qualify for group health insurance coverage, beginning with an open enrollment period that started Oct. 1. Buchanan, who made the change administratively and did present the proposal to the county commissioners for a vote, stated that the county is in "a competitive employment market" and this policy was intended to help the county "to recruit and retain the best employees possible." According to the *Wichita Eagle* (Sept. 28), this was the first domestic partnership benefits policy adopted by any governmental unit in Kansas. Several of the county commissioners told the newspaper that they were personally opposed to the benefits plan, but that this was a decision for the county manager to make and they would not interfere. However, numerous phone calls from county residents who disapproved of the benefits plan led several commissioners to put the issue on the agenda for the October 2 meeting, at which time the Commissioners unanimously voted to end the new policy, overruling their County Manager. *Washington Blade*, Oct. 12.

Illinois, Mt. Prospect Boy Scouts Funding The Village Board of Mt. Prospect voted 4-3 on Oct. 16 to reject a request for a \$3,000 grant to support the Boy Scouts Learning for Life Program, following the recommendation of its Plan Commission. A member of the Commission questioned the funding on two grounds: the Scouts' anti-gay policies, and the lack of data to show that the programs help low and moderate-income students. *Chicago Tribune*, Oct. 18.

Tucson, Arizona Charitable Polices; Transgender Protection The Tucson City Council voted unanimously on Oct. 1 to merge the city's charitable and social service programs into a single "human services" fund, whose expenditures will be controlled by Council members, city staffers and community members. The council ended its 17-year relationship with the United Way organization, which had previously received charitable funds from the city treasury. The sticking point in the city's relationship was the refusal of United Way to amend its non-discrimination policy to prohibit discrimination against transgendered persons, who are protected from discrimination by city ordinance. Last year, the city adopted a policy that none of its charitable grants to United Way could go to the Boy Scouts of America, but the efficacy of that measure has been questioned, since supporters of the Boy Scouts increased their giving to offset the loss of city money. *Arizona Republic*, Oct. 3.

Colorado, Denver Transgender Protection The Human Services, Health and Environment Committee of the Denver City Council approved a proposal to add protection on the basis of gender identity and gender variance to the city's human rights ordinance, intending to protect transgender individuals from discrimination in employment, housing, public accommodations, education, health and welfare services. The bill was scheduled for public hearing by the full council on November 5. *Rocky Mountain News*, Oct. 18. A.S.L.

Law & Society Notes

In a telephone interview with syndicated columnist Deb Price of the *Detroit News* published on October 29, former U.S. President Gerald Ford stated his support for equal treatment by the government for same-sex couples, and for legislation outlawing sexual orientation discrimination. Ford, now 88, referred with approval to President George W. Bush's appointments of several openly-gay men, and expressed hope that the Republican Party would adopt an inclusive outreach to "gays and others."

The Associated Press reported Oct. 3 that the number of U.S. employers offering or planning to offer domestic partnership health benefits for same-sex partners of their employees had increased by 20% in the past year. Reporting on a study conducted by Human Rights Campaign for the period August 2000 through August 2001, the news service reported that 4,284 U.S. companies now offer such benefits. *Milwaukee Journal Sentinel*, Oct. 3.

The provost of the University of New Mexico has ordered the university's Law School to end its ban against on-campus military recruitment. According to Provost Brian Foster, the Association of American Law Schools' non-discrimination policy now allows schools to permit military recruitment on campus, and he argued that there was a "credible legal argument" that the university is obligated to permit such recruitment activities, presumably because it is a federal funding recipient. *Associated Press*, Sept. 30. •••By contrast, in response to inquiries about its willingness to allow the Reserve Officers Training Corps (ROTC) back on campus in light of the current situation, Harvard University reiterated its position that so long as the military discriminates against gays, ROTC will not be allowed on the Harvard campus. At present, Harvard students who want to participate in ROTC are allowed to join ROTC units at the Massachusetts Institute of Technology (MIT), which is also located in Cambridge, Mass. *Wall Street Journal*, Oct. 4.

On October 10, New York Governor George Pataki signed executive order No. 113.30, directing that the state's Crime Victims Compensation Board treat same-sex partners as equivalent to spouses for purposes of coverage of expenses generated by the World Trade Center attacks. The Empire State Pride Agenda, New York's statewide lesbian and gay rights political group, contacted the governor's office to point out the unfairness that surviving partners of lesbian or gay victims of the terrorist events were not entitled to the same benefits eligibility as surviving spouses. *New York Times*, Oct. 14. The text of the order accomplishes two things: for World Trade Center-related claims by survivors of victims, it authorizes compensation for those who can show mutual interdependence "which may be evidenced by a nexus of factors, including but not limited to common ownership of property, common householding,

shared budgeting and the length of the relationship between such person and the victim." In addition, the governor ordered the Crime Victims Board to permanently alter its regulations for establishing dependence, to reduce from 75% to 50% the portion of an individual's support that must derive from a crime victim in order to make the dependent eligible for compensation. While this will not eliminate entirely the distinction between married couples and domestic partners, it may significantly increase the number of domestic partners who can claim coverage under the statutory category of dependent.

The Associated Press reported on Oct. 30 that the highest court of the United Methodist Church, the 9-member Judicial Council, ruled on October 29 that the denomination's *Book of Discipline* forbids the appointment as church pastors of "self-avowed practicing homosexuals." However, the Council also ruled that individuals who are already serving as pastors and who have announced that they are gay are entitled to due process church procedures before their appointments are rescinded. The focus of the due process would be to determine whether the individual is in violation of Church laws on conduct, the Council apparently emphasizing a distinction between conduct and status.

The Family Research Council, an avowedly anti-gay organization, issued a press release blasting the Bush Administration for advancing a "homosexual political agenda." The release, authored by the council's president, Ken Connor, cited the recent vote in the House of Representatives to allow the District of Columbia to implement its domestic partnership benefits plan, as the most recent in a string of pro-gay actions, the others including inviting openly-gay Rep. Jim Kolbe to speak at the Republican National Convention last year; nominating former Massachusetts Gov. Paul Cellucci (R.) Ambassador to Canada (Connor called Cellucci a "militant advocate of homosexual rights"), appointing openly-gay Scott Evertz, a conservative Republican labeled a "prominent gay activist" by Connor, to head the White House Office on AIDS Policy, appointing openly-gay Donald A Cappoccia to the U.S. Commission on Fine Arts. The memo also criticized Secretary of State Colin Powell for the swearing-in ceremony he conducted for newly-confirmed Ambassador Michael Guest, an openly-gay man whom the president appointed to be Ambassador to Romania. At the ceremony, Powell acknowledged Guest's life-partner, Alex Nevarez, who will live with the ambassador in his official residence in Bucharest. This release was issued on September 29, as part of the Council's continuing effort to help build national unity during the terrorist crisis. They are undoubtedly being advised on this by the Revs. Jerry Falwell and Pat Robertson. *Washington Post*, Sept. 30.

The *Washington Blade* reported Oct. 5 that the U.S. Department of the Navy has followed the lead of the Air Force in announcing that it will continue

to process discharges on grounds of homosexuality, while adopting a “stop-loss” policy suspending most other pending discharges during the current military mobilization.

