

**LOVING PARTNERS, LEGAL STRANGERS:  
ESTATE PLANNING AMIST HEATED DEBATE,  
DISAPPOINTMENT AND DISAGREEMENT**

Comment

*by Taylor Darby\**

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## I. INTRODUCTION

“It was a wonderful life,” remarked Edith Windsor in regards to her partnership with Thea Clara Spyer.<sup>1</sup> Little did she know just how far their battle for marriage equality would go.<sup>2</sup>

It was just a regular Friday night in New York City during 1963 when Edith Windsor and Thea Spyer met for the first time at the Portofino restaurant in Greenwich Village.<sup>3</sup> At the time, the Portofino was known as “about the only place a white-collar lesbian could be out and at ease.”<sup>4</sup> At the time, both women had remarkable careers; Thea Clara Spyer was a clinical psychologist and Edith Schlain Windsor worked as a “pioneer in computer programming” for International Business Machines (I.B.M.)<sup>5</sup>

Edith and Thea danced together the entire night—“our bodies just fit” remarked Thea.<sup>6</sup> “By the end of the evening, I had danced a hole through the bottom of one of my stockings,” recalled Edith.<sup>7</sup> In 1967, just four years later, the couple became engaged.<sup>8</sup> Thea proposed to Edith with a “round diamond pin, because a ring would draw unwanted attention” at I.B.M., where at the time Edith worked.<sup>9</sup>

Just two years after Canada began to recognize same-sex marriage, Thea was diagnosed with multiple sclerosis.<sup>10</sup> Doctors told Thea she had a year to live.<sup>11</sup> Although Edith held a senior position at I.B.M., she took early retirement to help and care for Thea.<sup>12</sup> Caring for Thea and her deteriorating health was demanding on Edith; for instance, the very process Edith had to take

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1. Greg Botelho, *Victory for Lesbian, Years After Her Longtime Partner’s Death*, CNN.COM (Oct. 19, 2012, 5:35 AM), <http://www.cnn.com/2012/10/18/us/new-york-doma-windsor/index.html>.

2. See *infra* Part V.

3. Jim Dwyer, *She Waited 40 Years to Marry, Then When Her Wife Died, the Tax Bill Came*, N.Y. TIMES June 8, 2012, at A1, available at [http://www.nytimes.com/2012/06/08/n\\_yregion/woman-says-same-sex-marriage-bias-cost-her-over-500000.html?\\_r=0](http://www.nytimes.com/2012/06/08/n_yregion/woman-says-same-sex-marriage-bias-cost-her-over-500000.html?_r=0).

4. Jill Hamburg Coplan, *When a Woman Loves a Woman*, NYU ALUMNI MAG., Fall 2007, at 40, available at <http://www.nyu.edu/alumni.magazine/issue17/index.html>.

5. Dwyer, *supra* note 3; Coplan, *supra* note 4, at 40.

6. *Id.*

7. Dwyer, *supra* note 3.

8. *Id.*

9. Coplan, *supra* note 4, at 40.

10. *Id.*

11. *Id.*

12. Dwyer, *supra* note 3.

to assist Thea into getting into bed each night took about an hour.<sup>13</sup> It took an additional three hours to get Thea ready to simply leave their home.<sup>14</sup>

Forty years after Thea first proposed, Thea proposed to Edith once again.<sup>15</sup> The couple took their closest friends to Toronto, Canada, and in 2007, married.<sup>16</sup> Although the State of New York recognized Edith and Thea's marriage, the federal government did not because of the DOMA.<sup>17</sup>

During the forty years of the couple's engagement, Edith and Thea "lived together and owned together and planned all their days together."<sup>18</sup> Just a year after their (first) engagement, Edith and Thea bought a country home in Southampton.<sup>19</sup> A few years later, the couple bought an apartment in New York City, with the price tag under \$300,000.<sup>20</sup> Today, this apartment is valued "at only \$1,300,000. That's because it is 'unimproved,'" laughed Edith.<sup>21</sup> The current value of this apartment Edith and Thea shared is notable; the higher its value, the higher cost of estate taxes Edith would later pay.<sup>22</sup>

In February 2009, two years after the couple married, Thea Spyer passed away.<sup>23</sup> Only a month later, not only did Edith forcibly write the checks for the estate of her spouse, but Edith suffered a heart attack "in her grief."<sup>24</sup> Edith Windsor's heart was truly broken.<sup>25</sup>

Because Edith Windsor and her late spouse were of the same sex, Edith was required to pay an inheritance tax on her late spouse's estate—more than \$500,000 total.<sup>26</sup> "The estate tax bill from the federal government was \$363,053. New York State took an additional \$200,000."<sup>27</sup> Had Thea and Edith been a heterosexual couple, Edith would not have had to pay the federal estate tax at all.<sup>28</sup> This is because under the federal tax code, married (heterosexual) couples can transfer to each other upon one spouse's death money or property without triggering the federal estate tax.<sup>29</sup> The passage of the Defense of Marriage Act (DOMA) in 1996 gave gay couples dissimilar rights compared to heterosexual couples regarding federal taxes, "even if the

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13. *Id.*

14. *Id.*

15. Coplan, *supra* note 4, at 40.

16. *Id.*

17. Lila Shapiro, *Edie Windsor vs. DOMA: 83-Year-Old Lesbian Petitions U.S. Supreme Court to Hear Case*, HUFFPOST GAY VOICES (July 16, 2012, 11:57 AM), [http://www.huffingtonpost.com/2012/07/16/edie-windsor-doma\\_n\\_1675983.html](http://www.huffingtonpost.com/2012/07/16/edie-windsor-doma_n_1675983.html).

18. Dwyer, *supra* note 3.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*; Coplan, *supra* note 4.

25. See discussion *supra* notes 22–23.

26. Dwyer, *supra* note 3.

27. *Id.*

28. Coplan, *supra* note 4.

29. *Id.* The federal estate tax is commonly called the "unlimited marital deduction." *Id.*; 1 U.S.C. § 7.

marriage is recognized by their state of residence, as Edie and Thea’s was by New York.”<sup>30</sup>

Edith Windsor was a widow living alone at the age of 80 on a fixed income, and “with a weakened heart, Edie paid a \$363,053 widow’s tax from her retirement savings.”<sup>31</sup> With Edith’s payment, *Windsor v. United States* was born.<sup>32</sup> “If Thea was a Theo, I wouldn’t have had to pay,” remarked Edith, “[o]ne letter” changes everything.<sup>33</sup>

Regardless of how one may feel regarding the recognition of same-sex marriage, Edith Windsor and Thea Spyer’s story of life-long companionship tugs at many heartstrings. While this is just one highly-publicized case, there are undoubtedly numerous examples and identical stories throughout the nation.<sup>34</sup> As more and more states recognize same-sex marriage, the question becomes more pertinent—how much longer will the federal government deny estate tax benefits to same-sex married couples in states that actually recognize such a relationship?<sup>35</sup> This question will hopefully be answered when the highest Court in the country begins oral arguments on March 27, 2013.<sup>36</sup>

