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PHILADELPHIA'S LIFE PARTNERSHIP ORDINANCE: BROADENING THE SAME-SEX MARRIAGE DEBATE AND IMPLICATIONS FOR FEDERALISM

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I. INTRODUCTION

President Clinton signed the Defense of Marriage Act as public law on September 21, 1996, igniting a national debate over same-sex marriage.¹ Pennsylvania followed suit in 1996 and passed its own version to protect the relationship of marriage between one man and one woman, and to prevent same-sex marriages that took place in other jurisdictions from being recognized in the state.² In response to Pennsylvania's law, Philadelphia took a number of measures to protect the rights of same-sex couples and to provide benefits to them. Philadelphia enacted the Life Partnership Ordinance in 1997, which allowed same-sex couples to receive a number of benefits such as health insurance, pension benefits, and tax breaks from the real estate transfer tax.³

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¹28 U.S.C. § 1738C (1996).

²23 Pa.C.S. § 1704 (1997).

³PHILA. CODE § 19-405 (28) (1997).

Many opposed this ordinance, and soon after its passage, Bill Devlin, founder of the Urban Family Council, filed suit in Pennsylvania state court, alleging preemption by Pennsylvania law. The portion of Philadelphia's ordinance relating to the real estate transfer tax was ultimately struck down by the Pennsylvania Supreme Court in 2004. The Philadelphia City Council responded in turn and re-worded the ordinance via an amendment that would comply with state law. Rather than calling same-sex partners "life partners," the ordinance used the wording, "financially interdependent persons." Not only does the ordinance continue to provide benefits for same-sex couples, it essentially broadened the category of persons who can be exempt from the transfer tax, and created more rights. Now, couples only have to acknowledge that they are financially interdependent, and they will be exempt from the transfer tax.

Philadelphia's creativity and logic in dealing with issues of preemption make it a true dissenter through initiative and forethought. Through intricate drafting measures, the city of Philadelphia was able to both comply with state law and create additional benefits for couples, including same-sex couples and elderly friends who may be living together for purposes of financial efficiency. The use of "financially interdependent persons" has changed the same-sex marriage debate in a dramatic way. Perhaps Philadelphia's strategy will open up possibilities for other cities, especially cities in generally conservative states, challenging them to craft policies that will be most effective for their cities.

II. BACKGROUND ON NATIONAL AND STATE ISSUE

On September 21, 1996, President Clinton signed the Defense of Marriage Act ("DOMA"). Its provisions are codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C.⁴ The effects of the law are twofold. First, DOMA provides that no state, or other political subdivision within the United States, needs to recognize a relationship between two persons of the same-sex as a marriage, even if the marriage is recognized in another state.⁵ Additionally, the federal government defines marriage as a relationship between

⁴ 1 U.S.C. § 7; 28 U.S.C. § 1738(C).

⁵ 28 U.S.C. § 1738C

one man and one woman.⁶ With the passage of DOMA, constitutional issues have arisen, mainly concerning the Due Process and Equal Protection Clauses of the 14th Amendment and the Full Faith and Credit Clause.⁷ The definition of “marriage” and “spouse” provisions of DOMA raise potential claims under the Due Process and Equal Protection Clauses, and the section concerned with powers reserved to the states presents potential problems relating to the Full Faith and Credit Clause.⁸

A fundamental right to marriage between one man and one woman overriding provisions of state law has been found in several United States Supreme Court cases of note: *Loving v. Virginia*, *Zablocki v. Redhail*, and *Turner v. Safley*.⁹ However, many states have enacted ordinances and policies to protect the rights of individuals within their states. Connecticut, Iowa, Massachusetts, and Vermont permit marriages of same-sex couples. Same-sex marriages will be recognized in New Hampshire as of January 2010, and New York and Washington D.C. recognize same-sex marriages that have occurred in other states. States such as Nevada and New Jersey recognize civil unions and domestic partnerships, and other states are pursuing legislation that will grant greater benefits to same-sex couples.¹⁰ One state that has continually recognized marriage as a relationship between one man and one woman, however, is Pennsylvania.¹¹

Pennsylvania passed its own version of DOMA in 1996, and the relevant statutory provision provides:

It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.¹²

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987).

¹⁰ *Id.*

¹¹ 23 Pa.C.S. §1704 (2005).

