Gay Lesbian Bisexual and Transgender Rights Section Newsletter

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Chair's Corner

by Nancy A. Del Pizzo

Since my term as chair began, we have held several social and educational events, with more still to come. We began by welcoming many of you at our summer social at the Watermark in Asbury Park, and provided two opportunities for continuing education. These two programs represent my initiative as chair to encourage more members 'outside of the box' to attend our business meeting/continuing education programs. By 'outside of the box,' I mean those members who do not necessarily practice in the core areas of our membership, which tend to relate to family law and trusts and estates. I am one of those outside-of-the-box members, and want to welcome more of you to become more active in the section.

To that end, in September we held a program, titled "Coming Out In the Workplace," which not only provided legal information from both the employer and employee side, but also featured personal perspectives. In October, we held a program that tackled "GLBT Issues Outside of Family Law," including a legal overview of trademark cases (yes, trademark!) with a GLBT spin, anti-bullying, federal spousal privilege, lewdness and health. To those who were able to attend, thank you for supporting your section!

Our core members are, of course, still core, which drives this year's daylong continuing legal education seminar. Please put Feb. 25, 2012, on your calendars for our section's annual Institute for Continuing Legal Education presentation, titled "GLBT Update," which is once again spearheaded by our immediate past chair, John Nachlinger (who also has graciously agreed to stay on this year as editor of this newsletter). Join us and learn from your colleagues and members of the Judiciary, and as an added benefit, help satisfy your continuing legal education requirements. The seminar will cover all areas of GLBT law, with an emphasis this year on family law issues.

In addition to planning programs, we have been grabbing opportunities to promote your section. The state bar association asked us to participate in its "We Belong" campaign, and

we jumped at the opportunity. You may have seen our friendly faces on full-page advertisements in various legal publications. And in October, we participated in the New Jersey State Bar Association's open house meet-and-greet for all sections.

Finally, the section leadership is open to your ideas not only for programs, but also for articles in this newsletter. What you may notice in this issue, is that we do sometimes present controversial topics. For instance, there is an overview of a presentation that occurred at Seton Hall University School of Law titled "A Civilized Debate on Same-Sex Marriage." I attended this presentation, particularly because the announcement of it to our section elicited significant comments from members—some of whom were offended by the very prospect of anyone debating what many of us consider a civil right. As lawyers, we need to know the other side to make informed and cohesive arguments benefiting our clients. Knowledge of the other side can also be helpful to us personally. Read the update and make your own decision about the strength, or lack thereof, of the arguments, and use that knowledge in your lives and/or practices.

As always, I look forward to hearing from you and seeing you at an upcoming section event. ■

Inside this issue

Recap of "Opening the Closet Door —Coming Out in the Workplace"

by John Nachlinger

As part of the Sept. 27 GLBT Rights Section meeting, the section presented a continuing legal education (CLE) panel discussing issues related to coming out in the workplace. The panel covered both the legal and personal issues involved when an employee comes out in the workplace.

Kevin Costello, whose practice focuses on representing plaintiffs in employment litigation, discussed employment discrimination issues from the employee's perspective. He discussed the Law Against Discrimination (LAD) and the criteria to prove a case of employment discrimination under both state and federal law. Kevin discussed what employers must do if they discover someone is being harassed due to their status or perceived status as GLBT. He briefly touched on the federal Family Medical Leave Act and the state Family Law Act, noting that there are circumstances under which you should choose to file suit under one law rather than the other. Above all, he indicated that in New Jersey, if possible, you should always choose to pursue your client's employment claims in state court under state law rather than in federal court under federal law.

Robyn Gigl discussed employment discrimination from the employer perspective. She indicated that her primary responsibility in representing employers is to counsel and educate them to take measures that will enable them to stay out of court. She discussed the common law and constitutional rights to privacy, and how those rights affect what an employer can and cannot do. For example, an employer cannot push for information, as that might be an invasion of privacy. Robyn emphasized the need to have policies in place to deal with harassment of employees by both other employees and management. She noted that coworker harassment is generally not the responsibility of the employer, unless the employee complains, at which point the employer must take steps to correct the problem or risk liability. Her overarching message was that employers must be proactive.

Nancy Del Pizzo, chair of the section, discussed her personal story of coming out in the workplace. Nancy's story of "unveiling" herself to members of her firm was both educational and inspiring. Robyn Gigl also discussed the process of transitioning while being the managing partner of her law firm. It was clear that both women should be proud of the way they came out.

Natalie Watson discussed the policies in place at McCarter & English as they relate to GLBT individuals. She discussed her firm's diversity committee, and how she was able to convince the executive committee to adjust salaries to correct for the federal tax inequalities in medical insurance benefits for the partners of GLBT individuals.

Finally, Lisa O'Connor, a medical doctor and therapist, whose practice focuses on the GLBT community, discussed her work in helping GLBT individuals come out in the workplace. She also shared her own story of what she went through in transitioning while working as a doctor in a major hospital.

This panel, like all CLE panels presented by the section, was designed to address issues that have particular relevance to members of the section. We encourage all members to attend our future CLE presentations. ■

John Nachlinger *is the immediate past chair of the GLBT Rights Section. He is an attorney with offices in Brielle and Metuchen, and his practice is limited to family law.*

Seton Hall Law Hosts Debate on Marriage Equality

by Marc R. Poirier

Seton Hall University School of Law hosted "A Civilized Debate on Same-Sex Marriage" on Sept. 8, 2011. Four nationally recognized academics from four disciplines—law, political science, philosophy, and history—debated the legal recognition of same-sex marriage to a full house of law students and undergraduates from Seton Hall University. It was the first major policy-oriented event of the law school's academic year.

