

New York's Marriage Equality Act: One Year Later

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I. The Marriage Equality Act

The "Marriage Equality Act" was signed into legislation by Governor Cuomo on June 14, 2011 and took effect July 24, 2011. The Act allows same-sex couples to acquire marriage licenses and recognizes same-sex marriages legally performed in another state or the District of Columbia.¹ Now the sixth state to recognize same-sex marriage, New York did not always afford same-sex couples such rights. A series of evolution took place before the enactment of the Marriage Equality Act, including landmark national cases² and the recognition of same-sex marriage in five other states and the District of Columbia.³ New York policy regarding same-sex marriage began with zero recognition, moved to recognition of valid same-sex marriages performed in other states, incorporated domestic partnership which gave same-sex couples some of the same rights as opposite-sex married couples, and finally in 2011 New York officially became the sixth state to acknowledge same-sex marriage. This evolution only came about through years of court challenges to the ban on same-sex marriage in New York and eventually the decision in *Hernandez v. Robles*, in which the court, in a coda to its opinion, urged "the participants in the controversy over same-sex marriage" to "address their arguments to the Legislature" along with a call to the Legislature to hear and "wisely" decide the issue.⁴ Even after this call to the Legislature and two bills recognizing same-sex marriage passing through the State Assembly, these bills were rejected by the State Senate. Five years after the court's deference to the Legislature, the Marriage Equality Act was finally passed.

Initial reactions to the act were strong on each side of the issue. President Obama stated that New York law was moving toward "greater equality," remarking that this was a "good thing."⁵ Former New York Senator and current Secretary of State Hillary Clinton referred to the law as "historic," supporting the "basic rights of gay people."⁶ Opponents of gay marriage, including the Catholic Church, expressed severe disappointment in the passage of the act.

II. Same-Sex Marriage Federally

While same-sex marriage has gained official recognition in New York, the rest of the country has yet to follow suit and, for the most part, has been moving in the opposite direction. In 1996, the federal government passed the Defense of Marriage Act (DOMA). DOMA classifies marriage solely between two members of the opposite sex. The act strictly limits the definition of marriage to "only a legal union between one man and

one woman as husband and wife"⁷ and limits the definition of a spouse "only to a person of the opposite sex who is a husband or a wife."⁸ Further, the act allows states to "prohibit same-sex marriage and/or refuse to recognize same-sex marriages validly performed in other states."⁹ Specifically, the act states that "[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex..."¹⁰

a. Effect of DOMA

DOMA withholds from same-sex couples the benefits of more than 1,000 federal statutes and regulations affording married couples' rights. Among these rights denied to married same-sex couples are the ability to file jointly federal income tax returns, the benefit of unlimited marital deductions and spousal transfers, survivor and spousal social security benefits, the capability to take unpaid leave to care for an ill spouse afforded under the Family and Medical Leave Act, and federal spousal privilege regarding communications.¹¹ Other marital rights denied to these same-sex couples through DOMA include health insurance coverage for spouses of federal employees, immigration allowances, and military benefits.

A total of 1,138 rights, benefits, and protections afforded to married couples under federal law are denied to same-sex married couples as a result of DOMA.¹² In tax considerations alone, almost 200 provisions consider marital status, affording benefits to married opposite-sex couples such as tax exemptions for spousal insurance premium payments.¹³ Same-sex married couples are also not afforded breaks in real estate taxes, estate taxes, and retirement savings taxes.¹⁴ Surviving spouse and surviving parent, to a deceased beneficiary's child, social security benefits are denied to same-sex partners.¹⁵ Citizens with same-sex partners are unable to petition for those partners to immigrate to the United States as they are not recognized as family.¹⁶ Almost 300 provisions relating to benefits afforded to "current and retired federal employees, members of the Armed Forces, elected officials, and judges" are affected by marital status.¹⁷ Health and other benefits are denied to same-sex spouses of these federal workers.¹⁸ Continued health coverage for private employees after cessation of employment provided under the federal COBRA initiative are denied to same-sex spouses under DOMA.