¹² *Id.*

Pennsylvania essentially reiterated the federal version of DOMA, making it impossible for same-sex marriages to be recognized in the state.

III. THE LIFE PARTNERSHIP ORDINANCE AND COURT CHALLENGE

A. *The Ordinance*

In spite of the hearings and protests, the Philadelphia City Council passed the Life Partnership Ordinance in 1997 and it went into effect in 1998.¹³ It performed three functions. First, it allowed city employees to obtain health insurance benefits for a domestic partner.¹⁴ Second, it allowed city employees to name a domestic partner as beneficiary on a city employee pension plan.¹⁵ Third, and the biggest product of controversy, was its allowance of non-city employees to receive an exemption from the city's real estate transfer tax.¹⁶ This was the only benefit a non-city employee could receive from the ordinance, and the benefit was quite extraordinary.

In Philadelphia, the transfer tax is 3%, and the process of adding another individual's name to a home deed went as follows: Individuals had to pay the 3% transfer tax to add another individual who was not married or related to them onto the deed.¹⁷ It almost prevented people from being able to do this due to the financial burden. The tax was placed on the value of the property as a whole; therefore, it had a financially crippling effect on those who wanted to add either partners or other non-related individuals to their home deeds.¹⁸ The third provision of the Ordinance allowed families (life partners) to be able to add names without paying the transfer tax.¹⁹

In 1996, Andrew Park founded the Center for Lesbian and Gay Law and Public Policy.²⁰ He was the sole employee at the organization's inception, and wanted to focus

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 23 Pa.C.S. §1704 (2005).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Interview with Tiffany Palmer, Esq., former Legal Director of Equality Advocates Philadelphia, now partner at Jerner and Palmer, P.C. (Oct. 15, 2009). Tiffany was instrumental in the passing of this Ordinance, and feels that it was both a political and social feat. Her current practice focuses on non-traditional Family Law, non-traditional Wills, Trusts, and Estate Planning, and anything else pertaining to the needs of non-traditional families.

the mission of the organization on education and policy reform for Lesbian, Gay, Bisexual, and Transgender (LGBT) rights.²¹ The first large piece of legislation that the Center for Lesbian and Gay Law and Public Policy worked on was Philadelphia's Life Partnership Ordinance. This process involved direct lobbying to city council members, and the primary city council proponents were Angel Ortiz (no longer a council member), Michael Nutter (former council member, current Mayor of Philadelphia), and Jim Kenney (current council member).²²

The decision to title the Ordinance the "Life Partnership" Ordinance, rather than Domestic Partnership Ordinance, was a political decision and process.²³ Some council members felt that by using Life Partnership in the name of the Ordinance, it would condone gay marriage in a lesser way than using Domestic Partnership would, and that the Ordinance itself would be less abrasive and more successful.²⁴ The Mayor of Philadelphia at the time was John Street, who was not in favor of the Ordinance, and actually fought against it.²⁵ During the beginning stages of the Ordinance, there were some very publicized and contested hearings, making the passage of the Ordinance a very difficult fight.²⁶ For example, the Archdiocese of Philadelphia came to speak against the Ordinance as well as local black clergy, focusing the debate on same-sex marriage at the local level.²⁷

The first and second provisions of the Life Partnership Ordinance that were not initially preempted by Pennsylvania state law require that Life Partners be registered with the city.²⁸ Life Partnership is defined as a long-term committed relationship between two individuals who: (1) are of the same sex, (2) agree to share the common necessities of life, (3) agree to be responsible for each other's welfare, (4) are not related by blood, (5) are not married, (6) share at least one residence, (7) and is the sole Life Partner of the

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Interview with Tiffany Palmer, Esq., former Legal Director of Equality Advocates Philadelphia, now partner at Jerner and Palmer, P.C. (Oct. 15, 2009).

