

LGBT SideBar

A Newsletter From

VISHNICK MCGOVERN MILIZIO LLP

Specifically for the Lesbian-Gay-Bisexual-Transgender

(LGBT) Community

Spread the Word!

A Letter from Joseph G. Milizio, Esq., Managing Partner

As we were planning this issue of the LGBT SideBar, many concepts and ideas were circulated and discussed. We had so many topics and potential articles, that one of our associates suggested that we write a treatise!

Our goal in writing this newsletter was to not only provide you with information on current topics affecting the LGBT community, but also to energize you. Knowing the rights that we have, the rights that have tentatively been given to us but that need to be solidified, and the rights that are still denied, will allow you to plan accordingly and make informed life decisions.

As the saying goes, “knowledge is power.” With knowledge, each of us has the power to guide our lives accordingly. Perhaps even more so, knowledge allows us the opportunity to spread the word. There is hardly a day that goes by that a new case, statute or other legal matter affecting the LGBT community does not pass my desk. Many of these items appear in community newspapers. The hype with respect to LGBT rights is out there. The more people know, the less fearsome they become. So spread the word!

With best regards,

Joe Milizio
Joe Milizio



*Joseph G. Milizio, Esq.
Managing Partner*

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online Updates

Check out www.LGBT-VMMLegal.com, Vishnick McGovern Milizio's website for LGBT legal issues and news. We've recently added a section on Gay Marriage updates, as well as seminar and event schedules. You can also track important updates by following us on Twitter: [LGBTVMMLEGAL](https://twitter.com/LGBTVMMLEGAL)



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Debra H. v. Janice R. – Rationing Rights to Same Sex Families

By Peter M. Carrozzo, Esq.

IN MAY 2010, THE NEW YORK COURT OF APPEALS

issued a decision impacting the rights of same-sex families. The case of *Debra H. v. Janice R.* increases the rights of unrelated “parental” figures to maintain relationships with the children of former partners. However, the decision represents an incomplete victory. The basis for the Court of Appeals’ decision is the doctrine of comity, whereby a state recognizes the legal acts and proceedings of a sister state. Within the state of New York, same-sex partners are left with the same limited rights as they had before. The Court of Appeals’ decision in *Debra H.* does little towards remedying the existing inequalities.



A History of the Facts

Janice R. is the biological mother of M.R., born in December 2003, and conceived through artificial insemination. Debra H. and Janice R. were in a relationship at the time. The pertinent facts of that relationship are as follows: the two women met in January 2002, registered as domestic partners in New York City in September 2003, and entered into a Vermont civil union in November 2003. They lived together for a time after conception, although Janice maintained a separate apartment. When Janice delivered the baby, Debra was present and cut the umbilical cord. The two women were listed as “parents” on their synagogue’s “child naming certificate” and Janice appointed Debra power of attorney to “act in loco parentis” to M.R. in the event of Janice’s incapacity; however, Debra never legally adopted M.R. In February 2006, Janice moved out of Debra’s apartment and ended their relationship the following month. Debra continued to visit and call M.R. until April 2008 when Janice ended all contact.

In May 2008, Debra H. brought an action for joint custody; Janice sought a dismissal, arguing Debra was neither the biological or adoptive parent and, therefore, lacked standing. The Supreme Court, New York County (trial level) ruled in Debra’s favor, and allowed her to proceed in her action for visitation based on her standing “in loco parentis” which is a form of parental right based on equity. The Appellate Division, First Department, reversed, holding that Debra H. had never exercised her right to the second parent adoption of M.R. Thus, according to the Appellate Division, Debra H. lacked standing.

The New York Court of Appeals, in a decision written by Judge Read, ruled in favor of Debra H. Limiting the decision to its specific facts, the court held “only that New York will recognize parentage created by a civil union in Vermont.” Thus, as a result of the civil union, which is a form of legal union akin to marriage except in name created exclusively

(at the time) for same-sex partners in Vermont, Debra H. was allowed to seek visitation rights and custody through “a best-interest hearing.”

