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First Comes Love: Advocating for a Revival of Pre-Obergefell Estate Planning Vigor for LGBTQ+ Couples and Families

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FIRST COMES LOVE: ADVOCATING FOR A REVIVAL
OF PRE-*OBERGEFELL* ESTATE PLANNING VIGOR FOR
LGBTQ+ COUPLES AND FAMILIES

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INTRODUCTION

On June 24, 2022, the Supreme Court of the United States handed down its decision in *Dobbs v. Jackson Women's Health Organization*.¹ Beyond the obvious devastation this opinion wreaked on abortion rights nationwide, it also unleashed a fear in communities that have gained substantive rights through the Court's decisions based on similar reasoning. News organizations and LGBTQ+ advocacy groups quickly published stories discussing the fate of same-sex marriage in a post-*Dobbs* society.² If the Supreme Court were to overturn *Obergefell v. Hodges*,³ it would be a crushing loss to the LGBTQ+ community. Not only would it signal the lack of respect for same-sex relationships in society, but it would deprive same-sex couples from the "constellation of benefits" marriage provides.⁴

Some of the benefits that marriage offers couples surround estate planning issues, specifically concerning the well-being of the decedent spouse's children, decision-making power in the event of incapacitation, and wealth transfer. Access to these benefits has undoubtedly improved the lives of members within the LGBTQ+ community, but it did not benefit all members of the LGBTQ+ community equally. The estate planning benefits of marriage result from the laws of intestacy—how property transfers when someone dies without all of their property transfers being accounted for. These rules are centuries old and can end up reinforcing inequities that exist in society.⁵ This result matters for members of the LGBTQ+ community whose families do not look like the typical nuclear family that the common law intestacy system has prioritized. It goes without saying that the benefits of same-sex marriage only impact same-sex couples who get married, and for many

1. 142 S. Ct. 2228 (2022).

2. *E.g.*, Erik Larson & Emma Kinery, *Same-Sex Marriage, Contraception at Risk After Roe Ruling (3)*, BLOOMBERG L. (June 24, 2022, 3:54 PM), <https://news.bloomberglaw.com/us-law-week/supreme-court-justices-disagree-on-scope-of-dobbs-ruling> [<https://perma.cc/SH9S-QTHT>].

3. 576 U.S. 644, 675–76 (2015) (holding the Fourteenth Amendment prohibits the deprivation of civil marriage from same-sex couples).

4. *Id.* at 646.

5. Carla Spivack, *Broken Links: A Critique of Formal Equality in Inheritance Law*, 2019 WIS. L. REV. 191, 196 (2019) ("The law of inheritance—of wills and intestacy—treats everyone the same. In other words, it is a system of formal equality. In doing so, it at times maintains and perpetuates inequality.").

reasons, same-sex couples are less likely to get married than opposite sex couples.

Before same-sex marriage was legally recognized, LGBTQ+ advocacy groups provided detailed and thorough estate planning resources, and same-sex couples were more proactive about planning around a set of default rules that disadvantaged them. This availability allowed more members of the LGBTQ+ community, not just those who would want to get married, to learn how to protect their assets and families in the event of death or incapacitation. When *Obergefell* was decided, these resources began to disappear, leaving members of the LGBTQ+ community who would not get married to figure out estate planning on their own.

There is a commonly held misbelief that estate planning is “most naturally the province of the affluent,”⁶ but this is not true. Estate planning, or lack thereof, impacts everyone in some way.⁷ Thoughtful estate planning can be the difference in a surviving partner’s housing status, it can determine child custody, and it can influence who makes medical decisions for someone else. Relying on marital status to make these decisions does a disservice to the LGBTQ+ community because default intestacy rules do not capture the unique challenges the LGBTQ+ community faces, and it reinforces inequality by privileging dyadic couples with marital status over other family structures.

This Comment argues that LGBTQ+ advocacy groups should prioritize nontraditional families when considering estate planning materials, taking steps to proactively dismantle the inequalities that occur when marital status is given a privileged position within the LGBTQ+ community. The community’s fear following the *Dobbs* decision can be captured and used to reinvigorate thorough estate planning for LGBTQ+ families. In no way is this Comment suggesting that estate planning can resolve all the discrimination LGBTQ+ couples face nor that improper estate planning is a cause or factor in discrimination faced by individuals. Rather, this Comment acknowledges the fact that estate planning can provide families with tools to combat discrimination based on their sexual orientation.

6. Iris Goodwin, *Access to Justice: What to Do About the Laws of Wills*, 2016 WIS. L. REV. 947, 954 (2016).

7. See generally Reid Kress Weisbord, *The Connection Between Unintentional Intestacy and Urban Poverty*, RUTGERS L. REV. COMMENTS. (2012) (discussing fractionation of estates in poorer communities resulting from failure to create an estate plan).

Part I of this Comment looks at the estate planning tactics of the LGBTQ+ community before there was a right to same-sex marriage and discusses how resulting issues motivated the community to secure marriage equality. Part II of this Comment first discusses the estate planning benefits of marriage, and then explains how same-sex marriage is less secure than opposite-sex marriage even with access to marriage, since these marital privileges do not benefit all members of the LGBTQ+ community equally. Finally, Part III of this Comment showcases that estate planning is less common among unmarried LGBTQ+ individuals. Then, this Comment discusses the harmful consequences of this trend and recommends a model for moving forward to prevent this harm. The ultimate recommendation is for LGBTQ+ legal advocacy groups and lawyers to take part in a two-fold strategy to accomplish this goal of increased estate planning: (1) reproduce and promote similar estate planning tools which were widely available before *Obergefell* and (2) host estate planning clinics especially for the LGBTQ+ community which should provide not only services for wills, but also for advance medical directives and guardianship issues.

I. THE PROBLEMS WITH MARRIAGE EXCLUSION

LGBTQ+ history is one of exclusion. Historically, same-sex relationships were pushed to the fringes of society and homosexuality was criminalized.⁸ Homosexuality was considered a mental disorder until 1973.⁹ The LGBTQ+ community was so ostracized from society that for much of the same-sex rights movement the goals were related more to decriminalization than to marriage rights. Because of the lack of marriage rights, same-sex partners had to rely on traditional estate-planning devices, like wills, advance medical directives, and trusts, to ensure in the event of a partner's death or incapacitation, the other partner, and any children the two may have cared for together, were taken care of. However, even with these devices, there was no guarantee the rights of same-sex couples would be protected due to judicial bias. This Part explores

8. Elon Green, *The Lost History of Gay Adult Adoption*, N.Y. TIMES MAG. (Oct. 19, 2015), <https://www.nytimes.com/2015/10/19/magazine/the-lost-history-of-gay-adult-adoption.html> [https://perma.cc/6K6S-7AHG] ("It is easy to forget that an American state would not decriminalize sodomy until 1961; that as late as 1966, gays and lesbians could not legally buy a drink in a New York City bar; that even after the Stonewall riots, in 1969, the American Psychiatric Association considered homosexuality a mental illness.").

9. See Robert L. Spitzer, *Position Statement on Homosexuality and Civil Rights*, 131 AM. J. PSYCHIATRY 497 (1974).

how these devices were utilized by the LGBTQ+ community before their relationships were legally recognized and then ends with a discussion on how these shortcomings and other changes in LGBTQ+ society propelled the movement towards marriage equality.

A. *Probate & Non-Probate Transfers*

Intergenerational wealth transfer in the United States can either take place publicly—in the probate system—or privately. Probate is a public system that is accomplished through the courts, and it allows wealth to transfer from a decedent to an individual with the approval of the legal system.¹⁰ Wealth can also be transferred informally through private ordering—scholars speculate this is how most wealth transfers in the country occur, but due to the private nature, it is difficult to track.¹¹ Private ordering allows wealth to transfer without the prying eyes of other potential beneficiaries, but it can also cause confusion and hurt among families and communities when expectations are not clearly understood.¹² Both public and private ordering offer benefits and costs to the LGBTQ+ community: probate can set expectations when they are not clear and non-probate transfers offer privacy that an individual who deviates from societal norms may crave.

1. Probate Transfers & Challenges

Wills are the most well-known vehicle for probate transfer, and the challenges of using a will for contentious wealth transfers have been the subject of many Hollywood dramas. The wills of same-sex couples were historically subject to a large number of challenges from family members, and consequently there was no guarantee same-sex partners could inherit from each other.¹³ A will can be challenged in a number of ways—the formalities (i.e., witnesses, signatures, in writing for a holographic will), the age of the

10. Allison Tait, *Fringe Inheriting: Probate Avoidance at Both Ends of the Wealth Spectrum*, 48 ACETC L.J. 95, 95 (2022).