This comment addresses the lack of tax uniformity for same-sex couples throughout the country, focusing on the case *Windsor v. US*.<sup>37</sup> Part I will discuss DOMA’s history and rationale while also detailing *United States v. Windsor*.<sup>38</sup> Part II begins with a general overview of taxpayer status and then leads into discussion regarding the various tax deductions same-sex couples, because not legally married under DOMA, are unable to use.<sup>39</sup> A detailed discussion of possible modern approaches for today’s attorney follows Part II, including suggestions and possible techniques for the non-traditional family.<sup>40</sup> Finally, this comment suggests a possible way to avoid the painful process of probate.<sup>41</sup> For instance, same-sex partners may choose to own assets as joint tenants with the right of survivorship.<sup>42</sup>

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30. *Id.*

31. *Id.*

32. *Id.*

33. Dwyer, *supra* note 3.

34. See Bob Bragar, *My Three Weddings: A Gay Love Story*, HUFFPOST GAY VOICES (Jan. 4, 2013, 1:01 PM), [http://www.huffingtonpost.com/bob-bragar/my-three-weddings-a-gay-l\\_b\\_2410461.html](http://www.huffingtonpost.com/bob-bragar/my-three-weddings-a-gay-l_b_2410461.html); Kat Kinsman, Same-sex couples take long road to the altar, CNN.COM (Jan. 19, 2013, 10:58 AM), <http://www.cnn.com/2013/01/19/living/same-sex-different-views/index.html> (stating “. . . our Federal government still taxes bequests to surviving same-sex partners—even those who have legally wed in states where that is now possible—just as harshly as if the dying partner had left the money to a total stranger”).

35. See *infra* note 33.

36. For the Session Beginning March 18, 2013, [http://www.supremecourt.gov/oral\\_arguments/argument\\_calendars/MonthlyArgumentViewer.aspx?Filename=MonthyArgumentCalMar2013.html](http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentViewer.aspx?Filename=MonthyArgumentCalMar2013.html).

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

38. See *infra* Part I; *Windsor*, 133 S. Ct. 2675.

39. See *infra* Part II.

40. See *infra* Part III.

41. See *infra* Part IV.

42. See *infra* Part IV.

This article's primary focus is to discuss the implications placed on federal estate taxes due to DOMA, while offering suggestions and possible techniques when estate planning for the same-sex couple and non-traditional family.<sup>43</sup>

### A. Goals of Estate Planning

Brigham Young once said, "A fool can earn money; but it takes a wise man to save and dispose of it to his own advantage."<sup>44</sup> This is the very essence and purpose of estate planning, to continue to achieve one's goals and wealth even after death.<sup>45</sup>

According to Black's Law Dictionary, estate planning is essentially two things.<sup>46</sup> First, it is the "preparation for the distribution and management of a person's estate at death through the use of wills, trusts, insurance policies, and other arrangements, especially to reduce administration costs and transfer-tax liability."<sup>47</sup> And second, estate planning is a type of law that "involves the arrangement of a person's estate."<sup>48</sup> However, this black letter law fails to inform of the inherent difficulty in planning, preparing and executing one's estate.

Estate planning is important because at one's death, it leaves a directive of how to distribute a person's assets after death. Additionally, estate planning encompasses more than just writing wills: it can also be a way to provide financial security for loved ones.

The goals of estate planning can be described as personal—each and every person has his or her own needs, concerns, and desires. While many do not like to think what happens to them or their things after they die, planning for this inevitable event is crucial. Estate planning becomes even more crucial when a non-traditional family, and same-sex couples especially, are involved. "Gay and lesbian couples need to make sure they have explicit estate plans and update their wills often. That's because assumptions about assets going to the surviving spouse don't hold—and families who didn't accept the relationship may be more likely to squabble."<sup>49</sup>

Difficulties arise in estate planning for same-sex couples because of the ongoing uncertainty regarding the couple's legal rights.<sup>50</sup> Clients who are same-sex couples are likely to be confused about their rights in addition to

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43. See Amy Feldman, *Same-sex Married Couples Face Tax Land Mines*, NBCNEWS.COM (Aug. 28, 2012), [http://today.msnbc.msn.com/id/48804322/ns/business-personal\\_finance/#.UGucNRjT1sF](http://today.msnbc.msn.com/id/48804322/ns/business-personal_finance/#.UGucNRjT1sF).

44. *Understand the Importance of Estate Planning and the Goals of Estate Planning*, BYU.COM, <http://personalfinance.byu.edu/?q=node/731> (last visited Feb. 5, 2013).

45. *Id.*

46. BLACK'S LAW DICTIONARY 629 (9th ed. 2009).

47. *Id.*

48. *Id.*

49. A. Feldman, *supra* note 43.

50. Joan M. Burda, *Estate Planning for Same-Sex Couples*, 15 (American Bar Association—General Practice, Solo & Small Firm Division eds., 2d ed. 2012).

being unclear about how protect them.<sup>51</sup> But more than simply providing clarity, assurance and advice for the same-sex individual or couple, estate planners must consider other people associated with the couple.<sup>52</sup> A greater audience—family, friends, and assets—suffer from this estate-planning headache as well.<sup>53</sup> “Simply put, LG [lesbian and gay] clients—both individuals and couples—must do more life and estate planning than typical heterosexual clients.”<sup>54</sup>

### B. *Marriage Is A Matter of State Law—Or Is It?*

The Tenth Amendment to the United States Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”<sup>55</sup> With respect to the Tenth Amendment, family law has traditionally been considered part of the states’ domain.<sup>56</sup> In addition, a recent case from the First Circuit reiterates prior Supreme Court case law that DOMA is highly likely to be considered an intrusion into the state realm; “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of States and not to the laws of the United States.”<sup>57</sup> New York University School of Law professor Kenji Yoshino says that DOMA “creates a federal intrusion into a traditional state domain.”<sup>58</sup>

#### 1. *The Defense of Marriage Act (DOMA—The Battle and The Hurdle*

DOMA, along with same-sex legal rights, has garnered much attention recently.<sup>59</sup> For instance, in his second inauguration speech, President Barack Obama explicitly stated that same-sex individuals must be afforded the same legal rights and recognition as heterosexual individuals.<sup>60</sup> In order to continue further discussion of DOMA, a brief commentary regarding DOMA’s history and rationale—as well as the battles and the hurdles DOMA faces—is necessary.<sup>61</sup>

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51. *Id.*

52. *See id.* at 15–16.

53. *See id.* (stating that “[a] growing number of lesbian and gay couples have or plan to have children, which raises additional issues that are not usually present in heterosexual estate planning”).

54. *Id.* at 16.

55. U.S. CONST. amend. X (emphasis added).

56. *See* Coplan, *supra* note 4, at 41.

57. *Massachusetts v. U.S. Dep’t of HHS*, 682 F.3d 1, 12 (1st Cir. 2012) (quoting *In re Burrus*, 136 U.S. 586 (1890)); *see also* *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

58. *See* Coplan, *supra* note 4, at 41.

59. Michelangelo Signorile, *President Obama’s History-Making Gay Rights Inaugural Speech*, HUFFPOSTGAYVOICES.COM (Jan. 22, 2013, 8:28 AM), [http://www.huffingtonpost.com/michelangelo-signorile/president-obamas-history\\_b\\_2522593.html](http://www.huffingtonpost.com/michelangelo-signorile/president-obamas-history_b_2522593.html).

60. *Id.*

61. *See infra* Part I.B.1.i–iii.

