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RECENT DEVELOPMENTS IN SEXUAL ORIENTATION AND GENDER IDENTITY LAW

IN THE HEADLINES

Gaps in Legal Definitions of “Family” Are Apparent in Wake of September 11 Tragedy; Efforts Made to Address Losses Suffered by Domestic Partners.

The fact that definitions of “family” for the purposes of federal and state programs such as Social Security have long excluded members of non-traditional families, including same-sex couples’ families, has become particularly apparent in the wake of the September 11 terrorist attacks. As part of the campaign to aid survivors of the attacks, several government agencies and charitable organizations have pledged to treat married couples and domestic partners equally in the dispersal of financial aid. On October 10, New York Gov. George Pataki signed Executive Order 113.30, which directs the New York State Crime Victims Compensation Board to treat people who relied on the victims for financial support equally, be they spouses or same-sex partners. In addition, officials with the Red Cross and the Sallie Mae 911 Education Relief Fund say that they will allocate emergency relief funds to domestic partners of those affected by the attacks. Efforts are under way to ensure that regulations implementing federal relief legislation, such as the September 11 Victim Compensation Fund created by the Airline Stabilization Act, provide equitable compensation to all victims without regard to their sexual orientation.

Maryland Becomes 12th State to Prohibit Sexual Orientation Discrimination.

A comprehensive non-discrimination law passed by the Maryland Legislature banning sexual orientation discrimination will go into effect immediately. Following the law’s passage in the Legislature, a group called “Take Back Maryland” gathered signatures to put the measure on the November 2002 ballot. The American Civil Liberties Union of Maryland filed a lawsuit challenging the validity of the signatures on behalf of Free State Justice and the Gay and Lesbian Community Center of Baltimore. The suit settled suddenly in late November.

Washington, D.C., Appropriations Bill Funding Domestic Partner Benefits Awaits Action by House-Senate Conference Committee.

Despite an amendment offered by House Republicans, Congress passed a District of Columbia appropriations bill that would authorize *local* funding of the Health Care Benefits Expansion Act for the first time since the measure’s 1992 passage. Congress refused to allow the use of federal and local funds to implement the measure in past years, citing objections to its provision on domestic partner benefits. On October 25, however, the House passed the D.C. Appropriations Bill 226-194 after an amendment by Rep. Dave Weldon, R-Fla., to block

funding for the program failed. The measure first moved intact through the Senate Appropriations Committee; then the full Senate OK'd the bill 75-24 on November 7 with different language regarding funding for a needle exchange program. On the Senate floor, Sen. George Allen, R-Va., offered an amendment that would have prohibited the use of local funds for such a program in the District. This discrepancy was slated to be addressed in conference. To date, the administration has not publicly commented on the domestic partnership provision of the bill, leading many to believe that President Bush will sign it if the conference report is passed with this provision intact.

Florida Federal Judge Upholds State Ban on Gay Adoption.

In a case showing extreme deference to an anti-gay law passed by the state Legislature 20-plus years ago, Judge James Lawrence King ruled in *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D.Fla. 2001), that two gay men could not adopt children that they had raised since infancy. The 1977 law prohibits adoptions by any gay or lesbian person or couple. The court said that the men had formed a "deeply loving and interdependent relationship" with the boys. But it found the men failed to demonstrate that "homosexual families are equivalently stable, are able to provide proper gender identification or are no more socially stigmatizing than married homosexual families." The American Civil Liberties Union's Lesbian & Gay Rights Project represented the plaintiffs.

California Passes Bill Dramatically Extending Domestic Partner Benefits.

Gov. Gray Davis signed A.B. 25 into law October 14, marking the greatest legislative advance in the country for the recognition of same-sex couples since Vermont's recognition of civil unions in 2000. The law modifies the California Code's taxation, adoption, insurance and other provisions, equating domestic partners with spouses for the purposes of the modified provisions. Opponents of the bill argue that it undermines Proposition 22, a ballot measure passed last year defining marriage as solely between a man and a woman. The California Alliance for Pride and Equality was instrumental in garnering support for the bill, sponsored by Assemblywoman Carole Migden.

Four of Five Cities Reject Anti-Gay Ballot Initiatives on Election Day.

Gay rights advocates secured victories on Election Day, as voters supported equality on ballot initiatives in four of the five states where they were offered. In two Michigan cities, Kalamazoo and Traverse City, voters rejected initiatives that would have prohibited any future measure that gave gay and lesbian people "protected status." In Huntington Woods, Mich., voters rejected a ballot measure that would have repealed the city's law prohibiting sexual orientation and gender identity discrimination. Miami Beach residents supported two measures that extended health care coverage to domestic partners of city employees, and pension benefits to the domestic partners of fire and police workers. The lone defeat came in Houston where citizens narrowly voted to prohibit the city from offering health care benefits to domestic partners of municipal employees.

