

10-5-2015

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Tiffany Bush, *Costanza and Brewer v. Caldwell*, 8 J. Civ. L. Stud. (2015)

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**MODERN FAMILY: INTRAFAMILY ADOPTION IN
LOUISIANA AND THE U.S. CONSTITUTION
(*COSTANZA AND BREWER V. CALDWELL*)**

Tiffany S. Bush*

I. INTRODUCTION

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.¹ This code article illustrates one of the most fundamental notions of the civil law tradition. Louisiana's Civil Code and the state's constitution often have run-ins with each other, but issues have often been resolved by reference to the civil code's idea that clear meaning should be adopted where reasonable and unless clear meaning leads to strange results, it should always be followed.

But, when the clear meaning of the Civil Code and Louisiana's constitution conflict with the less clear meaning of the 14th Amendment of the U.S. Constitution, a conflict arises that is not so easily resolved. Over time, the federal courts have interpreted 14th Amendment to provide various protections of citizens' rights.² The

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This note was written prior to the judgment delivered on June 26, 2015, by the U.S. Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), ruling that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

1. LA. CIV. CODE. art. 9.

2. The Fourteenth Amendment, in relevant part, states:

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

Supreme Court of the United States, several times, has extended these protections to individuals who were previously unrepresented, but due to a widespread change in societal attitudes, there was a shift in societal norms that warranted change. Louisiana and states like it have been resistant to these periodic shifts of societal norms.

This case presents a particularly confounding disagreement between the Code, Louisiana's Constitution and the U.S. Constitution on the issue of same-sex marriage. Though the Civil Code is clear on the status of same-sex marriage in Louisiana, the changing face of the family structure in our society may mean that the relevant code articles are outdated. Historically, Louisiana has been reluctant to change their laws in the face of an evolving society and many times, Louisiana has been one of the last states to change its laws and customs, especially in cases where the debate is on a substantial issue such as marriage and society seems to take an approach in opposition of that accepted in Louisiana. Interestingly, Louisiana judges make their voices heard in the debate and the opinions issued may come as a surprise. This case note will briefly discuss the issues at play in the case and analyze the way in which the court tackled issues and produced an opinion that strategically dismantles the archaic norms that are currently adhered to in Louisiana.

II. BACKGROUND

In 2004, Chasity Brewer gave birth to a baby boy while living in California.³ At the time, Brewer was unmarried, and the child

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

3. Minute Entry Ruling, *Costanza and Brewer v. Caldwell*, No. 2013-0052 D2, [15th JDC] (Feb. 22, 2014). At the time of this comment, there were no page numbers available for the judge's ruling because the opinion had not yet been published. Therefore, all citations to this ruling are to the whole opinion in general.

was conceived as a result of insemination by an anonymous sperm donor.⁴ In 2008, Brewer and her partner, Angela Costanza, were married in California, where same-sex marriages are permitted.⁵ By 2013, the couple came to live in Lafayette Parish in the state of Louisiana and in July 2013, Angela Costanza filed a petition for intrafamily adoption so that she may have parental rights to Brewer's son.⁶

In January of 2014, counsel for Costanza and Brewer presented the couples' entire adoption file to the court.⁷ Costanza, Brewer and their child were present, but the Attorney General for Louisiana was not.⁸ The court reviewed the entire adoption file and, after finding that all contents were in the proper form, granted the intrafamily adoption on January 27, 2014.⁹

In March 2014, the Attorney General for Louisiana, James Caldwell, filed an appeal in the Third Circuit Court of Appeals.¹⁰ Citing Louisiana's Code of Civil Procedure, the Attorney General stated that he was not given notice or any opportunity to be heard and the judgment should be vacated and remanded because of this.¹¹ Costanza and Brewer (the "petitioners") asked the court to

4. "According to the California Uniform Parentage Act, the anonymous sperm donor bears no rights to and no responsibilities for children born through donor insemination using his semen. The biological father remains to be unknown." Minute Entry Ruling, Costanza and Brewer v. Caldwell, No. 2013-0052 D2, [15th JDC] (Feb. 22, 2014).