11. See Naomi Cahn & Amy Zietlow, “*Making Things Fair*”: *An Empirical Study of How People Approach the Wealth Transmission System*, 22 ELDER L.J. 325, 331 (2015). For a more in-depth comparison of private and public ordering, see Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2338–2348 (2004).

12. See Cahn & Zietlow, *supra* note 11, at 356.

13. See, e.g., *In re Will of Kaufmann*, 247 N.Y.S.2d 664 (App. Div. 1964).

decedent, the intent of the decedent, the decedent's capacity, etc.¹⁴—but undue influence is a particularly common challenge.¹⁵ Undue influence is a legal doctrine which recognizes when an individual, other than the testator, exerts a degree of influence over the testator as to substitute that individual's wishes for those of the testator, then any bequest resulting from that influence must be invalidated.¹⁶ Although based in the American legal system's commitment to preserving donative intent in testamentary vehicles, undue influence has a history of “den[ying] freedom of testation for people who deviate from judicially imposed testamentary norms.”¹⁷ Beyond just preserving testamentary norms, undue influence has been used to deprive freedom of testation from individuals who deviate from societal norms.¹⁸ For most of American history, there were few legal actions more taboo than an individual leaving their estate to their same-sex companion. As a result, wills with bequests to same-sex partners ran a higher risk of being invalidated based on the doctrine of undue influence.¹⁹ The public nature of a probate transfer not only highlighted to society when blood relatives were cut out from another's will, but it also led to embarrassment and disappointment which likely fueled some challenges of undue influence.

For example, the court deciding *In re Will of Kaufmann* held the will of the decedent, Robert Kaufmann, to be a product of undue influence, and thus the court invalidated the bequest to the

14. ALFRED L. BROPHY, DEBORAH S. GORDON, KAREN J. SNEDDON, CARLA SPIVACK & ALLISON ANNA TAIT, *EXPERIENCING TRUSTS AND ESTATES* 246 (2d ed. 2021).

15. *See, e.g.,* *Moriarty v. Moriarty*, 150 N.E.3d 616, 620 (Ind. Ct. App. 2020) (holding a wife exerted undue influence over husband and tortiously interfered with the inheritance of her husband's daughters).

16. Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 575 (1997). The doctrine of undue influence can also be used to invalidate other estate and end-of-life planning tools.

17. *Id.* at 576.

18. *See, e.g.,* *In re Will of Moses*, 227 So. 2d 829 (Miss. 1969) (holding Moses' attorney exercised undue influence over her, and thereby invalidating her last updated will in favor of a will dated seven years prior); *see also* Claire C. Robinson May, *Commentary on In re Will of Moses*, in *FEMINIST JUDGMENTS: REWRITTEN TRUSTS AND ESTATES OPINIONS* 39, 53, 58 (Deborah S. Gordon, Browne C. Lewis & Carla Spivack eds., 2020) (arguing that cultural conceptions of the role of women at the time influenced the court to see Moses as susceptible to undue influence even though she was of sound mind at the time she made her 1964 will).

19. *See* Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 227, 267 (1981) (“[T]here is at least some evidence to suggest that a homosexual testator who bequeaths the bulk of his estate to his lover stands in greater risk of having his testamentary plans overturned than does a heterosexual testator who bequeaths the bulk of his estate to a spouse or lover.”).

decendent's partner, Walter Weiss.²⁰ Kaufmann and Weiss met in 1946, moved in together in 1949, and remained roommates until Kaufmann's death.²¹ Attached to Kaufmann's will was a letter which the majority noted "implicat[ed] . . . Weiss in some fashion . . . with [Kaufmann's] sex life."²² However, instead of relying on this statement and others by Kaufmann, which referenced his love and gratitude for Weiss, the court found the facts sufficiently allowed a reasonable jury to find Weiss unduly influenced Kaufmann into leaving him a substantial portion of his estate.²³

In the dissent of *In re Will of Kaufmann*, Justice Witmer stated there were no facts on the record to show the relationship between Kauffman and Weiss was anything other than "one of mutual esteem and self-respect."²⁴ Justice Witmer provided a rather modern take on the case: "The verdict in this case rests upon surmise, suspicion, conjecture and moral indignation and resentment, not upon the legally required proof of undue influence."²⁵ *In re Will of Kaufmann* shows the fragility of traditional testamentary devices when paired with a beneficiary who, for some reason, is disfavored by society. In a time where homosexuality was not to be spoken about openly and where courts lent no support to same-sex couples, the public probate system left some members of the LGBTQ+ community vulnerable to challenges by those who disfavored the bequests.

20. See generally *In re Will of Kaufmann*, 247 N.Y.S.2d 664 (App. Div. 1964).

21. See *id.* at 672, 679.

22. *Id.* at 672. After making this statement, the court noted Weiss "emphatically denied" any sexual relationship between himself and Kauffman. *Id.* However, Weiss's motivations for making this statement may in part have been due to the fact sodomy was not legalized in New York until 1980. *People v. Onofre*, 415 N.E.2d 936, 937 (N.Y. 1980) (holding New York's law criminalizing sodomy was unconstitutional). For a broader history on sodomy laws in New York, see GEORGE PAINTER, *New York, in THE SENSIBILITIES OF OUR FOREFATHERS: THE HISTORY OF SODOMY LAWS IN THE UNITED STATES*, https://www.glapn.org/sodomylaws/sensibilities/new_york.htm#fn220 [https://perma.cc/B774-33BS] (Aug. 10, 2004).

23. *In re Will of Kaufmann*, 274 N.Y.S.2d at 685–86.

24. *Id.* at 689 (Witmer, J., dissenting) ("The record is replete with evidence of the friendly relation, indeed love and affection, that existed between testator and Weiss for a decade.").

25. *Id.* But see Madoff, *supra* note 16, at 598 ("It would be easy to dismiss *Kaufmann* as just another example of judicial homophobia from an era in which courts and society at large were openly prejudiced against homosexual relationships. However, to categorize this case as an aberration, a misapplication of the undue influence doctrine, is to miss the more significant lesson that this case offers . . . [This] decision . . . rests on firm ground under the standard doctrinal undue influence analysis.").

2. Non-Probate Transfers

Non-probate transfers offer protection from the prying eyes of a public probate system, and thus could have been better utilized by the LGBTQ+ community before marriage equality was recognized. In the years following *In re Will of Kaufmann*, revocable trusts became a popular way to avoid probate and consequently avoid the types of challenges Kaufmann's family posed for Weiss.²⁶ A revocable trust is a testamentary device that gives the trust settlor control over their assets in life while also providing them with a mechanism to avoid probate and distribute their assets to their intended beneficiaries more privately upon death.²⁷

When created properly, a revocable trust can provide unmarried same-sex couples with protection from the objections of disapproving family members. However, establishing a revocable trust is more challenging than writing one's own holographic will, and thus certainly should be made with the advice of legal counsel.²⁸ If done improperly, a revocable trust may implicate other legal troubles, and end up being even more complicated than probating a will.²⁹ Properly creating and maintaining a revocable trust, or other options that offered more protection to LGBTQ+ individuals and couples, were practical only for the more financially well-off members of society and were not a viable option for all members of the LGBTQ+ community. Even more protective than revocable trusts are traditional trusts used for asset protection. However, with added protection comes added difficulties of establishing and maintaining a trust. Additionally, the costs associated with establishing asset-management trusts would be cost prohibitive for the individuals who are the focus of this Comment. Historically, these kinds of trusts were used by high-wealth families to preserve family fortunes but not for middle-class or low-income couples seeking only to transfer assets to a partner.

26. See generally NORMAN F. DACEY, *HOW TO AVOID PROBATE* (1965) (advocating for revocable trusts as the "legal wonder drug" for avoiding probate).

