

AFTER DOMA: COMMUNITY FORUM

with Gaysavannah.com

U.S. v. Windsor: The Case, Context and Consequences



On October 18, 2013, the Georgia Legal Services Program co-sponsored an LGBT Legal Forum for Law Students and the Private Bar at the Savannah Law School



- ***In preparation for the event, Savannah Law School student and GLSP intern Amy Crossin and GLSP Attorney Robert Bush disseminated notice of the forum to law students and the private bar.***

You are invited

“Georgia Legal Services Program and OUTLaws & Allies of Savannah Law School present: “United States v. Windsor: The Case, the Context, and the Consequences.” The event will be held at the Savannah Law School at 516 Drayton Street, Savannah, on Friday, October 18, from 1:00–3:00pm.

Mercer Law **Professor Scott Titshaw** and Georgia Legal Services Program attorney **Robert W. Bush** will discuss the most recent Supreme Court cases dealing with same-sex marriage. They will explain what the cases did and did not decide, and how the decisions employed interpretive theories, such as federalism and equal protection. They will also focus on the context of this impact litigation and the strategies involved. They will explore the immediate consequences of the decisions for same-sex couples and their children, particularly in states like Georgia. After briefly examining the possible relevance of civil unions and other non-marital relationship recognition to the marriage debate, they will conclude with a discussion of the likely significance of this year’s Supreme Court opinions for future constitutional cases.

Pending approval, 1.5 CLE credits will be offered to attorneys. (\$7.50 fee for CLEs; no fee to attend without CLEs.) Light lunch and beverages will be provided. For questions or to register, please email: amcrossin@savannahlawschool.org, or rbush@glsp.org.



Georgia Constitution Amend. 1

- (a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.
- (b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.

Robert W. Bush
Senior Staff Attorney , Georgia
Legal Services Program
Savannah

Scott C. Titshaw
Associate Professor, Mercer
University School of Law

Under DOMA:

- no state would have to honor the legal same sex marriage performed in another state.
- same sex couples were denied eligibility for federal benefits

VA Benefits

Employment Benefits

Retirement Benefits

Medicare/Medicaid

Tax Benefits

Immigration Benefits

This event was the first collaboration between the new Savannah Law School and the Georgia Legal Services Program





31 Savannah Law School students and 4 local attorneys attended.

What was Windsor about?

- Edith Windsor and Thea Spyer were married in Canada in 2007. When Thea died in 2009, she left her entire estate to Edith.
- Because DOMA banned Edith from being considered a "spouse", Edith paid approximately \$363,000.00 more in estate taxes than a different sex spouse would have.
- So, she sued. And won!



The presentation explained the legal principles involved in the *Windsor* decision, and included a discussion of the implications of the SCOTUS analysis.

