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# Back to the Future: How Illinois' Legalization of Same-Sex Relationships Retroactively Affects Marital Property Rights

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# BACK TO THE FUTURE: HOW ILLINOIS' LEGALIZATION OF SAME-SEX RELATIONSHIPS RETROACTIVELY AFFECTS MARITAL PROPERTY RIGHTS

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## INTRODUCTION

Once upon a time, there was an Illinois same-sex couple, whom we will call Richie and Homer. Richie and Homer dated for years and finally decided to tie the knot in 2002. However, at the time, Illinois refused to recognize any same-sex relationships. Therefore, the happy couple took matters into their own hands by traveling to Vermont to enter into a civil union. Afterwards, they returned to Illinois and started their lives together. Richie thrived financially by starting his own successful business while Homer primarily managed their shared home and occasionally worked part-time. For the next decade, they acted as though they were legal spouses by sharing a bank account, buying a house together, and even owning a family dog. In 2011, Illinois began recognizing same-sex civil unions and the couple, for the first time, had a legal relationship in Illinois. Alas, in 2012, the relationship began to fall apart and the couple separated both informally and legally. As part of dissolving their legal relationship, Richie and Homer begin the process of equitably dividing their shared assets. However, the parties cannot agree on what property they are required to divide under Illinois law. Richie claims that the couple did not begin acquiring shared marital property until Illinois recognized same-sex unions in 2011. Homer, on the other hand, claims that they began acquiring marital property the moment the two entered into a legal relationship in Vermont.

The question is then: When did Homer and Richie begin acquiring marital property and what effect does that determination have on their property rights? To that end, this paper discusses Illinois' treatment of the division of marital property followed by an analysis on the Illinois Religious Freedom Protection and Civil Union Act (Civil Union Act) to determine whether it should be applied retroactively or prospectively. In our hypothetical situation, this determination will dictate the amount of marital property subject to division between Homer and Richie. The further back a

* Chicago-Kent College of Law, Class of 2015. I would like to thank Professor Mickie Piatt for her help through the writing process as well as my wife, Brook, for her support.

court goes to recognize the start of the legal relationship, the more property it puts in the marital property pot.

The division of marital property following the breakdown of a relationship is not a novel source of litigation. However, constant changes to the way society views familial roles and the ever-changing definitions of those roles regularly add new wrinkles to this centuries old problem. Should women's contributions within the home count towards marital property? What about a gift from a rich uncle to one spouse? The value of a graduate degree one spouse earned while the other financially supported the family? The list of potential flash points and their permutations is endless and the result is a unique and complex area of law.

The analysis becomes even cloudier by adding the hottest topic in the so-called culture war—same-sex relationships—to the equation. In Illinois, the same laws dividing marital property apply to same-sex couples as well, but with an added twist. Before 2011, many couples like Richie and Homer—who did not want to wait for Illinois to recognize same-sex relationships—traveled to other states on the front line of the legalization fight to enter into same-sex civil unions or marriages. Such couples then returned to Illinois and acted as though they formed a legal partnership even if the state did not recognize the change.

When the Illinois legislature legalized same-sex civil unions by enacting the Civil Union Act on June 1, 2011, and completed the legalization process two years later by legalizing same-sex marriages under the Religious Freedom and Marriage Fairness Act (Fairness Act), the status of these couples was thrown into limbo.[1] Under both of these statutes, Illinois agreed to recognize relationships formed in other states without clarifying whether or not this reciprocity extends to relationships entered into before Illinois legalized same-sex relationships.[2] Without clear legislative intent, the statutes leave Illinois courts to their own devices in determining the retroactive effect of these statutes. Because the Fairness Act only recently took effect—on June 1, 2014—this paper will primarily analyze this question through the lens of the Civil Union Act.[3] The analysis regarding retroactivity is the same for both statutes.

This paper analyzes the potential for the retroactive application of the Act from several different points of view. First, it is necessary to understand divorce law in Illinois as the fledgling Civil Union Act case law consistently looks to the Illinois Marriage and Dissolution of Marriage Act

1. 750 ILL. COMP. STAT. 75/1 (2011); S.B. 10, 98th Gen. Assemb., 1st Reg. Sess. (Ill. 2013).
2. 750 ILL. COMP. STAT. 5/60; S.B. 10.
3. S.B. 10.

