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What is remarkable for estate planners about the *Windsor* Supreme Court decision?

By Richard A. Sugar

Introduction

In a momentous decision issued on June 26, 2013 the United States Supreme Court in *U.S. v. Windsor*[1] issued its first substantive decision on the controversial subject of same-sex marriage. There were several remarkable aspects to the decision, not the least of which is the way the decision alters the landscape for administering thousands of Federal programs, and lays the groundwork for the companion controversy surely to arise about a state's ability to ban same-sex marriage. Moreover, the sweeping change at the Federal level left unanswered many important questions, like the effective date of recognition of same-sex marital status (in those states where same-sex marriage is legal), and how to decide which state's law should apply when couples have contacts with more than one state.

Summary

To summarize the case, first, and fundamentally, the Supreme Court decision affirmed the decisions of both the U.S. District Court and the U. S. Court of Appeals, by deciding that Congress's enactment of the Defense of Marriage Act ("DOMA") was unconstitutional under the 5th Amendment Due Process Clause, because Congress, in a spiteful and biased way, placed unacceptable limitations on marital rights of same-sex couples, when the states, where these couples lived, enabled same-sex couples to enjoy the same marital privileges as opposite-sex couples. Specifically, the court held that Edith Windsor, who obtained a lawful same-sex marriage in Canada, and now lived in New York, a state which recognized same-sex marriages as lawful, was able to claim a marital deduction for the inheritance she received as a surviving same-sex spouse, and avoid $363,000 of Federal estate taxes. In 1996, Congress passed DOMA which defined "marriage" only as a legal union between one man and one woman as husband and wife. Thus, DOMA had forbidden a same-sex surviving spouses from utilizing the Federal estate tax deduction, otherwise available to surviving spouses who could avoid the imposition of Federal estate taxes on inheritances passing to surviving spouses.

Majority rationale

The Supreme Court (by a majority 5-4 decision) held that DOMA seeks to injure a class of citizens that the states, in allowing same-sex marriage, had decided to protect. It said DOMA imposes a disadvantage and stigmatizes those citizens who enter into same-sex marriages made lawful by their state, and it interferes with the equal dignity of same-sex marriages. The Court claimed that such differentiation in marital status, made by Congress, demeans the couple, whose moral and sexual choices the Constitution protects and whose relationships the state have sought to dignify, and "it humiliates tens of thousands of children now being raised by same-sex couples." The majority's decision in *Windsor* found no legitimate purpose for DOMA, but rather its purpose was to disparage and injure that class of citizens which a state-based marriage law sought to protect.

The majority's decision wrapped its rationale in a kind of federalism, pointing out that, historically, the definition of marriage and domestic relations was a subject left to be decided by the states, not the federal government. The majority said "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages."

In defining the discriminatory reach of DOMA, the majority pointed out that there are over 1000 federal laws in which marital or spousal status is addressed as a matter of federal law. Of course, central to the *Windsor* case, DOMA prevents same-sex couples from enjoying the tax exemptions and deductions available to opposite-sex couples under the Federal Estate, Gift, and Generation-Skipping Tax Laws.

Companion case not addressed

While the majority opinion attempted to limit the scope of its holding to federal law which interfered with state rights to determine marital status, the rationale used was unmistakably broad enough to apply to the next case - whether a state's law prohibiting same-sex marriage can be constitutional. In fact, that case, *Hollingsworth v. Perry*, came up coincident with the *Windsor* case on June 26th, 2013, but the Supreme Court declined to rule in *Perry,* on technical, procedural grounds. However, the dissenting justices in *Windsor* made it perfectly clear that they oppose any extension of the majority's decision to a finding that States are constitutionally forbidden from banning same-sex marriage.

Remarkable procedural process

What was remarkable about *Windsor* was that the surviving spouse won in the District Court and also won in the Court of Appeals, both ruling that DOMA was unconstitutional, and the principal party on the other side of the case (the US Government) refused to defend the propriety of DOMA. During the litigation, the US Justice Department refused to defend DOMA in court because the Executive Branch did not think the law was constitutional. Nonetheless, the Executive Branch continued to enforce the law on an administrative level (hence the refusal to refund to Edith Windsor the estate tax paid). When the Attorney General of the United States notified the Speaker of the House that the Department of Justice would not defend the constitutionality of DOMA, the Bipartisan Legal Advisory Group of the US House of Representatives ("BLAG") was appointed to intervene in the litigation in order to defend the constitutionality of DOMA.

Scalia's dissent

What was equally remarkable was the dissent from Justice Scalia. It is hard to take seriously the well-meaning effort of the legal profession to restore civility to court proceedings, when a Supreme Court justice is so intemperate in expressing his opinion.

