IN THE CIRCUIT COURT FOR ROANE COUNTY, TENNESSEE

FREDERICK MICHAEL BORMAN,

Plaintiff

VERSUS NO. 2014CV336

LARRY KEVIN PYLES-BORMAN

Defendant

MEMORANDUM OPINION

The parties, Frederick Michael Borman and Larry Kevin Pyles-Borman, were married on August 13, 2010 in the State of Iowa whose laws allow two individuals of the same sex to marry.

Iowa does not require that the two individuals be residents of the State, and the parties' marriage certificate shows that at the time of their marriage they were residents of Rockwood, Roane County, Tennessee. The problem arises for Plaintiff when he wants to be divorced from Defendant because Iowa requires that to be granted a divorce Plaintiff must establish residency in Iowa by being a citizen for some minimum period of time. In essence you do not have to be a resident of Iowa to be married there, but you do have to be a resident of Iowa to be divorced there.

The Constitution and the laws of Tennessee do not allow two individuals of the same sex to be issued a marriage license by defining a marriage as a union of one (1) man and one (1) woman. Tennessee's laws further provide that if another state allows persons to marry who are prohibited from marriage in Tennessee, then that marriage is void and unenforceable in Tennessee. Tenn. Const. Art. XI § 18,. Tenn. Code Ann. §36-3-113.

The portion of the law that declares Plaintiff's marriage void and unenforceable has

become known as the Anti-Recognition Law. It is this part of the Tennessee law that Plaintiff asks this Court to find in violation of the United States Constitution.

Plaintiff takes the position that Tennessee's Anti-Recognition Laws violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States because they treat "valid same sex marriages as a special class singled out for disadvantages... without any legitimate basis". He also claims Tennessee's Anti-Recognition Laws violate the Full Faith and Credit Clause of the Constitution of the United States by declaring a marriage found to be valid under the laws of Iowa is void and unenforceable under the laws of Tennessee.

I. Equal Protection Clause

Plaintiff's position, as stated above, is that Tennessee's Anti-Recognition Laws violate the Equal Protection Clause of the United States Constitution.

The State first takes the position that the United States Supreme Court has decided this issue in the Baker v. Nelson, 409 U.S. 810 (1972) case in which the Supreme Court dismisses an appeal from the Minnesota Supreme Court for want of a substantial federal question. Although this summary dismissal is given without explanation, the decision "is considered a binding decision on the merits as to the precise issues presented and necessarily decided'." Mandel v. Bradley, 432 U.S. 173, 176-177 (1977). Thus, Baker holds that a state's law on same-sex marriage do not violate the equal protection or substantive due process rights under the United States Constitution.

Although the United States Supreme Court has had opportunities to overrule the Baker decision, it has refused to take that position even in the decision on which the Plaintiff relies which is United States v. Windsor, 133 S. Ct. 2675 (2013). The Court therefore finds that Baker is still applicable. Plaintiff takes the position that even if the Baker decision is applicable, the decision is no longer valid because "doctrinal developments indicate otherwise" Hicks v. Miranda, 427 U.S. 332 (1975).

Windsor concerned a same sex couple who were married in Ontario, Canada and lived in New York when one of the partners died. New York laws allowed same-sex marriage and

recognized out of state valid same sex marriages. When the question of federal estate taxes were addressed, the federal law did not recognize same sex marriages under the Defense of Marriage Act (DOMA), and significant federal taxes were owed.

DOMA is similar to the laws and Constitution of Tennessee in that section 3 of DOMA defines marriage as a union of one (1) man and one (1) woman. This is the only section that is challenged in the Windsor case. Section 2 of DOMA which the U.S. Supreme Court did not address in the Windsor opinion, or in any other, allows States to refuse to recognize same-sex marriages that are valid under laws of other States.

The Windsor case is concerned with the definition of marriage, only as it applies to federal laws, and does not give an opinion concerning whether one State must accept as valid a same-sex marriage allowed in another State.