The four panelists were: Professor Amy Wax, of the University of Pennsylvania Law School, who argued against recognition at this time because of what she perceived to be potential social disruption; Professor Stephanie Coontz, of The Evergreen State College (Olympia, Washington), a marriage and family historian and director of research and public education of the Council on Contemporary Families, who presented historical arguments about the diversity of marriage forms and functions, and rebutted many of Professor Wax's factual claims; Sherif Girgis, a Rhodes scholar, prize-winning Princeton graduate, and now a Princeton Ph.D. student in philosophy and Yale law student, who presented a natural law argument about the nature of marriage, opposing legal recognition of same-sex marriage; and Professor Andrew Koppelman, of Northwestern University School of Law, who also holds a Ph.D. in political science from Princeton. Professor Koppelman offered legal and political arguments in favor of legal recognition of same-sex marriage.

The dean's Diversity Council sponsored the debate to better inform students and the larger Seton Hall community on the details of the positions surrounding marriage equality. The Diversity Council believes the public at large could be better educated as well. New Jersey has situated itself in the neither-nor of civil union, with the Civil Union Commission's report pointing out the failure of civil union status to confer on same-sex couples and their children the equality required by *Lewis v. Harris*.[1] The matter is once again in the state's courts,[2] and may someday find its way back into the Legislature. Meanwhile, public opinion is a vital part of the political equation.

Many people with an open mind on the issue of couples recognition will pay more attention to a debate that treats traditionalist positions with respect and meets them squarely, than to an event that sharply dismisses one side or the other as simply untenable. It is in this spirit that Seton Hall Law presented the debate.

Wax spoke first. She stated that she does not claim that the legal recognition of same-sex couples is categorically wrong, just that the state ought to think very hard before making such a drastic change in a fundamental social practice at this time. According to Wax, children only turn out right when raised by a mother and a father who are married to each other, and who both are biologically related to the children. A whole series of problems has befallen this traditional and necessary configuration for raising up the next generation, she said—too-easy divorce, single motherhood, absent fathers, and now claims to legal marriage by couples who simply in the nature of things cannot both be biologically related to the same children. Compared to the way marriage used to work so successfully, it is now in trouble for a number of reasons. For the sake of the children, Wax argued, we must forbear from extending marriage to same-sex couples.[3]

Coontz said she would speak as a historian,[4] sticking to the facts rather than to how things ought to be. She then categorically challenged Wax's account of the functions of marriage. Marriage, Coontz argued, has taken a variety of forms throughout history, the most prevalent being polygyny, not monogamy. Moreover, worldwide and throughout history, the most widespread function of marriage has not been to acquire companionship or unpaid labor or children, but to acquire useful in-laws. Marriage builds group alliances. With the development of western culture, Coontz argued, marriage provided couples each other's complementary labor skills, as well

as the labor of their children. In the industrial age, the enforcement of a monogamous marriage ideal often stigmatized single mothers and justified killing off illegitimate children, as well as fostering the dominance of men over women. (Here was another disagreement, as Wax had stated that a core function of marriage was to allow men to protect the vulnerable—that is, women and children.)

With regard to the changes in marriage practices from the last third of the 20th century on, Coontz stressed that regarding all of those changes—easier divorce, access to contraception and abortion, and access to equal employment opportunity—the driving force has been heterosexual women and their allies. None of these shifts was caused by the rise of the gay and lesbian movements or the current demand for marriage equality. If someone wanted to roll back the changes to marriage, Coontz said, they shouldn't be looking at marriage equality as the problem. Coontz argued that the studies on which Professor Wax and those who share her views rely concerning the effects of marriage on child-rearing are simply flawed. Many factors contribute to raising successful and functional children.

Girgis' 2011 law review article, "What Is Marriage?" co-authored with Robert George and Ryan Anderson, has been widely read.[5] It summarizes and updates the natural law argument against allowing same-sex couples access to legal marriage. Basically, Girgis' position, which he explained to the audience, is that while in most respects the functions necessary for human flourishing occur within each separate human body, we are incomplete as regards the essential human function of reproduction. That requires a man and a woman, and procreative sexual acts. Marriage is an intrinsic human good, both because it provides companionship and because sex within marriage is open to procreation and produces a biologically related family, he said.

Any kind of sexual union that is not open to the possibility of procreation cannot be "intimate," in the sense Sherif uses the term intimacy. Therefore, it cannot be good. Whatever same-sex couples may do to express affection and companionship is innately non-procreative. Therefore, by definition, same-sex couples cannot really marry. To think otherwise, Sherif states, is self-delusion.

Mr. Sherif sees his position as derived from natural reasoning going back to Plato and Aristotle and the Stoics. Although it does not rely on a religious foundation, it is congruent in almost all respects with the position of the Catholic Church and some other religions. Girgis also identified himself as a devout Catholic.

