MARRIED SAME-SEX COUPLES LIVING IN NON-RECOGNITION STATES: A PRIMER

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I. THE LEGAL STATUS OF SAME-SEX MARRIAGE IN THE UNITED STATES

Looking back from 2015, the modern history of same-sex marriage in the United States begins with the decision of the Hawai'i Supreme Court in *Baehr v. Lewin*, which held that unless the state could show a compelling reason for denying a marriage license to a same-sex couple, the court would require the issuance of such licenses.[1] In Hawai'i, the response was a statute expressly reserving the definition of marriage to the legislature who then passed a "reciprocal beneficiary" statute giving some of the legal consequences of marriage to couples who could not marry.[2]

The most significant response, however, was a federal statute, the so-called Defense of Marriage Act (DOMA), signed into law by President Bill Clinton on September 21, 1996.[3] DOMA provided a federal definition of marriage—marriage involves "one man and one woman"—and stated that no state was required to recognize any other sort of marriage even if that marriage was valid in a sister state.[4]

The Supreme Court of Vermont planted the next milestone on the road to same-sex marriage with its opinion in *Baker v. State*, holding that the denial of a marriage license to a same-sex couple violated the "common benefits" clause of the state constitution and told the legislature that unless it extended marriage, or at least the benefits of marriage, to same-sex couples the court would order that marriage licenses be granted.[5] The result was the nation's first "civil union" legislation, giving same-sex couples the choice to enter into a civil union, which gave them all of the rights and responsibilities of marriage, denying their relationships only the word *marriage*.[6]

Then, in 2003, the Massachusetts Supreme Judicial Court held in *Goodridge v. Department of Public Health* that denial of a marriage license to a same-sex couple lacked a rational basis and violated the equal protection

1. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).
2. HAW. REV. STAT. § 572C-6 (West 1997).
3. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2012)).
4. *Id.*
5. Baker v. State, 744 A.2d 864 (1999).
6. VT. STAT. ANN. tit 15, § 1202 (West 1999).

guarantee of the Commonwealth's constitution.[7] The remedy was remanded for the entry of an appropriate order, delayed 180 days to give the legislature the opportunity to act.[8] The legislature did nothing, and, consistent with the holding in the case, same-sex couples began to marry on May 17, 2004.[9]

Today, only eleven years later (and only twenty-one years since the decision in *Baehr v. Lewin*), same-sex couples may validly enter into marriage in thirty-seven states and the District of Columbia. In addition, a deeply divided United States Supreme Court struck down section 3 of DOMA in *United States v. Windsor*.[10]

A. State Cases and Statutes

The states where same-sex unions may be validly celebrated and the relevant authorities include:

1. **Alabama:** The U.S. District Court for the Southern District of Alabama issued a preliminary injunction in *Strawser v. Strange* prohibiting the Alabama attorney general from enforcing the state's ban on same-sex marriage but stayed the injunction.[11] The stay expired on February 9, 2015, when both the Eleventh Circuit and the United States Supreme Court refused the state's request to extend the stay, and same-sex couples could then marry; although, the practical effect of the ruling was complicated by the strong resistance from the state supreme court and some of the state's probate judges.[12]
2. **Alaska:** *Hamby v. Parnell* granted plaintiffs' motion for summary judgment holding the state's ban on same-sex marriage to be unconstitutional.[13] The defendants appealed to the Ninth Circuit, which issued a temporary stay pending consideration by the United States Supreme Court who denied the request.[14] The Ninth Circuit's temporary stay expired on October 17, 2014, and same-sex couples began marrying on that date.[15] The appeal to the Ninth Circuit is pending.
3. **Arizona:** *Majors v. Horne* declared the state's ban on same-sex marriage unconstitutional on October 17, 2014.[16] The state appealed and, on the request of all parties, the Ninth Circuit ordered the proceedings stayed

7. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (2003).
8. *Id.*
9. *Id.*
10. United States v. Windsor, 133 S. Ct. 2675 (2013).
11. Strawser v. Strange, 44 F. Supp. 3d 1206 (S.D. Ala. 2015).
12. *See id.*
13. Hamby v. Parnell, 56 F. Supp. 3d 1056 (D. Alaska 2014).
14. Parnell v. Hamby, 135 S. Ct. 399 (2014).
15. *Id.*
16. Majors v. Horne, 14 F. Supp. 3d 1313 (D. Ariz. 2014).

until the United States Supreme Court rules in *DeBoer v Snyder*.[17] In the meantime, the decision invalidating the ban stands and same-sex marriages are legal in the state.

4. **Colorado:** The decision by the Tenth Circuit in *Kitchen v. Herbert*, striking down Utah's ban on same-sex marriage, applied as well to Colorado.[18] After the United States Supreme Court denied certiorari in *Kitchen*, the Attorney General asked the Tenth Circuit to lift its say in *Burns v. Hickenlooper* and announced on October 7, 2014, that marriage licenses would begin to issue that day.[19]

5. **California:** Same-sex marriage was recognized in the decision of the California Supreme Court in *In re Marriage Cases*, holding that limiting marriage to different-sex couples is unconstitutional.[20] The result in the case was overturned on November 5, 2008, by the approval of Proposition 8 amending the state constitution to limit marriage to one man and one woman.[21] The California Supreme Court upheld the amendment but refused to invalidate the marriages that had been performed in the period when same-sex marriages were legal.[22] The U.S. District Court for the Northern District of California held Proposition 8 to be unconstitutional in *Perry v. Schwarzenegger*, and the Ninth Circuit affirmed in *Perry v. Brown*.[23] Certiorari was granted and the United States Supreme Court dismissed the appeal on June 26, 2013, in *Hollingsworth v. Perry*.[24] The state immediately resumed issuing marriage licenses to same-sex couples.

6. **Connecticut:** The state supreme court held in *Kerrigan v. Commissioner of Public Health* that denying same-sex couples marriage licenses violated the state constitutional guarantee of equal protection of the laws.[25] The decision was handed down on October 28, 2008, and on remand the superior court issued an order under which marriage licenses would be issued to same-sex couples beginning on November 12, 2008.[26] The legislature followed suit and enacted marriage equality effective April 23,

17. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom.*, Bourke v. Beshear, 135 S. Ct. 1041 (2015).

18. Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

19. Burns v. Hickenlooper, No. 14-cv-01817-RM-KLM, 2014 WL 3634834 (D. Colo. July 23, 2014); John Suthers, *Colorado Attorney General Tells County Clerks to Begin Issuing Same-Sex Marriage Licenses*, COLO. ATT'Y GEN. (Oct. 7, 2014), http://www.coloradoattorneygeneral.gov/press/news/2014/10/07/colorado_attorney_general_tells_county_clerks_begin_issuing_same_sex_marriage_.

20. *In re* Marriage Cases, 43 Cal. 4th 757 (2008).

21. *California Proposition 8, the* "*Eliminates Right of Same-Sex Couples to Marry*" *Initiative (2008)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_8,_the_%22Eliminates_Right_of_Same-Sex_Couples_to_Marry%22_Initiative_(2008) (last visited Feb. 24, 2014).

22. *See id.*

23. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (2010); Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

24. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

25. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (2008).

26. Kerrigan & Mock v. Dep't of Pub. Health, No. NNH-CV 04-4001813, 2008 WL 5203867 (Conn. Super. Ct. 2008) (Trial Order).

2009.[27] At the same time, the legislature repealed the existing civil union statutes effective October 1, 2010.[28] Like other states that have made the transition from civil union to marriage, Connecticut allowed persons in a civil union to turn the civil union into a marriage, and remaining civil unions automatically became marriages on a stated date (October 1, 2010).[29] In any event, the civil union is merged into the marriage as of the date of the marriage stated in the certificate or as of the automatic merger date.[30]

7. **Delaware:** Delaware adopted civil union legislation effective on January 1, 2012, and legislation giving full marriage equality became effective on July 1, 2013.[31] The statutes also recognize as married for purposes of Delaware law two "persons of the same gender who are parties to a legal union other than a marriage" no matter how described so long as their union was legally entered into, would not be otherwise be prohibited (as incestuous or bigamous), and carries with it substantially "the same rights, benefits, protections, responsibilities, obligations and duties as [a marriage]."[32] The civil union legislation has not been repealed, but civil unions are not to be performed on or after July 1, 2013, and the parties to a civil union can apply for a marriage license and have the civil union converted into a marriage without solemnization.[33] On July 1, 2014, all existing civil unions were automatically converted into marriages, and in all cases, the effective date of the marriage for state law purposes is the date of the solemnization of the original civil union.[34] Civil unions were limited to persons of the same sex.[35]

8. **Florida:** *Brenner v. Scott* held Florida's ban on same-sex marriage to be unconstitutional.[36] The court stayed its decision until January 5, 2015.[37] The United States Supreme Court denied an application to extend the stay pending appeal, and couples began to marry with the expiration of the district court stay on January 5.[38]

9. **Hawai'i:** Hawai'i authorized civil unions beginning on January 1, 2012.[39] On November 13, 2013, the governor signed a bill amending Chapter 572 of Hawai'i Revised Statutes to authorize same-sex marriage, and the new law came into effect on December 2 of that year.[40] The legislation also

27. CONN. GEN. STAT. ANN. § 46b-20a (West 2009).
28. *See id.* §§ 46b-38aa to -38oo.
29. *See id.* §§ 46b-38qq, -38rr.
30. *See id.* §§ 46b-38qq, -38rr.
31. DEL. CODE ANN. tit. 13, § 101(a) (West 2013).
32. *Id.*
33. *Id.* §§ 201–18.
34. *Id.* § 218(c).
35. *Id.* § 201.
36. Brenner v. Scott, 999 F. Supp. 2d 1278 (N.D. Fla. 2014).
37. *See id.* at 1294.
38. Armstrong v. Brenner, 135 S. Ct. 890 (2014).
39. HAW. REV. STAT. § 572-1 (West 2012).
40. *Id.*

amended section 572-3 of Hawai'i Revised Statutes to recognize marriages valid where celebrated.[41] Hawai'i's civil union statute apparently remains intact, and the legislation expressly does not invalidate existing reciprocal beneficiary arrangements.[42] The reciprocal beneficiary arrangement is available to any two persons who cannot legally marry, including siblings or other relatives prohibited from marrying.[43] The legislation also provides for marriages of persons currently in civil unions or reciprocal beneficiary arrangements.[44] If partners in a civil union marry the "rights, benefits, protections, and responsibilities" created by the civil union continue through the marriage and are "deemed to have first accrued as of the first date these rights existed under the civil union," and the same is true for those rights, benefits, protections, and responsibilities that were the result of the reciprocal beneficiary arrangement.[45] Whether or not this provision means that the parties are retroactively married as of the date of the civil union is not clear, especially because the "rights, benefits, protections, and responsibilities" attendant on a civil union are the same as those attendant on a marriage.[46]

10. **Idaho:** *Latta v. Otter* affirmed the district court ruling holding Idaho's ban unconstitutional.[47] After the full United States Supreme Court refused to continue a stay issued by Justice Kennedy, the Ninth Circuit dissolved its own stay effective 9 a.m. on October 15, 2014, at which time same-sex marriage became legal in Idaho.[48]

11. **Illinois:** The Illinois Religious Freedom and Marriage Fairness Act was signed by the governor on November 20, 2013, and went into effect on June 1, 2014.[49] It was preceded by civil union legislation effective June 1, 2011.[50] The new legislation allows parties to a civil union to apply for a marriage license at no charge and then have the marriage solemnized; for one year following the legislation's effect date parties to a civil union may have the civil union recorded as a marriage without the need for solemnization.[51] The marriage begins on the date stated on the marriage certificate, but if the second option, that is recording of the civil union as a marriage rather than a new solemnization is used, the marriage is "deemed effective on the date of the solemnization of the civil union."[52] Whether or not a couple who chose to record the civil union as a marriage rather than have their marriage

41. *Id.* § 572-3.
42. *Id.* §§ 572B-1 to 11, 572C-1 to 7.
43. *Id.* § 572C-4.
44. *Id.* § 572-1.7.
45. *Id.*
46. *Id.*
47. Latta v. Otter, 771 F.3d 456 (9th Cir. 2014).
48. Otter v. Latta, 135 S. Ct. 345 (2014).
49. S.B. 10, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).
50. 750 ILL. COMP. STAT. ANN. 75/1 to 75/90 (West 2011).
51. *Id.* at 75/65.
52. *Id.* at 75/65(b).

solemnized is retroactively married as of the date of the solemnization of the civil union is not clear. The same statute states that the successor marriage to the civil union begins "as of the date stated on the marriage certificate."[53] It remains to be seen whether marriage certificates are indeed backdated to the date of solemnization of the civil union.

Events, however, overtook the effective date of the legislation. On February 21, 2014, the U.S. District Court for the Northern District of Illinois in *Lee v. Orr* held that Illinois' ban on same-sex marriage was unconstitutional, but noted that given the procedural posture of the suit it applied only to Cook County (which includes the city of Chicago).[54]

12. **Indiana:** *Baskin v. Bogan*, decided on June 25, 2014, invalidated Indiana's ban on same-sex marriage.[55] The Seventh Circuit issued an emergency stay on June 27, creating the brief window for valid marriages reflected in the chart below.[56] The Seventh Circuit affirmed, and on October 6, 2014, the United States Supreme Court denied certiorari and same-sex marriages became legal on that date.[57]

13. **Iowa:** The Iowa Supreme Court made same-sex marriage legal in Iowa by its opinion in *Varnum v. Brien*, holding that denying a marriage license to a same-sex couple violates state constitutional guarantees of equal protection of the laws.[58] The decision became effective upon the issuance of procedendo on April 27, 2009.[59] The date of the procedendo casts doubt on the dates given in the Social Security Administration chart, below. The legislature has not amended the statutes to reflect marriage equality.

14. **Kansas:** *Marie v. Moser*, a case begun in an attempt to prevent the Tenth Circuit's decision in *Kitchen* from applying in Kansas, resulted in a preliminary injunction barring Kansas officials from enforcing the state's ban on same-sex marriage.[60] The district court issued a short-term stay pending appeal.[61] The Tenth Circuit then denied a stay pending appeal; Justice Sotomayor granted a temporary stay, which was lifted by the entire court on November 12, 2014.[62] Beginning on that date, at least some counties in the state began issuing marriage licenses to same-sex couples.

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53. *Id.* at 75/65(c).

54. Lee v. Orr, No. 13-cv-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014). The December 16, 2013 date in the Social Security Administration chart as the date when same-sex marriages began in Illinois is difficult to explain.

55. Baskin v. Bogan, 12 F. Supp. 3d 1144 (S.D. Ind. 2014).

56. *Id.*

57. Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014).

58. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

59. *Procedendo*, IOWA CT. (Apr. 27, 2009), http://www.iowacourts.gov/wfData/files/Varnum/procedendoVarnum.pdf.

60. Marie v. Moser, No. 14-cv-02518-DDC/TJJ, 2014 WL 5598128 (D. Kan. Nov. 4, 2014).

61. *Id.*

62. Moser v. Marie, 135 S. Ct. 511 (2014).

15. **Maine:** Same-sex marriage became legal in Maine by referendum on November 6, 2012, which ratified amendments to the statutes.[63] The approved provisions became effective on December 29, 2012.[64] Three years earlier, the voters had rejected a bill passed by the legislature and signed by the governor allowing same-sex marriage.[65] Marriage is "gender neutral" and same-sex marriages valid where celebrated are valid in Maine.[66] Maine still has a domestic partnership regime, which like Wisconsin's described below, granted only limited rights but was not limited to same-sex couples.[67]

16. **Maryland:** Maryland voters approved same-sex marriage by referendum on November 6, 2012.[68] The statutory amendments so approved became effective on January 1, 2013.[69] On February 23, 2010, Maryland's attorney general issued an opinion in which he stated that same-sex marriages valid where celebrated are valid under the law of Maryland; the Maryland Court of Appeals (the state's highest court) affirmed this conclusion in *Port v. Cowan*.[70]

17. **Massachusetts:** Massachusetts became the first state to allow same-sex couples to marry by decision of the Supreme Judicial Court, as noted above.[71] The *Goodridge* case was decided in 2003, and the holding became effective on the entry on remand of the trial order on May 17, 2004.[72] The Massachusetts statutes have not been amended to reflect marriage equality.

