**In the Court of Special Appeals**

September Term, 2004

No. 1789

KARL ULF WILHELM HEDBERG,

*Appellant*,

vs.

ANNICA MADELAINE DETTHOW,

*Appellee*.

Appeal from the Circuit Court for Montgomery County, Maryland
(The Honorable Nelson W. Rupp, Jr., Judge)

# BRIEF AND RECORD EXTRACT


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## INTRODUCTION

This appeal seeks reversal of the Circuit Court's denial on summary judgment without a fact-finding hearing of a motion to modify a custody restriction that is harmful to the best interests of a Maryland child. The Appellant Karl Ulf Wilhelm Hedberg ("Mr. Hedberg") is the custodial father of the parties' 12-year-old son XXXXXX. Mr. Hedberg seeks to remove a custody restriction imposed in 2002 by a court in Virginia, where no parties any longer reside. The restriction prohibited Mr. Hedberg from continuing to reside with his long-term domestic partner, who had lived with Mr. Hedberg and XXXXX and helped raise XXXXX for many years. In support of his petition to the Circuit Court, Mr. Hedberg presented undisputed evidence that the restriction has been detrimental to the child emotionally and has caused him to suffer from the loss of important practical and financial benefits, including having less daily care and support and having to move from a house to a smaller rental apartment. It is also undisputed that the partner's presence never has been in any way detrimental to XXXXX, with whom he had and continues to have a positive, loving and bonded relationship. The Appellee mother, Annica Madelaine Detthow ("Ms. Detthow"), did not dispute any of the evidence of detriment to XXXXX under the existing order or present any opposing evidence. Ms. Detthow also was not able to articulate any specific reason why the restriction should remain in place. In addition to these changed factual circumstances affecting the child's welfare and justifying modification since entry of the custody restriction, the U.S. Supreme Court issued its ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), significantly changing the law relating to state-imposed restrictions on same-sex relationships. The court below erroneously refused to consider these changed circumstances and the best interests of XXXXX in being relieved of this detrimental restriction.

## STATEMENT OF THE CASE

The divorced parties, Mr. Hedberg and Ms. Detthow, separated in 1996 in Virginia, where both then lived. (Record Extract ("E") 42 ¶ 2) Following Ms. Detthow's move in 2000 to Florida, both parties sought physical custody of their minor child, XXXXX, from the Juvenile and Domestic Relations Court of the City of XXXXXandria, Virginia. (E 12-13)

On May 14, 2002, following an April 1, 2002 hearing, the Virginia court issued a Custody Order (the "Custody Order") regarding XXXXX. (E 12-13) The Court awarded the parties joint legal custody and granted primary physical custody to Mr. Hedberg, with liberal visitation to Ms. Detthow. The Custody Order required, however, that Mr. Hedberg's domestic partner, Blaise Delahoussaye ("Mr. Delahoussaye"), no longer reside with Mr. Hedberg and XXXXX in their Virginia home, as he had for several years, after the end of that school year. (E 12-13) The Custody Order contains no findings of fact, and the April 1, 2002 hearing was not transcribed. (E 12-13, E 46) Mr. Hedberg has complied in full with the Custody Order and residency restriction. (E 42)

In June, 2003, Mr. Hedberg and XXXXX moved to Montgomery County, Maryland. (E 6) On February 6, 2004, Mr. Hedberg filed in the Circuit Court for Montgomery County (the "Circuit Court") a motion to enroll a foreign custody order, based on his move with XXXXX to Maryland. (E 6-9) On May 25, 2004, the Circuit Court entered a Consent Order to Enroll Foreign Custody Order, and thereby registered the Custody Order as a foreign custody decree with the Circuit Court. (E 24)

On February 6, 2004, Mr. Hedberg also moved for modification of the restriction in the Custody Order, based on changed circumstances affecting the welfare of XXXXX since the entry of the Custody Order and the U.S. Supreme Court ruling in *Lawrence v. Texas*, 539 U.S. 558, which constituted a significant

change in the law relating to government-imposed restrictions on same-sex relationships.[1] (E 6-9)

On May 3, 2004, Ms. Detthow filed an opposition to Mr. Hedberg's motion to modify. (E 19-21) On June 28, 2004, she filed a motion for summary judgment seeking denial of his motion. (E 26-34) Her motion was not supported by any evidentiary submissions. (*Id.*) On July 13, 2004, Mr. Hedberg filed his opposition to Ms. Detthow's motion for summary judgment (E 35-43), and on July 15, 2004, he filed a cross-motion for summary judgment (E 44-61), with affidavit and other evidence in support, seeking to strike the restriction against Mr. Delahoussaye's residence in the home. On August 5, 2004, Ms. Detthow filed a memorandum in opposition to the cross-motion for summary judgment. (E 63-68) Ms. Detthow submitted no affidavit or other evidence in opposition to the cross-motion.

On September 15, 2004, the Circuit Court heard argument on the cross-motions for summary judgment. (E 70-73) On the same date, the Circuit Court issued a ruling from the bench granting Ms. Detthow's motion for summary judgment and denying Mr. Hedberg's cross-motion for summary judgment and his motion to modify custody. (E 84-86) The Circuit Court ruled that there were insufficient "allegations . . . raised in the pleadings that would warrant a modification of custody or would trigger an inquiry as to whether there has been a significant change of circumstances, which would justify modification of custody." (E 85) The Circuit Court did not issue a written opinion or order at that time. The Circuit Court denied Ms. Detthow's application for attorney's fees and costs. (E 86)

On October 8, 2004, Mr. Hedberg filed a notice of appeal from the Circuit Court's September 15, 2004 ruling. (E 69) On January 14, 2005, after the parties complied with this Court's direction to request a written order from the Circuit

[1] Mr. Hedberg does not pursue in this appeal the additional argument made in the Circuit Court that in the alternative Maryland need not afford constitutional Full Faith and Credit to the Virginia Custody Order.

Court, the Circuit Court issued a written Final Order and Judgment granting Ms. Detthow's motion for summary judgment and denying Mr. Hedberg's cross-motion for summary judgment and motion for modification. (*See* Appendix.)

## QUESTIONS PRESENTED

1. Whether the Circuit Court erred in its summary judgment rulings and in refusing to modify the Custody Order to remove the residency restriction in light of changed factual and legal circumstances and the best interests of XXXXX.
2. Whether the residency restriction must be set aside because it impermissibly infringes Mr. Hedberg's constitutional rights of personal liberty and parental autonomy to direct XXXXX's upbringing, as made clear by the intervening decision of the United States Supreme Court in *Lawrence v. Texas*.

## STATEMENT OF FACTS

XXXXX, now 12 years old, was born on September 17, 1992 to Mr. Hedberg and Ms. Detthow during their marriage. (E 28-29) Mr. Hedberg and Ms. Detthow appointed Mr. Delahoussaye, a family friend, to be XXXXX's godfather at his baptism. (E 55) Following the parties' separation in 1996, XXXXX lived with Mr. Hedberg in Virginia and Ms. Detthow lived nearby. (*See* 42 ¶ 10) Since Ms. Detthow moved to Miami, Florida in 2000, where she continues to reside, XXXXX has remained in the physical custody of Mr. Hedberg. (E 7-8) There never has been any dispute that Mr. Hedberg is a fit parent.

Mr. Delahoussaye moved into the home shared by Mr. Hedberg and XXXXX in 1996, when XXXXX was four years old. (E 42 ¶ 2) XXXXX and Mr. Delahoussaye have a loving and bonded relationship. (E 42 ¶ 6) During the years he lived in the family home, Mr. Delahoussaye was an active, supportive presence in XXXXX's daily life. (E 42 ¶¶ 2-4) He often took XXXXX biking and participated in other athletic activities with him. (E 73-74) He took responsibility in the home for dinner preparation and other chores. (E 42 ¶ 4) This allowed Mr. Hedberg to devote more time to XXXXX and to assist him with homework. (*Id.*, E 73-74) In 1999 Mr. Delahoussaye and Mr. Hedberg jointly

bought a comfortable home with a backyard in XXXXXandria, Virginia where XXXXX could ride his bike. (E 43 ¶ 9, E 84) Mr. Delahoussaye had lived with XXXXX and Mr. Hedberg for five-and-a-half years when the Virginia court issued its May 2002 Custody Order.