Koppelman led off by analogizing denying same-sex couples the right to marry to denying folks born on Tuesday the right to marry. There's just no plausible argument for such an arbitrary discrimination, he said. Koppelman also addressed what is often seen as a fatal flaw in the natural law argument: It allows sterile heterosexual couples to marry, on the theory that their sterility is somehow accidental, but that they are still engaging in acts of the type that might otherwise result in procreation. If the function of marriage supposedly is to procreate, Koppelman argued, allowing those who cannot procreate to marry is inconsistent, and this inconsistency undermines the whole natural law argument.

Koppelman did not make an argument at this event that he is well known for:[6] that refusing to recognize marriage by same-sex couples is a violation of equal protection on the basis of sex, unconstitutional by analogy to *Loving v. Virginia*[7] and *McLaughlin v. Florida*.[8] *Loving* struck down Virginia's anti-miscegenation law, recognizing it as a mechanism for racism and white supremacy; *McLaughlin* struck down a criminal cohabitation statute that punished interracial cohabitation more severely. The miscegenation analogy prevailed in Hawaii in a 1993 challenge to a refusal to allow same-sex couples to marry, in *Baird v. Lewin;*[9] but more recent cases requiring marriage equality under state constitutions have either relied on a fundamental right to marry that includes same-sex couples or have found an equal protection violation based on strict or heightened scrutiny for classifications based on sexual orientation.[10]

Questions from the audience addressed several important issues: the dubious equality provided by civil union; the significance of popular plebiscites, all of which, to date, have limited marriage to different-sex couples; the availability of marriage to transfolk; and the fact that denying access to marriage harms gay and lesbian families. On this last point, Wax and Girgis both acknowledged that civil unions harm same-sex couples and their children, but said that the harm was outweighed by the benefit to society of protecting traditional marriage (Wax), or that such a union just couldn't be marriage (Girgis).

It is impossible, of course, to know whether many minds were changed because of this debate. The audience reaction appeared quite favorable. The positions were well-presented, in a lively and sometimes

entertaining format. In this author's view, the 'civilized debate' put on display the weaknesses of traditionalist positions opposing recognition of marriage by same-sex couples. In the other corner, especially persuasive was Coontz's historical argument that whatever ills may have befallen marriage in contemporary times, they have absolutely nothing to do with the gay and lesbian rights movements, same-sex couples and their families, or marriage equality.

Marc R. Poirier *is a professor of law and Martha Traylor research scholar at Seton Hall University School of Law.*

Endnotes

1. 188 N.J. 415 (2006).
2. Under caption, *Garden State Equality et als. v. Paula Dow et als.*, Mercer County Superior Court (filed June 29, 2011).
3. Professor Wax's position is articulated in Amy Wax, Traditionalism, Pluralism, and Same-Sex Marriage, 59 *Rutgers L. Rev.* 377 (2007); Amy Wax, The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage, 42 *San Diego L. Rev.* 1059 (2005); *see also* Amy Wax, The Family Law Doctrine of Equivalence, 107 *Mich. L. Rev.* 999 (2009) (reviewing Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law* (2008)) (critiquing Polikoff's call for legal recognition of a variety of family forms).

   One prominent sociologist who thoroughly disagrees with Wax's assessment is Judith Stacey. *See* Judith Stacey, Legal Recognition of Same-Sex Couples: The Impact on Children and Families, 23 *Quinnipiac L. Rev.* 529 (2004). Stacey and co-author Timothy Biblarz authored a leading study on the effects of same-sex parents on children. Judith Stacey and Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter?, 66 *Am. Soc. Rev.* 159 (2001). A related recent article by the pair is Timothy J. Biblarz and Judith Stacey, How Does the Gender of Parents Matter?, 72 *J. Marriage & Fam.* 3 (2010). Stacey and Biblarz do not, however, conclude that it makes no difference whether children are raised by a same-sex couple or a different-sex couple; rather they conclude that the children of same-sex couples—especially the girls—are different and better off, less constrained by gender roles.
4. Two of Coontz's most often-cited books are Stephanie Coontz, *Marriage, A History: From Obedience to Intimacy, or How Love Conquered Marriage* (2005); Stephanie Coontz, *The Way We Never Were; American Families and the Nostalgia Trap* (2d ed. 2000).
5. Sherif Girgis, Robert C. George, and Ryan T. Andersen, What is Marriage?, 34 *Harv. J. L. & Pub. Pol.* 245 (2011). A classic rebuttal of the natural law position on marriage is Andrew Koppelman, Is Marriage Inherently Heterosexual?, 42 *Am. J. Juris.* 51 (1997).
6. *See*, *e.g.*, Andrew Koppleman, The Decline and Fall of the Case Against Same-Sex Marriage, 2 U. *St. Thomas L.J.* 5 (2004); Andrew Koppelman, Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein, 49 *UCLA L. Rev.* 519 (2001); Andrew Koppelman, Why Disrimination Againt Lesbians and Gay Men is Sex Discrimination, 69 *NYU L. Rev.* 197 (1994); Andrew Koppelman, Note, The Miscegenation Analogy: Sodomy Law as Sex Discrimination, 98 *Yale L.J.* 145 (1988); *see also* Mark Strasser, Family, Definitions, and the Constitution: On the Miscegenation Analogy, 25 *Suffolk L. Rev.* 981 (1991). Not all pro-LGBT scholars agree. *See*, *e.g.*, Edward Stein, Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights, 49 *UCLA L. Rev.* 471 (2001) (arguing against reliance on *Loving*).
7. 388 U.S. 1 (1967).
8. 379 U.S. 184 (1964).
9. 852 P.2d 44 (Haw. 1993).
10. *See*, e.g., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

