

## Marriage Equality in Wisconsin: Are We There Yet?

*Presented by Attorney Tamara Packard*

*Cullen Weston Pines & Bach LLP*

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League of Women Voters of Dane County

Lively Issues Forum

- I. Marriage for Same-Sex Couples Before *Windsor* (current generation).
  - A. Hawaii--1993 *Baehr v. Lewin* decision.
  - B. The 1996 Federal Defense of Marriage Act
    1. Section 2: allows States to refuse to recognize same-sex marriages performed elsewhere. 28 U.S.C. § 1738C.
    2. Section 3: defines “marriage” for purposes of federal law to mean “only a legal union between one man and one woman as husband and wife;” defines “spouse” for federal purposes to mean only “a person of the opposite sex who is a husband or wife.” 1 U.S.C. § 7.
  - C. Massachusetts--2004.
  - D. By June 2013, same-sex couples could marry in 12 states, DC, 8 tribal nations within the US, and many foreign countries including Canada, France, England, Spain and Sweden. 29 other states had some form of a constitutional amendment banning marriage equality, like Wisconsin’s 2006 amendment (Art. 13, sec. 13). Four had a law banning marriage equality, but no constitutional provision on the subject.
  - E. On June 25, 2013, if married to a person of the same sex, no Wisconsin or federal significance.
  - F. Patchwork of significance in other states, countries.
  - G. Only formal same-sex relationship recognized in Wisconsin was Domestic Partnership (since 2009), no federal significance (with one exception), questionable significance elsewhere.

- II. June 26, 2013: the United States Supreme Court's *Windsor* Decision. *United States v. Windsor*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2675 (2013).
  - A. The love and marriage of Edith Windsor and Thea Spyer, Ms. Spyer's death, and Ms. Windsor's \$363,053 tax bill.
  - B. Lawsuit challenged Section 3, but not Section 2, of DOMA.
  - C. 5-4 decision, authored by Justice Kennedy. Holding: Section 3 of DOMA, which defines marriage and spouse for federal law purposes to exclude same-sex marriages and spouses, is "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."
  - D. Reasoning firmly rooted in the federalist concept of states' rights. State of New York decided it was appropriate to grant same-sex couples the right to marry, thus conferring upon those couples "a dignity and status of immense import." This was a decision to enhance "the recognition, dignity, and protection of the class in their own community." DOMA takes that state-defined class and uses it for the opposite purpose: "to impose restrictions and disabilities." That is, "DOMA seeks to injure the very class New York seeks to protect." The essence of DOMA was to interfere with the equal dignity of same-sex marriages.
- III. Marriages Between Same-Sex Couples in Wisconsin June 26, 2013 until June 5, 2014: Still Second-Class Marriages, But Achieved Significant Legal Effect Because They Gained Federal Recognition.
  - A. Still not recognized by Wisconsin.
    - 1. Neither "recognized" nor considered a "valid" marriage under Wisconsin Const. Art. 13, §13.
      - a. no ability to adopt as married couple.
      - b. children have no rights to support from unrecognized parent.
      - c. no marital property rights.
      - d. no access to divorce.
      - e. if also registered as domestic partners under Ch. 770, limited (though important) rights under state law

- B. 1,100+ federal laws regarding marriage, place of celebration vs. place of residence
- C. Particular Areas of Rights and Responsibilities
  - 1. Income Taxes
    - a. Fed: IRS follows place of celebration rule. MUST file married (jointly or separately) for 2013 forward; MAY file amended returns as married going back to SOL. *Rev. Rul. 2013-17.*
    - b. Employers may file refund claims for payroll taxes paid on previously-taxed health insurance and other fringe benefits provided to employees with a same-sex spouse. *See IRS Notice 2013-61.*
    - c. Employment benefits that are not exempt from federal taxes due to marriage are still taxed by the state, such as health insurance covering spouse (unless exempt due to dependent status).
    - d. Similar disparate tax treatment for things like IRA contributions, health savings accounts, health flex spending accounts, etc.
    - e. This disparate treatment is usually, but not always, to the disadvantage of the married same-sex couple.
  - 2. Estate & Gift Taxes
    - a. Fed: *Rev. Rul. 2013-17.* Married same-sex couples are treated as married for estate and gift tax purposes as well. Place of celebration rule.
    - b. No federal gift taxes for gifts between spouses; gifts between non-spouses are exempt from federal tax up to a specified amount (\$14,000 in 2013).
    - c. Wisconsin does not currently have estate or gift taxes.
  - 3. Social Security Benefits
    - a. Social Security statutes apply the place of residence rule for spousal SS benefits, so Wisconsin same-sex spouses may not be able to receive spousal retirement, survivor, disability or death benefits, however, this may be evolving.
    - b. NOTE BENNE: Regardless of marital status, couples registered as Domestic Partners under Wis. Stat. Ch. 770

