2013

A Supreme Court Ruling That's about Way More than Preemption

Nancy Polikoff

Nancy D. Polikoff

A SUPREME COURT RULING THAT'S ABOUT WAY MORE THAN PREEMPTION

During last summer's Supreme Court term, two marriage cases—*Hollingsworth v. Perry* (the Prop 8 case) and *U.S. v. Windsor* (the DOMA case)—were lauded as landmark gay rights victories. A decision in another case, *Hillman v. Maretta,*[1] was also handed down. At first glance, it is merely a federal preemption case, and seems unimportant in the nation's broader culture wars. But lurking within it are important questions about the purpose of employee survivor's benefits and the definition of a family that rival the two recent gay rights decisions. Concretely, the decision may have special significance for the estimated 88,000 LGBT federal government employees,[2] especially those who aren't married because they don't want to marry[3] or because their most important relationship is not with an intimate partner.

The facts are simple. Warren Hillman worked for the federal government. In 1996, he named his wife, Judy Maretta, as the beneficiary of his federal life insurance policy. According to the briefs, this life insurance benefit dates back to the Eisenhower years and was designed to enable employees to carry out their responsibilities to their families and to make the federal government competitive with the private sector. The couple divorced in 1998, and Hillman remarried in 2002. He was still married to his second wife, Jacqueline Hillman, when he died in 2008.[4]

Warren Hillman, however, never changed his beneficiary. Therefore, his life insurance proceeds, almost $125,000, were paid to Maretta, his first wife. At this point, Virginia state law kicked in. Virginia has a statute that wipes out designations to former spouses upon a divorce, unless the designation is reaffirmed after the divorce. Another way of saying this is that Virginia assumes that people don't want their ex-spouses to get their property, financial accounts, or any other benefit. Rather than require people to change designations they made during the marriage, the law wipes them out all at once.

But Virginia cannot trump federal law because of the preemption doctrine. Federal life insurance proceeds still go to whomever is designated by the employee because the preemption doctrine holds that a state statute cannot trump federal law.[5] No one disputed that the Virginia statute could not change who the insurance plan administrator paid. Another Virginia

---

Nancy D. Polikoff is a professor of law at American University Washington College of Law. She is the author of *Beyond (Straight and Gay) Marriage* (Beacon Press 2008).

law, however, gives a claimant who would otherwise have received the benefit if state law in fact wiped out the designation, the right to sue the designated beneficiary and get all the money from her. That's the law that was challenged in this case.[6]

The arguments were as follows: Hillman, the second wife, argued that the Virginia law didn't interfere at all with plan administration; it simply gave a family member an equitable remedy under state law to effectuate what the state presumes is the intent of its divorced residents. Ex-wife, Maretta, responded that the Virginia statute was a backhanded way of accomplishing what everyone agreed Virginia could not do directly -- require the plan administrator to pay proceeds to someone other than the designated beneficiary. She also noted that the handbook for the program given to federal employees specifically says that divorce does not revoke the beneficiary designation to a former spouse.

The Supreme Court unanimously affirmed the Virginia Supreme Court's holding that federal law preempted the state statute. The Court found that the intent of the federal life insurance program was to pay the proceeds to whomever the employee chose.[7] (The employee can change his or her beneficiary at any time and this information is conveyed to employees.) Any state law frustrating that purpose is preempted, as was the challenged Virginia statute. Maybe Hillman intended to revoke his ex-wife when they got divorced (which was 10 years before he died), but he never did. The designation governs, so she gets the money, and Virginia can't circumvent the federal statute by allowing Hillman's widow to sue the ex-wife for the proceeds.

Widening the lens for evaluating the case's outcome requires addressing why Jacqueline Hillman would have won if the Virginia statute prevailed. The reason is because the designation of the ex-wife would have been wiped out and, with no named beneficiary, the right to the life insurance proceeds would go to the person at the top of the default list in the federal regulations. It should be no surprise that such person is the deceased employee's spouse, in this case Jacqueline Hillman.

There are two distinct problems with the typical default list, including that found in the federal regulations. The first is about who isn't there at all, and the second is about the order of priority.

A default order of preference never includes an unmarried partner living with the employee, even when it is obvious that the deceased employee would have chosen that person to receive a benefit. Other "nontraditional" relationships, including a close friend or a person the employee raised since childhood, even though there was no legal relationship, are also excluded from default lists. A firm rule that the beneficiary designated by the employee

gets the benefit does the best job of effectuating intent, preventing disgruntled family members from asserting a claim. That makes the ruling in this case correct, even though we suspect that Hillman did not actually want his ex-wife to get the money.

