

THE COQUILLE INDIAN TRIBE, SAME-SEX MARRIAGE, AND SPOUSAL BENEFITS: A PRACTICAL GUIDE

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*Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.*²

INTRODUCTION

The Coquille Tribe, located in Oregon, is the first and only Indian tribe to codify the definition of marriage as a fundamental right regardless of the biological sex of the parties.³ Coquille Tribal Chief Ken Tanner stated, “we want

1. University of Tulsa College of Law, J.D. expected May 2009. The author would sincerely like to thank Professor Melissa Tatum, now the Associate Director of the Indigenous Peoples Law and Policy (IPLP) Program at the University of Arizona James E. Rogers College of Law, for her guidance and unwavering support in writing this article; Brian Gilley, Ph.D., assistant professor of Anthropology at the University of Vermont for his help in understanding a Native American tradition of recognizing “two-spirit” people; Melissa Cribbins, Esq. and Kay Collins from the Coquille Indian Tribe Legal Services Department for their assistance helping me understand Coquille law; last, but certainly not least, the staff and editorial board of the *Arizona Journal of International and Comparative Law* for their support and thoughtful advice.

The author uses the term “same-sex couple” throughout the article in an attempt to educate without creating confusion. However, this term is biologically incorrect for some couples as it presumes that all human beings are either male or female, and may foster unwarranted societal stigma of inferiority and/or immorality. Furthermore, the use of “sex” to refer to gender can be misleading. In fact, there is a distinct difference between a person’s gender identity and a person’s sexual orientation.

2. *Goodridge v. Mass. Dep’t of Pub. Health*, 798 N.E.2d 941, 954-55 (Mass. 2003) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (emphasis added) (internal quotations omitted)).

3. E-mail from Brian Gilley, Anthropologist and Assistant Professor at the University of Vermont, to Julie Bushyhead, Student at the University of Tulsa College of Law (Oct. 16, 2008) (copy on file with author).

all people to be open to benefits and accepted in our group.”⁴ The Tribe tries to accomplish this goal by recognizing “people of different lifestyles.”⁵ The Coquille’s new marriage ordinance “finds that the formation, continuity and recognition [of] domestic relationships are essential to the political integrity, economic security and the health and welfare of the Tribe.”⁶ By enacting this ordinance, the Tribe demonstrates its appreciation for the importance of recognizing a couple’s sincere commitment to one another through the institution of marriage.⁷ The Tribe supports its action to resist discrimination against same-sex couples by referring to the Tribe’s historic tradition of accepting people with different lifestyles—“none of [the Tribe’s traditional] mores would have excluded same-sex relations [or marriage].”⁸ Although the federal government impairs any attempt by tribes or states to completely abolish discrimination against same-sex couples,⁹ the Coquille Tribe is making an effort to promote equality for its members by granting marriage licenses to couples regardless of biological sex.¹⁰ Same-sex couples married by the Coquille Tribe are in a unique position to receive equal and respected recognition as “married” by the Coquille Tribe, extensive health benefits provided by the Coquille Tribe, and extensive spousal benefits provided by the Oregon Family Fairness Act if those couples register as domestic partners in Oregon.

This article will discuss the flaws underlying the majority view concerning access to marriage, the inherent discrimination against same-sex couples, and the various spousal rights concerning end of life and estate planning decisions. In particular, this article will examine spousal rights available to same-sex couples married by the Coquille Indian Tribe and registered as domestic partners under the Oregon Family Fairness Act. Part I discusses the United States view on same sex marriage including the problems with the federal definition, potential solutions, and the discrimination inherent in those solutions; Part II

4. *The Jefferson Exchange: Gay Rights/Indian Tribes* (Jefferson Public Radio Broadcast Aug. 26, 2008) (interviews with Ken Tanner and Brian Gilley) [hereinafter Interview with Ken Tanner and Brian Gilley]. Brian Gilley illustrated this point by stating, the:

Coquille have made a decision to accept people in their communities . . . [an] entire group of people who are hidden who could contribute to community, but ironically the majority of native peoples in the United States have decided to continue to alienate these potentially productive, contributing people, so I really admire what the Coquille have done.

Id.

5. Interview with Ken Tanner and Brian Gilley, *supra* note 4.
6. COQUILLE INDIAN TRIBAL CODE § 740.010(2) (2008) [hereinafter CITC].
7. *See* CITC § 740.010(1).
8. Interview with Ken Tanner and Brian Gilley, *supra* note 4.
9. Defense of Marriage Act of 1996, 1 U.S.C. § 7 (2000).
10. CITC § 740.010(3)(b).

discusses same-sex marriage in Indian Tribes, including cultural traditions and the present tribal views on same-sex marriage. Part III encompasses a case study involving spousal rights for same-sex couples married by the Coquille Indian Tribe and registered as domestic partners by the state of Oregon within the end of life and estate planning context. This includes examining the probate of non-trust property, probate of trust property, medical decisions, anatomical gifts, disposal of human remains, guardianships, and health insurance. Part IV provides several important notes regarding the intended scope of this article.

I. MARRIAGE AND MARRIAGE ALTERNATIVES IN THE UNITED STATES

The dominant definition of marriage, which largely remains an institution reserved for individuals of the opposite sex, is subject to strong criticism as it relies on several problematic assumptions: (1) there is a bright-line between people who are absolutely male or female;¹¹ (2) marriage is necessary to promote or ensure responsible procreation;¹² and (3) marriage promotes social goals of morality.¹³ This portion of the article will discuss why these assumptions are problematic and why adopting a definition of marriage based upon these assumptions frustrates any argument favoring marriage as a superior institution that should be reserved for couples of opposite sex. This section will explore one, albeit radical, method for alleviating discrimination against same-sex couples. Finally, this section discusses that while this radical proposal, along with many others, may present worthy goals for the future, same-sex couples need a practical understanding to navigate a legal framework that does not recognize their status as a committed couple.

A. The United States' View on Marriage

The United States defines marriage, both federally and in most states, as a union reserved for individuals of the opposite sex.¹⁴ Congress codified this belief in the Defense of Marriage Act (DOMA) enacted in 1996.¹⁵ Most states have taken similar legislative action to ban same-sex marriage.¹⁶ However, three

11. See *infra* text accompanying notes 60-69.

12. See *infra* text accompanying notes 70-95.

13. See *infra* text accompanying notes 96-105.

14. 1 U.S.C. § 7 (2000); NATIONAL CONFERENCE OF STATE LEGISLATURES, SAME-SEX MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS, <http://www.ncsl.org/programs/cyf/samesex.htm> (last updated May 2008) [hereinafter STATE SURVEY].

15. 1 U.S.C. § 7.

16. STATE SURVEY, *supra* note 14.

states' judiciaries—Connecticut, California, and Massachusetts—have found that banning same-sex marriage is unconstitutional under their state constitutions.¹⁷

Congress enacted DOMA in response to pending litigation by same-sex couples who asserted that precluding same-sex couples from marrying in Hawaii was unconstitutional.¹⁸ The United States House of Representatives stated two important purposes, among others, for enacting DOMA: to “defend the institution of traditional heterosexual marriage,” and to “protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions.”¹⁹ Accordingly, DOMA consists of two provisions in the United States Code: (1) a statutory definition,²⁰ and (2) a statutory exception to the Full Faith and Credit doctrine.²¹

Prior to the threat of legalized same-sex marriage, the House of Representatives recognized that the federal government relied on states to define valid marriages for the purposes of applying federal statutes and regulations that gave rights and benefits to married spouses.²² In an effort to preempt questions concerning the scope of federal benefits to married couples, DOMA defined “marriage”—a word that in 1996 appeared in over 800 sections of federal law—as “a legal union between one man and one woman as husband and wife.”²³ In addition, this statute defines the word “spouse” to refer “only to a person of the opposite sex who is a husband or a wife.”²⁴ Based on the federal definition of “marriage” and “spouse,” and unless later amended by Congress, the United States government does not recognize any marriage falling outside the contours of the definition above (i.e. same-sex marriage).²⁵ Consequently, all federal acts and regulations bestowing spousal benefits will exclude spouses of state or tribal recognized same-sex marriages.²⁶

The second provision of DOMA creates an exception to the Full Faith and Credit Clause of the United States Constitution.²⁷ As such, the exception

17. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Goodridge v. Mass. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). On November 4, 2008 California voted against allowing same-sex marriage, although in May 2008, the California Supreme Court held that it was unconstitutional to discriminate on the basis of sexual orientation. *Marriage Cases*, 183 P.3d 384.

18. H.R. REP. NO. 104-664 at 2 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2906.

19. *Id.* at 12.

20. 1 U.S.C. § 7.

21. 28 U.S.C. § 1738C (2000).

22. H.R. REP. NO. 104-664, at 10.

23. 1 U.S.C. § 7.

24. *Id.*

25. *Id.*

26. *Id.*

27. 28 U.S.C. § 1738C; H.R. Rep. No. 104-664, at 25; Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 70-71 (2006). This is why many legal scholars argue DOMA is unconstitutional. *Id.*

permits states to refuse to recognize marriages solemnized and legally formed in other states.²⁸ Specifically, the provision states:

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.²⁹

Many states have chosen not to recognize marriages solemnized in other states in addition to adopting the federal definition of marriage.³⁰ Some states have chosen to provide domestic partnerships, civil unions, or other civil remedies even where there is a state constitutional ban against same-sex marriage.³¹

B. State Views on Marriage

Pursuant to DOMA, Congress grants states the right to define their own policy regarding the definition of marriage because this right is domestic and inherently held by each sovereign state.³² In looking at marriage and marriage alternatives, two states permit same-sex marriage: Massachusetts³³ and Connecticut.³⁴ As of May 15, 2008, the California Supreme Court held that denying marriage to same-sex couples is a state constitutional violation.³⁵ However, on November 4, 2008, California residents voted to ban same-sex marriage and amend the constitution to reflect the DOMA definition of marriage.³⁶ Only one state, Rhode Island, *statutorily* recognizes same-sex marriages performed in other jurisdictions.³⁷ However, both New York³⁸ and

28. 28 U.S.C. § 1738C; Fletcher, *supra* note 27, at 70-71.

29. 28 U.S.C. § 1738C.

30. STATE SURVEY, *supra* note 14.

31. *Id.*

32. 28 U.S.C. § 1738C. This statute also grants tribes the right to define their own policy regarding the definition of marriage.

33. STATE SURVEY, *supra* note 14.

34. *Id.*

35. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

36. Jessie McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

37. STATE SURVEY, *supra* note 14.

38. *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008).

Massachusetts³⁹ recently decided to recognize valid same-sex marriages performed in other states. Four states allow civil unions and extend statutory benefits, generally reserved for spouses, to partners legally bound by a civil union: Connecticut,⁴⁰ New Jersey, New Hampshire, and Vermont.⁴¹ Two states provide domestic partnerships extending *all* of the state spousal benefits to domestic partners: California and Oregon.⁴² Four other states provide domestic partnerships but limit the amount of spousal benefits conferred on domestic partners:⁴³ Hawaii, Maine, District of Columbia, and Washington.⁴⁴ Finally, approximately seventy-five municipalities allow same-sex couples to register for domestic partnerships, even where those municipalities are located in states that ban same-sex marriage and have no state domestic partnership or civil union laws.⁴⁵ Domestic

39. Michael Levenson, *Same-Sex Couples Applaud Repeal*, THE BOSTON GLOBE, Aug. 1, 2008, available at http://www.boston.com/news/local/articles/2008/08/01/same_sex_couples_applaud_repeal.

40. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); STATE SURVEY, *supra* note 14. In October 2008, the Connecticut Supreme Court legalized same-sex marriage finding such a ban unconstitutional. *Id.*

41. STATE SURVEY, *supra* note 14.

42. *Id.*

43. *Id.*

44. *Id.*

45. Human Rights Campaign, *City and County Domestic Partner Registries*, http://www.hrc.org/issues/marriage/domestic_partners/9133.htm (last visited Nov. 11, 2008). The human rights campaign reports that the following municipalities offer domestic partnership registries: (1) Eureka Springs, Arkansas; (2) Tucson, Arizona; (3) Berkley, California; (4) Beverly Hills, California; (5) Cathedral City, California; (6) Davis, California; (7) Laguna Beach, California (8) Long Beach, California (9) Los Angeles County, California; (10) Oakland, California; (11) Palm Springs, California; (12) Palo Alto, California; (13) Petaluma, California; (14) Sacramento, California; (15) San Francisco, California; (16) Marin County, California; (17) Santa Barbara County, California; (18) Santa Barbara, California; (19) Santa Monica, California; (20) West Hollywood, California; (21) Boulder, Colorado; (22) Denver, Colorado; (23) Hartford, Connecticut; (24) Broward County, Florida; (25) Key West, Florida; (26) Miami Beach, Florida; (27) Miami-Dade County, Florida; (28) West Palm Beach, Florida; (29) Athens-Clark County, Georgia; (30) Fulton County, Georgia; (31) Atlanta, Georgia; (32) Iowa City, Iowa; (33) Cook County, Illinois; (34) Village of Oak Park, Illinois; (35) Urbana, Illinois; (36) Lawrence, Kansas; (37) New Orleans, Louisiana; (38) Boston, Massachusetts; (39) Brewster, Massachusetts; (40) Brookline, Massachusetts; (41) Cambridge, Massachusetts; (42) Nantucket, Massachusetts; (43) Provincetown, Massachusetts; (44) Portland, Maine; (45) Ann Arbor, Michigan; (46) Minneapolis, Minnesota; (47) Kansas City, Missouri; (48) St. Louis, Missouri; (49) Carrboro, North Carolina; (50) Chapel Hill, North Carolina; (51) Albany, New York; (52) East Hampton, New York; (53) City of Ithaca, New York; (54) Town of Ithaca, New York; (55) Rockland County, New York; (56) New York, New York; (57) Suffolk County, New York; (58) Rochester, New York; (59) Southampton Town, New York; (60) Westchester County, New York; (61) Cleveland Heights, Ohio; (62) Ashland, Oregon; (63) Eugene, Oregon; (64) Multnomah, Oregon; (65) Philadelphia, Pennsylvania;

partnership registries may only provide spousal benefits to same-sex couples at a municipal level depending on state law.

Some states have adopted one or both of the DOMA provisions: (1) defining marriage as between a man and a woman; and/or (2) refusing to recognize any same-sex marriages legalized in other states, tribes, etc.⁴⁶ Thirty states constitutionally define marriage as between a man and a woman, including the states whose residents recently approved a constitutional ban in the November 4, 2008 election: Arizona, California, and Florida.⁴⁷ Over forty states have statutes defining marriage as between a man and a woman.⁴⁸ Connecticut, however, divorced from this trend by recently finding that limiting marriage to persons of opposite sex is unconstitutional.⁴⁹ Currently, five states do not have *statutory* laws prohibiting same-sex marriage: Massachusetts, New Jersey, New Mexico, New York, and Rhode Island.⁵⁰

Until July 31, 2008, the lack of a statutory prohibition against same-sex marriage in the five states above significantly impacted same-sex couples seeking marriage in Massachusetts.⁵¹ Massachusetts previously granted marriages to out-of-state same-sex couples only where that couple's state did not ban such unions.⁵² In fact, couples from New Mexico and Rhode Island have been successful in obtaining marriage licenses from Massachusetts.⁵³ More recently, Massachusetts Governor Deval Patrick signed a bill on July 31, 2008, repealing the law limiting marriage in Massachusetts to couples that could legally marry in their home state.⁵⁴ As such, couples from all fifty states are able to successfully obtain a marriage license in Massachusetts, even though their marriages are not recognized in their own states of residence.⁵⁵ Marriages performed by Massachusetts for out-of-state couples may only serve to provide recognition—to show the world they “have a right to be married.” However, the law does not offer these couples any

(66) Pittsburgh, Pennsylvania; (67) Travis County, Texas; (68) Salt Lake City, Utah; (69) Lacey, Washington; (70) Olympia, Washington; (71) Seattle, Washington; (72) Tumwater, Washington; (73) Dane, Wisconsin; (74) Madison, Wisconsin; and (75) Milwaukee, Wisconsin. *Id.*

46. STATE SURVEY, *supra* note 14.

47. *Id.*; McKinley & Goodstein, *supra* note 36.

48. STATE SURVEY, *supra* note 14.

49. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

50. STATE SURVEY, *supra* note 14.

51. MASS. GEN. LAWS ch. 207, § 11 (1913) (repealed 2008).

52. *See id.*

53. David Abel, *Same-Sex Couples in N.M. Allowed to Marry in Mass. Bay State Agency Clarifies Ruling*, THE BOSTON GLOBE, July 27, 2007, available at http://www.boston.com/news/local/articles/2007/07/27/same_sex_couples_from_nm_allowed_to_marry_in_mass/.

54. MASS. GEN. LAWS ch. 207, § 11.

55. *See id.*

benefits unless private employers accept such marriage licenses as valid for purposes of employee benefits.⁵⁶

C. Problems with Federal and State (Majority) Definitions of Marriage

The problems underlying the federal definition of marriage are a result of society's reliance on three main assumptions about gender, procreation, and morality: (1) there is a bright-line between people who are absolutely male or female;⁵⁷ (2) marriage is necessary to promote and ensure responsible procreation;⁵⁸ and (3) marriage promotes social goals of morality.⁵⁹

1. Society Relies on a False Assumption about Gender

The House of Representatives, while hearing testimony in favor of passing H.R. 3396 (DOMA), relied on a biologically incorrect assertion made by Amherst College Professor Hadley Arkes that all people are either male or female.⁶⁰ Although the requirement in the majority of states mandates that marriage is valid only as between persons of opposite sex, there is not always a bright-line between individuals who are distinctly male or distinctly female.⁶¹ Instead, individuals are born with inconsistencies in the characteristics that define a person as male/female in terms of gonadal, genital, chromosomal, and hormonal makeup.⁶² In these instances a person is likely characterized as being "intersex."⁶³

56. See John O. Enright, Note, *New York's Post September 11, 2001 Recognition of Same-Sex Relationships: A Victory Suggestive of Future Change*, 72 *FORDHAM L. REV.* 2823, 2845 (2004) (As of 2004, "7,009 United States private sector companies and colleges and universities extended benefits to the same-sex partners . . . [and] 210 of all Fortune 500 companies do the same").

57. See *infra* text accompanying notes 60-69.

58. See *infra* text accompanying notes 70-95.

59. See *infra* text accompanying notes 96-105.

60. H.R. REP. NO. 104-664, at 12 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2916 ("And to discover the ends of marriage, we need only reflect on this central, unimpeachable lesson of human nature: We are, each of us, born a man or a woman." (quoting Professor Hadley Arkes)).

61. Terry S. Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 *BYU J. PUB. L.* 371 (2004).

62. In re Heilig, 816 A.2d 68, 73 (Md. 2003) (citing Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *ARIZ. L. REV.* 265, 278 (1999)); see also Kogan, *supra* note 61, at 384, 391 (defining the seventh characteristic above as "psychological sex" or "brain sex," suggesting that a person's brain has a more determinate role than genitals, gonads, and chromosomes in defining one's sexual identity).

In other circumstances, individuals are born with consistent characteristics in terms of gonadal, genital, chromosomal, and hormonal makeup.⁶⁴ However, the inconsistency for these individuals lies within the brain.⁶⁵ Where this individual does not “identify” with the sex determined by the first six factors,⁶⁶ this individual may be characterized as being “transsex” and not “intersex.”⁶⁷ Courts have been slow to recognize such incongruence in “transsex” individuals because a person’s sexual identity as defined by neurobiology, or “brain sex,” is difficult to prove. However, recent studies support the fact that individuals characterized as “transsex” possess the actual “brain components” of the gender they identify with rather than the gender demonstrated by their genitals.⁶⁸ Without a clearly defined bright-line between males and females in all circumstances, any attempt to define marriage as between a *true* man and a *true* woman is thwarted.⁶⁹

2. Society Relies on an Assumption that Marriage is Necessary to Promote “Responsible Procreation”

The House of Representatives further relied on testimony by Professor Arkes to support the argument that H.R. 3396 (DOMA) “advances the government’s interest in defending and nurturing the institution of traditional

Factors that may be relevant in determining whether a person is characterized as male or female:

(1) Internal morphologic sex (seminal vesicles/prostate or vagina/uterus/fallopian tubes); (2) External morphologic sex (genital); (3) Gonadal sex (testes or ovaries); (4) Chromosomal sex (presence or absence of Y chromosome); (5) Hormonal sex (predominance of androgens or estrogens); (6) Phenotypic sex (secondary sex characteristics, e.g. facial hair, breasts, body type); and (7) Personal sexual identity.

Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278 (1999).

63. Kogan, *supra* note 61, at 371.

64. *Id.* at 398. That is, the biological or gonadal, genital, chromosomal, and hormonal makeup of that individual is consistent with the designation of either male or female.

65. *Id.*

66. Greenberg, *supra* note 62, at 278 (providing the factors relevant in determining a person’s gender).

67. Kogan, *supra* note 61, at 398.

68. *Id.* at 399; Milton Diamond, *Biased-Interaction Theory of Psychosexual Development: “How Does One Know if One is Male or Female?”*, 55 SEX ROLES 589, 593 (2006).

69. See generally Aleks Kajstura, *Sex Required: The Impact of Massachusetts Same-sex Marriage Cases on Marriages with Intersex and Transsexual Partners*, 14 CARDOZO J. L. & GENDER 161 (2007).

heterosexual marriage.”⁷⁰ Professor Arkes testified that the United States does not have an interest in marriage, specifically “encouraging citizens to come together in a committed relationship,” *except* for the purpose of protecting the nation’s children.⁷¹ In addition, Professor Arkes testified that, “civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing.”⁷² Finally, Professor Arkes posited that the “government has an interest in marriage because it has an interest in children.”⁷³ As illustrated, the United States relies on a second problematic assumption that marriage necessarily promotes or ensures “responsible procreation.”⁷⁴

The assumption that marriage is necessary to promote or ensure “responsible procreation” is incorrect for several reasons. First, people can and do reproduce outside the institution of marriage.⁷⁵ Marriage as a religious and/or legal institution is not a biological prerequisite for engaging in sexual reproduction. Second, married heterosexual couples do not always “procreate responsibly,” or at all.⁷⁶ Some couples do not procreate at all as a result of biological barriers and/or other concerns.⁷⁷ Many married heterosexual couples procreate and raise children irresponsibly, while unmarried couples, heterosexual or homosexual, procreate and raise children responsibly, and vice versa.⁷⁸ Couples, regardless of sexual orientation or legal status, may procreate when they do not have sufficient income to support a family, or procreate when the domestic environment is a risk factor for the health and safety of the child(ren).⁷⁹ The two illustrations above demonstrate that quality of parenting has no direct correlation to sexual orientation or marital status.⁸⁰ In other words, both heterosexual and

70. H.R. REP. NO. 104-664, at 13 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2917.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 FLA. COASTAL L. REV. 181, 195 (2005).

