



Your Other Partner

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# OPEN COURT

A Newsletter of the PBA Gay and Lesbian Rights Committee

## Local ERISA case raises DOMA issue

By Gerald L. Shoemaker Jr.

**O**n Oct. 27, 2011, Judge C. Darnell Jones II of the U.S. District Court for the Eastern District of Pennsylvania issued his most recent order in the matter of *Cozen O'Connor, P.C. v. Jennifer Tobits, et al.* The order, while recognizing that the court may not even reach the issue, required the parties to brief the constitutionality of both the federal and state Defense of Marriage Acts.

The case centers on retirement benefits provided by Cozen O'Connor under the Employee Retirement Income Security Act (ERISA) and the distribution of those



Gerald L. Shoemaker Jr.

benefits to the appropriate person. ERISA mandates a spouse be named as the beneficiary of any retirement plan unless there is a specific spousal waiver filed.

Here, Sarah Elyn Farley was an attorney at Cozen, and she acquired an interest in Cozen's profit-sharing plan as a result of her employment. She married Jennifer Tobits in 2006 in a Canadian ceremony. Shortly after their marriage, Farley was diagnosed with cancer, and she lost her battle in 2010. Immediately prior to her passing, court documents

recite that Farley's parents coerced her into signing a form naming them as beneficiaries of her retirement plan. Tobits, however, never signed the spousal consent portion

of the form, a signature required to allow a beneficiary designation other than a spouse to be valid. At the time of her death, Farley had a vested interest in approximately \$41,000 in the Cozen profit-sharing plan.

Because Farley's parents did not recognize her relationship with Tobits, they filed an action to be named the administrator of Farley's estate. They also notified Cozen that they, not Tobits, should be assigned Farley's retirement benefits. They argued both the federal Defense of Marriage Act (DOMA) and its state counterpart precluded recognition of Farley and Tobits' marriage, an alleged prerequisite to an award of the retirement benefits to Tobits. Notably, the Cozen profit-sharing plan requires, consistent with the requirements of ERISA,

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## Top five issues for LGBT clients to consider about wills, trusts and estate tax

By Phyllis Horn Epstein

Taking care of loved ones after death is just as important for the lesbian, gay, bisexual and transgender (LGBT) community as it is for heterosexual people. Many people postpone the discussion of what will happen in the event of their death because the subject is too morbid. But for the LGBT community the failure to have a will may result in unintended consequences, taxes and litigation, as well as unnecessary hardship for remaining loved ones. If a member of a straight couple dies, the law protects

the surviving spouse – not so for LGBT couples. Here are a few important issues to consider when preparing a will for any couple, but especially for LGBT couples.

1. The Federal Tax Credit & Credit Equivalent Trusts. Federal estate tax limitations are uncertain. In 2010 Congress allowed estate transfers to pass free of federal estate tax as



Phyllis Horn Epstein

long as the transfer was less than \$5 million. Although Congress continued this tax-free transfer through 2012, as of this writing, the credit limit for the year 2013 and thereafter is unknown. Each individual has his or her own credit equivalent. Couples in federally recognized marriages have the advantage of combining those credits on

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# Committee Chair Chatter

By Leo L. Dunn

As we begin a new year, it gives me great pleasure to be writing a column for our third newsletter! We are working hard to ensure that gay, lesbian, bisexual and transgender (GLBT)<sup>1</sup> issues and concerns are heard by the bar at large and to make being a committee member more meaningful.

We have started to develop a five-year plan for the committee to allow us to move forward in a coordinated manner. Ideas currently being considered for inclusion are revising our bylaws and updating the committee name to be more representative of our community, creating an electronic directory of key Pennsylvania case law on GLBT issues, and undertaking development of a detailed review of Pennsylvania law as it relates to same-sex marriage in order to serve as a factual resource for elected officials and advocacy



Leo Dunn

groups. If you have ideas, or would like to work on one of these projects, please contact me at [leo@leodunnlaw.com](mailto:leo@leodunnlaw.com) or 717-503-1207.

We are currently trying to complete a resource listing of attorneys who are knowledgeable regarding LGBT issues. These “speakers’ bureau” attorneys need to be willing to be part of Pennsylvania Bar Institute and Pennsylvania Bar Association sessions to educate on the nuances of doing the best job for GLBT clients and how simple things can make a huge difference in outcomes. If you are willing to take part, please contact me or Vice Chair Martricia McLaughlin.

