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## **Overview**

The homosexual marriage issue is important to practitioners because of the potential impact any change in the definition of “spouse” would have on various estate planning, inheritance, property ownership and tax concepts and rights to various government benefits.

Historically, the definition of “spouse” and, as a result, the definition of marriage has rested on a foundation of tradition, legal precedent, theology, and an overwhelming support of the people. As a result, any change in the historic definition will most often be judge-made, rather than as a result of an elected body. Consequently, what constitutes “marriage” will turn on little more than a specific court’s interpretation of rights and result in a very unstable legal environment. The result is that estate and tax planning, and the associated legal issues become much more complex and unpredictable.

## **Federal DOMA Law**

At the federal level, the Defense of Marriage Act (DOMA)<sup>1</sup> was enacted in 1996 in anticipation that at least one state would, at that time, legalize homosexual marriage with the requirement that other states would then be required to recognize such marriages under the Full Faith and Credit Clause of the U.S. Constitution.<sup>2</sup> DOMA has two effects: (1) No state (or other political subdivision) need recognize a marriage between persons of the same sex, even if the marriage was concluded or

recognized in another state; and (2) the federal government may not recognize homosexual or polygamous marriages for any purpose, even if concluded or recognized by one of the states.<sup>3</sup>

**Note:** On July 8, 2009, the Massachusetts Attorney General filed a lawsuit challenging the federal definition of marriage established by DOMA.

## **State Law Developments**

Presently, only Vermont (by one vote) and Maine have enacted legislation legitimizing homosexual marriage. The Vermont provision becomes effective on September 1, 2009, but the Maine provision has not taken effect pending a ballot referendum to occur in November 2009. Courts in Massachusetts,<sup>4</sup> Connecticut<sup>5</sup> and Iowa<sup>6</sup> have ruled that state laws banning homosexual marriage are unconstitutional. But, to date, neither the legislatures in those states nor the voters have weighed in on the matter. That is precisely what happened in California. There, the California Supreme Court (by one vote) had legitimized homosexual marriage in early 2008, but when the issue was presented to the state’s voters via Proposition 8, they rejected the idea. In May, 2009, the California Supreme Court upheld voter’s rejection of the legitimization of homosexual marriage.<sup>7</sup>

A handful of states allow for a form of civil unions or registration as domestic partners. In those states, homosexual couples may file joint *state* tax returns, inherit property and make

medical choices on each other's behalf (note – they could do this anyway via an appropriate power of attorney), along with other benefits provided to married persons.<sup>8</sup>

**Note:** Non-U.S. jurisdictions that recognize homosexual marriages are The Netherlands, Belgium, Spain, Canada, Norway, Sweden and South Africa. In the U.S., only New Mexico and Rhode Island recognize foreign marriages.

**The Iowa decision.** In the Iowa case,<sup>9</sup> the Court (opinion by Cady) stated (without referencing a single supporting citation) that the matter involved civil rights. Based on that assumption, the Court proceeded to find an Equal Protection Clause violation of the Iowa marriage law that specifies that “[o]nly a marriage between a male and a female is valid.”<sup>10</sup>

While the Court said the Iowa marriage law violated the Equal Protection Clause of the Iowa Constitution, the Court failed to note that there is no Equal Protection Clause in the Iowa Constitution. The Iowa Constitution contains a Privileges and Immunities Clause in Article I, Section 6, but does not contain an Equal Protection Clause. Article I, Section 6 concerns undue favoritism, not discrimination (as is the concern under an Equal Protection Clause) with the concern over under favoritism arising when a privilege or immunity is granted to a minority class. The Clause states: “All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens.” In 1896, the Iowa Supreme Court ruled that the requirement that state law must be “of general and uniform operation” does not necessarily mean that state law must always operate uniformly on all the people of the Iowa.<sup>11</sup> To be subject to such a requirement, the law must be a law of “general nature.” As for the latter phrase contained in the Clause, it has a very specific meaning that had been thought to be well understood. The phrase was borrowed verbatim from the Indiana State Constitution of 1851 and the legislative history

