MARYLAND HIGH COURT RECOGNIZES RIGHT OF LEGAL SEX CHANGE

Another state's highest court has been heard from on the question whether transsexuals are entitled to legal recognition of their preferred sexual identity. Rejecting the reasoning of recent appellate court decisions from Kansas and Texas, Maryland's highest court unanimously ruled in *In the Matter of Robert Wright Heilig*, 2003 WL 282856 (Md. Ct. App., February 11, 2003), that the state's circuit courts may exercise their general equitable power to issue an ordering changing an individual's legal sexual identity, if the individual presents sufficient medical evidence to show that they have completed a permanent and irreversible change from one sex to the other.

The opinion creates an important precedent for the transgender rights movement, as well as an important victory for Alyson Meiselman, a crusading transgender rights attorney in Maryland who argued the case before the high court and whose extensive brief certainly provided the basis for much of the sophisticated written opinion issued by the court.

The petition for recognition of her sex change was filed in the Montgomery County Circuit Court by Robert Wright Heilig, who had been born and classified in Pennsylvania as male. Now living in Maryland, Heilig was transitioning from male to female and sought a legal name change to Janet Heilig Wright and an order that would legally change her sexual identity from male to female. The Circuit Court judge granted the name change, but held that the court did not have authority to issue an order changing a person's sexual identity, even though there is a Maryland statute that specifically authorizes amendments to Maryland birth certificates to indicate sex changes upon a court order finding that a person born in Maryland "has been changed by surgical procedure."

Heilig had submitted a copy of her Pennsylvania birth certificate, identifying her as a male named Robert, and letters from her endocrinologist (describing her hormone and anti-androgen therapy, which had led to "hormonal castration") and her social worker (describing her psychotherapeutic treatment and the conclusion that her gender identity was female). But the Circuit Court judge, having concluded that because Heilig's petition was unopposed there was no legal controversy to be decided, concluded that the court lacked jurisdiction to respond to her request. The judge assumed that Heilig was seeking an order called a declaratory judgment, which a court may issue to declare the rights of parties who are contending about some legal issue, and that the lack of any contention deprived the court of jurisdiction over the matter. The court also noted the lack of any statute specifically authorizing such an order. Heilig appealed this part of the court's ruling.

The Court of Special Appeals, an intermediate appellate court, affirmed on various grounds. It agreed with the trial court that an uncontested case could not be decided under the state's Declaratory Judgment Act. The court also found that there was no statutory or common law basis for the kind of order Heilig was seeking, and opined that such an order could not be based on the general equity jurisdiction of the court to right wrongs. Finally, the court pointed to the lack of probative evidence that Heilig had permanently changed her sex from male to female in light of the letters that were introduced. (Of course, the letters by themselves could not be considered evidence, since they were not submitted in the form of affidavits in which the writers swore to their truth before a notary public. Only statements given under oath are treated as evidence in a legal proceeding.)

Writing for the unanimous Court of Appeals of seven judges, the state's highest court, Justice Alan M. Wilner found that the trial court had misconstrued both the procedural situation and its substantive powers. Under the Maryland Constitution, the Circuit Court has broad powers as a court of equity to issue appropriate orders in matters involving the legal status of individuals. Wilner recited a lengthy catalog of circumstances in which the Circuit Court is called upon to make orders determining the legal status of individuals with respect to a variety of issues. Pointing to the statutory provision authorizing amendment of Maryland birth certificates, Wilner observed that the statute directs the Secretary of Health and Mental Hygiene, whose department issues birth certificates, to make such amendments when the Circuit Court has made an order determining that somebody has changed their sex. Clearly, this states the legislature's understanding that the Circuit Court has authority to make such orders finding that a person has changed their sex.

Of course, as Heilig was born in Pennsylvania and thus has a Pennsylvania birth certificate, and as the Maryland courts have no authority to order changes in Pennsylvania birth certificates, Heilig cannot obtain the kind of order contemplated by the statute. But, she argued, that is not what she was seeking. After all, what is a Maryland resident who was born out-of-state to do, if she has changed her sex and needs formal legal recognition of her new sex as she goes about her everyday life as a resident of Maryland? The Court of Appeals found that in these circumstances the broad equitable powers of the Circuit Court provide the court with authority to make an order establishing a legal change of sex (although if Heilig wants a birth certificate designating her as female, she would have to get one from Pennsylvania).

A remaining important question, both for Heilig and future transsexual petitioners, is what circumstances must be proved in order to qualify for such an order. The key issue for many transsexuals in this situation is whether surgery is a necessary step for a change of legal sexual identity. Justice Wilner refrained from opining directly on this issue, because technically the issue was not before the court. As an appellate court, the Court of Appeals is limited to deciding questions directly presented, and the only question directly presented here was whether the Circuit Court has jurisdiction to decide Heilig's petition.

However, the Court of Appeals opinion, which includes a lengthy summary of current scientific information about transsexualism as well as a review of court decisions from a wide variety of jurisdictions (including the recent decision by the European Court of Human Rights, which ordered Great Britain to give legal recognition to sex changes as a matter of the fundamental human right of self-definition encompassed within the privacy guarantees of the European Convention on Human Rights), shows that the Court of Appeals was hesitant to step into a real minefield prematurely.

On the one hand, Wilner summarized extensive studies contending that sexual identity has a physical basis in the brain. That is, studies have led some scientists to conclude that during pregnancy a foetus may develop the foundations of a female gender identity even though the body parts for male genitalia and internal reproductive organs and secondary sex characteristics are being generated. Some of the strongest evidence for these conclusions comes from the experiences of intersexuals, persons born with ambiguous genitalia, who for several decades have been routinely subjected to sex-change operations during infancy on the theory that regardless of their chromosomal makeup, if raised in the assigned sex they will develop the appropriate sexual identity, only to later reject their surgically assigned sex because their brains were gendered in the other way. The scientific opinion that sexual identity is seated physically in the brain, and is not necessarily determined by genital anatomy, would sup-

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Circulation: Daniel R Schaffer, LEGALGNY, 799 Broadway, Rm. 340, NYC 10003. 212–353–9118; e-mail: le-gal@earthlink.net

LeGaL Homepage: http://www.le-gal.org

Law Notes on Internet: http://www.qrd.org/qrd/www/usa/legal/lgln

$55/yr by subscription

Canadian Rate $60; Other Int'l Rate US$70 ISSN 8755–9021 March 2003

port the argument that a person should be entitled to a legal declaration of sexual identity without regard to whether they have undergone surgical alteration of their reproductive system and genitalia, provided they could present competent medical evidence as to their true sexual identity.

On the other hand, Wilner noted that in all but a very few of the jurisdictions that have authorized a legal change of sexual identity status, surgical alteration of genitals has been a prerequisite to legal change. Thus, some twenty-two states and the District of Columbia have statutes authorizing sex changes on birth certificates, most requiring a court order, and all but a handful requiring proof that surgery has been performed. Similarly, in those countries that have been willing to recognize a marriage between a transsexual and another person of the transsexual's birth sex (for example, a marriage between two people who were born with male genitalia but one of whom had transitioned to female identity), the law has premised such a marriage on the transitioning person having been surgically altered. Thus, there is substantial legal precedent for refusing to recognize a sex change in the absence of surgery, although Wilner also notes that many of the statutes do not describe with any particularity what surgery is necessary, leaving open the possibility that some cosmetic surgery other than genital alteration might suffice.

Courts seem concerned that hormone treatments by themselves do not effect a permanent transformation. In order to maintain the physical appearance of the desired sex, a transitioned person must continue to take the hormones, as medical science has not advanced to the point of transplanting the necessary hormone-producing body parts. Furthermore, thus far it is medically impossible to produce a fully functioning reproductive system. A male-to-female transsexual cannot now be given the capacity to generate ova, become pregnant, and gestate and bear children, nor can a female-to-male transsexual be given the capacity to generate sperm. And the courts seem unwilling, for reasons not always articulated in their opinions, to sanction a legal sex change for somebody who could change their minds and revert back to their birth sex.

The Court of Appeals also refrained from taking any position on whether somebody who has obtained a court order changing their legal sex would necessarily have the right to marry, or to have their sex change recognized in a variety of other circumstances. Once again, the court shied away from entering controversial waters prematurely, since the only question directly before it was whether the trial court had jurisdiction to issue the kind of order Heilig was requesting, thus leaving collateral issues for later.

The Court of Appeals concluded its opinion by directing that the case go back to the Circuit Court so that Heilig can present evidence to show that she has made a "permanent and irreversible change" from male to female. The court refrained from specifying exactly what that evidence must be in terms of surgical procedures, but it certainly left the inference that evidence of external transformations effected solely by hormone and anti-androgen treatments may be insufficient, in the absence of proof that they effect permanent change.

Thus, the decision falls short of a complete triumph for transsexuals seeking legal recognition of their desired gender. Surgical procedures are very expensive, not routinely covered by insurance policies, and may be viewed as undesirable or unnecessary by some transsexuals who have accepted the physical and psychological fact of their gender identity and feel no need to submit to surgical alteration of their bodies. On the other hand, it marks a major breakthrough as one of the few decisions by the highest court of an American state to attempt a state-of-the-art scientific view of transgender identity, to signal acceptance of the proposition that anatomical gender at birth as defined by genitalia and reproductive organs is not the sole basis for determining somebody's real gender, and to find that the courts have even in the absence of specific legislation inherent authority to recognize and validate a person's desired gender identity upon medical proof.

The *Heilig* decision may also come to be seen as the precursor of an important breakthrough in judicial understanding of transgender issues. Less than two weeks later, a Florida trial court issued a similarly sensitive decision, this time focusing on the merits, in the divorce and custody controversy involving Michael and Linda Kantaras (see below), and on the same date as the *Kantaras* ruling, the full court of the Family Court of Australia issued yet another such ruling in *Attorney General v. Kevin and Jennifer*, itself building on prior affirmative rulings from New Zealand and by the European Court of Human Rights. A body of trans-affirmative case law is emerging around the globe. A.S.L.

LESBIAN/GAY LEGAL NEWS

Florida Judge Rules for Transsexual Dad in Marriage and Custody Dispute

Ruling on questions without any precedent under Florida law, Pasco County Circuit Court Judge Gerard J. O'Brien issued an extraordinary 809–page opinion on February 21 finding that Michael Kantaras, born genetically female, is a man for purposes of Florida marriage law, is the legal father of the two children born to his wife Linda, and should be awarded primary custody of the children. *In re: The Marriage of Michael J. Kantaras v. Linda Kantaras*, Case No. 98–5375CA (Fla., Pasco Co. Cir. Ct., Feb. 21, 2003). [Ironically, on the same date, the full court of the Family Court of Australia issued its ruling, reported below, in *Attorney General v. Kevin and Jennifer*, affirming a trial judge ruling upon which Judge O'Brien relied in his *Kantaras* opinion.]

In so ruling, Judge O'Brien brought to an end what is likely just the first stage of one of the most highly-publicized divorce and custody disputes in American history, which included a lengthy trial that was nationally broadcast by Court-TV a year ago. Given the controversial nature of the decision and the passionately committed legal forces arrayed on both sides of the case, an appeal seems inevitable. Indeed, the judge seemed to anticipate this by writing an opinion that is probably unprecedented in its detail, thoroughness, and wide-ranging consideration of scientific issues.