5. At the time of their marriage, both women were at the age of majority.

6. Minute Entry Ruling, Costanza, *supra* n. 3.

7. The Fifteenth Judicial District Court of Louisiana, In re Adoption of N.B., 140 So.3d 1263 (2014).

8. Minute Entry Ruling, Costanza, *supra* n. 3.

9. The court reviewed a number of documents, including: an Authentic Act of Consent to Adoption from the biological mother (Chasity Brewer), a criminal records check from the Sheriff of Lafayette Parish, and a Child Welfare State Central Registry Check. The final decree of adoption and judgment was signed on February 5, 2014.

10. Attorney General Caldwell moved the court for a Suspensive Appeal from the final adoption decree signed in February. Additionally, the Attorney General and the Governor (the "defendants") also filed a peremptory exception of no cause of action and both sides filed motions for summary judgment. *See* Minute Entry Ruling, Costanza and Brewer v. Caldwell, No. 2013-0052 D2, [15th JDC] (Feb. 22, 2014).

11. LA. CODE CIV. PROC. art. 1572:

reaffirm the February 2014 judgment of adoption and alleged that their rights to Due Process and Equal Protection guaranteed by the 14th amendment of the United States Constitution would be denied if the final decree of adoption was thrown out.¹² Additionally, petitioners asserted that the state of Louisiana violated Article IV, Section 1 of the U.S. Constitution, known as the Full Faith & Credit Clause, by refusing to recognize their California marriage.¹³ Lastly, petitioners challenge the constitutionality of Louisiana's Defense of Marriage Act¹⁴ and several articles of the Louisiana Civil Code.¹⁵

The clerk shall give written notice of the date of the trial whenever a written request therefore is filed in the record or is made by registered mail by a party or counsel of record. This notice shall be mailed by the clerk, by certified mail, properly stamped and addressed, at least ten days before the date fixed for the trial. The provisions of this article may be waived by all counsel of record at a pre-trial conference.

12. Minute Entry Ruling, Costanza, *supra* n. 3.

13. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

14. LA. CONST. art. XII, § 15:

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

15. The challenged civil code provisions are as follows:

"Marriage is a legal relationship between a man and a woman that is created by civil contract. The relationship and the contract are subject to special rules prescribed by law." LA. CIV. CODE art. 86.

"Persons of the same sex may not contract marriage with each other." LA. CIV. CODE art. 89.

LA. CONST. art. XII, § 15:

A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.

III. DECISION OF THE COURT

The court addressed four issues set forth by the parties:

– Whether Louisiana Constitution Article XII, Section 15 (the Defense of Marriage Act), and Louisiana Civil code Articles 86, 89, and 3520(B) violate the Due Process and Equal Protection Clauses of the 14th Amendment of the U.S. Constitution;

– Whether, for purposes of the federal Due Process Clause, the right to marry someone of the same sex is a right deeply grounded in our Nation’s history and tradition;

– Whether the authority to recognize out-of-state marriages falls within the traditional authority of States over domestic relations law; and

– Whether Louisiana Constitution Art. XII, Section 15, Louisiana Civil Code Articles 86, 89, and 3520(B) violate Article IV, Section I, the Full Faith and Credit Clause, of the United States Constitution.¹⁶

The court ruled that Louisiana’s Defense of Marriage Act (DOMA) violates the Equal Protection and Due Process Clauses of the 14th amendment and is therefore unconstitutional.¹⁷ Additionally, Louisiana Civil Code Articles 86, 89, and 3520(B) were also declared unconstitutional for violating the same provisions of the U.S. Constitution.¹⁸

With regard to the question of whether the right to marry someone of the same sex constitutes a fundamental right for purposes of the Due Process Clause, the court appears to conclude that the right is fundamental. The court’s analysis of this issue was largely made up of an analogy drawn between this case and *Kitchen v. Herbert*, a case that came out of the Tenth Circuit Court of Appeals, where a same-sex couple sought to have their marriage recognized in Utah.¹⁹

