United States v. Windsor and Charitable Planned Giving for Same-Sex Couples

By
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On June 26, 2013, the United States Supreme Court issued a decision in United States v. Windsor that significantly impacts same-sex couples and their families. The Obama Administration has begun implementing the decision which held that portions of the so-called Defense of Marriage Act are unconstitutional. On August 29, 2013, the Internal Revenue Service issued Revenue Ruling 13-17 providing guidance on how the IRS will implement the decision. This article summarizes the case, analyzes how they apply to same-sex couples in a variety of situations, provides estate planning tips, and discusses the decision’s impact on charitable planned giving for same-sex couples.

I. United States v. Windsor

In United States v. Windsor, 570 U.S. __, 133 S.Ct. 2675 (2013), a 5-4 decision with Justice Kennedy writing for the majority, the Supreme Court held Section 3 of DOMA, which defines marriage as between a man and a woman, unconstitutional. The federal government enacted DOMA in response to the first marriage case to gain traction in the United State.

In 1993, the Supreme Court of Hawai‘i vacated a decision to dismiss a marriage case brought by gay and lesbian couples and remanded the case to the trial court ordering it to apply a higher level of scrutiny (“strict scrutiny”) when evaluating the claims asserted by the plaintiffs. Baehr v. Lewin, 74 Haw. 530 (1993). While the plaintiffs won in the trial court, Baehr v. Miike, 1996 WL 694235 (unpublished), the Supreme Court of Hawai‘i never addressed the merits of the
case because the state passed a constitutional amendment, Hawaii Const. Art. 1 §23, prohibiting same-sex marriage in 1998.

However this case generated significant publicity and in 1996 Congress and President Clinton passed the so-called Defense of Marriage Act (“DOMA”) (Public Law 104-199). Although no state or country allowed same-sex marriage at that time, Congress still found trouble brewing:

“[I]t is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. …H. R. 3396 is appropriately entitled the ‘Defense of Marriage Act.’ The effort to redefine ‘marriage’ to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.” H. R. Rep. No. 104–664, pp. 12–13 (1996). The House concluded that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially JudeoChristian) morality.”


DOMA added two parts to the U.S. Code. Section 2 of DOMA, which was not at issue in *Windsor*, explicitly allows one state to not recognize a same-sex marriage performed in another state or jurisdiction. Section 3 of DOMA, the statute addressed in *Windsor*, prohibited the federal government from recognizing any same-sex marriage:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. §7. This Section of DOMA has prevented married same-sex couples from receiving over 1,000 benefits and obligations from the federal government.

In 2009, Thea Spayer died naming her wife, Edie Windsor, as executor and sole beneficiary of her estate. Because DOMA prevented the federal government from recognizing their marriage, Spayer’s estate paid more than $350,000 in estate taxes. Windsor sued on behalf...
of the estate for a refund claiming Section 3 of DOMA is unconstitutional. Windsor won in the district court and the 2nd Circuit Court of Appeals which both found Section 3 of DOMA unconstitutional and ordered the United States to pay a refund.

During the litigation, the Obama Administration declined to defend DOMA after the Justice Department determined the law to be unconstitutional. Although the administration stopped defending DOMA in court, it continued to enforce DOMA. In response, the Speaker convened the Bipartisan Legal Advisory Group (BLAG) who voted along party lines to hire Paul Clement and Bancroft PLLC to represent the House of Representatives in defending DOMA.

In this case, the Supreme Court first determined that the United States had standing to appeal the appellate court’s ruling. Then the Court declared that Section 3 of DOMA violated the Constitution’s Equal Protection and Due Process Clauses. Consequently, the federal government must now recognize marriages between same-sex couples. The Court specified that the decision applies to lawful marriages (currently performed in 13 states and the District of Columbia), but did not address whether the Constitution provides a fundamental right to marry. In their dissents, Justice Roberts emphasized that the majority opinion only applied to actual marriages, Justice Scalia speculated that the decision would lead to a constitutional right to same-sex marriage, and Justice Alito argued that there is no constitutional right for same-sex couples to marry.