27. BROPHY ET AL., *supra* note 14, at 633.

28. Delmar R. Hoepfner, *Norman F. Dacey: How to Avoid Probate*, 1 VAL. U. L. REV. 197, 198 (1966) (book review).

29. See *id.* at 197–98.

B. *Advance Directives*

In addition to wills and trusts, there are other estate planning devices that LGBTQ+ couples relied on: advance directives (also referred to as living wills), health care proxies, and powers of attorney. An advance directive is “[a] legal instrument that shares the wishes of an individual (called a declarant) as to health care decisions relating to treatment preferences and the designation of a proxy to make health care decisions.”³⁰ A health care proxy is “[a] document through which an individual invests an agent with the legal authority to make healthcare decisions on behalf of the individual, when that person is incapable of making and executing the healthcare decisions stipulated in the proxy.”³¹ A durable power of attorney is yet another document that gives an agent the legal authority to represent and act on the declarant’s behalf when the declarant is incapacitated.³²

Just like wills, these other estate planning devices were sometimes ignored when exercised by unmarried LGBTQ+ couples. When the wishes captured in these devices are not exercised, the consequences for a couple can be heartbreaking. Take for example, Lisa Pond and Janice Langbehn, a lesbian couple who had been partners for eighteen years.³³ One day Pond found herself in the hospital suffering with an aneurysm, and Langbehn, who had both a health care proxy and durable power of attorney, was not allowed to be by her partner’s side as she died.³⁴ The hospital denied any

30. BROPHY ET AL., *supra* note 14, at 820.

31. *Id.* at 828.

32. *Id.* at 832. Giving an agent a durable power of attorney over healthcare decisions is the same as a health care proxy, but not all powers of attorney are health care proxies. A power of attorney can have responsibility over other areas in the declarant’s life, like finances for example. See generally EDWARD A. HAMAN, POWER OF ATTORNEY HANDBOOK (5th ed. 2004).

33. *Lesbians Sue When Partners Die Alone*, ABC NEWS (May 20, 2009, 9:29 AM), <https://abcnews.go.com/Health/story?id=7633058&page=1> [<https://perma.cc/QJL3-WEBF>].

34. *Id.*

wrongdoing.³⁵ Sadly, when Langbehn sued the hospital in federal court, the court agreed with the hospital.³⁶

Unfortunately, the story of Lisa Pond and Janice Langbehn highlights a problem LGBTQ+ couples faced even when they had proper estate planning documents; without a change in cultural attitude, there may be no legal way to stop this kind of discrimination from occurring. A blogpost from 2011 aptly summarizes as much:

Nearly everyone I know has a story of denied visitation rights, or family swooping down and forcing health decisions against a partner's wishes or contesting (often successfully) wills, or even walking into shared homes and taking things out. There almost isn't a gay or lesbian couple . . . that doesn't at least occasionally wonder or are concerned about one of their family members . . . who would make life hell for the partner if their family member became sick or died The fact of the matter is, courts and law still overwhelming[ly] favor[] blood relatives or married spouses over the partners of gays and lesbians.³⁷

Even the court in *Langbehn* acknowledged the innate unfairness Langbehn and her family experienced in that moment: “[The hospital’s] lack of sensitivity and attention to Ms. Langbehn, Ms. Pond, and their children caused them needless distress during a time of anguish and vulnerability [It] exhibited a lack of compassion and was unbecoming of a renowned trauma center like [the hospital at issue].”³⁸

C. Creative Solutions for LGBTQ+ Child Care and Death

Clearly, LGBTQ+ couples could not rely on documents alone; they needed legal rights—such as those afforded by marriage—

35. *Id.* It should be noted a health care proxy and durable power of attorney cannot trump a hospital’s visitation policy, which is how the hospital explained its treatment of Langbehn. The hospital believed it did not engage in wrongdoing. The hospital asserted it listened to Langbehn’s wishes as to Pond’s organ donation. However, Langbehn believed the hospital did not allow her to visit her dying partner not because of policy, but rather because of discrimination based on sexual orientation. *Id.* No matter how durable the power of attorney, it cannot overcome discrimination. See Ampersand, *Why A Power of Attorney Is No Substitute for Marriage when a Loved One Is in the Hospital*, ALAS! A BLOG (May 24, 2011), <https://amptoons.com/blog/?p=13337> [<https://perma.cc/L8HA-478U>] (“Heterosexuals have the luxury of believing that same-sex couples can just sign some legal papers printed out from a website and—poof!—the problems disappear. But the real-life experience of same sex couples show that legal papers are not a reliable solution when a loved one is critically ill.”).

36. *Langbehn v. Pub. Health Tr.*, 661 F. Supp. 2d 1326, 1347 (S.D. Fla. 2009) (granting defendant’s motion to dismiss for failure to state a claim).

37. Ampersand, *supra* note 35 (emphasis omitted).

38. *Langbehn*, 661 F. Supp. 2d at 1347.

that could not be invalidated on a case-by-case basis depending on how society viewed the relationship between the decedent and beneficiary. Although some had considered the idea of state-recognized marriage for same-sex couples earlier,³⁹ same-sex marriage did not become a popular agenda item for the LGBTQ+ community until the 1980s. The AIDS epidemic and the rise in same-sex couples raising children were two motivating factors in marriage becoming a goal for the community.⁴⁰ The difficulties the LGBTQ+ community faced during this time without state-recognized relationships propelled the community to seek out the same benefits and privileges as heterosexual couples surrounding issues of death and child rearing.

The AIDS epidemic especially highlighted the discrepancies between society's respect of heterosexual and homosexual relationships, and the impact these discrepancies have during times of crisis and death.⁴¹ Because there was no legal recognition of homosexual relationships, when one partner was in the hospital dying, the other partner had no right to visit them because there was no next-of-kin relationship, similar to the treatment of Lisa Pond and Janice Langbehn.⁴² Upon death, partners found themselves unable to voice the wishes of their deceased partner, and instead the wishes of blood relatives were respected.⁴³ Additionally, much like the case of Walter Weiss and Robert Kaufmann, families could challenge wills benefitting non-marital partners as unduly influenced. These challenges were even more injurious for poorer gay men, especially those battling AIDS. The lack of

39. GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY* 87–89 (2004) (discussing the sentiment surrounding gay marriage before it became a goal of the LGBTQ+ community). Notably in June of 1963, *ONE*, the first gay political magazine, published a cover story on “homophile marriage.” *Id.* at 87. The piece was not government-recognized gay marriage as we know it today, but rather a social recognition of homosexual couples in long-term partnerships which mirrored that of heterosexual couples. *Id.* at 87–88 (“My real eye opener occurred when these heteros, with a cool nonchalance that made me feel woefully unsophisticated, started calmly pulling out from their social backgrounds, and introducing us to other homophile married couples!”).

40. *Id.* at 95. This uptick in same-sex couples raising children is sometimes referred to as the “lesbian baby boom.” *Id.* Lesbians began to organize around issues of parenting as a member of the LGBTQ+ community, and the legal issues presented by lesbian-motherhood motivated interest groups to secure legal rights for LGBTQ+ families. *Id.* at 105.

41. For a more in-depth discussion on how AIDS impacted the legal rights of gay and lesbian relationships, see David L. Chambers, *Tales of Two Cities: AIDS and the Legal Recognition of Domestic Partnerships in San Francisco and New York*, 2 *LAW & SEXUALITY* 181 (1992).

42. See CHAUNCEY, *supra* note 39, at 96–98; see also *supra* notes 33–38 and accompanying text.

43. CHAUNCEY, *supra* note 39, at 98–99.

intestate rights given to marital partners or an invalidated will could result in devastating losses. For example, in cities like New York and San Francisco, a surviving partner losing access to the deceased partner's rent-controlled apartment could very well be the difference between someone becoming homeless.⁴⁴

In response, many couples found a creative solution to ensure their surviving partners could inherit from their estate upon their deaths: adult adoption. In the 1980s, adult adoption was presented as an innovative tool for gay couples to secure "pseudo-marriage" rights.⁴⁵ Not only did adult adoption allow couples to obtain intestacy rights, but it was especially beneficial during the AIDS epidemic; it allowed couples to visit each other in the hospital.⁴⁶ Unfortunately, there is no reliable data that exists about how many gay couples used adult adoption during this time to gain these rights.⁴⁷

Although adult adoption was a rather foolproof way to secure a familial relationship with a same-sex partner, and the process even was "surprisingly straightforward" for some, there still was something off-putting about adopting your significant other. Take for example, Kenneth Rinker, who was adopted by his partner, Sergio Cervetti, in 2000, so that Rinker could be on Cervetti's health insurance. The couple noted the awkwardness of being adopted by the person you share a bed with: "You're sitting there waiting for the adoption proceedings, and everyone's wondering, [w]here's the little kid?"⁴⁸ This awkwardness, in part, fueled the LGBTQ+ community to secure other means of having their relationships legally recognized, ultimately resulting in a federal right to same-sex marriage.

