

Marriage is ~~a Fundamental Right~~ an Option

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The question as to whether same-sex marriage is a fundamental right is one that continues to be litigated in the courts, debated in the legislatures, and discussed in law schools and legal journals across the country. The issue is an important one and it merits the time, attention, and financial contributions that are being invested into finding the answer. This article, however, is not going to join in that discussion. That question will remain with the many scholars, attorneys, judges, advocates, and legislators who are committed to that issue. This article will instead focus on another topic, one that is much less scholarly, much less theoretical, but much more applicable to the lives of committed same-sex couples living in the here and now. Whether or not same-sex marriage is a fundamental right, marriage is now a legal option for same-sex couples---an option that until recently did not exist. This paper will discuss what having the marriage option means to same-sex couples.

The LGBT community fought for, and won, the right to marry.² With that victory came a much less touted victory – the right *not* to marry. When “being married” was not an option for same-sex couples, “not being married” was not a choice either; it was the

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² Carole Feldman. *Same-Sex Marriage and Taxes: Gay Couples Could Face Surprises at Tax Time*. LGBTQ NATION. (Jan. 21, 2014), <http://www.lgbtqnation.com/2014/01/same-sex-marriage-and-taxes-gay-couples-could-face-surprises-at-tax-time> (Under *United States v. Windsor*, 133 S.Ct. 2675 (2013) and IRS Rev. Rul. 2013-17, the U.S. Federal Government recognizes same-sex marriages legally performed in any state, even if the couple's state of residence does not. The Ruling and *Windsor* do not, however, apply to domestic partnerships, same-sex unions and other partnership recognitions that are not marriage.).

couple's *only* reality. As two single people, a same-sex couple did have some limited options in building legal recognition. A couple had the option of living as two single individuals with no legal ties to each other, as two single individuals who created some legal ties, or as two single individuals who created as many legal ties as they could. No matter how many legal ties they created, they could not gain recognition of their relationship as a marriage from either the state or federal governments. Now, the times (and the law) have changed. Today, same-sex couples have the right to marry. But with that right comes a burden---the burden of choice. Because the marriage option exists, couples must choose whether to exercise their right to marry, or to exercise their right not to marry. They are now confronted with having to turn to each other and explore an extremely personal and difficult question: Should we get married?

This article will provide same-sex couples faced with this burden some background to assist them as they explore their marriage options. The first section reports on the status of legal recognition for same-sex married couples across the United States. The second section discusses the marriage options for same-sex couples in today's legal environment. It also highlights the rights and the obligations that accompany these options. The third section examines the trends in opposite-sex marriage and what same-sex couples might learn from the marriage choices that these couples are making.

I. LEGAL RECOGNITION

Same-sex marriage recognition in the United States made significant gains in 2013. The United States Supreme Court issued two rulings that strengthened marriage

equality;³ seven states⁴ joined nine others and the District of Columbia⁵ in recognizing same-sex marriages; a state legislature decided to begin conferring marriage rights to same-sex marriages in 2014;⁶ and a federal court found a state constitution's ban on same-sex marriage unconstitutional.⁷

Balanced against these advances is the legal reality that the majority of the States do not recognize same-sex marriage. As of December 31, 2013, twenty-five states prohibit same-sex marriage through amendments to state constitutions,⁸ four recognize only marriages between one man and one woman under other state law,⁹ and four states provide a form of partnership recognition to same-sex couples, however, this recognition falls short of marriage.¹⁰

³ *United States v. Windsor*, 133 S.Ct. 2675 (2013) (striking down § 3 of the Defense of Marriage Act (“DOMA”), which barred federal recognition of same-sex marriages); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (upholding the Ninth Circuit holding declaring California’s constitutional amendment banning same-sex marriage, Proposition 8, unconstitutional).

⁴ *Relationship Recognition for Same-Sex Couples in the U.S.*, NAT’L GAY AND LESBIAN TASK FORCE (Jan. 6, 2014), http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_1_6_14_color.pdf (Rhode Island, Minnesota, Delaware, California, New Jersey, Hawai’i, and New Mexico).

⁵ *Supra* note 4 (Massachusetts (2004), Connecticut (2008), Iowa (2009), Vermont (2009), New Hampshire (2010), District of Columbia (2010), New York (2011), Maine (2012), Maryland (2012) and Washington (2012)).

⁶ *Judge OKs Illinois Same-Sex Marriages in Cases of Life-Threatening Illnesses*, LGBTQ NATION (Dec. 16, 2013), <http://www.lgbtqnation.com/2013/12/judge-oks-illinois-same-sex-marriages-in-cases-of-life-threatening-illnesses/> (Illinois will grant marriage licenses to same-sex couples beginning June 1, 2014. Couples with severe health issues may apply for a waiver that would allow them to obtain the license immediately.).

⁷ *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874 (D. Utah 2013).

⁸ *Supra* note 4 (Alabama, Alaska, Arkansas, Arizona, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah and West Virginia).

⁹ *Id.* (Indiana, Pennsylvania, Virginia and Wyoming).

¹⁰ *Id.* (Colorado recognizes civil unions; Oregon and Nevada recognize domestic partnerships; and Wisconsin recognizes a limited domestic partnership).

