STATE OF MAINE	SUPREME JUDICIAL COURT Sitting as the Law Court Docket No. KEN-14-456
ELISABETH M. KINNEY, Plaintiff/Appellee v. TANYA A. BUSCH, Defendant/Appellant	DEFENDANT/APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE DATED JULY 23, 2015

NOW COMES Defendant/Appellant Tanya J. Bush (hereinafter "Tanya")[1] and responds to the July 23, 2015, Order to Show Cause as follows:

A. CURRENT PROCEDURAL POSTURE.

Presently before this Court, by agreement of the parties, and by report by the District Court pursuant to M.R.App. P. 24(a) and (c), is the following question:

> May property acquired between October 14, 2008, and December 29, 2012, by a same-sex couple married in the State of Massachusetts on October 14, 2008, be treated as marital property for the purposes of equitable divisions of property in a divorce action filed on January 18, 2013?

The District Court answered the Reported Question in the affirmative and certified it to the Law Court. All parties agree to the report, the question presented is one of first impression, it is of importance to the parties and to many others similarly situated, it is one capable of

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[1] Plaintiff/Appellee will be referred to herein as "Elisabeth" consistent with the given name usage in the briefs.

frequent repetition and it is not able to be decided by other possible dispositions. (App. 13-17)

Tanya has filed a brief urging that the Reported Question should be answered in the negative. To do otherwise, would result in the re-characterization of realty and other property that was previously "non-marital" prior to December 29, 2012, into "marital property" and would give illegal retroactive effect to 19-A M.R.S.A. sec. 650-B (effective December 26, 2012). (Appellant's Brief pp. 9-17)

In the interim, on June 26, 2015, the United States Supreme Court decided *Obergefell v. Hodges*, 576 U.S. ---, 192 L.Ed.2d 609 (2015). This Court issued an order on July 23, 2015, for the parties to show cause why the Reported Question should not be discharged as improvidently granted. In essence, this Court is asking the parties to summarize what impact, if any, *Obergefell* has on this litigation.

It is respectfully submitted that *Obergefell* has no impact on the question presented by the District Court. *Obergefell* does not tell us "when" same-sex marriages must be recognized. Is such a marriage effective as of the date of the decision, as of the date of the state law that recognized same-sex marriage or as of the date of the marriage ceremony? Accordingly, *Obergefell* does not give any "additional guidance" to the District Court and the Reported Question should not be discharged as improvidently granted.

B. *OBERGEFELL* DOES NOT HAVE AN EFFECTIVE DATE OTHER THAN THE DATE OF THE OPINION.

The United States Supreme Court carefully set forth in *Obergefell* that it was deciding only two questions presented. The Court explicitly stated that it had granted *certiorari* on only those two questions and none other: "This Court granted review, limited to two questions. (citation omitted). The first, ... is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, ... is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does not grant that right." *Id.* at ---.

Here, the key query is the effective date of the *Obergefell* decision. However, the United States Supreme Court simply did not answer that important question. Indeed, the majority specifically held: "[T]he Court **now** holds that same-sex couples may exercise the fundamental right to marry." *Id.* at 23 (emphasis added). The use of the present tense in a same-sex marriage ruling indicates that the holding does not apply retroactively to an earlier date. *See Evans v. State of Utah*, Case No. 2:14CV-55-DAK (May 19, 2014)(D.Utah 2014)(refusing to retroactively invalidate an earlier same sex marriage because of a new proscriptive law). Without more, *Obergefell* does not mandate that we reach back in time and provide Elisabeth the relief she requests.

After *Obergefell*, Maine must allow same-sex marriage. Maine already did that with the passage of section 950-B in 2012. After

Obergefell, Maine must recognize a same-sex marriage licensed and performed in another state. Maine already did that with the passage of section 950-B in 2012. As mentioned, *Obergefell* changed nothing with respect to how same-sex marriage was and is handled in Maine.

The issue is not whether same-sex marriage is legal in Maine today. Likewise, the issue is not whether Maine must recognize out-of-state same-sex marriages today. The issue is whether same-sex marriage was legal in Maine when Tanya acquired what would otherwise have been "non-marital" real estate. Simply put, at the time of Tanya's acquisition of 40 Greenville Street on September 1, 2012, Tanya and Elisabeth were not married in Maine.

Accordingly, *Obergefell* provides no guidance to the District Court on how to answer the Reported Question.