76. *Id.*

77. *Id.* at 194-95.

78. *Infra* text accompanying note 80.

79. *Id.*

80. Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 241, 243 (2006); Nancy Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-sex Marriage both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 582 (2005).

Dr. Michael Lamb, senior research psychologist at the National Institute of Child Health and Human Development, has done extensive research on the role of fathers in child development. He testified recently in litigation challenging Arkansas’s ban on foster parenting by lesbians

homosexual parents have varying degrees of success and failure in raising children. Accordingly, “responsible procreation” is neither dependent on marriage, nor does it necessarily follow from the incidence of marriage.

The United States asserts that its interest in marriage exists to protect children⁸¹—but protect them from what? Dr. Fiona Tasker conducted a study considering the affect of same-sex parenting on children.⁸² Dr. Tasker agrees with the findings of other existing research studies that a child’s “optimal development seems to be influenced more by the nature of the relationship and interactions within the family unit than by the particular structural form it takes.”⁸³ Moreover, Dr. Tasker observes, “findings to date indicate that some family processes, such as the effects of parenting stress, parental conflict, and parental mental illness, have similar consequences for children across different types of family form, irrespective of parental sexual orientation.”⁸⁴ In other words, it is the quality of parenting rather than the incidence of same-sex parenting that presents a potential risk factor affecting the health and well-being of children.⁸⁵ In fact, studies indicate that same-sex parenting is not a risk factor at all and that “beliefs that lesbian and gay adults are not fit parents have no empirical foundation.”⁸⁶ The American Psychological Association issued a resolution finding “there is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.”⁸⁷

and gay men. According to the court’s opinion, he testified that “both men and women have the capacity to be good parents and . . . there is nothing about gender, per se, that affects one’s ability to be a good parent.”

Id. (ellipses in original).

81. H.R. REP. NO. 104-664, at 13 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2917.

82. Fiona Tasker, *Lesbian Mothers, Gay Fathers, and Their Children: A Review*, 26 DEVELOPMENTAL & BEHAV. PEDIATRICS 224 (2005).

83. *Id.* at 238 (quoting Ellen Perrin & Comm. on the Psychosocial Aspects of Child & Family Health, *Technical Report: Coparent or Second Parent Adoption by Same-sex Parents*, 109 PEDIATRICS 341, 341 (2002)).

84. *Id.*

85. Patterson, *supra* note 80, at 243.

86. APA Council of Representatives, *Resolution on Sexual Orientation, Parents, and Children* (2004) (citing Charlotte Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. MARRIAGE & FAM. 1052-1069 (2000) [hereinafter Patterson 2000]; Charlotte Patterson, *Lesbian and Gay Parents and Their Children: Summary of Research Findings, in Lesbian and Gay Parenting: A Resource for Psychologists* (Am. Psych. Ass’n 2004), available at <http://www.apa.org/pi/lgbcc/publications/lgparenting.pdf> [hereinafter Patterson 2004]; Perrin, *supra* note 83, at 341-44).

87. APA Council of Representatives, *supra* note 86 (citing Patterson 2000, *supra* note 86; Patterson 2004, *supra* note 86; Perrin, *supra* note 83; Fiona Tasker, *Children in*

Opponents of same-sex marriage argue that raising children in such an atmosphere “denies children the combination of mother and father.”⁸⁸ Why is the presence of a male and female parent important? How is a mother or father defined? Is a father declared a father because he assumes “manly” roles (e.g., takes the trash out, fixes the car, mows the lawn, provides majority financial support, or sets an example for his children)? Or is a father simply a father because of his male anatomy? Surely not the former—many biological fathers fail at all of the tasks above. In fact, sociologist Judith Stacey asserts, there is no scientific support for the argument that children experience “optimal development” when raised by a male and female parent.⁸⁹ Instead, what is important is that children are exposed to traditional male and female role models to help a child develop his/her gender identity.⁹⁰ One author suggests, even if traditional dual male/female role models do not exist in the home, “conscientious gay parents, like conscientious straight single parents, take steps to ensure their children have male and female role models.”⁹¹ Furthermore, scientific evidence supports that “the presence of two parents, irrespective of their gender or sexual orientation, [is] associated with more positive outcomes for [a child’s] psychological well-being.”⁹² Simply stated, children benefit from quality parenting; and such quality may exist irrespective of a parenting couple’s gender or sexual orientation.⁹³

Lesbian-led Families: A Review, 4 CLINICAL CHILD PSYCHOL. & PSYCHIATRY 153-66 (1999)).

88. Summer Nastich, Note, *Questioning the Marriage Assumptions: The Justifications for "Opposite-Sex Only" Marriage as Support for the Abolition of Marriage*, 21 LAW & INEQ. 114, 145 (2003) (citing Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1551 (1998)).

89. Polikoff, *supra* note 80, at 581 (citing Judith Stacey, *Legal Recognition of Same-Sex Couples: The Impact on Children and Families*, 23 QUINNIPIAC L. REV. 529, 533 (2004)).

90. Diamond, *supra* note 68, at 591. This author concludes,

[s]tarting very early in life the developing child, consciously or not, begins to compare himself or herself with others; peers and adults seen, met, or heard of. All children have this in common. In so doing they analyze inner feelings and behavior preferences in comparison with those of their peers and adults. In this analysis they crucially consider “Who am I like and who am I unlike?”

Id. (internal citations omitted).

91. Nastich, *supra* note 88, at 145 (quoting DAN SAVAGE, *THE KID: WHAT HAPPENED AFTER MY BOYFRIEND AND I DECIDED TO GO GET PREGNANT, AN ADOPTION STORY* 58 (1999)).

92. Ellen C. Perrin et al., *Gay and Lesbian Issues in Pediatric Health Care*, 34 CURRENT PROBS. IN PEDIATRIC & ADOLESCENT HEALTHCARE 355, 378-79 (2004).

93. Patterson, *supra* note 80, at 243.

In conclusion, responsibility in procreating and/or raising a child (including adoption, artificial insemination, children from prior relationship) is not dependent on heterosexual orientation or marriage.⁹⁴ If society's only interest in marriage is protecting children by encouraging responsible procreation, then society should reward all couples that succeed in responsibly procreating and/or raising a child.⁹⁵ In other words, "if [heterosexual] couples that procreate and raise children deserve the benefits of marriage, then same-sex couples, unmarried opposite-sex couples, and single individuals who engage in these activities deserve the benefits married couples receive."⁹⁶

3. Society Relies on an Assumption that Marriage Achieves Social Goals of Morality

One author boldly states, "[i]f marriage is the moral foundation of our society, yet [nearly] half of all marriages end in divorce, then society is on very shaky moral ground indeed."⁹⁷ While this statistical statement is technically correct, that about 43-47%⁹⁸ of marriages end in divorce, this is not a new phenomenon.⁹⁹ In fact, statistics show that for the past two decades, the rate of divorce in relation to marriage has remained steady.¹⁰⁰ Whatever the percentage of divorce, the fact remains that the institution of marriage fails to promote permanent, monogamous, and heterosexual unions in all instances.¹⁰¹ Unfortunately, the institution of marriage is not a guarantee for the three factors

94. Polikoff, *supra* note 80, at 581 ("Research conducted over the last fifty years has firmly established that it is the quality of parenting and of the parent child relationship, rather than the gender of parents, that predicts healthy children's adjustment.") (quoting Stacey, *supra* note 80, at 533).

95. See Nastich, *supra* note 88, at 159-60.

96. *Id.*

97. *Id.* at 149 (citing 50 National Vital Stat. Rep. 1, at Table 1 (Ctrs. For Disease Control 2001), available at http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_01.pdf (indicating that the divorce rate for the twelve-month period ending with January 2001 was 4.1 per 1000 total population, excluding California, Colorado, Louisiana, and Indiana; the marriage rate for the entire United States for the same time period was 8.5 per 1000).

98. INFOPLEASE.COM, MARRIAGES AND DIVORCES, 1900-2008 (2007), <http://www.infoplease.com/ipa/A0005044.html>.

99. See generally Robert Schoen & Vladimir Claudas-Romo, *Timing Effects on Divorce: 20th Century Experience in the United States*, 68 J. MARRIAGE & FAM. 749 (2006). In addition, variables in marriage produce inconsistencies in the divorce rate. That is, the divorce rate varies depending on the particular marriage type (i.e. first marriages, second marriages, third marriages, age of the marriage participants, etc.). *Id.*

100. MARRIAGES AND DIVORCES, *supra* note 98.

101. Nastich, *supra* note 88, at 128, 150 (citing *United States v. Phillips*, 52 M.J. 268 (C.A.A.F. 2000)).

above and is not dependent on maintaining the factors above.¹⁰² For example, people may remain married even though one spouse has engaged in an extramarital affair, or, after years of societal pressure and oppression, one spouse has come to realize his/her “true” gender identity or sexual orientation.¹⁰³ Most importantly, with the accessibility of divorce, couples may marry, divorce, and remarry—each time reaping the benefits of marriage.¹⁰⁴ Summer Nastich recognizes that “[t]his ability to string together permanent, monogamous unions makes each union non-permanent.”¹⁰⁵ Ultimately, this same author concludes, “[i]f permanent, monogamous unions deserve reward for their contribution to the morality of society, then society should reward permanent, monogamous unions, not marriages.”¹⁰⁶ This point, along with many others, illustrates the need for social and political change in marriage and marriage alternatives.

D. Struggle Between Changing Policy to Decrease Discrimination and Adapting to Current Policy for Same-Sex Couples in Need of Practical Solutions

Activists fighting for equality for same-sex couples are only limited by their imagination, and the arguments attempting to affect this nationwide social/political change are wide-ranging. However, one compelling argument considers abolishing marriage altogether.¹⁰⁷ This argument approaches the problems of marriage realistically and refuses to adopt the problematic assumptions posited by traditional marriage proponents.¹⁰⁸ This section discusses the compelling argument for abolishing marriage and the struggle between changing policy and adapting to current policy for couples currently in need of practical solutions.

First, while the overriding argument for marriage is to protect children, the reality that nearly one-half of marriages end in divorce, and are therefore not permanent, in and of itself upsets this goal of marriage.¹⁰⁹ Studies show that

102. *Id.* at 128.

103. *Id.* at 150 n.218 (“In [United States v.] Phillips, the defendant married in order to receive military benefits that would allow him to live in civilian housing with his male partner. [52 M.J. 268, 269 (C.A.A.F. 2000)]. It also appears that the defendant's legal wife and his partner's legal wife may have been involved in a lesbian relationship. *Id.* at 271.”).

104. *Id.* at 150.

105. *Id.*

106. *Id.*

107. *Id.* at 160-65; See also Elizabeth Scott, *A World Without Marriage*, 41 FAM. L.Q. 537 (2007).

