

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

EDITH SCHLAIN WINDSOR, in her  
capacity as Executor of the estate of THEA  
CLARA SPYER,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

10 Civ. 8435 (BSJ) (JCF)  
ECF Case

**AFFIDAVIT OF  
EDITH SCHLAIN WINDSOR**

Edith Schlain Windsor declares under penalty of perjury, pursuant to 28  
U.S.C. § 1746, as follows:

1. I am the Plaintiff in this action seeking a refund of the federal estate tax levied on and paid by the estate of Thea Clara Spyer (“Thea”). I am the sole executor of Thea’s estate.

2. I was born on June 20, 1929, in Philadelphia, Pennsylvania. My parents struggled for financial security during the Great Depression, and my family lost our home when I was a child.

3. I received a bachelor’s degree from Temple University in 1950.

4. In the early 1950s, I moved to New York City from Philadelphia. Shortly after arriving in New York, I decided to pursue graduate studies in mathematics. I obtained a master’s degree in mathematics from New York University in 1957. I then joined International Business Machines Corp. (“IBM”), where I worked for sixteen years in senior technical and management positions related to systems architecture and implementation of operating systems and language processors. During my time at IBM, I spent two semesters studying applied mathematics at Harvard University on an IBM

fellowship. In May 1968, I attained the title of Senior Systems Programmer, the highest technical position at IBM.

5. I met Thea in New York City in 1963 at Portofino, a restaurant in Greenwich Village, where it was comfortable for a lesbian clientele to go on Friday evenings. I was working long hours at my job and decided to call an old friend and ask her to take me “to where the lesbians go.” At the restaurant, I was introduced to Thea. Although Thea and I were each there with other people, we danced together all night. In fact, by the end of the evening, I had danced a hole through the bottom of one of my stockings.

6. After that first night dancing together, Thea and I occasionally saw each other at parties over the next two years. At these parties, we would start dancing, and our respective dates would stand frustrated on the side of the dance floor with their coats on, waiting for us to separate.

7. We did not forget about each other—that first night made a deep impression on us both. Some two years later, in the late spring of 1965, I learned through mutual acquaintances that Thea would be spending Memorial Day weekend on the East End of Long Island. Eager to see Thea again, I asked some friends with a nearby house to let me stay with them for the weekend. After I arrived at the house, I declined to go out with my friends that Friday night so I could wait for Thea to arrive.

8. When my friends returned home later that evening, they told me that Thea was delayed at work in New York City and was not expected until the next day. Nervous but excited, I reconnected with Thea when she arrived that Saturday afternoon. As it turned out, there was nothing to be nervous about.

9. When Thea asked me that weekend what I wanted from her, my response was simple: “Not much. I’d like to date for a year. And if that goes the way it is now, I think I’d like to be engaged, say for a year. And if it still feels this goofy joyous, I’d like us to spend the rest of our lives together.” And we did.

10. Two years later, Thea asked me to marry her, even though no state in the United States afforded legal recognition to same-sex couples, much less marriage rights, at that time. Thea feared that if I wore an engagement ring to work, my sexual orientation might be disclosed to my colleagues at my job at IBM, so she proposed to me with a circular diamond pin instead. With this brooch symbolizing our commitment, we began our very long engagement in 1967.

11. Our choice not to wear traditional engagement rings was just one of many ways in which Thea and I had to mold our lives to make our relationship invisible. We both faced pressures not only in the workplace and in society at large, but also from family and friends. Like countless other same-sex couples, we engaged in a constant struggle to balance our love for one another and our desire to live openly and with dignity, on the one hand, with our fear of disapproval and discrimination from others, on the other.

12. Our relationship blossomed rapidly. We moved into an apartment in Greenwich Village together six months after getting engaged.

13. In 1968, Thea and I bought a small house together on Long Island. It was just big enough for us to shower off the sand from the beach and change into clothes for dancing. In that home, we spent the next forty summers, and it was the site of some of our happiest memories together.

