
Why Marriage Is Still the Best Default in Estate Planning Conflicts

Lynne Marie Kohm*

Abstract¹

By analyzing a Tennessee bigamy case, a New York same-sex marriage case, and the growing cultural trend toward cohabitation over marriage, this article discusses how and why marriage is the best estate plan to protect vulnerable parties as they age. The article examines how marriage assists vulnerable parties in avoiding potential conflicts in estate planning and distribution, particularly when those parties have entered into alternative relationships. By focusing on the cases of *Witherspoon*, in which John Witherspoon entered into a bigamous second marriage, and *Windsor*, in which Edie Windsor is suing the U.S. government over the lack of federal tax recognition afforded her Canadian same-sex marriage, this article reveals how marriage expansion does not necessarily incentivize marriage, nor does it provide the benefits and protections often sought by those who enter into those marriage-like relationships.

By contrasting the protection marriage affords to a vulnerable party in estate distribution and the dilemmas presented by marriage expansion (as illustrated in *Witherspoon* and *Windsor*) with the cultural disquiet over the importance of the nature and meaning of marriage, this article illuminates estate distribution conflicts in the context of the paradox of

* John Brown McCarty Professor of Family Law, Regent University School of Law. B.A., 1981, State University of New York at Albany; J.D., 1988, Syracuse University College of Law. Many thanks to Rachel K. Toberty and Elizabeth Oklevitch for their research and editing efforts on this piece, and to my husband, Joseph A. Kohm Jr., who is always my best editor and loving critic. This piece comes with thanks and congratulations to Mark McCormick-Goodhart of the *Penn State Law Review*—thanks for his kind invitation from the Law Review to publish this piece, and congratulations to him and his fiancée for making a wise and excellent estate planning decision by becoming engaged during this issue’s publication. Marriage blessings Mark and family!

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contemporary American socio-legal marriage culture. Despite the pop culture confusion over marriage, this article demonstrates why it is still the best default for estate planning conflicts.

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INTRODUCTION

What does a Tennessee bigamy case have to do with a New York same-sex marriage case? And what does either case have to do with the growing cultural trend and large demographic of individuals who choose cohabitation over marriage? The answer is hidden in a simple sentence: marriage is still the best estate plan. Marriage protects vulnerable parties as they age, and its benefits are sought after by a small demographic of same-sex partners. Yet, marriage is ignored or dismissed as unnecessary by a large demographic of vulnerable cohabiters who do not understand the legal jeopardy they live in—or die in—without the protection of marriage.

This article will discuss how marriage assists vulnerable parties in avoiding potential conflicts in estate planning and distribution when those parties have entered into alternative relationships. It will reveal how marriage expansion² does not necessarily incentivize marriage, nor

2. For purposes of this article, the term “marriage expansion” means any human consensual relational structure that seeks to mimic marriage by expanding or declining to recognize the common and generally universal substantive entry requirements for marriage. See Lynne Marie Kohm, *A Reply to “Principles and Prejudice”: Marriage and the Realization that Principles Win Over Political Will*, 22 J. CONTEMP. L. 293

does it provide the benefits and protections often sought by those who enter into those marriage-like relationships. To illustrate, the article will focus on two cases: *Witherspoon*,³ where John Witherspoon—father of Reese Witherspoon, the well-known actress who played an eager law student in *Legally Blonde*⁴—entered into a bigamous second marriage in Tennessee; and *Windsor*,⁵ where New York State resident Edie Windsor is suing the U.S. government over the lack of federal tax recognition afforded to her Canadian marriage to now-deceased partner Thea Spyer.⁶

This article will further discuss estate distribution conflicts in regards to the paradox of contemporary American socio-legal marriage culture. This paradox will be exposed by contrasting how marriage protects a vulnerable party in estate distribution dilemmas presented by marriage expansion, as illustrated in *Witherspoon* and *Windsor*. The notion that marriage offers individuals protection can seem all the more paradoxical when observing that one segment of the American population is beating down the door to marriage entry,⁷ while another larger segment of the nation's population simultaneously lacks a clear understanding of the protections that marriage offers.⁸ Despite the pop

(1996) [hereinafter Kohm, *A Reply*] (discussing one at a time, unrelated by consanguinity or affinity, of proper age, and of opposite sex as four categories of substantive requirements for marriage entry). These requirements are being challenged on many legal and cultural angles today (as will be analyzed here) and can be seen in law review articles that challenge that *Reply* piece. See, e.g., Jeffrey A. Kershaw, *Towards an Establishment Theory of Gay Personhood*, 58 VAND. L. REV. 555 (2005); Eric Engle, *Knight's Gambit to Fool's Mate: Beyond Legal Realism*, 41 VAL. U. L. REV. 1633 (2007) (both of which take serious issue with the opposite sex requirement for marriage entry). Marriage expansion for purposes of discussion in this article also includes marriage-like relationships, such as cohabitation arrangements that seek to mimic marriage without its legal ties, and, as this piece will demonstrate, without the legal benefits in life or death.

3. *Witherspoon v. Witherspoon*, No. 12D-1447 (Tenn. Davidson Cnty. 7th Cir. Ct. filed May 8, 2012) (sealed).

4. LEGALLY BLONDE (Metro-Goldwyn-Mayer & Marc Platt Productions 2001); see also Danielle & Andy Mayoras, *Still Legally Blonde, Reese Witherspoon Goes to Court to Protect Dad*, FORBES (May 14, 2012), <http://onforb.es/ITSeN1>. The Mayoras' describe Witherspoon as a "perky young attorney," though that may have been her role in a sequel. *Id.*

5. *Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012).

6. See *infra* notes 90-98 and accompanying text (discussing the facts in *Windsor*).

7. See *supra* note 2 (discussing marriage expansion). Note also that the political and judicial effort to expand marriage to include same-sex partnerships is the prime contemporary example of marriage expansion. See *infra* note 89 (providing an overview of the history of marriage expansion in American toward same-sex partnerships). The progressive effort to expand marriage to include more than one partner at a time, however, is also evidence of this ongoing momentum for marriage expansion. See *infra* notes 67-84 and accompanying text (providing an overview of those cases).

8. Those protections include marriage benefits not afforded to cohabiting couples. See *infra* Part II.C. This mindset is due to several factors, not the least of which is the high rate of divorce in America today. See U.S. CENSUS BUREAU, STATISTICAL

culture confusion over marriage,⁹ this article will show why it is still the best default for estate planning conflicts.

This article proceeds as follows. Part I will review the basic rules of marriage as a part of estate planning and asset protection. Part II will discuss some of the trends in marriage expansion that *Witherspoon* and *Windsor* highlight. Specifically, Part II will summarize the current litigation on poly-marriage and the Defense of Marriage Act (DOMA) litigation by same-sex partners. Part II will also discuss how the trend of expansion in marriage law and policy, along with the trend toward simple cohabitation, creates potential conflicts in estate planning and distribution, particularly with relationships unprotected by law.

The focus of Part III is to offer solutions to these potential conflicts in order to protect vulnerable parties with marriage. This protection is necessary because, when individuals enter into relationships unprotected by law, they run the risk of enduring the legal ramifications those relationships can create. Vulnerable parties who have entered into alternative relationships unprotected by law are generally the first to find that marriage remains the best default to avoid estate-planning conflicts.

I. MARRIAGE AS ESTATE PLANNING AND DISTRIBUTION PROTECTION

Intestate succession is the basic scheme for default estate planning.¹⁰ That is, when someone dies without a valid will, he or she dies intestate.¹¹ Although most wealthy individuals have a will,¹² state intestate succession laws set forth the statutes of descent and distribution that control by default when an individual does not have a valid will at death, or when certain assets are not distributed by a valid will.¹³

ABSTRACT OF THE UNITED STATES: 2012, at 96-98 (2012), *available at* <http://1.usa.gov/J0Bh4w>. In fact, one of my students recently stated, “Why would I get married when at least half of all marriages end in divorce? It would be like going skydiving with a 50% chance that my parachute would not open.” That analogy, though extreme in my view, might represent the sense of a large segment of American culture.

9. A unique example of pop culture confusion over marriage is the recent revelation of the surreptitious prank marriage between actress and political pundit Janeane Garofalo and screen writer Rob Cohen at a Las Vegas drive-thru chapel 20 years ago. They did not take the event seriously until Cohen tried to marry someone else in 2012. *See* Ben Waldron, *Janeane Garofalo Unwittingly Married for 20 Years*, ABC NEWS BLOGS (Nov. 13, 2012, 8:15 PM), <http://abcn.ws/W6qdIj>.

10. *See* ROGER W. ANDERSON, JOHN T. GAUBATZ, IRA MARK BLOOM & LEWIS D. SOLOMON, *FUNDAMENTALS OF TRUSTS AND ESTATES* 35 (Mathew Bender & Co., 1st ed. 1996) (discussing how “an intestate statute provides an ‘estate plan’ designed by the state legislature”).

11. *See id.*

12. *See* Marsha A. Goetting & Peter Martin, *Characteristics of Older Adults with Written Wills*, 22 J. FAM. & ECON. ISSUES 243, 253 (2001). In national polls of older, wealthier groups, 66% of respondents reported having a will. *Id.*

13. ANDERSON ET AL., *supra* note 10, at 35.

Furthermore, state law not only controls intestacy and descent but also controls other factors in an estate distribution. “Generally speaking, the law of the state where the decedent was domiciled at death governs the disposition of personal property, and the law of the state where the decedent’s real property is located governs the disposition of her real property.”¹⁴ The primary state policy objective is generally to carry out the intent of the average intestate decedent.¹⁵

Marriage is an important foundation of each state’s plan. Every state has a statutory scheme for the intestate share of the spouse as a primary aspect of the law. “Under current law, the surviving spouse usually receives at least a one-half share of the decedent’s estate,” although there are many variations as to the specifics.¹⁶ For instance, some statutory schemes provide for the entire estate to pass to the surviving spouse.¹⁷

Marital property systems determine how spouses share property acquired during their marriage¹⁸ and, depending on the jurisdiction, spouses have different protections from disinheritance by the decedent during marriage.¹⁹ Nearly all states protect against spousal disinheritance by will with a spousal elective share,²⁰ or what is sometimes called a “forced share” in the decedent spouse’s estate.²¹ This spousal elective share allows a surviving spouse to take what the will provides for him or her, or to elect to take a statutory share of the decedent’s estate regardless of what is provided (or not provided) to that spouse by will.²² This elective share is funded with and enforceable

14. JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES LINDGREN & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 60 (7th ed. 2005).

15. *Id.* at 62.

16. *Id.* at 63.

17. See UNIF. PROBATE CODE § 2-102 (1990) (providing for the entire estate to pass to the decedent’s surviving spouse under certain circumstances). Many community property states have adopted UNIF. PROBATE CODE § 2-102A, which provides for all community property to pass to the surviving spouse under many circumstances. See DUKEMINIER ET AL., *supra* note 14, at 61 n.3.

18. See JUDITH AREEN, MARC SPINDELMAN, & PHILOMILA TSOUKALA, *FAMILY LAW: CASES AND MATERIALS* 1021-22 (6th ed. 2012) (detailing marital property regimes). For a discussion of the differences and similarities between the various property schemes of dower, community property, and common law separate property schemes in estate planning, see ANDERSON ET AL., *supra* note 10, at 219-23.

19. See ANDERSON ET AL., *supra* note 10, at 222 (“Regardless of a will’s provisions, under traditional elective share statutes a surviving spouse can claim a share of the decedent’s probate estate.”).

20. *But see* GA. CODE ANN. § 53-3-1 (West 2012). Georgia has no elective share, but rather provides for one year of support for a surviving spouse from a decedent’s estate. *Id.*

21. DUKEMINIER ET AL., *supra* note 14, at 425.

22. *Id.*

against much of the property owned by the decedent spouse at death.²³ Surviving spouses enjoy other rights, benefits, and protections in addition to the elective share, such as social security benefits, pension benefits (particularly under the Employee Retirement Income Security Act²⁴), homestead law benefits to secure the family home,²⁵ a family allowance for maintenance and support for a fixed period of time while the estate is settled,²⁶ and important tax benefits.²⁷ The most critical among these tax benefits is the unlimited marital deduction, which allows for unlimited spousal transfers during life and at death.²⁸ These benefits incentivize marriage, while also increasing its value to the parties, particularly for the most vulnerable party of the pair by protecting that party with financial support.

