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### SUSAN MURRAY & BETH ROBINSON

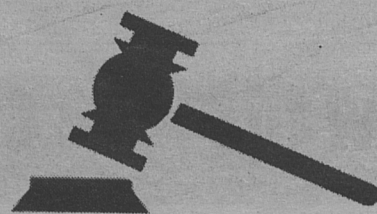
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## LEGAL BRIEFS

by Susan Murray and Beth Robinson



### Homophobia in the Courtroom

With the notable exceptions of the second parent adoption case in 1993 and the "gay marriage" case in 1999, the Vermont Supreme Court has not had much opportunity to decide cases with "gay" content. So when the Court writes an opinion that refers to homosexuality, it merits a mention in our column, even if the subject matter has nothing to do with g/l civil rights.

In December, the Vermont Supreme Court decided a case called *Mears v. Colvin*. Charles Mears had died of smoke inhalation when a fire broke out in his apartment in Shaftsbury, Vermont. His widow, Shirley Mears, filed a lawsuit against the owners of the apartment building, claiming that they had caused Mr. Mears's death because they had failed to install proper fire detectors that would have warned Charles Mears that a fire had broken out and would have given him time to escape.

The lawsuit Shirley Mears filed was called a "wrongful death" action. Under Vermont's Wrongful Death Act, the spouse and next of kin of a person whose death is caused by the wrongful or negligent act of another person can sue for "such damages as are just." These damages can include not only damages for economic loss, but also for the loss of the deceased's love and companionship.

Readers of this column will note that, prior to the passage of the civil union law, a gay man or lesbian whose partner had died as a result of the negligence of another had no right to seek damages under the Wrongful Death Act; our rela-

tionships were not recognized by the state, and we were therefore considered "legal strangers," with no right to sue. The civil union law has changed that, defining civil union partners as "spouses," so we now have the right to sue for damages when our partner is killed by the wrongful act of another.

The problem for Shirley Mears was that, although she was still married to Charles Mears at the time of his death, she was separated from him. Therefore, the question of whether she should be paid any damages for the loss of Mr. Mears's "love and companionship" was a hotly contested issue at the trial. In determining such damages, the jury is supposed to look at the spouses' physical, emotional, and psychological relationship, as well as their "living arrangements . . . the harmony of family relations, and the commonality of interests and activities." In other words, the issue of Shirley and Charles Mears' separation was a central issue at trial.

The attorney for the apartment owner produced evidence that Shirley Mears was not only separated from her husband, but that she was engaged in an extramarital affair. Not content to stop there, the attorney probed further, eliciting testimony that Shirley Mears was having an affair with another woman. Mrs. Mears denied having a lesbian affair, and also said that she and her husband were not planning to divorce. Nevertheless, the jury decided not to award Mrs. Mears or her children any damages for Charles Mears's death.

On appeal, the Vermont Supreme Court criticized the trial judge for allowing the testimony about the nature of Mrs. Mears's affair. The Court said that while "some aspects of a decedent's family relations may be relevant and admissible in a wrongful death action," that does not mean "that all aspects of family relations are relevant and admissible. There is a line to be drawn when the potentially inflammatory nature of the information exceeds its probative value."

Specifically, the Court said that while it was proper for the defense attorney to present evidence that Mrs. Mears was having an affair, "the additional evidence . . . concerning the homosexual nature of the extramarital affair was another matter. Such evidence added virtually nothing of probative value to the case. The only effect, if not indeed the purpose, of defense counsel's repeated probing of the witness . . . concerning the homosexual aspect of the alleged relationship was to appeal to homophobic prejudices." Because the Supreme Court could not abide such a blatant and repeated appeal to homophobia, the Court sent the case back to the trial court for another jury trial.

While this case illustrates the Supreme Court's desire to rid our courtrooms of homophobia, it is also unfortunate that, in the early 21st century, the Supreme Court believes a jury in Vermont can still be titillated and prejudiced by the mere revelation of a gay or lesbian relationship; may we someday reach the point where it doesn't matter.

*Susan Murray and Beth Robinson are attorneys at Langrock Sperry & Wool in Middlebury, Vermont whose practices include employment issues, family matters, estate planning, personal injury and worker's compensation cases, and general commercial and civil litigation. This column features timely information about legal issues of interest to our community. We hope to provide information about important laws and court cases that may affect our rights, as well as practical nuts and bolts advice for protecting ourselves and our families. If you'd like to see us cover a particular topic, please feel free to write OITM or call us at 388-6356.*

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