*i. DOMA: History and Rationale*

DOMA is a federal law that controls and defines what a marriage is and who may enter into a marriage.<sup>62</sup> The House Committee Report on H.R. 3396 (DOMA) stated that DOMA had two primary purposes:

The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.<sup>63</sup>

In order to achieve these two stated purposes, DOMA was drafted (and later enacted) with two operative provisions:

Section 2 . . . provides that no State shall be required to accord full faith and credit to a marriage license issued by another State if it relates to a relationship between persons of the same sex”, and Section 3 defines the terms “marriage” and “spouse,” for purposes of federal law only, to reaffirm that they refer exclusively to relationships between persons of the opposite sex.<sup>64</sup>

Further, in addition to these stated purposes for enacting DOMA, the House Committee goes on to list four governmental interests which DOMA advances: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.<sup>65</sup>

*ii. The Battle: The Justice Department Announces It Will No Longer Defend DOMA*

In February 2011, Attorney General Eric Holder announced that the Justice Department would no longer continue to defend DOMA.<sup>66</sup> The Attorney General stated:

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62. See 1 U.S.C. § 7 (defining “marriage” as “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”).

63. H.R. Rep. No. 104-664, at 3 (1996).

64. *Id.*

65. *Id.* at 8–13.

66. Coplan, *supra* note 4, at 41; Brian Montopoli, *Obama Administration Will No Longer Defend DOMA*, CBSNEWS.COM (Feb. 23, 2011, 12:44 P.M.), [http://www.cbsnews.com/8301-503544\\_162-20035398-503544.html](http://www.cbsnews.com/8301-503544_162-20035398-503544.html).

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny . . . The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases. I fully concur with the President's determination.<sup>67</sup>

Additionally, “Holder called parts of DOMA unconstitutional because they violate the equal protection rights enshrined in the Fifth Amendment.”<sup>68</sup> Following the joint decision of the Obama Administration and Justice Department to no longer defend DOMA, in August, 2012, the Department of Justice “directly advis[ed] in a brief to the court of the Southern District of New York that Windsor be granted a tax refund because DOMA’s definition of marriage is unconstitutional.”<sup>69</sup>

### iii. *The Hurdle*: United States v. Windsor

On appeal from the Southern District of New York, the Second Circuit decided *Windsor v. United States* on October 18, 2012.<sup>70</sup> The government was appealing before the Second Circuit, namely to dispute the federal district court’s grant of summary judgment in favor of Edith Windsor.<sup>71</sup> The Second Circuit struck down Section 3 of DOMA.<sup>72</sup> While the Second Circuit affirmed the federal district court’s ruling “that Section 3 of DOMA violated the equal protection clause because there was no rational basis to support it,” the Second Circuit went farther by holding Section 3 of DOMA is subject to heightened scrutiny.<sup>73</sup> In deciding to use heightened scrutiny, the Second Circuit evaluated four factors (used by the Supreme Court) to determine whether same-sex couples qualified as a quasi-subject class.<sup>74</sup> The four factors are as follows:

- (1) whether the class has been historically subjected to discrimination;
- (2) whether the class has a defining characteristic that frequently bears a relation to ability to perform or contribute to society; (3) whether the class

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67. Montopoli, *supra* note 66.

68. Coplan, *supra* note 4, at 41.

69. *Id.*; 1 U.S.C. § 7 (defining “marriage” as “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”).

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

71. *Id.*

72. *Id.*; John Swartz, *U.S. Marriage Act Is Unfair to Gays, Court Panel Says*, N.Y. TIMES, Oct. 19, 2012, at A1, available at <http://www.cnn.com/2012/10/18/us/new-york-doma-windsor/index.html>.

73. *Windsor*, 133 S. Ct. 2679.

74. *Id.*

exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (4) whether the class is a minority or politically powerless.<sup>75</sup>

After evaluating these factors, the Second Circuit held that DOMA failed under heightened scrutiny.<sup>76</sup>

Subsequently, on December 7, 2012, the Supreme Court announced certiorari for *United States v. Windsor*.<sup>77</sup> Oral arguments for *Windsor* began March 27, 2013.<sup>78</sup>

### C. Recognition of Same-Sex Marriage Is on the Rise

Slowly but surely, the support of same-sex marriages is on the rise. According to a Gallup Poll conducted in 1996, 68% of Americans opposed same-sex marriage.<sup>79</sup> This same Gallup Poll was conducted again in 2012; the percentage of Americans opposed to same-sex marriage dropped to 48%.<sup>80</sup>

As of January 24, 2013, nine states and the District of Columbia allow same-sex marriage.<sup>81</sup> These states are as follows: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington.<sup>82</sup> Additionally, five states, while they do not allow for same-sex marriage, allow for civil unions between same-sex couples: Delaware, Hawaii, Illinois, New Jersey, and Rhode Island.<sup>83</sup> Conversely, thirty-seven states have banned same-sex marriage, either by state law or constitutional amendments.<sup>84</sup>

The U.S. Census Bureau states that, “[t]here are more than 130,000 married gay and lesbian couples in the United States.”<sup>85</sup> Thus, it is reasonable

75. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985).

76. *Windsor*, 133 S. Ct. 2679.

77. *Id.*

78. *For the Session Beginning March 18, 2013*, [http://www.supremecourt.gov/oral\\_arguments/argument\\_calendars/MonthlyArgumentViewer.aspx?Filename=MonthyArgumentCalMar2013.html](http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentViewer.aspx?Filename=MonthyArgumentCalMar2013.html).

79. Caitlin Stark, *By the Numbers: Same-sex Marriage*, CNN (May 12, 2012, 10:31 AM), <http://www.cnn.com/2012/05/11/politics/btn-same-sex-marriage/index.html>.

80. *Id.*

81. *Rhode Island House easily passes gay marriage bill*, FOXNEWS (Jan. 24, 2013), <http://www.foxnews.com/politics/2013/01/24/rhode-island-house-begins-gay-marriage-debate/>; National Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NCLS.COM, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated Nov. 2012). For a colorful and easy to see graphical depiction, see the States that Allow Gay Marriage website, *Gay Marriage States*, (July 3, 2013), <http://statethatallowgaymarriage.com/>.

82. National Conference of State Legislatures, *supra* note 81.

83. *Id.*

84. *Id.* The following are the thirty-seven states which have banned same-sex marriage: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

85. A. Feldman, *supra* note 43.

to presume that this number will rise as more and more states either legalize same-sex marriage or recognize such relationships as civil unions.<sup>86</sup> Accordingly, the currently occurring and anticipated future growth of same-sex marriage recognition can only mean a need for awareness of the federal tax consequences same-sex couples face, as well as a rising need for efficient legal planning by competent and knowledgeable attorneys.