These benefits are principally based in the partnership theory inherent in marriage as well as the view that marriage is an economic joint venture. “Disinheritance of a surviving spouse brings into question the fundamental nature of the economic rights of each spouse in a marital relationship and the manner in which society views the institution of marriage.”²⁹ This partnership theory of marriage works “as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike.”³⁰ The Uniform Probate Code (UPC) tries to clarify this presupposition in its general comments on the partnership theory of marriage.³¹

23. Exercising the elective share necessarily disrupts an estate plan. ANDERSON ET AL., *supra* note 10, at 223. Accordingly, the Uniform Probate Code suggests, and many states have adopted, the concept of the augmented estate, which provides for a spousal elective share to be funded from three main categories or assets: the net probate estate, will substitutes given to third parties, and property given to the surviving spouse from the decedent spouse before death. See UNIF. PROBATE CODE §§ 2-202 to -207. For an overview of the augmented estate, see ANDERSON ET AL., *supra* note 10, at 232, 239-41.

24. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (2006 & Supp. 2011)).

25. See DUKEMINIER ET AL., *supra* note 14, at 421.

26. See UNIF. PROBATE CODE § 2-404 (1990) (providing a reasonable allowance for a period of one year).

27. See ANDERSON ET AL., *supra* note 10, at 26-29 (discussing the general rules of estate tax and the specifics of taxes between spouses).

28. See I.R.C. § 2056 (2006).

29. Lawrence W. Wagoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 236, 239 (1991) (discussing the partnership theory of marriage, while later noting that “[e]lective-share law in the common-law states has not caught up to the partnership theory of marriage” and how the UPC has worked to correct that). Anderson et al. also note the UPC’s efforts toward reform in applying the “partnership theory of marriage” to spousal election. See ANDERSON ET AL., *supra* note 10, at 233.

30. MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 131 (1989).

31. See UNIF. PROBATE CODE art. 2, pt. 2, gen. cmt. at 71 (2010) (quoting Glendon’s theory in the explanation of marriage partnership theory):

Spousal property rights figure prominently at divorce³² and at death. “By granting each spouse upon acquisition an immediate half interest in the earnings of the other, the community-property regimes directly recognize that the couple’s enterprise is in essence collaborative.”³³ Perhaps telling of the importance of the foundation of marriage to American society were the tax-free interspousal transfers included in the Economic Recovery Tax Act of 1981,³⁴ further embedding the partnership aspect of marriage into law. In the midst of marital change due to dissolution, the Uniform Marital Property Act was inspired by some to be a hope for stability in those changes, and a way to continue to protect women.³⁵

Is the Uniform Marital Property Act a panacea for the malaise of marriage? . . . If it does affect any [positive] considerations, it will take time and the process will be subtle. The disintegrating forces operating on marriages and families are many and complex. . . . Sharing is seen as a system of elemental fairness and justice so that those who share in the many and diverse forms of work involved in

The partnership theory of marriage, sometimes also called the marital-sharing theory, is stated in various ways. Sometimes it is thought of “as an expression of the presumed intent of husbands and wives to pool their fortunes . . .” [citing GLENDON, *supra* note 30, at 71]. Under this approach, the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, i.e., in the property nominally acquired by and titled in the sole name of either partner during the marriage. . . . A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is expressed in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise, as “a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost.

Id.

32. See generally UNIF. MARRIAGE & DIVORCE ACT (1973); see also UNIF. MARITAL PROP. ACT prefatory note (1983) (discussing the challenges of creating a framework for marital property in the midst of change, where “[e]quitable distribution’ of property became the handmaiden of no-fault divorce,” and that “it is the equitable distribution court’s demanding role in the judicial process to monitor and referee the ensuing contests in the divorce courts”); JOHN H. LANGBEIN & LAWRENCE W. WAGGONER, UNIFORM TRUST AND ESTATE STATUTES 706 (Found. Press 2005) (quoting the UNIF. MARITAL PROP. ACT prefatory note (1983)).

33. UNIF. PROBATE CODE art. 2, pt. 2, gen. cmt. at 71 (2010).

34. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981).

35. LANGBEIN & WAGGONER, *supra* note 32, at 710 (noting that the Act itself was “a response to the twenty-year-long challenge of the President’s Commission on the Status of Women issued in 1963 to face the reality that each spouse makes a different but equally important contribution in a marriage”).

establishing and maintaining a marriage will have a protected share in the material acquisitions of that marriage.³⁶

Thus, even in efforts to stabilize a growing cultural movement toward divorce, model lawmakers view marriage as a partnership designed to protect the often-vulnerable spouse and to deepen the partnership notion of marriage. “Spouses are not trustees or guarantors toward each other. Neither are they simply parties to a contract endeavoring to further their individual interest. The duty is between [spouses], and is one of good faith. . . .”³⁷

An understanding of the basic nature of marriage is critical to this discussion of marriage as a partnership. “[M]arriage has a nature independent of legal conventions.”³⁸ Therefore, “the state cannot choose or change the essence of real marriage.”³⁹ Deeply rooted theoretical reasons for marriage include a comprehensive union of oneness of spouses, a special link to children, and a normative sense of permanence, monogamy, and exclusivity.⁴⁰ This conjugal view of marriage has intrinsic value, and possesses the natural ability to conceive, bear, and

36. LANGBEIN & WAGGONER, *supra* note 32, at 707, 710 (citing portions of the UNIF. MARITAL PROP. ACT (1983)).

37. *Id.* at 711.

38. Sherif Girgis, Robert P. George, & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 252 (2011). Girgis, George, and Anderson debate two competing views of marriage: the conjugal view (where marriage is “the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together”), and the revisionist view (where marriage is the union of two people (whether of the same sex or of opposite sexes) “who commit to romantically loving and caring for each other and to sharing the burdens and benefits of domestic life”). *Id.* at 246. For a list of marriage revisionist theorists, see *id.* at 252 n.14. Girgis et al. hold to the conjugal view of marriage, as do other scholars. See, e.g., John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049 (1994) (explaining this notion generally and linking it to the welfare of children and the common good). By way of full disclosure, the reader should know that I also hold to the conjugal view of marriage. See Lynne Marie Kohm, *Liberty and Marriage-Baehr and Beyond: Due Process in 1998*, 12 BYU J. PUB. L. 253 (1998); Lynne Marie Kohm, *The Homosexual “Union”: Should Gay and Lesbian Partnerships be Granted the Same Status as Marriage?*, 22 J. CONTEMP. L. 51 (1996).

39. Girgis et al., *supra* note 38, at 252. In addition, Girgis et al. note that, “in radically reinventing legal marriage, the state would obscure a moral reality.” *Id.* Consequences to reinventing marriage are numerous. See Lynne Marie Kohm, *The Collateral Effects of Civil Unions on Family Law*, 11 WIDENER J. PUB. L. 451 (2002); Lynne Marie Kohm, *How Will the Proliferation and Recognition of Domestic Partnerships Affect Marriage?*, 4 J.L. & FAM. STUD. 105 (2002). The nature of this position is challenging to academic trends favoring same-sex unions. See Mark A. Yarhouse & Lynne Marie Kohm, *Fairness, Accuracy and Honesty in Discussing Homosexuality and Marriage*, 14 REGENT U. L. REV. 249 (2002).

40. Girgis et al., *supra* note 38, at 252-59 (discussing the basis of each within marriage).

raise children in the most stable and economical fashion as solid future citizens perpetuating the strength of the state, and it is precisely why states recognize and regulate marriage toward the common good.⁴¹ This view of marriage offers legal protections throughout the world.⁴²

Marriage as a legal notion and as a social institution, however, has endured some dramatic adjustments and alterations over the past half century. One of the largest marriage phenomena of the twentieth century was the favoring of monogamy in modernity (and the “almost universal[] disfavoring” of polygamy).⁴³ Another major occurrence and significant change in the core definition of marriage is the “acceptance of the individual spouse’s right to divorce on demand.”⁴⁴ The adoption of unilateral no-fault divorce affording each of the parties to the marriage an individual right to dissolve the marriage with or without cause, with or without consent, even over the objection and wishes of the other spouse,⁴⁵ has fundamentally altered the nature of marriage. Easy divorce and marriage expansion have caused the intrinsic value of marriage to be replaced by its expressive value. The recent move toward marriage expansion for same-sex partners focuses on the expression of the partners, rather than the intrinsic value of the relationship, and has been a strongly political process with cultural components.⁴⁶ Simultaneously,

41. See Hans Boersma, *Defending Marriage*, FIRST THINGS 51, 52 (Mar. 2013), available at <http://bit.ly/XFhbSI> (reviewing SHERIF GIRGIS, ROBERT P. GEORGE & RYAN T. ANDERSON, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012)) (discussing comprehensive sexual activity that is biologically reproductive by nature “that is ordered to the common good”).

42. Lynn D. Wardle, *What is Marriage?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 53, 81 (2006). Professor Wardle offers a thorough review of constitutional protection for the conjugal relationship of marriage, noted nationally in state law and internationally in national law. His appendices therein demonstrate the pervasive and foundational nature of conjugal marriage globally. See *id.* at 98-103.

43. *Id.* at 80-81. “Monogamy has been associated with modernity, affluence, education, women’s rights, and with the benefits of modern living, while polygamy is associated with old-fashioned, patriarchal, antiquated notions of marriage and living.” *Id.* at 80. Professor Wardle also notes that, even where polygamy is allowed, it is disfavored. Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 FAM. L.Q. 497, 500-02 (1995).

44. Wardle, *supra* note 42, at 81.

45. See Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 80 (1991) (discussing how unilateral no-fault divorce has altered marriage dissolution).

46. By “political,” I mean the development of same-sex marriage as an argument that has divided states and the nation, from the courtroom to the ballot box, as to what marriage means in law. Citizens of three states have voted to allow same-sex marriage, while courts of six states have done so judicially. Deron Dalton, *Nine States Least Likely to Legalize Same-Sex Marriage Anytime Soon*, HUFFINGTON POST (Jan. 2, 2013, 11:48 AM), <http://huff.to/X0SCSf>. Citizens of 31 states (California has voted accordingly, but its amendment is under challenge at the U.S. Supreme Court in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *appeal docketed*, No. 12-144 (Mar. 26, 2013)) have amended their

the movement away from marriage completely toward a preference of cohabitation⁴⁷ somewhat demonstrates an exhaustion with this vast alteration process.

From the no-fault divorce revolution that began with then Governor Ronald Regan's signature in 1969,⁴⁸ to expansion of entry requirements for marriage,⁴⁹ to preferences for cohabitation,⁵⁰ marriage is not viewed as having the protective legal status it once enjoyed. What is lost in these trends is that, despite the changes, marriage is still the best estate plan, offering legal protections from incapacity, estate tax benefits, and a host of financial benefits in death. Marriage expansion, however, does not provide the same legal protections as marriage. Consequently, when parties enter into relationships that attempt to parallel or emulate marriage but bear some defect of a basic legal requirement, those parties can suffer.

constitutions to include a definition of marriage and its recognition in their public policy. See Lynn Bonner & Jay Price, *N.C. to Add Marriage Amendment to Its Constitution*, NEWSOBSERVER.COM (Oct. 5, 2012), <http://bit.ly/KjOgQX>. A recent example of a court challenge to such a state constitutional amendment involves Nevada's marriage amendment, and whether a federal court will find that it is rationally related to a legitimate state interest. *Sevcik v. Sandoval*, No. 2:12-cv-00578-RCJ-PAL, 2012 WL 5989662, at *1 (D. Nev. Nov. 26, 2012). Interestingly, although the Ninth Circuit has not yet decided this case, a petition for certiorari was filed with the Supreme Court in advance of the Ninth Circuit judgment. See *Petition for a Writ of Certiorari Before Judgment, Coalition for the Protection of Marriage v. Sevcik* (No. 12-689), 2012 WL 6054793.

47. Paige D. Martin et al., *Adolescent Premarital Sexual Activity, Cohabitation, and Attitudes Toward Marriage*, 36 *ADOLESCENCE* 601, 601 (2001).

48. The first no-fault cause of action for divorce was signed into law in California; although originally a bilateral statutory regulation allowing marriage partners to mutually end their incompatible marriage in dissolution, the current law allows for unilateral divorce. California Family Law Act, ch. 1608, §§ 1-32, 1969 Cal. Stat. 3312 (Supp. 1986) (repealed 1994) (re-enacted 1994, current version at CAL. FAM. CODE § 2000 *et seq.* (West 2012)) (divorce for irreconcilable differences). For a discussion of how this demand for divorce altered marital stability, see MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 195-99 (1972). The last state to adopt a unilateral approach to no-fault divorce was New York in 2010. N.Y. DOM. REL. LAW § 170(7) (McKinney 2010).