The Salvation Army’s Western Corporation, which covers operations in 13 states, announced that it will expand its employee benefits program to allow employees to include any one adult residing in their household in their employee benefits entitlement. The adult could be a domestic partner, a spouse, a roommate or another family member. The Salvation Army hopes that this step will make it eligible once again to contract with the city of San Francisco. The organization terminated ties with the city government in 1998 rather than comply with the city’s Equal Benefits Ordinance, which conditions eligibility for city contracts on the extension of benefits to the same and opposite-sex partners of contractor employees. Spokespeople for the organization disclaimed any shift in its theological concerns, but, said one: “This decision reflects our concern for the health of our employees and those closest to them, and is made on the basis of straight ethical and moral reasoning that reflects the dramatic changes in family structure in recent years.” *San Francisco Chronicle*, Nov. 2.

In administering emergency relief funds and family assistance in the wake of the Sept. 11 terrorist attacks, both the American Red Cross and the Salvation Army have indicated that they will take account of domestic partnership relationships. The Red Cross is requiring that such relationships be verified through the victim’s employer, while the Salvation Army seems willing to accept a lesser standard of proof of a family relationship, according to a report published in the *Washington Blade* on Oct. 5. A.S.L.

Canadian Same-Sex Marriage Litigation: Federal Government Wins Vancouver Trial

Three constitutional challenges to the exclusion of same-sex couples from civil marriage are pending in Canadian courts: (1) *Egale Canada Inc. v. Attorney General of Canada*, No. L002698, *Dawn Barbeau & Elizabeth Barbeau v. Attorney General of B.C.*, No. L003197 (British Columbia Supreme Court, Vancouver) (the challenge of the Attorney-General of British Columbia, see [May 2001] LGLN, was dropped after June elections resulted in a change of government); (2) *Hedy Halpern & Coleen Rogers v. Attorney General of Canada*, No. 684/00, *Metropolitan Community Church of Toronto v. Attorney General of Canada*, No. 39/2001 (demanding that the Registrar General of Ontario register two same-sex marriages performed at the Church on Jan. 14) (Ontario Superior Court of Justice (Divisional Court), Toronto); (3) *Michael Hendricks & Rene Leboeuf v. Linda Goupil (Minister of Justice of Quebec)*, No. 500-05-059656-007 (Quebec Superior Court, Montreal). The Vancouver trial was held in July,

while the Toronto and Montreal trials are scheduled for November.

On Oct. 2, the Hon. Mr. Justice Pitfield released his judgment in the Vancouver trial, dismissing the petitions of EGALE, the national litigation and lobbying organization, and 8 same-sex couples (<http://www.courts.gov.bc.ca/jdb-txt/SC/01/13/2001BCSC1365.htm>). He began by concluding that “the common law in Canada and the province of British Columbia is that a marriage is a lawful and monogamous union of two persons of opposite sex.” A judge should not change this judge-made common law: “The legal nature of marriage is so entrenched in our society, and the changes in law required so uncertain in the event same-sex marriages are to be recognized by the state [what would constitute non-consummation? would adultery be a ground for divorce?], that Parliament or legislatures, and not the court, must make the change.”

Pitfield J. then considered whether the federal Parliament or the provincial legislatures have constitutional jurisdiction over the subject of same-sex marriage. Rejecting the widely-held view that same-sex marriage is an issue of “capacity to marry” falling within the federal Parliament’s jurisdiction over “Marriage and Divorce” (which the Attorney General of Canada supported), he held that: “the inability of same-sex couples to marry results from the fact that, by its legal nature, marriage is a relationship which only persons of opposite sex may formalize. The requirement that parties to a legal marriage be of opposite sex goes to the core of the relationship and has nothing to do with capacity.” The federal Parliament could not define its own jurisdiction by amending the opposite-sex meaning of “marriage,” which could only be changed by a constitutional amendment (requiring the approval of the federal Parliament and the legislatures of 7 of 10 provinces with at least 50% of the population). The formalization and recognition of same-sex relationships (implicitly, as something other than marriages) is constitutionally a matter for the provincial legislatures. Thus, according to Pitfield J., the single word “marriage” in s. 91(26) of the Constitution Act, 1867 creates a constitutional ban on same-sex marriages, a completely novel and astonishing interpretation for most Canadian lawyers!

In case he was wrong and the federal Parliament “can decide what kinds of relationships constitute marriage,” Pitfield J. went on to consider the petitioners’ claims under the Canadian Charter of Rights and Freedoms. He first rejected the federal Government’s argument that recent legislation extending the rights and obligations of unmarried different-sex couples to same-sex couples means that “same-sex couples are no longer in a disadvantaged position within Canadian society as compared to married couples.” For example, “[m]arried persons enjoy immediate entitlement to economic and social benefits for which unmarried partners must wait [e.g., one to three

years].” He then rejected the petitioners’ claims that their rights to freedom of expression and association, to freedom of movement within Canada, or to “liberty and security of the person” (the potential textual location of a Canadian equivalent of the U.S. fundamental right to marry) had been infringed.

Pitfield J. did find that the common-law rule excluding same-sex couples from civil marriage is prima facie discrimination based on sexual orientation contrary to s. 15(1) of the Charter. However, he held that the rule is saved by s. 1 of the Charter, which permits “such reasonable limits [on Charter rights] prescribed by law as can be demonstrably justified in a free and democratic society.” In his opinion, “the one factor in respect of which there cannot be similarity is the biological reality that opposite-sex couples may, as between themselves, propagate the species and thereby perpetuate humankind. Same-sex couples cannot.... Other than the desire for public recognition and acceptance of gay and lesbian relationships, there is nothing that should compel the equation of a same-sex relationship to an opposite-sex relationship when the biological reality is that the two relationships can never be the same. That essential distinction will remain no matter how close the similarities are by virtue of social acceptance and legislative action.... [T]he core distinction between same-sex and opposite-sex relationships is so material in the Canadian context that no means exist by which to equate same-sex relationships to marriage while at the same time preserving the fundamental importance of marriage to the community. I reject the petitioners’ claim that the real basis for the omission to publicly sanction and recognize same-sex relationships is the discriminatory belief that same-sex couples are simply not worthy of being married.”

The Vancouver challenge will now proceed to the British Columbia Court of Appeal, and will eventually join the Toronto and Montreal challenges before the Supreme Court of Canada. *Robert Wintemute*

Other International Notes

Columbia — The Supreme Court of Columbia, South America, ruled on October 12 that prison authorities must make the necessary accommodations to allow gay prisoners to have conjugal visits with their same-sex partners. “An intimate visit for people in custody is not limited to heterosexual couples,” wrote the court upon application of a female prisoner in the Pereira prison, according to a news report in the *Orlando Sentinel*, Oct. 13.

Finland Child Custody The Supreme Court of Finland ruled Oct. 19 that custody of two children should be awarded to their deceased mother’s female domestic partner, who had participated in raising them, rather than to their biological father. The court reported based its decision on the preferences of the children, who are both over 12, and did not take a stand on the sexual orientation of

the parties, which it deemed irrelevant. *Reuters*, Oct. 20.