The legal landscape of same-sex marriage recognition changed dramatically in 2013 and will continue to change in 2014 as courts hear even more challenges to state restrictions on same-sex marriage recognition. Twenty-four states are involved in litigation relative to their laws recognizing only opposite-sex marriages.¹¹ Furthermore, one state legislature is discussing a proposed amendment to its state constitution that would bar same-sex marriages.¹² The activity in the courts and legislatures leads one to an obvious conclusion: the Supreme Court did not ask and answer every question relative to same-sex marriage in its 2013 term. The Court's decisions have only started a conversation that will continue in courtrooms across the country this year and for years to come.

The Supreme Court determined long ago that marriage is a fundamental right.¹³ Last year, it also held that the federal government could not deny marriage recognition to legally married same-sex couples.¹⁴ What the Court has yet to examine is whether the Constitution requires states to grant marriages to same-sex couples, and to recognize legally valid same-sex marriages from other jurisdictions, which presently states are *not* required to do under Section 2 of the Defense of Marriage Act (DOMA).¹⁵

¹¹ *Marriage Litigation*, Freedom to Marry, <http://www.freedomtomarry.org/litigation> (last visited Feb. 9, 2014) (Arizona, Arkansas, Colorado, Florida, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin). Recently, Florida has also commenced litigation. *See Judge strikes Florida's same-sex marriage ban -- though no weddings yet*, CNN (Aug. 27, 2014), <http://www.cnn.com/2014/08/21/justice/florida-same-sex-marriage/index.html?iref=allsearch>.

¹² Tom LoBianco, *Indiana Gay Marriage Opponents Press Forward, Even as Tides Shift*, LGBTQ NATION (Feb. 9, 2014), <http://www.lgbtqnation.com/2014/02/indiana-gay-marriage-opponents-press-forward-even-as-tides-shift>.

¹³ *See Loving v. Virginia*, 388 U.S. 1 (1967) & *Zablocki v. Redhail*, 434 U.S. 374 (1978).

¹⁴ *See Windsor*, *supra* note 3.

¹⁵ 1 U.S.C. § 7.

While the courts continue to address questions relative to marriage and same-sex couples, it appears that the following are true as of this writing¹⁶: 1) Marriage is a fundamental right; 2) the federal government recognizes legally performed same-sex marriages; and 3) individual states may pass laws recognizing marriages only between one man and one woman. Applying these three truths to the reality of committed same-sex couples in our country, one may make the following analysis: 1) While marriage is a fundamental right a couple's state of residence may not be required to recognize a same-sex marriage even if it is valid in another jurisdiction; and 2) the federal government will recognize a valid same-sex marriage even if the couple's state of residence will not. Thus, if a couple lives in a state that does not recognize marriage as a fundamental right for same-sex couples, marriage is still an option for those same-sex couples willing to accept only federal recognition of their marriage and who are willing to travel to another jurisdiction which recognizes same-sex marriages to be married.

States that recognize same-sex marriages give couples more protections than states that do not recognize these unions. Couples in non-recognition states still have federal recognition, but as will be seen in the next section, that recognition does not presently apply to all federal benefits. Many of the benefits that come with the choice to marry are tied to the couple's state of residence. Same-sex couples have the option of marrying, but how good that option is depends in large part on where the couples live.

II. THE POSSIBLE MARRIAGE OPTIONS

The marriage options available to same-sex couples depends on where the couple lives. Not being married is an option for all same-sex couples regardless of where they

¹⁶ January 23, 2014.

live. If the couple lives in a full equality state then they will be recognized as a married couple by both their home state and the federal government. If they live in a state that doesn't recognize their marriage, then they will only have federal marriage equality benefits. If a couple is willing and able to relocate, then all three are viable options. However, given the reality that relocating to a new state is prohibitive to most couples for a variety of reasons, the real choice for most couples is between no marriage and either full marriage or federal only marriage, depending on the laws of their home state. And of course, once a couple marries they have the option of divorcing. Thus the four options available to same-sex couples are: No Marriage, Federal Marriage Recognition Only, Full Marriage, and Divorce.¹⁷ Of these options, the one with the most uncertainty is divorce. As later discussion will show, the uncertainty relates to whether the state of residence recognizes the marriage.

When choosing between these options it is important that a couple look at their own situation and determine which option benefits them the most. The couple should also be aware that along with the benefits of each option come certain costs. No option is perfect. Not every option works for every couple. So understanding what comes with each option is important to help ensure that the couple understands the consequences of their choice.

¹⁷ There are other options that will not be discussed. Civil unions and domestic partnerships are by definition not marriages and they are not recognized as marriages by the federal government (*see supra* note 2). They are options in only four states (*see supra* note 10) and each of these states is involved in litigation challenging the validity of these recognitions as substitutes for marriage (*see supra* note 11). Therefore they will not be considered in this discussion of marriage options. The option of being legally married to someone while being in a relationship with another person will also not be discussed. While these situations do exist, they are often part of a life transition or involve reasons unique to the individuals involved and would not benefit this discussion.