49. Basic entry requirements at common law were one at a time, of opposite sex, unrelated by blood or sanguinity, and of minimum age. See Lynne Marie Kohm, *A Reply, supra* note 2, at 296-303 (1996) (describing the basis for these substantive marriage entry requirements).

50. See Jay D. Teachman et al., *The Changing Demography of America's Families*, 62 *J. MARRIAGE & FAM.* 1234, 1238 (2000).

II. MARRIAGE EXPANSION CONFLICTS IN ESTATE PLANNING

A. Witherspoon—*Bigamy and Mental Capacity Protection*

When Dr. John Witherspoon married Tricianne Taylor on January 14, 2012,⁵¹ he neglected to remember that he was still married to Betty (Mary) Witherspoon.⁵² Tricianne refused to respond to inquiries regarding her marriage to Witherspoon even though Tricianne, age 60, is living with retired Dr. John Witherspoon, age 70, in a Nashville condominium owned by Reese Witherspoon (John and Mary's daughter). In light of what may appear to have been John's on-setting dementia, Mary Witherspoon filed for and won a protective order against Tricianne on behalf of John.⁵³ Mary has also filed a bigamy claim against Tricianne to annul the marriage, seeking family property that Tricianne received. Mary is also seeking Tricianne's removal from the Nashville condominium.⁵⁴ Alleging incapacity, John's daughter, Reese, joined by her mother Mary, filed a petition in a Tennessee court to request conservatorship over John, who voluntarily appeared before the court with them.⁵⁵

Although the information available on this case is sparse due to sealed court records, *Witherspoon* is an important case because of its implications surrounding marriage as part of an estate distribution plan. Mental or testamentary capacity may be an obvious consideration in these circumstances,⁵⁶ but the legal meaning of marriage is what has

51. *Witherspoon-Taylor*, JACKSONSUN.COM (Apr. 22, 2012), <http://bit.ly/X1EL1m>.

52. See, e.g., Luchina Fisher & Kevin Dolak, *John Witherspoon, Reese Witherspoon's Dad, Accused of Bigamy*, ABCNEWS.COM (May 10, 2012), <http://abcn.ws/Kp9A7V>; Duane W. Gang, *Reese Witherspoon's Dad Sued for Bigamy*, USATODAY.COM (May 9, 2012, 8:27 PM), <http://usat.ly/ZidGFQ>.

53. Fischer & Dolak, *supra* note 52. Tricianne Taylor Witherspoon's legal name is Patricia Taylor. John does not remember marrying her, nor does he remember other recent events. *Id.*

54. Danielle Majorhas & Andy Majorhas, *Legally Blonde Reese Witherspoon Goes to Court to Protect Father from Bigamy*, TRIAL & HEIRS (May 15, 2012), <http://bit.ly/YBrCbq>. Majorhas and Majorhas reported:

Mary alleged in her court filing that John and Tricianne used fraud or forgery, with her possibly posing as Mrs. John Witherspoon, to trick a bank into lending \$400,000 to them. She said that Tricianne has tried to borrow money as John's wife. She's also living in his condo, driving their families' [sic] vehicles, and even has convinced John to sign a new will.

Id.

55. Danielle Majorhas & Andy Majorhas, *Still Legally Blonde, Reese Witherspoon Goes to Court to Protect Dad*, FORBES.COM (May 14, 2012, 10:26 AM), <http://onforb.es/ITSeN1>. The case has been sealed to protect the vulnerable parties. *Id.*

56. See generally Howard S. Klein, *Of Sound Mind: While the Test for Capacity for Marriage is Relatively Simple, It is More Complicated During Divorce*, 35 L.A. LAW. 29

worked to protect John from his own poor (and perhaps criminal)⁵⁷ marital decision making.

Requirements for mental capacity in estate planning are somewhat minimal⁵⁸ but generally require that a testator understand the people who are legally the objects of his bounty, what his property includes, and how he is distributing it according to an estate plan.⁵⁹ The requirements inherently require the testator's competency and ability to communicate his or her true desires and intent.⁶⁰

Capacity includes "one of the most bothersome concepts in all the law": undue influence.⁶¹ Generally, undue influence may be established by proving that (1) the testator was susceptible to the influence, (2) the influencer had the disposition or motive to exercise undue influence, (3) the influencer had the opportunity to exercise undue influence, and (4) the disposition resulted from the influence. However, "this formulation begs the question because it does not tell us what influence is undue."⁶² The general notion is that a confidential relationship must exist (and marriage provides such a relationship) to trigger a concern of undue influence, and suspicious circumstances surrounding the preparation, execution, or formulation of the donative transfer must be present.⁶³ In *Witherspoon*, John Witherspoon's second (bigamous) wife may have initiated the marriage in hopes of gaining access to his fortune, but that objective is impossible because of his prior marriage. Therefore, John's first marriage protected him from his own incapacity and will ultimately protect him from losing his estate assets. These circumstances beg the question: does entry into such an alternative marriage hint at incapacity, either to enter into a valid marriage or to handle one's own estate? Here, it is unclear whether John adequately understood the people who are legally the objects of his bounty regarding his spousal

(Oct. 2012) (discussing mental capacity for entry into marriage in California and contrasting it with incapacity in petitioning for divorce).

57. Bigamy is criminal activity in Tennessee under TENN. CODE ANN. § 39-15-301 (West 2012). Bigamy is also illegal in all 50 states. See *Bigamy*, 11 AM. JUR. 2d § 1 (2003). If determined to be suffering from dementia, John's conduct would not be charged as criminal.

58. For the elements of testamentary capacity, see RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 (2003).

59. *Id.*

60. DUKEMINIER ET AL., *supra* note 14, at 146.

61. *Id.* at 158-59 ("Undue influence may occur where there is a confidential relationship between the parties or where there is no such relationship. Proof may be wholly inferential and circumstantial.").

62. *Id.* at 159. For a statutory review of the concept of undue influence, see RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 (2003) and comments following the description of suspicious circumstances.

63. DUKEMINIER ET AL., *supra* note 14, at 161.

obligations. Whether he remembered his marital obligation to Mary, John was apparently susceptible to the influence of Tricianne in entering into a new marriage as well as in sharing his property. Allegations that his actions reveal her influence over him are credible in light of the financial benefits Tricianne has reaped from her marriage to John.⁶⁴

The invalid bigamous marriage will have no effect on John's first wife in the event of his death. "Bigamous marriages pose special problems. Because a married person lacks the capacity to remarry without divorce, second and subsequent 'spouses' have void relationships with the bigamist. Upon the bigamist's death, theoretically (and in most jurisdictions, practically) only the first spouse qualified to inherit, even if long deserted by the decedent."⁶⁵ At John's death, the bigamous spouse is left with nothing. The only alternative for the bigamous spouse is, at best, possibly receiving an equitable remedy to petition for an intestate spousal share, but only if there is a showing of proof that she entered into the marriage in good faith.⁶⁶

The invalid marriage disqualifies the second spouse from the default protection marriage provides a (legitimate) surviving spouse, while the lawful marriage simultaneously protects the valid marriage partner's interest and prevents the bigamous partner from profiting from the illegitimacy of the marriage. The inherent statutory rules regarding marriage, both surrounding entry into marriage and property sharing in marriage, offer legal foundations that will work to protect John Witherspoon from his own poor decision making. Because marriage in

64. See Majorhas & Majorhas, *supra* note 55. Apparently, the property includes a vehicle or two, a hefty loan of \$400,000, and other borrowed funds, in addition to whatever she might have gained outright from John as gifts. Additionally, undue influence requires a showing that an estate plan resulted from the influence. Here, it has been reported that John "signed a new will," allegedly resulting from Tricianne's influence. *Id.*

65. ANDERSON ET AL., *supra* note 10, at 42.

66. *Id.* at 42. Anderson et al. also explain the only possible remedy for the second spouse is to invoke the concept of the "putative spouse," which would allow upon the death of the bigamous spouse a petition by an otherwise innocent spouse for some sort of spousal intestate share or equitable remedy based on his or her good faith that the marriage had been valid when entered into. Section 209 of the Uniform Marriage and Divorce Act describes this concept:

Any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminated his status and prevents acquisition of further rights. A putative spouse acquired the rights conferred upon a legal spouse. . . . If there is a legal spouse or other putative spouses, . . . the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interests of justice.

Id. (citing UNIF. MARRIAGE & DIVORCE ACT § 209 (amended in 1971 and 1973)).

Tennessee requires John to have only one spouse at a time, the law has protected him from his inability to remember how many spouses he has, thus protecting his estate. Marriage law has protected him, and his wife, against his own mental incapacity. The facts surrounding the case also offer solid evidence that marriage is a protective status in estate distribution when one spouse becomes vulnerable to the influence of a disreputable party or enters into an illegitimate marriage.

Bigamy in the *Witherspoon* case presents an opportunity for some interesting legal analysis regarding marriage expansion trends toward having more than one spouse at a time. Current trends can be instructive here. A review of the litigation begins in Canada with the constitutionality of that nation's law criminalizing the practice of polygamy.⁶⁷ In November 2011, the Supreme Court of British Columbia upheld the code's constitutionality.⁶⁸ While the Attorney General for British Columbia characterized the case against polygamy as about harm to vulnerable parties, the law's challengers argued that the case was not about harm, but instead about an unacceptable government intrusion "into the most basic of rights guaranteed by the *Charter*—the freedom to practice one's religion, and to associate in family units with those whom one chooses."⁶⁹ The Court agreed with the government that this case primarily dealt with harm, including the harm that women disproportionately suffer from in physical, psychological, and sexual abuse,⁷⁰ as well as the various harms to children,⁷¹ and overall harm to

67. *In re A Reference Concerning the Constitutionality of Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (Can.) [hereinafter "*Section 293*"] (also known as the Bountiful case). This ruling came after polygamy charges were brought against two men in the village of Bountiful, part of the province of British Columbia, but the charges were dropped in 2009 partially amid concerns about the law's constitutional status. The men were a part of a sect of the Fundamentalist Church of Jesus Christ of Latter-day Saints. The criminal investigation of the sect presented evidence that eight girls from the village of Bountiful, some as young as twelve, had been sent to the United States to marry men there.

68. Judge Bauman wrote a 355-page opinion after hearing over 42 days of testimony from both sides. *Id.*

69. *Id.*

70. Women in polygamous marriages encounter more domestic violence and abuse, shorter life spans, and worse economic conditions than do women in monogamous marriages. These disadvantages arise largely from the division of the husband's care and financial resources and, together with the resultant competition among wives, these factors lead to increased mental health problems. *Id.* ¶ 584. Some feminist scholarship has come out of the case that is also concerned with violence against women and children. See, e.g., Melanie Heath, *The Sticky Wicket of Regulating Violence Against Women in Polygamy: Feminist Perspective on the Constitutional Challenge in Canada*, SECOND ISA F. SOC. (Aug. 12, 2012), <http://bit.ly/106joZd>.

71. Children of polygamous marriages face higher rates of abuse; neglect; infant mortality; emotional, physical, and behavioral problems; and educational setbacks. These issues flow from several factors that mark polygamous households: heightened

society.⁷² Of additional concern to the Court was the impact of polygamy on society and monogamous marriage.⁷³ The importance of upholding the legislative body's concerns for protecting vulnerable women and children in light of the damaging effects of polygamy was the focus of this case, demonstrating both societal and legislative concerns for protecting monogamous marriage.

The most renowned case challenging marriage entry rules against multiple marital partners is *Brown v. Herbert*.⁷⁴ Brown and his wives, Meri Brown, Janelle Brown, Christine Brown, and Robyn Sullivan, brought an action against the State of Utah, challenging the state's anti-bigamy statute as unconstitutional and seeking to enjoin its enforcement.⁷⁵ The lawsuit alleges that Utah's anti-polygamy laws are a violation of the Browns' Fourteenth Amendment liberty interests as well as a violation of their First Amendment rights to religious freedom.⁷⁶

emotional tension, jealous rivalry among wives, births to very young mothers in short intervals, and the inability of fathers to provide adequate personal affection and discipline to each child. "Early marriage for girls is common, frequently to significantly older men. The resultant early sexual activity, pregnancies and childbirth have negative health implications for girls, and also significantly limit their socio-economic development." *Section 293, supra* note 67, ¶ 586. Canadian judicial rulings that altered meanings within marriage and family law may have laid some foundation for the claims and arguments set forth in this case. See Lynne Marie Kohm, *The First Amendment, Homosexual Unions, and "Newspeak": Has the Language Surrounding the Marriage Debate Altered the Nature of Marriage Itself, or Affected the Truth of the Issues Inherent in Alternative Marriage Demands?*, 4 LIBERTY U. L. REV. 593, 596, 598, 606, 608-10 (2010) (giving specific instances of changes to Canadian law that affect the nature and meaning of marriage).

