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*49 THE SAME **LOVE**: MARRIAGE EQUALITY IN BANKRUPTCY POST-DOMA AND THE EVOLVING RIGHTS OF REGISTERED DOMESTIC PARTNERS*

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I. Introduction

Whether a couple is permitted to form a legal domestic union, what form that union takes, whether their **love** and commitment to each other is recognized by both the State and by the United States, and whether that couple is treated equally with other couples--in short, "marriage equality"--is a fast-changing area of law, and of political and popular opinion. Whether or not one is a proponent of marriage equality, the direction of change in the laws of the United States and the several States is undeniable. The impact of that change on debtors, bankruptcy courts, and bankruptcy practice will be sweeping.

That should come as no surprise. Title 11 of the United States Code [FN2] refers to "spouse" [FN3] sixty times in thirty-seven separate sections or subsections. [FN4] The concept of "spouse" impacts, *inter alia*, what constitutes property of the estate, [FN5] what debts are automatically excepted from discharge, [FN6] and priority of distributions to creditors in asset cases. [FN7] For purposes of interpreting and applying federal law, including bankruptcy law, the 1996 federal Defense of Marriage Act ("DOMA") defines "spouse" as "a person of the opposite sex who ***50** is a husband or a wife." [FN8] Same-gender couples need not apply. On June 26, 2013, the United States Supreme Court issued its opinion in *United States v. Windsor*, [FN9] finding that DOMA is unconstitutional as a violation of equal protection pursuant to the Fifth Amendment's Due Process Clause. [FN10]

In the wake of *Windsor*, "marriage" and "spouse" are once again entirely in the purview of state law: [FN11] yet conditions are not returning to the pre-DOMA status quo. The demise of DOMA came as the result of years of change, sometimes incremental and sometimes wholesale, in legal and social approaches to issues of sexuality and gender. Among the incremental changes are the ""separate but equal"--or sometimes "separate but not-so-equal"--non-marital legal unions that have been created or expanded in many states to recognize committed same-gender [FN12] relationships. These include, among others: extension of limited rights but no status; civil unions; and domestic partnerships. In California, starting in 1999, non-marital unions took the form of the registered domestic partnership: and under California family law that pre-dates *Windsor*, registered domestic partners ("RDPs") are spouses. [FN13] Pursuant to the California Family Code, RDPs in California have all of the same "rights, protections, and benefits" and are "subject to the same responsibilities, obligations, and duties under law" as spouses. [FN14] That has interesting implications in a statutory scheme such as title 11, in which references to "spouse" outnumber references to "marriage" sixty to one.

The narrow purpose of this article is to explore the specific reasons why, and ways in which, *Windsor* is

already impacting debtors, bankruptcy courts, and the administration of bankruptcy cases in California, with specific reference to the rights and obligations of "spouses," and to identify specific issues of which ***51** bankruptcy practitioners and trustees already need to be cognizant. The broader purpose of this article is to anticipate in some small measure the yet-unseen changes in bankruptcy law as applied in the Ninth Circuit which may come as a result of the *Windsor* ruling.

II. A Selective History of the Defense of Marriage Act

A. The Beginning: the Enactment of DOMA

"By history and tradition the definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States." [FN15] Congress, however, does occasionally intervene. As noted in *Windsor*, "marriages 'entered into for the purpose of procuring an alien's admission to the United States as an immigrant' [do] not qualify the noncitizen" for immigrant status. [FN16] The *Windsor* court also noted that the Social Security Administration recognizes common-law marriages even if the state in which the couple resides does not recognize such marriages. [FN17] One might find federal recognition of common law marriages not recognized by a state ironic when considered in juxtaposition with events of 1996.

In 1996, the United States Congress passed--and President Clinton signed--DOMA, legislation which dictated interstate and federal treatment of same-gender marriages and had a far greater reach than other federal laws touching on marriage. [FN18] The statute has two operative provisions. [FN19] Section - creates a statutory exception to the Full Faith and Credit Clause of the United States Constitution, providing that:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, ***52** possession, or tribe, or a right or claim arising from such relationship. [FN20]

Section 3 provides that:

> 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. [FN21]

According to DOMA's legislative history, the first purpose of DOMA was "to defend the institution of traditional heterosexual marriage." [FN22] The House Report on the Act also specifically states that the proposed legislation was crafted in "response to a very particular development in the State of Hawaii" where state courts appeared to be "on the verge of requiring that State to issue marriage licenses to same-sex couples." [FN23] In other words, purpose of DOMA was to create a sleeper agent, put in place to protect against a perceived future "threat," both moral and institutional. The intended effect of DOMA was that if any state passed a law legalizing same-gender marriages (which none had at the time), those validly-created marriages would not be recognized by the federal government, and need not be recognized by sister-states.

According to the legislative history, the governmental interests alleged to be advanced by DOMA were: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government

resources." [FN24] The House Report acknowledges that the "Committee believes that it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage," and embraces the idea that Congress, as a political branch of government, should "take sides in this culture war." [FN25] The House Report repeatedly refers to same-***53** gender marriage in quotes, as if it were a simulacrum or a euphemism: same-gender "marriage." [FN26]

B. The Middle: Enforcement of DOMA through February 23, 2011 [FN27]

DOMA appeared to lie dormant for a number of years. A brief search of federal court cases making reference to "Defense of Marriage Act" between its enactment in September 1996 and February 23, 2011, produces only thirty-eight distinct cases in fifteen years that reference DOMA at all--some by a mere passing citation. Seventeen of those thirty-eight cases came between 2009 and February 23, 2011, ten of them in 2009 alone. For reasons abstruse, political, and social, between 2009 and 2011 the federal courts in this country seemed to awaken to civil rights for same-gender couples.