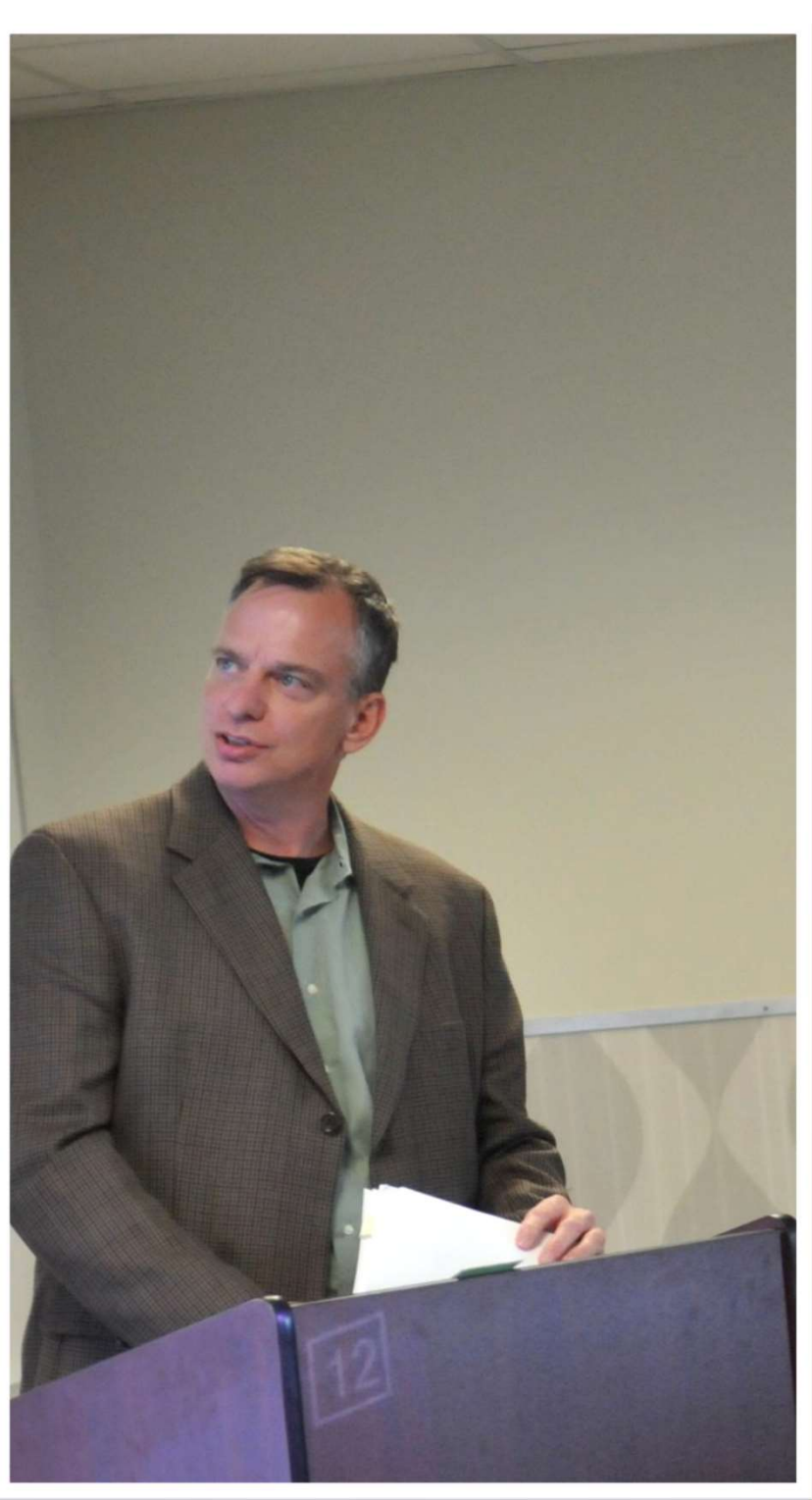


The event provided a great opportunity to connect with students, faculty and local attorneys by educating them about a current lgbt legal “hot topic”



How did it go?

- Very informative. I was interested to hear an overview of the many things affected by the DOMA decision . . .
- The presentation clearly delineated the rights/protections the federal government will now offer.
- Yes, it was very helpful. I particularly enjoyed learning about all the different areas of law affected by just the definition of marriage.
- ...as a gay man, it gave me the knowledge I needed in order to assert my rights and stand my ground if I have opposition.
- Absolutely helpful.



The next day, October 19th, Professor Titshaw and Robert Bush were joined by noted Adoption Law attorney, Lori Surmay, and presented a community forum, “After DOMA,” sponsored by GaySavannah.com.

GAYSAVANNAH.COM

*Online Magazine & Business Directory
Presents*

AFTER DOMA

A free forum

Saturday, October 19th - 10am-12pm
Marsh Auditorium at Candler Hospital



Can you and your same sex spouse receive federal benefits based on each others records, if you live in Savannah?

Can a same sex, international couple living in Atlanta, avail themselves of the naturalization rights of different-sex couples?

What rights do a same sex couple who were married in California have in Georgia?

Get the answers to these questions and bring your own questions!



27 people attended this forum discussing the legal rights of LGBT individuals in Georgia. Targeted outreach was made through the GLSP “Cementing LGBT Relationships 60+” project and the national LGBT Senior organization, SAGE, to LGBT’s 60 years of age and older.

“After DOMA; A Conversation with our LGBT Community” Evaluation Form

October 19, 2013

1. Did you find this training helpful? If so, what was most beneficial to you?

- ☺ Yes! the Q&A session.
- ☺ The variety of powers of attorney and direction that are recommended to be in place.
- ☺ Yes. The information about federal benefits and about Georgia law since we are somewhat new to Georgia.
- ☺ Very helpful. Beneficiary considerations.
- ☺ Yes, state specific DOMA.
- ☺ Beneficial in all information that was presented. The facts about getting married in another state and being able to have benefits here in Georgia was very informative.
- ☺ Yes, taxes and “ss” topics.
- ☺ Yes. Explaining of the breakdown of DOMA.
- ☺ Yes, explaining difference in state and federal law.
- ☺ Yes, general information.
- ☺ Yes, the adoption discussion.
- ☺ Yes, all of the information was beneficial. Federal state, adoption, wills immigration. All was equally informative.
- ☺ Yes, adoption information.
- ☺ **Very helpful...**



LGBT Rights in Georgia in a Post-DOMA America: What Has Changed, and What May Happen Next?

In June, the Supreme Court of the United States struck down the Defense of Marriage Act (DOMA), which had prohibited the Federal Government from recognizing same-sex marriages. Join us to hear how the DOMA decision affects legal rights for same-sex couples in Georgia, and to discuss and explore more broadly LGBT legal rights in our state.

PLEASE JOIN US FOR A FREE PRESENTATION ON

SATURDAY, OCTOBER 19th

from 10 a.m. to 12:00 p.m.

