

**FILED**  
STATE OF MINNESOTA  
12 AUG -1 PM 1:30  
COUNTY OF HENNEPIN  
BY: PROBATE/MENTAL HEALTH  
FOURTH DISTRICT COURT

**DISTRICT COURT  
FOURTH JUDICIAL DISTRICT  
PROBATE-MENTAL HEALTH DIVISION**

**In re: the Estate of**

**RECOMMENDATION AND ORDER OF  
FORMAL ADJUDICATION OF INTESTACY,  
DETERMINATION OF HEIRS AND  
APPOINTMENT OF PERSONAL  
REPRESENTATIVE**

**Thomas Proehl,**

**File No. 27-PA-PR-12-260**

Decedent  
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On April 23, 2012, this matter came before the Court on the Petition filed February 27, 2012, for Formal Adjudication of Intestacy, Determination of Heirs, and Formal Appointment of Personal Representative. Petitioner, James L. L. Morrison, appeared personally, and by attorneys Thomas E. Lund and David B. Potter. The parents of the Decedent, Joanne and Craig Proehl, were also present.

The matter was referred for hearing to George Borer, Referee of Probate Court, who now reports to the Court, recommending the following **Findings of Fact, Conclusions of Law, and Order:**

**BACKGROUND**

1. Thomas Proehl ("Tom") and James Morrison ("James") were in a committed relationship from 1987 until Tom's death in 2011.
2. In 1987, Tom and James moved from Minnesota to New York and purchased a home together. Each contributed to the down payment, and made mortgage payments from a joint checking account funded by their separate incomes. The couple shared other household expenses as well.

3. In 1999, Tom and James sold their home in New York and returned to Minnesota. They used the equity in their New York home to purchase a jointly-owned home in Minnesota.

4. The two were prominent members of the Minneapolis arts community. From 1999 to 2006, Tom was the general manager, and then the managing director, of the Guthrie Theater. James was Director of the World Stage at the Guthrie during that same period. In 2006, Governor Pawlenty appointed Tom as Executive Director of the Minnesota State Arts Board.

5. In the fall of 2007, the American Conservatory Theater in San Francisco recruited Tom to be its managing director. When they moved to California, Tom and James sold their Minneapolis house and used the proceeds of that sale to buy a house in San Francisco. Tom and James continued to share household expenses and to make mortgage payments from their joint checking account.

6. On October 29, 2008, Tom and James were legally married in the State of California.

7. In August of 2010, Tom and James returned to Minneapolis in order to be closer to their families. Tom started a job as the Producing Director of the Theater Arts and Dance Department at the University of Minnesota.

8. In October of 2010, Tom and James sold their home in San Francisco, with the intent of purchasing a new home in Minneapolis. Although there was a significant loss on the sale of that property, they still received about \$100,000 in equity. This amount was first deposited into their joint checking account. Pending the purchase of a home in Minneapolis, it was transferred to Tom's individual ING account to achieve a higher interest rate.

9. On April 5, 2011, Tom died unexpectedly.

10. Although Tom and James did not have a will, they had discussed the possibility of what would happen if one of them died unexpectedly. They believed that if one of them died, all the assets of that person would go to the other as the surviving spouse.

11. The cash assets in the estate consist largely of the proceeds of the sale of Tom and James' jointly-owned San Francisco home. The estate also contains a tax refund that was generated by the loss incurred on the sale of their home. The final asset is the proceeds of a life insurance policy provided by the University of Minnesota relating to Tom's employment. No beneficiary had been named on the policy.

12. Under Minnesota law, if Tom had died without a surviving spouse, his heirs would be his parents, Joanne and Craig Proehl.

13. Joanne and Craig Proehl consider James to be Tom's husband. From their conversations with their son, they believe that Tom's intent was for James to be his heir.

14. Joanne and Craig Proehl have disclaimed their interests in the life insurance proceeds and the retirement plan. They believe that all the assets of the estate should go to James, as their son's surviving spouse.