## II. ARE ALL TAXPAYERS TREATED EQUALLY?

Even before the Constitution was written, the Declaration of Independence stated that: “. . . all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>87</sup> If all men are truly created equal, then why the distinction based on someone’s gender? This section address the federal tax discrepancies between same-sex and heterosexual partners, as well as a discussion on the various federal tax deductions that same-sex couples are incapable to benefit from.<sup>88</sup>

### A. *The Filing Status of Same-Sex Partners*

The federal estate tax exemption is just one of many tax exemptions that same-sex couples cannot claim, whereas heterosexual married individuals may.<sup>89</sup> As of 2012, the federal estate tax was just one of 1,138 federal benefits conferred by marriage and withheld from same-sex couples, even if the state in which the same-sex couple resides acknowledges same-sex marriages.<sup>90</sup> A short list of such federal benefits includes the following: “. . . Social Security, inheritance, tax relief, bankruptcy protection, resident status for a spouse who’s a foreign national, parenthood, custody, adoption and property rights.”<sup>91</sup>

Thus, “when a same-sex spouse dies leaving assets to the surviving spouse, only the estate tax exemption amount can pass free of estate taxes . . . [a]nything over that would be subject to the federal estate tax.”<sup>92</sup> In contrast, when a partner from a heterosexual marriage “dies, everything that passes to the surviving spouse can go tax free.”<sup>93</sup>

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86. *Id.*

87. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

88. *See infra* Part II.A–B.

89. *See* Coplan, *supra* note 4, at 41.

90. *See id.*

91. *Id.*

92. Kevin A. Pollock, *Same Sex Couple Entitled to Federal Estate Tax Marital Deduction?*, KEVIN A. POLLOCK BLAWG (Sept. 25, 2012, 10:15 AM), <http://willstrustsestates.blogspot.com/2012/09/same-sex-couple-entitled-to-federal.html>.

93. *Id.*

As stated previously, there are more than 130,000 married gay and lesbian couples in our country today.<sup>94</sup> This number is expected to rise as more and more states legalize and recognize same-sex marriages.<sup>95</sup> DOMA's lack of marital recognition creates not only a lack of tax uniformity from the state to federal level, but also creates vast discrepancies between heterosexual and homosexual couples' tax burdens.<sup>96</sup>

Essentially, DOMA prohibits same-sex married couples from filing a joint federal tax income return, regardless of whether same-sex couples are married by their state's standards.<sup>97</sup> Author Amy Feldman provides an illustrative example using tax figures from 2012:

If you or your partner can file as head of household instead of as a single person, you'll be able to get a greater standard reduction—\$8,700 in 2012, versus \$5,950 for single status—and better tax rates. To qualify, you need to cover more than half the costs of the household's upkeep and have a “qualifying person” living with you—typically a related child. In the case of a lesbian couple where one partner was the biological parent of a child and the other was a breadwinner and not related to the child, neither would qualify.<sup>98</sup>

Even after the fiscal cliff crisis from the beginning of 2013, same-sex married couples may not file joint federal tax returns—in the face of an increasing number of states legalizing same-sex marriage throughout the country.<sup>99</sup> This issue becomes much more difficult when same-sex couples have dependents or even adopted children because “only the biological or legally adoptive parent” would be allowed to take child and education tax benefits.<sup>100</sup> Both dependents and adopted children of same-sex parents present the issue of which parent should claim the children as dependent.<sup>101</sup>

To summarize the tax disparity regarding income tax, if a same-sex couple is married in a state that recognizes their relationship, or even recognizes civil unions and domestic partnerships, couples may file a joint state income tax return.<sup>102</sup> But because of DOMA, the Internal Revenue Service “maintains they [sic] can't file a joint federal return, meaning extra tax prep hassles.”<sup>103</sup>

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94. A. Feldman, *supra* note 43.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Carole Feldman, *Same-sex couples can't file joint federal taxes*, CTPOST (Jan. 22, 2013, 12:03 PM), <http://www.ctpost.com/living/article/Same-sex-couples-can-t-file-joint-federal-taxes-4213773.php>.

100. A. Feldman, *supra* note 43.

101. C. Feldman, *supra* note 99.

102. Deborah L. Jacobs, *Married, With Complications*, FORBES (Aug. 22, 2011, 6:00 PM), <http://www.forbes.com/forbes/2011/0822/investing-same-sex-marriage-legal-rights-married-complications.html>.

103. *Id.*

Further, when the incomes are unequal between same-sex spouses, “being forced to file as singles will mean a higher federal tax bill.”<sup>104</sup>

### *B. Same-Sex Partners Are Not Able to Receive Certain Deductions*

There are numerous inherent, obvious, and discriminatory tax discrepancies between heterosexual and homosexual couples.<sup>105</sup> Addressed in this article are merely a few of these discrepancies: deductions for dependents, deductions for medical expenses, as well as a discussion of the unlimited marital deduction.<sup>106</sup> Sadly, these discrepancies affect not only the same-sex partner as an individual, but also the many other helpless, dependent persons that also live in the home who financially and emotionally depend on the same-sex couple.<sup>107</sup>

#### *1. Deduction for Dependents*

One discrepancy between heterosexual and homosexual couples in federal tax returns occurs when claiming qualified persons as dependents.<sup>108</sup> Married heterosexual couples list children on their joint tax return and in return accrue benefits.<sup>109</sup> This presents a two-fold problem for same-sex couples: first, same-sex couples cannot file a joint tax return and second, both same-sex partners cannot be the legal parent of a child.<sup>110</sup> Essentially, this means only one partner, the actual biological or legal parent of the child, may claim the child or children as dependents in the home, and only this partner would be entitled to the tax exemptions for dependents.<sup>111</sup>

In addition to claiming a qualifying child as a dependent, a qualifying relative counts for deduction purposes as well.<sup>112</sup> To count as a “qualifying relative” certain requirements (for example, gross income limitation) must be met.<sup>113</sup> However, if these monetary and support requirements are met, a qualifying relative includes:

- (A) A child or a descendant of a child; (B) A brother, sister, stepbrother, or stepsister; (C) The father or mother, or an ancestor of either; (D) A stepfather or stepmother; (E) A son or daughter of a brother or sister of the taxpayer; (F) A brother or sister of the father or mother of the taxpayer; (G) A son-in-

104. *Id.*

105. *See supra* Part II.B.

106. *See supra* Part II.B.

107. *See* A. Feldman, *supra* note 43.

108. *See* I.R.C. § 152 (West 2012).

109. I.R.C. § 152; *see also* A. Feldman, *supra* note 43.

110. I.R.C. § 152. However, some states allow for both same-sex partners to be considered the “legal parent.” *See also* A. Feldman, *supra* note 43.

