DESPERATELY SEEKING STATUS: SAME-SEX COUPLES BATTLE FOR EMPLOYMENT-LINKED BENEFITS

INTRODUCTION

Try to imagine the following scenario. A couple has moved to a new city and bought a home. This couple has a relationship reaching back twelve years. They do all the things that married couples typically do. Although they have no children, they are planning to adopt a child. They intermingle their financial affairs. They have a joint mortgage, joint credit cards and joint bank accounts. They have wills that name each other as executors and primary beneficiaries. They also have durable powers of attorney over each other for medical care. These two individuals have set their lives up as a family.

One member of the couple starts a new job and is handed the usual array of group insurance forms. The employee lists his partner on the benefits forms as his spouse. A few days later, a staff person from employer’s benefits office calls the employee. The staff person asks, somewhat awkwardly, if the employee inadvertently made a mistake on his benefit forms because he indicated that his spouse is male. The employee responds that there has been no mistake. A few days later, the employee’s benefit applications are returned and stamped “DEPENDENT BENEFITS DENIED. SINGLE COVERAGE ONLY.”

For a married heterosexual employee similarly situated to the employee in the foregoing scenario, this kind of unilateral denial of dependent benefits would not likely occur. In addition, proof of marriage would almost never be required in order to sign up an opposite-sex spouse for benefits offered as part of an employment compensation package. The scenario described above is becoming commonplace as more same-sex couples try to secure employment-linked benefits for their same-sex partners.

This hypothetical is a composite of the information collected in discussions with same-sex couples. Any similarity to individual cases is coincidental.

See Rebecca L. Melton, Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family," 29 J. Fam. L. 497, 516 (1990-91). “Same-sex and heterosexual cohabitants still struggle for health insurance, dental insurance, eye care, life insurance, bereavement leave, pensions, sick leave, social security, membership in clubs; all benefits that married couples can receive practically automatically.” Id.

In random telephone calls to 25 employers employing more than 100 employees in Summit and Portage Counties, none required proof of marriage for an employee to sign up a spouse within 30 days of marriage or during appropriate enrollment periods, even if the couple did not use the same last name.

This Comment uses the term “same-sex couple” to refer to any gay or lesbian couple engaged in a committed, long-term relationship.

This Comment uses the term “employment-linked benefits” to refer to all employee benefits that may arise out of the employment relationship. These benefits include but may not be limited to health and dental insurance, life insurance, various types of leave, Social Security, workers’ compensation, unemployment compensation, and pension or retirement plans.

This Comment uses the term “same-sex partner” to refer to each member of a gay or lesbian couple. Each member of the couple stands in the place of a spouse to the other member as in a marriage.
For example, a professor at a mid-sized, state-funded university in Ohio is currently preparing for a labor arbitration over the denial of benefits to his same-sex domestic partner of 14 years. The professor’s grievance alleges that the University’s denial of benefits to his same-sex partner is a direct violation of the nondiscrimination on the basis of sexual orientation clause recently-negotiated into the faculty’s collective bargaining agreement. The university’s action also allegedly violates similar clauses that appear in university policy documents. Arbitration hearings in this case will be scheduled before the end of 1993.

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7 See Robert L. Elbin, Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others), 51 OHIO ST. L.J. 1067, 1069 n.11 (1990). One commentator has defined the term domestic partner as follows:

The definition of “domestic partner” varies widely across these programs that recognize domestic partnership status. . . Given its broadest definition, however, a domestic partnership would include any two persons who reside together and who rely on each other for financial and emotional support. Some definitions presume a sexual relationship between the parties . . . however, a sexual relationship is not a requirement. . . While domestic partnership is the most widely-used term in benefit programs, other descriptives include “named partner” and “significant other.”

Id.


9 Intent and Purpose, COLLECTIVE BARGAINING AGREEMENT BETWEEN KENT STATE UNIVERSITY AND THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, September 16, 1992 at 1 provides in pertinent part:

The parties endorse Kent State University’s commitment to the achievement of optimal conditions of intellectual discovery, human development, and responsible social change and recognize that it can best recognize these goals within an atmosphere of freedom and fairness. To these ends the parties reaffirm their belief in the moral and legal principles supporting a University environment free of decisions and judgments based on race, color, religion, sex, age, disability, national origin, or sexual orientation.

Id. (emphasis added).

10 EQUAL OPPORTUNITY (UP)[6-01] §3346-6-01 Kent State University policy regarding equal opportunity provides in pertinent part:

In employment it is the policy of this university that there shall be no unlawful discrimination against any employee or applicant employee because of . . . sexual orientation. Such policy shall apply to, but not necessarily be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other compensation; and selection for training, including apprenticeship.

Id. at §3346-6-1(A)(2) (emphasis added).

See also DIVERSITY AT KENT STATE UNIVERSITY, REPORT OF THE UNIVERSITY-WIDE DIVERSITY PLANNING COMMITTEE 40 (Mar. 1, 1993). The report makes recommendations for increasing diversity at the University and specifically mentions the extension of health benefits to unmarried partners as follows:

Development begins on a comprehensive action plan for the recruitment and retention of under-represented faculty and staff, a plan which includes recruitment and hiring strategies, professional faculty and staff development programs, development of a faculty and staff handbook emphasizing diversity issues, faculty and staff awards, extension of benefits to non-married partners, and an outcomes assessment instrument to monitor progress on a continuing basis.

Id. at 40 (emphasis added).
The outcome of this arbitration will be decided in a state legislative atmosphere which has been less than sensitive to gay rights.\textsuperscript{11} Recently, 14 legislators\textsuperscript{12} in the Ohio House of Representatives sponsored a bill\textsuperscript{13} designed to prohibit any of Ohio's state-funded universities from allowing same-sex couples to live in university housing.\textsuperscript{14} The bill also explicitly prohibits all state-funded universities from providing insurance benefits to the same-sex partners of state university employees.\textsuperscript{15} In another example of some of the official hostility expressed towards gay and lesbian issues, a State Senator has publicly threatened the same university charged in the aforementioned arbitration with cuts to state subsidy allotments if the university's plans for introducing a new gay studies course are implemented.\textsuperscript{16}

\textsuperscript{11} See infra notes 12-15 and accompanying text. Ohio's State Representatives introduced House Bill 422 during the 1993-94 Regular Session. This bill excludes same-sex couples from living in university housing. The Bill also expressly prohibits state universities from offering "insurance or any other coverage" to a non-employer partner who is the same sex as the employee.

At present, Ohio affords legal status to "domestic partners," either of the same or opposite sex, in cases involving domestic violence. See Deacon v. Landers, 587 N.E. 2d 395 (Ohio Ct.App. 1990) (granting applicant protection order against former domestic partner). The court bases its holding on OHIO REV. CODE ANN. §3113.31(A)(1)(Anderson 1989) which defines domestic violence as specific acts against a family or household member and OHIO REV. CODE ANN. §3113.31(A)(3)(Anderson 1989) which defines household members as "a spouse or person living as a spouse of the respondent, . . . or one who has otherwise cohabited with the respondent within one year prior to the date of the alleged act of domestic violence." Id. at 397.

\textsuperscript{12} Representatives Fox(R), Amstutz(R), Brading(R), Haines(R), Hodges(R), Johnson(R), Kasputis(R), Netzley(R), Schuring (R), Sines(R), Terwilleger(R), VanVyven(R), Wachtman(R), and Wise(R) sponsored Ohio H.B. 442.

\textsuperscript{13} H.B. No. 442, Ohio 120th General Assembly, Regular Session (1993-94).

\textsuperscript{14} Id. The bill provides in pertinent part:

\begin{quote}
§3345.43 \{of the Ohio Revised Code\}. (A) A Board of Trustees of a state university or college as defined in Division (A)(1) of §3345.12 of the Revised Code, or an administrator authorized by the Board, may establish or designate one or more particular residential facilities owned or controlled by the university for both of the following:

1) legally married couples and any dependent children;

2) unmarried or legally separated parent, when such parents are residing with dependent children.

(B) If a university facility is established or designated pursuant to Division (A) of this Section, no persons shall be permitted to reside in such facility unless such persons are described by Division (A)(1) or (2) of this Section.

Id.
\end{quote}

\textsuperscript{15} Id. The bill provides in pertinent part:

\begin{quote}
§3345.42 \{of the Ohio Revised Code\}. No Board of Trustees of a state university or college as defined in Division (A)(1) of §3345.12 of the Revised Code shall include in any policy or contract that provides insurance or other coverage as described in Division (A)(1) of §9.90 of the Revised Code a non-employee who is the same sex partner of an employee of the institution.