²⁷ *Id.*

²⁸ Registration Packet from The Philadelphia Commission on Human Relations, *available at* www.phila.gov/humanrelations/pdfs/Life_Partnership_Reg.pdf.

other person.²⁹ To be recognized as Life Partners, same-sex couples must register through the Philadelphia Commission on Human Relations (PCHR).³⁰ There are a number of benefits and rights granted to all registered Life Partners in Philadelphia.³¹ Newly registered partners receive a *Life Partnership Verification Statement Letter* issued by the City of Philadelphia as official proof of their registration.³² Registration allows for the collection of important statistics on same-sex relationships. It established how many officially recognized *Life Partnerships* exist.³³

For employees of the City of Philadelphia, registration makes their Life Partners eligible for benefits under the City's and their union's various employee benefit plans (i.e. medical coverage, leave, etc.).³⁴ Additionally, city employees may designate their Life Partner or any other person as a beneficiary of their retirement benefits.³⁵ There is no fee for registration. However, an optional *Certificate of Life Partnership* is available for a fee of \$10. If Life Partners wish to have a *Certificate of Life Partnership*, they need to make a check or money order for the amount of \$10 payable to the City of Philadelphia.³⁶

In order to Register, Life Partners need to provide supporting documents as evidence of their relationships.³⁷ The applicants must also submit a notarized *Life Partnership Verification Statement* and proof of at least three of the following: (1) common ownership of property or a lease, (2) common ownership of a vehicle, (3) a driver's license listing a common address, (4) joint bank or credit accounts, (5) designation as beneficiary of life insurance, retirement benefits or under a partner's will, and (6) assignment of durable power of attorney or health care power of attorney.³⁸ The three forms of identification must be dated and at least six months old.³⁹

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Registration Packet from The Philadelphia Commission on Human Relations, available at www.phila.gov/humanrelations/pdfs/Life_Partnership_Reg.pdf.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

Under the third provision of the former Life Partnership Ordinance, now called the Financially Interdependent Persons Exemption Ordinance, couples must sign an Affidavit signifying financial interdependence.⁴⁰ The language of the affidavit is as follows:

I _____, and I _____, hereby certify our status as financially interdependent persons as defined in the Philadelphia Code, Chapter 19-1402 (7.1) and as such are exempt from the Real Estate Transfer Tax pursuant to (28) of the Philadelphia Code. We make this statement subject to the penalties of perjury of 18 Pa.C.S. §4904, relating to unsworn falsification to authorities.⁴¹

On the Philadelphia Real Estate Transfer Tax Certification, there is place to mark “Other” and to write in “Financially Interdependent Persons.”⁴² The Philadelphia Code defines Financially Interdependent Persons as “persons who live together as a single household and who, for at least six months, have agreed to share the common necessities of life and to be responsible for each other’s common welfare.”⁴³

B. The Court Challenge

One of the organizations opposing the Ordinance was the Urban Family Council, founded and led by Bill Devlin, a local voice for anti-gay rights.⁴⁴ As soon as the Ordinance was passed in 1997, he began looking for ways to attack it.⁴⁵ He filed a lawsuit against the city, and the Commonwealth Court of Pennsylvania heard arguments in June of 2002.⁴⁶ The city of Philadelphia defended the suit very aggressively with the aid of Equality Advocates of Philadelphia (formerly the Center for Lesbian and Gay Law and Public Policy, founded by Andrew Park).⁴⁷ Ultimately, the court struck down the third provision of the Ordinance pertaining to exemptions from the transfer tax because it

⁴⁰ City of Philadelphia Records Department, City Realty Transfer Tax Exclusions Memo.

⁴¹ *Id.*

⁴² *Id.*

⁴³ PHILA. CODE 19-1402 (7.1).

⁴⁴ Concerned Women for America, Culture and Family Issues Article, September 11, 2002.

⁴⁵ *Id.*

⁴⁶ Devlin v. City of Philadelphia, 809 A.2d 980 (Pa.Cmwlth.2002).

⁴⁷ Interview with Tiffany Palmer, Esq. (October 15, 2009).

violated Pennsylvania's tax uniformity clause.⁴⁸ The transfer tax portion of the Ordinance interfered with the state clause and was subsequently preempted. The case eventually progressed to the Pennsylvania Supreme Court in April of 2004, and the court found that the transfer tax portion of the Life Partnership Ordinance was indeed preempted by Pennsylvania state law.⁴⁹

This adverse court ruling did not stop the Philadelphia City Council, however, for it chose to respond quickly and efficiently.⁵⁰ This time, there was no public debate; rather, the Council passed the Financially Interdependent Persons Exemption Ordinance, signed by the Mayor in 2007.⁵¹ The Ordinance stated that if individuals shared assets, then they were considered a family-type relationship.⁵² This provision not only helps same-sex couples, but a broad range of family-type units including single parent families and families living together in a non-sexual manner.⁵³ The current Ordinance helps even more people and families; it just happens to help same-sex couples as well. The Ordinance in its current state now complies with Pennsylvania state law, and in a creative, nuanced manner, the Philadelphia City Council helped an even greater number of non-traditional families in the process.