But maybe effectuating the employee's intent isn't the right purpose of a benefit that's payable upon an employee's death. If there's someone who depended upon the wages earned by the employee, I would argue, that's who should get the money. And that is why having a spouse—and even an unmarried partner—at the top of the list bugs me. Most adults can work and earn their own wages. Minor children can't. They are the ones who should top any default list.

When men weren't liable for the support of their non-marital children and the divorce rate was low, it was a pretty safe bet that the only minor children a man was obligated to were living with his wife. So the part of this benefit's purpose that was about allowing employees to carry out their family responsibilities was pretty well met by naming spouses as the default beneficiaries in the 1950's. But today's world looks different. An employee may be paying child support for a child he never lived with, or for a child living with a former spouse. He may have no children with his current spouse, and their marriage may be short term, yet she will get the money if he hasn't made an alternate designation.

We are so used to seeing a spouse at the top of a default list that we don't often consider how out-of-step it is with modern family life, especially with the needs of children who have no source of support other than their parents. Consider this: most states provide that a spouse cannot be disinherited but minor children can be. We hope parents will have obligations to their children in mind when writing a will, and, if they don't write a will, in most states children will share with a spouse under intestacy laws. But few states stop a parent from writing a will that leaves nothing to minor children. Such rules, like the default list for life insurance proceeds in this case, make marriage matter more than it should.

There's no indication that Warren Hillman had minor children, so my critique of default laws in general isn't relevant to the outcome of this case. I'm glad employees without dependent children can pick the beneficiaries they want. For LGBT employees, that means the maximum flexibility in determining what relationships mean the most to them. I just think it's better public policy to constrain the choice of parents and require survivor's benefits, including life insurance, to cushion the financial blow that comes with the loss of an economic provider. That blow hits children the hardest.

NOTES

1 133 S. Ct. 1943 (2013).

2 I got this figure by looking at the total number of federal government employees. This is my source: 2% of federal government employees who filled out an employee survey in 2012 said they were gay; *see* U.S. Office of Personnel Management, 2012 Federal Employee Viewpoint Survey Results, *available at* http://www.fedview.opm.gov/2012files/2012_Government_Management_Report.pdf.

I multiplied this number times the total number of federal government employees, which according to the following website was over 4.4 million in 2011; *see* U.S. Office of Personnel Management, Historical Federal Workforce Tables, *available at* http://www.opm.gov/policy-data-oversight/dataanalysis-documentation/federal-employmentreports/historical-tables/total-governmentemployment-since-1962/.

3 For example, some same-sex couples are choosing not to marry. *See e.g.*, Cara Buckley, *Gay Couples, Choosing to Say 'I Don't,'* N.Y. TIMES, Oct. 25, 2013, *at* http://www.nytimes.com/2013/10/27/style/gay-couples-choosing-to-say-i-dont.html?_r=2&adxnnl=1&hpw=&pagewanted=1&adxnnlx=1383584519-W4T1zucWQus2DVfo2mwsZQ

4 133 S. Ct. at 4-5.

5 *Id.* at 2.

6 *Id.* at 3-4.

7 *Id.* at 1.

U.S. POSTAL SERVICE STATEMENT OF OWNERSHIP, MANAGEMENT & CIRCULATION (REQUIRED BY 39 U.S.C. 3685)