should qualify for spousal SS benefits because of the intestacy inheritance rights provided in Ch. 770. A person is eligible for SS spousal benefits if the state of residence provides that the person can inherit personal property without a will under state law as would a “wife, husband, widow or widower.” 42 U.S.C. § 416(h)(1)(A)(ii). For the same reason, a DP’s income will likely count in evaluation of eligibility for SSI, an income-dependent disability program.

4. Immigration

Immigration laws apply the place of celebration rule. People may now generally sponsor their same-sex spouses for a family-based immigration visa (“green card”).

5. Employment

- a. See income taxes re fringe benefits.
- b. U.S. Department of Labor Technical Release 2013-04 (9/18/13): Regulation of employee benefit plans (ERISA plans) will follow the place of celebration rule.
- c. spousal COBRA rights upon loss of insurance, divorce
- d. marriage is a qualifying event to add spouse to employer-sponsored health insurance
- e. married same-sex couples with employer-sponsored retirement benefits should review their beneficiary designations and form of benefit elections to ensure their designations and elections are accurate and complete, and that they reflect their wishes.
- f. Federal Family Medical Leave Act: currently follows the place of residence rule, so no new FMLA protection for married same-sex couples who live in Wisconsin. However, this is one area where efforts are underway to change this. See below for exception for federal employees.
- g. N.B.: Regardless of marital status, the federal FMLA regulations entitle a covered employee to take time off to care for a child for whom they serve *in loco parentis*, and birth/adoption of such child. This often will entitle an employee time off in connection with her same-sex spouse’s (or non-marital partner’s) biological/legal child, regardless of an absence of legal/biological relationship between the child and employee. See *US DOL Fact Sheet #28F*.
- h. One of the few benefits of a Ch. 770 Domestic Partnership is entitlement of a covered employee to Wisconsin FMLA to

care for a partner or partner’s parents (but not a partner’s child).

6. Active Military, Military Veterans

- a. DOD acted quickly to provide spousal and family benefits to all active military, based on place of celebration rule.
- b. DOD also provided special leave to allow same-sex military couples living in Wisconsin and other marriage-unequal states to travel to a jurisdiction where they can get married.
- c. Active military have a duty to report their marriage. Before the *Windsor* decision, there was no duty to report a marriage to a same-sex spouse. Such marriages should now be reported.
- d. Although VA statutes restrict spousal benefits to opposite-sex spouses only, AG Holder announced in September that this language will not be followed. However, these statutes also apply a form of place of residence rule, which prevent some *but not all* married same-sex couples living in Wisconsin from receiving veteran spousal benefits. See the chart from the “After DOMA” fact sheet below:

If...	Then, for purposes of the VA, you are...
You lived in a recognition state when you got married and live in a recognition state when the benefits take effect	Married
You lived in a recognition state when you got married but live in a non- recognition state when the benefits take effect	Married
You lived in a non- recognition state when you got married (by traveling to a recognition state to get married) but live in a recognition state when the benefits take effect	Married
You lived in a non- recognition state when you got married (by traveling to a recognition state to get married) and continue to live in a non- recognition state when the benefits take effect	<b>Likely Not married</b>

(A “recognition state” is a state that recognizes a same-sex couple’s marriage, like New York; a “non-recognition state” is one that does not, like Wisconsin.)

7. Other Federal Employees

- a. Office of Personnel Management extends all employment benefits to legally married same-sex spouses of Federal employees and annuitants. Follows state of celebration rule. *See OPM Benefits Administration Letter No. 13-203 (7/17/13).*
- b. Federal employee FMLA rights follow state of celebration rule. *OPM Memorandum CPM 2013-14 (10/21/13).*
- c. Office of Government Ethics applies state of celebration rule for its ethics rules--conflicts of interest, financial interest reports, etc.