108. See Nastich, *supra* note 88, at 124-32.

109. Sanford M. Portnoy, *The Psychology of Divorce: A Lawyer's Primer, Part 2: The Effects of Divorce on Children*, 21 AM. J. FAM. L. 126, 130-31 (2008).

divorce can have a devastating psychological impact on children.¹¹⁰ Dr. Sanford Portnoy concludes that “the psychological, emotional, and behavioral reactions cause some years of distress or disorder . . . [and] years of significant adjustment difficulty.”¹¹¹ Further, children born outside of wedlock, often referred to as illegitimate children, experience social stigma that can be psychologically harmful.¹¹² The abolition of marriage might alleviate some emotional distress that accompanies divorce and harmful social stigmas associated with parents who do not marry.¹¹³

Second, while some supporters of marriage argue that society has an interest in encouraging “stable and loving relationships,” the reality is that absent the institution of marriage, people would continue to engage in loving and stable relationships.¹¹⁴ In fact, marriage may encourage unwanted results: it may encourage people to marry to reap benefits accorded to married persons at the expense of a loving and stable relationship;¹¹⁵ it may encourage people to remain in unhappy relationships often leading to other socially unacceptable behavior such as adultery, alcohol abuse, and domestic violence;¹¹⁶ and it may impose potential physical and psychological risks for children raised by individuals that do not have a stable and loving relationship.¹¹⁷ One author presents a solution to

110. *Id.*

111. *Id.*

112. Polikoff, *supra* note 80, at 591 (citing Brief of American Psychological Association and New Jersey Psychological Association as Amici Curiae Supporting Plaintiffs-Appellants at 51-52, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. 2005) (No. A-2244-03T5)).

113. Nastich, *supra* note 88, at 148.

114. *Id.* at 138.

115. *Id.* at 150 n.218 (“In [United States v.] Phillips, the defendant married in order to receive military benefits that would allow him to live in civilian housing with his male partner. [52 M.J. 268, 269 (C.A.A.F. 2000)]. It also appears that the defendant's legal wife and his partner's legal wife may have been involved in a lesbian relationship. *Id.* at 271.”).

116. *Id.* at 140.

Marital distress inevitably touches all members of the family and can have profound effects on both physical and mental health. Among the symptoms or situations that may be associated with marital problems are bodily complaints (frequent headaches, low back pain, gastrointestinal disorders), depression, anxiety states, alcoholism, sexual dysfunction, extramarital activity, wife abuse, physical and/or sexual abuse of children, juvenile delinquency and adolescent suicidal behavior.

Id. at 140, n.165 (quoting Michael F. Myers, *Treating Troubled Marriages*, 29 AM. FAM. PHYSICIAN 221, 226 (1984)).

117. See Nastich, *supra* note 88, at 146 (looking at case law to illustrate that many children are raised by married individuals in environments where their physical or mental health is at risk).

eradicate these unwanted results, “[i]f society truly has an interest in encouraging stable and loving relationships, then society should encourage people to love, not to marry.”¹¹⁸ Further, the same author proposes, “[i]f stable and loving relationships are truly at issue, society should reward all such relationships equally.”¹¹⁹ While abolishing marriage may not entirely eliminate discrimination against same-sex couples, it would serve to eliminate the inferiority and inequality inherent in placing marriage on a pedestal for only opposite-sex couples to reach.¹²⁰

While there is immense desire to influence policy in this particular field of law, couples that struggle with the current definition of marriage need practical direction in providing for their partners in the event of death.¹²¹ In providing this direction, it is important to understand four major points: the state’s role in defining marriage; the types of laws that benefit same-sex couples; the discrimination inherent in marriage and various marriage alternatives; and, specifically for purposes of this article, the rights and benefits associated with end of life and estate planning decisions.

Civil unions, domestic partnerships (including reciprocal beneficiary laws), and state validated and/or recognized same-sex marriages offer same-sex partners/spouses a majority, if not all, of the state statutory benefits accorded to opposite-sex married couples.¹²² However, federal law still denies these partners important spousal benefits available to opposite-sex surviving spouses such as Social Security and Veteran’s benefits,¹²³ and state domestic partnership and civil union laws discriminately reserve the title of “married” to opposite-sex couples.¹²⁴ Although domestic partnerships and civil unions appear to be a milestone for gay, lesbian, and bisexual rights, these marriage alternatives “perpetuate”¹²⁵ the societal distinction between those worthy of marriage and those who are not.¹²⁶ In other

118. *Id.* at 142.

119. *Id.*

120. *Id.* at 134; Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-sex Marriage, and Separate but (Un)equal*, 25 VT. L. REV. 113, 134 (2000) (citing Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 218).

121. Enright, *supra* note 56, at 2825.

122. STATE SURVEY, *supra* note 14.

123. 1 U.S.C. § 7 (2000).

124. *See* Cox, *supra* note 120, at 134.

125. *Id.* at 136 (“[B]y agreeing to separation, we help them perpetuate their view of us as inferior”).

126. *Id.* (“[O]ur society’s experiences with ‘separate but equal’ have repeatedly shown that separation can never result in equality because the separation is based on a belief of distance necessary to be maintained between those in the privileged position and those placed in the inferior position”).

words, “separate but equal . . . [is] inherently unequal.”¹²⁷ The Connecticut Supreme Court in its recent decision in favor of same-sex marriage stated:

[t]he civil union law entitles same-sex couples to all of the same rights as married couples except one, that is, the freedom to marry, a right that has “long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women]”¹²⁸

Even same-sex marriage possesses unequal qualities for same-sex spouses who are not protected under federal law.¹²⁹ Nastich suggests that same-sex marriage fails to completely equalize the distinction made against same-sex couples by observing that society still places the stigma of *the same-sex married couple* instead of just an equally respected *married couple*.¹³⁰ Although same-sex marriage and marriage alternatives perpetuate inequality, the state’s extension of spousal rights cushions the blow.¹³¹

While it is essential for couples to be aware of all the rights available to them, rights concerning the death of a spouse/partner and the benefits available to a widower are “critically important,” especially for same-sex couples who may or may not be protected pursuant to state law.¹³² This article will focus on those rights that concern end of life and estate planning issues including: right to make medical decisions (including the right of hospital visitation), priority to make organ donation decisions, priority in claiming human remains, inheritance through intestate and testate succession, rights of spousal allowance, homestead allowance, and income for the surviving spouse (i.e. life insurance, pension benefits, social security benefits, etc.). Specifically, this article will explore these rights as they apply to a case study involving same-sex couples married by the Coquille Indian Tribe in Oregon.

II. TRIBES

Traditionally, many Indian tribes were not concerned with a member’s sexual orientation.¹³³ Instead, those Tribes focused on a person’s contribution to the community, which was a product of his/her gender.¹³⁴ For some Tribes,

127. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); see Cox, *supra* note 120, at 118.

128. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 416 (Conn. 2008).

129. 1 U.S.C. § 7 (2000).

130. See Nastich, *supra* note 88, at 134.

131. See Cox, *supra* note 120, at 117.

132. Enright, *supra* note 56, at 2828.

133. *Infra* text accompanying notes 140-44, 158-59.

134. *Infra* text accompanying notes 141-42, 155-57.

gender identity encompassed more than merely biological sex, but a person's spiritual gender identity.¹³⁵ Approximately 155 Indian Tribes recognized a group of people anthropologists refer to as "two-spirit" people.¹³⁶ These people could be modernly described as people who were neither male nor female but a third gender because they spiritually embodied both male and female genders.¹³⁷ The following section argues that this historic native tradition embraces the biological reality that not everyone fits into the inflexible gender categories of male and female. If society holds marriage superior on the basis that marriage is reserved for people of opposite sex, then the goal of "opposites" is thwarted by the biological reality that some people may be neither male nor female.¹³⁸ Societal education about gender marks the beginning of change in societal views encompassing gender, sexual orientation, and discrimination.¹³⁹ Tribes have the opportunity to illustrate flaws in restricting marriage to opposite sex couples by connecting with a historical native tradition of recognizing two-spirit people. Finally, this section discusses the Tribes' inherent authority to promulgate laws regulating domestic relations.

A. Traditional Tribal View on Same-Sex Marriage

Coquille Chief Ken Tanner stated that the Coquille Cultural Committee performed thorough research in response to several members' request to address the issue of same-sex marriage and spousal benefits.¹⁴⁰ The Committee found that oral history concerning "lifestyle and tribal methods of relating" revealed "no exclusions for people, in any way, [who engaged] in same sex marriages."¹⁴¹ Brian Gilley, a respected anthropologist who has conducted extensive research concerning "gay identity and social acceptance in Indian country" stated that, "sexuality really wasn't turning the social organization on its head like it was in Euro-American society."¹⁴² Gilley attributes this to the fact that for many native tribes, "who an individual had sex with was not necessarily the primary concern, [tribes] were more concerned about a person's potential contribution to the community."¹⁴³ Moreover, a person's role in the community was determined by

135. *Infra* text accompanying notes 146-51.

136. *Infra* text accompanying notes 144-45.

137. *Infra* text accompanying notes 148-52.

138. Greenberg, *supra* note 62, at 275; Marie-Amélie George, Note, *The Modern Mulatto: A Comparative Analysis of the Social and Legal Position of Mulattoes in the Antebellum South and the Intersex in Contemporary America*, 15 COLUM. J. OF GENDER & L. 665, 687 (2006).

139. See George, *supra* note 138, at 686; Greenberg, *supra* note 62, at 266-70.

140. Interview with Ken Tanner and Brian Gilley, *supra* note 4.

141. *Id.*

142. Interview with Ken Tanner and Brian Gilley, *supra* note 4.

143. *Id.*

gender identity, not necessarily biological sex.¹⁴⁴ One native tradition of recognizing “two-spirit” people, historically practiced in approximately 155 tribes,¹⁴⁵ illustrates the idea that gender identity is wholly separate from sexual orientation.¹⁴⁶

The name “two-spirit” is an attempt to explain this tribal tradition in the English language.¹⁴⁷ In fact, most tribes had different names for people who possessed both a male and a female spirit.¹⁴⁸ These individuals “were seen as being able to bridge the personal and spiritual gap between men and women.”¹⁴⁹ This unique gender identity was viewed as a gift from the Great Spirit, which was also named differently depending on each tribe’s religious practices.¹⁵⁰ The Navajo Tribe valued two-spirit people because they were “gifted with a more complex and nuanced understanding of both the masculine and feminine.”¹⁵¹ They were “seen as making a valuable contribution to the whole,” and as such were “treated with respect, even reverence.”¹⁵² Two-spirit people are most clearly described as people falling into a third gender.¹⁵³ Gilley explains that “this third gender often embodied a mixture of the social, ceremonial, and economic roles of men and women.”¹⁵⁴ Two-spirit people were identified through a variety of methods.¹⁵⁵ Generally, two-spirit people exercised a plethora of “spiritual roles in the community including serving as healers, ambassadors, teachers, matchmakers, parents to orphaned children, and mediators of disputes.”¹⁵⁶ Many two-spirit

144. *Id.*

145. Jeffrey Jacobi, *Two Spirits, Two Eras, Same Sex: For a Traditionalist Perspective on Native American Tribal Same-sex Marriage Policy*, 39 U. MICH. J.L. REFORM 823, 834 (2006) (citing WILL ROSCOE, CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE AMERICA, 7 (1998)).

146. Interview with Ken Tanner and Brian Gilley, *supra* note 4.

147. SUE-ELLEN JACOBS ET AL., TWO-SPIRIT PEOPLE: NATIVE AMERICAN GENDER IDENTITY, SEXUALITY, AND SPIRITUALITY, 2 (1997). Native American individuals invented this term in 1990 during the third Native American/first Nations gay and lesbian conference in Winnipeg. *Id.*

148. BRIAN Joseph GILLEY, BECOMING TWO-SPIRIT: GAY IDENTITY AND SOCIAL ACCEPTANCE IN INDIAN COUNTRY, 7-15 (2006); ROSCOE, *supra* note 145, at 7; TWO SPIRIT PEOPLE: AMERICAN INDIAN LESBIAN WOMEN AND GAY MEN, 23-25 (Lester Brown, ed., Routledge 1997) [hereinafter Brown].