A. NO MARRIAGE

Under the No Marriage option, the couple is treated as two separate individuals. There are no state or federal protections in place based on the unmarried couple's commitment to each other and to their relationship. There is no guaranteed right to make health care decisions for each other, to visit each other in a hospital, to become an incapacitated partner's guardian or to make funeral or burial decisions. Each individual will likely be responsible for his or her own health insurance, income tax payments and tax return filings. Property or monetary transfers between the partners may be subject to gift tax. Partners may be forced to testify against each other in a court of law. The couple receives no automatic rights to inherit from each other in the case of death or to sue in the case of a partner's wrongful death. There is also no right to alimony or maintenance in the event of divorce. If there are children in the relationship, parental rights for both parents may not be protected either.

Unmarried couples may take affirmative steps to build protections for each other. They can create health care directives that appoint each other to make health care decisions. They can appoint each other agents under durable powers of attorney. They can acquire property and make investments together as joint tenants with rights of survivorship. They can designate each other as beneficiaries on retirement accounts and life insurance policies. Couples who own a business or have substantial assets may also choose to form trusts, limited liability companies or corporations. With these devices the individuals are linked together like to regular business co-owners. They can create estate

plans that direct that assets pass to the survivor upon one partner's death. In some states they may also be able to be legally recognized as parents to their children.¹⁸

The only legal connections they share are the ones that they create. While this may be burdensome to some, to others it is a benefit. Some couples want to be able to control when they will be viewed as partners. They may also want to be able to amend or sever these ties by simply revoking wills and other estate planning instruments, closing accounts, selling property or changing beneficiary designations. These actions can certainly be easier than a divorce. The downside is that if the couple fails to take these steps, then they will have no protections in place. As a result, decision-making powers and valuable property may pass to the legally recognized next of kin rather than to a surviving partner. This option works for those who want to custom design their rights and protections, and who are comfortable not having the rights and protections of marriage.

B. FEDERAL MARRIAGE RECOGNITION ONLY

There are over 1,138 federal benefits related to marriage.¹⁹ Following the Supreme Court's ruling in *United States v. Windsor* that Section 3 of DOMA was unconstitutional, many believed that all of these benefits would be available to legally

¹⁸ *Parenting Laws: Joint Adoption*, HUMAN RIGHTS CAMPAIGN, http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/joint_adoption_6-10-2014.pdf (last visited Aug. 25, 2014) (Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Hawai'i, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington grant second parent adoptions. Mississippi and Utah do not allow same-sex couples to adopt. Michigan does not allow single people to jointly adopt. Laws in Kentucky, Nebraska, North Carolina and Ohio do not permit second parent adoptions. The remaining states look at adoptions on a case-by-case basis.).

¹⁹ *An Overview of Federal Rights and Protections Granted to Married Couples*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples> (visited Feb. 9, 2014).

married same-sex couples. However, due to both the language in the holding and the complexities of federal law, not all federal rights and protections are presently granted to all married same-sex couples.

Marriage is a right conveyed by states and the District of Columbia, not the federal government. The federal government affords certain rights and protections to those people who have entered into marriages granted by the states. Justice Kennedy acknowledged the sovereignty of the states to confer marriage rights in the *Windsor* opinion:

DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriage of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.²⁰

It is clear that the federal government must respect those couples that the states have sought to protect with marriage rights. What is less clear is what the federal government does when a couple's state of residence does not recognize the marriage when that marriage is fully legal and valid in the jurisdiction in which it was performed. The question for the federal government becomes which state does it respect, the one that performed the marriage or the one in which the couple resides?

Some federal laws tie marriage recognition to the ceremonial state. Others tie recognition to the couple's state of residence. Under laws that follow the ceremonial theory, the marriage is valid and recognized if the state that conferred the marriage rights recognizes the union. Under the state of residence theory, federal law

²⁰ *Windsor*, *supra* note 3, at 2696.

will only recognize the marriage if the couple's state of residence does. Prior to *Windsor* the distinction was for the most part academic, considering that with few exceptions heterosexual marriages are recognized across state lines. Now, in our post-*Windsor*, world the distinction is a real one for same-sex married couples seeking federal recognition and benefits.

Consistent with its practices for the last fifty years, the Internal Revenue Service (IRS) and the Treasury Department will look to the ceremonial state to determine marriage recognition.²¹ This means that the IRS will give same-sex married couples the same tax treatment that opposite-sex married couples receive even if the couple's state of residence does not recognize the marriage. What will be challenging for married same-sex couples in states that do not recognize their marriage is knowing how their state wants their state income tax returns prepared. For example, if a state does not recognize a marriage it may require the couple to file their state tax returns as two separate individuals. If their state tax code defers to the Internal Revenue Code (IRC) for tax rules and definitions it may require them to file either as married filing single or married filing jointly. But not all states that defer to the IRC have opted to have married, same-sex couples file as married.²²

Federal tax benefits that the married same-sex couples can receive include preferential treatment relative to the taxation of IRAs, 401Ks and other tax deferred retirement accounts transferred to a spouse upon death. Lifetime transfers between

²¹ IRS Rev. Rul. 2013-17.