72. According to the court, as older men acquire more wives, skewing the sex ratio, younger men often leave the community with little education, skills, or social support. Additionally, both boys and girls observe, and may internalize, "harmful gender stereotypes." *Section 293, supra* note 67, ¶ 603(e).

73. The negative impacts that can be expected to accompany polygamy in any society include a class of poor, unmarried, violence-prone young men, institutionalized gender inequality, fewer civil liberties, and other negative consequences of the large, poor families that are often created by polygamy.

Individuals in polygamous societies tend to have fewer civil liberties than their counterparts in societies which prohibit the practice. . . . Polygamy's harm to society includes the critical fact that a great many of its individual harms are not specific to any particular religious, cultural or regional context. They can be generalized and expected to occur wherever polygamy exists.

Section 293, supra note 67, ¶¶ 13, 14. Some scholarship argues that this case is sound public policy. See, e.g., Nicholas Bala, *Why Canada's Prohibition of Polygamy is Constitutionally Valid and Sound Social Policy*, 25 CAN. J. FAM. L. 165 (2009).

74. *Brown v. Herbert*, 850 F. Supp. 2d 1240, 1244 (D. Utah 2012).

75. *Id.* The case has also been referred to as the "Sister Wives" lawsuit, after their TLC show of the same name. See "Sister Wives" Lawsuit: Kody Brown and Family Suing Utah Over Bigamy Law, HUFFINGTON POST (July 25, 2012, 10:04 AM), <http://huff.to/PlrbzS> [hereinafter *Sister Wives*].

76. See "Sister Wives," *supra* note 75. Some claim minority religious liberty claims are important to this case. See, e.g., Richard A. Vazquez, *The Practice of Polygamy*:

Currently, the case remains on the court's docket. Two motions to dismiss submitted by the Utah Attorney General were denied based on findings that Brown's claims were meritorious and not moot.⁷⁷

The *Brown* case has important implications for marriage in estate planning. Marital death benefits at law are provided for one spouse: the first spouse.⁷⁸ That legal fact leaves the illegitimate spouses potentially destitute in the eventual death of Mr. Brown,⁷⁹ without an intestate share or an elective share in his estate.⁸⁰ In *Brown*, as in *Witherspoon*, marriage is the best estate plan for the first spouse because the law protects the estate for the first spouse and her husband only.

The third analysis on marriage expansion toward multiple partners surrounds the "Brazil Thruple."⁸¹ When three men living in Rio de Janeiro sharing bills and expenses applied for a civil union stating they wished to protect one another in the event of separation or death, the Public Notary in Sao Paulo accepted their application.⁸² The union has sparked outrage by many who claim it is "absurd and illegal."⁸³ Though the Brazilian thruple controversy may cause some to reconsider whether

Legitimate Free Exercise of Religion or Legitimate Public Menace—Revisiting Reynolds in Light of Modern Constitutional Jurisprudence, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225 (2001).

77. See *Brown*, 850 F. Supp. 2d at 1255.

78. No text even contemplates more than one spouse. For a typical example, see *DUKEMINIER ET AL.*, *supra* note 14, at 61. There is some sparse scholarship, however, promoting poly-marriage. See, e.g., Vazquez, *supra* note 76; Samantha Slark, *Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults*, 6 J.L. & FAM. STUD. 451 (2004); Kristen A. Berberick, *Marrying into the Heaven: The Constitutionality of Polygamy Bans Under the Free Exercise Clause*, 44 WILLAMETTE L. REV. 105 (2007).

79. The second, third, and fourth wives may be able to assert some claim as putative spouses, as discussed in *ANDERSON ET AL.*, *supra* note 10, at 42. Winning this claim would hinge on the ability to prove that each entered into their marriage in good faith. See UNIF. MARRIAGE & DIVORCE ACT § 209 (amended 1971 & 1973). That would require each spouse to prove that he or she thought the plural marriage was legal. That claim, however, is destroyed by the fact that, together, the Browns are suing the state of Utah to validate their marriage, proving knowledge of the invalid marriage.

80. It is likely that the other wives would be considered legally as dependent relatives, allowing them to share in the homestead rights and any other family allowances under the laws of Utah. A bequest or devise left to any of the four spouses by will would not be invalidated by the illegal marriage, but rather would be valid based on the testator's intent to make the transfer. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003) (requiring that the testator's intent be "given effect to the maximum extent allowed by law").

81. *Three-person Civil Union Sparks Controversy in Brazil*, BBC NEWS (Aug. 28, 2012, 3:08 PM), <http://bbc.in/POBNWO>.

82. *Id.*

83. *Id.* For further observations on this case, see *The Thruple*, FAM. RESTORATION BLOG (Sept. 17, 2012), <http://bit.ly/WPBLE1>.

traditional monogamous marriage is outdated,⁸⁴ this case demonstrates the foundational character of marriage to estate planning. These individuals wanted to enter into marriage to ensure the best estate plan for one another. As an estate planning default mechanism, those who pursue marriage expansion see that marriage is the best default plan in estate conflicts. That pursuit, however, dismisses marriage's foundation outright by expanding it into a new form, effectively denying its inherent nature of oneness between two people. The expressive value of marriage cannot replace or deny its intrinsic value, being the substance of family growth and societal formation, and the natural and fundamental partnership of two people and, therefore, a significant means of default wealth transfer.

Marriage expansion toward more than one spouse at a time challenges the nature of marriage itself but also reveals that the estate default underpinning of marriage as protective of spouses is a desirable estate planning mechanism. As the next section sets forth, those working toward marriage expansion for spouses of the same sex are also finding this fact to be true.

B. Windsor: Same-Sex Marriage, DOMA, and the Marital Deduction

A leading casebook notes “[t]he chief policies that underpin the spousal intestate share—giving effect to the probable intent of the decedent and protection of those whom the decedent treated as family—seem also to apply to domestic partners.”⁸⁵ However, the law currently does not afford domestic partners the same protections. *Windsor v. United States*, the New York same-sex marriage case challenging the federal Defense of Marriage Act (DOMA) and federal tax laws, presents a politically powerful case of spousal benefits as inuring to same-sex couples.⁸⁶ Windsor's eagerness to be included in marriage protection shows that the advantages of marriage as a default estate plan are significant. This section will offer a summary of that case, a review of the amici it evoked, and a summary of the law surrounding DOMA and the marital deduction.

Congress passed DOMA in 1996,⁸⁷ defining spousal rights under federal programs as those of marriages between one man and one

84. Jean Hannah Edelstein, *Why Shouldn't Three People Get Married?*, GUARDIAN (Aug. 30, 2012, 12:07 PM), <http://bit.ly/QCIFdD>.

85. DUKEMINIER ET AL., *supra* note 14, at 65.

86. *Windsor v. United States*, SCOTUSBLOG, <http://bit.ly/14hDWEJ> (last visited Mar. 12, 2013) (stating that *Windsor* is docketed at No. 12-63).

87. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738).

woman, and providing that states could not be forced to recognize same-sex unions performed in other jurisdictions.⁸⁸ Several cases have provided the foundation for challenging the Act;⁸⁹ other pending litigation over DOMA have built upon that foundation, some resulting in holding DOMA constitutional,⁹⁰ while others have resulted in holding DOMA to be unconstitutional.⁹¹ *Windsor* brings the DOMA challenges to a pinnacle in the context of marriage as an estate-planning tool.

88. “DOMA thus simply codifies in this area of law the long recognized public policy exception to the Full Faith and Credit Clause.” Cort I. Walker, *The Defense of Marriage Act as an Efficacious Expression of Public Policy: Towards a Resolution of Miller v. Jenkins and the Emerging Conflict Between States over Same-Sex Parenting*, 20 REGENT U. L. REV. 363, 381 (2008).

89. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (finding for the first time as a U.S. state court that same-sex couples have the right to marry, which is important to DOMA litigation because, after this case, same-sex couples now had standing to sue the federal government over DOMA); see also *Varnum v. Brien*, 763 N.W.2d 862 (2009) (holding that Iowa’s limitation on marriage as non-inclusive of same-sex couples was a violation of equal protection principles and Iowa’s constitution).

90. See *In re Kandu*, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005). See generally *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005). *In re Kandu* involved a Washington bankruptcy case where an American same-sex couple married in Canada and then filed a joint chapter seven bankruptcy in Washington. *In re Kandu*, 315 B.R. at 130. The bankruptcy court objected to their filing, which was upheld by federal district court under a rational basis analysis rejecting any claims that same-sex couples should be granted heightened scrutiny. *Id.* *Wilson* involved a lesbian couple validly married in Massachusetts and living in Florida. *Wilson*, 354 F. Supp. 2d at 1301-02. The couple sued the Florida county clerk for failing to recognize their marriage, arguing that DOMA was unconstitutional under the Full Faith and Credit Clause, Privileges and Immunities Clause, the Commerce Clause, and Due Process and Equal Protections Clauses of the Fourteenth Amendment. *Id.* The case was summarily dismissed, with the court concluding that the Supreme Court does not require a state to apply another state’s law in violation of its own public policy; the court held that there is no new fundamental right to private sexual intimacy, further clarifying that sexual orientation is subject to rational basis, not a heightened scrutiny. *Id.* at 1309. *Smelt* involved a same-sex couple registered under California’s Domestic Partner law that sued Orange County, California in federal court for refusing to issue them a marriage license, arguing that DOMA violated the First, Fifth, Ninth, and Fourteenth Amendments. *Smelt*, 374 F. Supp. 2d at 864-65. The district court dismissed the couple’s challenge to Section 2 of DOMA because they were not married (and therefore did not have standing) but allowed them to proceed under Section 3 of DOMA. *Id.* at 870-71. The court then held that DOMA’s marriage definition was constitutional because it did not involve sex discrimination or a fundamental right and further upheld the rational basis standard of review, finding the legitimate interest to encourage stability and legitimacy in the optimal union for procreating and raising children was a rational basis. *Id.* at 880. For an excellent overview and policy analysis of these cases, their consequences, and their implications, see Joshua Baker & William C. Duncan, *As Goes DOMA False . . . Defending DOMA and the State Marriage Measures*, 24 REGENT U. L. REV. 1 (2012).

91. See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (holding that DOMA exceeded Congress’s authority under the Spending Clause when GLAD filed on behalf of seven same-sex couples married in Massachusetts and three individuals, alleging DOMA is unconstitutional under the Fifth Amendment by denying them access

Edie Windsor and Thea Spyer began their relationship in 1963, registered as domestic partners 30 years later when New York law allowed such registration, and married in Canada in 2007.⁹² New York began recognizing Canadian same-sex marriages in 2008.⁹³ In 2009, Spyer passed away, leaving her estate to Windsor in her will.⁹⁴ Because Windsor did not qualify for the unlimited marital deduction⁹⁵ under DOMA,⁹⁶ Spyer's estate was charged with federal estate tax of \$363,053.⁹⁷

Windsor's subsequent suit sought a refund of the estate tax as well as a declaration that DOMA's definition of marriage in Section Three is

to federal employee benefits, retirement benefits, spousal survivor benefits, and other federal privileges); *see also* Massachusetts v. U.S. Dep't of Health and Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010) (arguing that DOMA exceeds Congress's enumerated powers and infringes upon the states' right to define marital status as granted by the Tenth Amendment, with the same judge from *Gill* also holding here that DOMA is unconstitutional because it infringes on the rights of the states to regulate marital status and that the law lacked a rational basis); *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011) (holding DOMA unconstitutional where same-sex plaintiffs challenged DOMA seeking to be considered joint petitioners on their bankruptcy petition; the Department of Justice decided it would not appeal the decision). A number of cases are before the U.S. Supreme Court for review. *See* GLAD, PENDING CASES CHALLENGING THE DEFENSE OF MARRIAGE ACT (DOMA) (2013), available at <http://bit.ly/10oer03>.

