

Chicago Daily Law Bulletin®

Volume 159, No. 149

Two major same-sex marriage rulings highlight high court's term

On the final day of its 2012-2013 term, a closely divided U.S. Supreme Court issued two long-anticipated landmark rulings affecting same-sex couples.

In *United States v. Windsor*, the court, in a 5-4 decision, struck down on due process and equal protection grounds Section 3 of the federal Defense of Marriage Act (DOMA), which defined "marriage" and "spouse" as excluding same-sex partners for certain federal benefits.

Minutes later, in *Hollingsworth v. Perry*, the court, by another 5-4 vote, dismissed the appeal brought by the sponsors of California's Proposition 8, the ballot measure which defined marriage as only between a man and a woman. By throwing out the appeal, the court effectively permitted same-sex marriages to resume in California, as it allowed a lower court ruling which invalidated that measure to stand.

Including California, 13 states plus the District of Columbia have approved same-sex marriage. The court's ruling in *Windsor* will immediately extend many federal benefits to same-sex couples married in those states, but will not apply to the other 37 states which restrict marriage to a union between a man and a woman. However, many commentators believe that the court's decision — which includes sweeping language regarding liberty and equality — may set the stage for future challenges to state bans on same-sex marriage.

In *Windsor*, two New York City women who had lived together for more than 40 years were married in Ontario, Canada, in 2007. When one of the women died two years later, she left her entire estate to her widow.

Although the state of New York deemed their marriage to be valid, the application of Section 3 of DOMA disqualified the widow from claiming the marital exemption from the federal estate tax for her interest in the decedent's property that passed to her as the surviving spouse.

Although a spouse in an opposite-sex marriage would not have been required to pay any tax, the widow here paid \$363,053 in estate taxes because the Internal Revenue Service determined that under DOMA she was not a "surviving spouse." She thereafter filed a tax refund suit and both the U.S. District Court and the 2nd U.S. Circuit Court of Appeals struck down the law as unconstitutional, ordering the U.S. Treasury to refund the taxes paid by her with interest.

In an opinion authored by Justice Anthony M. Kennedy, the high court affirmed. The court began its analysis by tracing the evolution of the slow-but-steady acceptance, state by state, of same-sex marriage.

Although "marriage" has traditionally been thought of as occurring only between a man and a woman, recent years have

“With its principal purpose being to ‘impose inequality,’ the court held that DOMA created ‘two contradictory marriage regimes within the same state’ ...”

ON APPEAL



MICHELE M. JOCHNER AND SHANNON R. BURKE

Michele M. Jochner is a partner at Schiller, DuCanto & Fleck LLP, after previously serving as a judicial law clerk to Illinois Supreme Court Justices Charles E. Freeman and Mary Ann G. McMorrow. She can be reached at mjochner@sdflaw.com. Shannon R. Burke is an attorney at Schiller, DuCanto & Fleck, where she concentrates on family law appeals. Reach her at sburke@sdflaw.com.

ushered in “the beginnings of a new perspective, a new insight” wherein “some states concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other.”

Accordingly, the limiting of marriage to heterosexual couples came to be viewed in some states as “an unjust exclusion.” Those states, therefore, allowed same-sex couples to be married and thus “live with pride in themselves and their union and in a status of equality with all other married persons.”

The court reaffirmed that the definition and regulation of marriage is exclusively within the province of the individual states, with the federal government generally deferring to state decisions in the realm of domestic relations. New York, as one of several states allowing same-sex marriages, properly exercised its sovereign authority in “responding to the initiative of those who sought a voice in shaping the destiny of their own times,” forming a “consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.”

In recognizing the validity of same-sex marriages, the court held that New York properly sought to provide “protection” and “dignity” to the bond of same-sex unions, “giv[ing] their lawful conduct a lawful status.” This status, the court concluded, is a “far-reaching legal acknowledgement of the intimate relationship between two people, a relationship deemed by the state worthy of dignity in the community equal with all other marriages.”

Turning to DOMA, the court held that “it seeks to injure the very class that New York seeks to protect” and, by so doing, “violates basic due process and equal protection principles applicable to the federal government.” Noting DOMA’s far reach, the court determined that not only did it depart from the tradition of state law defining marriage, its avowed purpose was to “impose a disadvantage, a separate status, and a stigma on all who enter into same-sex marriages made lawful by the unquestioned authority of the states.”

Reviewing the history of DOMA’s enactment, the court concluded that there was no doubt it was meant to treat same-sex unions as “second-

class marriages” by “writ[ing] inequality into the entire United States Code” affecting more than 1,000 statutes and federal regulations ranging from Social Security and taxes to housing and veteran’s benefits.

With its principal purpose being to “impose inequality,” the court held that DOMA created “two contradictory marriage regimes within the same state,” thereby “forc[ing] same-sex couples to live as married for the purposes of state law, but unmarried for the purposes of federal law, thus diminishing the stability and predictability of basic personal relations the state has found it proper to acknowledge and protect.”

DOMA placed same-sex couples “in an unstable position of being in a second-tier marriage,” thereby not only “demean[ing] the couple, whose moral and sexual choices the Constitution protects and whose relationship the state has sought to dignify,” but also “humiliat[ing] tens of thousands of children now being raised by same-sex couples ... mak[ing] it even more difficult for the children to understand

the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”

Because of the unquestioned purpose and effect of DOMA is to “demean those persons who are in a lawful same-sex marriage,” the court invalidated Section 3 as an unconstitutional deprivation of liberty of the person protected by the due process clause of the Fifth Amendment of the Constitution as well as the prohibition against denying to any person the equal protection of the laws guaranteed therein. This holding was expressly limited, however, to “lawful” same-sex marriages, meaning that those couples who were married in and live in states that allow same-sex marriage are now eligible for federal benefits. Notably, although the court struck down Section 3 of DOMA, DOMA’s Section 2, which allows states to refuse to recognize same-sex marriages performed under the laws of other states, remains intact. Thus, individual states can continue to define marriage

as they see fit and need not recognize same-sex marriages entered into in other states or countries.

Only moments after the court delivered its ruling in *Windsor*, it announced its opinion in *Hollingsworth v. Perry*. That case had its genesis in a 2008 decision of the California Supreme Court holding that limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California Constitution. Later that year, the California voters passed a ballot initiative, known as Proposition 8, which amended the California Constitution to provide that only marriages between men and women are valid or recognized in California.

Thereafter, two same-sex couples who wished to marry filed suit in federal court, challenging Proposition 8. The complaint named as defendants California’s governor, attorney general and other state and local officials. The named defendants, however, refused to defend the law. The U.S. District Court allowed the sponsors of the ballot initiative — who were private

citizens — to intervene to defend it. Following a trial, the district court declared Proposition 8 unconstitutional, a ruling affirmed by the 9th U.S. Circuit Court of Appeals.

The high court dismissed the appeal for lack of jurisdiction, holding that the parties seeking to defend Proposition 8 lacked standing. Because California officials had declined to appeal the district court’s ruling that the ballot initiative was unconstitutional, the court determined that the matter should have ended there.

Because the sponsors of Proposition 8 had suffered only a “generalized grievance” when it was struck down, they therefore were not entitled to represent the state’s interests on appeal.

Although the Supreme Court did not address the merits of that case, the practical effect of its ruling is that the district court’s declaration that Proposition 8 is unconstitutional now stands as the law of the case in California.

Accordingly, same-sex couples can again seek marriage licenses in California.