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OUT in the MOUNTAINS

Crossing State Lines

Conflicting rulings may send custody case to Supreme Court

By LYNN McNICOL

Lambda Legal, the ACLU of Virginia, and Equality Virginia filed an appeal last month on behalf of a Vermont lesbian being denied visitation with her child who is with her biological mother in Virginia. Just weeks prior to the appeal, a Vermont judge ruled for the first time that both members of a same-sex civil union are the legal parents of a child born to one of them.

The case being fought across state lines could wind up in the Supreme Court for a final decision. It also challenges Virginia's anti-gay marriage law, which went into effect last year.

Janet and Lisa Miller-Jenkins, after living together as a lesbian couple in Virginia for two years, traveled to Vermont to obtain a civil union in 2000. After returning to Virginia, they decided to have a child together, and Lisa gave birth to Isabella in 2002.

Several months later the family moved to Fair Haven, Vermont, because of Virginia's unwelcoming attitude toward gay families. The following year, the couple ended their relationship, and Lisa left for Virginia with their child. Rutland County Family Court Judge William Cohen agreed to dissolve the civil union last June and issued a temporary custody order for Lisa and visitation rights for Janet.

But on July 1, 2004 – the

same day Virginia's "Marriage Affirmation Act" went into effect – Lisa asked a Virginia judge to give her sole custody of their daughter. Citing the new anti-gay marriage law, which denies the validity of any other state's civil union or same-sex marriage, the Frederick County Circuit Court approved her request. Janet's visits with her daughter have been sporadic since the decision. "I had quite a bit of contact with her (Isabella) until Virginia came out with that (law)," Janet said.

Janet, who remains in Vermont where she runs a pre-school, said she did not formally adopt Isabella because she was advised the civil union would in effect define her as the child's other parent. "That is exactly why I'm here ... why we moved here," she said. Janet would have adopted Isabella if the couple had stayed in Virginia, she said, but she would be in worse shape there because of the state's homophobic climate. Lisa could not be reached for comment.

Joseph Price, of the Washington, D.C., law firm Arent Fox and lead attorney for Janet Miller-Jenkins' appeal, said Vermont clearly has jurisdiction in the case. "You can't have custody proceedings going on in two states," he said. "A Virginia court cannot modify a Vermont order."

"She (Janet) has rights both under Vermont law and under Virginia law," Price asserted – and under federal law as well.

The Parental Kidnapping

Prevention Act, a federal law, and Virginia's Uniform Child Custody Jurisdiction and Enforcement Act, are both cited in the appeal as laws that clearly give the Vermont court jurisdiction, according to a news release from Lambda Legal.

"This case presents the exact situation that the PKPA and UCCJEA [the federal and Virginia laws] were designed to address," states the argument for the appeal filed December 8, 2004. "A person seeking custody files an action in one state. She does not get the result she wants. Then, she files a custody action in a second state, where the law is more favorable to her claim. Both Congress and the Virginia legislature have found this gamesmanship harmful to children and unacceptable, and prohibit the second state from exercising jurisdiction, irrespective of any other public policy concerns."

While both courts continue to hold to their respective positions, Judge Cohen issued his decision in late November giving parental rights to both partners of a civil union. Cohen ruled the Miller-Jenkins case can be set for a final hearing in the Rutland court to determine custody and child support.

Price is optimistic that the Virginia court will do the right thing by accepting the appeal. He expects a decision sometime this spring. ▼

Lynn McNicol is a freelance writer who lives in Burlington.

When Mommy Dies, Does Mom Get Custody in WV?

While Vermont and Virginia courts continue at a standoff regarding the custody of a daughter of a lesbian couple, another case in West Virginia also involves the custody of a child of lesbian parents. Tina Burch and Christina

Smarr had a son together, Zachary, who was born in 1999. The couple raised Zachary together until Smarr was killed in an auto accident in 2002.

Smarr's parents attempted to gain custody of the boy, but the lower

court awarded custody to Burch, finding her to be his "psychological parent," who while not biologically related, acted as his parent. But a circuit court judge reversed the ruling, handing Zachary over to Smarr's parents. The case is now before the West Virginia Supreme Court on appeal,

and Burch has custody of her son pending the court's decision.

The ACLU of West Virginia filed a friend-of-the-court brief on behalf of Burch. The court will hear oral arguments in the case this spring. – L.M. ▼