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M. HATCHER, CLK.
U.S. BANKRUPTCY COURT
WD. OF WA AT TACOMA
BY _____ CLK.

Judge Paul B. Snyder
Chapter 7
Hearing Location: Vancouver
Hearing Date:
Hearing Time:

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

In re)
)
LEE KANDU and)
ANN C. KANDU)
)
_____)
Debtors.)

No. 03-51312

**MOTION FOR STAY OF JUDGMENT
PENDING APPEAL**

*Appeal # 04-005
USDC # C04-5544*

INTRODUCTION

Pursuant to Federal Rules of Bankruptcy Procedure, Rule 8005, Appellants, Lee Kandu and Ann C. Kandu, hereby move for a stay of judgment, pending appeal, of the Court order, dated August 17, 2004. Fed.R.Bank.P. 8005. In that appeal, Appellants seek review of the Bankruptcy Court's decision finding they are not entitled to file a joint bankruptcy petition. A stay is necessary to protect Appellants' real and personal property interests from creditor collection while her appeal is pending with the appellate court.

STATEMENT OF FACTS

Appellants, Lee Kandu and Ann C. Kandu, two women who are United States citizens were married in British Columbia, Canada, on August 11, 2003. Lee is 46 years old and Ann was 57 years old at the time of her death. Prior to Ann's death, Lee and Ann were in a committed relationship since 1990. On October 31, 2003, Lee Kandu filed pro se a voluntary petition for relief under Title 11, Chapter 7. Ann C. Kandu was listed on the petition as a joint

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debtor pursuant to 11 U.S.C. §302. Together, appellants have approximately \$43, 729.70 in total assets and \$94,356.40 in total liabilities.

On December 5, 2003, the Court issued an Order to Show Cause for Improper Joint Filing of unmarried individuals. On March 25, 2004, Ann C. Kandu died of metastatic endometrial carcinoma (cancer).¹

Appellant Lee Kandu filed a Memorandum in Support of Debtors' Joint Filing on April 20, 2004, challenging the constitutionality of the Defense of Marriage Act (DOMA), 1 U.S.C. §7. On May 21, 2004, the UST filed its response to the show cause order, and on June 4, 2004, the Debtor filed a reply thereto. On June 10, 2004, the Court heard oral arguments and subsequently took the matter under advisement.

On August 17, 2004, the Court held that DOMA does not violate the principles of comity, or the Fourth, Fifth, or Tenth Amendments to the U.S. Constitution. The Court ordered that Debtors' petition in bankruptcy shall be dismissed on September 3, 2004, unless the Debtors have filed a motion to bifurcate prior to said date. On August 26, 2004, Appellants filed a Notice of Appeal in this matter. Appellants' motion for a stay of judgment pending appeal follows.

ARGUMENT

Discretionary stays of bankruptcy judgments and orders pending appeal are governed by Federal Rules of Civil Procedure (FRCP) Rule 62(c) and (g); Federal Rules of Appellate Procedure (FRAP) Rule 8(a) and (b), and Federal Rule of Bankruptcy Procedure (FRBP) Rule 805. FRCP 62(c) and (g), taken together, grant the courts inherent power to make whatever

¹ Pursuant to Fed. R. Bankr. P. 1016, the death of Ann C. Kandu did not abate the Debtors' case under Chapter 7, nor did her death render the issues moot. Rather, in accordance with Fed. R.

order is necessary to preserve the status quo and to ensure the effectiveness of the final judgment. The discretion of the court is exercised “upon such terms as to bond or otherwise as (the court) considers proper for the security of the rights of the adverse party.” FRCP 62(c). The power to maintain the status quo pending appeal “should always be exercised when any irreparable injury may result from the effect of the decree as rendered.” *In re Wymer*, 5 B.R. 802, (B.A.P. 9th Cir. Cal. 1980).

A stay of bankruptcy judgment will be granted if the Appellant shows that serious questions are raised and the balance of hardships tips strongly in his or her favor. *Benda v. Grand Lodge of Int'l Ass'n of Mach., etc.*, 584 F.2d 308, 314-15 (9th Cir. 1978); *Wm. Inglis & Sons Baking Co. v. ITT Continental Baking Co. Inc.*, 526 F.2d 86, 88 (9th Cir. 1976); *Arthurs v. INS*, 959 F.2d 142, 143-44 (9th Cir. 1992). In *Benda*, the Court explained that if the balance of hardships tips decidedly toward the moving party, the motion should be granted if she has a “fair chance of success on the merits” or if the “questions are serious enough to require litigation.” *Benda*, 584 F.2d at 315 (emphasis added) When the public interest may be affected, it must be considered as a factor in balancing the hardships. *Caribbean Marine v. Baldrige*, 844 F.2d 668, 673 (9th Cir. 1988).

As explained below, this motion clearly meets the test set forth in *Benda*, and Appellant should be granted a stay of bankruptcy judgment.

