The U.S. Supreme Court grants
Certiorari Review of Proposition 8 and DOMA:
A summary of the arguments

By Richard J. Lupinsky Jr.

The U.S. Supreme Court granted certiorari review of two petitions that concern issues of marriage equality: Hollingsworth v. Perry (docket 12-144) and United States of America v. Windsor (docket 12-307).

Hollingsworth v. Perry concerns the constitutionality of Proposition 8, which restricts marriage in California to heterosexual couples. The Ninth Circuit found that Prop 8 violated the Equal Protection Clause of the 14th Amendment. Proponents of Prop 8 argue that California has "the absolute right" to establish the conditions under which marriage is defined and contend that the Ninth Circuit’s decision would ultimately force (by judicial decree) other states in the circuit to redefine marriage. Additionally, proponents contend that pursuant to Baker v. Nelson, 409 U.S. 810 (1972), a heterosexual-only definition of marriage does not violate the 14th Amendment.

Romer v. Evans, 517 U.S. 620 (1996). In Romer, the state of Colorado passed Amendment 2, which forbade any municipal entity in the state from passing laws protecting the rights of homosexuals. The panel majority

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Profile: Kathleen D. Schneider

By Sharon R. López

In high school, Kathleen D. Schneider was a bright and insightful student who worked hard and earned a scholarship to Allegheny College; however, as she was unsure of what course of study to pursue, she delayed attending college and started working full time in the check department at the Federal Reserve Bank.

Schneider’s supervisor at the Federal Reserve took note of her work ethic and took her under his wing, offering her a position in the accounting department and encouraging her to attend college. He even suggested that she consider graduate or law school. She realizes now that he was one of the most influential people she would encounter in her early career.

The first in her family to attend college, Schneider obtained her undergraduate degree at night while working at the Federal Reserve Bank. She passed the CPA exam, started law school at night and, while in school, was offered a full-time position as a

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Committee Chair Chatter

By Leo L. Dunn

Our committee is becoming increasingly active. Last spring we launched an ambitious project to enumerate the benefits that married couples receive under Pennsylvania’s statutory, regulatory and case law as well as some areas of federal law that are not available to same-sex couples. We are looking forward to creating a great educational reference for the gay, lesbian, bisexual and transgender community.

Things got a bit bogged down over the summer due to competing endeavors. We have now decided to enlist the aid of some law school students to help keep our volunteers moving along by providing research and editing time thanks to David Rosenblum, the legal director at the Mazzioli Center and a committee member. If you are one of our volunteers, expect a call from a law student beginning this month. We hope to have the project completed by Spring 2014, perhaps sooner with our new help!

Our committee led a session at the PBA’s Diversity Summit. This year’s focus was on mentoring new attorneys to enhance diversity continuity. Vice Chair Gerald Shoemaker did a great job pulling this together.

At our November meeting we discussed working with the PBA Young Lawyers Division to create a Continuing Legal Education program for young lawyers to help them with understanding what and how to ask about benefit coverage before and after being hired by a firm. This cooperation may evolve into more efforts to support our younger colleagues.

On the membership front, our committee continues to grow. We are up to 33 members, almost twice as many as three years ago. We still have a long way to go and will focus this winter and spring on increasing our numbers. We have found that many members lapsed without knowing they were removed from the committee roster. We are working to reach out to these prior members and others to increase participation.

I encourage everyone to plan to attend or call in to the Committee/Section Day meeting on April 11. We are planning on a 9:15 a.m. time slot, so put it on your calendar now.

If anyone knows of other areas that need to be addressed or wants to volunteer to help, please contact me at leo@leodunnlaw.com or leodunnlaw@gmail.com.

Leo L. Dunn has a solo estate planning practice in Harrisburg focusing on the needs of the GLBT community. Attorney Dunn also works for the Commonwealth of Pennsylvania in a non-legal capacity and serves as an adjunct professor at Widener University School of Law’s Harrisburg Campus.

