



**WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM**

**U.S. Supreme Court Decisions Relating
to Same-Sex Marriage**

Hollingsworth v. Perry challenged California's Proposition 8, the state's constitutional amendment banning same-sex marriage. The Court ruled that the proponents of the amendment did not have standing to appeal a lower-court decision overturning the amendment. The ruling leaves the lower-court's finding of unconstitutionality in place, which allows same-sex marriage to be recognized in California.

U.S. v. Windsor, challenged a denial by the Internal Revenue Service of federal benefits to a same-sex couple married in a state where such unions are recognized, under the 1996 Defense of Marriage Act's opposite-sex only definition of a "spouse." The Court ruled that the law was unconstitutional, citing equal protection and liberty with due process of law protections. The ruling allows spouses in a same-sex marriage to be eligible for spousal rights and obligations in federal programs. However, if a couple currently resides in a state that does not recognize a same-sex marriage, the applicability of the spousal rights and obligations varies depending on the rules for determining marital status under each particular federal law.

BACKGROUND

Historically, the regulation of marriage and marital status has been in the realm of the states to determine. However, state laws regulating marital status are subject to the rights guaranteed under the U.S. Constitution. This section briefly summarizes the applicable state and federal laws.

WISCONSIN LAW

Under Wisconsin law, marriage is a civil contract between a husband and wife, with particular rules governing the formation of that contract. [ch. 765, Stats.] To enter this contract, the Wisconsin Constitution specifically provides that a marriage may only be between one man and one woman. Any other marriage is not valid or recognized as a marriage in this state. The law further provides that a legal status that is identical or substantially similar to that of marriage, for unmarried individuals, is also not valid or recognized in this state. [Wis. Const. art. XIII, s. 13, created Nov. 2006.]

Wisconsin law also provides for the establishment of domestic partnerships, which are legal relationships entered into by two individuals of the same sex who share a residence together.

Domestic partners are granted certain benefits, such as inheritance rights and medical access, but lack certain other legal rights and obligations associated with marriage, such as the mutual obligation for support, the comprehensive marital property system, and child custody and placement rights and obligations. [ch. 770, Stats.] The Wisconsin Court of Appeals has found that domestic partnerships do not violate the state's Constitutional marriage amendment, stating that the legal status of a domestic partnership is not substantially similar to the legal status of marriage. [*Appling v. Doyle*, 2013 WI App 3, Wis. S. Ct. review accepted June 12, 2013.]

U.S. CONSTITUTION

Generally, under the Full Faith and Credit Clause of the U.S. Constitution, a marriage contracted in another state that satisfies the legal requirements of that state will be recognized if the married couple moves to Wisconsin. However, the U.S. Supreme Court has acknowledged a public policy exception to the full faith and credit requirement for actions in other states, if the action violates the state's public policy. [U.S. Const. art. IV, s. 1; e.g., *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).] Consequently, the Full Faith and Credit Clause has not been used to force a state to recognize a marriage it did not wish to recognize.

Additionally, both the Equal Protection and Due Process Clauses of the U.S. Constitution have been implicated in state laws regulating the marriage contract. For example, in 1967 the U.S. Supreme Court struck down Virginia's anti-miscegenation laws that banned interracial marriages. The Court held that the laws violated the Equal Protection Clause because there was no legitimate reason to restrict the rights of citizens to marry solely on racial classifications. The Court further held that the laws deprived an interracial couple of liberty without due process of law, stating that the freedom to marry "is one of the 'basic civil rights of man'". [U.S. Const. Amdts. V and XIV, s. 1; *Loving v. Virginia*, 388 U.S. 1 (1967).]

FEDERAL DEFENSE OF MARRIAGE ACT

The federal Defense of Marriage Act, commonly referred to as DOMA, was enacted in 1996. The law has two main effects: first, it expressly allows states to refuse to recognize a same-sex marriage performed under the laws of another state; and second, it provides a federal definition for the terms "marriage" and "spouse" for the purposes of all federal statutes. Under the Act, "marriage" means a legal union between one man and one woman, and a "spouse" means a person of the opposite sex who is a husband or a wife. [P.L. 104-199; 28 U.S.C. s. 1738C; 1 U.S.C. s. 7.]