92. *Windsor v. United States*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

93. *See* *Martinez v. County of Monroe*, 50 A.D.3d 189, 192 (2008) (ruling a same-sex marriage in Canada should be recognized in New York State). New York's legislature legalized same-sex marriage in 2011. *See* Nicholas Confessoro & Michael Barbaro, *New York Allows Same-Sex Marriage*, N.Y. TIMES (June 25, 2011), <http://nyti.ms/100nm74>. However, BLAG argues that, at the time of Spyer's death, New York did not recognize same-sex marriages, causing Windsor to lack standing in the matter. *See* *Bipartisan Legal Advisory Group of the House of Representatives v. Gill*, SCOTUSBLOG (Nov. 13, 2012), <http://bit.ly/Ziw55u>; *see also* Mark Hamblett, *Amicus Briefs Pour Into Second Circuit for Review of DOMA Validity*, N.Y. L.J. (Sept. 13, 2012), <http://bit.ly/14o6cWz> ("At the minimum, BLAG states, the circuit would have to certify the question of legal recognition of their marriage to the New York Court of Appeals.").

94. *Windsor*, 833 F. Supp. 2d at 397.

95. Codified at I.R.C. § 2056, the unlimited marital deduction is "the most important deduction . . . for transfers to surviving spouses." ANDERSON ET AL., *supra* note 10, at 28. "The Federal Defense of Marriage Act prevents the application of various rights and privileges otherwise available to married same-sex couples in any federal context by only recognizing the word 'marriage' as a legal union between a man and a woman, and the word 'spouse' as only a person of the opposite sex who is a husband or a wife." Tamara E. Kolz Griffin, *Estate Planning for Same Sex Couples*, A.L.I.-A.B.A. CONTINUING LEGAL EDUC. (Oct. 2012), available at TSub11 ALI-ABA 33 (Westlaw) (citing 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738 (2006)).

96. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738).

97. *Windsor v. United States*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

unconstitutional under the Equal Protection Clause.⁹⁸ The U.S. District Court for the Southern District of New York first heard the case, ruling that DOMA is unconstitutional and that Windsor is therefore entitled to a refund of the estate tax.⁹⁹ The court found DOMA unconstitutional because there was no rational relationship between DOMA and the governmental interests involved.¹⁰⁰ On appeal, the Second Circuit held that intermediate scrutiny, rather than a rational basis, is the proper standard for DOMA,¹⁰¹ holding the Act unconstitutional as not substantially related to a proffered government interest.¹⁰² The case is now under appeal to the U.S. Supreme Court.¹⁰³

An analysis of *Windsor* is complicated by the politics and policy of the law surrounding the cases. The Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG) stepped in to defend DOMA¹⁰⁴ after the Department of Justice declined to defend the Act due

98. Confessoro & Barbaro, *supra* note 93; see also Jennifer H. Cunningham & Samuel Goldsmith, *Gay Rights Activist Edith Windsor Sues Feds Over Estate Taxes*, N.Y. DAILY NEWS (Nov. 10, 2010, 4:00 AM), <http://nydn.us/13p7wca>.

99. *Windsor*, 833 F. Supp. 2d at 405. While declining to address whether homosexuals are a suspect class, the ruling articulated that the Supreme Court's dismissal of a previous equal protection challenge to a marriage-restrictive state law was not binding precedent because the dismissal hinged on the lack of federal question and thus addressed a different legal issue. Holding homosexuals as a suspect class would have required DOMA to be subject to a heightened standard of review, but that inquiry was unnecessary because the judge found DOMA to fail even a rational basis test, which would require a law's classification of groups to be rationally related to a government interest. *Id.* at 399, 400, 402.

100. Those interests include approaching changes to traditional marriage laws with caution, encouraging responsible procreation, or maintaining consistency among federal benefit eligibility and, as the court noted, the government's interest in conserving resources, while related, was not a legitimate reason to classify groups. *Id.* at 402, 405.

101. *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012).

102. *Id.* at 187. The court also noted that this is the proper standard when homosexuals have endured a history of discrimination; the sexual orientation distinction bears no relation to ability to contribute to society, homosexuality is a discernible characteristic, and homosexuals are a politically powerless minority. *Id.* at 182-85.

103. *Windsor v. United States*, SCOTUSBLOG, <http://bit.ly/14hDWEJ> (last visited Mar. 11, 2013). The High Court specifically stated its grant for certiorari reflects a concern for standing when the Executive will not defend the congressional law. See *United States v. Windsor*, 133 S. Ct. 786 (2012). The ideas presented in this article regarding marriage will not be altered by the outcome of this case. The strategies presented in Section 3 are valid estate planning strategies to avoid assessed estate taxes; marriage will remain the best default for estate planning conflicts regardless of the Supreme Court's decision. The outcome of the *Windsor* case, which will decide the federal definition of marriage rather than the tax implications of marriage, does not affect the principles of estate planning discussed in this article. Whatever the outcome of *Windsor*, marriage will remain the best default for estate planning even if marriage is legally expanded to include same-sex couples.

104. *Windsor v. United States*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012). The Bipartisan Legal Advisory Group has been defending DOMA in each of the pending

to the Attorney General's and the President of the United States' belief that the law was unconstitutional.¹⁰⁵ Because many parties weighed in on the significance and impact of *Windsor*,¹⁰⁶ providing an overview of amicus briefs submitted to the Second Circuit in *Windsor* is important and offers insight into the nature of marriage itself and its importance as an estate-planning tool.¹⁰⁷

Among the amicus briefs submitted to the Second Circuit in favor of *Windsor* (and therefore against DOMA), several argued for the Act to be analyzed under a heightened scrutiny because the Act serves to irrationally exclude same-sex couples from safeguards established in various areas of federal law.¹⁰⁸ One brief claimed that, based on the

litigations before the Supreme Court. See *Bipartisan Legal Advisory Group of the House of Representatives v. Gill*, SCOTUSBLOG (Nov. 13, 2012), <http://bit.ly/Ziw55u>.

105. For more information on these events, see Press Release, U.S. Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://1.usa.gov/fiP6Kp>. The unilateral presidential decision on a law's constitutionality is not known to have a basis in the Article I executive powers provided by the U.S. Constitution. But see Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951 (2010) (providing an overview of the separation of powers doctrine and the constitutionality of DOMA).

106. For more information on the significance of *Windsor*, see Hamblett, *supra* note 93.

107. Fourteen amicus briefs were submitted in favor of *Windsor* and five were submitted in defense of DOMA. See *id.*

108. See Brief of Amicus Curiae of The Citizens for Responsibility and Ethics in Washington on the Merits in Support of Respondent Edith Schlain Windsor at 6, *Windsor v. United States*, No. 90-567 (U.S. petition for cert. filed Sept. 11, 2012) (arguing that DOMA makes provisions designed to prevent conflicts of interest, nepotism, tax avoidance, and bankruptcy filings that harm creditors' interests inapplicable to same-sex partners); see also Amicus Brief of the Members of the U.S. House of Representatives—Including Objecting Members of the Bipartisan Legal Advisory Group, Representatives Nancy Pelosi and Steny H. Hoyer at 4, 6, 17, 23, 25, 27, *Windsor v. United States*, No. 90-567 (U.S. petition for cert. filed Sept. 11, 2012) (arguing that, under the appropriate standard of heightened judicial review, DOMA fails because it undercuts the policy objectives of the laws it affects and indicating that it is not the product of neutral lawmaking, that DOMA undermines the federal government's interest in supporting stable families, that it interferes with traditional federal recognition of state marriage laws, that its purported conservation of government resources does not justify equal protection violations, and that it is not justified by a desire for uniformity in marriage requirements); Amicus Brief of Professors of Family and Child Welfare Law at 6, *Windsor v. United States*, No. 90-567 (U.S. petition for cert. filed Sept. 11, 2012) (arguing that DOMA fails under any standard because marriage is not grounded in the procreativity of male-female relationships and because state interest does not favor biological parentage over alternative forms of family building, among other things); Amicus Brief of the NAACP Legal Defense & Education Fund at 6, *Windsor v. United States*, No. 90-567 (U.S. petition for cert. filed Sept. 11, 2012) (arguing for an application of a heightened scrutiny standard to advance civil rights to protect against government action that perpetuates social inferiority of groups facing sustained discrimination).

precedent of *Lawrence v. Texas*,¹⁰⁹ and consistent with statements from the Executive Branch,¹¹⁰ heightened scrutiny is the proper standard for distinctions premised upon sexual orientation.¹¹¹ One brief took a slightly different position, arguing that a rational basis review of DOMA is not necessarily deferential to federal or state legislatures and insisting on an adequate explanation of why the federal government has singled out a particular group of people for exclusion from marriage even under a rational basis review.¹¹²

Some amicus briefs argued that DOMA restricts particular interests and benefits,¹¹³ while two briefs argued for state authority,¹¹⁴ and another

109. *Lawrence v. Texas*, 539 U.S. 558, 575-78 (2003).

110. *See supra* note 104.

111. Amicus Brief of the Bar Associations and Public Interest and Legal Service Organizations at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012) (citing *Lawrence*, 539 U.S. at 578, and arguing that, although DOMA would fail even a rational basis test, establishing heightened scrutiny as the appropriate standard in *Windsor* is the best way to protect gay men and lesbians from future discrimination). This brief was submitted on behalf of 34 organizations. *Id.* at i-xiii.

112. Amicus Brief of The Columbia Law School Sexuality and Gender Law Clinic at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012). It should be noted here that the scholarship in defense of marriage as a relationship between one man and one woman explains that marriage does not exclude anyone in particular, but simply establishes parameters for entry into the status and thus does not discriminate, but equally applies the requirements to all who seek its entry. *See Kohm, Homosexual Union, supra* note 38, at 58-59 (discussing that all individuals who seek to enter marriage are subject to the same requirements).

113. *See* Brief for the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Change to Win (CTW), and National Education Association (NEA) as Amici Curiae Supporting Plaintiff-Appellee at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012) (arguing that DOMA unfairly excludes same-sex spouses and their families from receiving workplace benefits, whether they are employed by the federal government or the private sector, specifically restricting access to healthcare and other benefits for same-sex spouses); Brief for the Service and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (SAGE), National Senior Citizens Law Center (NSCLC) and American Society on Aging (ASA) as Amici Curiae Supporting Plaintiff-Appellee at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012) (concerning the negative impact of DOMA on the financial security of the growing population of elderly LGBT persons and their social security benefits, retirement plan benefits, and tax benefits).

114. *See* Brief for the Partnership for New York City as Amici Curiae Supporting Plaintiff-Appellee at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012) (arguing that marriage regulation should remain under state control so that businesses are free to locate in states that have marriage policies they find desirable and highlighting ways that DOMA burdens New York business); Brief for States of New York, Vermont, and Connecticut as Amici Curiae Supporting Plaintiff-Appellee at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012) (arguing that, by adopting the view of marriage taken by some states and rejected by others, DOMA discriminates among states, undermining federalism, and maintaining that DOMA should be subject to heightened scrutiny).

argued for local authority in marriage law.¹¹⁵ Yet another brief drew attention to the uniqueness of DOMA in denying recognition to a subset of state-recognized marriages. Traditionally, the power to confer marital status has been reserved to the states and, therefore, states have developed diverse criteria for determining whether a couple will receive marital status.¹¹⁶ DOMA's denial of certain state-recognized marriages effectively limits the states in an area where they previously had autonomy. One brief argued for the fitness of homosexuality for marriage and family life,¹¹⁷ while another brief filed by diverse cultural and religious organizations¹¹⁸ expressed concern over a threat to religious liberty posed by the incorporation into civil law of a single religious view of marriage.¹¹⁹ Each of these briefs in support of Windsor made arguments that conjugal marriage is too restrictive, unfair, and has no legal basis in government regulation.

There were several amicus briefs submitted in defense of DOMA's constitutionality. The first was the Frederick Douglass Foundation brief, filed by an organization predominantly comprised of Black Americans, which drew attention to distinctions between race and sexual orientation

115. Brief for The City of New York et al. as Amici Curiae Supporting Plaintiff-Appellee at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012) (describing how DOMA undercuts the efforts New York City has made to provide equal treatment to same-sex and opposite-sex couples and how it forces the City to act as an agent of discrimination, particularly with regard to City employees in state-recognized same-sex marriages).

116. Brief for the Family Law Professors as Amici Curiae Supporting Plaintiff-Appellee, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012) (representing a select group of family law professors, rather than all family law professors everywhere).