Mark your calendars for these upcoming events

- March 14-15, PBA Minority Bar Conference, Sheraton Philadelphia Downtown Hotel
- March 22-23, Statewide Mock Trial Competition, Crowne Plaza Hotel and Dauphin County Courthouse, Harrisburg
- April 11, PBA Committee/Section Day, Radisson Hotel Harrisburg, Camp Hill
- May 8-10, PBA Annual Meeting, Wyndham Grand Pittsburgh Downtown, Pittsburgh

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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.
Philadelphia LGBT Rights Committee presents CLE on state of marriage

By Mike Viola

On Nov. 29, the LGBT Rights Committee of the Philadelphia Bar Association presented a one-hour Continuing Legal Education program titled “Marriage (In)Equality: Update on the Legal Recognition of Same-Sex Couples and the Future of the Defense of Marriage Act.” The program was moderated by Lenore Carpenter, a professor at Temple University School of Law and a former legal director at Equality Advocates.

In the first segment, Rebecca Levin, an attorney with Jerner & Palmer PC in Philadelphia, discussed the historical path of the legal recognition of same-sex relationships. Her discussion included an explanation of the types of legal recognition currently available in the United States for such relationships. Levin also brought attention to the jurisdictions that allow individuals who obtain a civil union or same-sex marriage in a particular state to have that relationship legally dissolved in that state without either party being a resident of that state. Levin also explained ways in which parties in Pennsylvania have been able to dissolve their same-sex relationship in court.

David C. Berman, a sole practitioner in Montgomery County and the chair of the Montgomery County Bar Association’s Alternative Family-LGBT Law Committee, provided an overview of four cases for which petitions for certiorari to the U.S. Supreme Court were pending. It was originally anticipated that the Supreme Court would have announced which cases, if any, it was going to consider during the week prior to the program. Two were granted after the program.

In the final segment, David M. Rosenblum, the legal director of the Mazzoni Center in Philadelphia, led a discussion of the possible impact a determination that Section 3 of the federal Defense of Marriage Act (DOMA) could have in Pennsylvania. He also discussed what rights were currently available to individuals arising from recent changes to hospital visitation and family medical leave policies. Rosenblum also brought to everyone’s attention legislation that will be proposed by Philadelphia Councilman Jim Kenney which would, among other things, allow employers in Philadelphia to deduct the cost of health care benefits provided to life partners of employees to the extent such a deduction is allowed for the benefits provided to the spouses of employees. His proposed legislation would also call for a change on forms used by city agencies in Philadelphia to parents as “parent 1” and “parent 2” instead of the gender-limiting terms “mother” and “father.” His proposal would also allow for a “self-identify” gender option on such paperwork for transgender people.

A lively question-and-answer period brought the program to a close.

The results of the ballot initiatives in Maine, Maryland, Minnesota and Washington and the possible consideration by the U.S. Supreme Court of the “Prop 8” case from California and up to four cases involving challenges to the federal DOMA made this program very timely.

Mike Viola is a partner with the Philadelphia firm of Shainberg & Viola PC and is the family law staff attorney with Philadelphia VIP, which provides low-income individuals with legal advice and representation. He is a member of the PBA Gay and Lesbian Rights Committee, Alternative Dispute Committee and Family Law Section.

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Arguing that the Ninth Circuit erred in its analysis of Romer, proponents contend that the constitutionality of a prohibition is dependent on its substance; not relative to the time the prohibition was imposed. Proponents assert that California has as much freedom to withdraw a right that exceeds the federal constitution as it has in initially creating that greater right.