8. Health Care

- a. DHHS announced 3/14/14 that starting in 2015, all health insurance plans must cover same-sex spouses just as they do opposite sex spouses. Place of celebration rule.
- b. MA must cover services in a skilled nursing facility in which a "married same-sex spouse resides" to the same extent they would be required to provide such services if an opposite-sex spouse resided there. *DHHS CMS memo 8/29/13.* Applies the place of celebration rule.
- c. Medicaid & Children's Health Insurance Program: its complicated. *See DHHS SHO# 13-006 (9/27/13).*

IV. Marriages Between Same-Sex Couples in Wisconsin Since June 6, 2014.

- A. February 3, 2014 ACLU Files Marriage Equality Lawsuit in Federal District Court in Madison
- B. Judge Crabb's June 6, 2014 Opinion, June 13, 2014 Injunction and Stay.
- C. The "window marriages."
- D. 7<sup>th</sup> Circuit's September 4, 2014 Decision and Stay.
- E. U.S. Supreme Court October 6, 2014 Denial of Petition for Certiorari.
- F. October 7, 2014: Marriage Equality in Wisconsin.
- G. Domestic Partnership Registry still an alternative.

- V. 36 Down, 14 to Go.
  - A. What's going on at the Federal Appeals Court level: Pro-Marriage Equality rulings from 4<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Circuits. Anti-Marriage Equality Ruling from 6<sup>th</sup> Circuit. Decisions pending from 5<sup>th</sup>, 8<sup>th</sup> and 11<sup>th</sup> Circuits.
  - B. What's going on at the U.S. Supreme Court.
    - 1. Monday denied Certiorari in the Louisiana case.
    - 2. 6<sup>th</sup> Circuit Petition for Certiorari

**Questions? I'm happy to talk, and point you in the right direction.**

Tamara B. Packard  
Cullen Weston Pines & Bach LLP  
122 West Washington Avenue, Suite 900  
Madison, WI 53703  
(608) 251-0101  
packard@cwpb.com  
www.cwpb.com

**State-by-State Status of Marriage Equality  
as of January 12, 2015  
36 down, 14 to go**

<b>STATE</b>	<b>MARRIAGE EQUALITY STATUS</b>
Alabama	Constitutional amendment restricting marriage. Full challenges underway in federal trial court. A positive ruling in the 11 <sup>th</sup> Circuit in the Florida case would generate marriage equality in Alabama.
Alaska	Marriage equality due to 9 <sup>th</sup> Circuit ruling.
Arizona	Marriage equality due to 9 <sup>th</sup> Circuit ruling.
Arkansas	Constitutional amendment restricting marriage. State trial court found unconstitutional, ruling stayed pending appeal to the Arkansas Supreme Court. Federal trial court found ban unconstitutional, stayed pending appeal to the 8 <sup>th</sup> Circuit.
California	Marriage equality due to 9 <sup>th</sup> Circuit ruling.
Colorado	Marriage equality due to 10 <sup>th</sup> Circuit ruling.
Connecticut	Marriage equality due to state court ruling.
Delaware	Marriage equality (through legislation).
District of Columbia	Marriage equality (through legislation).
<b>Florida</b>	Marriage equality as of January 6, 2015 due to federal trial court ruling. Appeal pending to the 11 <sup>th</sup> Circuit but stay of trial ruling expired and US Supreme Court refused to extend it.
Georgia	Constitutional amendment restricting marriage. Challenge pending in federal trial court. A positive ruling in the 11 <sup>th</sup> Circuit in the Florida case would generate marriage equality in Georgia.
Hawaii	Marriage equality (through legislation).
Idaho	Marriage equality due to 9 <sup>th</sup> Circuit ruling.
Illinois	Marriage equality (through legislation).
Indiana	Marriage equality due to 7 <sup>th</sup> Circuit ruling.
Iowa	Marriage equality due to state court ruling.
Kansas	Marriage equality due to 10 <sup>th</sup> Circuit ruling.
Kentucky	Constitutional amendment restricting marriage. Federal district court ruled that state must recognize out of state marriages, but federal appellate court (6 <sup>th</sup> circuit) upheld ban. Petition seeking Supreme Court review pending (on 1/9/15 calendar). AG will not defend.
<b>Louisiana</b>	Constitutional amendment restricting marriage. Ban upheld by federal trial court, on appeal to the 5 <sup>th</sup> Circuit; arguments held 1/9/15. Petition seeking Supreme Court review denied 1/12/15.

