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Empire State Pride Agenda, New York's lesbian and gay lobby and PAC

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Cover Page Footnote

Ms. Post wishes to thank Paula Ettlbrick of the Lambda Defense and Education Fund and Stephanie Blackwood of Blackwood and Friends Public Relations for supplying vital primary information.

THE QUESTION OF FAMILY: LESBIANS AND GAY MEN REFLECTING A REDEFINED SOCIETY

Libby Post *

A cursory glance at the lesbian and gay rights struggle suggests that the push for civil rights and bias-related violence legislation and the need for increased AIDS funding are the cornerstone issues in today's urban centers. While these issues certainly are and will continue to be of crucial concern to all members of the lesbian and gay community, the cutting edge issue of the lesbian and gay political agenda is the battle for domestic partnership rights.

The absence of both civil rights and domestic partnership rights which are afforded to society in general results in unequal treatment of an entire class of people. Lesbians and gay men are routinely denied jobs, housing and economic benefits such as health care, insurance, public accommodations and equal credit treatment. Similarly, these individuals may be fired from a job or evicted from an apartment based solely upon their sexual orientation. Many have argued that this discriminatory treatment can be attributed, at least in part, to society's underlying fear and hatred of lesbians and gay men. This fear, known as homophobia,¹ is predicated upon an unfounded stereotyping of lesbians and gay men as depressed, mentally ill, and unsuitable to family life; some have even been labeled child molesters.²

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Ms. Post wishes to thank Paula Ettelbrick of the Lambda Defense and Education Fund and Stephanie Blackwood of Blackwood and Friends Public Relations for supplying vital primary information.

1. Homophobia is the irrational fear of homosexuality or homosexuals. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 578 (1989). It has been said that homophobia's "power is great enough to keep ten to twenty percent of the population living lives of fear (if their sexual identity is hidden) and lives of danger (if their sexual identity is visible) or both. Its power is great enough to keep the remaining eighty to ninety percent of the population trapped in their own fears." SUSAN PHARR, HOMOPHOBIA: A WEAPON OF SEXISM 1-2 (1988).

2. ROBERTA ACHTENBERG, PRESERVING AND PROTECTING THE FAMILIES OF LESBIANS AND GAY MEN 2 (Nat'l Center for Lesbians' Rights, San Francisco, Cal.,

Coupled with the assumption that the world is and must be heterosexual,³ homophobia thus limits the definition of "family" and places it within a heterosexual framework.

Over the past twenty-two years, as the lesbian and gay rights movement has matured, the political battle has broadened from a struggle for social acceptance and recognition to a fight for passage of domestic partnership legislation. Society must recognize that lesbians and gay men have the same overriding need and concern for protection of family members as do married heterosexual couples. This has led lesbians and gay men to challenge the current narrow legal definition of the word "family." Consequently, the goal of the lesbian and gay community today is to expand the meaning of "family" so that lesbian and gay families are legally protected in the same ways as heterosexual families.

I. The "Family" Today

The traditional notion of the family as consisting of mother, father, a couple of children and a pet does not reflect the reality of today's diverse family structures. In fact, the heterosexual two-parent, breadwinner-father and homemaker-mother family is now the exception to the rule.⁴ Furthermore, the number of married-couple households, consisting of an "Ozzie and Harriet" style family, decreased from sixty-one percent of all households in 1960 to twenty-seven percent in 1988.⁵ In 1991, only twenty-two percent of America's 91.1 million households fit this description.⁶ Increasingly, families are comprised of diverse membership, lifestyles and living arrangements including extended families, foster parents, single parents and step-parents. Currently, 4.6 percent of all U.S. households are comprised of unrelated people who share the same residence, an increase of one percent from 1980.⁷

While household composition has changed rapidly over the past ten years, society and the law's view of what constitutes a family has not

1990). "Review of the literature analyzing prejudice against lesbian and gay parents reveals some common themes. They are assumed to be psychologically and sexually maladjusted. It is believed that they will attempt to convert their children to homosexuality and may sexually exploit children left in their care." *Id.*