C. THE STATES SHOULD DETERMINE THE EFFECTIVE DATE OF THE MARRIAGE.

Since the United States Supreme Court did not decide the effective date of same-sex marriages in *Obergefell*, the question remains as who or what institution should decide that question. Conversely, the Court did provide some guidance, as recently as 2013, when it acknowledged that "[b]y history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate states." *United States v. Windsor*, 570 U.S. ---, 133 S.Ct. 2675 (2013). Further, the Court observed, "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the

States." *Id.* The majority also quoted *Williams v. North Carolina*, 317 U.S. 287, 298, 87 L.E. 279 (1942) that "Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within it borders."

While the full weight of the *Obergefell* decision is not known, what is certain is that when Tanya acquired property between October 14, 2008, and December 29, 2012, Maine did not recognize foreign same-sex marriage. In sum, Elisabeth is asking this Court to apply the case law of 2015 to the facts and circumstances that existed in 2008, 2009, 2010, 2011 and 2012, imposing a Maine union where there was none and rendering a redistribution of assets from Tanya to Elisabeth.

Accordingly, this Court should decide, consistent with its precedent, whether the effective date of the marriage recognition is October 14, 2008 or December 26, 2012.

D. *OBERGEFELL* SHOULD NOT BE APPLIED BACKWARDS IN TIME.

As outlined in Tanya's initial brief, Maine law abhors retroactive application of substantive law changes in any form. *See, e.g., Opinion of the Justices*, 370 A.2d 654, 660 (Me. 1977)(law change by initiative); *Weeks v. Allen and Coles Moving Systems*, 1997 ME 205, par. 6, 704 A.2d 320, 323 (enactments and administrative rules); *MacImage of Maine v. Androscoggin County*, 2012 ME 44, par. 22, 40 A.3d 975, 985 (statute); 1 M.R.S.A. sec. 302(2011)(anti-retroactivity engrained in Maine Constitution).

This precept is in harmony with the federal rule against retroactive application of newly announced legal principles:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not lightly be disrupted. For that reasons, the principal that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has universal appeal. In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions. *Landgraf v. USI Film Products*, 511 U.S. 244, 265-266 (1994)(footnotes and citations omitted).

Landgraf has never been overruled and is regularly cited as an anti-retroactivity case. *See, e.g., Vartelas v. Holder*, 566 U.S. ---, 132 S.Ct. 1479 (2012); *Lindh v. Murphy*, 521 U.S. 320 (1997); *Martin v. Hadix*, 527 U.S. 343 (1999); *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009).

The District of Maine and this Court have refused to give retroactive effect to new pronouncements of federal constitutional law. In *Gunter v. Merchants Warren National Bank*, 360 F.Supp. 1085 (D.Me. 1973), a three-judge panel struck down Maine's real estate attachment statute as violating due process. The Court refused to project its ruling backwards in time: "Since a retrospective judgment would cause doubt on the validity of all real estate attachments in actions now pending in the Maine courts and would create a cloud on title to any property hitherto sold pursuant to a real estate attachment, our decree will be prospective

only...." *Id.* at 1091. The next year this Court cited *Gunter* for the proposition that a constitutional rule change was "prospective only". *Cranston v. Commercial Chemical Corp.*, 324 A.2d 301 (1974). This Court remarked that "[it is settled that constitutional decisions may be limited so as to have only future effect." *Id.* at 305, ftn. 6 (citations omitted). This Court concluded with the observation that "... statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity." *Id.*

Accordingly, even where a federal constitutional right was implicated, there is ample precedent that this Court need not apply a recently announced declaration of law to past conduct.

"A judge may appropriately determine, not only the current applicable law, but whether the law was clearly established at the time an action occurred". *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Justice Kennedy, the author of *Obergefell*, noted that retroactivity and prospectivity are always ripe questions in landmark decisions, "[W]e do not read today's opinion to surrender in advance our authority to decide that in some exceptional cases, courts may shape relief in light of disruption of important reliance interests or the unfairness caused by the unexpected judicial decision." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 761 (1995)(Kennedy, J., *concurring*).

Elisabeth cites to the concurring opinion in *Hyde* for the proposition that *Obergefell* renders the prior same sex marriage ban in Maine from 1997-2012 as null and void "as if [it] had never existed in the first place." *Hyde*, 514 U.S. 749, 760 (1995)(Scalia, J., *concurring*). However, this is engaging in nothing more than a mere legal fiction and runs contrary to the principal of judicial restraint. Justice Frankfurter, observed, "We should not indulge in the fiction that the law now announced has always been the law .... It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law." *Griffin v. Illinois*, 351 U.S. 26, 100 L.Ed. 891 (1956)(Frankfurter, J., *concurring*).