In its May 2002 Custody Order, the court granted Mr. Hedberg primary physical custody of XXXXX. (E 13) The court also ordered, however, that "Blaise Delahoussaye no longer resid[e] in the . . . home after the end of the child's current school year." (*Id.*) The court cited no factual support for this restriction. It made no findings indicating that Mr. Delahoussaye was not a loving and positive presence in XXXXX's life. In particular, the court did not suggest that Mr. Delahoussaye had caused any harm to XXXXX or would do so. Indeed, the court's order expressly allowed Mr. Delahoussaye to remain in the family home for several more months, through the end of XXXXX's school year. (*Id.*) The court also did not restrict Mr. Delahoussaye's contact with XXXXX. Despite the absence of a court record of the proceedings, Mr. Hedberg recalls that the Virginia judge "specifically state[d] that Virginia's law does not permit same-sex couples to live together with a child." (E 43 ¶ 11) The Virginia court's restriction followed that state's practice at the time, premised on its sodomy law, to evaluate negatively any request for custody and visitation by a parent in a same-sex relationship. *See, e.g., Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) ("[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the [sodomy statute of the] Commonwealth, Code § 18.2-361; thus, that conduct is another *important consideration in determining custody*.") (emphasis added). See Point II *infra*.

At the end of the 2001-02 school year, Mr. Delahoussaye moved out of the family home in compliance with the Virginia Custody Order. (E 42 ¶ 2) The absence of Mr. Delahoussaye from the home has had a negative impact on XXXXX and his family life. Although the Maryland Circuit Court declined to hear proffered evidence that would have given a fuller picture of XXXXX's

current circumstances and the harm he now suffers from the restriction on Mr. Delahoussaye's residence (*see* E 72-73, 76-77, 79-80, 84-86), the record includes the following evidence, which was uncontested:

- Mr. Delahoussaye's absence from the home has proven very painful for XXXXX, who had lived with Mr. Delahoussaye and his father more than half of his life. After Mr. Delahoussaye's departure, "XXXXX cried often and repeatedly and asked [his father] why [Mr. Delahoussaye] moved out and when he would move back in." (E ¶ 3)

- XXXXX continues to wish for Mr. Delahoussaye to return to the family's home. (E 43 ¶ 7) XXXXX particularly "misses having [Mr. Delahoussaye] around for such activities as family games, vacations, and dinner time together." (E 42 ¶ 3)

- XXXXX also "worrie[s]" because Mr. Delahoussaye cannot live with the family. (E43 ¶ 10) For example, XXXXX "was especially upset during Hurricane Isabel" that Mr. Delahoussaye was not with them. (*Id.*)

- The restriction has had financial and practical consequences that adversely affect XXXXX's quality of life. Because Mr. Hedberg and Mr. Delahoussaye are required to maintain separate residences, they could no longer afford to keep the family's Virginia house that they had owned together since 1999. (E 43 ¶ 9) Instead, the family had to sell that home, and in 2003 Mr. Hedberg moved with XXXXX into much smaller quarters, a rental apartment in Montgomery County, Maryland. (*Id.*) XXXXX no longer has a backyard in which to play or a quiet suburban street for bicycling. (E 84) If Mr. Delahoussaye could move back in with the family and again share expenses and finances with Mr. Hedberg, they could afford to buy a house to provide XXXXX a permanent home in a better neighborhood, with a backyard and more freedom for XXXXX to ride his bicycle. (E 43 ¶ 9, E 84)

- With Mr. Delahoussaye no longer living in the home, Mr. Hedberg has lost his daily support and help in caring for XXXXX. For example, Mr. Hedberg

cannot devote as much time to working with XXXXX on his homework because he must spend more time attending to household tasks like preparing dinner. (E 42 ¶ 4) Mr. Delahoussaye also cannot care for XXXXX as before on evenings when Mr. Hedberg attends after-hours work-related meetings and workshops. (*Id.*)

. While abiding by the restriction, Mr. Delahoussaye has remained a committed, positive, and devoted presence in XXXXX's life and that of Mr. Hedberg, his life partner. (E 42-43 ¶¶ 5-6) Mr. Delahoussaye visits the family every weekend, cooking dinner on weekend nights and "keep[ing] up with XXXXX's activities, sports, and school news." (E 42-43 ¶ 6) On weekends he and XXXXX continue to "go biking, roller skating, swimming, and ball-playing often." (E 43 ¶ 6)

. It is XXXXX's wish that Mr. Delahoussaye be permitted to move back into the family home and that all the normal routines of the family resume. (E 43 ¶ 7)

Ms. Detthow did not refute any of Mr. Hedberg's specific factual evidence as to how XXXXX's circumstances have changed for the worse as a result of the restriction and how his best interests would be served by lifting the custody restriction. Indeed, Ms. Detthow's counsel conceded at the April 1, 2002 hearing that "perhaps the child being upset" *is* a "material change[]." (E 80)

No evidence was offered to suggest that the restriction ever has served or currently serves XXXXX's best interests. In her deposition testimony, Ms. Detthow did not point to a single benefit to XXXXX from the restriction or identify a single concern about Mr. Delahoussaye's presence in XXXXX's home. (E 52-61) In response to questioning about the basis for her objection to Mr.

Delahoussaye's residence in the home, Ms. Detthow's only answer was: *"I don't know."*[2]

In addition to the factual evidence in support of modification, Mr. Hedberg's motion for a modification also was premised on another material development since the 2002 Custody Order, the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558. *Lawrence* struck down sodomy laws like Virginia's and the use of such laws to justify discrimination against gay people in the exercise of their liberty interests. Mr. Hedberg argued in the Circuit Court that *Lawrence* calls into question the constitutionality of the Virginia Custody Order and warrants careful scrutiny of the factual circumstances of this family to ensure that XXXXX's best interests, rather than a constitutionally infirm presumption against permitting a gay parent to unite his family under one roof, govern the court's determination.

At the argument on the parties' cross-motions, Mr. Hedberg's counsel asked to proceed with an evidentiary hearing on the changed circumstances and on how XXXXX's best interests would be served by having Mr. Delahoussaye move back in with the family. (E 72-73, 76-77, 79-80, 84) In addition to evidence offered in support of Mr. Hedberg's summary judgment motion, counsel for Mr.

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[2] Specifically, Ms. Detthow responded "I don't know" to every one of these questions:
"Do you believe that [Mr.] Delahoussaye was somehow a bad person who would hurt your son?" (E 55) "Has anything changed since [you appointed Mr. Delahoussaye as XXXXX's godfather] about [him] as a good person in your son's life?" (E 55-56) "How does he behave with your son?" (E 56)
"Have you seen any behaviors of XXXXX that you – or that are negative that you believe are related to [Mr.] Delahoussaye?" (*Id.*) "Do you believe [that Mr. Delahoussaye's] moving in and sleeping there would make a difference in XXXXX's best interest?" (E 59) "[W[hat aspects of that change in the environment [for XXXXX from Mr. Delahoussaye's move into the home] is adverse to your son? Is there something adverse about it?" (E 60) "From what you could tell during [the Virginia custody hearing], why did the judge condition the custody, the primary physical custody, with . . . [Mr.] Hedberg on [Mr. Delahoussaye's] leaving the home?" (E 54)

Hedberg made a proffer of further evidence, including testimony from Mr. Hedberg, Mr. Delahoussaye, and the parent of a close friend of XXXXX who would have testified to the excellent parenting skills of both men and how she trusts them with her own 12-year-old child. (E 80)