Australia — The *Washington Blade* (Oct. 19) reports that a Family Court in Sydney, Australia, declared that a marriage between a female-to-male transgendered person and a woman was legally valid. The husband had been issued a new birth certificate identifying him as male after his sex-reassignment procedure, and a legal marriage celebrant issued a certificate of marriage in 1999, but the attorney general had disputed the validity of the marriage. Judge Richard Chisholm ruled that there was no persuasive reason to assume that somebody who was born female was necessarily female at the time of a marriage, and that the definition of “man” for purposes of the marriage law should be based on contemporary thinking.

Australia Legal Recognition of Same-Sex Partners The *Sydney Morning Herald* reported on Oct. 18 that the parliament of the state of Victoria has updated 43 different statutes to end discrimination against same-sex couples by adopting the terms “spouse,” “domestic partner” and “partner” in appropriate places. “These amendments will ensure same-sex couples receive the same legal rights as heterosexual couples, ending discrimination against one group of Victorians, but not at the expense of any other groups of discrimination,” said Attorney-General Rob Hulls.

United Kingdom Transsexual Discrimination According to a summary published in the *Daily Telegraph* on Oct. 9, an Employment Appeal Tribunal ruled on Oct. 2 in *A v. Chief Constable of W. Yorkshire* that the police had not unlawfully discriminated in refusing to hire a male-to-female transsexual on the ground that the applicant would not be able to perform the full duties of a police officer, in particular intimate searches. The court said that her male legal status would prevent her carrying out searches on women, and she would be seen as female if carrying out searches on men.

Malaysia Gays Not Welcome In an interview with the BBC, Malaysian Prime Minister Mahathir Mohammad, a vigorous prosecutor of homosexuals, announced that if a homosexual British cabinet minister came to Malaysia with his boyfriend, they would both be expelled from the country. The Blair Administration in Britain has several openly-gay highly-placed individuals, including Chris Smith, the nation’s first openly-gay Cabinet minister. *Los Angeles Times*, Nov. 2.

Germany — In an election held in Berlin on Oct. 21, openly-gay Social Democratic mayoral candidate Klaus Wowereit, who had been serving on an interim basis by appointment, led his party

to a plurality of votes in the multi-party race, thus earning an elective term provided he can construct a ruling coalition with other parties. The Social Democrats received 31 per cent of the vote, a significant increase from the previous election. According to news reports, Wowereit’s homosexuality was not really a significant issue in the election, and his main task as mayor will be to find ways of reducing the enormous municipal debt. *Daily Telegraph*, *Times of London*, Oct. 22.

Canada — Libby Davies, a member of the Canadian Parliament from Vancouver East, outed herself during floor debate on M.P. Svend Robinson’s same-sex marriage bill. Although Davies did not explicitly identify herself as a lesbian, she stated that she was living in a same-sex relationship with a woman, begun recently. According to a news report, Davies became the “first female MP in Canada to publicly declare she is in a same-sex relationship.” *National Post*, Oct. 30.

Czech Republic — On Oct. 26 the lower chamber of the Czech parliament rejected a bill that would have allowed same-sex couples to register their unions in local government offices in order to enjoy inheritance and health care rights similar to those enjoyed by married heterosexual couples. This was reportedly the third time that the parliament has rejected a proposal to extend some form of legal recognition to same-sex partners. *Gay.com U.K.*, Oct. 26.

Germany — The German state of Bavaria finally joined the other German states by approving a law allowing same-sex couples to register with the state in order to obtain some of the same rights as married heterosexual couples. The measure, approved Oct. 25, was to take effect Nov. 1. *Planet Out*, Oct. 26.

Canada Tales of espionage, derring-do, and the like circulated in the Canadian press when it was revealed that the Canadian Security Intelligence Service had dismissed a lesbian spy who had filed a discrimination complaint against the agency. According to press reports, Chantal-Annick Tremblay, an intelligence officer stationed in Quebec, claimed she was discharged after she filed a complaint of sexual orientation discrimination with the Canadian Human Rights Commission, but the Security Intelligence Review Committee upheld the decision of the Intelligence Service to dismiss Ms. Tremblay for revealing confidential information. Her partner, Mona Naess, a real estate agent, revealed that she helped the intelligence service to make a deal to relocate a Middle Eastern terrorist working for German intelligence to Quebec City. Later it turned out that the terrorist, a woman, could not

keep secrets and word was getting around the city about her. The Service then sought to move Tremblay, Naess and their three children to Montreal, the women contended to cover up the botched operation. Canadian newspapers lingered gleefully over the unusual details of the story. *National Post*, Oct. 29.

Professional Notes

The Massachusetts Lesbian and Gay Bar Association reports in its October newsletter that on October 18, 2001, Massachusetts Governor Swift was scheduled to swear in David Mills as an Associate Justice of the Massachusetts Appeals Court. Mills will be the first openly-gay man to sit as an appellate judge in Massachusetts.

Last month we reported that the Independent Democratic Judicial Screening Panel for New York County Supreme Court had reported six candidate, three of them openly-lesbian or gay, as most highly qualified for the two vacancies to be filled this year in the New York County Supreme Court. At the Judicial Nominating Convention, held on October 4, the nominations went to candidates who had qualified for consideration by being favorably reported by screening panels at least twice in the previous four years. However, of the openly-lesbian or gay candidates who were reported favorably by this year’s panel, Acting Justice Rosalyn Richter received the most votes at the convention, coming in third among the candidates. Next year there will be at least five vacancies in the New York County Supreme Court. *New York Law Journal*, Oct. 10.

A portrait of openly-lesbian U.S. District Court Judge Deborah Batts (S.D.N.Y.) was presented to Harvard Law School in a ceremony held Oct. 27 in the Casperson Room of the Harvard Law School Library. Dean Robert Clark, a law school classmate of Judge Batts, made a gracious speech accepting the portrait for the Law School’s distinguished collection and reiterating the institution’s commitment to diversity and non-discrimination on the basis of sexual orientation. Judge Batts, who was accompanied to the ceremony by her mother, sisters, and children, spoke about the importance of hanging the picture in a place where it will be seen by many students. The portrait was commissioned by the Harvard Law School Association Gay Lesbian and Bisexual Alumni Committee, which solicited the funds to support the project under the leadership of portrait committee co-chairs Jack Wofford and Lisa Otero and and Committee chair Scott Wiener. A.S.L.

AIDS & RELATED LEGAL NOTES

HIV/AIDS DISCRIMINATION CASE THROWN OUT OF COURT FOR LACK OF EVIDENCE & PLAINTIFF'S FAILURE TO DISCUSS REASONABLE ACCOMMODATION

The U.S. Court of Appeals for the 9th Circuit has upheld the Oregon U.S. District Court's summary dismissal of an HIV-discrimination suit under the Americans with Disabilities Act (ADA) and an Oregon rehabilitation statute. *Vawser v. Fred Meyer, Inc.*, 2001 WL 1174084 (Oct. 4) (unpublished). The court found that Richard Vawser and his doctor had failed to discuss with Fred Meyer, Inc., a retail store, various "reasonable accommodations" that could be offered by the store. Vawser further alleged HIV/AIDS-related harassment on the job, and that his dismissal was based on his ailment, but failed to produce any evidence to support either allegation.

