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Whether it's articles on rulings from the New York Court of Appeals or the Appellate Division, Third Department, to news about a new statute or budget battle, the Law Journal's coverage from Albany is archived in one central location at nylj.com.



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Today's Tip

Subscribers to nylj.com have access to news stories, columns and decisions going back more than five years.

New Challenges to DOMA Filed in Connecticut and New York

BY VICTOR LI

THE 81-YEAR-OLD widow of a same-sex partner filed suit in Manhattan federal court on Tuesday challenging the government's refusal under the Defense of Marriage Act to recognize her Canadian marriage.

Edith Windsor, the sole beneficiary of Thea Spyer's estate, has been forced to pay \$363,053 in federal estate taxes because she is not considered the surviving spouse under the 1996 Defense of Marriage Act (DOMA), which defines marriage as a legal union between a man and a woman.

"In other words, Edie's inheritance, unlike the inheritance of a widow who has been left everything by her deceased husband, has been significantly reduced by the estate tax," states the complaint in *Windsor v. the United States*, 10 cv 8435. "Edie, now 81 years old, faces the rest of her life without Thea, with shrunken retirement savings, and with the added insult of the federal government refusing to recognize the validity of her marriage, not to mention her forty-four-year committed relationship."

Ms. Windsor's Manhattan federal court lawsuit was one of two actions brought on Tuesday urging

that DOMA be thrown out on equal protection grounds. After successfully challenging Section 3 of the act in Massachusetts, the Gay & Lesbian Advocates & Defenders (GLAD) filed suit on behalf of two same-sex couples and one widower in federal district court in Connecticut, challenging the constitutionality of the federal government's denial of Social Security claims, retirement benefits, health care and family medical leave to lawfully married same-sex couples in Connecticut, New Hampshire, and Vermont.

Ms. Windsor, the New Yorker, is represented by Roberta Kaplan, a partner at Paul, Weiss, Rifkind, Wharton & Garrison who is working pro bono, the American Civil Liberties Union and the New York Civil Liberties Union. Other attorneys counseling her are Andrew J. Ehrlich of Paul Weiss, James D. Esseks and Rose A. Saxe of the ACLU and Alexis Karteron and Arthur Eisenberg of the NYCLU.

According to the Southern District complaint signed by Ms. Kaplan, "Edie and Thea's life stories are in one sense remarkable to the extraordinary times through which they live, and at the same time quite typical of the lives of gay men and lesbians of their genera-

tion, given the pervasive discrimination and homophobia that Edie and Thea encountered on a routine basis. Yet despite obstacles nearly unimaginable today to the generations of gay men and lesbians who followed in their wake, Edie and Thea went on to live lives of great joy, full of dancing, love, and celebration."

Ms. Windsor and Ms. Spyer were engaged in 1967 and finally married in Toronto in May 2007. By then, Ms. Spyer had contracted multiple sclerosis, a disease that became progressively more debilitating. She died in 2009.

Federal authorities generally levy no estates taxes on the money or property passed at death by one spouse to another. But despite New York's recognition of same-sex marriages contracted in Canada and other jurisdictions, the IRS taxed Ms. Windsor's inheritance. Ms. Windsor had to sell some of their assets to pay the hefty federal estate tax bill.

"Edie and Thea had been together for 44 years and [were] married in 2007 in Toronto," Ms. Kaplan said. "If they had been a woman and a man, then Edie would have inherited Thea's estate tax free. But because her name was Thea and not Theo, they were treated as strangers by the federal government, and that had a huge consequence, literally."

The Windsor case has been assigned to Southern District Judge Barbara Jones.

The New York and Connecticut lawsuits follow *Gill v. Office of Personnel Management*, 09-10309-JLT, in which a Massachusetts District Court judge ruled for the plaintiffs who claimed \$3 of DOMA should be found unconstitutional based on the Fifth Amendment, equal protection, and the federal government's historically consistent deference to state definitions of marriage.

Connecticut Lawsuit

DOMA's \$3 prevents the federal government from recognizing the marriages of same-sex couples who are legally married in their own states and restricts the federal government from granting such couples any federal benefits it provides to opposite-sex married couples. The U.S. Department of Justice appealed the lower court ruling last month.

Mary Bonauto, civil rights project director for GLAD, said the two recently filed cases, while similar to *Gill*, have some important differences.

"It's the same core legal theory as in *Gill* in that the claims involve federal taxation, Social Security, and retirement benefits," Ms. Bonauto said in a conference call with reporters on Tuesday. "In [the Connecticut] case, it's a different jurisdiction involving three additional states that have marriage equality at the state level. Beyond that, there are additional harms in this case."



Thea Spyer and Edith 'Edie' Windsor (right, both photos) spent 44 years together before Ms. Spyer died in 2009.



Ms. Bonauto cited one of the plaintiffs, Lynda DeForge, a federal postal employee who was denied family leave to care for her wife, who required regular injections into her neck because of a military-related injury and who recently had knee surgery.

The other plaintiffs in the Connecticut case, *Pedersen v. Office of Personnel Management*, 10 cv 01750, include a widower who was denied survivor and Social Security death benefits, and two women, one retired, who cannot add their wives to their own health insurance plans.

Ms. Bonauto, who will be working alongside attorneys at Sullivan & Worcester and Jenner & Block, said the suit marks a slow, but steady battle to end DOMA. "DOMA must fall," she said.

"In 1996, when Congress passed DOMA, the stated goal was to harm gay people and same-sex families with this law, and, sadly, it has succeeded. Married gay and lesbian couples fall through the federal safety nets that exist for other married people," Ms. Bonauto said in a statement. "We have to keep the pressure on and get DOMA off the books before it does even more harm."

In the New York case, Ms. Kaplan said she planned on using *Gill* as a roadmap. "It's a straight equal protection claim," she said.

Ms. Kaplan said she hopes the court will act soon.

"My client isn't getting younger," she said.

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