

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2018: No. 99

IN THE MATTER OF AN APPLICATION UNDER
THE BERMUDA CONSTITUTION 1968

AND IN THE MATTER OF THE DOMESTIC PARTNERSHIP ACT 2018

BETWEEN:

OUTBERMUDA

First Plaintiff

-and-

MARYELLEN CLAUDIA LOUISE JACKSON

Second Plaintiff

-v-

THE ATTORNEY GENERAL

Defendant

AFFIRMATION OF DOUGLAS NEJAIME

I, Douglas NeJaime, of New Haven, Connecticut, USA, declare and affirm as follows:

1. I am a tenured professor at Yale Law School, Yale University, in New Haven, Connecticut.
2. I teach and do research on sexual orientation law and family law, including relationship recognition. I am a co-author of *Cases and Materials on Sexuality, Gender Identity, and the Law*, a casebook in its Sixth Edition published by West. Before joining the Yale faculty, I was a tenured professor at UCLA School of Law, where I was also the Faculty Director of the Williams Institute, a research institute focused on sexual orientation law and policy. My curriculum vitae is attached as **Exhibit DNJ-1, Tab 1**.

3. In my opinion, the domestic partners recognized under Bermuda law would face significant challenges in attaining the rights and benefits provided to married couples in the U.S. For most purposes, the U.S. government and most state governments in the U.S. would not necessarily treat the domestic partners as married. This lack of recognition could have significant consequences in healthcare, travel and immigration, and employment.
4. After the U.S. Supreme Court's decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013) (**Exhibit DNJ-1, Tab 2**), striking down section 3 of the federal Defense of Marriage Act (DOMA) and thus requiring the federal government to recognize valid state-law marriages of same-sex couples, the U.S. federal government, through its various agencies, extended federal rights and benefits to married same-sex couples. But the federal government generally did not extend such rights and benefits to same-sex couples in civil unions or domestic partnerships recognized under state law.
5. The distinction that the U.S. federal government drew between marriages, on one hand, and civil unions and domestic partnerships, on the other hand, prompted some states in the U.S. to view their civil union/domestic partnership regime as a constitutional violation. By providing same-sex couples the state-law rights of marriage through domestic partnership or civil union but withholding the status of marriage, states effectively precluded same-sex couples from receiving the full panoply of federal rights attached to marriage. For example, the New Jersey Supreme Court, in considering the adequacy of civil unions, reasoned that because *Windsor* "paved the way to extending federal benefits to married same-sex couples" and "because a number of federal agencies responded [to *Windsor*] and now provide various benefits to married same-sex couples," "same-sex couples in New Jersey are being deprived of the full rights and benefits the State Constitution guarantees." *Garden State Equality v. Dow*, 79 A.3d 1036, 1042 (N.J. 2013) (**Exhibit DNJ-1, Tab 3**).
6. While some states in the U.S. would recognize civil unions and domestic partnerships, either pursuant to statutory directives or based on comity principles, most states would likely not recognize such relationships and would not automatically or necessarily afford them the rights, benefits, and obligations associated with marriage. Some state appellate courts in the U.S. have denied recognition to nonmarital relationships from other jurisdictions. For example, before same-sex couples had the right to marry nationwide in the U.S., courts refused to recognize civil unions from other states for purposes of family law and tort law. *See, e.g., Burns v. Burns*, 253 Ga. App. 600 (2002)

- (refusing to treat a civil union as valid for child custody purposes) (**Exhibit DNJ-1, Tab 4**); *Rosengarten v. Downes*, 71 Conn. App. 372 (2002) (refusing to subject a civil union to divorce proceedings) (**Exhibit DNJ-1, Tab 5**); *Langan v. St. Vincent's Hosp.*, 802 N.Y.S.2d 476 (N.Y. App. 2005) (refusing to allow a civil union partner to recover through a wrongful death action) (**Exhibit DNJ-1, Tab 6**).
7. The U.S. Constitution provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” Art. IV, Section 1. This provision does not apply to foreign acts or judgments, meaning that courts in the U.S. might be more likely to refuse to recognize a foreign domestic partnership than they would a domestic partnership from a state in the U.S.
 8. Even though the Full Faith and Credit Clause does not apply to marriages, courts and government agencies in the U.S. generally treat foreign marriages as valid, and there is a large body of case law in the U.S. regarding the recognition of foreign marriages.
 9. In U.S. law, more than a thousand federal rights and benefits are premised on marriage. The U.S. government does not recognize civil unions or domestic partnerships, including those from foreign jurisdictions, as marriages for most purposes.
 10. A U.S. citizen can sponsor a spouse for a green card or citizenship status but cannot sponsor a member of a domestic partnership or civil union. U.S. Citizenship and Immigration Services “does not recognize the following relationships as marriages, even if valid in the place of celebration: . . . Civil unions, domestic partnerships, or other such relationships not recognized as marriages in the place of celebration.” U.S. Citizenship & Immigration Servs., 12 USCIS Policy Manual, pt. G, ch. 2(A)(1) (current as of Mar. 28, 2018) (**Exhibit DNJ-1, Tab 7**). And the U.S. State Department has taken the position that “only a relationship legally considered to be a marriage in the jurisdiction where it took place establishes eligibility as a spouse for immigration purposes.” U.S. Visas for Same-Sex Spouses: FAQs for Post-Defense of Marriage Act, U.S. Dep’t St. (Mar. 21, 2015) (**Exhibit DNJ-1, Tab 8**).
 11. The U.S. Internal Revenue Service has ruled: “For Federal tax purposes, the term ‘marriage’ does not include registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are not denominated as a marriage under that state’s law, and the terms ‘spouse,’ ‘husband and wife,’ ‘husband,’ and ‘wife’ do not include individuals who have entered into such a formal relationship. This conclusion applies regardless of whether individuals who have entered into such

relationships are of the opposite sex or the same sex.” Rev. Rul. 2013–17, 2013–38 I.R.B. 201, at § 4 (**Exhibit DNJ-1, Tab 9**).

