

ORIGINAL

IN THE SUPREME COURT OF OHIO

JENNIFER MCKETTRICK,

Plaintiff-Appellant,

v.

CHERYL MCKETTRICK

Defendant-Appellee.

: CASE NO. 15-0440
:
: On Appeal from the Warren County Court
: of Appeals, Twelfth Appellate District
: (Court of Appeals Case No. CA 2014-05-076)
: (Trial Court Case No. 13 DR 36810)
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:

APPEAL FROM THE TWELFTH DISTRICT COURT OF APPEALS
WARREN COUNTY, OHIO

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents the critical issue that Ohio's ban on same-sex marriage is unconstitutional and the proposition of law that the Ohio Constitution, Article XV, § 11 and Section 3101.01 of the Ohio Revised Code violate the United States Constitution, Amendment XIV, § 1, and are therefore void ab initio. Accordingly, this case involves a substantial constitutional question.

Ohio's refusal to license marriages between same-sex couples demands close judicial examination because it impinges upon the liberty of such couples and treats them unequally under the law. Marriage is "a central part of the liberty protected by the Due Process Clause" – a "fundamental" right upon which our culture's familial rights and responsibilities are built. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). Same-sex couples "may seek autonomy" under the Fourteenth Amendment for such intimate relationships "just as heterosexual persons do." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). Marriage is a foundational means in our society of seeking personal fulfillment and acquiring community esteem. Ohio's gay marriage ban also requires scrutiny because the purpose and effect of the ban are to brand same-sex couples and their families as less worthy than other families. The marriage ban relegates a class of couples and their children to a second-tier status, precluding them from participating in the normalcies of adult, family, and community life. This categorical exclusion not only stigmatizes same-sex couples and their children; it denies them equal *protection* of the laws in a most literal sense, for marriage is the gateway to innumerable legal safeguards and accommodations, concerning matters ranging from adoption rights to health care decisions to retirement benefits to estate

planning. What is more, Ohio's ban imposes this second-tier status by classifying individuals on the basis of sexual orientation and sex. These characteristics are "so seldom relevant to the achievement of any legitimate state interest," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Constitutional protections "may not be submitted to vote; they depend on the outcome of no elections." *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

Further, Ohio's refusal to recognize the legal marriages of same-sex couples from other jurisdictions is unconstitutional for reasons beyond those fatal to its licensing ban. Once a state deems a couple "worthy" of marriage, this decision confers "a dignity and status of immense import" – a determination that their marriage ought to be "deemed . . . equal with all other marriages." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). Ohio's recognition ban negates this protected status.

In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court subjected DOMA to close examination because its "principal effect [was] to identify a subset of state-sanctioned marriages and make them unequal," and its "principal purpose [was] to impose inequality." *Id.* at 2694. When same-sex couples legally marry under the laws of a sovereign state, the Court explained, their union becomes endowed with "a dignity and status of immense import." *Id.* at 2692. "This status is a far reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages." *Id.* A state's refusal to recognize a marriage nullifies the "stability and predictability of basic personal relations" that another sovereign state "has found it proper to acknowledge and protect." *Id.* at 2694. The same is true here. The principal purpose and effect of Ohio's ban is to "identify a subset of state-sanctioned marriages and make them unequal." *Windsor*, 133 S. Ct. at

2694. It tells “all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.” *Id.* at 2696. Indeed, Ohio’s ban tells all the world that these marriages are not only less worthy, but that they are void. This recognition ban “touches many aspects of married and family life” for same-sex couples, “from the mundane to the profound.” *Id.* at 2694.

It makes no difference that *Windsor* involved federal recognition of a state marriage, whereas this case involves Ohio’s recognition. Whether recognition is denied by state or federal government, the impingement on equal dignity for individuals is every bit as severe. Once a couple makes solemn vows and undertakes to live as a lawfully wedded couple, they acquire a “sphere of privacy or autonomy surrounding an existing marital relationship.” *Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring in judgment); *see also Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989).

Four of the five federal courts of appeals to consider the issue, as well as the vast majority of district courts from across the country, have held that refusing to license or recognize marriages between same-sex couples violates the Fourteenth Amendment¹. This Court should validate this overwhelming consensus and ensure marriage equality in the dwindling number of states that still resist it.

The United States Supreme Court’s “past decisions make clear that the right to marry is of fundamental importance,” and that state laws forbidding a class of persons from becoming

¹ Compare *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.) *cert. denied*, 135 S. Ct. 316, and *cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.) *cert. denied*, 135 S. Ct. 308, and *cert. denied sub nom. Rainey v. Bostic*, 135 S. Ct. 286, and *cert. denied sub nom. McQuigg v. Bostic*, 135 S. Ct. 314 (2014); and *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014). For a compilation of district court opinions, see *Marriage Litigation, Freedom to Marry*, <http://www.freedomtomarry.org/litigation>.

married therefore demand a “critical examination” of the state interests advanced in support of the classification.” *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 314 (1976)). Marriage – as the Fourth and Tenth Circuits have held – is indeed a fundamental right for all persons, including same-sex couples. See *Bostic v. Schaefer*, 760 F.3d 352, 375-77 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1208-18 (10th Cir. 2014). “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967). It is, indeed, one of our “basic civil rights,” *id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)); “the most important relation in life,” *Maynard v. Hill*, 125 U.S. 190, 205 (1888); and “intimate to the degree of being sacred,” *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

The United States Supreme Court has thus recognized for over a century that “the right ‘to marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.” *Zablocki*, 434 U.S. at 384 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); see also *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause.”). When a statutory classification prevents a class of persons from being or becoming married, “it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Zablocki*, 434 U.S. at 388.

Therefore, for the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question.