18. **Minnesota:** Amendments to the Minnesota statutes legalizing marriage between two persons of the same sex became effective on August 1, 2013.[73] As amended, section 517.01 defines a *civil marriage* as a civil contract between "two persons."[74] Throughout the relevant statutes, the term *marriage* is now preceded by the word *civil*.[75]

19. **Montana:** *Rolando v. Fox* granted summary judgment for the plaintiffs, invalidating Montana's ban on same-sex marriage on November 19, 2014, and denied the defendants request for a stay.[76]

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63. *Maine*, FREEDOM TO MARRY, http://www.freedomtomarry.org/states/entry/c/maine (last visited June 1, 2015).

64. *Id.*

65. *See id.*

66. ME. REV. STAT. ANN. tit. 19, §§ 650-A, 650-B (West 2012).

67. *Id.* tit. 22, § 2710.

68. *Maryland*, FREEDOM TO MARRY, http://www.freedomtomarry.org/states/entry/c/maryland (last visited June 1, 2015).

69. *Id.*

70. *Id.*; Port v. Cowan, 44 A.3d 970 (Md. 2012).

71. *History and Timeline of the Freedom to Marry in the United States*, FREEDOM TO MARRY, http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage (last updated Jan. 16, 2015).

72. Goodridge v. Dep't of Pub. Health, No. 01-1647-A, 2004 WL 5064000 (Mass. Super. Ct. May 17, 2004) (Trial Order).

73. H.F. 1054, 88th Leg., Reg. Sess. (Minn. 2013).

74. MINN. STAT. ANN. § 517.01 (West 2013).

75. *See, e.g.*, *id.* § 517.08.

76. Rolando v. Fox, 23 F. Supp. 3d 1227 (D. Mont. 2014).

20. **Nevada:** The district court granted summary judgment in *Sevcik v. Sandoval*, denying plaintiff's claims that denial of marriage to same-sex couples is a violation of a constitutionally protected right.[77] On appeal to the Ninth Circuit, *Sevcik* was consolidated with *Latta v. Otter*, and reversed.[78] On October 9, 2014, a permanent injunction issued prohibiting enforcement of the ban on same-sex marriages and marriages began that same day.

21. **New Hampshire:** New Hampshire enacted legislation allowing same-sex couples to marry effective January 1, 2010, defining marriage as the "legally recognized union of 2 people . . . regardless of gender."[79] Marriages valid where celebrated, so long as they would be valid in New Hampshire, and civil unions valid where entered into are also recognized as marriages in New Hampshire.[80] Civil unions were allowed under New Hampshire law beginning on January 1, 2008.[81] No new civil unions could be established on or after January 2, 2010; before January 1, 2011, persons in civil unions on that date may apply for a marriage license and then have the marriage solemnized, or they may apply and receive a marriage certificate without the need for solemnization.[82] On January 1, 2011, all existing civil unions were deemed to be marriages as of that date.[83] Unlike the Illinois and Hawai'i legislation, this transitional provision does not address directly the issue of continuity of rights and obligations between the civil union and succeeding marriage.[84] The legislation does state that if the parties to a civil union marry, with or without solemnization, the civil union is dissolved "as of the date of the marriage stated in the certificate."[85] Civil unions still in existence on January 1, 2011, are "merged" into the successor marriage.[86] It is also unclear whether this provision is substantively different from the dissolution that occurs on the issuing of a new marriage certificate.[87]

22. **New Jersey:** New Jersey was a pioneer in formal domestic partnership arrangements, enacting enabling legislation in 2004.[88] The rights and obligations of a domestic partnership, which was limited to same-sex couples and different-sex couples age sixty-two or older, were like but not identical to those of marriage, and some health and pension benefits were available only to domestic partners of the same sex who could not marry under state

77. Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012).
78. Latta v. Otter, 771 F.3d 456, 465 (9th Cir. 2014).
79. N.H. REV. STAT. ANN. § 457:1a (2010).
80. *Id.* §§ 457:3, 457:45.
81. *New Hampshire Civil Unions*, N.H. FREEDOM TO MARRY COALITION, http://www.nhftm.org/Xtras/civilunions.html (last visited May 1, 2015).
82. N.H. REV. STAT. ANN. §§ 457:3, 457:45.
83. *Id.* § 457:46.
84. *See id.*
85. *Id.*
86. *Id.*
87. *See id.*
88. N.J. STAT. ANN. §§ 26:8A-1 to -13 (West 2004).

law.[89] The income and estate taxes applied in the same way as they did to married couples.[90] In addition, the statute set out several requirements for entering into a domestic partnership, including maintaining a common residence and exhibiting at least one of a statutory list of indicia showing that the partners were "jointly responsible for each other's common welfare."[91]

The domestic partnership, at least for same-sex couples, was doomed by the holding in *Lewis v. Harris* that equal protection required that same-sex couples be given the same rights and obligations as married couples.[92] In response, the legislature passed civil union legislation effective February 19, 2007.[93] The legislation limited civil unions to two parties of the same sex and stated that "[p]arties to a civil union shall receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage."[94] The legislation also put an end to future domestic partnerships for same-sex couples as of the effective date.[95] However, two persons who are over sixty-two years of age can still form domestic partnerships.[96] The reason for the exception has to do with Social Security benefits.[97] If two persons receiving Social Security old age pension benefits marry, it is possible that the benefits they receive as a married couple will be less than the sum of the individual benefits they received before marriage.[98] The domestic partnership gives such couples the option of a legally recognized relationship without the possible Social Security complications of being married.[99]

The New Jersey civil union was in turn undone by another equal protection decision of the state courts, *Garden State Equality v. Dow*.[100] The court held that because the decision in *Windsor v. United States* gave federal recognition only to "lawful marriages," couples in New Jersey civil unions were not afforded the same status as married couples.[101] The New Jersey Supreme Court granted the state's motion for immediate certification for appeal but unanimously refused to stay the lower court's order that marriage begin for same-sex couples on October 21.[102] The state then withdrew its

89. *Id.* § 26:8A-2(e).
90. *Id.* § 26:8A-2(d).
91. *Id.* § 26:8A-4(b).
92. Lewis v. Harris, 908 A.2d 196 (2006).
93. N.J. STAT. ANN. § 37:1-36 (West 2007).
94. *Id.* § 37:1-29.
95. *Id.* § 26:8A-4.1.
96. *Id.*
97. Erin Clearly, *New Jersey Domestic Partnership Act in the Aftermath of* Lewis v. Harris*: Should New Jersey Expand the Act to Include All Unmarried Cohabitants*?, 60 RUTGERS L. REV. 519, 532 n. 84 (2008).
98. *Id.*
99. *Id.*
100. Garden State Equal. v. Dow, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013).
101. *Id.* at 367.
102. Garden State Equal. v. Dow, 79 A.3d 1036 (N.J. 2013).

appeal, and same-sex marriage became a fact in New Jersey on October 21, 2013.

23. **New Mexico:** Until December 19, 2013, New Mexico was the only state to have no law on the validity of same-sex marriage.[103] While same-sex marriage had not been legalized by statute or court decision, neither had the state enacted a statutory prohibition (usually referred to as a "mini-DOMA" statute) or a constitutional definition of marriage as a union between one man and one woman.[104] Several counties in the state began issuing marriage licenses to same-sex couples, some on the initiative of the county clerk and some because the clerks had been ordered to do so by local courts.[105] One of those cases, *Griego v. Oliver*, resulted in an order finding the denial of marriage licenses to same-sex couples to be unconstitutional under the state constitution.[106] The supreme court accepted a request from the state's Association of Counties to give a definitive ruling and on December 19, 2013, issued its unanimous opinion in *Griego v. Oliver*, holding that denying a marriage license to a same-sex couple violated the state constitution's guarantee of equal protection.[107] While marriages entered into after the decision in *Griego* are unquestionably valid, the opinion does not deal with the validity of marriages entered into before the decision.[108] The decision expressly did not strike down existing marriage legislation, which the court found prohibited same-sex couples from marrying, but rather granted a writ of superintending control mandating the courts to enforce the holding and rationale of the opinion construing the term *civil marriage* to mean the union of two people, which clearly extends marriage to all couples given the definition of marriage as a *civil contract* in section 40-1-1 of New Mexico Statutes.[109] The date of the validity same-sex marriages entered into before December 19, 2013, is relevant to the federal treatment of those marriages.

24. **New York:** New York's Marriage Equality Act became effective on July 24, 2011.[110] Beginning on that date, "[a] marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex."[111] The statue also states:

> No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other

103. *New Mexico*, FREEDOM TO MARRY, http://www.freedomtomarry.org/states/entry/c/new-mexico (last visited May 1, 2015).

104. *Id.*

105. *See id.*

106. Griego v. Oliver, No. D 202 CV 2013 2757, 2013 WL 5768197 (N.M. Dist. Ct. Sept. 3, 2013).

107. Griego v. Oliver, 316 P.3d 865, 871 (N.M. 2013).

108. *See id.*

109. *See id.*; N.M. STAT. ANN. § 40-1-1 (West 2013).

110. N.Y. DOM. REL. LAW §§ 10-a, 10-b (McKinney 2011).

111. *Id.* § 10-a(1).

> source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.[112]

New York has recognized same-sex marriages as valid since the decision of the Fourth Appellate Department in *Martinez v. County of Monroe* on February 1, 2008.[113] Such marriages were not quite the same as different-sex marriages.[114] Because of the close connection between the federal income tax and estate tax systems, the New York tax authorities maintained that same-sex couples whose marriages were recognized in New York could not file joint income tax returns nor could the estate of the first spouse to die obtain a marital deduction for estate tax purposes for otherwise qualifying transfers to the surviving spouse.[115] This treatment changed with the enactment of the Marriage Equality Act, and after the United States Supreme Court decision in *Windsor*, the state tax authorities decided to allow taxpayers to amend returns for which the statute of limitations remains open.[116] Couples whose marriage was recognized before the passage of the Marriage Equality Act may file a joint income tax return, and estates of decedents whose marriages were recognized before passage of the Act may file for an estate tax refund based on the allowance of a marital deduction for qualifying transfers to the surviving same-sex spouse.[117]

25. **North Carolina:** Following the denial of certiorari in *Bostic v. Schaefer*, the U.S. District Court for the Western District of North Carolina issued a permanent injunction in *General Synod of the United Church of Christ v. Resinger* barring the enforcement of North Carolina laws prohibiting same-sex marriage.[118]

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112. *Id.* § 10-a(2).

113. Martinez v. Cnty. of Monroe, 50 A.D.3d 189 (N.Y. App. Div. 2008).

114. *See id.*

115. *See* New York State Department of Taxation and Finance, *The Marriage Equality Act*, TAXPAYER GUIDANCE DIVISION (July 29, 2011), http://www.tax.ny.gov/pdf/memos/multitax/m11_8c_8i_7m_1mctmt_1r_12s.pdf; *see also* New York State Department of Taxation and Finance, *Implementation of the Marriage Equality Act Related to the New York State Estate Tax*, TAXPAYER GUIDANCE DIVISION (July 29, 2011), http://www.tax.ny.gov/pdf/memos/estate _&_gift/m11_8m.pdf.

116. *See* New York State Department of Taxation and Finance, *Information for Same-Sex Married Couples*, TAXPAYER GUIDANCE DIVISION (Sept. 13, 2013), http://www.tax.ny.gov/pdf/memos/multitax/m13_5i_10m.pdf.

117. *See id.*

118. Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (Oct. 6, 2014); General Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790 (W.D.N.C. 2014).

26. **Oklahoma:** *Bishop v. Smith* invalidated Oklahoma's ban on same-sex marriage.[119] With the denial of certiorari on October 6, 2014, same-sex marriages began in the state.[120]

27. **Oregon:** Same-sex marriage has been possible in Oregon since the grant of summary judgment on May 19, 2014, invalidating Oregon's ban on same-sex marriage on constitutional grounds in *Geiger v. Kitzhaber*, which the state declined to appeal.[121]

28. **Pennsylvania:** The decision in *Whitehead v. Wolf*, issued on May 20, 2014, invalidated the Commonwealth's statutes banning same-sex marriage.[122] The state declined to appeal.[123]

29. **Rhode Island:** Rhode Island's civil union legislation became effective on July 1, 2011.[124] The statute was unusual for including a provision providing extensive protection to individuals who refuse to "treat as valid" any civil union because of "sincerely held religious beliefs."[125] In addition, the legislation included a provision that granted recognition of other state's civil unions and registered domestic partnerships so long as they do not grant "the status of marriage."[126] Both of these provisions are substantially more restrictive that those found in other states' civil union legislation. On May 14, 2012, the governor issued an executive order directing all state agencies to recognize same-sex marriages valid where celebrated.[127] The next step came almost exactly one year later when the same governor signed legislation allowing same-sex couples to marry in Rhode Island beginning on August 1, 2013.[128] The legislation also allows those in civil unions to merge the civil union into a marriage either with or without solemnization of the marriage.[129] Under Rhode Island law:

> For purposes of determining the legal rights and responsibilities involving individuals who previously entered into a civil union in this state, and whose civil union has merged into a marriage under this chapter, the date of the recording of the marriage certificate shall be the operative date by which legal rights and responsibilities are determined.[130]

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119. Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *aff'g* Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *cert. denied*, 135 S. Ct. 271 (2014).

120. *Id.*

121. Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. Or. 2014).

122. Whitehead v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014).

123. *Id.*

124. R.I. GEN. LAWS ANN. §§ 15-3.1-1 to -13 (West 2011).

125. *Id.* § 15-3.1-5.

126. *Id.* § 15-3.1-8.

127. Lincoln D. Chafee, *Executive Order No. 12-02, Recognition of Out of State, Same-Sex Marriages*, OFF. GOVERNOR (May 14, 2012), http://www.governor.ri.gov/documents/executiveorders/2012/Executive_Order_12-02.pdf.

128. R.I. GEN. LAWS ANN. § 15-1-1 (West 2011).

129. *Id.* § 15-3.1-12.

130. *Id.* § 15-3.1-13.