Id.
\end{quote}

\textsuperscript{16} See Roger J. Mezger, KSU's Course on Gays Angers Senator, AKRON BEACON JOURNAL, July 21, 1993, at A12. (According to this article, Ohio's State Senator Gary Suhadolnik, a Republican from Parma Heights sent a letter to Dr. Carol Cartwright, President of Kent State University, on the subject of Kent State University adding a gay studies course to its curriculum. In this letter, Senator Suhadolnik suggested that "the move [to approve a course devoted to studying homosexuality] could hurt the university in six months or so, when the legislature is likely to adjust the state budget."). See also Jill Elish, Senator Targets Gay Class, RECORD-COURIER, July 21, 1993, at A1; Jill Elish, Cartwright Defends Gay Course, RECORD-COURIER, July 22, 1993, at A1 (quoting State Senator Gary Suhadolnik, "Homosexuality bothers me. I'm not advocating violence against them or that they be discriminated against, but I don't think that homosexuals should get special treatment.").
Not all gay and lesbian employees face discriminatory treatment when they apply to secure dependent benefits for their same-sex partners. However, same-sex couples have realized few victories. State and federal case law on this issue is scattered throughout the country and holdings tend to be fact-specific. To date, the United States Supreme Court has not heard a case dealing with an employer's duty to provide employment-linked benefits to the same-sex partners of gay and lesbian employees. Only recently, through an occasional administrative ruling, agencies have pushed employers to extend policies of nondiscrimination on the basis of sexual orientation to include the granting of employment-linked benefits to the same-sex partners of gay and lesbian employees.

This Comment will focus on the battles that gay and lesbian workers face in their attempts to attain benefit parity in the workplace and how these battles are linked to the fact that their relationships lack legal status. Part I will discuss recent judicial decisions on the issue of employment-linked benefit availability to the same-sex partners of gay and lesbian employees. Part II will review two recent decisions, which although unrelated to employment, may have set the stage for a legal redefinition of the family, and may provide a means by which same-sex couples could attain the legal status required to guarantee employment-linked benefits for their partners. Part III will briefly outline other legal mechanisms same-sex couples are currently using to formalize their relationships. Part IV will discuss how one lesbian employee was successful in attaining employment-linked health benefits for her same-sex partner and the need for a uniform resolution to this issue across jurisdictions.


In California and across the nation, employment discrimination based on sexual orientation is pervasive. Studies reveal that as many as 30% of gay workers experience discrimination at work; up to 17% have been fired because of their lifestyle. Employers discriminate against sexual orientation minorities by rejecting their applications for employment or by firing employees thought or known to be attracted to members of the same gender. Employers similarly discriminate against sexual orientation minorities by failing to promote them and refusing to extend employment benefits to their domestic partners.

Id. (emphasis added).


See cases cited infra notes 28-84 and accompanying text. Part I of this Comment discusses six cases from 1982-1993 which address the issue of whether the same-sex partners of gay and lesbian employees are entitled to receive employment-linked benefits.

See, e.g., administrative ruling cited infra notes 85-101 and accompanying text. This Comment discusses a June 1993 decision by the Vermont Labor Relations Board holding that the University of Vermont was required to provide the same health benefit coverage to the same-sex partners of employees as was being provided to the spouses of married employees.
PART I - BLIND ALLEYS

A body of case law on the granting of employment-linked benefits to the same-sex partners of gay and lesbian employees is growing, but the holdings have been mixed, and few have been in favor of same-sex partners receiving employment-linked benefits.¹¹ The courts are still routinely denying the same-sex partners of gay and lesbian employees government and employer-provided benefits.²² In most cases that go to trial, the same-sex couple asserts that this denial of benefits is discriminatory on the basis of sexual orientation or marital status.²³ To date, courts have been disinclined to agree with this argument.²⁴ Meanwhile, almost daily, legislatures enact domestic partnership ordinances²⁵ and gay rights legislation.²⁶ To date, this piecemeal approach has not provided the legal status same-sex couples need so that employers are required to extend benefits to the same-sex partners of gay and lesbian employees.²⁷ The following cases offer a framework of existing case law on this issue.

*Donovan v. Workers' Compensation Board of California: Workers' Compensation Benefits Granted*

In *Donovan v. Workers' Compensation Board of California*,²⁸ after a lengthy battle,²⁹ the plaintiff was awarded a $25,000 death benefit. The court held that because the benefit involved was statutory, the plaintiff, as a gay person, could be classified as a "good faith member of another's household."³⁰ Plaintiff Earl Donovan was the live-in companion of Thomas Finnerty.³¹ Finnerty was injured on the job and was later determined to be one-hundred-percent disabled.³² Finnerty was seriously depressed about his disability and later died after a suicide attempt.³³ Donovan filed this action alleging that because

¹¹ See cases cited infra notes 28-84 and accompanying text.
²² See Melton, supra note 2, at 516.
³³ See cases cited infra notes 28-84 and accompanying text.
²⁴ Id.
²⁶ See LESBIANS, GAY MEN AND THE LAW, supra note 25, at 268-270 (reprint of Massachusetts Gay Rights Law and a list of states and municipalities which have enacted gay rights legislation).
³⁷ See Bowman & Comish, supra note 25, at 1165. "The lack of legally recognized alternatives to marriage and the exclusion of lesbians and gay men from marriage has left many couples unable to define their relationships as they chose, and has led to disparate and unfair treatment of similarly situated couples." Id.
²⁹ Id. at 870-71. See also Rivera, *Queer Law*, supra note 18, at 385 (full discussion of the Donovan case).
³⁰ Donovan, 187 Cal. Rptr. at 873. "Labor Code §3502 reads in part: 'No person is a dependent of any deceased employee unless in good faith a member of the family or household of the employee . . . ." Id.
³¹ Id. at 870.
³² Id.
³³ Id.
of his disabling injury Finnerty developed suicidal tendencies, and as a result, his subsequent death was work-related.  

In the first hearing, the Workers' Compensation Board held that the relationship between Donovan and Finnerty was "illicit," and therefore Donovan could not be a "good faith member of Finnerty's household." The Board awarded Donovan limited medical costs. Donovan appealed the Board's decision to the California Court of Appeals, which remanded the decision stating that the Board had purposely avoided the issue of dependency. Finally, the Workers' Compensation Appeals Board based its decision on the highly-publicized Marvin v. Marvin decision and ruled that Donovan was a good faith member of Finnerty's household and his total dependent. The Donovan court recognized the possibility that a gay person could be a "good faith member of another's household," and as a result, that individual could be classified as an employee's dependent under the workers' compensation statutory definition.

**Hinman v. Department of Personnel Administration: Dental Benefits Denied**

In Hinman v. Department of Personnel Administration, the California Court of Appeals held that the same-sex partner of a state employee was not entitled to dependent coverage under the State Employees' Dental Care Act. Boyce Hinman and his partner of over 12 years, Larry Beatty, owned their home together, placed their assets in a joint bank account, and were each other's primary beneficiaries in their wills and life insurance policies. The couple had entered into a covenant of mutual economic support and told the court that they would marry if they were not prohibited from doing so by state law. Hinman identified Beatty as his "family partner" on his dental enrollment

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34 Id.  
35 Id. at 873. See also Rivera, Queer Law, supra note 18, at 385.  
36 Donovan, 187 Cal. Rptr. at 872.  
37 Id.  
39 Donovan, 187 Cal. Rptr. at 872. See also Rivera, Queer Law, supra note 18 at 385.  
40 Donovan, 187 Cal. Rptr. at 873. The court held: Recognizing the obvious, the only petitioners for worker's [sic] compensation benefits are the employee and dependents. Labor Code section 3503 reads in part: 'No person is a dependent of any deceased employee unless in good faith a member of the family or household of the employee...'. At the threshold of any award by the Board must be the finding that the petitioner qualifies under the code definition of dependent. In the instant case, no such finding exists, however, the Board made an award in favor of petitioner 'of medical-legal costs and an amount to be adjusted.' Id. at 873.  
42 Id. at 419.  
43 Id. at 412.  
44 Id.
The following day, the employer informed Hinman that Beatty's coverage was denied. In denying the coverage, the Department of Personnel Administration relied on the definition of "family member" as provided for in the Public Employees' Medical and Dental Care Act.47

Hinman argued that the denial of Beatty's benefits unlawfully discriminated against homosexual employees who do not have the legal option to marry.48 The court agreed with the employer and held that the denial of benefits to Beatty was not discriminatory because the Department of Personnel Administration's policy had not classified Hinman on the basis of sexual orientation.49 The court pointed out that no differences in dental benefits given to homosexual and heterosexual unmarried state employees existed.50 The court ruled that the Dental Care Act, as applied by Hinman's employer, distinguished between married and unmarried employees and that Hinman and his partner's "real quarrel is with the California legislature if they wish to legitimize the status of a homosexual partner."51

The Hinman decision was crucial to the development of gay legal protection beyond the outcome of that case alone.52 By not granting Hinman review, the California Supreme Court established a strong precedent confirming that the state's denial of partner

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45 Id. at 412 n.2. The court rejected the lower court's definition of "family partner" as follows:
Hinman identified Beatty as his "family partner" in his dental plan enrollment authorization form. In its ruling the trial court stated it adopted this nomenclature... to refer to an individual living with a State employee in a 'loving relationship' having many of the attributes of marriage without benefit of the legal status of marriage ..." We decline to use the term, as it carries a conclusory implication of family relationship, yet is not established by blood relationship or the operation of law.