This year we participated in the PBA Annual Diversity Summit by organizing a panel to discuss diversity hiring with a focus on GLBT persons. Our panel included: Stephen Gierasch, co-

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*Editor’s note: Every edition of Open Court features a member of the Gay & Lesbian Rights Committee. This edition features one of the founding members of the committee as well as a past chair, Helen E. Casale a partner at Hangley, Aronchick, Segal, Pudlin and Schiller.*

## PROFILE: HELEN E. CASALE

By Sharon R. López

Helen E. Casale grew up in Haddonfield, N.J., and studied communications at Lynchburg College in Lynchburg, Va., with the hopes of one day having a career in journalism. However after receiving her Bachelor of Arts, she took a year off and worked for a union and labor law firm. Her experience there led her to leave journalism and enter law school.

Casale loved the experiences she had at Rutgers University School of Law, in part because it was a positive lesbian, gay, bi-sexual, transgender and questioning (“LGBTQ”) environment. By the end of law school, Casale ended her sexual identity questioning and “came out” to friends and family.



Helen E. Casale

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## Gay and Lesbian Rights Committee

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### GAY & LESBIAN RIGHTS

#### COMMITTEE HISTORY:

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

### GAY & LESBIAN RIGHTS

#### COMMITTEE MEMBERSHIP:

The Committee is open to LGBT Lawyers & Allies. The Committee welcomes all members who are interested in promoting equal rights for the LGBT lawyers and the LGBT community at large.

# Federal law prohibits gender-based and LGBT bullying in public schools

By Emily Lewis

Lesbian, gay, bisexual and transgender (LGBT) students rarely get the much needed acceptance they require to survive the culture that exists in our schools today. Many LGBT students are left with haunting memories of a school system that failed them because of their sexual orientation. Until courts consistently enforce protection for LGBT students, lawmakers enact legislation to protect our students, and school districts are held responsible for protecting students against sexual orientation harassment and assault, LGBT students will continue to remain vulnerable and exploited in schools.

Title IX of the Federal Education Amendment Act prohibits discrimination in all educational programs that receive federal assistance. Although Title IX prohibits gender discrimination based on gender nonconformity, it does not explicitly prohibit discrimination based on sexual orientation. Title IX recognizes a private right of action against school districts for student-on-student sexual harassment. The questions that remain are whether these protections are enough for our students and whether school districts can escape liability by turning a blind eye and deaf ear to LGBT harassment.

In *Davis v. Monroe County Board of Education*, the U.S. Supreme Court held students have a private right of action for student-on-student sexual harassment against school districts under Title IX. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999). However, the right of action only lies where the school district is deliberately indifferent to known acts of sexual harassment and the harasser is under the school district's disciplinary authority. *Davis* further held that deliberate indifference arises only where the school district's response or lack thereof is clearly unreasonable in light of the known circumstances. *Id.* at 648. In *Doe v. Bellefonte Area School District*, a student endured sexual harassment from middle school through high school, repeatedly being called a "fag," "queer," "pixy" or "peter-eater" during classes, intramural ac-



tivities and school clubs. *Doe v. Bellefonte Area School District*, 106 Fed. Appx. 798 (3<sup>rd</sup> Cir. 2004). Despite Doe's complaints and detentions issued to the harassers, the harassment continued. Doe avoided participating in school activities and attending school-related social events. Doe eventually brought a Title IX claim against the school district regarding the harassment and the school district's failure to stop it. The Third Circuit determined that under *Davis*, a school district is not required to purge schools of actionable peer harassment or to engage in any particular disciplinary action and refrained from second guessing the disciplinary decisions made by the school district. The court found that suspension of the student harassers and assemblies addressing peer-to-peer harassment were reasonable and that the school district was not deliberately indifferent to Doe's needs.

In *Doe v. Southeastern Green School District*, a seventh-grade student was constantly called a "faggot," asked for a "blow job," sexually touched by tormentors and was stabbed in the buttocks with a pencil. *Doe v. Southeastern Green School District, et al.*, No. 03-717, 2006 U.S. Dist. LEXIS 12790 (W.D. Pa. March 24, 2006). When complaints were made, teachers told Doe's parents that there was nothing they could do, and if Doe would be manlier and stand up to the tormentors, then maybe they would not pick on him. Despite repeated complaints to the school, the harassment continued. Eventually, Doe was admitted to

a hospital for depression and suicide watch. In this case, the court concluded that because Doe complained to teachers on several occasions about the harassment, a jury could conclude that the school district had actual knowledge of the harassment. The court also found that that the harassment in this case was so severe, persuasive and objectively offensive, that Doe could be deprived of access to educational opportunities.