Among other firsts, this case appears to be the first American transsexual marriage case in which a court has actually heard extensive live testimony from well-qualified medical experts. Recent appellate decisions from Kansas (*Estate of Marshall Gardiner*, 42 P.3d 120 (Kans. 2002)) and Texas (*Littleton v. Prange*, 9 S.W. 3d 223 (Tex. App., San Antonio, 1999), cert. denied, 531 U.S. 872 (2000)) were decided based on pre-trial defense motions, with the result that the courts in those cases never heard medical experts testifying and being cross-examined on the witness stand. Judge O'Brien appears to have been strongly influenced by the expert testimony he heard.

The bulk of the written opinion is made up of a detailed review of the evidence, including lengthy quotations from trial testimony. This accounts for about the first 500 pages of the opinion. About 200 pages are devoted to a lengthy review of court decisions on transsexualism from several different American states, Great Britain, New Zealand, and Australia, including extended quotations from those opinions and comparative analysis of the approaches taken by the judges. Judge O'Brien also reviews several law review articles, quoting at length, and several medical journal articles.

Indeed, the opinion provides a veritable treatise on the subject of transsexuality, its treatment by the medical community, and the divergent views about how it should be treated by the law. While Florida trial court decisions are not normally published, one suspects that this opinion will be widely available, at least on-line. The Court-TV website provided access to a downloadable version of the opinion on the day it was announced.

The underlying facts of the Kantaras case are relatively simple to relate. Margo Kantaras sought treatment for gender identity disorder in Texas,

submitted to psychological, hormonal and surgical treatment, and obtained a change of name in Texas and a correction of birth certificate in Ohio. Renamed Michael, Kantaras then returned to Florida, resuming employment in a retail business, where he became acquainted with Linda Forsythe, who was then living with a boyfriend. Linda became pregnant, broke up with her boyfriend, and began dating Michael. Shortly after Linda's son was born, she married Michael, and he adopted the child. A few years later, Michael's brother donated sperm for Linda to be inseminated, and she had a second child, for whom Michael was recorded as the father on the birth certificate. (Under the law in Florida and elsewhere in the U.S., when a married woman gives birth to a child, there is a legal presumption that her husband is the child's father.) Michael had informed Linda about his medica l history while they were dating and she accepted him as a man.

Michael and Linda lived together, raising their children, for about nine years. Their testimony was highly contradictory about the nature of their sexual relationship, and perhaps more than 100 pages of the court's opinion is taken up with recounting testimony relative to this issue. Michael, who did not undergo phalloplasty (the construction of an artificial penis), claimed that the hormonal treatments had cause his clitoris to become sufficiently enlarged so that it could be used as a penile substitute for sex, and that he and Linda had sex during their marriage. Linda, by contrast, testified that she never had sexual intercourse with Michael during their marriage. (Judge O'Brien rejected the credibility of Linda's testimony, and accepted Michael's assertion.) During their last few years living together, the ardor of their courtship apparently died down and Michael became emotionally involved with another woman.

Michael filed for divorce in 1998. Linda's ultimate response was to argue to the court that their marriage was invalid from the start, as Michael was a woman, and as such that his adoption of her son was invalid and that he had no legal parental relationship to her daughter, and as a consequence was not entitled to any legal rights with respect to the children. Since Florida law forbids same-sex marriage, most of the trial centered on the question whether the marriage was valid — a valid marriage being a prerequisite to the granting of a divorce and an award of child custody — which depended on the court's view of whether Michael was a man or a woman at the time of the marriage or subsequently. Florida law also forbids adoptions of children by "homosexuals," which may explain why Linda's case also involved attempts to paint Michael as a "lesbian," but Judge O'Brien rejected that ploy and did not devote any of his massive opinion to dealing with the adoption ban issue, which he evidently judged to be irrelevant to this case.

Recent court decisions on the question whether a post-operative transsexual is a member of his desired sex for purposes of marriage did not look promising for Michael. Although many American states have authorized changes of sex designation on birth certificates and permitted name changes for transsexuals who undergo treatment to conform their anatomy to their sexual identity, the handful of American courts that have decided transsexual marriage cases have been sharply divided, with recent appellate precedents being decidedly negative. In both *Gardiner* and *Littleton*, the courts in Kansas and Texas concluded that genetic sex at birth is determinative for this purpose and cannot be altered. An earlier decision by a New Jersey appellate court, *M.T. v. J.T.*, 140 N.J. Super 77, 355 A.2d 204 (1976), finding such a marriage to be valid had been followed by the intermediate appellate court in the Kansas case, only to be reversed by the Kansas Supreme Court. (The decision a few weeks ago by the Maryland Court of Appeals, reported above, was released too late to be considered by Judge O'Brien in this opinion, to judge by his lack of citation to it.)

But Michael was lucky that the case was eventually assigned to O'Brien, a retired judge who was called to fill in due to overcrowded court dockets, and who evidently was so intrigued by the unusual legal issues presented by this case that he seems to have immersed himself in a thorough study of the treatment of transsexualism throughout legal history and all available cases from other jurisdictions.

Much of the negative court precedent stems from an early British case, *Corbett v. Corbett*, 2 All E.R. 33 (1970), a trial court opinion in which the court took a hard-line traditionalist approach. *Corbett* was cited as influential in *Gardiner* and *Littleton*. But some recent cases, especially from New Zealand and Australia, and many law review articles, have been strongly critical of *Corbett*, and O'Brien found these criticisms to be merited. The chief failing of *Corbett* was the British court's assertion that the views of the contemporary medical community were essentially irrelevant and that this is entirely a legal, not a factual, issue. O'Brien strongly embraced the opposite viewpoint, as a few brief quotations from his opinion makes clear:

"As a post operative transsexual Michael Kantaras is, by virtue of all his medical treatment, possessed of the capacity to function sexually as a heterosexual male… There should be no legal barrier, cognizable social taboo or reason grounded in Florida public policy, to prevent Michael's qualification at least for purposes of marriage to be of the male sex and as indicated by the medical experts in this case, Michael Kantaras was certified to be a 'male.'… From a medical standpoint, Michael is of the male gender and has been his entire life."

With this last comment, O'Brien has accepted the contention that one's true sexual identity is not a function of genes and birth-anatomy, but is really seated in the brain, which becomes gendered during the process of gestation. The medical treatment is undertaken to conform one's physical reality to one's sexual identity, so as far as this judge is concerned, Michael Kantaras was never female.

As to interpretation of the Florida marriage law, O'Brien rejected the contention (apparently accepted by the courts in Texas and Kansas) that the parties to a marriage have to possess the capability to engage in heterosexual intercourse leading to procreation. Wrote O'Brien, "Genetic heterosexual women who undergo hysterectomy and oopheriectomy or are post-menopausal are still eligible to marry. Men who suffer erectile dysfunction or have a low sperm count, or suffer prostate problems (cancer) are eligible to marry. And both, as they exist, can be responsible parents with children they already have or they may adopt, or create through artificial insemination. There is no justification in the law to hold a transsexual to a higher standard than all heterosexuals in approaching marriage. Gender is only relevant, as male or female, at the time for a license to marry, not at birth. Age is the only requirement to be under oath. None for gender. The statement in *Corbett* that sex is fixed at birth is not the controlling law of Florida."

And, finally, this parting shot, from a Florida senior citizen: "Fortunately, the Senior Citizens in Florida happily marry each other without the ability to be fertile or even to engage in active intercourse. Marriage is fundamentally a state of mind, where two individuals pledge their love and devotion to each other… If marriage does not rise to the level of an honorable commitment, then the marriage is doomed regardless of the sexual aptitude of the couple. Is Judge Ormrod [the English judge in *Corbett*] correct that the essence of marriage is sex?"

O'Brien also found as an important factor that declaring Michael to be a woman and the marriage (and adoption) to be invalid would leave the children without a father and render both children illegitimate. Furthermore, it would forfeit all claim on Michael to support them, and Linda's earning capacity and assets were far from being up to the task. Although O'Brien never directly addressed Michael argument that he should win by application of the legal theory of estoppel, his observations on this point seemed to respond to the concerns such an argument would embrace: that the lives of several people, most notably these children, had been premised on a certain set of facts, and that Linda should not now be allowed to deny Michael's status as the man to whom she is married, when she previously accepted his status and recognized him as the legal father of her children.

Turning to the issue of child custody, O'Brien determined to follow the recommendation of the court-appointed expert who had been charged with studying Michael, Linda and the children and making recommendations in accord with the thirteen factors specified by Florida statute to be considered in contested custody disputes be-

tween legal parents. The expert found that ten of the factors were relevant to this case, and that on nine of the ten factors Michael came out ahead of Linda. Indeed, while finding that Michael had superior parenting skills and mental stability, the court noted some of the expert testimony from the series of court-appointed counselors that dealt with this case suggesting that Linda suffered from a borderline personality disorder.

While a trial court ruling does not create a precedent binding on any other court, the extraordinary depth of this written opinion is bound to carry significant weight in other controversies, especially given the devastating demolition job that Judge O'Brien did on the contrary court opinions from Kansas and Texas. For that very reason, however, it seems likely that the forces opposed to transsexual parenting and marriage rights will make strenuous efforts to appeal this decision, so the story is far from over, unless Linda decides to accept this ruling and abandon her fight for custody.

Much of the credit for this trial-level victory must be attributed to the extraordinary lawyering of Michael's attorneys, Colin D. Vause of Clearwater, Karen M. Doering of Equality Florida Legal Advocacy Project, Inc., from Tampa, and Shannon Minter, a staff attorney from the National Center for Lesbian Rights in San Francisco. Knowing how these things work, one suspects that the wide-ranging legal scholarship exhibited in O'Brien's opinion is based on the extraordinary legal briefs that this team submitted to the court, principally authored by the legal staff from the National Center for Lesbian Rights. A.S.L.

Idaho Supreme Court Reverses Ground on Newspaper Defamation Liability

The Idaho Supreme Court has rejected its own decision in *Uranga v. Federated Publications* from June 2001, which was reported in *Law Notes* and made available in the Media Law Reporter at 29 Media L. Rep. 1961, and ruled unanimously on February 14 that a man could *not* sue a newspaper for invasion of privacy for publishing a court document that stated the man had a homosexual affair with his cousin. Two years ago, the court had ruled that newspapers do not enjoy absolute immunity when they publish old court documents that might damage the reputation of living people, but apparently the court has changed its collective mind.

The case arose from *The Idaho Statesman*'s decision to publish an article in 1995 about the "Boys of Boise" scandal that had rocked the state forty years before. In 1955, police investigators looking into allegations that men had been propositioning teenage boys at the Boise YMCA interrogated about 1500 people and arrested 16 suspects on various public indecency charges. The *Statesman* story focused on Frank Jones, the son of a Boise City Council member who was a student at the U.S. Military Academy at West Point. Police investigators interviewed Jones, who admitted engaging in oral sex with one Melvin Dir, claiming that Dir had forced him at gunpoint. Dir responded with a written statement claiming the sex was consensual, and that afterwards he and Frank had talked about gay affairs that Frank had with a classmate and with his cousin Fred Uranga. Dir's written statement was in the court files, and *The Statesman* decided to reproduce the statement as an illustration of its story. Although the story never mentioned Uranga by name, readers could make out his name in the illustration. (Jones was forced to resign from the military academy as a result of the incident.)

