Pride's Progeny

Legal Ramifications Of Same-Sex Marriage

Legislation and litigation regarding same-sex marriage has altered the legal landscape for attorneys and clients in areas of family law, labor & employment law, immigration, and constitutional law with wide-ranging implications that are still being realized.

By Dale Carpenter, Sonja Dunnwald Peterson, Nancy Zalusky Berg, and R. Mark Frey

The Supreme Court's 2013 decision in *United States v. Windsor*,[1] the federal Defense of Marriage Act,[2] and Minnesota's adoption of same-sex marriage[3] together constitute a legal landscape significantly altered from what went before. Both new opportunities and new questions have arisen from these developments, prompting us to inquire into the substance, the significance, and implications of these changes in the law for various areas of Minnesota legal practice. Professor Dale Carpenter, Earl R. Larson Professor of Civil Rights and Civil Liberties Law at the University of Minnesota Law School, Nancy Zalusky Berg, partner at Walling, Berg & Debele, P.A., Sonja Dunnwald Peterson, partner at Dunnwald and Peterson, P.A., and R. Mark Frey, of Frey Law Office, have together contributed insights and perspectives on these developments as they relate to the Constitution, family law, labor and employment law, and immigration law.

CONSTITUTIONAL ISSUES

Bench & Bar: The United States Supreme Court decided *U.S. v. Windsor* on June 26, 2013 with the case generating lots of attention. What are the basic facts of the case?

Dale Carpenter: The case involves a New York same-sex couple, Edith Windsor and Thea Spyer, who married one another in Canada in 2007 to formalize their 40-year-old relationship. Spyer died in 2009 and left her estate to Windsor. The estate was sizable and the IRS hit Windsor with an estate tax of $363,000. Windsor argued in her lawsuit that she was in fact married under New York law, not subject to the tax given her surviving spouse status, and the law known as the Defense of Marriage Act (DOMA) deeming her marriage as invalid was unconstitutional.

B&B: What is DOMA (Defense of Marriage Act) and what's its significance?

DC: DOMA defines marriage as a relationship solely between opposite-sex couples under federal law. This affected thousands of matters in the federal realm, including such areas as estate taxes, immigration, social security benefits, and others.

B&B: What did the Supreme Court specifically decide and what rationale did it use in issuing its decision?

DC: Basically, the Supreme Court found Edith Windsor to be married under New York state law and thus exempt from paying that large estate tax. More specifically, the Court found the section of DOMA defining marriage to be a relationship solely between opposite-sex couples to be a denial of equal protection and unconstitutional under the Due Process Clause of the 5th Amendment.

B&B: Why is this decision significant?

DC: The Court emphasized that the federal government has traditionally deferred to the states' power to decide matters involving marriage and DOMA represented a significant departure from that stance. DOMA was held to have a significant impact on same-sex couples and effectively demeaned them and their families, reflecting Congress' animus towards them.

B&B: What impact does *U.S. v. Windsor* hold for states with laws on the books saying that same-sex marriage is illegal? Does it say that same-sex marriage is now legal in all states? If not, does a same-sex couple that married in a state where same-sex marriage is legal but living in a state where it's illegal have rights solely under federal law and not under state law?

DC: No change in those states. *U.S. v. Windsor* has to do with same-sex marriage under federal law, not that of specific states since states hold the power to regulate marriage within their borders. If a Texas couple, for example, gets married in California and then returns to their domicile in Texas, we have a marriage under federal law but not Texas law. So, for instance, the couple may file a federal tax return as a married couple but not a Texas tax return under state law.

B&B: Could this create some confusion at the state and federal levels?

DC: Well, Justice Scalia seems to think so and argues the Court's rationale may lead to an argument that states in total may not deny same-sex couples these rights nor demean them and their families with animus. We'll see but the Court was clear in its decision that states must be given great deference since they have the power to regulate marriage.

B&B: Do you foresee the Supreme Court revisiting same-sex marriage issues further down the road? Do you know if any litigation has already commenced over this set of affairs?

DC: Time will tell. There is litigation in two dozen states over this very issue and the Court just recently stayed a Utah decision that allowed same-sex marriages there, but it's anybody's guess how this will play out. We'll have to wait and see.

