
ALERT

A HISTORIC DECISION FOR SAME-SEX MARRIAGE: WHAT'S NEXT?

On June 26, 2013 — the last day of the U.S. Supreme Court's current term — the Court released opinions in two much-anticipated cases addressing the rights of same-sex couples: California's Proposition 8 ban on gay marriage and the Defense of Marriage Act (DOMA). The Court found DOMA unconstitutional and sent Proposition 8 back to California, potentially paving the way for same-sex couples to be recognized at both the federal and state levels.

Hollingsworth v. Perry addressed the validity of Proposition 8, a 2008 California ballot initiative that amended the state's constitution to define marriage as a union between a man and a woman. A federal court in San Francisco found the initiative unconstitutional, and the Ninth Circuit Court of Appeal affirmed. Proponents of the initiative then sought review in the U.S. Supreme Court.

The Court declined to address the dispute on its merits, concluding that the parties seeking to have Prop 8 enforced lacked standing to do so. The litigation was originally filed against the State of California and various state officials. When they declined to defend the law, sponsors of Prop 8 stepped in. But according to the Court, those sponsors did not have a direct stake in the outcome sufficient to allow them to appeal the decision of the District Court. Since the petitioners lacked standing, the Court concluded that it lacked jurisdiction to decide the issue. The ruling leaves in

effect the District Court decision that Prop 8 was unconstitutional.

Chief Justice Roberts wrote the opinion and was joined by Justices Scalia, Ginsburg, Breyer and Kagan. Justice Kennedy wrote a dissent (joined by Justices Thomas, Alito and Sotomayor) arguing that the case was properly before the Court and should have been decided on its merits.

Through its decision, the Court was able to avoid any discussion of whether same-sex marriage is a constitutionally-protected "equal protection" right that would apply to all states. The Supreme Court is not willing to make same sex marriage into a federal or nationwide issue just yet. States are free to continue to make the determination.

Massachusetts paved the way in 2004 for same-sex couples to lawfully marry, and California will become the 13th state to recognize same sex marriage, joining Massachusetts, Connecticut, Delaware, Iowa, Maine, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington. The District of Columbia also recognizes same-sex marriage, and the trend is toward more states approving same-sex marriage.

In *United States v. Windsor*, the Court declared unconstitutional key provisions of DOMA. Enacted in 1996, DOMA defines "marriage" as a legal union only between a man and a woman as husband and wife. The

term “spouse” refers only to a person of the opposite sex who is a husband or wife.

The case arose when Edith Windsor challenged the federal government’s refusal to allow her to use an estate tax exemption for surviving spouses following the death of the woman she married under New York law. Windsor argued that DOMA, in excluding same-sex spouses from the definition of marriage, deprives her of her constitutional right to equal protection. The majority agreed, stating that “the principal purpose and the necessary effect of this law are to demean those persons who are in lawful same-sex marriages.”

The Court held Section 3 of DOMA is unconstitutional, and its decision has thereby created the same federal benefits for same-sex married couples as heterosexual married couples. Lawfully married same-sex couples will now enjoy tax, health and retirements benefits that were previously not permitted due to the definition of marriage as a union between a man and a woman.

Justice Kennedy wrote the opinion, joined by Justices Ginsburg, Breyer, Sotomayor and Kagan. Chief Justice Roberts and Justices Scalia and Alito each wrote separate dissents, with Justice Thomas joining in Justice Scalia’s dissent.

The historical trend has been to leave the issue of marriage to each state to decide. One of the primary reasons for the ruling on DOMA was that the Act interfered with the state right to treat same-sex married couples and heterosexual married couples equally. The majority’s view was that DOMA’s principal effect was to identify a subset of state-sanctioned marriages and make them unequal. Based upon the ruling, lawfully married same-sex couples will now have the same benefits as heterosexual couples at both the federal and (in states that recognize the right) state levels.

Given that a majority of states has not approved same-sex marriage, same-sex couples will continue to have to move to states that have legalized same-sex marriage in order to marry - and to divorce as well. Further, in order to continue to receive preferential state tax treatment, legally married same-sex couples will have to live in states that have legalized marriage.

However, given the decisions of our highest Court, the future looks bright for same sex couples, and the number of states within which they can choose to marry, divorce and live will most assuredly be growing over the next few years.

The ramifications of this decision are immense and will be sorted out in the months and years ahead. The opinion is very broad and will affect the application of approximately 1,000 federal statutes, including Social Security and military benefits. The demise of DOMA will also have far-reaching implications in other areas, such as health care, labor law, immigration and family law.

Here are some of the issues to watch for.

