Between a Rock and a Hard Place-Ending Same Sex Marriages in the Wake of *DeBoer*

By Tim Cordes and Mindy L. Hitchcock

The American family is in the midst of unprecedented change, and the keyword is acceptance. Starting with the baby boomer generation, societal trends have changed what it means to be a "family." The nuclear family–consisting of two married parents, a breadwinner and a homemaker–is now in the minority, dropping from 40% of the population in 1970 to 19% in 2013.[1] Single parenting is on the rise. Births to unmarried women increased from 5% in 1960 to 41% in 2012.[2] Interracial marriage, which was a five-year felony until 1967, became legal with the history-making case of *Loving v Virginia.*[3] Today, 15% of all new marriages are of mixed race, while 8.4% of all married people in the US have a spouse of a different race.[4] What was once a crime has become an accepted, even commonplace, part of society.

As the definition of what constitutes a "family" increasingly expands, practitioners must respond to these changes in a way that serves our clients. Perhaps the last frontier is in addressing the needs of same-sex clients who wish to end their marriages. The law in this area has seen remarkable change in recent years. The Defense of Marriage Act ("DOMA"), a federal law passed in 1996, and constitutional amendments enacted in twenty five states, including Michigan in 2004, defined marriage as the union of "one man and one woman."[5] Yet the matter was far from settled, as states have responded to the demands of their constituents to recognize the validity of same-sex relationships. Massachusetts, the first state to recognize same-sex marriages in 2003, was followed by more than 30 other states and the District of Columbia in enacting laws allowing gay couples to wed.[6]

However, last year's landmark United States Supreme Court case, *United States v Windsor,*[7] opened the door to ending this controversy once and for all. *Windsor* involved a taxpayer who, as the surviving spouse of a same-sex couple, was denied the benefit of a spousal deduction because the definition of "marriage" and "spouse" in DOMA contradicted her own state's (New York) definition. In *Windsor*, the Court invalidated section 3 of DOMA on the ground that it impermissibly interfered with the states' right to define "marriage."[8]

In dicta, the majority opinion also noted that "the Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."[9] Noteworthy was the fact that, prior to the Court's decision, the Executive Branch itself concluded that DOMA was unconstitutional and the Department of Justice therefore declined to defend it, leaving it to a congressional group to present a "sharp adversarial presentation" in defense of the Act.[10] Yet, issues remained because the decision was based upon the authority of the states to define marriage, a double-edged sword in states with DOMA-like constitutional amendments.

This opened the floodgates to litigation at the state level. One federal court after another–in Utah, Oklahoma, Kentucky, Virginia, Texas, Michigan, Arkansas, Idaho, and Wisconsin–ruled that laws banning same-sex marriage were unconstitutional. In most of these states, the county clerks immediately began issuing marriage licenses for same-sex couples until the decisions were stayed pending the state's appeal. This happened in Michigan on March 21, 2014, when the Honorable Bernard A. Friedman, of the Eastern District of Michigan, struck down the Michigan Marriage Amendment on the ground that it violated the equal protection clause of the Fourteenth Amendment in *DeBoer v Snyder*.[11]

More than 300 same-sex couples were wed in Ingham, Muskegon, Oakland, and Washtenaw counties before the 6th Circuit Court of Appeals halted the ruling and issued a stay.[13] It seems evident that Judge Friedman's ruling will eventually be upheld, and the case is now on appeal to the Supreme Court. Meanwhile, there are almost 15,000 same-sex couples living in Michigan, most of them legally married in other states.[14] Like the general population, some of these marriages will fail. Should these clients be left in limbo during the months, or years, that the case is on appeal? How can we help our same-sex clients wishing to divorce, whether married in another state or married during that narrow window of opportunity in Michigan before the attorney general filed his appeal?