The Circuit Court refused Mr. Hedberg's request to proceed with a fact-finding hearing. The court characterized the changed circumstances as merely a "26-mile move" that did not warrant reconsideration of the restriction. (E 85-86) The Circuit Court further reasoned that because the Virginia Custody Order cited the Virginia statute enumerating factors to be considered in a custody determination, the Virginia Court had considered XXXXX's best interests in 2002. (E 84) The Circuit Court did not mention any other arguments or evidence raised or proffered by Mr. Hedberg. The Circuit Court granted Ms. Detthow's motion for summary judgment and denied Mr. Hedberg's cross-motion and motion for modification from the bench, without issuing written findings of fact or conclusions of law. (E 86)

At the direction of this Court after the notice of appeal was filed, the parties requested a written Final Order and Judgment from the Circuit Court, which issued on January 14, 2005. The Final Order and Judgment provides that Ms. Detthow's motion for summary judgment is granted and Mr. Hedberg's cross-motion for summary judgment and motion for modification are denied. It contains no findings of fact or conclusions of law. (*See* Appendix)

## ARGUMENT

### I. The Circuit Court Erred in Granting Summary Judgment to Ms. Detthow And Misapplied The Legal Standard For Evaluating A Petition To Modify Custody By Failing to Make Any Inquiry Into XXXXX's Best Interests Despite Evidence of Adverse Changes In His Circumstances Resulting From the Restriction.

#### A. Mr. Hedberg Demonstrated Changed Circumstances.

In most modification cases, a parent seeking to modify custody must meet the difficult burden of showing why a child's primary residence should change from one parent to the other. In this case, however, Mr. Hedberg already is the child's primary residential custodian and no party seeks to change that. Mr. Hedberg merely seeks to remove a restriction that, as the parent living with XXXXX on a daily basis, Mr. Hedberg strongly believes disserves his child's best interests.

In support of his petition, Mr. Hedberg presented evidence of changed circumstances, resulting from the restriction, that are adversely affecting XXXXX in significant ways. Because Mr. Hedberg and Mr. Delahoussaye are no longer able to pool their income and expenses, Mr. Hedberg and XXXXX have been forced to move out of their home into a smaller apartment, which has diminished the quality of XXXXX's life and his opportunities significantly. Mr. Hedberg and XXXXX also have lost the benefit of a second caregiver who can help to handle chores and other responsibilities in the home; as a result of that loss, Mr. Hedberg has not been able to spend as much quality time with XXXXX. In addition, XXXXX has lost the substantial additional daily love, care and support he previously received from Mr. Delahoussaye, and has suffered from that loss. XXXXX is strongly bonded to Mr. Delahoussaye and has been very upset by having less contact with him and by the disruption to his family.

The evidence of these changed circumstances and their negative impacts on XXXXX was unrebutted. Ms. Detthow did not factually contest that the restriction is harmful, nor was she able to identify even a single fact or consideration in favor of retaining it. On this basis alone, even under the Circuit Court's overly rigid two-step view of the test for modification, *see infra* section C, the Circuit Court should have considered the merits of Mr. Hedberg's motion and XXXXX's best interests. In addition, Mr. Hedberg asked the Circuit Court to consider the recent decision from the United States Supreme Court in *Lawrence v. Texas*, which held that gay and lesbian persons have a constitutionally protected

right to enter into same-sex relationships and that governmental interference with the personal and family relationships of gay people must be scrutinized carefully. The Circuit Court failed to do so. This additional changed circumstance also independently required the court to reach the merits of modification and the best interests of XXXXX, even under a rigid view of modification requirements.

Instead, the Circuit Court based its rulings entirely on its conclusion that Mr. Hedberg failed to allege a material change of circumstances sufficient to trigger an evidentiary hearing on whether modification is warranted. The Court found that "the 26-mile move by the custodial parent is not one that would result in a material change of circumstances . . . or would trigger an inquiry as to whether there has been a significant change of circumstances, which would justify modification of custody." (E 85; *see also id*. (asserting that Mr. Hedberg's motion "is merely an effort to re-litigate" the prior order).)

As explained below, the Circuit Court's approach was based on a serious misapplication of Maryland law, which has a more flexible modification test, including a much less rigid understanding of the nature and role of "changed circumstances" as well as a requirement that a court make the child's best interest its paramount consideration. Mr. Hedberg presented substantial undisputed evidence that XXXXX is being affected adversely by the restriction in the existing order and that the unconstitutionality of that restriction has been made clear by intervening Supreme Court case law. He sought to modify the order to permit Mr. Delahoussaye to reside with him and XXXXX in an integrated family setting that is best for XXXXX's welfare. Based on the well-settled principles that govern modification, it was error to omit any consideration of XXXXX's best interest and to deny the requested modification.

### B. Protecting The Best Interest Of The Child Is Of "Transcendent" Importance In All Stages of Custody Proceedings, Including Modification Actions.

In Maryland, it is well settled that "an award of custody is never absolute, but is always subject to modification." *Taylor v. Taylor*, 246 Md. 616, 620-21, 229 A.2d 131, 134 (1967).[3] In *Taylor*, the Court of Appeals long ago made clear that a custody decree entered in another state is not immune from later modification in Maryland. Rather, as the Court explained, "[t]he infant child by virtue of his domicile has a right to the protection which may be afforded by the sovereignty under which he resides." *Id*. at 621, 229 A.2d at 135. Thus, when necessary to protect the best interest of the child, such a decree may be modified under the same standards applied to an original decree entered in Maryland. *Id*. at 620-21, 229 A.2d at 135.

Family Law § 1-201(4) specifically provides that an equity court may "from time to time, set aside or modify its decree or order concerning the child." This statute "is declaratory of the inherent power of courts of equity over minors." *Ross v. Hoffman*, 280 Md. 172, 372 A.2d 582 (1977) (citing *Burns v. Bines*, 189 Md. 157, 162, 55 A.2d 487 (1955)). Based on the statute and the case law, courts have an ongoing responsibility to monitor the welfare of children in their jurisdiction and promote the children's best interests. *Kennedy v. Kennedy*, 55 Md. App. 299, 310, 462 A.2d 1208, 1215 (1983) (the power of the courts "to determine any question concerning the welfare of children . . . does not terminate once the initial custody, support and visitation rights have been established").

It is also well-settled that the best interest of the child must be "the paramount concern" in all child custody proceedings. *McCready v. McCready*, 323 Md. 476, 593 A.2d 1128 (1991). Regardless of whether a court is determining

[3] The same is true in Virginia. *See Sullivan v. Jones*, 595 S.E.2d 36, 40 (Va. App. 2004) (holding that Virginia courts retain jurisdiction to modify a child custody order and thus may reconsider the child's best interests upon an allegation of a substantial change of circumstances) (citing *Parish v. Spaulding*, 496 S.E.2d 91, 94 (1998), *aff'd*, 513 S.E.2d 391 (1999)); *see also* Va. Code Ann. § 20-124.2(E) (authorizing Virginia courts to maintain jurisdiction over custody and visitation issues).

custody in the first instance or considering a petition to modify custody, the best interest of the child is of "transcendent importance." *Id*. at 481, 593 A.2d at 1130 (citing *Ross v. Hoffman*, 280 Md. 172, 175 n.1, 372 A.2d 582 (1977)); *see also id.* ("The best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak.").

While a parent seeking to modify custody must show a material change of circumstances, the Court of Appeals repeatedly has cautioned the lower courts against applying that requirement in an overly formalistic manner, as if it were disconnected from the best interest of the child. Rather, as a general rule, evaluating a petition for modification "necessarily requires a consideration of the best interest of the child." *Id.* at 482, 593 A.2d at 1131. Only "infrequently" should the question of "changed circumstances" be treated as a threshold question. *Id.*; *accord Domingues v. Johnson*, 323 Md. 486, 498, 593 A.2d 1133, 1139 (1991). Instead, even in a modification proceeding courts should focus first and foremost on the child's best interests. *Id*.