**at the Marsh Auditorium of Candler Hospital
5353 Reynolds Street, Savannah**

The presentation will include the following speakers:

Scott Titshaw, J.D., LL.M., is an Associate Professor of Law at Mercer University. He is widely published on LGBT and immigration topics, including recent articles about DOMA on The Huffington Post. Professor Titshaw has been a presenter and panelist in dozens of conferences throughout the U.S. and Germany. He earned an ACLU of Georgia Pro Bono Award for successfully challenging a high school's ban on gay-straight alliance meetings on its campus. He is also the recipient of a Stonewall Bar Association of Georgia's Annual Award for his work on LGBT issues.

Lori Sumay, J.D., is a partner at Claiborne & Surmay, P.C., specializing in Adoption and Reproductive Technology Law. She is also an adjunct professor at the University of Georgia, where she teaches Human Sexuality and the Law. Ms. Sumay is a former president of the Stonewall Bar Association of Georgia and has served on the board for over ten years. She has been elected to membership in the American Academy of Adoption Attorneys, and is a sought-after lecturer on LGBT and adoption issues.

Robert W. Bush, J.D., is a Senior Staff Attorney at Georgia Legal Services Program of Savannah, where he has served the public for almost 25 years. Mr. Bush founded and headed the HIV/AIDS Legal Project for 13 years, and received the Stonewall Bar Association of Georgia's Award for Outstanding Community Service to the LGBT community. More recently, he initiated the Cementing LGBT Relationships Project, as well as the "60+" project, focused on serving the over-60 LGBT population. Mr. Bush has spoken at various national conferences on HIV and LGBT issues.

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Georgia Legal Services Program

{ Coffee and snacks will be provided }

Questions? Email: amcrossin@savannahlawschool.org or rbush@glsp.org

AFTER *AFTER DOMA*; WHAT'LL WE DO?

On October 19, at our *After DOMA* forum, Professor Scott Titshaw, attorney Lori Surmay and I presented on and discussed the legal status of LGBT's in Georgia. The conversation revealed that, in terms of legal protections and safeguards, we are a community not fully embraced by our state. We can be fired for being LGBT; we cannot marry, nor have other legal recognition afforded our relationships. There are no statewide protections, but many punitive laws to punish us.

We are "other" or "foreign", in many respects. As a result, we are denied legal protections that would keep us secure in our housing and jobs and in other parts of our lives. Paul Collier, in his book Exodus: How Migration is Changing Our World, wrote that this is the way countries have typically responded to an influx of immigrants. They impose measures that exclude them from the institutions which would allow them to assimilate and to become successful in society.

In both cases the assimilated majority shuts out disfavored classes of people from the institutions and processes that allow individuals to move up in life. This results in the "ghettoizing" of that community of individuals, locking them out of the benefits afforded "mainstream" communities and feeding generalized animus against them.

People perceive us not for our commonalities, instead they fix on our differences, and are threatened by those differences. This discord not only rests in the naive hearts around us, but it is manipulated by those who have specific agendas that can be furthered by sacrificing our security to grab and hold onto power. For example, a constitutional amendment banning the already illegal institution of same sex marriage was not necessary in Georgia. But, as in several states in the U.S. at the time, political parties saw the opportunity to scare their voters to the polls by pouring fuel on the lit fears of those who didn't know us, and who considered us a threat.

Collier explains that an influx of anything unfamiliar can upset and activate the entrenchment to the status quo. "Diversity can also have 'corrosive effects' on trust, cooperation, and the willingness to redistribute income." It is a common reactive response when a community or individual confronts the unfamiliar.

As long as our larger community continues to fear us, the less likely it is that they will want to share their quality of life, access to resources, and the security they have in their own relationships and jobs.

But, Collier also makes the point that in the middle and longterm, these fears lessen and, usually, dissipate, as familiarity de-mystifies what was once the fearful unknown. He writes: "successful immigrant societies create new forms of social solidarity and dampen the negative effects of diversity." They assimilate.

And it is clear: our LGBT community is assimilating.

Just since the October 19th *After DOMA* forum, three states have legalized same sex marriage: two days after the forum, in response to a ruling by the Supreme Court of New Jersey, state officials began performing same sex marriages. On November 20, Governor Pat Quinn signed a bill legalizing same sex marriage in Illinois, and Hawaii began issuing marriage licenses on December 2nd.

On November 7th, the U.S. Senate passed the Employment Non-Discrimination Act, which would protect LGBT's against employment discrimination. We are waiting to see if it passes the U.S. House of Representatives, an unlikely event, since the Republican leadership is refusing to bring up for discussion and a vote.

Which begs the point of how do we encourage the betterment of our situation in and from Georgia?

Personal commitment to public action must be motivated one individual at a time. What makes each person feel personally implicated enough, or strongly empathetic enough to take an action? The action may be a phone call or it may be showing up at the capital or a rally or forum. Maybe it's committing to organizing or participating in a local initiative to assist our community in discerning and advocating its particular interests.