46 Id. at 412.
47 Id. at 416. The court limited the eligibility of dependents under the dental plan as follows:
The negotiated terms of the state dental plan limit eligibility for benefits of family members, thereby excluding all non-spouses or other unmarried non-children, of both the opposite and the same sex.
Homosexuals are simply a part of the larger class of unmarried persons, to which also belong the employees' filial relations and parents, for example.

48 Id.
49 Id. at 416 n.8. "As we do not find any classification based on homosexuality in this legislative and administrative scheme, we need not discuss whether sexual orientation ought to be the basis of a suspect class requiring strict scrutiny under the equal protection clause." Id.
50 Id. at 416. See also supra note 40.
51 Id. at 419-20.
52 See Rivera, Queer Law, supra note 18, at 386-88 (discussion of Hinman v. Dep't of Personnel Admin., 213 Cal. Rptr. 410 (Cal. Ct. App. 1985)).
benefits to gay and lesbian employees does not violate employment policy and statutory protections forbidding discrimination on the basis of sexual orientation.

Brinkin v. Southern Pacific Transportation: Bereavement Leave Denied

Another case involving employment-linked benefits is Brinkin v. Southern Pacific Transportation Company. Brinkin worked as a railroad clerk. When his same-sex partner of eleven years died, the railroad refused to grant him funeral benefit leave. Brinkin's employer made this benefit available automatically to married employees. Brinkin's union denied his grievance and he subsequently sued his union and his employer. In federal court, Brinkin alleged that the employer's denial of funeral benefits violated his privacy rights under the California Constitution, violated the California Fair Employment Act and Housing Act, and also violated the San Francisco police code. The District Court concluded that it had no jurisdiction in the case and remanded the action back to state court.

When the case finally reached the California Court of Appeals, the court held that employers may lawfully grant to married persons benefits which are unavailable to unmarried partners. Like the courts in Hinman and Phillips, the Brinkin court upheld an employer's denial of employment-linked benefits to an employee's same-sex partner. The court classified Brinkin as a single adult male and not the immediate family member of his domestic partner Robert Reich.

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Although the gay plaintiff in Hinman did not prevail on his claim, the court's decision suggests that in the absence of an express exception, health plans that provide additional benefits for spouses of married employees but not the partners of unmarried employees would be found to violate the prohibition against marital status discrimination.

Id. at 1451.


55 Id. at 237.

56 Id.

57 Id.

58 Id.

59 Id.

60 Id. at 238.


62 Id.

63 Id. Elbin writes: "The court of appeals again decided the issue was whether Southern Pacific's action unlawfully discriminated against unmarried employees. As far as the court was concerned, Brinkin's intimate relationship with Reich was of no consequence." Id.
DESPERATELY SEEKING STATUS

Phillips v. Wisconsin Personnel Commission: Medical Benefits Denied

In Phillips v. Wisconsin Personnel Commission, the Wisconsin Court of Appeals held that an employer can limit dependent health insurance coverage without violating marital status, sexual orientation, or other gender-based provisions of the Wisconsin Fair Employment Act. Jerri-Linn Phillips brought this action against her employer after the employer denied dependent health insurance coverage to Lorri Tommerup, her lesbian companion. The court held that under Wisconsin law, Phillips had no legal relationship to Tommerup and, as a result, the law imposed no mutual duty of general support, and no responsibility for the provision of medical care on unmarried couples of any gender, as it does on married persons.

The court ruled that Phillips's insurance application was denied not because of her sexual orientation, but because the person to whom she wished coverage extended was not her spouse. As in the Hinman decision, the court placed Phillips in the same category as all unmarried heterosexual males and females. The court went further to say, "We also note in this regard that while there is, admittedly, disparate treatment in this case, not all disparate treatment is discriminatory, but it is only where similarly situated persons are treated differently that discrimination is an issue."

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64 482 N.W.2d 121 (Wis. Ct. App. 1992).
65 Id. at 123. The court relied on a Wisconsin statute as follows:
   Section 40.02(20), Stats., defines "dependent" for the purposes of the employee trust fund: "Dependent" means spouse, minor child, including stepchildren of the current marriage dependent on the employee for support and maintenance, or child of any age, including stepchildren of the current marriage if handicapped .... For group insurance purposes only, the department may promulgate rules with a different definition of "dependent" than the one otherwise provided in this section. Exercising the rule-making authority delegated to it by sec. 40.02(2), Stats., the department adopted a rule (Wis. Adm. Code sec. ETF 10.01(2)(b)) defining "dependent" for health insurance purposes as: "An employee's spouse and an employee's unmarried child who is dependent upon the employee or the employee's former spouse for at least 50% of support and maintenance ...."
66 Id. at 124 n.2.
67 Id at 123. The court upheld the Commission's interpretation of the applicable statute as follows:
   We conclude first that the commission ... could reasonably interpret the applicable statute and rule as legitimately limiting dependent health insurance coverage to employees' spouses and children without violating the marital status discrimination provisions of the act. We also conclude that the commission and the trial court correctly dismissed Phillips's claims ... because the rule applies equally to heterosexual and homosexual employees and thus does not discriminate against the latter group ... nor does the rule treat one gender differently than the other; it applies equally to males and females.
68 Id.
69 See supra notes 41-53 and accompanying text.
70 Phillips, 482 N.W.2d at 126.
71 Id.
The court's holding in the *Phillips* case followed the same rationale that the court used in *Hinman*. In *Phillips*, the judge reasoned that the disparity in treatment was the result of marital status and not sexual orientation. The courts in *Phillips* and *Hinman* refused to grant unmarried same-sex couples the same access to employment-linked benefits that married couples take for granted.

*Rovira v. AT & T: Death Benefits Denied*

In a recent New York case, *Rovira v. AT & T*, Sandra Rovira, the lesbian partner of a deceased AT & T employee sued the company for not paying survivor benefits to her and her two children under her domestic partner's employee's benefit plan. Rovira claimed that she and her own children who had all been living with the AT & T employee were entitled to benefits under the Employee Retirement Income Security Act (ERISA) and AT & T employment policy. Her complaint alleged that AT & T discriminated

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73 *Phillips*, 482 N.W.2d at 126. “[T]he fact that Phillips regards Tommmerup as her ‘spouse equivalent’ does not make her ‘similarly situated’ to a married employee in the context of a discrimination analysis.” *Id.*

74 See Melton, *supra* note 2, at 516.


76 *Id.* at 1064.

77 *Id.* The court reviewed the employee benefit plan for a definition of possible beneficiaries as follows:

As an AT & T sales manager, Forlini was covered under the Plan, an employee benefit plan covered under ERISA that provides for payment of a Sickness Death Benefit to the eligible beneficiaries of deceased employees who participated in the Plan. The Plan limits eligible beneficiaries to three categories of persons: “the spouse and the dependent children and other dependent relatives of the deceased.”

*Id.* at 1064-65.

78 29 U.S.C. §1002(8) Employment Retirement Income Security Act of 1974 provides in pertinent part: “The term ‘beneficiary’ means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.” *Id.*

79 *Id.* at 1067. In discussing AT & T's employment policies the court says:

In the Personnel Guide AT & T defines equal opportunity in general to mean “that all employment decisions are made and personnel policies are administered without discrimination on the basis of ... sexual preference or orientation [or] marital status ...” The Personnel Guide then explains that it is AT & T’s particular policy to “prohibit unlawful discrimination ... because of race, color, religion, national origin, sex, age ... in any employment decision or personnel policy. The use of a person’s sexual preference or orientation, or marital status,” on the other hand, is prohibited “as a criterion in personnel decisions.” While the personnel guide does not elaborate on the distinctions between “employment decisions,” “administration of any personnel policy” and “personnel decisions,” it states that the equal opportunity policy “applies equally to all aspects of employment at AT & T, specifically including benefits ...”