behind the language reveals that it was adopted with the intent to prevent “class legislation” and had nothing to do with discrimination based on race, sex, age or religion. Instead, the language was targeting special legislative privileges (or burdens) that might be given to certain classes of citizens. Indeed, in 1857, John Edwards, an Iowa lawyer, legislator and one of the framers of the Iowa Constitution (who later became Iowa Speaker of the House), urged the adoption of the language from the Indiana Constitution into the Iowa Constitution and explained its meaning as “to prevent the General Assembly from granting any privileges or immunities to any citizen or class of citizens that it would not be willing to grant to any other citizen or class of citizen upon the same terms. It is to prevent the Legislature from granting exclusive privileges to any class of citizens.” He should know--Edwards was elected to the Indiana State Senate in 1852. He moved to Iowa in 1853 and was elected to the Iowa State Senate in 1856 where he represented the ninth senatorial district in the constitutional convention in Iowa City beginning in January 1857.

Thus, there is no violation of Article 1, Section 6 unless the challenged law sheds favoritism on a minority class. Iowa's marriage law restricting marriage to parties of opposite gender clearly does not do that. The legal question under the Iowa provision is whether the law at issue *favours* a minority class, not whether discrimination *against* a suspect class is involved. Indeed, in 2005 the Indiana Court of Appeals construed its privileges and immunities clause (which the Iowa provision is taken from verbatim) to hold that state law limiting marriage to opposite-sex couples was *constitutional* and did *not* violate the provision.<sup>12</sup> Importantly, the court stated that “unlike federal equal protection analysis, there is no varying or heightened level of scrutiny based on the nature of the classification or the nature of the right affected by the legislation.” The Iowa Supreme Court however, did not even cite the Indiana opinion on the identical Constitutional language, let alone analyze it, and based its reasoning on an Equal Protection analysis. That is hard to understand not only because of the 2005 Indiana case, but also because in 1978 the Iowa Supreme

Court went to great detail to point out when interpreting the constitution it is critical “to ascertain the intent of the framers.”<sup>13</sup> Similarly, in 1995, the Court said it relies on plain text that “give the words used by the framers their natural and commonly understood meaning” and will “examine the constitutional history and consider the object to be attained or the evil to be remedied as disclosed by circumstances at the time of adoption.”<sup>14</sup> Given this legislative history, the Court's own statements in prior cases, and the 2005 Indiana Court of Appeals opinion construing the identical language, the fact that the Iowa opinion in *Varnum* was unanimous and didn't address any of these points raises significant questions about the extent and scope of legal research the Court engaged in to produce its opinion and whether the Court was merely engaged in a political exercise rather than judicial reasoning and analysis.<sup>15</sup> However, the Iowa Court did note that the U.S. Supreme Court has never ruled whether a ban on same-sex marriage violates the Equal Protection Clause of the U.S. Constitution.

**Note:** Some media reports (and the Iowa Attorney General) have placed emphasis on the fact that the Court's opinion was unanimous. But, caution may be warranted on that point. For example, in 1998 the Iowa Supreme Court unanimously held that an Iowa law designed to preserve agricultural land and provide farmers protection from nuisance lawsuits was unconstitutional. *Bormann v. Board of Supervisors in and for Kossuth County*.<sup>16</sup> However, all of the other states that have decided cases involving constitutional challenges to their respective state right-to-farm laws have rejected the holding in the Iowa case (that the right to maintain a nuisance is an easement).<sup>17</sup>

The Iowa Supreme Court said the protected class was defined by sexual orientation. But, as worded, the statute clearly applies equally to everyone irrespective of sexual orientation – neither homosexuals nor heterosexuals can

marry someone of the same gender. Class legislation is not involved. By defining the suspect class in accordance with sexual orientation, the court has placed Iowa County Recorders (the county official with the authority to grant marriage licenses) in a difficult position. What additional steps must a County Recorder take (or require a same-gender couple to take) to ensure that a same-sex marriage license is actually being issued to a same-gender couple that is sexually oriented to each other and, thus, part of the Court's protected class? According to the Court, same-gender couples that aren't sexually oriented to each other are *not* members of the constitutionally protected class. Unfortunately, the Court provided no guidance on the matter, and the Iowa Attorney General has informed county officials that they must comply with the Court's opinion without specifying *how* they are to comply.