Till Death Do Us Part? Evolving Rights for LGBT Individuals and Couples Who Cross State Lines

by Rebecca G. Levin

Rights are evolving for New Jersey's lesbian, gay, bisexual and transgender (LGBT) individuals and families. While the fight continues for marriage equality, both on the state and federal levels, New Jersey same-sex couples are now able to access many rights and benefits on the state level that were, previously, only available to opposite-sex married couples. With increased rights, comes increased security for many. However, in today's mobile society, it is important to understand the legal implications of same-sex civil unions in non-recognition states. This is especially true in New Jersey, as it borders three other states within a short driving distance of all regions of the state. A simple relocation from Lambertville, NJ, to New Hope, PA, for example, could have devastating legal consequences, which may not be recognized by our clients until after a move has occurred.

This article will explore the legal considerations for individuals and couples who are crossing state lines, with particular focus on one neighboring state, Pennsylvania, a non-recognition state.

Creating a Same-Sex Union

The number of states with marriage equality is growing. Six states—namely, Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and New York, as well as the District of Columbia—now permit same-sex marriage.[1] Rhode Island, Maryland, New Mexico and Illinois recognize same-sex marriages performed in other states.[2] Civil unions and domestic partnerships that grant rights at the state level that are supposedly equivalent to marriage are performed in 10 states, including New Jersey.[3] Still, the majority of states, including neighboring Pennsylvania, offer their citizens no formal recognition whatsoever, or registration by any state-wide government entity.[4] In fact, many states have gone so far as to enact legislation or constitutional amendments that narrowly define marriage as between one man and one woman, or declare same-sex marriages entered into in other jurisdiction as void.[5]

States that allow same-sex partners to enter into marriages, civil unions or domestic partnerships do not generally have residency requirements for entry into the union.[6] In New Jersey, individuals may enter into a civil union if they meet the following requirements:[7]

a. Neither individual is a party to another civil union, domestic partnership or marriage in this state, or that is recognized by this state;

b. The individuals seeking to enter a civil union are of the same sex; and

c. The individuals seeking to enter a civil union are at least 18 years of age, except that applicants under 18 may enter into a civil union with parental consent. Applicants under age 16 must obtain parental consent and have the consent approved in writing by any judge of the superior court, Chancery Division, family part.

There is no residency requirement to enter into a civil union. If neither applicant for a civil union license lives in New Jersey, the applicants may submit the application in the municipality where the civil union ceremony will be performed.[8] This means that couples from other states are coming to New Jersey to enter into civil unions, often without any advice from legal counsel about the legal issues this could raise in their home state, now or in the future.

Dissolving a Same-Sex Union

To dissolve a civil union in New Jersey, individuals must establish jurisdiction under N.J.S.A. 2A:34-10. Jurisdiction for the dissolution of a civil union may be acquired when process is served, and at the time the action arose either party was a *bona fide* resident of New Jersey, and continued to be a resident for one year prior to the commencement of the action.[9]

New Jersey is not alone in requiring those seeking divorces or dissolutions to establish residency. Currently, all jurisdictions permitting same-sex marriage or its alleged statutory equivalent have residency requirements that individuals must meet prior to filing for divorce in their courts.[10]

Effective Jan. 1, 2012, California—which, incidentally, no longer permits same-sex marriages—will be the first state to amend its Family Code to allow individuals who entered into a California same-sex marriage during the period those marriages were performed to dissolve their marriage, even where neither party resides in California.[11]

The new law provides:

> **Section 2320.**
>
> (a) Except as provided in subdivision (b), a judgment of dissolution of marriage may not be entered unless one of the parties to the marriage has been a resident of this state for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition.
>
> (b) (1) A judgment for dissolution, nullity, or legal separation of a marriage between persons of the same sex may be entered, even if neither spouse is a resident of, or maintains a domicile in, this state at the time the proceedings are filed, if the following apply:
>
> (A) The marriage was entered in California.
>
> (B) Neither party to the marriage resides in a jurisdiction that will dissolve the marriage. If the jurisdiction does not recognize the marriage, there shall be a rebuttable presumption that the jurisdiction will not dissolve the marriage.
>
> (2) For the purposes of this subdivision, the superior court in the county where the marriage was entered shall be the proper court for the proceeding. The dissolution, nullity, or legal separation shall be adjudicated in accordance with California law.[12]

Individuals who enter into civil unions in New Jersey do not currently have the option to return to New Jersey, without establishing residency, to dissolve their union.[13] Many individuals whose relationship has ended, question the urgency and/or necessity of dissolving a relationship that is not recognized by their home state or the federal government. There are, however, many significant problems associated with remaining in a marriage or civil union after the end of a relationship.

One of the most common concerns for individuals who cannot dissolve their same-sex union is the effect this continuing relationship will have on a current or future relationship. A party to an existing civil union will not be able to legally enter into another marriage, domestic partnership, or civil union with a new partner.[14] Even municipal registries for domestic partners in states that lack state-wide recognition may be inaccessible because of a continuing legal relationship with a former partner.[15] Ironically, parties to an existing civil union or same-sex marriage may not be precluded from entering into a marriage with an opposite-sex spouse in a non-recognition state that considers their same-sex union void. The legal ramifications of entering into an opposite-sex marriage where a same-sex union still exists could also be detrimental. If the opposite-sex couple later moved to a jurisdiction that recognizes the still-existing same-sex union, this could create competing claims for benefits or competing claims against that estate.

