

# The Marriage Equality Movement after *United States v. Windsor*: Resulting Litigation and Changes Across the Nation

Richard A. Roane, Esq. –  
Warner Norcross & Judd LLP –  
rroane@wnj.com  
Peter M. Kulas, Esq. –  
Kulas Law Office, PLLC –  
pmkulas@kulaslawoffice.com



On June 26, 2013, the U.S. Supreme Court issued two landmark civil rights rulings addressing same-sex marriage. *Hollingsworth v. Perry*<sup>1</sup> addressed California's voter-approved Proposition 8, resulting in a restoration of marriage equality in that state. *United States v. Windsor*<sup>2</sup> challenged the Defense of Marriage Act (DOMA),<sup>3</sup> resulting in a repeal of section 3, which had defined marriage as a legal union between one man and one woman as husband and wife, and had stated that the word "spouse" referred only to a person of the opposite sex who is a husband or wife, thereby making approximately 1,138 federal benefits unavailable to legally married same-sex couples. In the majority opinion authored by Justice Anthony Kennedy, the Supreme Court held that section 3 of DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.<sup>4</sup> This article examines the impact of the *Windsor* decision on marriage equality including resulting litigation in prohibition states.

The marriage equality movement is changing the face of the country virtually on a weekly basis. For example, on November 1, 2012, there were six marriage equality jurisdictions and just over one year later, more than one-third of the country recognizes marriage equality. As of the date of the preparation

of this article, there are 17 states and the District of Columbia that recognize marriage equality by case law, statute, or popular vote.<sup>5</sup> Additionally, federal district court judges in Utah<sup>6</sup> and Oklahoma,<sup>7</sup> Virginia,<sup>8</sup> and Texas<sup>9</sup> have issued rulings striking down the prohibition of same-sex marriages in their states; however, their rulings are currently stayed, pending appeal.<sup>10</sup> Finally, federal district court judges in Ohio<sup>11</sup> and Kentucky<sup>12</sup> have held their respective states are required to recognize out-of-state same-sex marriages, despite not recognizing same-sex marriages performed in their state. These changes impact the law in a variety of ways in every jurisdiction regardless of whether it is a marriage equality or prohibition state.

<sup>1</sup> *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).

<sup>2</sup> *United States v. Windsor*, 133 S.Ct. 2675 (2013).

<sup>3</sup> Pub.L. 104-199, 110 Stat. 2419, enacted September 21, 1996, 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

<sup>4</sup> *Windsor*, at 2696.

<sup>5</sup> The following states have legalized same-sex marriage by Court decision: California, Connecticut, Iowa, Massachusetts, New Jersey, and New Mexico; by State legislature: Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington DC; and by popular vote: Maine, Maryland, and Washington.

<sup>6</sup> *Kitchen v. Herbert*, 2:13-CV-217; 2013 WL 6697874 (D. Utah Dec. 20, 2013).

<sup>7</sup> *Bishop v. Oklahoma*, 04-CV-848-TCK-TLW; 2014 WL 116013 (N. D. Oklahoma, Jan. 14, 2014).

<sup>8</sup> *Bostic v Rainey*, 2:13-CV-395; 2014 WL 561978 (E.D. Va. Feb. 13, 2014).

<sup>9</sup> *DeLeon v. Perry*, SA-13-CA-00982-OLG (W.D. Tex. Feb. 26, 2014).

<sup>10</sup> Utah's ruling came in December 20, 2013; however, on January 6, 2014, the U.S. Supreme Court granted a stay of the District Court's order pending consideration of the appeal by the Tenth Circuit Court of Appeals after stays were denied by the District Court and the Tenth Circuit. Oklahoma's ruling came on January 14, 2014 and was immediately stayed pending the resolution of the appeal of the nearly identical case in Utah. Virginia's ruling came on February 13, 2014 and was stayed pending consideration of the appeal by the Fourth Circuit Court of Appeals. Texas's ruling came on February 26, 2014 and was stayed pending consideration of the appeal by the Fifth Circuit Court of Appeals.

<sup>11</sup> *Obergefell v. Kasich*, 1:13-CV-501; 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013).

<sup>12</sup> *Bourke v. Beshear*, 3:13-CV-750-H; 2014 WL 556729 (W. D. Ky. Feb. 12, 2014).

The *Windsor* decision impacts same-sex couples who are legally married in the United States or one of the 19 countries that recognize marriage equality.<sup>13</sup> In addition to having one's marriage recognized and validated by the federal government, the following list represents some of the areas of law affected by this change in federal law: adoption; COBRA; ERISA; estate planning; HIPPA; immigration; jurisdiction to divorce; life insurance; Social Security disability, retirement, and death benefits; Federal Income Tax; U.S. Military Dependent Benefits; and U.S. veteran benefits.

