

Chicago Daily Law Bulletin®

Volume 159, No. 80

Stay informed on the changing legal definition of marriage

Both the states and the federal government are engaged in an intense debate about how to treat same-sex couples who wish to avail themselves of the rights and responsibilities afforded to their heterosexual married counterparts.

The significance of this debate is not limited to same-sex couples themselves. Rather, it touches thousands of laws and regulations affecting the home life, businesses and public accommodations. Staying informed of the issues is important for lawyers and their clients.

In March, the constitutionality of the federal definition of marriage was questioned before the Supreme Court, when lawyers for plaintiff Edie Windsor argued that the Defense of Marriage Act (DOMA) violated her Fifth Amendment equal protection rights in *United States v. Windsor*, 12-307.

Windsor, who is 83 years old, filed her suit against the federal government after the Internal Revenue Service denied her a tax refund of more than \$363,000 in estate taxes after the death of her wife, Thea Speyer, in 2009. Windsor and Speyer were partners for more than 40 years at the time of Speyer's death. The couple married in Canada in 2007 and lived in New York. The IRS cited DOMA as its reason for denying Windsor's estate tax refund, which would have otherwise gone directly to her if Speyer was a man.

Section 3 of DOMA defines "marriage" for federal purposes as "a legal union between one man and one woman as husband and wife [for purposes of] any Act of Congress, or any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States."

In other words, under DOMA, the federal government only recognizes marriages as between two people of the opposite sex. This applies to any and all federal benefits, taxes, Social Security survivor benefits, Medicare and Medicaid, military spousal benefits and burial rights, rights in bankruptcy and many others. In all, DOMA's definition of marriage affects more than 1,100 federal

laws and regulations.

In Windsor's case, because Windsor's spouse was of the same sex, DOMA prevented her from benefiting from the estate tax code that permits the estate of a deceased spouse to pass free and clear of any taxing consequences to the surviving spouse.

Congress passed DOMA with vast bipartisan support in 1996 in response to fears the federal government would be required to provide certain benefits to same-sex couples after it seemed that Hawaii was poised to permit same-sex couples to legally marry. Hawaii's proposed equal marriage legislation fell short of becoming law that year, but since 2004, nine states and the District of Columbia have recognized same-sex couples' rights to legally wed and five more states allow couples to enter into civil unions, including Illinois as recently as 2010.

A handful of other states provide limited spousal rights to registered domestic partners, including California. No matter what title a state uses in conferring benefits on its same-sex couples, to date the federal government does not recognize such titles as "marriages" for purposes of federal law.

As for the *Windsor* case, Supreme Court observers have commented that the justices seem poised to strike down Section 3 of DOMA, either as a violation of the Fifth Amendment's equal protection clause, or under the 10th Amendment's federalism principles (the seemingly preferred theory by Justice Anthony M. Kennedy).

To observers, it seemed clear during oral arguments that the more liberal justices believed DOMA was enacted to single out gays and lesbians because of "prejudice, fear, spite and animus," as Justice Elena Kagan put it, rather than to create uniformity among federal spousal benefits. According to Kagan, who read from the 104th Congress' House Report on DOMA, the statute was a reflection of Congress' "collective moral judgment and to express moral disapproval of homosexuality."

Still, although most observers believe the law will fall, whether the court will strike down Section 3 of DOMA under some form of

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heightened scrutiny remains to be seen. In addressing whether gay men and lesbians are a politically disfavored and less powerful group, Justice John G. Roberts Jr. commented that the "sea change" in public opinion on same-sex marriage indicates that gays and lesbians are no longer a disfavored group.

DOMA's fate, however, may be of little consequence to Illinois' same-sex couples for two reasons. First, the state currently only affords same-sex couples benefits under civil unions. 750 ILCS 75/1 et seq. The law grants parties to a civil union all of the legal rights and responsibilities that opposite-sex spouses have under Illinois state law by requiring that such parties to a civil union be included in any use of the terms "spouse," "family," "immediate family," "dependent," "next of kin" or other terms indicating a spousal relationship in Illinois law.

Illinois also recognizes as a civil union any same-sex marriage or civil union performed in another jurisdiction. Despite this, however, Illinois itself has a ban on same-sex marriage under its own Defense of Marriage Act, which defines marriage as between a man and a woman of opposite genders. 750 ILCS 5/101 et seq.

Because of Illinois' current ban on same-sex marriage, even if Section 3 of DOMA is overturned as unconstitutional, Illinois' same-sex couples who obtain a civil union license in Illinois law are unlikely to see any change in their current status with respect to federal benefits, rights and responsibilities.

Second, Section 2 of DOMA exempts states from giving full

faith and credit to same-sex marriages performed in other states and jurisdictions, as is otherwise required by states of heterosexual marriages. Section 2, however, is not under scrutiny by the Supreme Court and, thus, even if Section 3 is overturned, Illinois' ban on same-sex marriage recognition would remain in effect.

It remains to be seen whether same-sex couples with marriage licenses from other jurisdictions, but who are Illinois citizens residing in Illinois, will be afforded federal benefits despite Illinois' treatment of such a union as a civil union for purposes of state law.

Percolating underneath all of this is the Illinois Religious Freedom and Marriage Fairness Act (S.B. 110), currently pending in the Illinois General Assembly. On Feb. 14 of this year, the Illinois Senate passed S.B. 110 on a bipartisan basis, which would repeal the state's ban on same-sex marriage. The bill is now before the Illinois House.

If passed, Gov. Patrick J. Quinn has pledged his support for the measure, which would permit same-sex couples in Illinois to legally obtain marriage licenses for the first time. If the Supreme Court observers are right, and DOMA is overturned (on any basis), should S.B. 110 become law, Illinois same-sex couples who obtain a marriage license will also be afforded federal spousal rights and benefits currently available to married, opposite-sex couples.

The implications any one of these scenarios has for Illinois' same-sex couples and businesses is significant. While same-sex couples will need to review the state of their estate planning instruments, employers would be wise to review their employee benefit policies, family and medical leave policies and other policies providing benefits or obligations on the part of its married employees or clientele.

The laws in this respect are rapidly changing, and by this time next year, the national legal landscape regarding same-sex couples will look very different. Despite the social flash point the issue of same-sex marriage causes, being ahead of the curve on legal compliance will only serve to benefit a lawyer's clients.