

Exhibit D

In The Matter Of:

EDITH SCHLAIN WINDSOR

v.

THE UNITED STATES OF AMERICA

NANCY F. COTT, PH.D. - Vol. 1

July 6, 2011

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EDITH SCHLAIN WINDSOR, in her
capacity as Executor of the estate of
THEA CLARA SPYER

Plaintiff

v. No. 1:10-cv-08435(BSJ)(JCF)

THE UNITED STATES OF AMERICA

Defendant

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DEPOSITION of NANCY F. COTT, PH.D.

Wednesday, July 6, 2011

9:34 a.m.

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Michelle Keegan, Court Reporter

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1 I N D E X

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09:52:19 1 together.

09:52:24 2 Q I think you talked about the pair, in your
09:52:31 3 previous answer. Did that pair ever include same-sex
09:52:36 4 couples?

09:52:36 5 A Not to my knowledge, in the colonial part of
09:52:41 6 the -- part of North America or at the time of the
09:52:44 7 founding among those who consider themselves part of the
09:52:47 8 new United States.

09:52:47 9 Q Has marriage been a national or federal issue
09:53:02 10 at times during American history?

09:53:05 11 MR. EHRLICH: Objection to the form. Vague and
09:53:08 12 ambiguous.

09:53:08 13 You can answer.

09:53:10 14 A You said a national or a --

09:53:13 15 Q Let me rephrase.

09:53:15 16 Has marriage been an issue of federal law at
09:53:17 17 times during American history?

09:53:19 18 A Yes, marriage in federal territories.

09:53:23 19 Q What about marriage among native Americans?

09:53:29 20 A Yes, that's a good point, that in dealing with
09:53:34 21 Indians, again, in federal territories and in certain
09:53:43 22 states where the federal government was dealing with
09:53:51 23 the -- with native Americans through the Bureau of
09:53:56 24 Indian Affairs, the form of marriage observed by these
09:53:59 25 populations was of concern to that federal agency, yes,

09:54:04 1 and to certain people in congress.

09:54:05 2 Q In the post civil war era, did the federal
09:54:12 3 government involve itself in the question of the
09:54:15 4 marriage between former slaves?

09:54:17 5 A During the civil war when the South was
09:54:21 6 occupied and in the very beginning of the post civil war
09:54:25 7 period when the southern states were not yet
09:54:28 8 reconstituted, yes, the federal government through the
09:54:32 9 Freedmen's Bureau concerned itself with marriages of the
09:54:36 10 freed men and women.

09:54:37 11 Q I'd like you to turn to Paragraph 13, page 5 of
09:54:55 12 Exhibit 2. This is your expert affidavit.

09:54:59 13 A I'm sorry. I didn't catch which page.

09:55:00 14 Q Page 5, Paragraph 13, right under Section B.

09:55:05 15 A Okay.

09:55:07 16 Q You write there, "What is seen as legitimate
09:55:11 17 marriage in a given society may be, for instance,
09:55:14 18 polygamous, monogamous, matrifocal or patrifocal,
09:55:19 19 patrilineal or matrilineal, lifelong or temporary, open
09:55:21 20 or closed to concubinage, divorce-prone or
09:55:25 21 divorce-averse," and so on.

09:55:26 22 Are you an expert in marriage and world
09:55:29 23 cultures?

09:55:30 24 A As I said at the outset, I am a specialist in
09:55:34 25 the history of the United States, but that is studied in

09:57:40 1 to divorce his wife because she was past child-bearing
09:57:43 2 age. Men and women known to be sterile have not been
09:57:46 3 prevented from marrying, nor could a marriage be
09:57:49 4 annulled for an inability to bear or beget children."

09:57:57 5 What about the case of impotence? Has that
09:58:02 6 been a bar to marriage?

09:58:03 7 MR. EHRLICH: Objection to form. In --

09:58:04 8 Q -- in the United States, from the founding
09:58:06 9 until now.

09:58:07 10 MR. EHRLICH: Under federal law or any state
09:58:09 11 law?

09:58:09 12 MR. DUGAN: That's right.

09:58:10 13 A Federal law, so far as I know, has never dealt
09:58:14 14 with this. Certainly in colonial law there -- in New
09:58:21 15 England, yes, impotence or impotency was a reason to
09:58:25 16 dissolve a marriage if there had been no knowledge of
09:58:29 17 that by the partner who was deprived before the
09:58:38 18 marriage.

