

The End of DOMA: What are the
Practical Effects of
Windsor and *Perry* in Oregon



JUDGE BETH A. ALLEN
MULTNOMAH CIRCUIT COURT

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Same-Sex Couples Raising Children



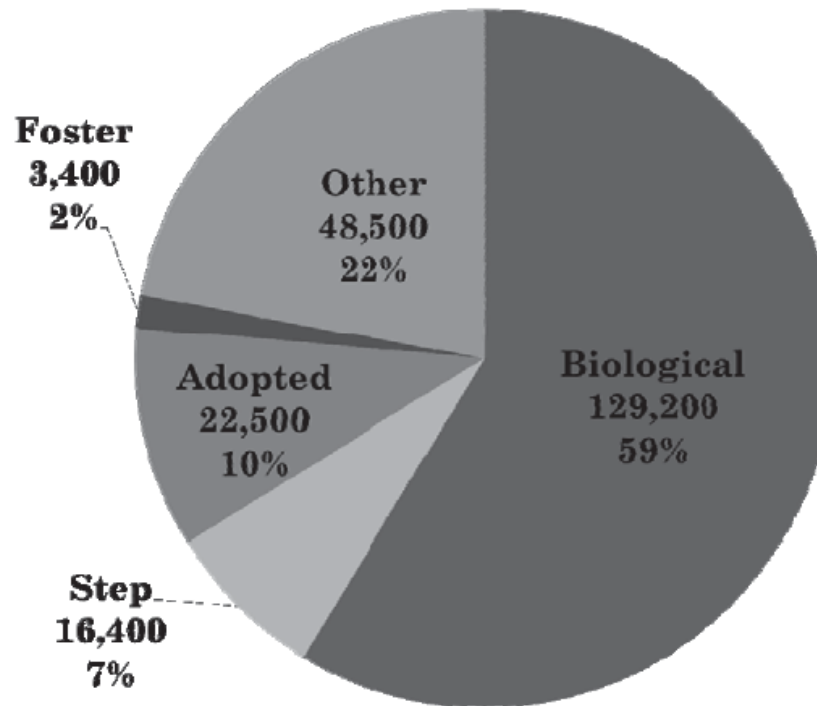
- 19% of same-sex couples in U.S. are raising children
- 220,000 children being raised by 125,000 same-sex couples

**Williams Institute (2013)*

Parent-Child Relationships



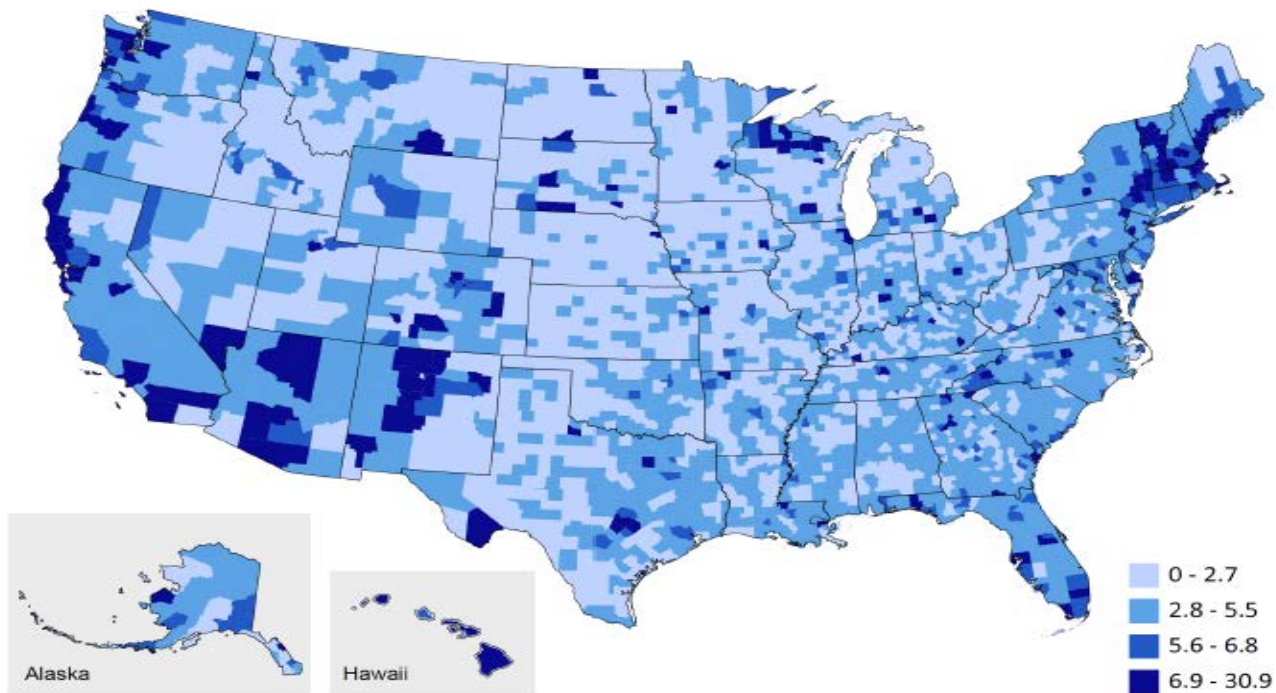
Figure D. Relationship of children under age 18 to householder (person 1) in same-sex couple households.