²² Carol Calhoun, *State Taxes and Married Same-Sex Couples*, *Employee Benefits Legal Resource Site*, <http://benefitsattorney.com/charts/state-taxes-and-married-same-sex-couples> (last visited Feb. 13, 2014) (for a full discussion of state income tax filing issues for same-sex married couples).

spouses are not subject to gift tax, which means that spouses do not have to stay within the annual gift tax exclusion amount (\$14,000 for tax year 2014) when making gifts to each other.²³ Federal estate tax treatment, which was at the heart of *Windsor*, is much more preferable for married couples. However, given that only estates having a net value of over five million dollars are subject to estate tax, this is not a benefit that most married couples, regardless of gender, will enjoy.²⁴

It is less clear as to whether treatment as a married couple for income tax purposes is a benefit or a detriment. In some situations a couple will pay lower annual income taxes as a married couple. When one person makes little or no income or when one makes significantly more than the other, filing as a married couple is often preferable. However, when both spouses are high wage earners they are likely to pay more as a couple than they would if they filed as two single people. This is a result of graduated tax brackets and the phase out of certain tax credits and deductions at higher income levels.²⁵ This reality is commonly known as the Marriage Tax Penalty. The Marriage Tax Penalty is not the result of a particular tax law targeting dual income married couples, but rather it is the result of fifty-nine separate provisions in the tax code.²⁶

²³ *In 2014, Various Tax Benefits Increase Due to Inflation Adjustments*, IRS, <http://www.irs.gov/uac/Newsroom/In-2014,-Various-Tax-Benefits-Increase-Due-to-Inflation-Adjustments> (last visited Feb. 9, 2014).

²⁴ *Id.* (the federal estate tax threshold for 2013 was \$5,250,000. The 2014 threshold amount is \$5,340,000.).

²⁵ *Supra* note 2.

²⁶ Leslie Whittington, *Marriage Penalty*, NTA ENCYCLOPEDIA OF TAXATION AND TAX POLICY, (Oct. 1, 1999), available at <http://www.taxpolicycenter.org/taxtopics/encyclopedia/Marriage-Penalty.cfm>.

Federal employees, military personnel, and their respective spouses receive all federal benefits accorded to married couples even when the couple's home state does not recognize the marriage. While there have been issues when same-sex couples sought access to their benefits from a state based facility, federal centers have cooperated.²⁷ Married same-sex couples across the country are also able to benefit from legislation such as the Family Medical Leave Act.²⁸ This protects couples from losing their jobs when they have to take a leave to care for each other or their children. Couples will also enjoy health insurance protections afforded married couples under the Consolidated Omnibus Budget Reconciliation Act (COBRA).²⁹ Those seeking benefits for spouses under federal immigration law have also been successful. In fact, a member of a same-sex married couple in Florida received a green card because he was married to a United States citizen in the days following *Windsor*.³⁰

The federal government continues to make policy changes that will allow married same-sex couples to enjoy federal benefits and protections. Attorney General Eric Holder has announced that married same-sex couples, regardless of residence, will be treated as married couples under bankruptcy laws, under federal laws protecting spouses from testifying against each other, under the bureau of prisons visitation laws, and under

²⁷ Zack Ford, *All States Now Providing Same-Sex Benefits To National Guard Servicemembers*, THINK PROGRESS, <http://thinkprogress.org/lgbt/2013/12/13/3063301/states-providing-sex-benefits-national-guard-servicemembers> (last visited Feb. 9, 2014).

²⁸ *Factsheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/regs/compliance/whdfs28f.htm> (last visited Feb. 9, 2014).

²⁹ *Supra* note 19.

³⁰ Julia Preston, *Gay Married Man in Florida Is Approved for Green Card*, N.Y. TIMES, (June 30, 2013), <http://www.nytimes.com/2013/07/01/us/gay-married-man-in-florida-is-approved-for-green-card.html>.

certain victim compensation programs.³¹ While married same-sex couples see this as good news, they are still waiting for clarity on other issues that are likely to affect a greater number of couples.

The Social Security Administration (SSA) is still waiting for guidance from the Department of Justice as to how to administer social security benefits to same-sex married couples residing in non-recognition states.³² Because the SSA also administers Medicare, spousal recognition as it relates to benefits is still in question if the couple does not live in a marriage equality state.³³ In the meantime the office suggests that all individuals who believe that they are entitled to benefits as a married couple, even if they reside in a non-recognition state, apply now so that when clarification is reached the applications can be processed.³⁴ Medicaid also lacks clarity. Since the program is jointly administered between a state and the federal government, a married couple might not be recognized as such if they are applying for benefits in a non-recognition state because the federal government can only encourage states to give recognition.³⁵

Federal recognition does nothing to help legally married same-sex couples obtain numerous other rights, protections and privileges that opposite-sex married couples enjoy under state law. Most state laws protect spouses in matters dealing with inheritance, state

³¹ Matt Apuzzo, *More Federal Privileges to Extend to Same-Sex Couples*, N.Y. TIMES, (Feb. 8, 2014), http://www.nytimes.com/2014/02/09/us/more-federal-privileges-to-extend-to-same-sex-couples.html?_r=0.

³² Dexter Mullins, *Social Security to Pay Survivor Benefits for Same-Sex Couples*, ALJAZEERA AM., (Dec. 16, 2013), <http://america.aljazeera.com/articles/2013/12/16/social-security-beginsprocessingurvivorbenefitsforsamesexcouple.html>.

³³ *After DOMA: Medicare Spousal Protections*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/after-doma-medicare> (last visited Feb. 9, 2014).

³⁴ *Important Information for Same-Sex Couples*, SOCIAL SECURITY, <http://www.ssa.gov/same-sex-couples> (last visited Feb. 9, 2014).