16. Minute Entry Ruling, Costanza, *supra* n. 3.

17. *Id.*

18. *Id.*

19. *See, generally*, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

The court also relied on similar reasoning that was adopted by a number of other cases to bolster their position.²⁰ Last, the court held that the authority to recognize out-of-state marriages does not fall within the traditional authority of States over domestic relations law and, as such, the relevant provisions of the Louisiana Constitution and Civil Code violate the Full Faith and Credit Clause of the Constitution and is unconstitutional.²¹

IV. COMMENTARY

Same-sex marriage has been a hot-button issue for scholars, legislators and the judiciary. Though the primary focus for the courts has been the constitutionality of same-sex marriage bans,²² with many states moving to legalize same-sex marriage, focus has slowly been shifting towards the legal effects of same-sex marriage in states that continue to ban gay marriage. This court methodically analyzed each constitutional issue and by drawing on several strong policy concerns of Louisiana, issued a ruling that should stand if reviewed by an appellate court.²³

According to the judgment, the Louisiana provisions that outlaw same-sex marriage (art. 86 La. CC and La. Const.) and forbid the recognition of same-sex marriages contracted out of state (La. Const.) violate two clauses in the U.S. Constitution.²⁴

The court found Louisiana DOMA's tendency to "make unequal a subset of state-sanctioned marriages" violated the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause requires that no state shall deny a person equal protection under its laws. Louisiana's DOMA, as well as the Civil Code articles, specifically article 86, does just that. Equal

20. See Minute Entry Ruling, Costanza, *supra* n. 3.

21. *Id.*

22. The United States Supreme Court is expected to address the issue in Summer 2015.

23. The Attorney General appealed the judgment to the Louisiana Supreme Court and the appeal is currently pending.

24. Minute Entry Ruling, Costanza, *supra* n. 3.

protection has not been interpreted to tolerate equal application of facially discriminatory laws. Instead, the Equal Protection Clause requires that states protect the constitutional rights of all individuals. The right to marry has been identified as a fundamental right protected by the United States Constitution.²⁵ Additionally, some courts have recognized other rights bearing close relation to the right to marry, such as a parent's right to raise their children, without undue interruption from the state, as being protected by the Constitution as well.²⁶

Both provisions of Louisiana law expressly limit legal recognition of marriage between a man and woman only. These provisions unduly interfere with the rights of same-sex couples to marry by not allowing their marriage to be recognized legally. In turn, same-sex couples are unable to benefit from the civil effects of marriage, including intrafamily adoption like Constanza and Brewer are trying to attain here. Furthermore, the additional Civil Code articles at issue here blatantly violate the Equal Protection Clause of the Constitution because they facially discriminate against a certain class of individuals by not allowing them to marry, simply because of who they choose to marry.

Next, the court tackled the issue of Louisiana's refusal to recognize a same-sex marriage lawfully entered into in California.²⁷ The petitioners asserted that the state's refusal to recognize their marriage violated Article IV, Section I, the Full Faith and Credit Clause, of the United States Constitution, stating that the denial is "unmerited and does not fall within the discretion of a State"²⁸ and further, Louisiana has not cited any compelling public policy that would allow the state to deny valid marriages

25. *Loving v. Virginia*, 388 U.S. 1 (U.S. 1967).

26. Here, the court quoted the Tenth Circuit case, *Kitchen v. Hebert*, saying: "Thus childrearing, a liberty closely related to the right to marry, is one exercised by same-sex and opposite-sex couples alike, as well as by single individuals." Minute Entry Ruling, *Costanza*, *supra* n. 3 (quoting *Kitchen*, *supra* n. 19).

27. Minute Entry Ruling, *Costanza*, *supra* n. 3.

28. *Id.*

from other states.²⁹ The defendants contended that the Full Faith and Credit Clause does not require the state of Louisiana to recognize the out-of-state marriage because “[o]ne State’s marriage is not a ‘judgment’ that merits full faith and credit in another State.”³⁰ Citing two older Supreme Court cases directly on point,³¹ the court agreed with the petitioners’ arguments on this point, finding that marriage has, historically, been recognized as a judgment that merits full faith and credit in another state.³²