Maine	Marriage equality (through popular referendum).
Maryland	Marriage equality (through legislation, upheld in popular referendum).
Massachusetts	Marriage equality due to state court ruling.
Michigan	Constitutional amendment restricting marriage. Federal district court found unconstitutional, but federal appellate court (6 <sup>th</sup> Circuit) upheld ban. Petition seeking Supreme Court review pending (on 1/9/15 calendar).
Minnesota	Marriage equality (through legislation).

Mississippi	Constitutional amendment restricting marriage. Federal trial court found ban unconstitutional. Stayed pending appeal to the 5 <sup>th</sup> Circuit. Arguments held 1/9/15.
<b>Missouri</b>	Constitutional amendment restricting marriage. Pro-marriage equality ruling from federal court, stayed pending appeal to 8 <sup>th</sup> Circuit. A state court ruling allows couples to receive marriage licenses from the city of St. Louis clerk; several counties have followed suit. Another state court ruling requires that marriage formed elsewhere must be respected by the state, and this is in effect after the AG and Governor decided not to appeal.
Montana	Marriage equality due to 9 <sup>th</sup> Circuit ruling.
Nebraska	Constitutional amendment restricting marriage. Challenge pending in federal court.
Nevada	Marriage equality due to 9 <sup>th</sup> Circuit ruling.
New Hampshire	Marriage equality (through legislation).
New Jersey	Marriage equality (through state court ruling).
New Mexico	Marriage equality (through state court ruling).
New York	Marriage equality (through legislation).
North Carolina	Marriage equality due to 4 <sup>th</sup> Circuit ruling.
North Dakota	Constitutional amendment restricting marriage. Challenges pending in federal court, decisions on summary judgment motions could come soon.
Ohio	Constitutional amendment restricting marriage. Federal district courts ruled that state must recognize out of state marriages in connection with death certificates and out of state marriages in general, but federal appellate court (6 <sup>th</sup> circuit) upheld ban. Petition seeking Supreme Court review pending (on 1/9/15 calendar).
Oklahoma	Marriage equality due to 10 <sup>th</sup> Circuit ruling.
Oregon	Marriage equality due to 9 <sup>th</sup> Circuit ruling.