The following are arguments that both authors have used to successfully help our same-sex clients to dissolve their marriages. We would note that, in each case, the judgment was issued pursuant to the consent of both parties. We would urge you to do the same prior to presenting the judgment to the

court. Regardless whether the court may personally favor recognition of the marriage or not, it is bound to follow the law. Our job is to provide a court with the legal basis to grant the relief our clients seek.

Current Law and Precedent Regarding Same-Sex Marriages

The current state of the law in Michigan unequivocally denies validity to same-sex marriages, whether solemnized in Michigan or elsewhere. In 1996, MCL 551.1 was enacted to prohibit marriages between couples of the same sex. It states, in pertinent part, that "[a] marriage contracted between individuals of the same sex is invalid in this state." While it serves to prevent the formation of marriages between same-sex couples in Michigan, it also prohibits the recognition of existing marriages between same-sex couples performed in other jurisdictions. MCL 551.271 affords full recognition of marriages performed in other jurisdictions; however, MCL 551.272 explicitly references MCL 551.1, even citing some of the exact language of that section, and concludes with the phrase "…and therefore a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction."

In cases decided since the 1996 amendment of MCL 551.271, but not involving same-sex marriages, various courts have found that Michigan follows the general rule that "'a marriage valid where it is contracted is valid everywhere.'"[15] A federal district court found that Michigan generally applies the doctrine of *lex loci contractus,* in holding that a marriage valid where contracted will be recognized as valid in Michigan.[16] Notwithstanding this general principle, MCL 551.271 explicitly excludes same-sex marriages in subsection (2), which states "[t]his section does not apply to a marriage contracted between individuals of the same sex, which marriage is invalid in this state under section 1 of chapter 83 of the revised statutes of 1846, being section 551.1 of the Michigan Compiled Laws."

In September 2004, Michigan Attorney General Mike Cox issued Opinion No. 7160 stating that MCL 551.1 means that "a marriage contracted between persons of the same sex in a state that recognizes same-sex marriages is not valid in the State of Michigan."[17] Attorney General Cox opined that the Full Faith and Credit Clause[18] of the United States Constitution does not "require Michigan to recognize [same-sex marriages] as valid for two reasons,"[19] the first being Section 2 of DOMA which he cited as "authoriz[ing] the states to decline to give effect to same-sex marriages under the Full Faith and Credit Clause."[20] DOMA states that:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[21]

Although Section 3 of DOMA has recently been ruled unconstitutional by the United States Supreme Court in *Windsor,* Section 2 remains in full force and effect.

The second basis for the Attorney General's opinion was the United States Supreme Court decision in *Nevada v Hall*[22] which stands for the proposition that even in instances where Congress has not specifically weighed in on "the extrastate effects" of one state's statutes, "'the full faith and credit clause does not require one state to substitute for its own statute … the conflicting statute of another state'" in instances where both states have statutes on the same subject.[23]

In support of this "public policy" exception, Attorney General Cox cited the 1927 case of *In Re Miller's Estate,* stating that the Michigan Supreme Court's holding in that case meant that "were the Michigan Legislature to declare a type of out-of-state marriage to be invalid as a matter of public policy, it would be invalid, even if valid in the state where contracted."[24] *In Re Miller's Estate* upheld a Kentucky marriage between first cousins because it found that Michigan's prohibition against marriages with that level of kinship only applied to marriages performed in this state.[25] Because MCL 551.271 was specifically amended in 1996 to explicitly exclude same-sex marriages performed in other states, the opinion concludes that "[t]he Legislature's declaration in MCL 551.1, that '[a] marriage contracted between individuals of the same sex is invalid in this state' falls squarely within this public policy exception."[26]

Subsequent to Michigan's adoption of its statutory bar to same-sex marriage in 2004, the citizens of Michigan amended the state constitution through a ballot proposal banning same-sex marriages, which was approved by 59% of Michigan voters. Article I § 25 of the Michigan Constitution now includes the language "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."[27] The leading case interpreting Article I § 25 is the Michigan Supreme Court's 2008 ruling in *National Pride at Work, Inc. v Governor of Michigan*,[28] in which the Court held that the language of the amendment was unambiguous when it broadly held that "the marriage amendment prohibits the recognition of unions similar to marriage"[29] in determining that public employers were prohibited from providing health insurance benefits to domestic partners. The Court held that "[t]herefore, a single agreement can be recognized within the state of Michigan as a marriage or similar union, and that single agreement is the union of one man and one woman."[30]