II. STATEMENT OF FACTS

The Appellant filed her Complaint for Divorce herein on November 20, 2013 and an Amended Complaint on March 5, 2014, with the Warren County Common Pleas Court, Division of Domestic Relations. Said Amended Complaint alleged that the Appellant and the Appellee were married on April 21, 2006, in Eastham, Massachusetts, and that there had been one (1) child born the issue of said marriage, namely; Joshua David McKettrick, whose date of birth is March 16, 2001. The Appellant further alleged that the Appellant and the Appellee entered into a lawful same sex marriage in Massachusetts. Additionally, Appellant alleged that any prohibition against same sex marriage in the State of Ohio violates the Constitution of the United States and is, therefore, unlawful and unconstitutional. As a result thereof, any prohibition against same sex marriage is null and void. Lastly, Appellant alleged that any failure or refusal to recognize a marriage legally performed, contracted and licensed in a State other than the State of Ohio violates the Constitution of the United States and is, therefore, unlawful and unconstitutional.

The Appellee subsequently filed a Motion to Dismiss on January 22, 2014 and supplemented it on March 24, 2014, arguing that the parties were not legally married in Massachusetts because they were unable to be validly married in Ohio and, as such, argued that the parties' purported Massachusetts marriage was and is void. The Appellee further argued that the law in Massachusetts at the time of the "alleged marriage allowed parties (same sex or otherwise) who were non-residents of Massachusetts to be validly married in Massachusetts only if they could be married in their state of residence".

By Entry dated May 6, 2014, the trial court granted Appellee's Motion to Dismiss.

Appellant timely appealed to the Twelfth District Court Appeals. The Court of Appeals affirmed the lower court's decision to dismiss Appellant's Complaint for Divorce. It is from this entry and decision that Appellant brings this timely appeal.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Ohio Constitution, Article XV, § 11 and Section 3101.01 of the Ohio Revised Code Violate the United States Constitution, Amendment XIV, § 1, and are Therefore Void Ab Initio

The Appellee argued below that the parties were not legally married in Massachusetts because they were unable to be validly married in Ohio and, as such, argued that the parties' purported Massachusetts marriage was and is void. The law in Massachusetts at the time of the marriage allowed parties (same sex or otherwise) who were non-residents of Massachusetts to be validly married in Massachusetts *only* if they could be married in their state of residence." Thus, Appellee argued that since same sex marriages were prohibited in Ohio, the Massachusetts marriage between the parties was void.

Massachusetts General Laws Chapter 207, Section 11, invalidated the marriage of non-residents *if* the marriage was invalid in the state where they lived. The statute in the Commonwealth of Massachusetts in 2006 provided, in pertinent part, as follows:

Section 11. No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void. *Mass. Gen. L. ch. 207, § 11 (2005)*.

The parties purchased a home in Eastham, Massachusetts sometime near the end of 2005 or the beginning of 2006, located at and commonly known as 45 Clover Way, Eastham,

Massachusetts, 02642. On April 18, 2006, the parties applied for and executed documents with the Town Clerk in Provincetown, Massachusetts for a marriage license. The marriage license was subsequently issued by the Clerk on April 21, 2006. A marriage ceremony was performed on April 21, 2006 and the Certificate of Marriage was subsequently recorded on April 24, 2006. On all of the documents executed for the marriage license and Certificate of Marriage, the parties utilized the Eastham, Massachusetts as their residence address.

As it operated in 2006, Mass. 207-11 invalidated the marriage of nonresidents of Massachusetts only if three conditions were present: (1) the parties were residing in another state (i.e., not Massachusetts), (2) the parties intended to continue to reside in that other state, and (3) the marriage was invalid in that other state. It is the third condition that the appellate court and the trial court found the marriage in the instant case to be invalid.

The marriage in Massachusetts would be valid if a similar marriage would be permitted in the State where the parties lived (Ohio). The only reason it would be invalid in Ohio is a result of Ohio's ban on same sex marriage. In the present case, if it were not for this law, the marriage which took place in Massachusetts in 2006 would be otherwise valid.

The OHIO CONST. art. XV, § 11, provides:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Section 3101.01(C) of the Ohio Revised Code, Persons who may be joined in marriage - minor to obtain consent, provides:

C)

(1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.

(2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

(3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes is void ab initio. Nothing in division (C)(3) of this section shall be construed to do either of the following:

As can be seen, with respect to purported marriages of the same sex, Ohio law provides that all purported marriages of persons of the same sex, regardless of where the marriage is purported to have occurred, are invalid.

The establishment of the U.S. Constitution in 1789 and its Bill of Rights in 1791 was a fundamental innovation in jurisprudence. It introduced the first constitutional republic and provided that all subsequent statutory law and official acts must be based on its provisions and not in conflict with it. Any statute or official act not so based, or in such conflict with it, was to be considered unconstitutional, and null and void from inception. *Marbury vs. Madison*, 1803. The Constitution of the United States is the supreme law of the land, and any statute, to be valid, must be in agreement. It is impossible for both the Constitution and a law violating it to be

valid; one must prevail. This is succinctly stated as follows: "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it. An unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted. Since an unconstitutional law is void, the general principals follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. A void act cannot be legally consistent with a valid one. An unconstitutional law cannot operate to supersede any existing valid law". *Sixteenth American Jurisprudence*, Second Edition, Section 177. (late 2nd Ed. Section 256).

