ACTEC Law Journal

Volume 42 | Number 1 Article 21

3-1-2016

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In June 2013, the Supreme Court decided *United States v. Windsor*,[1] a landmark case that fundamentally transformed not only American tax jurisprudence and practice, but American constitutional law as well. In *Windsor*, the Supreme Court reviewed the validity of same-sex marriages at the federal level in the context of a contested estate tax return. At the outset, it should be understood that *Windsor* was not a pure tax case, but a constitutional law case wrapped in tax clothing. This is an important distinction because the wake of *Windsor* reaches far beyond tax law and estate planning.

I. The Pre-*Windsor* World

A brief review of both the *Baehr v. Lewin*[2] case and the so-called Defense of Marriage Act ("DOMA") will provide relevant context for the discussion concerning *Windsor's* influence.

A. *Baehr v. Lewin*.

In 1993, the Hawaiian Supreme Court held that denying same-sex marriage licenses was sex-based discrimination in *Baehr v. Lewin*,[3] a lawsuit in which three same-sex couples argued that Hawaii's prohibition of same-sex marriage violated the Equal Protection clause of the Hawaiian State Constitution.[4] The Hawaiian Supreme Court remanded the case back to the trial court for a determination of whether the state could show a compelling reason for the justification of the same-sex marriage ban,[5] and the trial court judge rejected the state's justifications

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1 133 S. Ct. 2675 (2013).

2 852 P.2d 44 (Haw. 1993), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

3 *Id.* at 67.

4 *Id.* at 49-50.

5 *Id.* at 68.

for limiting marriage to opposite-sex couples.[6] The Hawaiian State Legislature, however, promptly proposed a constitutional amendment that expressly reserved the legislature the power to relegate marriage to opposite-sex couples only—and the amendment was passed by the Hawaiian voters in 1998.[7]

B. The Defense of Marriage Act.

Although Hawaii ended up prohibiting same-sex marriage at the time, the *Baehr* decision is seen as the impetus for the enactment of DOMA.[8] DOMA was signed into law by President Clinton in 1996.[9] Notably, at the time DOMA was enacted, neither same-sex marriage nor polygamous marriage was legal in any state, territory, or U.S. possession. Section 2 of DOMA was an exercise of Congressional discretion granted under Article IV, section 1 of the United States Constitution, commonly called the Full Faith and Credit Clause.[10] This section purported to grant states autonomy in choosing whether to recognize same-sex marriages performed in other U.S. jurisdictions by providing an exception to the Full Faith and Credit Clause. Section 3 of DOMA restricted, for all federal purposes, the definitions of "marriage" and "spouse" to opposite-sex couples, even though at the time no states allowed or recognized same-sex marriage.[11] Moreover, the federal enactment of DOMA prompted state legislatures to enact reform measures that banned same-sex marriage and prohibited the recognition of legally married same-sex couples from other states.[12]

II. *UNITED STATES V. WINDSOR*

In June 2013, the Supreme Court concluded in *Windsor* that section 3 of DOMA was unconstitutional because it denied same-sex couples

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6 Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *17-18 (Cir. Ct. Haw. Dec. 3, 1996).

7 *See* H.R. Rep. No. 104-664, 6 (1996) (discussing the legislative response to *Baehr*). In 2013, the state legislature eventually legalized same-sex marriage under the Hawaii Marriage Equality Act.

8 *See id.*

9 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 28 U.S.C. § 1738C and 1 U.S.C. § 7 (1996)) [hereinafter *DOMA*].

10 U.S. CONST. art. IV, § 1.

11 *DOMA*, *supra* note 9. Section 3 became the subject of most of the controversy surrounding the Act, and the challenged provision in *United States v. Windsor*. As states began to permit same-sex marriages, DOMA had the effect of creating two-tiers of marriages: those that were recognized by the federal government and those that were not.

12 *See generally* Lee-ford Tritt, Windsor*'s Wake: Non-Traditional Estate Planning Issues for Non-Traditional Families,* 48 U. MIAMI HECKERLING INST. ON EST. PLAN. ¶ 11, p. 78 (2014) (detailing a timeline and an index of citations to the state legislative statutes and constitutional amendments banning same-sex marriage).

