

Intestacy Concerns for Same-Sex Couples: How Variations in State Law and Policy Affect Testamentary Wishes

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I. INTRODUCTION

As the number of same-sex couples increases in the United States,¹ concerns regarding the evolution of federal and state law, with respect to rights for same-sex couples, also continue to rise. As marriage is not always available to same-sex couples, they often face very different legal issues than couples in a traditional marriage.² Because marriage is typically not a legal cause of action, the question of a marriage's validity often arises incidentally to another legal question, such as the disposition of a decedent's estate.³

Intestacy occurs when an individual dies without leaving a valid will; this results in the application of default rules with respect to the distribution of the decedent's property.⁴ In every state, intestacy statutes provide a framework for such distribution, typically leaving all or most of the decedent's estate to the lawfully married surviving spouse.⁵ In the event that there is no legally-recognized surviving spouse, the decedent's estate passes to descendants and relatives according to the state's statuto-

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1. As of 2011, there were over 500,000 same-sex couples in the United States. Madeleine N. Foltz, *Needlessly Fighting an Uphill Battle: Extensive Estate Planning Complications Faced by Gay and Lesbian Individuals, Including Drastic Resort to Adult Adoption of Same-Sex Partners, Necessitate Revision of Maryland's Intestacy Law to Provide Heir-at-Law Status for Domestic Partners*, 40 U. BALT. L. REV. 495, 498 (2011).

2. *See id.* at 495.

3. Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 936 (1998).

4. *See* RESTATEMENT (THIRD) OF PROP. (WILLS AND OTHER DONATIVE TRANSFERS) § 2.1 (1999); Christine A. Hammerle, *Free Will to Will? A Case for the Recognition of Intestacy Rights for Survivors to a Same-Sex Marriage or Civil Union*, 104 MICH. L. REV. 1763, 1764 (2006).

5. *See* RESTATEMENT (THIRD) OF PROP. (WILLS AND OTHER DONATIVE TRANSFERS) § 2.2 (1999); Hammerle, *supra* note 4, at 1764.

ry framework.⁶ Because intestacy statutes do not always adhere to the decedent's desires, estate planning is a practical necessity for individuals seeking to avoid the consequences of intestacy.⁷ Despite the inadequate protection of intestacy statutes, a majority of the U.S. population dies without leaving a valid will executing the disposition of their property.⁸ Couples often fail to execute a valid will or carry out proper estate planning due to young age, good health, and the expense of estate planning.⁹

These outdated intestacy statutes disregard evolving family structures and require that same-sex couples consider various estate-planning tools.¹⁰ These tools and transfers are necessary for same-sex couples because they face different issues than traditionally married couples¹¹ when it comes to their testamentary wishes.¹² As a result, more extensive planning is required to achieve the family, inheritance, and tax benefits automatically bestowed on traditionally married couples.¹³

Because marriage and intestacy statutes vary from state to state, same-sex couples receive little protection when it comes to the interjurisdictional recognition of their relationships.¹⁴ The severity of many intestacy statutes is exemplified in their complete exclusion of same-sex couples from the law.¹⁵ For example, if a same-sex couple establishes domicile in the same jurisdiction where the marriage is legally recognized, the forum state's intestacy laws also recognize the marriage.¹⁶ However, a significant problem arises if one of the spouses later dies in another jurisdiction that does not recognize same-sex marriage, because the surviving same-sex spouse would not be entitled to a portion of the decedent's estate.¹⁷ Therefore, it is critical for same-sex couples to consider how they wish to have their property distributed and plan accordingly to ensure that their testamentary wishes are honored upon their death.

Over the past decade, the challenges facing same-sex couples have changed significantly; however, these challenges remain societally perti-

6. Hammerle, *supra* note 4, at 1764.

7. Aimee Bouchard & Kim Zadworny, *Growing Old Together: Estate Planning Concerns for the Aging Same-Sex Couple*, 30 W. NEW ENG. L. REV. 713, 713 (2008).

8. *Id.* at 726.

9. Hammerle, *supra* note 4, at 1771.

10. Foltz, *supra* note 1, at 495.

11. The use of "traditionally married couples" in this article refers to heterosexual married couples.

12. Foltz, *supra* note 1, at 495.

13. *Id.* at 497.

14. Hammerle, *supra* note 4, at 1764.

15. Foltz, *supra* note 1, at 501.

16. Hammerle, *supra* note 4, at 1764.

17. *Id.*

nent today. With the U.S. Supreme Court's decision in *United States v. Windsor*, concerns for same-sex couples' rights are increasingly being considered at both the federal and state levels, but questions remain regarding the next steps.¹⁸ As the number of same-sex couples increases in the United States, problems will continue to arise when one state fails to recognize a same-sex marriage that is legally valid in another state.

This Note examines the problems facing same-sex couples in estate planning and the consequences of and reasons behind varying state intestacy statutes. Additionally, this Note proposes the Supreme Court should rule that state bans on same-sex marriage are unconstitutional and that states must apply the rules of comity in recognizing other states' valid same-sex marriages. To do so, the Court should address the remaining questions in *Windsor* and reject the federal government's traditional deference to state law on certain matters of domestic relations by adopting a public policy on interjurisdictional recognition. Part II discusses the effects of marriage, the background of the Defense of Marriage Act (DOMA), the lingering issues left by the decision in *Windsor*, and recent gains in federal benefits for same-sex couples. Part III discusses the comity doctrine, along with the effects of the public policy exception, and provides a comparison between Washington—a state that recently recognized same-sex marriage—and Texas—a state that considers same-sex marriage contrary to its public policy. Part IV proposes that the Supreme Court provide a uniform ruling regarding the interjurisdictional recognition of same-sex marriage. Part V concludes.