Further, in determining whether a modification of the existing custody order is warranted, a court always must make an individualized determination based on the circumstances in a specific case. *Taylor v. Taylor*, 306 Md. 290, 303, 508 A.2d 964, 970 (1986) ("[f]ormula or computer solutions in child custody matters are impossible because of the unique character of each case, and the subjective nature of the evaluations and decisions that must be made."); *see also Domingues v. Johnson*, 323 Md. at 501, 593 A.2d at 1140 ("The understandable desire of judges and attorneys to find bright-line rules to guide them in [modification proceedings] does not justify the creation of hard and fast rules where they are inappropriate."). This means that when considering whether a parent has alleged a material change of circumstances, the court must not analyze the criteria of materiality against some abstract measure, such as the length of a move in miles, but rather must consider whether the asserted change is relevant to the welfare of the particular child and the type of modification sought. *Id*. at 502-

03, 593 A.2d at 1140-1141 (holding that whether a petition to modify custody is warranted and will serve the best interest of a particular child "cannot be determined as a matter of law").

### C. The Circuit Court Misapplied The Law Governing Custody Modifications By Divorcing Its Analysis From XXXXX's Best Interests And Failing To Examine The Record Facts Based On Their Materiality To The Limited Modification Sought.

#### 1. The Circuit Court erred by refusing to examine XXXXX's best interests.

As the Court of Appeals has made clear, the requirement that a parent must show a material change of circumstances may not be used to deny a petition for modification except in "the limited situation where it is clear that the party seeking modification . . . is offering nothing new, and is simply attempting to relitigate the earlier determination." *McCready*, 323 Md. at 482, 593 A.2d at 1131. The evidence presented by Mr. Hedberg established changed circumstances under any view of that standard. *See* Point I.A, *supra*. The Circuit Court first set the bar of changed circumstances too high and then, in determining whether Mr. Hedberg had crossed it, erred in refusing to consider whether modification was in XXXXX's best interests. *Id.*.

Mr. Hedberg's petition for modification and his summary judgment submissions alleged a number of adverse changes in XXXXX's life, attributable to the residency restriction, that have occurred since the original custody order was entered in Virginia in 2002. XXXXX has suffered from the family's significant loss of income to the household after Mr. Delahoussaye moved out, requiring that two residences be sustained and resources be divided. In particular, Mr. Hedberg has been forced to sell his house and move with XXXXX to a smaller rental apartment. XXXXX also has lost positive daily companionship from Mr. Delahoussaye, as well as the benefits of having a second adult caretaker in the home, which previously had allowed Mr. Hedberg to spend more time with

XXXXX. In addition to the material disadvantages to XXXXX caused by these changes, Mr. Hedberg also presented undisputed evidence that XXXXX is saddened, worried, and distressed by Mr. Delahoussaye's inability to live in the home in an integrated family setting. XXXXX, now 12, clearly desires that Mr. Delahoussaye live in the home.

Where a parent demonstrates new circumstances, a court may not draw a preemptive legal conclusion that those circumstances are insufficient to permit the court even to consider the child's best interests. That is particularly true where the parent seeking modification has shown that the child is being harmed under the current custody arrangement, as Mr. Hedberg did here. Indeed, Ms. Detthow's lawyer admitted that perhaps it was "material" that XXXXX was "upset." (E 80) While showing harm to the child is not a prerequisite to modification, evidence of an adverse impact on the child requires the court to consider the evidence and determine whether the requested modification would better serve the child's welfare.

In *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 605 A.2d 172 (1992), for example, the original decree authorized the mother to enroll the child in a private school. When it became apparent that the child was having difficulties in that school, the father petitioned for modification to permit the child to attend a school that was better able to meet the child's needs. The mother objected, arguing that the father had failed to show a sufficiently material change to warrant a reexamination of the original order. The court disagreed, holding that if provisions in a prior order are not working well for the child that is, in and of itself, a proper basis to review and modify the order. *Id.* at 511-512, 605 A.2d at 184.[4]

[4] The American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations, 2000 ("ALI Principles"), also provide helpful guidance in situations where a parenting plan itself is causing harm to the child. *See* ALI Principles § 2.15(2) (specifically noting that "even if a substantial change

Similarly, here, Mr. Hedberg alleged that the restriction in the existing order is not working well for XXXXX and is adversely affecting him in a number of respects: by depriving him of additional daily care and support; by depriving him of additional financial and material support, including the opportunity to live in his own house with a yard rather than in a rented apartment; and by causing him to suffer emotional and psychological worry and distress because he has been separated from a supportive caretaker with whom he formerly lived and who continues to be important in his family life. The Circuit Court appears to have assumed, incorrectly, that Mr. Hedberg was precluded as a matter of law from justifying the requested modification by showing that the restriction had proved to be harmful to the child, as opposed to relying entirely on new circumstances and issues. But that is no more the law than that a court may not revisit a requirement that a child attend a particular school even if the child's grades and well-being suffer there. *Bienenfeld v. Bennett-White*, 91 Md. App. at 511-512, 605 A.2d at 184.

The Circuit Court's refusal to consider Mr. Hedberg's claim, insofar as it rested on the effects of the restriction on XXXXX, or to determine whether the existing order is detrimental to the child, was error. Where a parent provides substantial evidence that a child is being disadvantaged by an existing custodial arrangement, as Mr. Hedberg did here, a court has the obligation to consider the relevant evidence and to determine whether modifying the order will better serve the child's interests.

**2. The Circuit Court failed to analyze whether the changed circumstances were "material" in light of the child's best interests and the specific modification sought.**

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of circumstances has not occurred, a court may modify a parenting plan if it finds that the plan arrangements are not working as contemplated and in some specific way causes harm to the child").

The main purpose of the changed circumstance requirement is to protect children from the disruption caused by frequent changes in residential custody from one parent to another. "The desirability of maintaining stability in the life of a child is well recognized, and a change in custody may disturb that stability." *McCready*, 323 Md. at 481, 593 A.2d at 1130; *see also Krebs v. Krebs*, 255 Md. 264, 266-267, 257 A.2d 428, 429-430 (1969) ("Frequent change of custody does not contribute to that feeling of security essential to the mental well being of growing children."). Thus, a parent seeking to change primary residential custody from one parent to the other generally must show both a "material" change of circumstances affecting the child's welfare under the existing custody order and that changing custody is in the child's best interest. *McCready*, 323 Md. at 482, 593 A.2d at 1131. By enforcing those requirements, courts seek to ensure that the child will be subject to household moves only when the benefits are clear and outweigh any loss to the child's stability.

In this case, however, the modification sought by Mr. Hedberg does not involve a disruptive change of custody between parents. Instead, it will return to XXXXX's household a person with whom he has lived a substantial part of his life and with whom he continues to maintain strong bonds. The modification will only stabilize XXXXX's key relationships and does not require any change of custodians. *See, e.g.*, *Bienenfeld v. Bennett-White*, 91 Md. App. at 502, 605 A.2d at 179 ("The issue of stability may cut different ways in a given case[.]"). The Circuit Court should have adjusted its understanding of the materiality requirement accordingly. Instead, in denying Mr. Hedberg's petition, the Circuit Court summarily concluded that he had failed to allege a material change of circumstances. (E 85-86 (ruling that a "26-mile move by the custodial parent is not one that would result in a material change of circumstance")).

As the Court of Appeals has held, however, the determination of whether a parent's allegations of changed circumstances are "material" cannot be made in the abstract based on generalized assumptions. A 26-mile relocation may not

often justify a change of *custodians,* but it is not always insignificant and is only a part of the evidence presented in support of lifting the residency restriction here.[5] Rather, in determining the materiality of the alleged changes, a court must look to whether the changes "relate to the welfare of the child," *Wagner v. Wagner*, 109 Md.App. 1, 29, 674 A.2d 1, 15 (1996), and consider their *relation* to the specific modification being sought. *See, e.g., McCready*, 323 Md. at 480, 593 A.2d at 1130-31; *Bienenfeld v. Bennett-White*, 91 Md. App. at 511-12, 605 A.2d at 184.

