Whitewood: The Path to Pennsylvania Marriage Equality

By Jerry Shoemaker

“The issue we resolve today is a divisive one. Some of our citizens are made deeply uncomfortable by the notion of same-sex marriage. However, that same-sex marriage causes discomfort in some does not make its prohibition constitutional. Nor can past tradition trump the bedrock constitutional guarantees of due process and equal protection. Were that not so, ours would still be a racially segregated nation according to the now rightfully discarded doctrine of ‘separate by equal.’ See Brown v. Board of Education, 347 U.S. 483 (1954), overruling Plessy v. Ferguson, 163 U.S. 537 (1896). In the sixty years since Brown was decided, ‘separate’ has thankfully faded into history, and only ‘equal’ remains. Similarly, in future generations the label same-sex marriage will be abandoned, to be replaced simply by marriage.

We are a better people than these laws represent, and it is time to discard them into the ash heap of history.”

With these words, Judge John E. Jones III of the Middle District of Pennsylvania concluded his May 20, 2014, decision holding that Pennsylvania’s Marriage Laws violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution by prohibiting same-sex couples from the institution of marriage and further by refusing to recognize legal out-of-state, same-sex marriages. His decision effectively solidified the rights of gays and lesbians to marry in the commonwealth.

The road to marriage equality commenced slightly less than a year prior to Judge Jones’ decision when, on July 9, 2013, Deb and Susan Whitewood, along with their children and 20 other plaintiffs, filed suit challenging the constitutionality of two provisions of the Domestic Relations Code which defined marriage as between a man and a woman and further prohibited

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Same-Sex Marriage and Employee Rights

By Sharon Lopez

Workplace non-discrimination is still a huge legal gap for the LGBT community, even as same-sex marriage is gaining legal protection on a federal and state level. Some workplace protections are available under federal law as a result of Windsor and now there may be other state-law based protections as a result of Whitewood. Last year the United States Supreme Court issued the Windsor opinion finding the Due Process Clause of the Fifth Amendment protects same-sex married couples where federal laws and regulations apply, e.g., federal estate tax exemptions for surviving spouses. The ruling held that Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional. Section 3 of DOMA defined marriage as between one man and one woman. However; Section 2 of DOMA affords states the discretion to not grant full faith and credit to out-of-state same-sex marriages. The Windsor decision did not affect the Section 2 full faith and credit DOMA provision. Consequently, states that adopted their own DOMA, referred to as “mini DOMAs,” have been able to deny the rights and protections of marriage to same-sex couples married out-of-state seeking to have their marriages recognized for a variety of reasons. Courageous same-sex married couples across the country are challenging these mini-DOMAs. Last month, 25 plaintiffs won summary judgment in their challenge to Pennsylvania’s mini-DOMA in the Whitewood case, the decision in which being issued by United States District Court Judge John E. Jones, III. Judge Jones found Pennsylvania’s mini-DOMA violated equal protection rights

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What Whitewood Means for Marriage and Divorce

By John M. Schaffranek, Editor, Open Court, GLBT Rights Committee

Until recently, same-sex marriage was neither permitted nor recognized in Pennsylvania by operation of two separate statutes: 23 Pa.C.S. § 1102, which defines “marriage” as “[a] civil contract by which one man and one woman take each other for husband and wife,” and 23 Pa.C.S. § 1704, which provides that “[a] marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.” The United States District Court for the Middle District of Pennsylvania found both of these statutes to be unconstitutional in Whitewood v. Wolf, No. 13-cv-1861, 2014 WL 2058105, _____ F.Supp.2d _____ (M.D. Pa. May 20, 2014), joining a streak of other District Courts similarly so finding with respect to similar laws in other states. Pennsylvania’s governor having elected not to pursue an appeal of this decision, and the time to appeal having now lapsed, the ruling is final. With Sections 1102 and 1704 having been declared unconstitutional, same-sex couples in Pennsylvania may now think about what, in practical terms, the right to marry a same-sex partner means.¹