111. I.R.C. § 152. *See also* A. Feldman, *supra* note 43.

112. I.R.C. § 152(c)–(d).

113. I.R.C. § 152(d).

law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law; (H) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 7703, of the taxpayer) who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household.<sup>114</sup>

Thus, same-sex couples living with a qualifying child or relative have additional considerations when filing his or her tax return.<sup>115</sup>

## 2. Deduction for Medical Expenses

An additional deduction available for qualified taxpayers under current law is the deduction for medical expenses.<sup>116</sup> The general rule for allowance of this deduction is as follows:

There shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent (as defined in section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof), to the extent that such expenses exceed 7.5 percent of adjusted gross income.<sup>117</sup>

Thus, a taxpayer may receive a deduction for “medical care” for himself, for his or her spouse, and also for any dependents.<sup>118</sup> Additionally, the defined term “medical care” is quite broad.<sup>119</sup> Yet, for same-sex couples, this deduction is unavailable unless one partner qualifies as a dependent.<sup>120</sup> Further, because medical expenses are itemized deductible and therefore not taxable, “employers deduct the cost of health insurance from an employee’s paycheck on a pre-tax basis. But for gay and lesbian couples, the benefits for the partner are tax at the federal level as wage income.”<sup>121</sup>

Even though the medical expense deduction appears to wholly abandon same-sex couples, a Private Letter Ruling from the IRS held that “[a]n

114. I.R.C. § 152(d)(2)(A–H).

115. See A. Feldman, *supra* note 43.

116. I.R.C. § 213.

117. I.R.C. § 213(a) (emphasis added).

118. *Id.* “Medical care” means: “(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body, (B) for transportation primarily for and essential to medical care referred to in subparagraph (A), (C) for qualified long-term care services (as defined in section 7702B(c)), or (D) for insurance (including amounts paid as premiums under part B of title XVIII of the Social Security Act, relating to supplementary medical insurance for the aged) covering medical care referred to in subparagraphs (A) and (B) or for any qualified long-term care insurance contract (as defined in section 7702B(b)). In the case of a qualified long-term care insurance contract (as defined in section 7702B(b)), only eligible long-term care premiums (as defined in paragraph (10)) shall be taken into account under subparagraph (D).” *Id.*

119. *Id.*

120. I.R.C. § 213; see discussion Part III.B.1.

121. I.R.C. § 213; A. Feldman, *supra* note 43.

employee's domestic partner who is not related to the employee in one of the relationships specified in section 152(a)(1) through (8), may qualify as a dependent of the employee if all of the requirements of section 152(a)(9) and 152(b)(5) are met.<sup>122</sup> Thus, the IRS has at least recognized that same-sex couples may be dependents.<sup>123</sup>

### 3. *The “Unlimited Marital Deduction”*

The marital deduction allows for “lifetime and testamentary transfers from one spouse to another.”<sup>124</sup> Essentially, the unlimited marital deduction provides for property to pass outright from the decedent to a surviving spouse free of tax.<sup>125</sup>

Same-sex couples cannot use the federal spousal exception, also called the unlimited marital deduction, allowing a spouse “to transfer as much as they want to each other, either during life or at death, without having to pay any estate or gift tax.”<sup>126</sup> Even though both federal gift and estate taxes allow for an unlimited marital deduction, DOMA restricts all same-sex couples, including these couples married in states allowing for same-sex marriage, from taking advantage of unlimited marital deduction.<sup>127</sup>

Although same-sex couples cannot use the unlimited marital deduction, other alternatives exist, such as a Grantor Retained Interest Trust (GRIT).<sup>128</sup>

### 4. *Some Good News: Same-Sex Partners, If Qualified, May File as “Head of Household”*

It may be possible for a qualifying partner in a same-sex relationship to file his or her tax refund as a “head of household” which allows an individual to receive a higher standard reduction on his or her tax return.<sup>129</sup> The head of household is defined for income-tax purposes as an “unmarried or separate person (other than a surviving spouse) who provides a home for dependents for more than one-half of the taxable year.”<sup>130</sup> Essentially, a “head of household”

122. I.R.S. Priv. Ltr. Rul. 200339001 (Sept. 26, 2003); *see also* CARINA BRYANT, 8 MERTENS LAW OF FED. INCOME TAX’N § 31B:4 (updated Jan. 2003).

123. I.R.S. Priv. Ltr. Rul. 200339001 (Sept. 26, 2003); *see also* CARINA BRYANT, 8 MERTENS LAW OF FED. INCOME TAX’N § 31B:4 (updated Jan. 2003).

124. BLACK’S LAW DICTIONARY 475 (9th ed. 2009).

125. I.R.C. §§ 2056, 2523 (West 2012).

126. Jacobs, *supra* note 102; *see generally* DALE S. ADAMS & ROBERT B. SMITH, FED. EST. & GIFT TAX’N, ¶ 5.06 § 2056 (2012).

127. Raymond Prather, *Advising Same-Sex Couples*, THE BEST ARTICLES PUBLISHED BY THE ABA, March 2011, Vol. 28, No. 2 at 14-15, *available at* [http://www.americanbar.org/publications/gp\\_solo/2011/march.html](http://www.americanbar.org/publications/gp_solo/2011/march.html).

128. *See infra* Part IV.A.2; *Windsor*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

129. *See* I.R.C. § 2.

130. BLACK’S LAW DICTIONARY 787 (9th ed. 2009).

is taxed at a lower rate than a single person who is not a head of household.<sup>131</sup> For instance, in 2012 the standard deduction for an individual who qualified as the head of household was \$8,700, compared to the standard deduction for individual tax returns of \$5,950.<sup>132</sup> In 2013 these numbers again changed.<sup>133</sup> This year, the standard deduction for a “head of household” is \$8,950 and \$6,100 for individual tax returns.<sup>134</sup>

Doing so requires the partner to be unmarried at the close of his taxable year.<sup>135</sup> The next requirement for a partner filing for head of household is that he or she paid more than half of the cost of maintaining his or her principal home and that this principal home was also a principal home for a “qualifying person.”<sup>136</sup> Essentially, to qualify for this deduction, the partner must be unmarried, have paid more than half of the cost of keeping up the home, and be living with a “qualifying person.”<sup>137</sup> Thus, same-sex partners may be able to choose for one partner to file as head of household on his or her federal tax return.<sup>138</sup>

Unfortunately, the option for filing as a “head of household” is restricted to those who pay over one-half the costs of the household’s upkeep while also living with a “qualified person.”<sup>139</sup> However, these high-earning partners who have a “qualifying person” living with them in the home (such as a related child or legally adopted child) should file as “head of household” to receive a greater standard deduction of \$2,850, the difference between standard deductions for filing individually and filing as the head of household.<sup>140</sup>

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131. *Id.*

132. I.R.C. § 63(c)(2); Rev. Proc. 2011-52, 2011-45 I.R.B.701; *see also* A. Feldman, *supra* note 43.

133. I.R.C. § 63(c)(2) Rev. Proc. 2013-15, 2013-5 I.R.B.444.

134. I.R.C. § 63(c)(2) Rev. Proc. 2013-15, 2013-5 I.R.B.444.

135. I.R.C. § 2(b)(1); the word “marriage” means only a legal union between one man and one woman as husband and wife. 1 U.S.C. § 7.

136. A “qualifying person” means: (i) a qualifying child of the individual (as defined in section 152(c), determined without regard to section 152(e)), but not if such child—(I) is married at the close of the taxpayer’s taxable year, and (II) is not a dependent of such individual by reason of section 152(b)(2) or 152(b)(3), or both, or (ii) any other person who is a dependent of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such person under section 151, or (B) maintains a household which constitutes for such taxable year the principal place of abode of the father or mother of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such father or mother under section 151. For purposes of this paragraph, an individual shall be considered as maintaining a household only if over half of the cost of maintaining the household during the taxable year is furnished by such individual. I.R.C. § 2(b)(1)(A)(i)–(B).

137. *Id.*; I.R.C. § 2.