*Id.* at 1067-68. The court also mentioned AT & T’s Equal Opportunity Reference Guide as follows:

Like the Personnel Guide, the E.O. Reference Guide states that it is AT & T’s policy to “prohibit the use of a person’s sexual orientation or marital status as a criterion in personnel decisions,” ...[and] also promises that AT & T will administer “benefits and compensation ... for all employees and applicants without unlawful discrimination on the grounds of: ... marital status [or] sexual orientation.”

*Id.* at 1068.
against her by not paying a death benefit routinely paid to surviving family members.78 The District Court upheld the decision of AT & T’s Employees’ Benefits Committee to deny Rovira and her children dependent benefits under the AT & T employee benefit plan and granted AT & T’s motion for summary judgment.79 The court ruled that Rovira and her children did not fit the definition of beneficiaries as defined under either the employer’s benefit plan or as defined in an ERISA-covered pension plan.80

Gay Teachers Association v. Board of Education of the School District of New York: Medical Benefits Revisited

In another New York case, Gay Teachers Association v. Board of Education of the School District of New York,81 the plaintiff alleged that denying health benefits coverage to his domestic partner was discrimination based on marital status.82 This plaintiff argued that the employer’s denial of benefit coverage to same-sex partners of employees violated a city statute and a school board policy which prohibited discrimination based on sexual orientation.83 On appeal, the Appellate Division of the New York Supreme Court found that the trial court had improperly granted the defendant’s motion to dismiss and remanded the case.84 The outcome of this case could provide some indication as to whether New York courts are ready and willing to require public employers to provide employment-linked benefits to the same-sex partners of gay and lesbian employees.

Vermont Labor Relations Board: Medical Benefits Granted

Some gay and lesbian employees have been successful in securing benefits for their same-sex partners through administrative channels.85 The Vermont Labor Relations Board recently ruled that the University of Vermont had to provide medical benefits to the same-sex partners of employees.86 The unnamed gay and lesbian employees argued that the employer’s denial of benefits to their same-sex partners discriminated against them on the basis of sexual orientation because the University extended those benefits

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78 Id.
79 Id. at 1072.
80 Id. at 1071-72. "To establish that they have standing to bring this claim under ERISA, plaintiffs must make out a ‘colorable’ claim that they are beneficiaries under the Plan because they are or will become eligible for Sickness Death Benefits under the terms of the Plan." Id. See supra note 76 (definition of a beneficiary under AT&T’s ERISA-covered plan).
82 Id. at 1016.
83 See Domestic Partners 1991, infra note 210, at 5. See also Elbin, supra note 7, at 1079-80.
84 Gay Teachers, 585 N.Y.2d at 1016.
85 See, e.g., Bowman & Cornish, supra note 25, at 1177.
to the spouses of their heterosexual colleagues who are legally married.\textsuperscript{87} Relying on Vermont’s Fair Employment Practices Act, the Board ruled in the grievants’ favor.\textsuperscript{88} The Board ordered the University of Vermont to cease and desist from its blanket refusal to provide medical and dental plan coverage for the same-sex partners of gay and lesbian employees.\textsuperscript{89} In reaching its decision, the Board relied heavily on a nondiscrimination policy published in the University’s \textit{Officer’s Handbook}.\textsuperscript{90} The Board also cited language from the University President’s \textit{Equal Opportunity Policy Statement}.\textsuperscript{91}

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\textsuperscript{87} Id. at 207.
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\textsuperscript{88} Id. “The Fair Employment Practices Act, 21 V.S.A. §495 et seq. (“FEPA”) prohibits employment discrimination on the basis of sexual orientation.” Id. 21 V.S.A. §495 (1992) provides in pertinent part:
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  \item [(a)] It shall be unlawful employment practice, except where a bona fide occupational qualification requires persons of a particular race, color, religion, national origin, sex, sexual orientation, ancestry, place of birth, age or physical or mental condition:
    \begin{enumerate}
    \item [(1)] For any employer, employment agency or labor organization to discriminate against any individual because of race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth, or age or against a qualified handicapped individual;
    \item [(2)] For any person seeking employment or for any employment agency or labor organization to cause to be printed, published or circulated any notice or advertisement relating to employment or membership indicating any preference, limitation, specification or discrimination based upon race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth, age or handicapped condition.
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\textsuperscript{Id.}
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\textsuperscript{89} Id. at 221.
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\textsuperscript{90} Id. at 210. The Board referred to the University’s \textit{Officer’s Handbook} in pertinent part as follows:

The employer has a non-discrimination policy contained in the \textit{Officer’s Handbook} which provides, in part, that: Applicants for . . . employment . . . are hereby notified that the University of Vermont does not discriminate on the basis of . . . sexual orientation . . . in admission or access to, or treatment or employment in, its programs and activities.
\textsuperscript{Id.}
\end{flushleft}

\begin{flushleft}
\textsuperscript{91} Id. at 211. The Board relied on the University President’s statements as follows:

Employer President George Davis issued a document entitled \textit{Affirmative Action/Equal Opportunity Policy Statement, University of Vermont, September 1, 1991 - August 31, 1992}, which provided in pertinent part as follows: . . . The University of Vermont is doubly obligated to express and demonstrate its commitment to Equal Employment and Educational Opportunity for all persons in our community, regardless of irrelevant factors such as . . . sexual preference . . . [or] marital status . . . . In order to be effective, Equal Employment Opportunity will affect all employment practices including . . . compensation.
\textsuperscript{Id.}
\end{flushleft}
Citing Griggs v. Duke Power\textsuperscript{92} and Wards Cove Packing Co. v. Antonio,\textsuperscript{93} the Board relied on the "disparate impact theory"\textsuperscript{94} as the rationale for its decision.\textsuperscript{95} The Board held that the employer violated its own policy by providing health benefit coverage to the spouses of its married employees, while denying the same coverage to the same-sex partners of its gay and lesbian employees.\textsuperscript{96} The Board also held that the university's action was discriminatory because the university had not demonstrated that the practice was related to job performance or a business necessity.\textsuperscript{97} The practice had a negative disparate impact on gay and lesbian employees.\textsuperscript{98} The Board ordered the University to immediately develop and implement a revised medical and dental plan providing coverage, which would not discriminate on the basis of sexual orientation.\textsuperscript{99}

In response to this decision, Middlebury College, another Vermont school, has recently offered employment-linked benefits to the same-sex partners of the college's gay and lesbian employees.\textsuperscript{100} This type of local response suggests that administrative rulings can have immediate impact on those within the jurisdiction of the administrative

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{92} 401 U.S. 424 (1971). In Griggs the Court held that "The [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [a protected class] cannot be shown to be related to job performance, the practice is prohibited." Id. at 431.
\item \textsuperscript{93} 490 U.S. 642 (1989). In Wards Cove the Court held that once an employee has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer to prove the challenged practices business necessity. Id. at 750.
\item \textsuperscript{94} 16 V.L.R.B. at 216. "Once the employee demonstrates that the employer practice causes a disparate impact on a protected class, the practice is prohibited unless the employer can demonstrate that the practice is related to job performance and consistent with business necessity." Id.
\item \textsuperscript{95} Id.
\item \textsuperscript{96} Id. at 220.
\item \textsuperscript{97} Id. See also Elbin, supra note 7. He writes:
\begin{quote}
Employer concerns over the cost of domestic partner provisions can be divided into two categories: the natural concern over any rise in employee compensation and the fear that benefits for domestic partners will be relatively more expensive and difficult to administer than equivalent spousal benefits. . . .
\end{quote}
\begin{quote}
. . . Some employers have shied away from covering domestic partner benefits out of fear that gay employees will enroll significant numbers of partners with AIDS. Gay employees have constituted a minority of those taking advantage of domestic partner provisions, however, and gay employees using the benefits have not been singled out as costing more than non-gay employees.
\end{quote}
Id. at 1082.
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Id. at 221.
\item \textsuperscript{100} Available from the electronic Domestic Partnership Bulletin Board (domestic@tattoo.mti.sgi.com), MIDDLEBURY DP BENEFITS, August 27, 1993. "Effective September 1, 1993, Middlebury College will extend the same benefits to persons who meet the College's definition of a domestic partner that the College presently provides to spouses of employees, to the extent provided by law." Id.
\end{itemize}
\end{footnotesize}
agency; however, such decisions may have limited precedential value with other employers or in other states.101

To date, case law regarding the granting of employment-linked benefits coverage to gay and lesbian employees' same-sex partners has not been positive. However, gay and lesbian employees have made some headway getting courts to accept a broader definition of the family and thereby require employers in some circumstances to grant leave and the payment of death benefits to employees' same-sex partners.102 Hopefully this body of case law will continue to grow and eventually a legal status which would provide access to employment-linked benefits for the same-sex partners of gay and lesbian employees will emerge.103

PART II - WINDOWS OF OPPORTUNITY

Two cases which may open the way for the legal recognition of same-sex couples are Braschi v. Stahl Associates Company104 and Baehr v. Lewin.105 Neither case deals specifically with discrimination on the basis of sexual orientation in the workplace; however, each case presents a departure from rulings against granting legal status to same-sex couples.106 The Braschi decision allowed a broader definition of the family for eviction purposes.107 The Baehr case may result in a ruling which would allow same-sex marriages, at least in the state of Hawaii.109

Braschi v. Stahl Associates: Redefining the Family

In 1989, the New York Court of Appeals held that, as a matter of law, Miguel Braschi could be considered Leslie Blanchard's family member and, therefore, not be evicted from the rent-controlled apartment the couple shared for nearly a decade.110 Braschi and

101 See CHRISTINA L. KUNZ, ET AL., THE PROCESS OF LEGAL RESEARCH 331 (1992). “In thinking about the authoritative weight of administrative agency law ... regulations and decisions issued by administrative agencies are primary authority ... [but] the authoritative weight of a particular regulation or decision ultimately determined by the legislature and the courts.” Id.