In the private employment context, where employers may recognize legal statuses entered in recognition states for the purpose of employee benefits, there is a possibility that a private employer would not permit a party to terminate benefits for an old partner and/or add a new partner to health insurance benefits if a civil union or marriage to a former partner still exists.

There are also challenges for individuals who wish to create a family with a new partner. Same-sex couples who have children most often create their legal family unit through adoptions or second-parent adoptions. A future petition for the adoption of a child may require the consent of both spouses even if the couple is no longer together. Also, an adoption agency with locations in a state or states that recognize same-sex marriages or civil unions may be unwilling to place a child for adoption in a home where one party is still married or in a civil union with a former partner.

Upon the death of one of the partners, a surviving legal spouse who is a former partner could make an election to be a beneficiary and receive a portion of the former partner's estate through spousal elective share, even long after the relationship has ended, and even if a will has been executed to eliminate that person as a beneficiary.

The above scenarios illustrate just a few of the many problems lurking for individuals who are unable to obtain jurisdiction for the dissolution of their same-

sex relationship. There are limited options for same-sex couples who are married or have a civil union, but find themselves at the end of their relationship and living in a non-recognition state. The most obvious, but often least feasible option, is for one party to move to a jurisdiction that recognizes same-sex marriages or civil unions. Depending upon one's situation, this could involve selling or renting real estate, changing jobs, pulling children out of school and moving away from family and friends.

Given the impact of a move, many individuals, understandably, may choose not to relocate. Even where a party moves to a recognition state, he or she will not be able to file for dissolution of the civil union or divorce for a period of time—in New Jersey, one year.[16] The economic impact of having to wait a year to file a dissolution action can be devastating to a financially dependent spouse.

Where an individual establishes residency in a state that is able to dissolve his or her relationship, he or she will be granted a dissolution of the civil union or a divorce. However, issues may arise when it comes to obtaining personal jurisdiction over the other party. A court is likely to find it has personal jurisdiction over both parties to a civil union or marriage entered in that same state. Problems may arise, however, where one individual moves to a state that recognizes the union but is not the state where the parties joined in the civil union or marriage.

N.J.S.A. 2A:34-10 and N.J.S.A. 2A:34-8 codify the circumstances in which the court has jurisdiction over a divorce/dissolution, alimony and maintenance:

> The Superior Court shall have jurisdiction of all causes of divorce, dissolution of a civil union, bed and board divorce, legal separation from a partner in a civil union or nullity when either party is a bona fide resident of this State. The Superior Court shall have jurisdiction of an action for alimony and maintenance when the defendant is subject to the personal jurisdiction of the court, is a resident of this State, or has tangible or intangible real or personal property within the jurisdiction of the court. The Superior Court may afford incidental relief as in other cases of an equitable nature and by rule of court may determine the venue of matrimonial and civil union actions.[17]

So while a New Jersey court may grant a divorce or a dissolution, it is uncertain how New Jersey courts would address economic issues and/or enforce orders if one party has insufficient contacts with the state.[18] A court could grant a dissolution of civil union but refuse to address issues of support or equitable distribution.

If a move to a recognition state is not possible, parties may enter into a comprehensive post-nuptial agreement or property settlement agreement, and include a provision that the parties agree to proceed with a no-fault divorce if it becomes available in the jurisdiction or any other jurisdiction where either party may reside in the future. Such an agreement may prevent unexpected litigation in the future. Entering into a comprehensive agreement is a good option where parties can agree and/or in situations where parties have equal assets and earning capacity. However, in high-conflict situations and/or situations where there is disparate wealth between partners, one partner may have little or no incentive to enter into a settlement agreement.

Individuals in non-recognition states may also attempt to access the courts for relief in the states where they reside. Pennsylvania provides a close example of how courts may handle the civil unions and same-sex marriages entered elsewhere. Pennsylvania has a statutory Defense of Marriage Act (DOMA), which states:

> It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.[19]

Two of Pennsylvania's trial courts have interpreted the state DOMA to preclude the dissolution of same-sex marriages.[20] Since Pennsylvania's DOMA refers only to marriage, its silence on civil unions allows courts the discretion to dissolve a civil union. Philadelphia trial courts have granted uncontested civil union dissolutions filed in the Civil Division.[21] The court's subject matter jurisdiction extends to dissolution of civil unions and other non-marriage statuses pursuant to the court's equity jurisdiction.[22] The civil unions dissolved, thus far, by Pennsylvania's Civil Division in Philadelphia County have not asked the court to address any disputed

economic claims. It is uncertain as to how economic claims would be addressed if a contested action was presented to the Pennsylvania courts.