IV. LEGAL BARRIERS TO THE PROPOSED ACTION: PREEMPTION AND LACK OF UNIFORMITY

The *Devlin* case exposed preemption issues inherent within the provisions of the original Life Partnership Ordinance, as well as exposed the powers of municipalities and what they can and cannot do.⁵⁴ The first order issued by the Pennsylvania Commonwealth Court, entered June 22, 1999, granted the City of Philadelphia's preliminary objections to Counts 1 and 2 of the Plaintiffs' complaint: (1) that the Commonwealth had preempted the field of regulating the status of marriage and the marriage relationship, and (2) that the Ordinance violated the clear public policy favoring marriage that had been established in the Commonwealth.⁵⁵ In July of 2000, the

⁴⁸ *Id.*

⁴⁹ *Devlin v. City of Philadelphia*, 862 A.2d 1234 (Pa.Sup.Ct.2004).

⁵⁰ Interview with Tiffany Palmer, Esq. (October 15, 2009).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Devlin v. City of Philadelphia*, 809 A.2d 980 (Pa.Cmwlt.2002).

⁵⁵ *Id.* at 982.

Common Pleas Court granted preliminary injunctions as to these counts, and in October of 2000, the court granted the city's motion for summary judgment.⁵⁶ The October order indicated that the plaintiffs lacked standing to bring the case, and found that (1) the extension of health benefits and other benefits to life partners was a valid exercise of authority, and (2) that the amendments to the transfer tax ordinance providing an exemption for life partners was found to be constitutional and legal.⁵⁷

Devlin then appealed to the Commonwealth Court of Pennsylvania.⁵⁸ The Commonwealth Court used an abuse of discretion standard of review, and only determined whether the Common Pleas Court committed legal error in granting the City's preliminary objections to the first two counts and its motion for summary judgment.⁵⁹ The Commonwealth Court found that the plaintiffs had standing to bring the case and stated that even when a taxpayer's interest is not substantial, direct or immediate, standing may be granted where the legislation would otherwise not be challenged.⁶⁰ The court found that in this case, no private employer sought to challenge the legislation and the City had no reason to do so either; therefore, the Appellants came within the limited exception to have standing to bring the case.⁶¹

Devlin first argued that the city acted beyond its authority in creating Life Partnerships because neither the Pennsylvania Constitution nor its enabling home rule legislation gave the City the power to do so.⁶² Devlin and the other appellants also argued that the State had preempted the field of regulation of the marriage relationship and therefore the City could not enact a local ordinance creating a new or contrary marital status.⁶³ The Commonwealth Court began its analysis by looking to Article IX, Section 2 of the Pennsylvania Constitution: "A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution,

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 983.

⁵⁹ *Id.*

⁶⁰ *Devlin*, 809 A.2d at 983.

⁶¹ *Id.* at 984.

⁶² *Id.*

⁶³ *Id.*

by its home rule charter or by the General Assembly at any time.”⁶⁴ The court then discussed the principle that municipalities are not sovereigns; therefore, they have no original or fundamental power of legislation.⁶⁵ They only have the right to enact ordinances which are authorized by an act of the Legislature, and when they do enact ordinances, they must be in conformity with state statutes.⁶⁶ If an ordinance conflicts with a Pennsylvania state statute, it is automatically void on its face.⁶⁷

The court then discussed that a city’s legislative power is limited to municipal functions.⁶⁸ However, the General Assembly can only strike down ordinances when the General Assembly’s conflicting statute concerns matters of statewide concern, leaving localities a small amount of wiggle room.⁶⁹ In light of its discussion of municipal versus state concerns, the court then addressed that the main issue at hand was whether or not the Pennsylvania Legislature preempted the field of marriage, marital relationships, and marital status.⁷⁰ The court ultimately found that Philadelphia acted beyond the scope of its power when it defined and created for legal purposes a new relationship between same-sex persons that it categorized as being “part of the marital state.”⁷¹ By enacting the Marriage Law (the Pennsylvania state version of the federal DOMA), Pennsylvania thoroughly demonstrated its intent to preempt this field of legislation.⁷² In citing the rule from *Western Pennsylvania Restaurant Association v. City of Pittsburgh*, the court stated that where the general tone of a statute shows the General Assembly’s intent that it should not be supplemented by municipalities, the local legislation should be held to be invalid.⁷³

