



Your Other Partner

OPEN COURT

A Newsletter of the PBA GLBT Rights Committee

Volume 6, Number 1 • Spring 2017

What is a family?

By Martricia McLaughlin, Esq.

In a legislative and policy landscape frequently characterized by retrenchment, momentum is building on both the national and the state levels for paid family leave. The challenge for the gay, lesbian, bisexual, transgender and queer (GLBTQ) community, shared with others, is to ensure not only that adequate benefits are available to caregivers, but also that the definition of “family” in dependent care benefit legislation is realistic and inclusive to meet the needs of workers and their loved ones in 2017.

Legislative and public policy definitions of “family” control access to resources, rights and benefits in many ways. Restrictive definitions can reinforce and perpetuate systemic discrimination. Policies developed for the “nuclear family,” traditionally defined as a married man and woman, and biological or sometimes mutually adopted children, discount the reality that, in 2017, loved ones central to the individual’s caregiving responsibilities often fall outside the matrix of the “nuclear family.” According to [Gretchen Livingston](#) of the Pew Research Fact Tank, approximately 46 percent of children younger than 18 lived in a home with two married, heterosexual parents in their first marriage as of 2014, compared to 61 percent in 1980 and 73 percent in 1960. Livingston has also



reported that in 2011, 7.7 million children (or 10 percent of all children in the U.S. under the age of 18) reside in a household with a grandparent, with a reported additional 3 million being [cared for by the grandparent](#). Analysis of the data reveals that disproportionate numbers of people of color live in multigenerational households.

The number of people living with multiple generations under one roof rests at approximately 19 percent per the Pew Research Center, despite the frequent suggestions that the economy has successfully rebounded from the economic recession of 2008.

When legislating paid “family” leave, it is vital that the composition of the modern American household

is clear and accurate. It is striking to consider the U.S. Census definitions of “household” and “family”; examination reveals that before 1930, “family,” as defined by the U.S. Census, was more expansive than our more modern emphasis on traditional, heterosexual “nuclear families.”

In 1900, the census stated:

“The word family has a much wider application, as used for census purposes, than it has in ordinary speech. As a census term, it may stand for a group of individuals who occupy jointly a dwelling place or part of a dwelling place or for an individual living alone in any place of abode. All the occupants and employees of a hotel, if they regularly sleep there, make up a single family, because they occupy one dwelling place ...”

By 1930, the government began to view the concepts of “family” and “household” as distinct and different.

It is obviously true that there are many housing arrangements where individuals sleep in the same dwelling with no further responsibilities for the physical or financial well-being of cohabitants. However, it is also true that, in 2017, there are many individuals in a wide variety of circumstances who reside in long-term relationships with individuals to whom they are not related by blood or marriage. Prior to the national recognition of the lawfulness of same-sex marriage in 2015, certain individual states created civil

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The author has attempted to employ gender neutral grammar wherever possible even if this results in a plural (e.g. their) word choice where convention requires a singular.



Committee Chair Chatter

Jerry Shoemaker, Esq.

While it has been some time since our last publication, we have two new editors who are committed to this publication. A huge thank you to Martricia McLaughlin and Robert Oliver for agreeing to serve as editors of *Open Court*. Without this type of participation, our committee would cease to exist.

This brings me to my next point – participation. We are looking for articles for future issues of *Open Court*. There is plenty to write about, especially given the most recent actions of the Trump administration, which lends much consternation to members of this committee. By way of example, we have recently learned of Chechnya’s relocation of GLBT persons to something akin to concentration camps, and there has been a call for the President or the UN Secretary, Nikki Haley, to speak out about this issue, forcing it to the forefront. In addition, we recently learned that the 2020 census will not ask about sexual orientation as a classification, as had been done in the past. Moreover, President Trump signed an executive order removing protections from discrimination in government contracts. Finally, the slash in NIH funding will result in the loss of approximately \$300 million in funding for HIV/AIDS research.

On the positive front, the 7th Circuit out of Chicago, in an 8-3 decision, recently ruled that Title VII protects the GLBT community and prohibits discrimination on the basis of sexual orientation in employment. This decision would also make a great article for this publication. Along these lines, the Fairness Act is still churning about but is not expected to make it to the floor of the Pennsylvania Legislature at any point in the near future. This act would also prohibit discrimination in employment, housing and public accommodations.

While some of you may not wish to write articles, we are looking for workers to plan and prepare a summit on GLBT issues in September or after. We are hoping to do this in lieu of the previously planned CLE. This will require planning and participation, so if you are interested in assisting in the planning of this, please let me know.

We will be holding our next committee meeting in beautiful Pittsburgh (I’m biased as I lived there for nearly 12 years) on May 11 at 3 p.m. Following our meeting, we will hold our annual reception, at which time we will present the PBA David M. Rosenblum GLBT Public Policy Award to Leo L. Dunn (see page 8). For those of you who did not get a chance to become acquainted with David, he was a tireless advocate for GLBT rights, and his acerbic wit was second to none. He has been missed for a few years now by our community, but his legacy lives on.

In June, we start getting into Pride season. There is a large March planned in Washington, D.C., on June 11, 2017. I will be there, and if you will be attending, please feel free to reach out. ♦

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unions that some partners have chosen to utilize.

It remains true, however, that members of the GLBTQ community are disproportionately affected by restrictive family definitions despite the achievement of marriage equality. Often due to the rejection suffered from biological relatives, many in the GLBTQ community form “chosen families,” wherein close bonds with friends and others form a support network, which does not meet the traditional definition of a “nuclear family.” Caregivers who survived the AIDS epidemic clearly recall the fear and loathing with which the afflicted were often subjected. This societal response necessitated innovative caregiving networks. The legacy of that isolation and rejection can continue to affect the family structure of, in particular, older members of the GLBTQ community.