102 See cases cited supra notes 28-84 and accompanying text.

103 See Otis R. Damslet, Note Same Sex Marriage, 10 N.Y.L. SCH. J. HUM. RGTS. 555 (1993). “Efforts to secure same-sex couples equal protection of the marriage laws are likely to continue until they prevail.” Id. at 593.

104 74 N.Y.2d 201 (N.Y. 1989).

105 852 P.2d 44 (Haw. 1993).

106 See cases cited supra notes 28-84 and accompanying text.

107 Braschi, 74 N.Y.2d at 211.

108 Baehr v. Lewin 852 P.2d 44 (Haw. 1993). “It is the state's regulation of access to the status of married persons, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution.” Id. at 67.

109 See Reske, infra note 151 and accompanying text.

110 Braschi, 74 N.Y.2d at 213.
Blanchard lived together as permanent life partners and homosexual lovers from 1975 until Blanchard's death from AIDS in 1986. The two men held themselves out as a couple and were regarded by others as a couple. The couple shared all obligations including a household budget, joint checking and savings accounts, and joint credit cards. Blanchard executed a power of attorney so Braschi could make all the necessary decisions for Blanchard during his illness. Braschi was the named beneficiary of Blanchard's life insurance, as well as the primary legatee and co-executor of Blanchard's estate.

After Blanchard's death, Stahl Associates commenced eviction proceedings against Braschi pursuant to New York's Rent and Eviction Regulations. Braschi initiated an action seeking a preliminary injunction to enjoin Stahl from evicting him until a court could determine his right to protection under §2204.6(d) of the Regulations. Braschi alleged that as a member of Blanchard's family, he could not be evicted. The Appellate Division lifted a preliminary injunction, allowing Braschi temporary protection under the statute. In a plurality decision on appeal the court concluded that for protection from eviction under §2204.6(d), the term "family" should not be rigidly restricted to those who have formalized their relationship by obtaining a marriage license or an adoption order. The court used a four-factor test to determine that Braschi and Blanchard's relationship was sufficient to classify Braschi as Blanchard's family mem-

111 Id. at 206.
112 Id. at 213.
113 Id.
114 Id.
115 Id.
116 Id. at 206. The court relied on the New York eviction statutes as follows:

Hence, §2204.6 of the New York City Rent and Evictions regulations, which authorizes the issuance of a certificate for the eviction of persons occupying a rent-controlled apartment after the death of the named tenant, provides, in subdivision (d), non-eviction protection to those occupants who are either the "surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant [of record]."

Id. (emphasis added).

See also 9 New York City Rent and Eviction Regulations §2204.6(d), N.Y. UNCONSOL. LAW (McKinney 1987)(rent control regulation); 9 New York City Rent and Eviction Regulations §2520.6(o) N.Y. UNCONSOL. LAW (McKinney 1987)(rent stabilization regulations).

117 Braschi, 74 N.Y.2d at 206. "Respondent argues that since the relationship between the appellant and Blanchard has not been accorded legal status by the Legislature, it is not entitled to the protections of §2204.6(d), which, according to the Appellate Division, applies only to family members within traditional, legally recognized familial relationships." Id.

118 Id.
120 See supra note 116 and accompanying text.
121 Braschi, 74 N.Y.2d at 213.
The court reasoned that the intended protection against sudden eviction "should not rest upon legal fictions or genetic history, but should be based in the reality of family life." The court also held that in the context of an eviction, "a more realistic and valid view of the family would include two adult life partners whose relationship was long-term and characterized by an emotional commitment and interdependence."

Some commentators have hailed the Braschi decision as the onset of a new direction in family law. They claim that the decision's precedential value enhances the likelihood of success in legal actions nationwide in the areas of the law where same-sex couples challenge traditional definitions of the family. Other commentators are not so optimistic about the Braschi decision's precedential value. These critics argue that although the decision was a significant victory for same-sex couples, it will carry limited and unpredictable weight outside of the context of protection from eviction under New York statutes. These commentators reason that had the Braschi court relied on equal protection grounds rather than statutory construction, the decision might have provided more support for same-sex couples.

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122 Id. at 212-13. See also Mary Patricia Treuthan, Adopting a More Realistic Definition of the "Family," 26 GONZ. L. REV. 91 (1990-91). She writes:

The court analyzed the Braschi-Blanchard relationship using a four-factor test: (1) the exclusivity and longevity of the relationship; (2) the level of emotional and financial commitment; (3) the manner in which the parties conducted their everyday lives and held themselves out to society; and (4) the reliance placed upon one another for daily family services. Applying that test to "the reality of the family life" of the pair, the court concluded that they were in fact members of a family.

Id. at 115.

123 Id. at 211 (emphasis added).

124 Id.

125 See Charles-Edward Anderson, New Nuclear Family, 75 A.B.A. J. 20 (1989) (quoting Allen Terl, chair of the ABA's Committee on the Rights of Gay People, "This decision signals the onset of a new direction of family law.").

126 See also Elbin, supra note 7, at 1086. He writes:

If society's interest in supporting marriage and the traditional family is founded on the desire to promote the 'emotional and financial commitment and interdependence' cited by the court in Braschi, then society should be just as eager to support alternative relationships. The end result would be a greater total number of stable families, both traditional and alternative.

Id.


Although Braschi has been hailed as a significant legal victory for same-sex couples, this Note suggests that the case is likely to have limited and unpredictable precedential effect, both in New York courts and nationally. The Braschi plurality was careful to establish a narrow context in which couples can be considered 'family,' emphasizing that its definition of that term was fashioned to further the legislative purposes underlying §2204.6 (d).

Id. at 381.

128 Id. at 361.

129 Id. at 384.
The test of Braschi's precedential value in securing additional protection for same-sex couples is yet to be seen. The court's willingness in Braschi to sanction a broader definition of the family, even if only in a limited context, shows the judiciary's understanding of the need for the recognition and protection of same-sex couples.\textsuperscript{10} If more courts are willing to accept this broader definition of the family in situations other than eviction cases, same-sex couples could be one step closer to securing benefit parity in the workplace.

\textit{Baehr v. Lewin: Redefining the Family Revisited}

On December 17, 1990, three couples applied to the State of Hawaii's Department of Health for marriage licenses.\textsuperscript{131} The Department of Health denied the applications because the members of each couple were of the same sex.\textsuperscript{132} The couples subsequently filed an action against the Department of Health alleging that the Hawaii marriage statute is unconstitutional insofar as it is construed and applied to justify the Department's refusing to issue a license on the sole basis that the applicant couples are of the same sex.\textsuperscript{133} The couples also alleged that they had met all marriage contract requirements and provisions under the Hawaii statute,\textsuperscript{134} except that each couple was made up of applicants...

\textsuperscript{10} See David Link, Notes and Comments, \textit{The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples}, 23 LOY. L.A. L. REV. 1055 (1990). This commentator discusses the need for the courts to be more sensitive to the needs of same-sex couples as follows:

The New York court in Braschi v. Stahl Associates utilized the most immediate interim solution to the marriage problem—it recognized same-sex couples as de facto family members. This approach offers several advantages. Particularly in cases like those in New York, where the party has not only suffered the anguish of the loss of a life partner, but must also face an eviction proceeding with the prospect of a dramatically higher rent piled on to the already existing trauma of being forced to move out of the home he and his partner shared, sometime for more than decade—in such cases a court's sense of equities must and can run in favor of this survivor.

More important, though, is that it is a method by which the court can, if it wishes, open its eyes to the facts of the relationship. Courts which permit a de facto analysis allow the facts effect. Such courts are able to see that homosexual couples are born into a system that was not designed to be fair to them.