149. GILLEY, *supra* note 148, at 11.

150. Brown, *supra* note 148, at xvii and xviii.

151. The Fred Martinez Project, *Two Spirits*, <http://www.twospirits.org/film.html> (last visited Nov. 11, 2008) (discussing the documentary *Two Spirits*) [hereinafter Fred Martinez Project].

152. *Id.* See also GILLEY, *supra* note 148, at 10; ROSCOE, *supra* note 145, at 8; Brown, *supra* note 148, at xxii.

153. See GILLEY, *supra* note 148, at 10.

154. *Id.* at 8.

155. See *id.* at 9.

156. Fred Martinez Project, *supra* note 151.

individuals would “adopt orphans . . . and raise them as their own.”¹⁵⁷ Gilley points out that “the structure that we would think of as a family [was] being replicated without regard to a person’s sexual organs or sexuality.”¹⁵⁸ These two-spirit individuals were “members of [the] community and [were] showing their usefulness to society and their behavior [reflected] values of [the] community.”¹⁵⁹ As illustrated, gender was a product of a person’s role in the community, and “who you had sex with was really more up to your preference.”¹⁶⁰ In other words, sexual orientation was a non-issue.¹⁶¹

One of the most important lessons we can take from the Native tradition of recognizing two-spirit people is the existence and importance of a third gender.¹⁶² This revelation has important applications for attempting to educate society about gender, affect society’s views about the goals of marriage, and encourage equality.¹⁶³ This revelation encourages equality by decreasing discrimination against people who do not necessarily fit into the non-existent dichotomy of either the male or female gender, and by diverting society’s focus from an individual’s sexual orientation to the important role that person plays in society.¹⁶⁴ Even though people known as two-spirit are a product of many tribes’ culture and religion, the nature of being two-spirit reflects the biological reality that gender involves many factors, including “brain sex” or “personal sexual identity,” which naturally manifests differently in every person.¹⁶⁵ As a result, Tribes like the Coquille Tribe can act to educate society about this biological reality and act as beacons of light to transform the narrow societal views encompassing gender, sexual orientation, and discrimination.¹⁶⁶ Even if a Tribe’s impetus for affecting change is a product of tribal traditional culture and religion—there are biological truths underlying these traditions.¹⁶⁷

157. Interview with Ken Tanner and Brian Gilley, *supra* note 4.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. See GILLEY, *supra* note 148, at 8.

163. See Greenberg, *supra* note 62, at 266-70.

164. *Id.*; see *supra* text accompanying notes 143, 153, 159-61.

165. See GILLEY, *supra* note 148, at 8-9 (Brian Gilley refers to the native tradition as “not employ[ing] the gender-binary” and to the two-spirit people as “a separate category of persons”).

166. See Greenberg, *supra* note 62, at 266-70, 275; Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 121 n.145 (2008).

167. See *supra* text accompanying notes 60-69.

B. Tribal Sovereignty

Tribal sovereignty represents a tribe's inherent authority to govern its people and territories using the "governmental and legal systems" each tribe creates or adopts for its own.¹⁶⁸ While the federal government has continually narrowed tribal sovereignty,¹⁶⁹ tribal governments retain their sovereignty and authority to self-govern to the extent not limited by Congress.¹⁷⁰ Congress limits tribal sovereignty by imposing federal laws that divest tribes of "plenary and exclusive power over their members and their territory."¹⁷¹ In spite of federal limitations, Tribes retain the power to form their own government, determine tribal membership requirements, legislate, and levy taxes.¹⁷² Among these, tribes have the "undisturbed" power to regulate domestic relations affecting tribal members.¹⁷³

Inherent tribal authority over domestic relations permits tribes to "decide matters of domestic and family law within Indian Country."¹⁷⁴ For example, tribes may make laws regarding the testate or intestate succession of a deceased tribal member's property.¹⁷⁵ The American Indian Probate Reform Act (AIPRA) restricts this power only to the extent that the succession laws concern "trust and

168. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, at xvii (Nell Jessup Newton et al. eds., 2005) (1940) [hereinafter COHEN'S] (stating "[s]elf-government in Indian country . . . has always been central to Indian people"). COHEN'S also states "[i]ndian tribes consistently have been recognized . . . as 'distinct, independent political communities,' qualified to exercise the powers of self government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." *Id.* § 4.01(1)(a) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); citing *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978)). In addition, COHEN'S states "[t]ribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice." *Id.*

169. COHEN'S, *supra* note 168, § 4.01(a)(1)205 ("The right of tribes to govern their members and territories flows from a preexisting sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States.").

170. Fletcher, *supra* note 27, at 66 & n.107 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 174 n.24 (1982) (quoting Earl Mettler, *A Unified Theory of Tribal Sovereignty*, 30 HASTINGS L.J. 89, 97 (1978))); *United States v. Wheeler*, 435 U.S. 313, 323 (1978); COHEN'S, *supra* note 168, § 4.01.

171. COHEN'S, *supra* note 168, § 4.01(1)(b) (limits on tribal sovereignty originate "from treaties and statutes [and any federally imposed] limitations must be clearly expressed according to the Indian law canons of construction.").

172. *Id.* §§ 4.01(2)(a)-(c).

173. *Id.* § 4.01(2)(c); Fletcher, *supra* note 27, at 59 (citing *United States v. Quiver*, 241 U.S. 602 (1916)).

174. Fletcher, *supra* note 27, at 54 (citing *Morton v. Mancari*, 417 U.S. 535, 554 (1974)).

175. COHEN'S, *supra* note 168, § 4.01(2)(c).

restricted lands.”¹⁷⁶ In addition, the United States Supreme Court recognizes tribal authority to grant valid marriage licenses and similarly dissolve tribal marriages.¹⁷⁷ Given this broad authority, tribes have the power to define marriage as they choose.¹⁷⁸ As such, even where a tribe adopts a definition of marriage contrary to the federal or state definitions, the tribe will prevail in defining marriage as it pertains to the tribe’s members.¹⁷⁹ In other words, “some Indian tribes could become islands of nonconforming law in an area where the American people appear to have spoken with finality.”¹⁸⁰

Of the 562 federally recognized tribes, only a few tribal legislatures have attempted to more narrowly define marriage and consider the possibility of legalizing or banning same-sex marriage.¹⁸¹ Among these, the Cherokee and Navajo tribes have amended their marriage laws to explicitly define marriage as a union available only to persons of the opposite sex (i.e. marriage between one man and one woman).¹⁸² The Coquille Tribe is the only tribe to take legislative

176. 71 Fed. Reg. 45174 (Aug. 8, 2006) (to be codified at 43 C.F.R. pts. 4, 30); 25 U.S.C. § 2201(4) (2006). The AIPRA defines “trust or restricted lands” as:

lands, title to which is held by the United States in trust for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation; and . . . “trust or restricted interest in land” or “trust or restricted interest in a parcel of land” means an interest in land, the title to which interest is held in trust by the United States for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation.

25 U.S.C. § 2201(4).

177. COHEN’S, *supra* note 168, § 4.01(2)(c) (citing *Nofire v. United States*, 164 U.S. 657 (1897)).

178. *Id.*

179. Fletcher, *supra* note 27, at 59-60.

180. *Id.* Matthew Fletcher is talking about a constitutional amendment to ban same-sex marriage. *Id.* He comments that even with the passage of a constitutional amendment, tribes would retain their inherent authority to regulate domestic relations. *Id.* Although Mr. Fletcher was referring to an “island of nonconforming law” in a national context, it also applies in a state context where states refuse to recognize and prohibit same-sex marriage.

181. 71 Fed. Reg. at 45174.

182. CHEROKEE CODE § 50-1. The code states:

The institution of marriage between a man and a woman is recognized in the territory of the Eastern Band and shall be officially solemnized by any ordained minister or any judicial official of the Cherokee court. For a marriage to be legally recognized, a couple seeking to marry shall obtain a marriage license from, and record it with, the register of deeds in their county of residence. Alternatively, members of the Eastern Band may elect to obtain a marriage license from, and record it with, the Cherokee court.

action to allow same-sex marriage.¹⁸³ On May 8, 2008, the Coquille Indian Tribe adopted a Marriage and Domestic Partnership ordinance.¹⁸⁴ The next part of this article explores the impact of that ordinance.

III. CASE STUDY OF THE COQUILLE INDIAN TRIBE AND OREGON DOMESTIC PARTNERSHIPS

Same-sex couples married by the Coquille Tribe are in a unique position to be recognized as “married” by the Coquille Tribe under the new Coquille marriage ordinance,¹⁸⁵ receive extensive healthcare benefits from the Coquille Tribe,¹⁸⁶ and receive all state statutory spousal rights granted to opposite-sex spouses in Oregon under the Oregon Family Fairness Act.¹⁸⁷ Even though, to an extent, Coquille married same-sex couples are protected by Coquille law and Oregon state law, obstacles remain that result from societal discrimination against same-sex couples. In response, same-sex couples can take a proactive approach to guard against these inequalities and protect each other during the end of life events of one spouse.

A. Coquille Ordinance

The Coquille Tribe’s marriage ordinance recognizes that the right to marry is a fundamental right regardless of biological sex.¹⁸⁸ In approving and adopting this ordinance, the Coquille Tribe stated that recognizing “certain” domestic relationships regardless of biological sex is “essential” to preserve the “political integrity, economic security, and the health and welfare” of the Coquille

Id.

183. Email from Brian Gilley, *supra* note 3. Note that some Tribes may practice same-sex marriage without having a formal written ordinance or regulation authorizing such a practice; however, the existence of these Tribes has not yet been discovered.

184. CITC § 740.

185. *Id.*

186. *Infra* text accompanying note 228.

187. *Infra* text accompanying notes 208-11.

188. CITC § 740.010(3). The code defines marriage as:

[A] formal and express civil contract entered into between two persons, regardless of their sex, who are at least 18 years of age, who are otherwise capable of entering a Marriage or a Domestic Partnership (as provided below), and at least one of whom is a member of the Coquille Indian Tribe.

Id.

community and its recognized members.¹⁸⁹ The Tribe exemplifies the meaning of “political integrity” by adopting a definition of marriage that intelligently recognizes the wholly arbitrary requirement that the parties be of opposite sex—most assuredly in the face of national, Native and non-Native, opposition to same-sex marriage.¹⁹⁰

While the Tribe broadly defines domestic relationships, it does place a few eligibility requirements on the fundamental right to marry.¹⁹¹ The Tribe permits marriage where the couple meets three requirements.¹⁹² First, at least one partner must be a member of the Coquille Indian Tribe at the time the marriage license is issued and at the time the marriage is solemnized.¹⁹³ Second, both partners must be at least eighteen years of age at the time of marriage.¹⁹⁴ Third, the partners must not be related by blood, “whether of the whole or half blood.”¹⁹⁵ Specifically, the couple must not be “first cousins or any nearer of kin,” unless they are cousins by adoption only.¹⁹⁶ In the situation where the partners are cousins by adoption only, the Tribe does not prohibit their marriage provided the other two requirements are met.¹⁹⁷ The Tribe specifies that even where a couple meets the above three requirements, the marriage may be void or voidable in some situations.¹⁹⁸

The Tribe prohibits marriages where either party to the marriage has a current spouse or domestic partner living at the time of the marriage.¹⁹⁹ This would potentially exclude those instances where a couple dissolved their previous marriage or domestic partnership prior to the marriage in question.²⁰⁰ The Tribe also has the power to annul marriages where one of the partners is incapable of making a marriage contract because of insufficient capacity due to minority or insufficient ability to understand the nature of the contract.²⁰¹ Further, the Tribe may annul marriages where either party procured consent of the other by “fraud or force.”²⁰² In these instances where a marriage contract is voidable, any action by the Tribe to annul a marriage does not relieve the partners of a “married” status

189. *Id.* at 740.010(1)-(2).