15. Joanne and Craig Proehl fully support James' petition.

16. No one has challenged James' petition.

### **FINDINGS OF FACT**

1. The petition is complete. The Petitioner, James Morrison, has affirmed that the statements contained in the petition are true to the best of his knowledge and belief.

2. At the time of death, the Decedent, Thomas Proehl, was domiciled in Hennepin County, Minnesota, at 4456 Aldrich Ave. S., Apt. 1, Minneapolis, MN 55419.

3. The Petitioner appears from the petition to be an interested person as defined by Minnesota law.

4. Based on the statements in the petition, venue is proper because the Decedent was domiciled in this County at the time of his death, and was the owner of property located in the State of Minnesota.

5. Any notice required by Minnesota law has been given and proved.

6. The Decedent left no valid will or other testamentary documents, and therefore died intestate.

7. The Decedent died on April 5, 2011. Petitioner commenced this proceeding within the time limitations prescribed by Minnesota law.

8. All persons identified as heirs have survived the Decedent by at least 120 hours. The Decedent left no surviving issue.

9. James seeks appointment as personal representative. From the statements in the petition, James has a priority entitlement to the appointment, has not been disqualified, and has not renounced appointment.

10. The petition indicates that no personal representative has been appointed in another county of Minnesota whose appointment has not been terminated.

11. There are no objections to this petition.

## **CONCLUSIONS OF LAW**

### **I. Validity of California marriage**

1. Tom and James were married in California on October 29, 2008, when marriage between same-sex couples was legal in California.

2. Marriages such as theirs, celebrated before November 4, 2008, remain valid and were unaffected by the subsequent passage of Proposition 8, which purported to ban same-sex marriage in that state. *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009) (“Proposition 8 cannot be interpreted to apply retroactively so as to invalidate the marriages of same-sex couples that occurred prior to the adoption of Proposition 8. Those marriages remain valid in all respects”).

3. Therefore, Tom and James had a valid marriage in the state of California.

## **II. Rights of surviving spouse generally**

1. Generally, a decedent’s surviving spouse is provided with many statutory rights regarding the intestate estate. Where there is no will, the surviving spouse of the decedent has first priority for appointment as a personal representative of the estate. Minn. Stat. § 524.3-203 (2011). If there are no surviving descendants of the decedent, the intestate share of the surviving spouse is the entire estate. Minn. Stat. § 524.2-102 (2011).

2. The law recognizes these rights of a surviving spouse because the purpose of intestacy laws is to “discover and make effective the intent of a decedent in distribution of property.” Minn. Stat. § 524.1-102 (b) (2) (2011). Implicit in the law is the presumption that a spouse is the preferred beneficiary of the estate.

3. The Minnesota Uniform Probate Code has two sections entitled “Definitions.” Minn. Stat. §§ 524.1-201, 524.2-201 (2011). Despite the many definitions listed and the important role of the surviving spouse in probate matters, neither of these sections defines the phrase “surviving spouse.” Furthermore, the definition of “marriage,” listed in the definitions within the section addressing the elective share of the surviving spouse, states that “as it relates to a transfer of the decedent during marriage, means *any* marriage of the decedent to the decedent’s surviving spouse.” Minn. Stat. § 524.2-201 (3) (2011) (emphasis added).

4. There is nothing in the Minnesota Uniform Probate Code that indicates that the surviving spouse must be the opposite sex of the decedent. Similarly, with respect to the rights of a surviving spouse, the Minnesota Uniform Probate Code does not make any reference to the validity of the marriage under Minnesota law, nor to the application of the list of “prohibited marriages.”

5. Accordingly, no provision of the Minnesota Uniform Probate Code prohibits a surviving spouse of a same-sex marriage from receiving statutory rights under the Code and inheriting the estate of his deceased spouse under Minnesota intestacy laws.

6. At further issue, however, is whether the Minnesota Defense of Marriage Act applies to prohibit a surviving spouse of a same-sex marriage from receiving statutory rights, such as those provided under the Minnesota Uniform Probate Code. Thus, the Court must address the issue of whether the Minnesota Defense of Marriage Act prohibits the inheritance of the intestate estate of Petitioner’s deceased spouse.