3. This notion has been termed "heterosexism." See PHARR, *supra* note 1, at 16.

4. Martha Farnsworth Riche, *The Future of the Family*, AM. DEMOGRAPHICS, Mar. 1991, at 44.

5. *Id.*

6. *Id.*

7. Jan Larson & Brad Edmondson, *Should Unmarried Partners Get Married Benefits?*, AM. DEMOGRAPHICS, Mar. 1991, at 47.

reflected that change. Thus, lesbians and gays, although living in the same residence with a partner and perhaps children, are seen as people without families. The fact that many lesbians and gay men are involved in a long-term relationship, and as such, share financial responsibilities, raise children together, care for each other during illness and grieve at the death of their partners, is of seemingly little consequence given the lack of recognition, acceptance and protection provided by current law.

The heterosexual marriage contract conveys a legal status to a man and woman and any subsequent children. As a result of the marriage contract, the law traditionally defines family as a husband and wife team, with or without children. Despite the fact that the law does not recognize marriage between two people of the same sex, lesbians and gay men have historically created their own families. These families have included the other partner, children — either adopted, or from a previous heterosexual marriage, or from lesbians bearing children on their own — parents and siblings. Whatever the configuration, lesbian and gay families reflect the same love and commitment as their heterosexual counterparts.

In 1989, the New York Court of Appeals recognized non-traditional family units in the context of rent-control.⁸ In *Braschi v. Stahl Assocs. Co.*,⁹ the court held that the term “family,” as used in the non-eviction provision of the rent-control laws, included an unmarried lifetime gay partner and not just persons related by blood or law.¹⁰ Mr. Braschi, the gay partner of the tenant in a rent-controlled apartment, was granted a preliminary injunction to stay an eviction proceeding after his partner died.¹¹ In its opinion, the court stated that the law allowing rent succession “should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.”¹²

According to the court of appeals, this “reality” could be assessed by the following criteria: degree of emotional commitment and interdependence; interwoven social life (holding oneself out and thinking of oneself as part of a couple/family, and visiting with each partner’s family of origin); financial interdependence (sharing household expenses and duties, joint arrangements such as checking and savings,

8. *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

9. *Id.*

10. *Id.* at 211-12, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.

11. *Id.* at 206, 543 N.E.2d at 50-51, 544 N.Y.S.2d at 786.

12. *Id.* at 211, 543 N.E.2d at 53, 544 N.Y.S.2d at 788-89.

power of attorney, life insurance, wills, etc.); cohabitation; longevity; and exclusivity.¹³

Although the *Braschi* decision was heralded by lesbian and gay rights activists as a victory, the factors used by the court of appeals have only been applied in the limited context of family succession rights regarding rent-controlled and rent-stabilized apartments. For example, efforts to extend the *Braschi* definition of family to a visitation situation were refused when the New York Court of Appeals denied visitation rights to a woman whose "live-in relationship" with the child's mother had ended.¹⁴ In denying visitation rights, the court held that although the plaintiff "apparently nurtured a close and loving relationship with the child, she is not a parent within the meaning of DRL § 70."¹⁵

II. Laying the Groundwork for Change: Some Examples

The battle for lesbian and gay domestic partnership rights spans a wide range of issues, from access to family health insurance plans, to bereavement and child-care leave, to health-care proxies and obituary listings of survivors. The establishment of new rights in these areas for lesbians and gay men is crucial because lack of equal treatment can, and often does, result in a lower economic base and standard of living and, as a result, a lesser quality of life.

A. Obituary Survivor Listings

While newspaper managements' refusal to list lesbian and gay survivors in obituaries may not have a direct economic impact on lesbians or gay men, this policy is a poignant example of the disparate treatment afforded lesbians and gay men. One could argue that there is no more fundamental statement of "family" than the public recognition which an obituary survivor listing gives to those who shared a life with the deceased.

Imagine two couples. One heterosexual. One lesbian or gay. Both have a terminally ill partner. The healthy partner cares for the ill partner in a thousand large and small ways and grieves at the inevitable loss of the partner to death.