The breakdown of dialogue as to what would constitute a reasonable accommodation was caused by employee Vawser, said the court. However, "liability . . . ensues only where the employer bears responsibility for the breakdown." Vawser's physician, Dr. Diana Antoniskis, recommended on October 28, 1998, "a structured five-day work week" to accommodate Vawser's illness. Dr. Antoniskis invited Fred Meyer, Inc. to call with questions. However, when the human resources manager called the doctor to find out what a "structured work week" is and why this would be beneficial, Dr. Antoniskis would not speak with her. On November 10, 1998, Vawser presented Fred Meyer with a "Certification of Health Care Provider" and an application for medical leave indicating that he was no longer able to work at all, no matter what the schedule. Vawser and his doctor never had a dialogue with the store to agree upon a reasonable accommodation, despite the store's willingness. Therefore, Vawser was not entitled to any relief on his reasonable accommodation claim.

Vawser also complained of a hostile work environment, but produced no evidence that his supervisors or coworkers were hostile to him because of HIV/AIDS. He complained of differential treatment (e.g., a smaller raise) because of HIV/AIDS, but again could produce no evidence. And he alleged unlawful discharge based on disability under the ADA. To prevail, he needed to prove that (1) he was a disabled person under the ADA; (2) he was able to perform the essential functions of his job with or without reasonable accommodations; and (3) his employer terminated him because of his disability. The court found that Fred Meyer, Inc., could reasonably conclude that Vawser was unable to work, and Vawser produced no evidence to the contrary. Rather, he presented a certificate stating that he was unable to work. Under these circumstances,

the 9th Circuit upheld the dismissal of Vawser's suit. *Alan J. Jacobs*

Alaska Supreme Court Rejects Right to Assisted Suicide in Case Brought by PWA

On September 21, the Alaska Supreme Court ruled that terminally ill patients do not have a right under its state constitution to the assistance of a physician when they wish to end their life. *Sampson v. State*, 31 P3d 99 (Alaska 2001). Although Alaska has traditionally defined its right to privacy broadly, the Alaska Supreme Court determined that neither the state's due process nor equal protection guarantees required an exception to the manslaughter statute to allow a physician to facilitate a patient's suicide.

Kevin Sampson was an accountant who, after living for seven years with HIV, was diagnosed with AIDS in 1992. By 1998, Sampson's doctors had advised him that he was in the terminal phase of the disease. The second plaintiff in this case, known only as Jane Doe, was diagnosed with breast cancer in 1988. Although she underwent a mastectomy, radiation and chemotherapy, the cancer metastasized and spread first to her ribs and skin, and then ultimately to her bones and liver. Sampson and Doe filed suit in the Alaska Superior Court, seeking to invalidate the state's manslaughter statute, Alaska Stat. 11.41.120(a)(2), to the extent that it prevented mentally competent, terminally ill individuals from obtaining the prescribed medication for self-administration, with the goal of hastening their death. The state opposed plaintiffs' request, and the superior court resolved the cross-motions for summary judgment in the state's favor.

Although both plaintiffs died prior to the resolution of this case, the Supreme Court considered the issues raised in their appeal.

First, the Supreme Court ruled that physician-assisted suicide is not a fundamentally protected right under the Alaska constitution. As an initial matter, the court reviewed Alaska's privacy jurisprudence, which has been interpreted to protect a woman's right to make her own reproductive choices, an individual's right to control their appearance, an individual's right to possess a small quantity of marijuana for personal consumption within the home, and the right of a defendant to represent himself during post-conviction hearings. While acknowledging that a right need not be explicitly delineated in the state constitution to be worthy of protection, the court determined that none of these earlier cases "even remotely hints at any historical or legal support for the proposition that the general right of personal autonomy incorporates a right to physician-assisted suicide."

The court rejected plaintiffs' argument that the state may only intrude upon individual privacy to prevent harm to others, noting that previous cases

have upheld regulations designed to protect only the actor himself. Moreover, the court insisted that the manslaughter statute, which criminalizes the conduct of someone who assists another person in taking his or her own life, is specifically designed to prevent harm to others, i.e., the terminally ill patient.

After rejecting plaintiffs' characterization of their right to physician-assisted suicide as fundamental, the court examined whether the state had demonstrated not only that there was a legitimate governmental purpose behind the regulations, but also that the regulation bore a close and substantial relationship to that purpose. The court accepted without hesitation that the state has a substantial interest in the preservation of life, noting that "Alaska does not allow the death penalty as criminal punishment or otherwise sanction death in any context." Plaintiffs argued, however, that while the general ban on assisted suicide might be legitimate, the state could not justify its failure to carve out an exception for physicians who assist their patients to end their own lives. The plaintiffs attempted to carve out an extremely narrow exception, covering only those cases where patients are mentally competent, terminally ill and capable of administering the fatal doses of medication to themselves. The court rejected the invitation, noting the difficulties in determining competency and ascertaining the point at which an illness should be classified as terminal. The court also rejected the notion that patients capable of administering the medication to themselves should be entitled to commit suicide with physician assistance, but those incapable of doing so should not, suggesting that "this would arguably amount to discrimination based upon physical disability."

Finally, the court rejected plaintiffs' contention that criminalizing physician-assisted suicide while permitting patients to terminate life-sustaining treatment violates the equal protection clause. The court noted the "long-recognized distinction between action and forbearance," and although acknowledging that the distinction is "neither perfect nor easily applied in all cases, it has nonetheless shown itself to be sensible and dependable in the vast majority of situations." Interestingly, however, the court in a footnote specifically refused to comment on the practice of terminal sedation, to which the parties had apparently made passing reference in their briefs, but which the court felt had not been adequately defined by either side so as to determine whether it fell outside of the definition of physician-assisted suicide. Because the practice of terminal sedation was not implicated by the facts in the case before it, the court reserved judgment on this question for another day. *Sharon McGowan*

California Appeals Court Revives Intentional Concealment Suit Against City by Adoptive Mother of HIV+ Boy

In an unofficially published decision, the California Court of Appeal, 1st District, ruled Oct. 22 that a woman who adopted a child only to learn several years later that the child was HIV+ could maintain a tort claim for intentional concealment by the city adoption officials of facts about the child's risk factors for HIV. *Ann Marie N. v. City and County of San Francisco*, 2001 WL 1261958. In so ruling, the court reversed a dismissal of this claim, while affirming the trial court's grant of summary judgment to the city on claims of negligence and intentional misrepresentation.

According to the opinion for the court by Judge Kay, Mathew N. was born on August 7, 1986, with signs of alcohol and cocaine in his system, and his mother told authorities that she had regularly used cocaine and drank alcoholic beverages during her pregnancy. She was also known to the S.F. Department of Social Services "because of her substance abuse, transient and unstable lifestyle, and involvement in prostitution." The city removed Mathew promptly from his mother's custody, and he was declared a dependent of the city on January 14, 1987; shortly thereafter, parental rights were formally terminated and Mathew became available for adoption. Ann Marie N., a social worker in San Joaquin County saw a television program about children waiting for adoption in which Mathew was featured. She contained the DSS expressing specific interest in Mathew, and filled out a questionnaire in which she indicated she did not wish to adopt a child with any "blood disorder." During the adoption process, she was told that Mathew had been drug-exposed, that his mother had used alcohol and drugs, and that he had been born addicted to alcohol and drugs. Nothing was said about the prostitution activities of Mathew's birth mother. The city did not test Mathew for HIV; procedures to do that were not implemented until 1993, although the city had begun developing such procedures in 1987 based on emerging evidence about HIV transmission in utero.