The constitutional analysis set forth by the court is very strong on its own, but the court increases the strength of the argument by using the state’s strong policy of promoting intact families and making decisions in the best interest of the children.³³ The defendants argued that Louisiana’s marriage and adoption laws are linked to the furtherance of two state interests: “a) linking children to intact families formed by their biological parents, and b) ensuring that fundamental social change occurs through widespread social consensus.”³⁴ Citing the ruling from *Meyer v. Nebraska*, the court stated that the right to marry and raise children is a fundamental right and that the petitioners “are in a better position than the state to make decisions regarding the custody and care of the child.”³⁵ The court added that “there is no rational connection between Louisiana’s laws prohibiting same-sex marriage and its goal of linking children to intact families formed by their biological parents, or ensuring that fundamental social

29. *Id.*

30. Citing the RESTATEMENT (2D) CONFLICTS OF LAWS § 92, *Williams v. North Carolina*, *Sevcik*, *Baker v. Nelson*.

31. *Milwaukee County v. M.E. White Co.*, 269 U.S. 268 (1935); *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

32. In *Milwaukee County*, the Court held that “the public policy of the forum state must give way,” because the “very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties.” In *Sherrer*, the Court ordered Massachusetts to give full faith and credit to a Florida divorce decree.

33. Minute Entry Ruling, *Costanza*, *supra* n. 3.

34. *Id.*

35. *Id.* (citing *Meyer v. Nebraska*).

change occurs through widespread social consensus.”³⁶ Since Louisiana already allows adoptions by foster parents and those with no biological link to the child, according to the court here, it would be illogical to say that intact families are only those that are formed by a child’s biological parents.”³⁷

The court addressed Louisiana’s Defense of Marriage Act and adopted the reasoning set forth in *United States v. Windsor*, where the U.S. Supreme Court struck down the Defense of Marriage Act because “it found that the purpose of that Act [was] to influence or interfere with the state’s sovereign choices about who may be married.”³⁸ Quoting *Windsor*, the court added: “DOMA’s principal effect is to identify and make unequal a subset of state-sanctioned marriages. It contrives to deprive some couples married under the laws of their state, but not others, of both rights and responsibilities. [T]hough Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.”³⁹ Though *U.S. v. Windsor* struck down the federal DOMA for violating the Due Process Clause of the Fifth Amendment, the state laws and legislation must comport with the Due Process Clause of the Fourteenth Amendment.⁴⁰ Finding that Louisiana’s DOMA was drafted with almost the exact language of the federal DOMA, the court ruled that the constitutional provision is unconstitutional under the Due Process Clause of the Fourteenth Amendment.

V. CONCLUSION

There is no question that the face of what constitutes a “family” is changing. Our society’s view of same-sex marriage has

36. *Id.*

37. *Id.*

38. *Id.* (citing *United States v. Windsor*).

39. *Id.*

40. The Fourteenth Amendment of the United States Constitution incorporated the Bill of Rights against the states.

slowly shifted from disapproval and prejudice towards same-sex couples to an attitude of tolerance and many are proponents of equal protection of gay couples under our laws. With increasing pressure from the public to change the laws that discriminate against same-sex couples and increasing splits in the state court system, the final word on same-sex marriage may soon be pronounced by the Supreme Court of the United States. Though there is a large portion of the population who advocate for marriage rights for same-sex couples, there are still those who favor the traditional recognition of marriage between a man and woman only.

This case illustrates a coming change in the United States and a remarkable turn in state court adjudication. Southern states, in general, strongly favor the traditional approach. This makes the courage displayed by the Honorable Judge Rubin ruling all the more commendable. In order to effect widespread change, the state courts need to keep producing opinions striking down the state laws that unconstitutionally deprive same-sex couples of their rights. There will be more rulings like Judge Rubin's, moving up through the court system and signaling the need for the Supreme Court to hear and ultimately decide the legality of same-sex marriage in the United States. Until that time, state court judges will play a prominent role in applying pressure to state legislatures to repeal their discriminatory laws.⁴¹

41. Since the presiding district judge, the Honorable Judge Rubin, declared provisions of Louisiana's state law unconstitutional, the Attorney General was entitled to a direct appeal to the state's Supreme Court. The appeal is currently pending and was argued before the Louisiana Supreme Court January 25, 2015.