Temporally parallel to the AIDS epidemic, there was a rise in same-sex couples, predominantly lesbian couples, exploring parenthood. However, same-sex parenthood was not without its challenges because there were no laws in place that recognized a child with two mothers or two fathers.⁴⁹ States began banning

44. At the same time, gay men, especially those suffering with AIDS, were facing discrimination in housing and often were turned away from homeless shelters. *Id.* at 100–102.

45. Peter N. Fowler, *Adult Adoption: A "New" Legal Tool for Lesbians and Gay Men*, 14 GOLDEN GATE UNIV. L. REV. 667, 669 (1984).

46. Green, *supra* note 8.

47. *Id.*

48. *Id.*

49. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 52 (2008).

same-sex couples from fostering and adopting, and the Reagan administration recommended “homosexual adoption should not be supported.”⁵⁰ This policy became especially distressing when a parent had a biological child and raised the child with their same-sex partner, and the biological parent passed away when the child was still a minor.⁵¹ Blood relatives could successfully contest the non-biological parent being awarded custody. A hostile custody battle not only had awful emotional impacts on the surviving parent, but for the surviving children as well.⁵²

LGBTQ+ couples needed a better solution. Eventually second-parent adoption became a useful tool for these families to guarantee that in the event the biological parent passed away the surviving parent could retain parental rights, but it was not without its own struggles. The legal process of adoption can be arduous and second-parent adoption was only possible when the courts deemed it tolerable.⁵³ If instead these couples were married when they had their child, they likely would be afforded parentage via the marital presumption.⁵⁴ If both individuals in a couple were legally recognized as parents, then the family unit could survive the death of the biological parent.

The legal crises highlighted by the AIDS epidemic and the increased number of LGBTQ+ couples as parents showed the LGBTQ+ community how marriage benefitted opposite-sex couples and how exclusion from marriage unnecessarily complicated the lives of same-sex couples. Over the next thirty or so years, the LGBTQ+ community advocated for marriage. It was a long battle with many different quasi-marriage relationships created along the way, but eventually on June 26, 2015, federal same-sex

50. *Id.* at 53

51. *See* CHAUNCEY, *supra* note 39, at 108.

52. *Id.* at 107–08; *see, e.g.*, Bottoms v. Bottoms, 457 S.E.2d 102, 108–09 (Va. 1995) (granting custody to a maternal grandmother instead of the biological mother’s surviving partner). The trial court based its finding that the surviving partner was unfit largely because homosexual conduct was a Class 6 felony at the time. *Id.* at 109 (“I will tell you first that the mother’s conduct is illegal. It is a Class 6 felony in the Commonwealth of Virginia. I will tell you that it is the opinion of this Court that her conduct is immoral. And it is the opinion of this Court that the conduct of [the mother] renders her an unfit parent.”).

53. CHAUNCEY, *supra* note 39, at 109–11.

54. The marital presumption is a common law tradition that “children born within a marriage are children of the spouses.” June Carbone & Naomi Cahn, *The Past, Present, and Future of the Marital Presumption*, in INTERNATIONAL SURVEY OF FAMILY LAW 387 (Bill Atkin & Fareda Banda eds., 2013). The Supreme Court expanded the marital presumption to include same-sex couples in 2017. *See* Pavan v. Smith, 582 U.S. 563, 567 (2017).

marriage was recognized in the United States.⁵⁵ Unfortunately, the last eight years have proved access to same-sex marriage did not alleviate all of these historic concerns of the LGBTQ+ community.

II. THE PROBLEMS WITH MARRIAGE EQUALITY

Looking back, it is difficult to see exactly when the popular view of same-sex marriage shifted from distaste to support. The specific pleas and struggles of real LGBTQ+ couples and families have been lost in a wave of “love is love” embroidered pillows, but that does not change that at its core, the push for marriage equality was because same-sex couples needed the same benefits opposite-sex couples are guaranteed. In fact, the “constellation of benefits that the States have linked to marriage” are so ubiquitous in society, there rarely is reason to think about them in everyday life.⁵⁶ These marital benefits include:

[T]axation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.⁵⁷

However, without a legally recognized marriage, a couple cannot access these rights. For the purposes of this Comment, I will only be discussing intestacy and other default rights of surviving spouses at the death of a spouse, including the elective share.

A. *Estate Planning Marital Benefits*

In the United States, approximately sixty percent of individuals die intestate, or without leaving a valid will.⁵⁸ This means for the majority of Americans, upon their death their property is distributed via the intestate laws of the jurisdiction in which they died. These intestate laws supposedly “reflect the presumed intent of most individuals” and in turn often reflect accepted social norms.⁵⁹ Determining the presumed intent of a decedent relies in large part

55. *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015).

56. *Id.* at 646–47.

57. *Id.* at 670.

58. BROPHY ET AL., *supra* note 14, at 113–15 (2d ed. 2021). *See generally* Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNPIAC PROB. L.J. 36 (2009).

59. BROPHY ET AL., *supra* note 14, at 116.

on recognized legal relationships between the decedent and potential heirs. Intestate succession provides considerable protection to a decedent's surviving spouse. In fact, surviving spouses are the most protected heirs as far as intestate succession laws provide. For example, the Uniform Probate Code provides that a surviving spouse receives the entire intestate estate, even if the decedent is survived by parents, so long as the decedent's only descendants are children of both the decedent and the surviving spouse.⁶⁰ Even if the decedent had descendant-children with someone other than the surviving spouse, the surviving spouse is still entitled to a substantial portion of the estate.⁶¹

Beyond just guaranteed inheritance in the event the decedent spouse left no valid will, marriage provides protections for surviving spouses. Some of the most common protections offered to spouses are the homestead exemption, personal property exemption, and family allowance. In some states, the homestead allowance grants a surviving spouse a right in the marital home regardless of whether other testamentary vehicles state otherwise, and in others, it gives the surviving spouse a monetary allowance. The mechanics of how this exemption works varies greatly state to state.⁶² The exemption for certain personal property allows a surviving spouse to claim a specified value of personal property from the marital home.⁶³ The family allowance is yet another benefit to surviving spouses and families; it gives an allowance to the surviving spouse and minor children while the decedent spouse's estate is going through probate.⁶⁴ All of these exemptions offer benefits to the surviving spouse during the probate process, which can alleviate some of the burden of the notoriously lengthy process. Without marriage, these benefits cannot be reaped.

One of the most significant protections for omitted spouses in separate property states is the elective share.⁶⁵ The elective share

60. UNIF. PROB. CODE § 2-102 (UNIF. L. COMM'N 1969).

61. *Id.*

62. Compare FLA. STAT. § 196.031 (2022) (allowing up to a \$50,000 homestead allowance as a tax credit), with VA. CODE ANN. § 64.2-311 (2023) (granting a \$20,000 homestead allowance).

63. See, e.g., VA. CODE ANN. § 64.2-310 (2023).

64. BROPHY ET AL., *supra* note 14, at 660.

65. A separate property state is any state that is not a community property state, meaning that there is no joint marital property until or unless divorce occurs. BROPHY ET AL., *supra* note 14, at 655–56. The elective share is not necessary for protection in community property states because in such states each spouse owns an equal, undivided share in the property. *Id.*

provides protection for surviving spouses who are left out of the decedent spouse's will, whose testate share would be less than their elective share, or whose intestate share would be less than their elective share. It may be worth noting that in some states, surviving spouses may have to choose between accepting their elective share and other marital benefits like the homestead allowance.⁶⁶

The elective share has its roots in common law dower and curtesy,⁶⁷ but over time it developed into a statutory claim for surviving spouses.⁶⁸ The elective share "gives the surviving spouse the right to claim a share of the decedent spouse's estate if the surviving spouse is dissatisfied with the amount he or she would otherwise receive."⁶⁹ The elective share is a crucial protection in marriage, and recognizes that a spouse may sacrifice their own economic gain for the benefit of the couple as a whole, and thus it is unfair for the sacrificing partner to be left unsupported if their spouse dies without providing them sufficient funds.

Simply the act of having a legally recognized marriage entitles a surviving spouse to these rights. However, there are some marital rights, including the elective share, which are impacted by the length of the marriage.⁷⁰ This seemingly small issue accentuates that federal marriage equality did not result in all same-sex couples being treated the same as opposite-sex couples.⁷¹

66. BROPHY ET AL., *supra* note 14, at 659–61; *see, e.g.*, VA. CODE ANN. § 64.2–311(D) (2023).

67. Dower was a property right which widows were entitled to upon their husbands' deaths. Dower was only meant to sustain a widow in her old age, and rarely gave her any more than a lifetime interest in the property, and thus she could not bequeath it to anyone upon her death. Similarly, curtesy rights entitled widowers to a life estate in all of his wife's property. BROPHY ET AL., *supra* note 14, at 663–64. The gendered nature of dower and curtesy have posed problems for states that did not abandon these traditional tools for a statutory elective share. *See generally* Thomas H. Anthony & Jill N. Lauderman, *The Demise of Dower*, 95 Mich. B.J. 34 (2016) (discussing how same-sex marriage calls into question the validity of Michigan's dower law). Michigan state eventually abolished dower rights and replaced it with the elective share in 2016. *See* MICH. COMP. LAWS § 700.2202 (2016).