**Note:** The Iowa Attorney General also failed to address the legal issues that could arise for a County if a County Recorder failed to comply with the Court's opinion based on sincerely held religious beliefs and is terminated for such failure to comply.<sup>18</sup>

So, the possibility exists that until the Iowa Attorney General's office provides specification as to the procedure necessary for determining sexual orientation, county recorders will be at risk of granting marriage licenses to same-gender couples that could violate Iowa law. Consequently, some counties may conclude that the safest course of action would be to deny all marriage licenses to same-gender couples until either the Court or the Attorney General clarifies the matter.

**Note:** An important question is whether the Court's rationale applies to *all* same-gender couples regardless of sexual orientation. The Iowa Attorney General apparently believes it does, but the Court defined its suspect class according to sexual orientation. Likewise, the Court's Equal

Protection analysis may raise future questions as to whether existing Iowa law prohibiting incest and/or polygamy is also suspect.

Ultimately, the Court stated that the offending language "must be stricken from the statute." *That raises another question as to whether the Court has put the issue back in the Iowa legislature's lap to deal with the issue legislatively, or whether the Court's opinion is to be treated as Iowa law.* During the 2009 session of the Iowa General Assembly, a bill was proposed to legitimize homosexual marriage, but it failed to pass. To date, it appears that state government officials are proceeding on the basis that the Court's opinion is the law.

**Note:** In Iowa, the state constitution may not be amended through the initiative process. Instead, an amendment proposed by a majority of the legislators in each house must be approved in two successive legislative sessions before it can be submitted to voters for ratification in the next general election.

### Other Recent Developments

The Maryland Supreme Court has ruled that the state's ban on homosexual marriage is constitutional.<sup>19</sup> The court reasoned that sex discrimination is applicable only to groups of people and not individuals. The court ruled that homosexuals are not a protected class and that the state has a legitimate interest in limiting marriage to one male human and one female human.

**Note:** Relatedly, the U.S. Court of Appeals for the Tenth Circuit has ruled that transsexuals are *not* a protected group of workers under Title VII (employment discrimination statute) unless they have been discriminated against because of their gender as either a man or a woman. The court upheld the trial court's dismissal of the case.<sup>20</sup>

Another issue that has arisen is whether the Full Faith and Credit Clause of the Constitution requires a state to recognize a marriage that is valid under the laws of another state or foreign jurisdiction. That is an important question because, as mentioned above, seven foreign countries (Belgium, Canada, The Netherlands, Spain, Norway, Sweden and South Africa) recognize homosexual marriage. Also, in the U.S., New Mexico and Rhode Island recognize marriages that are valid in foreign countries.

In a recent case,<sup>21</sup> the question was whether a homosexual marriage entered into in Canada was legitimate in New York. The plaintiff, an employee of a community college in New York, went to Canada and married her "partner." The marriage was valid under Canadian law. On the basis of that marriage, the plaintiff applied to the college for "spousal" health care benefits. The college denied the application, and the plaintiff sued on the basis that the college's failure to recognize the "marriage" violated the Equal Protection Clause of the N.Y. Constitution and Executive Law Sec. 296 (unlawful discriminatory practices).

N.Y. law has long recognized marriages solemnized outside of the state unless; (1) the marriage is prohibited by the "positive law" of N.Y.; or (2) the marriage involves incest or polygamy, both of which fall within the proscriptions of "natural law". The court determined that the plaintiff's homosexual marriage, while not recognized under N.Y. law, was nonetheless valid because it was legal where solemnized and wasn't prohibited by either of the prohibitions mentioned above. The court noted that the N.Y. legislature had not taken action to prohibit homosexual marriage, so the positive law exception did not apply. The court reasoned that the natural law exception likewise did not apply because the homosexual marriage was not against the public policy of N.Y. primarily because the legislature had not taken action (as have the majority of states) under DOMA to enact legislation denying full faith and credit to homosexual marriages validly solemnized in another state. The court said that it wasn't the court's role to determine the public

policy of the state - that role belongs to the legislature. Thus, until the legislature enacts legislation prohibiting homosexual marriage validly solemnized in another state or abroad, such marriages will be recognized in N.Y.

So, the end result was that the college violated state law by discriminating against an employee in compensation or in conditions or privileges of employment, in violation of Executive law Sec. 296.