### **III. Applicability of the Minnesota Defense of Marriage Act**

#### **History**

1. The federal Defense of Marriage Act (“DOMA”), defining marriage as the legal union of one man and one woman, was signed into law by President Bill Clinton on September 21, 1996. Under this law, no U.S. state or political subdivision is required to recognize a same-sex marriage treated as a marriage in another state. Following the passage of the federal DOMA, many states began passing their own versions of DOMA.

2. The Minnesota Statutes recognize the validity of marriages contracted outside the state of Minnesota which were valid in that state at the time of the marriage. Minn. Stat. §

517.20 (2011). However, this rule is modified to a certain extent by the list of prohibited marriages, which includes marriages of persons of the same sex. Minn. Stat. § 517.03 (2011). The portion of the statute addressing same-sex marriages is known as the Minnesota Defense of Marriage Act (“Minnesota DOMA”).

3. The Minnesota DOMA was passed into law in 1997. It states that “[t]he following marriages are prohibited: . . . (4) a marriage between persons of the same sex.” Minn. Stat. § 517.03 (a) (4) (2011). It further states that “[a] marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.” Minn. Stat. § 517.03 (b) (2011).

#### **Legislative history**

1. In order to determine the legislature’s intent regarding the language in the Minnesota DOMA, it is helpful to examine the legislative history of the bill that was ultimately passed into law as the Minnesota DOMA.

2. In 1997, the law constituting the Minnesota DOMA was first offered into the Minnesota legislature through small bills, Senate File 11 and House File 16. It eventually became part of a large bill, Senate File 1908 (“S.F.1908”), that was known as the “Omnibus Health and Human Services Appropriations” bill, S.F. 1908, 80 Sess. (Minn. 1997), [https://www.revisor.mn.gov/revisor/pages/search\\_status/status\\_detail.php?b=Senate&f=SF1908&ssn=0&y=1997](https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=Senate&f=SF1908&ssn=0&y=1997).

3. The proposed language in S.F.1908 originally stated that “[t]he following marriages are prohibited:...(4) a marriage between persons of the same sex. A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by

another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state. *A same-sex relationship may not be recognized by this state as being entitled to the benefits of marriage.*” S.F. 1908 (emphasis added).

4. On April 29, 1997, S.F. 1908 was offered to the Senate with the italicized language included. On that date, S.F. 1908 did not pass. A five-person conference committee was convened to discuss this bill, and senate conferees were appointed.

5. On May 16, 1997, the conference committee offered their report to the Senate. The only change made to this portion of the bill was the deletion of the sentence italicized above, that “[a] same-sex relationship may not be recognized by this state as being entitled to the benefits of marriage.” On this date, the Senate adopted the conference committee report, and re-passed the bill with this language deleted. The House also adopted the conference committee report, and re-passed the bill. The language as offered on May 16, 1997, became law as the Minnesota DOMA.

6. Despite extensive legislative history research, this Court was unable to find minutes or discussion of the Senate conference committee regarding this bill. However, it found a recording discussing this bill on May 16, 1997. The discussion of this bill in the Senate was based primarily on the underlying issue of same-sex marriage, and not in regard to which rights would, and would *not*, be allowed to same-sex couples.

7. The fact that S.F. 1908 was not passed while it contained the sentence regarding the prohibition of the benefits of marriage, and was passed once this sentence was removed, is informative regarding the intentions of the Minnesota Legislature as to which rights it wished to prohibit to same-sex couples. Although S.F. 1908 was a small part of a large omnibus bill, the



language addressed a highly controversial political issue. Therefore, it is unlikely that the change in the bill language between the failed and successful passage of the bill was merely coincidental.

