

Same sex marriage, where are we now?

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Ingham County Bar
Association

Probate Section

Court Case Developments

- Federal District Court DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (Friedman, J.)
- U.S. 6th Circuit Court of Appeals DeBoer v. Snyder, 772 F.3d 388, 396 (6th Cir. 2014)
- Federal District Court (March 22nd 2014 marriages valid, Judge Goldsmith)
http://freemarry.3cdn.net/a23500c04c85189d47_50m6b90fz.pdf
- U.S. Supreme Court OBERGEFELL v. HODGES:
http://www.supremecourt.gov/opinions/14pdf/f/14-556_3204.pdf 576 US ___ 2015

Windsor a Precursor?

- http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf
- The State of New York recognizes the marriage of New York residents Edith Windsor and Thea Spyer, who wed in Ontario, Canada, in 2007. When Spyer died in 2009, she left her entire estate to Windsor.

Real Money

- Windsor sought to claim the federal estate tax exemption for surviving spouses, but was barred from doing so by §3 of the federal Defense of Marriage Act (DOMA), which amended the Dictionary Act—to define “marriage” and “spouse” as excluding same-sex partners. Windsor paid \$363,053 in estate taxes and sought a refund, which the Internal Revenue Service denied.

Federal Recognition and Response

- Windsor was decided in June 26 of 2013
- Federal government then started a review of what agencies should do
- Department of Labor and Internal Revenue Service issued guidance requiring federally regulated benefits, such as tax-qualified retirement plans--ie the same benefits to same-sex spouses as any marriage
- Less clear for employers and others—welfare and health care benefits, etc.

2013—2015 Examples-Responses

- <https://www.federalregister.gov/articles/2015/10/23/2015-26890/definition-of-terms-relating-to-marital-status>
- <https://www.dol.gov/whd/regs/compliance/whdfs28f.htm>
- <https://www.dol.gov/ebsa/newsroom/tr13-04.html>
- http://archive.defense.gov/home/features/2015/0615_pride/
- <https://www.irs.gov/uac/newsroom/treasury-and-irs-announce-that-all-legal-same-sex-marriages-will-be-recognized-for-federal-tax-purposes-ruling-provides-certainty-benefits-and-protections-under-federal-tax-law-for-same-sex-married-couples>

Lex Loci confusion no more?

Lex Loci Celebrationis

- After Windsor, but before the Obergefell decision, attorneys dealing with same sex marriage often asked:
- Where is your residence?
- Where were you married (and when)?
- Have you moved from one location to another?
- Was the marriage valid in your “marriage state, and how does your state of residence treat such marriages?
- Tip *Never use this Latin with clients*

Domestic Partnerships/Civil Unions Soon Dead as a Dodo?

- Before Windsor, and even after, several employers and some union contracts made allowances for various benefits for those in Domestic Partnerships and Civil Unions, however they may have been defined.
- This particularly happened in jurisdictions that did not recognize same sex marriage.
- After Windsor and especially after Obergefell, there likely will be a retrenchment of such largess—some of that has already happened.

State Governments and Some Companies Reconsider Domestic Partner Benefits

- <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/09/11/after-same-sex-marriage-ruling-states-reconsider-domestic-partner-benefits>
- Often a matter of contract negotiations so changes likely to come in next few years *Tip Inquire of your client*

Obergefell

- After two decades together, his partner now facing debilitating amyotrophic lateral sclerosis (ALS) James O was determined to marry John Arthur and both flew by medical transport plane to be married in Baltimore
- 3 months later, Arthur died, and Ohio said no way O could be listed on death certificate as surviving spouse

Who are

April DeBoer and Jayne Rowse

- Michigan nurses who celebrated a commitment ceremony to honor their permanent relation in 2007
- Fostered and adopted children including one needing around the clock care
- Michigan, however, permitted only opposite-sex married couples or single individuals to adopt, so just one legal parent/standing

Fundamental Right



- In Obergefell the majority held that the 14th Amendment required states to recognize same-sex marriages, calling the right to marriage a fundamental right under Due Process and Equal Protection Clause analysis
- Dissent_ – not truly a “liberty interest” and court decision stretches meanings of fundamental rights—legislation is better



What now? Clients

- Don't assume that all same-sex partners, even long-term partners, plan to marry—how will marriage change their standing?
- When advising a same-sex couple about marriage, it's important to have a complete picture of the couple's income and assets
- Many married clients believe that a married person does not need a health care power of attorney
- http://www.americanbar.org/publications/gp_solo/2015/july-august/advising_samesex_couples_after_obergefell_and_windsor.html
Zarembka

Waves of Clients?

- Older couples, long together, contemplating marriage—should there be an analysis of situation, or even a pre nuptial?
- Young clients?
- On-Demand Webcast ICLE: Advising Same Sex Couples After Obergefell
- Any retroactive analysis or tax return or demands of employers possible?
- And couples who had already been married?