Uranga, who claims that Dir's statement was untrue, demanded that *The Statesman* print a retraction. The newspaper declined to do so, but offered to let Uranga write something for publication denying the statement, or alternatively offered to print a statement that the newspaper took no position as to the truth or falsity of anything in Dir's statement.

This did not satisfy Uranga, who sued the newspaper, using various invasion of privacy theories. The newspaper raised a First Amendment defense, arguing that it was immune from liability for publishing a court document as an aspect of freedom of the press. The trial judge and a panel of the state's court of appeals agreed with the newspaper, rejecting Uranga's suit. But on June 22, 2001, the Idaho Supreme Court revived the lawsuit. *The Statesman* petitioned for a rehearing, arguing that the court had misconstrued the U.S. Supreme Court precedents, and evidently persuaded the Idaho Supreme Court.

In an opinion by Justice Daniel T. Eismann, the court relied on the U.S. Supreme Court's 1975 decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, which rejected liability for a television station that had broadcast the name of a teenage rape victim in violation of a state law. The *Cox* court held that an individual's privacy interest is sharply diminished when a claim of invasion of privacy is based on the publication of information contained in a public record. In that case, a television reporter had obtained the name of the rape victim by reading a copy of the indictment of the defendants who were being prosecuted for the rape, and the victim's father brought an invasion of privacy suit against the television station on her behalf. The Supreme Court in *Cox* had also emphasized the significant public interest in reporting on matters of crime and punishment, and that if the state wanted to protect privacy interests, it could take steps to keep the names of crime victims out of public records.

Uranga argued that the reasoning behind *Cox* was not relevant to a historical article reporting on a 40–year-old incident, but Justice Eismann was not persuaded, commenting, "There is no indication that the First Amendment provides less protection to historians than to those reporting current events." While agreeing that "the circumstances surrounding the publication in question certainly evoke sympathy for Uranga," the court concluded that this case could not be distinguished from *Cox* "based upon the age of the court record and lack of significance in having Uranga's name appear in the story." The court was also concerned that Uranga had not suggested any kind of workable standard for deciding whether a court record was too old to remain newsworthy for First Amendment purposes.

Unless Uranga can get the U.S. Supreme Court to take the case, his attempt to obtain compensation for the publication is at an end. A.S.L.

Oral Sex Analogy Held Rhetorical Hyperbole by Alabama Supreme Court

The Supreme Court of Alabama, in a slip opinion, held that sportscaster Paul Finebaum was entitled to summary judgement against defamation and tort of outrage claims, brought by rival sportscaster Richard Coulter on the theory that Finebaum implied that Coulter "is a homosexual." The court concluded that the statement at issue was rhetorical hyperbole, and that Coulter presented clear and convincing evidence neither that Finebaum intended to imply that Coulter is homosexual, nor that Finebaum made the statement with actual malice. *WERC AM/FM Radio v. Coulter*, 2003 WL 257385 (Ala., Feb. 7).

Finebaum's 1998 broadcast, critical of football recruiters on radio shows, contained this exchange: "[Finebaum:] I heard a program this morning that was easily the most embarrassing 30 or 40 minutes of radio I have ever heard in my life.... It was Matt Coulter, and I can't remember the other clown, it, I mean, these two guys really slobbered over each other, I mean, I really thought they were going to start performing oral sex on one another, it was so sickening.... [Bob Lochamy:] So, they got excited? [Finebaum:] Oh my goodness. This was the most repulsive thing I've ever heard. I mean, I just happened to flip on the radio to find something on, and these guys, I mean, you would have thought Alabama had just won its seventh straight national championship."

At deposition Finebaum characterized his statement as an attempt to satirize the sports entertainment business, and "absolutely not" an innuendo that Coulter was gay. The court cited *Hustler Magazine, Inc. v. Falwell* and *New York Times Co. v. Sullivan* extensively in detailing the elements that a public figure must prove to establish a claim of emotional distress for defamation. Usages of the words "blackmail" and "traitor" were given as other examples of rhetorical hyperbole.

Implicit in the court's opinion is the proposition that the false identification of a party as homosexual is susceptible to a defamatory meaning. An explicit analysis of the defamatory potential of the implication of homosexuality was not provided, nor necessary given the conclusion that Finebaum didn't intend to imply that Coulter is a homosexual person. *Mark Major*

D.C. Appeals Court Overrules Admissions Committee and Bars Gay Man From Practice

In *In re Byron C. Wells*, 2003 WL 193569 (D.C. Ct. App. Jan. 30), a sharply divided panel of the District of Columbia Court of Appeals denied admission to an applicant to the District of Columbia Bar because he was morally unfit to practice law in the District of Columbia, based on his arrest and subsequent plea of guilty to one count of misdemeanor battery in 1988 involving unwanted sexual advances with young male legal clients. (Wells was practicing law in Indiana at the time.) In doing so, the court rebuffed the recommendation of an equally sharply-divided panel of the Committee on Admissions of the District of Columbia Bar. The Committee on Admissions had voted 3–2 to recommend admission. The Court of Appeals ruled 2–1 to accept the dissenting opinion recommending that Wells be denied admission. The Court of Appeals annexed the Findings of Fact, Conclusions of Law and Recommendations of both the majority and minority of the Committee on Admissions.

Wells had been admitted to the Indiana Bar in 1977, after working as a reporter for 12 years and graduating law school. He had served as a judge in Shelby County, Indiana from 1977 (the year of his admission to the Indiana Bar) until 1983, and then went into private practice. He was married and had two children and four grandchildren at the time. During the three years he was in private practice, he began to make advances on certain of his younger male clients. Wells maintained that he never made advances on minors. He was arrested in 1987 on five counts of battery, and plead guilty to one count. The plea agreement allowed that adjudication would be withheld if he completed a diversion program successfully.

The Indiana Supreme Court Disciplinary Commission began disciplinary proceedings against him in 1989, resulting in a three-year suspension from practice, after which time he would be eligible to apply for readmission to the Indiana Bar. During the pendency of those proceedings, Wells was arrested and charged with two further counts of battery, but was acquitted by a jury. Wells applied twice for readmission to the Indiana Bar. Each time the Indiana Supreme Court overruled the recommendations of its own hearing officer and denied reinstatement as an Indiana attorney. Wells was also denied permission to take the Tennessee Bar examination in 1995.

The central issue in this case was whether Wells showed remorse for what he had done and was sufficiently rehabilitated. The majority and minority reports drew such sharply differing conclusions from the record that one wonders, at times, whether it was the same record. The factors to be considered in the District of Columbia are a (non-exclusive) laundry list of eleven. These include nature, character, number and duration of the offenses, age and maturity of the applicant at the time of offense, time elapsed since offense, grant or denial of parole, current attitude towards the offense, candor, sincerity and full disclosure in the filings concerning character and fitness, applicant's subsequent constructive activities and accomplishments, and opinions of character witnesses.

At the Commission, the majority report found that he satisfied 10 of the eleven factors to be considered (Wells neither sought nor was granted parole). The majority found him to be candid, forthcoming, remorseful and rehabilitated. He had persuasive witnesses and the support of his family. He was active in his church and in various AIDS and other health related causes. Two of the three young men who were involved in the events which led to his arrest sought him out during the pendency of his suspension proceeding for further criminal representation. (He declined to represent them due to the obvious conflict).

The minority report found only one factor in his favor: that a significant period of time has passed since the criminal proceedings at issue. The minority found him lacking in remorse, perceiving himself as being punished for what he sees as private and consensual conduct. In a section of their report which clearly riled the minority, Wells was found to portray himself as the victim of a vendetta by the chief judge of the Indiana Supreme Court, who, he alleged, has been rumored to have an "alternative lifestyle," and thus could not rule favorably on Wells's application, lest the Chief Judge himself be perceived as being gay. The minority specifically found that Wells presented nothing to support this claim. Wells's witnesses were unpersuasive, and he could not document the support of his family. The minority report noted that he also had substantial debt for medical bills and for credit cards. He had one judgment for credit card debt against him from 2000, and another matter is pending trial.

The standard of review in this type of matter is one of "clear and convincing evidence." All that is "clear and convincing" in this case is that Wells did not meet this burden, in the opinion of the majority of the court of appeals. *Steven Kolodny*

Lesbian Hairdresser Loses Title VII Claim Against Beauty Salon

In a lengthy opinion concerned with subtle distinctions between discrimination on the basis of sexual orientation and discrimination on the basis of sex, U.S. District Judge Victor Marrero (S.D.N.Y.) granted summary judgment for the employer on a Title VII claim against a beauty salon brought by a lesbian hairdresser trainee who claims she was discharged and discriminated against because she failed to conform to gender stereotypes. *Dawson v. Bumble & Bumble*, 2003 WL 470341 (S.D.N.Y., Feb. 25, 2003).

Dawn Dawson began employment with Bumble & Bumble in February 1999. At the time, she had seven years of prior experience working as an assistant in the educational programs of several Manhattan salons, each of which she had left without completing the training program, as well as some smaller establishments that did not require specialized training. She was interviewed, hired, and ultimately discharged by Connie Voines, a transitioning male-to-female transsexual. According to Judge Marrero's summary of the evidence, the salon employed many lesbians and gay men, several of whom were in management or supervisory positions. To summarize a lengthy factual recitation in the opinion as concisely as possible, it appears that Dawson presented herself in dress and styling in a more masculine manner than some who worked at the salon thought desirable, or at least this was her perception. According to evidence presented by the salon, she failed to acquire the skills necessary to advance in the program, and also fell short in the attitude and personality necessary to make a success in this very people-oriented, hands-on business. She claimed to have been denied certain training opportunities, and then to have been discriminatorily discharged on July 15, 2000.

Her federal court suit was premised on Title VII, with supplementary state claims under the New York Human Rights Law (which at the time did not cover sexual orientation but did forbid sex discrimination) and the New York City Human Rights Law (which forbids sexual orientation discrimination and, since last year, gender identity). In order for her case to continue in federal court, as a practical matter, she had to survive the employer's motion to dismiss her federal claim.

Judge Marrero found that even if one accepts the argument that discrimination on the basis of gender nonconformity would violate Title VII's ban on sex discrimination, which he accepted for purposes of ruling on the motion, Dawson's factual allegations were not sufficient to state a claim, as Marrero concluded that her factual allegations had more to do with her sexual orientation than her sex. But what is most fascinating about the opinion is the judge's attempt to figure out how to evaluate this kind of claim in the context of the beauty industry, where sexual diversity is rife.

Marrero notes that Dawson even seemed to concede the difficulty in her deposition, noting that "in relation to some of the events and individuals involved in the instant dispute, Dawson acknowledges that an evaluation of what constitutes conforming behavior is bound to run into 'a tricky place' and 'a very gray area.' When asked about who at the Salon was considered unconventional, Dawson replied: 'What is conventional to you? You're talking about hairdressers. Pressed further to identify in particular which of the Salon's employees was a nonconformist, Dawson said: 'I don't think hairdressers are conformists anyway, so I would say the whole lot of them." Thus, in effect, Dawson was trying to allege in her Title VII claim that the Salon considered some kinds of nonconformity acceptable and others unacceptable, and was attempting to carve out a notch, in effect, for 'butch lesbians' as a

discriminated-against group in the beauty industry. (Actually, that there might be discrimination on that basis sounds plausible to us, but the questions for Judge Marrero were twofold: whether such discrimination would violate Title VII, and whether Dawson had alleged facts sufficient to place such a contention in play for purposes of the lawsuit.)