8. Furthermore, denying same-sex couples “the benefits of marriage” is broader in scope, prohibiting more rights than “contractual rights granted by virtue of marriage.” The phrase “benefits of marriage” has been discussed in relation to the same-sex relationship, and may include legal and economic benefits, such as state and federal tax liability; employment benefits; health care coverage; accidental death benefits; spousal privilege and confidential marital communications; the right to make decisions about cremation, burial, and funeral arrangements; and the right to inherit under a state’s intestacy laws. *See Jennifer Gerarda Brown, Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. Cal. L. Rev. 745, 783-84 (1995); Taya N. Williams, *Committed Partnership: The Legal Status of Committed Partners and Their Children*, 13 J. Suffolk Acad. L. 221, 229, 235, 243 (1999).

9. Therefore, the phrase “benefits of marriage” has legal significance. So, too, does the deletion of the “benefits of marriage” sentence. It appears to be an intentional legislative compromise that allowed passage of this bill. Furthermore, since “benefits of marriage” includes inheritance under a state’s intestacy laws, it is possible that by leaving this language out, the legislature intended to allow the surviving spouse of a same-sex couple to inherit under the Minnesota intestacy laws.

### **Statutory vs. contractual rights**

1. At the time that the Minnesota Legislature drafted the bill that became the Minnesota DOMA, many other state legislatures were also enacting DOMA statutes. The Minnesota Legislature could observe the varied language used in other states' DOMAs at the time it was drafting its own.

2. In contrast with the broader reach of the language in other states' DOMA statutes, Minnesota's DOMA states that marriage of persons of the same-sex is "void in this state and *contractual rights* granted by virtue of the marriage or its termination are unenforceable in this state." Minn. Stat. § 517.03 (b) (2011) (emphasis added).

3. According to the statutory rules of construction, "words and phrases are construed . . . according to their common usage; [and] general words are construed to be restricted in their meaning by preceding particular words." Minn. Stat. § 645.08 (1), (3) (2011).

4. Since the word "contractual" is used before "rights" in the Minnesota DOMA, the clause should be interpreted as only affecting the contractual rights arising during the life of the married couple. It should not be construed to defeat the statutory rights of a surviving spouse under the Minnesota Uniform Probate Code.

5. The Minnesota DOMA should be interpreted as only applying to limit certain contractual rights of marriage available to married couples during their lifetime, not the statutory rights of a surviving spouse in an intestate probate. If the Legislature intended DOMA to deny the intestate probate rights of a surviving spouse, the statute would not limit its impact to "contractual rights."

6. This narrow interpretation is supported by the fact that other states have passed DOMA statutes with much broader provisions, which are clearly intended to have further-

reaching effects. For example, Georgia's DOMA also prohibits same-sex marriages, provides that same-sex marriages valid in another jurisdiction are void in Georgia, and states that any contractual rights shall be enforceable. However, unlike the Minnesota statute, the Georgia statute states that "no marriage of the same sex shall be entitled to the benefits of marriage," and says that "[c]ourts of this state shall have no jurisdiction whatsoever under any circumstances...to rule on any of the parties' rights arising out of or in connection with such marriage." Ga. Code Ann. § 19-3-3.1 (2011). This language reaches much further; it prohibits any rights possibly connected with a same-sex marriage. Such language is in contrast to the language of the Minnesota statute, which merely prohibits contractual rights arising out of a same-sex marriage.

7. While the language of other states' DOMA statutes are not as comprehensive as Georgia's, their statutes still specifically indicate a broader prohibition of rights connected with same-sex marriages. See, e.g., Ark. Code Ann. § 9-11-208 (a) (1), (2) (2011) ("No same sex marriage shall be recognized as entitled to the benefits of marriage [and] any marriage entered into by a person of the same sex...shall be void in Arkansas, and *any contractual or other rights* ...shall be unenforceable"); Fla. Stat. Ann. § 741.212 (1), (2) (2011) ("Marriages between persons of the same sex...which are treated as marriages in any jurisdiction...are not recognized *for any purpose* in this state. The state, its agencies,...may not give effect to *any...claim* arising from such a marriage or relationship."); Ky. Rev. Stat. § 402.045 (2) (2011) ("*Any rights* granted by virtue of the [same-sex] marriage...shall be unenforceable in Kentucky courts."); Mo. Rev. Stat. § 451.022 (4) (2011) ("A marriage between persons of the same sex will not be recognized *for any purpose* in this state even when valid where contracted.") (emphasis added).