138. I.R.C. § 2.

139. I.R.C. § 63(c)(2); Rev. Proc. 2013-15, 2013-5 I.R.B.444.

140. I.R.C. § 63(c)(2); Rev. Proc. 2013-15, 2013-5 I.R.B.444; *see also* A. Feldman, *supra* note 43.

### III. MODERN APPROACHES WHEN ESTATE PLANNING FOR THE NON-TRADITIONAL FAMILY

As previously discussed, certain federal tax deductions are unavailable to same-sex couples.<sup>141</sup> Thus, it is essential for estate planners to remain knowledgeable about current law, as well as possible options to present to same-sex couples.<sup>142</sup>

#### A. *A Modern Approach for the Attorney to Consider: The Grantor Retained Income Trust (GRIT) as a Viable Planning Tool*

Many individuals propose the grantor retained income trust (GRIT) as a viable estate-planning tool for same-sex couples.<sup>143</sup> As previously discussed, DOMA has two main components. “First, DOMA allows states not to recognize same-sex marriages legally performed in other states . . . [s]econd, DOMA says that the federal government does not recognize any same-sex marriages, civil unions, or other relationship designations.”<sup>144</sup> Thus, DOMA prevents same-sex couples from receiving any federal benefits of marriage.<sup>145</sup> Although the Supreme Court will hear oral arguments in the *Windsor* case during the 2013 Supreme Court term, it nonetheless remains wise for same-sex couples to become involved in planning for their estate.<sup>146</sup>

##### 1. *Generally*

Black’s Law Dictionary defines GRIT as “[a] trust in which a gift’s value can be reduced by the grantor’s retaining an income interest, for a specified time, in the gifted property.”<sup>147</sup> Thus, essentially “the grantor makes to the remainderman a current gift of the right to trust assets at a specified date in the future.”<sup>148</sup> One commentator proposes a more simplified definition:

[A GRIT] is a tax-saving trust in which the grantor of the trust places assets or transfers property into an irrevocable trust. The terms of the trust requires all of the income to be paid to the grantor for a specified period of time. At the end of the term, the remaining property is transferred to the beneficiary as

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141. See *infra* Part II.

142. See *infra* Part III.

143. See Prather, *supra* note 127; Chris Tymchuk, *Grantor Retained Income Trust: An Option for Nontraditional Couples*, UNIQUE ESTATE LAW BLOG, [http://uniqueestatelaw.com/lawyer/2011/07/21/Asset-Protection/Grantor-Retained-Income-Trust-An-Option-for-Unique-Families\\_bl2686.htm](http://uniqueestatelaw.com/lawyer/2011/07/21/Asset-Protection/Grantor-Retained-Income-Trust-An-Option-for-Unique-Families_bl2686.htm) (last visited Jan. 21, 2013); Nash & Kromash, LLP, *Grantor Retained Income Trust (GRIT)*, <http://www.n-klaw.com/grantor-retained-income-trustgrit/> (last updated Apr. 5, 2014).

144. See *supra* Part I.B.1.i.

145. See *supra* Part I.B.1.i; Prather, *supra* note 127.

146. *Windsor*, 833 F. Supp. 2d at 394.

147. BLACK’S LAW DICTIONARY 1651 (9th ed. 2009).

148. See *id.*

named in the trust. The benefit to this is that, at the end of the term, your partner will receive this property free of any gift or estate taxes on the appreciated value of the property. However, should you die before the termination of the trust a proportionate share of the trust will be included back into the grantor's estate.<sup>149</sup>

Any individual could establish a GRIT prior to 1990.<sup>150</sup> In fact, prior to 1990, many a GRIT as “a common method to reduce estate and gift taxes on the transfer of wealth.”<sup>151</sup> The change in 1990 was due to the addition of Chapter 14 of the Internal Revenue Code, which essentially disallowed any more discounts “for any gift to a family member that is made via a GRIT.”<sup>152</sup>

## 2. *The Protection a GRIT Would Likely Afford*

As previously stated, same-sex couples cannot use the unlimited marital deduction.<sup>153</sup> Yet, unlike heterosexual couples, same-sex couples are able to form a GRIT.<sup>154</sup> This is because a GRIT cannot be established to benefit anyone of the following: (1) an individual's spouse; (2) any ancestor or lineal descendant of such individual's spouse; (3) any brother or sister of the individual; and (4) any spouse of any individual in (2) or (3).<sup>155</sup> Thus, because DOMA does not recognize same-sex marriage, same-sex couples are able to benefit from the tax advantages a GRIT would likely offer.<sup>156</sup>

One disadvantage of a GRIT occurs if the grantor dies during the term of the trust.<sup>157</sup> If the grantor dies during the trust's term, the property will then be included in his taxable estate.<sup>158</sup> Thus, any estate tax savings will be lost.<sup>159</sup> However, the major advantage of a GRIT is that as an irrevocable trust, property passes to the beneficiary in further trust or outright when the terms of years expires.<sup>160</sup> At this point, the trust would be “a completed gift at the time of creation but the value of the gift would be discounted.”<sup>161</sup> The result is that the “remainder interest will have a lower value for gift tax purposes than its anticipated actual value.”<sup>162</sup>

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149. Tymchuk, *supra* note 143.

150. KAREN MOUDLING, 1 *SEXUAL ORIENTATION AND THE LAW* § 5:22 (updated Oct. 2012).

151. *Id.*

152. *Id.*

153. *See supra* Part II.C.

154. I.R.C. § 2704(c)(2)(A–D); *see* Tamara E. Kolz Griffin, *Estate Planning for Same-Sex Couples*, TSUB11 ALI-ABA 33, 48 (Oct. 31, 2012).

155. I.R.C. § 2704(c)(2)(A–D).

156. I.R.C. § 2702; Griffin, *supra* note 154. *See also* Prather, *supra* note 127.

157. MOUDLING, *supra* note 150.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Griffin, *supra* note 154, at 48.

Even though same-sex couples are not legally married under federal law, establishing a GRIT is just one example of how diligent estate planning can circumvent some forms of taxation.<sup>163</sup> As one commentator has put it, “GRITs . . . [are] not just for breakfast anymore.”<sup>164</sup>

*B. A Modern Approach When Advising Today’s Client: The Cohabitation Agreement*

The most basic contract is simply an agreement between two or more people or parties that creates enforceable obligations between them.<sup>165</sup> A cohabitation agreement is a type of contract defined as “[a] contract outlining the property and financial arrangements between persons who live together.”<sup>166</sup> For same-sex couples, “[h]aving a written agreement that delineates a couple’s intentions is one of the best ways to protect themselves.”<sup>167</sup> This formal, written agreement may provide same-sex couples legal protection based upon contract law.<sup>168</sup> These formal agreements are called cohabitation or “living together” agreements.<sup>169</sup>

Lately, many courts have become much more willing to recognize cohabitation agreements between same-sex partners.<sup>170</sup> It is also important for the same-sex couple to express when drafting the cohabitation agreement their assets, liabilities, and also how the couple intends to hold title to personal and real property.<sup>171</sup> An example template of a cohabitation agreement is a good place to begin in order to draft and implement a cohabitation agreement.<sup>172</sup>

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163. See 1 U.S.C. §§ 1, 7.

164. David W. Olsen, *GRITs: Not Just for Breakfast Anymore: Grantor Retained Income Trusts Saved From Meltdown of Estate Valuation*, 6 J. SUFFOLK ACAD. L. 131, 157 (1989) (concluding that “a GRIT is a powerful and important estate planning device, and if carefully created and implemented, can save a tremendous amount of estate tax dollars”).