B&B: Speaking of states' ability to regulate marriage, Minnesota Governor Mark Dayton signed a same-sex marriage bill on May 14, 2013 with the law going into effect on August 1, 2013. What does Minnesota's law say about marriage and same-sex couples in Minnesota?

DC: Basically this legislation amends Minnesota's marriage law by eliminating gender as a relevant factor. In short, two individuals of either sex may marry one another. They must, however, abide by the law's other requirements.

B&B: Are there any exemptions built into the law? We know, for example, that some religious institutions are opposed to same-sex marriage. Does Minnesota's law require them to perform same-sex wedding ceremonies despite their opposition?

DC: That's a good point worth emphasizing. The state's Human Rights Act is left untouched by this change so that religious exemptions continue unabated. The marriage ceremony itself cannot be imposed on those religious institutions who for, doctrinal reasons, are opposed to same-sex marriage. Thus, religious institutions, doctrines, practices, and facilities cannot be modified to accommodate same-sex couples seeking to solemnize their relationship through marriage.

FAMILY LAW ISSUES

Bench & Bar: What impact does Minnesota's new marriage law hold for same-sex spouses within the family law context?

Nancy Zalusky Berg: The impact of legalizing same-sex marriage continues to evolve in Minnesota. Despite all the legal unknowns, it's clear the Minnesota legislature intended same-sex marriage to be treated identical to, or as nearly identical to, opposite-sex marriages as possible. Some of the more common legal issues stemming from marriage include divorce, child custody, property settlement, adoption, healthcare directives, premarital agreements, estate planning, taxation and more. Generally speaking, same-sex couples have a legal right to the application of traditional family law standards regarding those issues.

B&B: What changes has Minnesota's law created in the realm of divorce and property settlement?

NZB: Same-sex couples, like opposite-sex couples, can by law end a marriage and equitably divide property, seek spousal maintenance, share child support obligations, and address other issues through Minnesota's legal system. And, like opposite-sex couples, they may use the same legal forms that now include more appropriate and accommodating terminology.

Minnesota follows rules of comity for divorce as with same-sex marriage. An interesting outcome of Minnesota's new marriage law is that formerly unrecognized same-sex marriages created in other states have now become legitimate here, causing some surprises for those who had moved on and married in Minnesota.

As for property settlement, marriage creates certain rights and responsibilities in relation to real estate and property in Minnesota, even if the property was acquired prior to the marriage. If real property is titled solely in the name of one spouse, the other spouse may acquire upon marriage certain rights that vest upon divorce or death of the titled spouse.

The inchoate martial interest arises with the act of marriage creating an interest in the real estate. Traditionally, same-sex couples owned property as tenants in common or joint tenants with rights of survivorship. They have, additionally, the advantage of right to real property as tenants by the entirety. Same-sex couples can now share in their percentage interest in real property. If one spouse dies, the surviving spouse becomes the sole owner. Existing co-tenancy or similar agreements between current domestic partners may also be affected and should be revisited if considering marriage. If a couple has an old property title they don't prefer and would like to change to tenants in the entirety, the process is fairly simple: record a new deed to modify.

Minnesota divorce law clearly differentiates between premarital property (property owned prior to the marriage) and marital property (property acquired after the marriage). For same-sex couples who have partnered for years without the legal protection of marriage, the major portion of their combined estate may be made premarital property whereby the nonowner spouse may hold no recognizable interest. This may include retirement accounts, bank accounts, investments, physical property, and business interests. Upon dissolution, same-sex spouses deal with property distribution in the same manner as opposite-sex spouses under Minnesota law. And, that means the court must make a "just and equitable division" of the couple's property.

B&B: How are child custody and adoption matters affected by these changes?

NZB: The child custody process has become the same as that for opposite-sex couples: absent a challenge to parentage, the birth mother and spouse are considered the child's legal "parents" and listed as such on the child's birth certificate. Two married women, for example, will be listed as "parents." This allows both spouses to share all rights to the child from the outset, including custody rights, which is a vast improvement. Prior to legalization of same-sex marriage, the birth mother was automatically granted custody while the partner was not, causing problems especially upon separation. Many family law practitioners continue, however, to encourage same-sex parents to seek a second-parent adoption to ensure both parents' legal rights regardless of where they may travel or relocate as a family

For couples using surrogates, this process is inherently more complicated. Minnesota adoption law and surrogacy laws continue to govern such a situation.