"equal liberty" guaranteed by the Fifth Amendment.[13] Beyond the significance of the Supreme Court's interpretation of the Fifth Amendment, *Windsor* is of import in that the Supreme Court addressed the constitutional requirements of the federal government concerning state marriage determinations.

Edith Windsor and Thea Spyer had been in a committed relationship for approximately 30 years. They were residents of New York, where they lived together. In 1993, Windsor and Spyer registered as domestic partners in New York City. In 2007, Windsor and Spyer (still New York residents) were married in a lawful ceremony in Canada. In 2009, Spyer died leaving her entire estate to Windsor and naming Windsor as executor. Windsor sought to claim the federal estate tax marital deduction under section 2056(a) of the Code for all property passing to her as a result of Spyer's death. The I.R.S. denied the marital deduction based upon Section 3 of DOMA.[14] Consequently, Spyer's estate was subject to more than $360,000 in estate tax. The estate paid the tax and Windsor filed suit in the United States District Court seeking a refund of the estate taxes paid and a declaration that Section 3 of DOMA was unconstitutional.[15]

The suit began with a procedural oddity: because of the Obama Administration's position on same-sex marriage, the Department of Justice made the controversial decision to decline to defend DOMA, so the Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") intervened as an interested party for the sole purpose of defending the statute on behalf of the government.[16]

The Southern District of New York used rational basis analysis to find Section 3 of DOMA—the section containing gender-specific definitions of "marriage" and "spouse"—unconstitutional under the Equal Protection Clause of the United States Constitution.[17] Thus, Windsor was granted her motion for summary judgment. Notably, the court applied a "heightened" form of rational basis review that required BLAG to show with "special clarity" the federal government's interest in intervention.[18] The court declined to consider whether a more stringent equal protection test was necessary for gay and lesbian persons "because the Court believes that the constitutional question presented here

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13 United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

14 *Id.* at 2683.

15 *Id.*

16 *Id.* at 2683-84.

17 Windsor v. United States, 833 F. Supp. 2d 394, 406 (S.D. N.Y. 2012).

18 *Id.* at 402.

may be disposed of under a rational basis review, [therefore] it need not decide whether homosexuals are a suspect class."[19]

In a 2-1 opinion, the Second Circuit Court of Appeals upheld the District Court's holding, but conducted its analysis using intermediate scrutiny under the equal protection paradigm, making the express conclusion that gay and lesbian persons are in a quasi-suspect class.[20] The court held that the classification of marriage effected by DOMA was not substantially related to any important government interest and therefore concluded that Section 3 was unconstitutional.[21] The court also addressed an underlying standing issue, specifically, whether New York recognized Windsor and Spyer's Canadian marriage at the time of Spyer's death in 2009.[22] Speculating that New York probably would have recognized the marriage,[23] the court found that Windsor did have standing to appeal.[24]

On December 7, 2012, the United States Supreme Court granted certiorari to hear *Windsor*.[25] The Court released its 5-4 decision on June 26, 2013.[26] Reasoning that the regulation of marriage is, and has historically been, the exclusive province of the states to which the federal government has no interest, the Court concluded that Congress's attempt to intervene with the imposition of DOMA was evidence of animus.[27] *Windsor* "stands for the proposition that the Internal Revenue Code cannot be applied in a manner that would disregard for tax purposes an individual's marital status determined under state law except to the extent required by a federal law enacted with a purpose of advancing a legitimate tax policy."[28] Moreover, because the "avowed purpose and

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19 *Id.* at 401-02.

20 Windsor v. United States, 699 F.3d 169, 210-11 (2d Cir. 2012).

21 *Id.* at 188.

22 *Id.* at 177-78.