II. Effects of Supreme Court decision

The primary result of United States v. Windsor is to shift the focus back to the states. In its decision, the Court made clear that the federal government must recognize legally performed marriages between same-sex couples but left enforcement up to the President (and Congress). Finally Section 2 of DOMA still exists ensuring that states do not have to recognize other states’ same-sex marriages. The combination of Section 2 of DOMA and the United States v. Windsor
decision creates an unusual complication. The rights and obligations given to same-sex couples may depend on their marital status and state of residency. There are now 4 categories that couples in legal relationships can be placed.

A. Married couples residing in states with marriage equality

The greatest impact of this decision is on same-sex couples who are married and reside in states recognizing their freedom to marry. At the state and federal levels, these couples now receive the same benefits and obligations as married different-sex couples.

This rings true even when a statute specifically applies only to different-sex couples. For example, on September 4, 2013, Attorney General Eric Holder sent a letter to the Speaker of the House stating the Executive Branch has determined 38 U.S.C. §101(3) and 38 U.S.C. §101(31) are unconstitutional in light of the *Windsor* decision and will not enforce them. Both statutes relate to the definition of spouse for the Department of Veterans Affairs, and both statutes only recognize spouses who are married to someone of a different sex.

B. Couples who obtained civil unions or domestic partnerships

Many states offer the rights and benefits of marriage without the name marriage. Civilly-united couples who live in states allowing civil unions or domestic partnerships offering some or all of the benefits and obligations of marriage (collectively “civil unions”) may be surprised that *United States v. Windsor* likely will not impact their relationships. These couples will continue to receive all the state benefits and obligations of their legal relationships so long as they live in the state recognizing their civil unions. However, it is unlikely they will receive any federal benefits or obligations because the Supreme Court limited its ruling to lawful marriages.

The Supreme Court stated that “[t]his opinion and its holding are confined to those lawful marriages.” *United States v. Windsor*, 570 U.S. ___ (2013), No. 12-307 at 26, 133 S.Ct. 2675 at
If there were any question as to whether the term “marriages” in the opinion includes civil unions, the Court put them to rest by identifying the states with lawful marriages as “New York, in common with, as of this writing, 11 other States and the District of Columbia…” *Id.* at 14, 133 S.Ct. at 2689.

The Office of Personnel Management (OPM) and the Internal Revenue Service are following the Supreme Court’s lead. Both agencies have declined to recognize civil unions, and in Revenue Ruling 13-17, the IRS stated:

For Federal tax purposes, the term “marriage” does not include registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are not denominated as a marriage under that state’s law, and the terms “spouse,” “husband and wife,” “husband,” and “wife” do not include individuals who have entered into such a formal relationship. This conclusion applies regardless of whether individuals who have entered into such relationships are of the opposite sex or the same sex.

While other federal agencies may take a different approach, none has announced doing so as of this writing.

C. **Married couples who are domiciled in a state with civil unions or domestic partnerships**

Some couples married in states that allow marriage, but currently reside in a state that recognizes the marriage as a civil union. While these couples will continue to receive all the state benefits and obligations afforded by the state’s domestic partnership or civil union laws, the extent these couples receive the federal benefits and obligations of marriage remains to be seen.

Shortly after the Supreme Court issued *United States v. Windsor*, President Obama issued a statement saying he had directed his Cabinet to ensure the decision “is implemented swiftly and smoothly.” (White House Press Release [http://www.whitehouse.gov/doma-statement](http://www.whitehouse.gov/doma-statement), June 26, 2013). But with numerous federal agencies and over 1,000 federal benefits and obligations provided to spouses, determining the particular federal benefits available to married same-sex
couples domiciled in states not recognizing their marriage will be an arduous task. To complicate matters, not every agency had a policy on this issue before the fall of DOMA.

Ultimately, whether the federal government will give a particular benefit to a married couple living in a state that does not recognize their marriage depends on whether eligibility for the benefit is determined by where the couple is domiciled or where the couple married (the “place of celebration”). Unfortunately each federal agency has its own rules on this issue.