An unconstitutional statute is to be considered as though it had never been enacted by the legislature. For example, the United States Supreme Court has said, "That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law." *Chicago, Indianapolis & Louisville Ry. v. Hackett*, (1912) 227 U. S. 559, S. Ct., 57 L. Ed. 966. See also *Louisiana v. Pillsbury*, (1881) 15 Otto 287, 26 L. Ed. 1090, where the court said in the course of an opinion declaring a state statute unconstitutional because impairing the obligation of contracts, "Legislation of a state thus impairing the obligation of contract made under its authority, is null and void; and the courts in enforcing the contracts will pursue the same course and apply the same remedies as though such invalid legislation had never existed." *Gunn v.*

Barry, (1872) 15 Wall. 610, 21 L. Ed. 212; 12 C. J. 800-1. A law which is declared unconstitutional is void *ab initio*. Id.

The U.S. CONST. amend. XIV, § 1, provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio's laws at issue violate the Equal Protection Clause of the Fourteenth Amendment because they deny lesbians and gays who wish to marry persons of the same sex a right they afford to individuals who wish to marry persons of the opposite sex. See, *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014). All laws which are repugnant to the Constitution are null and void." (*Marbury vs. Madison*, 1803). Since Ohio's laws are unconstitutional, they have no force and effect and are void as if they were never enacted.

If the ban in Ohio on same sex marriage was and is void "as if never enacted", there would be no impediment to the marriage and the marriage in 2006 would be valid. Therefore, because the Ohio laws prohibiting same sex marriage were unconstitutional, such laws could not have served as an impediment to the validity of the 2006 marriage.

Appellant asserts that Ohio's legal framework denies her certain rights and benefits that validly married opposite-sex couples enjoy. For instance, a same-sex surviving spouse has no right to an inheritance tax exemption and thus must pay higher death taxes. They are not entitled to the same healthcare benefits as opposite-sex couples; a same-sex spouse must pay to add their spouse to their employer-provided health insurance, while opposite-sex spouses can elect this option free of charge. Same-sex spouses and their children are excluded from intestacy laws

governing the disposition of estate assets upon death. Same-sex spouses and their children are precluded from recovering loss of consortium damages in civil litigation following a wrongful death. Under Ohio's workers compensation law, same-sex spouses have no legal standing to sue and recover as a result of their spouse's fatal workplace injury. Moreover, certain federal protections are available only to couples whose marriage is legally recognized by their home state. For example, a same-sex spouse in Ohio cannot take time off work to care for a sick spouse under the Family Medical Leave Act. 29 C.F.R. § 825.122(b). In addition, a same-sex spouse in Ohio is denied access to a spouse's social security benefits. 42 U.S.C. § 416(h)(1)(A)(i). No one denies these disparities. Ohio's laws deny them "a dignity and status of immense import," stigmatize them, and deny them the stabilizing effects of marriage that helps keep couples together.

Under both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.) *cert. denied*, 135 S. Ct. 308; *Washington v. Glucksberg*, 521 U.S. 702, 719-20, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); *Zablocki v. Redhail*, 434 U.S. 374, 383, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). This includes the fundamental right to marry. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.) *cert. denied*, 135 S. Ct. 308; *Zablocki*, 434 U.S. at 383, 98 S.Ct. 673; *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *see Griswold v. Connecticut*, 381 U.S. 479, 485-86, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *see also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Maynard v. Hill*, 125 U.S. 190, 205, 8 S.Ct. 723, 31 L.Ed. 654 (1888).

Ohio's marriage laws, by preventing same-sex couples from marrying and refusing to

recognize same-sex marriages celebrated elsewhere, impose profound legal, financial, social and psychic harms on numerous citizens of those states. See, *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014). These harms are not inflicted on opposite-sex couples, who may, if they wish, enjoy the rights and assume the responsibilities of marriage. *Id.* Laws that treat people differently based on sexual orientation are unconstitutional unless a "legitimate purpose ... overcome[s]" the injury inflicted by the law on lesbians and gays and their families. See, *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *SmithKline*, 740 F.3d at 481-82. Ohio's refusal to recognize the out-of-state marriages of same-sex couples violates the Fourteenth Amendment due process right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections. Same marriage bans challenged in this case violate Plaintiffs' constitutional rights by denying them equal protection of the laws and are therefore unconstitutional and unenforceable. *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.) *cert. denied*, 135 S. Ct. 316, and *cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014). Ohio's gay marriage and recognition bans unjustifiably violate due process and equal protection guarantees. Indeed, following the Supreme Court's *United States v. Windsor*, 133 S. Ct. 2675 (2013) ruling, a spate of federal and state courts around the nation have issued rulings holding that a state's ban on the right of same-sex couples to marry or to have their out-of-state marriages recognized violates the constitutional rights of these families. See, e.g., *De Leon v. Perry*, No. SA-13-CA-00982-OLG (W.D. Texas Feb. 26, 2014) (declaring unconstitutional Texas bans on same-sex marriage and out-of-state marriage recognition, and rejecting as irrational purported childrearing and procreation justifications); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.) *cert. denied*, 135 S. Ct. 308 (declaring unconstitutional Virginia's marriage ban, which has effect of "needlessly stigmatizing and humiliating children who are

being raised” by same-sex couples and “betrays” rather than serves an interest in child welfare); *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *28–33 (N.D. Okla. Jan. 14, 2014) (rejecting purported government interests in responsible procreation and childrearing as justifications for Oklahoma’s same-sex marriage ban, which was held unconstitutional); *Kitchen v. Herbert*, 755 F.3d 1193, 1208-18 (10th Cir. 2014), (declaring Utah’s marriage ban unconstitutional and finding that same-sex couples’ “children are also worthy of the State’s protection, yet” the marriage ban “harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples”); *Griego v. Oliver*, No. 34,306, 2013 WL 6670704, at *3 (N.M. Dec. 19, 2013) (rejecting “responsible procreation and childrearing” rationales to justify New Mexico’s marriage ban, and declaring ban in violation of state constitution)².