A few cases from this period are of particular note. In 2009, the United States Court of Appeals for the Ninth Circuit in *In re Levenson* [FN28] reasoned that "[t]he denial of federal benefits to same-sex spouses cannot be justified simply by a distaste for or disapproval of same-sex marriage or a desire to deprive same-sex spouses of benefits available to other spouses in order to discourage them from exercising a legal right afforded them by a state." [FN29] Similarly, in July 2010, the Honorable Joseph L. Tauro of the United States District Court for the District of Massachusetts issued a decision in *Gill v. Office of Personnel Management*, [FN30] finding § 3 of DOMA unconstitutional--insofar as it provided that some valid Massachusetts marriages were recognized under federal law while other valid Massachusetts marriages (those between same-gender spouses) were not--because it "violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution." [FN31] That same day, Judge Tauro also decided *Massachusetts v. Department of Health & Human Services* [FN32] and found that DOMA § 3 is unconstitutional pursuant to the Reserved Powers provision of the Tenth Amendment:

> ***54** [I]t is clearly within the authority of [Massachusetts] to recognize same-sex marriages among its residents, and to afford those individuals in same-sex marriages any benefits, rights, and privileges to which they are entitled by virtue of their marital status. The federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment. For that reason, [§ 3 of DOMA] is invalid. [FN33]

C. February 23, 2011: the Holder Letter

February 23, 2011, may be said to mark the beginning of the end. On that date, Eric H. Holder Jr., the Attorney General of the United States, sent a letter to Congressional leadership informing them that President Obama "has made the determination that Section 3 of [DOMA], as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment," and the Department of Justice would therefore no longer defend constitutional challenges to § 3. [FN34]

The Holder Letter was controversial and the subject of much political criticism. Such a step by the President is not unheard of, however, and appears not to be a particularly partisan act. President George W. Bush and his Department of Justice chose not to defend the constitutionality of a law regulating marijuana policy reform ad-

vertising in public transportation systems. [FN35] The Clinton administration announced that it would not defend a law barring HIV-positive men and woman from serving in the armed forces. [FN36] President George H. W. Bush and his Department of Justice chose not to defend federal statutes requiring the Federal Communications Commission to enact affirmative action "preference" measures in broadcasting. [FN37] The Reagan Administration's Immigration and Naturalization Service actively argued that § 244(c)(2) of the ***55** Immigration and Nationality Act was unconstitutional as a violation of explicit constitutional standards of bicameralism and separation of powers. [FN38]

In addition to being oddly controversial, the Holder Letter was influential. Many federal court cases that followed quoted the Holder Letter extensively, and many heeded Mr. Holder's and President Obama's suggestion that discrimination on the basis of sexual orientation be subjected to some form of heightened scrutiny. One such case was *In re Balas*. [FN39]

D. *In re Balas*: "Gay" Is Not Synonymous with "Lesser"

> *Section 302(a) [FN40] of title 11 provides that "A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse. The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter."*

On June 13, 2011, less than four months after the issuance of the Holder Letter, the Honorable Thomas B. Donovan of the United States Bankruptcy Court for the Central District of California published his decision in *In re Balas*. [FN41] Judge Donovan's *Balas* decision was particularly interesting because he was joined in signature by seventeen judges of the United States Bankruptcy Court for the Central District of California. [FN42]

The factual background and a detailed analysis of the *Balas* case is thoroughly discussed in an article previously published in this Journal. [FN43] In short, Mr. Gene Balas and Mr. Carlos Morales were legally [FN44] married in California. [FN45] In ***56** February 2011, the couple filed a voluntary petition under chapter 13 of title 11 as joint petitioners. [FN46] The trustee of the Balas-Morales bankruptcy estate moved to dismiss their petition pursuant to § 1307(c) [FN47] for "cause," on the grounds that DOMA's definition of "spouse" prohibited the court from treating Messrs. Balas and Morales as joint debtors [FN48] pursuant to § 302(a). [FN49]

Judge Donovan considered the factors set forth in the Holder Letter to determine whether discrimination or classification on the basis of sexual orientation ought to be subject to heightened constitutional scrutiny:

> (1) whether the group in question has suffered a history of discrimination; (2) whether individuals exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's ability to perform or contribute to society. [FN50]

Judge Donovan's analysis answered each question with an unequivocal "Yes." [FN51]

Having determined that discrimination on the basis of sexual orientation was subject to heightened scrutiny, Judge Donovan then eviscerated DOMA, as he found that it could not even pass rational basis review, a much lower threshold. [FN52] Judge Donovan stated that none of the goals of DOMA, as set forth in the House Report on the subject, stood up to *any* level of constitutional scrutiny, and found that applying DOMA to Messrs. Balas and Morales did not advance in any way any valid interest the government could conceivably have. [FN53] ***57**

In denying the motion, Judge Donovan held "that there is no valid governmental basis for DOMA," and that DOMA "violates the equal protection rights of the Debtors as recognized under the due process clause of the Fifth Amendment." [FN54]

Following *Balas*, legally married same-gender couples in the Central District of California would be entitled to the same treatment in bankruptcy as validly married opposite-gender couples. A statement issued by the United States Bankruptcy Court for the Northern District of California, while indicating that it was not bound by the *Balas* decision, subtly discouraged challenges of a similar sort: "This court does not on its own initiative investigate whether any individuals who represent that they are married, whether same-sex or mixed-sex, are in fact recognized as married under state or federal law." [FN55]

E. *In re Cusimano:* the Difference a Word Makes

> *Section 523(a)(15) [FN56] of title 11 automatically excepts from discharge a debt "to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5)[support obligations] that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit."*

Maryann Cusimano and Patricia Bennett [FN57] were RDPs under California law. Unlike Messrs. Balas and Morales, at the time Mmes. Cusimano and Bennett chose to solemnize their relationship in a legally recognized union, California's Prop 8 prevented them from marrying: registered domestic partnership was the legal equivalent for same-gender couples under California law at that time. In the summer and early fall of 2010, Mmes. Cusimano and Bennett filed and counter-filed for dissolution of their registered domestic partnership. Both partners waived spousal support.

***58** On September 27, 2010, Ms. Cusimano filed a voluntary petition under chapter 7 of title 11 of the United States Code. On January 18, 2011, her discharge was entered. On February 4, 2011, her bankruptcy was closed. At the time Ms. Cusimano's bankruptcy case was closed, the Superior Court of California, County of Orange, was in the process of adjudicating and liquidating the amount Ms. Bennett claimed Ms. Cusimano owed to her. Ms. Cusimano advised the family law court that she had received a discharge in bankruptcy. She contended that further family law court proceedings to establish a non-support obligation against her were barred by her discharge. Ms. Bennett believed that any such obligations were automatically excepted from discharge pursuant to § 523(a)(15). The family law court would not proceed without confirmation that the federal discharge injunction would not be violated by such further proceedings.