There is no question though, in this state, we are going to have to push back.

We must make sure our legislators know that there will be a consequence if they do not use the legislative process used to create protections from the majority's caprices. Sure, we may not outnumber non-LGBT's, but we can organize a response and we can motivate allies.

With this in mind, at *After DOMA*, we talked about "next steps" both in general terms and specific actions.

For starters, keep the contact information for your congressmen--state and federal--and other elected representatives on hand.

State Rep. (D) Craig Gordon, a longstanding ally of ours spoke at *After DOMA*. He emphasized that legislators prioritize the interests and concerns of the constituents that they hear from. When there is silence on an issue, there's often a lack of conviction on the part of our elected representatives to deal with it. We need to be heard from.

Given this information, I suspect our silence on issues such as U. S. Congressman (R) Lynn Westmoreland citing the Bible as justification to legislate against us, or the

then-Georgia Republican Party Chairwoman citing our matching private parts to assert our relationships are unnatural allows these goons to feel that they can get away with speaking that way.

Our silence helps them get elected. Our silence entrenches the status quo. Our silence insures that we will continue to be denied the rights guaranteed all other citizens of the United States.

So, register to vote! We are already a minority and we have to be creative to make our vote count; but our interests won't be represented if we don't participate in the process that can deliver the legal protections that we seek. Casting our conscionable vote is the first step. We need to be heard from.

And, stay tuned for information pertaining our next forum!

Below is the information we handed out to each of our *After DOMA* attendees. It comprises information to assist any one of you who wishes to "plug in" to some level of advocacy on behalf of our community.

Lastly, you will find attached information we promised during *After DOMA* to research, which is a list of the marriage waiting periods for the states which recognize same sex marriage. Of course, you must research further if you are considering a marriage trip. And, you should consider researching the availability of divorce, in order to avoid a marriage trap. Dissolving your marriage may not be possible without meeting onerous residency requirements.

I can't give you just the good news.

The Supremes, Gays, Love and Money

Robert Bush <robwbush@hotmail.com>

Sun 3/24/2013 9:22 PM

To: Larry Hodges <info@gaysavannah.com>

Writing about same sex marriage from Georgia constitutes an act of voyeurism, looking in on other people's reality, a remote, felt lacking in our own. Georgia does not recognize gay marriage. For good measure, it, also, mandates that no court within its borders shall rule on any case that might even suggest that facets of gay marriage might be legally recognized.

It's in our constitution.

This may or may not change as a result of the arguments taking place in front of the United States Supreme Court, this week. This is our gay moment in front of the highest court of our land. The nine Supreme justices will hear arguments on the two cases with the potential to be the most important legal rulings affecting gays and lesbians in our history.

Hollingsworth v. Perry, a.k.a. "the Proposition 8 case", presents the issue, does the 14th Amendment of U. S. Constitution prevent California from defining marriage as solely a legal arrangement between a man and a woman?

Prop 8 was a citizen-led initiative passed by California voters in response to a decision of the California Supreme Court declaring that same sex couples must be afforded the same marriage rights as different sex couples. Following that ruling, gay marriages flowed like wine.

In response to this, a committed group of opponents of same sex marriage, with loads of money support from the likes of the Mormon Church--among others, pushed through and passed a ballot stating that marriage can only occur between a man and a woman.

This prompted a legal challenge, and the eventual decision overturned Proposition 8. The state of California did not want to appeal this decision. However, a group determined citizens joined together to appeal the decision, which now confronts the Supreme Court.

DOMA, or the Defense of Marriage Act, was passed in 1996. DOMA explicitly denied same sex couples any federal benefit available to different sex couples.

This meant that, even if states decided that same sex couples have the right to marry, all federal benefits will be denied those couples. All told, these benefits number 1,138. Because of DOMA we cannot obtain green cards for our same sex spouses even if we are married; we cannot receive social security benefits available to different sex couples, and our household income suffers because of tax disadvantages.

Which is how U.S. v. Windsor brewed up.

Edith Windsor was stuck with a \$300K+ tax bill after her wife, Thea Spyer passed away, leaving Edith property. A different-sex married couple would not face this tax bill. But, Edith and Thea were a married same sex couple. Edith paid the bill, and, as is the procedure, she filed to have the money returned to her. The IRS refused to return the money. Citing DOMA, the IRS stated that returning the money would be a unlawful recognition of same sex marriage.

These cases present two broad issues for determination by the Supreme Court:

Does the 14th Amendment prevent CA from defining marriage as between a man and a woman?, and

Can the federal government under DOMA deny benefits to married gay and lesbian couples that are a right of their heterosexual counterparts?