Since much of Dawson's testimony concerned comments by other employees of the salon that she considered to be evidence of discriminatory intent, Marrero focused particularly on the problem of such comments and how they might weigh as evidence of discrimination. Observing that "the Salon and its business represent an aspect of the world of styles and fashion in which personal appearance often counts for much, if not everything," he found it unsurprising that employees would make remarks about the appearance of other employees. "Indeed, it may be that the Salon would fail in its business mission if the products of its self-described 'high-end' and 'trendy' beauty enhancement labors were greeted with utter silence. Where the work environment by its very nature engenders criticism about personal mien, manner and styles, a court is well-advised to probe exactingly at challenges to such commentary arising uniquely from the social context, and to exercise corresponding caution when called upon to rule as a matter of law that remarks about a particular individual's appearance, that may be contextually grounded, give rise to a claim for sexual discrimination."

Further, he commented, "the heterogenous environment that strives for the avant garde and extols the unconventional, also renders peculiarly challenging any finding that would, for the purposes of applying the discrimination laws, endeavor to classify what behavior does or does not conform to gender norms, what look, gesture or bearing may or may not deviate from defined expectations of what is or is not acceptable social conduct." Marrero found that "against this backdrop…, Dawson's claims of sexual discrimination, as she articulates them in the Complaint and elaborates in her deposition, take on somewhat protean quality, hard to grasp or pinpoint precisely what conduct she accuses of offending whatever behavioral norms she asserts govern the circumstances." Marrero voiced suspicions that some of Dawson's statements were tailored toward fitting the complicated sexual harassment case law under Title VII, further complicating evaluating any of it for purposes of the motion. Ultimately, however, Marrero ended up rejecting Dawson's Title VII claim for a somewhat different reason: he concluded, when summing up her allegations and deposition testimony, that every seemed to hinge on her sexual orientation rather than her sex, and thus that the threshold requirement of a Title VII claim had not been met, i.e., that she was discriminated against because of her sex. Some of this undoubtedly stemmed from the way her Title VII claim was conceptualized: that she was discriminated against because she was a nonconforming lesbian. To the extent that her lesbian identity remained central to her claim, the judge concluded that it was really a sexual orientation discrimination claim. And while such a claim might violate the city law (or state law as recently amended by not applicable to this case), it could not be the premise for federal jurisdiction.

Furthermore, Marrero found the employer's evidence of Dawson's insufficiencies as an employee and a trainee to be substantial enough to avoid the charge of pretext.

Consequently, Marrero granted summary judgment to the employer. (Actually, summary judgment had been granted on January 30, and the February 25 opinion was issued by way of explanation, since an opinion had not been ready when the judgment was announced.) A.S.L.

Civil Litigation Notes

Federal - Alabama — Because Title VII's ban on same-sex hostile environment sexual harassment is co-extensive with the ban on sex discrimination found in the Equal Protection Clause of the 14th Amendment, 11th Amendment sovereign immunity will not shield a state university from a Title VII same-sex harassment claim brought by a male former employee, ruling the U.S. Court of Appeals for the 11th Circuit in *Downing v. Board of Trustees of the University of Alabama*, 2003 WL 302222 (Feb. 13, 2003). Writing for the court, Circuit Judge Tjoflat found that Section 5 of the 14th Amendment, which authorizes Congress to enact laws to enforce the rights guaranteed by that Amendment, provides a sufficient basis for finding a federal override for state sovereign immunity, since the states ratified the 14th Amendment (Alabama was required to do so for "readmission" to the Union during the post-Civil War Reconstruction period) and thus consented to waive their immunity to 14th Amendment claims. In recent "New Federalism" cases, the Supreme Court has ruled that state employees may not sue their employers under the Age Discrimination in Employment Act or the Americans With Disabilities Act on claims of statutory violations that would not necessarily amount to constitutional violations. The University argued that same-sex harassment does not violate the Equal Protection Clause, so the 14th Amendment provides not grounds for state liability under Title VII. But, pointing to the Court's opinion in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), Judge Tjoflat opined that the Court had found no difference between same-sex and opposite-sex harassment as a practical and theoretical matter, so long as the victim was selected for harassment because of his sex, and, inasmuch as opposite-sex harassment in a public sector workplace has been found to violate the Equal Protection Clause, there would be no reason to treat same-sex harassment any differently. The court rejected the University's motion to dismiss, affirming the district court.

Federal - Ohio — On Feb. 26, a federal district court jury in Cincinnati found that the City unlawfully discriminated against Philecia Barnes, a police officer formerly known as Phillip Barnes, who had "come out" as transgendered, obtained medical treatment for a "sex reassignment" and obtained a legal name change. *Barnes v. City of Cincinnati* (U.S.Dist.Ct., S.D. Ohio). Barnes alleged that she was denied a promotion because of this, and sued for back wages and other damages. The jury awarded her $320,511. The police chief claimed there was no discrimination, and at press time the city had not announced whether it would appeal. The report on the case, an Associated Press story picked up on Feb. 28 by the *Akron Beacon Journal*, states that Barnes sued on an equal protection theory, and sought not only damages but affirmative relief in the form of an order from District Judge Susan Dlott to protect Barnes from further discrimination. Barnes is also using her case to challenge the 1993 Measure 3 city charter amendment that prohibits the city from protecting people from discrimination on the basis of sexual orientation.

California — The *San Francisco Chronicle* reported on Feb. 5 that Robert Haaland, a female-to-male transgendered man, has won a $107,500 settlement of his lawsuit against the city, charging that a police officer had "groped" him (presumably a "genitals check" during an in-custody search at a police station several years ago.

California — The California Court of Appeal, 4th District, affirmed a ruling by San Bernardino County Superior Court Judge James A. Edwards that the City of Loma Linda violated the due process rights of a municipal worker whose employment was terminated in a proceeding where he was not afforded the opportunity to review all the evidence against him. *Martinez v. Personnel Board of the City of Loma Linda*, 2003 WL 429505 (Feb. 24, 2003) (not officially published). Jaime Martinez was widely regarded by other employees as being gay, and claimed he was being subjected to harassment. When the city clerk's teenage sons volunteered for summer work in the city department where Martinez was employed, other employees warned them that Martinez was gay and might try to put the moves on them. The boys later reported that Martinez had done so, and he was discharged. When he grieved his discharge, the personnel department conducted an investigation, but refused to share with Martinez all of the statements that it had collected, and upheld the discharge, which he appealed to the courts. The trial court determined that Martinez was entitled to see the evidence against him, and was affirmed on this count by the court of appeal.

Maryland — A Maryland jury concluded on Feb. 24 that the Shock Trauma Center at the University of Maryland Medical System did not discriminatorily prevent a gay man from contact with his dying partner who was being treated at the Center. Throughout the litigation, the Center took the position that Bill Flanigan was excluded from

contact with Robert Daniel, who died on Oct. 19, 2000, at the Center, under circumstances which would have excluded a marital partner or close biological family member as well. The chief physician testified that doctors were too busy trying to save Daniel's life to allow visitors, and that the decision to remove Daniel from life support was made in consultation with Flanigan and Daniel's mother and sister. Before the verdict was read, the jury issued a statement of condolence to Flanigan and asserted that the defendant should improve its communication with persons in the position of Flanigan, who was represented in the litigation by Lambda Legal Defense Fund. *Baltimore Sun*, Feb. 25.

New York — Bad law lives on… On Jan. 21, the N.Y. Appellate Division, 2nd Department, citing *Allison D. V. Virginia M.*, 77 N.Y.2d 651 (1991), reversed a Family Court order from Brooklyn and reiterated that under N.Y. law a lesbian co-parent who is not the adoptive parent of her former domestic partner's "biological" child does not have standing to seek visitation with the child. *Lee P.S. v. Lisa L.*, 2003 N.Y. Slip Op. 10431. The court also stated that a constitutional challenge to the pertinent provisions of the Domestic Relations Law was not reviewable, because the Attorney General was not given timely notice to intervene in the proceedings, as required by the Civil Practice Law and Rules. Ros Quarto and Tom Shanahan were co-counsel for Lee P.S., the co-parent, on this appeal.

New York — A New York County Supreme Court jury has awarded Charles Bell $11.2 million in damages for sexual orientation discrimination. Bell had been hired to manage the Park Lane Hotel, owned by Leona Helmsley, the widow of hotel magnate Harry Helmsley. Bell was hired by Patrick Ward, a Helmsley company executive with whom Mrs. Helmsley allegedly had a personal relationship of some sort that ended when she terminated Ward's employment, allegedly over Ward being gay. Ward sued her and there was a monetary settlement. Then Bell was fired, and sued for sexual orientation discrimination. The jury heard testimony that Helmsley believed she had legitimate grounds for dismissal based on Bell's work performance, as well as testimony about remarks by Helmsley tending to support Bell's allegations that his sexual orientation was at least a motivating factor in his discharge. The jury evidently preferred Bell's story to Helmsley's. A point of contention that may be one of the bases for Helmsley's expected appeal is that Justice Walter Tolub instructed the jury that they could take account of Helmsley's financial condition in determining damages, and evidence was presented showing her net work as between $3.2 and 4 billion. Ultimately, the jury voted for $1.17 million in compensatory damages (including front-pay, back-pay, lost benefits and emotional distress injury) and $10 million in punitive damages. At this point, it is undoubtedly one of the largest verdicts ever won in a sexual orientation discrimination case, but it seems likely that an appeal would result in an adjustment of damages downwards, and a settlement certainly would. The trial story appeared in all the NYC daily newspapers in rich detail on February 5.

Texas — In January, we reported on *Thomas v. Bynum*, in which the Texas Court of Appeals reiterated prior precedents that falsely calling somebody gay or queer in Texas remains defamatory per se in light of the continuing existence of the misdemeanor Homosexual Conduct law in that state. At the time, it appeared that the decision would be unpublished. However, the Court of Appeals has evidently changed its mind, because the opinion has been redesignated for publication. It is now available at *Thomas v. Bynum*, 2003 WL 553277, and will eventually appear in S.W.2d. A.S.L.

Criminal Litigation Notes

California — Jaron Chase Nabors, 19, one of the co-defendants in the murder of Eddie "Gwen" Araujo, a Newark, California, teenage cross-dresser, has pleaded guilty to voluntary manslaughter and agreed to testify against his co-defendants. *San Francisco Chronicle*, Feb. 25. Nabors, who showed police officials where Araujo's body had been buried, testified about discussions he and the other three co-defendants had in the days leading up to the murder, which was evidently planned out in advance. Nabors will receive an 11–year sentence under his deal with prosecutors.

Florida — Taking an unusually aggressive prosecutorial role, U.S. District Judge Daniel T. K. Hurley decided to override the U.S. Attorney's recommendations and impose an 18–year prison term on Damon Amedeo, a former Palm Beach County Assistant Public Defender who was before Hurley on drug charges involving distributing samll quantities of drugs to Douglas Rozelle, III, an 18–year-old who had died of an overdose in Amedeo's apartment. Amedeo had pled guilty to the distribution charges, but Hurley viewed a video in which Amedeo was shown performing oral sex on Rozelle while Rozelle appeared to be unconscious. Hurley was critical of Amedeo "taking advantage" of the youth, and also took into account the testimony of various friends of Rozelle that Amedeo's apartment had become a hangout where teens went to use drugs. *South Florida Sun-Sentinel*, Feb. 14.