In a practical sense, this denial of federal marriage rights creates a number of obstacles for same-sex married couples to overcome. Before marriage these couples need to consider cohabitation agreements, residency issues, and tax issues.¹⁹ Once married, dissolution of the marriage presents an array of difficulties beyond the usual issues associated with the dissolution of the marriage of an opposite-sex couple. Foremost, divorce is not available in any state that does not recognize same-sex marriage. In states that do recognize the union, residency requirements may be in place that must first be met, ranging from six months to two years. Issues arise in equitable distribution of assets including in the ability to transfer assets and resulting taxation.²⁰ Issues also arise regarding maintenance awards including taxation, inexistence of spousal social security benefits, and the inability to continue health insurance through federal programs after divorce.²¹

III. Historically

The right to marry has long been established as a fundamental and basic civil right by the Supreme Court of the United States. After years of prohibition of interracial marriages, the Supreme Court in *Loving v. Virginia* held that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,” striking down state laws disallowing interracial marriage.²² The court further classified marriage as “one of the ‘basic civil rights of man’ fundamental to our very existence and survival.”²³

Circuit Judge Michael Boudin of the First District Court of Appeals has recently remarked that federalism permits the “diversity of governance based on local choice.”²⁴ DOMA interferes with federalism by taking the power to regulate marriage away from the states and into the hands of the federal government.

IV. State Levels

Currently, Massachusetts, Connecticut, New York, Iowa, New Hampshire, Vermont, and the District of Columbia recognize and allow same-sex marriage.²⁵ Maryland and Washington have passed laws allowing gay marriage which are not yet in effect.²⁶ Maryland and Rhode Island honor same-sex marriages performed in another state.²⁷ Eight states allow civil unions between same-sex couples and three do not specify. The remaining 31 states have enacted bans on same-sex marriage.²⁸ Most recently, North Carolina provided a prime example of the position of these 31 states, voting May 8, 2012 to strictly define marriage as between a man and a woman.²⁹

This divide between states raises the issue as to whether comity and full faith and credit between the states should be applied. The legislatures in a large majority of states have enacted “mini-DOMA” laws,

either by statute or amendment to the state constitution. However, state courts will be the ultimate deciders of whether or not to allow same-sex divorce in these states. These courts must decide whether to apply the principle of comity and acknowledge another state’s recognition of a same-sex marriage. In addition, these courts must take into consideration the Full Faith and Credit Clause of the U.S. Constitution which states “[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.”³⁰ A literal and straightforward application of this clause directs each state to acknowledge marriages performed and recognized by another state.

V. Marriage Equality Act in Effect

In New York, the Legislature was clear in its intent in drafting the Marriage Equality Act stating the “[m]arriage is a fundamental human right.”³¹ Further, it declared that “[s]ame-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage.”³² Most clearly it stated “it is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law.”³³

On June 6th, 2012, Judge Barbara Jones of the Southern District of New York became the third Article 3 judge to declare section 3 of DOMA violates the Constitution.³⁴ In *Windsor v. United States*, Edith Windsor sued the government for taking over \$393,000 in estate taxes after her spouse, Thea Spyer, passed away in 2009.³⁵ Had DOMA recognized same-sex marriage, Windsor would not have been subject to these exorbitant federal taxes. Although the third federal district court to find DOMA unconstitutional, the court in *Windsor* is the first New York district court to do so.

The Family Leave Insurance Act, a same-sex inclusive bill, was recently introduced in both the New York Senate and the State Assembly.³⁶ This bill, if enacted, would extend rights previously afforded to different-sex married couples, through the Temporary Disability Insurance program, to same-sex married couples.³⁷ Same-sex partners are in certain need of these rights including the ability to take paid leave to care for a newborn child and the ability to take paid leave to care for a seriously ill family member.³⁸

VI. Nationally

The Ninth Circuit Court in California upheld a lower court ruling in 2010 declaring Proposition 8, the 2008 amendment to the California Constitution barring same-sex marriage, unconstitutional.³⁹ Judge Reinhardt opined that “Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples.”⁴⁰ On June 6,

2011 the Ninth Circuit denied Proposition 8 proponents request for *en banc* review, leaving the Supreme Court as the last venue in which the case may be reheard.⁴¹

Other Judges in California have ruled recently on the issue. Judge Claudia Wilken likened DOMA to legalizing bigotry by withholding over 1,000 federal benefits from legally married same-sex couples,⁴² citing “joint tax filing, Social Security survivor payments and immigration sponsorship.”⁴³ Judge Jeffrey White also ruled DOMA unconstitutional, ordering family insurance coverage be afforded to a lesbian court employee’s spouse.