14. During our decades together, Thea and I lived a life full of joy and passion. We enjoyed travel and often took trips both in the United States and abroad. We also loved to entertain frequently, and Thea, an accomplished cook, would prepare elaborate meals for our friends on holidays and at other times, including annual celebrations of our anniversary every Memorial Day weekend. We grew closer together as a couple, and we independently thrived professionally and personally.

15. Twelve years into our relationship, Thea and I were confronted with what became the most serious challenge of our lives. In 1977, at the age of forty-five, Thea was first diagnosed with Progressive Multiple Sclerosis, or MS, a chronic disease of the central nervous system that causes gradually worsening and irreversible neurological damage and paralysis.

16. Despite the difficulties we faced following the diagnosis, we refused to give up on the life we had built together. Thea reinvented herself with each year of her increasing physical disability, working to maintain a life that was active and joyous. I committed myself to ensuring that our lives remained full of the passion they had felt when we first met. We even modified our dancing style, with Thea balancing herself on two canes to get to the dance floor and then dropping them to dance to the latest disco hit.

17. Thea's MS caused a gradual, but ever-increasing paralysis. I nursed, encouraged and supported her as her disability grew ever more severe—first requiring a cane, then crutches, then a manual wheelchair, then a motorized wheelchair that Thea could operate with her remaining usable hand.



18. When Thea could no longer swim, we installed special equipment to help her enter, exit and float in the pool at our Long Island house so that Thea could exercise and enjoy herself in the water, with my assistance.

19. When Thea started using a wheelchair, we adopted a new style of dancing. I would sit on Thea's lap as she maneuvered her wheelchair across the dance floor.

20. Despite Thea's illness, our love and commitment for one another never wavered. And as the years passed, we never gave up on our dream of getting married.

21. In 1993, twenty-eight years into our relationship and sixteen years after Thea's diagnosis, New York City first began registering domestic partnerships between same-sex couples.

22. I told Thea that I wanted us to be one of the first couples to register as domestic partners in New York City. Thea, ever-dedicated to her private practice as a psychologist, told me that we would have to wait to register as domestic partners because she had appointments with patients all day long. I responded, "I have waited almost twenty-eight years for this day, and I am not waiting a single day more!" Fortunately, Thea agreed, cleared her schedule for the day, and bought me flowers before we proudly became registered as domestic partners in New York City—we were issued certificate number eighty.

23. Notwithstanding our excitement, we both saw the limited rights and benefits afforded by domestic partnership as no substitute for the institution of marriage.

24. In 2002, Thea suffered a heart attack and was diagnosed with another serious medical condition, aortic stenosis, the narrowing of the aortic valve of the heart. Because of the near complete paralysis that had resulted from her MS, Thea was not willing to undergo the lengthy hospitalization that would have resulted from surgery to fix the valve. Without the surgery, the doctors told us that Thea did not have long to live.

25. Although we had always hoped to marry in our home state of New York, Thea's worsening condition was a constant and grave reminder that we were running out of time. Sometime after celebrating our fortieth anniversary together as a committed couple, Thea's doctor told her that she had less than a year to live. We decided we could not wait for the law in New York to finally recognize the reality of our relationship. We decided to seek civil marriage rights where we could get them.

26. With six friends, including one who was a physician, Thea, then seventy-five, and I, then seventy-seven, traveled to Toronto, Canada, where we were legally married on May 22, 2007.

27. A copy of our marriage license is attached hereto as **Exhibit A**, and a copy of our marriage certificate is attached hereto as **Exhibit B**. A copy of our wedding announcement, which was published in the *New York Times*, is attached as **Exhibit C**.

28. Thea and I were able to spend two years as a married couple before Thea succumbed to complications from her heart condition on February 5, 2009 and died. A copy of Thea's Death Certificate is attached hereto as **Exhibit D**.