³⁵ Chris Johnson, *New Guidance Affords Gay Couples Equal Access to Medicaid*, WASH. BLADE, (Sept. 28, 2013), <http://www.washingtonblade.com/2013/09/28/new-guidance>.

income tax, health care decision-making, funeral and burial arrangements, and insurance. Same-sex married spouses can be forced to testify against each other in state courts. A widow or widower may lack standing to sue for the wrongful death of his or her spouse. Spouses having children in these marriages are not the presumed legal parents. In states with gift and estate tax, surviving spouses may not benefit from the state based marital tax deduction and thus may have to pay a state inheritance or estate tax.

The lack of these state based rights, protections, and privileges in non-recognition states leaves married same-sex couples without all of the protections that opposite-sex couples enjoy. Marriage is not an equal right for same-sex couples in these jurisdictions. But if these couples value the federal rights and protections, they may opt for this less than perfect, less than equal, form of marriage.

C. FULL MARRIAGE

Same-sex married couples in marriage equality states no longer enjoy only state based rights and protections absent any federal benefits --- the type of marriage that Justice Ginsberg famously referred to as “skim milk marriage” during the *Windsor* oral arguments.³⁶ With Section 3 of DOMA a thing of the past, same-sex married couples enjoy all the same rights, benefits and burdens as opposite-sex married couples, under both state and federal law. Since these couples live in state jurisdictions that recognize their marriages, the state of ceremony versus state of residency question is not relevant as it pertains to federal marriage rights. As a result, married couples in full marriage states

³⁶ Jim Newell, *Justice Ginsberg: Doma Creates ‘Full Marriage and Skim-Milk Marriage’*, THE GUARDIAN, (Mar. 27, 2013), <http://www.theguardian.com/world/2013/mar/27/ginsberg-doma-marriage-skim-milk>.

enjoy more federal benefits than do married same-sex couples living in federal marriage recognition only states.

The Social Security Administration recognizes same-sex marriages for residents in marriage equality states and has started processing claims.³⁷ These rights and benefits include a death benefit to a surviving spouse (\$255)³⁸ as well as the ability of a surviving spouse to receive the deceased spouse's social security benefits if the deceased spouse's monthly benefits exceeded the survivor's.³⁹ This benefit is especially important to those survivors who may have stayed out of the work force to care for their spouse and/or children during the marriage and thereby gave up the opportunity to generate greater social security benefits for retirement, as well as the ability to contribute to 401(k)s, IRAs, and other deferred compensation plans.

Medicare is also administered by the SSA and thus same-sex married couples in marriage equality states will be fully recognized as such when applying for benefits. For some couples, their marriage status will help them obtain benefits, and for others, their marriage will prevent them from receiving benefits. Medicare will calculate an applicant's income based on the couple's income, not the individual applicant's income alone. For a Medicare applicant who makes more than the single person's eligibility amount to qualify for benefits, he or she may qualify if the other spouse makes no or little

³⁷ Sunnivia Brydum, *Social Security Paying Survivor Benefits to Married Gay, Lesbian Couples*, ADVOCATE.COM, (Dec. 16, 2013), <http://www.advocate.com/politics/marriage-equality/2013/12/16/social-security-paying-survivor-benefits-married-gay-lesbian>.

³⁸ Mary Beth Franklin, *Social Security Begins Paying Survivor Benefits to Same-Sex Married Couples*, INVESTMENT NEWS, (Dec. 16, 2013), <http://www.investmentnews.com/article/20131216/FREE/131219923#>.

³⁹ *Social Security Tips for Couples*, FIDELITY, <https://www.fidelity.com/viewpoints/retirement/social-security-tips-for-couples> (last visited Feb. 12, 2014).

income, thus bringing the couple's combined income into the eligibility guidelines for couples. A spouse with little or no income who would otherwise qualify for Medicare benefits may not qualify if his or her spouse's income puts the couple's income above the eligibility limits.⁴⁰

Like the same-sex married couples in federal marriage only states, these couples have the benefits and burdens of that come with tax treatment as a married couple under the Internal Revenue Code. As discussed under Federal Marriage Recognition Only, some couples will benefit by this income tax treatment, others will not. While income tax should not be a reason *to marry* or a reason *not to marry*, couples will be better prepared for their life together if they work with a tax advisor to determine how their marital status will impact their family budget.

Unlike the couples in non-recognition states these couples do enjoy many state based rights and privileges. Intestacy laws protect a person's right to inherit from a deceased spouse.⁴¹ Marriage laws create the presumption that any child born during a marriage is the legal child of both spouses.⁴² Tort law recognizes one's standing to sue for the wrongful death of his or her spouse.⁴³ State laws protect a spouse's decision-making power relative to health care, hospital visitation, final services and burial of

⁴⁰ See eligibility charts, *The Invalidation of the Defense of Marriage Act: Impact on Healthcare Reform and Health Insurance Access*, MANATT, at 2-3, (Feb. 12, 2014), http://www.manatt.com/uploadedFiles/Content/4_News_and_Events/Newsletters/HealthLaw@Manatt/Invalidation-of-DOMA-Health-Analysis.pdf.

⁴¹ Lina Guillen, Marriage Rights and Benefits, NOLO, <http://www.nolo.com/legal-encyclopedia/marriage-rights-benefits-30190.html> (last visited Feb. 13, 2014).