II. SAME-SEX RELATIONSHIPS COMPARED TO TRADITIONAL MARRIAGES

A. The Effects of Marriage

Marriage triggers the legal recognition of both federal and state death benefits as well as legal presumptions such as tax deductions and automatic inheritance rights.¹⁹ These presumptions, however, are not simple or automatic for same-sex couples whose marriages, or equivalent arrangements, are not legally recognized.²⁰ Although traditionally married couples receive wide protection of their assets and heirs, the lack of legal presumptions for same-sex couples leaves them with very little legal protection upon death.²¹

18. See generally W. Burlette Carter, *The "Federal Law of Marriage": Deference, Deviation, and DOMA*, 21 AM. U. J. GENDER SOC. POL'Y & L. 705 (2013).

19. See Bouchard & Zadworny, *supra* note 7, at 721; Foltz, *supra* note 1, at 495.

20. Bouchard & Zadworny, *supra* note 7, at 721.

21. *Id.* at 721–22.

One marriage inheritance benefit is the spousal elective share, an estate-planning tool that statutorily guarantees the surviving spouse a share of the decedent's estate in the event that a will is no longer relevant or the decedent fails to adequately provide for the spouse upon death.²² As mentioned in Part I, surviving spouses are also entitled to the protections offered by intestacy statutes in the event the decedent does not, or chooses not to, leave a will.²³ In the event that an individual dies intestate leaving no *legal* spouse behind, statutory provisions control and usually give the majority of the estate to the decedent's descendants or surviving parents.²⁴ Each state has its own statutory scheme allowing distribution to the decedent's heirs, but many states follow all or portions of the Uniform Probate Code, which provides distribution to descendants according to representation, followed by distribution to the decedent's parents, and so forth.²⁵ While this scheme may be favorable to many married couples, it assumes an automatic distribution scheme that may not resemble the modern family structure and excludes same-sex spouses in states that define "spouse" as someone of the opposite sex. Therefore, a surviving same-sex spouse fails to receive the same automatic protection as a surviving opposite-sex spouse.²⁶ Unfortunately, many same-sex couples may assume that intestacy statutes are uniform throughout the country and do not realize their relationship or marriage, and their interest in their spouse's estate, is not protected in all jurisdictions.²⁷

B. *The Defense of Marriage Act*

DOMA was enacted in 1996; it provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.²⁸

DOMA was enacted by Congress to "define and protect the institution of marriage."²⁹ The Act provided that under an exception to the Full Faith

22. *Id.* at 722.

23. *Id.* at 723.

24. *Id.* at 725–26.

25. See UNIF. PROBATE CODE § 2-103 (amended 2010).

26. See Bouchard & Zadworny, *supra* note 7, at 721.

27. Hammerle, *supra* note 4, at 1771–72.

28. Defense of Marriage Act, Pub. L. No. 104–199, § 3(a), 110 Stat. 2419 (1996).

29. H.R. Res. 3396, 104th Cong. (1996) (enacted).

and Credit Clause,³⁰ states were not required to recognize other states' laws when the laws contravened the forum state's public policy.³¹ Under DOMA, states were not required to recognize same-sex marriages performed in other states even if the marriage was valid under another state's law.³² Consequently, states enacted their own statutes, often referred to as "little DOMAs," which explicitly stated that same-sex marriage was against public policy.³³ These little DOMAs were often executed through state statutes or amendments to state constitutions.³⁴ Invoking such public policy exceptions creates significant problems for same-sex couples who rely on intestacy statutes in jurisdictions where the marriage or union is not legally recognized.³⁵

C. United States v. Windsor and the Questions It Left Unresolved

In *Windsor*, the Supreme Court held that DOMA was an unconstitutional "deprivation of the liberty of the person protected by the Fifth Amendment"³⁶ The Court held that, by passing DOMA, Congress interfered with each states' right to define marriage in its own terms.³⁷ As a result, DOMA was deemed unconstitutional.³⁸ The Court reasoned that DOMA could not survive because marriage is central to domestic relations law, and the responsibility of the states to regulate domestic relations is an "important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people."³⁹ Domestic relations law is not explicitly defined, but rather is incorporated in the definition of "family law," which refers to "marriage, divorce, adoption, child custody and support, child abuse and neglect, paternity, assisted reproductive technology, and other domestic-relations issues."⁴⁰ Courts have traditionally held that a state has the absolute right to "prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."⁴¹ The enactment of DOMA, therefore, was an unusual devia-

30. U.S. CONST. art. IV, § 1.

31. Hammerle, *supra* note 4, at 1765.

32. Emily J. Sack, *Civil Unions and the Meaning of the Public Policy Exception at the Boundaries of Domestic Relations Law*, 3 AVE MARIA L. REV. 497, 503 (2005).

33. *Id.*

34. *Id.*

35. Hammerle, *supra* note 4, at 1772.

36. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

37. *Id.* at 2691–92.

38. *Id.* at 2692.

39. *Id.* at 2693.

40. BLACK'S LAW DICTIONARY (10th ed. 2014) (Westlaw).

41. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (quoting *Penoyer v. Neff*, 95 U.S. 714, 734–35 (1878)).

tion from these principles.⁴² Furthermore, the Act was held to be unconstitutional because it significantly disadvantaged same-sex couples by establishing a separate class of citizens.⁴³

Unfortunately, the decision in *Windsor* left many questions unresolved.⁴⁴ First, while the Court acknowledged that the federal government may diverge from states on marriage when federal policies are at issue, it did not draw a distinction between state and federal power.⁴⁵ The lack of such a distinction left states to question their actual authority in domestic matters.⁴⁶ Second, the Court did not define the purpose of marriage in the United States, leaving a continuing debate regarding the purpose of marriage: procreation or the creation of family relationships.⁴⁷ Third, the Court did not address whether the federal government could grant same-sex couples and heterosexual couples uniform benefits as a matter of equal protection if states that recognized such marriages did not distinguish between the two groups of couples.⁴⁸ The granting of federal benefits concerns many same-sex couples, and while great strides have been made in this area since *Windsor*, these remaining questions must ultimately be resolved to prevent disparate treatment of same-sex couples.