Thus, as courts in other states also have concluded, "a specific change in circumstances may justify reconsideration of one provision of a divorce decree while not justifying reconsideration of another provision." *Becker v. Becker*, 694 P.2d 608, 610 (Utah 1984) (citing *Haslam v. Haslam*, 657 P.2d 757, 758 (Utah 1982) ("The change in circumstances required to justify a modification of a divorce decree varies with the type of modification sought.")); *see also Landingham v. Landingham*, 685 So.2d 946, 949 (Fla. App. 1996) (holding that the requirement that a parent must show a material change of circumstances to justify changing a child's residential custody should not be applied rigidly when the primary custodial parent petitions to remove a restriction on his or her custody).

In determining that the changes alleged by Mr. Hedberg were not material, the trial court erred by failing adequately to consider that Mr. Hedberg sought only to remove the prohibition on his life partner again residing with him and XXXXX in an integrated family setting. The changes alleged by Mr. Hedberg logically and

[5] To the extent the Circuit Court's holding was based on a view that relocation is by definition insufficient to show a material change of circumstances, that view has been rejected by this Court. "[T]he relocation of appellant to another state, can, under Maryland law, constitute the material change in circumstances necessary to trigger the best interests analysis." *Braun v. Headley*, 131 Md. App. 588, 613, 750 A.2d 624, 638 (2000) (quoting *Domingues*, 323 Md. at 500-03, 593 A.2d at 1139-41).

properly focused on the detriment to XXXXX resulting from that prohibition. The Circuit Court erred by failing to take the specific facts of this case into account and thus to recognize that these changes were more than sufficient to justify removing the restrictive condition on Mr. Hedberg's custody.

The Circuit Court's error rendered it powerless to fulfill its duty to protect XXXXX and thwarted the purpose of its continuing jurisdiction over custody cases. *See, e.g.*, *Kennedy v. Kennedy*, 55 Md. App. at 310, 462 A.2d at 1215 (Maryland courts have a continuing duty "to monitor the welfare of children in their jurisdiction and promote the children's best interests). As a result of that error, and absent reversal by this Court, the impact of the restriction on XXXXX will not be examined by any court, and the harm caused to him by the restriction will continue unabated.[6]

## II. The Circuit Court Erred By Ignoring Established Maryland Law Requiring Restrictions On A Parent's Right To Reside With A Non-Marital Partner To Be Premised On Careful Findings Of Harm To A Child.

As explained above, the Circuit Court misapplied Maryland law by disregarding undisputed evidence that the custody restriction is detrimental to XXXXX. The restriction is unsupported by any factual findings and can only be understood as reflecting discriminatory presumptions that living with cohabiting gay parents is harmful to children. This restriction should have triggered careful scrutiny by the Circuit Court. The Court of Appeals made plain in *Boswell v. Boswell*, 352 Md. 204, 721 A.2d 662 (1998), that courts must be vigilant to ensure a restriction on a parent's custody inhibiting his fundamental right to decide with whom it is in the child's best interest to associate rests not on "personal bias," "stereotypical beliefs," or "presumptions," but on evidence of actual harm to the

[6] *See* Point IV *supra.*

child. *Id.* at 237, 721 A.2d at 678. Confronted with such a factually unsupported restriction and ample evidence of its affirmative harm, the Circuit Court erroneously failed to heed these significant considerations of Maryland and constitutional law.

The Virginia court conditioned Mr. Hedberg's custody on a requirement that Mr. Delahoussaye depart from the family home at the end of the 2002 school year. In imposing this restriction, the court was governed by controlling Virginia jurisprudence on the propriety of giving custody to a gay parent residing with a same-sex partner. Under that jurisprudence Virginia courts have treated as an "important consideration in determining custody" that a gay or lesbian parent who resided with a partner could be presumed to engage in "felonious conduct" under Virginia's criminal sodomy prohibition, which – under the shelter of the now-repudiated decision in *Bowers v. Hardwick*, 479 U.S. 186 (1986)[7] – in 2002 outlawed even consensual adult sexual intimacy. *See Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995). Virginia courts also wrongly have given weight to what the Virginia Supreme Court characterized as "the 'social condemnation' attached to" a parent living in a same-sex relationship. *Id.* at 108. The Virginia courts have assumed without evidence that private bias about gay families "will *inevitably* afflict the child's relationships with its 'peers and with the community at large.'" *Id.* (quoting *Roe v. Roe*, 324 S.E.2d 691, 694 (1985)) (emphasis supplied). *See also Roe*, 324 S.E.2d at 691 (holding that "an award of custody to" a parent "who carries on an active homosexual relationship in the same residence as the child" "constitutes an abuse of judicial discretion").

The Virginia court imposed the original restriction based only on presumptions of harm. In this modification proceeding, Ms. Detthow also has failed to point to any evidence that Mr. Delahoussaye's residence with Mr.

[7] In 2003, *Lawrence v. Texas*, 539 U.S. 558, held consensual sodomy laws facially unconstitutional and disapproved their application to discriminate against gay men and lesbians. *See* Point III *supra.*

Hedberg and XXXXX ever has posed any harm to the boy, nor is there any evidence or finding to that effect in the record. To the contrary, the Virginia court permitted Mr. Delahoussaye to remain in the home for months following its April 1, 2002 hearing and otherwise to have continuing unrestricted contact with XXXXX, demonstrating that the court did not find that he posed any actual threat to the child. The custody restriction therefore must be understood not as an evidence-based determination but as a rote application of the blanket presumption in Virginia law that forbidding the same-sex partner of a custodial parent to live in the home is in the child's best interests. (*See* E 43 ¶ 11) Indeed, the Virginia trial judge "specifically state[d] that Virginia's law does not permit same-sex couples to live together with a child."[8] (E 43 ¶ 11)

The Maryland Court of Appeals has recognized that a restriction based only on a presumption against residence by a non-marital partner conflicts with a parent's protected constitutional rights without serving the child's best interests. *Boswell*, 352 Md. 204, 721 A.2d 662. In such cases, a court effectively substitutes its judgment for the parent's as to what is best for the child, merely because it believes the State's moral compass is superior. But as the U.S. Supreme Court has

[8] Ms. Detthow argued below that the Virginia court made its determination based on XXXXX's "best interests," pointing to the statement in the Virginia Consent Order that the court considered "the best interests" of the child and the general "factors set out in Virginia Code 20-124.2 and 20-124.3." (E 67) But this does not mean the restriction had evidentiary support. The Virginia cases on this issue make clear that the presumption against residence by a gay partner is considered an application of the statutory best interests standard in situations involving a cohabiting gay parent. *See, e.g.*, *Roe*, 324 S.E.2d at 691 ("This child-custody dispute *presents the question whether a child's best interests* are promoted by an award of custody to a parent who carries on an active homosexual relationship in the same residence as the child.") (emphasis added); *Bottoms*, 457 S.E.2d at 103 ("*The sole issue* is whether . . . the child's *best interests* would be served by awarding custody to the [lesbian] mother") (emphasis added). Thus, rather than make an individualized determination, as is required in Maryland before preventing a custodial parent from residing with a non-marital partner, courts in Virginia rely upon a blanket presumption that it is contrary to the best interests of the child to reside with a custodial parent's same-sex partner.

made clear, due process "does not permit a State to infringe on the fundamental right to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000). The restriction at issue here not only sends a condemning message to the child about his parent but is causing unwarranted damage in the child's life. When presented with a petition to modify such a restriction, a Maryland court's first inquiry should be the extent to which that restriction was demonstrably based on evidence of harm and not on mere presumptions about what is best for children.

Courts reviewing modification requests must be vigilant in this area because a parent's right to rear his children, instill their values, and make decisions about their associates and family life are among the most fundamental and protected liberty interests guaranteed under the federal and Maryland Constitutions. *See Boswell*, 352 Md. at 218, 721 A.2d at 669. "'A parent's Fourteenth Amendment liberty interest in raising his or her children as she sees fit, without undue interference by the State, has long been a facet of that private realm of family affairs over which the Supreme Court has draped a cloak of constitutional protection.'" *Id.* at 218, 721 A.2d at 668-89 (quoting *Wolinski v. Browneller*, 115 Md. App. 285, 299, 693 A.2d 30, 36-37 (1997)).