Mathew was placed in Ann Marie's home in May 1989. She took him to a pediatrician for examination, who determined that he was a "well child" with a few medical problems. The pediatrician did not do any HIV testing, not considering it necessary based on the information presented to him. The adoption became final in February 1990. In 1996, a D.S.S. social worker contacted Ann Marie to inform her that Mathew's birth mother had died from AIDS. Ann Marie took Mathew to be tested, and he tested positive for HIV antibodies.

Ann Marie sued on three theories: (1) that the city was negligent in not testing children available for adoption and disclosing their HIV status to prospective parents; (2) that the city had intentionally misrepresented Mathew's health status to

her; and (3) that the city had intentionally concealed information that Mathew was infected with HIV. (As the case developed, the third theory evolved to intentional concealment of facts indicating that the circumstances of Mathew's birth placed him at risk for HIV infection.) As a necessary part of her claim, Ann Marie alleged that she would not have adopted Mathew had she known he was HIV+. The trial court granted the city's motion for summary judgment on the first two theories, finding that an adoption agency cannot be liable for mere negligence in the performance of a discretionary governmental function, and that the agency had not affirmatively misrepresented Mathew's health status when it told Ann Marie that he "is considered to be medically, socially, and psychologically a suitable subject for adoption." Then the case went to trial, at the end of which the city moved for a nonsuit on the intentional concealment claim, arguing that the weight of the evidence showed that the city had not been in possession of relevant information that it would have a duty to disclose. The trial court granted the motion.

After finding that the trial court had properly granted summary judgment on the first two claims, Judge Kay turned to the intentional concealment claim, and found that the trial judge erred by taking into account the testimony by the city's witnesses about the state of their knowledge concerning Mathew's birth mother and his risk factors for HIV. On a motion for nonsuit, the issue is whether the plaintiff's allegations and evidence provide some support for a valid legal theory. If there is contrary evidence from the defendant whose resolution requires credibility determinations, a nonsuit is improper and the case should go to the factfinder, in this instance a jury.

In this case, Ann Marie had called a city agency official as an adverse witness, and another agency official had testified for the defense. Ann Marie alleged that the responsible agency official, Mr. Holman, "did not give her any information regarding Mathew's health. According to Ann Marie N., she was not given Mathew's medical records until after the adoption was final. Nor was she told that a child born addicted to drugs was at risk for HIV, or that prostitution was a risk factor. She was not told Mathew's mother had a history of prostitution. Crear [the agency official called by Ann Marie as an adverse witness] testified that it was known by 1988 that intravenous drug use by a birth mother was a risk factor in HIV transmission to her baby. Crear also acknowledged that a baby born addicted to drugs abused intravenously by the mother was at risk. Prostitution was not a known risk factor, according to Crear, but a mother who had sexual contact with persons infected with HIV or AIDS was a risk factor. Though there was no direct evidence Holman concealed the fact that Mathew was at risk for HIV or that Mathew's birth mother was involved in prostitution, the jury could have inferred from his silence on Mathew's health and on the birth mother's history (accord-

ing to Ann Marie N.), that he was concealing important facts in order to complete the adoption of Mathew. The nondisclosure of a significant fact may suggest fraud. However weak the evidence, it showed the existence of HIV risk factors known to City employees and not disclosed or discussed with Ann Marie N. Bearing in mind that Holman's testimony had to be disregarded in considering the motion for nonsuit, the state of the evidence was sufficient to require the City to offer evidence regarding Holman's discussions with Ann Marie N. and his knowledge of HIV risk factors, or evidence that Ann Marie N. would have adopted Mathew even if she had been told he was at risk."

The court also rejected the City's immunity argument with respect to this claim. "We fail to see how the alleged fraudulent concealment of HIV risk factors could be considered a discretionary act, and amicus curiae offers no legal argument on this point," Judge Kay commented. The court unanimously reversed the judgment of nonsuit on the intentional concealment claim. A.S.L.

Products Liability Limitations Rule Requires Dismissal of Transfusion-HIV Claim

In *Jones v. Methodist Healthcare*, the plaintiff allegedly contracted HIV during a hospital stay at the defendant hospital in November 1986. On October 8, 2001, the Tennessee Court of Appeals granted the defendants' motion for summary judgment because the plaintiff's claims were time-barred by a Tennessee statute of repose for products liability. 2001 WL 1194637 (Tenn.Ct.App.).

Jones was in the defendant hospital in November 1986, did not learn that he had contracted HIV infection until May 1999, and filed his claim in February 2000. This case focuses on whether the plaintiff's claim is time-barred because of a Tennessee statute, and whether the statute of repose for product liability covers blood products. The defendant argued that blood products are covered and the statute has a ten-year statute of limitations that has expired. Therefore, the defendant hospital filed a motion for summary judgment, which the Court of Appeals granted because their interpretation of the statute is that blood products were intended to be covered under product liability in the statute. Jones argued that because the statute in question bars strict liability claims for blood products, the statute of repose for product liability actions should not be applied to the sale of blood products. The court disagreed and concluded that the blood and blood products transfused into Jones in 1986 were in fact products within the meaning of the statute of repose applicable to claims for product liability. Jones tried to argue that a one-year statute of limitations should apply because of personal injury, and if this were true, the claim would stand because it was filed within one year of him discovering that he contracted the disease.

In conclusion, since the blood products are covered within the meaning of the statute, the

plaintiff's negligence-based cause of action is governed by the product liability statute of repose that is 10 years, rather than the 1-year limitation period for personal injuries. The Tennessee Court of Appeals did its job in interpreting the statute to the best of its ability, but one is left feeling there has been some injustice here as it leaves Mr. Jones with neither answers nor compensation. *Tara Scavo*

Needle-Stick Injury While Caring for HIV Patient Gives Rise to Negligence Claim Against Health Care Facility

In *Shumosky v. Lutheran Welfare Services of Northeastern Pa., Inc.*, 2001 WL 1160978 (Oct. 3), the Pennsylvania Superior Court, an intermediate appellate court, ruled that a cause of action for emotional distress relating to fear of contracting AIDS would be recognized under Pennsylvania law so long as the plaintiff was actually exposed to the virus in a manner that was scientifically recognized to be capable of transmission of the disease. The unanimous court distinguished similar cases that reached a contrary conclusion because, in those cases, the plaintiffs were suing for emotional distress after receiving false positive results on HIV tests.

Patricia Shumosky, a licensed practical nurse, worked for Bayada Nurses, Inc., which provided nursing services on a contract basis for Lutheran Welfare Services. In April 1993, she suffered a needle stick injury while providing home health care to a Lutheran Welfare Services patient. She did not learn that the patient was suffering from AIDS until the end of her shift. When she notified Bayada, she was instructed to get an HIV test and a hepatitis B test immediately. The Lutheran Welfare Services patient died a few days later from complications from AIDS.