One example of an agency to using the place of domicile for the definition of spouse is Social Security Administration. For persons applying for social security survivors’ benefits, the United States Code states:

[an applicant is the wife, husband, widow, or widower of a fully or currently insured individual... if the courts of the State in which such insured individual is domiciled... would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died.

42 U.S.C. §416(h)(1)(A)(i). The Social Security Administration announced it is working with the Department of Justice to determine what this means for same-sex couples. (Social Security Administration Press Release, July 12, 2013, [https://ssa.gov/pressoffice/pr/doma-pr-alt.pdf](https://ssa.gov/pressoffice/pr/doma-pr-alt.pdf)). But if the U.S. Code must be changed to allow couples domiciled in states not recognizing their marriage to obtain benefits, it will require an act of Congress which is unlikely to happen quickly.

On the other hand, the IRS issued guidance on the effects of the *Windsor* case through a revenue ruling. On August 29, 2013, the Internal Revenue Service announced in the previously mentioned Revenue Ruling 13-17 that it will follow the place of celebration rule. This is based on Revenue Ruling 58-66 that follows the place of celebration rule for common law marriages. The IRS also cited “uniformity, stability, and efficiency in the application and administration of the
Code” for reasons to use the place of celebration. Regardless of the controlling law, most agencies will likely issue press releases instructing same-sex couples on their positions in the upcoming months.

D. Married couples who reside in states without marriage or civil unions

Couples who married but now reside in states with laws prohibiting the state from recognizing same-sex marriages will not receive any state benefits or obligations of their marriage. For federal benefits and obligations, the same analysis described above for couples who married but are domiciled in states recognizing civil unions will apply to these couples.

Along with the benefits given to these couples by agencies that follow the place of celebration rule, they will also face some complications. For example, the IRS now requires same-sex couples who are married to file their tax returns as married filing jointly or married filing separately. This may require couples who reside in states with laws prohibiting their marriages to create pro forma federal income tax returns to complete their state income tax returns.

III. Tips for Estate Planning

In addition to the IRS announcing in Revenue Ruling 13-17 that the place of celebration rule applies to marriages between same-sex couples, they also stated gender-specific terms will be applied in a gender-neutral manner. This ensures that same-sex couples have access to all of the benefits of their marriage, and all married couples have the same benefits and obligations under the Internal Revenue Code.

Couples who benefit from the changes allowed by United States v. Windsor – such as lowering their tax burden by filing jointly or using the unlimited marital deduction – may be eligible for a refund for taxes paid in prior years or may be able to reclaim some of their unified
credit. In these cases, taxpayers may file amended returns so long as the statute of limitations has not run on the originally filed return.

Some practitioners may consider using the marital deduction when reporting prior years’ gifts on a current year’s estate or gift tax return. When filing Forms 706 and 709, taxpayers are required to report adjusted taxable gifts and prior year’s gifts respectively on the tax returns before applying the unified credit. Revenue Ruling 13-17 requires “all items required to be reported on the return or claim that are affected by the marital status of the taxpayer must be adjusted to be consistent with the marital status reported on the return.” But if the statute of limitations has run on the prior years’ returns, it is unclear whether the marital deduction may be applied when reporting such gifts on the current tax return. While Revenue Ruling 13-17, instructs taxpayers to apply the marital deduction consistently throughout the return, Treas. Reg. §25.2504-2(b) prohibits altering any gift amounts after the statute of limitations has run. This inconsistency may provide an opportunity for taxpayers to litigate the issue to potentially reclaim their unified credit or apply taxes previously paid to other gifts.

In some instances, couples may have filed returns where reporting their marriage would have had a detrimental effect. Even if the statute of limitations has not run on these returns, taxpayers are not required to amend the return because the ruling is applied prospectively beginning September 16, 2013.

