

OUTSide Influence

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Message from the Chair



Welcome to the second edition of OUTSide Influence! We are excited to continue our quarterly newsletter to provide important updates on LGBT legal issues in federal practice and beyond.

In addition to our newsletter, we are working to increase the number of events throughout the country, but need your help to do so. Please let members of the Board know if you are interested in working on an event in your area – be it a gathering for networking, a CLE on a current topic, a collaboration with another FBA Section, Division, or Chapter, or a joint effort with an LGBT organization. I can be

reached at cbadlani@hsplegal.com or lgbtsectionfba@gmail.com

With your help, we will continue to grow our Section in 2018!

LGBT Law Section Officers

Chair

Chirag Badlani
Chicago, IL
cbadlani@hsplegal.com

Treasurer

David Greco
San Diego, CA
dgreco@nicholaslaw.org

Vice Chair

David Thompson
New York, N.Y.
dthompson@sctlaw.nyc

Membership Chair

Brandon King
Washington, D.C.
brmking16@gmail.com

Eleventh Circuit Denies Tax Deduction to Gay Man for Costs of IVF

By Brandon King

On September 25, 2017, the Court of Appeals for the Eleventh Circuit released its opinion in *Morrissey v. United States*.¹ The issue was whether Joseph Morrissey, a gay man, could deduct the costs he had paid to produce a natural-born child with his partner through in-vitro fertilization (IVF).

Mr. Morrissey is a professor at Stetson University School of Law. He began working there in 2004 after he and his partner moved to Florida. Mr. Morrissey and his partner met in Chicago and have been together for more than 15 years.

In 2010 Mr. Morrissey and his partner decided to try to have children through IVF.² Between 2010 and 2014,³ he paid expenses relating to numerous IVF-related procedures, including egg donations, consulting, fertility specialists, and surrogates. These expenses totaled more than \$100,000. Of that amount, only \$1,500 was spent toward procedures relating to Mr. Morrissey's body—blood tests and sperm collection. The remaining expenses were for identifying egg donors and surrogates, compensating the donors and using surrogates for travel, and providing them medical care.

Mr. Morrissey reported his IVF-related expenses on an amended tax return and sought a refund. The IRS disallowed the refund on the ground that a taxpayer can only deduct medical expenses attributable to medical care provided to himself, his spouse, or a dependent.

Ruling on cross-motions for summary judgment, the District Court for the Middle District of Florida ruled for the IRS in a short order. Mr. Morrissey appealed to the Eleventh Circuit and raised two arguments: (1) IVF-related expenses are “medical care” expenses under section 213 of the Internal Revenue Code (I.R.C.) and (2) the IRS denied his due process and equal protection rights by disallowing his claimed deduction.

Under I.R.C. sec. 213, taxpayers can deduct expenditures for “medical care” (subject to a floor). Medical care is generally defined as amounts paid for “the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.” I.R.C. sec. 213(d).

Mr. Morrissey contended that the expenses he and his partner had paid to obtain eggs from a female body and to use a surrogate were expenses paid to affect a “structure or function of the body,” specifically, his own body's reproductive function. The Eleventh Circuit rejected this argument, determining that Mr. Morrissey could not deduct costs associated with “female” reproductive functions. The Court rejected Mr. Morrissey's argument that he was “effectively infertile,” determining that almost all of his IVF-related expenses affected only the bodies of the unrelated egg donors and surrogates.

In addition to his statutory argument, Mr. Morrissey advanced two alternative grounds for relief, due process and equal protection. He contended that the IRS' denial of his deduction violated his fundamental right to procreate. The Court rejected that argument, determining that the fundamental right to

procreate protects only the right to “traditional” procreation, i.e., there is no fundamental right to procreate using egg donors and surrogates.

He also contended that the IRS denied his rights as a gay man, i.e., that he was a victim of sexual orientation discrimination. The government contended that because it would have denied his deduction even if he was a straight man, there was no equal protection violation. The Court accepted the IRS' argument.