In sum, under Supreme Court jurisprudence, and as confirmed in numerous recent lower court decisions, states do not have governmental interests sufficient to justify their refusals to celebrate or recognize marriages between same-sex couples. The State’s marriage recognition bans and non-recognition of marital presumptions of parentage violate the substantive due process and equal protection rights of same-sex couples and their children.

Ohio’s statutory and constitutional marriage recognition bans, both enacted in 2004, single out only same-sex couples to deny recognition to their marriages, when other out-of-state marriages, similarly unavailable within Ohio, are invariably accorded comity. The marriage

² Also, compare *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.) *cert. denied*, 135 S. Ct. 316, and *cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.) *cert. denied*, 135 S. Ct. 308, and *cert. denied sub nom. Rainey v. Bostic*, 135 S. Ct. 286, and *cert. denied sub nom. McQuigg v. Bostic*, 135 S. Ct. 314 (2014); and *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014). For a compilation of district court opinions, see *Marriage Litigation*, Freedom to Marry, <http://www.freedomtomarry.org/litigation>.

recognition bans are extraordinary, animus-driven measures, whose “clear primary purpose and practical effect” is to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community.

Since the Supreme Court’s landmark decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013), every federal court to consider state bans on same-sex marriage and recognition has declared them unconstitutional, with one exception (*DeBoer v Snyder*, 6th Circuit, 772 F.3d 388, 2014, cert. granted by U.S. Supreme Court).

Appellant wants this Court to hold that Ohio’s exclusion of same-sex couples from civil marriage violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. The right to marry is a nonenumerated fundamental right; that is, it is not written in the Constitution. Its constitutional significance arises from various protected liberty interests, such as the right to privacy and freedom of association. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (marriage is a “right of privacy older than the Bill of Rights”); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (“[c]hoices about marriage . . . are among associational rights this Court has ranked as ‘of basic importance in our society’” (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971))). Most of our liberty interests —e.g. privacy, autonomy, procreation, travel —exist independent of the government. By contrast, civil marriage and the government are inseparable. The state institution of marriage —the issuance of marriage licenses and the distribution of benefits based on marital status — has become an integral component of the fundamental right to marry. It is in this way that civil marriage has become “objectively, deeply rooted in this Nation’s history and tradition . . . and implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quotations omitted). *Turner v. Safley*,

482 U.S. 78 (1987).

The marriage bans and the marriage recognition bans are unconstitutional and unenforceable under the due process and equal protection guarantees of the Fourteenth Amendment of the United State Constitution. Given that Ohio's ban on gay marriage is unconstitutional and, as such, is considered null and void from inception, there is not and was not any impediment to the marriage in Massachusetts. As such, the marriage is valid and should be recognized in Ohio.

IV. CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.



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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document upon John S. Mengle, Attorney for Appellee, 42 East Silver Street, Lebanon, Ohio 45036, on March 16, 2015, by regular U.S. Mail and by email.



MICHAEL J. DAVIS
Attorney for Appellant/Plaintiff

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COURT OF APPEALS
WARREN COUNTY
FILED

FEB - 2 2015

James L. Spaeth, Cler
LEBANON OHIO

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

JENNIFER MCKETTRICK,

Plaintiff-Appellant,

- vs -

CHERYL MCKETTRICK,

Defendant-Appellee.

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CASE NO. CA2014-05-076

JUDGMENT ENTRY

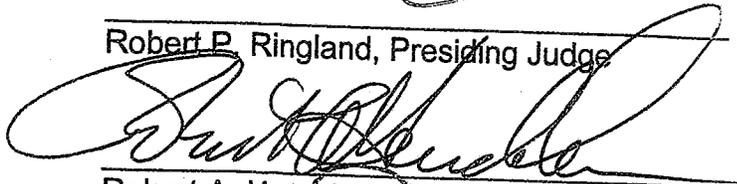
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas, Domestic Relations Division, for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

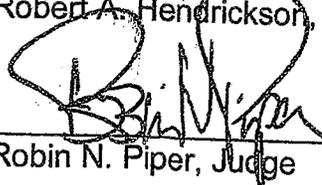
Costs to be taxed in compliance with App.R. 24.



Robert P. Ringland, Presiding Judge



Robert A. Hendrickson, Judge



Robin N. Piper, Judge

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

FEB - 2 2015

James L. Spaeth, Clerk
LEBANON OHIO

JENNIFER MCKETTRICK,

Plaintiff-Appellant,

- vs -

CHERYL MCKETTRICK,

Defendant-Appellee.

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CASE NO. CA2014-05-076

OPINION
2/2/2015

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 13 DR 36810

Michael J. Davis, 8567 Mason Montgomery Road, P.O. Box 1025, Mason, Ohio 45040, for plaintiff-appellant

John S. Mengle, 42 East Silver Street, Lebanon, Ohio 45036, for defendant-appellee

HENDRICKSON, J.

{¶ 1} Plaintiff-appellant, Jennifer McKettrick, appeals from the decision of the Warren County Court of Common Pleas, Domestic Relations Division, dismissing her complaint for divorce against defendant-appellee, Cheryl McKettrick. For the reasons set forth below, we hereby affirm the decision of the trial court.

{¶ 2} Between June 1998 and March 2012, Jennifer and Cheryl lived together in

Mason, Ohio as cohabiting, same sex partners. In either December 2005 or January 2006, Cheryl purchased a house in Eastham, Massachusetts. In April 2006, after a small ceremony at the Eastham house, Jennifer and Cheryl were issued a certificate of marriage by the Commonwealth of Massachusetts ("the 2006 marriage"). Although they vacationed in Eastham for between two and four weeks each year from 2006 to 2012, both Jennifer and Cheryl continued to maintain their home – and their respective positions of employment, voter registrations, and driver's licenses – in Ohio.