The premise that "doctrinal developments indicate otherwise" gives a Court discretion to formulate new law by predicting what future appellate decisions will say other than what they have already said. The decision of this Trial Court will only be binding on this case and on this Court. It would be more productive for an appellate court whose opinions would have more precedential authority to delve into this analysis. For purposes of passing this issue to the appellate courts without discussion, this Court will find that the doctrinal development of the question of whether or not Tennessee must accept another States same-sex marriage to be valid has not developed sufficiently to overrule precedent cases.

In the Windsor case the Supreme Court opines that if a state finds same-sex marriage to be valid, the Federal Government cannot trump that State's law. The Supreme Court does not go the final step and find that a State that defines marriages as a union of one (1) man and one (1) woman is unconstitutional. Further, the Supreme Court does not find that one State's refusal to accept as valid another States valid same-sex marriage to be in violation of the U.S. Constitution. As stated above this question was not an issue in the Windsor case.

The State also takes the position that the laws and Constitution of Tennessee do not deny equal protection because they do not burden a fundamental right, target a suspect class, or intentionally treat one differently than others similarly situated without any rational basis

for the difference. Rondigo, L.L.C. v. Twp of Richmond, 641 F.3d 673 (6th Cir. 2011).

Plaintiff's position that Tennessee's same-sex marriage laws single out his marriage as a second class marriage and proposes that any opposite sex couple married in Iowa would be granted a divorce in Tennessee is misconstruing the Tennessee Law. There are other marriages between opposite sex couples that are prohibited in Tennessee such as prohibited degrees of relationship (a parent marrying their child, a brother marrying a sister, etc.) T.C.A. §36-3-101. Also a second marriage before the dissolution of a first marriage is prohibited. T.C.A. §36-3-102.

The law which Plaintiff challenges is T.C.A. §36-3-113(d) which reads as follows: "If another state or foreign jurisdiction issues a license for persons to marry, which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state." The Amendment to the Tennessee Constitution which also has similar language was passed by referendum by 81.3% of the voters in Tennessee.

The Anti-Recognition clause clearly does not single out only same-sex marriages to be declared void and unenforceable, but would also declare void and unenforceable marriages within a prohibited degree of relationship and multiple marriages.

The Court finds that marriage is a fundamental right. However, neither the Tennessee Supreme Court nor the United States Supreme Court has ever decided that this fundamental right under a state's laws extends beyond the traditional definition of marriage as a union between one (1) man and one (1) woman.

The battle is not between whether or not marriage is a fundamental right but what unions are included in the definition of marriage. The Legislative Branch of Tennessee and the voters of Tennessee have said that the definition of marriage should be as it always has been. That man's best definition of marriage will always be the union of one (1) man and one (1) woman.

The Court also finds that this should be the prerogative of each State. That neither the Federal Government nor another state should be allowed to dictate to Tennessee what has traditionally been a state's responsibility, which is to provide a framework of laws to govern

the safety and wellbeing of its citizens.

One reason for this is that there is a divergence of opinion on this issue, and if Tennessee laws have a rational basis and a reasonable relationship to a legitimate state interest, then Tennessee's laws should not be found invalid because another opinion is available.

This Court adopts in part the State's brief on the issue of whether or not a law defining marriage as one (1) man and one (1) woman has a rational basis as follows:

> "The presumption that a law is constitutional is even stronger with regard to laws passed by the citizens themselves at the ballot box, and the constitutional provision that is part of Tennessee's Marriage Laws was passed by Tennessee voters. *See Gregory v. Ashcroft*, 501 &.S. 452, 470-71 (1991) (applying rational-basis review and noting that the Court was "dealing not merely with government action, but with a state constitutional provision approved by the people of Missouri as a whole" and therefore the "constitutional provision reflects ... the considered judgment... of the citizens of Missouri who voted for it."). In adopting the marriage amendment to the Tennessee Constitution, "[Tennessee] voters exercised their privilege to enact laws as a basic exercise of their democratic power".....And "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."
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> The State does not bear the burden to prove a rational basis; "[t]he existence of facts supporting the legislative judgment is to be presumed." The "heavy burden of negat[ing] every conceivable basis which might support [the enactment]"' must be placed on Plaintiff.
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> Tennessee's Marriage Laws have a rational basis in law and thus do not violate equal protection. "[M]arriage and procreation are fundamental to the very existence and survival of the race."....."[M]arriage] is the foundation of the family in our society.");.....(Marriage "is the foundation of the family and of society, without which there would be neither civilization nor progress.") Marriage can simply not be divorced from its traditional procreative purpose. *See* Noah Webster, *An American Dictionary of the English Language* 897 (1st ed. 1828) (marriage "was instituted... for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children"); ....."there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship") The promotion of family continuity and stability is certainly a legitimate state interest, ...and Tennessee's Marriage Laws expressly recognize the family "as the fundamental building block of our society."
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> Obviously, though, "[s]ame-sex couples cannot naturally procreate."".....Biology alone, therefore, provides a rational explanation for Tennessee's decision not to extend