This case follows a line of cases that have disallowed these types of deductions for gay men. *See, e.g., Longino v. Commissioner*, T.C. Memo. 2013-80 (2013), *Magdalin v. Commissioner*, T.C. Memo. 2008-293 (2008).⁴ But, the IRS has allowed different-sex married couples to deduct “IVF-related costs” in certain circumstances.⁵

Unlike in other cases however, the Eleventh Circuit chose to address the constitutional grounds. Its framing of the issues at the beginning of the Opinion perhaps foreshadowed its decision: (1) “Was the money that a homosexual man paid to father children through in vitro fertilization spent for the purpose of affecting his body's reproductive function” and (2) “Did the IRS violate his right to equal protection of the laws either by infringing a fundamental right or by engaging in unconstitutional discrimination.”

In concluding that there was no equal protection violation, the Court may have glossed over an equal protection violation found in the statutory text. Section 213 allows expenses paid or incurred “for the purpose of affecting any structure or function of the body” to be deducted. If a straight male can deduct IVF-related expenses to remedy his wife's infertility, not allowing a gay male to incur the same expenses to remedy his own infertility (by reason of his sexual orientation), is potentially problematic. The Court also stated that: (1) voluntary procreation through the means of IVF is not “deeply rooted in this Nation's history and tradition” and (2) procreation using egg donors and surrogates “raise[s] moral and ethical issues.” Framed in this light, Mr. Morrissey's due process challenge had little chance of succeeding.



Brandon King is a law clerk for Judge Albert G. Lauber at the United States Tax Court in Washington, D.C. In addition to the LGBT Law Section, he serves as an officer in the FBA Tax Section and is involved in several other tax and LGBT-related bar associations. Brandon received his J.D. from Indiana University Maurer School of Law and his LL.M.

in Taxation from Georgetown University Law Center.

Endnotes

¹2017 WL 4229063 (11th Cir. Sept. 25, 2017).

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LGBT Litigation Round Up

By the LGBT Law Section Board

Let Them Eat Cake?

On December 5, 2017, the Supreme Court heard oral arguments in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.¹ The case addresses whether the Free Speech Clause or the Free Exercise Clause of the First Amendment provides a defense to a claim of discrimination against a same-sex couple.

Charlie Craig and David Mullins sought to buy a cake for their Denver, Colorado wedding reception in July 2012.² Masterpiece Cake Shop, owned and operated by Jack Phillips, declined to sell the couple a cake. Craig and Mullins filed a charge of sexual orientation discrimination with the Colorado Civil Rights Division, and Phillips raised defenses under the First Amendment. Both an Administrative Law Judge and the Colorado Civil Rights Commission found that the bakery violated the Colorado Anti-Discrimination Act³ by refusing to serve Mullins and Craig. The Colorado Court of Appeals affirmed, finding that the Company's refusal to serve Mullins and Craig constituted sexual orientation discrimination. Regarding the Free Speech claim, the Court of Appeals held that the First Amendment does not exempt businesses open to the public from antidiscrimination laws, that the Anti-Discrimination Act targeted the conduct of discrimination and not speech, and that the Act only required equal treatment of same-sex and opposite-sex couples. As to the Free Exercise claim, the Court of Appeals found that the Act was subject to rational basis review and that it survived such review because it "prevents the economic and social balkanization prevalent when businesses decide to serve only their own kind."⁴

Before the Supreme Court, Phillips, represented by the Alliance Defending Freedom, argued that as a "cake artist," his custom-designed wedding cakes celebrating his clients' marriages are his "protected expression" and that the Court's compelled-speech doctrine "forbids the Commission from demanding that artists design custom expressions that convey ideas they deem objectionable."⁵ Phillips further argued that the Commission "has not only ordered Phillips to participate in celebrating what he regards as a religious event, it has forced him to do so through his expression," in violation of the Free Exercise Clause, and that because of the burden placed on his religious beliefs, the law should be subject to "strict scrutiny."⁶ The Trump administration filed a brief supporting the bakery, arguing that a distinction exists between laws that prevent discrimination in the sale of goods and services and those that put burdens on actual expression, the latter of which are impermissible under the First Amendment.⁷

The Commission, represented by the Colorado Attorney General, and the individual respondents, represented by the ACLU, argued that the Act at issue only bars discriminatory commercial conduct and is thus content-neutral. According to respondents, the Act ensures that businesses do not refuse to transact with certain classes of individuals, and in this

case prohibits Phillips' discriminatory policy of refusing to sell any wedding cake of any kind to any gay couple. Though the respondents argue that a heightened scrutiny does not apply, they argue that under any standard, the Act furthers the State's substantial interest in eradicating discrimination.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,⁸ the Supreme Court upheld the right of parade organizers to exclude the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) from the St. Patrick's Day Parade, finding that a parade is "inherently expressive" and that the application of a Massachusetts anti-discrimination law to a privately organized parade was a violation of the Speech Clause. The respondents argued that *Hurley* is not applicable to Masterpiece Cake Shop, because *Hurley* did not apply to commercial conduct. Here, they argue, a customer is not paying a business in order to spread its message.