What appears to be the distinguishing fact in these cases is the severity and offensiveness of the harassment, despite a school district's knowledge and action to a harassment complaint. It appears that physical violence, such as a stabbing, rises to the level of severe; but verbal harassment over a three-year period is somehow OK. It also appears that courts are reluctant to second-guess school districts in the reasonableness of their investigations and disciplinary actions. Sometimes, a reasonable amount of time to investigate is far too late and a detention is far too little disciplinary action.

While Title IX offers some protection to LGBT students, it does not require schools to adopt specific written policies on harassment. As these cases show, there needs to be more protection afforded to LGBT students under Title IX. Title IX needs to be expanded to protect all students to allow them to grow in their sexuality and identity. Courts need to continue to enforce consti-

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## Profile: Helen E. Casale

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In 1994 Casale clerked for Judge Martin Herman, who served on the Gloucester County, N.J., family court bench. Although Casale's legal experience was in labor law, she enjoyed the family law experiences she had with Judge Herman because she saw good people at their best and worst. She decided to practice family law because it is a challenging and interesting field. She particularly liked how the attorney-client relationship was a one-on-one relationship as opposed to the labor law model.

After her clerkship, she worked in a small firm in New Jersey for several years practicing family law and learning the ropes. She had a positive experience at this firm, but she was not "out" at the firm. In 1998, Casale started at Wolf Block in Philadelphia. Wolf Block was diverse, inclusive and welcoming. She saw Wolf Block had "out" gay partners and associates. The welcoming attitude of the firm became clear at the first litigation retreat she attended where other gay associates and gay partners brought their partners to the retreat. The firm culture not only made LGBT partners feel welcome, but there was also a conscious effort to hire diverse attorneys, including gay attorneys. Casale believes diversity in hiring is good for business and the right thing to do.

Family law provided Casale with lots of opportunities to represent gay and lesbian clients in second parent adoptions and custody cases in Pennsylvania and New Jersey. New Jersey was clearly ahead of the game in terms of laws that protected the rights of LGBT family law litigants, and Casale took her advocacy experiences in New Jersey courts and used them to advocate for her Pennsylvania LGBT clients, which she

viewed as an opportunity. She says: "I got lucky. I was looking for a profession that challenges me."

Pennsylvania law opened up for second parent adoption in 2002 when the Pennsylvania Supreme Court issued *In re adoption of RBF & RCF*. Casale recognized this new case presented her with an opportunity to educate other family law practitioners about LGBT second parent adoptions. She served as faculty for many Pennsylvania Bar Institute Continuing Legal Education presentations on this and other LGBT family law matters. Several other advocates joined her efforts, including Michael Viola, Mark Momjian and Tiffany Palmer. Soon thereafter Casale left Wolf Block and went to Hanglely Aronchick Segal & Pudlin ("Hanglely"). Hanglely provided the same welcoming LGBT atmosphere as Wolf Block. Both Hanglely and Wolf Block supported Casale's volunteer efforts and the leadership roles she played in the profession to advance the legal interests of LGBT attorneys and clients.

In 2005 then-PBA President Michael Reed, the first person of color to lead the PBA, supported the creation of a PBA standing committee on Gay & Lesbian Rights. After Alan Fuehrer chaired the committee (2005-2007), Casale stepped up to serve as co-chair of the G&LR Committee for three terms (2007-2010). Under Casale's leadership, the committee provided CLE courses, advocated for legislative action and helped bar leadership with issues that affected LGBT attorneys. Casale is also active with the American Academy of Matrimonial Lawyers, the Montgomery County Bar Association Diversity Committee, the New Jersey State Bar Gay Rights Section, the ABA and Lavender Law.

In 2008 then-Gov. Ed Rendell appointed Casale to a three-year term on the Inter-

branch Commission on Gender, Racial & Ethnic Fairness. She is one of 24 commissioners. Casale welcomes this opportunity for service because she can help draft uniform state rules that *In re adoption of RBF* in all commonwealth counties by way of Supreme Court rule. Casale recognizes this appointment provides her with a unique opportunity to generate legal changes. "Now I have the ability to help create equality," she says.

In addition to her work on the commission, Casale seeks strategic solutions for clients seeking dissolution of same-sex marriages from other states. The federal Defense of Marriage Act ("DOMA") creates a great deal of limbo for her clients. (See the DOMA article infra for an example.) Casale believes the PBA Gay & Lesbian Rights Committee provides needed leadership to the PBA on LGBT issues and helps set the tone for the profession on how to support LGBT attorneys and advocate for equal rights. She is proud that she has served on the committee since its inception.