And, then, there's the other issue that could mean that the Supreme Court will not rule directly on the lgbt issues in these cases at all. In order to file, prosecute or defend a lawsuit, you have to have "standing", a personal stake in the outcome of the controversy at the heart of the case. In Proposition 8, a group of citizens banded together to sue because the state chose not to appeal the court decision supporting same sex marriage. In Windsor, instead of a traditional litigant, your Congress created the Bipartisan Legal Advisory Group to defend DOMA because the Obama administration refused to do so. It is unclear whether either of these groups has standing to participate in their respective cases. If the Court finds that either or both did not, it could prevent the Court from ruling on one or both of the equality issues.

What's the bottom line for us?

Most feel it is unlikely that California's Proposition 8 would be reinstated. And many feel that DOMA likely may be struck down.

But, we may not get our Constitutional guarantee of marriage equality. When the 9th Cir. struck down Prop 8, it did so because gays and lesbians had been afforded the right to marry, and then had the right taken away by Prop 8. The Supreme Court may simply uphold the limited ruling without addressing the constitutionality of marriage equality.

I asked Mercer Law School Professor, Scott Titshaw, who specializes in issues related to sexuality and the law, what is his take on this: "Possibly the best thing they could do would be to restrict the ruling to a favorable decision for California couples, but wait about deciding the broader question of whether same sex couples have a constitutional right to marriage. He cited the years-long backlash against the Roe v. Wade decision.

"A broad ruling could stymie the current political process, which has been moving decisively in our favor. Focusing on the specific issues raised by particular cases is what courts are supposed to do."

Titshaw points out that the most important holdings of the Supreme Court decision in this case will be the logic used to support the decision. The Court may declare that courts must require a higher standard of proof before upholding a law that limits the rights of gays and lesbians.

The Court may say that, from now on, courts cannot uphold laws that limit the rights of gays and lesbians unless there is a compelling reason for doing so. A law discriminating against gays and lesbians cannot do so simply because a majority votes for it.

Which was the sad principle affirmed in the infamously homophobic Bowers v. Hardwick decision, zealously defended by our state's adulterous attorney general at the time, Michael Bowers. And it's also the principle reflected in DOMA, sponsored and steered to passage by a former Georgia Congressman, Bob Barr.

With our current senator, Saxby Chambliss, on the national stage harrumphing solid support behind DOMA and its principles, maybe the best thing we can do is take the option of limiting our rights out of the hands of Georgia lawmakers.

Me, I think there's an outside chance that we might get the sweeping declaration. There's a sense of inevitability about marriage equality that has been building, and support has been expanding for it. Roe v. Wade didn't benefit from this same cultural momentum.

Megan Kerkhoff

From: Robert <robwbush@hotmail.com>
Sent: Tuesday, October 26, 2021 7:06 PM
To: lacy.e.brooks@gmail.com; Luciana Spracher
Subject: [Caution - External Email] Fw: Your lgbt employment anti-disc'n bill

And, this is the last thing I'll send tonight, I promise. I just wanted to give you an idea of the nature of these forums, and how I prepared, hoped to achieve.

thank you....R

From: Robert <robwbush@hotmail.com>
Sent: Tuesday, October 26, 2021 7:02 PM
To: Robert <robwbush@hotmail.com>
Subject: Fw: Your lgbt employment anti-disc'n bill

From: Robert <robwbush@hotmail.com>
Sent: Saturday, October 19, 2013 4:07 PM
To: Karla drenner <dren16999@aol.com>
Subject: RE: Your lgbt employment anti-disc'n bill

thank you for responding. the forum went very well, with about 30 attendees!

Subject: Re: Your lgbt employment anti-disc'n bill
From: dren16999@aol.com
Date: Sat, 19 Oct 2013 07:41:01 -0400
To: robwbush@hotmail.com

Robert I am sorry about just now [responding.you](#) are correct this is the top priority for the Lgbt community. You can help by having people contact their rep and senator to lend support to the bill. Last years bill is still active and even though it has been heard it requires a vote. Jeff graham at Georgia equality is assisting and you could have those interested to join their efforts, lobby day, etc.,

Thank you so much for reaching out to me and being interested in helping with the bill.

Karla

Feel free to call me at the number below if you would like to chat.

Dr. Karla Drenner
Georgia State Representative
District 85
Cell phone: 678.232.1056

On Oct 19, 2013, at 6:28 AM, Robert <robwbush@hotmail.com> wrote:

I should give you my number again: 912-844-7383.....

From: robwbush@hotmail.com

To: dren16999@aol.com

Subject: RE: Your lgbt employment anti-disc'n bill

Date: Sat, 19 Oct 2013 06:28:09 -0400

Angela, the forum is today at 10; I would still welcome some guidance as to how I can lend support to the bill if it is going to be reintroduced this coming session, or some word on how lgbt'ers outside of ATL can help with the lgbt legislating in ATL. I will be mostly available prior to the forum, so if anyone with some strategic information could call, I would greatly appreciate it. My thought was to name employment discrimination protection as the number one issue to get behind.

Thank you!