D. Gains in Federal Benefits to Same-Sex Couples

While the “provision of benefits to same-sex couples is incredibly disparate across different states,”⁴⁹ gains are being made for same-sex couples at the federal level. Following the decision in *Windsor*, several federal departments made strides toward the federal recognition of same-sex marriages. For example, in August 2013, the IRS stated that all legally married same-sex couples would be allowed to file joint federal tax returns, even in states where the marriage is not legally valid or recognized.⁵⁰ Under this rule, same-sex spouses are now treated as married couples for all federal tax purposes, including income, gift, and estate taxes.⁵¹ Additionally, the Department of Defense granted military spousal support and veteran benefits to same-sex couples, and the U.S. Office of Personnel Management declared that it would extend benefits to legal

42. *Windsor*, 133 S. Ct. at 2693.

43. *Id.*

44. Carter, *supra* note 18, at 708.

45. *Id.* at 709.

46. *Id.*

47. *Id.*

48. *Id.*

49. Hammerle, *supra* note 4, at 1766.

50. See Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (2013).

51. See *id.*

same-sex spouses of federal employees.⁵² Social security benefits were also granted to same-sex married couples.⁵³

Further, in February 2014, U.S. Attorney General Eric Holder announced that he would apply the *Windsor* ruling to Justice Department employees and give same-sex spouses certain benefits granted to heterosexual spouses.⁵⁴ The Justice Department runs a number of benefit programs, some of which are now be available to same-sex married couples.⁵⁵ Same-sex marriages are now recognized in various federal legal matters, such as bankruptcies, disputes over prison benefits, and marital evidentiary privileges.⁵⁶ Accordingly, same-sex marriages are to be afforded the “same privileges, protections and rights as opposite-sex marriages under federal law”—such as the right to not be compelled to testify against each other—in every proceeding where the Department of Justice stands on behalf of the United States.⁵⁷ This expansion of federal benefits also applies to employees residing in states that do not recognize same-sex marriage, but will only apply to federal benefits.⁵⁸ Such benefits also include benefits to surviving spouses of public safety officers who suffer catastrophic or fatal injuries in the line of duty.⁵⁹

While the federal government still left a great deal of deference to the states regarding state benefits and taxes for same-sex spouses, the federal changes made since *Windsor* indicate a drive toward uniform recognition in the realm of federal matters that will hopefully continue. These federal gains for same-sex couples do not, however, require that states follow suit regarding certain state-granted spousal benefits.⁶⁰ For the moment, federal law has not completely preempted states’ rights to regulate domestic policies, as discussed in the following section.

52. *Federal Government to Expand Recognition of Same-Sex Marriages*, CBS NEWS (Feb. 8, 2014, 2:34 PM), <http://www.cbsnews.com/news/federal-government-to-expand-recognition-of-same-sex-marriages/> [hereinafter CBS NEWS].

53. *Id.*

54. *Id.*

55. *Id.*

56. Evan Perez, *U.S. Expands Legal Benefits, Services for Same-Sex Marriages*, CNN POLITICS (last updated Feb. 10, 2014, 3:15 PM), <http://www.cnn.com/2014/02/08/politics/holder-same-sex-marriage-rights/>.

57. CBS NEWS, *supra* note 52.

58. Perez, *supra* note 56.

59. CBS NEWS, *supra* note 52.

60. *See* Perez, *supra* note 56 (federal benefits will only apply where the U.S. government is involved).

III. THE REAL EFFECTS OF DIFFERING STATE LAWS AND POLICIES

A. *The Comity Doctrine and Conflict of Laws*

Traditionally, rules of comity were used to resolve local conflicts of law.⁶¹ The comity doctrine is a voluntary recognition by one state of another state's laws as a sign of respect for that jurisdiction's sovereignty.⁶² When exercised by a court, the comity doctrine leads to the recognition and enforcement of a foreign state's laws where such laws do not conflict with local law, work injustice on the local citizens, or violate local public policy.⁶³

The Restatement (Second) of Conflict of Laws describes conflict of laws as "that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state."⁶⁴ Early courts in America used the theory of conflict of laws to help understand what matters should be considered "local" matters.⁶⁵ Historically, the federal government has deferred to state law policy decisions with respect to domestic relations because the states have a legitimate interest in the marital status of individuals within its borders.⁶⁶ Thus, it follows that the recognition of same-sex marriages has been left to the states, making such marriages a conflict of laws issue.

However, the federal government has deviated from local deference—refusing to allow states to make local laws and policy decisions—when deference would conflict with an important federal policy.⁶⁷ In some cases, the federal government completely rejected the validity of some marriages; for example, marriages formed under Utah's polygamy laws and fraudulent marriages formed for the purpose of usurping immigration laws.⁶⁸ This history of deviation is a likely mechanism to argue that the federal government should not give such strong deference to state law on the matter of the recognition of same-sex marriage.⁶⁹ Justifications for deviation include: (1) when local law conflicts with a perceived constitutional duty; (2) when local law would undercut an existing federal statute, rule, or treaty; and (3) when local law would jeopardize a federal policy that stands apart from a specific statute, rule, or treaty, and

61. Carter, *supra* note 18, at 717.

62. *Id.*

63. 15A C.J.S. *Conflict of Laws* § 7 (2015).

64. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971).

65. Carter, *supra*, note 18, at 717.

66. *See* United States v. Windsor, 133 S. Ct. 2675, 2691 (2013); Williams v. North Carolina, 317 U.S. 287, 298 (1942).