Annulment of Invalid Marriages

Against this backdrop, Michigan's annulment statute provides a mechanism for the termination of same-sex marriages. MCL 552.3 provides that:

> When a marriage is supposed to be void, or the validity thereof is doubted, for any of the causes mentioned in the 2 preceding sections; either party, excepting in the cases where a contrary provision is hereinafter made, may file a petition or bill in the circuit court of the county, where the parties or 1 of them, reside, or in the court of chancery for annulling the same and such petition or bill shall be filed and proceedings shall be had thereon as in the case of a petition or bill filed in said court for a divorce; and upon due proof of the nullity of the marriage, it shall be declared void by a decree or sentence of nullity.

The "2 preceding sections" referred to are MCL 552.1 and MCL 552.2. MCL 552.2 refers to parties whose marriage is invalid due to the minority of the parties, or where consent was obtained by fraud, and who did not subsequently voluntarily cohabit together, and therefore, this section does not apply to same-sex marriages, especially where the parties cohabit. MCL 552.1 refers to marriages that are invalid because of consanguinity, affinity, because either party is already married, or "because either party was not capable in law of contracting at the time of solemnization." It is the authors' opinion that because MCL 551.1 states that "[a] marriage contracted between individuals of the same sex is invalid in this state," and MCL 551.272 provides that "…therefore a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction," a marriage between persons of the same sex would be invalid under Michigan law because neither party was "capable in law of contracting at the time of solemnization."

The Michigan Court of Appeals recently examined the application of Michigan's annulment statute, MCL 552.3. In *Rodenhiser v Duenas,* the court held that "MCL 552.3 provides a procedure for the parties to the marriage to annul a marriage that is allegedly void on any of the grounds set forth in MCL 552.1 or MCL 552.2."[31] While *Rodenhiser* specifically dealt with a marriage which was allegedly invalid due to mental incapacity, fraud, or duress, the Court stated that MCL 552.3 provides that a party "may petition to annul a marriage on grounds that it is void due to the reasons set forth in the two preceding statutory sections."[32] Indeed, in *Harris v Harris,*[33] a case involving a bigamous marriage, the Court emphasized the mandatory nature of the relief granted in MCL 552.3, stating "[i]n this case, the statute clearly states that where there is due proof that a marriage is invalid, the circuit court 'shall' declare the marriage void. Thus, the circuit court in this case was required to determine whether the marriage was bigamous and therefore void. If it was, the circuit court was required by statute to declare the marriage void 'by decree or sentence of nullity.'"[34]

Much like a bigamous marriage, a marriage between two persons of the same sex would be void or invalid under Michigan law *ab initio*. The *Harris* court stated that "refusing to grant an annulment would contravene public policy

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because it could be construed as essentially condoning bigamy. We therefore hold that the circuit court was required by statute to determine if the marriage was bigamous and, if so, to declare the marriage void."[35] Likewise, Michigan's statutes and the Constitutional amendment would argue against "condoning" same-sex marriage by refusing to grant the parties an annulment.

Even for parties married outside of Michigan, the circuit courts have jurisdiction over the parties for an action for annulment.[36] In 1959, the Michigan Supreme Court ruled that an invalid marriage contracted out-of-state could properly be annulled in a Michigan court in *Romatz v Romatz*.[37] There, the court found that its equitable powers granted it authority to annul such marriages:

> In the absence of any special statute conferring power on the courts to exercise jurisdiction over suits for annulment of marriage, the chancery courts of America have assumed jurisdiction in such cases under their inherent equity powers.[38]

Attorneys who represent same-sex clients are able to use an annulment to best serve their clients' needs for separation, including determining property rights.

