MORGAN AND DiSALVO, P.C.
attorneys at law

RICHARD M. MORGAN, Esq.
rmm@morgandisalvo.com

LORAINE M. DiSALVO, Esq.
ldisalvo@morgandisalvo.com

OF COUNSEL
DIANE B. WEINBERG, Esq.
dweinberg@morgandisalvo.com

News Alert: What do the Two Recent U.S. Supreme Court Cases of U.S. v. Windsor and Hollingsworth v. Perry mean for Gay and Lesbian Couples?

By Loraine M. DiSalvo

On June 26, 2013, the U.S. Supreme Court issued its rulings in two cases which involved marriage laws and the effect of those laws on gay and lesbian couples. There has already been much discussion of what these cases mean for those couples, and there will certainly be much more to come. What we hope to do here is simply provide our readers with a better idea of what these cases may mean for now, and what questions still remain unanswered for gay and lesbian couples living in Georgia.

One ruling, Hollingsworth v. Perry, should have very little immediate effect outside the state of California, although many people were hoping it might result in a ruling which recognized a federally protected right to marry for gay and lesbian couples. We address this case first, to avoid burying it beneath our discussion of the second, and potentially much more immediately important, case.

The second case, United States v. Windsor, opened the door for federal recognition of gay and lesbian marriages by striking down Section 3 of the federal Defense of Marriage Act. However, the question of just how far that door has been opened now looms large.

Hollingsworth v. Perry, 570 U.S. _____ (2013), is probably better known as the case in which California's Proposition 8 was challenged as unconstitutional. Proposition 8 was a 2008 voter initiative which amended the California state constitution to bar same-sex couples from entering legally recognized marriages. The initiative was widely seen as an attempt to undo the results of a California Supreme Court ruling from earlier that year which interpreted the state's constitution as requiring that gay and lesbian couples be allowed to marry just as straight couples could. Proposition 8's constitutionality was upheld by the California state courts, and then challenged in federal District Court. In 2010, the District Court ruled that Proposition 8 was unconstitutional and issued an order preventing the state of California from enforcing it. At that point, the state decided not to appeal that ruling and not to continue trying to defend Proposition 8. A group which consisted of the original proponents of Proposition 8 was eventually allowed by the California courts to take over where the state left off, and pursue an appeal of the District Court's ruling. Eventually, the federal Court of Appeals for the Ninth Circuit agreed that the original proponents had the legal standing necessary to continue the appeal. The Ninth Circuit also agreed that Proposition 8 was unconstitutional.

The U.S. Supreme Court's ruling in Hollingsworth disagrees with both the District Court and the Ninth Circuit's ruling that the group of proponents of Proposition 8 had the legal standing necessary to continue the appeal. The Supreme Court said that, because the group of proponents did not have the necessary standing to appeal the District Court's ruling overturning Proposition 8, neither the Ninth Circuit nor the Supreme Court itself had jurisdiction to hear the case in the first place. The Court's decision effectively means that the Ninth Circuit's decision is meaningless, and allows the District Court's decision striking down Proposition 8 to stand. The Court itself does not address the question of whether Proposition 8 was

RICHARD M. MORGAN, Esq.
rmm@morgandisalvo.com
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ldisalvo@morgandisalvo.com
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dweinberg@morgandisalvo.com

unconstitutional, or whether gay and lesbian couples have a right to marriage. **The effect of this ruling is that gay and lesbian couples may now get married in California, and that California will recognize those marriages as valid.**

The Supreme Court's ruling in **United States v. Windsor**, 570 U.S. _____ (2013) has a much broader effect. This case arose from an estate tax refund claim. Edith Windsor and her wife, Thea Spyer, were legally married in 2007, in Ontario, under Canadian law. The couple lived in New York, both at the time of their marriage and at the time of Spyer's death in 2009. Under New York law at the time of Ms. Spyer's death, their Canadian marriage was legally recognized as valid, giving them the status of spouses under state law. However, under Section 3 of the 1996 Defense of Marriage Act ("DOMA"), they were not recognized as spouses under federal law. One effect of this lack of federal recognition of their marriage was that Ms. Spyer's estate paid a federal estate tax of $363,053, even though all of her assets went outright to her wife, Ms. Windsor. If their marriage had been recognized by federal law, no federal estate tax would have been paid, since the outright transfer of Ms. Spyer's assets to Ms. Windsor would have qualified for the estate tax deduction for marital transfers. Ms. Windsor paid the tax and then sued for a refund, claiming that DOMA violated the Fifth Amendment of the U.S. Constitution. While the case was pending, President Obama and the Department of Justice announced that, while they would continue to enforce DOMA, they agreed that it was unconstitutional and would no longer defend it. A group of members of the U.S. House of Representatives, known as the Bipartisan Legal Advisory Group ("BLAG"), voted to intervene in the litigation in order to defend DOMA. The District Court allowed BLAG to step in and defend the law on behalf of the U.S. government. The District Court then held that Section 3 of DOMA was unconstitutional. BLAG appealed that ruling to the U.S. Second Circuit Court of Appeals, who upheld the District Court, and BLAG appealed again to the U.S. Supreme Court.