Same-Sex Couples



Same-sex couples per 1,000 households
by county (adjusted)*

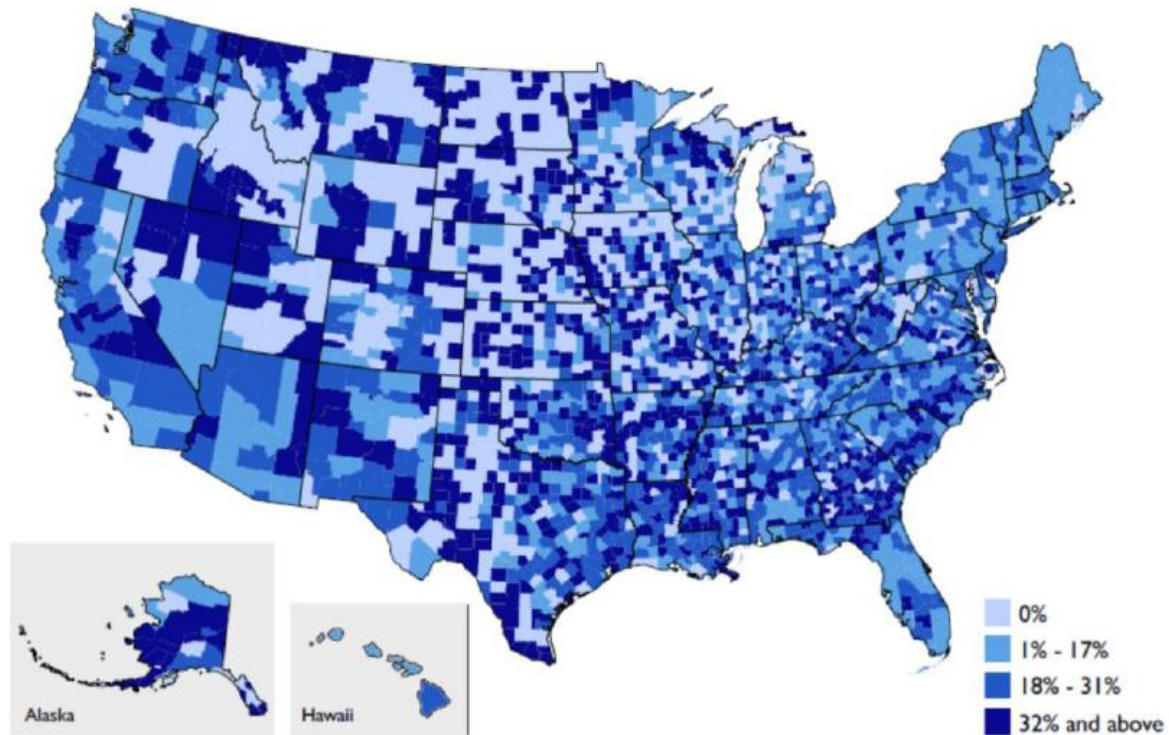


* Same-sex couples were identified in 93% of all US counties

Same-Sex Couples with Children



Figure 6. %Same-sex couples with biological, adopted, or foster children under age 18 in the home
Census 2010