Australia Further Supports Rights of Same-Sex Couples.

The parliament of the state of Victoria, Australia, updated 43 of their statutes to end discrimination against same-sex couples by replacing the terms "husband," "wife" and "marriage" with "spouse," "domestic partner" and "partner" where appropriate. Meanwhile, a Sydney Family Court ruled that a marriage between a woman and a female-to-male transgender person was legally valid despite the fact that the man's birth certificate listed him as female.

Egyptian Teen Appeals Sentence for Homosexuality.

A juvenile court in Cairo, Egypt, sentenced a teen to three years in prison for practicing homosexuality and being a member of a gay organization. His was one of 52 arrests made for "obscene behavior between men" and "contempt of religion." Nineteen of the men arrested were acquitted, and 23 were convicted and sentenced to one to five years in prison.

EMPLOYMENT

U.S. Supreme Court Denies Certiorari in Religious Discrimination Case.

The U.S. Supreme Court declined to hear an appeal of a 5th Circuit Court of Appeals ruling in *Bruff v. North Mississippi Health Services*, 244 F.3d 495 (5th Cir., 2001), in which the court revoked a \$300,000-damages award won at trial by a therapist who was fired for refusing to counsel gay patients based on her religious beliefs.

The 5th Circuit found that the employer adequately attempted to accommodate the therapist's religious beliefs, but that the therapist's "inflexible position" on an issue regarding an important aspect of her job made the termination lawful.

Harassment Based on Sexual Orientation Not Actionable Under Title VII.

A federal district court judge in Illinois ruled that an employee could not sue his employer under Title VII based on a co-employee ridiculing him on the basis of a perceived sexual orientation. The court in *Jones v. Pacific Rail Services*, 2001 U.S. Dist. LEXIS 16663, found that the harassment did not create an "objectively offensive" situation sufficient to constitute a violation of Title VII.

MARRIAGE / DOMESTIC PARTNERSHIP

Lesbian Couple in Georgia Seeks Recognition of Civil Union Obtained in Vermont.

In the first court case to address the portability of rights and responsibilities associated with Vermont civil unions, the Georgia Court of Appeals heard arguments to decide whether a divorced mother can visit her children while her partner lives in the same house. The divorce agreement between the mother and father stipulated that the child could not spend a night in either parent's house if an unrelated adult was there. The mother contends that the civil union makes her partner "related" for purposes of the divorce agreement. The National Center for Lesbian Rights and the Gay & Lesbian Advocates & Defenders submitted an *amicus* brief to the court on behalf of the petitioner, and the ACLU also filed an *amicus* brief in the case.

Gay Man's Claim to a Portion of Deceased Partner's Estate Supported by Washington Supreme Court.

Overturning a lower court's summary judgment ruling, the Washington Supreme Court suggested that the surviving partner of a gay man may be entitled to a portion of the deceased's estate on the theory that the two had a "meretricious relationship." The lower court in *Vasquez v. Hawthorne*, 2001 Wash. LEXIS 684, had ruled that gay couples cannot be treated as having "meretricious relationships" and questioned the closeness of the two men. The high court stated that equitable claims, such as the appellant's claims, are not "limited by the gender or sexual orientation of the parties," and that factual disputes made the lower court's summary judgment ruling inappropriate. The Lambda Legal Defense and Education Fund filed an *amicus* brief to the Washington high court on behalf of the gay partner, and the ACLU also filed an *amicus* brief in the case.

FAMILY LAW

State Courts Wrestle with Legality of Second-Parent Adoption.

In a decision challenging the legitimacy of thousands of adoptions statewide, the 4th Circuit California Appeals Court ruled in *Sharon S. v. Superior Court of San Diego County*, 2001 WL 1294101, that children cannot be adopted by a second parent without terminating the rights of the legal parent. The court, in a narrow interpretation of existing law, found that no state statute specifically granted the right of second-parent adoption, and that absent of clear instruction from the Legislature, the courts could not confer such a right. Both Lambda and NCLR, both of which submitted *amicus* briefs on behalf of the petitioner, expect an appeal of the ruling to reach the California Supreme Court. A Delaware court reached a far different legal conclusion on the issue of second-parent adoption, as a family court judge in *In Re Adoption of G.H. and P.H.* ruled that the gay partner of a man with two children could legally adopt the children as his own without terminating the father's parental rights. The judge, using a "best interests of the child" framework for his decision, found that the men had established a loving relationship with the children and had provided an environment in which they could thrive. The ACLU also filed an *amicus* brief in the case.