Determination of Property Rights in Annulment Actions

An annulment action is the best course of action for same sex clients desiring to terminate their marriages. MCL 552.12 grants the court the power to make awards of property between the parties. The statute states in its entirety: "Suits to annul or affirm a marriage, or for a divorce, shall be conducted in the same manner as other suits in courts of equity; and the court shall have the power to award issues, to decree costs, and to enforce its decrees, as in other cases." Moreover, Michigan court rules require that "[a] judgment of divorce, separate maintenance, ***or annulment*** must include … a determination of the property rights of the parties."[39]

In determining the property rights of the parties, MCL 552.19 provides that "[u]pon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, or for awarding to either party the value thereof, to be paid by either party in money." The Michigan Court of Appeals has held that MCL 552.19 permits courts to equitably address property issues in annulment actions, declaring that "the law regarding property settlements upon annulment is similar to

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that of divorce."[40] In 2003, the United States Sixth Circuit Court of Appeals found that Michigan's statutory scheme for annulments provided courts with the authority to divide property, stating that "*Mixon* illustrates Michigan's intent to treat annulments like divorces."[41]

Further Public Policy Considerations

If a court fails to grant the parties a judgment of annulment, one could argue that the parties would be left in a legal limbo which may have far-reaching implications. Because same-sex marriages are now valid in thirty-two states and the District of Columbia in addition to more than a dozen foreign countries, it is readily conceivable that one or both of the parties may eventually relocate to a jurisdiction that would recognize their current marriage. In that event, the question arises as to whether or not the parties' now-invalid marriage would suddenly "revive" itself, and restore all the rights and obligations that the parties cannot now exercise in Michigan. If so, one party may once again be entitled to spousal priority in intestate succession of the other party's decedent's estate. It is also uncertain whether the parties would be free to remarry, either to another woman or a man, without creating a bigamous relationship. Furthermore, after-acquired property could be subject to division as part of a marital estate in a later divorce in a jurisdiction which allows for recognition of the marriage. Thus, third parties could potentially face consequences from the indeterminate state of the parties' marriage as well. For example, if one of the partners subsequently purchases property with a new partner that property could later be determined to be marital property.

Even if neither party left the State of Michigan, the parties' rights may be adversely affected because of the recent United States Supreme Court ruling in *United States v Windsor* that Section 3 of DOMA is unconstitutional.[42] Since the United States Supreme Court has overturned Section 3 of DOMA, the parties may find themselves enmeshed in a Kafka-esque situation where they are legally married under federal law and not married under Michigan law. This might mean that their tax status would be "married" on their federal return, but "single" when they file their Michigan taxes. Without an annulment, the parties would be powerless to change their marital status with the federal government, since no federal divorce statute exists that would allow them to terminate their marriage. Beyond tax problems, it would be unclear if the parties would eventually be entitled to Social Security benefits for surviving spouses, even if Michigan never recognized their marriage.

According to a 2004 study by the United States General Accounting Office, there are 1,138 benefits, rights, and protections provided on the basis of marital status in federal law.[43] Following the *Windsor* ruling, President Obama directed Attorney General Eric Holder and other members of his Cabinet to begin poring over relevant federal statutes and regulations to determine whether changes can be made to ensure consistency in the way "marriage" is defined for federal purposes. Some federal rules define marriage by looking at the laws of the individual's state of domicile, while other regulations use the laws of the state or country where the marriage was celebrated. For residents of the State of Michigan, this distinction leads to two completely contrary and mutually-exclusive outcomes. The situation could become even more nightmarishly complex if one of the parties were to move to a state that recognizes same-sex marriage, while the other remained domiciled in Michigan. The overturning of DOMA by the United States Supreme Court has had a dramatic effect on the rights of the parties in the instant case virtually overnight.

