Published on *The National Law Review* https://natlawreview.com

Defense of Marriage Act (DOMA) Goes Down - Copyright Goes Up - U.S. v. Windsor, Supreme Court, No. 12-307, Decided June 26, 2013

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The Supreme Court handed down a far reaching decision throwing out an attempt by Congress to deny the benefits conferred by federal law on same sex couples legally married under state law holding that the **Defense of Marriage Act** ("**DOMA**"), as so applied, constituted a deprivation of the equal liberty of persons protected by the Fifth Amendment. In so doing, and perhaps without realizing it, the Supreme Court was also writing an important copyright case.

Much of copyright law is devoted to legal protection for intellectual property under a social contract allowing authors to exclusively benefit for a limited time from the fruits of their creative endeavors in exchange for enhancing the marketplace of ideas. The presently effective Copyright Act of 1976, and its predecessors including the Copyright Act of 1909, further establish a mechanism for succession assuring that certain defined classes of individuals, the author's "statutory heirs", may continue to enjoy those benefits following the author's death. These classes generally include the author's surviving spouse and children and, in certain circumstances, the grandchildren next of kin and/or the author's executor. Since copyrights are expressly solely a matter of federal law for the federal courts, any such federal benefits would have likely been denied by DOMA had it survived judicial scrutiny.

For example, the renewal copyright provisions allow the recapture of a deceased author's original term copyright (copyrights secured prior to 1978) by an author's surviving spouse and children as a class. Should there be no surviving spouse or child, the renewal right passes to the author's executor, if there is a will, or to the author's next-of-kin in the absence of a will. Clearly DOMA would have denied the benefits of renewal to a surviving, non-author, gay spouse even though such was legally married under state law. What would instead have happened is that an author's children (possibly by a first marriage) would have enjoyed the entire renewal copyright to the exclusion of the legal, non-author spouse. It should, in this regard, be noted that, much to the surprise of many estate attorneys even today, the renewal and other copyright privileges flow directly from the statute to the statutory heirs without regard to the author's plan of testamentary distribution or the state laws of intestacy.

Another example would have been the right of termination of transfers by which the author's statutory heirs are allowed to serve Notices of Termination on prior transferees. In most cases, the author's surviving spouse and children must jointly exercise the termination. Of course, if DOMA had

survived instead of the non-author gay spouse, the children would have exclusively owned the termination rights with no legal obligation to a possibly disfavored second spouse who might be left with nothing from the estate of his or her devoted marital partner.

Neither of these scenarios will now happen…at least not from a direct application of DOMA to the provisions of the Copyright Act. Instead, the Copyright Act will continue to neutrally apply to all legally married spouses regardless of their sexual orientation.

The children, whatever their feelings may be about their father or mother's choice of marital partner, should not feel deprived. The Supreme Court had already long ago shown favor to them. In an often forgotten decision, *De Sylva v Ballentine*, 351 US 570 (1956), the Supreme Court determined that even children born out of wedlock were entitled to the benefits conferred by the copyright laws on "children" as a class. However, the Supreme Court just as clearly stated that identifying who qualified as a "child" was a matter left to the states, hence, entirely consistent with the DOMA ruling. Following, *De Sylva*, the New York federal appellate court, the Second Circuit, applied the ruling of the Alabama Supreme Court to hold that Cathy Yvonne Stone, the out of wedlock daughter of the famous country singer, Hank Williams, was entitled to share the benefits of Williams' renewal copyrights. Once Alabama state law identified Stone as a legal child, the Copyright Act then extended renewal copyright benefits to her as a member of the federally defined class of "children". *Stone v. Williams*, 970 F2d 1043 (2d Cir. 1992).

Trusts and Estates attorneys, however, are not entirely out of business. The DOMA decision leaves substantial need for their services if only to determine the impact on pre-planned and future estates. The Supreme Court, both in *De Sylva* and *Windsor*, has made it clear that state law still governs who will be considered a legal spouse or child. In fact, *Windsor* expressly leaves intact the state law provisions of DOMA. If that were not enough, the Supreme Court's companion decision, *Hollingsworth v Perry,* No. 12-144, decided June 26, 2013, leaves in place a determination, under California state law, that same-sex partners could not be denied the benefits of marriage. In short, DOMA is one piece in the same-sex marriage mosaic, but not the final piece…not close to it. Instead, the *Windsor* and *Hollingsworth* decisions will only increase the need to carefully examine the impact of state law on the effective and predictable management of literary and artistic estates.

National Law Review, Volume III, Number 178