Mississippi Refuses to Issue Birth Certificate to Child with Lesbian Parents.

A Vermont lesbian couple has sued the state of Mississippi for its refusal to issue an updated birth certificate for their son. The child was born in Mississippi but has lived in Vermont with the couple since eight days after his birth. He was legally adopted by the couple in Vermont in April 2000. Mississippi based its decision on the fact that gay adoptions are not allowed in Mississippi. The Lambda Legal Defense and Education Fund filed the suite to release the birth certificate.

Surrogacy Agreement Reached by Two Gay Men Declared Unenforceable.

An Ohio court invalidated an oral surrogacy contract between two gay, HIV-positive men and the sister of one of the men on the grounds that it was against public policy. The court in *Decker v. Decker*, 2001 WL 1167475, based its finding on the fact that the contract wasn't written, that the state historically does not enforce "private agreements to give up parental rights," and that neither man was biologically or legally related to the child. The court did not address whether the ruling would have been different had the contract been written and approved by the appropriate agency, and did not address the couple's sexual orientation or HIV status.

Consideration of Sexual Orientation in Custody Battle Upheld By Ohio Court.

The Ohio Court of Appeals upheld a lower court ruling that allows courts to consider the sexual orientation of a parent when awarding visitation and custody rights. In *Layne v. Layne*, 2001 Ohio App. LEXIS 4937, a mother was denied standing as the residential parent and legal custodian in part because of her relationship with another woman. The court conceded that it may only consider sexual orientation if it has "a direct adverse impact" on the child. But it decided that since there was evidence that the child was upset by the mother's relationship, such a "direct adverse impact" existed.

Restriction of Gay Parent's Visitation Rights Rejected by Colorado Court.

The Colorado Court of Appeals found that a gay father was not barred from having overnight guests during visitation or from bringing his daughter to his gay-friendly church. Writing for a unanimous court in *In re Marriage of Dorworth*, 2001 Colo. App. LEXIS 1420, Judge Metzger stated that the father's visitation rights could not be restricted by the mother unless his actions endangered his daughter's health or impaired her emotional development, and that his actions to date had done neither. The ACLU of Colorado and the Colorado Legal Initiatives Project filed *amicus* briefs.

EDUCATION

San Antonio City Council Settles Viewpoint Discrimination Lawsuit.

The City of San Antonio paid \$550,000 to the Esperanza Peace and Justice Center and two other arts organizations in light of a federal court ruling in May finding that the San Antonio City Council had violated the First Amendment by refusing to fund the organizations due to the positive depiction of gay people in their arts programming.

School Play Depicting Jesus as Gay Does Not Violate First Amendment.

The 7th U.S. Circuit Court rejected a claim by Indiana residents that a production of the play *Corpus Christi* violated their First Amendment rights by publicly endorsing non-Christian beliefs. The decision in *Linnemeir v. Bd. Of Trs.*, 260 F.3d 757 (Ind. 2001), written by Judge Richard Posner, stated that there was no evidence that the university was hostile to Christianity or that it had a policy of promoting a certain religious belief. As such, while the play was "blasphemous" and "a typical product of the lunatic cultural Left," according to Posner, its production did not violate the First Amendment rights of state residents.

CRIMINAL LAW

Ohio Court Rules Same-Sex "Importuning" Law Discriminatory.

An Ohio District Court of Appeals has ruled in *City of Cleveland v. Maistros*, 2001 Ohio App. LEXIS 4102, that the state law criminalizing same-sex propositioning is unconstitutional under the state's equal protection clause. Before this ruling, it had been illegal for a person to make a sexual advance toward a person of the same sex, punishable by up to six months in prison and a \$1000 fine. However, the state law governing a sexual advance toward a person of the opposite sex called for a \$100 fine. The Ohio Supreme Court is currently deciding whether or not to review a decision in *State v. Thompson*, 2000 Ohio App. LEXIS 6090, a similar case in which an Ohio appeals court upheld a conviction under the importuning law based on previous rulings by the state's high court.

Arkansas Supreme Court Hears Arguments to Eliminate Sodomy Law.

The Arkansas high court heard arguments in October to repeal the state's same-sex sodomy law -- one of only four such laws remaining in the country. Lambda is representing seven plaintiffs challenging the law which was passed in 1977. A lower court invalidated the law earlier this year on the grounds that it violated a fundamental

right to intimate relationships. Texas, Oklahoma and Kansas are the only other states that have bans on same-sex sodomy only.