117. See Brief for the American Psychological Association (APA), The American Academy of Pediatrics, The American Psychiatric Association (APA), the American Psychoanalytic Association, The National Association of Social Workers and its New York City and State Chapters, and the New York State Psychological Association as Amici Curiae Supporting Plaintiff-Appellee at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012) (citing research indicating that homosexuality is generally not chosen and that homosexual relationships are essentially equivalent to heterosexual relationships).

118. See Brief for Religious Affiliates as Amicus Curiae Supporting Plaintiff-Appellee, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012). Those various religious organizations named in the brief were the Anti-Defamation League, Central Conference of American Rabbis, Congregation Beit Simchat Torah, Bend the Arc: A Jewish Partnership for Justice, Hadassah, the women's Zionist Organization of America, the Hindu American Foundation, the Interfaith Alliance Foundation, Japanese American Citizens League, the Justice and Witness Ministries, United Church of Christ, National Council of Jewish Women, People for the American Way Foundation, Union for Reform Judaism, Women's League for Conservative Judaism, and Women of Reform Judaism. *Id.*

119. *Id.* at 2-3.

that bear on the equal protection analysis of DOMA.¹²⁰ A brief submitted jointly by 14 states argued that any federal judicial decision on marriage policies violates principles of federalism by forcing a particular view of marriage upon all states.¹²¹ These states argued further that encouraging a link between marriage and parenting is a legitimate state interest and that any rationale extending benefits to same-sex unions would also extend to platonic, polyamorous, and other relationships.¹²² A brief by a former U.S. Attorney General, filed by the American Center for Law and Justice, focused on the troubling nature of the government's failure to defend the law of the United States.¹²³

The brief offered by the National Organization for Marriage argued that DOMA is a legitimate (and necessary) exercise of federal power¹²⁴ and that *Windsor* overlooks legitimate state interests in marriage.¹²⁵ Another brief argued that the rational basis test is appropriate and that the political powerlessness described in *Windsor* is missing, as same-sex couples do not lack political power.¹²⁶ Finally, the American College of

120. Brief for the Frederick Douglass Foundation as Amicus Curiae Supporting Intervenor-Defendant-Appellant at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012) (arguing that, unlike race, sexual orientation is not immutable, first, because rather than being an accident of birth, it is the product of combined biological, sociological, and environmental factors, and second, because rather than being objectively determinable, at least three definitions, which identify at least three different sets of people, are commonly used to define sexual orientation).

121. Brief for States of Indiana, Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Kansas, Michigan, Nebraska, Oklahoma, South Carolina, South Dakota and Virginia as Amicus Curiae Supporting Defendant-Appellant at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012) (arguing that, because state laws on marriage are nationally in flux and there is no clear constitutional mandate, the High Court should leave the decision to the political process rather than violating principles of federalism by forcing a particular view upon any state). It is worth noting that DOMA does not force one view of marriage on any state, but rather allows each state to recognize marriage as it deems appropriate, and allows each state to recognize marriages of other states or not based on each state's strong public policy.

122. *Id.* at 4.

123. Brief for Former Attorneys General Edwin Meese and John Ashcroft as Amici Curiae Supporting Intervenor-Defendant-Appellant at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012) (offering that, while the government submitted a brief backing *Windsor*, the attorneys general discussed the negative impact upon the judicial process and the importance of the separation of powers set forth in the Constitution).

124. Brief for National Organization for Marriage as Amicus Curiae Supporting Intervenor-Defendant-Appellant at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012) (demonstrating that Congress has historically, with Supreme Court approval, defined terms related to domestic relations law, including marriage, while arguing that Congress has a duty to define marriage for federal statutes and that the lower court's reasoning threatens existent state-federal relations).

125. *Id.* at 18.

126. Brief for The Concerned Women for America as Amicus Curiae Supporting Intervenor-Defendant-Appellant at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition*

Pediatricians—a group of some 100 dissenting physicians—filed a brief in favor of DOMA, parting with the position of the American Psychological Association, stating that the lower court was “mistaken to so cavalierly discount the child-related interests served by marriage that amply justify the definition of marriage retained by DOMA for purposes of federal law.”¹²⁷

Each of these briefs in support of DOMA made arguments that marriage regulation has a legal basis in legitimate government interests that greatly affect the state and the welfare of its citizens. The sheer number of amicus briefs submitted in *Windsor* provides evidence that marriage and its federal benefits are worth a fight. These briefs have done the job of making the argument for marriage or marriage expansion, revealing that this litigation is more about the nature and definition of marriage than the tax problem *Windsor* faces. Whatever the outcome, *Windsor* essentially proves that marriage is a critical aspect of default estate planning.

C. *Cohabitation: Marriage, Estate Planning, and the Cohabitation Paradox*

Marriage protects married individuals upon the death of a spouse.¹²⁸ Many individuals, however, cohabit rather than marry, or cohabit simply to delay marriage.¹²⁹

While deferring marriage, many young adults may choose to cohabit with a partner. Cohabitation has increasingly become the first coresidential union formed among young adults in the United States. Among women, 68 percent of unions formed in 1997–2001 began as a cohabitation rather than as a marriage. If entry into any type of

for cert. filed Sept. 11, 2012) (focusing on one factor used to determine whether a class is suspect or quasi and thus subject to heightened scrutiny—whether the class is politically powerless). This brief cites prominent officials’ support of same-sex marriage, gay contributors’ impact on presidential campaigns, the Democratic Party’s inclusion of the repeal of DOMA in their party platform, and public opinion’s shift toward favoring same-sex marriage as evidence that gays and lesbians across the country, and particularly in New York, are not politically powerless. *Id.*

127. Brief for the American College of Pediatricians as Amicus Curiae Supporting Intervenor-Defendant-Appellant at 6, *Windsor v. United States*, No. 90-567 (U.S. *petition for cert. filed* Sept. 11, 2012) (offering “important evidence suggesting that children derive substantial benefits from the unique contributions of both men and women, mothers and fathers, as opposed to just any two adults”).

128. *See supra* notes 16-37 and accompanying text (on estate distribution benefits of marriage).

129. *America’s Families and Living Arrangements: 2010*, U.S. CENSUS BUREAU, <http://1.usa.gov/e05NXo> (last visited Mar. 20, 2013). In 2010, unmarried households comprised 45% of all U.S. households, with 99.6 million unmarried individuals over age 18, representing nearly 44% of the adult population. *Id.*

union, marriage or cohabitation, is taken into account, then the timing of a first union occurs at roughly the same point in the life course as marriage did in the past.¹³⁰

Legal benefits have been a target for legislation. “Cohabitation has been regulated to such an extent that, in many statutory circumstances, it looks much like marriage.”¹³¹ Domestic partnership legislation has been a large part of that regulation to confer legal rights on cohabitants,¹³² but there is no federalization of this area of law.¹³³

The result of all this activity is a rather confusing legal situation, in which cohabitants rights are based upon a mixture of remedies that not only vary from state to state, but also result in intrastate legal regimes based on different legal theories and offering a patchwork of remedies from a variety of sources.¹³⁴

Rights in cohabitation, however, are not the default option in American law.¹³⁵ In fact, the traditional position is that cohabitants have no rights by virtue of their relationship.¹³⁶ If rights do arise between cohabitants, they do so by judicial fiat based on quantum meruit providing equitable remedies, not based on statutory marriage-like

130. CASEY E. COPEN ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., NAT’L HEALTH STATISTICS REP. NO. 49, FIRST MARRIAGES IN THE UNITED STATES: DATA FROM THE 2006-2010 NATIONAL SURVEY OF FAMILY GROWTH (2012), available at <http://1.usa.gov/GMzSjd>.

131. Lynne Marie Kohm & Karen M. Groen, *Cohabitation and the Future of Marriage*, 17 REGENT U.L. REV. 261, 272 (2005) (discussing the paradox of cohabitation as sabotaging the American dream of most adults for a happy marriage). “The trend in family law and scholarship in Europe and Canada is to treat married and cohabiting couples similarly, or even identically.” Margaret F. Brinig & Steven L. Nock, *Marry Me Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 403 (2004).

132. A very small number of states that afford default spousal rights to domestic partners, opposite sex couples, and same-sex couples include spousal rights in a decedent’s estate. See, e.g., 750 ILL. COMP. STAT. 75/20 (2011), available at <http://bit.ly/11EKWHL>. Many of these types of statutes are limited to same-sex partners. See, e.g., DEL. CODE ANN. tit. 13, §§ 201, 212(a), 212(d) (2011). For more comprehensive information on state spousal rights for domestic partners, see *Civil Unions and Domestic Partnership Statutes*, NAT’L CONF. OF STATE LEGISLATURES (last updated Mar. 21, 2013), <http://bit.ly/xWUlsj>.

133. For a review of this regulation, see Kohm & Groen, *supra* note 131, at 266-68 (discussing case law and statutory schemes for cohabitation rights).

134. Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 LAW & POL’Y 119, 146 (2004).

135. See generally Brinig & Nock, *supra* note 131. “An additional result is that same-sex couples are better protected in many areas than are heterosexual cohabitants. The system as it now exists is clearly unstable.” Bowman, *supra* note 134, at 146.

136. *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979). This longstanding Illinois case refused to recognize the marriage-like relationship of a man and a woman over a 15-year period yielding 3 children for any financial or equitable remedies. *Id.*

remedies.¹³⁷ Neither position grants rights in death to a surviving cohabitant.

Although people who are young rarely consider estate planning, death can happen at any age. Death can certainly happen during cohabitation, where little if any benefits are afforded to surviving partners. For those who wish to leave an inheritance to a partner, and apparently that is a desire of many cohabiting partners,¹³⁸ unless they do so testamentarily (by will), or by will substitute,¹³⁹ default estate distribution rules will be completely unhelpful in those objectives.¹⁴⁰

137. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). This longstanding California case initially granted palimony rights to a cohabitant despite the lack of a written agreement between the parties to do so. *Id.*

138. An empirical study published in 1998 concluded that a considerable majority of cohabiting partners wanted their surviving partner to share in their estate upon their death. See Mary L. Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1 (1998) (surveying both opposite sex couples and same-sex couples).

139. Will substitutes include trusts, assets left upon death to a named beneficiary, and jointly held assets, among others. For a discussion of both probate and non-probate assets, see LYNNE MARIE KOHM & MARK L. JAMES, ESTATE PLANNING SUCCESS FOR WOMEN: 9 SIMPLE STEPS TO PLAN YOUR ESTATE WITH FORESIGHT, CLARITY AND THOUGHTFULNESS FOR THE BENEFIT OF THOSE YOU LOVE 24-32 (2006).

140. The question of whether “significant others” shall have inheritance rights is posed by ANDERSON ET AL., *supra* note 10, at 43, but never answered. DUKEMINIER ET AL., *supra* note 14, outlines the efforts to gain default death protections for a committed partner:

In 1995 Professor [Lawrence W.] Waggoner proposed an amendment to the UPC—to become UPC § 2-102B—that would have provided an intestate share for “committed partners.” A committed partner was defined as a person “sharing a common household with the decedent in a marriage-like relationship.” Although Waggoner’s proposal was never adopted by the Uniform Law Commissioners, it was never rejected either. In 2002 the Joint Editorial Board for Uniform Trusts and Estates Acts revisited Waggoner’s proposal, appoints Professor [Thomas] Gallanis as special reporter for the project and tasking him with the preparation of a study on, and a model statute for, inheritance rights of domestic partners. The JEB then abandoned the project in 2004, but it consented to Gallanis publishing his study and model statute. Under the Gallanis proposal, both same-sex and opposite-sex domestic partners would be entitled to spousal rights to inheritance and elective share. Whether the Gallanis proposal will influence the ongoing debate in the state legislatures, and whether the Uniform Law Commission will ever take an official position on this issue remains to be seen.

DUKEMINIER ET AL., *supra* note 14, at 66. Other legal scholars have suggested remedies for cohabitants. See Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265 (2001) (describing the need for benefits for state welfare cohabitants); M. O. Mhango, *What Should the Board of Management of a Pension Fund Consider when Dealing with Death Claims Involving Surviving Cohabitants?*, 15(2) POTCHEFSTROOM ELEC. L.J. 183 (2010), available at <http://bit.ly/13rKLnX> (arguing for a government death benefit for South African cohabitants).