The principles enunciated in *Boswell* were confirmed by the U.S. Supreme Court in *Troxel v. Granville*, 530 U.S. at 72-73. *See Frase v. Barnhardt*, 379 Md. 100, 125, 840 A.2d 114, 128 (2003) (noting that in cases like *Boswell*, Maryland courts have "on many occasions . . . articulated and applied the same principles confirmed in *Troxel*"). In declaring unconstitutional an application of Washington's grandparent visitation statute, the Supreme Court in *Troxel* affirmed that a parent's fundamental right to rear her children requires courts to give "material weight" to the parent's judgments about whether and on what terms it is in the best interests of the children to associate with other adults. Under *Troxel* a court may not simply substitute its own views of a child's best interests for those of a fit parent. In particular, *Troxel* requires deference to the parent's views about

how to "develop[ ] . . . the child's social and moral character." *Troxel*, 530 U.S. at 78 (Souter, J., concurring).

Mr. Hedberg does not suggest that courts have no effective review of a child's living arrangements and contact with other adults in the home. In appropriate cases, if the evidence demands it, a court in a custody dispute may act in the best interests of the child to limit a parent's conduct without unconstitutionally infringing a parent's liberty interests. *Boswell*, 352 Md. at 219, 721 A.2d at 669. But "a sexually active parent['s] . . . fundamental right of contact with his child" cannot be curtailed unless the court finds that the parent's conduct has a harmful effect on the child. *Id.* at 234, 721 A.2d at 676-77.

*Boswell* applied these principles to reverse a lower court's restriction on a gay parent's visitation rights because there was no evidence that the presence of the parent's live-in partner caused any actual detriment to the children. The Court held that only "an evidence-based finding of adverse impact on the child caused by a parent's non-marital relationship" may "justify restrictions or limitations on custody or visitation." *Id.* at 236, 721 A.2d at 678. This requires the trial court to make "specific factual findings based on sound evidence in the record." *Id*. at 237, 721 A.2d at 678. The court has no "power" to use "blanket disapproval of a non-marital relationship as a basis for determining custody or visitation without a finding of adverse impact on the children." *Id.* at 238, 721 A.2d at 679. In this case, the Circuit Court was asked to scrutinize such a restriction in the context of a petition to modify, based on proffered evidence that the restriction is adversely affecting the child and serves no positive or legitimate purpose. Given the undisputed evidence and the lack of a factual predicate to conclude the restriction was imposed in response to actual harm, *Boswell* gives clear direction that the restriction must be lifted. *Id*. at 237, 721 A.2d at 678.[9]

[9] Although *Boswell* involved an initial visitation determination, the Court emphasized that its principles apply more broadly to other contexts in which a parent's right to rear his or her children while in a non-marital relationship may be

The Circuit Court ignored the requirements of *Boswell* in this case. Far from engaging in the careful fact-finding that the Court of Appeals has admonished lower courts to perform when a restriction on the presence of a non-marital partner is at issue, the Circuit Court simply denied the modification on a summary judgment motion unsupported by any admissible evidence at all, much less evidence establishing that the restriction ever was or is necessary to serve XXXXX's best interests.

## III. The Trial Court Erred In Failing To Consider Or Apply *Lawrence v. Texas* Which, Together With *Troxel v. Granville,* Established That The Custody Restriction Is Unconstitutional.

The restriction upheld by the Circuit Court makes it impossible, for no legitimate reason, for Mr. Hedberg to bring his family together under one roof. The Circuit Court's ruling conflicts not only with established Maryland law but also with the U.S. Supreme Court's decisions in *Lawrence* and *Troxel.* *Lawrence* declared unconstitutional sodomy laws like the one on which Virginia's presumption against gay parents is premised. It also firmly rejected the use of such laws and the moral condemnation they express to justify government discrimination against gay people beyond the criminal sphere. Most fundamentally, *Lawrence* established that, contrary to *Bowers v. Hardwick*, the protections of the Fourteenth Amendment – which include the right of parental autonomy guarded in *Troxel* – cannot legitimately be denied to gay people based on their status or intimate relationships alone. The Circuit Court erred in its failure to recognize the *Lawrence* decision as an additional changed circumstance

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at issue. *See, e.g., Boswell*, 352 Md. at 236, 721 A.2d at 677 ("We . . . reiterate that the case law discussed in this opinion concerning custody determinations, and the principles governing such situations, are equally applicable to visitation proceedings."). Indeed, this Court characterized the requirement of "proof of an adverse impact from a parent's non-marital relationship" as "an entrenched aspect of Maryland's custody jurisprudence." *Lapides v. Trabbic*, 134 Md. App. 51, 68, 758 A.2d 1114, 1122 (2000), and applied the principles enunciated in *Boswell* to dismiss a parent's claim that his ex-wife committed fraud in failing to disclose that she was in a romantic relationship with the woman residing with her and her child.

strengthening the need for careful scrutiny and modification of the prior custody restriction. When intervening changes in governing law dictate that continued enforcement of a custody restriction would unconstitutionally infringe a parent's due process rights, the restriction cannot stand.

As noted above, in *Troxel* the U.S. Supreme Court affirmed that the courts must give deference to the judgment of a fit custodial parent, whose role it is to "direct the upbringing" of their children, *Troxel*, 530 U.S. at 65, including to guide the "development of the child's social and moral character" and to determine those with whom it is in the child's best interest to associate. *Id.* at 78 (Souter, J., concurring). The view that these rights can be limited for gay parents – by imposing virtually automatic restrictions on a child's contact with adults with whom the gay parent is in an intimate relationship – rests on the now discredited holding of *Bowers v. Hardwick* that it is permissible to criminalize sexual intimacies between gay people and otherwise penalize them for engaging in such intimacies or simply for being gay. Since the Custody Order issued in this case, *Lawrence* reversed *Bowers* and made clear that gay people have equal constitutional liberties and cannot be denied them based on differences in moral attitudes toward homosexuality or gay relationships.

The Court made clear that in overruling *Bowers* it was doing more than decriminalizing an act – it was affirming the right of gay people to form and sustain loving personal relationships and to lead their private lives free of government restriction and legal condemnation. The Court declared that gay couples "are entitled to respect for their private lives." *Lawrence*, 539 U.S. at 578. It recognized that sodomy prohibitions wrongly "seek to control a personal relationship that . . . is within the liberty of persons to choose," in which intimate sexuality may be "but one element in a personal bond that is more enduring." *Id.* at 567.

The Court explicitly held that such prohibitions could not be used to justify invidious and far-ranging discrimination against gay men and lesbians in other parts of their lives:

> When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case. . . . Its continuance as precedent demeans the lives of homosexual persons.

*Id.* at 575. Likewise, in her concurrence, Justice O'Connor observed that sodomy laws had been abused to deny gay people rights in the very context before this Court: "the law 'legally sanctions discrimination against [homosexuals] in the area[ ] of family issues.'" *Id.* at 582. (O'Connor, J., concurring) (citation omitted). Justice O'Connor noted that the Constitution is most skeptical of state action that "inhibits personal relationships." *Id.* at 580.

