The *Windsor* Effect: Why Many Same-Sex Couples Will Be Looking to Leave Florida and Where They May Go

Much buzz has followed the recent United States Supreme Court decision of *United States v. Windsor*, 570 U.S. ___ (2013), where the Court held that a federal statute providing that the term "spouse" only applies to a marriage between a man and a woman was unconstitutional based on the due process clause and equal protection principles under the Fifth Amendment. In its decision, the Court deferred the definition and regulation of marriage to the separate States. This effectively causes the marital status of taxpayers for the purposes of federal benefits and federal tax law to be determined based upon the laws of the state where the applicable taxpayer resides. Therefore, if the same-sex couple is considered to be legally married under the laws of the state of their residence, then such taxpayers will be considered as married for federal law purposes and will be afforded the rights and benefits available to married couples under federal law.

In 2007, Edith Windsor and Thea Spyer, two female New York residents, traveled to Ontario, Canada to lawfully marry under Canadian law. Although New York law did not allow same-sex marriages at the time, New York did recognize same-sex marriages that are legally performed in out-of-state jurisdictions.[1] In 2009, Ms. Spyer passed away and left her entire estate to Ms. Windsor, who sought to claim the federal estate tax marital deduction applicable to the property left to the surviving spouse of a decedent.[2] The Internal Revenue Service ("IRS") denied Ms. Windsor from claiming the marital deduction because, under federal law, the definition of a "spouse" only included a person of the opposite sex who is a husband or a wife, and Ms. Windsor was not considered as the surviving spouse of Ms. Spyer for the purposes of the federal estate tax law.

In 2013, the "Get Engaged" and "Equal Marriage Florida" organizations were formed with the goal of repealing Florida laws that ban same-sex marriage and civil unions, and these organizations are pursing amendments to the current Florida laws in the 2014 elections. Several public opinion polls have found that Floridians are split on the issue of legalizing same-sex marriage in Florida. Nevertheless, if Florida does not join the list of states that recognize same-sex marriage, then many same-sex couples will be compelled to leave the State for other states, where the effect of the *Windsor* holding can be enjoyed.

Section Three of the now unconstitutional federal Defense of Marriage Act ("DOMA") stated that a spouse referred only to a person of the opposite sex who is a husband and wife.[3] Thus, the IRS claimed that Ms. Windsor was not entitled to claim the federal estate tax marital deduction that she sought as the sole beneficiary of Ms. Spyer's entire estate through her filing of a federal estate tax return for Ms. Spyer's estate. Ms. Windsor paid $363,053 in federal estate taxes related to Ms. Spyer's estate, and subsequently filed a lawsuit in the Federal District Court for the Southern District of New York to pursue a refund of the federal estate taxes that she paid, claiming that Section Three

[1] *Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't 2008).
[2] Windsor, 570 U.S. at 1.
[3] 1 U.S.C.A. § 7 (West 2013)

of DOMA violated the principles of due process and equal protection incorporated in the Fifth Amendment.

The District Court allowed the $363,053 refund on summary judgment.[4] The Court applied the "rational basis test" to determine that DOMA's exclusion of same-sex marriages from the definition of marriage violates the equal protection clause of the United States Constitution. Accordingly, the Court found that the estate taxes were improper, based upon the unconstitutional denial of Ms. Windsor as the surviving spouse of Ms. Spyer.

The House of Representatives Bipartisan Legal Advisory Group ("BLAG") appealed the decision to the Second Circuit Court of Appeals, which affirmed the District Court's ruling. The United States Supreme Court granted certiorari, and affirmed the Second Circuit's ruling.

In this landmark decision, Justice Kennedy delivered the opinion of the Court, holding Section Three of DOMA to be "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[5] Kennedy wrote that "[t]he liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."[6]

The *Windsor* opinion answered the long-debated question of whether the federal government could define marriage as being between a man and a woman, when the laws of certain states allow same-sex couples to be considered as married if they reside there. In holding that the laws of the states govern the definition of marriage vis-a-vis their respective residents, the *Windsor* decision allows same-sex couples to be considered as married for income, gift, and estate tax purposes if their marriage is legally recognized by the state of their residence. However, because Section Two of DOMA was not challenged, states that do not recognize same-sex marriages can refuse to recognize same-sex marriages that are legal in other states, leaving many same-sex couples without a right to claim many federal and state benefits available to heterosexual marriages.