The U.S. General Accounting Office (G.A.O.) has identified a total of 1,138 United States Code provisions in which marital status is a factor in determining or receiving benefits, rights, and privileges. According to the G.A.O., areas in which the application of federal law depends on the definition of "marriage" or "spouse" include the federal health and welfare programs, such as Social Security retirement and disability benefits, food stamps, child welfare services, and Medicare and Medicaid. Other areas include veterans' benefits, taxation, and federal laws relating to employment benefits, immigration, bankruptcy, mortgage lending, copyrights, criminal justice, and loan programs, among others. [Dayna K. Shah, *Defense of Marriage Act: Update to Prior Report*, GAO-04-353R, January 23, 2004, available at: <http://www.gao.gov/assets/100/92441.pdf>.]

HOLLINGSWORTH v. PERRY

On June 26, 2013, the U.S. Supreme Court issued a 5-4 opinion in *Hollingsworth v. Perry*. This case originated in California, where first the California Supreme Court held that limiting “marriage” to opposite-sex couples violated the Equal Protection Clause of the State Constitution, but then voters passed a ballot initiative known as Proposition 8, amending the State Constitution to provide that only a marriage between a man and a woman would be valid or recognized in California. [*Hollingsworth v. Perry*, ___ U.S. ___ (2013).]

The case began with two same-sex couples who wished to marry and challenged the amendment in the federal district court under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution. Because the California officials named in the suit refused to defend the law in court, while continuing to enforce the law, the district court allowed the official proponents of the initiative to defend the law.

After the district court found the amendment to be unconstitutional, the official proponents of the initiative appealed to the Ninth Circuit Court of Appeals. On behalf of the court of appeals, the California Supreme Court determined that the official proponents of the initiative were authorized under California law to appear and assert the state’s interests in the law’s validity. Relying on the determination that the proponents had standing under California law to defend the constitutionality of the amendment, the court of appeals determined on the merits of the case that the amendment violated the Equal Protection Clause of the U.S. Constitution.

The U.S. Supreme Court did not reach the merits of the case, instead finding that the official proponents did not have standing under the U.S. Constitution to appeal the district court’s decision. Under the U.S. Constitution, federal courts have jurisdiction only to decide an actual “case” or “controversy.” [U.S. Const. art. III, s. 2.] As summarized by the Court, it is not enough that the party invoking the power of the court have “keen interest” in the issue, but, rather, the person must have suffered a concrete and particularized injury.

The Court held that the proponents had no personal stake in defending the law that was distinguishable from the general interest of any citizen in vindicating the constitutionality of any state law. The Court further rejected arguments that the proponents were either acting as a third party on behalf of the state, or directly as an agent of the state in their official capacity as proponents of the initiative. Under the Court’s decision, the district court’s determination that the law is unconstitutional remains in effect, and same-sex couples in California may marry with all the rights and obligations of the marriage recognized by the state.

U.S. v. WINDSOR

On June 26, 2013, the U.S. Supreme Court issued another 5-4 opinion in *U.S. v. Windsor*. This case originated as a tax dispute when, under the DOMA definition for a “spouse,” a surviving same-sex spouse was denied the marital exemption from the federal estate tax. The Court held that the definitions for “marriage” and “spouse” under DOMA violate the liberty protected by the Due Process Clause of the Fifth Amendment, as applied to the federal government, and violate the more specific equal protection guarantees of the Fourteenth Amendment. [*U.S. v. Windsor*, ___ U.S. ___ (2013).]

The case began with a same-sex couple who was legally married in Ontario, Canada. At the time of one spouse's death, the couple was residing in the State of New York, which recognized their marriage as valid. The decedent spouse left her estate to her surviving spouse who then sought a refund of taxes paid to the Internal Revenue Service (IRS) under the marital exemption from the federal estate tax. The refund was denied by the IRS, who contended that she was not a surviving "spouse" under the applicable DOMA definition.