Scalia begins by claiming that the Supreme Court had no power to decide this case. He characterizes the majority's decision to undertake the case as "bearing no resemblance to our jurisprudence"; that it "effects a breathtaking revolution in our Article III jurisprudence." He says that the jurisdictional requirement relied on by the majority "is incomprehensible." He claims that the majority's action is "jaw-dropping" by asserting "judicial supremacy over the people's representatives in Congress and the Executive." He calls the process a "contrivance" and accuses the majority of entertaining the contrivance in order to "blurt out its view of the law."

After excoriating the majority on the procedural aspects of the case, Scalia then goes on to castigate them for the inferences that they make on the underlying constitutional question. He accuses the majority of "initially fooling many readers" into thinking that the case hinges on the principles of federalism. Scalia scolds that the underlying question lurking in the litigation is whether, under the equal protection and due process clauses, laws restricting marriage to a man and a woman are something to be reviewed under constitutional scrutiny. Scalia says "the sum of all the court's non-specific hand waving is that this law is invalid (maybe on equal protection grounds, maybe on substantive due process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a bare desire to harm couples in same-sex marriages." He goes on, in great hyperbole, to criticize the majority for inventing the rationale of their decision, which he warns will serve as the future underpinning for a forthcoming controversy about the power of the states to forbid same-sex marriages. Scalia characterizes the majority's rationale as "a disappearing trail of legalistic argle-bargle." Scalia concludes by saying that a hotly contested political issue of societal norms and values involving marriage are best left to the People, and not to the Judiciary to decide by legal reasoning without basis.

Alito's dissent

Justice Alito, in his dissent, stakes a strong position denying that the Constitution guarantees the right to enter into a same-sex marriage. He says "no provisions of the Constitution speak to the issue." Also remarkably, Justice Alito gives us a historical and sociological lecture on the development of the same-sex marriage movement. He, like Scalia, objects to the recognition of a new right, an innovative right that springs not from a legislative body elected by the people, but from unelected judges. Justice Alito clarifies the two competing views of marriage which are in dynamic conflict. He names the "traditional" or "conjugal" view, which, he says, sees marriage as an intrinsically opposite-sex institution, and contrasts it with the emerging view called the "consent-based vision of marriage," which he says is defined by a strong emotional attachment and sexual attraction marked by the solemnization of mutual commitment. He concludes by saying that the Constitution does not codify either of these views of marriage, so Congress and the states are entitled to enact laws recognizing either of the two understandings of marriage.

Justice Alito urges the Court to narrow the impact of its decision, and permit the people of each state to decide the question of marriage for themselves, and that the Court should stay out of the way, much like Justice Roberts' short and measured dissent and Justice Scalia's more extensive and impassioned dissent.

Finally, Justice Alito makes the following closing argument. If Congress has the power to enact laws providing special privileges and special benefits for its citizens, it should also have the power to define the categories of persons to whom the laws apply. I leave the reader to decide whether this simplistic statement begs the entire question presented.

Impact on estate planning

So where does *Windsor* leave the estate planner who deals with a same-sex couple?

First, there is the question of the effective date of this law change. Finding the law unconstitutional generally means it is unconstitutional *ab initio*. So same-sex couples should always have been treated as opposite-sex couples. Should the estate planner recommend that those clients file amended gift, estate, generation-skipping, or income tax returns (within the open years not closed by the statutes of limitation), in order to properly claim the benefits of marital status? Should those couples revisit the question of spousal rollovers of retirement benefits? Can the couple retroactively apply for spousal benefits under Social Security?

Second, since the question of marital status is left to the states, which state's law applies? If a same-sex couple were legally married in a state that recognized same-sex marriage, but then moved to a state that prohibited same-sex marriage, which law applies? Do issues of "full faith and credit" arise to require one state to honor the rules of a sister state?

Third, some states (like Illinois) recognize "civil unions" that in many ways are similar to legal marriage for state law purposes. Are civil union laws to be recognized in the same way as marital laws, so that the Federal government will be bound to recognize civil unions of same-sex couples in the same way they must now recognize legal marriage of same-sex couples?

Lastly, in recognizing the identity of "spouse" and "descendant" for administration purposes in estate planning documents, estate planners should now clarify these definitions, to assure that marital status of same-sex couples, and their progeny, are respected, or rejected, as the grantor (or beneficiaries) wish, independent of state law definitions. These changes are easily made in revocable documents. In irrevocable documents, consideration should be given to making these changes by decanting, virtual representation

agreements, changes of situs, or exercise of powers of trust protectors. Of course, the applicability of a particular situs to a trust is limited by "adequate contacts" the trust has with the applicable state, and caution is warranted in invoking this solution. ■

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1. *U.S. v. Windsor*, 570 U.S. _____ (2013), Docket No. 12-307.

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