165. See BLACK’S LAW DICTIONARY 365 (9th ed. 2009).

166. BLACK’S LAW DICTIONARY 296 (9th ed. 2009); see Burda, *supra* note 50, at 20.

167. Burda, *supra* note 50, at 20.

168. *Id.* at 39 (stating that “[u]nder contract law, people can agree to anything—even if the law states that there is not protection otherwise. As long as the agreement does not involve an illegal activity, the contract will be enforced”).

169. *Id.* at 20–21, 40.

170. See FRANK S. BERALL, *Estate Planning Considerations for Unmarried Same or Opposite Sex Cohabitants*, 23 QUINNIPIAC L. REV. 361, 380 (2004).

171. *Id.*; see Burda, *supra* note 50, at 40.

172. For an example template of a cohabitation agreement, see Burda, *supra* note 50, at 245.

#### IV. POSSIBLY AVOIDING THE COMPLICATIONS OF PROBATE—JOINT OWNERSHIP

As more states begin to recognize same-sex marriage as well as domestic partnerships, another question arises in this context of marriage and property—exactly whom owns what?<sup>173</sup>

Many same-sex couples do not consider the tax consequences when they live together and commingle their assets, nor do many same-sex couples consider what the IRS could or will do.<sup>174</sup> Unless a surviving same-sex spouse or partner can prove he or she has half ownership, the IRS considers commingled, joint “property to be *wholly* part of the decedent’s estate.”<sup>175</sup> Further, the commingling of these assets may also trigger the gift tax, then requiring the person who made the gift to file a gift tax return.<sup>176</sup>

While any type of ownership has both advantages and disadvantages, the most advantageous types of ownership depend on the marriage laws of the specific state.<sup>177</sup> In states that do not recognize same-sex marriage, joint tenancy is the preferred form of property ownership.<sup>178</sup> Whereas in states that do recognize same-sex marriage, tenancy by the entirety is likely the best option.<sup>179</sup> This section will mostly address joint tenancy as an ownership option for both real and personal property.

##### A. Real Property

Traditionally, three ways exist for one to own real property: joint tenants with the right of survivorship (JTWROS), tenants in common (TIC) and tenants by the entirety.<sup>180</sup>

##### 1. Joint Tenancy with the Right of Survivorship

Joint tenants share equally in the property they together own.<sup>181</sup> For example, when two people own property as joint tenants, each individual owns a 50% interest.<sup>182</sup> Additionally, “when one joint tenant dies, his interest *automatically* gets transferred to the surviving joint tenant.”<sup>183</sup> This automatic

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173. See *supra* Part I.B.1.i; see House Lawyer, *Same-sex marriages create new questions in property laws*, WASHINGTONPOST.COM (Jan. 4, 2013), [http://articles.washingtonpost.com/2013-01-04/news/36210882\\_1\\_joint-tenant-joint-tenancy-property](http://articles.washingtonpost.com/2013-01-04/news/36210882_1_joint-tenant-joint-tenancy-property).

174. Burda, *supra* note 50, at 22–23.

175. *Id.* at 23 (emphasis added).

176. *Id.*

177. House Lawyer, *supra* note 173.

178. *Id.*

179. *Id.*

180. See *id.*; MOUDLING, *supra* note 150, at § 5:24.

181. See House Lawyer, *supra* note 173.

182. See *id.*

183. *Id.* (emphasis added).

transfer is also known as a “non-probate transfer.”<sup>184</sup> Thus, “[m]any same-sex couples view joint tenancy with its automatic right of survivorship as an attractive way to own their property.”<sup>185</sup>

It is likely advantageous for same-sex couples to own property as JTWRROS.<sup>186</sup> This is because owning property as JTWRROS has the inherent element of the right of survivorship.<sup>187</sup> So, if a same-sex couple owns property in a joint tenancy, and one of the partners passes away, the result is that the surviving partner owns the property outright, automatically, and contrary to any terms of a will, should one exist.<sup>188</sup> The automatic, non-probate transfer allows that upon the death of one partner, the surviving partner becomes the 100% sole owner.<sup>189</sup> This process side-steps contravening state and federal law restricting such transfer in probate only to the surviving spouse.<sup>190</sup>

However, there remains one hurdle a surviving same-sex partner or spouse may have to clear because property held as JTWRROS between same-sex partners’ presents an estate tax issue.<sup>191</sup> The estate tax issue presented here is that the “IRS includes 100% of the property’s value in the estate of the first owner to die.”<sup>192</sup> This general rule is a rebuttable presumption, overcome if the surviving owner can provide evidence of his or her contribution to the acquisition of the property.<sup>193</sup> Unfortunately, the IRS does not define what kind of evidence is required to overcome this presumption, but a “[s]howing that both parties had sufficient individual assets to make the [mortgage] payments should be sufficient to rebut the presumption.”<sup>194</sup>

## 2. Tenancy in Common

Another way for real property ownership is tenancy in common.<sup>195</sup> In this ownership scheme, each tenant has a divided ownership share and also has an equal right to possess the entire property.<sup>196</sup> “The central characteristic of a TIC is simply that each tenant is deemed to own by himself, with most of the attributes of independent ownership, a physically undivided part of the entire

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184. Jim Flynn, *Money & the Law: Joint tenancy can have unexpected consequences*, GAZETTE.COM (Dec. 16, 2012, 8:08 AM) <http://www.gazette.com/articles/money-148505--.html>.

185. MOUDLING, *supra* note 150, at § 5:24.

186. *See* House Lawyer, *supra* note 173.

187. *Id.*

188. Flynn, *supra* note 184.

189. *See* House Lawyer, *supra* note 173.

190. House Lawyer, *supra* note 173.

191. *Id.*

192. Burda, *supra* note 50, at 183.

193. *Id.*

194. Burda, *supra* note 50, at 183.

195. *Id.*; *see* I.R.C. § 2040 (West 2012).

196. *See* House Lawyer, *supra* note 173.

197. BLACK’S LAW DICTIONARY 1604 (9th ed. 2009).

parcel.”<sup>197</sup> Unlike a JTWR0S, TIC have *no* right of survivorship.<sup>198</sup> Also unlike the JTWR0S, is that each tenant in a TIC may bequest his interest in their will.<sup>199</sup> Additionally, owning real property as a TIC will not trigger the gift tax because the partners individually do not give any value to the other; “both parties hold an interest in proportion to their contribution.”<sup>200</sup>

When tenants hold property as a TIC and when one dies, that tenant’s ownership interest becomes part of his or her probate estate.<sup>201</sup> Thus, it is important and necessary for same-sex individuals to avoid their ownership interest going to probate upon death.<sup>202</sup> Same-sex individuals must to take additional steps to ensure that the surviving spouse is not left to own the property with “strangers or estranged family members” as this could lead to unwanted and expensive disputes.<sup>203</sup>

### 3. Tenancy by the Entirety

Considered to be the strongest way to hold title, the tenancy by the entirety is only available to married couples.<sup>204</sup> This form of ownership is similar to the joint tenancy because of the right of survivorship, but also different in that claim’s of creditors (unless the creditor is the IRS) do not attach to property owned by tenancy in the entirety.<sup>205</sup> “Tenancy by the entireties is a form of joint tenancy . . . [i]t resembles joint tenancy in that upon the death of either husband or wife the survivor automatically acquires title to the share of the deceased spouse.”<sup>206</sup>

In states that do recognize same-sex marriage, same-sex couples should title their property as tenants by the entirety, which involves preparing and recording a new deed.<sup>207</sup> Additionally, same-sex couples who currently own property as tenants in common should also retitle their property as tenants by the entirety.<sup>208</sup>

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197. *Id.* (quoting Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests*, 54 (2d. ed. 1984)).