{¶ 3} In November 2013, Jennifer filed the complaint for divorce that serves as the basis for this appeal. Cheryl moved to dismiss Jennifer's complaint for lack of jurisdiction on the ground that "their purported marriage in Massachusetts was and is void." Jennifer then amended her complaint to allege that the couple's marriage in Massachusetts was lawful, to which Cheryl responded by supplementing her motion to dismiss. Thereafter, the parties submitted evidence by way of depositions, and provided argument through memoranda in support of their respective positions.

{¶ 4} On May 6, 2014, after reviewing the evidence and the parties' memoranda, the trial court granted Cheryl's motion to dismiss. In so holding, the trial court observed that the relevant Massachusetts law in effect in 2006 provided that:

No marriage shall be contracted in this commonwealth by a party residing in and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.

Mass.Gen.Laws. Ann. 207, Sec. 11 ("Mass.207-11").¹

{¶ 5} Applying this law, the trial court determined Jennifer and Cheryl intended to continue to reside in Ohio after their marriage, that same sex marriages were prohibited in

1. Mass.207-11 was repealed by Mass. Senate No. S800, Sec. 1 (2008).

Ohio in 2006, and that the Ohio laws prohibiting same sex marriage in 2006 were not unconstitutional. Therefore, the trial court concluded that the 2006 marriage was void, and dismissed Jennifer's complaint.

{¶ 6} Jennifer now appeals from the trial court's decision granting Cheryl's motion to dismiss, raising one assignment of error:

{¶ 7} THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING APPELLEE'S MOTION TO DISMISS.

{¶ 8} In her single assignment of error, Jennifer alleges two principal grounds upon which the trial court erred in dismissing her complaint. First, Jennifer argues that Mass.207-11 was not applicable to the 2006 marriage. Second, Jennifer argues that even if Mass.207-11 was applicable, the Ohio laws prohibiting same sex marriage were unconstitutional, thereby rendering them void ab initio. Therefore, according to Jennifer, because the Ohio laws prohibiting same sex marriage were unconstitutional, such laws could not have served as an impediment to the validity of the 2006 marriage. We will address each of Jennifer's arguments in turn.

1. Standard of Review

{¶ 9} A motion to dismiss for lack of subject matter jurisdiction pursuant to Civ.R. 12(B)(1) requires a determination of whether the complaint raised a cause of action cognizable by the forum in which it was filed.² *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80 (1989). This determination involves a question of law that the appellate court reviews de novo, independently, and without deference to the trial court's decision. *Bla-Con Indus., Inc. v. Miami Univ.*, 12th Dist. Butler No. CA2006-06-127, 2007-Ohio-785, ¶ 7. In

2. Jennifer characterizes Cheryl's motion to dismiss as a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim. However, Cheryl's original motion is captioned "Motion to Dismiss for Lack of Jurisdiction," and her arguments in support of the motion deny the trial court has subject matter jurisdiction. Accordingly, we review the trial court's decision as involving a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction.

determining whether the plaintiff has alleged a cause of action sufficient to withstand a Civ.R. 12(B)(1) motion to dismiss, a court is not confined to the allegations of the complaint and "it may consider material pertinent to such inquiry without converting the motion into one for summary judgment." *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St.2d 211 (1976), paragraph one of the syllabus.

{¶ 10} Under Ohio law, the jurisdiction of the trial court in divorce cases is limited by statute. *In re A.G.*, 139 Ohio St.3d 572, 2014-Ohio-2597, ¶ 44. R.C. 3105.17 provides that a complaint for divorce may be filed by "[e]ither party to the marriage." Implicit within this provision is the principle that a valid marriage is an essential element of a cognizable complaint for divorce. See, e.g., *Brooks v. Brooks*, 12th Dist. Warren No. CA2000-08-079, 2001 WL 433376, *1 (Apr. 30, 2001) (affirming the trial court's dismissal, for lack of jurisdiction, of the plaintiff's complaint for divorce where the plaintiff failed to show the parties had a valid common law marriage). Thus, to survive the Civ.R. 12(B)(1) motion to dismiss in this case, Jennifer was required to show the existence of a valid marriage.

2. Validity of the Marriage Under Ohio Law

{¶ 11} Jennifer's contention that the trial court misapplied Mass.207-11 to the 2006 marriage is a key component of her broader claim that the trial court erred in granting Cheryl's motion to dismiss. Yet, after a thorough review of the record, we note that even if the 2006 marriage was valid under Massachusetts law, Jennifer's complaint would not present a cognizable complaint for divorce under Ohio law.

{¶ 12} "Generally, the validity of a marriage is determined by the *lex loci contractus*; if the marriage is valid where solemnized, it is valid elsewhere * * *." (Emphasis sic.) *Mazzolini v. Mazzolini*, 168 Ohio St. 357 (1958), paragraph one of the syllabus. However, this rule does not apply where the marriages are "incestuous, polygamous, shocking to good morals, unalterably opposed to a well defined public policy, or prohibited." *Id.* at 358. To that end,

R.C. 3101.01(C) provides:

(1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state * *

(2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

See also Article XV, Section 11 of the Ohio Constitution ("[o]nly a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions").

{¶ 13} As can be seen, with respect to purported marriages of persons of the same sex, Ohio law does not look to the "lex loci contractus" to determine the validity of the marriage. Rather, Ohio law provides that *all* purported marriages of persons of the same sex, regardless of *where* the marriage is purported to have occurred, are invalid. See *DeBoer v. Snyder*, 772 F.3d 388, 419-420 (6th Cir.2014). Therefore, regardless of whether Massachusetts law recognized the 2006 marriage, that marriage is invalid under Ohio law. Where Ohio law does not recognize a valid marriage, the trial court has no jurisdiction to entertain a complaint for divorce. See *Brooks*, 2001 WL 433376 at *1.