Observers of the December 5, 2017 oral argument noted that, not surprisingly, Justice Kennedy held the crucial vote. He asked the attorney for the Trump Administration, "[i]f you prevail, could the baker put a sign in his window, we do not bake cakes for gay weddings?"⁹ When the Solicitor General answered yes, Justice Kennedy responded, "[y]ou would not think that an affront to the gay community?"¹⁰ However, he later stated that "the state in its position here has been neither tolerant nor respectful of Mr. Phillips' religious beliefs."¹¹

The argument did show the difficulty in drawing distinctions among various commercial activities that might rise to the level of "expression," from chefs and make-up artists (whose work is not expressive, according to Petitioner), to the invitation makers and bakers (whose work, according to Petitioner, is expressive). The case will likely turn on if (and if so, how) the Justices resolve drawing this line.

Court Denies Cert on Title VII and Sexual Orientation

In the last issue of OUTside Influence, Don Davis wrote about the possibility of the Supreme Court ruling on whether Title VII's explicit proscription against sex discrimination also forbids an employer from discriminating against an applicant or employee because they are gay, lesbian, or bisexual. On December 11, 2017, the Court declined review in *Evans v. Georgia Regional Hospital*,¹² the Eleventh Circuit ruling affirming dismissal of a lesbian security guard's allegations that a Georgia hospital violated Title VII by firing her because of her sexual orientation. This maintains a circuit split, with the Seventh Circuit holding in *Hively v. Ivy Tech Community College of Indiana*,¹³ that Title VII of the 1964 Civil Rights Act prohibits discrimination in employment on the basis of sexual orientation.

Trump's Transgender Military Ban Enjoined

Three federal judges have now issued rulings against President Trump's transgender military ban, cases that were highlighted in the last issue of OUTside Influence.

On October 30, 2017, the U.S. District Court for the District of Columbia issued an injunction on the ban in *Doe 1 v. Trump*,¹⁴ finding that the Trump administration likely violated transgender service members' rights under the Fifth Amendment due process clause. The plaintiffs are represented by the National Center for Lesbian Rights (NCLR) and GLBTQ Legal Advocates & Defenders (GLAD).

On November 21, 2017, a second federal judge in Maryland in *Stone v. Trump*¹⁵ halted the proposed transgender military ban, finding that active-duty service members are "already suffering harmful consequences" because of the president's policy. The preliminary injunction also prevented the administration from denying funding for sex-reassignment surgeries after the order takes effect. The plaintiffs are represented by the ACLU.

On December 11, 2017, the U.S. District Court for the Western District of Washington granted a preliminary injunction in *Karnoski v. Trump*,¹⁶ barring the government from taking actions inconsistent with the military policy that existed prior to July 26, 2017, under which transgender service members were allowed to join and serve in the military. The court found that the ban likely violates the plaintiffs' rights to due process and to equal protection under the law, without advancing any government interest. The ruling came in the lawsuit brought by Lambda Legal and OutServe-SLDN.

A fourth lawsuit against the ban, filed by Equality California, is pending before a federal court in California.

The Pentagon stated that as of January 1, 2018, openly transgender individuals are eligible to enlist in the military.

Endnotes

¹*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 137 S. Ct. 2290, 198 L. Ed. 2d 723 (2017).

²Same-sex marriage was not yet legal in Colorado, and

the couple had their ceremony in Massachusetts. *See* Br. of Respondents Charlie Craig and David Mullins, No. 16-111, *available at* http://www.scotusblog.com/wp-content/uploads/2017/11/16-111_bs-cc-and-dm.pdf.

³Colo. Rev. Stat. § 24-34-601(1), (2). Twenty other states and the District of Columbia likewise expressly prohibit places of public accommodation from discriminating on the basis of sexual orientation. State Public Accommodation Laws, NAT'L CONF. OF STATE LEGISLATURES (July 13, 2016), <https://perma.cc/86NK-4684>.

