SUPREME COURT OF ILLINOIS

Springfield, Illinois, October 20, 2016

THE FOLLOWING CASE ON THE REHEARING DOCKET WAS DISPOSED OF AS INDICATED:

No. 118781 - Jane E. Blumenthal, appellant, v. Eileen M. Brewer, appellee.
Appeal, Appellate Court, First District.
Petition for rehearing denied.
Theis, J., dissented upon denial of rehearing, with opinion, joined by Burke, J.

Order and dissent attached.

No. 118781

IN THE

SUPREME COURT OF ILLINOIS

Jane E. Blumenthal,	)	
	)	Appeal from
Appellant	)	Appellate Court
	)	First District
v.	)	1-13-2250
	)	
Eileen M. Brewer,	)	Circuit Court
	)	Cook County
Respondent	)	10 CH 48730
	)	
	)	Hon. LeRoy K. Martin, Jr.,
	)	Judge Presiding

ORDER

This matter is before the court on the petition for rehearing filed by the appellee, Eileen Brewer, pursuant to Supreme Court Rule 367 (Ill. S. Ct. R. 367 (eff. Aug. 15, 2016)). Brewer's petition is based, in part, on the contents of a paragraph that appeared in a circulating draft that was inadvertently transmitted to the Clerk's Office by the Reporter of Decisions in place of the court's actual opinion. The draft containing the paragraph at issue was never adopted by the court and should not have been filed, posted on the court's website, or distributed to the parties. The error was discovered immediately, and the opinion actually adopted by the court was substituted for the working draft the same day. The Clerk's office promptly mailed the correct document to the parties.

Because the paragraph at issue was never part of the court's opinion, it cannot serve as the basis for granting Brewer rehearing. Therefore, that portion of Brewer's petition directed to the unadopted draft filed in error is stricken on the court's own motion. Moreover, because Brewer received prompt notification when the correct document was filed, she cannot claim that the error impaired, in any way, her ability to fully present any arguments she had or may have had for challenging this court's judgment. Having considered the arguments Brewer did present directed to the adopted opinion, due notice having been given to the appellant, and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the petition for rehearing is denied.

Order entered by the Court.

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SUPREME COURT
CLERK

2016 IL 118781

IN THE

SUPREME COURT

OF

THE STATE OF ILLINOIS

(Docket No. 118781)

JANE E. BLUMENTHAL, Appellant, v. EILEEN M. BREWER, Appellee.

DISSENT UPON DENIAL OF REHEARING

¶ 117 JUSTICE THEIS, dissenting upon denial of rehearing:

¶ 118 I continue to believe that the majority was wrong to reaffirm *Hewitt v. Hewitt*, 77 Ill. 2d 49 (1979). That case should be overruled, and Brewer should be allowed to pursue her restitution claim for the reasons that I stated in my dissent. *Supra* ¶ 96 (Theis, J., concurring in part and dissenting in part, joined by Burke, J.). Further, this court should grant rehearing because the majority mischaracterized Brewer's restitution claim and ignored a key aspect of her constitutional challenge.

¶ 119 The majority opinion rejected that challenge, explaining that *Hewitt*

> "disallows unmarried cohabitants who live in a marriage-like relationship from accessing, under the guise of an implied contract, the rights and protections specified in the Marriage and Dissolution Act. In other words, individuals can enter into an intimate relationship, but the relationship itself cannot form the basis to bring common-law claims." *Supra* ¶ 85.

According to the majority, "*Hewitt* did nothing more than effectuate the policy established by the legislature to prevent knowingly unmarried cohabitants from

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evading the statutory abolition of common-law marriage *** by employing theories of implied contract to achieve the same result that would occur if common-law marriage were recognized." *Supra* ¶ 87. The majority then concluded that because "marriage is a legal relationship that all individuals may or may not enter into, Illinois does not act irrationally or discriminatorily in refusing to grant benefits and protections under the Marriage and Dissolution Act to those who do not participate in the institution of marriage." *Supra* ¶ 87.

¶ 120 That conclusion is suspect for two reasons. First, the majority mischaracterized Brewer's restitution claim. The majority intimated that Brewer makes a claim under the Illinois Marriage and Dissolution of Marriage Act. She does not. As I stated in my dissent,

> "[C]laims like Brewer's claim do not implicate the Marriage and Dissolution of Marriage Act and, thus, do not undermine the public policy of Illinois, as expressed in the prohibition of common-law marriage, that individuals themselves cannot create marriage-like benefits. See *supra* ¶ 61. Although the parties had what the majority terms a 'marriage-like relationship' (*supra* ¶ 1), Brewer does not seek 'marriage-like benefits' (*supra* ¶ 61) or 'marriage-like rights' (*supra* ¶ 77) in count III. She simply asks to bring the same common-law claims available to other people." *Supra* ¶ 114.