Kansas — The *Wichita Morning Sun* (Feb. 18) reported that a former parochial school teacher in Wichita was sentenced, as part of a plea agreement, to providing federal probation officers with his online passwords so they can monitor his Internet use. Jeffrey Klazura, 30, was sentenced for possessing two pictures of adult women posing nude on his home computer. There was no adjudication that the pictures were obscene. Klazura had been prosecuted after a Yahoo photo service reported him to authorities for trying to convert pictures of young-looking females from electronic form to print photos, according to the news report. Klazura had cancelled his order as soon as Yahoo informed him that the pictures might be illegal, but a postal inspector delivered the pictures to Klazura anyway and then arrested him and obtained access to search his computer. Klazura was charged with possession of child pornography, even though the age of the females in the pictures was never established, but agreed to plead to possession of obscene matter in order to avoid the draconian sentences that are inflicted on persons for violation of federal laws against possession of child porn. Klazura resigned from his teaching position upon his indictment.

Maryland — Darrell D. Rice has been charged with capital murder committed in a national park in connection with 1996 slayings of two lesbians who were discovered tied up with their throats slashed. According to a Feb. 2 report in the *Washington Post*, Attorney General John Ashcroft personally authorized the U.S. Attorney to seek the death penalty in the case, on the grounds that a bias motivation in the killing justifies seeking the extreme penalty as an aggravating factor. Although the existing federal hate crimes law does not include sexual orientation, under a 1994 federal criminal statute evidence of bias as an aggravating factor may be taken into account to justify capital punishment.

Massachusetts — The Supreme Judicial Court of Massachusetts rejected the third motion for a new trial by a gay man who was convicted of murder, in *Commonwealth v. Healy*, 2003 WL 292315 (Feb. 13, 2003). The court rejected the defendant's argument that some coroner reports that were not disclosed to his attorney violated his rights by depriving him of exculpatory evidence, and further rejected the defendant's argument that references to his homosexuality during the trial had biased the case. It seems that the defendant was an openly gay man, and the state's theory of the case was that the victim, who was found repeatedly stabbed while tied down to his bed in a semi-nude position, had died in the course of some sort of sexual activity with the defendant.

Tennessee — The Tennessee Court of Criminal Appeals affirmed the Madison County Circuit Court's imposition of a jail sentence on William Roy Gray, an HIV+ man who was arrested by police officers while in possession of a crack pipe. *State v. Gray*, 2003 WL 402811 (Feb. 21, 2003). On appeal, Gray, who also suffers from hepatitis A infection, asserted that the trial court erred in failing to take into account that he was afflicted with a terminal disease, and that the jail sentence would interfere with his treatment regime, which included regular doctor visits and consumption of a variety of medications. Gray's appeal was undercut when the alert trial judge, upon learning of the appeal, converted his sentence to house arrest with ankle-bracelet monitoring for the duration of the sentence. Even so, in reviewing the original sentence, the appeals court noted that the trial

judge had referred to Gray's medical condition on the record and had clearly taken it into account in determining the sentence. Ultimately, however, the trial court had recanted its original sentence on grounds of the hardship that would be placed on the Madison County sheriff's department as well as on Gray in having him confined in jail.

Texas — In an unpublished opinion dated Jan. 30, the Texas Court of Appeals, Eastland, upheld the conviction of Willie Charles Wyatt, a cross-dresser, on counts of sexual assault of a child and indecency with a child, with sentences of 18 years in prison on each count. *Wyatt v. State of Texas*, 2003 WL 203156. According to the brief opinion by Senior Justice Austin McCloud, Wyatt, cross-dressed as a woman, was hanging out in a Wal-Mart parking lot, and approached a 16–year-old male "victim," who was described as "trainably mentally retarded." According to the victim, Wyatt asked him if he wanted to have sex and gave him $10. The victim went with Wyatt to an "upstairs apartment" and, during unspecified "sexual activities," discovered Wyatt was male. Afterwards, the victim went back to the parking lot, where his mother found him "white as a ghost." The boy asserted that a "black woman raped me." He later told his counselor, shortly before trial, that his assailant was a man, and that he had been afraid to reveal that for fear of being called a "queer." Wyatt, who maintained throughout the proceedings that he was innocent of the charge, objected to the nature of the police line-up in which he was identified, and also objected to some impeachment testimony. Wyatt is HIV+ and had stated on the stand that he always advised his sexual partners of this before engaging in oral sex. The prosecution brought in another prisoner to testify that Wyatt gave him oral sex without telling him that he was HIV+. Responding to this objection, the court conceded that normally it would not allow impeachment on a collateral point like this, but in this case Wyatt had created a false impression through his testimony as to which the state had a right to attempt impeachment. A.S.L.

Legislative Notes

Federal — In what is becoming a regular ritual, U.S. Rep. Jerrold Nadler chose Feb. 14, St. Valentine's Day, to reintroduce the Permanent Partners Immigration Act in the 108th Congress. The statute would provide a basis for lesbian and gay U.S. citizens to sponsor their same-sex partners of other nationalities for immigration to the U.S. on the same basis as legal spouses. Nadler introduced the same measure in the two prior Congresses with no discernible effect on U.S. policy, although each introduction generates some media comment and stimulates some editorial support.

California — Los Angeles — The City Council voted unanimously to expand the city's Equal Benefits Ordinance so that all city contracts for more than $5,000 are restricted to contractors who provide domestic partnership benefits on the same basis as they provide benefits to employees' spouses. However, no contractor is required to provide benefits to anybody; they are merely required to provide *equal* benefits for partners. The ordinance goes into effect on April 1. *Associated Press*, Feb. 13. A prior ordinance had imposed this obligation only on larger contractors.

California — San Francisco and Santa Cruz — The city councils of San Francisco and Santa Cruz have both passed resolutions endorsing a recently introduced state bill that would extend to same-sex couples "the rights and duties of marriage." *San Jose Mercury News*, Feb. 12.

Illinois — For the first time, the Illinois Senate's executive committee has approved a pending sexual orientation non-discrimination bill, in an 8–4 vote on Feb. 27, according to the *St Louis Post Dispatch* (Feb. 27). Similar bills have passed the state House of Representatives in recent years, but have never achieved a floor vote in the Senate. Hopes are high for this year.

Minnesota — A legislative proposal by Rep. Arlon Lindner, a Republican, to repeal the state's ban on sexual orientation discrimination was immediately opposed by Governor Tim Pawlenty, for whom a spokesperson stated: "He has not seen the bill, but he would not wish to repeal such a law. He's about fairness for all Minnesotans." Lindner contends that the law encourages homosexuality and discriminates against religious organizations with conflicting beliefs. (Of course, like all such laws, the Minnesota law exempts religious organizations from complying where their religious tenets would dictate.) *Star Tribune*, Feb. 8. Lindner's proposal had the merit of bringing forth a slew of editorials and statements from political leaders of both parties denouncing the proposal and reaffirming support for the principle of non-discrimination on the basis of sexual orientation.

New Mexico — On Feb. 24 the New Mexico House of Representatives approved by a vote of 39–27 House Bill 314, which would amend the state's anti-discrimination laws to include the categories of "sexual orientation" and "gender identity." On Feb. 26, the New Mexico Senate approved Senate Bill 28, a similar but not identical measure, by a vote of 22–18. Gov. Bill Richardson has stated support for banning anti-gay discrimination, but reserved judgment until he could look at the final text of a bill approved by both houses. The political problem at this point is that one of these bills must pass the other house, or a compromise bill must pass both houses, in order for there to be something for the governor to sign. The legislative session in New Mexico ends on March 22, which leaves three weeks for something to happen on this. In the meantime, the legislature is expected to take up a proposed hate crimes bill that would include coverage for gender, gender identity and sexual orientaiton, and is expected to be more controversial than the non-discrimination measure. The state's Human Rights statute applies to employment, housing, credit, union membership, and public accommodations. *BNA Daily Labor Report No. 38*, Feb. 26, 2003; *Albuquerque Journal*, Feb. 27

New York — Syracuse — The developers of a proposed gay nightclub in Syracuse are charging that a city Common Council vote to deny a permit to open the establishment was motivated by anti-gay bias, but several Council members who voted to deny the permit rejected the charge, asserting that other issues dominated the decision, and pointing out that they had supported prior gay rights measures and had voted to "raise the gay flag over City Hall" and "took death threats because we supported the gay community." The location of the proposed club, on the border between an industrial zone and a residential zone, was a major cause of controversy. *Syracuse Post-Standard*, Feb. 4.

Ohio - Cincinnati — On Feb. 5, the Cincinnati City Council amended the city's hate crimes law to include sexual orientation bias crimes. Opponents claimed that the measure violates Measure 3, a ballot measure passed by Cincinnati voters in 1993 that forbids the Council from passing laws that extend rights based on sexual orientation. *Washington Blade*, Feb. 14. A.S.L.

Law & Society Notes

The United Methodist Church's Western Jurisdiction Committee on Appeals narrowly voted to dismiss a complaint that had been filed against the Rev. Karen Dammann, former pastor of the Woodland Park United Methodist Church, who had written to her bishop that she was in a "partnered, covenanted, homosexual relationship." Church doctrine prohibits "self-avowed, practicing homosexuals" from being ordained or serving as pastors, which led to the bishop filing a complaint against her with church authorities. An investigative committee dismissed the complaint, but the church appealed, drawing a dissent from its chairman, who found the result to be an "egregious error." Stated one committee member: "The current legal position of the United Methodist Church is morally and theologically untenable. It encourages duplicity and disqualifies those who are open and honest. The church has long ordained and been well-served by gays, and more recently, lesbians. Rev. Karen Dammann should not be punished but commended for her courage and honesty." *Associated Press*, reported Feb. 1 in *The Columbian*.

After three decades of refusing to extend official recognition to a gay students organization, the administration of Boston College, a Jesuit school, announced that they will extend official recognition to a proposed gay-straight alliance organization. According to the school, a gay advocacy group would be inconsistent with Church teachings, but a gay-straight group devoted to education and understanding is not inconsistent. *Boston Globe*, Feb. 2.

Shareholders of the Emerson corporation, a manufacturer of electronic controls systems, voted down a proposal to add "sexual orientation" to the company's non-discrimination policy. The management opposed the proposal on the ground that it does not discriminate so such a policy statement is not needed. Then logically one presumes that they include race and sex in their non-discrimination policy because they do discriminate on those bases? Something is circular in the city of St. Louis… *St. Louis Post-Dispatch*, Feb. 5.

Tom Tunney because the firt openly gay man to be elected to the Chicago City Council on Feb. 25 when he easily trounced a field of four opponents in the 44th Ward. Tunney was an unelected incumbent, having been appointed to fill a vacancy by Mayor Richard Daley in December. His leading opponent attributed, Rick Ingram, also openly-gay, credited Tunney's victory to superiority in fund-raising and the support of the mayor and his political "machine." *Chicago Tribune*, Feb. 26.