Marriage

There are two groups of same-sex partners in Pennsylvania that Whitewood will affect in different ways: the first are those same-sex couples who have previously been married in other jurisdictions; the second are those same-sex couples who

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Memories of David M. Rosenblum (1966-2014)

By Michael Viola

I first met David Rosenblum about 18-20 years ago — just as I was becoming more comfortable with myself as a gay man. I was introduced to David by Cheryl Ingram, another attorney to whom I had recently outed myself. In some ways, David was what most people would imagine a gay attorney to be — witty, smart, and a lover of musical theater. Despite being stereotypical in those ways, David was always genuine. Nothing was just an affection for him.

I can’t say that we had a very close friendship. Rather, over the years, our

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the recognition of same-sex marriages solemnized in other jurisdictions. The Plaintiffs in the matter were represented by the American Civil Liberties Union and volunteer counsel from Hangley Aronchick Segal Pudlin & Schiller. The suit was filed immediately following the United States Supreme Court’s decision in *Windsor*.

Some two days following the filing of *Whitewood*, Pennsylvania’s Attorney General, Kathleen Kane, announced that she would not defend the matter stating “I cannot ethically defend the constitutionality of Pennsylvania’s version of DOMA. I believe it to be wholly unconstitutional.” Because of Kane’s decision not to defend the action, Governor Corbett’s office was tasked with arguing that the Marriage Laws were constitutional.

On September 30, 2013, the commonwealth moved to dismiss the matter, arguing that the District Court lacked subject-matter jurisdiction over the plaintiffs’ claims. The basis for the request for dismissal was that the action did not present a substantial federal question, as the United States Supreme Court had previously dismissed an appeal from a constitutional challenge banning same-sex marriages on these grounds. *See Baker v. Nelson*, 409 U.S. 810 (1972). On November 15, 2013, Judge Jones denied the motion to dismiss, holding that the four decades of jurisprudence between the *Baker* decision and the present day challenge reflect a change in the constitutional analysis of cases, including same-sex marriage classifications. In denying the motion to dismiss, the Judge Jones specifically noted the intervening decision in *Windsor*.

With the denial of the commonwealth’s request for dismissal of the matter, the matter was ultimately set for trial to commence in June 2014. After the commonwealth divulged that it would not be presenting expert testimony to support its contention that the Marriage Laws were constitutional, both sides filed summary judgment motions with both acknowledging that no genuine disputes of material fact existed.

As noted above, Judge Jones issued his decision granting summary judgment in favor of plaintiffs on May 20, 2014. In determining plaintiffs’ substantive due process claims, the District Court determined that the right to marry was a fundamental right granted to each citizen and that this right was infringed upon by Pennsylvania’s Marriage Laws which only permitted marriages between persons of the opposite sex and which precluded recognition of out-of-state, legal same-sex marriages.

In relation to equal protection, Judge Jones was initially required to resolve the disagreement between the parties as to what level of scrutiny applied to the Marriage Laws. Plaintiffs argued that heightened scrutiny should be applied while Defendant’s argued that the lower standard of “rational basis” was all that was needed to validate the existing marriage laws. In deciding that heightened scrutiny applies, the trial court reviewed such factors as the history of discrimination, whether a person’s citizenship was tied to his or her sexual orientation, and the political power, or lack thereof, of the plaintiffs. A statute survives heightened scrutiny only if it is substantially related to an important governmental objective. Here, Judge Jones found that the commonwealth did not meet its burden, and he invalidated the Marriage Laws, finding that basing those laws on sexual orientation “is not substantially related to an important governmental interest.”

While the commonwealth had 30 days to appeal Judge Jones’ decision, Governor Corbett announced, the day following the decision, that he would not take an appeal from the ruling. He stated “[g]iven the high legal threshold set forth by Judge Jones in this case, the case is extremely unlikely to succeed on appeal. Therefore, after review of the opinion and on the advice of my Commonwealth legal team, I have decided not to appeal Judge Jones’ decision.”