Still No Cause for Celebration

The reasoning of the Court of Appeals in *Debra H. v. Janice R.* gives little cause for celebration. While it is a small step towards extending the rights of same-sex partners, the decision does not break new ground. In fact, the court reaffirmed *Matter of Alison D. v. Virginia M.*, a Court of Appeals decision from 1991 with similar facts. *Matter of Allison D.*

also dealt with same-sex partners who decided to have a child through artificial insemination. Ultimately, the relationship ended and the “biological stranger” (as opposed to the biological mother) petitioned for visitation under the New York Domestic Relations Law (DRL).

After losing at both the trial level and Appellate Division, Alison D. appealed to the Court of Appeals arguing, as a “de facto parent” or “parent by estoppel,” she had standing to seek visitation. A “parent by estoppel” is an equitable concept created to recognize parental rights where no biological or legal relationship exists. The Court of Appeals rejected this argument, refusing to interpret “parent” under the DRL “to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child’s parents and who wish to continue visitation with the child.” Ultimately, the court left the option to change this with the legislature.

The New York Court of Appeals in *Debra H.* used *Alison D.* as precedent to defeat the recognition in New York of “parent by estoppel” or any form of equitable parental right for non-biological and non-adoptive adults. The court also restated and reaffirmed the fundamental right of a biological parent, assuming parental competence, to determine and control the adult relationships of his or her child: “to determine with whom her child associates.” The Court of Appeals declared this power of biological parents a “bedrock principal of family law.”

Additionally, in *Debra H.*, the Court of Appeals coupled this fundamental right of parents with the right of second parent adoption to defeat the concept of “parent by estoppel.” The court argued that the very existence of the right of heterosexuals and homosexuals to adopt the children of their unmarried partners creates a presumption that absent such adoption, the biological partner did not intend for a parental relationship to arise with the non-biological partner and child. In fact, Janice R. argued in her brief that she consciously deflected the requests by Debra H. to adopt M.R. to maintain parental control. According to the court, “*Alison D.*, in conjunction with second parent adoption, creates a bright

Debra H. v. Janice R

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line rule that promises certainty in the wake of domestic breakups.”

The Court of Appeals did not leave Debra H. without a remedy, however. Although nothing in New York law gave her any right to visitation absent second parent adoption, the Vermont civil union entered into by the parties in 2003 was significant. Because the parties voluntarily chose to form a civil union in a foreign jurisdiction, the doctrine of comity required New York to recognize the out-of-state union. The court reasoned that, under a comity analysis, an out-of-state act will be recognized as long as it does not conflict with New York law. The availability of second parent adoption proved to the court that “recognition of parentage based on a Vermont civil union would not conflict with our State’s public policy.” Presumably, Governor Paterson’s executive order from 2008 directing New York’s administrative agencies to recognize out of state same-sex marriages (see page 5) assisted the Court of Appeals in its decision. Thus, New York’s recognition of the Vermont civil union allowed Debra H. to seek visitation rights under the DRL.

Has Progress Been Made?

Twenty years have passed since the decision in *Alison D.* In 1991, the concept of same-sex marriage was unknown. Since the New York Court of Appeals’ decision in 1991, landmark cases have been handed down and same-sex marriage became a constitutional right in Vermont, Massachusetts, Connecticut and Iowa. Additionally, same-sex marriage is legal in New Hampshire and the District of Columbia. Beyond

these jurisdictions, challenges are occurring in a number of other states and at the federal level. Some states also allow the recognition of parental relationships based on equity in order to serve the best interests of children. Remarkably, New York continues to lag behind in this campaign.