⁴*Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 102, 370 P.3d 272, 293, *cert. denied sub nom. Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), and *cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 137 S. Ct. 2290, 198 L. Ed. 2d 723 (2017).

⁵Br. of Pet. at 15, No. 16-111, *available at* <http://www.scotusblog.com/wp-content/uploads/2017/09/16-111-ts.pdf>.

⁶*Id.* at 15-16.

⁷Br. of the United States, No. 16-111, *available at* <http://www.scotusblog.com/wp-content/uploads/2017/09/16-111-tsac-USA.pdf>.

⁸515 U.S. 557 (1995).

⁹*See* No. 16-111, Oral Arg. Tr. at 27, *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf.

¹⁰*Id.*

¹¹*Id.* at 62.

¹²850 F.3d 1248 (11th Cir. 2017).

¹³853 F.3d 339 (7th Cir. 2017).

¹⁴No. CV 17-1597 (CKK), 2017 WL 4873042 (D.D.C. Oct. 30, 2017).

¹⁵No. CV MJG-17-2459, 2017 WL 5589122 (D. Md. Nov. 21, 2017).

¹⁶No. C17-1297-MJP, 2017 WL 6311305, at *1 (W.D. Wash. Dec. 11, 2017).

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²Mr. Morrissey and his partner had previously considered adopting a child, however until late 2010 Florida did not permit queer couples to adopt. *See* Florida Stat. Sec. 63.042 ("No person eligible to adopt under this statute may adopt if that person is a homosexual."), ruled unconstitutional by *Fla. Dept. of Children and Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. 3d DCA 2010).

³Mr. Morrissey and his partner made seven attempts over a four-year period to conceive a child through IVF, finally succeeding in June 2014.

⁴*But see O'Donnabhain v. Commissioner*, 134 T.C. 34 (2010) (allowing taxpayer to deduct costs for gender reassignment surgery on the ground that gender identity

disorder is a "disease" and that hormone therapy and other treatments associated with sex reassignment surgeries are not "cosmetic surgeries").

⁵The IRS has issued several Private Letter Rulings, which provide the IRS' ruling on the appropriate tax treatment of items to a particular taxpayer, in which it expressly allowed different-sex married couples to claim these deductions on the ground that the couple's fertility was affected. *See, e.g.*, IRS PLR 2003-18-017 (May 2, 2003). Also, IRS Publication 502 allows different-sex couples to deduct costs of "fertility enhancements" to "overcome your inability to have children."

Second Class Citizens No More: How the Federal Recognition of Same-Sex Marriage Is Now Leading to Full U.S. Citizenship for Foreign-Born Spouses of U.S. Citizens

By Michael R. Jarecki

The Supreme Court's 2013 decision in *United States v. Windsor*¹ held that Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional, paving the way for the immediate recognition of federal immigration benefits for foreign same-sex spouses and fiancé(e)s of U.S. citizens. What was once prohibited within U.S. immigration law became legal, namely the federal interpretation of "marriage" and "spouse" to include same-sex families.² The practical effect of the ruling within immigration was a game changer: foreign nationals in same-sex relationships now had a direct route to resident status, or the green card, through a marriage-based filing, something that was limited up until that point to heterosexual spouses equally situated. The Windsor ruling also allowed for a U.S. citizen to petition a same-sex fiancé(e), a key benefit considering that many countries did not, and still do not, recognize same-sex marriage, and some continue to go so far as to criminalize it.

Only a handful of states recognized same-sex marriage in 2013, and some states had laws specifically prohibiting the recognition of same-sex marriages in their states, colloquially referred to as mini-DOMAs.³ To ease the burdens on couples who did not live in a marriage-equality state, the domestic immigration agency, United States Citizenship and Immigration Services (USCIS), announced it would recognize marriages if they were legal in the jurisdiction where they were performed (place-of-celebration rule), not based on the residency of the married couple.⁴

Prior to *Windsor*, many same-sex spouses and couples had to find temporary and costly workarounds within the U.S. immigration system to remain together, including student visas, work visas, or investment visas. Other families made the scary and difficult choices of remaining together in the U.S., even though the foreign national partner did not have legal status within the country. Some families maintained long-distance relationships spanning two (2) countries; whereas, some U.S. citizens chose to live in exile, in the foreign-national's home country that recognized same-sex relationships, or a new country to both individuals, but welcoming of their legal relationship status.

