Procrastinators’ Programs

Civil Rights and Civil Liberties: Update on Marriage Equality

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Course Number: 0200141210
1 Hour of CLE
December 10, 2014
3:40 – 4:40 p.m.
Marjorie R. Esman has been Executive Director of the ACLU of Louisiana since September 2007, after twenty years in the private practice of law. Her law practice focused on copyright and trademark issues, as well as First Amendment litigation concerning the freedom of speech and religion. She was a member of the ACLU of Louisiana board of directors from 1995 and the ACLU National Board from 1997, until she resigned both positions to become Executive Director.

Since taking the helm of the ACLU, she has increased the full-time staff from four to six, expanded its lobbying presence in Baton Rouge, and added part-time field staff in Shreveport and Baton Rouge.

In addition to her law degree (Tulane 1987), Esman holds an undergraduate degree from Cornell University and a Ph.D. in Anthropology from Tulane University (1981) and has taught at Tulane, LSU, and the University of Southwestern Louisiana (now the University of Louisiana at Lafayette). She serves on the board of Parkway Partners, a New Orleans organization dedicated to restoring and preserving the green spaces in the city of New Orleans.
Civil Rights and Civil Liberties
Current status of marriage equality

Marjorie R. Esman
Executive Director, ACLU of Louisiana

History of marriage movement

1970’s
- 1973 – Maryland is the first state to affirmatively ban marriage between same-sex couples.
- Several lawsuits in other states all fail.

1980’s
- 1983 - Sharon Kowalski injured in car accident. Her partner, Karen Thompson, is denied the right to care for her despite Kowalski’s wishes. Eight years of litigation ensue ending in victory for the couple. This is considered the first case granting rights of any kind to a same-sex couple.
- 1984 – Berkeley, CA passes the first domestic partnership law in the US.
- 1987 (October 16) – mass wedding ceremony for same-sex couples held on National Mall in Washington DC (no legal status available for those marriages)
- AIDS epidemic focusses attention on survival benefits and related issues facing same-sex couples.
1990’s

- 1991 – New Orleans adopts Human Rights Ordinance giving broad protections to gay and lesbian individuals (gender identity added in 1997)
- 1992 - several national companies begin granting domestic partner benefits to same-sex couples.
- June 13, 1994 – New Yorker magazine issues a cover featuring a same-sex marriage.

The Backlash

- 1998 – Hawaii passed Constitutional Amendment banning same-sex marriage, nullifying earlier court ruling; Alaska passed similar amendment.
- 1996: some members of Congress sought a federal Constitutional amendment to define marriage as “between one man and one woman” in response to increased momentum in marriage equality movement.
- President Clinton advocated legislative response instead and supported passage of DOMA, which passed Congress in 1996.
Defense of Marriage Act ("DOMA")

- 2 sections of DOMA:
  1. (section 2): no state required to recognize same-sex marriages from other states
  2. (section 3): for purposes of federal law, marriage is between one man and one woman
- Net effect of DOMA: same-sex couples denied right to joint tax returns, survivor benefits, and some 1100 federal benefits of marriage, even if legally married

2000-2013
- 2000: Vermont adopts "civil unions" with the same benefits as marriage within the state
- 2001: Netherlands recognizes same-sex marriage, first country in the world to do so (followed by Belgium and some provinces of Canada in 2003)
- 2003: California passes Domestic Partnership law
- 2003: Massachusetts becomes the first state in the US to legalize same-sex marriage
- 2003: California passes Domestic Partnership law
- 2004: clerks in San Francisco, parts of New Mexico and New York, and other places issue marriage licenses to same-sex couples
- 2004: Proposed Constitutional amendment to ban same-sex marriage fails in Congress
- 2004: Louisiana (and many other states) pass Constitutional amendments banning same-sex marriage
- Bans continue to be enacted in many states, while other states roll back bans and allow marriage

2013: United States v. Windsor
- Challenge to Section 3 of DOMA, denying federal recognition of valid state marriages
- Supreme Court struck down Section 3, on Equal Protection grounds and as a deprivation of liberty (510 US ______).
- Result: legally married couples are treated as married for all purposes under federal law
- Section 2, which was not challenged, survives – states retain the right to ban same-sex marriage and to refuse to recognize those marriages legally performed elsewhere
2013-2014

- Increasing numbers of states legalize same-sex marriage through legislation or litigation
- Federal lawsuits create circuit split on challenges to Section 2 of DOMA
- 2014 – Supreme Court denied cert, allowing same sex marriage rights to expand
- 2014: Judge Martin Feldman, USDC, EDLA becomes the first judge since the Windsor decision to uphold a ban on same-sex marriage (Robichaux v. Caldwell 2:13-cv-00596-MCF-ALC) in a case seeking recognition of marriages performed elsewhere (set for oral argument at 5th Circuit on January 9, consolidated with cases from Texas and Mississippi); petition for cert pending

Current status

- Currently 35 states and DC allow marriage equality
- 65% of US residents live in marriage equality states
- (DeBoer, et al v. Richard Snyder, et al. 6th Cir. 14a0275p.06, Nov. 6, 2014) upheld marriage bans; cert applications pending
- 5th Circuit will hear argument in consolidated cases on January 9, 2015
  - Circuit split likely to result in Supreme Court review in 2015 or 2016