67. Carter, *supra* note 18, at 761.

68. *Id.*

69. *See id.* at 761–62.

is not constitutionally compelled.⁷⁰ It is clear that deference to state laws regarding domestic relations has not always been afforded and thus, does not have to remain the legal standard of the federal government going forward with same-sex issues.⁷¹

In addition to the rules of comity, the Full Faith and Credit Clause directs states to recognize other states' laws.⁷² The Clause reads: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."⁷³ The Clause was "designed to ensure *consistency in enforcement of legal actions* throughout the states and to prevent citizens' rights and responsibilities from vacillating as they cross state lines."⁷⁴ As a vital part of the Constitution, the Full Faith and Credit Clause promotes unity of the states, free movement throughout the country, and mutual respect among the states.⁷⁵

However, the Clause does not direct just how much deference should be given by one state to the laws, records, and judgments of another.⁷⁶ Thus, the Supreme Court has treated legal actions differently. The Court has treated laws, records, and judgments in various manners differently, giving each legal action different recognition under the Full Faith and Credit Clause.⁷⁷ For example, the Court has held that judgments are "exacting" under the Clause, meaning that if a final judgment is rendered in one state by a court with adjudicatory authority over the subject matter and persons, then the judgment is recognized and enforced throughout all states.⁷⁸

In contrast, courts have had difficulty determining the category in which marriage belongs, and subsequently, the level of recognition it should be afforded by other states.⁷⁹ Based on this, the Supreme Court has often applied a "choice of law 'interests' analysis" when considering the recognition of laws from one state to another.⁸⁰ Under this analysis, the rules of comity and adherence to the Clause were subject to an exception when the "foreign rule" would violate the forum state's public poli-

70. *Id.* at 761–64.

71. *See id.* at 761–66.

72. Sack, *supra* note 32, at 499.

73. U.S. CONST. art. IV, § 1.

74. Sack, *supra* note 32, at 499 (emphasis added).

75. *Id.*

76. *Id.*

77. *Id.* at 499.

78. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

79. Sack, *supra* note 32, at 501.

80. *Id.* at 500.

cy.⁸¹ Unfortunately, this public policy exception has the potential to displace all other choice of law rules where a state's law is at issue because of the forum state's interest in, or connection to, the issue.⁸²

Under the common law, marriage was considered to be a contract with special rules.⁸³ The Restatement (Second) of Conflict of Laws states that a marriage is valid everywhere if the requirements of the marriage laws of the state where the marriage takes place are met.⁸⁴ One exception to the recognition of a marriage's validity occurs when a state chooses to deny the validation and effect of a marriage because the marriage is against the state's strong public policy.⁸⁵ While the location in which the marriage took place controls the validity of the marriage, rules applying the "incidents of marriage" analysis have been subject to more variable standards; usually, the domicile with the closest contact to the marriage often controls.⁸⁶ The incidents of marriage traditionally included the rights and disabilities of a wife and the obligations of a husband.⁸⁷ Under the common law, states used public policy grounds to emphasize their failure to recognize divergent foreign law on certain marital (such as the capacity to marry) and divorce issues.⁸⁸ However, there was little evidence that under the common law, marriage was so "uniquely local" that federal power could not touch it.⁸⁹

Today, a public policy exception gives each state the right to deny full faith and credit to a valid out-of-state marriage if the marriage violates the forum state's strong public policy and the forum state has the "most significant relationship to the spouses and the marriage at the time of the marriage."⁹⁰ This usually means that at least one of the spouses was domiciled in the forum state at the time of the marriage and both spouses resided in the forum state after marriage.⁹¹ This exception means that courts are not required to enforce policies contrary to the state's own notions of justice and fairness rooted in the choice of law rule.⁹² One rationale for the exception is that the forum state is vindicating its own le-

81. Carter, *supra* note 18, at 718.

82. See Koppelman, *supra* note 3, at 935; Sack, *supra* note 32, at 500.

83. Carter, *supra* note 18, at 718.

84. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971).

85. See *id.*; Dawn Allison, *The Importance of Estate Planning Within the Gay and Lesbian Community*, 23 T. MARSHALL L. REV. 445, 459 (1998).

86. Carter, *supra* note 18, at 718.

87. *Id.* at 719.

88. *Id.*

89. *Id.*

90. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971); Sack, *supra* note 32, at 501.

91. Sack, *supra* note 32, at 501.

92. Koppelman, *supra* note 3, at 934-35.

gitimate interests by invoking the public policy exception; the state is not trying to assert its control over a situation foreign to its concerns.⁹³ For this reason, states assert that they have a reasonably legitimate governmental interest in the incidents of the marriage, such as procreating or child rearing.⁹⁴ Another rationale for the exception is that some foreign laws are found to be so repugnant to a state that they should not be enforced within the forum state's borders.⁹⁵

To be considered against a “strong public policy,” a similar marriage (or issue) must be void in the forum state.⁹⁶ Because of the Full Faith and Credit Clause's effect, the refusal to recognize a valid out-of-state marriage cannot be based solely upon the fact that the forum state does not permit that type of marriage under its own laws—it must also somehow essentially violate the forum state's public policy.⁹⁷ However, the analysis of state marriage policies under the Full Faith and Credit Clause and the comity doctrine was significantly altered by DOMA: it allowed states to refuse recognition of out-of-state, same-sex marriages even if the marriages were valid in the state where the marriage was contracted.⁹⁸ Pursuant to DOMA, states then enacted their own little DOMAs through statutes or constitutional amendments—which stated their public policy against same-sex marriage.⁹⁹ Founded upon the public policy exception, the little DOMAs permitted states to refuse recognition of what would otherwise be legal marriages.¹⁰⁰

B. The Lack of Interstate Recognition and its Effect on Estate Planning

Discord among jurisdictions leaves attorneys, judges, and married individuals without a clear understanding of the rights afforded to same-sex couples.¹⁰¹ Currently, thirty-six states and Washington, D.C. allow same-sex marriage; furthermore, the same-sex marriage bans in the fourteen remaining states are all being challenged in court.¹⁰² These fourteen states either give no legal recognition to same-sex relationships or grant only limited rights to same-sex couples that do not include certain

93. *Id.* at 938.