1. Title of Publication: NATIONAL LAWYERS GUILD REVIEW. 2 Publication number: 231 560. 3. Date of filing: October 1, 2013. 4. Issue frequency: quarterly. 5. Number of issues published annually: Four. 6. Annual subscription price: $25. 7. Complete mailing address of known office of publication: National Lawyers Guild Review, 132 Nassau Street, # 922, New York NY 10038. 8. Complete mailing address of the general business offices of the publisher: 132 Nassau Street, # 922, New York NY 10038. 9. Full names and complete mailing address of publisher, editor and managing editor: Publisher: National Lawyers Guild Review, 132 Nassau Street, # 922, New York NY 10038. Editor: Nathan Goetting, 132 Nassau Street, # 922, New York NY 10038. Managing editor: Brett DeGroff. 10. Owner: National Lawyers Guild. 11. Known bondholders, mortgagees, and other security holders owning or holding 1 percent or more of total amount of bonds, mortgages, or other securities: none. 12. For completion by nonprofit organizations authorized to mail at special rates (Section 423.12DMM only): Status has not changed during the preceding 12 months. 13. Publication name: NATIONAL LAWYERS GUILD REVIEW. 14. Issue date for circulation data below: Summer 2013. 15. Extent and nature of circulation. Average number of copies of each issue during preceding 12 months. A. Total number of copies (net press run): 815. B. Paid and/or requested circulation (1) Outside county: 715. (2) Paid in-county subscriptions: 40. (3) Sales through dealers and carriers, street vendors, counter sales and other non-USPS paid distribution: 0. (4) Other classes mailed through the USPS: 0. C. Total paid and/or requested circulation: 755. D. Free distribution by mail (samples, complimentary and other free): 15 (1) Outside county: 0. (2) In-county: 0. (3) Other classes mailed: 0. E. Free distribution outside the mail (carriers or other means): 0. F. Total free distribution: 15. G. Total distribution: 770. H. Copies not distributed: 45. I. Total:815. Percent paid and/or requested circulation: 94%. Actual number of copies of single issue published nearest to filing date. A. Total number of copies (net press run): 550. B. Paid and/or requested circulation (1) Outside county: 476. (2) Paid in-county subscriptions: 25 (3) Sales through dealers and carriers, street vendors, counter sales and other non-USPS paid distribution: 0. (4) Other classes mailed through the USPS: 0. C. Total paid and/or requested circulation: 501. D. Free distribution by mail (samples, complimentary and other free): (1) Outside county: 15. (2) In-county: 0. (3) Other classes mailed: 0. E. Free distribution outside the mail (carriers or other means): 0. F. Total free distribution: 15. G. Total distribution: 516. H. Copies not distributed: 34. I. Total: 550. Percent paid and/or requested circulation: 94% 16. This statement of ownership will be printed in the Fall 2013 issue of this publication. 17. I certify that the statements made by me above are correct and complete. Signature and title of editor, publisher, business manager or owner: National Lawyers Guild, owner, October 1, 2013.

panic fanned by the Bush campaign, the MMA, and the process by which it became law, is a case study in the codification of a people's irrational fears.

In "Michigan's Invisible People," Professors Brendan Beery and Daniel Ray of Thomas M. Cooley Law School advocate the cause of April DeBoer and Jayne Rowse, a same-sex couple denied both marriage and the right to adopt children, who are challenging the constitutionality of the MMA in a case that is gaining increasing attention in Michigan and around the country, *DeBoer v. Snyder.*

"Gay Marriage is a Fundamental Right" is an adapted version of a Constitution Day speech that editor Nathan Goetting recently gave as part of a symposium on the potential impact *DeBoer* will have on marriage equality and LGBTQ rights generally. It places the current gay marriage debate in the context of the Supreme Court's marriage and gay rights jurisprudence going back to the nineteenth century.

Though gay marriage has monopolized a great deal of national attention, the struggle for LGBTQ self-determination is being fought on many fronts other than marriage, often by transgender and queer people of color seeking economic as well as social justice.

The "Know Your Rights Manual for the Transgender Community: Immigration Law," created by the National Lawyers' Guild San Francisco Bay Area Chapter is a helpful resource for attorneys representing transgender, gender non-conforming, and queer people as they navigate an often inscrutable and oppressive immigration system. We hope that practitioners will share this resource with their clients and others who might benefit from it.

In the same spirit of creative lawyering, Kris Franklin's "'Baton Bullying': Understanding Multi-Aggressor Rotation in Anti-Harassment Cases," offers a litigator's analysis of the different ways in which many young LGBTQ people experience intimidation and violence, and how courts must be more responsive to these new realities.

Professor Nancy Polikoff's essay, "A Supreme Court Ruling That's About Way More Than Pre-Emption," is another perspective-shifting analysis. It examines *Hillman v. Maretta*, a little-known survivor's benefits case recently decided by the Supreme Court, whose seemingly benign holding is actually a foray into the culture wars that may harm and stigmatize LGBTQ relationships.

While this LGBTQ theme issue only considers a small number of the legal battles underway in our courts, we hope that it shines light on those it covers and adds a voice of support to legal activists fighting for LGBTQ justice around the country.

As the struggle continues, and momentum continues to build, we hope to see many more victories ahead.

—Nathan Goetting & Richael Faithful, *issue editors*