The Supreme Court



- *Hollingsworth v. Perry*
 - California's Proposition 8

- *United States v. Windsor*
 - Section 3 of DOMA

Proposition 8



- California Constitutional Amendment
- Only marriage between a man and a woman is recognized in California
- Compare Oregon's Measure 36:
 - Constitutional Amendment
 - Only a marriage between a man and a woman shall be recognized in Oregon

Proposition 8



- Despite not being decided on the merits, *Perry* effectively overturned California's ban on same-sex marriage
- After the decision, California's Attorney General Kamala Harris declared that the district court's injunction banning enforcement of Prop 8 applied statewide and appealed to the Ninth Circuit to lift the stay on the injunction
- Two days later, the Ninth Circuit did and same-sex marriages immediately resumed in California
- Justice Kennedy denied Protect Marriage's request that the U.S. Supreme Court vacate the Ninth Circuit's order until the Protect Marriage group could request rehearing

Perry



- Proposition 8 proponents have no standing to appeal the district court's judgment.
- No resolution regarding:
 - Equal protection challenge to state marriage laws, including constitutionality of separate non-marital recognition
 - Level of scrutiny for sexual orientation-based classifications
 - Fundamental right to marry claim by same-sex couples
- Effect on Oregon
 - Virtually no legal impact
 - Portability relevant due to interstate movement

Case Brief: *Windsor v. United States*



- 1963: Edith Windsor and Thea Spyer fell in love in New York City.
- 1993: They registered as domestic partners in New York City under a local ordinance.
- 2007: Ms. Spyer had fallen ill. The couple traveled to Canada specifically to marry.
- 2009: Ms. Spyer died and left her estate to Ms. Windsor.
- 2010: The IRS required Ms. Windsor to pay \$363,053 in federal estate tax due to DOMA. She sued.
- 2012: New York began recognizing marriages between same-sex couples that were lawfully entered into in other jurisdictions.
- 2013: *Windsor*. **Married** same-sex couples gain federal recognition and receive federal rights and benefits

Defense of Marriage Act (DOMA)



- Section 2: States do not have to recognize same-sex marriages from other states. Not addressed.
- **Section 3: Mandated that no federal entity could recognize a marriage between two persons of the same sex. 1 USC § 7 [2000]; 28 USC § 1738 [2000].**

Defense of Marriage Act (DOMA)



- In 2011, U.S. Attorney General Eric Holder announced that both the U.S. Department of Justice (DOJ) and the Obama Administration had concluded that Section 3 of DOMA was unconstitutional and unworthy of defense in court
- After the DOJ stepped aside, Republicans in the U.S. House of Representatives (via the Bipartisan Legal Advisory Group or BLAG) intervened in *Windsor* to defend DOMA



- Three primary issues:
 - Standing—Obama administration refused to argue in support, but because it had not refunded the taxes paid, it still had a “real and immediate economic injury[.]” And BLAG’s substantial adversarial argument satisfies prudential concerns against taking a case where the principal parties are in agreement about the outcome. An additional prudential factor weighing heavily in favor of hearing the case was cost as DOMA’s provisions affected thousands of statutes and uncertainty would have been costly in terms of judicial resources *i.e.* circuit-by-circuit litigation.
 - Separation of Powers Issue—not taking the case would have allowed the executive branch to violate separation of powers by refusing to enforce laws passed by legislative branch
 - 5th Amendment Due Process

Briefing the Case



- The opinion, written by Justice Kennedy, held that the Section violated the Fifth Amendment, stating:

“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.”

Looming Question



- *Are state laws restricting marriage for same-sex couples unconstitutional?*
 - *Kennedy, J.:* “The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”
 - *Scalia, J., dissenting:* “[T]he view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today’s opinion.”

What's the Big Deal?



- 1,138 benefits, rights, privileges and obligations per a 2004 GOA search of United States Code
- 13 categories
- 58 pages
 - Senate Beauty Shop
 - National Sheep Industry Improvement Center
 - Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act

Not All Benefits Are Created Equal



- Initial issue to determine is whether the agency (or other provider of the benefit) looks to the state of *celebration* or state of *domicile*
 - “State” includes foreign jurisdictions (Windsor was married in Canada)
- An Executive Order solves everything?
 - No. Some entitlements use state of residence as required by the language of the law

Relevance to Married Oregonians?