68. BROPHY ET AL., *supra* note 14, at 664.

69. Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIA. L. REV. 567, 575 (1995).

70. Under the most recent Uniform Probate Code, a surviving spouse cannot receive one hundred percent of the elective share unless the marriage lasted at least fifteen years. UNIF. PROB. CODE § 2-203(b) (amended 2019).

71. Ever since federal marriage equality was established, there has been a conversation surrounding whether or not to backdate same-sex marriages to achieve true marriage equality. Peter Nicolas, *Backdating Marriage*, 105 CAL. L. REV. 395, 398–99 (2017). However, backdating marriages would recognize marital rights during a time partners were not married, which juxtaposes the legal rights of cohabitating intimate partners, regardless of

B. *Instability of Gay Marriage Rights*

Perhaps the most concerning fact in this entire discussion is that marriage rights for the LGBTQ+ community are nowhere near as secure as they are for opposite-sex couples. Justice Clarence Thomas's concurring opinion in *Dobbs*⁷² underscores this fear. In *Dobbs*, the Court overturned *Roe v. Wade*,⁷³ a forty-nine-year-old Supreme Court precedent. That fact alone was sufficient to incite fear in the LGBTQ+ community that the much newer right to federal same-sex marriage could be next.⁷⁴ However, Justice Thomas's words transformed this fear from a general anxiety into an imminent threat. In his opinion, Thomas criticized the majority for not going far enough in its attack on substantive due process and urged the Court to do so in the future, writing specifically: "[W]e should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."⁷⁵ If *Obergefell* is overturned, most states will have a same-sex marriage ban put back into effect.⁷⁶

In response to Thomas's *Dobbs* concurrence, Congress passed the Respect for Marriage Act which officially repeals the Defense of Marriage Act ("DOMA") and requires states to give full faith and

gender. Michael J. Higdon, *While They Waited: Pre-Obergefell Lives and the Law of Non-marriage*, 129 YALE L.J. F. 1, 2 (2019). This issue highlights how the discrepancies that existed between heterosexual couples and same-sex couples can persist even when marriage is available for both.

72. 142 S. Ct. 2228, 2300 (2022) (Thomas, J., concurring).

73. *Id.* at 2234; 410 U.S. 113, 164–66 (1973) (holding Texas's state law criminalizing abortion violated the Fourteenth Amendment and strengthening the Court's substantive due process jurisprudence).

74. The *Dobbs* decision was officially released just two days before the seventh anniversary of the *Obergefell* decision.

75. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring). *See generally* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding a Connecticut state law that required wives to have their husbands consent to be prescribed contraceptives as unconstitutional because a right to privacy can be inferred from Constitutional amendments); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding Texas's law criminalizing sodomy was unconstitutional because it violated the Due Process Clause of the Fourteenth Amendment); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

76. Elaine S. Povich, *Without Obergefell, Most States Would Have Same-Sex Marriage Bans*, STATELINE (July 7, 2022, 12:00 AM), <https://stateline.org/2022/07/07/without-obergefell-most-states-would-have-same-sex-marriage-bans/> [<https://perma.cc/WD4M-UDFL>].

credit to other states' same-sex marriage laws.⁷⁷ However, even this may not be enough to fully protect marriage rights.⁷⁸

First, there is always the possibility the Respect for Marriage Act is repealed. Even though same-sex marriage has gained significant bipartisan favorability in the past decade,⁷⁹ the abhorrent anti-trans rhetoric sweeping the country lately should put members of the LGBTQ+ community on high alert for an attack on the rights of the entire community.⁸⁰ This analogy is not meant to incite baseless fear, nor is it meant to overshadow the very real, present threat to transgender individuals with a more abstract threat. Rather, this is just meant to highlight the tenuous hold of progress and how quickly rights can be taken from a community when society, or at least a small and loud subset of society, turns against it.

Second, the Supreme Court has been restricting the reach of same-sex marriage in favor of religious freedom since *Obergefell* was decided. One of the more infamous examples of this restriction was seen in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.⁸¹ In *Masterpiece Cakeshop*, a bakery owner, who was a devout Christian, refused to make a wedding cake for a same-sex wedding.⁸² The requesting couple filed a discrimination claim which ultimately led to an appeal in front of the Colorado Civil Rights Commission.⁸³ The Commission found in favor of the couple.⁸⁴ The bakery owner then appealed this decision in federal court.⁸⁵ While the Court mentioned “[o]ur society has come to the

77. Respect for Marriage Act, Pub. L. No. 117–228, §§ 3–4, 136 Stat. 2305, 2305 (2022). Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996), was a federal law that banned a federal recognition of same-sex marriage and defined marriage exclusively as a union between one man and one woman.

78. Jasmine Aguilera, *What Will Happen to Same-Sex Marriage Around the Country if Obergefell Falls*, TIME (Dec. 14, 2022, 10:26 AM), <https://time.com/6240497/same-sex-marriage-rights-us-obergefell/> [<https://perma.cc/MP8E-LTWE>] (discussing how overturning *Obergefell* would work with the Respect for Marriage Act).

79. Gabriel Borelli, *About Six-in-Ten Americans Say Legalization of Same-Sex Marriage Is Good for Society*, PEW RSCH. CTR. (Nov. 15, 2022), <https://www.pewresearch.org/short-reads/2022/11/15/about-six-in-ten-americans-say-legalization-of-same-sex-marriage-is-good-for-society/> [<https://perma.cc/V62S-MXW8>].

80. See, e.g., Maia Spoto, *Same-Sex Marriage Victors Ready to Refight Battle Already Won*, BLOOMBERG L. (Aug. 16, 2022, 4:45 AM), <https://news.bloomberglaw.com/us-law-week/same-sex-marriage-lawyers-say-battle-has-already-begun> [<https://perma.cc/CP5A-MZET>] (“State lawmakers have filed anti-LGBTQ legislation at record numbers this year even prior to the *Dobbs* ruling, much of which targets transgender people.”).

81. 138 S. Ct. 1719, 1732 (2018).

82. *Id.* at 1723.

83. *Id.* at 1720.

84. See *id.*

85. *Id.* at 1726.

recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,” it still ultimately held the Commission violated the bakery owner’s constitutional rights and that the owner was free to discriminate against same-sex couples because of his religious beliefs.⁸⁶ The Court heard a similar case this term, *303 Creative LLC v. Elenis*.⁸⁷ In this case, a website developer feared the state of Colorado would force it to build wedding websites for same-sex couples, even though no same-sex couple actually asked the business to make their website.⁸⁸ Rather than justifying its action in religious freedom, the business argued it should be allowed to discriminate based on freedom of speech.⁸⁹ The Court held that, despite Colorado’s “compelling interest” in eliminating discrimination in places of public accommodation,” requiring a website developer not to turn away clients on the basis of their sexual orientation would violate the developer’s First Amendment rights.⁹⁰ As the dissent pointed out, this is the “first time in [the Court’s] history, [it] grant[ed] a business open to the public a constitutional right to refuse to serve members of a protected class.”⁹¹ The majority decision in this case shows the extent the Court is willing to go to prioritize other rights at the expense of same-sex couples.

The third way same-sex marriage rights are weaker than opposite-sex marriage rights can be seen in the variation in state adoption laws. These adoption laws are particularly harmful to the LGBTQ+ community because same-sex couples in the United States are four times more likely to adopt children and six times more likely to foster children than opposite-sex couples.⁹² Some states provide LGBTQ+ individuals with explicit protections regarding adoption. For example, in Massachusetts, agency policy, regulation, and state nondiscrimination law all prohibit the

86. *Id.* at 1727, 1731. The Court was seemingly more frustrated with how the Commission admonished the bakery owner for his refusal to fulfill the same-sex couple’s request rather than the fact the Commission decided against the bakery owner. *Id.* at 1731 (“[T]he Commission’s consideration of [the owner’s] case was neither tolerant nor respectful of [his] religious beliefs. The Commission gave ‘every appearance’ of adjudicating [the owner’s] religious objection based on a negative normative ‘evaluation of the particular justification’ for his objection and the religious grounds for it.”) (citations omitted).

87. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023).

88. *Id.* at 2308.

89. *Id.*

90. *Id.* at 2314, 2321–22.

91. *Id.* at 2322 (Sotomayor, J., dissenting).

92. Gary J. Gates, *LGBT Parenting in the United States*, UCLA SCH. L., WILLIAMS INST. (Feb. 2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting-Feb-2013.pdf> [<https://perma.cc/488V-FDS2>].

Department of Children and Family Services from discriminating on the basis of sexual orientation and gender identity.⁹³ On the other hand, certain state governments have attempted to limit same-sex marriage privileges regarding same-sex couples and their relationship with their children. Most often this limit appears as allowing discrimination against LGBTQ+ couples from adopting or fostering children in the name of religious freedom. Currently, thirteen states allow child welfare agencies to refuse a placement for a child in need if it conflicts with their religious belief.⁹⁴ For example, in Oklahoma, state law permits child welfare agencies to refuse to place children with LGBTQ+ individuals or couples if doing so conflicts with the agencies' religious beliefs.⁹⁵

The Supreme Court unanimously validated this discrimination in *Fulton v. City of Philadelphia*.⁹⁶ There the City of Philadelphia stopped referring children to a Catholic foster care agency once it learned the agency was discriminating against foster home placements on the basis of sexual orientation.⁹⁷ The agency sued the City and ultimately prevailed, with the Court holding that the city's interest in ensuring the dignity and worth of the LGBTQ+ community did not outweigh the agency's right to religious expression manifesting in discrimination.⁹⁸

The preceding examples show that the foundation of same-sex marriage is shaky. "By refusing to recognize these marriages, opponents of LGBT equality are actively trying to deny same-sex

93. Movement Advancement Project (MAP), *Relationship & Parental Recognition: Foster Care Nondiscrimination*, LGBT MAP (Mar. 6, 2023), <https://www.lgbtmap.org/img/maps/citations-adoption-foster.pdf> [<https://perma.cc/UJ36-RQN4>].

94. Movement Advancement Project (MAP), *Child Welfare Nondiscrimination Laws*, LGBT MAP, https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws [<https://perma.cc/DUY6-XSPK>]; see also Movement Advancement Project (MAP), *supra* note 93 (offering a detailed synopsis of varying adoption laws relating to the rights of LGBTQ+ adopters). This Comment is only examining how this discrimination affects the LGBTQ+ community, however the discrimination is further-reaching. For example, in South Carolina a Catholic adoption agency refused to work with Jewish adoptees and used religious freedom as an excuse. Movement Advancement Project (MAP), *Continued Attacks Against LGBT Families Harm Children*, LGBT MAP (June 4, 2018) [hereinafter *Continued Attacks Against LGBT Families Harm Children*], <https://www.lgbtmap.org/news/continued-attacks-against-lgbt-families-harm-children> [<https://perma.cc/G8WB-KKLT>].

95. See OKLA. STAT. tit. 10A, § 1–8–112 (2018).

96. 141 S. Ct. 1868 (2021).

97. *Id.* at 1874.

98. *Id.* at 1882. Some scholars and activists have advocated for strict scrutiny to be applied to discrimination on the basis of sexual orientation, but that argument has yet to gain supporters on the Supreme Court. See generally Jasmine Hanasab Barkodar, *Gay Marriage is Legalized, Now What?: Discriminatory Adoption Regulations*, 26 S. CAL. REV. L. & SOC. JUST. 131 (2017).

couples the rights and protections that flow from marriage, making it harder for LGBT parents to ensure their children get the care and security they need.”⁹⁹ Even if the Court does not overturn *Obergefell*, it likely will continue to limit what same-sex marriage means, forever keeping it secondary to opposite-sex marriage in terms of appreciating the full gamut of marital rights. In the meantime, same-sex couples must work harder and rely on other devices, beyond a marriage license, to protect what rights they can.

C. *Who Even Is Getting Married?*

Moreover, even if conservative courts and legislatures do not succeed immediately in stripping same-sex couples of marital rights, it is also clear the right to marriage did not fully fix the inequalities between certain rights and benefits available for married same-sex couples versus opposite-sex couples; therefore, marriage cannot be treated as a panacea of solving these inequalities between gay and straight couples. Further, just like marriage among heterosexual couples, the white, the rich, and especially the white *and* rich, tend to get married at a higher rate than their poorer peers of color.¹⁰⁰ Additionally, it is same-sex couples who are more palatable to straight culture—couples who are in a monogamous dyadic relationship, financially successful, and oriented toward the traditional nuclear family—that are more likely to get married.¹⁰¹

This trend can be seen in who was selected as plaintiffs in *Obergefell*.¹⁰² Of the thirty *Obergefell* plaintiffs, only two were Black.¹⁰³ The plaintiffs all had respectable jobs like teachers, soldiers, and nurses. They were cisgendered.¹⁰⁴ Even the plaintiffs who did

99. *Continued Attacks Against LGBT Families Harm Children*, *supra* note 94.

100. Helen M. Alvaré, “You Can’t Get There from Here”: A Reply to Proposals to Dismantle Marriage as the Path to Care, in *THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS* 67–68 (Scott FitzGibbon, Lynn D. Wardle, A Scott Loveless eds., 2010)

101. POLIKOFF, *supra* note 49, at 126.

102. Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. F. 136, 140 (2015) (“The public face of same-sex marriage, as represented by the *Obergefell* plaintiffs, does not accurately represent the realities of either gay (LGB) or straight households. It thus reflects a missed opportunity to celebrate the diversity—racial, economic, cultural, and lifestyle—of all families.”).

103. *Id.* at 145–46 (highlighting this oddity given that people of color, especially Black people, make up a larger percentage of the LGBTQ+ population than they do the general American population).

104. *Id.* This Comment does not discuss the trans population separately from the umbrella LGBTQ+ population, though given the rise of transphobic rhetoric and anti-trans

suffer from illness “had more sympathetic diagnoses such as cancer or Lou Gehrig’s disease.”¹⁰⁵ By positing that these “straight-acting plaintiffs” are the only members of the LGBTQ+ community, a disservice was done— “[it] leaves intact the problematic traditional marital hegemony; squanders the potential diversity to enrich all families; and risks perpetuating the harmful norms that LGB[TQ+] families and cultures are second-best.”¹⁰⁶ These fears were not new. While the “marriage equality” and “marriage promotion” movements grew, many expressed that perhaps marriage was not the answer to the inequalities faced.¹⁰⁷ Additionally, there were fears that by moving towards marriage, a historically heterosexual union, the LGBTQ+ community would be weakened; by “valorizing those people who look just like straight people except for being gay and casting out (again) as weird, sick, and not representative of ‘us’ those whose queerness appears excessive” the LGBTQ+ community represses its diversity and hides “queer alternatives to the monogamous couple.”¹⁰⁸

Other scholars have noted the social acceptance of same-sex marriage was a rebranding effort to remove any topic of homosexual acts from how same-sex marriages work.¹⁰⁹ No longer were conversations about sex lives needed to establish the existence of a romantic relationship.¹¹⁰ In fact, it was better for the pioneers of the same-sex marriage movement to render the appearance of

violence and legislation, it should be noted the trans population is an especially vulnerable part of the LGBTQ+ population and even more attention should be given to them.

105. *Id.* at 146 (contrasting these more sympathetic diseases with diseases like HIV/AIDS).

106. *Id.* at 140–41.

107. POLIKOFF, *supra* note 49, at 6–8 (“The focus on access to marriage may be constricting the imagination of advocates for LGBT families who attribute every problem a same-sex couple experiences to marriage discrimination.”) In no way should this be taken to belittle the work done by people fighting for marriage equality. Nor am I implying same-sex marriage is not beneficial, rather this is just meant to highlight who benefits less from these newer rights.

108. Angela P. Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1569 (2006) (referencing Marc Spindelman’s “like-straight” argument). See generally Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615 (2004).

109. KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 61 (2015).

110. See *id.* (“Entitlement to the blessings of marriage was achieved by a conscious strategy of radically refiguring the meaning of homosexuality. This entailed carefully crafting a revised conception of gayness organized around a status or stable identity rather than sexual acts, and substituting love and family devotion as the operative forms of affect that bound same-sex couples together rather than sodomy or same sexual attraction.”); *supra* notes 20–24 and accompanying text (discussing the court’s examination of Walter Weiss and Robert Kauffman’s sexual relationship when determining whether Kauffman’s will was the product of undue influence).

complete asexuality.¹¹¹ For example, the plaintiff in *United States v. Windsor*,¹¹² Edith Windsor, had promised as a condition to her representation that she would not speak publicly about sex.¹¹³ The condition was a direct response to fear that if the Justices or the public associated a lesbian woman with lesbian sex, the Court would be less likely to find her constitutional rights had been violated.¹¹⁴ In fact, Windsor’s attorney even said, “All [Edith Windsor] needed was Antonin Scalia reading about Edie and [her wife’s] butch-femme escapades.”¹¹⁵

Whether these strategic litigation choices impacted who ended up taking advantage of same-sex marriage or not, whiter and richer same-sex couples are more likely to get married than LGBTQ+ couples who are people of color and lower income.¹¹⁶ This pattern generally holds for straight couples too.¹¹⁷ However, same-sex couples are less likely to get married than heterosexual couples overall. In fact, only fifty-nine percent of same-sex couples living together are married compared to the eighty-seven percent marriage rate for opposite-sex couples living together.¹¹⁸ When this disparity is matched with the fact that same-sex marriage rights are slowly being weakened, it becomes obvious to see marriage equality did not actually equalize treatment of same-sex and opposite-sex couples. In order to effectuate equality, or get closer to it, LGBTQ+ individuals cannot rely on the estate planning benefits of marriage; instead, these couples must revert to a reliance on pre-*Obergefell* type resources that prioritize individual and purposeful

111. See Godsoe, *supra* note 102, at 145.

112. 570 U.S. 744, 751–52, 774–75 (2013) (holding the Defense of Marriage Act which exclusively defined federally recognized marriages as “a legal union between one man and one woman” was unconstitutional because it violated Fifth Amendment equal protection rights).

113. Godsoe, *supra* note 102, at 142–43.

114. See *id.* at 148; Ariel Levy, *The Perfect Wife: How Edith Windsor Fell in Love, Got Married, and Won a Landmark Case for Gay Marriage*, NEW YORKER (Sept. 30, 2013), <https://www.newyorker.com/magazine/2013/09/30/the-perfect-wife> [<https://perma.cc/KA2Z-Y2RA>].

115. Levy, *supra* note 114.

116. *Same-Sex Couple Data & Demographics*, UCLA SCH. L., WILLIAMS INST. (Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=SS#density> [<https://perma.cc/7DMD-QZFK>].

117. *Marriage and Divorce: Patterns by Gender, Race, and Educational Attainment*, U.S. BUREAU LAB. STAT. (Oct. 2013), <https://www.bls.gov/opub/mlr/2013/article/marriage-and-divorce-patterns-by-gender-race-and-educational-attainment.htm> [<https://perma.cc/4EBF-9Z2V>].

118. *What is the State of Gay Marriage in the US?*, USAFacts (Oct. 5, 2023), <https://usafacts.org/articles/what-is-the-state-of-gay-marriage-in-the-us/> [<https://perma.cc/5BPA-XTDP>].

estate planning rather than relying on any state-provided substitution, as is the case with the rules of intestacy.

III. CONTINUED IMPORTANCE OF ESTATE PLANNING

Most Americans do not have wills or other crucial estate planning devices, like power of attorney. Luckily, and following common sense, older Americans are more likely than younger ones to have these devices, but there is no real data about how many Americans die without ever making these documents and thus die intestate.¹¹⁹ Eighty-one percent of adults over the age of seventy-two have a will and eighty-three percent have a power of attorney.¹²⁰ When confronted with why they do not have these documents almost half said they just “[haven’t] gotten around to it yet” and over a quarter said they “[d]on’t have enough assets or personal wealth to need one.”¹²¹ The following responses as to why respondents did not have a will are particularly interesting in the context of the LGBTQ+ community: two percent of respondents said they do not have a will because they are “[c]oncerned that [their] family situation would require extra or complex legal paperwork”; another two percent of respondents’ reasoning was they “[d]on’t believe the choices [they] make in a will would be upheld anyway”; and one percent of respondents stated they were “[c]oncerned about discrimination or judgement from a legal professional.”¹²²

The more troubling statistics appear when examining what the individuals who make up those percentages look like. Most people transferring wealth in the probate system are those who fall in the middle of the low-income and high-wealth on the wealth spectrum.¹²³ The less income one has, the less likely they are to have a will. Sixty-one percent of individuals with a household income of \$100,000 or more have a will. That numbers drops to 49% for individuals with a household income of \$40,000–\$99,999. That

119. Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 887, 896–97 (2012).

120. *Haven’t Done a Will Yet?*, AARP (Feb. 24, 2017), <https://www.aarp.org/money/investing/info-2017/half-of-adults-do-not-have-wills.html> [<https://perma.cc/UB44-KUR5>].

121. *American Experiences Survey: A Nationally Representative Multi-Mode Survey*, CONSUMER REPS. 8 (May 2022), https://article.images.consumerreports.org/prod/content/dam/surveys/Consumer_Reports_AES_April_2022.pdf [<https://perma.cc/SP84-J5QL>].

122. *Id.*

123. Tait, *supra* note 10, at 95. Individuals and families on the high-end of the wealth spectrum are just as absent as low-income individuals and families in terms of probate transfer, however wealthier individuals likely use non-probate mechanisms, like trusts and beneficiary designations, to avoid probate. *Id.*

numbers drops even more, to only 30%, for individuals with a household income under \$40,000.¹²⁴ Most unsettling is the disparity between white and nonwhite adults with wills. Fifty-five percent of white individuals had a will, whereas only 28% of non-white adults did.¹²⁵

A. Estate Planning Within the LGBTQ+ Community

Unfortunately, there is no widely available data about the LGBTQ+ population specifically and whether or not they have these key estate planning documents. However, this Comment will extrapolate trends in the LGBTQ+ community based on other known characteristics of the community and trends in estate planning. This Comment also must compare datasets that are not perfectly analogous. Therefore, none of the statistical conclusions made here should be taken as scientifically sound, but rather should be seen as useful in framing the practicality of the proposal this Comment will make later in Section III.B.

The LGBTQ+ community is younger as a whole than non-LGBTQ+ Americans, and for that reason alone the LGBTQ+ community is less likely to have wills.¹²⁶ Compared to the non-LGBTQ+ population, the LGBTQ+ community is also poorer: 25% of the LGBTQ+ community has access to less than \$24,000 compared to 18% of the non-LGBTQ+ population.¹²⁷ The LGBTQ+ community is also less white than America as a whole: 58% of the LGBTQ+ community is white compared to 76% of the American population as a whole.¹²⁸ All of these statistics more closely align the LGBTQ+ community as a whole with the groups less likely to have wills and other estate planning documents.¹²⁹

Further, the estate planning benefits of marriage are less likely to benefit the members of the LGBTQ+ community who could benefit from it the most. The members of the LGBTQ+ community who are more likely to get married are the same ones who are more

124. Jeffrey M. Jones, *How Many Americans Have a Will*, GALLUP (June 23, 2021), <https://news.gallup.com/poll/351500/how-many-americans-have-will.aspx> [https://perma.cc/6WV5-S-4D7R].

125. *Id.*

126. *LGBT Data & Demographics*, UCLA SCH. L., WILLIAMS INST. (Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#demographic> [https://perma.cc/AHY2-AVFU].

127. *Id.*

128. *Id.*

129. *See generally id.*

likely to have estate planning documents. In fact, when looked at as a whole, same-sex married couples are whiter and richer than the country as a whole.¹³⁰ Thus, same-sex marriage and its estate planning benefits are largely inaccessible to the neediest members of the LGBTQ+ community.¹³¹

For families handling a loved one's estate, marriage is one of the most influential factors in how belongings are transferred posthumously.¹³² As discussed in Section II.A, marriage has certain estate planning benefits, and regardless of the fears expressed here that those benefits may be weaker for same-sex couples, the benefits are available now. Additionally, there are many reasons couples choose not to marry—couples may not want to lose Social Security benefits or they may be personally opposed to marriage.¹³³ In fact, when gay marriage first became a unifying political goal, many members of the LGBTQ+ community rejected it as a heteronormative and patriarchal institution.¹³⁴

Married or not, dying intestate can cause problems for members of the LGBTQ+ community. The default rules of intestacy are supposedly meant to capture the presumed intent of the would-be testator. The rules were legislatively created and reflect a presumption that most individuals would want their property to pass to their surviving spouse and blood relatives.¹³⁵ Over time, modifications have been made to the rules of intestacy and it now incorporates adopted children and some stepchildren.¹³⁶ However, these rules are not modified fast enough and cannot be modified broadly enough to capture the presumed intent of the varying family structures that LGBTQ+ individuals often find themselves in.