Robert

From: robwbush@hotmail.com

To: dren16999@aol.com

Subject: Your lgbt employment anti-disc'n bill

Date: Mon, 14 Oct 2013 10:42:25 -0400

Rep. Drenner,

I am an attorney in Savannah, and a longtime lgbt advocate. I began my advocacy during the period that I managed an HIV/AIDS Legal Project through the Georgia Legal Services Program, and I received the 2004 award for advocacy from the Stonewall Bar Association.

On Saturday, October 19th, attorneys Lori Surmay and Scott Titshaw will join me in an "After DOMA" forum, sponsored by Gaysavannah.com, to present to our local lgbt community a discussion of their legal rights in Georgia. I conceived of the forum as a way to use a major lgbt current event to attract members of our community to attend a discussion of what our rights are in Georgia--and what they are not. I am hoping that this forum, which will be held at the Marsh Auditorium at Candler Hospital here in Savannah, from 10 a.m. until noon, will motivate some higher-level organizing among lgbt'ers, and that it might motivate some pushback on and support for our legal issues throughout the year--but, particularly during the legislative session.

FEPA is the major legislative issue for our community that I am presenting, although I do plan to introduce the issue of the private school scholarship program, diverting general tax monies to homophobic schools. I am interested in any suggestions you might have as to how I can direct members of our community to support your bill. Of course, should you decide that a road trip to Savannah looks nice on your agenda for next week, I'd give you a slot on our agenda. :
] But, as this is almost last minute, and I know you are likely over-scheduled like most public figures, I would welcome, as well, any written suggestions/requests you might have.

State Rep. Craig Gordon will be speaking at the forum, and I have discussed with him this opportunity to reach out to the lgbt community and that we will appreciate and make use of his ongoing support. We are awaiting word from the mayor's office as to whether she will open the conference with a few remarks.

In case you or your staff would like to speak with me about this, my number is (912)844-7383. I would like to support your bill in any way that you deem constructive and effective.

Robert Bush

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While Georgia residents still cannot get married to a same-sex partner in Georgia, they can easily go to one of the 18 US jurisdictions that will issue marriage licenses to them and have a weekend wedding.

Because their marriage still won't be recognized for Georgia State law purposes:

- they won't have authority to make **healthcare decisions** for each other without **an Advance Directive** or **appointment as a Guardian** (and they won't have priority in appointment as a Guardian);
- they won't have authority to **manage each other's property** without a **DPOA**, authority under a **trust** instrument, or appointment as a **Conservator** (and they won't have priority in appointment as a Conservator)
- they won't have a right to any portion of the other's **estate** or to priority in **appointment as an Administrator** without a Will

However, the marriage will be recognized for Federal law purposes, with the Tax treatment being a BIG change.

In contrast to prior law, this means:

- they can take advantage of any **marriage bonus** that results under Federal income tax law
- amounts paid by an employer for a **health plan** for a spouse are tax-deductible
- **transfers incident to divorce** are not be taxable
- **gift-splitting** and **portability of the estate tax exemption** applies
- gifts and bequests between them can qualify for the **marital deduction**
- **retirement plan benefits** can be rolled over into the survivor's qualified plan or IRA, stretching out distributions and saving income taxes

But there's also bad news. It also means:

- in some cases they will be subject to the Federal income tax "**marriage penalty**"
- amounts paid to **adopt a spouse's children** are not tax-deductible
- they each have vested rights in the other's **retirement plans** that need to be waived on divorce or in order to transfer assets to someone else
- **GRITs** are no longer a fun way to efficiently transfer wealth between them
- **income tax filing** is more burdensome since Federal and state returns won't match

Moreover, divorce is problematic, since Georgia courts do not have jurisdiction to grant them.

Thus, unless the marriage is planned appropriately, your clients could end up in a situation

where they can't change their marital status for Federal law purposes—or marry anyone else—without changing their residence for 6 months-2 years, depending on the state in which they're getting divorced.

However, CA, DC, DE, Minnesota, and Vermont have all passed very friendly statutes.

In each case, same-sex spouses who were married in the State may also divorce in the same State without any residency requirement IF neither party is a resident of a State that will allow them to divorce.

I'm not a family lawyer so I don't know how the divorce statutes in each of these jurisdictions interact with things like child support and property settlements,

but these are the 5 states to start with in coming up with an appropriate jurisdiction for a client who wants to marry his or her same-sex partner.

- I. **As you are no doubt aware**, last June the Supreme Court struck down the US prohibition on the recognition of same-sex marriages for Federal purposes. **You are also no doubt aware that Georgia** does not grant such marriages, and considers any such marriages to be void for Georgia law purposes. **As a result, there is now a disjuncture** between how same-sex married couples, who are resident in Georgia, are treated for state law purposes and how they are treated for Federal law purposes.

This disjuncture creates both potential pitfalls and planning opportunities.