Shumosky sued Lutheran Welfare Services for negligence in failing to inform her that her patient was suffering from AIDS, and failure to provide proper equipment to care for the patient. She never claimed that she was infected with HIV as a result of the incident. Her claim actually sounded in emotional distress. She alleged that she suffered depression and sexual dysfunction, lost weight, was unable to work for a year, and was unable to return to her chosen profession.

Lutheran Welfare Services filed a third party claim against Bayada for contribution and indemnification. Bayada filed a motion to dismiss the third party complaint, which was granted in 1997. Lutheran Welfare Services filed a motion for summary judgment against Shumosky, which was granted in 2000. Shumosky appealed the summary judgment, and Lutheran Welfare Services appealed the dismissal of the third party claim.

The trial court had dismissed the third party claim because there was no contractual obligation between Bayada and Lutheran Welfare Services, and The Superior Court affirmed the dismissal of claims against Bayada. Summary judgment had

been granted against Shumosky because prior case law appeared to indicate that Pennsylvania did not recognize a cause of action for fear of contracting AIDS. The Superior Court in this case reached a different conclusion because, unlike the prior cases, in this case the plaintiff suffered actual exposure to the disease. In the other cases, the plaintiffs did not, but were falsely lead to believe that they had. Because they were not actually exposed, no claim would be recognized for consequent psychological harm (referred to as "parasitic" damages, which gives some indication of the level of hostility which the courts feel for such claims). For a claim for psychological damages to succeed under these circumstances, "the existence of a scientifically accepted method of transmission of the virus must coalesce with the presence of an HIV positive specimen," wrote Judge Melvin for the court. A claimant who suffers from psychological damages resulting from a false positive HIV test, by contrast, is simply out of luck.

The case was remanded to the Common Pleas Court in Lackawanna County for trial of the emotional distress claim. *Steven Kolodny*

Plaintiffs Who Can't Connect HIV to Blood Products Forfeit Cause of Action

The survivors of a hemophiliac who died of AIDS-related illnesses were unable to establish causation in their liability suit against two blood product manufacturers, and the court rejected their alternative liability theory. *Spencer v. Baxter International, Inc.*, 163 F. Supp. 2d 74 (D.Mass., Sep. 28).

Hemophiliac Sharyn Spencer was treated with three types of blood products at various hospitals: 200 cc's of packed red blood cells, 56,872 units of antihemophilic factor (Factor VIII concentrate or AHF), and 478 units of cryoprecipitate. Because cryoprecipitate is assembled from the blood of fewer donors, the risk of HIV transmission is lower than through the other products. Sharyn's parents opted out of a \$100,000 class action settlement to pursue negligence and breach of warranty judgements against Baxter and Alpha Therapeutic Corporation, on the "purely probabilistic" grounds that she received HIV from one or both of those companies' AHF. As the plaintiffs could not directly establish causation because they could not trace Sharyn's infection to a specific blood product or manufacturer, they sought to proceed under the theory of "alternative liability" under which a group of manufacturers whose medications were on the market at the appropriate time might be held jointly liable.

Judge Lindsay's opinion for the district court demonstrates that the theory of alternative liability is not yet Massachusetts law. Were the court to adopt it in this case, the plaintiffs could not satisfy the requirement that one of the defendants caused the harm. Even if it were assumed or established that AHF rather than one of the other products

transmitted the HIV, the plaintiffs can't establish that Sharyn didn't receive AHF from a manufacturer other than the defendants, because Sharyn's medical records don't identify the manufacturer of the majority of the AHF doses she received. (The opinion doesn't note any duty of the administering hospitals to maintain this data.) Therefore it is uncertain that all defendants who might be responsible for the harm were joined.

"Naked statistical proof" being insufficient to support a jury verdict, the court granted the defendant's summary judgement. *Mark Major*

Court Rejects Defamation and Unauthorized Publicity Claims Based on Newspaper Publication of Picture

The parents of a deceased infant were unable to satisfy the burden of proof on their claims of defamation and Civil Rights violations after the infant's picture was used by the *New York Times* (the Times) to illustrate an article concerning treatment of AIDS patients at Westchester County Medical Center (WCMC), although neither the parents nor the infant suffered from HIV or AIDS. *McCormack v. County of Westchester*, 731 N.Y.S.2d 58 (App.Div., 2d Dept, October 1). Justice Barry A. Cozier, writing for the Appellate Division, reversed an order from the Westchester County Supreme Court (Justice W. Denis Donovan) which denied defendants' motion seeking summary judgment dismissing the complaint.

In May, 1996, Stella McCormack, who was seven months pregnant, was admitted to WCMC and diagnosed with preeclampsia. Two weeks later, McCormack gave birth to Sabrina McCormack. The infant, who was born two month premature, was admitted to WCMC's neonatal intensive care unit and diagnosed with pulmonary ductus, an opening of the heart. Neither the parents nor the infant was ever diagnosed with HIV or AIDS.

Shortly after the infant's birth, in connection with an article that would appear in the *Times*, McCormack gave permission for the infant's picture to be used "for any purpose of medical education, knowledge or research which WCMC may deem proper (including media publicity), but not for advertising or other commercial trade purposes." Under the terms of the release, neither the infant nor any members of her family may were to be identified in connection with the public use of the picture.

On June 2, 1996, the *Times* published an article relating to health issues in Westchester County including, *inter alia*, raccoon rabies, Lyme disease, tuberculosis, and AIDS. A portion of the article discussed females who are getting HIV by having sexual intercourse with men who are HIV+ intravenous drug users. The article also discussed the efforts made to avoid passing on HIV from infected mothers to their babies during pregnancy. A photograph of McCormack's infant appeared to the left of this portion of the arti-

cle. Further, the caption under the photograph identified the infant as Sabrina McCormack of New Rochelle.

The McCormacks sued WCMC and the *Times* for defamation and violating sections 50 and 51 of New York's Civil Rights Law. Under Civil Rights Law section 50, any person, firm or corporation that uses for trade or advertising purposes, the name, portrait, or picture of any living person without written consent, is guilty of a misdemeanor. Civil Rights Law section 51 provides that: "Any person whose name, portrait, or picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use."

Justice Cozier held that the defendants would only be liable where the photograph bears no real relationship to the article or the article is an advertisement in disguise. Justice Cozier stated: "The subject photograph is illustrative of the type of services that the defendant WCMC provides, i.e., neonatal care. Even assuming that the article, together with the photograph, implied that the infant and her parents suffered from AIDS, the photograph bears a real relationship to the article." On this basis, the court reversed the trial court and dismissed the Civil Rights Law violation claims.

With respect to defamation, Justice Cozier stated that the plaintiff must show by a preponderance of the evidence that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties. Reviewing the record, Justice Cozier found that the *Times*' section editor and deputy editor had reviewed and edited the article prior to publication and used professional journalistic judgment in publishing the picture. Based upon this, the court found that plaintiffs failed to meet their burden on the grossly irresponsible factor. Justice Cozier reversed Justice Donovan's order and granted summary judgment to defendants dismissing the complaint in its entirety. *Todd V. Lamb*

AIDS Litigation Notes

Federal 9th Circuit Prison HIV Litigation In an unpublished disposition, a panel of the U.S. Court of Appeals for the 9th Circuit upheld a decision by District Judge Roger L. Hunt (D. Nev.) to dismiss a section 1983 action by a prisoner who claimed his 8th Amendment rights were violated when prison officials allowed an HIV+ inmate to pour his own drinks from a pitcher used by other inmates, including the plaintiff. "The district court properly dismissed Muzen's complaint, because Muzen did not demonstrate that he suffered from a serious medical need or that prison officials knew

of and disregarded any excessive risk," wrote the court in *Muzen v. Keller*, 2001 WL 1295121 (Oct. 15).