This provision, at least, clearly means that the marriage begins in every sense when the certificate of marriage is recorded, whether the marriage is entered into through solemnization or not.[131]

30. **South Carolina:** South Carolina's ban on same-sex marriage was held unconstitutional in *Condon v. Haley*, decided on November 12, 2014.[132] The district court granted a one-week stay of its injunction prohibiting enforcement of the state law provisions banning same-sex marriage.[133] The United States Supreme Court denied the request for a stay on November 20, when marriages began.[134]

31. **Utah:** Same-sex marriage was legal in Utah from December 20, 2013, when the decision in *Kitchen* invalidated Utah's ban on same-sex marriage, until a stay was granted by the United States Supreme Court on January 6, 2014.[135] The Tenth Circuit affirmed the district court, and with the denial of certiorari, the Tenth Circuit lifted its stay, issued its mandate that same day, and same-sex marriage was again legal in the state.[136]

32. **Vermont:** Vermont was the first state to create civil unions and the first to allow same-sex couples to marry by enacting legislation that defined marriage as "the legally recognized union of two people."[137] The legislation, effective September 1, 2009, also states that when the word *marriage* is used in any statute the term means a *civil marriage*.[138] Unlike other states that have replaced civil unions with marriage, Vermont did not enact legislation to deal with the transition from civil union to marriage, but the legislation creating "civil marriage" did repeal the statutory provisions governing the issuing of civil union licenses and the solemnization of civil unions.[139]

33. **Virginia:** After the denial of certiorari in *Bostic v. Schaefer*, the Fourth Circuit lifted its stay, issued its mandate on the same day, and same-sex marriage became possible in Virginia.[140]

34. **Washington:** Like Maine and Maryland, the state of Washington legalized marriage equality by popular vote on November 6, 2012.[141] The legislation approved by the voters became effective on December 6, 2012.[142] Washington had enacted registered domestic partnership legislation effective July 22, 2007.[143] As in other states that have replaced marriage substitutes with marriage, registered domestic partnerships can turn into marriages by

131. *See id.*
132. Condon v. Haley, 21 F. Supp. 3d 572 (D.S.C. 2014).
133. *Id.*
134. Wilson v. Condon, 135 S. Ct. 702 (2014).
135. Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013).
136. Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (Oct. 6, 2014).
137. VT. STAT. ANN. tit. 15, § 8 (West 2009).
138. *Id.*
139. S.B. 115L, § 12, 2009 Leg. Sess. (Vt. 2009).
140. Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (Oct. 6, 2014).
141. *See History and Timeline of the Freedom to Marry in the United States*, *supra* note 71.
142. WASH. REV. CODE ANN. § 26.04.010 (West 2012) (defining marriage).
143. *Id.* §§ 26.60.010–.901.

obtaining a marriage license and solemnizing the marriage.[144] On June 30, 2014, all remaining registered domestic partnerships where the parties are the same sex became marriages.[145] The legal date of such successor marriages, whether solemnized or created by operation of law, is "the date of the original state registered domestic partnership."[146] However, no doubt in response to the possible effects of marriage on Social Security benefits, the legislation exempts domestic partnerships where at least one partner is age sixty-two or older from automatic merger.[147]

35. **West Virginia:** In *McGee v. Cole*, decided on November 7, 2014, the U.S. District Court for the Southern District of West Virginia held that West Virginia's ban on same-sex marriage was unconstitutional.[148] In light of the denial of certiorari in *Bostic*, the state announced on October 9, 2014, that it would not defend the ban on same-sex marriage, and marriages began.[149]

36. **Wisconsin:** The Wisconsin marriage equality case, *Wolf v. Walker*, holding Wisconsin's ban unconstitutional was affirmed in *Baskin v. Bogan*, and with the denial of certiorari same-sex marriage became legal in Wisconsin.[150]

37. **Wyoming:** *Guzzo v. Meade*, decided on October 17, 2014, granted a preliminary injunction against enforcing the state's ban on same-sex marriage and granted a stay to allow the state to decide whether or not to appeal.[151] The state informed the court on October 21, 2014, that in light of *Kitchen* it would not appeal the grant of the preliminary injunction to the Tenth Circuit.[152] The court lifted the stay on the same day and marriages began in the state.[153]

38. **District of Columbia:** Marriage became gender neutral in the District of Columbia on March 9, 2010, under legislation that became effective on March 3, 2010.[154] Legislation recognizing same-sex marriages validly celebrated elsewhere became effective on July 7, 2009.[155]

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144. *Id.* § 26.60.100.

145. *Id.*

146. *Id.*

147. *Id.*

148. McGee v. Cole, No. 3:13–24068, 2014 WL 5802665 (S.D. W. Va. 2014).

149. Hunter Schwarz, *West Virginia Will Stop Defending Bans on Same-Sex Marriage, Governor and Attorney General Say*, WASH. POST (Oct. 9, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/10/09/west-virginia-will-stop-defending-bans-on-same-sex-marriage-governor-and-attorney-general-say/.

150. Wolf v. Walker, 986 F. Supp. 2d 982 (W.D. Wisc. 2014); Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (Oct. 6, 2014).

151. Guzzo v. Meade, No. 14-CV-200-SWS, 2014 WL 5317797 (D. Wy. 2014).

152. *Id.*

153. *Id.*

154. D.C. CODE § 46-401 (West 2010).

155. *Id.* § 46-405.01.

The information on each state is summarized in the following table prepared by the Social Security Administration and appearing in the Program Operations Manual.[156]

State	Date Same-Sex Marriages Were Permitted in the State	Date Same-Sex Marriages from Any Other State Were Recognized
Alabama	February 9, 2015	February 9, 2015
Alaska	October 17, 2014	October 17, 2014
Arizona	October 17, 2014	October 17, 2014
California (See GN 00210.003B.1.)	June 16, 2008 – November 4, 2008 June 26, 2013 – present	June 16, 2008 – November 4, 2008 June 26, 2013 – present
Colorado (See GN 00210.003B.2)	June 25, 2014 – July 18, 2014 October 6, 2014 – present	June 25, 2014 – July 18, 2014 October 6, 2014 – present
Connecticut	November 12, 2008	November 12, 2008
Delaware	July 1, 2013	July 1, 2013
District of Columbia	March 9, 2010	July 7, 2009
Florida	January 5, 2015	January 5, 2015
Hawai'i	December 2, 2013	December 2, 2013
Idaho	October 15, 2014	October 15, 2014
Illinois	December 16, 2013	February 21, 2014
Indiana (See GN 00210.003B.3)	June 25–27, 2014 October 6, 2014 – present	June 25–27, 2014 October 6, 2014 – present
Iowa	April 20, 2009	April 30, 2009
Kansas	November 12, 2014	November 12, 2014
Maine	December 29, 2012	December 29, 2012
Maryland	January 1, 2013	February 23, 2010
Massachusetts	May 17, 2004	May 17, 2004
Michigan (See GN 00210.003B.2.)	March 21–22, 2014	March 21–22, 2014
Minnesota	August 1, 2013	August 1, 2013
Missouri	Hold claims involving a same-sex marriage celebrated in Missouri per instructions in GN 00210.005.[157]	October 6, 2014
Montana	November 19, 2014	November 19, 2014

156. *Same-Sex Marriages—Dates States Permitted or Recognized Same-Sex* Marriage, SOC. SEC. ADMIN. (Mar. 20, 2015), http://policy.ssa.gov/poms.nsf/lnx/0200210003.

157. The references to GN numbers are to statements of Social Security Administration policy dealing with some of the ambiguities caused by the, sometimes, complex relationship between court orders resulting from cases invalidating bans on same-sex marriage and the actions of state officials.

Nevada	October 9, 2014	October 9, 2014
New Hampshire	January 1, 2010	January 1, 2010
New Jersey	October 21, 2013	October 21, 2013 February 19, 2007 – October 20, 2013 recognizes marriages from other states as civil unions
New Mexico	August 21, 2013 Per GN 00210.005, hold all claims in which same-sex couples allege a ceremonial marriage in New Mexico based on a marriage license issued by Sandoval County in 2004.	January 4, 2011
New York	July 24, 2011	February 1, 2008
North Carolina	October 10, 2014	October 10, 2014
Oklahoma	October 6, 2014	October 6, 2014
Oregon	May 19, 2014	October 16, 2013
Pennsylvania	May 20, 2014 Per GN 00210.005, hold all claims in which same-sex couples allege a marriage in Pennsylvania based on a marriage license issued prior to this date.	May 20, 2014
Rhode Island	August 1, 2013	February 20, 2007
South Carolina	November 19, 2014	November 19, 2014
Utah (See 6)	December 20, 2013 – January 6, 2014 October 6, 2014 – present	December 20, 2013 – January 6, 2014 October 6, 2014 – present
Vermont	September 1, 2009	September 1, 2009
Virginia	October 6, 2014	October 6, 2014
Washington	December 6, 2012	December 6, 2012
West Virginia	October 9, 2014	October 9, 2014
Wisconsin (See GN 00210.003B.5)	June 6–13, 2014 October 6, 2014 – present	June 6–13, 2014 October 6, 2014 – present
Wyoming	October 21, 2014	October 21, 2014

In some cases, for example, New Mexico, the questions came from the actions of local, usually county, officials who took it upon themselves to issue marriage licenses to same-sex couples even though the legal authority for doing so was uncertain.[158] Most of these situations are discussed in the state specific sections above.

158. *See, e.g.*, *New Mexico*, *supra* note 103.

In addition, the accuracy of this table with respect to the entries for states where marriage has succeeded civil unions and registered domestic partnerships through legislation (succession states), is questionable, given the various rules governing the effective date of successor marriages. For example, under the Connecticut statute the civil union is merged into the marriage as of the date marriage stated in the certificate or as of the automatic merger date.[159] In Rhode Island, the date of the recording of the marriage certificate is the date on which rights and responsibilities are determined.[160] In Illinois, the successor marriage beings on the date stated in the marriage certificate, but the statute also says that when the successor marriage comes about by recording a certificate rather than by a new solemnization, the marriage is "deemed effective" on the date of the civil union.[161] In Hawai'i, the "rights, benefits, protections, and responsibilities" created by the civil union continue through the marriage and are deemed to have begun on the date they first existed under the civil union.[162] In Delaware, the effective date of the marriage is the date of the solemnization of the predecessor civil union.[163] The New Hampshire statute dissolves the civil union as of the date of the successor marriage as stated on the certificate, but civil unions still in existence on January 1, 2011, were "merged" into a successor marriage.[164] Vermont has no provision dealing with the effective date issue, and the Washington statute clearly states that the legal date of successor marriages is the date of the original registered domestic partnership.[165]

Whether or not these differences will have any practical effect remains to be seen. For state law purposes, the question of when the marriage began could become relevant on dissolution because it would presumably have an effect on the date marital property began to be accumulated for purposes of equitable distribution in common law states and the date community property began to be accumulated in community property states.[166] Note that the Washington statute "back dates" the marriage to the date of the registered domestic partnership and, thus, presumably preserves the community property nature of property accumulated by the couple during the partnership period.[167] The most problematic statute is New Hampshire's which "dissolves" the civil union as of the date of the marriage, at least when the marriage is solemnized.[168] Does that rule have an effect on the status of property as marital or separate? In New Mexico the question is more acute.

159. CONN. GEN. STAT. ANN. § 466-38qq (West 2009).
160. R.I. GEN. LAWS ANN. § 15-3.1-12 (West 2013).
161. 750 ILL. COMP. STAT. ANN. 75/65 (West 2013).
162. HAW. REV. STAT. ANN. § 572-1.7 (2010).
163. DEL. CODE ANN. tit 13, § 218 (West 2013).
164. N.H. REV. STAT. ANN. § 457:46 (West 2010).
165. WASH. REV. CODE ANN. § 26.60.100 (West 2012).
166. *See infra* Part IV.
167. WASH. REV. CODE ANN. § 26.60.100.
168. N.H. REV. STAT. ANN. § 457:46.

Marriages were being solemnized in some counties before the supreme court's decision in *Griego*.[169] That opinion says nothing about the validity of those marriages, although it can be argued that because the limitation of marriage to different-sex couples is unconstitutional those marriages always were valid.[170] Finally, the New Hampshire and Delaware statutes provide that couples who are in a civil union are married in those states.[171] What is the date of marriage of a couple that entered into a civil union in Colorado and then moved to New Hampshire or Delaware? Answers will no doubt be forthcoming through litigation or otherwise, although the Social Security Administration has taken an important step by recognizing legal relationships that give the partners mutual inheritance rights as the equivalent of marriage for Social Security purposes.[172]

B. Current Federal Litigation[173]

The United States Supreme Court's decision in *Windsor* said nothing about the status of same-sex marriage under the federal Constitution.[174] More precisely, the Court did not say that the denial of a marriage license to a same-sex couple violates the equal protection clause of the Fourteenth Amendment.[175] The Court had the opportunity to address the question in the case decided with *Windsor, Hollingsworth v. Perry*.[176] However, the Court dismissed the appeal from the decision of the Ninth Circuit affirming the district court's finding that Proposition 8, which amended the state constitution to define marriage as existing only between one man and one woman, is unconstitutional.[177] Since the decision in *Windsor*, five federal circuit courts of appeals have upheld district court decisions invalidating prohibitions on same-sex marriage:

(a) *Latta v. Otter*;[178]
(b) *Baskin v. Bogan*;[179]
(c) *Bostic v. Schaefer*;[180]

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169. Griego v. Oliver, 316 P.3d 865, 874 (N.M. 2013).
170. *Id.*
171. *See* DEL. CODE ANN. tit. 13, § 218; N.H. REV. STAT. ANN. § 457:46.
172. *See infra* App. A.
173. See *Pending Marriage Equality* Cases, LAMBDA LEGAL, www.lambdalegal.org/pending-marriage-equality-cases, for a complete and up-to-date annotated list of all marriage equality cases pending in state and federal courts.
174. United States v. Windsor, 133 S. Ct. 2675 (2013).
175. *Id.*
176. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
177. *Id.*
178. Latta v. Otter, 771 F.3d 456 (9th Cir. 2014).
179. Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (Oct. 6, 2014).
180. Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (Oct. 6, 2014).

(d) *Bishop v. Smith*;[181]
(e) *Kitchen v. Herbert*.[182]

The denial of certiorari by the United States Supreme Court on October 6, 2014, brought legal same-sex marriages to all of the states in those circuits. Only one circuit court of appeals case has upheld a ban on same-sex marriage: *DeBoer v Snyder*.[183] The United States Supreme Court granted certiorari in the case on January 16, 2015, "limited to the following questions: 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?"[184] Presumably, the decision will settle the question of whether or not the Constitution requires states to allow same-sex couples to marry.

C. Marriage Substitutes

The *Windsor* decision refers to equal treatment for "lawful marriages," and federal agencies have interpreted this phrase to limit federal recognition of marriages, a discussion of the federal consequences of marriage follows.[185] This was once an important distinction because some states that did not allow same-sex couples to marry did allow them to enter into legal relationships that gave all the rights and privileges of marriage.[186] All those states now allow same-sex couples to marry.[187]

In addition, at least for purposes of Social Security benefits, legal relationships granting the partners the right to inherit from one another are treated as marriages.[188] The Social Security Administration has produced a chart showing all the states' various marriage equivalent arrangements, the dates they are effective, and which ones give inheritance rights and qualify the partners for spousal Social Security benefits.[189]

181. Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (Oct. 6, 2014).
182. Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (Oct. 6, 2014).
183. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom.*, Bourke v. Beshear, 135 S. Ct. 1041 (Jan. 16, 2015).
184. *Id.*
185. United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).
186. *See id.* at 2691.
187. *See supra* Part 1.A.
188. *Important Information About Social Security Benefits for Same-Sex Couples*, SOC. SEC. ADMIN. (May 2014), www.socialsecurity.gov/pubs/EN-05-10567.pdf.
189. *See infra* App. A.

II. FEDERAL TREATMENT OF SAME-SEX MARRIAGES AFTER *WINDSOR*

As noted above, the majority opinion in *Windsor* invalidates the statutory provision defining marriage for federal purposes only with respect to "lawful marriages."[190] The various marriage substitutes are not equivalent to marriage for federal purposes, either before or after *Windsor*, with the exception being for Social Security purposes discussed immediately above.[191] The Department of Labor's post-*Windsor* guidance addressed to administrators of employee benefit plans sets out the reasons for the lack of recognition of marriage substitutes:

> The terms "spouse" and "marriage," however, do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union, regardless of whether the individuals who are in these relationships have the same rights and responsibilities as those individuals who are married under state law. The foregoing sentence applies to individuals who are in these relationships with an individual of the opposite sex or same sex.[192]

Therefore, for now, federal recognition is limited to lawful marriages, except for Social Security purposes, but what is a "lawful" marriage?"[193] Once a same-sex couple validly marries, are they married for federal purposes until the marriage ends by death or dissolution, or does it matter where they live when they interact with the federal government? For example, if a validly married same-sex couple moves from New York to Texas, do they still file jointly for federal income tax purposes, and if one makes a gift to the other and one of the spouses dies, is there a gift or estate tax marital deduction? The answer is that for most federal programs and functions, once a couple is married, they are married no matter where they live.[194] The following summarizes the legal situation as of February 2015.