The *Cusimano* bankruptcy was re-opened by order of the court entered on January 18, 2012. Ms. Bennett filed a Motion for Order Confirming that Discharge Is not Violated by Continued Family Law Proceedings re: Non-Support Obligations. She argued that as an RDP under California law, she was a "spouse," and as such she would be entitled to the protections afforded under § 523(a)(15) *but for* the provisions of DOMA, which excluded same-gender couples. She asked the bankruptcy court to rule DOMA unconstitutional as applied to her.

The *Bennett'Cusimano* case bears one important difference from the *Balas'Morales* case: the form of the domestic union between the parties. Balas and Morales were married men, husbands. Bennett and Cusimano were RDPs. While recognizing the authority of *Balas'Morales* that DOMA's definition of "marriage" as "a legal union between one man and one woman as husband and wife" is unconstitutional and same-gender *married* persons

are to be treated as spouses under title 11, Ms. Cusimano argued that RDPs are different because they are not "married." The provision of § 523(a)(15) that non-support obligations to a spouse or former spouse are automatically excepted from discharge, she argued, simply did not apply.

On Friday December 7, 2012, while the *Bennett'Cusimano* contested matter was pending, the Supreme Court granted two important petitions for writ of certiorari, in *Hollingsworth v. Perry* and *United States v. Windsor*. *Perry* was the appeal from the Ninth Circuit's ruling upholding a Northern District of California opinion that California's Prop 8 is unconstitutional. *Windsor* was the appeal from the United States Court of Appeals for the Second Circuit's ruling upholding a Southern District of New York opinion that § 3 of DOMA is unconstitutional. Both would be watershed cases with an important impact on ***59** California bankruptcy proceedings. The *Bennett'Cusimano* case was stayed pending the outcome of *Windsor*.

F. The End: Hon. Vaughn Walker Style

On August 4, 2010, the Honorable Vaughn R. Walker, Chief Judge for the United States District Court for the Northern District of California (now retired) issued his opinion in *Perry v. Schwarzenegger* [FN58] striking down Prop 8. Judge Walker determined in a 136-page ruling that Prop 8 was unconstitutional under the Due Process Clause because no compelling state interests justifies denying same-gender couples the fundamental right to marry and under the Equal Protection Clause because there is no rational basis for limiting the designation of "marriage" to opposite-sex couples. The case was primarily defended by intervenors, Prop 8's official proponents. Those proponents, Hollingsworth *et al.*, appealed Judge Walker's decision to the Ninth Circuit Court of Appeals. [FN59]

On February 7, 2012, the Ninth Circuit issued its ruling on the *Perry* appeal, *Perry v. Brown*, [FN60] and in its 80-page ruling affirmed Judge Walker's ruling and concluded that Prop 8 violated the Equal Protection Clause of the United States Constitution. It is considered to have been a slightly narrower ruling than Judge Walker's. Importantly, the State of California had refused to appeal the decision in Prop 8. The Ninth Circuit certified to the California Supreme Court the question of whether an initiative's official proponents have standing to defend it where the State will not, and received an answer in the affirmative. It therefore proceeded with its analysis to affirm. The Hollingsworth *et al.* proponents filed a petition for writ of certiorari in the Supreme Court.

On June 26, 2014, rather interestingly to those of a constitutional bent, the Supreme Court in *Hollingsworth v. Perry* [FN61] vacated the Ninth Circuit decision for standing reasons. Despite the fact that the California Supreme Court had decided as a properly certified issue that an initiative's official proponents do have standing under California law to defend their initiative where the State will not, the Supreme Court determined that state-created standing does not suffice to ***60** create the "case or controversy" necessary for Article III standing. [FN62] Thus, while Prop 8's proponents might (would, one presumes) have standing to defend it in the California state courts, they did not have standing to defend it in federal court. When the officials of the State of California (*via Schwarzenegger* and then *Brown*), as named defendants and half-hearted participants in the district court case, refused to appeal the case to the Ninth Circuit, there was no longer a "real party in interest" on the appealing team, and the Ninth Circuit lacked subject matter jurisdiction to hear the case. The Supreme Court therefore *vacated* the Ninth Circuit's ruling. [FN63] Proponents of marriage equality **love** and hate this result: on the one hand, the broader condemnation in Judge Walker's ruling is the final word on the constitutionality of Prop 8; on the other hand, it's not binding on other courts in the Ninth Circuit. [FN64]

G. The End: Justice Anthony Kennedy Style

In 2007, Edith Windsor and Thea Syper, longtime residents of New York and partners in **love** for then forty years, traveled to Ontario, Canada to be married in a lawful ceremony. [FN65] In May 2008, New York Governor David Paterson ordered state agencies to recognize same-gender marriages legally solemnized in other jurisdictions. The Ontario marriage is now deemed by the State of New York to have been valid. [FN66] When Mrs. Spyer died in 2009, she left her substantial estate to her wife, and Mrs. Windsor "sought to claim the estate tax exemption for surviving spouses." [FN67] The IRS denied her claim, finding that DOMA § 3 excluded her from qualifying as a surviving ""spouse." [FN68] Mrs. Windsor, long a gay rights activist and then 80 years old, was game for the fight. She paid the $363,053 estate tax, and on November 9, 2010, filed suit against the United States in the United States District Court for the Southern District of New York, asserting that "DOMA violate[d] the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment." [FN69]

***61** While the suit was pending, pursuant to the Holder Letter the United States stopped defending DOMA. The Department of Justice agreed that DOMA's exclusion of Mrs. Windsor from the federal benefit of the surviving spouse tax exemption was unconstitutional. However, that did not end the district court's jurisdiction, because although the Department of Justice was not defending the suit, Mrs. Windsor still had a "concrete, persisting, and unredressed" injury, the denial of her refund, which was capable of remedy by a ruling of the district court. [FN70] The United States, in other words, could have taken a default, and the United States District Court for the Southern District of New York could enter a valid ruling. [FN71]

That is not what happened. In response to the Holder Letter, the Bipartisan Legal Advisory Group ("BLAG"), a standing body of the United States House of Representatives since 1993 and comprising five members of the House leadership (the Speaker, the majority and minority leaders, the majority and minority whips), directed the House Office of General Counsel to "intervene in the litigation to defend the constitutionality of § 3 of DOMA." [FN72] BLAG had done so in numerous cases around the country where the Department of Justice had ceased to defend, and so intervened in *Windsor*. Although the intervention was unopposed by the Department of Justice, the district court denied BLAG's motion to enter the suit as of right, but granted intervention as an interested party. [FN73]