Georgia Court Strikes Down Self-Defense Claim in Murder of Gay Man.

A Georgia court denied the appeal of a man convicted of murdering a gay man. The defendant, in *Harris v. Georgia*, 2001 Ga. LEXIS 829, claimed that he was defending himself from sexual assault, despite the fact that the defendant initiated the fatal meeting and had several opportunities to leave the victim's apartment. The court rejected this claim, holding that further evidence of the victim's sexual orientation was irrelevant to the defendant's appeal.

Murder of Gay Man Not a "Heat of Passion" Crime.

The Indiana Court of Appeals rejected defendant's claims that he acted in the "heat of passion" when he killed a man who made sexual advances toward him. Defendant Hornbostel met the victim in a gay bar and went home with him. After the victim made sexual advances, the defendant choked him to death and stole his car and electronic equipment. The court upheld the conviction, finding that Hornbostel intended to kill the victim and then steal from him. *Hornbostel v. Indiana*, 2001 Ind. App. LEXIS 1812.

Prosecution Not at Fault for Repeatedly Reminding Jury of Defendant's Sexual Orientation.

A panel of the 10th U.S. Circuit Court of Appeals affirmed a lower court's decision denying a death row inmate's habeas corpus petition that was based in part on the prosecution's use of the inmate's sexual orientation at trial. During the capital murder trial, the prosecuting attorney repeatedly reminded the jury during closing arguments that the inmate was a "vowed [sic] homosexual." The defendant appealed his conviction, arguing that the prosecution used his sexual orientation in a prejudicial way. The 10th Circuit Court disagreed, finding that the defendant's sexual orientation was relevant to the prosecution's case as well as to the inmate's defense. A bristling dissent argued that the prosecution's "blatant hatemongering" was inappropriate, and criticized the inmate's counsel for not objecting to the comments. *Neill v. Gibson*, 263 F.3d 1184 (10th Cir. 2001).

HIV/AIDS

Ninth Circuit Court Throws Out Discrimination Case Brought under the ADA.

The 9th U.S. Circuit Court of Appeals in *Vawser v. Fred Meyer, Inc.*, 2001 U.S. App. LEXIS 21805, rejected two claims under the Americans with Disability Act by an HIV-positive employee fired from his job. Vawser first alleged that his employer made no attempts at reasonable accommodation, but the court found that there was no evidence that Vawser and his doctor had a dialogue to determine what a reasonable accommodation might be, despite the employer's willingness to do so. Vawser's second claim alleged unlawful termination based on his disability. The court rejected this claim because there was no proof Vawser was able to perform the essential functions of his job with or without accommodation, and that he had given his employer a letter stating he was unable to work under any circumstances.

Sharing Water with HIV-Positive Inmate Does Not Constitute "Cruel and Unusual Punishment."

In another unpublished opinion, the 9th U.S. Circuit Court in *Muzer v. Keller*, 2001 WL 1295121, upheld a lower court ruling which dismissed a §1983 suit by a prisoner. The prisoner claimed his Eighth Amendment rights to be free from cruel and unusual punishment were violated when an HIV-positive inmate was allowed to share a pitcher of water with him and several other inmates. The Appeals Court upheld the lower court's ruling, finding that there was no evidence that the prison employees knew of or disregarded any excessive risk to the inmates.

IN THE STATES

Ohio "Super-DOMA" Pending in State Senate.

The Ohio House of Representatives has OK'd one of the country's most restrictive "marriage defense" measures. It is now pending in the state Senate. In addition to restricting marriage to different-sex partners, it also prohibits the extension of any statutory "marital benefits" to any parties to a "non-marital" relationship.

Challenges to Anti-Discrimination Laws in Two Florida Counties.

Petition signatures are also at issue in Dade and Broward Counties in Florida, where anti-gay organizations have attempted to overthrow existing ordinances that ban sexual orientation discrimination. In Broward County, a group called Equal Rights Not Special Rights fell thousands of signatures short in its bid to repeal the county's ordinance. In Dade County, a lawyer has filed suit against the supervisor of elections, claiming that the supervisor wrongfully rejected signatures on a petition to repeal the county's ordinance.

Threats By Neighbors in Massachusetts Violates Gay Couple's Civil Rights.

A state appeals court in *Commonwealth v. Pike*, 2001 Mass. App. LEXIS 913, found that certain open acts of hostility against a gay couple constituted threats of force and thus violated their civil rights under Massachusetts law. The defendant couple, the Pikes, engaged in a series of anti-gay acts after learning of their neighbors' sexual orientation, including making threats of violence and putting signs posted on their property warning people in the neighborhood to keep their children away from the gay couple. The court rejected the Pikes' claim of a right to free speech, stating that their words and actions fell under the "insulting or fighting words" exception.