In considering family caregiver legislation, broader definitions of family must be considered and must be as precise as possible so that the greatest protection is achieved for *all families*. The lower wage worker is the most vulnerable and least likely to have sick benefits of any kind through employment, per the Institute for Women’s Policy Research (Jenny Xia *et al*, 2016). Data from the 2014 National Health Interview Survey suggest there may be differences in access to paid sick time among women depending on sexual orientation.

But there is a dearth of research broken down by GLBTQ status.

It is also important to consider that

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many caregivers remain outside the workforce. Such a family caregiver receives no compensation whatsoever in order that they may provide care to a loved one. This article will concentrate on paid family and medical leave available to workers.

What is paid family leave?

In general, per Bureau of Labor Statistics data from March of 2016, access to paid family leave is very limited among all U.S. workers. Paid family leave (generally defined as extended time off for private sector workers with pay while the employee cares for a new child or a seriously ill family member) is enjoyed by only approximately 13 percent of workers. Access to these benefits increases with income level and is proportionately less prevalent among workers of color.

The Family and Medical Leave Act (FMLA) was enacted on a federal level in 1993 (29 C.F.R. § 825.701et. seq.). The FMLA does not apply to at least 40 percent of the workers in the U.S. due to the nature of their employment (public vs. private), the size of the business, as well as other factors. Among its many limitations, the FMLA allows eligible employees up to 12 weeks of job protected leave *without pay* to allow the worker to care for a new child or a seriously ill family member. Further, the FMLA defines “family member” restrictively, to include only a child under 18, a child with a disability, a spouse or a parent. Absent from this definition of family are domestic partners (registered or otherwise), adult children, grandchildren, grandparents,



siblings and in-laws or any individual who resides with a worker for whom the worker has a duty of care not made official by a blood relationship or a legal marriage or adoption.

How is paid family medical leave important socially and economically?

Conversation about paid family leave for caregivers is reaching a crescendo by necessity. Glynn and Corley of the Center for American Progress have argued that the lack of family medical leave (FML) has a huge economic cost for workers and their families: more than \$20 billion per year in lost wages. In addition, the collateral costs of reduced savings and retirement contributions and lower wage growth are impossible to calculate. It still remains true that whatever the household structure (two-parent, single-parent or some other composition), women still bear the major costs of family caregiving. See, [Bucks County Women Advocacy Coalition White Paper: Who Cares? The Economics of Caregiving](#).

The total estimated aggregate of lost wages, pension and Social Security benefits of these caregivers is nearly \$3 trillion, according to a [Met Life](#)

[Report](#). For women, a conservative estimate of the cost impact of caregiving on the individual female caregiver in terms of lost wages and Social Security benefits is \$324,044. According to the Center for American Progress research on pay equity, over a 40-year career, the average woman will lose \$431,000 to the gender wage gap, which is substantially attributable to women’s caregiving responsibilities, regardless of race, ethnicity or sexual orientation.

The AARP Public Policy Institute has estimated that in 2013 family caregivers provided \$470 billion of care for adults without any compensation. (Valuing the Invaluable: 2015 Update. The Growing Costs of Family Caregiving, Feinberg and Reinhard.) For perspective, that figure represents almost \$1,500 for every person in the United States in 2009 ([U.S. Census Bureau Population Estimates Program](#), April 1, 2001 to July 1, 2009). The same AARP report provided an assessment that in Pennsylvania in 2013, 1.54 billion hours of unpaid caregiving were provided with an economic value at \$12.47 per hour for a total of more than \$19.2 billion.

Proponents of paid family and medical leave argue that there are health benefits derived from FML in reducing the spread of illness at schools and workplaces, improving childhood health and family adjustment by allowing new children in the family to be properly cared for and by reducing the stress and exhaustion that contribute to depression and family dysfunction. In addition, the strong push for the sick, disabled and elder population to remain at home rather than move to institutional care is motivated by

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research that supports better health outcomes, economic value and quality of life when home care is competently provided. The importance of quality child care on the social, physical and educational development of a child is also widely recognized.

However, many suggest that that the provision of paid family leave, along with adaptive policies such as flextime and telecommuting, can benefit employers as well.

What about family medical leave in Pennsylvania?

Pennsylvania has not emerged as a leader for family medical leave for workers. (Although, as noted above, many workers do enjoy some coverage under the federal FMLA.) At the time of this writing, there was no FML legislation pending in the General Assembly. In the 2015-16 session, several bills were introduced in the General Assembly but not enacted into law. In the past, however, attempts have been made to provide for working caregivers.

HB 383 (Rep. Pam Snyder) was introduced in February 2015. That bill proposed to amend the Pennsylvania Human Relations Act to prohibit discrimination in employment based on marital, familial or caregiver status of any applicant of any gender. In that bill, “caregiver status” was defined as a “person who provides medical or supervisory care to a person related to a person by blood, legal custody or marriage.”



Rep. Dan Truitt persistently sought to expand FMLA in Pennsylvania. HB 429 (2015) sought to expand federal FMLA benefits to include siblings, grandparents and grandchildren. Under this bill, eligible employees would receive half the time allowed under federal law, or six weeks. The bill failed to gain traction.

HB 1697 was also introduced by Rep. Truitt in November 2015 as the Pennsylvania Family Medical Leave Act for Terminal Illness. Like HB-429, this bill sought to extend the FMLA to include siblings, grandparents and grandchildren. However, this bill proposed the same 12 weeks of leave provided by the federal program, when the employee needs it to care for a family member with a terminal illness. This bill also failed to become law.

