

No. 13-01049-CA

IN THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL

IN RE ANGELA MARIE COSTANZA and CHASITY SHANELLE
BREWER
Petitioners/Appellants

ON APPEAL FROM THE 15TH JUDICIAL DISTRICT COURT
PARISH OF LAFAYETTE
STATE OF LOUISIANA
DIVISION C,

HONORABLE EDWARD B. BROUSSARD, J.

CIVIL ACTION NO. 2013-33539

ORIGINAL BRIEF ON BEHALF OF PETITIONERS/APPELLANTS
ANGELA MARIE COSTANZA and CHASITY SHANELLE BREWER

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September 25, 2013

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MAY IT PLEASE THE COURT:

Now come ANGELA MARIE COSTANZA and CHASITY SHANELLE BREWER, Petitioners/Appellants, and respectfully appeal the judgment of Honorable Edward B. Broussard entered on July 26, 2013, dismissing their petition for failure to disclose a cause of action upon which relief can be granted. The trial court dismissed the petition sua sponte without allowing petitioners to amend their petition to state with more particularly their causes of action.

JURISDICTION

This Court has jurisdiction pursuant to Article V, § 10(A) of the Louisiana Constitution of 1974.

STATEMENT OF THE CASE

A. PLAINTIFFS' PETITION. Angela Marie Costanza and Chasity Shanelle Brewer are two adult women who by their lawful marriage in California compose a contemporary family unit, now domiciled in Lafayette, Louisiana, and who claim that “any statutes, administrative rule, jurisprudence, or any other source of law in and for the State of Louisiana that denies the recognition and full faith and credit of a valid foreign Certificate of Marriage lawfully issued to persons of the same sex should be held invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom a state, by its marriage laws, sought to protect in personhood and dignity” (R. 1). “By seeking to displace this protection and treating those persons as living in marriage less respected than others, said source(s) of law are in violation of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States*” (R. 1). And more: “[S]uch denial of full faith and credit listed directly above would also violate *Article IV, Section 1* of the *Constitution of the United States*” (R. 2).

Petitioners pray for “an order declaring any statute, administrative rule, jurisprudence, or any other source of law in and for the State of Louisiana that denies the recognition and/or full faith and credit of a valid marriage between persons of the same sex be invalidated, unenforceable and unconstitutional” (R. 2). Petitioners further pray “that this Honorable Court order the appropriate state agencies, including but not limited to, the Clerk of Court in an for the Parish of Lafayette, Louisiana to take all appropriate measures to facilitate the recognition of the marriage between the Petitioners listed herein” (R. 2) .

Service of the petition was requested upon Louisiana Attorney General James David (“Buddy”) Caldwell, Sr. (R. 6).

B. RULING OF THE TRIAL COURT. The trial court dismissed the petition, saying in its Judgment of Dismissal, “Pursuant to La.Code Civ. P. art. 927 (B), the Court finds on its own motion that the original petition filed in this matter fails to disclose a cause of action upon which relief can be granted” (R. 8).

C. JUDGMENT OF JULY 26, 2013, DISMISSING THE PETITION. The trial court entered a final judgment dismissing the Costanza/Brewer petition on July 26, 2013. No leave to amend the petition appears in the judgment of dismissal (R. 8). No hearing was held affording counsel an opportunity to fill in the details of what is claimed to be unconstitutional.

ASSIGNMENT OF ERRORS

1. The trial court erred in dismissing the petition for failure to disclose a cause of action without allowing petitioners leave to amend their petition to state the factual basis of their claims.

ISSUES PRESENTED FOR REVIEW

Whether the trial court erred in dismissing the Costanza/Brewer petition without allowing petitioners an opportunity to amend their petition to specify the provisions of Louisiana law that unconstitutionally discriminate against them as a lawfully married contemporary family who seek joint adoption of a child under Louisiana's Children's Code.

SUMMARY OF ARGUMENT

The Costanza/Brewer petition, liberally construed, challenges Louisiana's Defense of Marriage constitutional provision, Art. 12, § 15, under the federal Equal Protection, Due Process, and Full Faith and Credit Clauses. The petition plainly claims that any source of Louisiana law, and what could be more fundamental than Louisiana's constitutional law, violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment and Article IV, §1 of the United States Constitution. Hence in one particular the petition states a claim and prays for a declaratory judgment that Art. 12, § 15 is unconstitutional and void. Other provisions of Louisiana law that discriminate against the Costanza/Brewer family unit are set forth herein with particularity. The judgment of dismissal should be vacated with instructions to allow petitioners to amend their petition.

Under Louisiana Code of Civil Procedure Article 934, leave to amend the petition to particularize the provisions of Louisiana law that are claimed to violate the Equal Protection and Full Faith and Credit Clauses of the United States Constitution is required.