The Court first resolved the question of whether the parties had standing in the suit. Under Executive direction, the U.S. Department of Justice declined to defend the constitutionality of the law, while the IRS continued to enforce the law. The Court held that the government had standing in the suit, reasoning that although the government may welcome a ruling that the law is unconstitutional, the ongoing claim for a refund that the IRS refused to pay was a sufficient controversy for jurisdiction, and an order to pay the refund would be an economic injury to the U.S. Treasury. In addition to the legal jurisdiction, the Court noted that prudential reasons favored the Court's exercise of jurisdiction, as attorneys for the House of Representatives were able to make an adversarial presentation of the issues, and, if the case were not resolved, courts would be without guidance in the myriad of "over 1,000" federal statutes involved by DOMA.

On the merits of the case, the Court's decision focused on the issues of basic due process and equal protection principles. The Court noted that a state's interest in defining and regulating the marital relation is subject to these constitutional guarantees. On that background, the Court framed the question as whether the "injury and indignity" of the federal restrictions are a deprivation of an essential part of the liberty protected by the Constitution when the federal law injures the same class of persons that the state of New York sought to protect.

The Court held that the definitions in DOMA are invalid, stating that there is no legitimate purpose that overcomes both the purpose and effect of the law in disparaging and injuring those whom the state sought to protect in lawful marriage. In its reasoning, the Court discussed the incongruity between the state's ability to define the marital relationship, while under the federal law an otherwise valid marriage was "unworthy" of federal recognition. The Court stated that DOMA's principal effect was to identify a subset of state-sanctioned marriages and make them unequal throughout the "entire United States Code."

The Court noted that its holding is limited to lawful same-sex marriages recognized by a state.

DISCUSSION

The Court's holdings in these two cases clarify some areas of the law, but leave other questions yet to be resolved, particularly in their implications for Wisconsin residents.

For example, the decisions do not affect the status of Wisconsin's constitutional amendment that recognizes only opposite-sex marriages as valid. Because the appeal of the challenge to the similar California amendment was vacated for lack of standing, the controlling district court decision finding the amendment unconstitutional applies only in California. Thus, if a same-sex couple lives in California, and was legally married elsewhere or is married in California, the marriage is now recognized in that state. However, because the portion of DOMA that allows

states to individually determine whether or not to recognize a same-sex marriage is unaffected by the decisions, Wisconsin is not required to recognize a California couple's same-sex marriage.

Likewise, because the decisions apply only to valid same-sex marriages that carry all of the same rights and obligations as any other valid marriage within a state, Wisconsin's domestic partnership law is unaffected and the state is not required to recognize a domestic partnership as a marriage. The federal government may, however, assess whether or not to include a domestic partner in the rights and obligations of a spouse under any programs administered under federal law.

Ultimately, under the decisions, if a same-sex couple was married in, and lives in, a state that recognizes the marriage, both spouses have all the rights and obligations of a spouse under any programs administered under federal law.

However, if a same-sex couple was married in a state that recognizes the marriage as valid, but reside or move to a state such as Wisconsin that does not recognize the marriage, the rights and obligations will vary with each applicable law, depending on whether the marital status is determined from the place of marriage, or the couple's current residency. Where the method of determining marital status is unclear under any particular federal law, presumably the federal agency responsible for the program will assess the applicability of the program's marital status provisions and will issue general guidance for determining a same-sex couple's marital status.

SUMMARY

In summary, *U.S. v. Windsor* challenged the IRS's denial of federal benefits to a same-sex couple married in a state where such unions are recognized, under the DOMA opposite-sex only definition of a "spouse." The Court ruled that the law was unconstitutional, citing equal protection and liberty with due process of law protections. The ruling allows spouses in a same-sex marriage to be eligible for spousal rights and obligations in federal programs. However, if a couple currently resides in a state that does not recognize a same-sex marriage, the applicability of the spousal rights and obligations varies depending on the rules for determining marital status under each particular federal law.

The second case, *Hollingsworth v. Perry*, challenged California's Proposition 8, the state's constitutional amendment banning same-sex marriage. The Court ruled that the proponents of the amendment did not have standing to appeal a lower-court decision overturning the amendment. The ruling leaves the lower-court's finding of unconstitutionality in place, which allows same-sex marriage to be recognized in California, although the Court did not address the underlying constitutionality of a ban on same-sex marriage.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

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