The case carried on, and on June 6, 2012, the Honorable Barbara S. Jones of the United States District Court for the Southern District of New York, applying a rational basis standard of review to DOMA's § 3, found that it did not withstand even such light scrutiny, and held that denial of the refund was clearly unconstitutional as a violation of Mrs. Windsor's rights under the equal protection guarantees of the Fifth Amendment's Due Process Clause. [FN74] The court ordered the Treasury to refund the estate tax, with interest. [FN75] On appeal, the Second Circuit affirmed, [FN76] but held that review of discrimination on the basis of sexual ***62** orientation requires heightened scrutiny, and that § 3 of DOMA "violates equal protection and is therefore unconstitutional." [FN77]

On December 7, 2012, the Supreme Court granted certiorari, and on June 26, 2013, the Supreme Court's *Windsor* ruling, authored by Justice Anthony Kennedy, came down affirming the lower courts. [FN78] There are several interesting features of the case, aside from its central holding. First, the Supreme Court abstained from deciding whether BLAG, on its own authority, would have standing to appeal; rather, the Supreme Court relied on Article III prudential standing to determine that the case could be decided on the merits despite the United States' non-defense. [FN79]

Second, the Supreme Court did not explicitly apply any previously recognized level of constitutional scrutiny to discrimination on the basis of sexual orientation; rather, it advanced a "careful consideration" standard [FN80] with hints at heightened scrutiny by concluding that "no legitimate purpose overcomes the purpose and effect to disparage and injure." [FN81]

The third interesting feature, which currently bears no relevance to the ultimate bankruptcy issues narrowly addressed by this article but does hint at future implications, is the way *Windsor* defines the subject of its decision. *Windsor* notes early on that "Congress enacted the Defense of Marriage Act (DOMA), 110 Stat. 2419. DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States ... Section 3 is at issue here. It amends [1 U.S.C. § 7], to provide a federal definition of 'marriage' and 'spouse.'" [FN82]

***63** The opinion continues--several times--to use language which draws a distinction between DOMA, the whole, and § 3, the part. For example, the majority opinion states that: "[i]t held that § 3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest"; [FN83] "[i]n an unrelated case, the United States Court of Appeals for the First Circuit has also held § 3 of DOMA to be unconstitutional"; [FN84] and "[t]he Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with § 3 of DOMA, which results in Windsor's liability for the tax." [FN85] Hence, "DOMA" is not used throughout the opinion as being synonymous with or limited to "§ 3." Despite demonstrating the capacity to distinguish between DOMA as a whole and the particular definitional provisions of § 3, Justice Kennedy's articulation of the final ruling is:

> *DOMA* instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriage of others. *The federal statute is invalid*, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. [FN86]

There is a colorable argument that, whether advertently or not, the effect of *Windsor* is to invalidate DOMA *as a whole*, not just § 3. This observation will assist in small part with our projections into the future of same-gender rights in bankruptcy.

III. Bankruptcy Law Post-DOMA

A. The Obvious

Any bankruptcy practitioner with some time on their hands, after they're done reading *Stern v. Marshall*, might find *Windsor* to be interesting reading. Following *Windsor*, every bankruptcy practitioner in a state in which same-gender marriage has been legalized will be faced with its very obvious effects.

***64** As noted above, the word "spouse" appears sixty times in title 11, in thirty-seven distinct subsections. [FN87] What follows is a non-comprehensive list of some of the effects *Windsor* has on same-gender married debtors in bankruptcy, their trustees, their estates, and their creditors:

- Same-gender married couples can file joint bankruptcy petitions. [FN88]

• In community property states (including California), both the debtor's and the debtor's same-gender spouse's interest in community property comes into the estate to the extent necessary to pay community claims. [FN89]

• If a trustee seeks to sell such property to a third party, the debtor's same-gender spouse can purchase such property at the price at which the sale was to be consummated. [FN90]

• Same-gender married debtors filing separate bankruptcy petitions can only claim one homestead exemption between them. [FN91]

• Any interest that a debtor acquires within 180 days post-petition as the result of a divorce or dissolution property settlements with their same-gender spouse constitutes property of the estate. [FN92]

• If a debtor owes to their same-gender spouse or former spouse a debt that is in the nature of alimony, maintenance, or support, that domestic support obligation is recognized in bankruptcy. [FN93]

• Domestic support obligations owed by same-gender spouses are entitled to super-priority claim status. [FN94]

***65** • Domestic support obligations owed by same-gender spouses are automatically excepted from discharge. [FN95]

• In chapters 7 and 11, non-support obligations to a same-gender spouse are also automatically excepted from discharge. [FN96]

• Non-debtor same-gender spouses get the community property protections of the co-debtor discharge. [FN97]

As of the day this Article was sent for publication--and the number has increased since the Article was written--same-gender marriage is legal, recognized, or is being adjudicated in 20 jurisdictions. In Oklahoma, Texas, Utah, and Virginia, federal district courts have ruled that bans on same-gender marriages are unconstitutional: in each of those cases, the rulings are stayed pending appeal. Same-gender marriage is legal in: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington, D.C. Same-gender marriages solemnized in other states are recognized in Kentucky. In those jurisdictions where same-gender marriage is legal or recognized, the sweeping impact of *Windsor* on bankruptcy law is already in effect.

B. The NotASoAObvious

A number of important issues which arise in bankruptcy depend on the application of state law. For example, property rights are determined by relevant non-bankruptcy law, including state law. [FN98] In addition, while bankruptcy law governs whether a claim is nondischargeable under § 523(a)(6), [FN99] the court looks to state law to determine whether an act falls within the underlying tort. [FN100] State law statutes of limitations also set the outside limit on the time in which a trustee ***66** must bring an action under § 544. [FN101] In this tradition, following *Windsor* state law also now determines who constitutes a “spouse” for bankruptcy purposes.