### **Other Legal and Tax Issues**

Among the important legal issues impacted by a change in the historic definition of “spouse” include the following:

- Because marriage automatically revokes an existing will unless a “contemplation of marriage” provision is included in the will (or a codicil), homosexual couples planning to marry will need to execute codicils containing such a provision prior to marriage. If presently married, homosexual couples should execute codicils reinstating the wills or execute new wills;
- Homosexual couples would need to be aware of how their property would be disposed of under state intestacy law, and should be aware of a surviving spouse’s right to elect against the deceased spouse’s will;
- Even though state law may recognize a homosexual marriage, under DOMA, homosexual couples are not entitled to federal estate and gift tax marital deductions. In addition to a gift tax, generation-skipping tax would be due upon a gift to a homosexual spouse who is more than 37.5 years younger than the donor spouse. So, IRS (and other federal agencies) will not recognize any state court decision that legitimizes homosexual marriage. In states, that have legitimized the concept, those respective state Departments of Revenue will need to promulgate rules that detail the differences between the federal and

state rules and how taxpayers are to comply under various scenarios;

- Due to DOMA, homosexual spouses may not file federal joint income tax returns or utilize the \$500,000 capital gain exclusion upon sale of a principal residence, and may not roll-over a deceased spouse’s IRA or qualified plan account;
- In Iowa, some state tax benefits will be available to same-gender couples that otherwise would not be, including:
  - The ability to offset capital losses incurred by the spouse;
  - The ability to offset one spouse’s passive losses by passive income from the other spouse;
  - The ability to count the spouse’s material participation as the taxpayer’s for purposes of meeting the 10-year rule as applied to the capital gains deduction;
  - The ability to leave one’s property to the spouse exempt from Iowa inheritance tax;
  - The ability to double-up the existing \$6,000 pension income exclusion;
  - The ability to utilize a spouse’s excess tax credits and/or net operating losses

**Note:** Because homosexual marriage is not recognized for federal tax purposes, such couples will not run afoul of any related party rules (for federal tax purposes, but not for state tax purposes) which otherwise

might apply to a tax transaction . In addition, no anti-abuse (for federal tax purposes) will apply to homosexual “married” taxpayers. That means that such couples will have tax planning opportunities which could be utilized to achieve a lower federal income tax liability than otherwise similarly situated heterosexual married couples could achieve. On the other hand, neither “spouse” in a homosexual “marriage” would be entitled to “innocent” or “injured” spouse relief under the Internal Revenue Code.

In mid June, 2009, the Iowa Department of Revenue (IDOR) issued a press release pointing out that Iowa and federal filings will differ because federal tax law does not legitimize same-sex marriage. The press release also noted that Iowa same-sex "spouses" utilize single filing status. Thus, for Iowa income tax purposes, same-sex spouses have three filing options: (1) file as married filing jointly; (2) married filing separately; or (3) married filing separately on a combined Iowa return. The IDOR also noted that same-sex "spouses" who file their federal taxes as head-of-household cannot file their Iowa taxes as head-of-household. That's because Iowa's use of the term "head-of-household" is based on the federal definition, which generally allows that status for unmarried persons. The IDOR stated that the filing options are available starting in 2009.

## Conclusion

The homosexual marriage issue creates numerous legal and tax issues. We’ve just scratched the surface here. But, it’s an issue that practitioners will have to address as it comes up in practice. Recognizing the potential problem areas that could come up may be a large part of the battle.

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<sup>1</sup> 1 U.S.C. §7; 28 U.S.C. §1738C.

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<sup>2</sup> Art. IV, Sec. I.

<sup>3</sup> DOMA overwhelmingly passed the House by a 342-67 vote (1 Republican (revealed as homosexual during debate on the bill) voted against the bill) and the Senate by a 85-14 vote (14 Democrats voted against the legislation).

<sup>4</sup> *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003).

<sup>5</sup> *Kerrigan, et al. v. Commissioner, et al.*, 289 Conn. 135, 957 A.2d 407 (2008).

<sup>6</sup> *Varnum, et al. v. Brien*, 763 N.W.2d 862 (Iowa 2009).

<sup>7</sup> *Strauss v. Horton*, 46 Cal. 4th 364 (2009).

Proposition 8 has been challenged based on allegations that it is unconstitutional.