Some couples’ planning strategies may have included creating trusts with terms that were motivated by the fact that the couple could not use the unlimited marital deduction. Now that married same-sex couples can use the unlimited marital deduction, a couple may wish to terminate these trusts. In most states, they can terminate these trusts if the grantor and all beneficiaries agree. If the grantor has died or a beneficiary objects, a surviving spouse or couple
may also be able to terminate these trusts because the trusts’ purpose of tax efficiently transferring assets between partners has been frustrated by the availability of the unlimited marital deduction. Practitioners should also consider claims to terminate these trusts through equitable deviation because unknown and unanticipated circumstances make the trust terms inconsistent with its purpose.

If the grantor and beneficiaries want the trust to continue but the grantor retained an interest or power that combined with the spouse’s recognition triggers unfavorable valuation rules to apply to property included in the estate, then the trusts must be amended before the grantor’s death to prevent the inclusion. In these instances, it may be possible to decant the trust, reform it based on changed circumstances, or reform it under the doctrine of equitable deviation.

Because Section 2 of DOMA is still effective, all same-sex couples must continue to take certain precautions to protect themselves in other states. First, same-sex spouses should carry powers of attorney for health care when traveling to ensure that the spouses can continue making health care decisions for one another in states that are hostile to their relationship. Second, same-sex parents who are not the birth parent must obtain adoptions for their children to be recognized as a parent in all 50 states. Birth certificates are not enough; adoption orders are the only documents showing parentage that are entitled to full faith and credit.

IV. Charitable Planned Giving

DOMA’s repeal means same-sex couples should have their estate plans reviewed for potential changes, and the charitable giving portion of their estate plan is no exception. Fortunately the repeal of DOMA does not directly affect charitable planned giving, and same-sex couples can continue to give in the same ways they have in the past. However, there may be some indirect effects on charitable giving. Because gifts and inheritances to a same-sex spouse...
now qualify for the marital deduction, there may be couples who have life insurance or other liquid assets set aside to pay estate taxes that can be used for charitable purposes.

Donors may see indirect benefits from making these charitable gifts as well. When a donor creates a charitable remainder trust and names his same-sex spouse as the income beneficiary, the gift to the spouse will now qualify for the marital deduction. Also married same-sex couples can now both create and contribute property to the CRT; PLR 9547004 may have caused some practitioners to hesitate doing so before this guidance.

Same-sex couples also receive benefits in charitable gift annuities. When a donor purchases a CGA for a same-sex spouse, the gift now qualifies for the marital deduction. Likewise, the marital deduction will apply to joint and survivor annuities that are included in the first-to-die spouse’s estate.

*Windsor* and the marital deduction may also have negative effects on charitable gifts. One example where the unlimited charitable deduction may negatively impact charitable giving is through the use of formula clauses in estate plans. A potential plan for an individual in a same-sex relationship transfers the maximum amount of the individuals’ estate to their partner that can be transferred tax-free, and gives the balance to charity. With the repeal of DOMA, the couple will have an unlimited marital deduction which means the plan would no longer leave any assets to charity. These types of plans should be reviewed to ensure the couple’s desire to make charitable gifts is still part of their legacy.

Couples can continue to include charitable gifts in their estate plans by making testamentary gifts at the death of the first spouse or through a qualified terminable interest property trust. With the QTIP trust, the charity will not receive the gift until after the second
spouse dies. If a surviving spouse is not a U.S. citizen, then the couple should use a qualified domestic trust (QDOT) to accomplish the same thing but with slightly different requirements.

V. Next Steps

Windsor is an important victory for the LGBT community and its allies. Revenue Ruling 13-17 ensures all married same-sex couples can enjoy the full federal tax effects of the decision. But not all the federal benefits of marriage will be felt in by married same-sex couples domiciled in states that do not recognize their marriages. Couples in civil unions or domestic partnerships may not feel any effects. And all same-sex couples must continue to take steps to protect their relationship when traveling to other states.

After United States v. Windsor, the fight for equal rights for same-sex couples has returned to the states. Organizations representing same-sex couples have announced new or soon-to-be filed lawsuits in Pennsylvania, North Carolina, and Virginia, presumably intending to rely on United States v. Windsor as precedent. These lawsuits join others in Illinois, Nevada, New Jersey, and New Mexico.