\textit{Id.} at 1145.

\textsuperscript{131} 852 P.2d 44, 49 (Haw. 1993).

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} HAW. REV. STAT §572-1(3) (1992) provides that "the man does not at the time have any lawful wife living and that the woman does not at the time have any lawful husband living" (emphasis added); HAW. REV. STAT. §572-1(7) provides that "the marriage ceremony be performed in the State by a person with a valid license to solemnize marriages and the man and the woman to be married and the person performing the marriage ceremony be all physically present at the same place and time for the ceremony" (emphasis added). See also HAW. REV. STAT. §572-6 (1992)(This section of the statute makes no reference to the fact that the parties must be man and a woman.).

\textsuperscript{134} Baehr, 852 P.2d at 48-49.

\textsuperscript{135} See supra note 133.
of the same sex. Finally, the couples alleged that the Hawaii Department of Health violated their constitutional rights of privacy, equal protection, and due process as guaranteed under the Hawaii Constitution.

In a highly-publicized and controversial plurality decision the Hawaii Supreme Court reversed the Circuit Court's decision to dismiss the case for failure of the plaintiffs to state a claim on which relief could be granted. In a two-part holding, the court concluded that the Hawaii Constitution does not guarantee a fundamental right to persons of the same sex to marry. The court also concluded that Hawaii's marriage statute implicitly restricts the marital relation to male-female couples and thereby establishes a sex-based classification which is subject to strict scrutiny in an equal protection challenge under the Hawaii constitution. The court stated specifically that "on its face and as applied, HRS §572-1 denies same-sex couples access to marital status and its concomitant rights and benefits, thus implicating the equal protection clause of article I section 5 [of the Hawaii Constitution]."

Writing for the plurality, Judge Levinson compared the Baehr case to Loving v. Virginia in which the U.S. Supreme Court struck down laws banning interracial

136 Baehr, 852 P.2d at 44. "Applicants received a letter from the Department Director stating that the law of Hawaii does not treat a union between members of the same sex as a valid marriage." Id.
137 HAW. CONST. art. I, §6 provides: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."
138 HAW. CONST. art I, §5 provides: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."
139 Id.
140 Baehr, 852 P.2d at 44. The court held that sex is a "suspect category" for the purposes of equal protection analysis under article I §5 of the Hawaii Constitution, therefore Hawaii Revised Statute §572-1 is subject to the "strict scrutiny" test. Id. at 48. Under the "strict scrutiny" test the statute will be presumed to be unconstitutional unless it can be shown that the statute's sex-based classification or interpretations are justified by compelling state interests and that the statute is narrowly drawn to avoid unnecessary abridgements of constitutional rights. Id.
141 See generally Damslet, supra note 103 (discussion of the lower court's opinion in Baehr v. Lewin).
142 Baehr, 852 P.2d at 48.
143 See supra notes 137-38.
144 Baehr, 852 P.2d at 67.
145 See supra note 133.
146 See supra note 140.
147 Id.
148 Baehr, 852 P.2d at 67.
149 See supra note 133.
150 Baehr, 852 P.2d at 67.
marriages. "With all due respect to the Virginia courts of a bygone era," Judge Levinson wrote, "we do not believe that trial judges are the ultimate authority on the subject of Divine Will, and, as Loving amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order." The Hawaii high court remanded the decision and placed a heavy burden on defendant Lewin to overcome the presumption that HRS §572-1 is unconstitutional. To prevail, the defense must demonstrate that the statute furthers compelling state interests and is drawn narrowly enough to avoid unnecessary abridgments of constitutional rights. In the past, Hawaii courts have allowed only public safety statutes past this strict test.

On remand, this decision may guarantee same-sex couples the constitutional right to marry. The full impact of the Baehr decision will not be known until the case completes the appellate process. William Rubenstein, director of the ACLU's Lesbian and Gay Rights Project, said that the Baehr ruling may be persuasive in other cases and also may have practical effects outside of Hawaii because state laws generally provide that "if you're married in one state you're married in another." The legal right to marry would afford same-sex couples the requisite legal status for coverage of spouses and dependent children under employment-linked benefit plans.

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152 Baehr, 852 P.2d at 62.
153 Baehr, 852 P.2d at 63.
154 John C. Lewin was the defendant-appellee in his official capacity as Director of the Department of Public Health, State of Hawaii. Baehr, 852 P.2d at 48.
155 Baehr, 852 P.2d at 68.
156 Id.
158 See Reske, supra note 151, at 28.
159 Id.
160 Id. In general, marriages that are valid when contracted are valid everywhere with certain exceptions. See, e.g., Mazzolini v. Mazzolini, 155 N.E. 2d 206 (Ohio 1958). The court held that "[t]he policy of the law is to sustain marriages, where they are not incestuous, polygamous, shocking to good morals, unalterably opposed to a well defined public policy, or prohibited." Id. at 208. See also In re Loughmiller, 629 P.2d 156 (Kan. 1981). The court held:

The general rule with regard to the recognition of marriages solemnized elsewhere is that if the marriage is valid where contracted, it is valid everywhere. Exceptions to that rule are (1) polygamous marriages incestuous according to the principles of Christendom and (2) marriages prohibited by the forum state for public policy reasons.

Id. at 158.
161 See Beattie, supra note 53, at 1415. He writes:

The institution of marriage, for those who chose to enter it, affords special legal and social advantages. The United State Supreme Court recognizes a fundamental right to marry, and courts carefully scrutinize state actions that may impinge on that right. Thus married couples can be secure in the knowledge that the legal system supports and encourages their relationships.
In an effort to give their relationships at least partial legal status, same-sex couples have been taking advantage of any available legal alternatives which guarantee couples some of the rights and benefits automatically granted to married couples. In addition to negotiating and litigating with government agencies and private businesses to have their relationships recognized through the granting of employment-linked benefits to same-sex partners, some couples have attempted to formalize their relationships by executing contracts and wills. Others have lobbied for legally-recognized relationships via domestic partnership, guardianship, and adult adoption. Still other couples opt to affirm their relationships in symbolic civil or religious ceremo-

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163 See LESBIANS, GAY MEN, AND THE LAW, supra note 25 at 430-31. One commentator writes: [Gay people have endeavored to create or receive some of the rights and benefits that are automatically enjoyed by married couples [which] include: rights to spousal shares of marital property upon death of one partner; tax benefits (including joint income tax returns, dependency deductions, gift tax exemptions, and exemptions for alimony and property settlements); rights in tort law (including emotional distress, wrongful death actions, and loss of consortium); rights in criminal law (including immunity from compelled testimony and the marital communication privilege); nonexclusion under zoning laws; visitation privileges in hospitals and other institutions; authority to make decisions for an ill spouse; employee benefits for spouses (including health insurance, medical leave, and bereavement leave); government benefits (including Social Security and veterans payments to spouses, workers’ compensation, [unemployment compensation] for those whose spouses move for job-related reasons); lower fees for married couples (including automobile and life insurance, family travel rates, and family memberships); immigration benefits; and draft exemptions.

Id.


Given the legal, economic, and psychological benefits of marriage, it is not surprising that homosexual couples who live in committed relationships would also wish to procure these benefits. A number of homosexual couples have tried to effectuate a legal marriage, but to date no court has recognized such a union.

Id. See also Beattie, supra note 53, at 1145.

165 See cases and administrative decisions cited supra notes 28-101 and accompanying text.

166 See infra notes 172-186 and accompanying text (discussion of how same-sex couples have used cohabitation agreements and estate planning documents to formalize their relationships).

167 See infra notes 203-211 and accompanying text (discussion of how domestic partnership ordinances have created some legal rights for same-sex couples).

168 See infra notes 187-192 and accompanying text (discussion of guardianship rights of same-sex partners).

169 See infra notes 193-202 and accompanying text (discussion of adult adoption as an option for same-sex couples to formalize their relationships).
nies. Nevertheless, these methods, jointly or severally, do not provide a result that guarantees same-sex couples a legal status comparable to that of marriage.

Some same-sex couples use contracts such as cohabitation agreements to formalize their relationships. Marvin v. Marvin was the landmark California decision which upheld the validity of cohabitation contracts. The Marvin court held that two adults who cohabit and engage in sexual activity are as competent as anyone else to contract concerning their earnings and property rights. Some courts still object to enforcing cohabitation contracts if sexual relations are part of the consideration on which the contract is based. But in general, courts have been willing to uphold cohabitation contracts between same-sex partners as long as they conform to state statutory and case law requirements.

