

## RKL-Litigation Offensive Continues

# Court of Appeals Refuses Stepparent-Adoption

RKL: „Now it’s the turn of the Supreme Court“

After the great successes gained in tax law and regarding health insurance partner benefits RKL-litigation offensive for same-sex partners’ rights goes into its next round. The District Court of Neusiedl refused to approve the adoption of a minor child by the same-sex partner of her mother. Upon appeal the Regional Court of Eisenstadt confirmed this decision. The case is now pending before the Supreme Court.

Theoretically according to Austrian law also homosexuals can, as individuals, adopt a child (single adoption), also the (biological) children of their partners (stepparent-adoption). In fact this however is not practically possible, since the biological mother loses her parental rights, when her partner adopts her child; vice versa the biological father loses his parental rights, when his partner adopts his child. On the contrary heterosexual couples (also if unmarried) can be both legal parents after adoption of a child of one of the partners by the step-parent. The law withholds this possibility, and therefore a meaningful and practical step-parent adoption, from same-sex partners.

RKL supports the case of a woman, who entered into an adoption contract with her partner concerning the adoption of her child. The woman however could not ask the Court for approval of this contract since such an approval would have meant that the biological mother, her partner, would lose all her parental rights. So the woman and the child asked the Constitutional Court to repeal the respective statutory provision (Art. 182 par. 2 2<sup>nd</sup> sentence General Civil Code, ABGB). The Constitutional Court referred the applicants to the family court. After this court refuses approval of the adoption the applicants could then ask the Appeals Court or the Supreme Court to address the Constitutional Court for repeal of the provision (VfGH 14.06.2005, G 23/05).

### License to discriminate?

The applicants did so and the family court, the District Court of Neusiedl am See, refused approval by decision of 10<sup>th</sup> October 2005 (1 P 101/05g). Sexual orientation, the judge said, is a protected category under the right to private and family life (Art. 8 ECHR) and discrimination on the basis of sexual orientation as a principle is intolerable. Nevertheless the judge (referring to the judgment of the European Court of Human Rights in *Fretté vs. France* 2002) held the opinion that in the area of adoption states would enjoy a wide margin of appreciation, which margin would allow disadvantaging of same-sex couples in stepparent-adoption.

The two partners and her child appealed this decision and pointed out that their case, unlike *Fretté* 2002, is not about single adoption of a foreign child, to which there is no relation yet established at all, but that their case is about unequal treatment of unmarried same-sex couples in relation to unmarried opposite-sex couples (such unequal treatment having been declared inadmissible by the Court one year after *Fretté* in *Karner vs. Austria* 2003) regarding stepparent-adoption.

The Regional Court of Eisenstadt however confirmed the decision (21.02.2006, 20 R 177/05m). The panel of three appellate judges was of the opinion that the difference in treatment was justified on the basis that a child always would need parents of opposite sex. The family is challenging this decision now before the Supreme Court and alleges *inter alia* that children are provided with manifold opportunities to experience male and female ways of life, be it with friends and acquaintances, be it in kindergarten, school, media and many more. Above all the issue in question is not, as in *Fretté*, whether a child should grow up in a same-sex family, but if children in such families should be disadvantaged vis a vis children in heterosexual families by withholding from them a legally secured and recognized relationship to their stepparents.

“Now it’s the turn of the Supreme Court”, says *Dr. Helmut Graupner*, president of the Austrian lesbian and gay rights organization *Rechtskomitee LAMBDA (RKL)* and counsel of the family, “We are

anxious to see if it will follow the invitation of the Constitutional Court and, as the Upper Regional Court of Innsbruck did regarding infamous Art. 209, will on the basis of human rights apply for the repeal of legislation discriminatory to same-sex couples.”

*Rechtskomitee LAMBDA (RKL), founded in 1991, on a supra-partisan and denominational level is working for the implementation of human rights for homo- and bisexual men and women. In its honorary board it convenes so prominent members as the Chairman of the Social-Democratic Party of Austria (SPÖ) Dr. Alfred Gusenbauer, President MP Peter Schieder, MP Mag. Terezija Stoisits (Green Party), the well-known child and adolescent psychiatrist Univ.-Prof. Dr. Max Friedrich and the Ombudspersons for Children and Adolescents of Vienna DSA Monika Pinterits und Dr. Anton Schmid, the Secretary General of Amnesty International Austria Mag. Heinz Patzelt and the well-known human rights experts Dr. Lilian Hofmeister und Univ.-Prof. Dr. Manfred Nowak, the sexologists ao.Univ.-Prof. Dr. Josef Christian Aigner, Prof. Dr. Rotraud Perner and Mag. Johannes Wahala, the theologian Univ.-Prof. Dr. Kurt Lüthi, entertainer Günter Tolar and many more.*

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