The New York Court of Appeals, while exercising judicial restraint, found a way to reach an equitable decision through recognition of the Vermont civil union. That is not insignificant, especially for Debra H. However, without the help of sister states, requiring New Yorkers’ to travel and utilize rights provided outside our jurisdiction, Debra H. and many others in her position, could be without a remedy. Indeed, second parent adoption provides some rights and is indicative of the progress that has been made in New York. But as long as homosexuals are not treated the same as heterosexuals in New York, rights such as second parent adoption are insufficient accommodations rationed to homosexuals. The fact remains, members of the LGBT community are at the mercy of the benevolence of a legislature that continues to play politics with their lives. **M**

Peter M. Carrozzo, Esq. is an Adjunct Professor at John Jay College of Criminal Justice where he teaches Constitutional Law and a Seminar on the Supreme Court. He is the author of a number of law review articles focusing on the ownership of real property and the rights of same-sex families, and on the history of mortgage lending from the New Deal to the twenty-first century. He serves as an editorial advisor for the LGBT Sidebar. Peter can be reached at 718-819-2188 or via e-mail at trumancaro@msn.com.

Don't Ask, Don't Tell, Don't Expect Lending Equality

By Joseph G. Milizio, Esq.

“Don’t Ask, Don’t Tell” may soon be a thing of the past for those serving in the military, but veterans looking to live the American Dream may face additional obstacles. One of the benefits of military service is entitlement to a VA Guaranteed Home Loan. VA loans allow veterans to qualify for mortgages on their personal residences with various benefits, including no down payment, no mortgage insurance and favorable interest rates.

VA Guaranteed Loans are available to Veterans and their spouses. Occupancy of the residence by the spouse alone also satisfies the personal occupancy requirement. It would seem logical that a veteran and his or her same-sex spouse would also qualify, but that is not the case.

The reality is that same-sex spouses cannot qualify for VA Guaranteed Loans because the federal government only recognizes spouses as being “one man and one woman.” The result is that the VA guarantee will only cover the veteran’s portion of the loan. For the loan to be processed successfully, the veteran’s same-sex spouse would also have to qualify for a regular loan for his or her portion and would have to find a lender willing to make a hybrid VA/Non-VA loan, which would probably require a down payment to cover the Non-VA portion. Each spouse would also have to independently qualify for his or her share of the loan. This amounts to inequality for same-sex couples and such a loan will likely never be approved.

Imagine the reaction if every married couple was told they had to independently qualify for their share of the mortgage on their home. Imagine the uproar if all military personnel were told they cannot utilize a VA loan to purchase a home for their spouse to live in while they are stationed overseas. Even if “Don’t Ask, Don’t Tell” is repealed, gays can still expect unequal treatment in the military. **M**



news & Events

Professional Achievements

Joseph G. Milizio, Esq. was appointed as a member of the Special Committee on LGBT People and the Law of the New York State Bar Association. Mr. Milizio was also named in the *Who's Who in Corporate Law* section of *Long Island Business News*.

In the Media

Vishnick McGovern Milizio LLP responded to an article that appeared in *Long Island Business News* on employer fairness. Our response was printed in the paper's Opinion column and is reprinted on page 6 of this issue of the LGBT Sidebar.

Events

On February 17, 2010, **Joseph G. Milizio**, Managing Partner at Vishnick McGovern Milizio LLP and Cindy Grauer of Ameriprise Financial gave a presentation at the Long Island GLBT Center, entitled: ***Without Same-Sex Marriage in New York State: Protecting Yourself & Your Loved Ones***. This seminar reviewed which benefits are given to same-sex couples who marry in other jurisdictions and which are denied. The seminar was also presented on May 18th at the New York City LGBT Community Center.

On May 6, 2010, Joseph Milizio on behalf of the firm held a fundraiser to benefit Camp Aranu'tiq, a week-long, tuition-free, overnight summer camp for transgender and gender-variant youths ages 8 through 15.

On April 29, 2010, Vishnick McGovern Milizio LLP sponsored "A Conversation with **Kathleen Rice**, Nassau County District Attorney and NYS Attorney General Candidate" on behalf of the Human Rights Campaign. Ms. Rice spoke on the importance of equal rights for the LGBT community, as well as her vision for New York State government.