Thus, those who do not choose marriage are generally eliminated from the benefits of estate planning default.¹⁴¹

Without marriage, those who live together until death do not receive these automatic estate-planning benefits and are left vulnerable to a great deal of problems. A cohabiting partner can be evicted from his or her home in the event of the death of a partner,¹⁴² is prohibited from the basic family allowances as unrelated,¹⁴³ and is barred from any employment, retirement, military, or intestate benefits allowed to a marriage partner or family member,¹⁴⁴ including health care benefits.¹⁴⁵ If a decedent partner claimed homestead benefits, the surviving partner may not enjoy those benefits thereafter.¹⁴⁶ Even the household furniture and personal items that the cohabitants shared cannot be passed to the surviving partner under personal property set-aside laws; they can be passed only to a surviving spouse.¹⁴⁷

Marriage brings a number of legal and economic consequences, mostly beneficial, to a surviving spouse. A married partner is entitled to social security benefits based on the other partner's earnings, to pension rights from the other partner's job, to an elective share of the other partner's estate, and to the federal estate tax marital deduction (eliminating all estate taxes on property one marriage partner

141. See, e.g., *In re Estate of Cooper*, 592 N.Y.S.2d 797, 798 (1993) (holding that a survivor of a homosexual partnership could not be considered a "surviving spouse" under New York's law for spousal election, N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 2013)).

142. In New York, however, a same-sex cohabiting partner was considered a "family member," prohibiting his eviction from their home upon the death of his partner, the legal tenant. See *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201, 212 (1989).

143. A family allowance generally is authorized by statute to award a surviving spouse and dependent children maintenance and support for a fixed period at the death of a decedent. *DUKEMINIER ET AL.*, *supra* note 14, at 422.

144. The federal Employee Retirement Income Security Act of 1974 (ERISA) governs the role of pension accounts, retirement accounts, etc., and is designed to provide survivorship rights to the spouse of an employee; it provides nothing to a cohabitating partner. 29 U.S.C. §§ 1001-1461 (2000 & Supp. 2004). For a comprehensive look at these benefits, see JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW 577-87* (3d ed. 2000); see also Jeffrey A. Brauch, *The Federal Common Law of ERISA*, 21 HARV. J.L. & PUB. POL'Y 541 (1998) (providing an overview of the foundation for the law).

145. See Jeffrey A. Brauch, *Health Care Providers Meet ERISA: Are Provider Claims for Misrepresentation of Coverage Preempted?*, 20 PEPP. L. REV. 497 (1993).

146. Generally, this is true, unless provided otherwise by particular state statute. For an overview of how the homestead laws work, see *DUKEMINIER ET AL.*, *supra* note 14, at 421-22.

147. Certain tangible personal property of the decedent—generally up to \$10,000—is exempt from creditors' claims. See, e.g., UNIF. PROBATE CODE § 2-403 (amended 2010), 8 U.L.A. 134 (1969).

transferred to the other at death). Unmarried surviving partners have none of these benefits.¹⁴⁸

Cohabitation regulation at common law has generally included the doctrine of common law marriage,¹⁴⁹ which, at one point, increased the number of couples considered legally married who were living together unmarried.¹⁵⁰ Common law marriage, however, is recognized by only a few jurisdictions.¹⁵¹ Consequently, unless cohabitants meet the common law requirements and reside in one of these jurisdictions, they do not receive spousal rights by default.¹⁵²

The paradox of cohabitation is that individuals generally desire a happy marriage but are unwilling to make the commitment that objective requires, which causes them to opt for cohabitation and thereby lose all of the benefits that the marital commitment affords.¹⁵³ “Marriage is preferred over cohabitants’ rights, but people cohabit because they fear failure of a marriage, or they fear the work that marriage requires.”¹⁵⁴ Furthermore, most people who choose cohabitation over marriage do not understand the consequences of that decision.¹⁵⁵ Enjoyment of the default benefits that marriage affords to a surviving spouse is usually completely lost in cohabitation. Marriage, once again, is still the best default option for protecting vulnerable parties in estate conflicts.

III. SOLUTIONS TO POTENTIAL CONFLICTS TOWARD PROTECTING VULNERABLE PARTIES

Although marriage is clearly the best default for estate planning conflicts, some alternative solutions are available for each of the

148. DUKEMINIER ET AL., *supra* note 14, at 437.

149. The elements of common law marriage include that a man and a woman agree to cohabit exclusive of all others and hold themselves out as married. *See* HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 48, 50 (2d ed. 1988). However, the formal requirements of license and solemnization of marriage are not required, yet the cohabitating couples are allowed to be treated as married for all state and federal purposes. *Id.*

150. HARRY D. KRAUSE ET AL., *FAMILY LAW: CASES, COMMENTS, AND QUESTIONS* 220 (4th ed. 1998).

151. *See Common-Law Marriage*, NAT’L CONF. OF STATE LEGISLATURES (last updated Apr. 19, 2011), <http://bit.ly/102A5WO>.

152. The only exception to this general rule appears to be New Hampshire, which recognizes common law marriages as effective at death only, largely to protect cohabiters. N.H. REV. STAT. ANN. § 457:39 (2013).

153. *See* Kohm & Groen, *supra* note 131, at 271-72.

154. *Id.* at 272.

155. DAVID POPENOE & BARBARA DAFOE WHITEHEAD, *SHOULD WE LIVE TOGETHER? WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE: A COMPREHENSIVE REVIEW OF RECENT RESEARCH* (2d ed. 2002).

forementioned cases set forth in this article, which deserve a brief review.

A. *Alternatives for the Witherspoon Example*

Family-wealth-transfer strategies may be helpful to a spouse suffering from dementia or any loss of mental capacity, such as that evident in the John Witherspoon circumstance. Generally, generational wealth transfer strategies are designed to preserve family wealth looking ahead to future generations,¹⁵⁶ but those same strategies can be useful in protecting a vulnerable and aging spouse. Research suggests that the odds of sustaining wealth across generations are as low as 30 percent.¹⁵⁷ That wealth cannot be passed to forthcoming generations if the current generation loses capacity to understand how to best transfer it, as illustrated in *Witherspoon*. Furthermore, though Mr. Witherspoon was a doctor who likely earned a relatively high income, most of his current wealth has likely come from his daughter's success.¹⁵⁸

Generational estate planning strategies are significantly helpful in dealing with pop culture¹⁵⁹ and should be able to work in the reverse, protecting children's assets from parental abuse. Importantly, heirs frequently are not equipped to know how to protect their own money or their own emotions.¹⁶⁰ Successful transition of family wealth can benefit from preparation or training of heirs who gain that wealth.¹⁶¹ Many resources exist to assist in that preparation;¹⁶² sharing and transferring the

156. See, e.g., RON BLUE, *SPLITTING HEIRS: GIVING YOUR MONEY AND THINGS TO YOUR CHILDREN WITHOUT RUINING THEIR LIVES* (2004) (discussing how to positively impact the future generations of a family with sound and charitable estate planning principles).

157. See ROY WILLIAMS & VIC PREISSER, *PREPARING HEIRS: FIVE STEPS TO A SUCCESSFUL TRANSITION OF FAMILY WEALTH AND VALUES* 17 (2003).

158. His daughter is worth \$80 million. *Reese Witherspoon Net Worth*, CELEBRITY NET WORTH, <http://bit.ly/15NiKmp> (last visited Mar. 25, 2013).

159. See Lynne Marie Kohm, *The Latest Twist on the Rich Girl Dilemma: My Partner Wants My Money and My Child*, 3 *EST. PLAN. & COMMUNITY PROP. L.J.* 199, 205-06 (2011) (discussing decision-making in generational estate planning in the context of the Johnson Dynasty estate and the now deceased so-called "Band-Aid Princess" heiress, Casey Johnson).

160. See *Love and Money Are Two Separate Things*, WEALTH LEGACY GRP., <http://bit.ly/ZnXrnl> (last visited Mar. 25, 2013); *Relationships*, WEALTH LEGACY GRP., <http://bit.ly/ZnXxeP> (last visited Mar. 25, 2013) (each discussing the emotional entanglement in wealth transfer).

161. See generally JUDY MARTEL, *THE DILEMMAS OF FAMILY WEALTH: INSIGHTS ON SUCCESSION, COHESION, AND LEGACY* (2006); WILLIAMS & PREISSER, *supra* note 157.

162. See generally CHARLES W. COLLIER, *WEALTH IN FAMILIES* (2007); JOLINE GODFREY, *RAISING FINANCIALLY FIT KIDS* (2003); JAMES E. HUGHES, JR., *FAMILY: THE COMPACT AMONG GENERATIONS* (2007); JAMES E. HUGHES, JR., *FAMILY WEALTH—KEEPING IT IN THE FAMILY: HOW FAMILY MEMBERS AND THEIR ADVISERS PRESERVE*

same family values is largely the key to any successful strategy.¹⁶³ In this situation, Witherspoon's daughter, Reese, may be the family member who must communicate her values to her parents, specifically, the value of marriage. When families agree together on their values, future family members are more likely to uphold them.¹⁶⁴ Taking the opportunity to talk about values may even ferret out mental health issues that implicate capacity concerns, such as those that John Witherspoon exhibited.

Another solution includes pursuing a conservatorship over an incapacitated family member, as the Witherspools are doing under these circumstances.¹⁶⁵ When an adult is impaired to such a significant extent that he or she is unable to manage financial resources or meet essential requirements for physical health and safety, state laws generally provide for protection of the incapacitated individual.¹⁶⁶ A court-appointed guardian or conservatorship can be a solution to protect an incapacitated person in need of assistance, and it provides court oversight of the agents that care for the incapacitated individual.¹⁶⁷ Guardianship may be an expensive solution, however, due to the costs associated with litigation,¹⁶⁸ but there are other remedies available to the average individual to avoid estate-planning conflicts.

A simple power of attorney can be a better and more flexible management tool in the event of incapacity. A power of attorney can be general or limited and can be easily prepared if the principal has some limited capacity to understand that he or she is appointing an agent.¹⁶⁹ A trust may provide similar management protection from creditors,¹⁷⁰ and

HUMAN, INTELLECTUAL, AND FINANCIAL ASSETS FOR GENERATIONS (2004); ROY WILLIAMS & VIC PREISSER, PHILANTHROPY, HEIRS, & VALUES: HOW SUCCESSFUL FAMILIES ARE USING PHILANTHROPY TO PREPARE THEIR HEIRS FOR POST-TRANSITION RESPONSIBILITIES (2005); THAYER CHEATHAM WILLIS, NAVIGATING THE DARK SIDE OF WEALTH: A LIFE GUIDE FOR INHERITORS (2008).

163. *5 Ways to Prepare Your Heir to Inherit Your Estate*, INVESTORGUIDE.COM (Aug. 23, 2010), <http://bit.ly/WSavVi>.

164. *Id.*

165. *See* Gang, *supra* note 52.

166. KOHM & JAMES, *supra* note 139, at 40. However, "the mere presence of poor judgment, mental illness or a physical disability does not render one an incapacitated person." *Id.*

167. For a comprehensive discussion of guardianship, see ANDERSON ET AL., *supra* note 10, at 20-21. Guardianship can be plenary, covering comprehensive and complete care for the affairs of the incapacitated, or it can be limited and specific. *See* KOHM & JAMES, *supra* note 139, at 42.

168. KOHM & JAMES, *supra* note 139, at 41 ("The expense, publicity and delay caused by the guardianship hearings, court deliberations and issuance of a court order can all be avoided by proper planning.").

169. *See id.* at 41-46 (discussing the principal-agency concept, how to prepare a power of attorney, the types of powers, how to use the power of attorney after it is executed, and the essential benefits of the power of attorney).

170. *Id.* at 46, 102-03.

even spendthrift protection from the beneficiary himself.¹⁷¹ A trust is a useful tool for management concerns because it provides “a continuum of control by clearly stating what happens to your assets no matter what happens to you.”¹⁷²

These solutions reveal that estate planning provides numerous alternatives for dealing with the conflicts that result from incapacity. Marriage, however, is the best default estate-planning tool because it protects assets from interloping third parties. The next section shows that tax strategies can also offer solutions to conflicts in estate planning when marriage is impossible.

B. Alternatives for the Windsor Example

The litigation in *Windsor* arose because the best default for estate-planning marriage was not possible for federal estate tax purposes. Intentional estate planning, and some specific and significant strategies, therefore, would have been the best avenue for Windsor and Spyer. These strategies are deserving of explanations that are missed, or not considered, by most commentators of the case.