The trial court erred in not affording petitioners such leave to amend.

ARGUMENT

I. THE COSTANZA/BREWER PETITION LIBERALLY CONSTRUED CLAIMS THAT ARTICLE 12, § 15 OF THE

LOUISIANA CONSTITUTION VIOLATES THE EQUAL PROTECTION, DUE PROCESS, AND THE FULL FAITH AND CREDIT CLAUSES OF THE UNITED STATES CONSTITUTION.

After *United States v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675 (2013), the constitutionality of Article 12, § 15 of Louisiana’s Constitution, which discriminates against lawfully married same-gender couples, is open to serious question. The Costanza/Brewer contemporary family unit—of the same sex, true, but a constitutionally protected “family” none the less, is entitled to be treated with the same dignity and respect that Louisiana affords her heterosexual married couples. To paraphrase the Court’s opinion in *Windsor* only slightly: “The Act’s [substitute Article 12, § 15] demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposed of federal [substitute state] law. This raises a most serious question under the Constitution’s Fifth [substitute Fourteenth] Amendment.” 133 S. Ct. at 2693-2694. Says the *Windsor* Court (133 S. Ct. at 2694):

By this dynamic DOMA [substitute Article 12, §15] undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal [substitute state] recognition. This places same-sex coupled in an unstable position of being in a second-tier marriage.

By their petition Angela Marie Costanza and Chasity Shanelle Brewer plead the same cause of action against Louisiana’s Defense of Marriage Act, a part of Louisiana’s fundamental law, Article 12, § 15 of the Louisiana Constitution.

Such discrimination, petitioners claim, violates the Fourteenth Amendment to the United States Constitution. They may be wrong on the merits. But they are right at the pleading stage.

Justice Kennedy's majority opinion (133 S. Ct. at 2682) notes that Section 2 of DOMA allows States to refuse to recognize same-sex marriages performed under the laws of other States, 28 U. S. C. § 1738C. Article 12, § 15 of Louisiana's Constitution does precisely that:

No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

But Section 2 of DOMA, "has not been challenged here," says the *Winsor* Court (133 S. Ct. at 2682). Quite to the contrary, the Costanza/Brewer petition, liberally construed, as it must be, *Giron v. Hous. Auth. of City of Opelousas*, 393 So.2d 1267 (La. 1981), certainly challenges the constitutionality of Louisiana's DOMA, Article 12, § 15, to say nothing of petitioners' Full Faith and Credit Clause challenge, which is all over the petition (R. 1, 2).

II. ARTICLE 934 OF THE LOUISIANA CODE OF CIVIL PROCEDURE REQUIRES THAT PETITIONERS BE ALLOWED TO AMEND THEIR PETITION SO AS TO STATE WITH PARTICULARITY THE FACTUAL BASIS OF THEIR CLAIMS. LOUISIANA LAW PROHIBITS AN INTRAFAMILY ADOPTION BY COSTANZA/BREWER AND THEY WILL SO STATE AS A CLAIM, AMONG OTHERS, UPON WHICH RELIEF CAN BE GRANTED.

Article 934 of the Code of Civil Procedure states in its opening part as follows:

When the grounds of the objection pleaded by peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court.

No such opportunity was afforded Costanza/Brewer as the trial court dismissed their original petition for failure to disclose a cause of action upon which relief can be granted.

Petitioners have filed a petition for an intrafamily adoption (No. 20130052, 15th Judicial District Court) seeking to have the son born of Chasity Shanelle Brewer made the adopted son of her partner Angela Marie Costanza. They seek to have their contemporary family unit recognized as a part of their liberty under the Fourteenth Amendment's Due Process Clause. They have jointly raised the boy in question, Nicholas Ashton Costanza Brewer, since his birth, August 1, 2004. Petitioners aver that Louisiana law forbids an intrafamily adoption in the circumstances of their case. True, Art. 1243 of the Children's Code does not on its face proscribe an intrafamily adoption by Costanza/Brewer, but read in light of Article 12, § 15 the legal implication is clear.

The Scholar, Saint Mary's Law Review on Race and Social Justice, after carefully parsing Article 1243 of the Children's Code, says (15:293, 312 (2013)): "While the text does not expressly prohibit unmarried [same-sex] couples from jointly adopting, the state's Attorney General has opined otherwise." Op.Atty.Gen., No. 06-0325 (April 18, 2007), 2007 WL 1438453. "This interpretation of Louisiana law, taken in conjunction with Louisiana's constitutional prohibition against recognition of same-sex marriages, creates a de facto prohibition of same-sex couple adoptions." *The Scholar* (15: 312).

The Florida Court of Appeal, Third District, has held that a Florida statute banning adoption by homosexuals is unconstitutional. *Florida Department of Children and Families v. In re Matter of Adoption of X.X.G. and N.R.G.*, 45 So.3d 79 (2010). Costanza and Brewer are entitled, we submit, to a trial on the merits to establish the same claim against Louisiana's discriminatory adoption law.