The administrations of Temple University and Drexel University, both in Pennsylvania, have decided to provide domestic partnership benefits for same-sex partners of their employees, according to a Feb. 14 press release by the ACLU Lesbian and Gay Rights Project. Temple becomes the first public university in Pennsylvania to adopt such a plan, by contrast with the University of Pittsburgh, which has been resisting a demand for similar benefits and is defending a lawsuit on the issue. (As part of its defense, the university is arguing that Pittsburgh's Human Rights Ordinance is invalid, a move guaranteed to endear the institution to its lesbian and gay employees.)

Collective bargaining covering all employees of the state of Iowa and the Iowa State University has produced an agreement to provide health insurance benefits to same-sex partners of employees. Union members ratified the agreement, but some Republicans in the state legislature, expressing opposition to the partnership benefits coverage, suggested that they might seek to bar funding for implementation of the partner benefits provisions.. *Ames Tribune*, Feb. 17; *Bettendorf News*, Feb. 27.

Another important player in the early history of gay liberation has passed away. Dr. John E. Fryer, the gay psychiatrist who appeared incognito at a panel discussion on homosexuality held at the annual meeting of the American Psychiatric Association in Dallas in 1972, died in Philadelphia on Feb. 21. He was a professor emeritus at Temple University Medical School. Fryer was recruited by early gay-rights activist Barbara Gittings to speak at the APA meeting as part of an effort to get American psychiatry to agree that homosexuality was not a mental illness and should not be treated as such. Recalling the event, Gittings said: "It made a big difference. Here, for the first time, was a gay psychiatrist telling his colleagues why his career would be ruined if people knew he was gay. It opened up things a great deal, because it made many psychiatrists realize gays were not some abstract idea, but were in fact in their profession there was one right in front of them." The following hear, the APA's board of trustees voted to removed homosexuality from the Diagnostic and Statistical Manual of Mental Disorders, an action subsequently endorsed in a mail-in ballot referendum of the APA's membership. *Philadelphia Inquirer*, Feb. 26. A.S.L.

International Notes

Australia — The full court of the Family Court of Australia has affirmed the ruling of Family Court Judge Chisholm in the case of *Attorney General for the Commonwealth v. Kevin and Jennifer*, Appeal No. EA 97/2001 (Feb. 21, 2003), finding that "Kevin," a post-operative female-to-male transsexual, should be considered a man for purposes of the law and thus qualified to marry Jennifer. Kevin and Jennifer had sought an advisory opinion from the Attorney General prior to marrying, but having received an ambiguous reply, proceeded with their marriage and the subsequent donor insemination of Jennifer and birth of their child. (She is pregnant again through donor insemination.) They then filed suit seeking a court declaration that their marriage is valid, which Judge Chisholm granted over the fervent opposition of the government. The A.G. argued that the 1961 Family Law Act should be construed according to the meanings that Parliament would have given to its terms when it was enacted, and with reference to the English common law concept of marriage derived from 19th century British cases. The Family Court rejected this contention, finding that the undefined terms in the law should be given meaning by reference to contemporary Australian society. The court noted as significant that the law authorized issuing Kevin a new birth certificate and passport showing his desired sex, and that Australian law in most of the states forbids discrimination against transgendered persons. The court also noted that it would not be in the best interest of the children of Kevin and Jennifer for the courts to declare their marriage void. The court decisively rejected the British precedent of *Corbett v. Corbett* as not being a correct statement of Australian law, and emphasized the importance of Australian law being congruent with international human rights standards, as embodied in last summer's *Goodwin* decision by the European Court of Human Rights. By happy coincidence, this opinion was issued on the same day as the *Kantaras* decision in Florida.

Belgium — In addition to legislating in favor of same-sex marriage in January, the Belgian government had previously also passed legislation banning discrimination on the basis of sexual orientation, which goes into effect this year shortly before the marriage bill goes into effect, according to belated news reports.

Brazil — The Supreme Court of Brazil ruled on Feb. 14 that surviving lesbian and gay partners have a claim to receive social security benefits and pensions after the deaths of their partners who had paid into the National Institute of Social Security for coverage, affirming a prior decision by a federal trial judge. *Washington Blade*, Feb. 21.

Canada — A new report on gay parenting by Ann-Marie Ambert, a sociologist at York University, asserts that children of gay and lesbian parents are just as well-adjusted as children of heterosexual parents, according to an internet posting on Datalounge.com (Feb. 5). Ambert recently finished writing a book on the subject.

Canada — As government leaders ponder how to respond legislatively to recent court decision suggesting the constitutional requirement of same-sex marriage, openly gay New Democratic Party MP Svend Robinson decided to cut to the chase and introduce a private member's bill on Feb. 13 to give same-sex couples equal marriage rights. *265Gay.com*, Feb. 14. This is the second such bill Robinson has filed. Private members bills normally do not win enactment without the support of the governing party.

Israel — We quote the following story from the *Jerusalem Post* of Jan. 31 in full: "Court allows lesbians to establish family unit. A lesbian couple, whom Beersheba Family Court Judge Osnat Alon-Laufer - in a precedent-setting ruling - said could legally establish a family unit, are planning to marry in Eilat next week. The ruling allows the two to raise children and provides for alimony should they decide to split up. The two, in their 30s, were both previously married and one of them has an eight-year-old son they are raising together with her ex-husband's agreement. The couple plans to have other children through artificial insemination." We're not quite sure what this means. In Israel, the Orthodox Jewish Rabbinate controls the institution of marriage, so this clearly was not a ruling authorizing an actual marriage. Presumably, the court was holding that the couple could attain the same status that the law accords unmarried heterosexual couples, which is substantial in Israel in light of the unavailable of marriages that do not comply with Orthodox Jewish requirements.

South Africa — A Feb. 27 report in *Business Day* indicated that some judges on the Constitutional Court expressed concern that the government has not taken steps to extend recognition to same-sex partners in various circumstances. The concerns were expressed from the bench during arguments over a case where the Durban High Court had declared unconstitutional a statute that would deny parental rights to a lesbian who artificially fertilized ova were implanted in her life-partner's womb, resulting in the birth of two children. The court was hearing arguments over whether to uphold the Durban court's order requiring legal recognition of the co-parent.

Vatican — To the astonishment of just about nobody, the Congregation for the Doctrine of the Faith of the Roman Catholic Church instructed superiors of religious orders worldwide that transsexuals are ineligible for admission to religious orders and should be expelled from the priesthood if discovered. The instructions were part of a series of directives that the Church has been sending out about qualifications for the priesthood; yet to be addressed are formal rules involving gay candidates. Late in January, the Vatican reaffirmed a decision to excommunicate seven women who had managed to obtain ordination as priests. *Chicago Tribune*, Feb. 1. A.S.L.

Professional Notes

The Maryland Senate has confirmed the nomination of openly-lesbian Baltimore City District Judge Halee F. Weinstein. Weinstein had been nominated by outgoing Gov. Parris N. Glendening, and the nomination was resubmitted by the new governor, Robert L. Ehrlich, Jr. Some opposition emerged to Weinstein's nomination on the ground that she had served in the Army during the 1980s at a time when personnel forms required enlisted members to respond to questions about her sexual orientation and required discharge of anybody who was gay. Sen. Alex Mooney, a Republican, called for reconsideration of Weinstein's nomination, asserting: "Clearly, the nominee falsified in order to gain entrance to the military," but Mooney was outvoted in committee, 38–4. *Baltimore Sun*, Feb. 12.

Paul M. Smith, an openly-gay partner at Jenner & Block, will argue the Texas sodomy case before the U.S. Supreme Court as a cooperating attorney for Lambda Legal Defense & Education Fund, which represents petitioners John Lawrence and Tyron Garner. Smith has been a partner at J&B since 1994, and is co-chair of the firm's appellate and Supreme Court practice groups. The argument will be held on March 26. *Washington Blade*, Feb. 14.

A historical note: On Jan. 23, Louis B. Schwartz, a retired law professor who was a co-author of the Model Penal Code, which proposed decriminalization of consensual sodomy in the U.S., passed away in San Francisco at the age of 89. According to an obituary that appeared in the *New York Times* on Feb. 9, Prof. Schwartz, who was on the faculty of the University of Pennsylvania Law School, was co-author with Prof. Herbert Wechsler of Columbia University. The *Times* noted that the MPC "posited that criminal law should not punish any kind of sexual relations between consenting adults in private." A substantial minority of the states took up the recommendation and decriminalized consensual sodomy during the 1960s and 1970s as part of their adoption of the Code. A.S.L.

AIDS & RELATED LEGAL NOTES

Georgia Supreme Court Reaffirms Actual Exposure Requirements in AIDS Phobia Cases

Ruling unanimously in *Johnson v. American National Red Cross*, 2003 WL 396354 (Feb. 24, 2003), the Georgia Supreme Court held that a woman who received a letter from the Red Cross after her blood transfusion apologizing for having supplied blood that did not meet its standards because the donor had lived in an HIV-ravaged part of Africa was not entitled to sue for negligence or infliction of emotional distress, as she had not actually been exposed to HIV.

Bernice Mantooth, suffering from a variety of ills, went to the Cartersville Medical Center on Aug. 29, 1998, complaining of chest pains and shortage of breath. She was diagnosed with exacerbation of emphysema, and the emergency room physician prescribed a transfusion of two units of blood. She reacted badly to the transfusion and was moved to intensive care, where she was treated and stabilized, then transferred to another hospital and discharged several days later. She was subsequently diagnosed with lung cancer. A few months later, the Red Cross notified the Medical Center that the blood it had supplied for transfusion did not meet Red Cross standards, as they normally did not accept donations from people who had stayed for more than 12 months in parts of Africa where it was known that strains of HIV not detectable by ordinary screening tests were in circulation. In this case, the donor had been back in the U.S. for more than five years, had never tested positive for HIV or exhibited any symptoms, and there was no reason to believe that he was infected. The Medical Center contacted Mantooth's personal physician, who subsequently notified Mantooth. Mantooth underwent HIV testing repeatedly, always testing negative. On Dec. 24, 1998, the Red Cross sent Mantooth a Christmas present: a letter apologizing for having caused her concern, and assuring her that the donor of her transfusion appeared to be in good health, it was unlikely he was infected, and that the chance of transmitting HIV diseases was "extremely remote."

None of this reassured Mantooth, who claimed that she lived in constant fear of having been infected, although she did not seek medical treatment for emotional distress or any physical injury associated with the transfusion. Instead, she sued everybody in sight: the emergency room doctor, her personal physician, the Medical Center, and the Red Cross. The lower Georgia courts, applying established precedent, granted summary judgment to the Red Cross on her negligence claims, finding that although the Red Cross had been negligent in accepting blood from this donor, no harm had been done so no tort had been committed, an injury being a necessary element of a negligence claim; furthermore, emotional distress claims for fear of contracting AIDS in Georgia require a showing that the plaintiff was actually exposed to HIV.

After Mantooth died, her estate was substituted as plaintiff, and appealed to the Georgia Supreme Court. The Court affirmed the existing Georgia precedents on both counts: that an actual injury must be shown for a negligence action to be maintained, and that an emotional distress claim for fear of contracting AIDS requires a showing of actual exposure to HIV. As to the former, the estate had argued that Mantooth had sustained an injury in that she had to submit to repeated HIV testing at her own expense, but the court was unwilling to characterize this as the kind of injury required to support a negligence claim. As to the latter claim, the estate argued that the issue should be whether a reasonable person in Mantooth's position would have been alarmed by this sequence of events and reasonably feared HIV infection, but the court reiterated the wisdom of restricting claims against the Red Cross, a non-profit charitable organization performing an essential function of collecting and distributing blood, to those in which it could be shown that an individual had actually been exposed to HIV through the organization's negligence. A.S.L.

