

LGBT Issues in a Post-DOMA World

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What is the Stonewall Bar Association of Michigan?

- ▶ The Stonewall Bar Association is a voluntary state-wide professional association of lesbian, gay, bisexual and transgender lawyers and their allies providing a visible LGBT presence within the Michigan legal system.
 - ▶ Named after the Stonewall Riots
 - ▶ Considered by many to be the birth of the modern gay rights movement.
 - ▶ The Stonewall Inn was a gay nightclub located at 51 and 53 Christopher Street, in the Greenwich Village section of Manhattan.
 - ▶ The riots began 1:20 a.m. Saturday, June 28, 1969, when police raided the Stonewall Inn.
 - ▶ Subsequent clashes with New York City Police lasted for the next 3 days.
 - ▶ The following year saw the first Gay Pride Parades which continue to this day in cities all around the nation.
- ▶ Stonewall Bar Association members seek to protect and advance the rights of all Michiganders by providing legal representation, advocacy, education and outreach on the issues facing members of the LGBT community.

Windsor and the death of DOMA didn't resolve everything, in fact it may have created more problems than it solved.

- ▶ The Federal Defense of Marriage Act (DOMA) section 3 was the only part of the law that was held unconstitutional in Windsor. This is the section that prevented the Federal government from recognizing same-sex marriages for any purpose.
 - ▶ Generally, this means that the Federal government will now recognize same-sex marriages entered into in states that allow them, when both parties still reside in that state.
- ▶ Recent Federal Court rulings in Utah and Oklahoma have cited the language from Windsor as support for finding state law same-sex marriage prohibitions unconstitutional.

Same-sex marriage laws: Current status around the globe.

- ▶ As of today, 17 states have legalized same-sex marriage, 2 more states have had Federal courts rule their ban on same-sex marriages unconstitutional, and 4 states allow civil unions or domestic partnerships, but not marriage.
- ▶ In addition, 8 Native American tribal authorities issue same-sex marriage licenses, including the Little Traverse Bay Bands of Odawa Indians.
- ▶ As of August 2013, fifteen foreign countries allow same-sex couples to marry, and the United Kingdom will follow suit in March of 2014.
- ▶ 27 states (including Michigan) have unchallenged constitutional amendments prohibiting recognition of same-sex marriage, and 4 others have state laws barring same-sex marriage.
- ▶ A recent court ruling in Ohio allowed a valid, out-of-state, same-sex marriage to be recorded on a death certificate, although Ohio is otherwise a constitutional non-recognition state. (*Obergefell v. Wymyslo*, U.S. Southern District Ohio).

Things are far more complicated in so-called “non-recognition” states.

- ▶ DOMA section 2 was not affected by the Windsor ruling. Section 2 states:
 - ▶ “No State...shall be required to give effect to any public act, record, or judicial proceeding of any other State...respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State...or a right or claim arising from such relationship.”
- ▶ Now, legally married same-sex couples who move to a “non-recognition” state (like Michigan) will generally be married for purposes of Federal law and some Federal benefit programs, but will be unmarried for all state law purposes.
- ▶ Many Michigan same-sex couples have legally married in other states and jurisdictions that do not have residency requirements.

Different standards of determining the validity of same-sex marriages are applied for Federal programs.

- ▶ *Lex loci celebrationis* – if the marriage was valid according to the laws of the jurisdiction where it was solemnized, then it is valid everywhere.
 - ▶ This doctrine is being applied by the Department of Homeland Security in immigration cases. (www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act)
 - ▶ The Internal Revenue Service is applying this doctrine to Federal tax filers, allowing legally married same-sex couples to file as married even if they reside in non-recognition states. (www.treasury.gov/press-center/press-releases/Pages/jl2153.aspx)
- ▶ *Lex domicilii* – the marriage is valid only if such a marriage is allowed in the jurisdiction where the parties presently reside.
 - ▶ On September 27, 2013, Department of Health and Human Services issued a letter regarding Medicare and Medicaid eligibility for same-sex married couples that included the following statement:
 - ▶ “We note that, because states may opt not to recognize same-sex marriages for purposes of Medicaid and CHIP, and because, as set forth in concurrent CCIIO Marketplace guidance, APTC/CSR eligibility methodology will follow PTC eligibility methodology, a narrow benefit eligibility gap could arise in states that do not recognize same-sex marriages. We are currently considering this issue. As part of that consideration, we will consult with the states.” (www.medicaid.gov/Federal-Policy-Guidance/Downloads/SHO-13-006.pdf)
 - ▶ The U.S. Social Security Administration Program Operations Manual states that not only must a recipient have been married in a state that permitted same-sex marriage at the time the marriage was celebrated, but they also must reside in a state that recognizes same-sex marriage at the time they apply for benefits. (<https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210100#b1>)