The Pennsylvania Court of Common Pleas, Family Division, Philadelphia County, has denied parties to a civil union access to the Family Division, directing that the Civil Division is the appropriate forum for the filing of such a complaint.[23] The court has stated:

> The fact that a cause of action arises out of a family or domestic situation, which is true of these parties, does not automatically result in jurisdiction in the Family Court Division. Financial disputes can arise between a parent and an adult child or between siblings or between unmarried opposite sex partners who have now ended their relationship. However none of these matters qualify for jurisdiction in Family Court under the applicable statutes.[24]

The court's denial of access to the Family Division would essentially bifurcate dissolutions of civil unions with children, whereby claims relating to the children would be heard in the Family Division and other claims, if considered, would be under the jurisdiction of the Civil Division. Denying access to the Family Division also denies individuals access to the well-developed procedures that are applied to opposite-sex divorces.

Conclusion

In *Lewis v. Harris*, the state of New Jersey offered the interest in uniformity with other states' laws as a justification against granting rights equivalent to marriage. The New Jersey Supreme Court rejected this argument, finding "equality of treatment" was a "dominant theme" of the laws of New Jersey and warranted extended protections where other states do not.[25] That begs the question of whether New Jersey has a duty to former residents and visitors who are invited by the state to enter a civil union to also dissolve those unions where a relationship has ended and a person's home state or new home state will not grant a dissolution and/or address economic claims arising out of the civil union. Where does the "central guarantee" of "equality of treatment" referred to by the Court in *Lewis v. Harris* begin and end?

Many of the problems associated with individuals being unable to dissolve their relationship could be resolved if states allowing individuals to enter civil unions and same-sex marriages also allowed individuals to dissolve those relationships where their home state will not. The newly enacted California statute provides a good example of how legislation can be enacted to resolve this problem and allow individuals to avoid the many, often devastating, consequences associated with a legal relationship continuing after a personal relationship has ended. New Jersey could take another step toward equality by offering individuals who unite in a New Jersey civil union a forum to dissolve the union where a couple's home state will not. ■

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Endnotes

1. *See* http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_6_28_11.pdf.
2. *Id.*
3. *Id.* (Showing that civil unions are available in Vermont, New Jersey, Illinois, Rhode Island, Delaware (2012), and Hawaii (2012), and that domestic partnerships are available in California, Oregon, Washington, and Nevada).
4. *Id.* (illustrating that Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming do not legally recognize same-sex relationships).
5. *See e.g.* Kan. Const. art. XV, § 16; Alaska Stat. Ann. § 25.05.013 (West); Ariz. Rev. Stat. Ann. § 25-101; Ind. Code Ann. § 31-11-1-1.
6. *See e.g.* N.J. S.A. 37:1-3.
7. N.J.S.A. 37:1-30.
8. N.J.S.A. 37:1-3.
9. *See* N.J.S.A. 2A:34-10; *see also Das v. Das*, 254 N.J. Super. 194 (1992).
10. *See e.g.*, ALM GL ch. 208, §4 (2005) (Massachusetts statute requiring residence in commonwealth as

spouses as well as residence in commonwealth at time of cause for divorce); 15 V.S.A. §592 (2005) (requiring six months' residence in order to file initial complaint, and one year residence before final hearing); R.S.C. 1985, c.3 (2nd Supp), s.3 (requiring residence of at least one spouse for one year before Canadian courts can claim jurisdiction over divorce proceedings); N.J.S.A. 2A:34-10 (2008) (New Jersey statute requiring residence of at least one spouse for one year before an action can be brought for the dissolution of a civil union or marriage).

11. S.B. 651, SEC. 4. (amending Family Code Section 2330) (effective Jan. 1, 2012).
12. *Id*.
13. *See* N.J.S.A. 2A:34-10.
14. *See e.g* N.J.S.A. 37:1-30; Iowa Code Ann. § 595.19.
15. *See e.g.* Philadelphia, PA., Code § 9-1106.
16. See N.J.S.A. 2A:34-10.
17. N.J.S.A. 2A:34-8. *See e.g. Boghosian v. Boghosian*, 2009 WL 2486583, 5 (2009) (finding that where the parties married in New York, had children in New York and lived together in New York, the wife had insufficient contacts with New Jersey for New Jersey to assert jurisdiction over her), but *see Healy v. Healy,* 152 N.J. Super. 44 (1977) (finding that certain relief may be awarded where the relief would not be available in a state that has granted a judgment of divorce).
18. *See Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1948).
19. Pa.C.S. §1704 (2005).
20. *See Kern v. Taney*, Berks County, No. 09-10738, March 15, 2010 (denying a same-sex divorce under a Constitutional theory denied); *see also Schlegelmilch v. Eckert*, Philadelphia County, No. August Term, 2009 No. 008528, Jan. 20, 2011 (denying a same-sex divorce under a limited-basis recognition theory).
21. *See Mangano v. Weigl*, January Term 2009, No. 2736, Philadelphia County, Sept. 23, 2009.
22. *See* Article V, Section 5B of the Pennsylvania Constitution; *see also* 42 Pa.C.S. 931 (stating that the court has unlimited original jurisdiction of all actions and proceedings, including all actions and proceedings cognizable by law or usage in the court).
23. *See Guerin v. Steffy*, February Term 2010, No. 08407, Philadelphia County, Jan. 14, 2011.
24. *See Guerin v. Steffy*, February Term 2010, No. 08407, Philadelphia County, Jan. 14, 2011.
25. *Lewis v. Harris*, 188 N.J. 415, 453 (2006).