When she is not in court, teaching CLE, leading bar association meetings, or serving on system-changing commissions, Casale is at home with her partner, raising twins who are in first grade. Thanks for all your work, Helen! ■

*Sharon López is the managing partner at Triquetra Law, a boutique Lancaster law firm dedicated to appellate, civil rights and employment law advocacy for workers.*



## Federal law prohibits gender-based and LGBT bullying in public schools

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tutional protection for LGBT students and sanction those that violate their rights. Every state needs to enact anti-legislation

regarding school districts' requirements to protect LGBT students, and all students, from peer harassment, bullying and assaults. The world will continue be a lesser place until the courts, legislators and school districts implement policies that protect students against bullying, harassment and abuse based on sexual orientation and gender identity. ■

*Emily Lewis is the committee relations coordinator for the Pennsylvania Bar Association. She is also in her final semester at Widener University School of Law.*



## Announcement:

Are you looking for an opportunity to help an LGBT client? The Mazzoni Center (<http://mazzonicenter.org/>) is a Philadelphia-based non-profit health care center that has a legal clinic (<http://mazzonicenter.org/programs/legal-services>). Mazzoni staff members frequently get calls from prospective clients across the commonwealth who are seeking volunteer attorney assistance. Some prospective clients need name changes or wills. The legal director of the Mazzoni Center, David Rosenblum, will provide legal technical assistance if needed. Please contact Rosenblum at [drosenblum@mazzonicenter.org](mailto:drosenblum@mazzonicenter.org) or by calling (215)563-0652, ext. 233.

### Local ERISA case raises DOMA issue

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that a spouse be named beneficiary unless a specific waiver is filed. However, neither the retirement plan documents nor ERISA define the term "spouse."

Cozen, upon learning of the competing request for payment from the profit-sharing plan, brought an action in Pennsylvania naming both Tobits and Farley's parents as defendants.<sup>1</sup> In the suit, Tobits alleges that she is the rightful beneficiary of the retirement proceeds given that she is Farley's spouse as ERISA allocates to Cozen the right to regulate its plan, and the Cozen plan does not explicitly exclude same-sex couples from the plan's definition of spouse. Furthermore, ERISA does not preclude

same-sex couples from its definition of spouse. Conversely, Farley's parents argue that since the plan is governed by ERISA, a federal act, DOMA must apply so as not to recognize Tobits and Farley's relationship, resulting in them receiving the retirement proceeds.

Farley's parents are also left in an awkward position given that the Obama administration has taken the position that it will no longer defend DOMA. In light of this, the Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives sought to intervene in the action to defend the constitutionality of DOMA. The BLAG is a five-member panel consisting of the speaker of the house, majority leader, majority whip, minority leader and minority whip. The BLAG may authorize the non-partisan office of the House general counsel to take legal action on behalf of the House

of Representatives. Two BLAG members, Democrats Nancy Pelosi and Steny Hoyer, do not support the motion to intervene to defend DOMA.

Initial briefs on the constitutionality of DOMA were due on Dec. 2, with reply briefs due Dec. 21. Oral argument is set for March 12. ■

<sup>1</sup> Significantly, Farley was an attorney in the Chicago, Ill., office of Cozen. Illinois recognizes same-sex marriage. Pennsylvania, on the other hand, does not. If the action were brought in Illinois, then Farley's parents would be precluded from arguing the state DOMA issue, given its recognition of out-of-jurisdiction same-sex marriages.

*Gerald L. Shoemaker Jr. is a shareholder in the Norristown office of Hangley Aronchick Segal Pudlin & Schiller. He concentrates his practice in family law.*

### Committee Chair Chatter

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managing partner of Buchanan Ingersoll Rooney's Harrisburg office, giving us a large-firm view from the perspective of a hiring decision-maker; David Rosenblum, legal director for the Mazzoni Center in Philadelphia, providing a non-profit organization viewpoint; Melanie Drozjock, a Widener Law School senior, giving us what she is looking for when searching for a position after graduation. Yours truly did the moderation. We had excellent feedback from the presentation and are considering doing a panel on a similar

theme at next year's summit, which will be held in Pittsburgh. The proposed theme is "Mentoring New Lawyers: A GLBT Perspective."

