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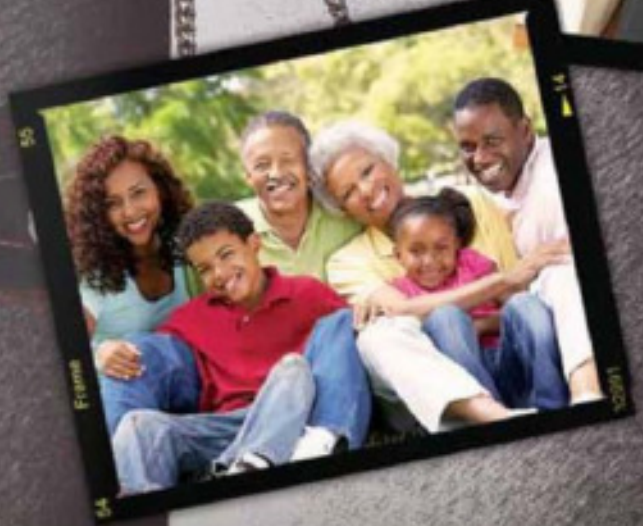

The Status of Marriage Equality in the Aftermath of DOMA's Demise

By SAM M. (TREY) YATES, III

In the landmark case of *United States v. Windsor*,[1] which was decided on June 26, 2013, the U.S. Supreme Court struck down Section 3 of the federal Defense of Marriage Act (DOMA).[2] This invalidated section defined a "marriage" as a "legal union between one man and one woman as husband and wife," and a "spouse" as a "person of the opposite sex who is a husband or a wife," for the purpose of determining the meaning of any federal law. Justice Kennedy, who wrote the majority opinion, observed the following about the statute:

> The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the states in the exercise of their sovereign power, was more than an incidental effect on the federal statute. It was its essence...
>
> Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways... It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly. It prohibits them from being buried together in Veteran's cemeteries...
>
> What has been explained to this point should more than suffice to establish that ***the principal purpose and necessary effect of [DOMA] are to demean those persons who are in a lawful same-sex marriage***. This requires the Court to hold, as it now does, ***that DOMA is unconstitutional as a deprivation of liberty of the person protected by the Fifth Amendment of the Constitution.***[3]

Currently, 17 states[4] and Washington,

D.C., recognize same-sex marriages, and three states offer same-sex couples broad protections short of marriage.[5] Over 38 percent of the U.S. population lives in states that either allow same-sex couples to marry or honor out-of-state same-sex marriages, and over 41 percent of the U.S. population lives in states with either marriage laws for same-sex couples or legal statuses, such as civil unions or domestic partnerships.[6]

In the states that do not recognize same-sex marriages, couples have challenged laws, including constitutional amendments, containing DOMA-type language. On December 20, 2013, in *Kitcher v. Herbert*, U.S. District Judge marriage, observing that:

> The State of Utah has provided no evidence that opposite-sex marriage will be affected in any way by same-sex marriage. In the absence of such evidence, the State's unsupported fears and speculations are insufficient to justify the State's refusal to dignify the family relationships of its gay and lesbian citizens. Moreover, the Constitution protects the Plaintiff's fundamental rights, which include the right to marry and the right to have that marriage recognized by their government... The Constitution therefore protects the choice of one's partner for all citizens, regardless of their sexual identity.[7]

The Utah Attorney General requested a stay in that case from the U.S. Supreme Court, and, on January 6, 2014, Justice Sotomayor granted the stay pending final disposition of the appeal by the Tenth Circuit Court of Appeals.[8] The Obama Administration later announced that the same-sex marriages performed in Utah after Judge Shelby's decision and before the stay are considered legal under federal law, and that same-sex couples who married during that period will be eligible for all federal benefits.

On January 14, 2014, in *Bishop v. United States*, U.S. District Judge Terence C. Kern struck down Oklahoma's ban on same sex marriage, and permanently enjoined the enforcement of Part A of an Oklahoma constitutional amendment defining marriage as the union of one man and one woman because it precluded same-sex couples from receiving an Oklahoma marriage license and, therefore, violated the Fourteenth Amendment's Equal Protection Clause.[9] However, Judge Kern stayed the injunction pending final disposition of any appeal of his ruling to the Tenth Circuit Court of Appeals.[10]

After *Windsor* was decided, the federal government updated its policies by promulgating new federal tax guidelines tending federal benefits to some same-sex couples. In that regard, on August 29, 2013, the U.S. Treasury and the Internal Revenue Service announced that all legal same-sex marriages are recognized as marriages for all federal tax purposes, no matter which state they call home. And, in a letter to Congress dated September 4, 2013, Attorney General Eric Holder stated that the Justice Department would not prohibit same-sex spouses of veterans from receiving military benefits if they live in a jurisdiction that recognizes their marriage.

In November 2013, the Texas National Guard announced that same-sex spouses could apply for military benefits at its state facilities instead of federal facilities. According to Texas officials, the Texas National Guard previously could not process benefits for same-sex couples because the state's constitution prohibited recognition of same-sex marriage. The Defense Department now provides federal personnel, funding and equipment to enroll the spouses, ensuring that no Texas National Guard members in state status will have to do the work.