I. The Balance of Hardships Tips Sharply in Appellants’ Favor.

If the Court denies this request for a stay, Appellants stand to lose all real and personal property assets. Appellant Lee Kandu will suffer irreparable injury if the Court does not grant a

Bankr. P. 1016, the estate “shall be administered and the case concluded” in the same manner as

stay of its judgment. Because the Court's judgment dismissed Appellants' petition, unless a stay is granted, Appellants will be legally liable for all debt owed their creditors. Appellants accrued approximately \$94,356.40 in liability. Their total assets are comprised of approximately \$43,729.70. Because Appellants assets are substantially less than their liability, Appellant Lee Kandu stands to lose physical possession of all real and personal property, including her home, if her creditors should seek to collect before her appeal is complete, as is almost certain to occur.

By contrast, the government would not suffer any hardship if Appellants' bankruptcy judgment is stayed until the Court rules on their appeal. Even if the Court ultimately denies Appellants' appeal, Appellants' creditors will have the same legal access to Appellants' real and personal property in order to satisfy their claims.

Moreover, the public interest strongly weighs in favor of granting a stay in this case. Appellant Lee Kandu is 46 years old and has been diagnosed with cancer. She continues to reside in the home she and Ann Kandu shared for almost 14 years. If her home is taken or sold by creditors, she will have nowhere to live and has no monetary funds to make alternative arrangements. If Appellant Kandu loses her home and is required to seek public assistance, the public will be harmed.

In addition, while this Court appeared in its decision to assume that Appellants would not be harmed or prejudiced in any manner by bifurcating their petitions,² that is not necessarily the case. Appellants were legally married in Canada; in the aftermath of Appellant Ann Kandu's death, Appellant Lee Kandu is in the process of obtaining legal advice from attorneys to understand her legal situation as a surviving spouse and, in particular, to determine whether and

though the death did not occur.

how the status of her bankruptcy petition may affect her legal rights in other areas. The legal situation faced by Appellants is unprecedented, complicated, and fraught with potential legal perils. The burden of having to negotiate these untested legal waters, in addition to dealing with the death of a spouse and a serious illness, is a heavy one. For this reason, as well as those described above, the balance of hardships tips heavily in Appellants' favor and supports granting a stay to maintain the status quo.

II. Appellants' Appeal Raises Serious Questions That Deserve to Be Litigated.

It is beyond dispute that the Appellants' appeal raises serious legal questions that deserve to be litigated. Appellant's appeal rests on the premise that her joint petition for bankruptcy was properly filed with the Court. Appellant further contends that the Defense of Marriage Act, which defines marriage as that between a man and a woman, does not apply in this case and, if it does apply, is unconstitutional. As this Court noted in its decision, "the argument presented by [Appellant Lee Kandu] as to DOMA's constitutionality are matters of first impression." Memorandum Decision of Aug. 17, 2004 at 3. Prior to the court's ruling in this case, this issue has never before been considered by any court; it certainly has not been considered by a District Court within the Ninth Circuit. This is an issue of great importance, and Appellants should be given the opportunity to litigate it fully.

A. Petitioner Kandu Has Raised A Serious Question as to Whether Section 3 of DOMA Must Be Construed Narrowly To Comply with Settled Constitutional Limitations on Congress' Power To Legislate in the Domestic Relations Arena.

It is only very recently that same-sex couples have been able to marry legally in some jurisdictions. Accordingly, the courts have not yet had an opportunity to consider how to

² See Mem. Dec. at 18 n.6.
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construe and apply Section 3 of DOMA, which purports to exclude married same-sex couples from any ability to obtain any of the more than 1000 rights, benefits, and protections accorded to legal spouses under federal law. In particular, other than the decision in this case, no court has considered whether Section 3 of DOMA must be construed narrowly to comply with settled constitutional limitations on the power of Congress to legislate in the domestic relations arena.

As this Court's decision acknowledged, the general principles governing the constitutional allocation of power between the federal and state governments is well-settled. Under America's federalist structure, the federal legislature may exercise only those powers that are specifically enumerated. All remaining powers are reserved to the States pursuant to the Tenth Amendment. *See* U.S. Const. amend. X. Legislating in the arena of domestic relations is not enumerated as one of the powers allocated to Congress. To the contrary, family law "has long been regarded as a virtually exclusive province of the States." *Sonsa v. Iowa*, 419 U.S. 393, 404 (1975) (upholding Iowa's right to impose a durational residency requirement upon parties before granting a divorce); *see also Trammel v. United States*, 445 U.S. 502 (1980) ("laws of marriage and domestic relations are concerns traditionally reserved to the states."); *see also Andrews v. Andrews*, 188 U.S. 14, 32-33 (1903) (stating that "it is certain that the Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage in the States or its dissolution"); *Williams v. North Carolina*, 325 U.S. 226,

³ *See, e.g., Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930) (refusing federal court jurisdiction over divorce and alimony claims of Vice-Consul of Romania who was stationed in Ohio).