Brewer has not employed an implied contract theory to achieve the same result that she would obtain under section 503 of the Marriage and Dissolution of Marriage Act (750 ILCS 5/503 (West 2014)). She has employed an equitable theory to achieve a just result. Claims like Brewer's claim have long been recognized in Illinois. *Supra* ¶ 113 (Theis, J., concurring in part and dissenting in part, joined by Burke, J.).

¶ 121 Second, the majority ignored the key aspect of Brewer's constitutional challenge. In her response brief, Brewer asserted that applying *Hewitt* to bar her restitution claim would violate due process and equal protection because our holding in that case effectively penalizes unmarried domestic partners who cohabitate for exercising their right to an intimate relationship, as recognized by the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Consequently, *Hewitt*'s holding is not rationally related to a legitimate governmental interest. Brewer added that it would be "particularly irrational" to expand *Hewitt* from its fact context of opposite-sex domestic partners who could

have married, but chose not to do so, to the fact context here of same-sex domestic partners who could not have married. According to Brewer, she and Blumenthal "did not choose not to marry; they were barred from it" by a law, like those declared unconstitutional in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), that has since been repealed and replaced.

¶ 122 The majority overlooked that point, relying on a false version of history in which all Illinoisans could marry as the justification for its application of *Hewitt*. Of course, it is not irrational or discriminatory to deny the protections of the Act's dissolution provisions to persons who never used its marriage provisions. A question remains whether it is irrational and discriminatory to deny the protections of the common law to persons who never could have used the marriage provisions because of their sexual orientation.

¶ 123 The majority assumed that all domestic partners who cohabitate are the same. They are not. Some domestic partners have always enjoyed the right to marry, and consequently have always had the option of exercising that right and resorting to the Marriage and Dissolution of Marriage Act in the event of divorce. Others have not always enjoyed that right and have not always been able to resort to the Act. Until Illinois extended the Act to domestic partners who enter civil unions in 2010, all domestic partners who cohabitated without marrying did so knowingly, but not all of them did so willingly. During the entire 26 years that Brewer and Blumenthal were together, marriage was not a legal relationship for them.

¶ 124 In her rehearing petition, Brewer contends that the majority's adherence to *Hewitt* repeated and compounded unconstitutional discrimination against same-sex domestic partners by barring Brewer's restitution claim simply because she did not do what the law prevented her from doing. According to Brewer, "it is irrational to prevent same-sex couples from marrying and, at the same time, exclude them from common law property protections on the ground that, if they wished to have any property protections, they should have married." Brewer asserts that application of *Hewitt* to same-sex domestic partners who separated before they could legally marry creates "an untenable double bind" because it "conditions an important right—the ability to seek an equitable division of property when a relationship ends—on marriage, and then applies that restriction even to couples [who] were legally barred from marriage during the entire duration of their relationship, and even though that legal prohibition has now been ruled unconstitutional by the U.S. Supreme Court."

¶ 125 That double bind and its accompanying constitutional issues are a result of the majority's flawed reasoning. The majority stated that *Hewitt* "did no more than follow the statutory provision abolishing common-law marriage, which embodied the public policy of Illinois that individuals acting privately by themselves, without the involvement of the State, cannot create marriage-like benefits." *Supra* ¶ 61. Again, Brewer does not seek marriage-like benefits. It defies logic, however, to insist that Brewer could not create marriage-like benefits without state involvement when she could not have created a marriage with state involvement. Indeed, the state refused to be involved because Illinois did not allow same-sex marriage while she and Blumenthal were together. The parties' relationship may have been identical in every essential way to that of a married couple (*supra* ¶ 63), but those similarities did not create a legal marriage.

¶ 126 The problems created by the majority opinion could be easily solved by discarding *Hewitt* as an outmoded and unfair rule for all domestic partners. Short of that, rehearing should be allowed to consider not the majority's version of Brewer's constitutional challenge, but her actual argument that *Hewitt*'s rule, as applied to same-sex domestic partners like herself and Blumenthal, whose relationships ended before they were permitted to marry in Illinois, violates due process and equal protection. I dissent from the denial of rehearing.

¶ 127 JUSTICE BURKE joins in this dissent upon denial of rehearing.