Senate Bill 681, introduced by Sen. Andy Dinniman, failed to move out of the Committee for Labor and Industry where it was sent in April 2015. Termed the Pennsylvania Family and Medical Leave Act, it sought to apply those eligible for federal FMLA protections to a more broadly conceived family. Under this bill, workers protected under the federal law could receive up to six weeks of unpaid leave to care for

the eligible employee’s “sibling, grandparent or grandchild provided the sibling, grandparent or grandchild has no living spouse, child over 17 years of age or parent under 65 years of age.”

Finally, Sen. Daylin Leach introduced a Paid Parental Leave Bill (SB541) in March 2015 that required employers with four or more employees “to provide not less than 12 weeks of paid leave to eligible employees” to care for a child during the period extending from the beginning of a pregnancy to one year after the birth, adoption or placement of the child,” according to a specified formula for accumulating leave based on hours worked. This bill would apply to including public employers and offers federal FMLA “protection from discrimination and interference, the right to reinstatement and the right to continuation of health care benefits.” The rate of pay required was proposed to be “the employee’s full rate of pay the eligible employee received before the period of leave commences or, if the rate of pay is based on an hourly rate, the weekly average applicable during the four weeks before the period of leave commences.”

Notable as the only bill in Pennsylvania during the last two legislative sessions to broadly establish paid leave and job and benefit protection for workers, this bill was limited to the care needs arising during pregnancy, after birth, adoption or foster placement. Nothing in the bill suggested the necessity of a marital unit for the protections and benefits to apply. Very recently, a bill has been introduced providing paid family leave to employees of the state House.

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What benefits do workers in other states enjoy?

Meanwhile, our neighboring states of New Jersey and New York, as well as California and Rhode Island, have been active in providing economic relief for family caregivers.

New Jersey's Family Leave Insurance applies to workers covered by the state unemployment insurance law, including public workers and some domestic workers. This program allows leave to be used either to bond with a child within one year of birth or to care for a family member with a serious health condition. (Workers themselves may be covered by the state's Temporary Disability Insurance Program.) A family member is defined as a worker's child (under age 19 or unable to provide self-care due to mental or physical impairment), parent, spouse, registered domestic partner or civil union partner. The program is funded by a payroll deduction from employee wages (0.08 percent) capped at wages of \$32,000 per year, as well as by employer funding. Workers who are covered receive two-thirds of their average weekly wage up to \$615 per week for up to six weeks in a 12-month period after a seven-day waiting period in many cases. New Jersey does not offer job protection under this law to workers not covered by the federal FMLA nor are workers' health insurance benefits protected except as provided by other state or federal laws. While there is a state-run Family Leave Insurance program, employers may seek approval for equivalent private plans. (N.J. Statute Ann. Section 43-21-25 et seq.)



New York workers will begin to enjoy Paid Family leave (PFL) on Jan. 1, 2018. The New York PFL law covers most private sector workers, with some exceptions, including full-time domestic workers and allows for an "opt in" for uncovered employers and the self-employed. Uses of PFL are similar to that of New Jersey with additional provisions for military family needs. New York also has a temporary Disability Insurance Program for workers. The leave may be used for care of a worker's child, parent, parent-in-law, domestic partner, spouse, grandchild or grandparent. A flexible definition of "domestic partner" is used and registration is not required. Funding for New York's PFL is by payroll deduction up to a maximum and provides, initially, 50 percent of the worker's average weekly wage up to a cap of 50 percent of the statewide average weekly wage. It is anticipated that by 2021, the cap will rise to 67 percent. Under New York's plan there is no waiting period, and benefits are available up to 12 weeks

in a 52-week period. Job protection is required by PFL in New York, and health benefits are continued. There is a state fund available to employers, or they may use a private insurer or become self-insured.

Rhode Island has established Temporary Caregiver Insurance (TCI) (Rhode Island Gen. Laws, section 28-39-1 et seq.), a system which provides most workers, including some domestic workers, covered by the state unemployment insurance laws benefit which can be used for care giving. TCI can be used for a worker to bond with a child within one year of the child's birth, adoption or foster care placement. It is also available for workers requiring time from employment responsibilities to care for a family member with a serious health condition. Family member is defined to include a worker's child, parent, parent-in-law, grandparent or registered domestic partner or spouse. Rhode Island separately provides for a worker's own disability through a state temporary disability insurance program. TCI is funded by payroll deductions from employee's wages currently set at 1.2 percent up to a maximum wage of \$66,300 per year. The approximate benefit available is 60 percent of the employee's average weekly wage and is available for up to four weeks in a 52-week period. The plan includes job protection provisions and requires continuation of benefits, including health benefits. Rhode Island has a separate Rhode Island Parental and Family Medical Leave Act, RIPFMLA. (Rhode Island Gen. Law Section 28-48-2 et seq.), which applies to private employers with 50 or more workers and many public employers.

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RIPFMLA provides for leave upon the birth of a worker's child, foster placement of a child 16 years or younger in connection with the adoption of the child of a worker, "serious illness" of the worker, their parent, spouse, child or parents-in-law.

("Serious illness" is defined to mean a disabling physical or mental illness, injury, impairment or condition that involves in-patient care in a hospital, nursing home or hospice, or out-patient care requiring continuing treatment or supervision by a health care provider.) Regulations for the terms for leave are set forth. The leave which may be unpaid may last up to 13 weeks. RIPFMLA also provides for up to 10 hours of leave for school-related activities for a worker who has a child, foster child or child under a guardianship. RIPFMLA also offers terms for job protection and benefit continuation.