Then, as bankruptcy practitioners or judges, why do we still care about *Perry*? Why do we still care about *In*

re Cusimano? Didn't *Windsor* say it all? “Ding dong, DOMA is dead.” It's true that DOMA is recognized by the Supreme Court as being unconstitutional and is no longer enforceable in any jurisdiction. [FN102] Yet as we saw in the conclusion of the previous section, the group of jurisdictions impacted by *Windsor* is not a fixed set. Interestingly, in some jurisdictions the scope of *Windsor*'s impact will also be drastically different than in others. California is one of those jurisdictions.

Windsor impacts California in part by virtue of the *Perry* ruling--Judge Walker's decision stands, Prop 8 is unconstitutional, and marriage banns are being read for same-gender couples state-wide. As such, post-*Windsor*, same-gender married couples in California will be entitled to the same right as opposite-gender marries couples. Prop 8, however, is not the only law that need concern us: the California Family Code has interesting implications for debtors in bankruptcy now that DOMA no longer defines “spouse.” As evidenced by the *Cusimano* case, which we will revisit below, the interplay of *Windsor, Perry*, and the California Family Code have a dramatic and (to some) unexpected impact on bankruptcy administration in California, and potentially several other states in the Ninth Circuit.

The California Family Code provides in part as follows:

> (a) Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.
>
> (b) Former registered domestic partners *shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law,* whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, *as are granted to and imposed upon former* ****67*** *spouses*.
>
> ...
>
> (e) To the extent that provisions of California law adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law.
>
> (f) Registered domestic partners shall have the same rights regarding nondiscrimination as those provided to spouses.
>
> ...
>
> (j) Where necessary to implement the rights of registered domestic partners under this act, gender-specific terms referring to spouses shall be construed to include domestic partners. [FN103]

It is apparent that the California Family Code creates total identity of rights and responsibilities between spouses and RDPs. It even mandates that where other California laws refer to a “husband,” they shall be read to mean and include males and females in same-gender registered domestic partnerships, and where other California laws refer to a “wife,” they shall be read to mean and include females and males in same-gender registered domestic partnerships. [FN104] The legislature went to the effort of dictating how gender-specific terms elsewhere in the law are to be interpreted to prevent hyper-technical readings of the law to create a loophole allowing for unequal treatment of RDPs. [FN105] In short, the drafters of the California Family Code cast a remarkably broad net to ensure that in every possible way, RDPs are treated as spouses.

One argument advanced by Ms. Bennett in the *Cusimano* contested matter was that California RDPs are not “like spouses” or “separate from but equal to spouses:” *they are spouses*. As spouses, they are entitled to the

protections of title 11 such as those set forth in §§ 523(a)(5) and (15). [FN106] Only DOMA, she argued, prevented Ms. Bennett from attaining to the protections of § 523(a)(15), [FN107] because although she was a wife under California law, she was not a wife of the opposite gender. Moreover, she argued that DOMA as applied to same-gender ***68** RDPs was unconstitutional because it treated them differently than opposite-gender RDPs. Opposite-gender RDPs are "person[s] of the opposite sex," [FN108] as required by DOMA, and are "husband" and "wife" pursuant to California Family Code § 297.5(j). [FN109] They would therefore be entitled to protection under title 11 which was denied Ms. Bennett solely on the basis of the gender-pairing of her legal domestic union. Ms. Bennett urged the court to rule DOMA unconstitutional.

The *Cusimano* court stayed its decision pending the Supreme Court ruling in *Windsor*. After *Windsor*, the *Cusimano* court re-opened proceedings, heard final argument, and allowed one last round of briefing. On November 12, 2013, the Honorable Erithe A. Smith issued an unpublished Memorandum and Order Granting Motion for Order Confirming that Discharge Is not Violated by Continued Family Law Proceedings re: Non-Support Obligations. [FN110] Judge Smith cited California Family Code § 297.5 in holding that California RDPs are spouses. [FN111] She also acknowledged the ruling of *In re Rabin*, [FN112] which held that "[t]he Legislature clearly intended that registered domestic partners have the same rights and responsibilities under California law as spouses, married persons, a wife or a husband, excepting only to the extent explicitly excluded by the [California Domestic Partner Rights and Responsibilities Act of 2003]." She noted that California law was consistent: *Koebke v. Bernardo Heights Country Club* [FN113] held that the California Domestic Partner Rights and Responsibilities Act of 2003 should "be construed liberally in order to secure to eligible couples who register as domestic partners the full range of legal rights, protections and benefits, as well as all of the responsibilities, obligations, and duties to each other, to their children, to third parties and to the state, as the laws of California extend to and impose upon spouses." [FN114]

***69** Judge Smith found that Ms. Bennett and Ms. Cusimano had, prior to the dissolution of their registered domestic partnership, been "spouses" under applicable California law, that Ms. Bennett is provided the same protections under § 523(a)(15) as a woman married to a man would be, and that Ms. Bennett would not violate the discharge injunction by pursuing her claims against Ms. Cusimano in family court.

This ruling, although unpublished, cracks open the doors of bankruptcy for California RDPs. Applied broadly, in California bankruptcy courts every instance of the word "spouse" in title 11--all sixty of them--will be read to include RDPs. Just as RDPs "have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties" under state law, [FN115] so shall they under federal law. Furthermore, it means that those same-gender couples who entered into registered domestic partnerships at a time when marriage was not available to them under California law will not be treated differently from those same-gender couples who married in the brief window between *Marriage Cases* and Prop 8 or in the current post-*Perry* era. The protections of federal law truly will be applied equally across the board.

Judge Smith is not the only one to think that "spouse" should be read to include RDPs. On November 25, 2013, just days after the *Cusimano* ruling, the Judicial Council of the Ninth Circuit issued an opinion in *In re Fonberg*, [FN116] reaching substantially the same result with respect to Oregon RDPs.

IV. Looking Forward: *Fonberg* and *Abbott*, a Sign of Things to Come

The *Fonberg* decision is significant because one of the concerns of marriage equality proponents about the ruling in *Windsor* is Justice Kennedy's Parthian shot: "This opinion and its holding are confined to those lawful

marriages." [FN117] What about those couples who, during a time of discrimination before same-gender marriage was available to them, had entered into marriage-substitute unions? *Fonberg* appears to be the first published opinion to answer that question.