VII. Recent Federal News

On the executive level, President Barak Obama has become the first president ever to come out in support of same-sex marriage, officially stating that he believes “same-sex marriage ‘should be legal.’”⁴⁴ President Obama revealed to ABC News that he “concluded that for me personally, it is important for me to go ahead and affirm that I think same-sex couples should be able to get married.”⁴⁵ This announcement came in response to a North Carolina vote to limit the definition of marriage to between a man and woman.⁴⁶ Previously, other members of the Obama Administration, including Vice President Joe Biden, had come out in support of same-sex marriage.

Federal judicial opinion also appears to be moving in favor of same-sex marriage. The 1st Circuit Court of Appeals recently upheld a lower court’s decision that DOMA’s discrimination against same-sex couples is unconstitutional.⁴⁷ In July of 2010, the U.S. District Court in Boston ruled in both *Commonwealth of Massachusetts v. Health and Human Services and Gill v. Office of Personnel Management* that DOMA’s discrimination against same-sex couples is unconstitutional.⁴⁸ On May 31, 2012, the United States Court of Appeals for the 1st Circuit ruled in *Commonwealth of Massachusetts v. United States Department of Health and Human Services, et al.* that DOMA discriminates against married same-sex couples through the denial of rights and benefits afforded to opposite-sex couples.⁴⁹ No immediate effect will occur as the Circuit Court “stayed its ruling in anticipation of an appeal to the Supreme Court.”⁵⁰ In its decision, the Circuit Court limited the scope of the issue to the denial of benefits to same-sex couples rather than addressing the legality of same-sex marriage.⁵¹ However, this decision is still regarded as an “illustration of the growing consensus of the judiciary about the unconstitutionality of discriminating against gays and lesbians in the realm of marriage.”⁵²

VIII. Conclusion

At this point a call has been made to the Legislature to take action. Both the President and the Federal Circuit Court, whose opinion may soon be the deci-

sion of the United States Supreme Court, have rejected DOMA as unconstitutional. Until DOMA is repealed, states will never be able to exercise their constitutionally given power to regulate marriage and same-sex couples will not receive equal rights in marriage or in divorce.