(Marriage Act) as a guide. Second, I analyze the structure of same-sex civil unions now legalized in Illinois based on the text of the Civil Union Act. Third, the Civil Union Act only has a retroactive application if it does not affect substantive rights of parties unless the legislature explicitly indicated the Act's intended temporal reach. Additionally, Illinois case law interpreting the Marriage Act provides valuable insight into how courts should interpret the Act because both statutes explicitly adopt the Marriage Act and both acts state that their purpose is to ensure that same-sex couples have the same rights and duties as heterosexual married couples. Fourth, a court should also consider the parties' intent as traditional contract law dictates that parties should be held to their bargained-for agreement. Financial actions taken in contemplation of marriage may also be binding in Illinois. Finally, the Full Faith and Credit Clause did not force Illinois to recognize same-sex relationships in 2002 because the Defense of Marriage Act (DOMA) protects states' abilities to create their own laws regarding same-sex relationships.

This analysis leads to the conclusion that the courts should not retroactively apply the Act, as doing so would drastically alter the substantive rights of the parties involved. It is hard to know what Richie and Homer thought the legal effect of their Vermont unionization was in 2002, so it is impossible to hold the parties to their true intent. While Illinois courts do take party intent into account to determine the retroactive application of marital property purchased in contemplation of marriage, this doctrine is very narrow.[4] It is unlikely that such an argument would succeed twelve years after the unionization when party intent is so murky. Additionally, traditional marriage case law shows that Illinois courts treat invalid marriages that are subsequently perfected as effective on the date of perfection rather than the initial ceremony. Therefore, the Civil Union Act should not retroactively apply and Richie and Homer began acquiring marital property on June 1, 2011.

## I. DIVORCE IN ILLINOIS

Within the last century, as divorce became more commonplace and recognition of a stay-at-home parent's contribution to the family increased, the old common law notion—that each partner in a relationship carries his or her own property both into and out of the relationship—has approached

4. *See* BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 5:27, at 4 (3d ed. 2005).

extinction.[5] By 1970, the rise of no-fault divorce legislation and proposed reforms by The National Conference of Commissioners of State Laws (ULC) opened the floodgates for marital property reform.[6] Illinois soon adopted its own marital property reform act based upon the ULC's model statute in 1977 by enacting the Illinois Marriage and Dissolution of Marriage Act (Marriage Act).[7] These reforms adopted the concept of equitable distribution when dividing marital assets, in which the marriage relationship is defined as a partnership or shared enterprise and both partners are equally entitled to the fruits of that enterprise.[8] Under the equitable distribution doctrine, marital misconduct is not relevant to the distribution of property unless it demonstrates financial misdeeds.[9]

Section 503 of the Marriage Act defines marital property as "all property acquired by either spouse subsequent to the marriage" and creates a presumption that any property acquired by either party during the marriage is marital property.[10] From the outset, Illinois courts supported this presumption and actively pursued the principles of equitable distribution.[11] The few recognized exceptions to marital property include property acquired by one spouse prior to the marriage, gifts received by a spouse during marriage, and property that the owner never comingled with marital assets.[12] All other property deemed "marital" is subject to equitable distribution by the courts.[13] The division of property does not require mathematical equality, but rather, must be equitable in nature based on factors such as the contributions of each party, the duration of the marriage, and relevant future economic circumstances.[14]

Therefore, the courts presume that all property acquired by either spouse after the marriage and before the entry of a judgment for dissolution

5. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 79 (1991).

6. *See generally* UNIF. MARRIAGE & DIVORCE ACT (1973).

7. *See In re* Marriage of Komnick, 417 N.E.2d 1305, 1308 (Ill. 1981) (stating that the Illinois Marriage and Dissolution Act is based on the ULC's Uniform Marriage and Divorce Act).

8. *See id.* (holding that the "distribution of property is based in part on the contributions of each spouse to the marital relationship as well as to the accumulation of wealth or property.").

9. *See* UNIF. MARRIAGE & DIVORCE ACT § 308 cmt. (stating that "the court is expressly admonished not to consider the misconduct of a spouse during the marriage.").

10. 750 ILL. COMP. STAT. 5/503 (2013).

11. *See, e.g.*, Kujawinski v. Kujawinski, 376 N.E.2d 1382, 1386 (Ill. 1978).

12. 750 ILL. COMP. STAT. 5/503.

13. Debra DiMaggio, *The "Prodigious Spouse": Equitable Distribution and Wealthy Wage Earner*, 91 ILL. B.J. 460, 461 (2003), *available at* https://a.next.westlaw.com/Document/I0952c901637711dbbd2dfa5ce1d08a25/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=91+Ill.+B.J.+460.