3. Validity of the Marriage Under Massachusetts Law

{¶ 14} In addition, just as the trial court held, we find the 2006 marriage was invalid under Massachusetts law. As it operated in 2006, Mass.207-11 invalidated the marriage of nonresidents of Massachusetts only if three conditions were present: (1) the parties were residing in another state (i.e., not Massachusetts), (2) the parties intended to continue to reside in that other state, and (3) the marriage was invalid in that other state.

{¶ 15} Jennifer argues that two of the three conditions were not present in the 2006 marriage. First, Jennifer contends that although she and Cheryl were domiciled in Ohio at

the time of their marriage, they were nevertheless residents of Massachusetts and not residing in another state. That is, because she and Cheryl owned a house – a residence – in Massachusetts in 2006, Jennifer claims they were also Massachusetts "residents" under the plain meaning of that term. Further, Jennifer claims she and Cheryl did not intend to continue to reside in another state because they had expressed their intent to retire to Massachusetts in the future. Thus, Jennifer contends that Mass.207-11 was not applicable to the 2006 marriage.

{¶ 16} However, Jennifer's interpretation of Mass.207-11 is at odds with Massachusetts precedent. Her argument that Mass.207-11 was inapplicable to the 2006 marriage hinges on the distinction between the terms "residence" and "domicile," and the notion that a person may have more than one residence. Yet, a Massachusetts Supreme Judicial Court decision indicates Jennifer misstates and misinterprets the meaning of those terms in the context of Mass.207-11:

When a person domiciled in another State comes to Massachusetts with the intent to marry, that person's ability to enter into a valid marriage contract, in the first instance, is governed by [Mass.207-11], which, in turn, mandate[s] that the Commonwealth look to the marriage laws of the person's domiciliary State.

Cote-Whitacre v. Dept. of Pub. Health, 446 Mass. 350, 359 (2006). In other words, according to the Massachusetts Supreme Judicial Court, the words "residing" and "intending to continue to reside" as used in Mass.207-11 do not connote the plain meaning of the term "residence," but instead signify the concept of "domicile." See *Levanosky v. Levanosky*, 311 Mass. 638, 641 (1942) (interpreting the same language in Mass.Gen.Laws. Ann. 207, Sec. 10).

{¶ 17} Under Massachusetts law, a person can only have one domicile. *Dane v. Bd. of Registrars of Voters of Concord*, 374 Mass. 152, 161 (1978). A person's domicile is the

place that one calls "home," and "[h]ome is the place where a person dwells and which is the center of his domestic, social, and civil life." *Id.* at 161-62, quoting Restatement of the Law 2d, Conflict of Laws, Sec. 12 (1971). In her brief to this court, Jennifer concedes that "at the time of the issuance of the marriage license, the parties had their domicile in Ohio." Moreover, Jennifer cannot point to anything in the record which shows that either she or Cheryl had any definite intention of changing their domicile after they were issued a marriage certificate. Therefore, Mass.207-11 was applicable to the 2006 marriage.

{¶ 18} Further, Mass.207-11 operated to render the 2006 marriage void. Under that provision, the 2006 marriage was invalid at the time it was entered into if same sex marriage was explicitly deemed void or otherwise prohibited by Ohio constitutional amendment, by Ohio statute, or by an Ohio Supreme Court decision. See *Cote-Whitacre v. Dept. of Pub. Health*, Suffolk No. CIV.A. 04-2656, 2006 WL 3208758, *4 (Mass.Super. Sept. 29, 2006) (applying the Massachusetts Supreme Judicial Court's earlier interpretation of Mass.207-11). As noted above, same sex marriage was prohibited by an amendment to the Ohio Constitution (Article XV, Section 11) and an Ohio statute (R.C. 3101.01(C)), both of which were in effect in 2006. Thus, under Massachusetts law, as under Ohio law, the 2006 marriage was invalid.

4. Constitutionality of Ohio's Laws Regarding Same Sex Marriage

{¶ 19} Lastly, Jennifer argues the laws prohibiting same sex marriage in Ohio are unconstitutional. Specifically, Jennifer contends that R.C. 3101.01(C) and Article XV, Section 11 of the Ohio Constitution (collectively, "the Ohio same sex marriage provisions") violate her due process and equal protection rights under the Fourteenth Amendment of the United States Constitution.³ She further contends that because these provisions are

3. Jennifer also alleges violations of the Establishment Clause of the First Amendment, freedom of association as guaranteed by the First Amendment, and the Supremacy Clause of Article VI. However, we decline to

unconstitutional, they were void ab initio and could not have served as impediments to the 2006 marriage.

{¶ 20} As a primary authority for her constitutional arguments, Jennifer cites *Obergefell v. Wymyslo*, 962 F. Supp.2d 968 (S.D. Ohio 2013). She asserts that the *Obergefell* court's reasoning, "applied to the facts of this case, should compel the same conclusion – Ohio's [same sex marriage provisions] unjustifiably violate due process and equal protection guarantees." We find Jennifer's position problematic for several reasons.

{¶ 21} First, "Ohio appellate courts are not bound by lower federal court opinions." *Huntington Natl. Bank v. Coffman*, 10th Dist. Franklin No. 14AP-231, 2014-Ohio-3743, ¶ 17, citing *State v. Burnett*, 93 Ohio St.3d 419, 423-24 (2001). It is well-settled that the Supremacy Clause in Article VI of the United States Constitution "binds state courts to decisions of the United States Supreme Court on questions of federal statutory and constitutional law." *Burnett* at 422. However, the decisions of lower federal courts "constitute persuasive authority only and are not binding on this court." *State v. Prom*, 12th Dist. Butler No. CA2004-07-174, 2005-Ohio-2272, ¶ 22. Therefore, even if *Obergefell* represented the controlling federal authority in this jurisdiction, we would not be bound by its holding.