Transfusion Case Falls Short of Constitutional Violation

U.S. District Judge Sam Lindsay (N.D. Tex.) ruled on Jan. 3 in *Kinzie v. Dallas County Hospital District*, 2003 WL 343234, that the hospital did not violate the constitutional rights of James Kinzie, who acquired HIV-infection from a transfusion at the hospital when he was four years old in March 1985 and was not told about his infection until he sought HIV-testing eleven years later as a teenager. Granting the hospital's motion to dismiss, Lindsay found that Kinzie's complaint failed to allege facts sufficiently shocking to the court to amount to a Due Process violation.

Kinzie, then age 4, required heart surgery, which was scheduled to take place at Parkland Memorial Hospital in Dallas on March 11, 1985, just one week after the U.S. Food and Drug Administration licensed the ELISA test to screen blood for HIV-antibodies. Blood administered to him either during surgery or his recovery period included a donation collected by a Parkland mobile unit from a gay man. According to Kinzie's complaint, the blood technician did not administer the screening protocol that was then widely in use to try to avoid collecting blood from those perceived as high risk for HIV infection, such as sexually-active gay men. Further, Parkland never had the blood tested, even though the test was then available, until many months later. To com-

pound its errors, when Parkland learned in September 1985 that it had transfused Kinzie with HIV-tainted blood, it contacted neither Kinzie nor his doctor. When Kinzie learned of his HIV-infected in 1996 and contacted the hospital, it denied having transfused him with HIV-tainted blood.

Kinzie and his parents sued under 42 USC 1983, alleging that Parkland violated substantive and procedural due process rights as well as a specific federal regulation, 21 CFR 610.47, which requires notification of persons who test HIV+. (Kinzie and his parents also sued the hospital for negligence in state court, and that lawsuit was settled on terms not specified in Judge Lindsay's opinion.) At the heart of Kinzie's argument was that the hospital's conduct in this case was so shocking and deliberately indifferent to his health as to constitution a violation of substantive due process, and to have deprived him of his opportunity to seek redress in violation of procedural due process. The hospital moved to dismiss, asserting that its conduct did not amount to a constitutional tort.

Lindsay sided with the hospital, although he described the case as "perhaps the most difficult case" he has had to decide since his 1998 appointment to the court. After extensively reviewing the case law from the Supreme Court and the 5th Circuit, Lindsay concluded that bad as the hospital's conduct was in this case, it did not reach the level of a constitutional tort. Although courts have imposed constitutional liability on state actors for outrageous conduct, Lindsay found that in the context of March 1985, the hospital's failure to screen donated blood adequately may have been negligent but was not outrageous enough to meet the high standard set by the precedents. Although Lindsay did find the hospital's subsequent conduct outrageous (i.e., not notifying Kinzie, and then denying the truth when confronted eleven years later), this could not serve as the basis for a constitutional tort, in the court's view, because it did not "cause" Kinzie's injury, i.e., the HIV infection. (The court was unwilling to recognize as a separate, independent injury the deprivation of treatment opportunities during the eleven years; in light of available treatments from 1987, when AZT became available, through the mid–1990's, when protease cocktails came into use, one might question this judgment call, although the opinion does not reflect that Kinzie's lawyers put in the kind of evidence that might support an argument for a distinct injury.) Part of Kinzie's problem was that most of the case law subjecting government actors to constitutional liability with respect to health care has arisen in the prison context, and that the Supreme Court has consistently refused to impose constitutional liability on the government for health care decisions in situations where the plaintiff was not in governmental custody. In short, a constitutional right to health care, so far as the federal courts are now concerned, is not enjoyed by the general population.

Lindsay also noted that the regulation upon which Kinzie's argument partially relied seems to have been in effect only since about 1997, making it essentially irrelevant as a basis for liability, but even if it were in effect earlier, Lindsay expressed doubt that violation of a regulation would suffice under 42 USC sec. 1983, which provides the jurisdictional basis for constitutional tort claims, since a regulation is not, strictly speaking, a "law" within the scope of that statute.

Of course, this decision does not leave transfusion-recipients remediless, since, as Kinzie did, they can sue hospitals under state law using ordinary non-constitutional tort theories. A.S.L.

FMLA Application Contents Subject to Confidentiality Requirements

A postal worker who informs the Postal Service that he is HIV+ in response to a request that he complete a Family Medical Leave Act (FMLA) application, subjects his employer to the Rehabilitation Act's confidentiality requirements. *Doe v. United States Postal Service*, 317 F.3d 339 (D.C. Cir. Feb. 7, 2003). Doe had missed work for several weeks in March and April of 1998. In late April, Doe's supervisor sent him a letter directing him to submit, within five business days, a Postal Service administrative form and medical certificate explaining the nature of the illness. The letter also informed Doe that he may be eligible for coverage under the FMLA and enclosed the proper forms to request such coverage. The letter further warned that the failure to submit these forms may lead to disciplinary action.

Faced with possible disciplinary action, Doe chose to complete the FMLA form and submit it to the Postal Service. Prior to that time, no one at the Postal Service knew that Doe was HIV+. In fact, due to the concerns about confidentiality, Doe requested and obtained permission to submit the form to a Postal Service administrative assistant rather than to his direct supervisor.

When Doe returned to work, his co-workers were all aware of his HIV status. Doe's co-workers informed him that they had learned he was HIV+ from Doe's management level supervisor. Doe brought suit against the Postal Service under the Privacy Act and Rehabilitation Act alleging that the Postal Service had disclosed confidential medical information contained on his FMLA verification form.

The District Court granted summary judgment to the Postal Service, finding that Doe failed to raise a genuine issue of fact regarding whether a Postal Service employee had improperly disclosed information retrieved from his medical records. In addition, the Court held that the Rehabilitation Act did not apply because the FMLA form was not an "employer inquiry" subject to the Americans With Disabilities Act. Doe appealed.

With respect to the fact issue, the Court of Appeals reversed and held that Doe had made a sufficient showing through circumstantial evidence to defeat the Postal Service's summary judgment motion. The improper disclosure of medical information is sufficient to state a claim under the Privacy Act.

With respect to the Rehabilitation Act, to state a claim Doe must show that the FMLA form was completed and submitted to the Postal Service in response to a Postal Service inquiry. The District Court found that the Rehabilitation Act did not apply because Doe had a choice whether to apply for coverage under the FMLA. In support of this position, the Postal Service relied upon *Cash v. Smith*, 231 F.3d 1301 (11th Cir. 2000), a case rejecting a Rehabilitation Act Claim based upon the employee's voluntary disclosure of her illness to her employer.

The Court of Appeals distinguished *Cash* and found that Doe revealed his medical diagnosis only after the Postal Service, through the letter from Doe's supervisor, told him he would face disciplinary proceedings unless he completed the FMLA form or a medical certificate explaining the nature of his illness. Under the circumstances, the disclosure of Doe's medical condition certainly could not be considered voluntary. As a result, the Court of Appeals reversed the District Court and remanded the matter for trial. *Todd V. Lamb*

Mother's AIDS Phobia Claims Rejected, but Son's Suit Continues

In *Rodriguez v. Prommer*, 2003 WL 253947 (Cal.App. 2 Dist., Feb. 6, 2003) (not officially published), the California Court of Appeal, 2nd District, affirmed the dismissal of a tort suit by Susan Rodriguez, who had been misdiagnosed as HIV+, but reversed dismissal of claims brought on behalf of Rodriguez's infant son Moses, who had been needlessly subjected to HIV testing as a result of his mother's misdiagnosis.

Susan had withdrawn a prior suit after a hospital employee told her attorney that she had not been treated at the hospital, but filed this new suit, including her son as co-plaintiff, after learning about the false representation. The appeals court, finding that it was unreasonable for Susan's attorney to have relied on Prommer's representation, upheld the trial court's dismissal of Susan's cause of action for deceit. Susan's action for negligence was found to be barred by the statute of limitations. However, as for Moses' cause of action, the appeals court did not agree with the trial court and held that he should be permitted to amend his complaint, to allege a cause of action as a direct victim of the hospital's alleged negligence.

The court pointed out that Moses may not be considered a direct victim in the traditional sense of the word as in other cases, but it may be that in conveying Susan's incorrect HIV test results to

her, the hospital advised her to have her children tested for the virus, and then Moses became a direct victim. The court also held that Moses was not precluded from raising the issues raised in the initial action, even though the hospital claims he should be.

In the end, the hospital in this case was not charged with malpractice for misdiagnosing a patient with HIV. A woman was caused to think she was infected with the AIDS virus, she had already taken unnecessary medication, she suffered emotional distress and had to worry that her 18–month-old son was also HIV+. There was an injustice done in this case, which needs to be addressed. Hospitals need to be more careful when drawing and labeling drawn blood from patients in order to ensure proper diagnosis. *Tara Scavo*

Digital Penetration of Minor Without Transferring Bodily Fluids Does Not Warrant Involuntary HIV Test as Part of Sentence

As part of a plea agreement, Thomas Alexander pleaded no contest to committing a lewd act upon Brandy F., a six-year-old girl. The only lewd acts alleged were fondling the victim's vagina and digital penetration. Under these circumstances, there was no probable cause to believe that a bodily fluid capable of transmitting HIV had been transferred from the defendant to the victim, which is a necessary predicate for the court to order an HIV test. Therefore, a California appellate court overturned the trial court's HIV-testing requirement. *People v. Alexander*, 2003 WL 284155 (Cal. Ct. App. 3d Dist. Feb. 11, 2003) (not officially published).

The determination of what acts actually occurred was based on an interview with Brandy F. by a "child abuse response team." Brandy's detailed description of repeated incidents indicated that Alexander contacted Brandy with nothing more than his hands. Under California statute (Cal. Health & Safety Code 1202.1(a), (e)(6)), if the court finds probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred to a child/victim, the court "shall" order the one who commits such acts to undergo an HIV test.

The appellate court found that there clearly was no probable cause to believe that a bodily fluid capable of transmitting HIV had been transferred. However, the prosecution claimed that appellate review was precluded because the defendant did not earlier object to the testing, or to the court's failure to find probable cause. The prosecution asserted that such claims must be raised in the trial court, or they are waived.

The appellate court ruled, however, that the waiver doctrine is inapplicable where the sentence is unauthorized, that is, it could not lawfully be imposed under any circumstances. Obvious legal errors at sentencing are not capable of being waived. Since there was no probable cause to believe that a bodily fluid had passed between Alexander and Brandy F., there was an obvious error requiring no remand. Therefore, the appeals court struck the order for HIV testing. *Alan J. Jacobs*

HIV Employment Discrimination Case Survives Dismissal Motion

Richard Roe (presumably a pseudonym, although the court's opinion says nothing on the point), a police academy graduate who was employed elsewhere as a police officer, applied for a position with the Westmont, Illinois, Police Department, and was turned down when preemployment testing showed him to be HIV+. He sued under the Americans With Disabilities Act, the Rehabilitation Act, 42 U.S.C. section 1983 (Equal Protection Claim) and the Illinois Constitution. Defendant's motion to dismiss counts II through III was denied by U.S. Senior District Judge Milton Shadur on February 24. *Roe v. Village of Westmont*, 2003 WL 444508 (N.D. Ill.).