The court refused to entertain the City’s argument that the ordinance did not impermissibly regulate in the field of the Domestic Relations Code because it did not

⁶⁴ 23 Pa.C.S. §1704 (2005).

⁶⁵ *Devlin*, 809 A.2d at 985.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 986.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Devlin*, 809 A.2d at 986.

⁷² *Id.*

⁷³ *Id.* at 987; *see also*, *Western Pennsylvania Restaurant Association v. City of Pittsburgh*, 77 A.2d 616, 620 (Pa.Sup.Ct. 1951).

legislate with respect to relationships at all.⁷⁴ Rather, the court reasoned that Section 1102 of the Marriage Law defined marriage as a “civil contract by which one man and one woman take each other for husband and wife.”⁷⁵ The court also rejected the City’s argument that the ordinance only recognized Life Partnerships, and therefore did not create them.⁷⁶ It reasoned that this was a thinly veiled attempt by the City to duplicate the institution of marriage for couples of the same sex.⁷⁷ The court ultimately found that the law of domestic relations is reserved for the state; therefore, the city is preempted from regulating in this area, despite its best intentions.⁷⁸ The City again argued that it did not create a new category of marital relationships, and that it only intended to list the categories of persons exempt from its transfer tax, yet the court found that the Life Partnership category created a new and unique domestic relationship which public policy has clearly contradicted, and which the Legislature has also rejected.⁷⁹ The court ultimately held that Philadelphia’s Life Partnership ordinance violated the public policy of the state, and was additionally preempted by Pennsylvania’s Marriage Law.

In addition, the court found that the third provision of the ordinance, the transfer tax exemption, violated the Uniformity Clause of the Pennsylvania Constitution, which provides: “All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under the general laws.”⁸⁰ A state may create different tax classifications, but uniformity must be maintained within each class.⁸¹ The court stated that the test for uniformity was whether there is a reasonable distinction and difference between the classes of taxpayers sufficient to justify different tax treatment, and that when considering a classification for taxation purposes, thought may be given to public policy concerns.⁸²

⁷⁴ *Devlin*, 809 A.2d at 987.

⁷⁵ *Id.*; *see also*, 23 Pa.C.S. §1102.

⁷⁶ *Devlin*, 809 A.2d at 987.

⁷⁷ *Id.*

⁷⁸ *Id.* at 989.

⁷⁹ *Id.* at 991.

⁸⁰ *Devlin*, 809 A.2d at 992; *see also*, Article VIII, Section 1 of the Pennsylvania Constitution.

⁸¹ *Devlin*, 809 A.2d at 992; *see also*, *Commonwealth v. After Six, Inc.*, 413 A.2d 1017 (1980).

⁸² *Devlin*, 809 A.2d at 992; *see also*, *F.J. Busse Co., v. City of Pittsburgh*, 279 A.2d 14, 19 (Pa.Sup.Ct.1971).

The Court of Common Pleas found that there was a rational basis for exempting transfers between Life Partners, but the Commonwealth Court found that there were sufficient longstanding policy reasons that the transfer tax exemption in the ordinance violated the Uniformity Clause.⁸³ The court felt that the inclusion of two unmarried, unrelated people who live together as Life Partners did not support uniformity within the class, and that treating same-gender persons who have filed Life Partner Verification Statements differently from same-gender persons who have not filed such sworn statements promoted a lack of uniformity in the taxation area.⁸⁴ After this adverse ruling for the City, the City appealed to the Pennsylvania Supreme Court, challenging the Commonwealth Court's rulings of preemption and violation of the Uniformity Clause.⁸⁵