12. The U.S. Office of Personnel Management (OPM) has issued guidance explaining that federal employee health benefits will not be provided to same-sex domestic partners because the relevant federal statute “defines ‘member of [employee’s] family’ to mean the employee’s ‘spouse’ and certain children. Same-sex domestic partners are not encompassed within the statutory definition of member of family. OPM is therefore without authority to extend coverage to domestic partners.” Final Rule Amending Federal Employees Health Benefits Program, 78 Fed. Reg. 64,873, 64,875 (Oct. 30, 2013) (**Exhibit DNJ-1, Tab 10**).
13. The U.S. Department of Labor has issued guidance stating that it will not require pension plan administrators to recognize civil unions or domestic partnerships. Emp. Benefits Sec. Admin., U.S. Dep’t of Labor, Technical Release No. 2013-04, Guidance to Employee Benefit Plans on the Definition of “Spouse” and “Marriage” Under ERISA and the Supreme Court’s Decision in *United States v. Windsor* (2013) (**Exhibit DNJ-1, Tab 11**).
14. In U.S. law regulating government healthcare, marital status is used “for purposes of certain entitlement, eligibility and enrollment provisions for Medicare.” Dep’t of Health and Human Servs., Ctrs. for Medicare & Medicaid Servs., CMS Rulings, Ruling No. CMS-4176-R, at 3 (Feb. 9, 2015) (**Exhibit DNJ-1, Tab 12**). The Centers for Medicare & Medicaid Services within the U.S. Department of Health and Human Services has ruled that “[i]ndividuals in non-marital same-sex relationships (such as domestic partnerships or civil unions that are not marriages) are not considered married” for purposes of Medicare entitlement, eligibility, and enrollment. *Id.* at 6.
15. A few federal agencies in the U.S. provide some discrete benefits to couples in civil unions or domestic partnerships. For example, the U.S. Social Security Administration (SSA) recognizes civil unions or domestic partnerships that provide inheritance rights. This position relies on language in the Social Security Act providing that an applicant may be treated as married “if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a wife, husband, widow, or widower” U.S. Soc. Sec. Admin., GN 00210.004, Non-Marital Legal Relationships (Such as Civil Unions and Domestic Partnerships) (2014) (**Exhibit DNJ-1, Tab 13**);

Public Health and Welfare Act, 42 U.S.C. § 416(h)(1)(A)(ii) (2012) (Exhibit DNJ-1, Tab 14).

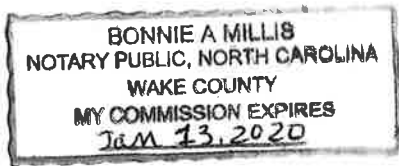
16. In my opinion, because the U.S. government would not treat domestic partners from Bermuda as married for purposes of U.S. law, and because most state governments in the U.S. would not extend the rights and benefits of marriage to domestic partners from Bermuda, individuals recognized as domestic partners under Bermuda law would confront significant difficulties in accessing the rights and benefits associated with marriage in the U.S., under both federal and state law. These difficulties could arise across a number of areas, including healthcare, travel and immigration, and employment.

AFFIRMED by the said)
DOUGLAS NEJAIME)
In ~~New Haven, Connecticut~~ ^{Durham, North Carolina})
In the United States of America)
On the 2 day of April 2018)



Before me: Douglas Nejaime

Bonnie A. Millis
Notary Public



IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2018: No. 99

IN THE MATTER OF AN APPLICATION
UNDER
THE BERMUDA CONSTITUTION 1968

AND IN THE MATTER OF THE DOMESTIC
PARTNERSHIP ACT 2018

BETWEEN:

OUTBERMUDA

First Plaintiff

-and-

MARYELLEN JACKSON

Second Plaintiff

-v-

THE ATTORNEY GENERAL

Defendant

AFFIRMATION OF DOUGLAS NEJAIME



aswlaw

ASW Law Limited | Crawford House
50 Cedar Avenue | Hamilton, HM11
BERMUDA

Attorneys for the Plaintiffs

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2018: No. 99

IN THE MATTER OF AN APPLICATION UNDER
THE BERMUDA CONSTITUTION 1968

AND IN THE MATTER OF THE DOMESTIC PARTNERSHIP ACT 2018

BETWEEN:

OUTBERMUDA

First Plaintiff

-and-

MARYELLEN JACKSON

Second Plaintiff

-v-

THE ATTORNEY GENERAL

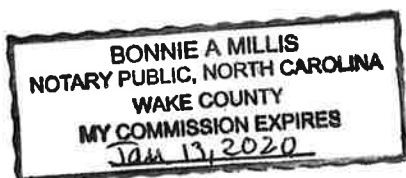
Defendant

EXHIBIT "DNJ-1"

These are the documents referred to in the affirmation of Douglas NeJaime affirmed before me this 2 day of April 2018.

Bonnie A. Millis

Notary Public



IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2018: No. 99

IN THE MATTER OF AN APPLICATION
UNDER
THE BERMUDA CONSTITUTION 1968

AND IN THE MATTER OF THE DOMESTIC
PARTNERSHIP ACT 2018

BETWEEN:

OUTBERMUDA

First Plaintiff

-and-

MARYELLEN JACKSON

Second Plaintiff

-v-

THE ATTORNEY GENERAL

Defendant

EXHIBIT "DNJ-1"



asw|law

ASW Law Limited | Crawford House
50 Cedar Avenue | Hamilton, HM11
BERMUDA

Attorneys for the Plaintiffs