Tax and Benefit Considerations

- Your friendly IRS--check two web pages as starting off point:
<https://www.irs.gov/uac/answers-to-frequently-asked-questions-for-same-sex-married-couples>
- <https://www.irs.gov/retirement-plans/treatment-of-marriages-of-same-sex-couples-for-retirement-plan-purposes>

A funny thing happened on the way to the forum, or surprise, surprise

- Current entanglements?
- No question too dumb?
- Some questions possibly offensive
- Cultural competence
- Legal Competence
- Ethical Considerations



The times, they are a changing

- Michigan Vital Records now changing forms—but more work ahead?
http://www.michigan.gov/mdhhs/0,5885,7-339-71551_4645---,00.html
- Michigan Law Review Commission, Draft Report:
http://council.legislature.mi.gov/Content/Files/DR_AFT_MLRC%20-%20Same%20Sex%20Marriage%20Report.pdf
(68 pages)
- <http://www.michbar.org/opinions/ethicsopinions>

What do you think?

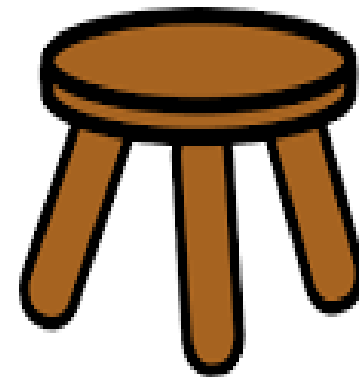
- Is Dower on the way out? Or is it like an Oprah show—you have dower, she has dower, he has dower—*Dower for Everyone!*
- What about Tenancy by the Entirety versus Joint Tenants with Rights of Survivorship?
- What about multiple marriages or ceremonies, any need to determine validity?
- Tip—*be careful about making assumptions*

Estate Planning/Traditional of Non-traditional? Default Provisions Under the Law

- For couples who haven't married (gay or straight) estate planning, property ownership, partnership or contractual arrangements loom in importance?
- Use language to signify importance? i.e.: "...my good friend and long-term companion. . ."
- Intestate succession NOT what many lgbt individuals desire/plan/understand
- Traditional or not, basics of estate planning remain

The 3 Legs of the Stool

- The 3 most basic items for good life and estate planning in Michigan are:
- --Durable Power of Attorney for Finances
- --Designation of Patient Advocate (Medical Power of Attorney)
- --Will
-



Good, better, best?

- Although the three basics are important, and *“everyone should have them”* other items are probably worth considering:
- --property sharing or partnership arrangements?
- --HIPAA releases
- --Trust or Trusts
- --Funeral Representative (MCL 700.3206)

Default provisions in the law shifting



Ingham County Bar Association

- NOTE: This information, compiled by Bradley Vauter and the law firm of Bradley Vauter & Associates, P.C., of Grand Ledge MI, is offered as information only and not legal advice or counsel. Information gathered May 2016.
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Sniffing around for more info?

Appendix and Resources



- The following materials and links and resources might be of interest in your dogged pursuit of information to help with matters for clients in the community—many of these were last checked in 2015, however, so “buyer beware”

Appendix Materials: The Invention of Heterosexuality Jonathan Ned Katz

- The writer reminds us that In 1923, "heterosexuality" made its debut in Merriam Webster's authoritative New International Dictionary. "Homosexuality" had, surprisingly, made its debut fourteen years earlier, in 1909, defined as a medical term.
- Took on mantle of "normalcy" for many years

Terms

- Heterosexual
- Homosexual—Gay/Lesbian
- Transgender
- Transsexual
- Bisexual
- (slang includes straight, breeder, gay, lesbian, dyke, faggot, fruit, cross dresser, transvestite, switch-hitter, queen, bull dyke, fairy, tranny, etc. etc. etc.)

Terms/Slurs/Humanity

- Shylock:
 - I am a Jew. Hath not a Jew eyes? Hath not a Jew hands,
 - organs, dimensions, senses, affections, passions; fed with the same
 - food, hurt with the same weapons, subject to the same diseases,
 - heal'd by the same means, warm'd and cool'd by the same winter
 - and summer, as a Christian is? If you prick us, do we not bleed? If
 - you tickle us, do we not laugh? If you poison us, do we not die?
 - And if you wrong us, do we not revenge? If we are like you in the
 - rest, we will resemble you in that.
 - *The Merchant Of Venice Act 3, scene 1, 58-68*

Misc. considerations. . .

- Funeral Representative--
<http://www.legislature.mi.gov/documents/2015-2016/billconcurrent/Senate/pdf/2015-SCB-0551.pdf>
- Mediation-SCAO Dispute Resolution Services
- Equitable end run-a-rounds

Kinsey (1948) and American Psychiatric Association (1973)

- As Katz noted: Kinsey popularized the idea of a "continuum" of activity and feeling between hetero and homo poles:
- "Only the human mind invents categories and tries to force facts into separated pigeon-holes. The living world is a continuum." —Dr. Alfred Kinsey
- APA deletes homosexuality from their list of psychiatric disorders in 1973. **Diagnostic and Statistical Manual** of Mental Disorders (**DSM**)

Transgender & Transvestite

- http://www.huffingtonpost.com/2015/06/29/john-oliver-transgender-rights_n_7686976.html
- Transgender: a person whose gender identity does not correspond to that person's biological sex assigned at birth
- Transvestite: a person, typically a man, who derives pleasure from dressing in clothes appropriate to the opposite sex.