190. Interview with Ken Tanner and Brian Gilley, *supra* note 4.

191. CITC §§ 740.010(2), 740.030, 740.100.

192. CITC § 740.100.

193. *Id.*

194. CITC § 740.100(2).

195. CITC § 740.100(3).

196. *Id.*

197. *Id.*

198. CITC §§ 740.210, 740.220.

199. CITC § 740.210.

200. CITC § 740.500.

201. CITC § 740.220.

202. *Id.*

for purposes of spousal support and property settlement as required by Tribal law.²⁰³

The Tribe also provides that it will recognize some marriages and domestic partnerships from other jurisdictions for the purpose of providing Tribal benefits.²⁰⁴ The Tribe limits this recognition to marriages and domestic partnerships where one of the parties is a member of the Coquille Tribe, both parties are eighteen (18) or older, the parties are not related by blood (excluding first cousins by adoption), providing benefits is not prohibited by federal law, and the parties present “adequate” proof of their marriage or domestic partnership.²⁰⁵ While the purpose of recognizing marriages and domestic partnerships involving a Coquille Tribal member is to provide spousal benefits, this ordinance does not limit the Tribal Council’s authority to alter or eliminate the benefits available to spouses or domestic partners of Coquille members.²⁰⁶

Just as the Coquille Tribe is making an effort to resist discrimination against same-sex couples in the community, Oregon is taking steps to recognize the “lasting, committed, caring and faithful relationships” formed by many “Gay and Lesbian Oregonians.”²⁰⁷

B. Oregon Family Fairness Act: Domestic Partnerships

Oregon recently enacted a Domestic Partnership law under the Oregon Family Fairness Act effective February 1, 2008.²⁰⁸ The legislature recognized that

203. *Id.*

204. CITC § 740.030.

205. CITC § 740.030(1)(a)-(e).

206. CITC § 740.030(3).

207. H.B. 2007 § 2(3), 2007 Leg., 74th Sess. (Or. 2007).

208. The following describes the legislative history of the Oregon Family Fairness Act:

Oregon’s new domestic partner law consists of two separate laws: House Bill 2007 and Senate Bill 2. House Bill 2007, also known as the Oregon Family Fairness Act (OFFA), allows qualified same-sex couples to register their domestic partnership in Oregon and, by doing so, affords the registered domestic partners the same rights and benefits granted to spouses under Oregon law. OFFA’s original effective date of January 1, 2008, was postponed pending the outcome of a legal challenge; however, a federal judge upheld the legislation on February 1, 2008, allowing same-sex couples to register their domestic partnership pursuant to OFFA as of February 4, 2008. Senate Bill 2, also known as the Oregon Equality Act, prohibits discrimination against persons based on sexual orientation, including discrimination in compensation or in terms, conditions or privileges of employment. The Oregon Equality Act became effective on January 1, 2008.

same-sex couples in Oregon have relationships, raise children, and participate in the community just as opposite-sex couples do “despite long-standing social and economic discrimination.”²⁰⁹ Accordingly, the legislature conceded that “[w]ithout the ability to obtain some form of legal status for their relationships, same-sex couples face numerous obstacles and hardships in attempting to secure rights, benefits and responsibilities for themselves and their children.”²¹⁰ In furtherance of Oregon’s interest in promoting “stable and lasting families” regardless of biological sex, the Oregon Family Fairness Act extends benefits, protections, and responsibilities to committed same-sex partners, comparable to those benefits received by married spouses, when those same-sex couples file for domestic partnership status.²¹¹

C. Relationship of the Oregon Family Fairness Act and Same-Sex Couples Married by the Coquille Indian Tribe

What does it mean for same-sex couples that obtain a marriage license from the Coquille Tribe? These couples are in a unique position because of their ability to obtain benefits under the Coquille Indian Tribe, and in addition, obtain benefits as Oregon residents.²¹² Same-sex couples that obtain a marriage license from the Coquille Indian Tribe assume the respected status of “married.”²¹³ In addition, if these couples apply for domestic partnership status under Oregon law, they are eligible for spousal benefits under Tribal law and Oregon law.²¹⁴ In contrast, other Oregonian same-sex couples that apply for domestic partnership status under the Oregon Family Fairness Act will not be considered “married” but domestic partners.²¹⁵ While these couples will enjoy all the benefits afforded to married spouses under state law, they are denied the equal recognition of being married.²¹⁶ Though the inequality suffered by couples married by the Coquille Tribe is arguably less than those united by a domestic partnership status under Oregon law, neither the Coquille couple nor the Oregon couple will be eligible for federal benefits such as Social Security.²¹⁷ If and when other Tribes decide to

The ODS Companies, Oregon Family Fairness Act, http://www.odscompanies.com/employers/news/080527_offa.shtml (last visited Mar. 12, 2009).

209. OR. REV. STAT. § 106, Domestic Partnerships note § 2(3) (2007).

210. *Id.*

211. *Id.* §§2(4)-(5).

212. CITC § 740.010–740.100 (2008); OR. REV. STAT. § 106, Domestic Partnerships note § 2(3).

213. CITC § 740.010(3)(b).

214. *See supra* text accompanying notes 208-11.

215. OR. CONST. art. XV, § 5a.

216. *Id.*

217. 1 U.S.C. § 7 (2000).

enact laws making marriage available to couples regardless of biological sex, the result may differ depending on the state marriage/domestic partnership laws where the Tribe is located. Oregon, like California, enacted a domestic partnership law extending all statutorily created spousal rights afforded to married spouses to domestic partners.²¹⁸ Whereas, same-sex couples married by a Tribe in Oklahoma would not enjoy any state or federal benefits; these couples would be reliant on the Tribe's extension of benefits alone.²¹⁹

VI. PRACTICAL APPROACH TO END OF LIFE, ESTATE PLANNING, AND PROBATE ISSUES FOR SAME SEX COUPLES MARRIED BY THE COQUILLE TRIBE: RIGHTS AND BENEFITS, AND OTHER SOLUTIONS

Before delving into the specific rights and benefits accorded to same-sex couples married by the Coquille Tribe and registered as domestic partners under Oregon law, it is important to discuss issues concerning jurisdiction. Specifically, what law applies to couples married by the Coquille Tribe who are also residents of Oregon? The answer depends on the specific legal issue in question (i.e. probate of non-trust property, probate of trust property, guardianship, organ donation, claiming spouse's remains, homestead and spousal allowance rights, and health insurance). Where the Coquille Tribe does not have laws in a particular area, couples married by the Coquille Tribe who reside in Oregon are Oregon residents and as a result receive the protections of Oregon law.²²⁰ First, the Coquille Tribe does not have a probate code or rules regarding inheritance of either trust or non-trust property.²²¹ Probate of non-trust property diverts to Oregon's state law, while probate of trust property diverts to the American Indian Probate Reform Act (AIPRA).²²² The Coquille Tribe and its members no longer possess Indian allotments, and as such the AIPRA does not apply.²²³ The Coquille Tribe has laws regarding guardianships and conservatorships for adults who are

218. OR. REV. STAT. § 106, Domestic Partnerships note §§ 9(1)-(11).

219. OKLA. STAT. ANN. tit. 43, § 3.1 (2001). In addition, Oklahoma does not have any domestic partnership, civil union, or reciprocal beneficiary laws at the state or municipal level.

220. See OR. REV. STAT. § 106, Domestic Partnerships note §§ 2(1), (3).

221. E-mail from Melissa Cribbins, Representative of the Coquille Tribe, to Julie Bushyhead, Student at the University of Tulsa College of Law (Nov. 10, 2008) (copy on file with Author) [hereinafter Email from Melissa Cribbins].

222. Douglas Nash & Cecelia Burke, *The Changing Landscape of Indian Estate Planning and Probate: The American Indian Probate Reform Act*, SEATTLE J. FOR SOC. JUST. 121, 133 (2006).

223. Email from Melissa Cribbins, *supra* note 221; Nash & Burke, *supra* note 222, at 133.

incapacitated.²²⁴ Oregon law applies to issues regarding organ donation,²²⁵ disposition of human remains,²²⁶ spousal allowance, and homestead rights of non-trust property.²²⁷ Finally, the Coquille Tribe extends health benefits to non-Indian spouses married to Coquille Tribe members.²²⁸

While decisions surrounding the failing health and death of a spouse are unpleasant to confront, taking a preemptive approach may abate some problematic issues.²²⁹ Such an approach acts to promote compliance with a dying spouse's wishes and protect a decedent's surviving spouse.²³⁰ There are two estate-planning tools that are extremely important for couples to consider in preparing for the failing health and/or death of their spouse.²³¹ These include the living will (advance directive), and a will.²³² These tools will discuss such spousal rights as

224. CITC §§ 375.001-375.950 (2006).

225. OR. REV. STAT. § 97.965 (2007).

226. *Id.* § 97.130 (2007). In addition to Oregon granting surviving spouses the right to designate their decedent spouse's burial arrangements, the Coquille Tribe offers benefits to surviving spouses for burials. Email from Melissa Cribbins, *supra* note 221.

227. OR. REV. STAT. § 652.190 (2007).

228. The Tribe provides health benefits to non-Indian spouses, regardless of biological sex. These benefits activate after one year of marriage. These benefits apply to couples that live within the five counties surrounding Coos County. If however the couples move away from the area, they would be eligible for private insurance paid for by the Tribe. This Tribal benefit is vitally important for same-sex couples especially where employers or other insurance providers may refuse to recognize a same-sex spouse as a "spouse" for purposes of health insurance benefits. Interview with Ken Tanner and Brian Gilley, *supra* note 4.

229. See Patience Crozier, *Nuts and Bolts: Estate Planning and Family Law Considerations for Same-Sex Families*, 30 W. NEW ENG. L. REV. 751, 752 (2008).

230. *See id.* at 752, 759.

231. *Id.* at 756, 759.

232. *Id.* While a durable power of attorney might be appropriate as well, Oregon's advance directive already includes a durable power for health care (health care proxy). However, where one spouse becomes incapacitated and is unable to manage his/her property, the incapacitated spouse may want to designate in advance that his/her spouse manage the property. Under Oregon law, someone other than the spouse could petition for guardianship/conservatorship and there is no priority rule stating that Oregon must give priority to a person nominated in the durable power of attorney. OR. REV. STAT. § 125.305 (2007). However, in the event the court takes the spouse's nomination into consideration, the spouse should execute a durable power of attorney naming the other spouse as the agent over the property, and nominating the spouse as the preferred guardian.

In terms of will alternatives, a trust is the safest way to protect the decedent's assets from claims where the decedent's family is particularly "hostile" to the partners' same-sex relationship. Erica Bell, *Estate Planning for Domestic Partners and Non-Traditional Families*, in TAX LAW AND ESTATE PLANNING COURSE HANDBOOK SERIES 879-920 (Practising Law Institute ed. 2008). However, the necessity of a trust to protect surviving same-sex partners/spouses diminishes in Oregon because Oregon law treats domestic partners as spouses for purposes of intestate succession. Therefore, even if the decedent's family contested the validity of the will, the surviving partner as the surviving spouse

the right to make medical decisions, priority for a guardianship/conservatorship, right to make anatomical gifts (organ donation), right to a forced share election against a will if disinherited, and right to a share of intestate succession where the decedent spouse dies intestate. The following discussion will focus on the two estate planning tools as they apply to same-sex couples married by the Coquille Tribe and recognized as domestic partners under Oregon law. The discussion will consider the impact of using and not using these tools. Finally, the discussion will confront other rights and benefits not provided for within these two tools such as medical benefits to spouses, spousal allowance and homestead rights, and financial support for a surviving spouse. While the issues above do not explore all the estate planning tools available to same-sex couples, this discussion serves as an introduction to the most critical estate planning issues that face same-sex couples in Oregon.