Ms. Fonberg, a former law clerk (and therefore employee) of the District of Oregon, and her same-gender partner are RDPs under an Oregon law ***70** substantially similar to California Family Code § 297.5(a). [FN118] It confers on RDPs rights "on equivalent terms, substantive and procedural," to marriage. [FN119] Ms. Fonberg tried to enroll her partner in the district's family health plan, but was denied by the United States Office of Personnel Management ("OPM"). [FN120] Ms. Fonberg sought redress by means of an Employee Dispute Resolution process, which eventually came before the Ninth Circuit Judicial Council. Ms. Fonberg "complained of workplace discrimination and filed a Petition for Review in an employment dispute under the District of Oregon's Employment Dispute Resolution (EDR) Plan." [FN121] Relying on *Windsor*'s final note about "lawful marriages," the OPM argued that employees in same-gender legal unions other than actual marriage are not entitled to federal benefits for their partners. [FN122] The Judicial Council reasoned otherwise, and sweepingly:

> Oregon's statutory scheme purports to confer upon same-sex domestic partners the same rights and legal status as those conferred on married couples. In practice, however, it does not. Domestic partners are denied benefits from the federal government that are granted to married couples (including same-sex couples) ... Fonberg and her partner are treated differently in two ways. First, they are treated differently from opposite-sex partners who are allowed to marry and thereby gain spousal benefits under federal law. This is plainly discrimination based on sexual orientation, which the District of Oregon's EDR Plan prohibits. They are also treated unequally vis-à-vis same-sex couples in other states in the circuit, who may marry and thus gain benefits under *Windsor*. This violates the principle that federal employees must not be treated unequally in the entitlements and benefits of federal employment based on the vagaries of state law. Here, Oregon law suffers from precisely the same deficiency that the Supreme Court identified in *Windsor* with respect to the Defense of Marriage Act. Both these forms of discrimination are prohibited under the Oregon EDR Plan. [FN123]

***71** Less than two months later, on January 21, 2014, the Ninth Circuit published its opinion in *SmithKline Beecham Corp. v. Abbott Laboratories*. [FN124] The case arose as an antitrust, contract, and unfair trade practice case brought by SmithKline Beecham against Abbott Laboratories, relating to a licensing agreement and the pricing of HIV medications, "the latter being a subject of considerable controversy in the gay community." [FN125] "During jury selection, Abbott used its first peremptory strike against the only self-identified gay member of the venire." [FN126] The outcome of the trial was challenged in part on that basis. The Ninth Circuit, in determining what standard of constitutional review to apply, noted that *'%7FWindsor*, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary." [FN127] The *Abbott* court did explicitly what *Windsor* implied: it tackled the question of what standard of constitutional review applies to discrimination on the basis of sexual orientation, after a detailed analysis determined that heightened scrutiny applies, and concluded that *Windsor* had quietly applied that level of scrutiny: [FN128] "we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection." [FN129] Turning to the *venire* at issue and applying heightened scrutiny, the *Abbott* court held that equal protection prohibits peremptory strikes on the basis of sexual orientation. The case was remanded for new trial. [FN130]

If judicial opinion in the Ninth Circuit continues on its current path-- and there appears to be no reason to believe it will not--*Windsor* is going to find broad application. RDPs are likely to be determined to have all of the federal rights and benefits afforded married persons of any ilk, in bankruptcy and elsewhere. Furthermore,

Fonberg gives us reason to predict that, consistent with the broad reading of *Windsor* as applying to DOMA as a whole and not just § 3, a Ninth Circuit decision on the legality of same-gender marriage bans and sister-state recognition will come down hard on the side of gay rights. Even beyond the realm of marriage, any discrimination on the basis of sexual orientation is now subject to heightened scrutiny in the Ninth Circuit: the government must establish ***72** that the classification is substantially related to an important government objective.

V. Final Thoughts

In light of the *Fonberg* and *Abbott* rulings, the outcome of the *Cusimano* contested matter seems obvious, and the expansion of California RDP rights in bankruptcy seems inevitable. Hindsight is such a perfect thing.

In November 2012, while the *Bennett'Cusimano* case was being actively litigated, one of the Authors had occasion to speak with the Honorable Vaughn R. Walker (Ret.) at a professional event. As the reader will recall, Judge Walker issued the district court *Perry* decision which is now the final word on Prop 8. The Author mentioned to Judge Walker that bankruptcy practitioners were running up against the issue of marriage equality. To paraphrase, Judge Walker wondered how on Earth this social and civil rights issue could impact the world of bankruptcy. The full answer to that question would have required hours of conversation, or hundreds of pages of disquisition: the Author gave Judge Walker a brief précis of the *Bennett'Cusimano* case instead.

Judge Walker seemed a bit stunned. The far-reaching impacts of *Perry* and DOMA were difficult to foresee, and there can be no doubt that we have not yet seen them all.

VI. Conclusion

Windsor resolved one key issue in the evolution of the protection of non-heterosexual and non-cisgender civil rights in this country: whether the federal government is required to recognize same-gender marriages validly solemnized pursuant to state law. In striking down DOMA, *Windsor* answered that question in the affirmative. As anticipated by some and feared by others, the results were sweeping and dramatic. A swarm of cases followed throughout the United States. [FN131] The Attorney General of the United States began implementing procedures by which Federal agencies and offices would effect *Windsor*'s ruling, ***73** recognizing legally solemnized same-gender marriages not only of federal employees but of all citizens. [FN132]

In the midst of all this change, the Ninth Circuit is going through growing pains, caused in part by the bifurcation of marriage and domestic partnership in several states. Bankruptcy practitioners, trustees, and courts in California should anticipate that recognition of the equal rights of *all* legally joined same-gender couples is on the horizon. California RDPs and California married couples, regardless of gender-pairing, will be treated equally. California law clearly dictates it, California bankruptcy courts have already twice recognized it in *Rabin* [FN133] and *Cusimano*, [FN134] and the Ninth Circuit has anticipated it with *Fonberg*. [FN135]

In the end, it's actually going to make things easier. Trustees can stop wrangling with non-debtor former RPDs for the recovery of community property. A woman will not have to wonder if her former wife's bankruptcy filing is going to affect the support award entered by a California family court. Bankruptcy counsel and family law counsel will be able to coordinate their representations of a divorcing debtor, knowing that there is no subset of clients whom the bankruptcy court will treat differently from others.

Uniformity will return: it will just bring diversity with it.

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[FN2]. 11 U.S.C. §§ 101-1532.

