

## For Some, Saying 'I do' Remains Difficult

*Law360, New York (July 09, 2013, 1:04 PM ET)* -- The U.S. Supreme Court's decision in *Windsor v. United States*, striking down the federal law limiting the definition marriage to one man and one woman, answers one important question but raises many more. The decision opens many rights, benefits and privileges conferred via federal statute to couples in state-sanctioned same-sex marriages, but access to those federal advantages still may be hampered for couples who live in states that do not recognize same-sex marriage.

*Windsor* also leaves open what the court may do about the federal statutory provision allowing states to decline to recognize same-sex marriages that are valid in the states where they are performed. These outstanding questions create a thicket of legal issues for state and municipal government entities, employers, insurers, health care providers and others that the courts will undoubtedly wrestle with in the coming years.

### Overview

The court held in *Windsor v. United States* that the provision in the federal Defense of Marriage Act (DOMA) that defines marriage for purposes of federal government actions as being between one man and one woman violates the due process and equal protection principles in the Fifth Amendment to the U.S. Constitution. By refusing to recognize the marriages that are otherwise valid in 13 states and the District of Columbia, DOMA forced same-sex couples to live as married for state law purposes but unmarried for federal law purposes.

Same-sex couples and the tens of thousands of children raised by same-sex couples were deemed second-tier and visibly and publicly burdened by DOMA. The court ruled that DOMA violated the Fifth Amendment by displacing the protection certain states established by recognizing same-sex marriages and treating same-sex marriages as less respected than others.

*Windsor* opens many federal programs and benefits — ranging from Social Security to veterans' benefits to housing programs to the option to file joint federal income tax returns and hundreds more — to same-sex married couples. But as other commentators have written, same-sex couples whose marriages are valid in the states where they were married may have difficulty obtaining some of those federal benefits and advantages if they live in states that do not recognize same-sex marriages.

It will take some time to sort out how existing statutes (such as the provision of the Social Security Act limiting spousal benefits to marriages recognized in the state of the claimant's residence) will apply and whether those laws will be changed.

Although the court's companion case to *Windsor*, *Hollingsworth v. Perry*, opened the door for gay marriage in California, it did so on narrow procedural grounds and did not address whether there is any federal constitutional right for same-sex couples to marry.

Taken together, Windsor and Hollingsworth leave intact the split between states that recognize same-sex marriage and those that do not (which some have dubbed “mini-DOMA states”), perpetuating existing complications and potentially creating new ones for businesses and other entities that do business across state lines.

Although Windsor lifts many of the burdens DOMA placed on same-sex couples in the areas of government health care benefits, bankruptcy laws governing domestic-support obligations, filing state and federal taxes and veterans’ burials to name a few, Windsor did not alter the applicability of state-conferred rights, benefits and obligations to same-sex marriages.

And, in situations where federal programs currently defer to state marriage laws, access to federal benefits for same-sex married couples residing in mini-DOMA states may continue to be denied. Mini-DOMA states may continue to refuse to recognize same-sex marriages for purposes governed by state laws, such as inheritances, taxes, domestic abuse, adoptions, child custody disputes, hospital visitations and medical decisions.

In another section of DOMA (Section 2), Congress has allowed mini-DOMA states to refuse to recognize same-sex marriages sanctioned by other states' laws. DOMA Section 2 was expressly not addressed by Windsor.

Currently, about three dozen states do not recognize full marriage rights for same-sex couples. DOMA Section 2 has different legal grounding than the portion struck down in Windsor, Section 3. The Full Faith and Credit Clause requires states to recognize and respect the "public acts, records, and judicial proceedings" of other states, subject to regulation by Congress.

Whether this clause regulates one state's recognition of another state's marriage is not clearly established, but the portion of the clause giving Congress regulatory authority over the issue may provide additional justification for DOMA Section 2.

But it is difficult to see how Section 2 of DOMA would withstand constitutional scrutiny in light of Windsor's strong language about how DOMA Section 3's failure to respect state-sanctioned same-sex unions deprived those marriages of dignity and respect and were apparently rooted in the desire to diminish same-sex marriages.

Additionally, if the federal government must respect states' decisions in the area of marriage because those state decisions are within their sphere, there would be no basis for mini-DOMA states to refuse to respect those same decisions under principles of state respect for other states' decisions. We are aware of no litigation on Section 2 that is likely to reach the U.S. Supreme Court soon, so this issue is likely years away from final resolution.

### **Looking forward**

Whether DOMA Section 2 survives constitutional scrutiny is a question for other cases. The court could also directly address whether the mini-DOMA laws limiting marriage to one man and one woman are constitutional — essentially determining whether there is a constitutional right to same-sex marriage.

Portions of Windsor could support more than one outcome: On one hand, Windsor stressed that states maintain authority to define marriage, but on the other, it holds that denying same-sex individuals the full benefit of marriage degrades and demeans those individuals for no legitimate state purpose.

The practical results of the decisions are as follows:

- The 1,000-plus federal statutes touching on marriage will apply to same-sex marriages, although some benefits may not be available to same-sex spouses who reside in states that do not recognize same-sex marriage and implementation of some changes may take time.
- Gay marriages are being performed and recognized as valid in California.
- For employers, the federal Employee Retirement Income Security Act will now include same-sex marriages when it uses the term “marriage” or spouse, including for provision of a joint and survivor spousal annuity, spousal consent to changing a named beneficiary, using retirement dollars for a spouse’s medical expenses, tuition or funeral costs and the qualified domestic relations orders received in a divorce.
- Federal taxation laws will now include same-sex spouses domiciled in states that recognize same-sex marriages for purposes of filing jointly, the marriage penalty, tax withholding and the taxability of employer-provided health care benefits for individuals in same-sex marriages.
- Married same-sex couples who move to states that do not recognize same-sex marriage will encounter the same difficulties with regards to state-provided benefits as before, including the ability to obtain a divorce and issues under state taxation laws.
- Immigrants in same-sex marriages will be able to obtain the same benefits under immigration laws as those in opposite-sex marriages.
- But eligibility for Social Security survivor benefits will be determined on the marriage’s validity in the state in which the couple lives when a spouse dies.

The questions related to same-sex marriage that remain include the following:

- Must employers in states that do not recognize same-sex marriages recognize same-sex marriages performed elsewhere for purposes of the provision of employee benefits governed by ERISA?
- Will the Internal Revenue Service recognize for federal taxation purposes same-sex couples married in a state recognizing same-sex marriage but domiciled in a mini-DOMA state?
- To what extent will states that do not recognize same-sex marriage attempt to resist, and be able to resist, administering federal benefits (such as Medicaid, food stamps, etc.) in a manner that recognizes same-sex marriage?
- Which states will continue to refuse to recognize same-sex marriages?
- Which states that refuse to recognize same-sex marriages will recognize same-sex marriages performed in other states?

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