A variety of individuals and entities have brought lawsuits across the country to implement the ruling in *Windsor*, especially in states known as "marriage prohibition" states. In Nevada, a petitioner in a federal case unsuccessfully argued that the state's constitutional ban on marriage equality violates the Equal Protection Clause of the U.S. Constitution, but the case is currently pending on appeal in the Ninth Circuit Court of Appeals.[11] In Virginia, a pending federal class action lawsuit seeks freedom for all same-sex couples in the state to marry, and an end to the state's refusal to recognize lawful same-sex marriages from other jurisdictions.[12] In West Virginia, a federal lawsuit was filed on behalf of three same-sex couples, and the child of one of the couples, challenging the constitutionality of statutes that prevent same-sex couples from marrying and tions.[13]

Challenges have been made to similar constitutional provisions and laws in Texas, and there is an open question as to whether Texas courts have jurisdiction to grant divorces to same-sex Texas residents who were legally married to each other in another state. In that regard, on November 8, 2005, Article 1, Section 32, of the Texas Constitution, was amended to state that marriage is only allowed between one man and one woman.[14] This amendment also forbids the state from recognizing out-of-state marriage relationships or domestic partnerships for same-sex couples. Texas Family Code Section 2.001's prior use of the terminology "a man and a woman" for those seeking a marriage license effectively prohibited a county clerk from issuing a marriage license for "persons of the same sex."[15] In accordance with the constitutional amendment, Texas Family Code Section 6.204(c) currently provides that "[t]he state or an agency or political subdivision of the state may not give effect to a: (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or (2) right or claim to any legal protection, benefit, or responsibility asserted as

a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction."[16] While the Texas prohibition against recognition of same-sex marriages lawfully entered into in other states seems clear, the resulting lack of divorce options for same-sex Texas residents who were lawfully married to each other in another state has become a pressing issue for Texas family law judges and attorneys.

On November 5, 2013, the Texas Supreme Court heard oral arguments in three consolidated cases on the same-sex divorce issue.[17] The two essential questions presented in those cases are: (1) whether Texas Family Code Section 6.204 strips district courts of jurisdiction to hear a petition for divorce involving a same-sex couple who was legally married in another state, and (2) whether Texas Family Code Section 6.204, if construed to prevent a same-sex couple who was legally married in another state from obtaining a divorce in Texas, violates the U.S. Constitution. Additional questions raised in these cases are whether the state may intervene to contest the trial court's jurisdiction to grant the divorce and, if not, whether the state can challenge the trial court's jurisdiction to issue such a judgment in a mandamus proceeding.

Additionally, on February 26, 2014, in *DeLeon v. Perry*,[18] U.S. District Judge Orlando Garcia, of San Antonio, issued an injunction barring Texas from enforcing Texas Family Code Sections 2.001 and 6.204, as well as Article 1, Section 32, of the Texas Constitution. The court held that the current marriage laws of Texas deny same-sex couples the right to marry and, by doing so, demean their dignity for no legitimate reason.[19] Therefore, Article 1, Section 32, of the Texas Constitution and the corresponding provisions of the Texas Family Code were unconstitutional.[20] However, consistent with the stays in Utah and Oklahoma, Judge Garcia stayed the ruling while Texas officials appeal to the Fifth Circuit Court of Appeals.[21]

As Justice Kennedy wrote in the majority opinion in *Windsor*, "The responsibility of the states for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people."[22] Whether Texas will redefine marriage within its borders or grant divorces to same-sex couples who lawfully married elsewhere is unclear. What is certain is that additional changes and challenges in this area of the law are surely on the horizon.

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Endnotes

1. *United States v. Windsor*, 133 S. Ct. 2675 (2013).
2. 1 U.S.C. § 7 (2006).
3. *See Windsor*, 133 S. Ct. at 2693–95 (emphasis added).
4. Those 17 states are California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont and Washington.
5. Colorado allows civil unions, while Oregon and Nevada offer domestic partnerships, and Wisconsin recognizes a more limited domestic partnership.
6. *Freedom to Marry*, *available at* http://www.freedomtomarry.org/states/ (last visited Feb. 26, 2014).
7. *Kitchen v. Herbert*, 2:13-CV-217, 2013 WL 6697874, at *29 (D. Utah Dec. 20, 2013).
8. *Herbert v. Kitchen*, 134 S. Ct. 893 (2014).
9. *Bishop v. United States ex rel. Holder*, 2014 U.S. Dist. LEXIS 4374, at *121 (N.D. Okla. Jan. 14, 2014).
10. *Id.* at *121–22.
11. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012).
12. *Harris v. McDonnell*, 5:13CV00077, 2013 WL 5720355 (W.D. Va. Oct. 18, 2013).
13. *McGee v. Cole*, CIV. 3:13-24068, 2014 U.S. Dist. LEXIS 10864 (S.D. W.Va. Jan. 29, 2014).
14. TEX. CONST. art. I, § 32.
15. TEX. FAM. CODE ANN. § 2.001 (West 2006).
16. TEX. FAM. CODE ANN. § 6.204(c) (West 2006).
17. *In re State*, No. 11-0222, 2013 Tex. LEXIS 610 (Aug. 23, 2013); *State v. Naylor*, 330 S.W.3d 434 (Tex. App.—Austin 2011, pet. filed); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010, pet. filed).
18. *DeLeon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *48 (W.D. Tex. Feb. 26, 2014) (designated for publication).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Windsor*, 133 S. Ct. at 2693.