Be Careful Where You Live When You Die: Termination of Transfers & Marriage Equality

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1980

• Author & Significant Other
  – have lived together for 5 years in Boston, shared financial resources and mutual responsibility
  – Author writes *Song* and assigns copyright to Entertainment Conglomerate Inc. for lump sum
  – *Song* is recorded & released to great acclaim
• Author’s transfer subject to termination in 2015
• If Author were to die in 1980, what could Significant Other expect as to termination?

• Essentially, if author is dead, termination interest is owned
  – entirely by author’s widow or widower
  – unless author leaves surviving kid(s) and/or grandkid(s), in which case
    • widow or widower owns 50%
    • surviving kid(s) and/or grandkid(s) own 50%
1980

Alexander Author & Samantha Significant
- Sam can’t terminate
- BUT, Alex & Sam can change that at any time by getting married
- if they marry & Alex dies in 1980, Sam becomes Alex’s “widow” and is entitled to terminate

Alexandra Author & Samantha Significant
- Sam can’t terminate
- AND Alex & Sam can’t change that because can’t legally marry anywhere
- If Alex dies in 1980, her grant can never be terminated by anyone under section 203
1980

• Federal copyright statute provides *facial* equality
  – on its face, treats unmarried couples equally
    • whether opposite-sex or same-sex

• But *incorporates by reference* state inequality
  – author in opposite-sex relationship can marry
  – author in same-sex relationship *can’t* marry
2000

• In 1998, Congress amended section 203(a)(2) on ownership of termination interest of deceased author
  – if author leaves no widow or widower, no kids, and no grandkids
  – then author’s “executor, administrator, personal representative, or trustee” owns termination interest

• If Alex were to die in 2000, what could Sam expect as to termination in 2015?
2000

Alexander & Samantha

- S can’t exercise as widow
- S can exercise if
  - A’s will names S beneficiary
  - and A has no surviving kids

- BUT, Alex & Sam can still change that at any time by getting married
  - S would then be A’s widow and own at least 50% interest

Alexandra & Samantha

- S can’t exercise as widow
- S can exercise if
  - A’s will names S beneficiary
  - and A has no surviving kids

- AND Alex & Sam still can’t change that because can’t legally marry anywhere
  - A has to incur expense of will
  - A can’t leave to S if A has kid
2000

• Federal copyright statute still provides *facial* equality, while *incorporating* state law inequality by reference

• But now adds a *private-ordering alternative*
  – allows author in same-sex relationship to obtain *some* of the same benefits that author in opposite-sex relationship can obtain by marriage
  – though not a complete or perfect substitute
2005

• Massachusetts allows same-sex marriage beginning May 2004
• Alex & Sam get married in Massachusetts
• If Alex were to die in 2005, what could Sam expect as to termination in 2015?
The author’s “widow” or “widower” is the author’s surviving spouse under the law of the author’s domicile at the time of his or her death, whether or not the spouse has later remarried.
In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “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.
2005

Alexander & Samantha
- S can exercise as widow
  - 50% interest if A has surviving kid(s)

Alexandra & Samantha
- S can’t exercise as widow
  - legally married in MA
  - But DOMA §3 says Sam can’t qualify as “spouse” because not of the opposite sex

- S can exercise only if
  - A’s will names S beneficiary
  - and A has no surviving kids
2005

• Federal *copyright* statute still provides *facial* equality, and *incorporates by reference* both equal and unequal state laws
• Federal *noncopyright* law imposes a layer of formal federal unequal treatment that trumps copyright’s facial equality and any state’s equal treatment
• Though *private-ordering alternative* remains
2014

• Alex & Sam move to Florida, which has constitutional and statutory ban on recognizing same-sex marriage
• If Alex were to die in 2015, what could Sam expect as to termination in 2015?
The author’s “widow” or “widower” is the author’s surviving spouse under the law of the author’s domicile at the time of his or her death, whether or not the spouse has later remarried.

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “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.
Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 12–307

UNITED STATES, PETITIONER v. EDITH SCHLAIN
WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE
ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June 26, 2013]

JUSTICE KENNEDY delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of "spouse" as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor’s favor.

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, see, e.g., Baehr v. Lewin, 74
1 U.S.C. §7 (DOMA §3)

In determining the meaning of any Act of Congress, or of an official ruling or construction thereof, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “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 as a husband or a wife.
17 U.S.C. §101

The author’s “widow” or “widower” is the author’s surviving spouse under the law of the author’s domicile at the time of his or her death, whether or not the spouse has later remarried.
Alexander & Samantha
– S can exercise as widow
  • 50% interest if A has surviving kid(s)

Alexandra & Samantha
– S can’t exercise as widow
  • even though legally married in MA
  • even though DOMA §3 struck down
  • because state law of A’s domicile at death doesn’t recognize S as spouse

– S can still exercise only if
  • A’s will names S beneficiary
  • and A has no surviving kids
2014

• Federal formal unequal treatment (DOMA) gone
• Federal *copyright* statute
  – provides *facial* equality
  – *incorporates by reference* both equal and unequal state laws
  – but copyright’s choice-of-law rule means state-law inequality will trump equality in some instances
• leaving incomplete *private-ordering alternative*