14. *In re* Marriage of Wolf, 536 N.E.2d 792, 797 (Ill. App. Ct. 1989).

of marriage is marital property regardless of how the parties treat the property or hold the title.[15] It is possible to overcome this presumption, but doing so is not an easy task. The burden of proof rests with the party seeking to show that the property is non-marital, and the party must do so by clear and convincing evidence.[16] Marital property also extends to most business interests, such as partnerships, interests in corporations, stock options, and income.[17] For instance, if one spouse has an interest in a partnership, that spouse will retain control of the partnership, "but the court may award to the other spouse property or a sum of money to be paid in recognition of the rights of the spouse who is not a member of the professional partnership."[18] While the court may not insert the non-owning spouse into a business relationship (e.g., a partnership, individually owned business, or farm), the court may distribute property based on accumulated income and assets coming from those relationships. Even property owned by a corporation—an entity that is in and of itself marital property subject to equitable distribution—controlled by one spouse is presumed to be marital property.[19]

Applying these principles, it is evident that if a court determines that Homer and Richie began acquiring marital property after their 2002 unionization in Vermont, it must equitably divide all assets acquired after that date between the two. Richie will receive consideration for his work in starting his own business[20] and retain his interest in that endeavor, but Homer will receive consideration for both his work in the household and the fact that Richie's future economic earning power is much higher.[21] Although Homer may not receive a mathematical half of all Homer's assets, a court seeking an equitable division is very likely to reach a figure that is near half. Therefore, this case, with millions of dollars hypothetically at stake, turns on the question of the exact date the couple began acquiring marital property.

15. 750 ILL. COMP. STAT. 5/503(b).

16. *In re* Marriage of Schmitt, 909 N.E.2d 221, 228 (Ill. App. Ct. 2009).

17. MARSHALL J. AUERBACH ET AL., ILL. INST. FOR CONTINUING LEGAL EDUC., ILLINOIS FAMILY LAW: PROPERTY AND FINANCIAL ASPECTS OF DISSOLUTION ACTIONS § 4.21 (2011).

18. *Id.*

19. *In re Schmitt*, 909 N.E.2d at 229–30.

20. *See In re* Marriage of Woodward, 404 N.E.2d 575, 577 (Ill. App. Ct. 1980) (holding that it is not an abuse of discretion to consider one party's contributions in determining just distribution).

21. *See In re* Marriage of Gaumer, 785 N.E.2d 122, 125–26 (Ill. App. Ct. 2003) (holding that a distribution was just even though the husband was the sole provider because the wife supported the husband by working at home, the marriage was long, and the income in question was the only way the wife would be able to provide for herself).

## II. LEGALIZATION OF CIVIL UNIONS

Before 2011, Illinois did not recognize partnerships between members of the same sex in any legal form, and the Illinois code explicitly stated that same-sex relationships were void as against public policy.[22] Therefore, same-sex couples received no legal rights or responsibilities under Illinois law. This changed once the Civil Union Act went into effect on June 1, 2011.[23] Under the Act, civil unions are "entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law to spouses."[24] Section 45 of the Act explicitly states that the courts should judge the validity of a civil union as if it was a heterosexual marriage and that the same rules for dissolution apply.[25] Importantly, the Act also contains a reciprocity provision indicating that Illinois recognizes civil unions or "substantially similar legal relationship[s]" entered into outside of Illinois.[26] Without such a provision, there would be no question that Richie and Homer did not form a legal relationship until they took the necessary steps in Illinois.

Based on the text of the Civil Union Act, it is evident that as of June 2, 2011, Illinois considered Richie and Homer to be in a legal relationship. The fact that their unionization occurred in Vermont is not an issue as the Act explicitly and broadly recognizes such relationships entered into out of the state.[27] Therefore, the Act dictates that the state should treat Richie and Homer no differently than any heterosexual spousal relationship.[28] However, this does not answer the question of when the couple entered into their relationship in Illinois' eyes for purposes of property rights. Illinois could retroactively recognize the relationship from 2002 even though it deemed such relationships as "against public policy" at the time. On the other hand, the state could view the relationship as suddenly springing up the moment the Act went into effect or the moment Richie and Homer filed for a civil union license in Illinois. This determination will guide how the court should divide the couple's property upon the dissolution of the union.

22. 750 ILL. COMP. STAT. 5/213 (1977); 750 ILL COMP. STAT. 5/213.1 (repealed 2014) ("A marriage between 2 individuals of the same sex is contrary to the public policy of this State.").

23. 750 ILL. COMP. STAT. 75/1 (2011).

24. 750 ILL. COMP. STAT. 75/20.

25. *See* 750 ILL. COMP. STAT. 75/45.

26. 750 ILL. COMP. STAT. 75/60 (amended 2013).

27. *See id.*

28. *See* 750 ILL. COMP. STAT. 75/45.