For both couples, the newspaper obituary chronicles the life, civic involvements, church affiliation and other activities and interests of the deceased partner. For the heterosexual couple, the surviving

13. *Id.* at 212-13, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

14. *In re Allison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991).

15. *Id.* at 655, 572 N.E.2d at 28, 569 N.Y.S.2d at 587.

spouse is listed. For the lesbian or gay couple, the surviving partner is not.

Editorial boards have responded to the uproar in the lesbian and gay community concerning this policy by claiming that problems of "logistics" preclude listing surviving partner information. Questions as to whether the "nature" of the partnership between the deceased and the surviving partner should be revealed, and whether the "family" of the deceased would object to the listing, continually act as a smoke screen for what many lesbians and gay men perceive as an underlying ambivalence, and even homophobia, of the newspapers' management in acknowledging a lesbian or gay couple as a family.

One newspaper which initially refused to list lesbian and gay survivors, the *Albany Times-Union*, eventually changed its policy — but not until a leading member of the lesbian and gay community died¹⁶ and strong protest from staff members of the paper and the community at large, was voiced upon the newspaper's refusal to list the surviving partner.

B. Employment Benefits

Exclusion of survivors from obituary listings is one small but concrete example of the unequal treatment lesbians and gays receive as a result of the lack of legal recognition of their status as a family. Another example of such treatment is the disparity between employment benefits offered to heterosexual and homosexual couples. Married heterosexuals are routinely offered family-based employment benefits such as health insurance, bereavement leave, parental or care-taking leave and child-care or relocation subsidies, while such substantial economic benefits are unavailable to family members of lesbian and gay employees. As employment benefits can comprise up to forty per-

16. On June 30, 1991, James L. Perry, a prominent lesbian and gay rights activist based in Albany, died of AIDS-related complications. The author wrote his obituary which chronicled his political activism and listed his partner of seven years, Joseph Salgado, as his survivor. The editor of the *Albany Times-Union* refused to list Salgado but consented to an editorial board meeting with members of the lesbian and gay community to discuss the issue. He also asked the author to submit an op-ed piece to run in the newspaper before the meeting in order to raise the issue publicly and gauge readership response. The meeting took place in the late summer of 1991. The newspaper's editorial board met with the author, the president of the local lesbian and gay democratic club, a member of Parents and Friends of Lesbians and Gays (PFLAG) and a lesbian who had lost her partner to cancer several years before and had her request to be listed as a survivor in the published obituary refused. Subsequent to the meeting, the editorial board made a decision to list lesbian and gay survivors, on the condition that the funeral home act as "go-between" and provide the information to the newspapers.

cent of an employee's total compensation package,¹⁷ these benefits are bread and butter issues for all workers, but especially for lesbian and gay employees. And, where an employer may boldly discriminate against an employee based on his or her sexual orientation, lesbians and gay men are unlikely to speak out and make an issue of these benefit denials for fear of reprisals on the job, or even dismissal.

The majority of private corporations do not recognize lesbian and gay families. Furthermore, many companies may openly discriminate against a lesbian or gay employee with impunity. For example, when Cracker Barrel Old Country Store in Douglasville, Georgia, fired a female employee, her termination notice indicated she was losing her job of three years "due to violation of company policy. The employee is gay."¹⁸ As Georgia has no statewide sexual orientation anti-discrimination law, this policy and practice is perfectly acceptable. In Atlanta, however, where there is a local law prohibiting termination on the basis of sexual orientation.¹⁹

1. *The Lotus Alternative*

While clearly in the minority, several large corporations have begun to recognize the diversity within their workplace and have extended domestic partnership benefits, such as health care and insurance, to families of lesbian and gay employees. In September 1991, Lotus Development Corporation, a computer software manufacturer, took the bold step of offering health insurance benefits to partners of lesbian and gay employees.²⁰ Lesbian and gay activists hailed the Cambridge, Massachusetts, corporation's action as revolutionary. An internal controversy erupted, however, which took company officials by surprise: heterosexual employees, fearing the new policy would serve to attract more lesbians and gays, strongly protested the new offering by Lotus.