A primary focus for 2012 needs to be increasing our committee's membership. If you know of other attorneys working with LGBT clients, interested in seeing equal treatment for GLBT individuals and couples, or who are LGBT or questioning themselves, please encourage them to join our committee and take part in one meeting or conference call this year. We need to show that our issues have support, and a healthy membership roster is one way to prove this. Please spread the word that

we need our allies within the PBA to join our committee and be known! ■

<sup>1</sup> Note that at times there are references to LGBT or GLBT, but the order of the identities does not change the meaning of the reference.

*Leo L. Dunn is the chair of the PBA Gay & Lesbian Rights Committee. Dunn is a government attorney for the commonwealth of Pennsylvania. He is also a part-time solo practitioner in the area of estate planning and teaches GLBT legal issues at Widener Law School's Harrisburg campus.*

## Top five issues for LGBT clients to consider about wills, trusts and estate tax

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the second death so that the total assets that may pass to heirs free of federal estate tax would be \$10 million. Same sex couples do not enjoy that advantage, and as a result, they may need to consider creating “credit equivalent” trusts in their wills, which would remove assets from the surviving partner’s estate while giving them the benefit of having access to funds through a trust.

2. **Fiduciaries: Who will implement your wishes?** Every will requires an executor, that is, someone who will be responsible for the administration of the estate. The obligations of an executor include: identifying assets, obtaining valuations of assets, preparation of federal and state tax returns, identifying beneficiaries and determining their distributive share, maintenance of the estate assets, and final administration of affairs for the decedent. In some wills, there may be a trust established in which event a trustee or trustees must be named. Selecting a fiduciary (and substitutes) is one that should be given careful thought as the position is one that requires attentive responsibility. Creating a will allows the decedent to choose the best person to implement their wishes. Without a will, in most cases, someone, perhaps a family member not of your choosing, will step forward to be appointed by the court as “administrator” to carry out the same duties required of an executor.
3. **Guardianship.** Unless there has been a second parent adoption, the surviving partner of a same-sex couple will not by operation of law become the guardian of their partner’s minor children regardless of having lived together as a family for many years. Designating a guardian for minor children will help, but it still will likely require legal proceedings and, in some instances, litigation with other surviving family members over who should be guardian. Guardians, trustees and trusts are useful to protect property for minor children. Trusts can be created in a will or a separate instrument and may allow property distribution or sale for the minor child’s benefit at a particular age or event. For example, you have options to allow for distributions in whole or part at 21, 25, in between or older.
4. **Ownership of Property.** Some property is passed to others after death by will instrument, while other property passes automatically. Property that passes automatically includes anything that is jointly titled with rights of survivorship or property that has a designated beneficiary, such as an IRA



or life insurance benefit. Keeping this important concept in mind, couples may rearrange the ownership of assets to take advantage of important tax benefits or to be certain the wishes set out in a will or trust are applied. Same-sex couples are cautioned about transferring assets as these transfers will likely be characterized for tax purposes as gifts, and depending upon the amount, a gift tax return may be required and tax could be imposed. Philadelphia has its own rules exempting “financially dependent” individuals or “life partners” from real estate transfer tax.

5. **Failing to have a will at all.** In the absence of a will, an individual’s estate will pass according to the laws of intestacy. In Pennsylvania, that means that at death, the estate will pass in the following order of persons:
  - a. Children, natural and adopted.
  - b. In the absence of children, then to surviving parents.
  - c. In the absence of surviving parents, then to brothers, sisters or their children.
  - d. In the absence of surviving brothers, sisters or their children, then to grandparents or the surviving children of deceased grandparents.
  - e. Thereafter, to uncles, aunts and their children and grandchildren.
  - f. In the absence of any of the above, to the commonwealth of Pennsylvania.

Pennsylvania does not recognize the legal status of a same-sex partner, and therefore without a will, your partner will not inherit. If you have any interest in a different result, a will is the only way to be certain your intentions are carried out.

Avoidance of tax is only one motivation for having a will. Failing to have a will can have other unintended results on the selection of administrators of an estate, guardians and tax burdens. While we fail to contemplate the worst and go about our days as if nothing will change, we do a disservice to our loved ones by failing to plan ahead. Since a will can be altered as circumstances change, there is really no excuse for not having your will ready. An experienced estate planning attorney can help define issues and assist in preparing individualized wills and other documents. ■

*Phyllis Horn Epstein’s practice at Epstein, Shapiro & Epstein in Philadelphia includes tax planning, estate planning, tax controversy matters before the IRS and in court, trust and estate management, and family and elder law. Epstein was elected treasurer of the Pennsylvania Bar Association in May 2011.*