Cohabitation agreements are a valuable tool when same-sex couples set up property rights or other elements of their lives for which the couple wishes to contract. Courts also frequently use cohabitation agreements as evidence to establish the length and commitment of a same-sex relationship. However, a cohabitation agreement does not

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170 See Rivera, Queer Law, supra note 18, at 373. She writes:

Many gay couples want to be legally married. They desire the symbolism and recognition of the marital relationship, and the financial and legal benefits enjoyed by married couples. However, marriages between persons of the same sex are not legally recognized anywhere in the United States. While many gay couples have been "married" in religious ceremonies, . . . these ceremonies do not effect the couple's legal status.

Id.

171 Id.

172 See Lisa R. Zimmer, Note, Family, Marriage, and the Same-Sex Couple, 12 CARDOZO L. REV. 681, 695-97 (1990). BLACK'S LAW DICTIONARY 260 (6th ed. 1990) defines: "Cohabitation. To live together as man and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations." Id. "Cohabitation agreement. Contract between a man and a woman who are living together in contemplation of sexual relations and out of wedlock, relating to the property and financial matters of the parties." Id.

173 134 Cal. Rptr. 815 (Cal. 1976). The Marvin case set the standard that contract theory can govern the breach of a cohabitation agreement when a meretricious relationship is not the sole consideration for the agreement. Id. at 819.

174 See Zimmer, supra note 172, at 695.

175 Marvin, 134 Cal. Rptr. at 831.

176 See Same Sex Couples and the Law, supra note 162, at 1624. "Modern courts have shown a willingness to enforce explicit or implied agreements between unmarried heterosexual cohabitants defining the terms of their relationship, so long as the consideration for the contract is severable from the sexual aspect of the relationship." Id.

177 See Zimmer, supra note 172, at 695-97. "Carefully drafted contracts, conforming to state statutory and case law requirements and executed by same-sex cohabitators, can resolve the issue of partnership rights." Id. at 696.

178 Id.

179 See Same Sex Couples and the Law, supra note 162, at 1611. "Generally, courts that have protected the rights of a gay and lesbian couple have required proof that the relationship is sufficiently stable and close to constitute a family." Id.
function like a marriage license.\textsuperscript{180} Even an artfully drafted cohabitation agreement is likely to have little influence in the battle to secure employment-linked benefits for same-sex partners.\textsuperscript{181}

Same-sex couples have succeeded in providing inheritance rights for partners with wills and other estate planning documents.\textsuperscript{182} Without this kind of explicit protection, same-sex partners have no intestate succession rights\textsuperscript{183} and courts are reluctant to rule for same-sex partners over family members.\textsuperscript{184} Some same-sex couples are also executing durable powers to designate who will make routine medical care decisions, act as a guardian should one partner become incapacitated, select various treatment options, or even authorize the termination of life support.\textsuperscript{185} Again, without this kind of explicit designation as to who is authorized to make these decisions, courts are likely to allow immediate family members to make these important decisions when the authority of an undesignated same-sex partner is challenged.\textsuperscript{186}

\textsuperscript{180} See Zimmer, \textit{supra} note 172, at 697. She writes:

But because this ... contract is not recognizable by law as a marriage contract, it fails to address the problem of creating a legal status for same-sex couples. Rights should not be premised on subordinating the same-sex relationship, they should arise out of that relationship in the same way that marriage rights arise out of the heterosexual relationship.

\textsuperscript{181} Id.

\textsuperscript{182} See Zimmer, \textit{supra} note 172, at 696. "[U]nless a same-sex couple explicitly outlines their intentions upon death in contract or wills, they cannot establish inheritance rights." \textit{Id.} See, e.g., OHIO REV. CODE ANN. §2105.15 (Anderson 1990) which provides in pertinent part:

A person of sound mind and memory may appear before the probate judge of his county and in the presence of such judge and two disinterested persons of such person's acquaintance, file a written declaration declaring that, as his free and voluntary act, he did designate and appoint another, stating the name and place of residence of such person specifically, to stand toward him in the relation of an heir at law in the event of his death. ... The rules of inheritance will be the same between him and the relations by blood of the declarant, as if so born.

\textsuperscript{183} Id.

\textsuperscript{184} See Same Sex Couples and the Law, \textit{supra} note 162, at 1625.

\textsuperscript{185} Id.

\textsuperscript{186} Id. See Bowman & Cornish, \textit{supra} note 25. They write:

Many domestic partners would want their partner to be able to make medical decisions for them in the event of their incapacity. In cases where an individual cannot make her wishes known, the court will appoint a guardian to make decisions on her behalf. Typically, courts will favor a spouse or blood relative as guardian. By executing a durable power of attorney, a domestic partner can help to assure that her wishes will be followed.

\textsuperscript{186} Id. at 1209.
One of the leading cases in this area is *In re Guardianship of Kowalski*. Sharon Kowalski suffered severe brain injuries in an automobile accident. These injuries left her seriously disabled and in need of constant care. At the time of her accident, Sharon was living with her lesbian lover Karen Thompson. The Minnesota Court of Appeals reversed the lower court's decision and named Karen Thompson as Sharon's legal guardian. The court legitimized the relationship by calling the couple “family of affinity.”

Adult adoption is another method same-sex couples have used in their attempts to legitimize their relationships. Some same-sex couples have relied on adult adoption to establish property and inheritance rights. Usually the partner without inheritance rights in a former family acts as the adoptee, while the partner who already has inheritance rights acts as the adopter. This way one inheritable relationship is created without destroying another. Currently, every state recognizes the inheritance rights of an adopted child of an unmarried intestate decedent over those of the decedent’s non-immediate blood relatives. In addition, adoption becomes final at the moment of execution and provides a secure mechanism for same-sex couples to assign property to partners. The availability of adult adoption varies from state to state. Some courts have refused to grant adoption in cases where the parties to the adoption share a sexual

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188 Id. at 791.
189 Id.
190 Id. at 797.
191 Id. In determining Karen Thompson’s role as Sharon’s guardian, the court held:
   All the medical testimony established that Sharon has the capacity reliably to express a preference in this case, and she has clearly chosen to return home with Thompson if possible. The choice is further supported by the fact that Thompson and Sharon are a family of affinity, which ought to be accorded respect.
192 Id.
194 Id.
195 Id. at 689.
196 Id.
   Only spouses or specific blood-related family members can be designated as beneficiaries of social security survivor benefits; lesbian or gay partners of social security recipients cannot receive survivor benefits upon the death of the recipient. Furthermore, because a lesbian or gay relationship is not legally recognized, lesbians and gay men can not even designate their partners as beneficiaries. For example, even where the partner of a gay man, who subsequently dies of AIDS-related complications, is the primary caretaker during his partner’s illness, the surviving partner is still denied survivor benefits.
198 See Same Sex Couples and the Law, *supra* note 162, at 1626.
199 Id.
relationship, while others have ruled that when statutes do not specifically limit adoption to children the sexual element of the relationship is irrelevant. Most commentators agree that adult adoption does not provide the appropriate method to achieve the legal status sought by same-sex couples. Adult adoption and all these other legal mechanisms do not eliminate the need for a more comprehensive means by which same-sex couples can define partners’ rights.

A legislative mechanism which can serve to legitimize same-sex relationships is domestic partnership ordinances. Local lawmakers have instituted these statutory provisions in many municipalities and also in four states. These laws require couples to register with the designated local office as domestic partners. A written application is required on which the couple is asked to describe the details of their relationship.

200 See Zimmer, supra note 172, at 691 n.49-50.
201 Id.
202 In response to the tumultuous changes in the American family, a legal redefinition of both family and marriage must follow. Courts can no longer accept “fictitious legal distinctions” to draw arbitrary lines between who qualifies as a legal family and who does not. . . . Because the state has not established legal mechanisms to deal specifically with same-sex couples, it must open marriage to them. Their alternative legal options cannot survive.
203 Id. at 706.
204 See also Same Sex Couples and the Law, supra note 162.

In making a [determination of the status of a gay or lesbian relationship], . . . courts have considered factors such as interdependence and the quality of the relationship. Although preference to an outright rejection of their claims, this requirement places an unjust burden on gay men and lesbians in long-term relationships because, unlike their married heterosexual counterparts, they do not have the automatic protection through marriage.

206 See Lesbians, Gay Men, and the Law, supra note 25.
207 Id.
208 See Link, supra note 130, at 1147.
209 Id. at 1147. One commentator used the Los Angeles domestic partnership ordinance as a model as follows:

The definition of domestic partnership proposed for the city of Los Angeles is typical:

Domestic partners are two persons who declare that:

(1) they currently reside in the same household, and have been doing so for the previous 12 months;
(2) they share the common necessities of life;
(3) they have a mutual obligation of support, and are each other’s sole domestic partner;
(4) they are both over 18 years of age and are competent to contract;
(5) neither partner is married;
These application forms typically require more detailed information than is required on a marriage license application. The benefits resulting from a couple registering under a domestic partnership law are very statute-specific. Under some domestic partnership ordinances access to employment-linked benefits are guaranteed for specific categories of employees. According to one commentator:

There is no question that domestic partnership begins as an inferior solution to the marriage problem, a "separate but equal" status for yet another group of people disenfranchised from the majority. But equally important ... is the fact that domestic partnership is a method by which gay and lesbian couples may declare publicly their intentions and obligations toward one another in a legally significant way.