In Oregon, a living will, or advance directive, has two main goals: (1) to appoint a durable power of attorney to make health care decisions where the principle is unable²³³ and (2) to dictate health care instructions concerning life-sustaining treatment.²³⁴ When a partner/spouse is listed as the health care representative in the first provision, there is no concern as to whether or not same-sex spouses would be entitled to make those decisions for his/her same-sex domestic partner under Oregon law.²³⁵ However, even where a spouse fails to execute an advance directive prior to hospitalization, the other spouse has priority to make “health care decisions,” including decisions regarding life-sustaining treatment, as a “health care representative” for his/her spouse (unless a guardian other than the spouse has been appointed).²³⁶ In accordance with the Oregon

would take priority over the decedent’s other family (other than the decedent’s issue) in receiving a portion or all of the decedent’s intestate estate.

233. OR. REV. STAT. § 127.510 (2007).

234. *Id.* § 127.531 (2007).

235. *Id.* § 127.635; *id.* § 127.505. However, as health-care proxy statutes differ in other states, there is a concern about whether or not the spouse would have the authority to make these decisions under other states’ law if for instance a spouse was injured outside of Oregon and treated in another state. Therefore, if a couple regularly travels to another state, they should consider executing an additional and consistent health-care proxy in that state. Crozier, *supra* note 229, at 755. In addition to designating a health care proxy in an advance directive (living will), a couple should also consider executing a stand-alone HIPPA waiver used to ensure that a partner/spouse has access to the other spouse’s medical information. *Id.* at 756. For more on this estate-planning tool, see *id.*

236. OR. REV. STAT. § 127.635; *id.* § 127.505. At first glance, § 127.635 seems to give a spouse only rights to make decisions regarding life-sustaining treatment. In fact, this is the statute’s primary goal, however section 127.635(2) states that a health care representative may be appointed in the absence of an advance directive. Based on the definition of “incapable” in section 127.505(13), a Court may appoint a health care representative where “in the opinion of the principle’s attending physician, a principle lacks the ability to make and communicate health care decisions to health care providers.” Under the definition of “health care decisions,” and “health care,” defined in sections 125.505(7)

Family Fairness Act, a domestic partner has the same right as a spouse to make medical decisions for his/her partner.²³⁷ However, failure to execute an advance directive could foster several problems for the non-hospitalized spouse.²³⁸

Without an advance directive, the hospitalized spouse's desires about life sustaining treatment may be unknown or debated.²³⁹ Although a domestic partner is protected as a spouse to make decisions about whether to continue or cease life-sustaining treatment, this decision is unconscionably traumatic for a partner/spouse.²⁴⁰ In addition, where there is no advance directive appointing a health care representative, the family of the hospitalized spouse may attempt to petition for guardianship, especially if the family disapproves of the couple's same-sex relationships, and if successful, have the ability to make health care decisions including life-sustaining decisions without consulting the spouse.²⁴¹ The Coquille Tribe specifies an order of priority for appointing a guardian/conservator.²⁴² Unlike the Uniform Guardianship and Protective Proceedings Act, which gives a *spouse* priority for letters of guardianship where the alleged incapacitated individual has not previously nominated a guardian or appointed a health care proxy in durable power of attorney, the Coquille Tribe grants priority to an incapacitated person's parent.²⁴³ The Coquille Tribal Court has the authority to appoint someone other than the parent(s) upon a showing that this preference should be rebutted.²⁴⁴ The Court may appoint a "conservator and/or guardian who is most suitable and willing to serve."²⁴⁵ In making this

and 125.505(8) these decisions concern consent, refusal of consent, or withholding or withdrawal of consent to health care which includes "diagnosis, treatment or care of disease, injury and congenital or degenerative conditions, including the use, maintenance, withdrawal or withholding of life-sustaining procedures and the use, maintenance, withdrawal or withholding of artificially administered nutrition and hydration." Therefore, based on reading section 127.635 in conjunction with section 127.505, it would appear that a spouse has the authority to make all medical decisions for his/her spouse where that spouse is unable. If the hospitalized spouse did not execute an advance directive, a Court will evaluate whether or not the principle is incapable and appoint a health care representative in the order of priority listed in section 127.635. However, if a principle is incapable (that he/she is unexpectedly faced with a decision regarding life-sustaining treatment, and he/she is incapable of making the decision pursuant to the definition in section 127.505), and there is no health care representative, or guardian, the spouse has priority in making the life-sustaining decision.

237. OR. REV. STAT. § 106, Domestic Partnerships note § 9.

238. *Infra* text accompanying notes 233-37.

239. *See* Crozier, *supra* note 229, at 756.

240. OR. REV. STAT. § 127.635.

241. *Id.*; *id.* §§ 125.305, 125.315(3).

242. CITC § 375.300.

243. Unif. Guardianship & Protective Proc. Act § 5-310, 8II U.L.A. 362-63 (Supp. 2008).

244. CITC § 375.300.

245. *Id.*

determination, the Court may consider factors such as “the relationship by blood or marriage of the proposed conservator and/or guardian of the proposed ward.”²⁴⁶ Therefore, the Court could choose to appoint a person’s parent(s) over a spouse, or vice versa.²⁴⁷ In an effort to prevent confusion, disputes, and costly legal proceedings, executing an advance directive appointing a health care representative, and/or a durable power of attorney nominating a guardian, are the most effective ways to ensure that a same-sex spouse has the authority to make all medical decisions for the other spouse where that person is unable.²⁴⁸

Although Oregon’s domestic partnership law, pursuant to the Oregon Family Fairness Act, provides the same benefits to domestic partners as it does to “married” spouses for purposes of intestate succession and priority in decision-making, partners should execute wills in an effort to give specific instruction as to the disposition of property upon his/her death, his/her wishes for making anatomical gifts, and his/her funeral or burial wishes.²⁴⁹ When the testator makes these decisions in advance, the testator protects his/her partner and family from unnecessary disputes concerning the decedent’s wishes.²⁵⁰ The following sections discussing descent and distribution will be separated into two categories: non-trust (allotment) property under Oregon Probate Law and trust (allotment) property under the American Indian Probate Reform Act (AIPRA).²⁵¹

As stated earlier, the Coquille Tribe does not have a probate code.²⁵² As such, Oregon law applies to the disposition of non-trust property upon a person’s death, where the person was domiciled in Oregon at the time his/her death.²⁵³ Where a testator elects to dispose of his/her property outside the general progression of intestate succession, or with more specificity, the testator may execute a will as long as the will does not disinherit his/her spouse.²⁵⁴ As a common law state, Oregon law permits a spouse to take an elective forced share against the will in the amount of one-fourth of the decedent’s net estate.²⁵⁵ A spouse might elect to take a forced share where one-fourth of the decedent’s net estate would be more than the will devised, if anything.²⁵⁶

In determining whether or not to execute a will, an individual should think about his/her decisions regarding anatomical gifts and burial wishes,

246. *Id.*

247. *Id.*

248. *Supra* text accompanying notes 239-47.

249. Crozier, *supra* note 229, at 759.

250. *See id.*

251. The use of “surviving spouse” in the following sections is meant to refer to couples married under Coquille law and registered as domestic partners under Oregon law; domestic partners under Oregon law; and married spouses under Oregon law.

252. *Supra* text accompanying note 221.

253. OR. REV. STAT. § 114.105 (2007).

254. *Id.*

255. *See id.*

256. *Id.* § 114.105(2).

especially if those wishes are specific.²⁵⁷ Oregon law provides several ways for a person to make an anatomical gift: through indicating on a driver's license, executing a will, communicating to two adults during terminal illness or injury, etc.²⁵⁸ However, where an individual has specific instructions concerning what organs to donate, a will provision may more effectively serve the spouse's wishes.²⁵⁹ Moreover, in instances where a spouse passes without indicating his/her desire to make an anatomical gift, a surviving spouse has priority over everyone in making this decision where the deceased spouse did not have a power of attorney (health care representative) other than the spouse.²⁶⁰

Second, a spouse should consider designating his/her burial wishes prior to death to avoid confusion and family disputes after his/her death.²⁶¹ Oregon law specifies that an individual may direct the disposition of his/her remains by executing a "written signed instrument" or by making planned arrangements with a funeral service.²⁶² If a spouse fails to specify his/her wishes prior to death, the surviving spouse shall have first priority to designate the disposition of the deceased spouse's remains by executing a written instrument.²⁶³

In the event a spouse dies intestate (i.e. without a will), Oregon law will treat partners as spouses for purposes of intestate succession.²⁶⁴ Oregon's law permits a surviving spouse to inherit all of the net intestate estate where the decedent did not have issue (children).²⁶⁵ If instead the decedent had a surviving spouse and child(ren), the amount the surviving spouse receives depends on whether or not the decedent's child(ren) are also the surviving spouses child(ren).²⁶⁶ If the child(ren) are also the surviving spouse's child(ren), the spouse will receive all of the net intestate estate.²⁶⁷ On the other hand, if the decedent's child(ren) are not the surviving spouse's child(ren), then the surviving spouse will only receive one half of the net intestate estate.²⁶⁸ The question of

257. Crozier, *supra* note 229, at 759.

258. OR. REV. STAT. § 97.957 (2007).

259. Bell, *supra* note 232, at 899.

260. OR. REV. STAT. § 97.955 (2007). In all likelihood, the spouse would probably occupy the position of health care representative for his/her spouse/partner.

261. In addition, it is a good idea to name the surviving spouse as executor of the estate, expressly appoint that person to make funeral arrangements, make explicit instructions concerning cremation or anatomical donation, and execute a second separate written designation giving authorization to the partner to make funeral arrangements for the deceased partner/spouse. Also, do not forget to put contingency plans such as nominating an alternate executor and/or person to make funeral arrangements. Bell, *supra* note 232, at 899.

262. OR. REV. STAT. § 97.130 (2007).

263. *Id.*

264. *Id.* § 106, Domestic Partnerships note § 9.

265. *Id.* § 112.035 (2007).

266. *Id.* § 112.025(1) (2007).

267. *Id.* § 112.025(1).

268. OR. REV. STAT. § 112.025(2).

when a child is also the surviving spouse's child is particularly relevant and potentially problematic for same-sex couples in determining the amount of intestate succession due a surviving spouse.

Through adoption, artificial insemination, etc., same-sex couples may bear and raise children just like any other couple.²⁶⁹ Under Oregon law, adopted children are considered children of the adoptive parents for purposes of intestate succession.²⁷⁰ In terms of artificial insemination, Oregon law states,

[T]he relationship, rights and obligations between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination.²⁷¹

This definition may be problematic even with the application of the Oregon Family Fairness Act.²⁷² The typical approach to artificial insemination in same-sex (specifically female) couples would consider the carrying woman as the parent of the child to the exclusion of the same-sex partner.²⁷³ In this circumstance, the partner would be forced to adopt the child.²⁷⁴ However, the Oregon Family Fairness Act extends rights afforded to an individual because he/she is married to domestic partners as if they were married.²⁷⁵ Arguably, the statute above does not give rights to the husband solely because he is married.²⁷⁶ The statute states that a husband shall have the same rights as if the child had been "naturally and legitimately conceived" by the wife and husband.²⁷⁷ Obviously, this poses a problem for same-sex couples. So the question remains: will a spouse of a same-sex mother who bears a child through artificial insemination have the same "responsibilities, rights and obligations" as a husband would in the same situation particularly for purposes of determining a decedent's and surviving spouse's issue for intestate succession?²⁷⁸ The Massachusetts Supreme Court suggests that a

269. Nastich, *supra* note 88, at 159.

270. OR. REV. STAT. § 112.175 (2007).

271. *Id.* § 109.243.