It is not surprising that the next step in the evolution of marriage equality would result in lawsuits being filed challenging state's prohibition on same-sex marriage with proponents and opponents of marriage equality finding rhetoric in the *Windsor* decision to advance their positions.<sup>14</sup>

Generally, opponents concentrate their arguments on the portions of the *Windsor* opinion that emphasizes federalism, as well as the Court's acknowledgment of the State's "historic and essential authority to define the marital relation."<sup>15</sup> Opponents interpret *Windsor* to stand for the proposition that section 3 of DOMA was unconstitutional because the statute departed from the federal government's "history and tradition of reliance on state law to define marriage."<sup>16</sup> Opponents further assert that just as the federal government cannot choose to disregard a state's decision to recognize same-sex marriage, the federal government cannot intrude upon a state's decision not to recognize same-sex marriage.

The proponents of marriage equality point out that the *Windsor* Court grounded its holding in the Due Process Clause of the Fifth Amendment, which protects an individual's right to liberty.<sup>17</sup> In *Windsor*, the Court held that section 3 of DOMA "place[d] same-sex couples in an unstable position of being in a second-tier marriage," a differentiation that "demean[ed] the couple, whose moral and sexual choices the Constitution protects[.]"<sup>18</sup> Proponents argue that just as the Fifth Amendment prohibits the federal government from differentiating between same-sex and opposite-sex couples, the Fourteenth Amendment prohibits state governments from making this distinction as well.

The impact of the *Windsor* decision on marriage equality across the country has created a maelstrom of legal issues for family law practitioners, tax advisors, and other professionals to navigate with their legally married same-sex clients.

Specifically, when a legally married same-sex couple wants to dissolve their marriage and they reside in a prohibition state, their remedies can be extremely limited and often non-existent. Since most prohibition states refuse to recognize legally married same-sex couples, the result is unequal treatment across the country between opposite-sex marriages and same-sex marriages. Without the ability to dissolve the marriage, the result is a financial nightmare when the couple is trying to divide their assets and liabilities or resolve custody and support issues. The parties remain legally married in jurisdictions that recognize their marriages, which can be very problematic.

Several marriage equality states have made provisions for dissolution of marriages that were *celebrated* in their respective jurisdictions but where the couple resides in a prohibition state. California, Delaware, Minnesota, and the District of Columbia will allow non-resident legally married same-sex couples to dissolve their marriage if: 1) they married in the state they are seeking dissolution, and 2) neither spouse now lives in a state that will dissolve their marriage.<sup>19</sup> Vermont will grant non-resident same-sex spouses a divorce if: 1) they married in Vermont, 2) neither spouse resides in a state that permits them to divorce, 3) the couple has no minor children of the marriage, 4) neither spouse has a protective order against the other, and 5) the parties file a stipulation that resolves all issues in the divorce and contains all the statutorily required elements.<sup>20</sup> Finally, Washington requires that at least one spouse be a resident before commencing a divorce action; however, there is no required time for residency—one can file the day they establish residency.<sup>21</sup>

Another obstacle that is inextricably intertwined with the marriage equality movement involves the custody of a child in prohibition states for a non-biological and/or non-legal parent over a child raised together with his or her spouse. In prohibition states, the question of custody of any child of legal same-sex marriages will generally be limited to recognizing only the biological or legal parent, while considering the "other" parent a legal stranger.

Children denied a legally recognized second parent may not be covered by their non-legal parent's health insurance plan. If the child is sick or injured, hospital staff may prevent the non-legal parent from visiting the child in the hospital or from consenting to needed medical care. In some cases, a child may be removed from the only home he or she has ever known if the legal parent dies.

<sup>13</sup> The following countries have legalized same-sex marriage: Argentina, Australia, Belgium, Brazil, Canada, Denmark, France, Iceland, Israel, Mexico (not every state must grant same-sex marriages; however, they must all recognize those performed where they are legal), Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, United Kingdom (civil marriages permitted in England and Wales starting summer of 2014), and Uruguay.

<sup>14</sup> By way of example: *DeBoer v. Snyder*, lawsuit filed in the U.S. District Court for the Eastern District of Michigan; *Fisher-Borne v. State*, lawsuit filed in U.S. District Court for the Middle District of North Carolina; *Whitewood et al. v. Wolf et al.*, lawsuit filed in U.S. District Court for the Middle District of Pennsylvania; *Bradacs v. Haley*, a lawsuit filed in U.S. District Court for the District of South Carolina; *Tanco v. Haslam*, a lawsuit filed in U.S. District Court for the Middle District of Tennessee; *Harris et al. v. McDonnell et al.*; lawsuit filed in U.S. District Court for the Western District of Virginia; and *McGee v. Cole*, lawsuit filed in the U.S. District Court for the Southern District of West Virginia.