8. If the Minnesota Legislature had intended to prohibit the application of statutory rights to a surviving spouse of a same-sex marriage, it could have used any of the language used by other states to say so. It could have said "all rights" instead of "contractual rights." However, the Legislature did not do so. Instead it limited the rights which were prohibited by adding the modifier "contractual."

9. Therefore, when examining this statute using principles of statutory construction, and by comparing its language with the language of other states' DOMA statutes, it is apparent that the Legislature intended to limit the prohibition of rights granted by virtue of a same-sex marriage to only apply to contractual rights. The Minnesota DOMA statute is limited in scope to prohibiting contractual rights, and should not apply to prohibit statutory rights.

10. Accordingly, statutory rights granted by virtue of a same-sex marriage, such as those rights provided to a surviving spouse under the Minnesota Uniform Probate Code, are not affected by the Minnesota DOMA.

11. Therefore, the language of the Minnesota DOMA does not prohibit a surviving spouse of a same-sex marriage from receiving statutory rights under the Uniform Probate Code. This language does not prohibit James from inheriting the intestate estate of Tom as the surviving spouse of a same-sex marriage.

### **Recognizing marriage for limited purpose of intestacy**

1. In addition to the reasons listed above, James should also be recognized as the surviving spouse for intestacy purposes due to the different treatment of marriages in such circumstances.

2. Intestacy is a unique area of law. Courts have recognized marriages that might not otherwise be enforceable in order to protect the inheritance rights of the surviving spouse. These courts have recognized legally valid marriages from other jurisdictions, despite the void status of the marriage in the court's jurisdiction, for the limited purpose of allowing the intestacy rights of a surviving spouse.

3. For example, in 1948, the Mississippi Constitution and Mississippi Statutes stated that interracial marriages were unlawful and void. In *Miller v. Lucks*, an interracial couple was legally married in the state of Illinois, where they lived together until the wife's death. 36 So. 2d 140, 141 (Miss. 1948). The wife died intestate, with no heirs but her husband, and leaving property in Mississippi. Despite Mississippi law defining interracial marriages as "unlawful and void," the Mississippi Supreme Court upheld the marriage for intestacy purposes, stating that it was requested to "recognize this marriage to the extent only of permitting one of the parties thereto to inherit from the other property in Mississippi, and to that extent it must and will be recognized." *Id.* at 142.

4. The *Miller* court reasoned that since the purpose of the statute was to prevent interracial couples from living together in Mississippi as husband and wife, and this had not occurred, it did not violate the purpose of the statute to allow a person in such a marriage to simply inherit property in Mississippi. *See id.* at 141-42; *see also In re Dalip Singh Bir's Estate*, 188 P.2d 499, 500-02 (Cal. Dist. Ct. App. 1948) (recognizing polygamous marriage contracted in India to allow intestate succession of both surviving spouses, as "where only the question of descent of property is involved, public policy is not affected"); *In re May's Estate*, 114 N.E.2d 4, 6 (1953) (recognizing marriage of uncle and half-niece, which was valid where contracted in

Rhode Island, as valid in New York despite New York statute declaring such marriages “void,” to allow surviving spouse rights in estate administration).

5. Under this same logic, it would not violate the public policy behind the Minnesota DOMA to recognize a valid same-sex marriage from another state if only for the statutory rights provided to a surviving spouse relating to intestate succession. Since this only addresses the disposition of a person’s property after death, and does not sanction the relationship of the same-sex marriage during the life of the parties, it cannot be seen to be contrary to the public policy behind the Minnesota DOMA. Similarly, a refusal to recognize intestacy rights for same-sex couples is unlikely to deter same-sex relationships. *See* Christine A. Hammerle, *Free Will to Will? A Case for the Recognition of Intestacy Rights for Survivors to A Same-Sex Marriage or Civil Union*, 104 Mich. L. Rev. 1763, 1778-79 (2006) (weighing competing public policies).

6. Therefore, it does not violate the public policy behind Minnesota DOMA to allow James to receive statutory rights relating to intestate succession as the surviving spouse.