Taxation and Wealth Planning

Windsor was first and foremost, an estate tax case. While DOMA was in effect, the federal government did not have to extend a variety of benefits to same-sex couples, even though their marriages were legally recognized in the states in which they resided. In *Windsor*, under the auspices of DOMA, the federal government denied an unlimited marital deduction for federal estate tax purposes.

For decades, the unlimited marital deduction has been a significant element in estate planning for traditional married couples. The Internal Revenue Code provides that any property passing at death to an individual’s surviving spouse is exempt from federal estate taxes. Eligibility for the unlimited marital deduction has been made available to surviving spouses by the states that recognize same-sex marriage. Windsor argued that DOMA violated the Equal Protection Clause of the U.S. Constitution, claiming she should be entitled to the same tax benefits as any other legally married widow or widower.

By overruling DOMA, the Court made this extremely significant and tax-savings advantage available to all surviving spouses whose marriages are recognized at the state level. It also enables same-sex couples to use other important estate planning techniques, such as qualified disclaimers, gift-splitting and various marital trusts. In addition, the holding of

the case creates another form of tax parity, with the federal government now having to afford same-sex couples the same income tax benefits as those given by the states to both traditional and same-sex married couples.

Legally married same-sex couples should consult their estate planners and tax advisors to ensure that their wills and other estate planning documents enable them to take full advantage of these extremely important federal and state estate and income tax changes.

Employee Benefits

DOMA limited the term “spouse,” when used in the Internal Revenue Code, ERISA and myriad other federal legislation, to someone of the opposite gender to whom a person was legally married. So when an ERISA-qualified plan used the term “spouse,” it would exclude legally married same-sex partners.

Many plans decided on their own to include same-sex partners in their definition of “spouse,” but this created a tax issue. While employee benefits provided in a qualified plan were not generally considered “compensation” for tax purposes, that portion of benefits provided to same-sex partners was treated as compensation. So employers had to report the value of the benefit provided to the same-sex partner on the W-2 of the employee spouse.

With that portion of DOMA invalidated, this issue of taxation under the federal scheme may now be resolved.

A plan that defines “spouse” as including a same-sex partner can treat the entire benefit as a non-taxable event. However, it also brings into focus some specifics not previously considered. For example, spouses generally have a right to distributions from an employee’s retirement plan (e.g., a 401(k)), and spousal waivers are required to make someone other than a spouse the designated beneficiary for that plan. Now, every plan subject to spousal restrictions (most commonly retirement plans) conceivably has to consider the same-sex spouse as a default beneficiary and apply the spousal waiver rules. This may require

plan administrators to change how they approach plan administrations.

There is also the question of how to administer benefits for same-sex partners married in a state that recognizes same-sex unions, when the plan and plan sponsor are in a state that does not. The Supreme Court’s decision is not clear as to whether the definition of “spouse” in an employee benefit plan can be limited based on the state where the plan is domiciled. The federal tax issue may be somewhat resolved, but the eligibility and application to benefit plans generally remains muddled.

So it would be inappropriate at this stage to say all plans must now cover same-sex spouses regardless of what state the plan is in. However, if your plan does define “spouse” as including same-sex partners, it appears that the opinion makes it easier to manage your plans for taxation purposes.

Immigration

Department of Homeland Security Secretary Janet Napolitano has already announced that her department will allow legally married U.S. citizens to petition for green cards and visas for their same-sex spouses. Alejandro Mayorkas, director of U.S. Citizenship and Immigration Services, noted that his department has been tracking denied same-sex couple filings for several years now and is geared up to move ahead now that DOMA has been rendered unconstitutional. While it is unclear at this time how the processing of the various possible cases will be implemented, all indications are that the federal government is ready to accept filings for same-sex spouses.

Employment Law

Extending benefits to opposite-sex spouses, but not same-sex spouses, is already illegal in several states (including California). Now in other states that recognize gay marriage, employers will need to extend benefits they provide to spouses to same-sex spouses. Affected laws include:

- The Family and Medical Leave Act (FMLA) –
The right to take time off to care for a spouse with

a serious health condition now extends to legally married same-sex spouses.

- The Consolidated Omnibus Budget Reconciliation Act (COBRA) – COBRA requires private employers with 20 or more employees to offer continued group health coverage to employees and their covered dependents under certain circumstances, such as termination. Same-sex spouses will need to receive the same COBRA continuation rights as their opposite-sex counterparts.

- The Health Insurance Portability and Accountability Act (HIPAA) – Health plans that covers spouses will need to offer enrollment when a participant marries a same-sex spouse.

Employers will need to pay close attention to government agencies as they announce new rules and procedures in response to the rulings.

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For guidance on the impact of the Supreme Court's decision in *Hollingsworth*, please contact any Fox Rothschild attorney with whom you usually work.