

Hawai'i Two-0

Lambda Legal is back in the birthplace of the modern marriage equality movement, fighting the latest attack on lesbian and gay couples and their children: Gov. Lingle's veto of civil unions.

By Staff Attorney Tara Borelli

IT IS ONLY FITTING that Lambda Legal is launching another round of family protection litigation in Hawai'i—the birthplace of the modern marriage equality movement—as our Western Regional Office celebrates its 20th anniversary. Almost 20 years ago, the Hawai'i Supreme Court set the stage for some extraordinary gains for same-sex couples, ruling in its landmark 1993 *Baehr v. Lewin* decision that barring lesbian and gay couples from marriage discriminates based on sex, and requiring the state to justify this discrimination only with a compelling government purpose. Lambda Legal joined the case as co-counsel and helped conduct a historic trial in 1996. This trial led to a first-of-its kind decision in the country, finding that same-sex couples are equally good parents to their children and the state had no adequate reasons for abridging their equal right to marry.

As the state appealed the trial court's decision, the legislature struck a supposed compromise—enacting a limited “reciprocal beneficiaries

law” for same-sex couples and others who are not allowed to marry, while also approving a proposed antigay constitutional amendment to allow the legislature to restrict marriage just to heterosexual couples. In a bruising fight that would repeat itself in 28 additional states, money from antigay forces poured into Hawai'i, antigay churches mobilized and voters ratified the amendment in 1998, locking the state courthouse doors to lesbians and gay men, who could no longer bring freedom-to-marry litigation.

THE COMMUNITY REGROUPED, as we must after disappointing defeats, and worked tirelessly over many years in efforts culminating in the passage of civil union legislation in May 2010 by strong majorities in both houses of the state legislature. As the bill was sent to Governor Linda Lingle's desk, Lambda Legal helped provide legal guidance to community members and legislators, who made a compelling case to

the governor that the bill should become law.

But on July 6, Lingle dashed the hopes of same-sex couples across the islands, announcing that she had vetoed the bill because “[t]his is a decision that should not be made by one person sitting in her office...but by all the people of Hawaii behind the curtain of the voting booth.” And with that, Lingle—as one person—decided the issue for the thousands of families who have been suffering from incomplete legal protections, by overriding the strong majority votes in both representative houses with her veto of the bill. And worse, she did so endorsing the appallingly misguided and destructive notion that minority rights should be put to a popular majority vote.

LAMBDA LEGAL THEN PUT THE finishing touches on a lawsuit that we had been preparing for over a year in the event the civil union legislation did not succeed. We developed our case recognizing that there is a frustrating limit on the relief the court can provide, but that

ALOHA, EQUALITY!

Two decades of
historic victories
and setbacks

1990 Three Honolulu same-sex couples, denied marriage licenses, sue the director of the Hawai'i Health Department. Case dismissed by trial court.

1992 Lambda Legal joins as amicus as appeal goes directly to Hawai'i Supreme Court.

1993 High court rules that denying gay couples the right to marry is sex discrimination needing compelling state justification, and sends the case back to trial court. Lambda Legal joins as co-counsel for the plaintiffs.

1996 Following trial, the circuit court rules the state failed to prove that denying marriage is justified. The state appeals.

the status quo must not continue—the current reciprocal beneficiaries system relegates same-sex couples to a confusing, incomplete third-tier status, inflicting daily harm and risk on them and their families. While the 1998 constitutional amendment bars the court from ordering an end to restrictions on marriage based on sex and sexual orientation, and thus prevents us from suing for full equality, same-sex couples and their children need a better interim safety net. The civil union legislation would have accomplished that, but Lingle’s absurd suggestion that same-sex couples should have to go door-to-door among voters to ask for civil unions made clear we cannot wait any longer to take the litigation route. Hawai’i activists and allies will continue to work toward full equality by advocating for a change in the marriage law, which the legislature has the power to do under the 1998 constitutional

highest court that civil unions are insufficient to satisfy New Jersey’s unamended constitutional guarantees of equal treatment of all. Although New Jersey’s Supreme Court declined to re-open our *Lewis v. Harris* marriage case of several years ago, the press for full equality will continue in the Garden State. Securing stop-gap relationship protections as a “best available” safety net for same-sex couples, in the absence of marriage equality, is a familiar feature of our work. Lambda Legal has drafted domestic partnership legislation, including California’s seminal law, and has participated in litigation to defend domestic partnership laws across the country. All forms of this work are needed. We won’t settle for less than full equality, but responsibility requires that in the interim we shore up basic family protections using the range of complementary legal and policy arguments.

