

## **UNITED STATES SUPREME COURT SAME SEX MARRIAGE CASES – WHAT PENNSYLVANIA PRACTITIONERS NEED TO KNOW**

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On March 27, 2013, the United States Supreme Court will hear argument in two landmark cases involving the very controversial issue of same sex marriage. The question we face as Pennsylvania practitioners is how these cases will impact the issue of marriage in the State of Pennsylvania, if at all. The constitutionality of the Defensive Marriage Act is at issue in both cases but in very different ways. The Defensive Marriage Act or DOMA is a federal law that was enacted in 1996. 1 U.S.C.A. Section 7, 28 U.S.C.A. Section 1738(C). Section 3 of DOMA defines “marriage” and “spouse” for all purposes under federal law to exclude marriages between persons of the same sex, including marriages recognized under state law. In other words, DOMA trumps the state’s determination that a same sex couple is married and says they are not married for purposes of federal laws and programs. The word “marriage” means only the legal union of a man and a 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. This federal law has caused a lot of confusion in states wherein same sex marriage has been recognized and is now legal.

A typical example of the federal DOMA creating confusion is in the case of *United States v. Windsor*. 699 F.3d 169 (2d Cir. 2012). This case involves a same sex couple, Edie Windsor and Thea Spyer, who shared their lives as a same sex couple in New York City for 44 years. They were engaged in 1967 and finally married in Canada in May 2007. Subsequently, the State of New York recognized their marriage as a valid, legal marriage. Thea passed away two years after the parties were married after living for decades with multiple-sclerosis. At the time Thea died, the federal government refused to recognize their marriage and taxed Edie’s inheritance from Thea as if they were strangers. Under federal law, a spouse who dies can leave her assets, including the family home, to the other spouse without incurring estate taxes but this was not so for Edie Windsor. The federal government did not recognize Edie and Thea’s relationship as a legal marriage, therefore, the inheritance Edie received from Thea was taxable. The federal government did not recognize their marriage as valid because of Section 3 of DOMA. Edie Windsor challenges the constitutionality of DOMA and seeks a refund of the inheritance taxes she had to pay. She claims DOMA violates the equal protection clause of the United States Constitution because it recognizes heterosexual marriages and not same sex marriages despite the fact that the State of New York treats all marriages the same.

It is important to understand what this case is **not** about. This case does not ask the Supreme Court to recognize a federal right for same sex couples to marry. It does not challenge other state’s laws or amendments prohibiting same sex couples from marriage, otherwise known as mini-DOMA’s. In 1996 the Pennsylvania legislature amended the marriage statute to coincide with the federal DOMA, creating Pennsylvania’s own mini DOMA. Marriage in Pennsylvania is defined as a “civil contract by which one man and one woman take each other for husband and wife.” 23 Pa.C.S.A. Section 1102. *United States v. Windsor* does not address the constitutionality of a state’s mini DOMA’s and therefore the state of the law in Pennsylvania will not change regardless of the decision in *Windsor*. There is no doubt though, if Edie Windsor is

successful in her challenge for federal benefits under her state's law, it will have a far reaching affect on same sex couples across the country.

Even though the issue in the case focuses only on federal estate taxes, it could be interpreted to have an impact on other types of federal benefits afforded to married couples. The Supreme Court's ruling may then apply to married same sex couples living in other states that recognize their marriages as valid. The couples residing in those states may then be afforded the same federal benefits as married persons. The federal benefits may not then be limited to federal estate inheritance taxes but perhaps other federal benefits married couples enjoy such as Social Security benefits or even the ability to file a joint federal tax return as a married couple, something same sex couples cannot do at this time.

Perhaps the ruling in *Windsor* will go one step further. Perhaps it can be argued that residents of Pennsylvania who availed themselves of other state's laws to obtain a legal marriage should be afforded these federal benefits as well? A couple does not have to reside in New York to get married. The couple can travel to a jurisdiction that allows same sex marriage and obtain a valid legal marriage and then continue to reside in Pennsylvania. Pennsylvania may not recognize the relationship as a valid binding marriage but does the federal government have to do so if there is a favorable ruling in *Windsor* for the petitioner? At the current time same sex couples have the freedom to marry in six states (Massachusetts, Vermont, New Hampshire, Connecticut, Iowa, New York and the District of Columbia). In addition, ten countries now allow marriage for same sex couples (Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina and Mexico). Many residents of Pennsylvania travel to these jurisdictions to obtain a marriage and continue to reside in the state.

The second case being argued on March 27, 2013, does, in fact, involve the right to marry but it may be limited in its scope. *Hollingsworth v. Perry*, 671 F.3d 1052 (9<sup>th</sup> Cir. 2012) involves California's Proposition 8, a 2008 ballot initiative that amended the California Constitution to restrict marriage to opposite sex couples. Same sex couples could legally marry in California from June to November 2008 because in May 2008 the California Supreme Court held in the case, *In Re: Marriage Cases* 183 P.3d 384 (2012), that state statutes limiting marriage to opposite sex applicants violated the California constitution. The following month, same sex couples were able to marry in California. Then, in November 2008, the California's electorate adopted Proposition 8, a constitutional amendment that restored the opposite sex limitation on marriage. Following the passage of Proposition 8, three same sex couples filed suit in federal court saying Proposition 8 violated the United States Constitution's guarantee of equal protection and the right to marriage cannot be limited to heterosexuals.

While it may seem as though the opinion in *Perry* may be far reaching and extremely impactful on more states than just California, this may not be the case. The issue involved in *Perry* is actually very narrow as a result of the 9<sup>th</sup> Circuit opinion which may, in turn, limit the overall decision only to the situation found in California. *Perry* involves a situation wherein a state actually made marriage legal and then the electorate took this right away by the passage of Proposition 8. Proposition 8 overturned the California's Supreme Court decision by inserting language into the state's constitution limiting marriage to opposite sex couples only. How will the *Perry* decision impact residents of Pennsylvania regarding same sex marriage? If the United States Supreme Court keeps the focus narrowed to only the situation found in California then it is unlikely to impact Pennsylvania law. There can be no doubt, however, that if both *Perry* and *Windsor* have favorable outcomes for the petitioners then it is possible for more change to come. How soon the change comes to Pennsylvania is very questionable.

Both *Perry* and *Windsor* are being argued on March 27, 2013, with a decision expected in early June. For now, the law is unchanged in Pennsylvania. Same sex couples are not permitted to marry in Pennsylvania. They can travel elsewhere to obtain a legal marriage but Pennsylvania does not have an obligation to recognize the relationship as a valid marriage. This has created a lot of problems not only for the same sex couples but for the courts. There is currently no mechanism to dissolve these same sex marriages because although a couple can travel anywhere to get married, they cannot travel anywhere to get divorced. Most states require residency to obtain a divorce. If a same sex married couple residing in Pennsylvania wants to dissolve their marriage they cannot do so, they are stuck, unless they move to a jurisdiction that recognizes their marriage as valid. But, stay tuned, perhaps that tide is changing.