[FN3]. Interestingly, "marriage" appears only once in the Bankruptcy Code. *See* 11 U.S.C. § 362(b)(2)(A)(iv) (no automatic stay "of the commencement or continuation of a civil action or proceeding ... for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate").

[FN4]. 1 U.S.C. §§ 101 *et seq.* This article does not propose to reproduce each of these 37 sections and subsections in full, but will address specific provisions of title 11. Interested practitioners are advised to download a searchable version of the complete text of title 11 and review each section containing a reference to "spouse" for applicability in their own practice.

[FN5]. *See, e.g.*, 11 U.S.C. § 541(a)(2).

[FN6]. *See, e.g.*, 11 U.S.C. § 523(a)(15).

[FN7]. *See, e.g.*, 11 U.S.C. § 507(a)(1)(A).

[FN8]. 1 U.S.C. § 7.

[FN9]. United States v. Windsor, 133 S. Ct. 2675 (2013).

[FN10]. *Id.* at 2695.

[FN11]. *See id.* at 2691-92 (acknowledging that since "the Nation's beginning," state laws have defined marriage).

[FN12]. The term "same-gender" will be used throughout this article, except in direct quotes, in place of "same-sex" to describe interpersonal relationships wherein both parties have the same biological sex and are as- signed by gender-normative culture to the same group of either "male" or ""female." The Authors acknowledge that either version of the phrase may be perceived to elevate cisgender or heteronormative values: it is not used to that purpose here.

[FN13]. CAL. FAM. CODE §§ 297-297.6 (the "California Family Code").

[FN14]. *Id.* § 297.5(a).

[FN15]. *Windsor*, 133 S. Ct. at 2689-90.

[FN16]. *Id.* at 2690 (citing 8 U.S.C. § 1186a(b)(1)).

[FN17]. *Id.* (citing 42 U. S. C. § 1382c(d)(2)).

[FN18]. *Id.* (DOMA enacted "a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations").

[FN19]. Section 1 is the title of the Act. DOMA, Pub. L. 104-199, § 1, 110 Stat. 2419 (1996) ("This Act may be cited as the 'Defense of Marriage Act"').

[FN20]. 28 U.S.C. § 1738C.

[FN21]. 1 U.S.C. § 7.

[FN22]. H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905.

[FN23]. *Id.*

[FN24]. *Id.* at 12.

[FN25]. *Id.*

[FN26]. *See, e.g., id.*

[FN27]. A date whose significance is discussed at Section C, *infra*.

[FN28]. *In re* Levenson, 587 F.3d 925 (9th Cir. 2009).

[FN29]. *Id.* at 931.

[FN30]. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010).

[FN31]. *Id.* at 396-97.

[FN32]. Massachusetts v. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010).

[FN33]. *Id.* at 253.

[FN34]. Letter from Eric H. Holder, Jr. to Hon. John A. Boehner (Feb. 23, 2011), 2011 WL 641582, at *1 (the "Holder Letter").

[FN35]. ACLU v. Mineta, No. 0420262 (PLF) (D.D.C. 2004).

[FN36]. Alison Mitchell, *President Finds a Way to Fight Mandate to Oust H.I.V. Troops*, N.Y. TIMES, Feb. 10, 1996, http://www.nytimes.com/1996/02/10/us/president-finds-a-way-to-fight-mandate-to-oust-hiv-troops.html.).

[FN37]. Metro Broadcasting v. Federal Communications Comm'n, 497 U.S. 547 (1990).

[FN38]. Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

[FN39]. *In re* Balas, 449 B.R. 567 (Bankr. C.D. Cal. 2011).

[FN40]. 11 U.S.C. § 302(a).

[FN41]. *Id.*

[FN42]. *Id.* at 568.

[FN43]. Robert J. Pfister, *Marriage Equality in Bankruptcy: Joint Petitions for Same'Sex Couples*, 32 CAL. BANKR. J. 109 (2012).

[FN44]. On May 15, 2008, the California Supreme Court decided *In re Marriage Cases*, and held that provisions of the California Family Code prohibiting same-gender marriage were unconstitutional. *In re* Marriage Cases, 43 Cal. 4th 757, 857, 183 P.3d 384 (2008). Following *Marriage Cases*, until the passage of Proposition 8 ("Prop 8") on November 5, 2008, same-gender couples had a constitutional right to marry in California. *Id.*; *see also* CAL. CONST. art. I, § 7.5 (2008). Prop 8, through amendment to the California Constitution, limited marriages in California to those between one man and one woman. CAL. CONST. art. I, § 7.5 (2008).

[FN45]. *Balas*, 449 B.R. at 569-70.

[FN46]. *Id.* at 569.

[FN47]. 11 U.S.C. § 1307(c).

[FN48]. *Id.*

[FN49]. 11 U.S.C. § 302(a).

[FN50]. *Balas*, 449 B.R. at 574.

[FN51]. *Id.* at 573-78.

[FN52]. *Id.* at 579.

[FN53]. *Id.* at 578-79 ("This court cannot conclude from the evidence or the record in this case that any valid government interest is advanced by DOMA as applied to the Debtors").

[FN54]. *Id.* at 579.

[FN55]. *Joint Bankruptcy Petitions by Same'Sex Married Couples*, http://www.canb.uscourts.gov/announcements/joint-bankruptcy-petitions-samesex-married-couples (last visited March 7, 2014).

[FN56]. 11 U.S.C. § 523(a)(15).

[FN57]. Marshack Hays LLP represented Ms. Bennett in this litigation. The facts and summary of arguments set forth here are based on the public record of Ms. Cusimano's bankruptcy case, *In re* Cusimano, No. 8:10-bk-23646-ES (Bankr. C.D. Cal. 2010).

[FN58]. Perry v. Schwarzenegger, 704 F.Supp.2d 921 (N.D. Cal. 2010).

[FN59]. After Judge Walker's Decision but before the appeal to the Ninth Circuit, Jerry Brown succeeded Arnold Schwarzenegger as Governor of California and the style of the case changed from *Perry v. Schwarzenegger* to *Perry v. Brown*.

[FN60]. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

[FN61]. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

[FN62]. *Id.* at 2662.

[FN63]. *Id.* at 2668.

[FN64]. They probably need not have worried. *See* further discussion *infra*.

[FN65]. *Windsor*, 133 S. Ct. at 268-283.