Windsor seeks a judicial ruling affirming her marital deduction on Spyer’s estate; yet, even if she wins the deduction judicially, her estate will pay estate taxes upon her death.¹⁷³ Estate tax on Windsor’s remaining estate will be paid out of her estate at her death because estate taxes are paid by the estate on the death of the surviving spouse.¹⁷⁴ The marital deduction “allows each spouse to give unlimited amounts of property to the other without incurring transfer taxes, so long as the property will be exposed to tax if and when it leaves the marital unit.”¹⁷⁵ In sum, the marital deduction simply delays the estate tax until the death of the surviving spouse, unless spouses plan ahead.

As same-sex spouses seeking legal tax and estate planning advice, Spyer and Windsor should have consulted an estate-planning attorney that would have predicted their tax problem. The problem was not only that the marital deduction would be impossible for them to enjoy under federal law. Rather, the problem was also that, without proper planning, even if same-sex marriage qualified for the deduction, the tax deferred by the marital deduction is recaptured in any event after the death of the last

171. See ANDERSON ET AL., *supra* note 10, at 311-23 (discussing the concept and jurisprudence surrounding the concept of the spendthrift trust).

172. KOHM & JAMES, *supra* note 139, at 100.

173. See ANDERSON ET AL., *supra* note 10, at 28.

174. See I.R.C. §§ 2035-42 (2006) (discussing the recapture of the marital deduction from the gross estate of the surviving spouse at his or her death).

175. *Id.*

survivor.¹⁷⁶ This second problem is what most married couples plan to avoid. A prudent estate-planning attorney could have helped Windsor and Spyer avoid this problem (while also averting the ensuing litigation) by using a credit shelter trust or bypass trust. This unified credit¹⁷⁷ allows couples to avoid paying the estate tax upon the death of the surviving spouse.¹⁷⁸ Spyer and Windsor could have planned their estates using a credit shelter trust to preserve their lifetime exclusion amounts allowable by federal tax law to every individual U.S. citizen.¹⁷⁹ “With proper estate planning, a same-sex couple can utilize bypass trusts to avoid a second estate tax at the death of the second partner.”¹⁸⁰ Using the unified credit maximally is the thrust of this concept.

The solution, from a tax perspective, is to give less to the surviving spouse and more to a separate trust that will be able to use the unified credit in the first estate. A “credit shelter trust” can work differently in a variety of situations, but the basic idea is to create an entity that does not use the marital deduction.¹⁸¹

In 2009, when Spyer passed away, the federal lifetime exclusion was \$3,500,000 for every individual.¹⁸² Securing that exclusion in a credit shelter trust for each spouse would have allowed both Spyer and Windsor together to pass seven million dollars free of estate tax to their heirs.

Spyer could have also utilized the annual gift tax to make the most of her lifetime exclusion.¹⁸³ Making lifetime gifts each year would have allowed her to transfer a significant amount of her estate to Windsor free

176. Proper planning could include a number of ways to maximize the unlimited marital deduction. KOHM & JAMES, *supra* note 139, at 173-77.

177. I.R.C. § 2505 (2006 & Supp. 2011); I.R.C. § 2056 (2006); INTERNAL REVENUE SERV., PUB. 950, INTRODUCTION TO ESTATE AND GIFT TAXES (2011), *available at* <http://1.usa.gov/4Nr0eE> (describing the unified credit shelter tax rule).

178. *See* ANDERSON ET AL., *supra* note 10, at 30-32 (explaining the concept).

179. *See, e.g.*, KOHM & JAMES, *supra* note 139, at 177-84 (describing how to establish and operate such a trust, as well as how to calculate it and how to fund it).

180. Patricia A. Cain, *Planning for Same-Sex Couples in 2012: Tax and Estate Planning for Same-Sex Couples: Overview and Detailed Analysis*, A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 1, 8 (Oct. 2012). This article offers an excellent overview of the law in this area, as well as of estate planning techniques. Griffin provides additional techniques on estate and gift tax planning strategies for same-sex couples and suggests that, “[w]hile in most cases, same-sex couples are disadvantaged by the lack of legal recognition of their relationships, that non-recognition can afford tax planning opportunities.” Griffin, *supra* note 95, at 41 (discussing how to effectively use Chapter 14 of the Internal Revenue Code).

181. ANDERSON ET AL., *supra* note 10, at 30-31.

182. *See* KOHM & JAMES, *supra* note 139, at 164 (offering a chart on lifetime exclusion amounts for easy reference).

183. I.R.C. § 2503(b) (2006); *see also* ANDERSON ET AL., *supra* note 10, at 25-26 (providing a background and brief history of the gift tax).

of tax.¹⁸⁴ This couple might have used additional strategies, such as the concept of a family limited partnership (FLP),¹⁸⁵ which would have established a business entity to separate ownership interests in partnership assets for family members.¹⁸⁶ The tax benefits would have been significant for Spyer's estate if she and Windsor had used a strategy utilizing an FLP, as "the value of those interests are discounted for estate tax purposes."¹⁸⁷

A combination of the aforementioned strategies would have been astutely wise and financially beneficial for Windsor and Spyer to have implemented. Utilizing a combination of these strategies, Windsor and Spyer would likely have avoided their marriage non-recognition problem and their tax problem. The next section offers solutions for those who choose cohabitation.

C. *Alternatives for Cohabitation*

Although cohabitating partners could benefit by utilizing the strategies suggested above for Spyer and Windsor, cohabitating partners could also utilize private arrangements. For example, naming a cohabiting partner as a beneficiary whenever possible—such as on employment agreements, bank accounts, and other death benefits—as

184. See KOHM & JAMES, *supra* note 139, at 184-85 (explaining how this strategy works to reduce estate tax with gifts to adults). Because it is difficult to anticipate which partner will predecease the other, most couples use this strategy to balance their respective estates to maximize estate tax avoidance.

185. A family limited partnership first arose in *Turner v. Commissioner*, 382 F.3d 367, 369 (3d Cir. 2004), where the court held that a family limited partnership ("FLP") was a lifetime transfer that was testamentary in nature that bypassed estate tax. *Id.* at 377; see also DUKEMINIER ET AL., *supra* note 14, at 886 (providing a more complete description of *Turner*). The essence of the FLP is that, as an estate-planning vehicle, it is a non-probate transfer involving a partnership interest that is driven by tax considerations. Dukeminier et al. explain:

In an FLP, the decedent transfers assets (usually the majority of his assets) to the partnership in exchange for a limited partnership interest. The decedent's family likewise transfers assets (usually minimal assets, however) to the partnership in exchange for limited partnership interests. The general partner is a corporation owned by the decedent and his family. The reason for creating an FLP is that, when the decedent's limited partnership interests pass to his family, the value of those interests are discounted for estate tax purposes because of their lack of control rights and nonmarketability.

Id. at 330.

186. See KOHM & JAMES, *supra* note 139, at 190-93 (setting forth not only how to establish an FLP but also the benefits of an FLP and who should consider using one).

187. DUKEMINIER ET AL., *supra* note 14, at 886.

well as holding assets jointly, is an excellent way to provide partner protection in the event of death.¹⁸⁸

In addition, contractual remedies between the cohabiting parties could assist in limiting the detriments they will face at death by not being married.¹⁸⁹ Although the traditional position is that cohabitants have no rights by code,¹⁹⁰ and some by quantum meruit,¹⁹¹ couples can make written contracts that could protect each other at death. For example, a written lease signed by both cohabitants would protect the survivor from eviction upon the death of a partner.¹⁹² A trust agreement is a non-probate form of a written contract that could be utilized by cohabiting partners to carry out their wishes.¹⁹³

A will is a useful estate-planning tool for cohabitants, as each cohabiting partner may name the other as an heir outright.¹⁹⁴ Furthermore, to protect from loss of shared personal property, each partner could also utilize a separate writing to distribute upon death certain specified tangible personal property for the benefit of the surviving partner.¹⁹⁵

188. See KOHM & JAMES, *supra* note 139, at 24-32 (reviewing how assets can be held jointly, or left to named beneficiaries, all as will substitutes).

189. See Bowman, *supra* note 134, at 126-29 (describing the law of contracts between cohabitants).

190. *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210 (Ill. 1979). Perhaps *Hewitt* is a reason why Illinois adopted a domestic partner code, the Illinois Religious Freedom Protection and Civil Union Act. 2010 Ill. Legis. Serv. 96-1513 (West). The Act allows same-sex and opposite-sex couples to enter into civil unions, giving them some of the same benefits available to married couples, including the right to visit a sick partner in the hospital, disposition of a deceased loved one's remains, and the right to make decisions about a loved one's medical care (but offering no estate planning protection). *Id.*

191. *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976).

192. Some landlords may still resist leasing a property to unmarried tenants. See generally Erin P. B. Zasada, *Civil Rights—Rights Protected and Discrimination Prohibited: Living in Sin in North Dakota? Not Under My Lease*, 78 N.D. L. REV. 539 (2002); Michael V. Hernandez, *The Right of Religious Landlords to Exclude Unmarried Cohabitants: Debunking the Myth of the Tenant's "New Clothes,"* 77 NEB. L. REV. 494 (1998).

193. KOHM & JAMES, *supra* note 139, at 82-101 (offering an overview of how and why to establish, implement, and benefit from using a trust).

194. See *id.* at 32, 72-81 (explaining the primary benefits of a will).

195. See, e.g., VA. CODE ANN. § 64.2-400 (2012). This writing would also be referenced in each partner's will with language such as:

I have herewith created simultaneously with this, my last will and testament, a separate writing to name beneficiaries for specific items of personal property as I so choose. That writing I hereby incorporate into this, my last will and testament, by this reference, and it shall have the full force and effect of this, my last will and testament, accordingly.

The list would include specific items of personal property naming the cohabitant as the beneficiary.

The greatest problem that implementing these strategies and solutions will encounter, however, is the attitude of the cohabitants themselves: they generally do not plan for an ending of the relationship, by death or otherwise.

A much more profound problem with the use of contract principles to redress inequities that may arise on termination of a cohabiting relationship is that cohabiting couples—like married couples—typically do not make contracts; they simply proceed trusting that their relationship will endure and that each party will treat the other fairly. . . . Most cohabitants simply proceed under vague agreements to pool resources and make no provision for remedies upon termination.¹⁹⁶

Though cohabitating couples may proceed in the relationship as if they are married, they are not married and will not receive the default benefits married couples enjoy. Therefore, they must plan ahead, even when married couples have the luxury of relying on the default. These facts prove once again that marriage is still the best default for estate planning conflicts.

CONCLUSION

This article has explored the potential problems in estate planning and distribution when parties enter into marriage-like relationships that are unprotected by law. When a conflict challenges a testator's testamentary capacity, as in the bigamous case of *Witherspoon*, marriage is the default that protects a partner from his own indiscretions. When a conflict challenges estate taxes, as in the same-sex marriage challenge in *Windsor*, marriage remains the best estate-planning default. And, when estate-planning conflicts involve cohabiting partners, again those instances reveal that marriage is honorable¹⁹⁷ and is still the best default in estate planning conflicts. Marriage expansion in situations of same-sex marriage and marriage-like cohabitation does not necessarily mimic marriage, nor do those marriage-like relationships provide the benefits

196. Bowman, *supra* note 134, at 128. Professor Bowman cites to an empirical study that revealed these attitudes in cohabitation relationships.

One empirical study of Minnesota residents who self-identified as being in a committed unmarried relationship found that only 21 percent had written agreements about property; of these, 52.1 percent had a provision for dividing property if the relationship were to end, but only 35.4 percent set up duties of support upon termination[.]

Id. (citations omitted).

197. "Let marriage be honored by all." *Hebrews* 13:4, LIGUORI PUBLICATIONS 1325 (New American Bible 2004). Marriage protects partners in the event of death by providing considerate and honorable foresight to benefit the one you love.

and protections often sought by those who enter into them. Such relationships simply are not equivalent to marriage.

Marriage protects vulnerable parties as they age. Its benefits are sought after by a small demographic of same-sex partners and yet are ignored or dismissed as unnecessary by a large demographic of vulnerable cohabiters who do not understand the legal jeopardy they live in—or die in—without the protection of marriage. When individuals enter into relationships unprotected by law, they risk enduring the legal ramifications that those relationships can create. Vulnerable parties who have entered into alternative relationships unprotected by law are generally the first to find that marriage is still the best default to avoid estate-planning conflicts.

What does a Tennessee bigamy case have to do with a New York same-sex marriage? And what does either case have to do with the growing cultural trend and large demographic of individuals who choose cohabitation over marriage? This article has demonstrated that the answer is hidden in a simple sentence: Marriage remains the best default in estate planning conflicts.