While the road to marriage equality was a long and hard-fought battle over decades, for many foreign-born spouses of U.S. citizens, the 2013 *Windsor* decision also provided an expedited route to U.S. citizenship, or naturalization. Generally, naturalization requires five (5) years of residence in the U.S., following an approval of lawful permanent resident status.⁵ Under 8 CFR §319.1(a)(3), spouses married to U.S. citizens are able to apply for U.S. naturalization within three (3) years of becoming a lawful permanent resident, by proving

they have been living in marital union with their U.S. citizen spouse and have spent the majority of their time living in the U.S. This is a significant benefit and a powerful affirmation to a whole class of individuals and their families, especially since prior to *Windsor*, these families were treated as legal strangers by the federal government.

We are now at an important milestone for bi-national same-sex spouses who received their green cards through sponsorship by their U.S. citizen spouses. Many of these green card holders are now within the period of time where they will begin to qualify for or have pending naturalization applications with USCIS, having received approvals of their residency within the last three (3) years.

Even though the Supreme Court ruled in June 2013, case processing times and adjudications from application to green card or to naturalization could each take six (6) to twelve (12) months or longer. These times represent the normal administrative processing times, delays, and USCIS' overall caseload throughout the year. Once approved for the green card (not the marriage date or application date), an applicant starts to accrue time towards naturalization, which again could be three (3) years for those who are married to a U.S. citizen.

The decision to become a U.S. citizen is a personal matter and one that could have consequences on whether the applicant may maintain dual citizenship with a country of origin. Lawful permanent residency permits one to live in the U.S, work here, and travel in and out of the country. However, the top considerations when deciding whether to seek U.S. citizenship include the right to vote and establishing the most stable status possible within the U.S. Unlike permanent resident status, U.S. citizenship cannot be taken away for living outside of the U.S. for too long a period, nor can a U.S. citizen be deported from the U.S., as lawful permanent residents can, for certain serious crimes. U.S. citizens may also sponsor their parents and adult married children, a benefit that is not available to permanent residents.⁶

While there certainly is a class of individuals who never go on to apply for U.S. citizenship, it is significant and important that this option is fully available to all spouses of U.S. citizens, whether same-sex or opposite-sex. Once denied under DOMA, qualifying same-sex spouses of U.S. citizens may now access and participate in the full legal and civic avenues available to all spouses. This achievement cannot be overstated! Additional information on naturalization is available at the USCIS website, <https://www.uscis.gov/us-citizenship/citizenship-through-naturalization>.



Michael R. Jarecki is the principal of the immigration law firm, Law Office of Michael R. Jarecki, LLC, in Chicago, Illinois. He serves as Chicago Chapter Chair of the American Immigration Lawyers Association (AILA) and formerly served as Chair of AILA's National Working Group for LGBT immigration issues. Michael was named one of the Best LGBT Lawyers Under 40, Class of 2012, by the National LGBT Bar Association, an affiliate of the American Bar Association. He is a graduate of the University of Illinois College of Law and Loyola University Chicago.

⁵See, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartG-Chapter2.html#footnotelink-9>

⁶Immigration and Naturalization Act §316(a), 8 U.S.C. §1427(a)(1); 8 CFR §316.5.

⁷8 CFR §319.1(a)(3).

Endnotes

¹*United States v. Windsor*, 570 U.S. ___, 133 S.Ct. 2884 (2013).

²See <https://www.uscis.gov/family/same-sex-marriages>, a 2013 FAQ by the Secretary of Homeland Security directing United States Citizenship and Immigration Services (USCIS) to “review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed of an opposite-sex spouse.”

³It should be noted that some legal recognition within federal immigration for the LGBT community started as early as 2005, with *In re Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005), where the Board of Immigration Appeals held that “a marriage between a postoperative transsexual and a person of the opposite sex may be the basis for benefits under section 201(b)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(i) (2000), where the State in which the marriage occurred recognizes the change in sex of the postoperative transsexual and considers the marriage a valid heterosexual marriage.”

⁴These mini-DOMAs were not found unconstitutional until 2015 in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

Congratulations to Founding LGBT Law Section Chair Daniel Weiss

Congratulations to Judge Daniel Weiss, the founding Chair of the LGBT Law Section, on his appointment to the New Jersey Superior Court! We thank him for his vision and efforts in forming the Section, and we wish Judge Weiss the best in his new role on the bench.