*Lawrence* thus established that the states are forbidden not only to criminalize the sexual intimacies of gay people,[10] but also to leverage the stigma of this government condemnation to justify restrictions in other spheres of their

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[10] After *Lawrence*, which declared sodomy statutes facially unconstitutional, the private consensual sexual conduct of gay men, lesbians and others may not be deemed criminal in any state without a legitimate and sufficient justification. Indeed, earlier this year, the Virginia Supreme Court in *Martin v. Ziherl*, __ S.E.2d __, 2005 WL 77326 (Va. Sup. Ct. Jan. 14, 2005), explicitly followed *Lawrence* in declaring unconstitutional Virginia's criminal fornication statute. The Virginia Supreme Court held that the fornication statute, "like the Texas statute at issue in *Lawrence*, is an attempt by the state to control the liberty interest" of "two unmarried persons" to enter into a personal relationship with one another. *Id.* at *3. The court rejected as contrary to *Lawrence* the purported justification for the statute to "'encourag[e] that children be born into a family consisting of a married couple.'" *Id.* The Virginia Supreme Court's analysis of the state's fornication statute fully applies to its sodomy prohibition which, "but for the nature of the sexual act, . . . [is] identical." *Id.* at *3 n. *. *Compare* Va. Code Ann. § 18.2-344 ("Fornication") *with* Va. Code Ann. § 18.2-361 ("Crimes against nature") (sodomy) *and* Tex. Penal Code Ann. § 21.06(a) ("Homosexual conduct").

lives, including family and child-rearing. "Persons in a homosexual relationship may seek autonomy" to make personal decisions relating to "family relationships [and] child rearing." *Id.* at 574. In a ringing renunciation of *Bowers* and the legacy of discrimination it had sanctioned, the Court flatly held that "*Bowers* was not correct when it was decided, and it is not correct today." *Id.* at 578. *Lawrence* thus made clear that past applications of sodomy laws to discriminate against gay people were unconstitutional as well.

Significantly, the Court held that there was "no legitimate state interest" in the desire to "condemn homosexual conduct as immoral." *Id.*. The Court acknowledged the "profound and deep convictions" some hold against homosexuality "shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Id.* at 571. Yet the Court concluded that "the power of the State" may not be used to "enforce these views on the whole society." *Id.* The courts must "define the liberty of all, not . . . mandate our own moral code." *Id.* (quotations omitted).

Further, the Court held that this broad "right to liberty under the Due Process Clause gives [gay and lesbian persons] the full right to engage in their conduct without intervention of the government." *Id.* at 578. "This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship *or to set its boundaries absent injury to a person* or abuse of an institution the law protects." *Id.* at 567 (emphasis added). The Court thus instructed that where a gay person's intimate relationship harms no one – the circumstance in this case – the government has no basis to restrict or intrude upon it.

*Lawrence*, read together with *Troxel*, repudiates restrictions on gay and lesbian parents' custodial rights based not on evidence of harm to a child but on mere differences in moral values between a court and a parent, presumptions about gay people's "felonious conduct," or any purported "social condemnation" of their same-sex relationships. *Bottoms*, 457 S.E.2d at 108. After *Lawrence* the equal

right of a gay parent to rear children and to form relationships with a same-sex partner must be acknowledged.[11] This change in the nation's law should cause the Court to re-examine the restriction at issue here and strike it down as lacking any legitimate support. *Lawrence* makes clear that the custody restriction is unconstitutional, and Mr. Hedberg appropriately has called on the courts of this State to modify the Custody Order to remove this unconstitutional burden and restore his ability as custodial parent to direct XXXXX's upbringing and unite his Maryland family.

In an analogous case involving modification and evolving constitutional standards, the Texas Court of Appeals held that it was error for the trial court to refuse to entertain a parent's motion to modify a grandparent visitation order in light of the Supreme Court's intervening decision in *Troxel*, which, the parent asserted, called into question the validity of the Texas law on which the visitation order had been premised. *See In the Interest of T.J.K.*, 62 S.W.3d 830 (Tex. Ct. App. 2001). The Texas appellate court concluded that a parent "has no less a right to seek modification" of a visitation order because the law on which it was based "is found unconstitutional than because of a change of fact." *Id.* at 832. *See also In the Matter of Shapiro*, 437 N.Y.S.2d 618, 622 (N.Y. Fam. Ct. 1981) (granting

[11] That XXXXX's mother seeks enforcement of the custody restriction does not negate its infringement of Mr. Hedberg's constitutional rights nor empower a court to impose such a restriction without evidence of actual harm to the child. Ms. Detthow answered only "I don't know" when asked why the restriction should continue to be enforced. A parent's personal discomfort, bias, or hostility toward an ex-spouse's gay relationship cannot control whether a partner should stay in the home when no adverse impact on the child is demonstrated. Private bias, negative attitudes, and animus are illegitimate grounds on which to make judicial decisions regarding custody. *See Queen v. Queen*, 308 Md. 574, 588, 521 A.2d 320, 328 (1987) ("'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'") (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). This is true whether such views are held by the community at large, the court, or the child's other parent. *Palmore*, 466 U.S. 429 (reversing award of custody to white father who objected to his daughter's residence with mother's African-American husband).

motion to reconsider a support order issued several years earlier that had been "based on doctrine which is now outmoded because of constitutional, basic changes in the legal treatment of the sexes"); *State v. Ingel*, 18 Md. App. 514, 523, 308 A.2d 223, 229 (1973) ("a decision that a criminal statute is unconstitutional must be fully retroactive so that a judgment thereunder shall not stand.").

As in *Troxel*, the Court must give weight to Mr. Hedberg's unrebutted judgment that the home he made with Mr. Delahoussaye is a fully appropriate, moral environment in which to raise XXXXX and that Mr. Delahoussaye is an entirely positive influence on his son. Since its imposition, the restriction has caused XXXXX only to suffer. That harm should be brought to an end.

## IV. The Circuit Court's Rationale Effectively Denies Any Forum For Relief From A Harmful Restriction That Has Been Shown To Be Unconstitutional By Intervening Case Law.

With no member of XXXXX's family any longer residing in or having significant connections to Virginia, Maryland offers the only forum in which Mr. Hedberg may secure XXXXX's best interests by striking the constitutionally infirm custody restriction. *See* Md. U.C.C.J.E.A. §§ 9.5-203 ("Jurisdiction to modify determination") and 9.5-201 ("Initial child-custody jurisdiction") (read together, demonstrating that as XXXXX's "home state" and with neither parent residing in Virginia, Maryland is vested with jurisdiction to modify the custody restriction). *See also* Va. Code Ann. §§ 20-146.12 ("Initial child custody jurisdiction") and 20-146.13 ("Exclusive, continuing jurisdiction") (establishing that a parent has no right to seek modification of a Virginia custody order in a Virginia court if the parents and child no longer live there). The Consent Order was enrolled properly and without objection in Maryland, and it is with the courts of this State that responsibility for freeing this family of the harmful and unreasonable restriction rests.

The Circuit Court below abdicated this responsibility, despite uncontested facts that the restriction is harmful to XXXXX. In failing properly to adjudicate

the motion to modify or to address the now apparent unconstitutionality of this restriction, the Circuit Court left this Maryland family without a forum or remedy. "It is a basic tenet, expressed in Article 19 of the Maryland Declaration of Rights, that a plaintiff injured by unconstitutional state action should have a remedy to redress the wrong." *Piselli v. 75th Street Medical*, 371 Md. 188, 205-06, 808 A.2d 508, 518 (2002) (quotations omitted); *see* Md. Declaration of Rights, Art. 19.[12] So long as this restriction stands, Mr. Hedberg cannot reunite his family under one roof. XXXXX is left to suffer for years to come the anxiety and loss of Mr. Delahoussaye's support and presence in the household caused by the restriction. By refusing to scrutinize this harmful and unconstitutional restriction, the Circuit Court ignored its paramount obligation – to safeguard the best interests of this child.

## CONCLUSION

For the foregoing reasons, Mr. Hedberg respectfully requests that the Court reverse the Circuit Court's orders granting Ms. Detthow's motion for summary judgment and denying Mr. Hedberg's cross-motion for summary judgment. Mr. Hedberg further requests that his motion to modify be granted and the restriction on residence by his life partner be removed.

Respectfully submitted,

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[12] "That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land."

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Brief, Appendix and Record Extract were this 31 day of January, 2005 served by postal mail to Patrick H. Stiehm, Esq. Stiehm Law Office, 4308 Lawrence Street, XXXXXandria, VA 22309, counsel for Appellee.

_____
Lisa Busby

THE BRIEF WAS PREPARED IN TIMES NEW ROMAN 13 POINT.