California also offers workers Paid Family Leave (PFL), applicable to those covered by the state's unemployment insurance law and most domestic workers with an opt-in provision for the self-employed and public workers. See Cal. Unemp. Ins. Code Section 2601 e. PFL, funded through a payroll deduction scheme (which also includes the Disability Insurance program which covers the worker themselves) set at 0.9 percent, as of September 2016, up to wages up to \$106,742 per year). PFL identifies a family member as a worker's child, parent, grandparent, grandchild, sibling, spouse, registered domestic partner or the parent of a worker's spouse or registered



domestic partner. Workers giving birth may initially take disability leave for recovery from childbirth and then take family leave for purposes of bonding with the child. PFL is set at up to six weeks in a 12-month period. Most workers are eligible to receive through PFL 55 percent of their weekly wage up to a cap of \$1,120 per week. These amounts are set to increase in January 2018. No job protection is specifically provided by PFL, although there is also available in California the California Family Rights Act (CFRA), also known as the Moore-Brown-Roberti Family Rights Act (Cal. Gov. Code §§ 12945.1 to 12945.2 (2011)). Leave allowed under the CFRA is unpaid, up to 12 weeks of leave in a 12-month period, for the birth, adoption or foster placement of an employee's child, the employee's own serious health condition or the serious health condition of an employee's child, spouse or parent. The CFRA is not preempted by the federal Family and Medical Leave Act of 1993 (29 C.F.R. § 825.701(a)).

Is there any new law on the federal level?

President Trump has signaled support for proposals put forward by his

daughter Ivanka Trump for childcare support for working women. These legislative concepts, however, are not inclusive of LGBTQ families. In addition, the Republican administration's discussions about family leave appear to be limited to child care and appear centered on tax deductions that benefit families making up to \$500,000 per year, allowing them to deduct their child care cost from their income tax up to the average cost of child care in their state. Under a plan attributed to Ivanka Trump, 70 percent of benefits would go to families earning at least \$100,000, according to the Tax Policy Center. Very few benefits go to the lowest income families who are likely to struggle most with paying for child care.

The FAMILY (Family and Medical Insurance Leave Act) Act, S. 337 (Sen. Kirsten Gillibrand, N.Y. for herself and others with a companion bill in the House of Representatives, H.R. 947) was introduced and referred to committee on Feb. 7, 2017. Included in its findings:

"... both men and women need to be able to take time off work to participate in the care of their children, the care of seriously ill family members and to address their own serious health conditions. Yet a mere 14 percent of workers in the U.S. have access to paid medical leave through their employers, and fewer than 40 percent have access to short term disability insurance provided by their employers ... Working families in the U.S. lose an estimated \$20.6 billion in wages each year due to lack of family and paid medical leave ... Ensuring working families have paid ... leave to care for ailing elders could drive down Medicare costs...."

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The bill proposes the establishment of a Family and Medical Leave Insurance Trust Fund to “create a comprehensive national program that helps meet the needs of new mothers and fathers and people with serious personal or family health issues through a shared fund that makes paid leave affordable for employers of all sizes and for workers and their families.”

The bill reviews the state legislation outlined above as models for the federal insurance program. The bill would: provide workers with up to 12 weeks of partial income when they take time for the established purposes; allow a worker to receive up to 66 percent of income up to a cap based on wages; cover all workers no matter company size; provide opt-in for the self-employed; be funded by employer/employee donations of small amounts; and create a new Office of Paid Family and Medical Leave within the SSA, funded in concept through payroll deductions.

Significantly, the bill defines the term spouse to include “the individual’s domestic partner,” and the term son or daughter is inclusive of the son or daughter of the worker’s domestic partner. The act defines a domestic partner as an individual with whom the worker is in a committed relationship. The bill defines “committed relationship” as “between two individuals (each at least 18 years of age) in which each individual is the other individual’s sole domestic partner and both individuals share responsibility for a significant measure of each other’s common welfare.” The term includes any such

relationship between two individuals, including individuals of the same sex, that is granted legal recognition by a state or political subdivision of a state as a marriage or analogous relationship, including a civil union or domestic partnership.

Where do we go from here?

A social, and perhaps even political, consensus has emerged that it is critical to the health of families, and beneficial to employers, workers and strong economic development, that individual workers have access to paid family and medical leave to fulfill their caregiving responsibilities for children, the seriously ill and the elderly, as well as to preserve their own health. The proposed federal legislation compels examination and advocacy to create law that will serve the needs of families and workers. Pennsylvania legislators can be educated about the existing programs in other states that utilize an efficient and effective insurance model to protect and support the care crisis in our state where a significant and increasing population is over age 60. Business leaders, health care organizations, employers, unions, policy experts and concerned citizens are coalescing around the issue of paid family leave in Pennsylvania through groups such as AARP, ReACT, United Way of Southwestern Pennsylvania and Women and Girls of Pennsylvania.

On both the state and federal levels, it remains for the GLBTQ community to consolidate advocacy as to what “family” means for this community and to ensure that legislation meets the care needs of the GLBTQ community. GLBTQ rights have advanced in the last decade. However, discrimina-

tion and bigotry remain a blot on our social and political landscape. Issues of equal access to competent healthcare are pressing for the GLBTQ community, as many fear that there are signs of a pushback against acquired rights through discrimination based on AIDS/HIV status. The trans community, in particular, has already experienced a disruption of recent gains in equal rights. Healthcare reform on the federal level may adversely impact lower income populations, including members of the GLBTQ community. In addition, many in the GLBTQ community of an older age have been ostracized by biological relatives or have found self-affirmation in successful “chosen families,” which many of the pieces of legislation reviewed neither recognize nor address.

Momentum appears to be increasing for Pennsylvania and the United States to finally join western democratic governments which recognize that the provision of paid family leave strengthens families, improves the workplace, increases profits and respects the worker. Assuring equal access to worker rights under law requires continued political and social advocacy by and for the GLBTQ and civil rights communities to guarantee that all workers are empowered to care for those whom they love, especially in times of sickness and need. ♦



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legal practice in criminal law and appellate advocacy. She is also a certified mediator concentrating in family and elder issues mediation.

