

Tribal Same-Sex Marriage Laws

Preliminary Outline

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I. Introduction.

- A. Background on Defense of Marriage Act (“DOMA”) and State Laws on Same-Sex Marriage.
 - 1. Section 2 of DOMA, 28 U.S.C.A. § 1738C, provides that state and tribal governments are not required to recognize same-sex marriages from other jurisdictions.
 - a. However, states and tribes have always had a good deal of discretion as to what outside marriages to recognize, so it’s unclear what this provision does.
 - b. Although this provision of DOMA is not currently before the Supreme Court, the Court has accepted certiorari on one DOMA case regarding section 3 of DOMA and one case regarding the constitutionality of California’s constitutional ban on same sex marriages.
 - i. It is possible that the Supreme Court’s opinion on section 3 of DOMA may affect the validity of section 2.
 - ii. It is also possible that the Supreme Court’s DOMA opinion or its opinion on California’s constitutional amendment could establish that marriage discrimination against same-sex couples violates the Equal Protection Clause of the Fourteenth Amendment.
 - iii. Tribes generally would not be bound by such a decision because they do not have the constitutional obligations that states do and because the Indian Civil Rights Act (“ICRA”) contemplates that tribes will take their own customs and traditions into account in interpreting statutory obligations under the ICRA.
 - iv. However, tribes that have expressly incorporated federal constitutional provisions into their own constitutions may

be bound under tribal law.

2. Currently nine states and the District of Columbia issue marriage licenses to same-sex couples, eight states provide benefits to same-sex couples that are equivalent to those provided to married opposite-sex couples, two additional states provide some of the benefits of marriage to same-sex couples, and one to two states that do not permit same-sex marriages to be performed within their borders recognize same-sex marriage from other states.
3. Thirty-eight states prohibit same-sex marriages, either by statute or by constitutional amendment.

B. Background on Research of Tribal Laws.

II. Tribal Laws: Preliminary Research.

A. Tribal Laws Permitting Same-Sex Marriage.

1. Coquille Indian Tribe
2. Suquamish Tribe

B. Tribal Laws and Policies Providing Some of the Benefits of Marriage.

1. Confederated Tribes of the Umatilla Indian Reservation
2. Ponca Tribe of Nebraska
 - a. Sick leave and bereavement leave for tribal employees who are in same-sex (or opposite-sex) domestic partnerships.
 - b. Death benefits provided to domestic partner or spouse if worker is injured on the job.
3. Mashantucket Pequot Tribal Nation
 - a. Medical benefits for same-sex couples who are employees of Foxwoods Resort Casino.
4. Proposed Laws
 - a. Little Traverse Bay Bands of Odawa Indians.

- C. Tribes that Recognize Same-Sex Marriages Performed Elsewhere.
 - 1. Tulalip Tribes
 - 2. Neutral Language Suggests Possibility of Recognition
 - a. Hoopa Valley Tribe
 - b. Yurok Tribe
 - c. The Confederated Tribes of the Colville Reservation
 - d. Mashantucket Pequot Tribal Nation
 - e. Ponca Tribe of Nebraska
- D. Sex-Neutral Tribal Laws that May Allow for Same-Sex Marriage or Domestic Partnerships.
 - 1. Neutral Marriage Laws.
 - a. Hoopa Valley Tribe
 - b. Yurok Tribe
 - c. The Confederated Tribes of the Colville Reservation
 - d. Mashantucket Pequot Tribal Nation
 - 2. Neutral Domestic Partnership Laws.
 - a. Confederated Tribes of Siletz Indians
 - i. Adoption
 - b. Little River Band of Ottawa Indians
 - i. Elderly housing
- E. Tribes that Prohibit Same-Sex Marriage.
 - 1. Cherokee Nation

2. Eastern Band of Cherokee
3. Navajo Nation
4. Sault Tribe of Chippewa Indians
5. Muscogee (Creek) Nation
6. Iowa Tribe
7. Chickasaw Nation