Again, we are at the pleading stage. “When a court can reasonably do so, it should maintain the petition so as to afford a litigant an opportunity to present his evidence.” *Owens v. Martin*, 449 So.2d 448, 452 (La. 1984), quoted in *Piccione v. Piccione*, 2009-300 (La. App. 3 Cir. 10/7/09), 20 So.3d 576. The Costanza/Brewer proofs await discovery. Judgment on the merits awaits trial.

Baton Rouge’s on-line *Advocate* (Mark Ballard, 9/5/13) recently reported that “New federal Internal Revenue Service rules have created a Catch 22 situation for Louisiana’s gay community.” (<http://theadvocate.com/home/6964271-125/new-same-sex-marriage-tax-rules>).

The United States Internal Revenue Service has issued Revenue Ruling 2013-17, post *Windsor*, allowing same-sex married couples to use “married filing jointly” status on their federal tax returns, even in states that do not recognize same-sex marriage. Contrariwise, the Louisiana Department of Revenue has issued a ruling, 9/13/13, that requires married couples in Louisiana to file separately as “single” on their State income tax returns. As reported in the Baton Rouge *Advocate* (Mark Ballard, 9/14/13, p. 1A), <http://theadvocate.com/home/7050818-125/la-department-of-revenue-gay>, the ruling, signed by Department of Revenue Secretary Tim Barfield, recites Article 12, § 15 which defines marriage as consisting “only of the union of one man and one woman.” According to Revenue Secretary Barfield:

Louisiana’s Secretary of Revenue is bound to support and uphold the Constitution and laws of the state of Louisiana, and any recognition of a same-sex filing status in Louisiana as promulgated in IRS Revenue Ruling 2013-17 would be a clear violation of Louisiana’s Constitution.

Revenue Information Bulletin, No. 13-024, 9/13/13, Appendix A-2, *infra*.

Under this, the latest expression of Louisiana’s revenue laws, Costanza and Brewer are denied the “married filing jointly” status of hundreds of other “married”

couples in Louisiana. Here, specifically, is another factual basis of their claim that Louisiana law denies them equal protection of the laws under the Fourteenth Amendment.

Article 934 of the Code of Civil Procedure requires that Costanza/Brewer be allowed to plead such a claim by an amended petition. *Chrolmaceutical Adv. Tech. v. Lundy & Davis*, 2008-653 (La. App. 3d Cir. 2/4/09), 4 So.3d 227, 230 (“We see no reason why La.Code.Civ.P. art 934 should not be apply in the case before us.”) The principle of liberality in the reading of petitions is “particularly appropriate in the amendment process according to leading scholars and jurists.” *Giron v. Hous. Auth. of City of Opelousas*, 393 So.2d 1267, 1270 (La. 1981).

So too, an amended petition would claim that Louisiana’s civil law of persons, Civil Code Art. 96 (“A purported marriage between parties of the same sex does not produce any civil effects.”), and Louisiana’s conflict of laws provision, Civil Code Article 3520 (B) (“A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.”), deny petitioners Angela Marie Costanza and Chasity Shanelle Brewer due process and equal protection of the laws in violation the Fourteenth Amendment .

The Louisiana Supreme Court has emphasized that when the grounds for sustaining the peremptory exception of no cause of action may be removed by amendment of the petition, “the judgment sustaining the exception *shall* order such amendment within the delay allowed by the court.” *Sanborn v. Oceanic Contractors, Inc.*, 448 So.2d 91, 94 (La. 1984) (per Calogero, C.J).

CONCLUSION

For the foregoing reasons, the judgment below should be vacated. The matter should be remanded to the trial court with instructions to allow petitioners to amend their petition to state their claims with more particularity within thirty days.

Respectfully submitted,

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Joshua S. Guillory (LA Bar # 33872)

APPENDIX

Trial Court’s Final Judgment, July 26, 2013.....A-1

Louisiana Department of Revenue, Revenue Information Bulletin,
No. 13-024 (9/13/13), Impact of the Internal Revenue Service
Revenue Ruling 213-17.....A-2

Out-of-State opinion,
*Florida Department of Children and Families v. In re Matter of Adoption
of X.X.G. and N.R.G.*, 45 So.3d 79 (2010).....A-3

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September 2013 a copy of the above and foregoing Original Brief on behalf of Angela Marie Costanza and Chasity Shanelle Brewer has been served, by placing same in US regular mail proper postage paid, on Louisiana Attorney General James David (“Buddy”) Caldwell, Sr., 1885 North Third Street 6th floor, Baton Rouge, LA 70802.

Joshua S. Guillory (La Bar # 33872)