94. See Koppelman, *supra* note 3, at 927; see also Sack, *supra* note 32.

95. See Koppelman, *supra* note 3, at 939.

96. Sack, *supra* note 32, at 502.

97. *Id.*

98. *Id.* at 503.

99. *Id.*

100. See *id.*

101. See Lisa Yurwit Bergstrom & W. James Denvil, *Availability of Spousal Privileges for Same-Sex Couples*, 11 U. MD. L.J. RACE, RELIGION, GEND. & CLASS 224, 227 (2011).

102. Lyle Denniston, *Court Will Rule on Same-Sex Marriage*, SCOTUSBLOG (Jan. 16, 2015, 7:51 PM), <http://www.scotusblog.com/2015/01/court-will-rule-on-same-sex-marriage/>.

spousal privileges.¹⁰³ Little DOMAs that explicitly ban the recognition of any marriage-like union of same-sex couples prevent partners, who may be legally married in another state, from asserting marital privileges in the forum state.¹⁰⁴ Current estate law, which dictates that the applicable law governing a decedent's estate is the state in which the decedent was domiciled at death, emphasizes that states need not recognize the validity of same-sex marriages performed in other states.¹⁰⁵

However, courts may choose to recognize marriages that are not valid in the litigation forum by using the "incidents of marriage" approach to avoid intestacy issues.¹⁰⁶ Under this approach, courts examine a specific incident of the marriage, such as the right to inherit, and recognize the marriage strictly for that purpose.¹⁰⁷ Some courts will even base recognition of the marriage on the state's intestate succession policies rather than the state's same-sex marriage laws.¹⁰⁸ Traditionally, in cases involving the recognition of marriage, courts will balance the forum state's "public policy interest against the interests of other states in effectuating their own marriage laws and the interests of the parties in having their marriages recognized in the forum."¹⁰⁹ This balancing effort, however, is sometimes displaced by another approach—a blanket rule of non-recognition—where courts, in a state that does not recognize same-sex marriage, will refuse to recognize a marriage contracted in another state for "any purpose whatsoever."¹¹⁰ Therefore, inconsistent state intestacy proceedings result in unpredictability for same-sex couples across the board.

C. Differing Intestacy Statutes

As discussed above, intestacy statutes establish rules for the division of a decedent's probate property in the event that the decedent fails to leave a valid will.¹¹¹ While the purpose of intestacy statutes is to reflect the intent of the testator, the statutory provisions often fall short of actually fulfilling the decedent's wishes. These statutes are often founded upon the marital relationship¹¹² and provide that the surviving spouse

103. See Bergstrom & Denvil, *supra* note 101, at 227.

104. See Denniston, *supra* note 102.

105. Foltz, *supra* note 1, at 500. For example, "Except as otherwise provided in this Code, this Code applies to (1) the affairs and estates of decedents . . . domiciled in this state . . ." UNIF. PROBATE CODE § 1-301 (amended 2006).

106. Hammerle, *supra* note 4, at 1775.

107. *Id.*

108. *Id.* at 1778.

109. Koppelman, *supra* note 3, at 923.

110. *Id.* at 924.

111. Foltz, *supra* note 1, at 501.

112. *Id.* at 501-02.

take all or most of the decedent's estate.¹¹³ As such, "intestacy statutes protect only the rights of *lawfully married* survivors."¹¹⁴ Consequently, same-sex spouses are excluded from intestacy inheritance when they are domiciled in states that do not recognize same-sex marriage as a legal marriage.¹¹⁵ Therefore, same-sex spouses are prevented from receiving shares of their deceased spouse's estate when no valid will exists because they are not legally recognized as "heirs" in the statute.¹¹⁶ Rather, intestacy laws use a type of "relationship hierarchy," and a decedent's inheritance is usually directly conferred on biological family members.¹¹⁷ This focus on distribution to biological relatives can ultimately cut the same-sex partner "out of any share of the decedent's estate."¹¹⁸

Unfortunately, the laws of intestacy and marriage are not the same in any two states.¹¹⁹ Although a majority of states have adopted particular sections of the Uniform Probate Code, only about one-third have adopted significant portions of the Code.¹²⁰ These inconsistencies create problems for same-sex couples that relocate to states where same-sex marriage is not legally recognized. Dying intestate is a common occurrence, and many same-sex couples die without leaving a will behind.¹²¹ The expense of the unique estate-planning techniques often required by same-sex couples increases the unlikelihood of the parties creating a will.¹²² Even in states where same-sex marriage is legal, the need for specialized estate planning remains a significant problem because same-sex couples face recognition issues if they relocate to another state.¹²³ Some states, however, afford equal intestacy rights to same-sex couples without extending complete marital benefits.¹²⁴ This has been accomplished by some jurisdictions through reciprocal-beneficiary legislation or domestic partnerships.¹²⁵ While this is a progressive gain for same-sex couples, these inconsistencies in recognition will continue to create problems.

113. Hammerle, *supra* note 4, at 1764 (emphasis added).

114. *Id.*

115. *Id.*

116. Foltz, *supra* note 1, at 501.

117. Bouchard & Zadworny, *supra* note 7, at 725.

118. *Id.*

119. Allison, *supra* note 85, at 459.

120. *Id.* at 459–60.

121. Foltz, *supra* note 1, at 503.

122. *Id.*

123. *Id.* at 499.

124. *Id.* at 517.