Concerning the legitimacy of the governmental interest in implementing Prop 8, proponents argue that marriage encourages responsible procreation and child-rearing in heterosexual couples. As such, California has a legitimate government interest in encouraging heterosexual couples to procreate only after marrying. Proponents also contend that Californians have an interest in proceeding slowly in redefining marriage and further
DOMA: The courts and taxes

By Phyllis Horn Epstein

In 1996 Congress enacted the Defense of Marriage Act (DOMA), which defines marriage as the "legal union between one man and one woman as husband and wife" and defines a spouse as "a person of the opposite sex who is a husband or wife." In February 2011 the United States attorney general announced a new policy that the Justice Department would not defend the constitutionality of DOMA insofar as it excludes same-sex couples from the definitions of marriage and spouse. In the view of the administration, all laws, including DOMA, that make distinctions based upon sexual orientation are subject to a more rigorous standard of scrutiny for constitutionality.

DOMA is responsible for disparate tax treatment and the denial of federal health and welfare benefits for same-sex couples. DOMA, because of how it defines marriage and the spouse, prevents the filing of a joint income tax return, which can reduce overall tax; prevents access to tax-free employment health coverage to a same-sex spouse; limits the ability to allocate the dependency exemption; prevents use of the estate tax marital deduction or the transfer of the unused estate tax exclusion amount to a same-sex spouse; and limits how IRA benefits may be inherited.

Of great interest are two recent circuit court opinions that have held DOMA to be unconstitutional in the context of tax and financial benefits. Of great interest are two recent circuit court opinions that have held DOMA to be unconstitutional in the context of tax and financial benefits. The plaintiffs in Pedersen v. Office of Personnel Management, et al, No. 3:10-cv-1750 (DC CT 2012), the court allowed a tax refund to same-sex couples in the amount represented by the difference in filing separate vs. joint returns. A second case decided this year in California held that registered domestic partners could not be denied favorable tax treatment for long-term care under Code Section 7702B(f) to the extent DOMA would compel such a result. The plaintiffs in Dragovich v. Dept. of Treas., et al, (2012, DC CA) 109 AFTR 2d ¶2012-821 were registered domestic partners in California and participants in California Public Employees' Retirement System (CalPERS). A state plan may cover only eligible employees, which by definition includes a spouse as defined in the U.S. Tax Code. (Code Sec. 7702B(f) (2)(C)(ii) and Code Sec. 152(d)(2)) DOMA precludes same-sex partners from the definition of spouse under the tax code, which caused CalPERS to exclude same-sex partners from coverage. The court held that the exclusion from coverage based upon sexual orientation was not rationally related to a legitimate governmental interest and therefore under the doctrine of equal

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protection was constitutionally invalid.

An earlier Massachusetts District Court case where the plaintiffs sought, among other things, the right to file a joint federal tax return, held Section 3 of DOMA unconstitutional again, citing no rational relationship between the law and any legitimate government purpose “Indeed, Congress undertook this classification for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves. And such a classification, the Constitution clearly will not permit….As irrational prejudice plainly never constitutes a legitimate government interest, this court must hold that Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution.” Nancy Gill v. Office of Personal Management, 699 F. Supp. 2d 374, 106 AFTR 2d 2010-5184 (D. Mass. 2010).

Regardless of these incremental steps, or perhaps because of them, the IRS recently issued guidance declaring its intention to administratively uphold DOMA with the following effects:

1. Same-sex couples may not file their tax returns jointly or as married filing separately.
2. Same-sex couples may not file as head of household if one partner is the only dependent.
3. Only one partner can claim a child for purposes of the dependency deduction under 152(c).
4. One partner may itemize deductions and the other may claim the standard deduction.
5. Adoption expenses may be claimed by each partner to the extent of expenses actually paid however both partners together may not claim more than the total allowable credit. This is a departure from the general rule that does not allow for a credit for adoption expenses related to the second parent adoption of a spouse’s child.
6. A same-sex partner may be recognized for tax purposes as the stepparent of a partner’s child if that relationship is recognized by the domiciliary state.