*Kathleen Rice at
VMM Office*

On June 13, 2010, Vishnick McGovern Milizio participated in the LI Pride event in Huntington. The firm had a display table and offered event attendees information on legal issues affecting the LGBT Community.



*L to R: Joseph Trotti, Esq., Saskia Thomson,
Joseph G. Milizio, Esq., Managing Partner*

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Benefits To Partners

President Obama ordered federal government agencies on June 2, 2010 to extend additional benefits to same-sex partners of federal employees. The benefits include child care services for the children of employees' domestic partners; travel and relocation expense allowances; and access to employer assistance programs. The order follows a 2009 memorandum giving federal workers benefits such as dependent-care rights.

The extended benefits do not include access to health care (see "Finally, A DOMA Challenge" in this issue), retirement benefits and many other benefits that are not available as a result of the Defense of Marriage Act. ❧



Status Quo with the Same-Sex Marriage Tax

By Joseph G. Milizio, Esq.

FIRST THE GOOD NEWS: Marriages of same-sex couples that were validly performed in other jurisdictions have been recognized by the State of New York since 2008. As a result, state agencies, as well as public and private employers, have begun offering spousal benefits to same-sex partners who are married.



In 2008, Governor Paterson instructed all state agencies to review their policies to ensure that their agencies carried out this "respect for same-sex marriage" to the fullest extent permitted by law. This translated into a host of benefits for married same-sex couples. Among

the new benefits are insurance coverage, including health and automobile policies, on the same terms as other married couples; birth certificates listing both the birth mother and her spouse as parents; and Worker's Compensation benefits on the death of a same-sex spouse.

But that's where the good news ends. Despite the Governor's directive to respect same sex marriage "to the fullest extent of the law," the New York State Department of Taxation and Finance still refuses to recognize same-sex marriages for income tax purposes.

A little background: In 2004 and 2005, same-sex married couples filed petitions with the State of New York Commissioner of Taxation and Finance asking whether their marriages will be recognized for personal income tax purposes. Unfortunately, the Advisory Opinions issued by The Department of Taxation and Finance in response to the petitions stated that since same-sex marriages were not recognized for the purposes of filing federal income tax returns, New York State would not recognize them for State personal income tax purposes. Given the political climate at the time, this viewpoint wasn't so surprising.

Hopes began to rise, however, after Governor Paterson issued his gay-friendly directive to state agencies. In September 2009, a new petition was filed by a married gay couple asking if marriage to a same-sex partner would be recognized for personal income tax purposes as a result of the Governor's directive. Somewhat surprisingly, on May 12, 2010 the Department of Taxation and Finance once again ruled that marriage to a same-sex partner will not be recognized for purposes of New York State personal tax. And for all the same reasons.

It would seem that New York State respects gay marriage in many ways. But not in ways that may negatively affect its personal income tax coffers. ❌

Civil Union Dissolution

By Joseph Trotti, Esq.

The New York State Courts have determined that New York has jurisdiction to entertain an action seeking dissolution of a civil union validly entered into outside of the State. In 2003, Audrey Dickerson and Sonya Thompson, both New York State residents, took a day trip to Vermont where they entered into a civil union. When their relationship deteriorated, they were not able to terminate the civil union in Vermont, which has a one-year residency requirement for at least one of the parties seeking dissolution. A five judge panel of the Appellate Division reversed dismissal of the dissolution action by the lower court, citing the State's "commitment to respect, uphold and protect parties to same-sex relationships." The Court also noted that the New York City administrative code forbids civil union partners from entering into domestic partnerships with anyone else. New Yorkers will now have the luxury of terminating their civil unions without having to relocate. ❌

For more information, please contact Joseph Trotti, Esq. at 516-437-4385, ext. 140 or via e-mail at Jtrotti@ymmlegal.com.

Finally, A DOMA Challenge

In a case filed in Boston Federal District Court, a married same-sex couple have brought the first major challenge to the Defense of Marriage Act. The Act, known as DOMA, provides in part that a "marriage" is between "one man and one woman." The lead litigants, two women who live in Massachusetts, are challenging DOMA based upon the denial of marriage-related benefits to same-sex couples and have asserted a denial of equal protection under the law.