Protecting Families

by William S. Singer

Many LGBT family law practitioners struggle with 'bad parent' cases. They occur when a same-sex couple splits up and a biological parent denies that the non-biological parent has any right to custody or visitation with a child they mutually planned for and raised. They are heart-wrenching, devastating cases for everyone involved.

More than decade ago, I represented A.B. in one of these cases. We ultimately lost in the New Jersey Supreme Court by a unanimous decision.[1]

Two women, A.B. and S.E.W., were in a committed relationship. They had both borne children conceived using sperm from the same anonymous donor. The women parted ways, and although A.B. had helped raise K.W., S.E.W.'s biological child, S.E.W. refused A.B. any visitation. Cards and presents were returned; all contact was denied.

S.E.W. also refused to allow K.W. to have any contact with A.B.'s child, although the two children shared a common sperm donor, making them genetic siblings.

The procedural history is tortuous. If you are interested, you can read the New Jersey Supreme Court decision.

Although the trial judge found that A.B. did stand *in loco parentis* to K.W., he still held against A.B. The judge found that it would not be in the best interest of K.W. to have continuing contact with A.B. or her son, because of the hostility between the mothers.

In the interim, the legal landscape for same-sex couples in New Jersey has changed dramatically. When A.B. first consulted me, there were no domestic partnerships, no civil unions and no same-sex marriages in New Jersey or anywhere in the United States. New Jersey courts had just started to grant second parent adoptions for the same-sex partner of a legal parent.

Four years after A.B.'s trial, the New Jersey Supreme Court issued a landmark decision recognizing the concept of psychological parentage.[2] That decision gives non-biological parents a clearly defined four-prong test to prove they have established rights as a parent for continued contact with a child.

Unfortunately, all of that came too late for A.B. As a lawyer, I was distressed by my inability to stop the destruction of my client's relationship with her daughter.

Courts throughout the United States continue to adjudicate similar parentage disputes between same-sex couples. Since the law is unsettled, groups hostile to LGBT families exploit these cases to create laws harmful to the LGBT community. Unfortunate results take years to overturn.

At the end of 2010, the North Carolina Supreme Court heard an appeal where a biological mother attacked the validity of the adoption of her son by her same-sex partner.[3] The North Carolina Supreme Court ruled that the adoption by the same-sex partner was invalid because the trial court lacked subject matter jurisdiction of her child by her lesbian partner.

In that one holding, *all* same-sex adoptions in North Carolina were invalidated. As a result of one biological parent's zeal to keep her former spouse from seeing their child, all same-sex couples in North Carolina lost protection for their families.

Children being raised by same-sex couples in North Carolina are now at risk. A child's right to continuing contact with a non-biological parent is no longer secure. A child's right to inherit from a deceased non-biological parent is compromised, as well as the ability of that child to collect Social Security benefits.

That case exemplifies a national epidemic. There are too many cases where a biological parent, mostly biological mothers, willfully destroys a family when splitting with a partner. They inflict an incalculable toll on the children. Adult survivors of these battles attest to serious medical repercussions, as well as financial devastation, including bankruptcy. Last year at Christmas, one Texas non-biological parent committed suicide after suffering loss of contact with her child.

Why are these cases so prevalent? Is it because the relationships of LGBT couples have yet to gain widespread acceptance? If other people do not recognize and respect LGBT families, some people in the LGBT community start to take the same attitude. For whatever reason, we, as lawyers, need to take action.

In 1999, the Gay and Lesbian Advocates and Defenders (GLAD) developed a document titled "Protecting Families: Standards for Child Custody in Same-Sex Relationships" to create sensible standards for families in the LGBT community.

This year, under the aegis of GLAD and the National Center for Lesbian Rights (NCLR), I helped revise and update that document. It has been endorsed by all of the major LGBT national organizations, and can be found at http://www.glad.org/protecting-families/.

The document calls for respect for LGBT families despite what legal protections exist or what steps the adults took to protect their family. Most importantly, the standards seek to ensure continuity of a child's parental relationships.

The 10 standards are:

1) Support the rights of LGBT families.
2) Honor existing relationships, regardless of legal labels.
3) Honor the children's existing parental relationships after a breakup.
4) Maintain continuity for the children.
5) Seek a voluntary resolution.
6) Remember that breaking up is hard to do.
7) Investigate allegations of abuse.
8) The absence of agreements or legal relationships should not determine outcome.
9) Treat litigation as a last resort.
10) Refuse to resort to homophobic/transphobic law and sentiments.

In addition to publishing the document, GLAD and NCLR are asking individual attorneys to endorse the document. By their endorsement, lawyers agree to discuss these principles with their clients. I strongly urge you to go to the website and consider becoming an endorser.

The document and standards can be a powerful tool with clients. Try discussing it with all families, not just families in crisis. Reviewing it with a couple considering creating a family or doing estate and other life planning can bring up subjects that need to be resolved. Consider sharing it with opposing counsel in contested matters concerning children raised by a same-sex couple.

Although New Jersey law is generally favorable in recognizing LGBT families no matter how they are constructed, we as lawyers need to dissuade our clients from the use of destructive tactics that harm the children raised by the couple.

William S. Singer *is a partner in Singer & Fedun, LLC in Montgomery Township. His practice concentrates on the creation and protection of both traditional and nontraditional families and he serves as counselor to numerous, varied nonprofit organizations.*

Endnotes

1. *A.B. v. S.E.W.*, 175 N.J. 508 (2003).
2. *V.C. v. M.J.B.*, 163 N.J. 100 (2000).
3. *Boseman v. Jarell*, 704 S.E. 2d 494 (NC 2010).