(6) neither partner is related by blood to the other;
(7) they agree to notify the appropriate agency within 30 days if any of the above facts change.

Id.

A marriage license application issued by the Portage County Court of Common Pleas requires that the parties pay a $45.50 non-refundable fee; abide by a five day waiting period; both be 18 years of age; provide parental consent if either party is under 18; prove residence in the county of one of the parties; and provide evidence of the termination of any prior marriage if any.

A domestic partnership statement from the University of Chicago requires that the parties attest to the fact that they are each other's sole domestic partner and intend to remain so indefinitely, are of the same sex and neither is married, are at least 18 years old, are not related by blood to a degree of closeness that would prohibit marriage in the state in which they reside, are jointly responsible for each other's common welfare and shared financial obligations as designated by three of the following: domestic partnership agreement, joint mortgage or lease, designation of partner as life insurance beneficiary, designation of domestic partner as will beneficiary, durable property and health care powers of attorney, joint ownership of motor vehicle, joint checking account, or joint credit account. The couple must also promise to notify the University if there is any change in status of the domestic partnership such as residence change or partnership termination.

See Link, supra note 130, at 1147. "Because domestic partnership is not a marriage, it does not automatically entitle the partners to established statutory benefits." Id. He also writes:

The contract of domestic partnership can be used in a variety of contexts: to secure employment benefits; as a private contract between the partners; to qualify partners for the family discount on insurance policies, or at private institutions such as health clubs. Regardless of the context in which such contracts would be used the partners have created documentary evidence of their relationship.

Id.

See, e.g., DOMESTIC PARTNERS/NON-TRADITIONAL FAMILY RECOGNITION IN CAMPUS BENEFIT POLICIES SURVEY, Lesbian and Gay Families Project of the National Gay and Lesbian Task Force Policy Institute, (1990); Loralie Van Sluys, Domestic Partners and Employee Benefits, Hewitt Associates (1991) [hereinafter Domestic Partners 1991]. See generally Bowman & Cornish, supra note 25. See also Available from the electronic Domestic Partnership Bulletin Board (domestic@tattoo.mti.sgi.com) NEWEST COMPANIES LIST, August 19, 1993 (complete listing of all public and private sector United States and Canadian employers which provide domestic partner benefits to employees); Atlanta recognizes gay couples, but no benefits, THE GAY PEOPLE'S CHRONICLE, July 9, 1993, at 1. "The city government will officially recognize unmarried couples who live together, including those of the same sex. But a second measure extending benefits to city workers' partners was vetoed by Mayor Maynard Jackson." Id.

Link, supra note 130, at 1149.
If same-sex couples comply with all the legal alternatives described in this section, they will still not hold a legal status that provides them all the benefits and entitlements that a marriage provides. Without some kind of blanket statutory or common law status for same-sex couples, this piecemeal approach to common law and statutory rights leaves these individuals at the mercy of sometimes insensitive judges and law-makers. One commentator has said,

Society must recognize that lesbians and gay men have the same overriding need and concern for the protection of family members as do married heterosexual couples ... consequently, the goal of the gay and lesbian community today is to expand the meaning of 'family' so that lesbian and gay families are protected in the same ways as heterosexual families.

PART IV: REALITY CHECK

Same-sex couples make up a growing percentage of the families in the United States. In 1988, U.S. census officials estimated that there were 1.6 million unmarried same-sex couples living in the United States. All over the world, these couples are actively pushing the legal mechanisms available to gain recognition for their relationships.

For example, Elizabeth Clinton, a nurse in a Canadian hospital, recently brought an action before the Ontario Human Rights commission when her employer denied health benefits coverage to her same-sex partner, Laurie Ann Mercer. When asked why the couples decided to go ahead with the action Laurie said, "We didn't go into it because

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212 See supra note 163 and accompanying text. See also Same Sex Couples and the Law, supra note 162. A specific example would be as when a will fails. One commentator writes:

Intestate succession laws generally provide that a portion or all of a deceased's assets go to the surviving spouse. Such statutes are based on fairness to the surviving spouse as well as the desire to prevent a surviving spouse from becoming a public charge. These rationales apply to domestic partners as well. ... But cities clearly would be preempted by state law from passing an intestate succession law to protect surviving domestic partners.

Id. at 1208.

213 See supra notes 11-16 and accompanying text.

214 See Post, supra note 197, at 748.

215 See Bowman & Comish, supra note 25, at 1165 n.5. See also Patrick Rogers, How Many Gays are There?, NEWSWEEK, February 15, 1993, at 46. "Most recent studies place gays and lesbians at somewhere between 1 and 6 percent of the population." Id.

216 Id.

217 See cases cited supra notes 28-84 and accompanying text.

we’re gay activists... *we did it because we wanted to set things up for our lives.*” Like many gay and lesbian couples, Laurie and Elizabeth have made the decision to set their lives up as a family. They bought a condominium together in 1988. They intermingled their financial affairs, shared credit card accounts, and executed wills that name each other executrix and major beneficiary. They even hope to bring a child into their family.

Many same-sex couples are being denied the basic rights married couples take for granted just because they are both women or both men. This couple was successful in arguing that Laurie was entitled to the same spousal benefits that heterosexual couples employed by Elizabeth’s employer receive. The Commission’s board of inquiry accepted the couple’s argument that the only difference between Elizabeth and Laurie’s relationship and a heterosexual marital or common law relationship is that one of them is not male. Unfortunately, many same-sex couples do not win this battle.

Active legal discussion of this issue began in the 1970’s, and at that time one commentator wrote:

> Because this area of the law is so young and so fragmented it has not been possible to find broad rules which cut across all the areas involved. ... [and] at a minimum, judges ... [and] attorneys need to examine their homophobic attitudes and the many popularly held myths and stereotypes ... [and] only after such a reevaluation of judicial and societal attitudes can our legal system begin to achieve a fair and equal application of the laws to all persons.

This discussion has continued and in a Spring 1993 law review article another commentator wrote:

> Efforts to secure same-sex couples equal protection of the marriage laws are likely to continue until they prevail. [L]itigation of the issues enters its

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219 Id. (emphasis added). In an interview the couple also said that they considered themselves “relatively quiet, apolitical women” and found it somewhat daunting to take on such a big corporation. *Id.*

220 *Id.*

221 *Id.*

222 *Id.*

223 *Id.*

224 See Melton, *supra* note 2, at 516.

225 See Edwards, *supra* note 218. Mark Leshner, a crown attorney who won full family benefits for his live-in partner in a similar case a year ago, applauded the courage of this couple and criticized the government for not legislating that all workers in the province should be entitled to employee benefits for their partners, “regardless of their sexual orientation. *Id.*

226 *Id.*

227 See Rivera, *supra* note 164, at 948.
third unsuccessful decade . . . [and] given the importance of marriage as an institution . . . the validity of same-sex marriage is crucial to any consistent understanding of equal protection of the laws and the freedom all persons should be able to expect in making decisions about their own lives.228

CONCLUSION

Not until 1967,229 and after an extended legal battle could inter-racial couples enjoy the full legal benefits of marital status anywhere in the United States.230 Today, same-sex couples face similar legal obstacles. An old Chinese proverb philosophizes, if a canal is dug, water will fill it.231 This means that when the time is right, things will happen easily. For the time being, it appears that same-sex couples will have to keep “digging” and continue their battle to convince judges and legislators that they are entitled to a legal status that will grant them all the benefits, including employment-linked benefits, that legally-married couples enjoy.

American families rely on employment-linked benefits. These benefits are part of an employee’s total compensation package. They also provide families the security of health care, retirement and other financial and emotional support. Same-sex couples should be legally entitled to these same securities for their families.

The time has come for courts and legislatures to pull the legal status that same-sex couples seek out of the tangle of emotional issues and prejudices which have often caused judicial and legislative gridlock concerning decisions affecting same-sex couples. The time has come for the judiciary and the legislature to get in step with reality and recognize that an American couple doesn’t only have to be one man and one woman. The canal is ready.

SUE NUSSBAUM AVERILL

228 See Damstet, supra note 103 at 593 (emphasis added).
229 Supra notes 151-53 and accompanying text.
230 See Trosino, supra note 153, at 93-94.