⁴² *Id.*

⁴³ *Id.*

remains.⁴⁴ State law also protects spouses from testifying against each other in federal court.⁴⁵

State tax planning and filing is much easier for couples in full marriage states. When both the state and federal governments recognize a marriage, the couple elects one tax filing status for both returns and in most cases will only file one joint state and one joint federal return.⁴⁶ While some married couples may pay more income tax than they would as two single people, they can at least plan strategies to minimize both their state and federal taxes using the same filing status. In many non-recognition states, married same-sex couples have to do their federal income planning as a married couple and their state income tax planning as two single people. In states that have an estate or inheritance tax, particularly those that have a much lower estate threshold than the federal estate tax level,⁴⁷ married couples can make use of the marital deduction to avoid paying any state estate tax, but unfortunately, no state has adopted the portability rules that apply to federal estate tax.⁴⁸

Married same-sex couples living in marriage equality states have the benefit of knowing that their marriages will be recognized by both the state and federal government,

⁴⁴ *Supra* note 41.

⁴⁵ *Id.*

⁴⁶ *Supra* note 22.

⁴⁷ *Estate Tax*, N.Y. STATE DEP'T OF TAXATION AND FIN., <http://www.tax.ny.gov/pit/estate/etidx.htm> (last visited Feb. 13, 2014) (New York State, for example, imposes estate tax on taxable estates with a net value of one million dollars.).

⁴⁸ See Lisa Rico, *Estate Planning with Portability in Decoupled States*, AM. BAR ASS'N, (May/June 2013), available at http://www.americanbar.org/publications/probate_property_magazine_2012/2013/may_june_2013/article_rico_estate_planning_with_portability_in_decoupled_states.html (for a more complete discussion on the issues married couples face who reside in states that impose state estate or inheritance taxes).

and that they will be treated the same as opposite-sex married couples. That is not to say that full marriage is a couple's best option, but it does give a couple a clear understanding of how their marriage will either benefit or burden them under state and federal law based on the experience of opposite-sex couples living in the same state.

D. DIVORCE

Divorce is not an optimal choice. It is one of the most stressful events in a person's life second only to the death of a spouse or a child.⁴⁹ The average cost for a divorce in the United States is fifteen thousand dollars, which makes divorce both stressful and expensive.⁵⁰ The high costs of divorce often lead one or both members of the former couple to file bankruptcy after the marriage ends.⁵¹ In fact, many couples make bankruptcy part of their divorce.⁵² The reality is that 40% to 50% of first marriages will end in divorce.⁵³ Based on this reality, same-sex couples contemplating marriage have to accept that there is a strong probability that the marriage will end in divorce; and they should be aware of the difficulties that may lie ahead particularly if they do not live in a marriage equality state.

The Divorce option can be a tricky one for couples living in federal recognition only states. Couples may not have the benefit of their state court system to grant them a

⁴⁹ *Life Events Stress Test*, <http://www.stresstips.com/lifeevents.htm> (last visited Feb. 13, 2014).

⁵⁰ Elizabeth Alterman, *Divorce Can Cost You Over And Over*, CNBC, (May 4, 2011), <http://www.cnbc.com/id/42767466>.

⁵¹ *Family Law, Divorce, and Bankruptcy*, http://www.divorcenet.com/states/new_jersey/family_law_and_bankruptcy (last visited Feb. 13, 2014).

⁵² David C. Hoskins and Ellen R. Welner, *Bankruptcy and Divorce: What Divorce Counsel Should Know About Bankruptcy*, 37 THE COLO. LAWYER 35, (Oct. 2008).

⁵³ Christine Kim, *National Marriage Week: Marriage in America, 2012*, THE DAILY SIGNAL, (Feb. 7, 2012), <http://blog.heritage.org/2012/02/07/national-marriage-week-marriage-in-america-2012>.

divorce if the state does not grant same-sex marriage rights.⁵⁴ In these instances, couples would have to seek another jurisdiction to hear their case. The state of ceremony may be one possibility, but often times that state has a residency requirement that makes using that state as a venue an unrealistic option.⁵⁵ Couples residing in these jurisdictions whose relationships unravel may well face the irony of being forced to remain married because their state court system will not grant them a divorce based on a marriage that the state does not recognize.

If couples can find a venue to grant them a divorce then the newly divorced individuals may be afforded certain rights under federal law. They will have rights to each other's social security benefits if the marriage lasted at least ten years.⁵⁶ The newly divorced individual may also be entitled to certain benefits if the former spouse was a federal employee. These can include access to health insurance benefits and rights to part of the ex-spouse's retirement.⁵⁷ It should be noted that determining the exact benefits to which an ex-spouse of a federal employee is entitled is complicated since the benefits vary among the various federal departments. If a state court will hear their case then they will be able to resolve a multitude of difficult issues which fall under state law such as alimony/maintenance, splitting of marital assets, custody, visitation, support and division

⁵⁴ Margaret Klaw, *Recognizing Gay Divorce Equality*, UNTE READER, (Jan. 2014), <http://www.utne.com/politics/gay-divorce-equality-ze0z1401zcalt.aspx> (for a discussion of a Pennsylvania couple without access to the court system to obtain a divorce).