<sup>8</sup> Often, the claim is made by same-sex partners that they are denied certain “rights.” However, that claim is often used as a smokescreen for societal legitimization of same-sex relationships. *See, e.g., Langbehn, et al. v. The Public Health Trust of Miami-Dade County*, No. 08-21813-CIV-JORDAN (S.D. Fla. Oct. 2, 2009)(plaintiff, same-sex partner of decedent who was named as agent under medical power of attorney for decedent, failed to state claim under Florida law for negligence, intentional infliction of emotional distress or breach of fiduciary relationship for alleged damages arising from hospital staff's failure to provide updates on decedent's medical situation; evidence showed that hospital staff consulted with plaintiff about critical emergency medical decisions for decedent and that further information or visitation within discretion of hospital staff; plaintiff not entitled to “enhanced” rights based on same-sex status).

<sup>9</sup> *Varnum, et al. v. Brien*, 763 N.W.2d 862 (Iowa 2009).

<sup>10</sup> In 1971, the Minnesota Supreme Court heard a similar challenge to the Minnesota statutory ban on same-sex marriage. The court held that the statute did not violate either the First, Fourth, Ninth or Fourteenth Amendments to the U.S. Constitution. *Baker, et al. v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

<sup>11</sup> *State ex rel. West v. Des Moines*, 96 Iowa 521, 65 N.W. 818 (1896).

<sup>12</sup> *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005).

<sup>13</sup> *Redmond v. Ray*, 268 N.W.2d 849 (Iowa 1978).

<sup>14</sup> *Howard v. Schildberg Construction Co.*, 528 N.W.2d 550 (Iowa 1995).

<sup>15</sup> For example, Justice Cady, on multiple occasions, referred to the failure of the legislature to legitimize same-sex marriage in Iowa *as a basis* for the court’s involvement in the matter which the court then framed as a constitutional issue. This is judicial

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activism at its most extreme as it essentially results in amending the Iowa Constitution via the judiciary rather than by way of the democratic process. Interestingly, in a later case involving the issue of whether a defendant's 25-year prison sentence for consensual sex with his underage girlfriend was unconstitutionally cruel and unusual, Justice Cady dissented from the majority's opinion that the sentence was unconstitutional on the basis that the majority was substituting its judgment for that of the legislature. Justice Cady stated as follows: "The individual-assessment approach introduced by the majority in this case will only permit the courts to substitute their judgment for that of the legislature in cases to follow. This approach is contrary to the principles of judicial restraint and separation of powers." *State v. Bruegger*, No. 07-0352 (Iowa Sup. Ct. Oct. 2, 2009). Apparently, Justice Cady only engages in judicial restraint when doing so produces a result that comports with his personal views on a particular issue.

<sup>16</sup> 584 N.W.2d 309 (Iowa 1998).

<sup>17</sup> See *Lindsey v. DeGroot, et al.*, 898 N.E.2d 1251 (Ind. Ct. App. 2009)(Indiana has not adopted the "seemingly unique Iowa holding that the right to maintain a nuisance is an easement"; right to maintain a nuisance contained in the Indiana right-to-farm law does not create an easement); *Moon v. North Idaho Farmers Association*, 140 Idaho 536, 96 P.3d 637 (2004)(right-to-farm act's grant of immunity from nuisance lawsuits is not an unconstitutional taking of property under either the state or federal constitution); *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544 (Tex. App. 2004)(right-to-farm law which limits the circumstances under which a nuisance claim can be brought against a farming operation does not amount to a constitutional taking).

<sup>18</sup> See, e.g., *Slater v. Douglas County*, No. 09-6274-TC (D. Ore. filed Oct. 7, 2009)(former County Records Clerk terminated for refusing to record domestic partnerships due to sincerely held religious beliefs after asking to be excused for religious reasons filed a Civil Rights lawsuit for damages resulting from religious discrimination). This is a key point because the Iowa Supreme Court, in *Varnum*, has now put County Recorders in the position of endorsing religious beliefs that approve of homosexual marriage. The author is not aware of the argument ever being raised in any court that the issuing of marriage licenses to heterosexual couples constitutes an endorsement of the religious views that approve of traditional marriage.

<sup>19</sup> *Conaway, et al. v. Deane, et al.*, 401Md. 219, 932 A.2d 571 (Md. Ct. App. 2007).

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<sup>20</sup> *Etsitty v. Utah Transit Authority*, 502 F3d 1215 (10th Cir. 2007).

<sup>21</sup> *Martinez v. County of Monroe*, No. 1562 CA 06-02591, 2008 N.Y. App. Div. LEXIS 854 (N.Y. Sup. Ct. Feb. 1, 2008).