For same-sex couples adopting together, both parents' names are listed on the birth certificate. This rule applies as well to children from a previous marriage adopted by a new spouse. Likewise, the second-parent adoption lists both parents' names on the birth certificate as "parent." This allows unmarried same-sex couples, male spouses adopting together, and married, second-parent adopters rights to health insurance coverage, medical decision-making in case of emergency, estate inheritance rights, and custody rights.

B&B: May we assume that income and estate taxes as well as premarital agreements have been altered by Minnesota's new law?

NZB: That's correct. Since the recent *Windsor* decision vacating Section 3 of the federal Defense of Marriage Act (DOMA), the federal government now recognizes same-sex spouses for federal income and estate tax purposes.

In Minnesota, a married couple may choose to file their returns as "married filing jointly" or "married filing separately." They may also, according to the ACLU's *Know Your Rights: Frequently Asked Questions About Minnesota's Freedom to Marry Law*, "file joint state tax returns, take spousal deductions on state income taxes, exclude employer contributions for spousal health insurance from taxable income for state taxes, exempt property inherited from spouses from state estate tax, and receive tax benefits when transferring interests in property."[4] I also understand the IRS has ruled that it will accept amended federal and state returns for a prior year.

Moving on to premarital agreements, we can say that same-sex couples may form premarital agreements in the same manner as opposite-sex couples, subject, of course, to Minnesota law.

Any same-sex couple previously married in a state legally recognizing same-sex marriage should consider updating their estate planning documents to reflect current Minnesota law.

In general, such agreements continue in place regardless of marriage. If contemplating marriage, a same-sex couple should review the provisions of previously created agreements with a family law attorney to discuss their implications for an impending legal marriage in this state.

B&B: Health care directives have been a serious point of discussion for many years for same-sex couples since important decisions need to be made about care of a partner. How does the new law affect this area?

NZB: Health care directives remain critical to same-sex couples as they provide spouses a say in the other's health crisis. Despite recent changes in the law, directives continue to play an important role in ensuring proper care of a partner and spouse. If a spouse, for example, is injured or killed in a state not recognizing same-sex marriage, it's critical that health care directives and health care proxies be in place to allow the

uninjured spouse to make decisions about care for the other.

Elderly spouses, in states recognizing same-sex marriage, can now take advantage of protections under Medicaid. Healthy spouses have an allowance on their income providing Medicaid eligibility for the institutionalized spouse. Prior to same-sex marriage, couples did not have this benefit.

B&B: Over the years, the terms same-sex marriage, civil unions, and domestic partnerships have been used somewhat haphazardly around the country. Frankly, it's confusing. Is there any distinction between civil unions and domestic partnerships and same-sex marriage? How would such relationships be handled under Minnesota law for such couples now residing here? Would they be considered married? Or, would these unions be considered something less such that those couples should be encouraged to marry in order to derive benefits guaranteed by Minnesota law?

NZB: Currently, there are four states allowing civil unions to both same-sex and opposite-sex couples. Civil unions provide same-sex couples recognition of their relationship and legal rights similar to married spouses. Two states—Nevada and Oregon—have adopted "broad domestic partnerships" granting spousal rights to unmarried couples.

A "civil union" is not recognized in Minnesota and couples with a civil union should marry in Minnesota in order to obtain the rights and benefits Minnesota accords.

Same-sex couples in civil unions and living in states allowing civil unions may dissolve their legal relationships there.

B&B: How are same-sex marriages formed in other states treated in Minnesota?

NZB: All legal same-sex marriages formed outside of Minnesota will be recognized and couples may divorce here as long as they follow the same guidelines as opposite-sex couples. That means they must meet Minnesota's residency requirements by living here at least 180 days before starting their divorce case. Prior to passage of Minnesota's marriage law and recognition of same-sex marriage, same-sex couples lawfully married in other states could not seek a divorce here.

Likewise, states not recognizing same-sex marriage will not acknowledge a legal Minnesota same-sex marriage. And, since those states do not recognize such a marriage, a same-sex couple will be denied the right to obtain a divorce. Interestingly, however, under Minnesota's new law, that same-sex married couple may return to Minnesota to get a divorce without establishing residency.

LABOR & EMPLOYMENT ISSUES

Bench & Bar: What effect does Minnesota's same-sex marriage law have on labor and employment issues? More specifically, are the same employee benefits available to opposite-sex couples now available to same-sex couples? What about such matters as leaves of absence? Retirement? Health coverage?