marriage to same-sex couples. *See Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006) (holding that state constitutional amendment recognizing marriage only between a man and a woman was rational "based on a 'responsible procreation' theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot");....."Beyond these reasons of family, societal stability, governance and progress, as important as they are, courts analyzing marriage have focused upon even more compelling reasons: its exclusive role in procreation and in insuring the survival, protection and thriving of the human race.").....("Many courts have credited the responsible-procreation theory and held that there is a rational link between the capability of naturally conceiving children ---unique to two people of opposite genders---and limiting marriage to opposite-sex couples.").

Again, a court does not review a statute's wisdom or desirability but considers only whether it has a rational basis. And there is nothing irrational about limiting the institution of marriage to the purpose for which it was created, by embracing its traditional definition. To conclude otherwise is to impose one's own view of what a State ought to do on the subject of same-sex marriage.....("Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State's justification 'lacks a rational relationship to legitimate state interest.'") "This case is not about how the debate about [same-sex marriage] should be resolved. It is about who may resolve it.".....Marriage is the province of the individual states, and in 2006 Tennessee voters resolved the debate for Tennessee."

The Court finds that Tennessee's laws concerning same-sex marriage do not violate the equal protection clause or the U. S. Constitution.

Full Faith and Credit Clause

As stated above, Plaintiff asks this Court to find that the laws and Constitution of Tennessee violate the Full Faith and Credit Clause of the U.S. Constitution only in its Anti-Recognition Clause.

The Constitution of the United States Art. 4, § 1 provides in part that "Full faith and credit shall be given in each state in the public acts, records, and judicial proceeding of every other state."

Both the Supreme Court of the United States and the Courts of Tennessee have both found that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." Nevada v. Hall, 440 U.S. 410 (1979); Blackwell v. Haslam, No. M 2012-01001-CDA-R3-CV, 2013 WL 3379364 (Tenn. Ct. App.

June 28, 2013).

"Public policy in Tennessee is to be found in its constitution, statutes, judicial decisions and applicable rules of common law." Alcazor v. Haynes, 982 S.W.2d 845, 851 (Tenn. 1998).

Iowa laws allow same sex marriage and provides that valid same-sex marriage in other states will be valid in Iowa. Tennessee laws and Constitution prohibits same-sex marriage and provides that prohibited marriages in Tennessee (which includes same-sex marriages) that are valid in other states are void and unenforceable in Tennessee.

The laws of Iowa concerning same sex marriage is so diametrically opposed to Tennessee's laws, and Tennessee's own legitimate public policy concerning same-sex marriage, that Tennessee is not required by the U.S. Constitution to give full faith and credit to a valid marriage of a same-sex couple in Iowa.

The Court finds that the sections of the Constitution of Tennessee Art. XI, § 18 and Tennessee Code Annotated §36-3-113(d) which declares that a valid marriage in another state, prohibited in Tennessee, and thus void and unenforceable in Tennessee, does not violate the Equal Protection Clause or the Full Faith and Credit Clause of the United States Constitution.

Attorney General for Tennessee is to prepare an order within ten days reflecting the findings of this Memorandum Opinion.

Entered this 5th day of August, 2014.

RUSSELL E. SIMMONS, JR.
Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was delivered via U. S. Mail to attorneys, Mark Foster and Kathryn A. Baker, on this the 5 day of August, 2014.

Kim Nelson, Circuit Court Clerk
By: Amy Brown deputy clerk