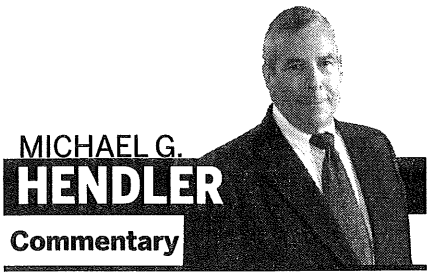
The evolution of DOMA, and questions still unanswered

In 1996, the Defense of Marriage Act (DOMA) was passed by Congress and signed into law by then President Bill Clinton.



Section 3 of DOMA provided a federal definition of marriage for all federal purposes, stating "the word 'marriage' means only a legal union between one man and woman as husband and wife and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

In June 2013, in *U.S. v. Windsor*, the Supreme Court held that Section 3 of DOMA, which had previously confined marriage to unions between a man and a woman, was unconstitutional.

U.S. Attorney General Eric Holder recently announced and reiterated that, regardless of individual states' positions on same-sex marriage, the federal government will extend the over 1,000 federal benefits that were previously denied to all couples in same-sex marriages.

Section 2 of DOMA, which declares that states and territories of the United States have the right to deny recognition of same-sex marriages that originated in other states, however, was not considered by the Supreme Court in the Windsor case, and is still valid.

Moreover, although increasing numbers of states are legalizing same-sex marriage, the majority of states still do not have laws that permit same-sex marriage to take place within their state. The result is that any given same-sex marriage will be treated inconsistently on a national level.

The DOMA effect today

What are the implications of the still valid portion(s) of DOMA? In this post-Windsor era, there are (at least) three classes of marriages:

(1) heterosexual marriages, which enjoy full state and federal recognition;

(2) same-sex marriages where the couples marry and live in states permitting same-sex marriages, and

(3) same-sex marriages where the couples marry in states permitting same-sex marriages, but live in states which do not recognize same-sex marriages.

Maryland has permitted same-sex marriage since the Civil Marriage Protection Act went into effect Jan. 1, 2013. Thus, a same-sex couple living married in Maryland would fall under category (2). The marriage would be entitled to state and federal recognition while the couple was in Maryland, but the couple should be wary of their potentially limited rights when traveling outside of Maryland.

Full faith and credit of other states' laws is subject to a public policy exception, under which states are not required to recognize another state's law if it violates their own public policy. Thus, if such a couple visited a state which did not legally recognize same-sex marriage, and one of the spouses got ill, the sick spouse could use the other spouse's federal employee health insurance, but a local hospital could refuse to let him/her into the sick spouse's hospital room.

The Windsor decision leaves several questions unanswered. Maryland family law practitioners must be mindful of these issues when advising same-sex families. Here are a few which should be considered:

Before the marriage

Advise your client of potential adverse consequences of same-sex marriage, such as privacy implications and potential discriminatory problems (i.e. attempting international adoption from an intolerant or discriminatory country).

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Ask your client about any past relationships: be sure that any prior state-recognized relationship status with ex-partners have been resolved (i.e. legally ended) before the couple marries in Maryland.

Tax implications during same-sex marriage

In Rev. Rul. 2013-17, the IRS stated that regardless of the state in which a same-sex couple resides, the couple will be considered lawfully married under the Internal Revenue Code if they were married in a state whose laws authorize same sex marriage.

Although this is undoubtedly good news for same-sex couples wishing to jointly file their federal income taxes, same-sex couples residing in states that do not recognize their marriage should be advised that they may need to file state income taxes as individuals. This may require completing supplemental schedules or forms at the state level.

Divorce

Even though Maryland recognizes same-sex marriages, same-sex couples who marry in Maryland and move to a state that does not recognize same-sex marriage may run into legal obstacles.

The public policy exception to full faith and credit may prove extremely problematic for same-sex couples married in Maryland who wish to dissolve their marriage, if they relocate to a non-recognition state, as a court likely will not recognize the marriage even if only for the purpose of ending it.

Adding insult to injury is the fact that the solution may not be as easy as simply moving back to Maryland or the state in which the couple was wed, because many states have minimum residency requirements to establish domicile before the states allow couples to file for divorce.

In Maryland, if the grounds for divorce occurred outside of the state, a party cannot apply for a divorce unless one of the parties has resided in Maryland for at least a year prior to the filing for divorce.

As we know, there are several grounds for divorce available in Maryland. There is the "no fault" divorce ground which requires a one-year separation as a prerequisite to divorce, and there are also a number of fault grounds.

One of those grounds is adultery, and a divorce case filed on grounds of adultery does not require a waiting period. However, the definition of adultery is derived from the criminal law and requires vaginal penetration. Absent a ruling from the Court of Appeals to the contrary or a change from the legislature, same-sex couples may not be able to avoid the 12-month waiting period even if one spouse has, in fact, been unfaithful.

Equitable division of property and alimony

Length of marriage typically holds a great deal of importance in assessing the equitable division of property and determining whether alimony is appropriate. This becomes an issue for attorneys working with LGBT couples who couldn't marry in the state until 2013. A pre-nuptial agreement may be able to address this.

Parental rights, custody and visitation

Because Section 2 of DOMA is still in effect, the existence of same-sex marriage itself will not suffice to prove parental status. Birth certificates may be used as presumptive evidence of a parent-child relationship.

However, they do not, by themselves, create legal relationships. Thus, second-parent adoption or a parentage order is imperative to protect a non-biological parent's rights, both when traveling to non-recognition states and if the same-sex couple splits up.

Adoptions, which are provided for by statute, are the safest way to protect parental rights in Maryland. An adoption results in a court order subject to full faith and credit and comity from other states (with no public policy exception). Adoptions are also imperative in the event of a divorce, as Maryland's de facto parenting rights provide little to no protection to unmarried, non-biological "parents."

Conclusion

In sum, there are a host of additional issues for a family law practitioner to keep in mind when providing legal advice to clients involved in same-sex relationships. Until the country is united in its recognition of same-sex marriages, clients entering same-sex marriages would be well-served by a pre-nuptial agreement that does not leave their fate to the state.

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