Sonja Dunnwald Peterson: Prior to enactment of Minnesota's same-sex marriage law in 2013, the value of employee benefits received by LGBT employees in a committed relationship was significantly less than that offered their married, straight coworkers, unless their employer offered domestic partner benefits. On its face, this would seem to be in violation of the Minnesota Human Rights Act but LGBT employees have rarely attempted to litigate this issue because it was widely assumed that the federal Employee Retirement Income Security Act ("ERISA") would preempt such a claim. ERISA generally applies to welfare benefit plans, such as health, dental, and vision plans, as well as pension and retirement benefits, such as 401(k)s. Federal district courts have concluded that ERISA preempts state/local law requiring employers with health insurance plans for married employees to also make health care coverage available to domestic partners.

In light of the Supreme Court's ruling in *U.S. v. Windsor*, ERISA should no longer preempt state/local laws that require employers to provide equal benefits to opposite-sex and same-sex married couples. If an employer's ERISA plan does not apply to same-sex married couples in a state that recognizes their marriages, same-sex married couples would be subject to disparate treatment, a situation found to be unconstitutional in *Windsor*.

Keep in mind, too, the *Windsor* court noted that Section 2 of DOMA remains valid and provides that states may continue to refuse recognition of same-sex marriages created under other states' laws. Section 2 provides that each state has the authority to define marriage to exclude or include same-sex marriages. Preempting states like Minnesota from requiring employers to provide equal benefits to same-sex and opposite-sex married couples alike would infringe upon a state's right under DOMA.

It's also important to note that ERISA only preempts benefits plans meeting ERISA's definition of a "plan"—not benefits failing to fall within that definition. Thus, laws requiring equal application of an employer's non-ERISA plans, like those providing moving expenses, travel discounts, bereavement leave, and membership discounts, must be offered equally to same-sex and opposite-sex employee couples.

B&B: Houses of worship are allowed by Minnesota law to decline to perform same-sex marriage ceremonies if they so desire. May those same entities or religious-based organizations refuse to provide employee benefits to same-sex couples or refuse to hire such individuals in a same-sex marriage?

SDP: Under the Minnesota Human Rights Act (MHRA), religious associations are exempt from the MHRA's prohibitions against sexual orientation discrimination in employment. This would include hiring LGBT employees or, for that matter, providing benefits to same-sex married couples. Thus, religious entities may continue to refuse to hire LGBT individuals or refuse to provide benefits to same-sex couples.

B&B: Are other entities, which are opposed to same-sex marriages on religious grounds but secular-based, exempt?

SDP: No, they're not exempt. Take, for example, an owner of a business who is a born-again Christian and argues that (s)he is exempt from employing people not adhering to those beliefs. That employer cannot justify such action by claiming this is simply an exercise of one's religious beliefs. The Minnesota Supreme Court held in its 1985 decision, *State v. Sports & Health Club, Inc.*,[5] that this was unacceptable and argued the state has an overriding compelling interest in eliminating discrimination against protected classes. The same logic would apply to benefits for same-sex married couples.

B&B: What is the impact of Minnesota's same-sex marriage law for unmarried couples currently receiving domestic partner benefits? Would the coverage continue or would those couples need to marry under Minnesota law?

SDP: Prior to the enactment of Minnesota's same-sex marriage law, a number of Minnesota employers safely provided domestic partner benefits solely to LGBT employees. But now, if an employer provides domestic partner benefits to unmarried same-sex but not opposite-sex couples, the employer risks litigation under Title VII of the Federal Civil Rights Act ("Title VII").

In the past, courts addressing this type of claim held that a domestic partner benefits policy limited to same-sex couples did not constitute sex discrimination because opposite-sex domestic partners were able to marry while same-sex domestic partners were not. Thus, they were not "similarly situated" to opposite-sex domestic partners.

However, given that Minnesota as well as a number of other states and Washington D.C. recognize same-sex marriages, unmarried, opposite-sex couples denied employee benefits in those states should now be able to show they are similarly situated to same-sex unmarried couples. Thus, employers providing domestic partner benefits solely to same-sex couples should either amend their policies providing such benefits to opposite-sex couples or rescind their offer of domestic partner benefits and provide notice under the Consolidated Omnibus Budget Reconciliation Act ("COBRA") to the LGBT employees' partners who are denied coverage. If the LBGT employee marries his or her partner, that partner could again receive coverage.

