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DOMESTIC RELATIONS

Gay marriage poses legal knots for states

Must Texas accept another state's recognition of a legal union as valid?

By J. THOMAS OLDHAM

GAY marriage is becoming increasingly accepted throughout the Northeast, but is banned throughout most of the rest of the country. What if a gay married couple living in Massachusetts moves to another state like Texas that doesn't accept gay marriage? Does this affect their health insurance? If the relationship deteriorates, is a divorce possible?

Spouses moving from one state to another have not traditionally presented great legal problems regarding the validity of the couple's marriage. A couple validly married in one state clearly remained so after moving, due to the fact that our marriage laws traditionally have not differed greatly. Some minor disagreements have existed, such as whether first cousins could marry or whether common-law marriage was recognized. But these policy differences were not considered sufficiently important to affect the validity of a marriage validly established before the move. A "rule of validation" was established whereby a marriage was considered valid if it satisfied the legal requirements of any state that had contacts with the couple.

The advent of gay marriage has changed the legal landscape. A small number of states now permit gay marriage, while most do not. This problem has been exacerbated because these rules are perceived to reflect important social policies, so the "rule of validation" mentioned above is not applied. So, if a couple living in a place where

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gay marriage is not permitted goes to another where it is (such as Massachusetts or Canada) and purport to marry, in most states the marriage will not be considered valid in the couple's domicile. This presents some practical burden on gay couples, but may well be needed to stop couples from evading important laws of their domicile at the time they want to marry. Still, in such an instance it is conceptually clear, in most states, that the couple never is validly married under U.S. law.

Another issue relating to gay marriage validity is more complex and has not yet been resolved. Assume a gay couple lives in Massachusetts (or some other state that permits gay marriage) and decides to marry. Such a couple clearly is validly married while living in Massachusetts. They could enjoy the benefits of being a married couple under state law, such as allowing one partner to be covered under the other's health insurance at work or filing a joint tax return. Divorce, with all its possible remedies, is available if the marriage breaks down.

But if at some later point one of the partners accepts a job transfer to another state that does not permit gay marriage, such as Texas, complications arise. Texas law provides that a gay marriage is "void" and that no state agency should give any effect to a purported gay marriage. If the gay partners move from Massachusetts to Texas, what impact would this have on their marriage? Would they immediately cease being married as soon as they set foot on Texas soil? If so, what happens to their health insurance coverage? If the marriage breaks down, could one partner file for divorce in Texas? To further complicate the matter, let's assume the partners decide they don't like Texas and move back to Massachusetts. Would they once again be married? What about the period while living in Texas?

There currently are no definitive answers to the questions posed in the preceding paragraph. One way to help defuse this problem would be for states that don't generally accept gay marriage to create an exception to their general rule of non-recognition. They could choose to recognize certain gay marriages, but only if celebrated by a gay couple while living in a state that accepted gay marriage. Otherwise, some very sticky legal issues will arise.

Oldham is the John H. Freeman professor of law at the University of Houston Law Center.