### **Intent of Decedent**

1. The Minnesota Uniform Probate Code states that it “shall be liberally construed and applied to promote the underlying purposes and policies.” Minn. Stat. § 524.1-102 (a) (2011). One of the purposes listed below is “to discover and make effective the intent of a decedent in distribution of property.” Minn. Stat. § 524.1-102 (b) (2) (2011). Furthermore, the court should apply principles of law and equity to supplement the provisions of the Probate Code. Minn. Stat. § 524.1-103 (2011).

2. From the evidence presented to the Court, it is clear that with regard to his distribution of property, Tom’s intent was to have his property go to his long-term partner and

spouse, James. In fact, the two had discussed what might happen if one of them died without a will. They believed that since they were legally married in California, their assets would pass to the other upon death, because the survivor was the surviving spouse.

3. By recognizing James as the surviving spouse, the Court would give effect to the Decedent's intent with regard to his property.

4. Furthermore, principles of law and equity supplement the requirements of the Minnesota Uniform Probate Code. In the instant case, where a couple believed their marriage was legal and valid, and believed that their assets would go to each other upon death, that belief should be recognized to create a fair result. Also, the assets in the estate that James would inherit are, in fact, shared assets, which Tom and James mutually established from a long life together. In addition, Tom's parents have disclaimed their interest in the estate assets, stating that they believe that the assets should go to James. There is no one objecting to James' petition to be personal representative and to be recognized as the surviving spouse for intestacy purposes.


5. Based on these reasons, the fairest and most equitable result would be to recognize James as the Decedent's surviving spouse.

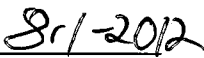
## **Conclusion**

1. After examining the language of the Minnesota Uniform Probate Code and the Minnesota DOMA; addressing the limited recognition of otherwise "void" marriages for intestacy purposes; exploring the applicable policies; and reviewing the equitable principles of this matter, it is evident that given the specific facts of this case, none of these would prohibit James, as Tom's surviving spouse, from receiving his statutory rights relating to intestacy.

2. Therefore, James Morrison's petition should be granted, and he should be recognized as the surviving spouse of the Decedent for the limited purposes of intestate succession.

Findings Submitted and Order Recommended by:

  
George F. Borer  
District Court Referee

  
Date

### **REVIEW OF A REFEREE'S ORDER**

It is confusing to many that one judge in a black robe heard Mr. Proehl's case, and that another judge seems to be involved in the case by reviewing and signing off on the first judge's order. To clarify this confusion for those who are unfamiliar with this process, a brief explanation is in order: Under Minnesota Statute Section 484.70, a person known as a referee may be appointed to assist a judge in the handling of certain types of cases. Judges nearly always appoint referees who are experts in the particular subject area. The referee in this case, George Borer, fits the characterization of an expert: He has practiced in probate law for decades.

The referee's duty is to hear the case just as a district court judge would, and then prepare a recommended order. The recommended order is based on the facts the referee finds to be true, and on the law the referee believes applies to that factual scenario. The order becomes a final order when the district court judge reviews the order and confirms it.

Most matters submitted to me by a referee such as Referee Borer require no discussion or additional analysis. This case, however, is unlike any that has come before Minnesota's probate court. In the backdrop of the highly contentious view over whether same-sex marriage should be



constitutionally prohibited, it may also be of greater public interest than the vast majority of cases that come to probate court. Accordingly, it is appropriate to explain why Referee Borer's recommended findings of fact are fully supported by the record and why his conclusions of law and proposed order are just and reasonable under the circumstances.

**I. Referee Borer's Recommended Findings of Fact Are Fully Supported by the Record.**

Unlike many cases that come before the courts, this case reveals no real evidentiary points in dispute. The record before the court overwhelmingly establishes that the couple at issue in this case--Thomas Proehl and James Morrison--was no different in life than most married couples:

- They were legally married in a solemn ceremony;
- They were loving, dedicated to each other, and committed to spending the rest of their lives together;
- They had combined their assets to create a single household to which they each contributed; and
- They wished the other to receive all their assets upon death.