Today, I plan to cover:

- the complex of laws that previously prevented the recognition of a Georgia couple's marriage on both the federal and state level if both spouses were the same sex;
- the extent to which the Supreme Court decision in *Windsor* changed this landscape;
- the impact of these changes on your clients who were married to a same-sex spouse prior to last year;
- recommendations for future planning to best position your clients to take advantage of the benefits, including those afforded by the gap between Federal and State law; and
- an overview of some of the issues you want to be careful to avoid.

- II. **Until last year, estate planning for same-sex GA couples was fairly straightforward:** any marriage between persons of the same sex was ignored for both Federal and State purposes.

- A. **The federal treatment was a result of the Defense of Marriage Act**, better known as DOMA.

DOMA was signed into law in 1996, just as states were beginning to grapple with the then-novel idea of same-sex marriages.

Section 3 of DOMA amended the federal Dictionary Act by providing that, for all federal purposes,

- 'marriage' means only a legal union between one man and one woman as husband and wife,
- and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

These definitions applied for purposes of interpreting over 1000 Federal laws and a whole host of Federal Regulations.

Once states started issuing marriage licenses to same-sex couples,

starting with **Massachusetts** in 2004,
this provision meant that **even validly married** same-sex couples
were treated as **single** for purposes of
tax filings, federal benefits, retirement benefits,
immigration...

B. In addition to amending the Dictionary Act for Federal purposes, in Section 2 DOMA explicitly authorized States to ignore any same-sex marriages other states might allow.

C. In 2000, the Georgia legislature adopted its own version of DOMA.

Thus, § 19-3-3.1 of the Georgia Code:

- **prohibits** same-sex marriages from being performed in Georgia;
- **denies recognition** same-sex marriages entered into in other States;
- and
- **provides** that Georgia courts do not have jurisdiction to grant divorces to same-sex couples

In this, Georgia is in a shrinking majority:

- **currently** 33 States bar same-sex marriage, while 17 and DC allow it.
 - **6 additional states though are currently in flux**, with decisions or agency actions or pending statutes pointing in the direction of recognition.
- We may well see Georgia in the minority as early as next year.**

D. The result of this parallel Federal and State scheme was that, regardless of the actual marital status of the couple, if both partners were male or both female, for estate planning purposes, they were single.

III. Last year, this changed. In June, the Supreme Court decided *Windsor* in favor of the taxpayer, blowing a big hole in DOMA.

A. Thea Spyer died in 2009.

- She was survived by her wife, Edith Windsor; they had legally married 2 years earlier in Canada.
- Mrs. Spyer left almost all of her assets to her wife in a form that would have qualified for the marital deduction if one of the women had been a man.
- New York State allowed the marital deduction for state estate tax purposes, but the estate was required to pay \$363,000 in federal estate tax for on the assets passing to Mrs. Windsor due to DOMA's definition of "marriage" and "spouse".
- Mrs Windsor paid the estate tax and filed for refund, but her claim was denied by the IRS.
- Mrs Windsor then sued, claiming that Section 3 of DOMA violates the principles of Equal Protection.

- The case worked its way up to the Supreme Court last year, where Mrs Windsor was successful.
- As a result, Section 3 of DOMA—the section limiting marriage for Federal law purposes to male-female couples—is no longer in effect.
- Procedurally there's some fun stuff in the case, but it isn't relevant for our purposes today.

I love this case because, for once, I can talk about the estate tax in public without people's eyes immediately glazing over.

- B. Now it's pretty clear from the opinion that the Supreme Court did not make any ruling concerning Section 2**—the section allowing states to ignore same-sex marriages from other jurisdictions—and, based on the wording of the opinion and conversations with folks who know *far* more about Supreme Court jurisprudence than I do, it seems unlikely it will, at least until the States not recognizing same sex marriages are a small minority.
So I don't expect to see Georgia forced to recognize same sex marriages in the near future.
- C. While Georgia residents still cannot get married to a same-sex partner in Georgia, they can easily go to one of the 18 US jurisdictions that will issue marriage licenses to them and have a weekend wedding.**

Because their marriage still won't be recognized for Georgia State law purposes:

- they won't have authority to make **healthcare decisions** for each other without an **Advance Directive** or **appointment as a Guardian** (and they won't have priority in appointment as a Guardian);
- they won't have authority to **manage each other's property** without a **DPOA**, authority under a **trust** instrument, or appointment as a **Conservator** (and they won't have priority in appointment as a Conservator)
- they won't have a right to any portion of the other's **estate** or to priority in **appointment as an Administrator** without a Will

- D. However, the marriage will be recognized for Federal law purposes, with the Tax treatment being a BIG change.**
In contrast to prior law, this means:
- they can take advantage of any **marriage bonus** that results under Federal income tax law
 - amounts paid by an employer for a **health plan** for a spouse are tax-deductible
 - **transfers incident to divorce** are not be taxable
 - **gift-splitting** and **portability of the estate tax exemption** applies
 - gifts and bequests between them can qualify for the **marital deduction**