While one might believe this to be the end to a long road, the matter was not quite over. On June 6, 2014, Theresa Santai-Gaffney, in her official capacity as Clerk of Orphan’s Court in Schuylkill County, filed to intervene in the action so that she could appeal Judge Jones’ decision. On June 18, 2014, her motion was denied by Judge Jones, who stated that Santai-Gaffney’s “deep personal disagreement [with his decision] doesn’t make her a stand-in for the state.” Santai-Gaffney then sought review by the Third Circuit. On July 3, 2014, Judge Patty Shwartz affirmed Judge Jones’ denial of Santai-Gaffney’s request to intervene “[f]or essentially the same reasons set forth in the Opinion of the District Court.” In a final move, she requested that the U.S. Supreme Court halt same-sex marriages in Pennsylvania while her fight to intervene continued, but Justice Alito denied that request on July 9, 2014.

With this conclusion, marriage equality is now real and finite for Pennsylvanians.

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under the Fourteenth Amendment and declared it is time to discard laws denying rights based on the classification of sexual orientation “into the ash heap of history.” The question remains, how do the Windsor and Whitewood opinions protect LGBT workers who are in same-sex marriages?

While the Windsor opinion will impact federal law and regulations irrespective of locality, the District Court Whitewood opinion is not precedential and cases pending before other Pennsylvania District Courts are not required to follow Judge Jones’ ruling. The opinion is not likely to ever be precedential as Pennsylvania Governor Corbett decided not to appeal it to the Third Circuit Court of Appeals. There are several other Pennsylvania cases pending, but it appears as though the Whitewood order will be treated as a repeal of unconstitutional statutory provisions. See Palladino v. Corbett, No. 13-cv-5641, Doc. 75 (E.D. Pa. May 22, 2014). Consequently where federal law interacts with state law definitions of spouse and marriage, federal law protections are available for same-sex couples under federal law. Two clear possible areas of protection are available: Family Medical Leave and federal law employment discrimination anti-retaliation claims.

Family Medical Leave Act, Military Caregiver Leave, and Qualifying Exigency Leave - Protected time off from work will now extend to same-sex families.

The Family Medical Leave Act (FMLA) protects employees who work for qualifying employers who have a qualifying reason for taking family or medical leave. FMLA allows qualifying employees to take up to 12 weeks of unpaid leave. Although FMLA is a federal law, its definitions interact with the state law definition of “spouse.” One of the qualifying reasons for protected time off is the serious health condition of a spouse. “Spouse” is defined as husband or wife as recognized under the state law where the employee resides. Because it appears as though Pennsylvania will now allow same-sex couples to marry and will recognize out of state same-sex marriages, the definition of spouse for the purpose of FMLA leave will include same-sex married couples residing in Pennsylvania. Consequently, when a qualifying employee’s spouse has a serious medical condition, the employee may take leave and must be returned to work at the end of the leave.

FMLA also includes Military Caregiver Leave (MCL). MCL entitles eligible employees who are the spouse, son, daughter, parent, or next of kin of a covered service member (current member or veteran of the National Guard, Reserves, or Regular Armed Forces) with a serious injury or illness incurred in the line of duty. These employees may take up to 26 workweeks of unpaid, job-protected leave during a single 12-month period to care for their family member. Another type of leave specific to military personnel that may affect Pennsylvania servicemen and women is Qualifying Exigency Leave (QEL). QEL entitles eligible employees to take up to 12 workweeks of unpaid, job-protected leave in a 12-month period for a “qualifying exigency” related to the foreign deployment of the employee’s spouse, son, daughter, or parent.

It should be noted that the U.S. Department of Labor issued proposed rules that would allow employees to take FMLA leave to care for a same-sex spouse even if they live in a state that doesn’t recognize same-sex marriage. The proposed rule changes the regulatory definition of “spouse” so that eligible employees in legal same-sex marriages would be able to take FMLA leave to care for a spouse no matter what state they live in.