## III. RETROACTIVITY

### *A. Statutory Interpretation*

Illinois courts should only apply the Act prospectively as the Act substantively affects parties' rights, and the Act is silent regarding retroactivity. Illinois case law regarding retroactivity has a turbulent past with many twists and turns. In 2003, for the third time in less than a decade, the Illinois Supreme Court changed procedures for determining the retroactivity of an Illinois statute.[29]

Illinois jurisprudence on retroactivity began in 1996 with *First of America Trust Co. v. Armstead*, where the court focused on whether the parties held vested rights rather than inquiring into legislative intent.[30] The decision to take legislative intent out of the equation faced immediate criticism, and the Illinois Supreme Court reversed itself five years later in *Commonwealth Edison Co. v. Will County Collector*.[31] In that decision, the court reintroduced legislative intent by following the United States Supreme Court's decision in *Landgraf v. USI Film Products*.[32] Both *Landgraf* and *Commonwealth Edison* determine retroactivity based first upon legislative intent and then ask the courts to substitute in their own judgment when the legislature did not provide guidance for a given statute's temporal reach.[33]

Most recently, the Illinois Supreme Court again reversed itself in the 2003 case of *Caveney v. Bower*.[34] In *Caveney*, the court held that the only questions required in determining the retroactivity of a statute is whether the legislature has clearly intended for the statute to be retroactive and whether the law is procedural or substantive.[35] If the legislature clearly indicated the temporal reach of a new statute, the courts should apply the law accordingly.[36] Thus, the first prong of the *Caveney* test is consistent with both *Landgraf* and *Commonwealth Edison*.[37] However, the court's treatment of statutes without a clear temporal reach is where *Caveney* separates from the previous decisions. When the legislature is silent about a

29. Robert C. Feldmeier, *The Illinois Supreme Court's Latest Last Word on Statutory Retroactivity*, 92 ILL. B.J. 260, 260–61 (2004).

30. 664 N.E.2d 36, 38 (Ill. 1996).

31. 749 N.E.2d 964, 972 (Ill. 2001).

32. *Id.*

33. *Id.*; *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 257 (1994).

34. Caveney v. Bower, 797 N.E.2d 596, 601–02 (Ill. 2003).

35. *Id.*

36. *Id.* at 601.

37. *See* Feldmeier, *supra* note 29, at 261.

statute's retroactivity, *Caveney* interpreted Section 4 of the Illinois Statute on Statutes to mandate that no law may be construed to repeal a right accrued through an earlier law.[38] Section 4 states:

> No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done . . . or any right accrued, or claim arising under the former law, or in any way whatever to affect an such offense or act so committed or done . . . or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceedings.[39]

In *Caveney*, the court interpreted this section to mean that legislative intent is always available, and the courts should never rely on their own judgment in determining retroactivity for statutes affecting the rights of the parties in question.[40] Thus, the second prong of *Landgraf*, reliance on judicial judgment, is irrelevant under Illinois law.[41] In practice, this means that the courts may not apply substantive laws retroactively without a clear legislative directive while they may give procedural laws retroactive effect.[42]

When the legislature provides clear temporal direction within a statute, the retroactive test is simple. For instance, in *Allegis Realty Investors v. Novak*, the Illinois Supreme Court applied an Illinois Highway Code statute retroactively based on the language of the statute that gave explicit temporal directions.[43] Recognizing the court's new standard set forth in *Caveney*, the court held that the Statute on Statute's distinction between procedural and substantive property rights was only a default standard and did not apply to statutes in which the legislature clearly indicated a temporal reach.[44] If the statute's temporal reach is indicated, "[T]here is no need to invoke [S]ection 4 of the Statute on Statutes."[45] In doing so, the court held that explicit legislative intent overrules judicial discretion in retroactivity cases unless doing so would be unconstitutional.[46]

Without a clear indication of temporal reach from the legislature, the Statute on Statutes provides an implied temporal default based on whether the rights are substantive or procedural. This means a judicial inquiry is

38. *Caveney*, 797 N.E.2d at 601–602.
39. 5 ILL. COMP. STAT. 70/4 (1874).
40. *See Caveney*, 797 N.E.2d at 603.
41. *See* People v. Atkins, 838 N.E.2d 943, 947 (Ill. 2005).
42. *See id.*; Doe A. v. Diocese of Dall., 917 N.E.2d 475, 482 (Ill. 2009).
43. Allegis Realty Investors v. Novak, 860 N.E.2d 246, 254 (Ill. 2006).
44. *Id.* at 253.
45. *Id.*
46. *Id.* at 253–54.