{¶ 22} Second, the *Obergefell* holding is inapposite to the present case. In *Obergefell*, the plaintiff and his homosexual partner were married in 2013 in Maryland, a state that recognizes same sex marriages as valid. *Obergefell* at 976. After the death of his partner that same year, the plaintiff sought an injunction from the federal district court requiring the state of Ohio to issue a death certificate that accurately reflected the Maryland marriage. *Id.* In finding for the plaintiff, the *Obergefell* court was very clear about the limited scope of its ruling:

consider these allegations because she failed to provide supporting arguments or citations to supporting authority. See App.R. 16(A)(7); App.R. 12(A)(2).

The Court's ruling today * * * states simply, that under the Constitution of the United States, Ohio must recognize *valid* out-of-state marriages between same-sex couples on Ohio death certificates * * *.

(Emphasis added.) *Id.* at 973. Apart from the issue of the authority of *Obergefell*, then, there is also the issue of relevance. *Obergefell* sought to force Ohio to recognize *valid* same sex marriages performed in other jurisdictions. As discussed above, however, the 2006 marriage was not valid under either Massachusetts or Ohio law.

{¶ 24} Third, we note that in the interim between the filing of Jennifer's brief and this court's consideration of the matter, the United States Court of Appeals for the Sixth Circuit issued its decision in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir.2014). *DeBoer* reversed *Obergefell* and several other federal district court rulings from Kentucky, Ohio, Michigan, and Tennessee favorable to advocates of same sex marriage. *Id.* at 421. In so doing, the Sixth Circuit found, among other things, that Ohio's same sex marriage provisions did not violate either the due process clause or the equal protection clause of the Fourteenth Amendment. *Id.* at 404-08, 410-16. Although *DeBoer* is not binding on this court, we agree with its reasoning.

{¶ 25} Finally, we decline Jennifer's invitation to find the Ohio same sex marriage provisions could not have served as an impediment to the 2006 marriage. In effect, Jennifer is asking this court to make three distinct rulings. First, to declare that the Ohio same sex marriage provisions are unconstitutional. Second, to retroactively apply our decision to nullify the effect of those provisions in 2006. And third, to re-apply Massachusetts law in light of our retroactive nullification. Even if we were inclined to take the first step – which we are not – we are powerless to take the second.

{¶ 26} The general rule is that a decision of a court of *supreme jurisdiction* striking down a statute as unconstitutional is retrospective in its operation. *Wendell v. AmeriTrust*

Co., 69 Ohio St.3d 74, 77 (1994), citing *Peerless Elec. Co. v. Bowers*, 164 Ohio St. 209, 209 (1955). However, no such decision exists with respect to Ohio's same sex marriage provisions, and a decision by this court would not constitute a decision of a court of supreme jurisdiction. Because neither the Ohio Supreme Court nor the United States Supreme Court have spoken on the issue, we decline to retroactively nullify the Ohio same sex marriage provisions.⁴ See, e.g., *United States v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675, 2696 (2013) (Roberts, C.J., dissenting) ("[t]he Court does not have before it, and the logic of the opinion does not decide, the distinct question whether the States, in the exercise of their 'historic and essential authority to define the marital relation' * * * may continue to utilize the traditional definition of marriage").

{¶ 27} For the foregoing reasons, having found no merit to any of the arguments advanced herein, Jennifer's single assignment of error is overruled.

{¶ 28} Judgment affirmed.

RINGLAND, P.J., and PIPER, J., concur.

4. Notably, the United States Supreme Court recently granted certiorari in a related case on the following questions: (1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?; and (2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? *Bourke v. Beshear*, 83 U.S.L.W. 3315, 2015 WL 213651, *1 (Jan. 16, 2015). The final briefs in *Bourke* are due on April 17, 2015. *Id.*

MAY

2014

COMMON PLEAS COURT
WARREN COUNTY, OHIO
FILED

23 MAY -6 PM 2:49

MICHAEL L. SPAETH
CLERK OF COURTS

5-16-14
TO THE CLERK,
SERVE NOTICE OF JUDGMENT
PURSUANT TO CIVIL RULE 58(B)

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

JENNIFER McKETTRICK)

Plaintiff)

vs.)

CHERYL McKETTRICK)

Defendant)

CASE NO. 13DR36810
Judge Tim Oliver

ENTRY GRANTING
MOTION TO DISMISS

DTS

The above matter came on for decision upon the Motion to Dismiss filed by Cheryl McKettrick ("Cheryl") on January 22, 2014 and the Supplemental Motion to Dismiss filed by Cheryl on March 24, 2014. At a conference on February 5, 2014, the Court ordered Jennifer McKettrick ("Jennifer") to notify the Attorney General pursuant to ORC 2721.12 as the issue on constitutionality of Ohio law was being raised; such notification occurred March 11, 2014. The Attorney General has not made an appearance. Further, the attorneys indicated depositions would be submitted on the issue of whether or not there was a legally valid marriage in Massachusetts. Those depositions were filed April 8, 2014. For the reasons hereinafter set forth, the Court grants Cheryl's Motion to Dismiss.

