

What the High Court's Ruling on DOMA Does *Not* Say

By Jeffrey W. Larroca, JD

On June 26, 2013, the U.S. Supreme Court ruled on the *U.S. v. Windsor* case, declaring the Defense of Marriage Act (DOMA) unconstitutional. Enacted in 1996, before same-sex marriage was legal in any state, DOMA provided a federal definition of marriage as a legal union between one man and one woman. While there is a great deal of commentary on the decision, it is important to identify what it does not say. The opinion, written by Justice Anthony Kennedy, goes quite a ways in explaining the strides made by same-sex marriage proponents:

> "Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons."

Justice Kennedy's historical recap, however, is a prelude to the basis of his decision, which is that Congress unconstitutionally infringed on the rights of states to designate who could and who could not marry in their jurisdictions. As held by the Supreme Court:

> "The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages."

Nothing in the decision suggests a constitutional right for same-sex couples to marry, and a state remains free to deny or allow same-sex couples the right to marry and to define marriage as it deems fit. It is a fair reading to say that the rights of gay couples to marry and the rights of states to, as Justice Kennedy writes, define the statuses "the State finds to be dignified and proper" both received a boost.

The case, however, has immediate practical consequences. By finding DOMA unconstitutional, the Supreme Court acknowledges the authority of each state to decide its own definition of "spouse." Therefore, if an employee is married to a same-sex partner and also lives in a state that recognizes same-sex marriage, then the employee will be entitled to receive the benefits of federal law previously denied.

For example, same-sex couples in states where their marriage is recognized may now take leave under The Family & Medical Leave Act (FMLA) to care for their spouse who is suffering from a serious health condition. Under FMLA, eligible employees are entitled to 12 weeks of job-protected leave to care for certain family members, including spouses with a qualifying medical condition.

FMLA regulations define "spouse" as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides…."

FMLA is not the only federal law impacted by the Supreme Court's decision on DOMA. The Court's decision will affect how the Affordable Care Act (Obamacare) is administered, as well as several other benefits. For example, health care continuation coverage under COBRA was only available in the case of a qualifying event that resulted in a loss of coverage to spouses of the opposite sex. After *Windsor*, these continuation benefits will be made available to same-sex spouses.

A plethora of other federal laws and regulations related to spousal rights, from The Health Insurance Portability and Accountability Act to survivorship annuities to dependent care assistance to rules under Individual Retirement Accounts, are affected. Indeed, as reported by the *Washington Post,* one of the most dramatic impacts may be tax related: "There is a smaller outcome derived from the same decision: The U.S. Treasury owes Ms. Edith Windsor of New York City $363,053. Plus interest! That is the amount that the estate of Windsor's late wife, Thea Spyer, paid in taxes upon Spyer's death in 2009. Had they been a heterosexual married couple, there would have been no tax due, but by virtue of the Defense of Marriage Act the federal government did not recognize their marriage as valid for tax purposes."

So, while *Windsor* did not rule that prohibiting same-sex marriage is unconstitutional, its effect is nonetheless sweeping.

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