198. BLACK’S LAW DICTIONARY 1604 (9th ed. 2009) (emphasis added).

199. *See* House Lawyer, *supra* note 173.

200. Burda, *supra* note 50, at 184.

201. *Id.*

202. *Id.*

203. *Id.*

204. House Lawyer, *supra* note 173.

205. *Id.*

206. BLACK’S LAW DICTIONARY 1604 (9th ed. 2009) (quoting Robert Kratovil, *Real Estate Law* 198 (6th ed. 1974)).

207. House Lawyer, *supra* note 173. Tenants by the entirety is recognized for same-sex married or registered couples in the following states: Hawaii, Vermont, Massachusetts, New Jersey, Oregon, Rhode Island, Illinois, and the District of Columbia. MOUDLING, *supra* note 150, at § 5:24.

208. House Lawyer, *supra* note 173.

However, if a same-sex couple owns property in a state that does not recognize same-sex marriage, the best available option is to have the property titled as a joint tenancy.<sup>209</sup> This is just another discrepancy created by DOMA—the validity of a marriage ceases to exist when crossing from one state into another.<sup>210</sup>

### B. Personal Property

Almost any asset, including real and personal property, may be owned in joint tenancy.<sup>211</sup> Personal property may consist of: bank accounts, securities, stocks, bonds, mineral rights, and even cars and boats.<sup>212</sup> However, unlike real property, which usually comes with a deed or title, personal property usually lacks such document of title.<sup>213</sup> Because of the likelihood that a document does not exist for personal property, same-sex couples—assisted by their attorney—should form a document to evidence the intention that certain personal property is intended to be owned as joint tenants.<sup>214</sup>

But what about when personal property or assets do not have formal title?<sup>215</sup> For example, what about simple household items or appliances? The blender?<sup>216</sup> This is another example of the importance of a cohabitation agreement, and same-sex couples will need evidence to prove such items are jointly owned.<sup>217</sup>

Additionally, because the federal government does not recognize same-sex marriage, same-sex couples must also be aware of the tax consequences commonly associated with personal property.<sup>218</sup> For instance, a gift tax may have to be imposed when certain property “is transformed from sole ownership to joint ownership without any contribution from the new joint owner.”<sup>219</sup>

## V. WINDSOR, REVISITED

The ruling in *Windsor* is much anticipated, especially for the possible changes effecting estate planning. Yet, it is important to understand that the ruling in *Windsor* may not actually change that much.<sup>220</sup> “Repealing the Defense of Marriage Act (DOMA) will alleviate many of these concerns, at

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209. *Id.*

210. *See* 1 U.S.C.A. § 7.

211. MOUDLING, *supra* note 150, at § 5:24; Burda, *supra* note 50, at 53.

212. MOUDLING, *supra* note 150, at § 5:24; Burda, *supra* note 50, at 53.

213. MOUDLING, *supra* note 150, at § 5:24.

214. *See id.* (stating that “the parties should execute an agreement stating their intention that the property be owned jointly and be treated that way for all purposes”).

215. Burda, *supra* note 50, at 54.

216. *Id.*

217. *Id.* Evidence of joint ownership may include receipts from the original purchase. *Id.*

218. *See* MOUDLING, *supra* note 150, at § 5:24.

219. *Id.*

220. Burda, *supra* note 50, at 16; *United States v. Windsor*, 133 S. Ct. 2675 (2013).

least for those living in recognition states. The question of whether DOMA's repeal will benefit married lesbian and gay couples who live in nonrecognition states remains an open question."<sup>221</sup>

Additionally, most state intestacy laws do not even include same-sex couples.<sup>222</sup> So, if a same-sex partner dies without a will, his or her surviving partner will likely be "denied any right to inherit from the decedent's estate."<sup>223</sup> Only the heirs (as defined by state statute), of the intestate decedent are legally entitled to all of the decedent's assets."<sup>224</sup> Further, even same-sex couples that are legally married under another state's laws but who live in a nonrecognition state are unlikely to know that their marriage is irrelevant under that state's laws.<sup>225</sup>

Ultimately, regardless of the outcome in *Windsor*, estate planners must remain knowledgeable about the intestacy statutes in their own state.<sup>226</sup>

## VI. CONCLUSION

On June 26, 2013, I stood at the steps of the United States Supreme Court just minutes after *Windsor* was announced. Many same-sex couples were visually emotional over the ruling, realizing for the first time the legal legitimacy of their solemn vows. And although legal scholars purported the ruling to be limited to those states actually recognizing same-sex marriages, today, more than ever, the importance of estate planning for one's loved ones is now more crucial than ever.

DOMA has undoubtedly forced estate planners to find ways to protect the rights and assets of same-sex couples.<sup>227</sup> However, "[u]ntil such time that the Federal government recognizes same-sex marriage, unique and non-traditional families will have to take extra steps to protect their rights and the rights and happiness of their loved ones."<sup>228</sup>

Additionally, while many wait with great anticipation the ruling of *Windsor*, no one more than Edith Windsor herself.<sup>229</sup> After her spouse's death, Ms. Windsor lost her will to continue living and suffered from a type of heart attack, "known as broken heart syndrome."<sup>230</sup> Today, Edith Windsor has something to fight for—a fight that could not just end in marriage equality, or federal estate tax equality, but end an era of inferiority which plagues numerous

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221. Burda, *supra* note 50, at 16.

222. *Id.* at 19.

223. *Id.*

224. *Id.*

225. *Id.* at 17.

226. *Id.* at 16; *Windsor*, 133 S. Ct. 2675.

227. See generally THEGAYESTATE.COM, <http://thegayestate.com>.

228. Tymchuck, *supra* note 143. [[uniqueestatelaw.com]]

229. Larry Neumeister, *NY plaintiff: Gay benefits 'bigger than marriage'*, ASSOCIATED PRESS (Dec. 30, 2012), <http://www.google.com/hostednews/ap/article/ALeqM5hSC6ICqVrTkVmrC1bhLAN25rRJCQ?docId=c4ce86ecbb2d4273b3c9820d4faa6944>; *Windsor*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

230. Neumeister, *supra* note 229.

Americans.<sup>231</sup> “Keep me alive until after the Supreme Court . . . [i]t’s [Windsor] bigger than marriage . . . I think if we win, the effect will be the beginning of the end of stigma.”<sup>232</sup>

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231. *Id.*; Jeffrey Toobin, *How Far Will Obama Go for Same-Sex Marriage?*, THE NEW YORKER.COM (Jan. 15, 2013) <http://www.newyorker.com/online/blogs/comment/2013/01/how-far-will-obama-go-for-same-sex-marriage.html> (stating that “what’s become ever clearer is that the edifice of discrimination against gay people is falling”).

232. Neumeister, *supra* note 229.