The map – December 1, 2014

- Current status as of December 1, 2014
- Map showing states that allow same-sex marriage

ACLU
Laura E. Fine is a partner of the law firm of Lehmann Norman & Marcus, LC. Laura received her Bachelor’s degree in psychology at Centenary College of Louisiana in her hometown of Shreveport in 2001. Laura graduated with her J.D. from Thomas Jefferson School of Law in San Diego, California in 2006. She then attended Tulane University Law School and received her LL.M degree in Comparative and International Law in 2007. Her concentration is in the fields of estate planning, estate administration, and business law. She is admitted to practice in California and Louisiana. She is a board member of the non-profit organizations Project Lazarus and Friends of Jefferson Parish Animal Shelter. She recently obtained her board certification as a specialist in Estate Planning and Administration from the Louisiana Bar Association and is a frequent speaker on various estate planning topics.
**Civil Rights and Civil Liberties: Update on Marriage Equality**

*United States v. Windsor*

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**What Does U.S. v. Windsor mean for the LGBT Community?**

- The holding in *Windsor* means that federal benefits are now available for LGBT couples who have been married in a state or country that allows same-sex marriage.
- *Windsor* did not invalidate Section 2 of DOMA which allows an individual state to refuse to recognize a lawful same-sex marriage performed in another state or country.

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**Place of Celebration v. Place of Domicile Test**

- The Supreme Court ruling did not specify the test by which federal agencies should use to determine whether a couple is married.
- Two tests are used:
  1. Place of celebration (i.e. it doesn’t matter where you are domiciled as long as you were married in a state or country that allows same-sex marriages), and
  2. Place of domicile (i.e. you have to be married in a state or country that allows same-sex marriage and also be domiciled in a state that allows same-sex marriage)
What Federal Benefits Are Available to Louisiana LGBT Couples?

- Joint filing of federal income tax returns
- Earned Income Tax Credit and Child Tax Credit for same sex couples with children
- Tax on gain from sale of principal residence
- Unlimited gift tax exemption
- Unlimited estate tax exemption
- Portability
- Gift splitting
- Immigration
- No longer taxed on employer contributions to health care for same sex spouse
- Considered spouse for ERISA plans

Federal Benefits that Aren’t Available to Louisiana LGBT

- Several federal agencies are currently using the place of domicile test for benefits.
  - Social Security
  - Department of Veterans’ Affairs
  - Railroad Retirement Board

Disadvantages of Living in Louisiana for LGBT couples

- Louisiana LGBT couples do not have the protection of Louisiana law in several important areas:
  - Intestacy
  - Torts
  - Divorce
  - Adoption
Same Sex Couples with Children

- Louisiana doesn’t allow unmarried couples to jointly adopt
- Adar v. Smith: Fifth Circuit refused to allow the birth certificate of a child legally adopted by a gay couple to be revised to include both adoptive parents
- Medical authorization for non-biological parent
- Designation of tutor/tutrix in testament

IRS Revenue Ruling 2013-17

- The IRS issued a ruling on August 29, 2013, which states that all same sex couples married in a state or country which allows same sex marriage will be treated as married no matter where they reside.
- The ruling does not apply to domestic partnerships

The Brave New World of Federal Tax Returns

- Revenue Ruling 2013-17 means that all same sex married couples (as long as they were married in a state or country that allowed same sex marriage) will have to file a joint federal return, or elect “Married Filing Separately”.
- Same sex couples can elect to file amended tax returns or gift tax returns for 2010-2012.
- Same sex widows can elect to amend the estate tax return.
To Amend or Not to Amend?

- The lawyer answer: “It depends.”
- Do the spouses have disparate incomes? If so, may want to amend.
- Was one spouse covered under the other spouse’s employer-sponsored healthcare plan? If so, may want to amend to recoup taxes paid by the employed spouse on the value of the healthcare coverage.
- Were any gift tax returns filed? If so, will want to amend.
- Will amending invite an audit?

Louisiana State Income Tax Returns: Lawsuit Fodder and the Stuff of Nightmares for CPAs

- Louisiana’s revenue department has stated that it will not allow same sex married couples to file a joint or “married filing separately” state return
- Louisiana’s constitution specifically prohibits same sex marriage
- Louisiana law requires that a taxpayer file using the same status on both federal and state returns
- Louisiana LGBT will have to file separate state returns as “single” or “head of household”.

Retirement Plans

- ERISA plans: The Labor Department stated that any plans which are governed by ERISA (profit-sharing retirement accounts, 401ks, defined benefit plans, etc.) will recognize legally married same sex spouse regardless of place of domicile.
- Non-ERISA plans: Do not have to recognize same sex spouses.
**HIPAA**

- The US Department of Health and Human Services Office of Civil Rights released a statement that for purposes of HIPAA they will use the “place of celebration” test.

**Litigation is on-going throughout the country and will continue.**

There are many issues left unresolved and the likelihood is the Supreme Court will have to rule in the next year on whether marriage is a constitutional right which cannot be denied based on sexual orientation.

This area will continue to evolve quickly as litigation over issues such as equal protection and Full Faith and Credit are decided at the state and federal level.

**The Future of Same Sex Marriage Litigation**