125. *Id.*

D. A Comparison: Washington and Texas

Same-sex couples likely have a reasonable expectation that their estate will pass to their partner upon death, particularly if they are domiciled in a state where same-sex marriage is recognized.¹²⁶ However, in the event that same-sex couples leave the state where their marriage was valid, they are often surprised to find disparate treatment upon a spouse's death.¹²⁷ This section discusses the events that would likely take place should a same-sex couple, legally married in Washington, move to Texas, where same-sex marriage is not yet recognized.¹²⁸ As discussed above, some courts use state public policy exceptions to prevent the distribution of a decedent's estate to a same-sex spouse.¹²⁹ Consequently, a blanket, non-recognition rule would place same-sex couples in a difficult position and their rights would be lost once they crossed into a state that fails to recognize their marriage.¹³⁰ On the other hand, some courts use the "incidents of marriage" approach to dictate the division of an intestate decedent's estate to a same-sex surviving spouse which is based on another legal issue, such as tax consequences.¹³¹

1. Washington

In 2007, Washington took its first step toward legitimizing same-sex relationships, when it enacted legislation that bestowed equal inheritance rights upon state registered domestic partnerships; however, same-sex marriage was still not legal.¹³² Under Washington's statute, a surviving domestic partner is granted the same status as a surviving spouse and is treated as an "heir-at-law" for purposes of estate distribution.¹³³ Washington's intestacy statute provides that in the event an individual dies intestate, the shares of the estate are first distributed to the "surviving spouse or state registered domestic partner."¹³⁴ As a result, any state registered domestic partner is eligible to receive a share of the

126. Hammerle, *supra* note 4, at 1779.

127. *Id.*

128. TEX. FAMILY CODE ANN. § 6.204(b) (West, Westlaw through 2013 Third Called Sess. of 83d Legis.). This provision has been held unconstitutional but is currently in effect pending appeal to the Fifth Circuit Court of Appeals. *De Leon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014) ("Applying the United States Constitution and the legal principles binding on this Court by Supreme Court precedent, the Court finds that Article I, Section 32 of the Texas Constitution and corresponding provisions of the Texas Family Code are unconstitutional.").

129. *See supra* Part III.B.

130. Koppelman, *supra* note 3, at 925.

131. *See supra* notes 105–106 and accompanying text.

132. Foltz, *supra* note 1, at 521.

133. *Id.*

134. WASH. REV. CODE § 11.04.015(1) (2010).

decedent's estate. This framework likely matches the decedent's intent and reflects the evolving adaptation of state intestacy statutes.

The Washington state legislature chose to extend such fundamental inheritance rights to state registered domestic partners despite recent case law upholding the state's own little DOMA, which prohibited same-sex marriage.¹³⁵ The legislature explained that because same-sex couples could not marry, they lacked access to certain traditional marital rights and benefits—such as death benefits.¹³⁶ The legislature also noted, “Although many of these rights and benefits may be secured by private agreement, doing so is often costly and complex”¹³⁷ Thus, the legislature acknowledged that while same-sex couples are capable of creating inheritance rights through “contract-based agreements such as wills, trusts, and joint-ownership arrangements[,]” such agreements are burdensome and do not always guarantee inheritance rights.¹³⁸

Washington's legislative findings, which led to the enactment of the state registered domestic partner system, are comparable to states that have enacted similar laws.¹³⁹ All such “statutes were enacted to further the state's interest in ‘promoting family relationships and protecting family members during life crises.’”¹⁴⁰

Finally, in December 2012, Washington voters passed Referendum 74, which amended RCW 26.04.010, which now provides that a “[m]arriage is a civil contract between two persons.”¹⁴¹ By this amendment, Washington thus legalized same-sex marriage and recognized unions other than domestic partnerships. The statute further explains that rules of law must be gender neutral when implementing the rights and responsibilities of spouses so that they are applicable to same-sex spouses.¹⁴² With the passage of same-sex marriage, same-sex couples that now get married and are domiciled in Washington will be afforded automatic intestacy protections and the same rights as traditionally married couples under the state's estate laws.

135. *Andersen v. King Cnty.*, 138 P.3d 963, 969 (Wash. 2006) (holding that Washington's DOMA was constitutional because it bore a reasonable relationship to legitimate state interests such as procreation and child rearing); *see also* Foltz, *supra* note 1, at 521.

136. Foltz, *supra* note 1, at 522.

137. *Id.* 522 n.209 (quoting WASH. REV. CODE ANN. § 26.60.010 (West, Westlaw through 2011 Laws chapter 1 & 2)).

138. *Id.*

139. *Id.* at 521.

140. *Id.* at 522 n.209 (quoting WASH. REV. CODE ANN. § 26.60.010 (West, Westlaw through 2011 Laws chapter 1 & 2)).

141. WASH. REV. CODE § 26.04.010(1) (2012).

142. WASH. REV. CODE § 26.04.010(3) (2012).

2. Texas

In contrast to Washington, Texas has continued to refuse to recognize same-sex marriages that occur in other states because such unions are against the state's public policy.¹⁴³ This stems from the Texas constitution, where marriage is defined as "the union of one man and one woman."¹⁴⁴ The marriage provision further declares that the state will not "recognize any legal status identical or similar to marriage."¹⁴⁵ Additionally, the state's family code expressly states that a marriage between persons of the same sex is contrary to the state's public policy and is therefore void in Texas.¹⁴⁶ The statute also provides that neither the state nor an agency of the state shall recognize or validate a same-sex marriage or any relationship status that serves as an alternative to marriage that took place in any other jurisdiction.¹⁴⁷ Thus, the family statutory provisions and constitutional amendment, acting as little DOMAs, mean that Texas will not give recognition to a same-sex civil union, domestic partnership, or marriage that validly occurs in another state.

Unlike Washington's intestacy statute that protects state registered domestic partners and all marriages, Texas's intestacy statute only protects a "spouse" when an individual dies intestate.¹⁴⁸ While the statute does not define "spouse,"¹⁴⁹ it is clear that the intestacy statute must be read in conjunction with the Texas family code and the Texas constitution;¹⁵⁰ thus, for a spouse to take in intestacy, they must be one who is a heterosexual partner. There is no provision for registered partners, and therefore, there is no distribution protection for same-sex couples in Texas who die intestate. Instead, the Texas courts and legislature have determined that same-sex couples must address their particular desires through other legal vehicles such as private contracts, and guardianship.¹⁵¹ The Texas court of appeals declined to adopt the "marriage-like relationship" doctrine, reasoning that the doctrine is against the state's public policy and cannot be enforced as an equitable remedy.¹⁵² The

143. TEX. FAMILY CODE ANN. § 6.204(b) (West, Westlaw through the 2013 Third Called Sess. of 83d Legis.).

144. TEX. CONST. art. I, § 32(a).

145. *Id.* § 32(b).