<sup>15</sup> *Windsor* at 2692, 2691 ("[S]ubject to [constitutional] guarantees, 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'" (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975))).

<sup>16</sup> *Windsor* at 2692.

<sup>17</sup> *Windsor* at 2695 ("DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.").

<sup>18</sup> *Windsor* at 2694.

<sup>19</sup> Cal. Fam. Code § 2320(b), Del. Code Ann. tit. 13, § 216; Del. Code Ann. tit. 13, § 1504 (effective July 1, 2013), Minn. Stat. § 518.07 (2), D.C. Code § 16-902(b).

<sup>20</sup> Vt. Stat. Ann. tit. 15, § 592(b)-(c).

<sup>21</sup> Washington State Revised Code - Title 26 - Chapter 26.09.030.

Adoption is one avenue for a non-biological parent to establish him or herself as a legal parent; however, only 21 states<sup>22</sup> and the District of Columbia permit joint adoptions<sup>23</sup> and only 13 states<sup>24</sup> and the District of Columbia permit second-parent adoptions.<sup>25</sup> Five states<sup>26</sup> have anti-homosexual laws or policies preventing joint adoptions and seven states<sup>27</sup> have anti-homosexual laws or policies preventing second-parent adoptions, while the remaining states are silent on the issue. This issue has also led to lawsuits being filed across the country with both sides again relying on the *Windsor* decision to support their position.<sup>28</sup>

The way the country views same-sex relationships is changing rapidly. In a recent lawsuit challenging Virginia's ban on same-sex marriage,<sup>29</sup> Virginia Attorney General Mark Herring announced that he does not intend to defend a state statute and constitutional amendment in Virginia that denies the freedom to marry to same-sex couples. Herring's announcement mirrors stances taken from the Attorneys General in Pennsylvania and Illinois as well as the stance taken by President Barack Obama and Attorney General Eric Holder through the U.S. Department of Justice in 2011 when they declared they would no longer be defending DOMA.

Legal practitioners, tax advisors, and related professionals need to be knowledgeable of the impact of the *Windsor* decision on clients who seek advice and legal services in the domestic relations area. Professionals need to be prepared to discuss these issues with their clients and render advice on the many federal benefits that are available to legally married same-sex couples whose marriage may not be recognized in the state in which they reside, but whose marriages nevertheless entitle them to significant and valuable federal benefits. As the legal challenges to a state's marriage laws banning same-sex marriage work their way through the state and federal courts, additional change in various states' treatment of same-sex couples is on the horizon.

Richard A. Roane, Esq. is a Partner at Warner Norcross & Judd LLP. He specializes in domestic relations matters, domestic and international custody matters, complex business valuation, paternity, non-traditional relationships and related matters. Mr. Roane can be reached at +1.616.752.2367 or [roane@wnj.com](mailto:roane@wnj.com).

Peter M. Kulas, Esq. of Kulas Law Office, PLLC is a Family Law Attorney. Mr. Kulas concentrates his practice in domestic relations litigation including divorce, child custody, non-marital domestic relationships, and abuse and neglect actions for Kent County. Mr. Kulas can be reached at +1.616.717.5797 or [pmkulas@kulaslawoffice.com](mailto:pmkulas@kulaslawoffice.com).

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<sup>22</sup> Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington.

<sup>23</sup> Joint adoption is an adoption in which the prospective parents apply as a couple and are approved or rejected as a couple.

<sup>24</sup> California, Colorado, Connecticut, Illinois, Indiana, Iowa, Maine, Massachusetts, Montana, New Jersey, New York, Oregon, Pennsylvania, and Vermont.

<sup>25</sup> Second-parent adoption is an adoption by an unmarried cohabitating partner of a child's legal parent, not involving the termination of a legal parent's rights.

<sup>26</sup> Louisiana, Michigan, Mississippi, North Carolina, and Utah.

<sup>27</sup> Kansas, Kentucky, Nebraska, North Carolina, Ohio, Utah, and Wisconsin.

<sup>28</sup> By way of example: *DeBoer v. Snyder*, lawsuit filed in the U.S. District Court for the Eastern District of Michigan; *Fisher-Borne v. State*, lawsuit filed in U.S. District Court for the Middle District of North Carolina; *Whitewood et al. v. Wolf et al.*, lawsuit filed in U.S. District Court for the Middle District of Pennsylvania; and *Harris et al. v. McDonnell et al.*, lawsuit filed in U.S. District Court for the Western District of Virginia.

<sup>29</sup> *Harris et al. v. McDonnell et al.*