A. Department of the Treasury and the Internal Revenue Service

The United States Treasury and the IRS have decided to use a "place of celebration standard" so that once married the same-sex couple is treated as a married couple no matter where they live.[195] Revenue Ruling 2013-17,

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190. *See Windsor*, 133 S. Ct. at 2689.

191. *See Important Information About Social Security Benefits for Same-Sex Couples*, *supra* note 188.

192. *Technical Release No. 2013-04*, U.S. DEP'T LABOR (Sept. 18, 2013), http://dol.gov/ebsa/newsroom/trl13-04.html.

193. *See id.*

194. Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

195. *Id.*; I.R.C. § 1 (2012).

jointly issued by the Treasury and the IRS, was the first statement on the issue and, as mentioned, uses a place of celebration standard.[196]

A couple may choose either the married filing jointly or married filing separately income tax filing status.[197] The estate and gift tax marital deductions are available for transfers that satisfy the requirements of sections 2056 and 2523 of the Internal Revenue Code (IRC) (so long as the donee spouse is a U.S. citizen).[198] The spouses are in the same generation for generation skipping transfer tax purposes, and generation assignment of lineal descendants of one spouse's grandparents with respect to the other spouse is the same as their generational assignment with respect to the spouse to whom they are related.[199] For example, Bill and Sebastian enter into a lawful marriage in New York before the date of the *Windsor* decision. Bill is an only child but Sebastian has a niece and nephew who are fifty-six years younger than Bill. If the marriage is not recognized for purposes of federal taxation, the niece and nephew are not skip persons with regard to Sebastian because they are related; however, they are skip persons with regard to Bill because as nonrelatives their generational assignment is based on the number of years between their births and Bill's and because that number is more than 37½ years they are two generations younger than Bill and are skip persons.[200] Once the marriage is recognized they are not skip persons with regard to Bill because they are not skip persons with regard to their uncle.[201]

Employer-paid health insurance premiums for coverage of the employee's same-sex spouse are not included in taxable income.[202] Validly married same-sex couples are also married for purposes of employee benefit plans governed by ERISA, meaning that the employee must take any pension benefit as a qualified joint and survivor annuity (QJSA) if the plan is a defined benefit, money-purchase plan, or target benefit plan, otherwise the spouse must be the beneficiary of other types of plans unless the other spouse waives his or her right to the pension benefit.[203]

Finally, because the Supreme Court held that section 3 of DOMA is unconstitutional, the statute is void ab initio; it simply never was.[204] Therefore, same-sex married couples are entitled to obtain refunds based on amended returns, open years, or claims for refunds.[205] Generally speaking, because income tax returns remain open for the longer of three years from the date the return was due, or actually filed if an extension was granted, or

196. Rev. Rul. 2013-17; I.R.C. §§ 2056, 2523 (2012).
197. Rev. Rul. 2013-17; I.R.C. § 2651(b), (c) (2012).
198. *See* I.R.C. §§ 2056(d), 2523(i).
199. *Id.* § 2651(b), (c).
200. *Id.* § 2651(d).
201. *Id.* § 2651.
202. *See id.* § 106; Rev. Rul. 2013-17.
203. Rev. Rul. 2013-17; I.R.C. § 1003 (2012).
204. *See* United States v. Windsor, 133 S. Ct. 2675 (2013).
205. Rev. Rul. 2013-17.

for two years from the date the tax was paid, readjustments will not happen for income tax years before 2010.[206] The same three-year limit generally applies to estate and gift tax returns as well.[207] The result may be different if proper protective claims were timely made.[208]

Notice 2013-61, issued September 23, 2013, deals with employment taxes and provides procedures for employers who wish to make claims for refunds or credits.[209] The most common situation involves employer-paid health insurance for the employee's same-sex spouse and sums paid by the employee for the spouse's coverage.[210] The former are excludible from gross income and the latter may be paid on a pre-tax basis through a salary reduction.[211] Both arrangements affect the amount of the employee's wages subject to FICA, and once the employee's marriage to the same-sex spouse is recognized for federal taxation purposes, the amount of employment taxes owed with respect to that employee may be reduced.[212]

Notice 2014-1, issued December 17, 2013, deals with cafeteria plans and health savings accounts.[213] The notice provides guidance on when employers may recognize the valid same-sex marriages of their employees for purposes of making changes in elections governing cafeteria plans and health savings accounts.[214] Consistent with Revenue Ruling 2013-17, an employee's marital status is determined by whether or not the employee is a party to a marriage valid where celebrated, regardless of whether or not the employee and the spouse reside in a state that recognizes the marriage.[215]

Notice 2014-19, issued April 5, 2014, explains the application of the *Windsor* decision and the provisions of Revenue Ruling 2013-17 to qualified plans.[216] The notice states that operation of any qualified plan must reflect "the outcome of *Windsor* as of June 26, 2013."[217] This requirement means that plans whose documents define a marital relationship by reference to section 3 of DOMA, or in some other way that excludes same-sex married couples, must be amended by the later of the applicable deadline under section 5.05 of Revenue Procedure 2007-44, or December 31, 2014.[218] A governmental plan need not be amended "before the close of the first regular

206. *See* I.R.C. § 6511 (2012).
207. *See id.*
208. *See id.*; Rev. Rul. 2013-17.
209. I.R.S. Notice 2013-61, 2013-44 I.R.B. 432.
210. *Id.*
211. *See id.*
212. *See id.*
213. I.R.S. Notice 2014-1, 2014-2 I.R.B. 270.
214. *Id.*
215. *Id.*; Rev. Rul. 2013-17.
216. I.R.S. Notice 2014-19, 2014-47 I.R.B. 979.
217. *Id.*
218. *Id.*; Rev. Proc. 2007-44, 2007-28 I.R.B. 54, § 5.05 (an interim amendment generally must be adopted by the later of the end of the plan year in which the change is first effective, or the due date of the employer's tax return for the tax year that includes the date the change is first effective, i.e. June 26, 2013).

legislative session of the legislative body with the authority to amend the plan that ends after December 31, 2014."[219] The notice also states that a plan sponsor may select a date before June 26, 2013, to begin to recognize same-sex marriages but an amendment will be needed to do so, and the notice cautions that such an amendment may be difficult to implement "and may create unintended consequences."[220] An amendment may be limited to recognizing same-sex marriages before June 26, 2013, for only certain purposes, for example, "solely with respect to the QJSA and QJSA requirements of section 401(a)(11) and, for those purposes, solely with respect to participants with annuity starting dates or dates of death on or after a specified date."[221] The notice states:

> For Federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" do not include individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state, and the term "marriage" does not include such formal relationships.[222]

Again, based on the governing statute, the Social Security Administration has taken a different position.[223] The promised guidance on mid-year amendment of plans to comply with Notice 2014-19 was given in Notice 2014-37.[224]

B. Department of Labor

The Department of Labor has issued two guidance documents dealing with the legal consequences of *Windsor*, one of which uses the place of celebration standard to determine if an employee is married, the other uses a "state of residence standard." The place of celebration standard applies to employee benefit plans and ERISA.[225] Technical Release 2013-04, issued September 18, 2013, makes it clear that where "the Secretary of Labor has authority to issue regulations, rulings, opinions, and exemptions in title I of ERISA and the Internal Revenue Code, as well as in the Department's regulations at chapter XXV of Title 29 of the Code of Federal Regulations," the word *spouses* are two people lawfully married under the law of any state

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219. I.R.S. Notice 2014-19.

220. *Id.*

221. *Id.*

222. *Id.*

223. *See* Windsor *Same-Sex Marriage Claims*, SOC. SEC. ADMIN. (Jan. 15, 2015), http://www.secure.ssa.gov/poms.nsfllnx/0200210000.

224. I.R.S. Notice 2014-37, 2014-24 I.R.B. 1100.

225. *Technical Release 2013–04*, U.S. DEP'T LABOR (Sept. 18, 2013), http://www.dol.gov/ebsa/newsroom/tr13-04.html.

and that *marriage* includes "a same-sex marriage that is legally recognized as a marriage under any state law."[226]

These definitions mean that once a couple is legally married each spouse has rights in the other's pension plan, if one exists.[227] Generally, that right consists of being the beneficiary of a qualified joint and survivor annuity or the sole beneficiary of the plan on the employee's death, depending on the type of plan.[228] These rights can be waived, but they survive divorce.[229]

It's worth noting that the word "'state' means any state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Northern Mariana Islands, any other territory or possession of the United States, and any foreign jurisdiction having the legal authority to sanction marriages."[230]

The place of residence standard applies to the Family Medical Leave Act (FMLA).[231] Fact Sheet #28F released by the Wages and Hours Division of the Department of Labor in August 2013 defines *spouse* "as a husband or wife as defined or recognized under state law for purposes of marriage *in the state where the employee resides*, including 'common law' marriage and same-sex marriage."[232] The FMLA requires that employers allow employees up to twelve weeks of unpaid leave a year to care for an ill family member, including a spouse, and for other family-related reasons such as the birth or adoption of a child.[233]

Fact Sheet #28F does not state any reason for adopting a place of residence standard, and it is not known whether the use of the place of celebration standard in Technical Release 2013-04, which was issued after Fact Sheet #28F, superseded the earlier pronouncement.[234] The question was presumably laid to rest in February 2015 when the Department announced the completion of the rulemaking process and the issuing of a final rule

226. *Id.* These definitions are identical to those in Revenue Ruling 2013-17. Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

227. *See Technical Release 2013–04*, *supra* note 225.

228. *Id.*

229. *Id.*

230. *See id.*

231. 29 U.S.C. §§ 2601–54 (2012).

232. Wage & Hour Division, *Fact Sheet #28F: Qualifying Reasons for Leave Under the Family and Medical Leave Act*, U.S. DEP'T LABOR (Aug. 2013), http://www.dol.gov/whd/regs/compliance/whdfs28f.pdf.

233. 29 U.S.C. § 2612.

234. *See* Wage & Hour Division, *supra* note 232.

changing to the place of celebration standard for FMLA purposes.[235] The new regulation, however, was held invalid in *Texas v. U.S.*[236]

C. The Social Security Administration

On August 8, 2013, the Social Security Administration promulgated a new section of the Program Operations Manual System (POMS), Part 02, Chapter 002, Subchapter 10, entitled "Windsor Same-Sex Marriage Claims," which adopts a place of residence standard for determining eligibility for spousal benefits under Social Security.[237] The original release has been amended several times and the information it contains is now found in several different sections of the POMS.[238]

The new policy applies to all claims filed on or after June 26, 2013, the date of the *Windsor* decision, and claims that were pending final determination on that date.[239] It allows payment of claims when the person on whose earning record the claim is being made (the "Number Holder" or "NH" in the release) "was married in a state that permits same-sex marriage [and] is domiciled at the time of application, or while the claim is pending a final determination, in a state that recognizes same-sex marriage."[240]

Although the instructions do not make an express reference to the definition of *spouse* in the Social Security Act, they are compatible with subsection (h)(1)(A) governing the determination of who is a spouse or surviving spouse, which states:

> (i) An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this title if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such insured individual is dead, the courts of the State in which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find that such applicant and such insured individual were

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235. Wage & Hour Division, *Fact Sheet: Final Rule to Amend the Definition of Spouse in the Family Medical Leave Act Regulations*, U.S. DEP'T LABOR (Feb. 2015), http://www.dol.gov/whd/fmla/spouse/factsheet.htm. The new regulations will become effective March 27, 2015, and will be found in 29 C.F.R. pt. 825. 29 C.F.R. §§ 825.100–.803 (2015). The rulemaking process and the rule itself are explained in the Federal Register for February 25, 2015. *See Definition of Spouse Under the Family and Medical Leave Act*, FED. REGISTER (Feb. 25, 2015), https://federalregister.gov/a/2015-03569.

236. Texas v. United States, No. 7:15–cv–00056–O, 2015 WL 1378752 (N.D. Tex. Mar. 26, 2015).

237. *See GN 00210.000* Windsor *Same-Sex Marriage Claims*, SOC. SEC. ADMIN. (Apr. 30, 2015), https://secure.ssa.gov/poms.nsf/lnx/0200210000.

238. *See id.*

239. *GN 00210.001* Windsor *Same-Sex Marriage Claims—Introduction*, SOC. SEC. ADMIN. (Sept. 6, 2013), https://secure.ssa.gov/poms.nsf/lnx/0200210001.

240. *GN 00210.705 Same-Sex Marriage – Medicare Based on End Stage Renal Disease (ESRD)*, SOC. SEC. ADMIN. (July 7, 2014), https://secure.ssa.gov/poms.nsf/lnx/0200210705.

> validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died.
>
> (ii) If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless be deemed to be the wife, husband, widow, or widower, as the case may be, of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a wife, husband, widow, or widower of such insured individual.[241]

It is this provision that has led the Social Security Administration to recognize legal relationships other than marriage as conferring the status of spouse for Social Security purposes. Section 416(h)(1)(A)(ii) deems an applicant to be the spouse or surviving spouse of an insured individual if under the laws of the state in which the applicant is domiciled, the applicant has the same status in intestate succession to the individual as a spouse would.[242] This provision raises the possibility that the survivor of a civil union or a registered domestic partnership who has the rights of a surviving spouse for purposes of distribution of the applicant's estate in intestacy is a spouse or surviving spouse for Social Security purposes.[243]

The first step, then, in making a determination on a claim by a same-sex spouse or surviving spouse of an insured individual (the NH) is to determine the state of domicile of the NH.[244] If the NH's domicile is or was the same state in which the marriage was performed and that state permits same-sex marriage, and the application date is on or after the date on which same-sex marriage was permitted in that state, the claim can be processed; the next step being determining the length of the marriage.[245]

If the NH is or was not domiciled in the state where the marriage was performed but was married in one of the states permitting same-sex marriage on or after the date shown in the chart, was domiciled in one of the states recognizing same-sex marriages before a final determination on the claim, and the application date is on or after the date the state of domicile recognized same-sex marriages wherever performed, then the claim can be processed.[246] If all of the conditions are not met, the claim is "held."[247]

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241. 42 U.S.C. § 416(h)(1)(A)(i)–(ii) (2012).
242. *See id.* § 416(h)(1)(A)(ii).
243. *See id.*
244. *GN 00210.002 Same-Sex Marriage—Determining Marital Status for Title II and Medicare Benefits*, SOC. SEC. ADMIN. (Dec. 12, 2014), https://secure.ssa.gov/poms.nsf/lnx/0200210002.
245. *See id.*
246. *See id.*
247. *See id.*

The release makes it clear that the length of the marriage is measured from the date the couple was married and is not determined by the date of the *Windsor* decision.[248] Furthermore, the date of the *Windsor* decision does not have anything to do with determining the "date of entitlement"; that determination is governed by the date of filing the application.[249] That conclusion is surely correct because section 3 of DOMA was found to be unconstitutional.

> **1. Examples of claims where there is a marriage that can be recognized for purposes of determining entitlement**
>
> 1. Allison (the NH) and Liz (the claimant) marry in Massachusetts (MA) after MA permits same-sex marriage. They are domiciled in MA. Liz files for aged spouse's benefits on Allison's record while they are domiciled in MA. The marriage can be recognized for purposes of determining entitlement for Title II and Medicare benefits. Accordingly, process the case under the instructions set out in GN 00210.100.
>
> 2. Sheldon (the NH) and James (the claimant) are domiciled in Georgia (GA) when they marry while on vacation in MA after MA permits same-sex marriage. James files for aged spouse's benefits on Sheldon's record while they both live in GA. While the application is pending, James and Sheldon move to and become domiciled in MA. Because they became domiciled in MA while the application is pending, the marriage can be recognized for purposes of determining entitlement for Title II and Medicare benefits. Accordingly, process the case under the instructions set out in GN 00210.100.
>
> **2. Examples of claims where the marriage cannot be recognized for purposes of determining entitlement**
>
> 1. Lily (the NH) and Wendy (the claimant) consider themselves married based on a ceremony celebrated in Washington (WA) state on August 23, 2010 (before WA permitted same-sex marriage). They are currently domiciled in WA. Wendy files a claim to receive aged spouse's benefits from Lily's record. Because the ceremony occurred before WA permitted same-sex marriage, the NH and claimant cannot be recognized as married for purposes of determining entitlement to Title II benefits or Medicare. Accordingly, process the case under the instructions set out in GN 00210.100.
>
> 2. John (the NH) and Dave (the claimant) married in New York on October 1, 2012. John died on January 31, 2013, while domiciled in Minnesota (MN), and Dave filed for surviving spouse benefits. Because the date of John's death was before the date that MN recognized same-sex marriages, the NH and claimant cannot be recognized as married for

248. *See GN 00210.400 Same-Sex Marriage—Benefits for Surviving Spouses*, SOC. SEC. ADMIN. (Sept. 8, 2014), https://secure.ssa.gov/poms.nsf/lnx/0200210400.

