

Marriage Rights after the Defense of Marriage Act

By David J. Gordon, CFP®, CIMA®

Acceptance and legislative recognition of same-sex marriage is gaining momentum in states across the country. With the Supreme Court's June 2013 ruling in *United States v. Windsor*, attorneys and other advisors would be well-served to become familiar with the issues, benefits, responsibilities, and planning opportunities facing the lesbian, gay, bisexual, and transgender (LGBT) community.

Public attitudes and perceptions about same-sex marriage have changed more quickly than possibly any other social and legal issue in the country. A 2013 Quinnipiac University poll found that 56 percent of households supported same-sex marriage. In 2003, the same poll found that 60 percent were opposed. In other words, in about a decade public opinion has undergone an almost complete reversal—from 60 percent opposed to nearly 60 percent in favor.

At the time of this article, 19 states and the District of Columbia recognized same-sex marriages. By comparison, only 10 years ago the number was zero. In terms of the U.S. population, this is even a bigger jump. One year ago only 20 percent of citizens lived in a marriage-equality state; now nearly 38 percent of the U.S. population lives in a state that permits same-sex marriage.

On the 150th anniversary of Abraham Lincoln's Gettysburg Address, which highlighted the struggle of "... a nation, conceived in liberty, and dedicated to the proposition that all men are created equal," the pace of change is astounding. It is no coincidence that Gov. Pat Quinn made Illinois the 16th state to allow same-sex marriages by signing the Illinois Religious Freedom

and Marriage Fairness Act into law on the very same desk that Lincoln used to draft his inauguration speech.

Equal-protection decisions, along with other seminal baby-boomer era cases, have redefined and advanced our understanding of liberty under the Constitution. In 1965, the Supreme Court extended the right to privacy to the use of contraceptives. In *Brown v. Board of Education* (1954), the Court ruled that *de jure* racial segregation violated the 14th Amendment's Equal Protection clause. In *Loving v. Virginia* (1967), all race-based restrictions on marriage were eliminated, and in *Lawrence v. Texas* (2003), the Court found that the 14th Amendment's Due Process clause invalidated laws criminalizing same-sex conduct between consenting adults.

Families of same-sex couples, however, essentially were ignored under the law until *Romer v. Evans* (1996). The U.S. Supreme Court ruled that a government could not completely ignore or exclude an individual or a set of families from the protections of law under the Equal Protection clause of the U.S. Constitution. Immediately a controversy arose as to whether a state might be required to recognize same-sex marriages, if one state allowed it. When the Federal Defense of Marriage Act (DOMA) was enacted a few months later, it was partly in response to this backlash and it included a clear provision stating that same-sex marriages would not be recognized under federal law.

The Supreme Court's June 2013 ruling regarding DOMA in the *United States v. Windsor* has important social, economic, and legal consequences. By legalizing same-

sex marriages under federal law, this far-reaching ruling immediately impacts the nation's roughly 114,000 legally married LGBT couples who previously were denied federal benefits. It applies to more than 1,000 federal statutes, including hundreds governing veterans' benefits, tax laws, and family medical leave provisions. In addition, the U.S. Treasury Department and the Internal Revenue Service (IRS) have affirmed that same-sex couples who marry or already are legally married will retain eligibility for many benefits, even if they live in or move to states that don't recognize their unions.

The Windsor Case

Edith Windsor and Thea Spyer were residents of the State of New York. The two women, unable to legally marry in New York, nonetheless had been together for some 40 years. During that time, they effectively hid their relationship from the public and their employers. However, in 2007, Spyer was in declining health with multiple sclerosis and the couple travelled to Ontario, Canada, where they were legally married. The U.S. government did not recognize their marriage, but the State of New York did recognize valid marriages from other jurisdictions.

In 2009, Spyer died and the U.S. government imposed an estate tax of some \$363,000 on the inheritance received by Windsor. Had Windsor been a man, she would not have had to pay this tax. The federal estate-tax provision that exempts transfers between spouses from taxation would have applied. DOMA, however, required that for purposes of any federal statute, any reference to spouse or marriage referred only to a heterosexual marriage. As a result, Windsor filed suit and after exhaustive appeals she won the

June 2013 Supreme Court decision that invalidated parts of DOMA.

The Court's decision warrants careful consideration because it found that DOMA was a "discrimination of an unusual character," as prohibited by the 14th Amendment. Before DOMA, for nearly 200 years, the court had deferred to state definitions of marriage unless there was a legitimate federal interest. In this case, the Court decided that the statute's purpose and effect was to treat same-sex couples unequally and that it did not serve a legitimate government purpose. The Court went on to describe the negative impacts to same-sex families and their children, including deprivation of numerous benefits and privileges.

Equal Protection and Due Process

Chief Justice John Roberts' dissent in *United States v. Windsor* rested on federalist grounds and advocated independence for the states in these matters as in other domestic-relations matters. The Supreme Court majority opinion, written by Justice Anthony Kennedy, instead found that state decisions were subject nonetheless to constitutional restrictions and limitations. Citing the 1967 case of *Loving v. Virginia*, Kennedy pointed out that although the state courts could decide who may marry, states prohibiting interracial marriage violated the U.S. Constitution. By extension, the same lack of constitutionality extended to same-sex marriages.

The *Windsor* opinion specifically does not say whether same-sex couples must be permitted to marry, but it did decide that Section III of the Federal Defense of Marriage Act unconstitutionally discriminated against same-sex couples. What remains to be decided is whether states may discriminate against same-sex couples in their marriage laws. Following *Windsor*, the Department of Justice announced that the Obama administration had instructed all federal agencies to examine whether the ruling applied to any (of more than 1,000) statutes and regulations referring to married couples, spouses, etc. Their instructions are, as soon as possible, to issue guidance as to the impact of the invalidation of DOMA.