Anti-Discrimination Claims – Same-Sex couples should fall within the “zone of interests” protected by anti-discrimination laws.

Federal law prohibits employment discrimination of certain protected classes (e.g., race, sex, color, national origin, religion, disability). In order to promote these non-discrimination laws, most anti-discrimination statutes also prohibit employers from taking adverse action against an employee who opposes workplace discrimination or who participates in an investigation or proceeding relating to the discrimination allegation. Anti-retaliation laws usually require some affirmative action on the part of the litigation to permit the employee to bring a cause of action for retaliation. In 2011, the United States Supreme Court expanded this rule to include third-party employees. The United States Supreme Court issued an opinion in Thompson v. N. Am. Stainless, LP, 131 S.Ct. 863 (2011), that extends anti-retaliation protections to aggrieved parties even if the employee does not engage in protected activity. In Thompson, the court held an employee who alleged he was fired as retaliation for his fiancé’s filing of a harassment claim fell within the “zone of interests” protected by Title VII. The court found that a reasonable worker might be dissuaded from engaging in protected activity if she knew her fiancé would be fired. Therefore the fiancé fell within the “zone of interests” because 1) he was an employee of the defendant employer, and 2) the allegations, if accepted as true, were not accidental and intended to harm or punish the employee reporting the discriminatory act.

The court acknowledged the type of relationship that triggers the anti-retaliation claim is not set in stone. Id at 868 (“We must also decline to identify a fixed class of relationships for which third-party reprisals are unlawful.”). The court also acknowledged a close family member will “almost always” meet the standard. The Windsor and Whitewood opinions make clear same-sex spouses will fall within the zone of interests, thus receiving anti-retaliation protection.

Conclusion – Marriage Equity impacts economic security in the workplace.

Marriage equity is important for many reasons, not the least of which is the freedom to share life’s joys in health and in sickness, as well as create and protect collective wealth. Workplace protection for same-sex couples is an essential step in the path to full equality. Laws that ban discrimination based on sexual orientation and identity are necessary to provide equal treatment for all. Although Governor Corbett announced he would sign such proposed legislation into law, the bill has not passed the Pennsylvania Legislature. It should be noted that the Pennsylvania Bar Association adopted a resolution in support of the proposed amendments in 2007.

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(Endnotes)

4 Id.
6 In addition to striking down Pennsylvania’s mini-DOMA, thereby requiring Pennsylvania to recognize out-of-state marriages, the Whitewood decision also struck down Pennsylvania’s definition of marriage as being “one man, one woman,” thereby permitted same-sex couples to marry in Pennsylvania.
7 29 U.S.C. 2601, et seq.
12 Resolution in support of an amendment to the Pennsylvania Human Relations Act that would add sexual orientation, and gender identity or expression as protected classes, Pennsylvania Bar Association (June 2007) at http://www.pabar.org/public/committees/CIV01/resolutions/SB_761.pdf.

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. She also serves the Pennsylvania Human Relations Commission as special counsel.

GLBT Rights Committee
Member Honored by FLS

Our own Jerry Shoemaker was recognized by the PBA Family Law Section at its recent annual meeting for his work on the marriage equality resolution adopted by the House of Delegates. Family Law Section Chair Dan Clifford, in presenting Jerry with an award for his work, remarked “It isn’t always easy to be the one out there, in front, on GLBT issues and Jerry is to be complimented on how he conducted himself as both a leader of the GLBT Committee and of our Section.”
What Whitewood Means for Marriage and Divorce

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have not previously been married in another jurisdiction and would like to marry in Pennsylvania.

For those same-sex couples married in other jurisdictions, their marriages became recognized upon the entry of the Whitewood ruling. Just as there is no need for an opposite-sex couple to take any action upon arriving in a state to have their out-of-state marriage recognized, same-sex couples do not need to do anything to have their marriages recognized.