249. *See GN 00210.002 Same-Sex Marriage—Determining Marital Status for Title II and Medicare Benefits*, *supra* note 244.

> purposes of determining entitlement to Title II or Medicare benefits. Accordingly, process the case under the instructions set out in GN 00210.400.[250]

As these examples clearly show, the critical datum is the domicile of the NH, the person whose earning record is the basis of the claim.[251] Assuming a valid marriage, so long as the NH is domiciled in a state that recognizes same-sex marriage when the application is filed, or if not, becomes domiciled in a state recognizing the marriage before a final determination of the claim, the marriage will be recognized for determining Social Security benefits.[252] This application of the rule would seem to have been complicated in the succession states whose treatment of marriage substitutes differ, as described above and in the following chart.[253] If the successor marriage really is effective as of the date of the predecessor civil union, as it arguably is in Delaware, or registered domestic partnership, as it is in Washington State, did the state "recognize" same-sex marriage as of that date? And what about the statutes that "merge" the predecessor relationship into the marriage? If in at least some of these states the result, for state law purposes, is a *nunc pro tunc* recognition of same-sex marriage, does the holding in *Windsor* require the federal government to recognize that result? Until June 2014, the only response was "time will tell," but on July 20, 2014, the Social Security Administration issued a release taking the position that legal relationships that provide the partners with inheritance rights do make the partners spouses for Social Security purposes, basing the conclusion on section 416(h)(1) of the IRC.[254]

Spousal benefits under Social Security are significant and include an entitlement to a benefit equal to one-half of the other spouse's benefit.[255] The rules and strategies for claiming these benefits are complex, and in some cases they are not eliminated by divorce.

D. Federal Employment Benefits (Office of Personnel Management)

Benefits for employees of the federal government that are related to marriage are determined under a place of celebration standard.[256] Benefits

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250. *See id.*

251. *See id.*

252. *See id.*

253. *See supra* Part I.A, C; *Non-Marital Legal Relationships (Such as Civil Unions and Domestic Partnerships)*, SOC. SEC. ADMIN. (May 19, 2015), https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210004.

254. 42 U.S.C. § 416(h)(1) (2012); *Non-Marital Legal Relationships (Such as Civil Unions and Domestic Partnerships)*, *supra* note 253.

255. *Retirement Planner: Benefits for Your Spouse*, SOC. SEC. ADMIN., http://www.ssa.govretire2/yourspouse.htm#a0=0 (last visited May 1, 2015).

256. *Benefits Administration Letter 13-203*, OFF. PERSONNEL MGMT. (July 17, 2013), http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf.

Administration Letter #13-203, issued July 17, 2013, states that valid marriages in existence on the date of the *Windsor* decision are considered new marriages and that all same-sex marriages will be recognized as valid marriages "regardless of an employee's or annuitant's state of residency."[257] The letter reiterates the rule of other federal agencies that recognition applies only to marriages and not to marriage substitutes: "Therefore, same-sex couples who are in a civil union or other forms of domestic partnership other than marriage will remain ineligible for most Federal benefits programs."[258]

E. Department of Defense

In News Release 581-13, issued by the Department of Defense on August 14, 2013, the Department of Defense announced that it would use a place of celebration standard in determining whether the spouse of a service member or of a civilian employee is eligible for spousal benefits.[259] These benefits include basic housing allowance, health care under the TRICARE program, and family separation allowance.[260] Entitlement to benefits for those married on the date of the *Windsor* decision, June 26, 2013, begins on that date.[261] For military personnel stationed in states that do not recognize same-sex marriage, the Department will allow nonchargeable leave to travel to a state where marriage to a partner is possible.[262]

While some states where same-sex marriage is not recognized would not issue spousal identification cards to same-sex spouses of members of the state's National Guard, all have now complied, albeit with some restrictions on state facilities issuing identification cards.[263]

F. Department of Veteran Affairs

On August 4, 2013, the Attorney General wrote to congressional leaders saying that the executive branch would move to provide veterans' benefits to same-sex spouses of veterans on the same basis as different-sex spouses in spite of the language in Title 30 of the U.S. Code restricting recognition of marriages to those involving one man and one woman.[264] The benefits

257. *See id.*

258. *See id.*

259. *DOD Announces Same-Sex Spouse Benefits*, *Release No. 581-13*, DEP'T DEF. (Aug. 14, 2013), http://www.defense.gov/releases/release.aspx?releaseid=16203.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. Letter from Eric H. Holder, Jr., Attorney General, to John Boehner, Speaker of the U.S. House of Representatives (Sept. 4, 2013), *available at* http://www.justice.gov/150/opa/resources/557201394151530910116.pdf.

involved are disability and survivor benefits and the right to joint burial in a veterans' cemetery.[265]

Whether or not a marriage exists is determined by the place of residence standard applied as of the date of the marriage or when the right to benefits accrued.[266] The definition of surviving spouse in section 103(c) of the U.S. Code states that the marriage of a veteran and his or her spouse "shall be proven as valid for the purposes of all laws administered by the Secretary according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued."[267] Presumably, this definition means that a veteran and his or her partner, living in a state that does not recognize same-sex marriage, who make a trip to a state that recognizes same-sex marriage, are married there, and then return home, are not married for purposes of veterans' benefits.[268]

G. Department of State and United States Citizenship and Immigration Services (USCIS)

In a series of FAQs released shortly after the *Windsor* decision, both the Department of State and the United States Citizenship and Immigration Services (USCIS) (which is part of the Department of Homeland Security) announced that they would recognize a place of celebration standard for all visa and immigration questions.[269] The Department of State in fact goes a bit beyond place of celebration, announcing in its FAQs that if a U.S. citizen is engaged to be married to a foreign national of the same sex whose country of citizenship will not allow them to marry, the couple can obtain a fiancé(e) (K) visa for the noncitizen intended spouse.[270] The USCIS also announced that it would immediately reopen cases where relief was denied because of section 3 of DOMA.[271]

H. Department of Justice

On February 8, 2014, the Attorney General made a speech at the annual dinner of the Human Rights Campaign announcing that on February 10 he would issue policies to insure that validly married same-sex couples receive

265. *See id.*
266. 38 U.S.C. § 103(c) (2012).
267. *Id.*
268. *Id.*
269. *U.S. Visas for Same-Sex Spouses*, DEP'T STATE, http://travel.state.gov/content/dam/visas/DOMA/DOMA%20FAQs.pdf (last visited May 1, 2015); Janet Napolitano, *Same-Sex Marriages*, U.S. CITIZEN & IMMIGR. SERVICES (July 1, 2013), http://www.uscis.gov/family/same-sex-marriages.
270. *U.S. Visas for Same-Sex Spouses*, *supra* note 269.
271. Janet Napolitano, *supra* note 269.

the same treatment as different-sex couples in all of the work of the Department of Justice on a place of celebration basis.[272]

The memorandum was indeed released on February 10, 2014.[273] The memorandum deals first with "Implementation by Department Components."[274] This section states how various components of the Department have released guidance on complying with policy of treating same-sex couples equally: divisions of the Department of Justice that administer benefit and compensation programs, such as the Public Safety Officers' Benefit Program, will use a place of celebration standard to decide the validity of a marriage; the United States Trustee Program has issued guidance to personnel to apply the Bankruptcy Code and rules to all married couples lawfully married in the jurisdiction where the marriage occurred; the Bureau of Prisons will likewise recognize the validity of a marriage valid where celebrated, no matter the residence of the spouse of a prisoner or the place where the prisoner is incarcerated; and the Bureau of Alcohol, Tobacco, Firearms, and Explosives "will treat same-sex surviving spouses in the same manner as opposite-sex surviving spouses for purposes of carrying on a deceased spouse's licensed firearms or explosives business."[275]

The memorandum next deals with Department policy and states that it is the Department's policy to recognize same-sex marriages valid where celebrated to the widest extent possible, including in the interpretation of statutes and regulations and in evaluating invocations of the spousal evidentiary privileges.[276]

I. Judicial Developments in Federal Recognition Before and After the Denial of Certiorari in 4th, 7th, 9th and 10th Circuits' Cases on October 6, 2014

In *Cozen O'Connor v. Tobits*, the decedent and her spouse married in Canada four years before the decedent's death.[277] The couple resided in Illinois where the decedent was a partner in a law firm and participated in its pension plan, which of course is governed by ERISA.[278] After the decedent's death both her surviving spouse and her parents claimed the death benefits

272. Attorney General Eric H. Holder, Jr., Speech at the Annual Dinner of the Human Rights Campaign (Feb. 8, 2014); *see Attorney General Makes Landmark Announcement from HRC NY Gala Stage*, HUM. RTS. CAMPAIGN (Feb. 8, 2014), http://www.hrc.org/blog/entry/attorney-general-makes-landmark-announcement-from-hrc-ny-gala-stage.

273. *Department Policy on Ensuring Equal Treatment for Same-Sex Married Couples*, OFF. ATT'Y GEN. (Feb. 10, 2014), http://www.justice.gov/iso/opa/resources/9201421014257314255.pdf.

274. *See id.*

275. *See id.*

276. *Id.*

277. Cozen O'Connor v. Tobits, No. 11-0045, 2013 WL 3878688, at *1 (E.D. Penn. July 29, 2013).

278. *Id.* at *4.

under the plan.[279] Because the default beneficiary under the plan is a surviving spouse first and then, if there is no spouse, the participant's surviving parents or parent, the case turned on whether the surviving spouse was the surviving spouse for purposes of the plan.[280] The court answered *yes*, relying on *Windsor* and ERISA preemption of Pennsylvania law under which the plan was organized (and which does not recognize same-sex marriage).[281] However, the applicability of the holding to other cases is questionable because the court also noted that under the law of Illinois the marriage was recognized as a civil union and that an Illinois court had already recognized the surviving spouse as the decedent's "surviving spouse" under Illinois law.[282] Therefore, it is not clear whether the result would have been the same had the couple been residents of a state that did not recognize their marriage in any way.[283]

In *Roe v. Empire Blue Cross Blue Shield*, the plaintiff's employer's health insurance plan expressly excluded same-sex spouses from spousal benefits.[284] Plaintiff was denied coverage for her same-sex spouse whom she married after the state (New York) enacted legislation allowing same-sex couples to marry.[285] Plaintiff sued claiming discrimination and breach of fiduciary duty in violation of sections 501 and 404 of ERISA.[286] The district court dismissed the suit and the Second Circuit affirmed because the plaintiff failed to allege any right under the plan with respect to which the employer had discriminated and because the plaintiff had not adequately alleged any breach of fiduciary duty.[287] The district court distinguished *Cozen O'Connor*: "In that case, in the absence of a definition of 'spouse' in the plan, and in light of the recognition of the marriage as valid of the state of the couple's domicile (Illinois), the federal government must interpret ERISA as recognizing that marriage."[288] The express exclusion of same-sex spouse in the plan at issue was the distinguishing difference.[289] The district court held, however, and the Second Circuit agreed, that the opinion "does not address whether the plan exclusion is constitutional or otherwise lawful under any other federal or state laws."[290]

In *In re Fonberg*, the executive committee of the Judicial Council of the Ninth Circuit ruled in favor of a former employee of the federal court for the

279. *Id.* at *1.
280. *Id.*
281. *Id.* at *3–4.
282. *Id.* at *4.
283. *Id.*
284. Roe v. Empire Blue Cross Blue Shield, No. 12-cv-04788, 2014 WL 1760343, at *1 (S.D.N.Y. May 1, 2014), *aff'd*, 589 F. App'x 8 (2d Cir. 2014).
285. *Id.*
286. *Id.*
287. *Id.* at *6–8.
288. *Id.* at *7.
289. *Id.*
290. *Id.* at *9.

district of Oregon who made a claim for back wages to compensate her for the expense of providing health insurance for her same-sex registered domestic partner (under Oregon law) after the federal Office of Personnel Management refused to treat the partner as a spouse for employee benefit purposes.[291] The judges held that the denial of benefits involved unlawful discrimination in two ways:

> Fonberg and her partner are treated differently in two ways. First, they are treated differently from opposite-sex partners who are allowed to marry and thereby gain spousal benefits under federal law. This is plainly discrimination based on sexual orientation, which the District of Oregon's EDR [Employee Dispute Resolution] Plan prohibits. They are also treated unequally vis-à-vis same-sex couples in other states in the circuit, who may marry and thus gain benefits under *Windsor*. This violates the principle that federal employees must not be treated unequally in the entitlements and benefits of federal employment based on the vagaries of state law. Here, Oregon law suffers from precisely the same deficiency that the Supreme Court identified in *Windsor* with respect to the Defense of Marriage Act. Both these forms of discrimination are prohibited under the Oregon EDR Plan.[292]

The holding in this employee discrimination case is certainly limited to federal employees, but it could be the first opening to treating all persons in "marriage substitutes" who by law are given the same rights and obligations as married persons in the same way the law treats persons in lawful marriages.[293] Just when one might think that the story of same-sex marriage is on its way to its denouement, another plot line may still be very much alive. Granted, extending the status of lawfully married spouses to persons in a legal relationship defined by statute to be the same as marriage in all but name will not necessarily lead to anything drastically new, but it may help more same-sex couples gain legal security, and Social Security as well.

III. DISSOLUTION

Some marriages end in divorce, and it is unlikely that marriages between persons of the same sex will be any different. Planning for divorce is not at all unusual; prenuptial agreements are often entered into with just such that possibility in mind.[294] What has not been so common, at least since the mid-

291. *In re* Fonberg, 736 F.3d 901, 902 (9th Cir. 2013).
292. *Id.* at 902–03.
293. *See id.*
294. *8 Reasons Why You Should Get a Prenuptial Agreement*, PRENUPTIAL AGREEMENTS, http://www.prenuptialagreements.org/why-get-prenupt/ (last visited Feb. 20, 2015).

twentieth century, is planning for obtaining a divorce.[295] While once limited grounds for divorce in state X led one spouse to go to state Y to remain long enough to acquire residency and give the courts of state Y jurisdiction to grant a divorce on grounds unavailable at home (state Y might also be a foreign jurisdiction like Mexico or the Dominican Republic), today divorce is widely available to United States married couples without the need to forum shop.