Member Spotlight Series

*(**Editor's Note:** This recurring series highlights attorneys in the GLBT Rights Section of the NJSBA who stand apart from the rest. Previously, Daniel Weiss, Leslie Farber, Thomas Prol, Felice Londa, Debra Guston, Bill Singer, Jeanne LoCicero, and Stephen Hyland were spotlighted for their substantial contributions to the practice of law in New Jersey, either simply as a GLBT attorney and/or for advancing GLBT-related law. If you wish to read about their achievements and views on a variety of topics, we invite section members to access our archives on the NJSBA website for our past newsletters.)*

Nancy Del Pizzo, Esq.

Nancy Del Pizzo is an attorney who has a significant pre-attorney professional life and is the current chair of the GLBT Rights Section. She was born and grew up in Paterson.

Nancy started her undergraduate studies in the 1980s at the University of Florida, where she helped name the school's first gay student group (University of Florida Lesbian and Gay Society or UFLAGS), participated as a student counselor for students as they were "coming out," and was an impromptu master of ceremonies for a rally in support of the Equal Rights Amendment. Nancy finished her undergraduate education at William Paterson University, where she received a Bachelor of Arts in communication, with a concentration in journalism.

Throughout Nancy's high school and undergraduate days, she was an avid tennis player. During high school, she represented Paterson at the U.S. Youth Games in Boston, New Haven, and Richmond. In college, she competed in NCAA Division III tennis.

After college, Nancy became a writer, editor, and consultant, specializing in health, fitness, and eye care. She also wrote for gay travel publications, including penning a "women's" chapter in what appears to have become a controversial guide to Costa Rica, and a regular health section for a GLBT magazine called *Metrosource*. Most interestingly, Nancy proposed a book called *Unconventional Coupling and the Law* in the mid-1990s, around the time Hawaii was considering domestic partnerships. Her agent could not find a publisher for the book. One rejection from a large publisher was particularly notable; it said that there was no use for the book because Hawaii was about to spur nationwide marriage rights for gay people. It is unfortunate that Nancy's book was not published; it would still be applicable in most states today.

Nancy attended law school at Seton Hall University, receiving her *juris doctorate, magna cum laude*, in May 2005. While in law school, Nancy was managing editor of the *Journal of Sports and Entertainment Law*, was recognized as best oralist, and was recognized as having the best brief for appellate advocacy (a required second-year course at the school). She was the evening vice president of the Student Bar Association and was a writer for *Res Ipsa Loquitur*, the school's newspaper. Nancy's law school career also included an externship for the Honorable William J. Martini, U.S.D.J., in Newark.

After law school, Nancy clerked for the Honorable Barbara Byrd Wecker, J.A.D. (ret.), and then joined the firm of Wolff & Samson as an associate. She currently practices in the firm's commercial litigation department, and has a particular interest in matters relating to trade secrets, copyright, trademarks, and defamation.

Nancy has been a member of the NJSBA since law school, and is an active member of the GLBT Rights Section. She is admitted to practice in New Jersey, New York, the District of New Jersey, the Southern and Eastern Districts of New York, and the Second Circuit Court of Appeals.

We sat down with Nancy and asked for her thoughts on a couple of issues.

When did you decide to become an attorney, and what made you want to practice law?

Apparently, I wanted to be a lawyer since at least Wednesday, Jan. 1, 1975, which is what I wrote in my journal that day. I realized that I wanted to "practice" law after working part-time during law school as a clerk for Blume, Goldfaden, Berkowitz, Donnelly, Fried and Forte in Chatham, where I was given the opportunity to research obscure narrow areas of law, draft briefs, and watch experienced trial attorneys in action.

In the next five years, what do you think will be the greatest legal issues facing the GLBT community in both New Jersey and elsewhere in the United States?

Obtaining full civil rights will be the greatest legal issue facing the GLBT community throughout and beyond the next five years in New Jersey, and throughout the United States. The right for same-sex couples to legally marry in a handful of states outside of New Jersey is a beginning, but has resulted in precarious situations when crossing state borders—particularly where children are involved—as well as backlash throughout the nation. Right now, the opportunity for the GLBT person to pursue life, liberty, and happiness *closer to being on par* with her or his heterosexual neighbor is dependent on where she or he lives in these United States, and what political party controls.

How should we deal with these challenges as attorneys?

Those of us who are practicing in areas directly addressing GLBT issues have an enormous opportunity to improve the lives of those to come by initiating important actions and counseling the brave GLBT individuals and couples who come forward with pain and courage to challenge legislative and other wrongs. Those of us who do not practice in areas that directly address GLBT issues can try to keep abreast of those issues, educate, and learn key resources for referrals. We must also take our voting privilege seriously, because the personal is political.

What advice would you give to new GLBT attorneys as they begin their careers?

Be yourself at all costs.

Which U.S. or N.J. Supreme Court justice to you admire most, and why?

Justice Sandra Day O'Connor, for overcoming the sexism that prevented her from obtaining a job as a lawyer upon graduation from Stanford Law School by closing the boys' club at the Supreme Court.

Celebrating the Holidays in Asbury Park