- No equal marriage in Oregon
- So, where federal benefit is determined by place of domicile, federal benefits denied
- But, where federal benefit is determined by place of celebration, federal benefits granted
- Examples:
 - Social security insurance for death of spouse
 - Veteran's burial plot/payment for burial for spouse
 - Federal Health Benefits for employees of federal agencies

Relevance to Married Oregonians?



Same-sex couples can't get married in Oregon, but as of October 16, 2013 the Oregon A.G. issued a legal opinion stating that state agencies can begin recognizing same-sex marriages performed in other jurisdictions

Social Security



- Based on “place of domicile”
- But, defines “husband” and “wife” in terms of state law
 - ✦ a person is the wife or husband of an insured individual if "the courts of the State [of domicile] ... would find that such applicant and such insured individual were validly married ..." or, if not, that under the state's laws of intestate succession, the person would have the same status with respect to the individual's property as a wife or husband, widow or widower.”
- Good news: Under Oregon RDP, a Partner has the same status with respect to the individual’s property as a wife or husband

Social Security



- Available as a spousal support resource in dissolution
- Death benefits available to children who are deemed children as a matter of law
- Support enforcement
- Spousal survivor protection
- Spousal retirement protection
- Benefits of parents used for reunification efforts
- A consideration in providing elder resources
- May cut the other direction—families who have been means tested as two separate families to obtain benefits may now lose out on benefits

Veteran's Benefits



- USERRA—Notice and Stay
- Veteran's benefits as part of spousal /child support/property calculus
- Pensions/Survivor Benefit Plan (SBP) annuity
- Indemnity compensation for service-connected deaths, MIA, disability
- Medical care, nursing home care
- Educational assistance
- Housing assistance
- Divorced Spouse protections

Veteran's Benefits



- Six states (Texas, Georgia, Louisiana, Mississippi, Oklahoma, and West Virginia*) are refusing to comply with the Defense Secretary's directive that gay spouses of the National Guard be given the same federal benefits as heterosexual spouses
- Each state has cited a conflict between state laws that do not recognize same-sex marriage
- The Defense Secretary argues that the six states are violating federal law and that their refusal "creates division among the ranks and furthers prejudice."

*West VA officials have said the state intends to follow the directive

Taxation



- Option to file joint or separate income tax returns
- No longer paying for imputed value of health insurance premiums
- No more adoption credit for 2nd parent adoptions where the non-bio mother is treated as a step-parent under federal law
 - But, the adoption should be done anyway (see below)
- Spousal Support taxable to obligee, deductible to obligor
- Property transfer no longer a taxable “gift”
- Qualified Domestic Relations Orders (QDROs)—what a relief!

Employment Benefits and Related Laws



- **COBRA**
 - Provides for continuation of employer-sponsored health benefits after death or divorce of the employee
- **FMLA**
 - Right to protected leave for family includes spouses, children, adoption
- **ERISA**
 - Prohibits an employee from changing beneficiaries in a retirement plan or from waiving the joint and survivor annuity form of retirement benefit without the written consent of spouse
 - Allows for a QDRO to protect/administer retirement benefits awarded in a dissolution

Immigration



- Immigration law classifies spouses of US citizens as “immediate relatives.”
- Immediate relatives of US citizens have a much faster route to getting a green card than most other US immigrants

Bankruptcy



- Able to file as a couple (some courts already allow); one filing equals one fee
- Married spouses keep enough property to support both
- A former spouse making a claim for payments pursuant to a divorce or separation gets higher priority than some creditors
- Protection from discharge of spousal support awards
- Under some states' laws, debtors' spouses are responsible for any amount their spouses owe

Ethical Obligations Post *Windsor*



Do family law lawyers have an obligation to prior clients to determine whether their divorce decree should be reconsidered?

Possible “look-back” obligations



- Did the judgment award “partner” support? If so, does that now constitute spousal support and the taxation rules flowing therefrom?
- How was property divided? If married, would the basis assumptions apply? Would the tax implications be the same? If not, does an attorney have an obligation to demand reconsideration? May a party demand reconsideration in light of the interest in finality of judgments? What about seeking resolution through the IRS?
- Perhaps property was deemed a gift and gift taxes were paid. Is the party now entitled to a refund because the property transfer should never have been taxed?