- **retirement plan benefits** can be rolled over into the survivor's qualified plan or IRA, stretching out distributions and saving income taxes

But there's also bad news. It also means:

- in some cases they will be subject to the Federal income tax "**marriage penalty**"

- amounts paid to **adopt a spouse's children** are not tax-deductible

- they each have vested rights in the other's **retirement plans** that need to be waived on divorce or in order to transfer assets to someone else

- **GRITs** are no longer a fun way to efficiently transfer wealth between them

- **income tax filing** is more burdensome since Federal and state returns won't match

E. **Moreover, divorce is problematic, since Georgia courts do not have jurisdiction to grant them.**

Thus, unless the marriage is planned appropriately, your clients could end up in a situation

where they can't change their marital status for Federal law purposes—or marry anyone else—without changing their residence for 6 months-2 years, depending on the state in which they're getting divorced.

However, CA, DC, DE, Minnesota, and Vermont have all passed very friendly statutes.

In each case, same-sex spouses who were married in the State may also divorce in the same State without any residency requirement IF neither party is a resident of a State that will allow them to divorce.

I'm not a family lawyer so I don't know how the divorce statutes in each of these jurisdictions interact with things like child support and property settlements,

but these are the 5 states to start with in coming up with an appropriate jurisdiction for a client who wants to marry his or her same-sex partner.

IV. **There are some immediate things for you to think about in the aftermath of *Windsor* with respect to your clients, particularly those who were validly married prior to last year.**

A. **In September, the IRS issued Revenue Ruling 2013-17, providing guidance explaining the Federal tax implications of *Windsor*:**

(1) **the IRS has adopted a "State of Celebration" rule** with respect to determining which marriages count for Federal tax law purposes.

In other words, 2 women, residents of GA, who get validly married in DC are “married” for Federal tax purposes even though they live in GA which does not recognize the marriage

NOTE: the US Citizen and Immigration Services has adopted the same rule for use in considering immigrant visa petitions for same-sex spouses

HOWEVER the Social Security Administration has **NOT** adopted this rule. It requires that applicants for benefits based on marital status both be validly married under state law AND be domiciled during the application and claim determination stage in a jurisdiction that recognizes the marriage

- (2) **While “married” filing status is mandatory for their income tax returns going forward**, same-sex couples who previously filed as single despite their marriage may elect whether to amend their prior returns to now file as married.

- **This is available in most cases** for 2010, 2011, and 2012 tax returns

- **However, the SoL for many 2010 returns** will run on April 15th of this year, so it’s important to act quickly on this point if changing the filing status would be beneficial

In determining whether to amend their returns, clients should consider

- the impact of any “marriage bonus/marriage penalty”,
- any tax they paid on amounts paid by an employer to cover their spouse’s healthcare,
- as well as the many other provisions affected by marital status
 - unavailability of the credit for **adoption expenses** where the spouse is the other parent of the child;
 - requirement that spouses act consistently with respect to the decision whether **to itemize deductions or take the standard deduction**
 - inability to claim a spouse as a **dependent** or file as “**head of household**”
 - ability to receive up to \$500,000 in **tax-free gain** on the sale of a principal residence even if only one spouse met the residency requirements for the exclusion

In short, you should advise them to **consult with their accountant** (or if you’re a tax lawyer you should review their returns for them) ASAP.

(3) **finally, only actual marriages—not domestic partnerships or civil unions—are marriages for tax law purposes**

B. In addition to the tax issues, you should review all estate plans to see what needs updating:

- (1) review benefits for clients who work for the Federal government and take into account in estate plan
- (2) check with clients currently receiving social security benefits to see whether they are eligible for higher benefits based on predeceased spouse's status
- (3) COBRA coverage available based on spouse's employment
- (4) Some trusts that were not previously grantor trusts will be now. To the extent this status is not intended, trust document should be amended if possible.
- (5) Eligibility for some programs (e.g., SSI) may be negatively affected
- (6) Antenuptial and postnuptial agreements should be reviewed and, if necessary, waivers typically obtained but not previously necessary for same-sex marriages—for example of rights to retirement assets—should be signed

C. In drafting documents, you should consider including expansive definitions of “spouse” in documents (e.g., with respect to limited powers of appointment) to include same-sex spouses, even if the forum state (like Georgia) does not recognize same-sex marriages

D. There's one small piece of planning that exploits the gap between Federal recognition of same-sex marriages and state non-recognition.

For clients where one spouse has really no taxable income, and the other one has an average to high amount, consider shifting income-producing assets to low tax bracket one to take advantage of the slightly progressive nature of the GA's income tax system.

While not a substantial savings, if shifting the assets makes sense in your client's overall plan, there's no reason not to do it and get a bit of an advantage out of the fact that GA won't recognize their marriage.