The Pennsylvania Supreme Court ultimately reversed the Commonwealth Court's preemption analysis, and found that the first two provisions of the City's ordinance were not preempted by state law.⁸⁶ It did find, however, that the tax exemption provision did violate the Uniformity Clause of the Pennsylvania Constitution, and thus affirmed that portion of the Commonwealth Court's ruling.⁸⁷ The Court reasoned that the City did not legislate in the area of marriage, and that there was no preemption by the Marriage Law.⁸⁸ The Court indicated that though there are certain facial similarities between marriage and Life Partnership, the similarities were not sufficient to establish that the City has legislated in the area of marriage.⁸⁹ The City's designation of Life Partnership was not a designation of marital status, so it could not be construed as state-sanctioned marriage.⁹⁰ Rather, the designation of Life Partnership was simply another category under "unmarried status," therefore the City did not impermissibly regulate in the area of marriage.⁹¹

⁸³ *Devlin*, 809 A.2d at 993.

⁸⁴ *Id.*

⁸⁵ *Devlin v. City of Philadelphia*, 862 A.2d 1234 (Pa.Sup.Ct.2004).

⁸⁶ *Id.* at 1237.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1241

⁸⁹ *Id.* at 1243.

⁹⁰ *Id.*

⁹¹ *Devlin*, 862 A.2d at 1243.

In addition, though the Legislation gives Life Partners certain limited rights, those rights pale in comparison to the myriad of rights given to married couples.⁹² Life Partnership under the current ordinance does not extend to Life Partners spousal benefits such as the marital exemption from the real estate transfer tax, a guaranteed share of the spouse's intestate share, the testimonial privilege between husband and wife, or the right to bring a wrongful death action on behalf of the deceased spouse.⁹³ The legal relationship that the City has created is merely a "label" that the City can use to identify individuals to whom it desires to confer certain, limited local benefits.⁹⁴

Because of these reasons, the Court found that the City's ordinance could not be viewed as an improper attempt to legislate in the area of marriage; therefore the first two provisions of the ordinance were not preempted.⁹⁵ Similarly, the State does not need to interfere with matters "affecting merely the personnel and administration of the offices local to Philadelphia and which are of no concern to citizens elsewhere," as the Court made clear in *Lennox v. Clark*.⁹⁶ The benefits this ordinance provides only affect personnel and the administration of offices local to Philadelphia, and are not a concern to citizens elsewhere.⁹⁷ This serves as an additional reason why the ordinance is not preempted by Pennsylvania state law.

V. FINANCIALLY INTERDEPENDENT PERSONS PROVISION

The City argued that it was rational for Philadelphia to determine that persons who could demonstrate that they live together in one household as a long-term, financially interdependent unit are entitled to an exemption when they transfer property between one another.⁹⁸ The City also argued that other jurisdictions have concluded that it is rational for municipalities to treat opposite-sex couples, who have the ability to marry and thereby demonstrate their independence to the state, differently from same-sex couples.⁹⁹

⁹² *Id.* at 1244.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Devlin*, 862 A.2d at 1246; *see also*, *Lennox v. Clark*, 93 A.2d 834 (Pa.Sup.Ct.1953).

⁹⁷ *Devlin*, 862 A.2d at 1246.

⁹⁸ *Id.* at 1250.

⁹⁹ *Id.* at 1251.

The Court found these arguments to be unpersuasive and reasoned that the City favored same-sex couples over other couples in legitimate relationships.¹⁰⁰ It also discussed relationships that cannot be consummated in marriage and can also be financially interdependent, such as relationships between first cousins, aunts or uncles and nephews and nieces, and individuals and minors under the age of eighteen who are not qualifying relatives.¹⁰¹ Because the City did not provide the Court with a legitimate distinction between the classes and because it could not independently discern a legitimate distinction that would permit it to “escape the conclusion that the tax scheme imposed substantially unequal tax burdens upon persons otherwise similarly situation,” the Court found that the third provision of the ordinance violated the Uniformity Clause of the Pennsylvania Constitution.¹⁰²

This ruling barring same-sex couples from exemption under the Real Estate Transfer Tax prompted the City of Philadelphia to re-craft the ordinance.¹⁰³ The City took the Court’s ruling and adapted the ordinance around it, thus providing that “Financially Interdependent Persons” are exempt from the Real Estate Transfer Tax. This new provision extended benefits for many legitimate couples and family relationships.¹⁰⁴ The City no longer needed to worry about preemption issues, for the Pennsylvania Supreme Court reversed the Commonwealth Court’s ruling, and found that the City was not preempted from enacting this ordinance. The only barrier it needed to bridge was the violation of the Uniformity Clause, and through the enactment of the Financially Interdependent Persons clause, the ordinance was no longer in violation of the Uniformity Clause. There are currently no additional legal barriers to this ordinance that are foreseeable at this time.