Until such time as the Supreme Court weighs in on DOMA, one option for legally married same-sex couples is to file individual returns and then an amended joint return claiming a tax refund. This was the remedy advised by the Massachusetts District Court in Gill v. OPM. The joint return should include full disclosure of the relationship of the individuals, their marital status and their intention to seek a refund based upon a future finding by the courts that Section 3 of DOMA is unconstitutional.

As more cases move through the courts it is inevitable that these issues will land on the docket of the U.S. Supreme Court. The Second Circuit in Windsor provides a path to strike down DOMA while preserving the religious context of marriage:

“Our straightforward legal analysis sidesteps the fair point that same-sex marriage is unknown to history and tradition. But law (federal or state) is not concerned with holy matrimony. Government deals with marriage as a civil status — however fundamental — and New York has elected to extend that status to same-sex couples. A state may enforce and dissolve a couple’s marriage, but it cannot sanctify or bless it. For that, the pair must go next door.”

By drawing these distinctions between civil and religious unions the Supreme Court may find a way to strike down DOMA.

Phyllis Horn Epstein, a partner in the Philadelphia firm of Epstein, Shapiro & Epstein PC and current PBA treasurer, practices in the areas of tax law, estate planning and corporate transactions. Her firm’s website is www.cselaw.com.

Profile: Kathleen D. Schneider
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tax consultant at Touche Ross. She received her CPA license in 1985 and graduated from law school and was admitted to the bar in 1986. Shortly thereafter, a head-hunter recruited her for a position as tax counsel for Mellon Bank, where she was employed for eight years and worked on mergers and acquisitions, executive compensation and employee benefits.

In addition to her “day job,” Schneider continued to assist a small group of clients who needed tax advice. Working with these clients was the stepping stone to the successful private practice that she maintains today. In 1995 she left Mellon Bank to form The Law Offices of Kathleen D. Schneider. Today her firm consists of two other attorneys, an accountant and a secretary. She continues to enjoy the challenges of practicing law and is interested in ways to increase her knowledge and expertise, particularly into the area of elder law issues.

Mentor relationships and friendships play a significant role in Schneider’s professional and personal life. One of her professional mentors was attorney Vera Sanchas, who sponsored Schneider’s admission to the bar. Sanchas was a kind voice of reason and a cheerleader in difficult and challenging times.

Friendships outside the legal profession also play an important role in Schneider’s life. Her interest in the arts led her to join a group of women who continued the restaurant, art gallery and performance space started by the Wildsisters at The Wildsisters Coffee House. That coffee house is also where she met her partner of 25 years.

Community involvement is a constant

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of America v. Windsor concerns the constitutionality of Section 3 of DOMA, the federal statute that limits the eligibility of federal benefits to heterosexual couples. The Second Circuit found that Section 3 violated the Equal Protection Clause of the Fifth Amendment, and in so doing, was the first federal appeals court to apply intermediate scrutiny. The Windsor petition for certiorari was filed before judgment of the Second Circuit was announced. Therefore, no arguments before the court directly address the Second Circuit’s opinion.

The U.S. Attorney General Eric Holder reviewed the history of homosexual discrimination and the relevance of sexual orientation to government policy objectives and notified Congress that he and President Obama determined that Section 3 required heightened scrutiny rather than rational basis review. They concluded that Section 3 failed heightened scrutiny, and therefore, they refused to defend it. The attorney general nevertheless instructed executive agencies to enforce Section 3. The Solicitor General Donald B. Verrilli Jr. is the petitioner in Windsor but directs the court to examine his arguments found in two previous First Circuit petitions addressing DOMA: United States Department of Health & Human Services v. Massachusetts, (docket 12-15) and Office of Personnel Management v. Golinski, (docket 12-16).

The solicitor general does not defend Section 3 but applies the factors that guide the determination of whether heightened scrutiny is applicable. The solicitor general concludes that Section 3 fails under heightened scrutiny because “[t]he disparate treatment of homosexual couples legally married under state law does not substantially advance any important government purpose that motivated the enactment of Section 3.”