Possible “look-back” obligations



- What if a party were granted an interest in retirement, but the parties did not draft a QDRO, as it was not recognized prior to marriage equality. A prescient lawyer would have provided a term that once marriage became legal a QDRO would be drafted. But most would have never guessed that they would be still practicing when marriage equality became the law, especially those who started drafting judgments more than 10 years ago.

Possible “look-back” obligations



- What if the lawyer drafted a partnership agreement for the parties?
 - What if the Agreement doesn't contemplate marriage?
 - What changes might be appropriate now, and what future view changes might be needed?

Ethical Obligations Post *Windsor*



- Do Wills & Estates lawyers have an obligation to former clients?
 - Does the Will have a marital “exception” to being deemed void
 - Does the Will still effectuate the parties’ desires to the best extent possible

“State Law Shoes” that are dropping post-*Windsor*



- Death Certificates—morbid, but important.
- In Ohio, as part of a challenge to Ohio’s constitutional provision forbidding same sex marriage, a federal judge enjoined the Ohio registrar of death certificates from accepting a death certificate that did not record terminally ill plaintiff’s status of married and did not record his husband as his surviving spouse
- Jennifer Neuman-Roper, a plaintiff in the New Mexico state court case requesting freedom to marry, was married in August 2013 when a judge ordered the Santa Fe county clerk to begin issuing marriage licenses to same-sex couples. When Ms. Neuman-Roper died in October 2013, she became the first person to be issues a NM certificate of death that acknowledged a same-sex spouse

“State Law Shoes” that are dropping post-*Windsor*



- In the Order in the Ohio case—*Obergefell v. Kasich*—the judge recognized that *Windsor*'s holding was limited to a finding that the federal government cannot refuse to recognize state laws authorizing same-sex marriage but still applied *Windsor*'s reasoning in concluding that Ohio law unjustifiably created two tiers of couples, opposite sex couples married in other states and same-sex couples married in other states. The judge concluded that this lack of equal protection was fatal.
- In September, the judge granted a motion to expand the precedent in the case to “all similarly-situated couples.”

“State Law Shoes” that are dropping post-*Windsor*



States that have legal same sex marriage

- By court decision: California (June 28, 2013 the day the Ninth Circuit lifted the stay); Connecticut (Nov. 12, 2008); Iowa (Apr. 24, 2009); Massachusetts (May 17, 2004); New Jersey (October 21, 2013)
- By state legislature: Delaware (July 1, 2013); Hawaii (law will take effect Dec 2, 2013); Minnesota (Aug. 1, 2013); New Hampshire (Jan. 1, 2010); New York (July 24, 2011); Rhode Island (Aug. 1, 2013), Vermont (Sept. 1, 2009)
- By popular vote: Maine (Dec. 29, 2012); Maryland (Jan. 1, 2013); Washington (Dec. 9, 2012)
- Washington D.C. legalized same-sex marriage Mar. 3, 2009

“State Law Shoes” that are dropping post-*Windsor*



Drew Reisinger, the North Carolina Buncombe Register of Deeds, began accepting marriage license applications from same-sex couples and requested review of the decision from North Carolina’s Attorney General

Other Impacts



- Spousal privilege—does spousal privilege apply to a legally married same-sex couple living in a state that does not recognize same-sex marriage
- Recent Kentucky Case---Geneva Case, who entered into a civil union with her partner in Vermont in 2004, invoked spousal privilege when the prosecutor called on her to testify against her same-sex partner in the partner's murder trial
- The Kentucky judge explained that the State of Kentucky would not allow a Vermont Civil Union to grant Ms. Case spousal privilege

Other Impacts



- The Kentucky judge clarified that this not a matter of Kentucky ignoring the constitutionality of another state's marriage because Case and her partner were not technically married

Conclusion



- An astounding change of the legal landscape, but...
- It's still a parallel universe affecting not only gay couples and their children, but also bureaucrats who must determine entitlement to benefits or imposition of obligations, and to judges, who will have to sort it all out when parties disagree
- Complete marriage equality will not resolve all issues because the incremental inclusion of gay men and lesbians to the institution of marriage means that uncertainty about intentions will control many issues such as parentage, property and probate

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