FEATURED PERSON

The Honorable Daniel J. Clifford

By Robert D. Oliver, Esq.

This edition of Open Court features Honorable Daniel J. Clifford of the Court of Common Pleas of Montgomery County. Judge Clifford was the “first openly gay man to win a county-wide election in Pennsylvania outside of Philadelphia.” I spent some time talking with Judge Clifford since he’s been elected to serve and the following is our conversation:

Q You’ve been essentially quoted as saying that things changed “phenomenally” between 2008, when you first campaigned for the bench, and 2015, when you were elected to the bench in Montgomery County. Have you found that there has been more, less, or the same amount of embrace for you as an openly gay man in office in the year or so you’ve actually been on the bench?

A When I first started running in 2008, there were no real “out” candidates running for offices in our state. They were running in Massachusetts and California, not so much in Pennsylvania. At that time, we hadn’t even elected the first openly gay state legislator. I think that was in 2012 – Brian Sims. Now, we still only have one.

There was a general feeling that it just wasn’t going to happen. Even in 2015. I wasn’t convinced it would. So, every time someone like me gets elected somewhere, it does raise awareness and hopefully makes it easier for newcomers to office, as they will not be the first. Society generally has changed.

Although no one has stepped forward since 2015 to run for any county-wide office that I’m aware of — in Montgomery or Delaware or any of the suburban counties. So, we still have a long way to go.

Q When you first were elected to the bench, President Donald Trump was not yet in office; do you think his election to the presidency has directly and negatively affected legislators, judges and other public officials whom are openly part of the LGBTQIA+ community?

A Well, I think specifically [Donald Trump’s] comments about the judiciary have raised a lot of concerns from the organized bar and from judges throughout the country. Generally, the reaction has been extremely supportive with respect to the judiciary and the concept of an independent judiciary.

I’m not sure the public is aware of all those distinctions. However, at least among those involved in the judicial system, it’s been a pretty universal response to reject [Donald Trump’s] comments [about the judiciary]. There has also been some dismay because [Donald Trump’s] sister is a well-respected federal circuit court judge. The general theme seems to be that [the president] should “know better.”

Q As a member of the local Montgomery County Bar and bench, what are your short- and long-term goals for continuing your legacy of promoting diversity in the legal com-



Judge Daniel J. Clifford

munity, particularly as it relates those who identify as LGBTQIA+?

A I continue to be active in issues relating to the efficiency of the court system, not just locally but statewide. I’m on the Supreme Court Rules Committee. I remain active in those issues [affecting the LGBTQIA+ community], and not necessarily only those that relate directly to the LGBT community, but those that provide strong leadership for the local LGBT community.

In other words, I hope to demonstrate that I am a good, competent judge that happens to be part of the LGBT community, not that I am just an “out” judge. So, my primary goal is to be the best judge I can be. Being a part of the LGBT community was neither my strategy for getting elected, nor was it why I was elected. I ran because I thought I was competent and qualified and had all those other judicial attributes that are necessary in a successful court system.

With that, I also make myself available as a resource for the LGBT community. I remain involved in speaking

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with the LGBT affinity groups at local law schools. Overall, the discussions revolve around finding jobs, generally. Students' concerns have focused basically on how I succeeded with my diverse background and any advice one may have for them as new and upcoming lawyers.

I think it is still very hard for someone who is 25 years old to make a decision as to whether they will be totally out in the interview process. It's been my experience that most of our (LGBTQIA+) community members are more comfortable with [their diversity] after they have achieved a certain level of status in a job, whether it is becoming a partner or working several years in the field. By that point, they know if the people they are working with are going to be open to our (LGBTQIA+) type of diversity. You don't necessarily know that when you apply to work somewhere. Because our diversity is one that you can't [always] tell from looking at someone, it is a little different that way.

We are the one kind of diversity where it is possible for one to make a decision about whether they can show that diversity. It usually comes after someone feels comfortable where they are that they can come "out." Not just social acceptance but professional acceptance, that they will advance and it will not be held against them.

Q Prior to you becoming a judge, you practiced family law for thirty (30) years, and were a partner at Weber, Gallagher, LLP, and before that at Wolf Block. Did you cater at all to an LGBTQIA+ client base?

A I did handle LGBT family law matters, including some of the very early gay custody cases, going back to the late 1980s when it was difficult for a gay parent to obtain custodial rights against their straight spouse. I also handled second-parent adoptions for gay couples who wanted to confirm their parental rights. In fact, I handled the first second-parent adoptions in Philadelphia, Chester and Delaware counties, and my partner and I were the first in Montgomery County after the 2003 decision by the Supreme Court to permit them.

Q When you were confronted with a divorce/dissolution matter between same-sex couples, as opposed to an adoption or other type of family law case, how did you manage client expectations before Pennsylvania law became clear that trial courts have jurisdiction over dissolution of same-sex civil unions that were created out-of-state?

A If you owned property it was extremely difficult. You had to proceed under an archaic remedy under the law called partition, which was established essentially in the 1800s for all these wealthy landowners who owned land together but weren't related. When something would go wrong, they could partition. LGBT were lumped into this group. So, you'd be stuck in the civil divisions, not family court. The civil judges would then say, "Why isn't this in family court? This is a family court case." You (LGBT) had to proceed under those [archaic] types of laws, which did not include equitable distribution or other equitable remedies like you (LGBT) do now with a divorce.

It was extremely difficult for

[LGBT] clients to understand such procedure [for dividing property] because their "straight" friends could proceed in family court with equitable remedies for their financial situations.