VI. POLICY ISSUES AND IMPLICATIONS

A. *Family Policy*

As a matter of public policy, this ordinance and the debate surrounding it can be best viewed in light of Nancy Polikoff’s book, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Interview with Tiffany Palmer, Esq., (October 15, 2009).

¹⁰⁴ *Id.*

ALL FAMILIES UNDER THE LAW.¹⁰⁵ When Devlin and his fellow plaintiffs set out to strike down the ordinance in court, little did they know that the ordinance as it now stands would provide rights to a broader range of relationships and families, thus taking the debate outside the realm of same-sex marriage and providing greater rights to more families. When the same-sex marriage debate is broadened, and the focus is placed on a desire to obtain rights for all families, perhaps more can be achieved. This is precisely what Nancy Polikoff, law professor at American University and LGBT rights activist, argues in her book. She advocates for

[f]amily law reform that would recognize all families' worth. Marriage as a family form is not more important or valuable than other forms of family, so the law should not give it more value. Couples should have the choice to marry based on the spiritual, cultural, or religious meaning of marriage in their lives; they should never *have* to marry to reap specific and unique benefits.¹⁰⁶

Polikoff “supports the right to marry for same-sex couples as a matter of civil rights law . . . [but] opposes discrimination against couples who do not marry.”¹⁰⁷ Rather, she posits that all families, whether based on a marriage or not, need and deserve “economic well-being, legal recognition, emotional peace of mind, and community respect.”¹⁰⁸

When Polikoff speaks of the concept of worth and value for all families, it resonates with what Philadelphia successfully accomplished, prompted by the Pennsylvania Supreme Court ruling, when it re-worded the ordinance by redefining Life Partnership to encompass all financially interdependent couples. Valuing all families under the law would broaden the same-sex marriage debate, and perhaps provide a less polarizing method for LGBT activists to gain the protections under the law that they desire.

Polikoff attributes the awareness of various family relationships present in our modern age to the feminist movement of the 1960s and 70s, for that movement made tremendous headway for valuing all families.¹⁰⁹ It opened avenues for recognition of new family forms because it helped to abolish gender and “marriage” norms which were present up until that

¹⁰⁵ POLIKOFF, NANCY. *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (Beacon Press 2008).

¹⁰⁶ *Id.* at 3.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 11.

point.¹¹⁰ Because of the feminist movement, there are currently situations where those in non-conjugal relationships have obtained rights. For example, in Madison, Wisconsin, there is an ordinance that provides benefits for domestic partners who live together as a “single, non-profit housekeeping unit, whose relationship is of a permanent and distinct domestic character.”¹¹¹ The District of Columbia has a similar ordinance that provides legal recognition and benefits for same-sex couples, different sex (unmarried) couples, and those in non-conjugal relationships.¹¹²

Evan Wolfson, a Lambda Legal (LGBT non-profit) staff attorney, drafted a blueprint for a just policy encompassing the needs of all families, titled the “Family Bill of Rights.”¹¹³ A portion of that Bill of Rights states that “no family should be penalized because it was not based on marriage.”¹¹⁴ The issue today is that the focus on access to marriage may be “constricting the imagination” of advocates for LGBT families who attribute every problem a same-sex couple experiences to marriage discrimination.¹¹⁵ Polikoff feels that this mentality is more harmful than helpful, which is why she chooses to broaden the debate to the need for all families to be recognized under the law. She indicates in her book that laws that distinguish between married couples and everyone else need to be reexamined for this very reason.¹¹⁶ Today, more people live alone, more people live with unmarried partners, and more parents have minor children who live neither with them nor with their current spouse.¹¹⁷ The laws that affect families need to be reevaluated in light of contemporary realities.¹¹⁸ Polikoff feels that a “valuing-all-families approach” does this by demanding a good fit between a law’s purpose and the relationships subject to its reach.¹¹⁹

Nancy Polikoff provides a model that cities should use in evaluating possibilities for legal protection and benefits for same-sex couples as well as other family units. Cities will be able to accomplish far more utilizing this approach if they truly want to protect the rights of same-sex couples. During the process, cities will be able to provide legal protections for other family units

¹¹⁰ *Id.*

¹¹¹ POLIKOFF, *supra* note 105, at 50-51.