Police Not Guilty in Suicide of Gay Pennsylvania Teen.

A Pennsylvania jury dismissed a wrongful death suit against the Schuylkill County police officer who arrested Marcus Wayman for underage drinking with a male friend in a car. After lecturing Wayman about Bible teachings, the officer allegedly threatened to tell Wayman's step-grandfather that Wayman was gay. The next day, Wayman killed himself, allegedly distressed that his family would discover his sexual orientation. Last year, in a landmark ruling anticipating this case, the 3rd Circuit Court of Appeals said that people have a constitutional right to protect the privacy of their sexual orientation. In the instant case, however, the jury found that there was insufficient evidence that the officer made the threat, so the privacy issue was not addressed. Wayman's mother was represented by the ACLU of Pennsylvania and David Rudovsky of Philadelphia.

INTERNATIONAL

Same-Sex Couples in Toronto Fight For Gay Marriage Recognition; British Columbia Court Finds Same-Sex Marriages Unconstitutional.

A case in which eight couples are suing to have their marriages at Toronto's Metropolitan Community Church recognized by the Canadian government began in early November, on the heels of a British Columbia court's refusal to permit gay marriages a month earlier. In the Toronto case, the church is taking part in the complaint against the city, arguing that it should register the marriage licenses. In the British Columbia case, the court dismissed the claim of several same-sex couples on the grounds that marriage between different-sex partners is entrenched in constitutional and common law, holding that the court's ruling could not be overturned without an amendment to the national Constitution. The Canadian organization Equality for Gays and Lesbians Everywhere represented the petitioners in the British Columbia case and is supporting the case in Toronto. The two cases will be joined for hearing before the Canadian Supreme Court.

Malaysian Prime Minister Warns Against Gay Dignitaries Visiting His Country.

Malaysian Prime Minister Mahathir Mohammad announced that he will expel from his country any homosexual British cabinet member that visits Malaysia with his or her partner. Several current British cabinet members are gay.

Gay and Lesbian Prisoners in Colombia Allowed Conjugal Visits.

The Supreme Court of Colombia ruled in October that prison authorities are required to make accommodations so that gay inmates can have conjugal visits with same-sex partners, a right currently afforded to heterosexual inmates. The Court's ruling stems from a suit by a female inmate in the Pereira prison.

GENDER IDENTITY AND EXPRESSION

Massachusetts Commission Recognizes Transgender Discrimination Under Existing Gender and Disability Law.

In two separate decisions released on the same day, the Massachusetts Commission Against Discrimination found that existing statutes barring workplace discrimination on the basis of sex and disability also barred discrimination on the basis of gender identity. In the first case, *Millett v. Luttco, Inc.*, a transgender employee

was given written warnings and threatened with termination after she complained about harassment by her supervisor. The commission found that “transsexuality is sufficiently sex-linked to bring it within the ambit of sex discrimination laws,” remarking that “discrimination against complainant on account of her transsexuality is completely about her current sex, in light of her former sex.” In the second case, *Jette v. Honey Farms Mini Market*, the commission again upheld a claim based on sex discrimination but also addressed a claim based on disability discrimination. Stating that this was an issue of first impression, the commission noted that, unlike the ADA, the Massachusetts disability statute listed conditions that were exempted from the definition of “disability” under the law, and gender dysphoria was not included among these exemptions. Thus, the commission ruled that gender dysphoria was among the disabilities the Legislature intended to protect in the workplace. Gay & Lesbian Advocates & Defenders represented the complainants in these actions.

Nebraska Court Decreases Damages Award on Remand in Teena Brandon case. After a Nebraska Supreme Court ruling held local police responsible for failing to respond to the plight of transgender teen Brandon Teena, a lower court on remand awarded damages far less than those sought in the initial lawsuit. The lower court in *Brandon v. County of Richardson*, 624 N.W.2d 604 (Neb. 2001), awarded \$80,000 for negligence as instructed by the high court, but lacking any instruction on the other two claims, awarded only \$7,000 for emotional distress and \$5,000 for wrongful death. Lambda Legal Defense and Education Fund is representing Mrs. Brandon and announced that it will appeal the damage awards.

RELIGION

United Methodist Church: No Gay Pastors. The Judicial Council of the United Methodist Church publicly affirmed that the denomination will not permit practicing homosexuals to be pastors in their church. However, the church agreed that a bishop cannot release a pastor from the church without a full hearing. Church members have commented that the announced policy amounts to a sort of “don’t ask, don’t tell” policy for pastors.

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