IMMIGRATION LAW ISSUES

Bench & Bar: Can married same-sex couples obtain immigration benefits for the foreign national spouse?

R. Mark Frey: Yes, same-sex couples can now marry one another and obtain immigration benefits. Of course, the couple must, like opposite-sex couples, prove the *bona fide* nature of their relationship through evidence that they married one another to solemnize their relationship rather than simply to provide the foreign national spouse a "green card." In fact, on July 1, 2013, just a few days after the Supreme Court's decision in *U.S. v. Windsor*, Secretary of Homeland Security Janet Napolitano issued a statement that directed U.S. Citizenship and Immigration Services "to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse." And, I might add, same-sex couples who applied for immigration benefits before issuance of the *U.S. v. Windsor* decision and denied on account of DOMA may move to reopen their cases provided they meet certain criteria, too detailed to cover in this space.

B&B: We know that not all states allow same-sex couples to marry one another. What are the implications for a same-sex couple that marries in a state allowing same-sex marriage, Minnesota for example, but lives in a state that does not recognize same-sex marriage? Can the couple still pursue immigration benefits for the foreign national spouse in their state of domicile?

RMF: Yes, since *U.S. v. Windsor* contemplates federal law and DOMA, which is the province of immigration law, same-sex couples can now apply for immigration benefits in any state of the union, notwithstanding the discrepancy between states in recognizing same-sex marriages or not. Same-sex couples receive equal protection of the law in the realm of immigration.

B&B: If this is the case, what about areas involving other family members (*e.g.*, a parent petitioning for an adult child and that child's same-sex spouse, a sibling petitioning for a sibling and that sibling's same-sex spouse, an adult child petitioning for a parent and that parent's same-sex spouse, or fiancé(e)s?

RMF: The same result. The key issue is proving the qualifying relationship for that specific immigration benefit. It no longer matters whether the relationship is between members of a same-sex or opposite-sex couple.

B&B: What about business immigration matters? Same effect?

RMF: Absolutely. As long as the couple is legally married, immigration benefits accrue to that foreign national spouse just as they have for opposite-sex spouses over the years. Take, for example, the H-1B visa that is a type of temporary worker visa in the immigration arena. An H-1B worker's spouse and children may come along to the United States as derivatives. No longer is there any difference if the couple is a same-sex or opposite-sex couple.

B&B: What about the refugee and asylum context? That is, what about people fleeing persecution in their countries of origin on account of past persecution or a fear of future persecution based upon their race, religion, nationality, political opinion, or membership in a particular social group?

RMF: Again there is no difference. Individuals successfully obtaining refugee or asylee status may give the same status to their spouses and children provided those same-sex couples are legally married.

B&B: Immigration also encompasses efforts by the U.S. government to remove or deport certain foreign nationals from the United States. We understand that relief from removal is possible for some who have key family relationships with a permanent resident or U.S. citizen. May we presume that similar relief would accrue to same-sex couples?

RMF: Yes, indeed, that is the case. Just as with opposite-sex couples, same-sex couples may now obtain similar relief from removal for the foreign national spouse. But, it's not easy. One must prove eligibility for that relief, known as cancellation of removal, by showing among other things that the person in question is a person of good moral character, as well as showing a high degree of hardship to the permanent resident or U.S. citizen spouse.

B&B: This is fairly comprehensive in the field of immigration law, isn't it?

RMF: Yes, it is. It's a big deal for the country. *U.S. v. Windsor* is a key Supreme Court case and all the more significant given the passage of same-sex marriage legislation in Minnesota the very same year. I can't help but think of Hubert H. Humphrey and his tireless efforts championing human and civil rights over the course of his life. And, let's not forget his key role in securing passage of the Civil Rights Act of 1964 which outlawed major forms of discrimination based on people's race, ethnicity, national origin, religion, and sex. Somehow I think he's smiling approvingly of this great step forward. ▲

Notes

[1] *United States v. Windsor*, 570 U.S. ___ (2013).
[2] Defense of Marriage Act (DOMA), 110 Stat. 2419 (1996).
[3] Minn. Stat. §517 (2013).
[4] *http://tinyurl.com/mvn9whe/*
[5] *State by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985).