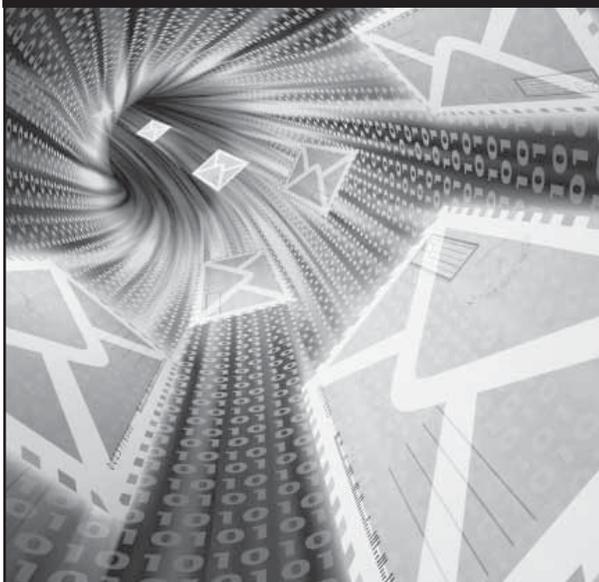
Endnotes

1. Alison Arden Besunder, *Closing the Gap*, N.Y.L.J., Sept. 19, 2011, at [hereinafter A Match Made in Albany].
2. Frank Gulino, *A Match Made in Albany: The Uneasy Wedding of Marriage Equality and Religious Liberty*, N.Y. BAR ASSOC. J., Jan. 2012 at 38, 38-39.
3. *Nightly News: Appeals Court: Denying Federal Benefits to Same-Sex Couples is Unconstitutional* (NBC television broadcast May 31, 2012), available at http://usnews.msnbc.msn.com/_news/2012/05/31/11990019-appeals-court-denying-federal-benefits-to-same-sex-couples-is-unconstitutional?lite [hereinafter Appeals Court].
4. See Gulino, *supra* note 2, at 39 (quoting *Hernandez v. Robles*, 7 N.Y.3d 338 (2006)).
5. See Gulino, *supra* note 2, at 39.
6. *Id.*
7. Defense of Marriage Act, 1 U.S.C. § 7 (1996).
8. *Id.*
9. *A Match Made in Albany*, *supra* note 1.
10. 1 U.S.C. § 7.
11. Alison Arden Besunder, *For Love and Money: Inequalities Remain Despite Same-Sex Marriage*, N.Y.L.J., July 1, 2011.
12. Human Rights Campaign, *An Overview of Federal Rights and Protections Granted to Married Couples*, <http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples> [hereinafter An Overview].
13. *Id.*
14. *Id.*
15. An Overview, *supra* note 12.
16. *Id.*
17. *Id.*
18. *Id.*
19. Colloquium, *The Marriage Equality Act: Issues and Considerations for the Practitioner in Advising Same-Sex Couples*, Nov. 1, 2011.
20. *Id.*
21. *Id.*
22. See Gulino, *supra* note 2, at 38 (quoting *Loving v. Virginia*, 388 U.S. 1 (1967)).
23. *Id.*
24. Washington United for Marriage, *DOMA Ruled Unconstitutional By Federal Appeals Court*, May 21, 2012, <http://washingtonunit-edformarriage.org/doma-ruled-unconstitutional-by-federal-appeals-court/>.
25. *Appeals Court*, *supra* note 3.
26. *Id.*
27. Wendy B. Samuelson, *Recent Legislation, Decisions, and Trends*, N.Y. BAR ASSOC. FAM. L. REV., Spring 2012 at 24.
28. *Id.*
29. *Id.*
30. U.S. Const. art IV. §1.

31. Marriage Equality Act, N.Y. DRL §11.
32. *Id.*
33. *Id.*
34. Mark Hamblett, *Judge Finds DOMA Discriminates Against Married Same-Sex Couples*, N.Y.L.J., June 12, 2012, available at http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202558215733&Judge_Finds_DOMA_Discriminates_Against_Married_SameSex_Couples&slreturn=1.
35. *Id.*
36. Jared Make, *In Sickness and in Health? LGBT New Yorkers Need Family Leave Insurance*, HUFFINGTON POST, June 21, 2012, http://www.huffingtonpost.com/jared-make/in-sickness-and-in-health_1_b_1616448.html.
37. *Id.*
38. *Id.*
39. Samuelson, *supra* note 27 at 25.
40. *Id.* (quoting *Perry v. Schwarzenegger*, 91 F.3d 1147 (9th Cir. 2010)).
41. Santa Barbara, <http://www.independent.com/news/2012/jun/06/pride-foundation-celebrates-9th-circuits-declining>.
42. *Appeals Court, supra* note 3.
43. *Id.*
44. Jonathan Lemire, *Obama Sez Yes*, N.Y. DAILY NEWS, May 10, 2012 at 4.
45. *Id.*
46. *Id.*
47. *Appeals Court, supra* note 3.
48. Samuelson, *supra* note 27 at 25.
49. *Comm. of Mass. v. U.S. Depart. of Health and Human Serv., et al.*, (1st Cir. 2012) available at <http://www.ca1.uscourts.gov/pdf/opinions/10-2204P-01A.pdf>.
50. *Id.*
51. *Id.*
52. *Id.* (quoting Geoffrey Stone, professor of law at the University of Chicago).

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