The Windsor Effect

The *Windsor* holding has left the door open to many attendant issues. Because state law can define marriage, there will now "effectively" be a two-tier marriage system throughout the country. Currently, thirteen states and the District of Columbia recognize same-sex marriages.[7] Additionally, there are other states that define marriage as a legal union between a man and a woman.[8] If a legally

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[4] *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).
[5] Windsor, 570 at 25.
[6] Id.
[7] California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota (as of August 1, 2013), New Hampshire, New York, Rhode Island (as of August 1, 2013), Vermont, and Washington currently recognize, or will recognize on August 1, 2013, same-sex marriages. In addition, same-sex marriage is legalized in five Native American tribes (Coquille, Little Traverse Bay Bands of Odawa Indians, Pokagon Band of Potawatomi Indians, Santa Ysabel Tribe, and Suquamish).
[8] Marriage is defined between a man and woman in 35 states. Twenty-nine of those states have the language in their

married same-sex couple's state of residence recognizes same-sex marriages, then the married couple will be permitted to access federal and state rights and benefits that are provided to spouses in heterosexual marriages. Conversely, if the state of a same-sex couple's residence does not recognize same-sex marriages, then the federal and state rights and benefits afforded to heterosexual spouses based on their marital status will not be available to a same-sex couple, regardless of whether the couple was legally married in a jurisdiction that recognizes same-sex marriages.

The issues that stem from this opinion are complex and abundant, as there are over a 1,000 federal statutes and countless federal regulations that pertain to marriages and spouses. Journalists and legal analysts have termed the issues to come from *Windsor* as "legal chaos." By defining "marriage" for the purposes of federal law, Section Three of DOMA controlled laws pertaining to Social Security, housing, taxation, criminal sanctions, copyright, and veterans' benefits, amongst many other areas. Id.

The unconstitutionality of Section Three means that same-sex couples who are legally married in jurisdictions that recognize same-sex marriage, and who reside in states that recognize same-sex marriage, will have access to the same rights granted to heterosexual marriages based on marital status. However, the *Windsor* holding will not have an immediate practical effect on same-sex couples who get married but reside in a state that does not recognize same-sex marriages. For example, a same-sex couple who resides in Florida will not be entitled to the rights and benefits afforded to heterosexual married couples, even if they were legally married in New York. As a result, many same-sex couples will be compelled to flee Florida in favor of jurisdictions which recognize same-sex marriage.

The authors have prepared a chart indicating the states that recognize same-sex marriage, and the tenants by the entireties laws, the state estate and gift taxes, and state income tax laws applicable to those states. It is important to note that none of the states that recognize same-sex marriage also offers tenants by the entireties ownership as a creditor protection tool, and has no state income tax or estate tax. While Delaware, the District of Columbia, Maryland and Vermont offer the creditor protection advantages of tenants by the entireties ownership, each of these states has either an income tax or an estate tax. Further, other than New Hampshire (which has an income tax only for dividend or interest income) and Washington (which has no state income tax), all of the states that recognize same-sex marriage also have a state income tax, with the highest top income tax rate varying from 5.3% in Massachusetts to 13.3% in California. If Florida were to recognize same-sex marriage, then it could become the preferred state for same-sex couples, due to tenants by the entireties laws and its lack of a state income tax or estate tax.

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state constitution, and the other six have the language in their statutes. The states which do not recognize same-sex marriage are Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.

Along with the rights now afforded to legally married same-sex couples comes important considerations, responsibilities and, perhaps, burdens. As Deborah Jacobs, a Forbes Senior Editor, notes in her article entitled "Married, With Complications", same-sex couples who choose to get married will now have to worry about the rights and responsibilities that stem from marriage, which can include obligations of support, inheritance and property rights upon death or divorce, and higher income tax brackets for married couples filing jointly.[9] Further, married same-sex-couples might be subject to a lower aggregate threshold for the 3.8% to apply, with the threshold for unmarried taxpayers being $200,000 ($400,000 for the same-sex couple in the aggregate), and the threshold for married taxpayers being $250,000.

Married same-sex couples will have to take into account their spouses' financial situation, his or her current medical liabilities (in some states), any unresolved legal issues and any other factors that influence their financial position.

Determining a Marriage as "Legal" for the Purposes of Certain Federal Agencies and Regulations

Determining whether the thousands of federal rights and regulations will apply to same-sex couples will depend on the regulations of each agency, and how they determine if a couple is legally "married." The current determination of the legality of a marriage under federal regulations vary based on three alternative criteria: (1) the determination is made by looking at where the marriage was performed; (2) the determination is made by looking where the couple resides; or (3) the applicable federal regulation is silent on the issue.

