

## **WHAT CALIFORNIA FAMILY LAW ATTORNEYS AND CLIENTS NEED TO KNOW ABOUT THE SUPREME COURT MARRIAGE DECISIONS**

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### **WHAT DID THE COURT DECIDE?**

- 1) **The *Windsor* Ruling (DOMA):** The Court ruled that section 3 of the federal Defense of Marriage Act (DOMA) is unconstitutional. According to the majority opinion, "DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment."
- 2) **The *Perry* Ruling (Prop 8):** The Court ruled that the proponents of Prop 8 lacked standing to appeal the federal District Court's ruling (Judge Walker). The Ninth Circuit decision therefore is vacated and the matter remanded.

### **WHAT DOES THIS MEAN FOR FAMILY LAW ATTORNEYS AND OUR CLIENTS?**

#### **WHEN WILL SAME SEX COUPLES AGAIN BE ABLE TO MARRY IN CALIFORNIA?**

On June 26, 2013, shortly after the Supreme Court issued its decisions, Governor Brown directed the California Department of Public Health to advise county officials that the District Court's injunction against enforcing Proposition 8 applies statewide and that all county clerks and county registrar/recorders must comply with it. However, same-sex Californians will not be able to marry until the Ninth Circuit Court of Appeals confirms the stay of the injunction is lifted, which is likely to take a few weeks. It is anticipated that marriage licenses will be issued by the end of July.

***NOTE: On Friday afternoon June 28<sup>th</sup>, 2013, the U.S. Ninth Circuit Court of Appeals lifted the stay opening the way for same-sex marriages to resume in the state of California.***

#### **HOW WILL ACCESS TO FEDERAL BENEFITS WORK?**

Each major federal program has its own rules and procedures for accessing federal benefits, which makes it extraordinarily complicated to try to answer questions about the impact of the Windsor decision on this process. The national organizations have assembled initial fact sheets addressing access to specific federal benefits, which can be found at: [http://www.nclrights.org/site/PageServer?pagename=DOMA\\_FAQ\\_2013](http://www.nclrights.org/site/PageServer?pagename=DOMA_FAQ_2013). Attorneys and their clients can find much guidance from these fact sheets.

## **WILL CALIFORNIA DOMESTIC PARTNERSHIPS RECEIVE FEDERAL RECOGNITION UNDER THE *WINDSOR* RULING?**

We do not know the answer to this question. The *Windsor* decision only addressed the constitutionality of the Defense of Marriage Act, and did not address federal recognition of domestic partnerships and civil unions. It is quite possible that some federal programs will begin to recognize California Domestic Partnerships (and other states' marital equivalents) for purposes of allocating benefits, but this will be up to each individual program. The national LGBT organizations (e.g. National Center for Lesbian Rights, Lambda Legal) will be issuing detailed fact sheets outlining the impact of the rulings on specific federal benefits. Attorneys and clients should look to the national organizations for leadership on these issues

## **CAN A CALIFORNIA SAME-SEX COUPLE, MARRIED SINCE 2008, FILE AMENDED INCOME TAX RETURNS FOR PAST TAX YEARS TO OBTAIN THE BENEFITS OF JOINT FILING?**

There is a 3 year statute of limitations on filing an amended return, but same sex married couples *may* be able to file amended returns for tax years 2010, 2011 and 2012 if they would have benefited in those years from filing jointly. It is too soon to know how the IRS will address this issue, but couples in this situation should be encouraged to investigate their options. Again, attorneys and clients should look to the national organizations for leadership on these issues.

## **DO CALIFORNIA SAME-SEX COUPLES HAVING CHILDREN STILL NEED TO COMPLETE 2ND PARENT ADOPTIONS?**

The short answer to this question is **YES**. To explain why, think about the time-honored tradition of a family summer road trip. A married lesbian couple gets in their car in California and starts driving toward Washington DC with their children, excited about camping and seeing the sights along the way. Assuming they had their children after they were married, both women are presumed parents based on California's marital presumption, and both women's names are on their birth certificates. When they reach Nevada, their marriage no longer is recognized, and therefore the marital presumption no longer applies – although their family ties might be honored there given Nevada's broad domestic partnership law. But when they stop to see the Great Salt Lake, they DEFINITELY no longer will enjoy any marital protections or be entitled to any recognition of their marriage – including recognition of the parent-child relationship between the non-biological mother and the children. In order to gain the protections offered by the federal Full Faith & Credit Clause, they need a court Judgment affirming that both women are parents – most often obtained through a 2nd parent adoption. This has not been changed by the *Windsor* decision, which held that the federal government needs to recognize the marriage but not that every state has to recognize the marriage.

## **WILL SAME SEX COUPLES FROM NON-RECOGNITION STATES BE ABLE TO GAIN ACCESS TO FEDERAL BENEFITS BY MARRYING IN CALIFORNIA?**

Currently, eligibility for some federal benefits turns on whether a marriage was valid where it took place (at "place of celebration"), while eligibility for other federal benefits depends on whether the person's marriage is respected where the person lives. People who are legally married to same-sex partners and live in states that permit same-sex couples to marry will be eligible for *all* federal benefits based on marriage. People who are legally married to same-sex partners in states that do not respect such marriages will be eligible for *some* federal benefits, but *likely not all*. Pending further guidance by the relevant federal agencies, the answer to this question for couples who live in states that do not respect their marriage is uncertain. However, it is important to note that **IMMIGRATION BENEFITS** are based on validity of marriage at the place of celebration. Therefore, it is anticipated that the *Windsor* decision will allow same sex

couples to obtain immigration benefits by marrying in any of the marriage recognition states, regardless of where they live. For more information re: immigration benefits for same sex couples in light of the *Windsor* decision, see <http://immigrationequality.org/2013/06/the-end-of-doma-what-your-family-needs-to-know/>.

### **HOW SHOULD WE ADVISE COUPLES CONSIDERING TRAVELING TO CALIFORNIA TO MARRY?**

Couples from states that do not allow same sex couples to marry will likely be traveling to California for their nuptials. Many of these couples would do well to have pre-nuptial agreements to address some of the legal/financial issues raised by the lack of recognition of their marriages in their home states. Further, couples traveling from non-recognition states to California to marry should be aware of **MARRIAGE EVASION STATUTES**. Marriage evasion statutes are laws designed to prevent a resident of State A from going to State B to get married if the marriage would have been illegal in State A. They can carry criminal penalties. For more information on these statutes and their potential applicability in this context, see Flexcom member Deborah Wald's blog from 2008: <http://debwald.blogspot.com/2008/06/lions-and-tigers-and-marriage-evasion.html>.

### **WHERE CAN WE GET MORE INFORMATION?**

The National Center for Lesbian Rights, ACLU, Lambda Legal and Equality California also have put out a comprehensive fact sheet on marriage issues for same sex couples in California, which can be downloaded at: <http://www.nclrights.org/site/DocServer/MarriageforSameSexCouplesFAQ.pdf>.



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