In the Windsor case, the Supreme Court first addressed the question of whether BLAG had the standing necessary to continue the appeals on behalf of the U.S. government. Without BLAG having the appropriate standing, the Supreme Court would not have had jurisdiction to address the underlying tax refund case, and the result would have been the same as in Hollingsworth. However, in the Windsor case, the Supreme Court found that BLAG, unlike the Proposition 8 proponents in Hollingsworth, did have the necessary standing. This standing appears to have rested largely on the grounds that the members of BLAG were acting in the capacity as members of the House of Representatives and not simply as private individuals who originally supported the law. **The Court then held that Section 3 of DOMA, which allows the federal government to ignore state laws validating same-sex marriages, was unconstitutional because it violated the "basic due process and equal protection principals applicable to the Federal Government" (Windsor, page 20 of slip opinion issued by the Supreme Court).** The Court said that historically, the states have been allowed great leeway to define marriage, and that the federal government has historically been deferential to the states' decisions in that regard. It then characterized DOMA's Section 3 as an attempt by the federal government to single out and harm a class of persons (gay and lesbian married couples) who New York state had decided to protect by allowing them to marry. **The Court's majority opinion speaks in broad terms about the rights and responsibilities of marriage, but in the end states that the decision is limited to "those persons who are**

RICHARD M. MORGAN, Esq.
rmm@morgandisalvo.com

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dweinberg@morgandisalvo.com

joined in same-sex marriages made lawful by the State." (Windsor, page 25 of slip opinion issued by the Supreme Court).

The Court in Windsor does not answer a number of questions. The Court does not address the question of whether states may ban same-sex marriages, or whether there is a right to marriage provided by the U.S. Constitution. What it does clearly say in Windsor is that the federal government may not ignore marriages which are recognized as valid by the state in which the married couple resides. It does not address the question of whether marriages recognized as valid by the state where the marriage took place, but not by the state in which the couple is residing, must still be respected by the federal government. It also does not address Section 2 of DOMA, which is the part that says states may ignore marriages which were performed in states where the marriage was legally recognized and thereby creates an exception to the general rule that states should give full faith and credit to judgments issued by other states. It does not address laws banning adoption by same sex couples or gay or lesbian individuals. These questions, among others, remain open for now.

Gay and lesbian couples who live in Georgia or one of the many other states which do not recognize same-sex marriages may now be asking: should we go ahead and get married anyhow? The answer is a solid "we don't know." If the federal government decides to take the position, following the Windsor ruling, that marriages recognized as valid by any state should be recognized as valid by the federal government, even if the state where the couple resides may not recognize the marriage, then being married may open up a host of federal benefits, protections, obligations, and even restrictions to gay and lesbian married couples in all states, not just those which currently recognize same-sex marriages. However, in states where same-sex marriages are not recognized, being recognized as married for federal purposes but not for state purposes may produce a number of complications for couples, such as the need to file a joint federal income tax return as married persons but separate state returns as unmarried persons. In addition, many couples who married in states or countries which allow same-sex marriage but reside in states which do not are finding that breaking up can be harder than usual to accomplish, since most of those states do not allow same-sex couples to divorce. Couples who live in or may move to states which do not recognize same-sex marriage need to weigh all of the potential complications and benefits and make their decisions to marry or not marry very carefully.

At Morgan & DiSalvo, we have long worked with both same-sex and opposite sex couples, married and unmarried. If you have questions about what these cases may mean for you or those you love, please contact us at (678) 720-0750 or info@morgandisalvo.com.