

Chaos Looms if the Court Strikes Down DOMA and Punts on Prop 8



Joshua Roberts/Reuters

Elsbeth Reeve 4,540 Views Mar 27, 2013

Making predictions of Supreme Court rulings based on oral arguments is a notoriously unreliable undertaking, but after two days of historic arguments on gay marriage, legal analysts seem to have settled on the prediction the Court will punt on California's Prop 8 — letting stand a lower court's ruling that struck down Prop 8 which will allow gay marriage in California but keep bans in other states intact — and strike down the Defense of Marriage Act — which would let the plaintiff Edith Windsor (shown above) recover the \$363,000 estate taxes she paid when her wife died, but on narrow states rights grounds that wouldn't establish a federal right to marry. While the potential for that outcome has cheered legal advocates of gay marriage — both of the laws they set out to strike down would be ruled null — experts say that such rulings would mean legal chaos for gay couples.

It's worth repeating that people who make predictions of

how the Court will rule based on oral arguments are frequently proven wrong. Many legal experts incorrectly predicted the demise of Obamacare based on oral arguments in 2012 and were stunned by the decision that upheld its main components. (In fairness to these experts, Chief Justice Roberts did change his mind in between the arguments and when he wrote the decision.) But if the analysts are correct and this is how the Court rules, Shannon Minter, legal director of the National Center for Lesbian Rights, says it would be a positive development for gay people but not the total victory proponents of marriage equality are seeking. "Having Section 3 of DOMA off the books would dramatically hasten the day when we do have marriage equality in all 50 states — it would still take some time but would provide such a huge incentive for states to stop discriminating," he says. But in the meantime, gay couples, married or not, would be in a legally precarious position especially as they cross state lines. "Given the combination of these two cases," Douglas NeJaime, law professor at Loyola University, says, "if the outcomes are what was hinted at, we're going to have a very administratively difficult situation that's going to produce a lot of political and legal conflicts."

Based on our conversations with experts, this is what they would expect life to be like for gay couples if the Supreme Court rules as is now expected:

What if...

A gay couple marries in New York or California?

They would get access to the more than 1,000 legal benefits federal law allows to married people.

A gay couple wants to marry in Florida?

State law forbidding same-sex marriage will still apply, so they won't have any access to federal legal protections since they remain unmarried in the eyes of their home state.

A gay couple marries in New York but moves to Florida?

This is where things get really complicated. This married couple will lose many (but not all) federal benefits. Minter explains that if someone wanted to take advantage of the Family Medical Leave Act which allows an employee to take time off work to take care for a sick spouse without

losing their job, the state law on whether gay marriage exists would apply. So that right would be taken away from a New York couple that moves to Florida.

But Minter says that once a federal right is exercised, it cannot be taken away. So, take the example of Social Security's survivor benefits. If a gay couple was married in New York, and one spouse died there, the survivor would continue to collect Social Security survivor benefits even if he or she moved to Florida, Minter explains. However, if the couple was married in New York, moved to Florida and one spouse died in Florida, the survivor would not be eligible for Social Security benefits. Minter bases this on how the federal government deals with existing common law marriages, which are recognized in some states but not in others. If you're in a common law marriage and living in a state that recognizes it, the federal government does too, but it won't recognize those marriages in states that don't.

However, Douglas NeJaime, a law professor at Loyola University, thinks it will be even more complicated. "I don't think that's the case as a doctrinal matter." He points out that while New York doesn't recognize common law marriages, it will recognize a common law marriage formed in South Carolina if the couple moves to New York. NeJaime says that's because states don't feel they have a strong public policy interest in not recognizing common law marriages established in other states, but they have argued they have a public policy interest in not recognizing gay marriage. "It's clearly going to disincentivize movement into states that don't recognize same sex marriage," he says. Elizabeth F. Schwartz, a Florida attorney who works on family law cases for gay couples, agrees, saying her state "would lose a lot of Floridians who want to relocate somewhere where they can get both federal and state benefits."

Bottom line: "It's going to create an administrative nightmare," NeJaime says.

A gay person in the military gets married? Or a gay couple stationed in a state that recognizes gay marriage is transferred to a state that doesn't?

NeJaime says the federal government will have to make new rules in military cases. Military members are "much more likely to have little control over their movement," he says — moving from base to base every couple years, in and out of states that recognize same sex marriage. NeJaime suspects

"the military will decide to provide them spousal benefits regardless of location, but that's going to require some action by the federal government."

A gay couple wants to get divorced?

The Atlantic Wire's Jen Doll explained last year, gay divorce is quite complicated. If the Supreme Court rules as expected, that wouldn't change, Schwartz says:

Divorce, unfortunately, would remain a mess because marriage dissolution requirements vary by state as they are dictated by states, not the federal government. Because there continue to be bans on marriage recognition in many states, and a "states' rights" approach from the Supreme Court wouldn't change that, there could continue to be a frustrating patchwork of rights throughout the nation where obtaining dissolution of a same-gender marriage or civil union will continue to be complicated. The fact that states have different residency requirements for granting divorces would mean many couples would remain "wedlocked," married in one state and unable to divorce where they reside.

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