

## Brian Dickerson: Will Michigan's same-sex marriage showdown be a historical footnote?

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*Nolan, 5, left, poses with April DeBoer, 42, Jacob, 5, Ryanne, 5, and Jayne Rowse, 49. DeBoer and Rowse are asking the court to overturn a 2004 law that prohibits same-sex couples from marrying in the state and to declare unconstitutional Michigan's Adoption Code, which prohibits joint adoption by gay or lesbian couples. / File photo by Mandi Wright/Detroit Free Press*

Just last October, when U.S. District Judge Bernard Friedman set Feb. 25 as the trial date for a legal showdown between state Attorney General Bill Schuette and a lesbian couple challenging Michigan's constitutional ban on same-sex marriage, it looked as if *DeBoer v. Snyder* might become the decisive battleground in the nationwide campaign for marriage equality.

But what a difference four months has made.

While lawyers for both sides have been preparing for the trial that begins in Friedman's Detroit courtroom this Tuesday, federal judges elsewhere have struck down all or parts of state laws banning same-sex marriage in Ohio, Utah, Oklahoma, Kentucky and Virginia.

Meanwhile, state supreme courts in New Jersey and New Mexico have rejected challenges to laws permitting same-sex couples in those states to marry.

By the time a new law permitting gay marriage in Illinois takes effect June 1, same-sex couples will be free to marry in at least 17 states. Four more states either recognize civil unions between gay couples or honor same-sex marriages consecrated elsewhere.

In Michigan and 32 other states where state laws or constitutional amendments bar same-sex partners from marrying, elected officials defending the status quo are under siege. Freedom to Marry, a nationwide advocacy group, counts more than 40 pending lawsuits in which LGBT plaintiffs seek to invalidate restrictions on same-sex marriage.

With federal appellate judges already poised to take up same-sex rulings from half a dozen trial courts, the likelihood that *DeBoer v. Snyder* will percolate its way through the system to the U.S. Supreme Court is diminishing.

### Targeting the ban

Even so, Judge Friedman is likely to create a stir when he issues a ruling in the bench trial that begins Tuesday. And although appeals and stays will likely delay the practical impact of any

decision for months or years, Friedman has already telegraphed his skepticism that Michigan's same-sex marriage ban can withstand constitutional scrutiny.

April DeBoer and her longtime partner, Jayne Rowse, weren't even challenging Michigan's now 10-year-old ban when they filed their federal lawsuit against the state (and its governor, whose last name became part of the case's shorthand style) in January 2013.

The two women, both nurses in Oakland County, sought only to adopt the three special-needs children they had been raising together since 2010. Each had already exercised her right to adopt as a single parent. But under a Michigan law that forbids unmarried couples from jointly adopting, neither was legally recognized as the legal parent of her partner's children.

The consequences are more than symbolic. In the event that DeBoer were to die or become disabled, her partner, Rowse, would have no legal right to custody of DeBoer's adoptive daughter, RYanne, who has lived with both women and Rowse's adopted sons since all three children were babies.

It was Friedman who suggested that the real obstacle to the joint adoptions that DeBoer and Rowse sought was the constitutional amendment that forbade them from marrying in Michigan, or even obtaining the state's recognition for a marriage legally performed in some other state.

If DeBoer and Rowse could only wed, Friedman reasoned, their path to cross-adopting each other's children would be unobstructed. At the judge's suggestion — and over the objections of lawyers representing the state — DeBoer and Rowse's lawyers amended their lawsuit to attack the state's same-sex marriage ban head-on.

Facing similar legal challenges, attorneys general in other states have been reluctant to defend state bans like Michigan's. Many legal scholars believe such prohibitions are constitutionally doomed in the wake of the 5-4 ruling that U.S. Supreme Court justices issued last June in *Windsor v. United States*. The landmark *Windsor* ruling struck down the Federal Defense of Marriage Act (DOMA), which had barred the federal government from recognizing same-sex marriages even if they were consecrated in one of the states that explicitly authorizes them.

### **A tortured interpretation**

Schuetz contends that the *Windsor* ruling protects every state's right to decide for itself who can marry within its borders. But that argument represents a willful indifference to the essence of *Windsor*, in which a majority of justices concluded that the primary (and constitutionally forbidden) purpose of DOMA was "to impose inequality" on gay citizens for no legitimate government purpose.

To defend Michigan's untenable discrimination against gay people, Schuetz has been reduced to arguing that Michigan's ban on same-sex marriage serves the legitimate governmental purpose of promoting "responsible procreation."

Never mind that many couples, heterosexual and gay, get married with no intention of having or adopting children. It's within the state's right to reserve marriage to heterosexuals, Schuetz argues, because children have better outcomes when they have two parents of opposite

genders.

The main problem with this argument — which the Windsor majority and innumerable lower court judges have already rejected — is that it flies in the face of virtually every reputable study comparing children raised by same- and opposite-sex couples.

Friedman will likely spend much of the DeBoer trial hearing the plaintiffs' expert witnesses summarize the voluminous empirical data suggesting that children raised by same-sex couples are just as healthy, well-adjusted and successful in school and life as peers raised by opposite-sex parents.

## **Two shots at the ban**

DeBoer and Rowse's attorneys believe the expert evidence will convince Friedman that Schuette has no rational basis for his argument that Michigan's gay marriage ban is good for children. But opponents of gay marriage may face an uphill fight to sustain Michigan's ban, even if Schuette prevails on that point.

In the event Friedman finds that Michigan has a reasonable basis for discriminating against same-sex couples, Friedman has told attorneys for both sides, the court will convene a second hearing to determine whether the state's same-sex marriage ban deserves the heightened scrutiny reserved for statutes that disadvantage members of certain minorities. In other words, Friedman could find that voters who legitimately sought to protect children went too far when they decided to forbid all same-sex marriages.

Like most people who have noted Friedman's cautious but unmistakable skepticism toward Michigan's ban, I'll be surprised if he allows it to stand as is.

But the truth is that whatever Friedman does, the inexorable evolution of voter sentiment and judicial attitudes toward same-sex marriage presage the eventual triumph of marriage equality.

When it's over, Michigan voters may be left wondering why, with so many demands on their state's limited law enforcement resources, Michigan's attorney general spent so much time and money just to make sure two loving parents couldn't adopt each other's special-needs children.

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