This hodgepodge of differing standards is further complicated by issues of state-law procedure.

- ▶ Michigan allows neither common-law marriage nor common-law divorce. That means that a valid marriage can only be terminated under Michigan law by death or divorce.
 - ▶ It is not clear what would happen if a validly married same-sex couple moved to Michigan, stayed for 10 years and then moved back to a state that recognizes same-sex marriage.
 - ▶ Were they married the whole time?
 - ▶ Did they become “unmarried” when they drove across the Michigan State Line?
 - ▶ What if one of the spouses dies while on vacation in a “recognition” state?
 - ▶ Similarly, what happens when Michigan finally allows same-sex marriage in a year or ten years?
 - ▶ Is the couple now validly married (again)?
 - ▶ Do they have to re-marry each other?
 - ▶ What if they broke up in the interim?
- ▶ Michigan State Senator Rebekah Warren introduced Senate Joint Resolution W, SB 405 and SB 406 in June of 2013 to attempt a repeal of Michigan’s Constitutional Ban on same-sex marriage, and to amend statutes to recognize out-of-state same-sex marriages. It is currently stalled in the Committee on Governmental Operations. This will likely require a ballot initiative.

In addition to the Federal/State benefits divide, other significant probate issues arise from the confusion.

- ▶ The right to determine the disposition of a spouse's body or ashes has significant impact on same-sex couples.
 - ▶ In my own practice, when my client's same-sex partner died, her Will included a clause giving "possession" of her remains to my client.
 - ▶ After interment, and following a dispute with the partner's family, my client wished to exhume the remains and re-inter them in my client's cemetery plot out-of-state.
 - ▶ The cemetery refused to allow it, citing the exclusive right of "next-of-kin" to exhume the remains.
- ▶ Guardianship of minor children may go to hostile grandparents rather than the non-biologically-related same-sex spouse who raised them.
 - ▶ The prioritization of appointment for Guardians and Conservators under EPIC would place a same-sex spouse behind other family members.
- ▶ Inter-vivos transfers of money or property between validly married same-sex spouses in non-recognition states could be subject to gift tax limits.

Drafting around the foregoing problems will have to account not only for interstate moves, but also potential changes to the marital status of the couple arising from changes in the law.

- ▶ Some same-sex couples may have entered into domestic partnerships, civil unions, or out-of-state marriages in multiple jurisdictions.
- ▶ Sometimes, same-sex couples may fail to take any legal action to terminate prior legal relationships before entering into new ones in other jurisdictions. This may create problems with the validity of subsequent marriages or even run afoul of bigamy laws.
- ▶ In July of 2012, Vermont enacted a law allowing dissolution of civil unions for couples residing in non-recognition states.
 - ▶ In the case of *Elia-Warnken v. Elia*, the Massachusetts Supreme Judicial Court ruled that civil unions from other states should be recognized, just as marriages are, and ruled that a man's same-sex marriage was void *ab initio* because he had failed to dissolve his prior Vermont civil union to a different man.
- ▶ In June of 2013, Canada amended its laws to waive the one-year residency requirement for divorce for non-resident, same-sex couples, who married in Canada but reside in non-recognition states.

Notwithstanding DOMA, issues of Assisted Reproductive Technology (ART) and adoption will continue to affect the LGBT community.