146. TEX. FAMILY CODE ANN. § 6.204(b) (West, Westlaw through the 2013 Third Called Sess. of 83d Legis.).

147. *Id.* § 6.204(c).

148. TEX. ESTATE CODE ANN. § 201.001 (West, Westlaw through the 2013 Third Called Sess. of 83d Legis.).

149. *See id.* § 22 (no definition of spouse in the defined terms section).

150. *See Ross v. Goldstein*, 203 S.W.3d 508, 514 (Tex. App. 2006).

151. TEX. FAMILY CODE ANN. § 6.204 (West, Westlaw through the 2013 Third Called Sess. of 83d Legis.).

152. *Ross*, 203 S.W.3d at 514.

court further found that the “State’s public policy is unambiguous, clear, and controlling on the question of creating a new equitable remedy akin to marriage[,]” and the court was unable to create such an equitable remedy.¹⁵³

Additionally, Texas’s failure to recognize same-sex marriages has resulted in a lack of standing for same-sex couples in Texas courts to proceed with same-sex divorce cases where the marriages arose from another state.¹⁵⁴ Therefore, Texas district courts do not have subject-matter jurisdiction to hear same-sex divorce cases, and the Texas court of appeals has held that the Texas statute that compels this result does not violate the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁵

However, a district court decision in San Antonio left resident same-sex couples hopeful that change is soon on the horizon for the conservative state. On February 26, 2014, in response to a challenge by two same-sex couples, a federal judge in Texas declared the state’s ban on same-sex marriage unconstitutional.¹⁵⁶ Judge Orlando Garcia ruled that section 32 of the Texas Constitution violated the Equal Protection Clause because the defendants could not assert a legitimate governmental purpose for the ban on same-sex marriage.¹⁵⁷ The judge declared, “Without a rational relation to a legitimate governmental purpose, state-imposed inequality can find no refuge in our United States Constitution.” Judge Garcia added that he was not making the ruling in order to defy the people of Texas.¹⁵⁸ The case was appealed to the Fifth Circuit and oral arguments were heard on January 10, 2015.¹⁵⁹ The court is currently reviewing the same-sex marriage bans in Texas, Louisiana, and Mississippi.¹⁶⁰ With the Supreme Court set to rule on same-sex marriage bans this summer, this could mean that the Fifth Circuit court will be “dragging its heels” before making a decision.¹⁶¹

153. *Id.*

154. *See In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 670 (Tex. App. 2010).

155. *Id.* at 659.

156. *See De Leon v. Perry*, 975 F. Supp. 2d 632, 640 (W.D. Tex. 2014).

157. *Id.* at 652–53.

158. Doug Stanglin & Michael Winter, *Federal Judge Strikes Down Texas Gay Marriage Ban*, USA TODAY (Feb. 26, 2014, 10:27 PM), <http://www.usatoday.com/story/news/nation/2014/02/26/texas-gay-marriage-ban/5839579/>.

159. Pamela Colloff, *Fifth Circuit Hears Texas’ Same-Sex Marriage Lawsuit*, TEXAS MONTHLY (Jan. 10, 2015, 2:45 AM), <http://www.texasmonthly.com/story/fifth-circuit-hears-texas'-same-sex-marriage-lawsuit>.

160. Lauren McGaughy, *Supreme Court Decision to Take Up Gay Marriage Could Delay Texas Case*, CHRON (Jan. 16, 2015, 4:46 PM), <http://www.chron.com/news/politics/texas/article/Supreme-Court-decision-to-take-up-gay-marriage-6020807.php>.

161. *Id.*

The district court's decision and the pending Fifth Circuit decision have led to increased public support for same-sex marriage in Texas and have prompted lawmakers to file bills on the issue. For example, proposed House Bill 130 would allow same-sex marriages by changing the constitution's definition of marriage.¹⁶² Another proposed resolution would repeal the constitutional ban on same-sex marriages.¹⁶³ Other proposed legislation has been filed as well, ranging from adoption to religious issues.¹⁶⁴ Within the next year, pending litigation and legislation, Texas may undergo a significant change in its public policy, ultimately resulting in a change of the state's intestacy statutes and affording same-sex couples protection of their estates.

3. Consequences

As the differing laws and policies in Washington and Texas currently stand, a same-sex couple's transition between the two states would prove to be very difficult.¹⁶⁵ As an example, assume that a same-sex couple gets married in Washington, and their marriage is legally valid under state law. In Washington, they would receive all of the traditional marital protections and benefits afforded by statute.¹⁶⁶ In the event that the couple chooses not to or fails to create a will to provide for the surviving spouse, Washington's intestacy statute would leave the surviving spouse with a share of the decedent's estate by default.

However, if the couple were to relocate to Texas after getting married, they would receive no spousal protection or benefits, even upon the death of one of the spouses.¹⁶⁷ First, the couple would not even be considered legally married in the state of Texas due to Texas's policy against same-sex marriage.¹⁶⁸ This means that the couple would not receive any state-recognized benefits or privileges of marriage. Second, if one of the spouses should die intestate, the surviving spouse would not receive a share of the decedent's estate based on Texas's intestacy provisions. Without the recognition of same-sex marriage or alterations to its family code and constitution, Texas's intestacy statute does not allow property

162. H.R. 130, 84th Leg., Reg. Sess. (Tex. 2015).

163. H.R.J. Res. 34, 84th Leg., Reg. Sess. (Tex. 2015).

164. See Anna M. Tinsley, *Gay Marriage: A 'Hot Spur' to Texans*, STAR-TELEGRAM (Feb. 14, 2015), <http://www.star-telegram.com/news/politics-government/article10271435.html>.