Transsexual and Gender Dysphoria

- Transsexual-people who find themselves experiencing a gender identity not congruent with their “assigned” sex –often viewed as adjective--and typically people in transition by way of living the life of the sex they hope to be, hormone therapy and sex reassignment therapy.
- Gender dysphoria or gender identity disorder-medical term or diagnosis.

Heterosexual/CIS/Straight

- Having sexual attraction to members of the opposite sex; sexual feelings for those of the opposite sex.
- Cisgender—a linguistic approach to describe someone feeling a connection or match between their “assigned” sex and the gender they feel themselves to be.
- Straight-slang for “normal” or opposite sex attraction, activity, etc. Rare among youth?
<http://www.dazeddigital.com/artsandculture/article/25945/1/half-of-young-people-dont-identify-as-straight>

Bisexual

- Bisexual--the potential to be attracted, romantically and/or sexually, to people of more than one sex (and not always at the same time or to the same degree or same way).

Homosexual/Gay/Lesbian

- Homosexual – a person attracted romantically or sexually to a person of their same sex.
- --Gay—although often used as an umbrella term for anyone with same sex attraction, more often used for males attracted to males—typically viewed as a positive term within the community.
- Lesbian—female who experiences romantic love or sexual attraction/activity with another female.



Why put LGBT together?

- If the LGB of LGBT is most often a description of attraction or possible activity—maybe even orientation and sexual acts, and the T is typically seen as a matter of sexual identity that differs from a birth identity, why combine these?
- Some say these populations shouldn't be put together—and one can read about political struggles by advocates.
- The main reason these are often seen working together? Whether sexual orientation or gender identity—these people fall outside the “norm” and so they have common issues as relates to law, policy, prejudices, etc.

Approaches-People First

- Core or fundamental skills of a mediator are many. They include building rapport, suspending judgment or bias, displaying empathy. Also a good mediator must be adept at trust building, framing or reframing issues, facilitating negotiation, discerning real needs and interests, all while keeping in mind diversity and cultural competency issues and participant dynamics.



Possible Baggage

-might it affect empathy,
power in mediation,
terms, mediator
neutrality and cultural
competence, willingness
of both parties to find
common ground?

Special Considerations

- Living in “two worlds”
- --age related
- --community related
- --peer issues
- --acceptance



Special Considerations

- Homophobia felt by elderly?
<https://www.michigandaily.com/content/homophobia-rampant-some-nursing-homes>
- Elder LGBT at high risk for elder abuse:
http://www.ncea.aoa.gov/Resources/Publication/docs/NCEA_LGBT_ResearchBrief_2013.pdf
- Aging sometimes tougher for gays?
http://www.huffingtonpost.com/entry/5-problems-of-aging-while-gay_559fd6d0e4b01c2162a64e91

Special Considerations, continued

- Young MSM/Gays and HIV increasing rates:

<http://www.sandiegouniontribune.com/news/2014/sep/06/hiv-public-health/>

- Bisexuals stand out:

<http://www.pewresearch.org/fact-tank/2015/02/20/among-lgbt-americans-bisexuals-stand-out-when-it-comes-to-identity-acceptance/>

Special Considerations, continued

- Many types of discrimination still legal:
<http://money.cnn.com/2015/06/26/news/companies/lgbt-discrimination/>
- Challenges Remain:
<http://mic.com/articles/92349/11-major-obstacles-to-equality-that-lgbt-americans-still-face-in-2014>
- Lesbians coming out selectively?
<http://www.telegraph.co.uk/women/womens-life/10452313/Young-lesbians-where-are-they-all-Coming-out-in-an-era-of-lesbophobia.html>

Special Considerations, continued

- Anti-LGBT Bills Introduced in 28 States 2015
<http://www.hrc.org/blog/entry/anti-lgbt-bills-introduced-in-28-states>
- Possible pushback against the “gay marriage case”
http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf

Resources

- Lambda Legal <http://www.lambdalegal.org/>
- National Center for Transgender Equality
- <http://transequality.org/>
- National Center for Lesbian Rights
- <http://www.nclrights.org/>
- Out Serve
- <http://www.sldn.org/>
- PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS
- <http://community.pflag.org/Page.aspx?pid=194&srcid=-2>
- SAGE Services and Advocacy for GLBT Elders
- <http://www.sageusa.org/>
- Equality Michigan
- <http://www.equalitymi.org/>
- LGBT Project ACLU Michigan
- <http://www.aclumich.org/courts/lgbt-project>
- Stonewall Bar Association Michigan
- <http://www.michsba.org/index.html>
- Transgender Michigan
- <http://www.transgendermichigan.org/>

More Resources

- American Psychological Association
<http://www.apa.org/pi/lgbt/>
- ABA
http://www.americanbar.org/diversity/lesbian_gay_bisexual_transgender_lawyers.html
- AARP <http://www.aarp.org/relationships/friends-family/aarp-pride/>
- CDC <http://www.cdc.gov/lgbthealth/youth-resources.htm>
- Trevor Project
<http://www.thetrevorproject.org>