The defender of DOMA is the Bipartisan Legal Advisory Group (“BLAG”) of the U.S. House of Representatives, whose counsel is former Solicitor General Paul Clement. The BLAG directs the court’s attention to its arguments found in the First Circuit’s Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill, (docket 12-13).

The BLAG primarily relies on prior caselaw to defend the constitutionality of DOMA. The BLAG argues that Baker allows for the use of the traditional definition of marriage without violating equal protection. The BLAG further contends that 10 circuits have held that sexual orientation is not a suspect class, and therefore, only rational basis review applies.

Arguments before the court are set for March 26-27, 2013, with opinions being announced this summer. Given the reality that nine states still prohibit same-sex marriage by statute and 30 states prohibit it by state constitution, many questions remain concerning the breadth of the court’s eventual ruling. Whether same-sex marriage becomes truly universal or whether the ruling narrows the holding, it will doubtless be an exciting year to come.

1 Citing Sosna v. Iowa, 419 U.S. 393, 404 (1975) (quoting Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877)).
2 App. 55a. The panel majority held that Romer v. Evans, 517 U.S. 620 (1996) governs this case because Proposition 8 is “remarkably similar” to the prohibitions analyzed in Romer.
6 Pet. 36.
7 Res. Pet. 18.

Richard J. Lupinsky Jr. is clerk to the Hon. Jolene Grubb Kapriva, president judge of the 24th Judicial District in Blair County. He also serves as a JAG attorney in the Pennsylvania Army National Guard. He is a member of the 2012–2013 Class of the PBAs Bar Leadership Institute. Lupinsky is a graduate of Mansfield University (B.S., magna cum laude, 2003) and the Dickinson School of Law of the Pennsylvania State University (J.D. 2010). He served as a senior editor for the Penn State Law Review and was also named as public interest advocate by the Miller Center for Public Interest Advocacy.
Transgender legal issues are part of the LGBT movement

By David M. Rosenblum

We are living in interesting times, where definitions are being challenged and expanded, and the legal framework that affects our communities are evolving at an expedited pace. Nowhere is that more obvious than in the world of transgender and gender-variant individuals, whose rights are slowly but surely being recognized in a number of different forums.

At the 11th annual Philadelphia Trans Health Conference, held in June 2012, there was a full track of programs devoted to legal issues, "know your rights" panels and CLE presentations that addressed the unique concerns and interesting developments of the legal landscape for transgender individuals.

The most obvious legal issues confronted by transgender individuals are those around name changes and official documentation. While there is obviously no trans-specific law about the name change process in Pennsylvania, the process is rather straightforward. Individuals wishing to change their names have to comply with the procedures outlined in 54 Pa. C.S. § 701, which include providing fingerprints (to ensure that there are no criminal barriers to the proposed change), judgment searches (to notify any creditors) and publication of the proposed change (which can be waived in those instances where that would jeopardize the safety of the person). Once a person has undergone the legal name change in court, he or she can then seek to update various official documents with his/her new name and, in certain circumstances, his/her new gender designations.

In addition to this rather straightforward statutory procedure for a legal name change, there are some exciting steps being taken to extend legal protection to transgender individuals in the workplace, even in the absence of specific statewide civil rights protections. Most notable is the re-examination of definitions of gender discrimination and sex stereotyping to broadly include transgender and gender non-conforming individuals. Relying on the long-established standards set forth in Hopkins v. Price Waterhouse, 490 U.S. 228 (1989), sex stereotyping has been incorporated into broader notions of sex discrimination under Title VII of the Civil Rights Act of 1964. In a number of recent rulings, spurred on by the U.S. Equal Employment Opportunity Commission’s holding in Macy v. Holder, EEOC Appeal No. 0120120821, Agency No. ATF-2011-00751 (April 20, 2012), the courts have found that discrimination against transgender individuals falls within the definition of discrimination “because of sex.” For example, in Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011), the court reasoned that the fact that a person changed his or her gender presentation and then was deemed unqualified for a position was clearly “because of sex” in the same way that someone who converted from one religion to another was being discriminated against because of his or her religion. Regardless of whether the employee has undergone any surgery or hormone treatments, if the decision-makers believe that the employee does not conform to some sort of societal expectation of what a man or a woman “should” look like, this is clearly gender discrimination per se.