23 *Id.* While New York did not itself license same-sex marriages at that time, it is a somewhat open question as to whether it recognized same-sex marriages performed in foreign jurisdictions before 2011. Rather than certifying the question to the New York Court of Appeals (New York's highest state court), the court opted to "predict" state common law by relying on rulings of intermediate courts. Here, all intermediate appellate New York courts that had considered the issue—three of the four appellate divisions—had found that New York did recognize foreign same-sex marriages based on New York's common-law marriage recognition rule that recognizes marriages valid in the foreign jurisdiction in which they were performed and not in contravention of New York statute or public policy.

24 *Id.*

25 United States v. Windsor, 133 S. Ct. 786, 786-87 (2012) (granting certiorari).

26 United States v. Windsor, 133 S. Ct. 2675, 2675-76 (2013).

27 *Id.* at 2693.

28 Carlyn S. McCaffrey & John C. McCaffrey, Obergefell *and the Authority of the IRS to Challenge Valid Marriages and Divorces*, STEVE LEIMBERG'S EST. PLAN. EMAIL NEWSL. no. 2345, Sept. 21, 2015.

practical effect" of DOMA was to impose "a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States," DOMA's Section 3 was found to be an unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.[29] The Supreme Court ruled that Section 3 was an unconstitutional "deprivation of the liberty of the person protected by the Fifth Amendment," and that the Constitution prevents the federal government from treating same-sex marriages any differently from heterosexual marriages.[30] Such differentiation, the Court reasoned, would "[demean] the couple, whose moral and sexual choices the Constitution protects."[31]

It is critical to note several oft-overlooked or mischaracterized aspects of the decision. First, the Court did *not* hold DOMA itself unconstitutional, but rather only section 3 of DOMA. Section 3 of DOMA was the only section at issue in the case and, in fact, the Court did not opine about Section 2 of DOMA.[32] Because of *Windsor*'s narrow holding concerning DOMA—that is to say, a holding applicable only to Section 3 of DOMA—the recognition of same-sex marriages continued to generate debate on both the federal and state levels after *Windsor*.

Second, while *Windsor* had a direct effect on the interpretation and administration of federal tax law, *Windsor* did not directly amend the federal tax law. *Windsor's* immediate impact, however, was on federal tax law and the estate planning profession. The inconsistent and ever-changing jurisprudential landscape concerning the validity or recognition of same-sex marriages from state to state raised serious conflict of law questions and impacted the implementation of various federal benefits for same-sex married couples depending on whether the couple lived in a recognition state or non-recognition state.[33]

III. *WINDSOR'S* WAKE

When *Windsor* was decided on June 26, 2013, same-sex marriage was already allowed in thirteen states. Immediately following *Windsor*, federal and state courts were flooded with litigation related to the decision. Tellingly, Tom Watts writes that "[t]he marriage equality cases may represent the first time in American legal history that a single constitutional question has been so rapidly and broadly litigated."[34] There

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29 *Windsor,* 133 S. Ct. at 2693, 2696.

30 *Id.* at 2695.

31 *Id.* at 2694.

32 *Id*. at 2682-83.

33 *See, e.g.*, Tom Watts, *From* Windsor *to* Obergefell*: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. S52, S59-60 (2015).

34 *Id.* at S53.

were constitutional challenges in thirty-seven states covering nine federal circuits.[35] After the decision in *Windsor*, four Federal Circuit Courts of Appeal upheld District Court decisions invalidating prohibitions on same-sex marriages[36] and one decision by the Circuit Court of Appeals upheld a ban on same-sex marriage.[37] *Obergefell v. Hodges*[38] resulted from the consolidation of these cases, under which the right to a same-sex marriage became fundamental.[39]

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[35] *Id.* at S81.

[36] Latta v. Otter, 771 F.3d 456, 495 (9th Cir. 2014); Baskin v. Bogan, 766 F.3d 648, 672 (7th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014); Bishop v. Smith, 760 F.3d 1070, 1096 (10th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193, 1229-30 (10th Cir. 2014).

[37] DeBoer v. Snyder, 772 F.3d 388, 420 (6th Cir. 2014).

[38] 135 S. Ct. 2584 (2015).

[39] *See id.* at 2593, 2608. For a discussion concerning *Obergefell* and its impact, see Lee-ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of* Obergefell, 2016 Wis. L. Rev. 873 (2016).