Interestingly, Lotus extended health benefits only to lesbians and gay men living with partners, not to unmarried heterosexuals living with partners.²¹ When unmarried heterosexual employees in long-term relationships complained of the new policy, Lotus defended its

17. PAULA ETTLEBRICK & PENNY PERKINS, *DOMESTIC PARTNERSHIP: ISSUES AND LEGISLATION 1* (Lambda Legal Defense and Education Fund, 1990).

18. Dena Bunis, *Fighting Discrimination Against Gay Employees*, N.Y. NEWSDAY, Sept. 21, 1991, at 15.

19. ATLANTA, GA., CHARTER OF THE CITY OF ATLANTA (1973 Ga. Laws 2188) (Mar. 3, 1986).

20. William M. Bulkeley, *Lotus Creates Controversy by Extending Benefits to Partners of Gay Employees*, WALL ST. J., Oct. 25, 1991, at B1.

21. *Id.*

program, stating: "the plan was designed to correct an inequity, because homosexuals can't legally marry to obtain benefits while heterosexuals can."²²

To obtain the benefits at Lotus, the lesbian or gay employee and the partner must sign an affidavit that they are each other's "sole spousal equivalent and intend to remain so indefinitely."²³ The affidavit also stipulates that the couple live together and take responsibility for each other's welfare.²⁴ Lesbian and gay couples are also afforded other partner benefits such as bereavement leave.²⁵

While Lotus' progressive employment benefits represents a step in the right direction, statistics indicate that very few corporations have adopted similar policies. In fact, although the extension of employee benefits to domestic partners of employees has been the "subject of much discussion" recently, "few employers are moving to offer these benefits."²⁶

2. *A Three-Step Plan*

Ed Mickens, a gay activist and private consultant on employee benefits who lectures extensively on workplace equity issues, has developed a three-step plan which businesses can use to tackle employee benefit issues. Mickens' plan focuses not only on the extension of domestic partner benefits, but also on expanding workplace inclusivity. According to Mickens, these goals can be successfully achieved as an evolutionary process.

The first step in the plan requires the employer to create and enforce a nondiscrimination hiring and employment practice policy. Second, in order to foster a more open and inclusive work environment, the employer must educate all employees on lesbian and gay issues. As a final step, the employer must examine its employee benefit policies to ensure that all employees receive equal compensation. This step-by-step approach will thus guarantee that all individuals — both management and other employees — are sensitized to the issues involved and share the same commitment to resolving existing inequities in the workplace.

By looking long and hard at current employment practices and ex-

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *FOCUS ON: Benefits for Domestic Partners*, 8 *BENEFITS TODAY* (BNA) No. 12, at 188 (June 14, 1991). Some of them include Ben & Jerry's Homemade, Inc., an ice cream maker in Waterbury, Vermont, and the American Psychological Association, based in Washington, D.C. *Id.*

tending benefits, some entities in corporate America are doing their part to expand the definition of family. As major corporations begin to recognize and acknowledge lesbian and gay families, this recognition will enforce the notion that lesbian and gay workers deserve the same family benefits as married heterosexual employees with families. In this way, the extension of health-care benefits to families of lesbians and gay men plays an important role in the battle for lesbian and gay acceptance in the social and economic mainstream.

III. Effecting Change Through State and Federal Legislation

The glacial pace at which change has been adopted by corporations in the private sector has been mirrored by minimal progress in the public sector. Indeed, only twelve cities²⁷ have enacted domestic partnership legislation and/or registration²⁸ laws. Nonetheless, enacting

27. See ETTLEBRICK & PERKINS, *supra* note 17, at 9.

The following cities have enacted domestic partnership legislation:

<i>City</i>	<i>Date Enacted</i>	<i>Type of Legislation</i>
Ann Arbor, MI	November 1991	Registration
Berkeley, CA	April 1985	Health benefits; sick and bereavement leave
	October 1991	registration for general public
Ithaca, NY	August 1990	Registration (benefits under consideration)
Laguna Beach, CA	June 1990	Health benefits to city employees (not legislation)
Los Angeles, CA	March 1988	Sick and bereavement leave
Madison, WI	August 1988	Registration; sick and bereavement leave
Minneapolis, MN	January 1991	Registration (provides hospital visitation)
San Francisco, CA	November 1990	Registration
Santa Cruz, CA	May 1986	Health benefits; sick and bereavement leave
Seattle, WA	September 1989	Sick and bereavement leave
	March 1990	Health benefits
Takoma Park, MD	November 1988	Sick and bereavement leave
West Hollywood, CA	February 1985	Health benefits; sick and bereavement leave; registration (provides hospital and jail visitation)

28. Domestic partnership registration legislation provides lesbian or gay couples with the ability to register in the city or county of residence as domestic partners. The City of San Francisco, for example, defines "domestic partners" as "two people who have chosen

this type of legislation is the first step toward recognizing and increasing rights for lesbians and gay men.

Federal tax and social security law are other areas where lesbian and gay families are economically disadvantaged. 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 from AIDS-related complications, is the primary caretaker during his partner's illness, the surviving partner is still denied survivor benefits.

Tax ramifications for lesbian and gay couples can also be economically debilitating. Lesbian or gay partners who reside in the same household are taxed at the highest rates, single or single, head of household, because they cannot enter into a valid marriage contract and consequently obtain the legal status of their heterosexual counterparts. As a result, lesbians and gay men are ineligible for the economic savings allowed by the joint filing status of married couples. That the lesbian or gay couple may be financially interdependent, share assets, own a home or jointly raise children in the same household, is irrelevant under existing tax law. This inequity of denying lesbian and gay couples the financial benefit of filing jointly operates on both the federal and state levels.

The controversy surrounding court-ordered child custody decisions perhaps epitomizes the problems which the current definition of family poses for lesbian and gay couples. As one advocate has noted:

[T]he most commonly litigated conflict in the area of lesbian and gay rights is the conflict over child custody and visitation when a marriage dissolves and one parent is homosexual. The legal standard applied to child custody cases varies from state to state. Almost every state has a statute which sets out general standards. However, those standards tend to be vague and vest a great deal of discretion with the judge. Judges and court personnel are all too

to share one another's lives in an intimate and committed relationship of mutual caring, who live together and have signed a Declaration of Domestic Partnership in which they have agreed to be jointly responsible for basic living expenses incurred during the Domestic Partnership, and have established their partnership under Section 4005 of this Article." SAN FRANCISCO, CAL., POLICE CODE art. 40, § 4002 (1990).

Enacted in 1990, San Francisco's domestic partner legislation, allows the lesbian or gay couple to register with the county clerk by presenting a Declaration of Domestic Partnership. *Id.* at § 4005.

often believers in the common stereotypes about lesbians and gay men, and the harm that they supposedly bring to children — even their own children.²⁹

While some appellate courts have acknowledged that one's sexual orientation is not a per se ground for the denial of custody, others "have decided that homosexuality, in and of itself, is a basis upon which a parent should be deemed unfit to have custody of his or her child."³⁰

This legal perception has clouded cases in which no prior heterosexual relationship existed. Many lesbians and gay men have had children of their own, either through adoption or artificial insemination, despite lack of formal recognition of lesbian or gay families. This scenario is problematic because current law recognizes only one of the partners as the parent.³¹ Nonetheless, lesbian or gay couples have raised children together, defined themselves to the child as his or her parents, instilled a value system and cultural ties, introduced an extended set of family members to the child and indeed, developed a substantial relationship with the child, whereby the child views both partners as his parents.