¹¹² *Id.*

¹¹³ *Id.* at 59

¹¹⁴ *Id.* at 61.

¹¹⁵ *Id.* at 8.

¹¹⁶ *Id.*

¹¹⁷ POLIKOFF, *supra* note 105, at 9.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

who often largely go unnoticed under the law. If they do this, the public policy implications will be dramatic. Not only will same-sex couples be protected, but the children of families who are not currently recognized under the law will have protection and benefits as well, and this is truly a public policy concern that many constituents would recognize as legitimate, even if they do not want to recognize a heightened legal status for same-sex couples.

B. Federalism

When localities waded into creating family policy, there will logically be proponents and opponents to such action. With the federal enactment of DOMA in 1996, a national debate on same-sex marriage erupted at the federal level. When Pennsylvania enacted its own DOMA, the debate shifted to the state level. With the passage of Philadelphia's Life Partnership Ordinance, the third provision of which is now the Financially Interdependent Persons provision, Philadelphia brought the debate on same-sex marriage to the local level.

On one hand, it was absolutely necessary for Philadelphia to act in this way, for families, including same-sex couples, were forced to pay a significant tax if they wished to add a partner's name to a home deed or transfer property to a partner or family member who was not a legal spouse. This taxation scheme put tremendous pressure on same-sex couples, prompting the City to act. Because the Pennsylvania Supreme Court reasoned that the first two provisions of the Life Partnership Act, health benefits and pension plans, were not preempted by the Pennsylvania constitution, the City acted reasonably and legally. The City needed only to change the language of the third provision, and there were no longer legal barriers such as preemption to stand in the way.

However, same-sex marriage has historically been a debate centered at the federal and state levels of government. If cities construct policies and ordinances that reflect the true desires of their constituents, it would be logical to conclude that some cities would enact ordinances restricting same-sex couples from receiving any benefits at all. On the other hand, some cities would most likely enact policies granting additional rights than those granted by the state, prompting the state to act.

In the end, it cannot be ignored that localities are likely to have a much better understanding of what their constituents want and need, rather than the state and federal

governments. The same-sex marriage debate on the national and state levels is so polarizing, that it seems as if it will continue to go on forever. If cities act now, it is more likely that the state and federal governments will be forced to respond. Perhaps by dissenting by deciding, cities will be able to compel action in a tangible way. If cities begin to enact policies extending rights to same-sex couples that go beyond the scope of state law, states will logically respond. When the states respond, the media will grant attention. When the media grants attention, the people will understand the implications of the same-sex marriage debate. And when the people understand the implications of the debate, the federal government will be forced, or at least encouraged, to act. This is how democracy can truly be enacted at the local level, and why cities are in the best position to understand the needs and desires of their constituents.

VII. CONCLUSION

The same-sex marriage debate has and will continue to be an increasingly heated and controversial debate. What ordinances like the Philadelphia Life Partnership ordinance (which now includes the Financially Interdependent Persons ordinance) reveal is that cities are becoming increasingly concerned with affording rights and benefits for their constituents, whether they be same-sex couples, different sex couples, unmarried couples, or non-conjugal families. After the Pennsylvania Supreme Court handed down its opinion in *Devlin*, it made it clear that benefits for same-sex couples in Life Partnerships are permissible. All Philadelphia needed to do was broaden the ordinance to encompass all financially interdependent persons, and the ordinance would stand both the tests of preemption and the Uniformity Clause of the Pennsylvania Constitution.

Though the plaintiffs in the *Devlin* case thought that they could put an end to benefits for same-sex couples in Philadelphia, the City ended up offering benefits to a broader range of couples and families as a result of the Pennsylvania Supreme Court's ruling. Polikoff's central thesis, that all families should be protected under the law, is making headway in Philadelphia as a result of this seemingly small, but powerful ordinance. The same-sex marriage debate will likely continue for years to come, but cities such as Philadelphia are leading the way by affording more rights to more families, even in a state that does not recognize same-sex marriage.