⁴ *See, e.g., In re Burrus*, 136 U.S. 586 (1890) (refusing federal court jurisdiction over a child custody claim); *Solomon v. Solomon*, 516 F.2d 1018 (3d Cir. 1975) (same).

⁵ *See Buechold v. Ortiz*, 401 F.2d 371 (9th Cir. 1968) (refusing to hear suit to establish paternity and enforce child support); *Albanese v. Richter*, 161 F.2d 688 (3d Cir. 1947) (same).

237 (1945) (it is well settled in our federal system that “the regulation of domestic relations has been left with the States and not given to the national authority.”).

This Court concluded that DOMA does not implicate the Tenth Amendment because the definition of marriage in DOMA is not binding on states. Mem. Dec. at 5. While this Court’s analysis of this issue may be sustained on appeal, there is also a significant likelihood that an appellate court will reach a different conclusion. As legal scholars have noted, DOMA’s definitions of “marriage” and “spouse” significantly impede the states’ ability to exercise their constitutionally reserved power over domestic relations.⁷ In practice, if a state uses a definition of “marriage” or “spouse” different from that adopted by Congress, the pervasive nature of federal regulation may make it practically impossible for a state to operate with those different definitions. Accordingly, Section 3 of the DOMA will almost certainly have the effect of coercing some states into using the federal definitions, for fear of losing the federal money and other benefits to which those definitions are attached. *See, e.g., Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565 (Mass. 2004), Sosman, J., dissenting (arguing that Massachusetts would be justified in conforming its definition of marriage under Massachusetts state law to the federal definition of marriage in DOMA in order to avoid the problems caused by having a different definition, including the fact that “State officials will have to differentiate

⁶ Cases and Materials on Family Law 400 (Judith Areen ed., 3d ed. 1992)

⁷ *See, e.g.,* Scott Ruskay-Kidd, “The Defense of Marriage Act and The Overextension Of Congressional Authority,” 97 Colum. L. Rev. 1435 (1997) (DOMA infringes upon the Tenth Amendment because it acts in an area that has been traditionally reserved to the states); Kristian D. Whitten, “Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States,” 26 Hastings Const. L.Q. 419, 421 (1999) (same); Jay Macke, “Of Covenants and Conflicts-When ‘I Do’ Means More Than It Used To, But Less Than You Thought,” 59 Ohio St. L.J. 1377, 1418 (1998) (same); and Evan Wolfson and Michael F. Melcher, “Constitutional and Legal Defects in the ‘Defense of Marriage’ Act, 16 Quinnipiac L. Rev. 221 (1996) (same).

between [opposite-sex and same-sex marriages] under essentially all federal funded State programs”).

In sum, given the tremendous practical power exerted over the states by the enactment of a freestanding federal definition of marriage, at a minimum, Appellants have raised a serious question as to whether the Tenth Amendment exerts any limits on how DOMA must be interpreted and applied. Accordingly, Appellants’ motion for stay of the judgment should be granted to preserve the status quo while the appellate courts consider this important question.

B. Appellants Have Raised a Serious Question As To Whether DOMA Violates the Due Process and Equal Protection Guarantees of the Federal Constitution.

This Court has rejected Appellants’ argument that DOMA unconstitutionally infringes upon the fundamental right to marry and unconstitutionally discriminates on the basis of gender and sexual orientation. In so ruling, however, the Court acknowledged that other courts have reached a different conclusion on these issues. *See, e.g., Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (excluding same-sex couples from marriage violates the fundamental right to marry and the constitutional guarantee of equal protection under the law); *Andersen v. King County*, No. 04-2-04964-4-SEA (Aug. 4, 2004) (same).

This Court also noted that *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), does not clearly resolve the issues presented by this case and that, in the thirty-two years since *Baker* was decided, the U. S. Supreme Court’s jurisprudence regarding lesbians and gay men has shifted perceptibly. *See Mem. Dec.* at 10-15.

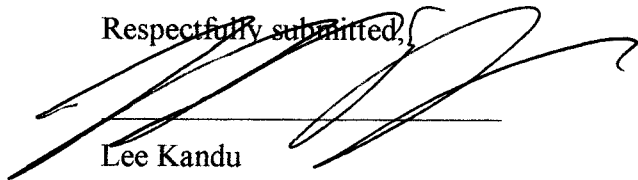
Accordingly, while this Court's resolution of Appellants' due process and equal protection claims may be upheld on appeal, there can be no dispute that Appellants have raised serious legal issues that require and deserve litigation.

CONCLUSION

Because the balance of hardships clearly weighs in favor of Appellants and because this case presents serious questions which deserve to be litigated, the Court should stay Appellants' bankruptcy judgment period pending appeal to the district court.

Dated: August 26, 2004

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lee Kandu', is written over a horizontal line. The signature is stylized and cursive.

Lee Kandu

Appellant