As far as custody, it was extremely hard to manage their expectations, especially in the 1980s, because a straight parent would raise AIDS issues, knowing full well it had no bearing on the other parent's right to custodial time with their child. The argument was a gay parent should have supervised or no custodial time because they could have AIDS. It was heartbreaking to the gay parents not being able to see their children due to someone just recklessly throwing that (AIDS) out there. And there was a lack of knowledge in the courts about the subject.

Q Of course, in my last question, I was referring to the recent Superior Court decision in *Neyman v. Buckley*. Do you agree with the reasoning and outcome achieved by the appellate court, or do you think it could have gone further?

A The case did help formalize the fact that these types of cases (involving LGBT relationships) belong in family court. It also provided important recognition to those family relationships that they (LGBT) should have had outright.

[Prior to marriage equality,] gay couples in Pennsylvania, and other states, were forced to seek alternative relationships to marriage (e.g. civil unions and domestic partnerships) in other states where alternatives were available. Even with marriage equality, before *Buckley*, this conundrum of having your legal relationship recog-

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nized in one state and not in another caused real psychological issues for many gay couples because they lacked the psychological closure that a divorce provides.

Q What do you think you would have done or opined as a judge if such a case was presented to you prior to the Superior Court’s decision in *Buckley*?

A There is still a problem. [The Superior Court] remanded in *Buckley*. But they didn’t necessarily give guidance to the trial court on remand as to whether or not they should be applying what we have available here, as far as Pennsylvania-specific equitable distribution factors, or are they to follow what is Vermont’s equitable distribution-type factors. The implication is that the trial courts would have to follow the factors in the Pennsylvania code because the Superior Court basically equated civil unions to marriages, generally. This equation has been made, despite the fact that Vermont has essentially two distinct separation remedies under law for marriages and civil unions.

I do agree completely that cases involving same-sex relationships that are not marriages should be heard in family court [in those counties in which there is a separate family bench]. Family court judges are more familiar and comfortable to deal with issues that arise when there is a breakdown in a relationship. I especially believe this to be so given my prior experience of appearing before civil judges in this area on partition cases.

Q One area of focus that future editions of *Open Court* will hopefully expand on is diversity in the legal workplace and the millennial generation that is now entering that workplace. Specifically, the GLBT Committee of the PBA wants to help both employers and potential employees (law students and recent graduates) understand the goals and benefits of a diverse workplace and collaborate on what actually makes a diversity initiative authentic and meaningful. You have worked extensively on diversity initiatives in Montgomery County and, in fact, first chaired the county’s diversity internship program along with now-Judge Cheryl Austin, which has proven very successful. Do you have any advice for employers in terms of creating, attracting and maintaining meaningful diversity programs that cater to the different culture stemming from diversity?

A I don’t think most people (employers) think of diversity in the way that you might be framing it, such that each type of diversity has its own unique culture that must be emphasized in the work place. Instead, true equality seems to be the focus — someone from a diverse background can do the same job as anyone else.

Particularly in the legal profession, potential clients are looking for legal representation that includes diversity. Firms that fail to recognize this demand may be overlooking that dynamic, and that (dynamic), in my view, is just going to continue as the diversity population grows in suburban areas.

The expectation is that Montgomery County’s population will rise from 800,000 residents to well over a million in the next 20 years. Within that time,

the population will become increasingly diverse. So, to exclude people with diverse backgrounds is probably not the best business plan for the future.

Q How about potential employees — what should LGBTQIA+ law students and others searching for new employment be doing in order to promote their diversity as more than just an attractive statistic on an employer’s website, and instead actually be a part of a collective of unique and valuable ideas?

A I saw approximately 600 resumes in my years as a hiring partner at a law firm; just two resumes listed OUTlaw, an LGBT affinity law group. If I hadn’t seen that listed, I never would’ve known the candidate was diverse in that way, but when I did (see LGBT groups listed), those students were going to receive an interview, all else being equal.

Again, employers reading resumes don’t know if you’re diverse unless you have something written down. Whether a person’s particular diversity would be a plus or not for the employer, that all depends on who is reading [the] resume.

Q Okay, one last question, Judge Clifford: What do you think is/are the biggest issue(s) that the LGBTQIA+ community will face in the next eight years?

A I think there is a legitimate concern over whether or not additional appointments to the Supreme Court of the United States will affect the *Obergefell* decision. In fact, I had at least two gay couples ask to be married prior to [President Trump’s] inauguration with that very concern in mind. I

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think that concern or fear is the biggest challenge over the next several years.

Also, [on a state level,] there is the ongoing goal to enact non-discrimination legislation in the state legislature. That seemed to be where everyone was headed before the recent presidential election. Now, I think there are concerns everything is on the table for our (the LGBT) population, as far as progress being made. Interestingly, an early indication for some is that perhaps a Trump presidency won't be as bad as everyone thought, given the President agreed to maintain the federal protection for LGBT employees to prevent discrimination. Whether it goes further or stops there remains to be seen.

Overall, Judge Clifford seemed to have a very practical approach for facing the issues troubling the LGBT community.

Legal employers seek diversity, not only because it is the right thing to do, but because it is in demand by most clients. Ignoring that growing demand will only hurt business. Whether or not diversity is a help or a hindrance to a job applicant depends on the person reading the resume. Yet, if you want your diversity to help and you think it will be coveted, then you need to clearly include something to signal the resume-reader to your diversity.

As far as the progress the LGBTQIA+ community should expect to see under the Trump presidency, Judge Clifford is open minded, one might even say slightly optimistic, particularly because Donald

Trump's presidency has awakened many citizens who were "comfortably" quiet or complacent during the previous administration, which was more outwardly progressive on LGBTQIA+ issues than the current one. ♦



Robert graduated from Villanova University School of Law in 2015, after which he was admitted to the Pennsylvania and New Jersey Bars. He is currently serving as a law clerk for the Honorable Gail A. Weilheimer in the Court of Common

Pleas of Montgomery County.