⁵⁵ See Lizzy Crocker, *The Gay Divorce Trap: When Same-Sex Marriage Goes Wrong*, THE DAILY BEAST, (Sept. 30, 2013), <http://www.thedailybeast.com/articles/2013/09/30/the-gay-divorce-trap-when-same-sex-marriage-goes-wrong> (for a discussion of one Florida based couple without access to the court system for a divorce).

⁵⁶ Jim Miller, *How Divorce Can Affect Your Social Security*, THE HUFF. POST, (Nov. 11, 2013), http://www.huffintgonpost.com/jim-t-miller/how-divorce-can-affect-yo_b4251411.html.

⁵⁷ *Federal Retirement and Health Care Issues At Divorce Are Very Complex*, FLYING SOLO, <http://www.lifemanagement.com/fsa10.1.1210> (last visited Feb. 13, 2014).

of retirement assets. The laws that will apply will be the same ones that exist for all married couples in that jurisdiction regardless of the couple's gender composition.

Couples that live in marriage equality states will have a much easier time obtaining a divorce. They will not have to forum shop for a venue that will hear the matter so long as one of the spouses can meet the state's residency requirements. Since marriage and divorce are state based concerns there is not a singular and/or uniform set of rules that apply throughout the United States. Specific laws will vary from state to state, case law interpretation of model rules may not agree across jurisdictions, and community property states will have different equitable remedies than non-community property states. But couples divorcing in marriage equality states will have the right to have a state court system available to them as they work to dissolve their relationships --- a right that they would not have if they did not have the right to marry. This right is especially important for the lower earning partner who without the benefit of divorce has no right to a property settlement since claims for equitable settlements based on a domestic partnership theory or business partnership are difficult to prove.⁵⁸

III. MARRIAGE TRENDS

Marriage has always been an option for opposite-sex couples in the United States, but it appears to be an option that traditional couples are exercising less often than in past generations. In the 1950s opposite-sex married made up 78% of all households. In 2010

⁵⁸ See *supra* note 54 (for a discussion of the difficulties one partner faced establishing a right to claim property rights following the end of a twenty year relationship).

that number had dropped to 48%.⁵⁹ In the 1950s families with a husband, wife and their children made up 43% of all households, but by 2010 the traditional family had diminished to approximately 20% of all households.⁶⁰ The decline in the number of married households does not mean that people are choosing to live alone or that they are choosing to be childless. It just means that they have found other options.

The overall number of households grew 11% from 2000 to 2010. The number of married households grew below the overall growth rate only increasing 4%. The major areas of growth were in the number of households with unmarried opposite-sex couples (up 40%) and same-sex couples (up 80%).⁶¹ Those who do decide to marry are opting for marriage at an older age. The median marriage ages for women and men in 1960 were 20.3 and 22.8, but by 2010 the median ages had risen to 26.5 and 28.7.⁶² Another major change is that the majority of couples who do marry live together first.⁶³ Unmarried couples are also opting to have children in increasing numbers. In 2007 41% of all births were to unmarried couples and 40% of all households with opposite-sex unmarried couples included children.⁶⁴ The numbers prove that marriage is not the only option for a couple that wishes to live together, nor is it an option that has to be exercised

⁵⁹ Sarah Parnass and Lisa Stark, *The End of Marriage? Husband-Wife Households at Record Lows: 2010 Census*, ABC NEWS, (Apr. 25, 2012), <http://abcnews.go.com/blogs/politics/2012/04/the-end-of-marriage-husband-wife-households-at-record-lows-2010-census>.

⁶⁰ Sabrina Tavernise, *Married Couples Are No Longer a Majority, Census Finds*, N.Y. TIMES, (May 26, 2011), http://www.nytimes.com/2011/05/26/us/26marry.html?_r=0.

⁶¹ Gary Gates, *Same-Sex Couples in Census 2010: Race and Ethnicity*, THE WILLIAMS INST., <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-CouplesRaceEthnicity-April-2012.pdf>.

⁶² D'Vera Cohn, et al., *Barely Half of U.S. Adults Are Married: A Record Low*, (Dec. 14, 2011), <http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low>.

⁶³ *Statistics*, UNMARRIED EQUALITY, <http://www.unmarried.org/statistics> (last visited Feb. 14, 2014).

⁶⁴ *Id.*

as early a possible. Even couples with children are choosing the no marriage option over the marriage option.

There is no consensus as to what has caused the decline in marriage. Some experts believe that the economy is a factor,⁶⁵ others believe that society just accepts unmarried families as a new norm,⁶⁶ and some believe that this is a reflection of the growing number of people in our society that believe marriage is an obsolete institution.⁶⁷ It may of course be a combination of these factors. Regardless of the cause, the reality is that those couples who have always had the right to marry are choosing to marry much less often than in past decades.

While marriage might be trending downward here is an interesting fact to consider: the overall rate of divorce is down as well.⁶⁸ Even if the number of married people is down, it seems that more couples that are married are choosing to stay married, which would indicate that for those couples marriage was the right choice. Perhaps this relates to the fact that couples today know each other better because they most likely lived together before marriage. Maybe the fact that people are getting married later in life gives them more time to know themselves better before committing to someone else for the rest of their lives. Since recent surveys indicate that married people today are more likely to be college graduates, maybe today's spouses are making more educated

⁶⁵ Mark Mather & Diana Lavery, *In U.S., Proportion Married at Lowest Recorded Levels*, POPULATION REFERENCE BUREAU, (Sept. 2010), <http://www.prb.org/Publications/Articles/2010/usmarriage decline.aspx>.