[FN66]. *Id.* at 2683.

[FN67]. *Windsor*, 133 S. Ct. at 2682.

[FN68]. *Id.* at 2683 ("Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax").

[FN69]. *Id.* at 2683.

[FN70]. *Windsor*, 133 S. Ct. at 2685.

[FN71]. *Id.* at 2685.

[FN72]. *Id.* at 2684.

[FN73]. *Id.*

[FN74]. Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) ("because the Court believes that the constitutional question presented here may be disposed of under a rational basis review, it need not decide today whether homosexuals are a suspect class").

[FN75]. *Id.* at 406.

[FN76]. BLAG and the Justice Department appealed to the Second Circuit Court of Appeals, and the Solicitor General filed a petition for certiorari before judgment in the Supreme Court, citing Mrs. Windsor's advanced age and uncertain health. The Second Circuit took very little time to rule, however, and affirmed on October 18, 2012.

[FN77]. Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012).

[FN78]. *Windsor*, 133 S. Ct. 2675.

[FN79]. *Id.* at 2688.

[FN80]. *Id.* at 2693 ("The Constitution's guarantee of equality must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group. In determining whether a law is motivated by an improper animus or purpose, discriminations of an unusual character especially require careful consideration. DOMA cannot survive under these principles" (citations omitted)).

[FN81]. *Id.* at 2696.

[FN82]. *Id.* at 268-283 (citations omitted).

[FN83]. *Id.* at 2684.

[FN84]. *Id.*

[FN85]. *Id.* at 2686.

[FN86]. *Id.* at 2695-96 (emphasis added).

[FN87]. *See supra* Part I.

[FN88]. 11 U.S.C. § 302(a).

[FN89]. 11 U.S.C. § 541(a)(2).

[FN90]. 11 U.S.C. § 363(i).

[FN91]. 11 U.S.C. § 522(b)(1).

[FN92]. 11 U.S.C. § 541(a)(5)(B).

[FN93]. 11 U.S.C. § 101(14A).

[FN94]. 11 U.S.C. § 507(a)(1).

[FN95]. 11 U.S.C. § 523(a)(5).

[FN96]. 11 U.S.C. § 523(a)(15).

[FN97]. 11 U.S.C. § 524(a)(3).

[FN98]. Butner v. United States, 440 U.S. 48, 55 (1979).

[FN99]. 11 U.S.C. § 523(a)(6).

[FN100]. *In re* Radow, 2013 WL 1397342 (B.A.P. 9th Cir. Apr. 2, 2013) (citing Del Bino v. Bailey (*In re* Bailey), 197 F.3d 997, 1000 (9th Cir.1999)).

[FN101]. 11 U.S.C. § 544.

[FN102]. With respect to section 3, this is certain. With respect to section 2, see *infra*.

[FN103]. CAL. FAM. CODE § 297.5 (emphasis added).

[FN104]. *Id.* § 297.5(j).

[FN105]. *Id.*

[FN106]. 11 U.S.C. § 523(a)(5) and (15).

[FN107]. 11 U.S.C. § 523(a)(15).

[FN108]. 1 U.S.C. § 7.

[FN109]. CAL. FAM. CODE § 297.5(j).

[FN110]. Memorandum and Order Granting Motion for Order Confirming that Discharge Is not Violated by Continued Family Law Proceedings re: Non-Support Obligations, *Cusimano*, No. 8:10-bk-23646-ES (Bankr. C.D. Cal. Nov. 12, 2013), ECF No. 56.

[FN111]. CAL. FAM. CODE § 297.5.

[FN112]. Johnson v. Schoenmann (*In re* Rabin), 359 B.R 242, 247 (B.A.P. 9th Cir. 2006) (finding that RDPs are treated as spouses and can, therefore, only claim a single homestead exemption).

[FN113]. Koebke v. Bernardo Heights Country Club, 36 Cal. 4th 824, 115 P.3d 1212 (2005) (quoting 2003 Cal. Stat. ch. 421, § 15).

[FN114]. *Id.* at 845-46.

[FN115]. CAL. FAM. CODE § 297.5(a).

[FN116]. *In re* Fonberg, 736 F.3d 901 (9th Cir. 2013).

[FN117]. *Windsor*, 133 S. Ct. at 2696.

[FN118]. *Fonberg*, 736 F.3d at 901-02.

[FN119]. OR. REV. STAT. § 106.340(1).

[FN120]. *Fonberg*, 736 F.3d at 902.

[FN121]. *Id.* at 901.

[FN122]. *Id.* at 902 (OPM, relying on *Windsor*, argued that "the Supreme Court only held that *married* same-sex couples are protected by the Constitution" (emphasis in original)).

[FN123]. *Id.* at 902-03.

[FN124]. SmithKline Beecham Corp. v. Abbott Laboratories (*"Abbott"*), 740 F.3d 471 (9th Cir. 2014).

[FN125]. *Id.* at 474.

[FN126]. *Id.*

[FN127]. *Id.* at 480.

[FN128]. *Id.* at 481-82.

[FN129]. *Id.* at 484.

[FN130]. *Id.* at 489-90.

[FN131]. *See, e.g.*, David S. Cohen and Dahlia Lithwick, *It's Over: Gay Marriage Can't Lose in the Courts--a Perfect Record for Equality post'Windsor*, SLATE MAGAZINE, Feb. 14, 2014, *available at* ht- tp://www.slate.com/articles/news_ and_politics/jurisprudence/2014/02/virginia_s_gay_marriage_ban_ruled_ unconstitutional_a_perfect_record_for.html; *see also*, Editorial Board, *The Expanding Power of U.S. v. Windsor*, N.Y. TIMES, Jan. 26, 2014, *available at* ht- tp://www.nytimes.com/2014/01/27/opinion/the-expanding-power-of-us-v-windsor.html?_r=0.

[FN132]. *See*, Matt Apuzzo, *More Federal Privileges to Extend to Same'Sex Couples*, N.Y. TIMES, Feb. 8, 2014, *available at* http:// www.nytimes.com/2014/02/09/us/more-federal-privileges-to-extend-to-same-sex-couples.html.

[FN133]. *Rabin*, 359 B.R. 242.

[FN134]. *Cusimano*, No. 8:102bk-23646-ES.

[FN135]. *Fonberg*, 736 F.3d 901.
33 Cal. Bankr. J. 49

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