The previous sentence has to be amended to read "married different-sex couples." It is at least possible that courts of a state that does not recognize same-sex marriage will not accept jurisdiction and dissolve a same-sex marriage valid where contracted.[296] This puts the married same-sex couple resident in a nonrecognition state in a terrible bind. A couple that lives in a state that refuses to grant them a divorce will be forced to travel to another state that will grant it, however that will require living in that state for some period of time, something that may be impossible for either spouse.[297]

Although academic commentators have worked hard to craft arguments that would allow the courts of nonrecognition states to take subject matter jurisdiction of divorces of same-sex married couples, no matter how well crafted the arguments getting them accepted is an uphill battle given existing precedent.[298] In addition, as one commentator has noted, do you really want your clients to have to go to an appellate court to get divorced?[299]

Nonetheless, the supreme court of one nonrecognition state, Wyoming, has decided that the state courts may take subject matter jurisdiction of divorces of same-sex married couples, relying on the Wyoming statute that makes marriages valid if legally performed.[300] It must be noted, however, that while Wyoming statutes define marriage as a contract between one man and one woman, there is neither a statutory nor a constitutional prohibition on recognizing same-sex marriages valid where celebrated.[301]

As of early February 2015, the Supreme Court of Texas has not yet decided its analogue of *Christiansen*. On August 23, 2013, the court granted review of the court of appeals decision *In re Marriage of J.B. and H.B.*, which held that the Texas courts do not have subject matter jurisdiction over the divorce of a same-sex couple whose marriage is valid where celebrated.[302] Also on August 23, 2013, the court granted review of the court of appeals

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295. *See* Robert Pagliarini, *Divorce Financial Planner: 3 Common Fears*, CBS (Aug. 23, 2013, 7:24 AM), http://www.cbsnews.com/news/divorce-financial-planner-3-common-fears/.

296. *See, e.g.*, *In re* Marriage of J.B. & H.B., 326 S.W.3d 654, 670 (Tex. App.—Dallas 2010, pet. granted).

297. *See id.*

298. *See* Tracy A. Thomas, *Same-Sex Divorce*, 5 CAL. L. REV. CIRCUIT 218 (2014); Mary Patricia Bryn & Morgan L. Holcomb, *Wedlocked*, 67 U. MIAMI L. REV. 1 (2012).

299. *See* Bryn & Holcomb, *supra* note 298.

300. WYO. STAT. ANN. § 20-1-111 (West 2013); Christiansen v. Christiansen, 253 P.3d 153 (Wyo. 2011).

301. WYO. STAT. ANN. § 20-1-101 (West 2013).

302. *In re* Marriage of J.B. & H.B., 326 S.W.3d 654 (Tex. App.—Dallas 2010, pet. granted).

decision in *State v. Naylor*, which held that the state could not intervene and appeal a district court decision granting a divorce to a same-sex couple whose marriage was valid where celebrated.[303] The court heard arguments on November 5, 2013, and as of this writing a decision is pending.

Several nonrecognition states have constitutional or statutory prohibitions on granting divorces to validly married same-sex couples:

1. **Alaska:** Section 25.05.013 of Alaska Statutes makes contractual rights granted by a valid same-sex marriage, including its termination, unenforceable in Alaska; however, this provision, along with the state's ban on same-sex marriage, is unconstitutional under *Hamby v. Parnel*, which is on appeal to the Ninth Circuit after stay was denied by the United States Supreme Court.[304]
2. **Arkansas:** Section 9-11-208 of the Arkansas Code makes unenforceable in Arkansas the contractual rights attendant on a valid same-sex marriage, including its termination.[305]
3. **Georgia:** The state's constitution states that courts of the state shall have no jurisdiction to grant a divorce or separate maintenance with regard to any same-sex marriage.[306]

While the answer to whether a married same-sex couple can obtain a divorce in any other nonrecognition state is an open question, one has to assume the answer is likely to be *no*.[307] Fortunately, several states that allow same-sex couples to marry allow couples married in that state to seek a divorce without the need to meet the usual jurisdictional predicates.[308]

1. **California:** Section 2320(a) of the California Family Code does not allow a judgment of dissolution of a marriage to be entered unless one of the parties has been a resident of the state for six months and of the county in which the proceeding is filed for three months.[309] However, subsection (b) creates an exception for same-sex marriages, even if neither of the parties is a resident of or maintains a domicile in California, if the parties were married in California and neither party resides in a jurisdiction that will dissolve the marriage; if the jurisdiction will not recognize the marriage, there is a rebuttable presumption that it will not dissolve it.[310] Venue is in the proper court of the county where the marriage was celebrated and "[t]he dissolution,

303. State v. Naylor, 330 S.W.3d 434 (Tex. App.—Austin 2011, pet. granted).

304. ALASKA STAT. ANN. § 25.05.013(a) (West 2013); Hamby v. Parnel, 56 F. Supp. 3d 1056 (D.C. Alaska 2014).

305. ARK. CODE ANN. § 9-11-208(a)(2) (West 2011).

306. GA. CONST. art. I, §4, ¶ I(b) (2004).

307. *See* Hayley Bruce, *Same-Sex Couples 'Wed-Locked'*, THE GAZETTE (Apr. 11, 2014), http://www.thegazette.com/subject/news/government/laws/same-sex-couples-wed-locked-same-sex-couples-can-face-legal-headaches-when-seeking-divorce-in-states-not-recognizing-unions-2014-0411.

308. *See* CAL. FAM. CODE § 2320(a) (West 2012); DEL. CODE ANN. tit. 13, § 129(f) (West 2013); HAW. REV. STAT. § 580-1 (West 2013).

309. CAL. FAM. CODE § 2320(a).

310. *Id.* § 2320(b)(1).

nullity, or legal separation shall be adjudicated in accordance with California law."[311]

2. **Delaware:** Title 13, section 129 of the Delaware Code states:

> All persons who enter into same-gender marriages that are solemnized in this State or are created by conversion from a civil union under the laws of this State consent to the nonexclusive jurisdiction of the Family Court of this State for all proceedings for divorce and annulment of such marriage, even if 1 or both parties no longer reside in this State, as set forth in § 1504 of this title.[312]

However, section 1504 provides an exception to the six-month residence requirement in the state in order to give jurisdiction over a divorce:

> Notwithstanding the immediately preceding sentence, in addition to any other basis for jurisdiction it may otherwise have, the Family Court of this State has jurisdiction over all proceedings for divorce and annulment of same-gender marriages that are solemnized in this State or created by conversion of civil unions pursuant to the laws of this State, notwithstanding that the domicile or residency of the petitioner and the respondent are not in this State, if the jurisdiction of domicile or residency of the petitioner and/or the respondent does not by law affirmatively permit such a proceeding to be brought in the courts of that jurisdiction.[313]

The provision also requires that if neither of the parties to the marriage reside in the state, the petition for divorce or annulment shall be brought in the county in which one or both parties last resided.[314] This last requirement could be problematic for a couple who came to Delaware solely to marry because it is unlikely either party ever resided in the state.

3. **Hawai'i:** Section 580-1(b) of the Hawai'i Revised Statutes creates an exception to the usual requirement of six months residency in the state and three months in the county where the action is brought if the couple was married under Hawai'i law and neither party can pursue an action for divorce, annulment, or separation in the domiciliary jurisdiction or jurisdictions.[315] There is a rebuttable presumption that an action cannot be maintained if the domiciliary jurisdiction or jurisdictions do not recognize the marriage.[316] Under section 580-1(c), the action must be commenced in the judicial circuit where the marriage was solemnized, and the law of Hawai'i shall govern.[317] Subsection (c) contains a further limitation:

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311. *Id.* § 2320(b)(2).
312. DEL. CODE ANN. tit. 13, § 129(f).
313. *Id.* § 1504(a).
314. *Id.*
315. HAW. REV. STAT. § 580-1(b) (West 2013).
316. *Id.*
317. *Id.* § 580-1(c).

> Jurisdiction over actions brought under subsection (b) shall be limited to decrees granting annulment, divorce, or separation that address the status or dissolution of the marriage alone; provided that if both parties to the marriage consent to the family court's personal jurisdiction or if jurisdiction otherwise exists by law, the family court shall adjudicate child custody, spousal support, child support, property division, or other matters related to the annulment, divorce, or separation.[318]

4. **Illinois:** Effective June 1, 2014, when the Illinois Religious Freedom and Marriage Fairness Act went into effect, the following new law also went into effect:

> § 220. Consent to jurisdiction. Members of a same-sex couple who enter into a marriage in this State consent to the jurisdiction of the courts of this State for the purpose of any action relating to the marriage, even if one or both parties cease to reside in this State. A court shall enter a judgment of dissolution of marriage if at the time the action is commenced, it meets the grounds for dissolution of marriage set forth in this Act.[319]

5. **Minnesota:** Section 518.07(2) of the Minnesota Statutes creates an exception to the usual requirement of residence or domicile for 180 days immediately before the commencement of the proceeding for dissolution by giving a Minnesota court jurisdiction of a proceeding to dissolve a same-sex marriage if the marriage was performed in the state and neither party resides in a jurisdiction that will dissolve the marriage.[320] There is a rebuttable presumption that a jurisdiction will not dissolve the marriage if the jurisdiction will not recognize it.[321] The action for dissolution must be adjudicated according to Minnesota law.[322]

6. **Vermont:** Title 15, section 592(b) of the Vermont Statutes creates an exception to the requirement in subsection (a) of six months residency before the bringing of a complaint for divorce or annulment and residence for one year before the date of final hearing if one meets the following:

> (1) The marriage was established in Vermont.
> (2) Neither party's state of legal residence recognizes the couple's Vermont marriage for purposes of divorce.
> (3) There are no minor children who were born or adopted during the marriage.
> (4) The parties file a stipulation together with a complaint that resolves all issues in the divorce action. The stipulation shall be signed by both parties and shall include the following terms:

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318. *Id.*
319. 750 ILL. COMP. STAT. ANN. 5/220 (West 2014).
320. MINN. STAT. ANN. § 518.07(2) (West 2013).
321. *Id.* § 578.07(2)(b).
322. *See id.*

> (A) An agreement that the terms and conditions of the stipulation may be incorporated into a final order of divorce.
> (B) The facts upon which the court may base a decree of divorce and that bring the matter before the court's jurisdiction.
> (C) An acknowledgment that:
> (i) each party understands that if he or she wishes to litigate any issue related to the divorce before a Vermont court, one of the parties must meet the residency requirement set forth in subsection (a) of this section.
> (ii) neither party is the subject of an abuse prevention order in a proceeding between the parties.
> (iii) there are no minor children who were born or adopted during the marriage.
> (iv) neither party's state of legal residence recognizes the couple's Vermont marriage for purposes of divorce.
> (v) each party has entered into the stipulation freely and voluntarily.
> (vi) the parties have exchanged all financial information, including income, assets, and liabilities.[323]

Subsection (c) provides:

> The court shall waive a final hearing on any divorce action filed pursuant to subsection (b) of this section unless the court determines upon review of the complaint and stipulation that the filing is incomplete or that a hearing is warranted for the purpose of clarifying a provision of the stipulation. Final uncontested hearings in a nonresident divorce action shall be conducted by telephone unless one or both of the parties choose to appear in person.[324]

7. **District of Columbia:** Section 16-902(b) of the District of Columbia Code creates an exception to the usual requirement of six months residence in the District in order to give jurisdiction over a divorce if the parties to the marriage are of the same sex, the marriage was performed in the District, and neither party resides in a jurisdiction that will maintain an action for divorce.[325] The statute creates a rebuttable presumption that the jurisdiction of residence will not maintain the action for divorce if it does not recognize the marriage.[326] Finally, there is an express provision that the action must be adjudicated in accordance with the laws of the District of Columbia.[327]

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323. VT. STAT. ANN. tit. 15, § 592(b) (West 2012).
324. *Id.* § 592(c).
325. D.C. CODE § 16-902(b) (2012).
326. *Id.*
327. *Id.* Note that this provision applies only to actions for divorce; subsection (c) provides that the residence of the parties is irrelevant in a proceeding to annul a marriage performed in the District. *Id.* § 16-902(c).

The question then arises: Which state's provision is better for the same-sex married couple who cannot be divorced in their state of residence? The law of the state that has taken jurisdiction for purposes of the divorce action will apply.[328] This fact means that no choice can be safely made without thorough knowledge of the domestic relations laws of these states, knowledge that is beyond the scope of these materials. However, some basic observations can be made safely.

First, of the states allowing nonresident divorces, only California is a community property state.[329] Generally, property accumulated while a married couple does not reside in a community property jurisdiction is not community property, unless on moving to a community property jurisdiction their separate property is converted to community property by agreement.[330] In California this process is called "transmutation."[331] Under section 125 of the Family Code *quasi community property* is defined as property acquired "by either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition."[332] Moreover, *community estate* is the community and quasi-community property, and the entire community estate is divided between the spouses on divorce, except if there is a written agreement providing otherwise or the parties agree in open court to an oral stipulation.[333] Seeking a divorce in California, therefore, will require figuring out how much of the couples' property is quasi-community property, and then, if an equal division is not desired, entering into a written agreement binding under California law (the stipulation in open court may be unlikely in the case of a nonresident divorce).[334]

Washington is a community property state, and it does not have a residency requirement for jurisdiction in divorce; the statutes require only that one party be a resident of the state, but the cases have interpreted *resident* to mean *domiciliary*.[335]

Second, the remaining states are all common law title states, and as such the division of property on divorce, at least in the absence of a binding agreement, will be decreed under the state's version of "equitable distribution," a concept foreign to community property states.[336] Third, any pre- or post-nuptial agreement must be binding under the law of the state

328. *See, e.g.*, *id.* § 16-902(b)(3).

329. CAL. FAM. CODE § 760 (West 2013).

330. Alvin Golden, *An Overview of Community Property Law*, IKARD GOLDEN JONES 16–17, http://igjlaw.com/alvin_golden_articles/ACTECCP.pdf (last modified Feb. 29, 2012).

331. CAL. FAM. CODE § 850 (West 2013).

332. *Id.* § 125.

333. *Id.* §§ 63, 2550.

334. *See id.* §§ 63, 2550.

335. WASH. REV. CODE ANN. § 26.09.040(1) (West 2008); Sasse v. Sasse, 249 P.2d 380 (1952); *In re* Marriage of Strohmeier, 659 P.2d 534 (1983).

336. *See, e.g.*, VT. STAT. ANN. tit. 15, § 751 (West 2013).

taking jurisdiction. Fourth, serious planning for the possibility of dissolution by divorce will require specialized knowledge of the law of the chosen state. Fifth, a divorce is also necessary for favorable tax treatment for property transfers between the spouses, both in planning for and after the divorce.[337]

IV. PLANNING FOR THE MARRIED COUPLE LIVING IN A NON-RECOGNITION STATE

Once the newly married couple returns home to a state that will not recognize their marriage, estate planning, in the broad sense, must be what it always was—that is, aimed at getting the couple what they want in a local legal framework that does not recognize their marriage.

In a state like Texas without state income or transfer taxes, tax planning is the same as for any other married couple who is or might be subject to the federal transfer taxes. Transfers between the spouses (so long as the donee is a United States citizen) will not have federal gift tax complications.[338] Because they are now a married couple for federal purposes, the special valuation rules of section 2702 of the IRC will apply, and while before marriage one partner could create a common law Grantor Retained Income Trust (GRIT)—transferring property to a trust in which the transferor retains the income for a period of time one hopes will end before the transferor's death, remainder to the other partner, with the gift being the actuarially calculated value of the remainder—after marriage, such a trust will have to be in the form of a Grantor Retained Annuity Trust (GRAT) or Grantor Retained Unitrust (GRUT).[339] Note that if one of the, then, unmarried partners did create a GRIT for the other, some part of the donor's unified credit was used to offset the resulting gift tax.[340] Now that the couple is married, there would be no gift because of the marital deduction.[341] Can the donor spouse get back the unified credit used up in the creation of the GRIT? Guidance from Treasury may be forthcoming.

The unlimited gift tax marital deduction will greatly simplify lifetime planning. For example, if one of the spouses provides all of the consideration for the acquisition of real property to which the couple takes title as joint tenants with rights of survivorship, there will still be a gift of one-half the value of the consideration to the noncontributing joint tenant, but who cares, the marital deduction will wipe out the gift.[342] In addition, of course, the couple will be able to elect to "split" gifts made by one of them.[343]

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337. I.R.C. §§ 1014(a)(2), 2516 (2012).
338. *Id.* § 2523.
339. *Id.* § 2702; Treas. Reg. §§ 25.2702-1 (as amended in 1998), 25.2702-2 (as amended in 2005).
340. I.R.C. § 2505 (2012).
341. *See id.* § 2056.
342. *See id.*
343. *See id.* § 2513.