Case Law Update

Summary by Robert D. Oliver, Esq.

Recently in *Freyda Neyman v. Florence Buckley*, No. 2203 EDA 2015 (Pa. Super. 2016), the Superior Court of Pennsylvania held “a Vermont civil union creates the functional equivalent of marriage for the purposes of dissolution.” This decision reversed the Philadelphia County Court of Common Pleas Family Division, which had dismissed the appellant’s complaint in divorce seeking dissolution of her Vermont civil union. See *Buckley* at 1.

In 2002, the parties, two adult Pennsylvania residents, entered into a civil union in Vermont. *Id.* at 2. At that time, same-sex individuals did not have a constitutionally protected right to marriage in Pennsylvania or



federally. The couple separated and lived apart approximately six months after being joined by civil union. *Id.* In 2014, Appellant sought dissolution of the parties’ civil union under Section 3301 (c) of the Pennsylvania Divorce Code (the Divorce Code). *Id.*

The Philadelphia trial court subsequently dismissed the complaint for lack of jurisdiction. Specifically, the trial court interpreted the Pennsylvania Constitution of 1968, Divorce Code,

and Rules of Civil Procedure as “[...] not authoriz[ing] the dissolution of civil unions.” Interestingly though, the trial court’s dismissal order notified the parties that “The Civil Trial Division of Philadelphia County has jurisdiction over complaints seeking dissolution of civil unions as actions in equity [...].” *Id.* Appellant’s comity argument likewise failed because the trial court felt it “was under no obligation to recognize a Vermont civil union as a same-sex marriage because Vermont maintains a distinction” between the two. *Id.*

The Superior Court began its analysis by looking at the history of same-sex marriages and unions in Pennsylvania and Vermont and at the federal level. *Id.* at 4-5. The Superior Court noted Pennsylvania’s longstanding public policy that marriage shall be between members of the opposite sex.

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Case Law Update

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Id. at 7. Vermont, on the other hand, achieved equality under the law for same-sex couples in 2000 by affording same-sex couples “all the same benefits, protections and responsibilities under law ... as are granted to spouses in a civil marriage.” *Id.* at 8 (citing 15 V.S.A. § 1204(a); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 968 (Vt. 2006)). In addition, Vermont law in 2000 provided that civil union dissolution was to be carried out in accordance with Vermont’s laws “[...] concerning divorce, including property division[.]” *Id.* at 9. Eventually, in 2009, the Vermont legislature recognized same-sex marriage. *Id.* (citation omitted).

By 2012, the country as a whole began to shift its policy on same-sex marriages, and the Supreme Court of the United States (SCOTUS) handed down *United States v. Windsor*, 133 S. Ct. 2675 (2013), which held, *inter alia*, the definition of marriage as “only a legal union between one man and one woman as husband and wife” in the federal Defense of Marriage Act (DOMA) is an unconstitutional deprivation of a person’s liberty under the Fifth Amendment of the U.S. Constitution. (11-12) (internal citations and quotations omitted). Yet, post-*Windsor*, states were still free to define legal marriages as they saw fitting to their public policy. *Id.* at 12. In 2014, states’ ability to discriminate against same-sex couples by refusing to recognize out-of-state, same-sex marriages and by excluding same-sex couples from civil



marriage altogether, came to an end when the SCOTUS decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *Id.*

The central issue on appeal in *Neyman v. Buckley*, then, was whether Pennsylvania courts should equate Vermont civil unions with marriages “for purposes of dissolution pursuant to the Divorce Code in Pennsylvania.” *Id.* at 14. In other words, are the Pennsylvania courts bound by the principle of comity, equating the two distinct legal relationships for purposes of divorce and dissolution? The Pennsylvania Superior Court held that, yes, the principle of comity is binding.

The principle of comity reflects one state giving “effect to the laws and judicial decisions of another state out of deference and mutual respect, rather than out of duty [.]” like that of the Full, Faith, and Credit Clause in Article IV, Section I of the United States Constitution. *Id.* Thus, the comity is a question of judicial discretion. *Id.* Given the significant shift in the law and Pennsylvania public policy regarding same-sex marriage, the Pennsylvania

Superior Court in *Buckley* opined that comity should be utilized on the issue of equating civil unions to marriages for dissolution purposes. *See id.* at 15-17.

Not only did the *Buckley* court find that applying comity would *not* be in contravention of contemporary public policy in Pennsylvania, the court also noted the application of comity would actually “promote the strong Pennsylvania public policy interest in uniformity of result, particularly in the context of recognition of marriage.” *Id.* at

18 (citations omitted). By recognizing the parties’ “Vermont civil union as the legal equivalent of marriage for purposes of dissolution” in Pennsylvania, the *Buckley* court also promoted the interests of interstate uniformity and of limiting forum shopping by litigants. *Id.*

The *Buckley* case is important because it does provide clarity and uniformity for Pennsylvanians — judges, lawyers and litigants alike. Before *Buckley*, the decisions by the trial courts in Pennsylvania varied in their analyses and holdings, included those on principles of comity; the Full, Faith, and Credit Clause; and choice of law. *Buckley*’s holding quite simply is that the Pennsylvania Divorce Code, 23 Pa. C.S.A., § 3101, *et seq.*, applies to same-sex legal relationships originating from other states, which are equal to a marriage in those states. ♦

Harrisburg Lawyer Leo L. Dunn to Be Honored with PBA David M. Rosenblum GLBT Public Policy Award

The Pennsylvania Bar Association (PBA) Gay, Lesbian, Bisexual and Transgender (GLBT) Rights Committee will present its 2017 David M. Rosenblum GLBT Public Policy Award to Leo L. Dunn, chairman of the Pennsylvania Board of Probation and Parole.