- ▶ Because same-sex couples need the assistance of medical technology to have biological children, “informal” ART solutions are more common.
 - ▶ Questions of paternity for purposes of custody and child support are muddled when couples try to conceive outside of official sperm banks and ART facilities.
- ▶ Normally, sperm donors at formal ART facilities are shielded by anonymity, and immune for paternity charges, however, informal donors may face child support liability.
 - ▶ In Shawnee County District Court in Kansas earlier this month, William Marotta was held to owe child support for the child of a lesbian couple who had sought him as a sperm donor through Craigslist.
 - ▶ Because Mr. Marotta and the women did not use the services of “a licensed physician” he wasn’t entitled to the same protections given other sperm donors under Kansas law.

Michigan second parent adoption

- ▶ MCL 710.51 subsection (5) states “If a parent having legal custody of the child is married to the petitioner for adoption, the judge shall not enter an order terminating the rights of that parent.”
- ▶ On September 14, 2004, then-state attorney general Mike Cox issued an advisory opinion that said that since gay marriages are not valid in Michigan, and since Michigan does not permit unmarried couples to jointly adopt, then a gay couple validly married in another state cannot legally adopt together.
- ▶ *DeBoer et al v. Snyder et al* Case #2:12-cv-10285 in US District Court for the Eastern District of Michigan
 - ▶ Lesbian couple who each adopted special needs children want to jointly adopt.
 - ▶ Judge Bernard Friedman encouraged amending the complaint to include the issue of marriage.
 - ▶ Trial is set for February 2014.

Michigan second parent adoption (cont'd)

- ▶ *Usitalo v. Landon*, (Michigan Court of Appeals, December 11, 2012).
 - ▶ Lesbian couple who jointly adopted one party's minor child were awarded joint custody and parenting time rights.
 - ▶ Biological mother sought to collaterally attack the validity of the 2005 adoption order by saying that the probate court lacked subject-matter jurisdiction because Michigan's adoption code only permits adoptions by a single person or a married couple.
 - ▶ The COA rules to uphold the lower court's custody order, because the collateral attack does not touch on subject matter jurisdiction.
 - ▶ 'Even assuming defendant's interpretation of the Michigan adoption code is correct and same-sex adoptions are not permitted under Michigan law,² the fact that the court that granted the adoption in 2005 made an error of law is not sufficient to render the adoption void, and collateral attack is not permitted. When subject-matter jurisdiction is proper "mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void," and such a judgment is "valid and binding for all purposes and cannot be collaterally attacked."

ART and legal parentage cases from other states

- ▶ *T.M.H. vs. D.V.T.* (Florida Court of Appeals, Dec. 23, 2011).
 - ▶ Lesbian couple are both parents to child born during their relationship.
 - ▶ Overturns trial court ruling that gestational mother was the only legal parent because biological mother had “donated” her ova under application of FL surrogacy statute.
- ▶ *Frazier v Goudschaal* (Kansas Supreme Court, Feb. 22, 2013).
 - ▶ Kansas Supreme Court holds that co-parenting agreement between two lesbians is enforceable and gives non-biological mother custody and parenting time rights, and child support for custodial biological mother.
- ▶ *Jacob v. Shultz-Jacob* (Superior Court Of Pennsylvania, 2007).
 - ▶ Two mothers and the sperm-donor father were all determined to have custody rights and child support obligations.

Conclusion

- ▶ Highly mobile same-sex couples and families will continue to move back and forth between jurisdictions that allow same-sex marriage and non-recognition states.
- ▶ Failure to terminate prior same-sex marriages or civil unions may render newer marriages void.
- ▶ ART and second parent adoption problems can complicate intestate succession and guardianship of minors.
- ▶ Federal benefits, such as Social Security and Medicare/Medicaid must be closely analyzed to ensure eligibility.
- ▶ Intestacy and prioritization of appointment under EPIC will be a continuing problem for same-sex married couples in Michigan.
- ▶ The rapid pace of change in the legal landscape affecting same-sex couples and their families requires careful drafting.