Review of the impact is ongoing, but significant findings already have changed the way same-sex marriages are viewed at the federal level:

- The IRS has issued guidance that same sex-couples should file as "married." Additionally, same-sex couples currently married may, at their option, amend their past tax returns (within the three-year statute of limitations) and re-file as married, even if the couples lived in states that did not recognize same-sex marriages.
- The Social Security Administration now allows spousal benefit claims for same-sex couples living in states that recognize their marriages and has encouraged people in other states to file their claims in the event they may be recognized in the future.
- Immigration law now treats same-sex couples the same as opposite-sex couples.
- For the many employer-provided retirement plans that fall under the mandates of the Employee Retirement Income Security Act of 1974 (ERISA), the Department of Labor has indicated that couples should be treated as married if their marriages are recognized in any state in the country.

Civil Union vs. Domestic Partnership

Recognition of nontraditional marriage, civil unions, and domestic partnerships is growing rapidly among the states. It should be noted, however, that most states have adopted amendments to their state constitutions or passed statutes that define marriage as between a man and a woman.

In addition to the 19 states permitting marriage, four other states have nonmarital forms of recognition: Oregon, Colorado, Nevada, and, with a more limited set of rights and obligations, Wisconsin. Civil unions generally provide all of the rights and obligations of marriage, and domestic partnerships can be found in two formats, including those that (like Wisconsin's) have a more limited scope.

Windsor and Investing

Many investment products provide unique benefits to spouses including annuities, life

insurance, long-term care policies, and retirement plans. Spousal continuation provisions can provide a stepped-up death benefit plus continuation of other guarantees and benefits that otherwise might come only at higher cost. Longevity and the prospects of increasing healthcare costs have given rise to riders such as lifetime withdrawal benefits that can provide for guaranteed income for the remainder of both spouses' lives. Given today's low interest-rate environment, many insurance companies have increased the cost of benefits or reduced them outright. The ability to take over an earlier-issued policy could be an important decision.

From a planning perspective, the overturn of DOMA creates opportunities, including the following:

- The *Windsor* case was tried to address federal estate taxes. Special provisions eliminate federal taxation of inheritances received by surviving spouses. Distributions on qualified assets upon death provide that surviving spouses can roll over assets into traditional individual retirement accounts. In the case of younger spouses, this marital rollover opportunity may allow for additional years of tax deferral and can provide a valuable tax-arbitrage opportunity.
- The unlimited marital deduction can eliminate taxes on gifts between spouses, including couples who wish to gift or share title or assets without equal contribution of both parties. For example, placing a home in joint tenancy without a fair-value contribution from the other tenant is considered a taxable gift, but the application of the spousal gifting allowance avoids the tax.
- Federal tax law provides every person with a \$5.25 million estate-tax exemption (\$10.5 million for married couples in 2013, rising to \$5.34 million and \$10.68 million in 2014). This exemption is portable, which means that when a spouse dies, any unused credit passes to the surviving spouse. As a result, a couple conceivably could gift \$1 million to their child but only reduce their exemption by \$500,000 each. In short, the

overturn of DOMA enables same-sex married couples to use their overall assets as a team, further leveraging their tax advantages.

- A refund request may be made in connection with overpayments of income and employment taxes on employer-provided health benefits and fringe benefits that are excludable from income based on an individual's marital status. The employee can treat employer-provided benefits with respect to a same-sex spouse as excludable from income. In addition, if the employee made pre-tax contributions under a cafeteria plan for his or her coverage and made after-tax contributions for his or her same-sex spouse, then the employee may treat the after-tax contributions as pre-tax contributions.
- Probate and transfer taxes can be very expensive, especially where the transfer is not to a spouse. A large home or business interest, or a limited liability company/limited liability partnership interest, now may be exempt from transfer tax in states where nonspousal transfers are taxed.
- Clients who engaged in advanced or complicated tax strategies that were invalidated may now use the Innocent Spouse Rule as a defense to prosecution as a co-conspirator.

Current Litigation

Although the Supreme Court decides which cases it wants to hear, it can expect an increasing number of these issues to be moving in its direction. At present, filings in state courts on Equal Protection grounds show dozens of pending lawsuits nationwide. They consist of three main types of lawsuits:

1. Dignitary harms, where nearly all of the state rights are allowed but the status of marriage is not. This stigmatizes partners and children and prevents access to federal levels of protection not recognized by domestic partnership and civil unions. Such a case from Nevada is before the 9th Circuit Federal Court of Appeals.
2. Loss of marriage rights and obligations in cases where a couple lived in a state recognizing marriage and later moved

to a state that does not. Such a case is now before a federal court in Tennessee, which has no domestic partnership or civil union opportunities. Four couples who accepted jobs in Tennessee are arguing that the price paid for moving to that state is loss of marriage in violation of the constitutional right to travel and move among states.

3. Suits seeking the affirmative right of same-sex couples living in states without the right to marry to a federal constitutional right to marry. These claims basically challenge any same-sex marriage restrictions and are based on equal protection, fundamental rights, due process, and more.

Beyond these, marriage legislation and ballot initiatives are proposed in many states that already have extended nonmarital forms of recognition (unrecognized at the federal level) for same-sex couples. Change in this arena is coming fast, and advisors who are aware of these developments and ready to respond will be able to better serve their LGBT clients. ●

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