272. *Infra* text accompanying notes 273-79.

273. Crozier, *supra* note 229, at 768.

274. *Id.*

275. OR. REV. STAT. § 106, Domestic Partnerships note § 9.

276. *See id.* § 109.243.

277. *Id.*

278. Deborah L. Forman suggests, in analyzing Massachusetts law which contains similar language of parental rights for husbands,

If Andrea and Sarah lived in Massachusetts and were to marry there, Sarah would enjoy the same parental rights as a husband in her position

child born to same-sex parents through artificial insemination is a legitimate child of the carrying mother and her partner, just as a husband would be with his wife.²⁷⁹

Regardless of whether the decedent spouse executed a will before his/her death, the surviving spouse may still be entitled to benefits such as wage benefits, spousal allowance, and homestead rights.²⁸⁰ First, a surviving spouse has a right to recover wages earned by his/her deceased spouse but not yet paid for, in an amount not exceeding \$10,000.²⁸¹ Second, a surviving spouse has a right to spousal allowance, which is a benefit granted by a presiding probate court when the exempt property retained by a surviving spouse is insufficient for his/her care and maintenance.²⁸² Finally, a spouse retains "probate homestead" rights to possess the (non-trust) property until his/her death without threat that the homestead will be sold to satisfy a lien or judgment against it.²⁸³

As discussed earlier, the Coquille Tribe and its members no longer possess federal "trust and restricted lands."²⁸⁴ As a result, the AIPRA does not apply to the descent and distribution of property owned by members of the Coquille Tribe.²⁸⁵ However, the AIPRA may find its way into the analysis of same-sex couple spousal rights when other tribes, whose members own "trust and restricted lands," pass laws allowing same-sex marriage. In these cases, the AIPRA, as an Act of Congress,²⁸⁶ discriminates against same-sex spouses by

would. Massachusetts, like most states, provides that a husband who consents to his wife's artificial insemination becomes for all purposes, the father of any children resulting from the procedure. Thus, Sarah would be considered Madeleine's legal parent and would have a right to seek custody and visitation in the event of a divorce.

Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1, 9 (2004).

279. MASS. GEN. LAWS ANN. ch 46, § 4B (1994); *Goodridge v. Mass. Dep't of Pub. Health*, 798 N.E.2d 941, 956 (Mass. 2003).

280. *Infra* text accompanying notes 281-83.

281. OR. REV. STAT. § 652.190 (2007).

282. *Id.* § 18.395 (2007); *U.S. Nat'l Bank of Portland v. United States*, 188 F. Supp. 332 (D. Or. 1960).

283. *Id.* § 18.395; *Benedict v. Lee*, 256 P.2d 507 (Or. 1953).

284. Email from Melissa Cribbins, *supra* note 221.

285. *See id.*

286. 1 U.S.C. § 7 (2000).

In determining the meaning of *any Act of Congress*, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Id. (emphasis added).

employing the federal definition of spouse for intestate succession.²⁸⁷ Moreover, the AIPRA's discrimination against same-sex married couples represents the larger federal inequality created by the Defense of Marriage Act (DOMA).²⁸⁸

There are over one thousand federal laws that extend benefits to spouses²⁸⁹—spouses that fall under the definition: “only to a person of the opposite sex who is a husband or a wife.”²⁹⁰ Refusal of some benefits such as Social Security and Veterans benefits are among the most devastating for same-sex couples, especially lower-income same-sex couples that may not have established sufficient savings for their elder years.²⁹¹ In response, same-sex couples should take a proactive role to protect each other in the event of one's death.²⁹² This could include purchasing life insurance plans, modestly spending

287. 25 U.S.C. § 2206(a)(2). The AIPRA specifies that a testator may devise “trust and restricted land” to an “Indian” or an “Indian Tribe” that has jurisdiction over the land. *Id.* § 2206(b)(1)(B). This devise would transfer the land with a “trust or restricted status.” *Id.* Alternatively, a testator may devise his/her interest in the “trust and restricted land” to someone other than an “Indian” or the “Tribe” having jurisdiction if the devise is only for a life-estate in the property. *Id.* § 2206(b)(2). In this latter situation, a testator could transfer a life-estate in the land to his/her “non-Indian” spouse. Moreover, the statute does not limit the transfer of a life-estate to spouses. In other words, a testator could transfer a life-estate in the land to his/her “non-Indian” same-sex spouse, as this person would qualify as “any person” under the provision. If the deceased spouse did not execute a will regarding the disposition of “trust or restricted property, any trust or restricted interest in land or interest in trust personality” is distributed according to the AIPRA rules for descent and distribution. *Id.* § 2206(a)(1). Under the AIPRA, where the decedent does not have any eligible heirs, the surviving spouse receives “all of the trust personality of the decedent and a life-estate without regard to waste in the trust or restricted lands of the decedent.” *Id.* § 2206(a)(2)(A)(iv). However, where the surviving spouse is a non-Indian, there are some exceptions concerning trust personality. *Id.* § 2206(b). As shown earlier, a same-sex surviving spouse will not receive the benefits of intestate succession. Accordingly, a same-sex couple should consider executing a will that devises a life-estate to the surviving spouse. Without this protective measure, the AIPRA will not protect a same-sex surviving spouse by granting a “probate-homestead” and allowing the spouse to continue residing on the “trust and restricted land” for the remainder of his/her life. The AIPRA's discrimination against same-sex married couples represents the larger federal inequality created by the Defense of Marriage Act (DOMA).

288. 1 U.S.C. § 7.

289. Jacobi, *supra* note 145, at 832.

290. 1 U.S.C. § 7.

291. LAWRENCE A. FROLIK & ALISON MCCHRISTAL BARNES, ELDER LAW: CASES AND MATERIALS 151 (2007) “Personal savings, Social Security, and employer-sponsored benefits are sometimes referred to as the ‘three-legged stool’ of retirement income.” *Id.* at 160. Unfortunately, in 2005 the average percent of disposable income that Americans saved was almost zero. *Id.*

292. Crozier, *supra* note 229, at 752.

and aggressively saving, and researching employers that offer employee benefits to spouses/partners regardless of biological sex, etc.²⁹³

V. CONCLUSION

Part I of the article illustrated that marriage is desirable as a symbolic institution recognizing a couple's "deeply personal commitment,"²⁹⁴ and as an institution providing spousal rights and imposing spousal obligations. However, the assumptions upon which many same-sex marriage opponents rely, in supporting marriage as a superior union reserved for opposite-sex couples, invite criticism due to either a lack of conclusive evidence or a blatant misstatement of the truth. Of these: the clearest is the gender assumption. The fact that gender does not always fit into dichotomous gender categories frustrates many of the propositions favoring marriage as a union between only a man and a woman. Second, "responsible procreation" is not dependent on marriage or heterosexual parents, nor is it guaranteed because a parenting couple is heterosexual and married. Studies reveal that it is the quality of parenting, not sexual orientation or marital status, which has an impact on the "adjustment, development, and psychological well-being of children."²⁹⁵ Finally, the policy goals of encouraging permanent, monogamous, and heterosexual²⁹⁶ unions are not necessarily achieved by limiting marriage to opposite-sex couples.

Part II presented an important lesson—the existence of a third gender. A historic native tradition recognizing two-spirit people embraces the biological reality that not everyone fits into the inflexible gender categories of male and female. This lesson serves to educate society about gender and the role anatomy and physiology play in defining a person's gender identity and sexual orientation. If nothing more, this lesson illuminates one simple truth: we are people first. If society views gender and sexual orientation as a biological reality, and something other than deviance, society might find enlightenment concerning the arbitrary prejudice against people falling outside the dichotomous gender categories and, similarly, couples described as homosexual. In fact, society might find, as

293. For a discussion of how spousal benefits are impacted by ERISA and the application of DOMA, see Janice Kay McClendon, *A Small Step Forward in the Last Civil Rights Battle: Extending Benefits Under Federally Regulated Employee Benefit Plans to Same-Sex Couples*, 36 N.M. L. REV. 99 (2006); Jill Louise Ripke, *Employee ERISA Benefits after Goodridge v. Public Health: Do Same-Sex Marriages Qualify as Legal Marriages under Employer Created ERISA Plans?*, 31 J. CORP. L. 267 (2005).

294. *Goodridge v. Mass. Dep't of Pub. Health*, 798 N.E.2d 941, 954-55 (Mass. 2003).

295. Patterson, *supra* note 80, at 243.

296. Note that the condition or lifestyle of heterosexual orientation relies on the gender assumption above: that all people fit into the male and female gender categories. The condition of being heterosexual implies opposites: male as opposite to female. This line may not be so clearly defined in all instances.

evidence supports, that gender and sexual orientation do not threaten the institution of marriage—an institution that “is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.”²⁹⁷

Part III examined a practical approach for Coquille same-sex couples dealing with spousal rights, related to end-of-life and estate planning decisions, in a system that is undoubtedly resistant to change. These couples are in a unique position to receive equal and respected recognition as “married” by the Coquille Tribe, extensive health benefits provided by the Coquille Tribe, and extensive spousal benefits provided by the Oregon Family Fairness Act if those couples register as domestic partners. Unfortunately, Oregon’s constitutional ban against same-sex marriage prevents most Oregon same-sex couples from obtaining the status of “married”—a fundamental right discriminately put on a pedestal as a privilege for opposite-sex couples in Oregon.²⁹⁸

How does the Coquille’s action to embrace loving, committed relationships regardless of a couple’s biological sex affect same-sex couples in the United States? Brian Gilley suggests that it is incorrect for advocates to “[appropriate] what the Coquille Tribe has done as a political statement of gay rights.”²⁹⁹ Instead, the Coquille tribe is “simply [recognizing] people of different lifestyles” consistent with the Coquille’s cultural tradition.³⁰⁰ Depending on the cultural history of other tribes, the Coquille’s new marriage ordinance might inspire tribes to legislate in a manner that embraces tribal tradition. It is difficult to predict whether other tribes will embrace their cultural traditions; however, the Cherokee and Navajo tribes have already demonstrated their stance *against* same-sex marriage.

Finally, because this article encourages the overall goal of defending and protecting human rights, it is necessary to consider same-sex marriage in the larger context of Native rights. While same-sex marriage is an important and highly publicized issue, Native societies combat far more devastating challenges, which receive far less attention.³⁰¹ Gilley takes issue with the fact that because of same-sex marriage, this is probably “the only time that the Coquille Tribe has ever gotten any attention from advocates.”³⁰² He is concerned that advocates only pay attention to tribes “when it helps them romanticize their position.”³⁰³ He agrees with advocates that the Coquille Tribe is setting a great example for encouraging “the overall goal of equality,” but finds it problematic when those same advocates

297. *Goodridge*, 798 N.E.2d at 954-55.

298. OR. CONST. art. XV, § 5a; *see Cox, supra* note 120, at 134.

299. *See Cox, supra* note 120, at 134.

300. *Id.*

301. Fletcher, *supra* note 27, at 55.

302. Interview with Ken Tanner and Brian Gilley, *supra* note 4.

303. *Id.*

ignore crucial issues affecting Native peoples such as diabetes and socioeconomic isolation.³⁰⁴



304. *Id.*