29. After Thea's passing, I was hospitalized. I learned that I was suffering from stress cardiomyopathy, an ailment commonly known as "broken heart syndrome." Complications occurred in the hospital, resulting in "total heart stoppage," insertion of an implantable cardioverter-defibrillator (ICD), and serious, irreversible damage to my heart.

30. Thea's Last Will and Testament, dated September 7, 2004, was admitted to probate by the Surrogate's Court of New York County (Index No. 2009-1162), and I was appointed as executor of Thea's estate on April 24, 2009. A copy of Thea's Last Will and Testament is attached hereto as **Exhibit E**. A copy of the Letters Testamentary appointing me as executor of Thea's estate is attached hereto as **Exhibit F**.

31. In accordance with Article Third of Thea's Last Will and Testament, her executor is directed to distribute her entire estate to the TCS Revocable Trust created by Thea. A copy of the TCS Revocable Trust is attached hereto as **Exhibit G**.

32. In accordance with Article III of the trust agreement creating the TCS Revocable Trust, because I survived Thea, the trustees were directed to distribute the remaining trust property, after the payment of taxes and administration expenses, to the trustees of the ESW Revocable Trust created by me. I am a trustee and the sole beneficiary of the ESW Revocable Trust during my life, and I have the power, exercisable by me alone, to invade the trust property and to revoke the trust agreement in its entirety at any time. A copy of the ESW Revocable Trust is attached hereto as **Exhibit H**.

33. Because Thea's estate slightly exceeded the applicable exclusion amount set forth in 26 U.S.C. § 2010(c), Thea's estate was subject to federal estate tax.

34. As executor of Thea's estate, I filed an Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes (Form 4768) with the IRS on October 28, 2009. A copy of Form 4768 is attached hereto as **Exhibit I**.

35. On November 5, 2009, in my capacity as executor of Thea's estate, I made an advance payment of the estate's federal estate tax to the U.S. Treasury in the amount of \$520,000.00.

36. On January 28, 2010, in my capacity as executor of Thea's estate, I filed a United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) with the IRS, which showed that \$363,053.00 was due in federal estate tax, \$156,947.00 less than the advance payment made in November 2009. A copy of Form 706 (without attachments) is attached hereto as **Exhibit J**.

37. On Schedule M (Bequests, etc., to Surviving Spouse) of the estate's United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) I, as executor of Thea's estate, explained that, although Thea and I were married at the time of her death and her entire estate passed for my benefit, the estate was not claiming the marital deduction authorized by 26 U.S.C. § 2056(a) because of the operation of the Defense of Marriage Act, or DOMA.

38. In March, 2010, the U.S. Treasury issued a refund to the estate in the amount of \$156,947.00, representing the overpayment of federal estate tax by the estate in November 2009.




39. In my capacity as executor of Thea's estate, I filed a Claim for Refund and Request for Abatement (Form 843) and a Disclosure Statement (Form 8275) with the IRS on April 7, 2010, stating that Thea and I were lawfully married in Toronto, that New York State recognizes that marriage under local law, that DOMA unconstitutionally discriminates on the basis of sexual orientation, and, as a result, that Thea's estate is entitled to the marital deduction and to a refund in the amount of \$363,053.00. In the Disclosure Statement, I, in my capacity as executor of Thea's estate, explained that DOMA is unconstitutional. A copy of Form 843 and Form 8275 filed therewith are attached hereto as **Exhibit K**.

40. On May 26, 2010, the IRS notified me, in my capacity as executor of Thea's estate, that it disallowed the estate's claim for a refund on the grounds that "[s]ince both spouses were women and since under DOMA ' . . . the words [sic] "spouse" refers only to a person of the opposite sex who is a husband or a wife', Section 2056 is inapplicable because the surviving spouse is not a spouse as defined by DOMA." A copy of the letter from the IRS dated May 26, 2010 disallowing the estate's claim for a refund is attached hereto as **Exhibit L**.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed at New York, New York on this 23rd day of June 2011:

  
Edith Schlain Windsor