⁶⁶ Elizabeth Lopatto, *Unmarried Couples Living Together is New U.S. Norm*, BLOOMBERG, (Apr. 4, 2013), <http://www.bloomberg.com/news/2013-04-04/unmarried-couples-living-together-is-new-u-s-norm.html>.

⁶⁷ *Supra* note 62.

⁶⁸ Lamar Clarkson, *Divorce Rates Falling, Report Finds*, CNN, (May 19, 2011), <http://www.cnn.com/2011/LIVING/05/19/divorce.rates.drop>.

decisions about marriage as it relates to their relationships.⁶⁹ In any event the downward marriage trend coupled with the downward divorce trend seems to indicate that opposite-sex couples see marriage as an option rather than a social requirement; and, based upon the lower rate of divorce, they are getting better at deciding when marriage is their best option.

IV. CONCLUSIONS

The United States government recognizes same-sex marriages validly performed in any state even if a couple's state of residence does not recognize the couple's union. As a result, marriage is a real option for all same-sex couples in this country regardless of where they live. Individuals in these relationships have the legal right to refer to each other as husband, wife or spouse rather than life partner, domestic partner, or long time companion --- terms which all fall short of describing the real relationship and bond that exists between two people who have made a commitment to share a lifetime together. Federal recognition of same-sex marriages makes them legitimate and valid, but it falls short of conferring the full marriage rights that come with recognition from a same-sex couple's state of residence. While marriages only recognized by a state were once considered "skim milk marriages," it now appears that the marriages with a "lite" set of rights are the ones with only federal recognition. For couples in these marriages, the question as to whether marriage is a fundamental right for same-sex couples is an important one. It is not merely academic, it is quite real; because if the answer is *Yes, it is a fundamental right*, then these "lite" marriages would likely be recognized by all states, and thus would become full marriages.

⁶⁹ *Supra* note 60.

Same-sex married couples residing in full recognition states have the same marriages as opposite-sex couples in their state. These same-sex marriages include all the rights and privileges, as well as all the burdens and costs, of opposite-sex marriages. Whether marriage is more of a benefit or a burden may depend on a couple's financial status and their place on the timeline of life. Young couples starting a family, couples with a high wage earner and a low wage earner, and couples in their retirement years, might find that the benefits of marriage outweigh the costs. Comparatively, a couple without children at the height of their careers may find marriage is a more expensive option than remaining two single individuals.

The benefits and burdens of marriage may shift for a couple as their marriage evolves, and as fate adds new chapters and plot twists to their love story. Given the shifting value of marriage under both state and federal law, perhaps couples contemplating marriage should focus on a different question, one that is not tied to benefits, burdens, costs and privileges. Perhaps couples should openly and honestly ask each other: *Do we really want to spend the rest of our lives together in a loving committed relationship, one in which we will support and care for one another, one in which we will invest and spend as one person,*⁷⁰ *one in which we will work hard to avoid the costs and pain of divorce, and one in which the world will see us as a family of two or more?* The answer to that question is far more important and a better predictor of long term marriage stability than is: *Does getting married make financial sense?* If the answer to the first question is *Yes* than the couple may want to visit their financial advisors and attorneys before running to the altar to see what adjustments may need to be made to their

⁷⁰ Couples considering marriage must accept the reality that the federal government and states often view a couple's annual individual incomes and combined assets as one source.

existing investment and estate plans. Since the couple most likely did all of their planning in light of the reality that they were legal strangers under the law, they will need to examine those plans in light of the new reality that they will now be viewed as a married couple.

Marriage is not the only option. Population studies show that couples who have always had the right to marry are exercising the marriage option less often than at any other time in our country's recorded history. It is no longer a societal requirement that two people in loving live-in relationship be married to each other --- even if they have children. It is acceptable for a loving couple to live legally and financially as two separate individuals. Two people can love and care for each other in a committed relationship that does not have to be a marriage. This is a reality that same-sex couples have always known to be true.

“No marriage” is an option that opposite-sex couples have been choosing in higher numbers, and it was the only reality that same-sex couples knew under the law until very recently.⁷¹ At the same time that same-sex-couples were fighting for the right to marry, opposite-sex couples were choosing not to marry. This is not to say that the right to marry was not worth the fight, or that opposite-sex couples no longer believe that marriage has value. Rather, it does indicate that opposite-sex and same-sex couples may have learned something from each other. Perhaps straight couples have learned from the LGBT community that living in a committed relationship where a couple builds whatever legal commitments they wish to is a viable option for some people. Perhaps the LGBT

⁷¹ The first state to recognize same-sex marriage was Massachusetts under *Goodridge v. Dept. of Public Health*, 798 N.E. 2d 941 (Mass. 2003).

community has learned from straight couples that the institution of marriage is not a societal relic and can still bring value and stability to some relationships.

Regardless of sexual orientation, every couple now has the right to choose to marry or not to marry. Every couple can choose for themselves which relationship option works best for them. Marriage is no longer the only option for opposite-sex couples, and “no marriage” is no longer the only option for same-sex couples. Being married and not married are both legitimate options, accepted by society and recognized under the law for *all* couples.