WE WON’T SETTLE FOR LESS THAN FULL EQUALITY, BUT FAMILIES NEED BETTER PROTECTIONS IN THE INTERIM.

amendment. In the meantime, same-sex couples need the complete set of legal tools to protect their families that different-sex spouses already have. *Young v. Lingle* seeks exactly that. Nothing about the 1998 amendment prevents the court from providing same-sex couples the rights and responsibilities granted to spouses, and in fact, the state constitution’s equal protection clause demands it. The constitutional amendment does not render gay people strangers to the law in Hawai’i, and the abiding equal protection guarantees require the courts to reduce the law’s inequality for same-sex couples to the greatest extent possible.

YOUNG V. LINGLE PRESENTS a set of challenges that are both new and familiar. Never before has Lambda Legal filed an affirmative relationship recognition case seeking a second-class status, instead of full equality through marriage. In fact, not long before we filed our civil union lawsuit in Hawai’i, we returned to court in New Jersey to argue to that state’s

We could sense exhilaration among community members on the day we filed *Young v. Lingle*. It’s bruising for any vulnerable minority group to have the right to equality nullified by an official elected to uphold the constitution and to serve everyone. It’s especially painful because Hawai’i’s community of activists and allies worked tirelessly to show political decision-makers that civil unions are a necessary next step to protect our families. Lambda Legal stands in good stead to carry this fight to the courts in tandem with the ongoing equality movement built by community activists, and we will continue working side-by-side to ensure that the effort to secure stop-gap protections today goes hand-in-hand with our collective push for marriage equality tomorrow. **L**

Lambda Legal is co-counsel with attorneys from the ACLU of Hawai’i Foundation and the Honolulu law firm of Alston, Hunt, Floyd & Ing.

LESS THAN EQUAL?

What “reciprocal beneficiary” status means for our plaintiff couples.



Robie Lovinger (right) helps partner **Louise Esselstyn** cope with multiple sclerosis. If they need public assistance with nursing home care, the state may place a lien on their home.



Suzanne King (right) faced unfair barriers to securing legal status as mother to **Shylar**, the daughter she is raising with **Tambyr Young**, and to taking the last name Tambyr and Shylar share.



Afghanistan war veteran **Sean Smith** (left), discharged under “Don’t Ask, Don’t Tell,” plans a family including children with **Kale Taylor**, but they worry about how secure their status as parents will be.



Jill (left) and **Pauline Guillermo-Togawa** worry about roadblocks to adopting a second child, and vulnerabilities their daughter Carmel may face as she starts school.



Kathleen Sands (left) and **Linda Krieger** are pained that the state favors religious views that discriminate against same-sex couples while ignoring religious views that, like their own, favor equality and inclusion.



Danny Robinson (right) and **Allen Castro** long to solemnize their relationship through a state-sanctioned ceremony in their home state of Hawai’i.

1997 With anti-equality dollars and forces flooding the state, legislators propose a constitutional amendment, subject to voter approval, reserving for the legislature the power to restrict marriage to different-sex couples.

1998 Voters approve the amendment.

1999 Hawai’i Supreme Court dismisses marriage case. Lawmakers submit a broad domestic partnership bill, but it dies without action by the end of the two-year legislative session.

2001 Lawmakers submit a civil union bill, which dies by session’s end. The bill is resubmitted in the three subsequent sessions with the same result.

2010 Legislature strongly approves civil unions bill in April, and sends it to Gov. Lingle, who vetoes it in July. Three weeks later, Lambda Legal and the ACLU of Hawai’i file suit.



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