Federal 7th Circuit Federal courts continue to follow a narrowly literalistic construction of the definition of "disability" under the ADA, now deriving support from the limited analysis rendered by the Supreme Court in its HIV-as-disability case, *Bragdon v. Abbott*, 524 U.S. 624 (1998). In *Furnish v. SVI Systems, Incorporated*, 2001 WL 1256407 (Oct. 22), the court ruled that a man who alleged he was terminated because he suffered from cirrhosis of the liver caused by chronic Hepatitis B infection did not have a disability within the statute's meaning. Although the court, in an opinion by Judge Kanne, conceded that Mr. Furnish suffered a physical impairment, it rejected his assertion that compromised liver function involves a "major life activity," and pointed to statements by Furnish's doctors that his liver function was acceptable.

Federal, D. Delaware Prison Medical Treatment - Chief Judge Robinson of the U.S. District Court in Delaware rejected a claim by a prisoner that the failure of prison medical authorities to give him an HIV test after he was bit by another prisoner violated his 8th Amendment rights. *Gregory v. PHS Inc.*, 2001 WL 1182779 (Sept. 21). The court found that Gregory's wound was cleaned and bandaged, and he was given tylenol for pain, but no HIV test was authorized. Gregory claimed that this was inadequate, alleging that HIV was "rampant" in the prison system. Without expressing any view about whether an HIV test would be medically indicated in these circumstances, the court found that differences of opinion about appropriate medical treatment do not rise to the level of "deliberate indifference" necessary to impose liability under the 8th Amendment. The court also noted that most of the named defendants had nothing to do with Gregory's health care in prison, and that respondeat superior theories do not apply in this context.

California — HIV+ parents — In an opinion that appeared to place no weight whatsoever on the HIV-status of the parents, the California Court of Appeal, 2nd District, affirmed Los Angeles County Superior Court Judge Debra Losnick's decision to continue the guardianship of paternal grandparents for the six-year-old son of an HIV+ couple. *In re Mathias B.*, 2001 WL 1217334 (Oct. 11) (not officially published). The child was born with a drug addiction. Both of his parents, natives of Sweden, had histories of drug abuse, and the father had a history of physically abusing the mother. The parents failed for several years to comply with court orders to enter drug rehabilitation and parenting programs. Shortly after the child was born, he was placed in his maternal grandmother's home, then spent some time with uncles and aunts, and finally was placed with his paternal grandparents. When after many years of sporadic visitation and failures at drug rehabilitation, both parents finally managed to complete a

drug rehabilitation program and petitioned to terminate the guardianship and reclaim custody of their son. In turning them down, the trial court rejected their request to have the boy testify in court, and found that the trial court's decision was not an abuse of discretion. Although the parents' HIV status is mentioned in the opinion in passing, the court makes nothing of it and does not appear to treat it as a factor in deciding the petition.

California Compelled HIV Testing In an unofficially published opinion, the California Court of Appeal, 5th District, ruled that the statute authorizing compelled HIV testing of persons convicted of certain enumerated crimes should be strictly construed so as not to apply to any crimes that were omitted from the list. In *People of California v. Brock*, 2001 WL 1260839 (Oct. 19), defendant George Brock agreed to a plea bargain on an attempted forcible rape charge; after approving the plea, the trial judge ordered that Brock submit to HIV testing. Following prior court of appeal precedent, the court held per curiam that Brock's failure to object to this at the sentencing hearing did not waive his rights for purposes of appeal, that the list of offenses for which HIV testing could be ordered was exclusive, and that "Because the crime to which appellant pled guilty is not listed in Penal Code section 1202.1, the order that he submit to an HIV test must be stricken."

Colorado Medicaid Coverage In *T.L. v. Colorado Dept. of Health Care Policy and Financing*, 2001 WL 1285591 (Oct. 25), the Colorado Court of Appeals ruled that the state was violating federal Medicaid requirements by categorically refusing to consider an application for coverage of the purchase of a hot tub for an HIV+ man whose doctor had requested authorization for the purchase as part of his therapy. T.L. suffers from multiple epiphyseal dysplasia, a hereditary form of arthritis that causes chronic hip pain, and also suffers from various fungal skin viruses due to his HIV-status. His doctor's application for authorization for the hot tub purchase was documented for medical necessity. Colorado Medicaid turned down the request, citing a state regulation categorically excluding the purchase of hot tubs for private homes with Medicaid funds. The reasoning expressed in the regulation was that Medicaid money could only be used to buy equipment that was solely useful for therapeutic purposes and had no non-medical uses for the recipient, and evidently the Department believed that hot tubs had non-medical uses. (Imagine! What could they be thinking?) T.L. appealed the turn-down, which had been upheld by an Administrative Law Judge. Writing for the court of appeals, Judge Kapelke pointed out that the federal Medicaid regulations do not allow for categorical exclusions of this type. While the federal law does not require state Medicaid programs to fund every treatment modality that a doctor claims to be necessary for a particular patient, there must be a reasoned decision-making process that decides on a case-by-case basis. T.L. may eventually get his hot tub.

Missouri Spitting At Appointed Defense Counsel
An HIV+ criminal defendant who, apparently upset about a proposed plea agreement, spit at his attorney from the Public Defenders Office, was sentenced to an additional five years beyond the sentence for the offense for which he had been charged. Calvin Taylor was facing one count of aggravated battery before the Madison County, Missouri, Superior Court, for punching a police officer, and was unhappy with a plea bargain that would have produced a two year prison sentence and involved the dropping of several traffic citations outstanding against Taylor. After he spat at public defender Tim Berkley, Berkley withdrew from the case and the court appointed another attorney for Taylor. The prosecutor asked Berkley what he "wanted" in response to this assault on him, and Berkley said "extra time." Ironically, the five years for spitting is more than twice as long as the two years for punching the police officer. Berkley told the *St. Louis Post-Dispatch* (Oct. 5) that he knew he could not catch HIV from Taylor by being spit upon, but wanted to send a message that defendants unhappy with their appointed counsel should not spit at them!

Texas Failure to Communicate HIV Test Result
The Texas Court of Appeals in Houston ruled Oct. 18 in *University of Texas Medical Branch at Galveston v. Mullins*, 2001 WL 1249622, that a woman who tested positive for HIV in the defendant hospital in 1993 incident to the birth of her son but was not told her HIV status at that time could not bring a claim against the University under the Texas Torts Claims Act for negligence or fraudu-

lent concealment. The Act waives sovereign immunity for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." The court found that to state a claim, Mullins had to plead "that her injuries were caused by a condition or use of tangible personal property. Tangible personal property refers to something that is corporeal and palpable. Information is an abstract concept that is intangible; the fact that information is recorded does not render the information tangible. Thus, the State has not waived sovereign immunity by the use or misuse of information transcribed in a patient's medical records." Thus, the court reversed the trial judge and ordered dismissal of the claim. A.S.L.