Looking at where the marriage was performed means that, if a federal benefit or regulation only requires that the marriage be legal where it was performed, then a couple may be "married" under that federal right or regulation even if they live in a state that does not recognize same-sex marriages. For example, the U.S. Immigration and Citizenship Services Agency looks to where the marriage was performed in determining whether a marriage is legal. Thus, an American citizen sponsoring his or her foreign spouse for a green card may be afforded this right, as heterosexual couples are, so long as the couple was married in a jurisdiction that recognizes same-sex marriages. Another example of this occurs in the context of federal student financial aid. The Free Application for Federal Student Aid (FAFSA) will require applicants seeking federal funding for education to list both their parent and his or her same-sex spouse (and their assets) as parents for determining financial aid eligibility, regardless of whether the state of domicile of the parent and his or her spouse recognizes same-sex marriage.

If a federal right or regulation requires the marriage to be valid in the state where the couple resides before it is recognized for the purposes of the applicable regulation, then legally married

[9] Same-sex couples might pay considerably more in income taxes if they file jointly due to the so-called "marriage penalty." The spouses would be able to file separately, but this might make them ineligible for a number of tax benefits, such as the ability to take certain deductions and credits.

same-sex couples will only be treated as "married" if their state of residence recognizes same-sex marriage. This method of determining whether a marriage is legal will likely draw the most controversy because of the number of same-sex couples who have traveled to other states to get married, only to return to their state of domicile, which does not recognize their marriage and thus does not grant them the same federal and state benefits afforded to heterosexual couples. Currently, most federal agencies, including the Social Security Administration, the IRS, and the Veterans Administration, use the place of residence to determine whether a couple is married.

Finally, if a federal right or regulation is silent on the definition of a legal "marriage" or of a "spouse", then the situation may be fact specific, or an agency may look to another agency for guidance. This is still a gray area of law that is yet to be determined, which can be frustrating and confusing for same-sex couples and their advisors, who will not have certainty as to whether federal benefits will be available, as they are to heterosexual marriages.

How Are Floridian Same-Sex Couples Affected?

Florida alone has approximately 65,601 same-sex unmarried partner households, according to a 2010 United States Census Bureau estimate. That is a 59.8 percent increase from the same report taken with the 2000 United States Census. This has many implications for Florida residents and prospective residents. For example, if a same-sex couple is legally married in the District of Columbia and has to pick up and move their family to Florida for work, will that marriage exist in Florida or will it disappear as they cross the state lines?

This type of "moving-marriage" will continue to be recognized in the District of Columbia and the other states that recognize same-sex marriage, but in Florida, this couple's marriage would no longer be recognized for most federal and all state purposes. This can lead to detrimental consequences, such as the loss of the federal estate and gift tax marital deduction which could cause thousands of dollars in federal estate taxes upon the death of a same-sex spouse.

The Florida Constitution bans same-sex marriages in Florida, as well as any legal union that is treated similarly.[10] Under Florida Statute 741.212, Florida refuses to recognize any legal marriage or any legal union treated as a marriage for any and all purposes in Florida.[11] Further, the statute defines "marriage" as a legal union between one man and one woman, and the term "spouse" applies only to a member of such union.[12] Section Three of the Florida Statue is almost identical to Section Three of DOMA, which was held unconstitutional and was described by Justice Kennedy as having the "principal effect [] to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency."[13]

What does this mean for Florida same-sex couples?

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[10] Fla. Const. art. 1, § 27.
[11] Fla. Stat. § 741.212 (2013).
[12] Fla. Stat. § 741.212(3).
[13] Windsor, 570 U.S. ____.

Despite the landmark holding in *Windsor*, the following benefits, amongst others, will still not be available to same-sex couples who have been legally married, but reside in Florida:

- The right to an elective share of his or her spouse's estate.
- Property rights associated with his or her spouse's homestead.

- Consideration as the natural health care proxy for his or her spouse (if a spouse does not have a validly executed health power of attorney), second only to a court-ordered guardian.

- Same-sex spouses may not hold assets as tenants by the entireties, which heterosexual couples may do for creditor protection purposes.

- Inheritance rights, if a same-sex spouse dies intestate. Married opposite-sex surviving spouses are entitled to 50% of the estate if there are children from the decedent's prior marriage, or 100% if the decedent has no children from a prior relationship.

- The ability to file federal income taxes jointly, and the ability to take advantage of the federal estate and gift tax marital deductions.

- Preference of appointment as the personal representative of a deceased spouse's estate.

Because of the lack of practical impact of the *Windsor* decision on Florida same-sex couples, many Florida same-sex couples will move to a state that recognizes same-sex marriages in order to be entitled to the rights and benefits afforded to heterosexual spouses. However, this would be a very difficult decision for some people to make due to their employment, family, and other personal situations, and the emotional toll relating to uprooting one's family.

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