Dunn will receive the award during a May 11 joint reception of the PBA Civil and Equal Rights Committee, PBA Commission on Women in the Profession, PBA GLBT Rights Committee, PBA Minority Bar Committee, PBA Senior Lawyers Committee, PBA Solo and Small Firm Practice Section and the Pennsylvania Bar Foundation, which will take place during the association's Annual Meeting in Pittsburgh.

Rosenblum, an active member of the PBA GLBT Rights Committee and a staunch proponent of civil rights, passed away suddenly in 2014. He was a driving force behind the report, "How Marriage Counts: 572 Ways Marriage Counts in Pennsylvania," a joint publication of the PBA GLBT Rights Committee, the Mazzoni Center and Dechert LLP. Rosenblum was the legal director at the Mazzoni Center. The award honors individuals who have effected change resulting in a positive impact for the LGBT community and who have used his or her position of leadership to inspire others to act and promote civil rights and equality.

For more than 26 years, Dunn has served the citizens of the commonwealth in two state agencies. The



Leo L. Dunn

first openly gay board member of the Pennsylvania Board of Probation and Parole, Dunn was confirmed to the board by the Senate in 2015 and appointed chairman in 2016 by Gov. Tom Wolf. Prior to his current role, he held positions as director and assistant director of policy and legislative affairs at the Board of Probation and Parole and worked in various positions at the Department of Agriculture, where he was instrumental in the development of the PA Preferred Program, a state-supported agricultural marketing program used to identify and promote food and agricultural products grown, produced or processed in Pennsylvania.

In addition to public practice, Dunn had a solo private practice drafting various planning documents, including wills, powers of attorney and

living wills, for LGBT clients and others. He also taught LGBT legal issues as an adjunct professor at Widener University School of Law in Harrisburg.

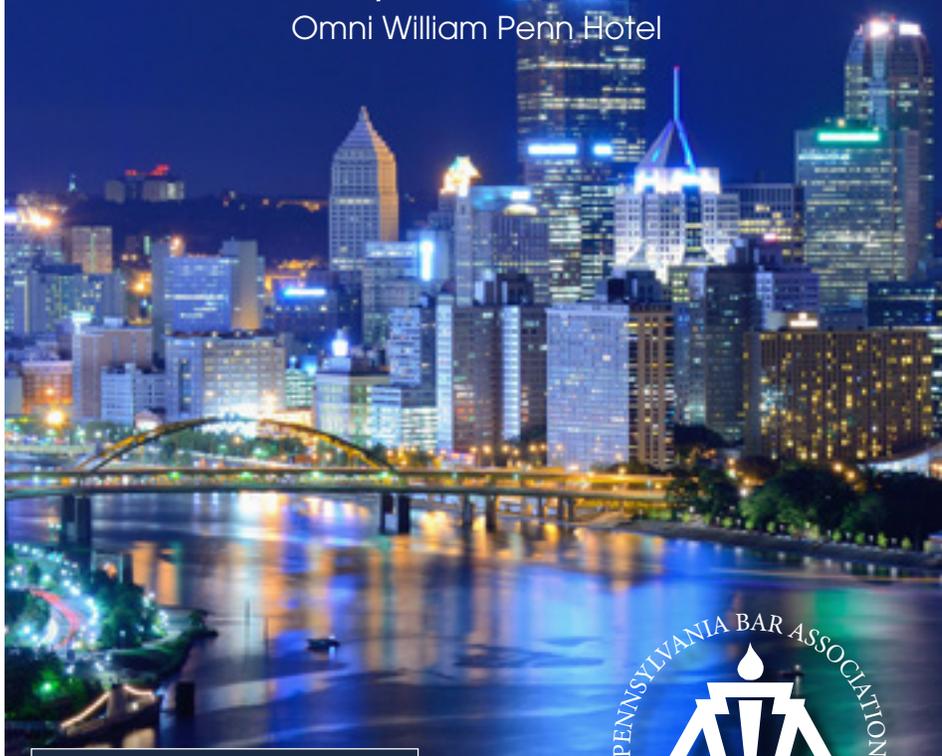
During the five years he served as chair of the PBA GLBT Rights Committee, Dunn focused the committee's efforts on creating a record of the need for marriage equality, recognizing that an educational tool would be the most effective way to spark a thoughtful discussion on the topic in Pennsylvania. Dunn's leadership, vision, openness to collaborate and commitment to keeping the project moving were cornerstones in the success of "How Marriage Counts: 572 Ways Marriage Counts in Pennsylvania." Designed to be a roadmap for same sex equality policy and legislation, this report continues to be used by advocates to help remove the barriers to equality.

Dunn is a member of the PBA Corrections System, PBA GLBT Rights, PBA Government Lawyers and PBA Statutory Law committees. He is the former chair of the PBA GLBT Rights Committee, former vice chair of the PBA Corrections System Committee and former council member of the PBA Solo and Small Firm Practice Section.

During his public service, Dunn served on the Juvenile Act Advisory Committee, the Homeless Program Coordination Committee and the Mental Health Justice Advisory Committee at the Commission for Crime and Delinquency. ♦

PBA ANNUAL MEETING PITTSBURGH

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Committee History:

The committee was formed in 2005. The committee's mission is to study matters pertaining to the recognition and protection of the legal rights of the gay, lesbian, bisexual and transgender (GLBT) community. The committee monitors and makes recommendations on issues and developments in the law impacting GLBT people in the public and the legal profession.

Committee Membership:

The committee is open to GLBT lawyers and allies. The committee welcomes all members who are interested in promoting equal rights for the GLBT lawyers and the GLBT community at large.