Timeline

- 1996 Parties met (Depos. Cheryl - pg. 8)
- 1997 Relationship began (Depos. Cheryl - pg. 8)
- 1998 Began to live together (Depos. Cheryl - pg. 8)
- 2/00 Commitment ceremony in church in Cincinnati (Depos. Cheryl - pg. 11)

12/05-01/06	Real estate closing in Cape Cod	(Depos. Jennifer – pg. 13 & Depos. Cheryl – pg. 25)
Mid-April 06	Arrive in Massachusetts for 1 week to clean house for rental season	(Depos. Cheryl – pg. 24)
4/18/06	Notice of Intention of Marriage	(Exhibit 1 Depos. of Cheryl)
4/21/06	Certificate of Marriage	(Exhibit 2 Depos. of Cheryl)
3/12	Parties separated	(Depos. of Cheryl – pg. 8)
11/12	Reconciled for a few weeks	(Depos. of Cheryl – pg. 34)

Massachusetts Law at Time of Issuance of Certificate of Marriage

No marriage shall be contracted in this commonwealth by a party residing in and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every such marriage contracted in this commonwealth in violation hereof shall be null and void. Mass. Gen. L. Ch. 207 §11 (2005). Note: Massachusetts eliminated “intent to reside provision” in 2008.

Ohio Law at Time of Issuance of Certificate of Marriage

Ohio DOMA enacted in 2004.

Facts

Jennifer lived in the Mason area at least since the mid-1990’s (Depos. pg. 5-6). Cheryl lived in the Mason area for twenty-five years (Depos. pg. 6). Jennifer worked for Pro-Kids for twenty-three years (Depos. pg. 6). Cheryl worked for Proctor & Gamble for twenty-eight years (Depos. pg. 6). They both voted in Ohio (Jennifer Depos. pg. 7 and Cheryl Depos. pg. 36). They both had Ohio driver’s licenses (Jennifer Depos. pg. 7-8 and Cheryl Depos. pg. 36). Their

income tax returns were filed in Ohio using Ohio addresses (Jennifer Depos. pg. 8-9 and Cheryl Depos. pg. 36-37). No tax returns were filed in Massachusetts except for payment of real estate taxes (Jennifer Depos. pg. 10 and Cheryl Depos. pg. 38).

Notwithstanding the foregoing, both parties listed Massachusetts as their residence on the Notice of Intention of Marriage. A warning was included that “if you are not a Massachusetts resident and you enter into a marriage...that would be void...in the state where you reside and intend to continue to reside, your marriage ‘shall be null and void.’” On the Marriage Worksheet, the parties indicated their planned address after marriage was Mason, Ohio (Exhibit 1). The Certificate of Marriage also listed Massachusetts as their residence (Exhibit 2).

Jennifer sidestepped the question of whether the Cape Cod property was a “vacation home” but admitted that it was a rental property they used for two to four weeks/year (Depos. p. 13-14). On the other hand, Cheryl specifically referred to this as a “summer home” (Depos. pg. 25). Cheryl indicated that, upon retirement, they talked about summers on the Cape but the balance of the year in the southwest, someplace warm (Depos. pg. 25-27). The rental ad prepared by Jennifer indicated that “we plan to retire” (Exhibit 3). The rental ad after the separation was changed to “I plan to retire” (Exhibit 4). See Cheryl Depos. pg. 29-32.

Conclusion

Jennifer’s memo correctly states the law for a Motion to Dismiss a Complaint. The parties must be allowed to provide evidence prior to the dismissal of a Complaint. In this case, the parties agreed to submit evidence by way of depositions and this Court is now in a position to rule upon the Motion.

The parties were not residents of Massachusetts at the time they obtained a marriage certificate. At best, they were summer vacationers. Jennifer and Cheryl had stable, long-term jobs in Ohio, lived in Ohio nearly all the year, voted in Ohio, paid taxes in Ohio, and had Ohio driver's licenses. Purchasing real estate in Massachusetts and preparing the house for rental did not establish residency in Massachusetts. The planned address after the marriage was in Ohio. Clearly the parties falsified their "residency" in order to get a marriage license in Massachusetts. They resided in Ohio and intended to remain in Ohio.

Next, did the parties intend to continue to reside in Ohio or Massachusetts? The Court finds they intended to continue to reside in Ohio. For example, there are no job searches in Massachusetts or transfer of bank accounts to Massachusetts. At best, the parties might reside in Massachusetts at some time in the future. Or, as testified by Cheryl, they might summer in Massachusetts. An intent to reside must mean a present state of mind to begin the process, not some future intent not yet defined.

Obergefell v. Wymyslo WC 6726688 (S.D. Ohio 2013) and related cases require Ohio to recognize valid out-of-state marriages. In that these parties were not residents of Massachusetts nor did they intend to reside in Massachusetts, this is not a valid out-of-state marriage. The parties could have remarried after Massachusetts changed its law, but they did not. The parties falsified their residence knowing that it would likely be declared null and void. A void marriage is an absolute nullity, without any semblance of validity.

Jennifer invites this Court to declare Ohio's law unconstitutional. This Court will not do so. Thus far the US Supreme Court has declined to declare a ban on same-sex marriage as unconstitutional nor did the District Court do so, *U.S. v. Windsor*, 133 S.Ct. 2675 (2013); *Obergefell, supra*. Further, the Sixth

Circuit has placed a stay on the Michigan order, *Deboer v. Snyder* (6th Cir. March 25, 2014)(No. 14-1341).

Second, the Court notes that marriages are the province of the states. In 2006, Massachusetts clearly was unwilling to approve marriages of out-of-state residents if not allowed in their home state. Jennifer wants us to re-write Massachusetts law and allow a marriage that Massachusetts did not allow in 2006. Given all of the above, this Court sees no reason to declare this statute unconstitutional at this time.

For these reasons, the Motion to Dismiss is granted.



JUDGE TIM OLIVER

c. Michael Davis, Esq.
John Mengle, Esq.