In fact, the Supreme Court has refused to engage in such casuistic legal fictions since 1853. In *Ohio Life & Trust Co. v. Debolt*, 57 U.S. (16 How.) 416, 432, the Court held:

> "The sound and true rule is that if the contract, when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law."

The refusal to engage in the "nullity" fiction was repeated even more vigorously in *Gelpcke v. City of Dubuque*, 68 U.S. 175 (1863) which was by its express terms a "constitutional" ruling. After quoting the exact language above from *Debolt*, the Court emphasized:

> "The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we

> adhere. It is the law of this Court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case." *Id.* at 207.

The Court found that it would not "... immolate truth, justice, and the law ..." by retroactively applying a new ruling. *Id.*

If same-sex marriage is given an earlier effective date than December 26, 2012, estates that had been settled might have to be re-opened, insurance proceeds would have to be retracted and paid to third-parties (who are now considered surviving spouses), and deeds, conveyances and official documents long considered sacrosanct would be subject to challenge. Applying *Obergefell* in such a manner "... could open numbers of cases in all areas of law to the same argument." *Charron v. Amaral*, 451 Mass. 767, 773 (2008), 889 N.E.2d 946 (where a new law "changed the history of marriage law," it could be applied "prospective only"); *see also Mason v. Torry*, 1998 ME 159, par. 7, 174 A.2d 790, 792 ("In the context of civil proceedings, constitutional decisions may be limited so as to have only future effect.")

A very recent commentator has observed that precisely "when" *Obergefell* is effective remains unanswered:

> "An open issue that has not been decided is the effective date for employers to comply with *Obergefell*. In other words, what is the date upon which a same-sex marriage should be recognized? For example, if a previously unrecognized same-sex spouse was denied a death benefit because the plan did not recognize the marriage, does the plan have to go back and pay the death benefit if the plan participant died prior to the *Obergefell* decision? How far back must a plan go with respect to these benefits? Similarly, if a plan refused to

> recognize that QDRO, or will it only have to recognize QDROs for same-sex divorcing couples that are ordered after the date of the *Obergefell* decision? Following the *Windsor* decision, the Internal Revenue Service (IRS) issued guidance which required changes for plan qualification purposes to be made on a prospective basis only. The guidance also required employers to treat employees in same-sex marriage as though their date of marriage was effective on the date of the *Windsor* decision. In the absence of other guidance, a reasonable plan administrator might turn to the IRS's approach after *Windsor* (even if only by analogy) and set the "compliance date" for *Obergefell* as the date of the Court's decision (June 26, 2015)." Braltman, *et al.*, "Government Plans: Moving Forward After the *Obergefell* Decision," IceMiller Professionals (July 10, 2015)

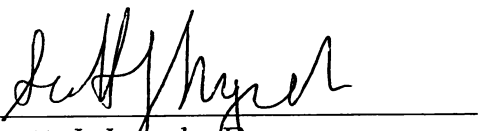
The IRS only recognizes same sex marriages "prospectively" as of September 16, 2013, the date of the *Windsor* decision. *See* Rev.Rul. 2013-17, 2013-38 I.R.B. 201. Similarly, the marriage *sub judice* should be recognized as though the effective date was December 26, 2012, and such a ruling would not be contrary to *Obergefell*.

E. CONCLUSION

For the reasons noted herein, this Court should answer the Reported Question.

Dated: August 13, 2015

Respectfully submitted,



Scott J. Lynch, Esq.
Bar No. 7814
Attorney for Defendant/Appellant
Tanya J. Busch

CERTIFICATE OF SERVICE

I hereby certify that two (2) true copies of the foregoing were sent this day by postpaid first-class mail to each of the following:

Tammy Ham-Thompson, Esq.
Farris Law Office
6 Central Maine Crossing
P.O. Box 120
Gardiner, Maine 04345

Catherine R. Connors, Esq.
Pierce Atwood, LLP
254 Commercial Street
Portland, Maine 04101

Michael P. Asen, Esq.
Mittel Asen, LLC
P.O. Box 427
65 Exchange Street
Portland, ME 04112-0427

Dated: August 13, 2015

Scott J. Lynch, Esq.
Bar No. 7314
Attorney for Defendant/Appellant
Tanya J. Busch