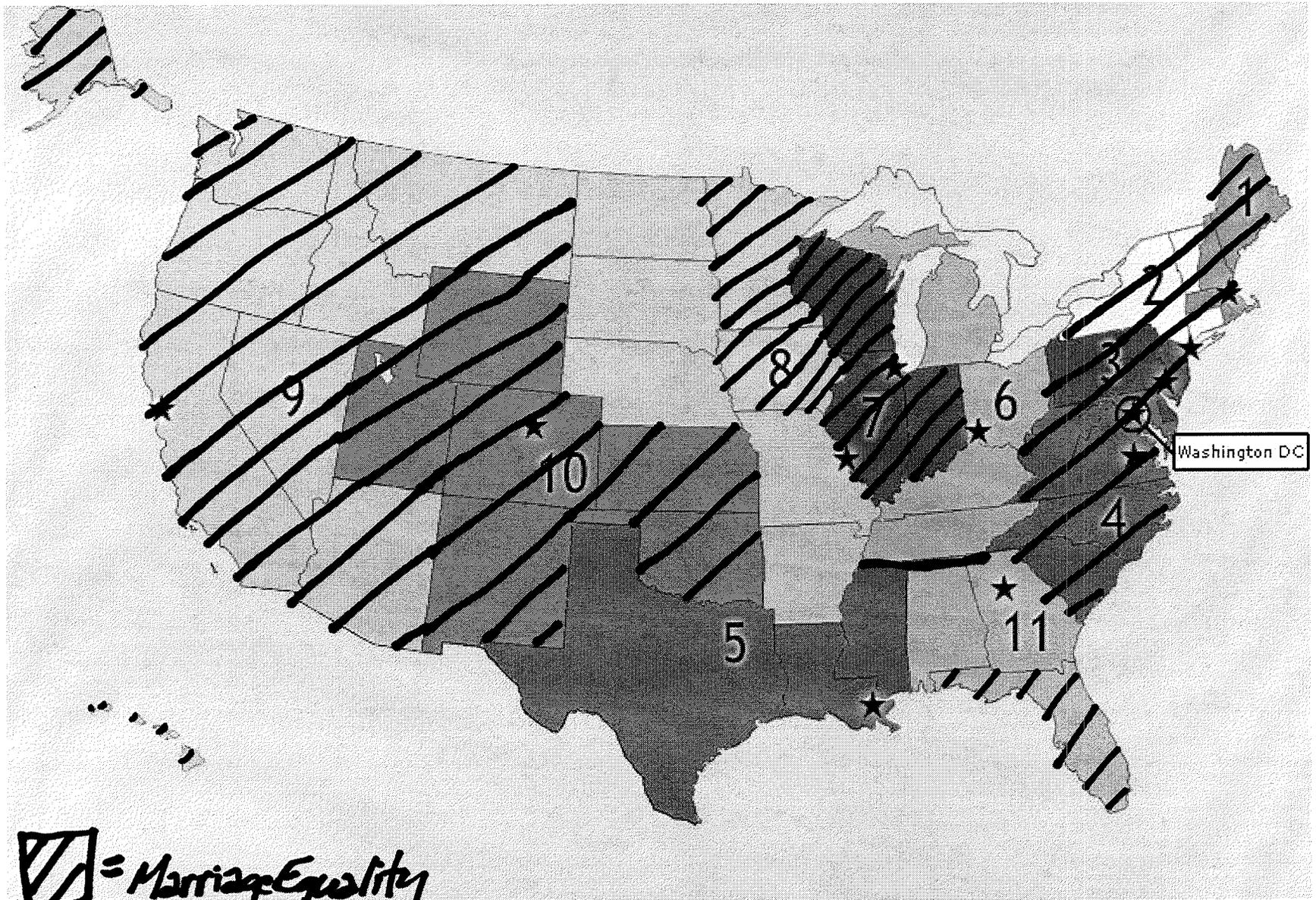
Pennsylvania	Marriage equality due to federal trial court ruling, AG and Governor refused to appeal.
Rhode Island	Marriage equality (through legislation).
South Carolina	Marriage equality due to federal trial court ruling, stay expired; also in the 4 <sup>th</sup> Circuit which has ruled for marriage equality in Virginia, binding on South Carolina.
<b>South Dakota</b>	Constitutional amendment restricting marriage. On Jan. 12, 2015, Federal district court found ban unconstitutional, stayed pending appeal to 8 <sup>th</sup> Circuit.
Tennessee	Constitutional amendment restricting marriage. Federal district court ruled that state must recognize out of state marriages, but federal appellate court (6 <sup>th</sup> Circuit) upheld ban. Petition seeking Supreme Court review pending (on 1/9/15 calendar).
Texas	Constitutional amendment restricting marriage. Federal district court found unconstitutional, ruling stayed pending appeal (5 <sup>th</sup> Circuit). Arguments held 1/9/15.
Utah	Marriage equality due to 10 <sup>th</sup> Circuit ruling.
Vermont	Marriage equality (through legislation).
Virginia	Marriage equality due to 4 <sup>th</sup> Circuit ruling.
Washington	Marriage equality (through legislation, upheld in popular referendum).
West Virginia	Marriage equality due to 4 <sup>th</sup> Circuit ruling.
Wisconsin	Marriage equality due to 7 <sup>th</sup> Circuit ruling.
Wyoming	Marriage equality due to 10 <sup>th</sup> Circuit ruling.

**For a detailed summary of all litigation, including information about the plaintiffs, who is representing them, and the status of each case, go to:**

**[www.freedomtomarry.org/litigation](http://www.freedomtomarry.org/litigation). Lambda Legal has an even more detailed summary of all litigation. Go to [www.lambdalegal.org](http://www.lambdalegal.org) and search for the “pending marriage equality cases” page.**

Compiled by Attorney Tamara B. Packard, partner at Cullen Weston Pines & Bach LLP, with assistance from A.J. Grund, third year law student at University of Wisconsin Law School and law clerk with CWPB.

Cullen Weston Pines & Bach LLP  
122 West Washington Avenue, Suite 900  
Madison, WI 53703  
(608) 251-0101  
packard@cwpb.com  
www.cwpb.com



☑ = Marriage Equality  
As of 1/12/15