## CITATION AND VERBATIM TEXT OF STATUTES AND RULES

**Fourteenth Amendment - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection**

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Maryland Declaration of Rights, Article 19**

That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

**Maryland Declaration of Rights, Article 24**

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

**MD Code, Family Law, § 9.5-203**
**§ 9.5-203. Jurisdiction to modify determination**

Except as otherwise provided in § 9.5-204 of this subtitle, a court of this State may not modify a child custody determination made by a court of another state unless a

court of this State has jurisdiction to make an initial determination under § 9.5-201(a)(1) or (2) of this subtitle and:
(1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under § 9.5-202 of this subtitle or that a court of this State would be a more convenient forum under § 9.5-207 of this subtitle; or
(2) a court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

**MD Code, Family Law, § 9.5-201**
**§ 9.5-201. Initial child-custody jurisdiction**

(a) Except as otherwise provided in § 9.5-204 of this subtitle, a court of this State has jurisdiction to make an initial child custody determination only if:
(1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
(2) a court of another state does not have jurisdiction under item (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under § 9.5-207 or § 9.5-208 of this subtitle, and:
(i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
(ii) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
(3) all courts having jurisdiction under item (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under § 9.5-207 or § 9.5-208 of this subtitle; or
(4) no court of any other state would have jurisdiction under the criteria specified in item (1), (2), or (3) of this subsection.

(b) Subsection (a) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this State.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

**Maryland Famly Laws Section 1-201(4)**

§ 1-201.

(a) An equity court has jurisdiction over:

(1) adoption of a child, except for a child who is under the jurisdiction of any juvenile court and who previously has been adjudicated to be a child in need of assistance;

(2) alimony;

(3) annulment of a marriage;

(4) divorce;

(5) custody or guardianship of a child except for a child who is under the jurisdiction of any juvenile court and who previously has been adjudicated to be a child in need of assistance;

(6) visitation of a child;

(7) legitimation of a child;

(8) paternity; and

(9) support of a child.

(b) In exercising its jurisdiction over the custody, guardianship, visitation, or support of a child, an equity court may:

(1) direct who shall have the custody or guardianship of a child, pendente lite or permanently;

(2) determine who shall have visitation rights to a child;

(3) decide who shall be charged with the support of the child, pendente lite or permanently;

(4) from time to time, set aside or modify its decree or order concerning the child; or

(5) issue an injunction to protect a party to the action from physical harm or harassment.

(c) This section does not take away or impair the jurisdiction of a juvenile court or a criminal court with respect to the custody, guardianship, visitation, and support of a child.

**Va. Code Ann. § 20-124.2 (2004)**

**§ 20-124.2. Court-ordered custody and visitation arrangements**

A. In any case in which custody or visitation of minor children is at issue, whether in a circuit or district court, the court shall provide prompt adjudication, upon due consideration of all the facts, of custody and visitation arrangements, including support and maintenance for the children, prior to other considerations arising in the matter. The court may enter an order pending the suit as provided in § 20-103. The procedures for determining custody and visitation arrangements shall insofar as practical, and consistent with the ends of justice, preserve the dignity and resources of family members. Mediation shall be used as an alternative to litigation where appropriate. When mediation is used in custody and visitation matters, the goals may include development of a proposal addressing the child's residential schedule and care arrangements, and how disputes between the parents will be handled in the future.

B. In determining custody, the court shall give primary consideration to the best interests of the child. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest. The court may award joint custody or sole custody.

C. The court may order that support be paid for any child of the parties. The court shall also order that support will continue to be paid for any child over the age of 18 who is (i) a full-time high school student, (ii) not self-supporting, and (iii) living in the home of the party seeking or receiving child support until such child reaches the age of 19 or graduates from high school, whichever first occurs. The court may also order the continuation of support for any child over the age of 18 who is (i) severely and permanently mentally or physically disabled, (ii) unable to live independently and support himself, and (iii) resides in the home of the parent seeking or receiving child support. In addition, the court may confirm a stipulation or agreement of the parties which extends a support obligation beyond when it would otherwise terminate as provided by law. The court shall have no authority to decree support of children payable by the estate of a deceased party. The court may make such further decree as it shall deem expedient concerning support of the minor children, including an order that any party provide health care coverage.

D. In any case in which custody or visitation of minor children is at issue, whether in a circuit or district court, the court may order an independent mental health or psychological evaluation to assist the court in its determination of the best interests of the child. The court may enter such order as it deems appropriate for the payment of the costs of the evaluation by the parties.

E. The court shall have the continuing authority and jurisdiction to make any additional orders necessary to effectuate and enforce any order entered pursuant to this section or § 20-103 including the authority to punish as contempt of court any willful failure of a party to comply with the provisions of the order.

**Va. Code Ann.** § **20-124.3 (2004)**
**§ 20-124.3. Best interests of the child; visitation**

In determining best interests of a child for purposes of determining custody or visitation arrangements including any pendente lite orders pursuant to § 20-103, the court shall consider the following:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;

2. The age and physical and mental condition of each parent;

3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;

4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;

5. The role that each parent has played and will play in the future, in the upbringing and care of the child;

6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;

7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;

8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;

9. Any history of family abuse as that term is defined in § 16.1-228. If the court finds such a history, the court may disregard the factors in subdivision 6; and

10. Such other factors as the court deems necessary and proper to the determination.

The judge shall communicate to the parties the basis of the decision either orally or in writing.

**Va. Code Ann. § 20-146.12 (2004)**
**§ 20-146.12. Initial child custody jurisdiction**

A. Except as otherwise provided in § 20-146.15, a court of this Commonwealth has jurisdiction to make an initial child custody determination only if:

1. This Commonwealth is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this Commonwealth but a parent or person acting as a parent continues to live in this Commonwealth;

2. A court of another state does not have jurisdiction under subdivision 1, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this Commonwealth is the more appropriate forum under § 20-146.18 or § 20-146.19, and (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this Commonwealth other than mere physical presence and (ii) substantial evidence is available in this Commonwealth concerning the child's care, protection, training, and personal relationships;

3. All courts having jurisdiction under subdivision 1 or 2 have declined to exercise jurisdiction on the ground that a court of this Commonwealth is the more appropriate forum to determine the custody of the child under § 20-146.18 or § 20-146.19; or

4. No court of any other state would have jurisdiction under the criteria specified in subdivision 1, 2, or 3.

B. Subsection A is the exclusive jurisdictional basis for making a child custody determination by a court of this Commonwealth.

C. Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

**Va. Code Ann. § 20-146.13 (2004)**
**§ 20-146.13. Exclusive, continuing jurisdiction**

A. Except as otherwise provided in § 20-146.15, a court of this Commonwealth that has made a child custody determination consistent with § 20-146.12 or § 20-146.14 has exclusive, continuing jurisdiction as long as the child, the child's parents, or any person acting as a parent continue to live in this Commonwealth.

B. A court of this Commonwealth that has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under § 20-146.12.

**Va. Code Ann.** § **18.2-344 (2004)**

**§ 18.2-344. Fornication**

Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor.

**Va. Code Ann. § 18.2-361 (2004)**
**§ 18.2-361. Crimes against nature**

A. If any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony, except as provided in subsection B.

B. Any person who carnally knows by the anus or by or with the mouth his daughter or granddaughter, son or grandson, brother or sister, or father or mother shall be guilty of a Class 5 felony. However, if a parent or grandparent commits any such act with his child or grandchild and such child or grandchild is at least thirteen but less than eighteen years of age at the time of the offense, such parent or grandparent shall be guilty of a Class 3 felony.

**Tex. Penal Code § 21.06 (2004)**
**§ 21.06. Homosexual Conduct**

(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.

(b) An offense under this section is a Class C misdemeanor.

**Appendix**

1. January 14, 2005, Circuit Court Final Order and Judgment granting Ms. Detthow's motion for summary judgment and denying Mr. Hedberg's cross-motion for summary judgment and motion for modification.