For those same-sex couples desiring to marry in Pennsylvania, the process will proceed just as it has for opposite-sex couples: the partners will apply for a marriage license and, after a three-day waiting period, may receive their license and be married. Marriages in Pennsylvania began immediately upon Whitewood being rendered, with judges in Allegheny County, at least, waiving the three-day waiting period ordinarily required between applying for a marriage license and receiving it. Given the celebratory nature of these waivers, they should be considered an exception. In line with what “marriage equality” entails, same-sex couples, as a rule, should expect to be subject to the ordinary three-day waiting period.

Marriage equality also allows same-sex couples to enjoy the same rights and protections without securing separate documents that protect the couple’s relationship in a similar fashion as opposite-sex married couples. Many same-sex couples married out of state and those seeking marriage in Pennsylvania have spent significant sums in legal fees to create estate plans, health care directives, and the like, in order to replicate the rights attendant to marriage in Pennsylvania. Now that same-sex marriage is recognized in Pennsylvania, same-sex couples will incur fewer expenses just to protect their relationship.

While Pennsylvanian same-sex couples now have the right to marry, should they choose to exercise that right, they also will have obligations flowing from the marital relationship, as well. Notably, same-sex couples married elsewhere had these obligations thrust upon them with the Whitewood ruling. Those spouses immediately became subject to, for instance, the duty to financially support one another. See 23 Pa.C.S. § 4321. In other words, pre-Whitewood, partners in same-sex couples married in other jurisdictions could not institute actions for spousal support against one another due to the operation of Section 1704, which prohibited the commonwealth from recognizing same-sex marriages from other jurisdictions.

Certain same-sex couples also have been placed in the odd position of needing to marry in order to retain benefits they have been able to secure without being married under Pennsylvania law. Some Pennsylvania jurisdictions (county and municipal) have been ahead of the curve in granting some rights to same-sex domestic partners. Among others, Pittsburgh, Allegheny County, Harrisburg, and Philadelphia all offer domestic partner benefits to their employees. Recently, however, in light of Whitewood, Allegheny County announced that benefits to same-sex domestic partners will be terminated and only married couples will continue to receive spousal benefits. As of this writing, Pittsburgh has not announced its plans for its domestic partner benefits, nor have Harrisburg or Philadelphia.

Same-sex couples in Pennsylvania have long attempted, through legal contortions, to replicate marital rights as closely as possible. With full marriage equality now a reality in Pennsylvania, these couples may now rely simply on the same tool used by their opposite-sex counterparts: marriage.

Divorce

The concomitant right to marriage to which Whitewood held same-sex couples are entitled, is the right to dissolve that marriage. Irrespective of the location of a same-sex couple’s marriage, divorce for married same-sex couples in Pennsylvania became immediately available when Whitewood was decided. This is of particular import to those Pennsylvanians who had been “wed-locked” in the pre-Whitewood era, that is, having been married in another jurisdiction and relocating to Pennsylvania and unable to obtain a divorce here by virtue of the commonwealth refusing to recognize their marriage in the first place. These couples, provided they had been residents of Pennsylvania for at least six months prior to Whitewood, became eligible to file a complaint in divorce when Whitewood was entered.

The presumption that property acquired during the marriage is part of the marital estate and subject to equitable distribution now applies to same-sex married couples. Probably most importantly, qualified domestic relations orders will allow each spouse equitable shares of retirement funds and pensions. Presumably, for couples married in other states pre-Whitewood, the date of their marriage in another state will be utilized for determining the marital portion of the value of assets subject to equitable distribution. Unfortunately for those same-sex couples who did not marry in another state (even if they would have married in Pennsylvania but for the prohibition of their marriage), they likely will not be able to reach what would otherwise have been marital portions of the value of assets acquired during their relationship. This may be an issue to watch as the law develops in this area. For same-sex married couples in deteriorating or abusive relationships, this access to economic support is essential for survival outside the marriage. While, pre-Whitewood, same-sex couples could secure protection from abuse orders against an abusive partner, spousal support and exclusive possession of the marital residence would not have been an available option for an abused same-sex spouse. Divorce and separation should not result in homelessness and impoverishment, but before Whitewood, these outcomes were real risks, particularly in abusive relationships. Now divorce with resources is a reality.