09:58:39 19 Knowledge that the person he or she was
09:58:42 20 marrying could not engage in sexual intercourse would --
09:58:47 21 if that knowledge was there before the marriage, then
09:58:49 22 the inability was not a cause for dissolving the
09:58:53 23 marriage.

09:58:53 24 Q Does this mean that consummation has been
09:58:57 25 required to validate marriages in the United States,

09:59:00 1 federal or state subdivisions?

09:59:02 2 A Well, certainly federal law has never dealt
09:59:04 3 with this, so far as I am aware.

09:59:07 4 No, I do not think that consummation has been
09:59:10 5 required. I'm not aware of any law in a state or colony
09:59:16 6 that required consummation through sexual intercourse
09:59:19 7 for a marriage to be valid. Consent was considered
09:59:24 8 sufficient. And prior and more important and even the
09:59:28 9 Christian church from the beginning of the period
09:59:31 10 considered consent more important than consummation to a
09:59:34 11 marriage.

09:59:34 12 Q And in returning to the question of impotence,
09:59:38 13 do you know why impotence has been a grounds for
09:59:40 14 annulment or divorce in American law?

09:59:42 15 A Yes. I believe that it is because sexual
09:59:49 16 intimacy was assumed to be part of marriage. It was not
09:59:55 17 required for a marriage, but it was assumed to be part
09:59:57 18 of marriage. And that was the reason.

10:00:01 19 Q Would you turn to Paragraph 21, which goes from
10:00:15 20 the bottom of page 6 to the top of page 7. Dr. Cott,
10:00:19 21 you write, "The notion that the main purpose of marriage
10:00:22 22 is to provide an ideal or optimal context for raising
10:00:26 23 children was never the prime mover in states'
10:00:29 24 structuring of the marriage institution of the United
10:00:32 25 States, and it cannot be isolated as the main reason for

10:11:15 1 characteristics and in their skills and in their
10:11:18 2 strengths and weaknesses. Yes.

10:11:21 3 Q Has monogony been a central part of the
10:11:38 4 American understanding of marriage?

10:11:40 5 MR. EHRLICH: Objection to the form. At all
10:11:43 6 points since the founding?

10:11:44 7 MR. DUGAN: At all points since the founding in
10:11:46 8 the states and in federal law.

10:11:49 9 A Has monogony be a central understanding of what
10:11:52 10 marriage is? I would say yes.

10:11:54 11 Q And where does the concept of monogony come
10:11:57 12 from?

10:11:58 13 MR. EHRLICH: Objection to the form and beyond
10:12:00 14 the scope of the affidavit.

10:12:01 15 But you can answer if you know.

10:12:02 16 A I believe it is Christianity that has been the
10:12:11 17 most important philosophical trend in enforcing
10:12:15 18 monogony -- Christianity as compared to Judaism or Islam
10:12:23 19 or Buddhism or other world religions.

10:12:27 20 Q And the understanding of monogony in the United
10:12:45 21 States from the founding until, let's say, 15 years ago,
10:12:49 22 monogony was understood to be between one man and one
10:12:52 23 woman, correct?

10:12:53 24 MR. EHRLICH: Objection to the form.
10:12:55 25 Understanding by whom?

10:12:56 1 Q The public understanding.

10:12:57 2 A The general public understanding?

10:12:58 3 Q Yes.

10:12:59 4 A Yes, although I would put it back more than

10:13:05 5 15 years. I would say that really from the 1970s

10:13:09 6 certain people thought that monogony could -- was

10:13:15 7 appropriate for two people of the same sex, but it

10:13:17 8 wasn't a general majority view.

10:13:28 9 Q I want to paraphrase. I hope I'm accurately

10:13:45 10 paraphrasing your testimony about Christianity's

10:13:48 11 influence in establishing monogony. I think you said it

10:13:54 12 was a -- sort of the chief philosophical -- not

10:14:00 13 principle but philosophical sort of thread that led to

10:14:05 14 monogony in the west. Is that correct?

10:14:07 15 A Well, that valorized or celebrated monogony,

10:14:12 16 yes.

10:14:12 17 Q Does that mean monogony has been the norm in

10:14:15 18 Western society for 2,000 years?

10:14:18 19 MR. EHRLICH: Objection to the form.

10:14:19 20 Definitely beyond the scope of the affidavit.

10:14:20 21 But if you know, you can answer.

10:14:22 22 A No, not that long. In Roman -- Christian Rome,

10:14:27 23 for instance, monogony with concubinage was quite

10:14:32 24 typical for elites. So no, I think it's a much shorter

10:14:37 25 history than that.