Accordingly, for all factual purposes (except one), Mr. Proehl and Mr. Morrison are like every other couple subject to Minnesota's probate laws. What makes this couple different is that they were a married, same-sex couple in a state where that status is legally unwelcome.

**II. Referee Borer Correctly Concluded that Minnesota's Probate Laws Do Not Discriminate Against Same-Sex Couples.**

As mentioned above, this would be a completely routine case but for the existence of the Defense of Marriage Act (DOMA). As a general matter, there is no doubt that DOMA is hostile to the interests of same-sex couples. But the question before the Court is not whether DOMA

should exist, or whether it is generally antagonistic to same-sex couples. Instead, the question is far more narrow: Does DOMA prevent a surviving spouse in a same-sex marriage from inheriting through intestacy the dead spouse's assets?

There is little that I can add to the thoughtful and complete legal analysis provided by Referee Borer, and I fully support his findings and his reasoning. There are, however, a couple points worth emphasizing to reinforce the conclusions Referee Borer reached.

**A. The Legislature chose more narrow language in DOMA than the broad language used in other states.**

The first point deserving comment addresses a question that many may ask: How can one reach a conclusion favorable to a same-sex couple when a surface reading of DOMA is so hostile to them? Indeed, the language of DOMA seems sweeping when it states:

“[a] marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction *is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.*” Minn. Stat. § 517.03(b) (2011) (emphasis added).

The answer to the question does not lie in a hidden agenda of either myself or Referee Borer to defeat one cause or to advance another. That is not our job. Our job is to look carefully at the language of the statute and apply it to the facts at hand. In doing this, the answer emerges from an analysis that goes beyond the surface, and which credits the Legislature's ability to select language which effectuates its actual intent.

**1. The Legislature had available to it broad language.**

As Referee Borer ably illustrates, the Legislature had numerous options for selecting language that would comprehensively abrogate any legal benefit or right that would otherwise come from a lawful marriage. For instance, the Legislature could have selected broader terms which included a *catch-all* provision, similar to what Arkansas and Kentucky did:

“...any marriage entered into by a person of the same sex...shall be void in Arkansas, and *any contractual or other rights*...shall be unenforceable”. Ark. Code Ann. § 9-11-208(a)(1),(2) (2011) (emphasis added).

or,

“*Any rights* granted by virtue of the [same-sex] marriage...shall be unenforceable in Kentucky courts.” Ky. Rev. Stat. § 402.045(2) (2011) (emphasis added).

Alternatively, our Legislature could have selected language that made it clear that a same-sex marriage would not be recognized for *any* purpose, as Missouri and Florida did:

“A marriage between persons of the same sex will not be recognized *for any purpose* in this state even when valid where contracted.” Mo. Rev. Stat. § 451.022(4) (2011) (emphasis added).

or,

“Marriages between persons of the same sex...which are treated as marriages in any jurisdiction...are not recognized *for any purpose* in this state. The state, its agencies... may not give effect to *any...claim* arising from such a marriage or relationship.” Fla. Stat. Ann. § 741.212(1), (2) (2011) (emphasis added).

Those statutes, and several others like them, serve to identify for the Minnesota Legislature (and the Court) the ways in which language can be used for the greatest possible effect. The Court credits the Minnesota Legislature with having an ability at least equal to those of the legislatures in Kentucky, Florida, Arkansas and Missouri, to include highly expansive language in its statutes when it chooses to do so and when it is politically feasible to do so. Those state legislatures have nothing on the Minnesota Legislature when it comes to carefully choosing language that will become law.

## **2. The Legislature considered and rejected broader language.**

The Minnesota Legislature was obviously aware of its linguistic options and their legal effects when drafting DOMA. This is evidenced by the fact that the Legislature included more

comprehensive language in an earlier version of DOMA. Specifically, a previous draft of DOMA stated:

...A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state. *A same-sex relationship may not be recognized by this state as being entitled to the benefits of marriage.*” S.F. 1908 (emphasis added).