Despite this substantial relationship, if the "legal" parent dies, the other partner can be denied custody of the child unless the deceased parent specifically designates in his or her will that the partner act as guardian for the child. Without a will designating guardianship, the relationship between the remaining family members, the surviving parent and the child, is legally unprotected. Such was the case in Florida where a lesbian co-parent lost a custody dispute with the biological grandparents of her six year-old child.³² Although expert testimony suggested that the child was primarily bonded to and emotionally dependent upon the nonbiological parent, that the grandparents were strangers to the child, in their seventies and lived in a retirement community which did not allow children and that it would be devastating for the child who had just lost one parent to lose her other parent, the court awarded custody to the grandparents.³³

The outcome in this case would no doubt have been different if the biological mother's will had named her partner as the child's guardian. The fact remains, however, that the real problem in lesbian and

29. ACHTENBERG, *supra* note 2, at 2.

30. *Id.*

31. *Id.*

32. See ACHTENBERG, *supra* note 2, at 6 (citation to this unpublished trial court opinion available upon request from the National Center for Lesbian Rights, 1663 Mission Street, 5th Floor, San Francisco, CA 94103).

33. *Id.*

gay custody disputes is that lesbian and gay families are not legally recognized. Thus, unlike heterosexual married couples, the automatic legal presumptions to protect the family unit from dissolution upon death or divorce do not apply. Because the partnership is not legally viewed as family, lesbian and gay couples must actively protect themselves rather than rely upon automatic protection by the law.

IV. Towards Some Proactive Solutions

Legal redefinition of "family" is an ongoing process which can and must take place on many different levels. Obviously, corporate America can do its part by extending employee benefits to families of lesbian and gay employees. Similarly, membership organizations can offer "family" memberships to lesbian and gay couples and their children. Where voluntary action is not forthcoming, however, two other remedies exist to expand and protect the rights of lesbians and gay men: litigation and legislative initiatives.

In the litigation arena, the *Braschi* decision³⁴ is one example of a proactive solution. As defined by *Braschi*, the meaning of family moved beyond the "related by blood or marriage" definition toward a more realistic and meaningful recognition of the financial and emotional interrelationship between two people.

Another proactive legal decision is the recent Minnesota case of *In Re Guardianship of Sharon Kowalalski*.³⁵ In *Kowalski*, an eight year legal battle for guardianship was waged by the plaintiff on behalf of her lesbian partner who had suffered severe brain injuries and was subsequently incapacitated as a result of an automobile accident.³⁶ The plaintiff sought guardianship status in order to legally care for her partner.³⁷ After being rebuffed by her partner's parents, the plaintiff petitioned the lower court to be named guardian. The court denied plaintiff's application for guardianship and the parents of the accident victim were named guardians.³⁸ The guardianship order gave complete control over visitation to the parents; they denied the plaintiff access to her partner.³⁹ The plaintiff then appealed the decision. The Minnesota Court of Appeals named the plaintiff as legal guardian, calling the relationship between the plaintiff and her partner

34. See *supra* notes 8-13 and accompanying text.

35. 478 N.W.2d 790 (Minn. Ct. App. 1991).

36. *Id.* at 791.

37. *Id.*

38. *Id.*

39. *Id.*

“a family of affinity.”⁴⁰

On the legislative front, domestic partnership laws can provide legally protected rights allowing designation of a decision maker in the event of legal incapacity of one partner. New York State allowed such designation in July 1990.⁴¹ Similarly, change can be effected in the area of state domestic partnership registration legislation. In New York State, for example, Assembly member Deborah Glick and Senator Franz Leichter have introduced statewide domestic partnership legislation which would give legal status to lesbian and gay couples by prohibiting local and state government from using marital status as a factor in any practice or policy unless the term “domestic partnership” is included as well.⁴² Similar efforts can also be accomplished at the local level. For example, the City of Ithaca, New York, recently passed a domestic partnership bill.⁴³ Lesbian and gay couples residing in Ithaca who register now have legal status as domestic partners.

These legislative initiatives are but a few of the avenues for achieving the redefinition of family. To a certain extent, courts, legislatures and private corporations have displayed the courage needed to make more open-minded and realistic decisions. While legislators have begun the task of recognizing domestic partnership rights, they must be willing, in the face of adversity, to continue to push for those rights so that lesbians and gay men, like their heterosexual counterparts, are accorded full protection of the law.

40. *Id.* at 797.

41. N.Y. HEALTH CARE PROXY LAW ch. 752 (1990).

42. New York State Bill A.7205-A/s.4333-A.

43. Ithaca, N.Y., Ordinance 90-7 (1990).