165. As of February 2015, not taking into account the pending appeal regarding the constitutionality of Texas's ban on gay marriage. See *supra* Part III.D.2.

166. See *supra* Part III.D.1.

167. See *supra* Part III.D.2.

168. TEX. FAMILY CODE ANN. § 6.204(b) (West, Westlaw through 2013 Third Called Sess. of 83d Legis.). As noted above, this provision has been held unconstitutional, pending appeal. See *supra*, note 128.

to pass to a domestic partner or otherwise. The surviving spouse would, therefore, be afforded no legal protection of their rights or marital benefits.

This example demonstrates the importance of estate planning for same-sex couples and the use of testamentary tools to account for death benefits. For now, whether seeking spousal benefits, distribution rights to a decedent's estate, or a divorce, same-sex couples domiciled in Texas will continue to struggle. Although estate planning does not account for all spousal privileges, it remains the most effective option while Texas awaits the decision regarding its constitutional ban.

IV. PROPOSAL

The rapidly changing views on same-sex marriage in the United States are apparent through the Supreme Court's overturning of DOMA and through the increasing state recognition of same-sex marriages. Furthermore, new federal legislation that recognizes same-sex marriages for the purpose of federal benefits demonstrates how far the country has come just within the past few years.¹⁶⁹ However, while many states await this summer's anticipated Supreme Court decision, the rules of comity intertwined with the public policy exceptions still leave many questions and concerns regarding the future of same-sex rights unresolved.

In April 2015, the Court held a hearing on four cases from the U.S. Court of Appeals for the Sixth Circuit and will issue a ruling sometime in the summer, signifying a turning point for same-sex couples in the United States.¹⁷⁰ The Court stated that it will rule on two issues: (1) the power of the states to ban same-sex marriages; and (2) the power of the states to refuse to recognize same-sex marriages performed in another state.¹⁷¹ Until the Court rules on the controversy, the Eleventh Circuit has put any same-sex marriage cases on hold.¹⁷² While no other circuits have announced an official hold, it is likely that at least the Fifth Circuit will also wait to rule on pending same-sex marriage appeals.¹⁷³

Although limiting review to these two issues, the Court will likely have to address certain constitutional tests that must be applied to the bans and consider the weight given to state policies in justifying the bans. In doing so, the Court should consider the remaining questions re-

169. *See supra* Part II.D.

170. Lyle Denniston, *Eleventh Circuit Puts Off Same-Sex Marriage Cases*, SCOTUSBLOG (Feb. 5, 2015, 7:31 AM), <http://www.scotusblog.com/2015/02/eleventh-circuit-puts-off-same-sex-marriage-cases/>.

171. Denniston, *supra* note 102.

172. Denniston, *supra* note 170.

173. *See supra* Part III.D.2.

garding certain state benefits, the distinction between federal and state power, and the purpose of marriage from *Windsor*. The Court should then declare state bans against same-sex marriage to be unconstitutional and require states to act within the rules of comity to recognize other states' legally valid marriages. The Court will have to do this by deviating from local law, and by proposing a federal public policy that supports interjurisdictional recognition of same-sex marriages.

While the incidents of marriage that states attach to valid marriages within their borders are given a certain deference, the Court must look to history to justify the position that local deference in domestic relations law has not always prevailed.¹⁷⁴ The federal government has deviated from local deference when such deference would conflict with an important federal public policy, and such a mechanism must be used to justify the matter of recognition.¹⁷⁵ Because history has proven that the federal government will act with public policy in mind when refusing to give deference to state government, the federal government must adopt a public policy for interjurisdictional recognition of same-sex marriages in order to maintain uniformity across the states and emulate the purpose of the Full Faith and Credit Clause. Furthermore, history and the common law have not demonstrated that marriage was so "uniquely local" that federal power cannot touch it.¹⁷⁶

Such a deviation will result in a loss of choice of law rules for states in certain domestic matters, but it would provide stability for same-sex couples and resolve inconsistencies in recognition and state benefits. This deviation from local deference would highlight the persistent conflict that state non-recognition has had with the important federal public policy of establishing rights for same-sex couples. While the Court is not ruling on intestacy issues for same-sex couples, such a resolution would likely lead to states adopting a framework similar to Washington's intestacy statute. Consequently, there would no longer be a problem for the same-sex married couple relocating from Washington to Texas.

V. CONCLUSION

Same-sex couples face comparatively different issues than traditionally married couples when planning for their death and the distribution of their estate.¹⁷⁷ Because of current federal deference to local law, states have the ability to define their own terms of marriage and other

174. See Carter, *supra* note 18.

175. *Id.* at 761.

176. *Id.* at 719.

177. Foltz, *supra* note 1, at 497-98.

areas of domestic relations law.¹⁷⁸ As a result, states are not yet required to recognize otherwise legally valid same-sex marriages that take place in other states.¹⁷⁹

From this non-recognition, issues arise when a same-sex spouse dies intestate, leaving no valid will to provide for the surviving spouse. Based on public policy, a majority of intestacy statutes do not provide protection for surviving same-sex spouses or state registered domestic partners.¹⁸⁰ Therefore, all too often a same-sex spouse receives nothing from the decedent's estate. Due to these challenges faced by same-sex couples, estate planning is a necessary tool for such couples to use in order to avoid these harsh and outdated intestacy statutes.

Ideally, this summer's Supreme Court ruling will bring about a turning point for same-sex couples in this area of the law, as well as within other areas of law that have traditionally been left to the states.

178. See Carter, *supra* note 18.

179. Sack, *supra* note 32, at 503.

180. See Foltz, *supra* note 1, at 501–02.