Nancy Gill, one of the lead plaintiffs in the case, has worked for the Post Office for 22 years. She married her partner, Marcelle Letourneau, in Massachusetts in 2004. Because she is a federal employee and DOMA is a federal law, Ms. Gill cannot provide health benefits to her spouse that her co-workers can provide to their spouses.

The case was argued in May. The Justice Department, arguing for the government, defended DOMA and asked the Court to dismiss the case. The government acknowledged the Obama administration's opposition to DOMA, but said it was still obligated to defend its constitutionality. It is highly anticipated that the case will ultimately end up before the U.S. Supreme Court. ❌

legal
Briefs

Inequalities of the “Equality Index”

By Joseph G. Milizio, Esq.

A FEW WEEKS AGO, *Long Island Business News* ran a story on Long Island companies that rank high on the Human Rights Campaign’s Corporate Equality Index, which is designed to measure an employer’s index of fairness and equality. As advocates for LGBT equality and in the interest of legal accuracy, Vishnick McGovern Milizio responded to this article in the paper’s Opinion column. Below is our response that appeared in the May 28 - June 3, 2010 issue of *Long Island Business News*.

I read with interest Claude Solnick’s article regarding the Human Rights Campaign’s Corporate Equality Index. The Index is a great resource for anyone who wants to make sure they are dealing with businesses that are inclusive and treat all of their employees fairly. Although employers are to be commended for offering their gay and lesbian employees spousal benefits, those benefits are not given equal weight with benefits received by employees in opposite-sex marriages. By statute, premiums an employer pays for health benefits provided to the spouse of an employee are tax free, but only if your spouse is of the opposite sex. These tax benefits do not apply to same-sex couples. So if an employer provides health insurance to a same-sex spouse, the portion of the premiums paid for the coverage is included in the employee’s gross income and is reported on the employee’s Form W-2.

Moreover, it costs the employer more, because it must pay withholding and employment taxes on those premiums. Why is there a distinction? Because of a federal statute called The Defense of Marriage Act (DOMA), which provides, in part, that the federal government will not recognize same-sex couples as spouses. As a result, gay and lesbian individuals that receive employer sponsored health insurance for themselves and their spouses incur a significant tax penalty.

It is interesting to note that New York State recognizes same-sex marriages validly performed outside of New York. Such marriages must be treated as valid and spouses in such relationships must be afforded health insurance benefits if such benefits are offered to spouses by an employer. But the NYS Department of Taxation and Finance does not follow suit. It follows the definitions of the IRS which, because of DOMA, does not recognize same-sex marriage. As a result, not only are health insurance benefits taxed, but same-sex spouses are also denied survivor benefits from a deceased spouse’s pension, denied Social Security death and widow(er) benefits and are denied the ability to qualify for income tax benefits for married couples filing jointly. These are only some of the more than 1,100 federal protections afforded to spouses, but denied to legally married same-sex spouses.

– Joseph G. Milizio, Esq.
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If you would like more information on this topic, please contact Joseph G. Milizio, Esq. at 516-437-4385, ext 108 or via e-mail at jmilizio@lgbt-vmmlegal.com



Find out the latest news at:

www.LGBT-VMMLEGAL.com

Vishnick McGovern Milizio LLP attorneys advocate for and strongly believe in the rights of gay, lesbian, bisexual and transgendered individuals. The LGBT community has the same concerns and the same needs as the larger community. Unfortunately, society does not automatically grant the same legal rights, or offer the same legal benefits to the LGBT community. However, with proper planning, many of those rights and benefits can be fulfilled. Whether counseling individuals, families, or businesses, we understand the issues and are well versed in strategies that protect our clients and satisfy their wishes.

We offer a number of services that uniquely address the issues that matter most to the LGBT community.

The content of this newsletter is for informational purposes only. Please contact us if you would like legal counsel.



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