Deathtime transfers will qualify for the federal estate tax marital deduction.[344] The "reverse QTIP election," will be available in the estate of the first to die.[345] The surviving spouse can make a qualified disclaimer of property passing to him or her from the decedent even though retaining an interest in the property.[346] All of the couple's community property will receive a new basis on the death of the first spouse to die (but if during their marriage the couple resided in a community property state that did not recognize their marriage it is unlikely that this provision will apply to what the state would consider as community property had the state recognized the marriage).[347] The personal representative of the first to die can take advantage of portability and give the decedent's unused applicable exclusion amount to the surviving spouse.[348]

Income tax planning will be that applicable to any married couple. They will have the choice of filing jointly or as married filing separately.[349] If they file jointly, they may have a marriage bonus or a marriage penalty.[350] All of the various income limits related to income tax calculation will apply to them as a married couple, e.g., the amount of AGI relevant to the calculation of the tax on net investment income for married couples filing jointly is $250,000.[351] The couple will not be able to realize losses on capital property one sells to the other.[352] The grantor trust rules will treat a power held by the grantor's spouse as held by the grantor.[353] The survivor will be able to rollover the decedent's IRAs into the survivor's own IRA, and so on.[354]

A. Property Law Aspects of Planning

If the state of residence does not recognize the couple's marriage, then property law planning will be what it always has been for unmarried couples. Because under the law of the state of residence there is no legal relationship between the spouses, their estate plans are vulnerable to family members who may or may not be hostile to the relationship because the family members, not the spouse, will be the heirs and will, therefore, have standing to challenge a will.[355]

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344. *Id.* § 2056.
345. *Id.* § 2652(a)(3).
346. *Id.* § 2518(b)(4)(A).
347. *Id.* § 1014(b)(6).
348. *Id.* § 2010(c).
349. *Id.* § 1.
350. *Id.*
351. *Id.* § 1411(b).
352. *Id.* § 1041(a).
353. *Id.* § 672(e)(1).
354. *Id.* § 408.
355. *See, e.g.*, TEX. EST. CODE ANN. §§ 256.204, 22.018 (West 2014).

The most common advice has always been to create nonprobate property to at least minimize the possibility of a post-death contest.[356] However, even if the surviving spouse is the beneficiary of every sort of nonprobate property arrangement created by the decedent, there is always the possibility of a contest involving challenges to the creation of the arrangement—undue influence being perhaps the most common.[357] For those with sufficient wealth to make the arrangement practical, creating a lifetime revocable trust in a jurisdiction that recognizes the marriage governed by the law of that jurisdiction could be an excellent option, although this may require a local trustee. The law of its situs of course governs real property.[358] Joint tenancy with rights of survivorship will remove the property from the probate system on the death of the first to die, and a transfer on death deed is also a possibility in some jurisdictions, although like most lifetime arrangements those who would take the probate estate in intestacy could challenge it.[359] It might be possible to hold real estate in an LLC and then put the LLC interests into a lifetime trust, effectively removing the real property from the probate system, and if the trust is subject to the laws of a state that recognizes the marriage, the possibility of a successful challenge is further decreased. Any employee benefit arrangement governed by ERISA will have to treat the couple as married.[360]

B. Lifetime Considerations

The couple must be counseled to do everything possible to make sure that their relationship will be respected.[361] Powers of attorney running to each other are often a necessity.[362] Whatever needs to be done to insure that each spouse can indeed make medical decisions for the other and have access to a hospitalized or institutionalized spouse must be done.[363]

V. DRAFTING CHALLENGES POSED BY MARRIAGE EQUALITY

It is clear that once a same-sex marriage is recognized in a jurisdiction or by the federal government all of the legal consequences of being married

356. *See* GERRY W. BEYER, TEXAS WILLS AND ESTATES: CASES AND MATERIALS 334–35 (7th ed. 2015).

357. *See id.*

358. Michael S. Finch, *Choice-of-Law and Property*, 26 STETSON L. REV. 257, 259 (1996).

359. *See, e.g.*, TEX. EST. CODE ANN. § 111.001 (West 2014).

360. *See Technical Release No. 2013-04*, DEP'T LABOr (Sept. 18, 2013), http://www.dol.gov/ebsa/newsroom/tr13-04.html.

361. *See Still Not Married: Estate Planning for Same-Sex Couples in Texas*, CHRISTIANSEN DAVIS LLC (Nov. 11, 2014), http://www.cdfirm.com/still-not-married-estate-planning-for-same-sex-couples-in-texas/.

362. *See id.*

363. *See id.*

follow.[364] It is not as certain, however, that private documents like wills and trusts are as easy to construe.

Gifts in wills and trusts to persons described as the spouse of another person can arise in many contexts. One such context is an outright gift in a will or on the termination of a trust (especially a revocable trust used as a will substitute) to spouses of a named beneficiary, to the spouses of class members, or as an alternative beneficiary should the primary beneficiary not survive the testator or the date of termination of the trust.[365] The following are examples of each type of gift:

> a) I give ten thousand dollars ($10,000) to my daughter, [name], and her husband.
> b) I give twenty thousand dollars ($20,000) to each of my children and their spouses.
> c) I give fifteen thousand dollars ($15,000) to my son, [name], if he shall survive me, and if he does not to his wife, [name].

Another context is lifetime beneficiaries of income or principal, or both; for example, the trust instrument gives the trustee extended discretion to distribute income and principal to a class consisting of the settlor's descendants and their spouses.[366] A third context is as permissible appointees of a power of appointment.[367] For example,

> a) On the termination of a trust for the lifetime benefit of the settlor's surviving spouse, the trustee is directed to distribute the trust property as the surviving spouse shall appoint among a class consisting of the settlor's and the spouse's issue and their spouses; or
> b) On the termination of a trust for a child the child may have a non-general power to appoint outright or in trust to the child's surviving spouse among others.

Wills and trusts can also make gifts to the settlor's or testator's spouse, whether outright or in trust, and the spouse can be described by name, by status, or perhaps most commonly, by both; for example, If my spouse [name] shall survive me, I give the residue of my estate to my trustee hereinafter named to hold in trust for the surviving spouse. It is believed, and probably rightly, that the wills of married persons overwhelmingly make the surviving spouse the principal beneficiary of the probate estate.[368] It is likely

364. I.R.S. News Release IR-2013-72 (Aug. 29, 2013).
365. 74 TEX. JUR. 3D *Wills* §§ 259–60 (2014).
366. 72 TEX. JUR. 3D *Trusts* § 118 (2014).
367. 59 TEX. JUR. 3D *Powers* § 1 (2014).
368. *Texas Probate Passport: A Guide to Probate and Estate Planning in Texas*, TEX. YOUNG LAW. ASS'N 1 (2011), http://www.tyla.org/tyla/assets/file/38668TexasProbatePassport WebReady.pdf.

that most wills of married persons will name their spouse, or at least contain language that sets out existing family relationships: I am married to [name] and all references to "my spouse" in this will are to [name].

VI. DRAFTING CONSIDERATIONS IN THE WILL OF THE PERSON MARRIED TO A PERSON OF THE SAME SEX[369]

A. State Law Context

If the testator is a domiciliary of a state that allows same-sex couples to marry, or at least recognizes the validity of same-sex marriages valid where celebrated, traditional drafting practices will work just as well for the testator whose spouse is of the same-sex as for the testator married to a different-sex spouse. For example, a definitional provision like I am married to [name] and all references to "my spouse" in this will are to [name], will effectively define the person referred to as the testator's *spouse* no matter the sex of the spouses.

In Texas, section 6.204(b) of the Texas Family Code states that a marriage between persons of the same sex or a civil union "is contrary to the public policy of this state and is void in this state."[370] In addition, section 6.204(c) states:

> The state or an agency or political subdivision of the state may not give effect to a: (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.[371]

The Texas Constitution states: "Marriage in this state shall consist only of the union of one man and one woman [and that] [t]his state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."[372] Both the statute and the constitutional provision were held to violate the equal protection guarantee of Amendment XIV to the United Stated Constitution and, therefore, void in *De Leon v. Perry*.[373]

Given the Texas statutory and constitutional scheme, consider the meaning of the following in the will of a testator who is married to a person of the same sex: I am married to [name] and all references in this will to "my

369. These observations are made in the context of a will. They are equally applicable to a trust created by a married person that includes the settlor's spouse as a beneficiary.

370. TEX. FAM. CODE ANN. § 6.204(b), (c) (West 2013).

371. *Id.* § 6.204(c).

372. TEX. CONST. art. I, § 32.

373. De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014).

spouse" are to [name]. Under Texas law, this sentence is a legal impossibility.[374] It could be taken to be either patently ambiguous, if the name of the spouse makes it clear to the reader that the testator and the spouse are the same sex, or latently ambiguous, if the fact that the spouse is the same sex as the testator is not clear from the spouse's name (think of "I am married to Terry Testator . . . ." Is "Terry" a nickname for Theresa or Terrence, or is it the given name of the spouse?). In either event, if in a construction proceeding a court were to hold that the provision did not identify the testator's spouse, it is possible that any gift made in the will to the testator's *spouse* would be held to be ineffective, which would cause all gifts to the spouse to lapse, perhaps reducing the estate, or at least some part of it, to intestacy.[375]

While invalidation of gifts to the testator's *spouse* in this circumstance is clearly an extreme result, it is not unimaginable and the possibility makes it necessary to carefully consider the wisdom of referring to the testator's spouse as *spouse*. The will could still contain a provision stating that the testator is married to the spouse, I am married to [name], but the second part of the provision defining the meaning of *my spouse* should be omitted. That means, of course, that all references to *spouse* would use the spouse's given name.

Compare the first example, a typical clause disposing of the residuary estate to the surviving spouse with the second, suggested for use in a state that does not recognize the couple's marriage:

> a) Instead of: I give the rest, residue, and remainder of my estate, both real and personal and wheresoever situated to my spouse [with or without the addition of the name] if he shall survive, and if he does not [whatever substitute gift the testator wishes to make]
> b) The residuary gift would read: I give the rest, residue, and remainder of my estate, both real and personal and wheresoever situated to [name], if he shall survive me, and if he does not . . .

An alternative that makes gifts in the will based on the marital relationship relies on the ability of the testator or settlor to define terms as he or she wishes: I am married to [name]. In this [will or trust] references to "my spouse" are to [name] whether or not our marriage is recognized in the jurisdiction in which the terms of this [will or trust] are to be effective or carried out [or where this will is admitted to probate].

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374. FAM. § 6.204; TEX. CONST. art. 1, § 32.
375. *See, e.g.*, TEX. EST. CODE ANN. § 255.512 (West 2014).

B. Gifts to the Testator's Children and More Remote Descendants

We generally do not think very much about a gift in a will or trust to the testator's or grantor's children or more remote descendants unless there are questions related to adoption or nonmarital children. We assume that when the testator or grantor is married a reference to *my children* includes the children of the marriage.[376] However, that is not necessarily the case where the parents of the child are a married same-sex couple.

Consider the case *Matter of Seb C-M* where the same-sex spouse of the child's genetic and birth mother filed a petition to adopt the child.[377] Under New York law the adoption was superfluous because the child's birth certificate identified both spouses as the parents of the child.[378] The surrogate denied the petition because it was unnecessary, even though the court took notice that in a jurisdiction that does not recognize the couple's marriage the parent-child relationship between the petitioner and the child might not be recognized, resting as it does on the marriage.[379]

Assume the parents of Seb C-M and the child do indeed move to a state that does not recognize the marriage. The couple has valid New York wills that give the estate of the first to die to the survivor and on the death of the survivor, to "my children" or "my descendants by representation" or in any way that relies on the parent-child relationship between the spouses and the child. The wills are never changed, but being valid under the law of New York makes them valid under the law of the domiciliary jurisdiction.[380] If the nongenetic and birth parent is not the second spouse to die, the gift in the will of the other spouse to "children" or "descendants" will include Seb C-M only if the New York birth certificate is sufficient to create the parent-child relationship in the nonrecognition state, and the answer to that question is uncertain.

The will of the spouse who may or may not be the child's parent must identify the child in some way that does not rest on the marriage. For example, a definition of *children* might read: I am married to [name] and with [name] have raised [name's] child [child's name] since [his or her] birth. All references to my children in this will are to [child's name].

It might be better still to define descendants so that the child's children and more remote descendants will be included in the will: I am married to [name] and with [name] have raised [name's] child [child's name] since [his or her] birth. All references to "my descendants" in this will are to [child's name] and [his or her] descendants.

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376. TEX. FAM. CODE ANN. §§ 160.201, 160.204 (West 2013).
377. Matter of Seb C-M, NYLJ 1202640083455 (N.Y. Sur. Ct. Jan. 6, 2014).
378. *Id.*
379. *Id.*
380. *See id.*

These suggestions have one glaring flaw: they do not take into account the possibility of the couple having more children. The usual approach to dealing with the possibility is to define *children* to include those named and "all children hereafter born to or adopted by me."[381] That would work in the will of the spouse who is the biological and birth parent of the future children but not in the will of the other spouse, unless adoption is indeed possible (which it may be, at the price of cutting off the parental rights of the birth parent).[382] In addition, a pretermitted child statute will not apply to the will of the nonbiological parent because, of course, the children born after the execution of the will are not that person's children.[383] The best solution is to execute new wills if additional children are born, but we know that no matter how important the event estate planning documents are often not brought up to date.

Needless to say, the spouses in *Matter of Seb C-M* were both women.[384] A male same-sex married couple is in a different situation because while one of the spouses can be the biological father of the child, neither of them can be the birth parent; they will have to rely on a surrogate to bear the child. The nonbiological parent may have to become a parent by second-parent adoption of the spouse's child, if that is possible under state law.[385] Adoption will not be necessary if state law provides a proceeding that establishes the parentage of the couple who contracted with the surrogate.[386] However, in Texas "intended parents" who are parties to a gestational agreement must be married to each other.[387] In both cases, a state that does not recognize the couple's marriage may not recognize the second-parent adoption or the confirmation of the couple's parentage if the basis for the recognition is the marriage.[388] Drafting for nonrecognition of the nonbiological parent's relationship is the same as that suggested above.

VII. IN THE DOCUMENTS OF THIRD PERSONS

The parents and other relatives of the validly married same-sex couple may or may not be pleased by their child's or other relative's marriage. We

381. *See* 2 EDWARD KOREN, ESTATE TAX & PERSONAL FINANCIAL PLANNING § 18:68 (2014).

382. Realize that this usual approach works only because of the strong presumption that children born during marriage are the children of both spouses. *See* TEX. FAM. CODE ANN. §§ 160.201, 160.204 (West 2013).

383. *See* TEX. EST. CODE ANN. §§ 255.051–56 (West 2014).

384. *Matter of Seb C-M*, NYLJ 1202640083455, at *1.

385. *See* COLO. REV. STAT. ANN. § 15-11-119 (West 2010).

386. *See* CAL. FAM. CODE § 7630(f) (West 2014); *In re* Doe, 793 N.Y.S.2d 878 (N.Y. Sur. Ct. 2005) (describing the California procedure and recognizing its effect with reference to a New York trust on comity grounds).

387. TEX. FAM. CODE ANN. § 160.754(b) (West 2013).

388. *See Adoption by LGBT Parents*, NAT'L CENTER FOR LESBIAN RTS. (2015), http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf.

need to consider strategies for both including and excluding the relationships created by the marriage in the estate plans of persons other than the spouses.