AIDS International Notes

Asia-Pacific — A meeting of health ministers from "nearly all Asian-Pacific countries" resulted in a pledge by participants to step up the amount of resources devoted to HIV/AIDS. Although the rate of HIV infection in Asian-Pacific countries is still relatively low, it is increasing faster than anywhere else in the world. An estimated 7.5 million people are infected in the region. *NY Times News Service*, Oct. 11.

Malaysia — The Malaysian government was preparing at the end of October to implement a requirement of HIV testing for marriage license applicants in Johore State, responding to a fatwah issued by a group of local Islamic clerics. The

requirement will only be applicable to Muslim license applicants, and will come into effect on World AIDS Day, November 13. The Malaysian Medical Association stated strong opposition to the measure. *New Straits Times*, Nov. 1; *South China Morning Post*, Nov. 2.

China — The Chinese government has begun negotiations with major drug companies in an attempt to negotiate sharply reduced prices for AIDS drugs in China. An official at the Health Ministry's AIDS Prevention and Control Centre told the *Beijing Daily Star* that if the talks are not satisfactory, the government may authorize violation of patents in order to produce cheap generic versions of AIDS drugs for internal use. *South China Morning Post*, Nov. 2.

South Africa — GlaxoSmithKline, a major international pharmaceutical company holding patents on several important AIDS drugs, has entered a licensing agreement with Aspen Pharmacare, a South African manufacturer of generic drugs, to allow Aspen to produce various drugs patented by GSK at cut rates for use in the burgeoning AIDS epidemic in South Africa. The action follows on the abandonment of litigation brought by GSK and other companies to protect their patents in South Africa. However, it is uncertain how much of the generic drugs will reach South Africans with HIV/AIDS, given the Mbeki government's expressed unwillingness to appropriate major sums to purchase pharmaceuticals and the pricing beyond the means of many individual AIDS sufferers. *London Independent*, Oct. 8. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

CONFERENCE ANNOUNCEMENTS

Keele University in Staffordshire, U.K., announces a conference titled "Gender Sexuality and Law" to be held on June 28–30, 2002. This is a follow-up to a very successful conference that was held at Keele in 1998. Full information about the conference can be found at the following web address: www.keele.ac.uk/depts/la/GSL2002.htm or by sending an email inquiry to GSL2002@keele.ac.uk or by writing to GSL, The Law Department, Keele University, Staffordshire, ST5 5BG, United Kingdom.

The 7th Annual LatCrit Conference will be held in Portland, Oregon, on May 2–5, 2002. The conference theme is "Coalitional Theory and Praxis: Social Justice Movements and LatCrit Community." Although the time for submitting panel proposals will have passed once this issue of *Law Notes* is published, we wanted to bring the conference dates to your attention. To get on the mailing list for details about the conference, write to: LatCrit, Inc., Latina and Latino Critical Legal Theory, Inc., P. O. Box 248243, Coral Gables, FL 33124.

JOB ANNOUNCEMENTS:

STAFF ATTORNEY. Gay Men's Health Crisis, Inc. seeks an experienced attorney to provide legal services to clients in areas of housing law and some family law from intake to case resolution including litigation before Housing Court and Family Court Judges. Provides on-site legal services to clients of community based organizations and health care facilities. JD, admission to NY State Bar, proven experience in housing or family law. Knowledge of HIV/AIDS & public benefits/entitlements. Bilingual Spanish a plus. Equal opportunity employer. Send resume, cover letter and writing sample with salary requirements to: GMHC, HR Dept. 119 West 24th St., New York, NY 10011.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Becker, Susan J., *Second-Parent Adoption by Same-Sex Couples in Ohio: Unsettled and Unsettling Law*, 48 *Clev. St. L. Rev.* 101 (2000).

Bell, Tom W., *Pornography, Privacy, and Digital Self-Help*, 19 *John Marshall J. Comp. & Info. L.* 133 (Fall 2000).

Cabezas, Amalia Lucia, *Legal Challenges to and by Sex Workers/Prostitutes*, 48 *Clev. St. L. Rev.* 79 (2000).

Calvert, Clay, and Justin Brown, *Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace*, 18 *Cardozo Arts & Ent. L. J.* 469 (2000).

Cherry, April L., *Welfare Reform and the Use of State Power in the Prostitution of Poor Women*, 48 *Clev. St. L. Rev.* 67 (2000).

Cossmann, Brenda, *Canadian Same Sex Relationship Recognition Struggles and the Contradictory Nature of Legal Victories*, 48 *Clev. St. L. Rev.* 49 (2000).

Culhane, John G., A "Clanging Silence": *Same-Sex Couples and Tort Law*, 89 *Ky. L. J.* 911 (2000–2001).

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Vol. 89, No. 4 (2000–2001) of the Kentucky Law Journal is entirely devoted to articles about lesbian and gay law. Individual articles and student notes are listed above. ••• Vol. 48, No. 1 (2000) of Cleveland State Law Review contains a symposium titled "Re-Orienting Law and Sexuality." Individual articles and student notes are listed above.

Specially Noted:

After a lengthy gestation, *Legal Recognition of Same-Sex Partnerships*, edited by Robert Wintemute and Mads Andenaes, was published in October by Hart Publishing, Ltd. This is an international survey for the legal status of same-sex partners, based on papers delivered at a conference held at King's College, London, under the auspices of the British Institute of International and Comparative Law, in July 1999. To order a copy in the U.S. or Canada, consult the following website: www.isbs.com; for orders from other

countries, www.hartpub.co.uk. Robert Wintemute, who teaches at King's College, is a regular contributor to *Law Notes* on Canadian, English and other European developments, and was the principal organizer of the conference. A native of Canada, he is a long-time member of LeGaL, having practiced law in New York City prior to returning to academia.

In the new paperback original, *Gay Men, Straight Jobs* by Dan Woog (Alyson Books, 2001), four gay men in the legal profession are profiled: Judges Ray Warren (North Carolina) and Michael Sonberg (New York), Joe Paolucci, investment banker and general counsel of Equity Group Investments LLC in Chicago, and John Duran, a Los Angeles-based criminal defense attorney. The book is a quick, fascinating read, and provides interesting insights into the experiences of gay men in a variety of non-stereotypical occupations.

Gay & Lesbian Marriage & Family Reader, edited by Jennifer M. Lehmann (Gordian Knot Books, 2001), is an anthology of articles about same-sex marriage from a variety of perspectives. The book includes a lengthy critique of the Virginia Supreme Court's decision in *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995), as well as historical, psychological, and sociological data on same-sex couples and their children.

Prof. Lisa Kloppenberg of University of Dayton School of Law has published *Playing It Safe: How the Supreme Court Sidesteps Hard Cases and Stunts the Development of Law* (N.Y.U. Press), which examines the Supreme Court's tactics for evading controversial constitutional questions. It includes a chapter on the Court's evasion of sexual orientation law issues.

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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* and *Announcements* 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.