On the Rehabilitation Act claim, the Village argued that Roe does not have a disability, because the doctor appointed by the Board of Police and Fire Commissioners of the Village had certified that although Roe was HIV+ he was fully able to perform all job duties as a police officer and did not pose a threat in performing those duties. Judge Shadur pointed out that under *Bragdon v. Abbott*, 524 U.S. 624 (1998), an ADA case, the Rehabilitation Act is to be construed in common with the ADA, and that Roe's ability to do the job without presenting a risk was not the relevant issue here. "Indeed, defendants would appear hard put to advance this branch of their argument in light of Roe's rejection for the job precisely because of his HIV-positive condition. That would quite clearly seem to bring the third statutory alternative ('regarded as having such an impairment') into play." Shadur noted that in *Bragdon* "the major life activity implicated in HIV-infected individuals is procreation, or even engaging in sexual relations. Defendants' view that Roe could not be hired because he is HIV positive, a view acted on in the teeth of the doctor's opinion giving Roe a clean bill of health in terms of his ability to do the job and the absence of any threats to others, can surely be considered as reflecting a different perception of his impairment but still as considering it to be a disqualifying impairment."

On Count III, Roe was making a constitutional equal protection claim that defendants intentionally "classified and treated Roe differently because of his HIV infection, denying him employment on that basis," according to Roe's complaint. Shadur held that this "express allegation prevails over any contention based on other assertedly missing allegations," referring to the Village's claim that Roe's complaint should be dismissed because, or so it claimed, "all applicants were subjected to the same medical testing at the same time during the application procedure and that Roe does not allege that any other candidates were not HIV positive." Shadur expressed puzzlement at Roe's addition of a state constitutional claim, finding it duplicative of the federal claim, but nonetheless concluded that it should not be dismissed, since Roe had alleged the essential elements. A.S.L.

California Appeals Court Uphold Denial of Custody to HIV+ Father

In an unpublished decision, the California Court of Appeals found no error with a lower court's decision to proceed with a child welfare hearing, despite the absence of the child's HIV+ father, based on its determination that he had not provided medical evidence to support his request for a continuance due to illness. *Jeffrey L. v. Superior Court*, 2003 WL 257555 (Feb. 7).

In March 2001, the San Diego County Health and Human Services Agency took Jeffrey's child Aaron out of his custody based on its finding that Jeffrey's history of substance abuse, bipolar disorder and prior episodes of violence jeopardized Aaron's safety. Although Jeffrey, who is also HIV+ and diabetic, took advantage of some programs provided by the Agency, he missed numerous service appointments and tested positive for cocaine in July 2002. As a result, the Agency concluded that, although Jeffrey had put forth "great effort to reunify with his son, … returning Aaron to his care would be detrimental to the child." The Agency noted that Aaron's foster family was better able to provide him with a stable environment and to meet his physical and medical needs. Accordingly the Agency began proceedings to make the placement permanent.

Jeffrey did not appear at the contested custody hearing, but his counsel informed the court that he was ill and unable to attend. His attorney requested a continuance so that Jeffrey could offer his testimony for the court's consideration. The court denied the motion, however, finding that Jeffrey "had not established good cause for a continuance." The court noted that Jeffrey had claimed to be ill but had not provided medical evidence to support this claim. Although some evidence favorable to Jeffrey was presented at the custody hearing, the court ultimately ruled that the Agency had proven by clear and convincing evidence that returning Aaron to Jeffrey's care would create a substantial risk of detriment to Aaron's physical and emotional well-being.

Jeffrey filed a motion for extraordinary relief, alleging that the court improperly denied his request for a continuance despite clear evidence of his medical history in the record. This decision, Jeffrey alleged, was driven by the court's (and the Agency's) view that his HIV status rendered him incapable of caring for his son. On appeal, the court rejected this claim, noting that it found "no support for Jeffrey's allegation that the court and social worker prejudged this case based on his physical health." The court commented that Aaron had been in protective custody for over nineteen months and reiterated that promoting

his best interests was the primary goal of the custody hearing. Furthermore, the record reflected that Jeffrey's history of mental illness and dependence on illegal drugs had severely impacted his ability to care for Aaron.

Finally, the court noted that the trial judge had cross-examined the social worker and considered evidence that the foster mother would be able to provide emergency care for Aaron in the event that Jeffrey was hospitalized. Although acknowledging that "Jeffrey's testimony would have been beneficial in making a decision," the Court of Appeals ruled that, "based on all of the circumstances," it could not say that the trial court abused its discretion by denying the request for the continuance.

As to the merits of the custody decision, the court found that "substantial evidence" supported the trial court's decision to remove Aaron from his father's custody in order to protect the child's health and well-being. *Sharon McGowan*

AIDS Law and Society Notes

The U.S. Centers for Disease Control and Prevention announced on Feb. 11 that diagnoses of HIV-infection rose 8% from 1999 to 2001 in the 25 states with longstanding reporting records on viral infection. (In many states, the Public Health authorities did not collect such data until recently, having previously collected only data about AIDS diagnoses.) This was the first significant rise in reported cases in a decade. The study did not include New York and California, the two states with the largest incidence of HIV/AIDS, and so may not be fully representative of what is happening in those areas which were first affected and have the longest history of public health efforts to stem new infections. The researchers also indicated that the an upward spike in infection rates might be attributable to new venues for finding sex partners on the internet, something that did not exist when AIDS was first identified. *Wall Street Journal*, Feb. 12; *AIDS Policy & Law*, Feb. 28, 2003.

No sooner had right-wing Bush nominee Jerry Thacker withdrawn his name from the Presidentiary Advisory Council on HIV and AIDS than he was followed into exile by Patricia Ware, the executive director of the Council, who had been a major proponent of Thacker's appointment. Covering their tracks, administration officials insisted that Ware had been "promoted" to a more important position at the Department of Health and Human Services. *Washington Post*, Feb. 5.

United Kingdom — The *Times of London* reported on Feb. 13 that the government, responding to reports of a substantial increase in the number of new cases of HIV-infection, is planning to introduce compulsory HIV testing for immigrants. TB screening will also be required for anybody seeking to move to Britain. Positive tests will not necessarily be a barrier to entry, according to the news report, but the government may restrict access for those with "pre-existing conditions" to the National Health Service, reacting to reports that some from other countries were coming to England for free treatment (so-called "health tourism"). A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

CONFERENCE ANNOUNCEMENTS

The National Lesbian and Gay Law Association and the Lesbian & Gay Law Association of Greater New York will be presenting the 2003 Lavender Law Conference in New York City on October 17–19. Conference events will be held at several locations, including Fordham University Law School (at Lincoln Center) for most of the panels and workshops, and the Association of the Bar of the City of New York. Arrangements have been made for conference rates at hotels in the proximity of Fordham Law. Information about advance registration rates and hotels can be found on the NLGLA website. The Conference Program Committee is now assembling the panels and workshops. Individuals or groups who are interested in presenting panels or participating on panels, or who have suggestions for panels, should contact Robert Bacigalupi, co-chair of the conference committee, at Rbacigalup@aol.com or bbacigalupi@legalsupport.com, or 212–431–7200x128 as soon as possible.

Harvard Law School Lambda will hold a full-day conference on Saturday, September 20, on current issues concerning gays in the military, including litigation strategy against the Solomon Amendment, potential arguments against the "Don't Ask, Don't Tell" policy, and questions about why the gay movement should take this issue up now. For more information about the event, which will also include a reception and performance event on the evening of Sept. 19, contact Adam Teicholz, at ateicholz@yahoo.com or lambda@law.harvard.edu..

Hofstra University will also be hosting a conference on the issue of gays in the military on September 18–20. For more information, contact conference director Eric Lane, a professor at the Hofstra Law School: lawezl@hofstra.edu.

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Specially Noted:

Vol. 11, No. 1, of the *American University Journal of Gender, Social Policy & the Law* features a symposium titled "Homophobia in the Halls of Justice: Sexual Orientaiton Bias and its Implications Within the Legal System." Individual articles are noted above. The symposium includes a brief introduction by student editor Michael B. Shortnacy. The event was the third annual tribute to the memory of Peter Cicchino, an openly-gay faculty member who died all too young. The issue of the review also includes brief reflectins on lawyering "at the marginsá each of which features some reminiscences of Mr. Cicchino, and a previously unpublished essay by him (see above).

Vol. 36, No. 2 (2002) of *Law & Society Review* is a "special issue" on "Nonbiological Parenting." Individual articles are noted above. • • • In *Constitutional Law: Equal Protection of the Laws* (2003), a paperback published as part of their "Turning Point Series" (evidently aimed primarily at law students and legal academics) by Foundation Press, Prof. Louis M. Seidman of Georgetown University Law School attempts to provide an overall analytical framework for evaluating the Supreme Court's contemporary approach to Equal Protection under the 14th and 5th Amendments. Prof. Seidman devotes about ten pages to the subject of lesbian and gay rights, focusing relatively narrowly on *Bowers v. Hardwick* and *Romer v. Evans* and briefly expressing views on gays in the military and same-sex marriage. The discussion is undertaken in terms of attempting to place the subject of anti-gay discrimination into the larger framework of the Court's approach to equality issues, which Seidman sees as an evolutionary process that depends heavily on developing social attitudes about difference and sameness.

Here's something a bit odd. Foundation Press has published as a paperback in its University Casebook Series a volume titled "Sex Equality: Lesbian and Gay Rights," by Catharine A. MacK-

innon (2003). On examination between the covers, it turns out to consist of chapters 1 and 8 of Prof. MacKinnon's casebook titled "Sex Equality." Chapter 1 consists of general/philosophical materials on equality, and Chapter 8 consists of the material on lesbian and gay rights from her casebook. This strikes me as too small a volume for a 2–credit course, but long enough for a 1–credit course. Maybe that's the market niche they are seeking to fill. Certainly the materials are interesting and would be useful reading for anybody seeking an introduction to the subject of lesbian and gay rights through the prism of feminist equality theory.

The 2002 volume of the *University of Chicago Legal Forum* is a symposium on "The Scope of Equality Protection." Individual articles that appear from their titles to discuss lesbian and gay equality issues are noted separately above.

Vol. 23, No. 2, of the *Women's Rights Law Reporter* (Spring 2002) publishes the amicus curiae brief of Religious Organizations opposing the criminalization of same-sex sodomy that was filed in *Picado v. Jegley*, the recent litigation over the Arkansas sodomy law.

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Herek, Gregory M., *Thinking About AIDS and Stigma: A Psychologist's Perspective*, 30 J. L. Med. & Ethics 594 (Winter 2002).

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Specially Noted:

Vol. 4, No. 2, of the *Journal of Immigrant Health* (April 2002), includes a mini-symposium on *Immigrants and HIV/AIDS*. Individual articles from the symposium are noted above. • • • Vol. 20, No. 6, of *Behavioral Sciences & the Law* (2002) is devoted to articles under the general heading of "Disability, Public Policy, and Employment." • • • Vol. 30, No. 4, of *The Journal of Law, Medicine & Ethics* (Winter 2002) features a symposium on "Taking Rights Seriously in Health." Those articles specifically focused on HIV-related issues are noted separately above.

EDITOR'S NOTE:

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