The protections and responsibilities of marriage and divorce are real for opposite-sex couples. Whitewood makes these protections and responsibilities a reality for same-sex couples as well.

John M. Schaffranek is an associate at Frank, Gale, Bails, Murcko & Pocrass, P.C., a family law firm in Pittsburgh.

(Endnotes)

1 When Whitewood was decided, legislation was pending to amend Sections 1102

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and 1704 so as to permit same-sex marriage. This legislation has been effectively mooted.

David M. Rosenblum

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paths would cross when we were both involved in the same organizations, whether it was GALLOP, the Philadelphia Bar Association’s LGBT Rights Committee or the PA Bar Association’s Gay Lesbian Rights Committee (GLRC), now known as the GLBT Committee. With David, however, it did not matter how infrequently you interacted with him, he was always friendly and always as generous with his time as his schedule allowed. He was always quick with a snarky remark or a serious explanation of a pertinent legal issue.

At the memorial service for David in early June, many people shared their experiences and memories of David. They noted that David had a vibrant personality. That he was a teacher, a friend, and a mentor. That he impacted the lives of so many people. He was involved in the creation and/or development of many of the law-related LGBT organizations in Philadelphia and New Jersey. When the GLRC was formed, David was still working in New Jersey. However, after he started work at the Mazzoni Center in Philadelphia, it did not take much convincing for David to become a member of the PA Bar Association and to become an active member of the GLRC.

One memory that I have of David that is the most pervasive is that he was one of the “go to” people when it came to LGBT issues in the Philadelphia legal community. If he did not have the answer, he knew where to get the answer. I will miss being able to send off a quick email to David and getting an immediate response.

When the Lavender Law program was coming to Philadelphia, I remember having a discussion with David and others about devising a logo for the event. At one point, we joked about having shirts printed with small alligators on them, like the IZOD logo, but we were calling them “lesbigators” as an amalgamation of lesbian, bisexual, gay, and transgender labels. More recently, I remember an email exchange with David and Barrett Marshall and resulting in-person conversation about the appropriate collective nouns to apply to various groups with the LGBT community. I also remember David sharing, on a different occasion, why he has an aversion to carrots (he ate so many when he was a child that his nose turned orange). While I will certainly miss David’s legal acumen, I will miss his humor more.

On a more serious note, I remember waiting in the bitter cold to gain entrance into the United States Supreme Court building with David to hear the Windsor argument, laughing as quietly as possible to Justice Ginsburg’s mention of full marriage and skim milk marriage. Together we heard Justice Sotomayor read the stated reasons why the Defense of Marriage Act (DOMA) was passed to undercut the argument presented that DOMA was passed to provide a uniform definition of marriage for federal law purposes. These moments gave us the hope that the Supreme Court would strike down DOMA. Not long after the Windsor decision was announced, David helped pull together a group of attorneys to present a panel discussion on what the Windsor decision would mean for the average LGBT person in Pennsylvania.

David Rosenblum was such an integral part of the LGBT legal community in Pennsylvania and New Jersey. Like other members of the GLRC, I knew David, but I did not know him as well as others did. Still, he had an impact on me; he helped broaden my understanding of some of the legal issues for the LGBT community. I will miss his presence very much.

(Endnotes)

1 David M. Rosenblum was a civil rights attorney and a leader in the gay rights movement in Philadelphia who died suddenly on May 2 after suffering a heart attack. He was 47 and lived with his husband, Stephan Stoeckl, in New Jersey.