130. *Id.*

131. This problem is not unique to the LGBTQ+ community. Across the country, poorer individuals are less likely to be married. This Comment is just looking at this issue through the lens of the LGBTQ+ community, but both acknowledges the benefits of and encourages further work approaching this issue from the intersectional lens of race, income, and sexual orientation.

132. See Cahn & Zietlow, *supra* note 11, at 340 (“[R]egardless of whether their parents had planned, their perceptions of the distribution process were integrally shaped by the parents’ marital status.”).

133. Weisbord, *supra* note 119, at 893.

134. CHAUNCEY, *supra* note 39, at 93–94.

135. Weisbord, *supra* note 119, at 891.

136. Cahn & Zietlow, *supra* note 11, at 363 n.213.

B. *Model for Moving Forward*

Before *Obergefell*, LGBTQ+ legal groups had a plethora of estate planning resources available widely, but since the decision was handed down, these groups have devoted less time to these resources. Likely, the decision to devote fewer resources to LGBTQ+ specific estate planning was based on the false belief that marriage equality would alleviate the problems LGBTQ+ couples and families faced. Although access to marriage most definitely eased the estate planning burden for LGBTQ+ couples whose family structures more closely align with the heterosexual nuclear family, the intestate rights of same-sex marriage are inaccessible to all the members of the LGBTQ+ community whose family structures do not. Their ideas of who should be making critical medical decisions, who should raise their children in the case of their death, and who should inherit their property upon death do not match up with what state legislatures have imagined.

In addition to the facial shortcomings of marriage to ensure true equality between same-sex and opposite-sex couples, there is unfortunately no guarantee that federal marriage equality will remain given the tenuous nature of the political economy. Without needlessly fearmongering, it is imperative that the LGBTQ+ community take proactive action to protect themselves and their loved ones in the event there is no longer a federal right to same-sex marriage.

Within the field of estate planning, there are legal scholars who have already invented creative solutions to the problem of intestate succession for the general population.¹³⁷ This Comment takes a more pragmatic solution that can be implemented with the urgency required for LGBTQ+ couples during this specific, turbulent political moment. This Comment would be reticent not to acknowledge the various online sources available to individuals to make wills.¹³⁸ However, individuals have always been able to draw up their own wills in this fashion; these wills have to subscribe to certain formalities (although there is some push to relax these formalities in the case of wills created online), and failure to subscribe can result in the will being thrown out. Thus, the rules of intestate

137. See, e.g., *id.* at 366–74 (recommending various statutory changes to modernize intestate succession); Weisbord, *supra* note 119, at 920 (recommending an attachable will to state tax returns).

138. See, e.g., LEGALZOOM, <https://www.legalzoom.com/personal/estate-planning/last-will-and-testament-overview.html> [https://perma.cc/WZ4G-GP9W].

succession must be followed.¹³⁹ The recommendations here hopefully are just as easily accessible for LGBTQ+ individuals who are seeking estate planning advice but are less likely to be invalidated by the courts because they will be made with advice from legal professionals.

In general, LGBTQ+ couples, especially those concerned with how other relatives and a court may interpret their wishes, should prioritize private vehicles of succession whenever possible. Devices like trusts and life insurance beneficiary designations are less likely to be challenged in courts. Therefore, any concerns about other family members potentially being frustrated with the decedent's wishes and attempting to invalidate the will are moot. Second, a number of individuals were concerned with will making from fear of judgment by legal professionals. Although setting up these vehicles may, in some instances, require or benefit from legal advice, the actual transfer for things like life insurance policies occur completely privately, away from any judgment of others.

However, for the reasons discussed in Section I.A.2, non-probate succession is not always attainable, especially for lower-income individuals who cannot afford something like an asset management trust. These individuals are prime to make and probate a will or rely on default rules of intestate succession. For members of the LGBTQ+ community who are lower income and who have complex family structures or personal wishes, the rules of intestate succession will not be satisfactory, and thus these individuals should be consulting with legal professionals to draft wills.

This Comment recommends that these individuals should be prioritized when thinking about estate planning for the LGBTQ+ community because they are the neediest individuals in the community. Luckily, estate planning issues are the types of issues lower-income individuals have prioritized, and therefore there is momentum in society to build upon to ensure that LGBTQ+ specific estate planning resources are available to this population.¹⁴⁰ This can be accomplished in a two-fold strategy executed by LGBTQ+ legal groups and lawyers: (1) reproduce and promote similar estate planning tools which were widely available before *Obergefell* and (2) host estate planning clinics especially for the

139. Goodwin, *supra* note 6, at 956–57.

140. Sarah John & Mary C. Slosar, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans*, L. SERVS. CORP. 30 (Apr. 2022) <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/B7VM-U2UM>].

LGBTQ+ community which provide services for wills, advance medical directives, and guardianship issues which are more relevant or necessary for this community.

Beginning during the AIDS epidemic and until *Obergefell*, LGBTQ+ advocacy groups had estate planning tools available for free.¹⁴¹ Although these are still available, many are not updated with the same vigor they were when there was no right to same-sex marriage across the country.¹⁴² With the future of same-sex marriage questioned and with the complexity surrounding issues with same-sex adoption and guardianship in certain states, these organizations should reallocate resources to this issue. Particularly, there must be some publicity about the importance of estate planning for the LGBTQ+ community because the social events which spurred the origination of these resources are becoming less relevant to the younger members of the LGBTQ+ community, and instead of waiting for a new generation of LGBTQ+ individuals to go through the same types of discrimination experienced by Walter Weiss, Lisa Pond, Janice Langbehn, Kenneth Rinker, Sergio Cervetti, and Edith Windsor, and countless others, organizations have the opportunity to be proactive and help protect and build up wealth in the LGBTQ+ community.

Estate planning clinics offered by law schools and legal advocacy groups are fairly common. LGBTQ+ advocacy groups and bars should either advertise and participate in these clinics or host their own. When LGBTQ+ groups and lawyers participate in these clinics, there will be an assurance to those hesitant to access legal services that they will not be judged because the lawyer preparing their will and other estate planning documents are similar to them in some ways.

Additionally, more services than just will making should be provided at these clinics. As highlighted in Section II.B, the LGBTQ+ community is currently especially vulnerable to discrimination surrounding parental rights. For this reason, these clinics should offer guardianship services to members of the LGBTQ+ community with non-biological children. Similarly, this political climate is fraught with transphobia, and therefore many members of the

141. See CHAUNCEY, *supra* note 39, at 96–97 (discussing how the Gay Men’s Health Clinic was formed in response to the AIDS epidemic and offered legal advice to over a thousand gay men every year).

142. FAQ: *Legal Issues for LGBTQ+ Families in the Post-Roe Era*, NCLR, <https://www.ncrlrights.org/get-help/resource/post-dobbs-faq/#couple-rights> [<https://perma.cc/EDU9-PCHJ>].

LGBTQ+ community are likely to face discrimination when seeking medical care. Therefore these clinics should offer services where members of the LGBTQ+ community can draft advanced medical directives. Although neither of these types of documents can fully shield any person from discrimination, they both serve as tools in the arsenal of the LGBTQ+ community to combat discrimination and other inequalities that plague this community.

CONCLUSION

The current political climate has left the LGBTQ+ unsure of the future of their rights, including the right to marry. While this uncertainty is fear provoking, it can also serve as a reminder that same-sex couples and families have faced many challenges throughout history and have constantly developed solutions to combat this discrimination. This zeal and commitment to achieving equality between same-sex and opposite-sex couples can be utilized not only to ensure federal same-sex marriage is protected, but also to protect the interests of LGBTQ+ couples who do not get married.

There are many benefits to marriage, but there are also many reasons individuals may choose not to get married. LGBTQ+ individuals who choose not to get married face even more discrimination when it comes to matters of estate planning than married LGBTQ+ couples because of the respect and privileges associated with marriage in the American legal system. LGBTQ+ legal advocacy groups should continue to provide these individuals with the same type of resources that were available prior to *Obergefell* to shrink the gap between estate protections offered to married couples and unmarried couples. By offering these resources, the entire LGBTQ+ community will be benefitted in the event the government further weakens the right to same-sex marriage.

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