For the employment practitioners amongst us, this can be a real game-changer. Prior to these decisions, we were left with an unfortunately patchwork of employment protections based on local ordinances which may or may not include gender identity. If a client did not live in one of the 30 Pennsylvania municipalities that expressly protect transgender individuals from employment discrimination, they were unable to bring a claim anywhere to redress that wrong. Now, transgender legal activists are suggesting that even in the absence of gender identity as an express protected category, most transgender individuals could establish jurisdiction to lodge a complaint of sex stereotyping against a discriminating employer. The EEOC's logic is also being extended to other agencies within the federal government to expand coverage in some surprising areas. For example,

There are some exciting steps being taken to extend legal protection to transgender individuals in the workplace, even in the absence of specific statewide civil rights protections.

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have been deemed to be purely sexual orientation claims. See, e.g., Veretto v. Donahoe, EEOC Appeal No. 0120110873, Agency No. 4B-060-0130-10 (July 1, 2011) (where a gay postal employee was harassed after announcing that he was going to marry his male partner, the harassment was directed at him because of the stereotype that men are "supposed to" marry women).

In any case, our committee addresses issues associated with sexual orientation and gender identity, so it is important that we understand the unique issues and developments that impact on this group. Indeed, since the time of last year's Trans Health Conference, we were suddenly cast into the contentious voter-ID issue because of the sometimes conflicting and confusing documentation that transgender individuals may have. I am happy to report that as a result of this new thinking about the role of gender in society, advocacy groups were able to successfully advocate for the removal of gender designations on the Pennsylvania-issued voter identification cards. Like the efforts to remove such markers on SEPTA’s monthly transit passes, it is clear that a person’s gender has no rational relation to their ability to vote, ride a bus or perform his or her job duties.

The law is evolving to reflect the real-life situations faced by transgender individuals, and we need to do our part to advocate for this part of the larger LGBT community. We hope that you’ll consider becoming a part of the discussion at the next Trans Health Conference, scheduled for June 13-15, 2013, in Philadelphia.

David M. Rosenblum is legal director of the Mazzoni Center in Philadelphia.

Profile: Kathleen D. Schneider

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in Schneider’s life. In addition to her involvement with the Allegheny County Bar Association, she donates her time to the Persad Center, the second-oldest lesbian, gay, bisexual and transgender (LGBT) counseling center in the country. Persad serves clients in the tri-state area and offers free or reduced fees to those who are uninsured or under-insured.

Schneider recently agreed to serve on the board of a national organization known as GALA Choruses, and her main focus is its youth choruses. She believes that music offers homeless or at-risk LGBT youths the power to rise above their current circumstances, connect with other LGBT youths, and see a positive future. Along those same lines, she is very supportive of other organizations that provide a continuing venue for youths to express themselves through music.

Schneider joined the Pennsylvania Bar Association’s and Allegheny County Bar Association’s Gay and Lesbian Rights committees because she believes they play an important role in promoting awareness of LGBT issues within the legal community as a whole, as well as providing support for LGBT lawyers and identifying the unique issues affecting the LGBT community. The committees work to assist lawyers in advising their LGBT clients on all manner of issues, including those related to hospital visitation, cohabitation agreements and estate planning.

What is Schneider’s advice for LGBT lawyers and allies of the LGBT community? Remember that the personal becomes political when you “come out,” so if you are given the opportunity to state your position, use it to promote understanding and equality. Schneider was clear: “It’s a civil rights issue.”

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.