A. Drafting to Include a Child's Same-Sex Spouse and the Offspring of the Marriage

The person who wishes to include same-sex spouses in gifts and references to the spouses of beneficiaries of the will or trust could define *spouse* with this provision: The term *spouse* means any person validly married to another person under the law of the jurisdiction where the marriage was celebrated whether or not the spouse and the other person are or at some time were of the same sex or different sex and whether or not any jurisdiction where the spouse and the other person are domiciled or reside recognizes their marriage as valid.

A person who wishes to exclude same-sex spouses could define *spouse* with this provision: The term *spouse* means any person validly married to another person who is not the same sex as the spouse whether or not any jurisdiction where the spouse and the other person are domiciled or reside recognizes as valid marriages between persons of the same sex.

A testator or settlor who wishes to be as inclusive as possible should consider including in the term *spouse* a person in a civil union or other "marriage equivalent" with another person: The term *spouse* means any person validly married to another person under the law of the jurisdiction where the marriage was celebrated and any person who with another person has entered into an legal relationship which under the law of jurisdiction where the relationship was entered into gives the parties to the arrangement the legal status of spouses (a "marriage equivalent") whether or not any jurisdiction where the spouse and the other person are domiciled or reside recognizes their marriage or their marriage equivalent as valid.

B. Drafting to Include or Exclude the Offspring of a Same-Sex Marriage

Many wills and trusts include gifts to the "issue" or "descendants" of the testator, settlor, or of other persons whether or not they themselves are beneficiaries. In the modern world, the default rules applicable to class gifts in wills, trusts, and other instruments that refer to issue, descendants, heirs, and other similar terms include in those gifts both nonmarital and adopted children on the same basis as children born within marriage in one case and born to the parent or parents in the other.[389] There are numerous examples of language that is designed to include or exclude nonmarital and adopted

389. *See* TEX. FAM. CODE ANN. §§ 160.202 (no discrimination based on marital status), 162.017(c) ("The terms 'child,' 'descendant,' 'issue,' and other terms indicating the relationship of parent and child include an adopted child unless the context or express language clearly indicates otherwise.").

children from participation in class gifts.[390] Drafting language to include or exclude children who are related through a same-sex marriage to a testator, settlor, or other creator of any other donative instrument from class gifts in those instruments is a challenge.

The following is an example of a provision for broad inclusion of adopted children: I direct that any child or children now or hereafter adopted by any issue of mine be treated, in all respects and for all purposes of this will, as though the said adopted child or children were the child or children of the blood of my issue. This language is comprehensive enough to include adoption of the children of a spouse of any of the testator's issue. A frequently seen provision in a clause like this limits the inclusive treatment of adopted persons to persons who were adopted before they reached a stated age, who lived as minors with the adoptive parent, or both.[391]

The following is an example of a provision for broad inclusion of children who are children of the testator's issue by reason of blood, adoption, a legal declaration or judgment of parentage, or marriage to the other parent: Whenever in my will I make a disposition of property to persons described therein as a child, children, issue, descendants, or heirs or by any term of like import, I intend to include all children whether their relationship to their parents or parent is created by blood, adoption, a legally binding declaration or judgment of parentage, or the marriage between the child's legal parents whether or not the parents are or have been of the same or different sex.[392]

The following is an example of a provision for inclusion of adopted children and exclusion of children whose parentage is the result of the marriage between the parent and the parent's same-sex spouse: I direct that any child or children now or hereafter adopted by any issue of mine be treated, in all respects and for all purposes of this will, as though the said adopted child or children were the child or children of the blood of my issue, except those children whose status as children of the blood is the result of a marriage between one of my issue and a person of the same-sex.

C. Gifts Conditioned on Marriage

Some testators and settlors may wish to encourage their beneficiaries to marry the "right person," at least the right person in the eyes of the donor. The most well-known cases involve religious restrictions on marriage; the most recent to be widely noticed, and an unusual one in that it involves

390. *See, e.g.*, Tootle v. Tootle, 490 N.E.2d 878, 880–81 (1986) (discussing the precise meaning of "heirs of the body").

391. *See* UNIF. PROBATE CODE § 2-705(f) (amended 2010) (providing that when construing a gift by someone who is not the adoptive parent, a child is not a child of the adoptive parent unless the adoption took place before the adopted person reached eighteen years of age, the adoptive parent was the adopted person's stepparent or foster parent, or the adoptive parent "functioned as a parent" of the adopted person before the adopted person attained eighteen years of age).

392. *See id.* § 2-705(b) (equating all potential relationships between parent and child).

restrictions in a trust, is *In re Estate of Feinberg*.[393] The case involved trusts created by Max Feinberg for the benefit of his widow, Erla, for life and then for the benefit of his grandchildren for their lives.[394] The trust terms contained a condition on the grandchildren's interests: any grandchild who married outside the Jewish faith or whose non-Jewish spouse did not convert to Judaism within one year of marriage was deemed to have died as of the date of the marriage and that person's interest would pass to Max and Erla's two children.[395] The trusts for the grandchildren, however, were takers in default of Erla's exercise of a lifetime nongeneral power of appointment, the permissible objects of which were Max's descendants.[396]

During her life Erla exercised the power to give $250,000 from the trust at her death to each of her two children and to any grandchild not deemed deceased under the condition contained in the trusts.[397] At the time of Erla's death all of the grandchildren had been married for more than one year but only one had fulfilled the condition included in the trusts.[398] One of the grandchildren sued the executors of Max's and Erla's estates for violation of their fiduciary duties (the executors were the son, daughter, and son-in-law of Max and Erla) and the executors moved to dismiss on the grounds that the grandchild was not a beneficiary because she had failed to fulfill the condition.[399]

The trial court held the condition invalid and a bitterly divided intermediate appellate court affirmed.[400] The Illinois Supreme Court reversed, unanimously finding the condition to be valid and not contrary to the public policy of Illinois "[b]ecause no grandchild had a vested interest in the trust assets and because the distribution plan adopted by Erla has no prospective application."[401]

This narrow and fact specific holding leaves open the possibility that some conditions involving religious restraints on the marriage choices of beneficiaries would be void. This conclusion is reinforced by the court's discussion of the reliance by the majority below on section 29, comment j, illustration 3 in Restatement (Third) of Trusts, which involves a trust for the settlor's nephew, N, from which he receives discretionary payments before age eighteen and then all of the income until age thirty at which time the trust terminates and N is to receive all of the trust property outright.[402] The trust

393. *In re* Estate of Feinberg, 919 N.E.2d 888 (2009), *cert. denied sub nom.*, Trull v. Feinberg, 560 U.S. 939 (2010).
394. *Id.* at 891.
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.* at 892.
399. *Id.*
400. *Id.*
401. *Id.* at 905.
402. *See id.* at 902; RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j, illus. 3 (2003).

terms state that if N marries someone who is not of R religion before the age of thirty all his rights terminate and the trust property is to be distributed to a named educational institution.[403] The illustration says the restraint is invalid.[404] The Illinois high court said whether the conclusion in the illustration is correct or not, and although the facts are very much like the provisions of the trusts created by Max Feinberg, Erla Feinberg's exercise of her power of appointment makes it inapplicable to the instant case because under the exercise of the power of appointment the restraint is a condition precedent, rather than a condition subsequent that would most likely be invalid.[405]

One important message, and one which authorities agree, is that when it comes to conditioning the receipt of a gift in a will or trust on marriage to the "right" person, conditions precedent are generally valid and conditions subsequent are not.[406] That is, if the beneficiary is unmarried at the time of the testator's death or of the distribution from the trust, conditioning the gift on a future marriage can be enforceable, but a condition that takes away a gift that has already been received is not.[407] It is also clear that a condition that requires the beneficiary to divorce cannot be enforced on public policy grounds.[408]

The reporter's note to comment j presents more detail, discussing cases that generally have focused on the probable effect of such provisions and not the motivation behind them, an approach that tends to diminish the chances of invaliding such provisions.[409] A classic example is *In re Estate of Donner*, which upheld a provision under which income distributions to the settlor's daughter would begin at age sixty-five unless her husband should die, or they should divorce sooner.[410] The court found a reasonable economic basis for the provision even though it could be read as encouraging divorce.[411] An older, but very similar example, is *Hunt v. Carroll*, where the court upheld a provision withholding income distributions for a minimum of twenty years from the testator's daughter if her marriage to her current husband continued.[412]

Be that as it may, it is likely that the courts of a state that recognizes same-sex marriage would strike down a condition that required the

403. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j, illus. 3.
404. *See id.*
405. *See Feinberg*, 919 N.E.2d at 902–03.
406. *See id.* at 903.
407. *See id.*
408. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (stating that conditions tending "to encourage disruption of a family relationship or to discourage formation or resumption of such a relationship" are contrary to public policy and void).
409. *Id.*
410. *In re* Estate of Donner, 623 A.2d 307, 308 (1993).
411. *See id.* at 308–09.
412. Hunt v. Carroll, 157 S.W.2d 429 (Tex. Civ. App.—Beaumont 1941, writ dism'd).

beneficiary to divorce the beneficiary's same-sex spouse. The courts of a nonrecognition state would seem to be faced by a quandary. If the public policy of the state insists that marriage is limited to one man and one woman, can one enforce a condition that requires the dissolution of a marriage that does not exist, especially if the beneficiary is a resident of that state or of another nonrecognition state?

Conditioning the gift on getting married within a period of time from the testator's death or the termination of a trust to anyone not of the same-sex as the beneficiary presents difficult questions. Because of its inclusion in popular casebooks, the most well-known case involving a religious restraint coupled with a time limit is *Shapira v. Union National Bank*.[413] In this case, the father's will conditioned the gift of one-third of the residue to each of his two sons (his third child was a daughter) on their being married within seven years of his death to "a Jewish girl both of whose parents were Jewish," with a gift over to the State of Israel.[414] The younger son, who was twenty-one years of age and unmarried at his father's death, sued to overturn the restriction.[415] The court upheld the restriction, not surprisingly finding that the provision did not implicate freedom of religion or the right to marry, or indeed any constitutionally protected right the son might have had, because not only did he not have a right to inherit from his father but state action was not involved.[416] The court also found no violation of public policy; the restriction did not unduly limit the son's choices (there was no dearth of Jewish women of appropriate age) in the Youngstown, Ohio area where the son lived, seven years was sufficient time, and forfeiture was not involved because there was a gift over.[417]

What is the probable fate of a provision in a will that parallels the condition in the *Shapira* will but instead of a religious restriction requires the beneficiary to marry within seven years of the testator's death of a person of a different sex?[418] That is an open question for now.

D. Construction of Existing Instruments Making Gifts to Spouses

As noted above, wills, trusts, and other donative instruments often make gifts on the basis of who is married to whom.[419] In a jurisdiction that allows same-sex couples to marry, instruments executed after the date such marriages may be validly performed in the jurisdiction are most likely to be construed to include a same-sex spouse in the term *spouse*. It is also possible

413. Shapira v. Union Nat'l Bank, 315 N.E.2d 825 (Ohio Ct. Com. Pl. 1974).
414. *Id.* at 829.
415. *Id.* at 827.
416. *Id.* at 828.
417. *Id.* at 832.
418. *Id.*
419. *See supra* Part IV.

that the courts of a jurisdiction that recognized the validity of same-sex marriages validly celebrated elsewhere before allowing same-sex marriages to be celebrated in the jurisdiction would construe a reference to *spouse* in an instrument executed after the recognition date to include a spouse of the same sex. Such a construction presumably can be overcome by evidence of the donor's intent, at least where it is admissible.

Far more uncertain is the construction of instruments executed before the recognition or legalization dates. There are possible parallels to the way courts approach the question of including adopted persons in class gifts made in instruments of persons other than the adoptive parent or parents.[420] Many United States jurisdictions began by excluding adopted children from class gifts in instruments of adoptive relatives other than their parents, applying the "stranger to the adoption rule."[421] One could argue that gifts to persons described as spouses of another in instruments executed before the legalization of same-sex marriage should be construed the same way—that is, either to flatly exclude same-sex spouses or to exclude or include on the basis of the intent of the creator of the instrument, with the usual complications involved in allowing or forbidding the use of extrinsic evidence to show that intent.

However, marriage is not quite adoption. While adoption was "unknown to the common law" and completely a creature of statute, marriage has been around for a very long time and the concept of *spouse* is equally old.[422] While bringing a child into a family by adoption, rather than birth, was once novel and exceptional, marrying and acquiring a spouse is anything but novel, even though the legal consequences of marriage have changed greatly over the centuries.[423] It is possible that a court sitting in a jurisdiction that recognizes same-sex marriages as valid would construe the term *spouse* in an instrument to mean any person married to another person, no matter when the instrument was executed.

The constructional problems created by the legalization of same-sex marriage will work themselves out through litigation or perhaps legislation in the years to come. In the meantime, now that same-sex marriage is possible but not recognized as valid everywhere in the United States, drafting should address the issues.

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420. *See, e.g.*, *In re* Trust Under Agreement of Vander Poel, 933 A.2d 628 (N.J. Super. Ct. App. Div. 2007).

421. *See id.* at 634.

422. *See* Amanda C. Pustilnik, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL'Y REV. 263, 266 (2002).

423. *See id.*

APPENDIX A

Legal Relationships for Social Security Purposes

State	Relationship Type	Inheritance Rights	Development	Effective Date
AZ	Domestic partnership	No	n/a	n/a
AZ	Civil union	No	n/a	n/a
CA	Domestic partnership	Yes	Request the date the domestic partnership was entered into.	January 1, 2000
CO	Designated beneficiary (DB)	Yes, unless specifically excluded in the DB agreement	(1) Request the date the designated beneficiary agreement was signed, and (2) ask if the right to inherit as each other's spouse was specifically excluded in the agreement. Accept the relationship if there is no exclusion of inheritance rights in the agreement. Do not accept the relationship if there is exclusion of inheritance rights in the agreement.	July 1, 2009
CO	Civil union	Yes	Request the date the civil union was entered into.	May 1, 2013
CT	Civil union	Yes	Request the date the civil union was entered into.	October 1, 2005 – October 1, 2010
DE	Civil union	Yes	Request the date the civil union was entered into.	January 1, 2012 – July 1, 2014
DC	Domestic partnership	Yes	Request the date the domestic partnership was registered.	January 26, 2006
HI	Reciprocal beneficiary (RB)	Yes	Request the date the certificate of RB was issued.	June 1, 1997 – December 2, 2013

State	Relationship Type	Inheritance Rights	Development	Effective Date
HI	Civil union	Yes	Request the date the civil union was entered into.	January 1, 2012
IL	Civil union	Yes	Request the date the civil union was entered into.	June 1, 2011
ME	Domestic partnership	Yes	Request the date of the declaration of domestic partnership.	July 30, 2004
MD	Domestic partnership	No	n/a	n/a
MN	Domestic partnership (municipal)	No	n/a	n/a
NV	Domestic partnership	Yes	Request the date the domestic partnership was registered.	October 1, 2009
NH	Civil union	Yes	Request the date the civil union was entered into.	January 1, 2008 – December 31, 2009
NJ	Domestic partnership	Yes	Request the date of the affidavit of domestic partnership.	July 10, 2004 – February 19, 2007
NJ	Civil union	Yes	Request the date the civil union was entered into. New Jersey also recognizes same-sex marriages from other states as civil unions from February 19, 2007 through, and including, October 20, 2013.	February 19, 2007
NY	Domestic Partnership	No	n/a	n/a
OR	Domestic partnership	Yes	Request the date of the certificate of domestic partnership.	February 4, 2008
RI	Civil union	Yes	Request the date the civil union was entered into.	June 1, 2011 – August 1, 2013

State	Relationship Type	Inheritance Rights	Development	Effective Date
VT	Civil union	Yes	Request the date the civil union was entered into.	July 1, 2000 – September 1, 2009
VT	Reciprocal beneficiary	No	n/a	n/a
WA	Domestic partnership	Yes	Request the date the domestic partnership was registered.	July 22, 2007
WI	Domestic partnership	Yes	Request the date of the declaration of domestic partnership.	August 3, 2009