The law that actually passed to become DOMA did *not* include a comprehensive bar to spouses in same-sex marriages to receiving *the benefits of marriage*. The decision the Legislature made to eliminate that language must be presumed to have been intentional, and to have significance. As thoroughly discussed by Referee Borer, the most logical conclusion to be drawn from that action is that the Legislature eliminated *some* of the benefits of marriage (specifically, “the contractual rights granted by virtue of the marriage or its termination”) but not all the rest. Logically, then, spouses in valid same-sex marriages at least retain the statutory rights available under the Uniform Probate Code.

**B. Allowing Mr. Morrison to Inherit Through Intestacy is Completely Consistent with the Purpose of Minnesota’s Probate Laws.**

The second point worth emphasizing is that this result effectuates the intent underlying Minnesota’s probate laws. A primary driver for Minnesota’s probate laws is to give effect to what the law expects would be the deceased person’s wishes. Minn. Stat. § 524.1-102 (b) (2) (2011) (One of the main goals of the Uniform Probate Code is “to discover and make effective the intent of a decedent in distribution of property”). When one spouse dies without a will and there are no surviving descendants of the deceased spouse, the law presumes that the deceased spouse would want his surviving spouse to get his entire estate. Minn. Stat. § 524.1-102 (b) (2011). This result is what most believe it should be.

The reasons underlying the statutory presumption of allowing a surviving spouse to inherit an estate apply with equal force regardless of whether the couple was a heterosexual or a same-sex couple:

- Members of either-type couple presumably love each other and see the other as the natural recipient of their worldly property;
- Members of either-type couple typically wish to take care of the other in death; and
- The living spouse of either-type couple faces financial challenges upon the loss of the other, and the receipt of the property in the estate helps mitigate those challenges.

As Referee Borer's factual findings illustrate, Mr. Proehl and Mr. Morrison organized their lives around these principles in the exact same ways that heterosexual couples would. They shared expenses; they comingled their funds; and they jointly owned their home. No doubt, if they had prepared wills -- something that a large percentage of heterosexual couples fail to do as well -- they would have named the other as their sole beneficiary. Since they neglected to prepare a will that explicitly identified the other as the sole recipient of his estate, Minnesota probate law does this for them just as it would for a heterosexual couple.

## CONCLUSION

In short, there is no apparent reason why the probate laws would disfavor spouses in a same-sex marriage, and every reason why they should be treated in death like any other married couple. Accordingly, I fully accept Referee Borer's Recommended Findings of Fact and Conclusions of Law in making the following Order:

**IT IS THEREFORE ORDERED**

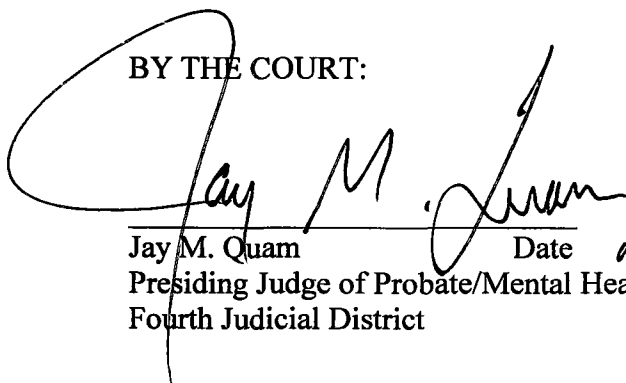
1. That the petition is hereby granted.
2. That the Decedent died intestate leaving no valid will.
3. That the heir of the Decedent is as identified in the petition commencing this proceeding, and he and his interest is as follows:

James L. L. Morrison, spouse, the entirety of Decedent's intestate estate.

4. That James L. L. Morrison is hereby formally appointed personal representative of the estate of Thomas Proehl, Decedent, with no bond, in an unsupervised administration.

5. That upon qualification and acceptance, Letters of general administration issue accordingly.

BY THE COURT:

  
Jay M. Quam                      Date August 1, 2012  
Presiding Judge of Probate/Mental Health Court  
Fourth Judicial District