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news

Custody Day(s) in Court VT vs. VA Battle Continues

BY EUAN BEAR

MONTPELIER – The question is, which state court has jurisdiction over Isabella's Moms, Vermont or Virginia? The prospects of getting an answer anytime soon are fading fast, despite the most recent developments: a hearing before the Vermont Supreme Court on September 7, and an appeals court hearing in Virginia on September 14.

The facts of the case are as follows: Janet Jenkins and Lisa Miller met, fell in love, and traveled from their home in Virginia to Vermont in 2000 to legalize their relationship with a civil union. The Miller-Jenkins then went home to Virginia. Lisa and Janet decided to start a family, and Lisa conceived through artificial insemination. Isabella was born. The two women moved to Vermont when she was four months old. Within a year or so, Lisa petitioned Vermont's Family Court to dissolve the civil union and grant her custody of Isabella with visitation for Janet. Her petition was granted. Lisa then moved to Virginia and asked the Virginia court to declare her Isabella's sole parent on the basis of her being the child's biological mother. Her request was granted. Janet hasn't seen Isabella since.

Legal Arguments

There's plenty of drama. Both sides have enlisted the help of national agencies with political agendas: for Lisa, the Florida-based Liberty Counsel, most well known for its attempts to shut down the San Francisco gay and lesbian marriages in February and March 2004; for Janet, Gay & Lesbian Advocates & Defenders in Vermont and Lambda Legal and the ACLU in Virginia.

Liberty Counsel's Rena Lindevaldsen made two basic arguments before the Vermont Supreme Court. First, she argued that the Miller-Jenkins civil union was never valid. Vermont, she reasoned, has an evasion law for marriages, which (as in Massachusetts) says that if a marriage is illegal in the home state of the participants, it is illegal here. And since the civil union law was written to incorporate all the rights, responsibilities and obligations of Vermont's marriage laws, the evasion law should apply. Virginia's

legislature has passed several laws designed to prevent the state's recognition of any same-sex relationship, regardless of its legality elsewhere.

Justice John Dooley raised an eyebrow and suggested that a lot of people would be very surprised if the court accepted that argument, since the majority of civil unions performed in the last five years have been for out-of-state couples. Chief Justice Paul Reiber, who (with newly installed Justice Brian Burns) was not on the court when the *Baker v. State* ruling was issued, suggested that Lisa Miller had forfeited her right to make that argument when she petitioned a Vermont court to dissolve the union.

"So you invented this argument?" Dooley asked Lindevaldsen, noting that it had not previously been raised. She agreed.

The second argument Lisa's lawyers raised was that even if the civil union was valid, Vermont law did not presume that Janet was a legal parent to Isabella. Since Janet has no biological link to Isabella (artificial insemination), and she did not file for a second-parent adoption, the argument went, the court should not recognize her right to be considered a legal parent.

The justices raised several points regarding such a ruling's effect on mixed-gender couples who have children through artificial insemination.

GLAD attorney Jennifer Levi faced far fewer questions as she argued that Vermont law presumes that the partners in a civil union are the legal parents of any child born within the civil union. She also cited federal law, the Parental Kidnapping Prevention Act, which prohibits parents with custody issues from taking children to another jurisdiction for a more favorable ruling. It establishes the precedence of the first state where in an action is filed.

Even before the red light on the appellants' lectern had come on, Levi had finished her argument, and the audience of lawyers, legislators, and media stood as the justices filed out.

Similar arguments were aired before the Virginia Court of Appeals a week later, by slightly different teams of lawyers, although it was also suggested that the federal DOMA might overrule

the Parental Kidnapping Prevention Act.

Impressing the Press

At the press gaggle shepherded by Kevin Blier of Vermont Renewal, Lindevaldsen and local lawyer Judy Barone of Rutland pushed hard on the second-parent adoption issue, Lindevaldsen framing their arguments as just trying to "establish stability for children" and "equality to marriage" for civil union couples. But Barone insisted with some vehemence that the case was about "just who we allow to be parents in this state."

Lindevaldsen refused to predict the court's ruling, but said they would keep appealing until there was no recourse.

Generally, when states are deadlocked over an issue, it is the U.S. Supreme Court's job to resolve it.

Janet Miller-Jenkins, who had been in the courtroom, read a brief statement: "Although I have a lot I would like to say, I don't think it serves my daughter well to air this case through the media. I sincerely believe it is best for my daughter that both of her parents continue to be an active, loving, responsible part of her life." GLAD's Jennifer Levi was upbeat about Janet's chances here and reiterated her arguments, adding that Janet had accompanied Lisa to all her doctor appointments, was present at Isabella's birth, and cut the umbilical cord.

Asked whether this case was a poster child for why Vermont needs marriage equality, Levi smiled and said, "It depends on how it comes out." Then she suggested that the same issues would arise regardless of whether the same-sex relationship was a marriage or a civil union.

Life Outside the Courtroom

Janet, 40, and Lisa, 37, both run childcare centers, Janet's in Fairhaven, Vermont. Lisa's in Winchester, Virginia. In an interview with the *Virginian-Pilot*, Lisa said it was a visit to her brother's church that made her seek to strip Janet of parental rights and leave the "homosexual lifestyle" with a "clean slate."

Meanwhile, Isabella, now three years old, will be without her other mother until the case is resolved, and it doesn't look like that will happen any time soon. ▼