As citizens of Michigan, courts should grant the parties a judgment that would resolve their rights fully and finally and which would relieve them of the worry that their unsettled affairs may create future liabilities that they in no way intend. Since Michigan's current law forecloses the option of an action in divorce, the parties' only avenue for terminating their marriage is through annulment. Unless courts issue judgments of annulment to same-sex couples, the parties would be forced to seek dissolution of their marriage in another state or jurisdiction. Many other states and jurisdictions require long residency periods to file a divorce action, so the parties would likely be forced to give up employment or educational careers in Michigan if they sought a divorce out-of-state. The effect may be that educated, productive citizens, who have chosen to make their home in this state, would be compelled by necessity to permanently move out of Michigan, never to return. Michigan's public policy will not be well-served by forcing its citizens to leave because its laws will not allow them to protect themselves from future risks and obligations.

(With appreciation to the Honorable Joan E. Young for encouraging us to submit this article.)

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Endnotes

1 Pew Research Center's Social & Demographic Trends Project, The Decline of Marriage and Rise of New Families, November 18, 2010.

2 *Id.*

3 *Loving v Virginia*, 388 US 1, 87 S Ct 1817, 18 L Ed 2d 1010 (1967).

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8 *Id.,* at 2681.

9 *Id.,* at 2693, *quoting Department of Agriculture v Moreno*, 413 US 528, 534-535, 93 S Ct 2821, 37, L Ed 2d 782 (1973).

10 *Id.,* at 2680.

11 *DeBoer v Snyder*, 973 F Supp 2d 757 (2014).

13 Weiss, Debra Cassens, Hundreds of Gay Couples Get Married in Michigan before 6th Circuit stays Judge's Ruling, ABA Journal (2014).

14 *Id.*

15 *People v Schmidt*, 228 Mich App 463,466; 579 NW2d 431 (1998), citing *In re Toth Estate*, 50 Mich App 150, 152; 212 NW 2d 812 (1973) (finding valid a marriage between first-degree cousins married in Hungary).

16 *Detroit Diesel Corp. v Lane-Smith*, 39 F Supp 2d 852, 858 (ED Mich 1999).

17 Mich Att'y Gen Opinion No. 7160 (2004).

18 US Const, Art IV, §1.

19 Mich Att'y Gen Opinion No. 7160 (2004).

20 *Id.*

21 28 USC §1738C.

22 *Nevada v Hall*, 440 US 410, 99 S Ct 1182, 59 L Ed 2d 416 (1979).

23 *Id.*, at 422, quoting Pacific Employers Ins Co v Industrial Accident Comm'n, 306 US 493, 502-503, 83 L Ed 940, 59 S Ct 629 (1939).

24 Mich Att'y Gen Opinion No. 7160.

25 *In re Miller's Estate*, 239 Mich 455, 214 NW 428 (1927).

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27 Mich Const art I, § 25.

28 *National Pride at Work, Inc. v Governor of Michigan*, 481 Mich 56, 748 NW2d 524 (2008).

29 *Id.,* at 86.

30 *Id.*, at 77.

31 *Rodenhiser v Duenas*, 296 Mich App 268, 279; 818 NW2d 465 (2012).

32 *Id.,* at 281.

33 *Harris v Harris,* 201 Mich App 65, 506 NW2d 3 (1993).

34 *Id.,* at 68.

35 *Id.*, at 70.

36 MCL 552.3.

37 *Romatz v Romatz*, 355 Mich 81, 94 NW2d 432 (1959).

38 *Id.,* at 92, quoting *Witt v Witt*, 271 Wis 93, 95; 72 NW2d 748 (1955).

39 MCR 3.211(B)(3)(Emphasis added).

40 *Mixon v Mixon*, 51 Mich App 696, 700; 216 NW2d 625 (1974).

41 *Hansmann v Fidelity Investments Institutional Services Co.*, 326 F3d 760, 766 (6th Cir 2003).

42 *United States v Windsor*, __ US __, 133 S Ct 2675 (2013).

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