required to determine if the rights are procedural and if they are, courts may apply procedural laws retroactively.[47] Such a distinction is not always clear and "[i]t is often difficult to distinguish between statutes that are procedural and those that are substantive."[48] Illinois courts define procedural laws as the "mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right."[49] For instance, in *Deicke Center v. Illinois Health Facilities Planning Board*, the court held that a law altering the procedure for shutting down a nursing home applied retroactively because it only altered the steps necessary to complete the shutdown.[50] Other examples of procedural laws include amendments to long arm statutes that change the mode of obtaining jurisdiction, changes in substitute service requirements, and a statute requiring new judges to preside over post-criminal conviction relief hearings.[51] If a statute affects the parties' rights, it still may be considered procedural if it only changes the way in which the parties may enforce their rights.[52] For instance, in *Schweickert v. AG Services of America, Inc.*, the court interpreted a statute relating to the steps a property owner must take to retain first priority in repayments of debt incurred by a farmer-tenant.[53] The court found the statute procedural and applied it retroactively because it did not create or alter any right, but merely altered the method by which a property owner could enforce his or her rights.[54]

On the other hand, statutes that alter parties' rights under a preceding law may not have a retroactive effect. A substantive law is a statute that creates or defines a party's right.[55] In *Caveney*, legislative intent regarding the temporal reach for the statute in question was unclear, so the court's decision turned on the nature of the law.[56] In that case, the court found that a law that established income tax credits for certain corporation shareholders was clearly a substantive law because those shareholders' property rights obtained under the old law would be diminished under the new law.[57] Similarly, the Second Illinois Appellate Court ruled in *Foster Wheeler*

47. *Id.* at 253.
48. Schweickert v. AG Servs. of Am., Inc., 823 N.E.2d 213, 215 (Ill. App. Ct. 2005).
49. *Id.* (quoting Ogdon v. Gianakos, 114 N.E.2d 686, 689 (Ill. 1953)).
50. 906 N.E.2d 64, 70 (Ill. App. Ct. 2009).
51. *See* People v. Ruiz, 479 N.E.2d 922, 923–25 (Ill. 1985); *Ogdon*, 114 N.E.2d at 689; Ores v. Kennedy, 578 N.E.2d 1139, 1142 (Ill. App. Ct. 1991).
52. *See Schweickert*, 823 N.E.2d at 216.
53. *Id.* at 216–17.
54. *Id.*
55. *Ogdon,* 114 N.E.2d at 689.
56. Caveney v. Bower, 797 N.E.2d 596, 603–604 (Ill. 2003).
57. *Id.*

*Energy Corp. v. LSP Equipment, L.L.C.* that a statute dealing with forum selection for construction contracts in Illinois is substantive law rather than procedural.[58] Although that change appears to be procedural on its face, the court held that it represented a substantive change in the law because it interferes with parties' right to contract.[59] The inquiry turns on whether applying the law retroactively will affect the parties' rights as they understood them at the time their agreement or actions took place.

Using these principles, we turn to Richie and Homer. The Civil Union Act is silent on retroactivity, and nothing in the text shows a clear legislative intent to make it retroactive. The section of the Act controlling reciprocity only states that Illinois shall recognize a civil union from another jurisdiction without providing any temporal instructions.[60] Because the statute is silent on its temporal reach, the first prong of the reciprocity test is irrelevant and the court must look to the second prong and determine if the Civil Union Act substantively affects Richie and Homer's rights.

When Richie and Homer entered into their civil union, they did so with the knowledge that their actions had no legal effect in Illinois. As far as they knew, their relationship would never be subject to Illinois laws, such as the division of marital property under the Marriage Act. If they would have thought of that outcome, they could have taken steps to avoid comingling their assets or signed an extra-marital contract to divide assets. For instance, Illinois recognizes the validity of pre-nuptial agreements and enforces such agreements under traditional contracts doctrine.[61] Alternatively, the parties could have taken steps to ensure their pre-marital assets remained separate from marital assets. Private assets held by a person prior to a marriage can be transmuted into marital property by an affirmative action from a spouse, such as contribution of that property into the marital estate.[62] If Richie and Homer knew that entering into a civil union would comingle their assets, they could have taken steps ensuring that their pre-marital assets or exempt assets remained isolated.

Holding that the Civil Union Act retroactively applies to the date of their civil union ceremony in Vermont would unjustly alter their property rights in a way the parties did not choose to contract between themselves. Just as the law in *Foster Wheeler* was substantive because it altered parties'

58. 805 N.E.2d 688, 694 (Ill. App. Ct. 2004).

59. *Id.*; *see also* Weisberg v. Royal Ins. Co. of America, 464 N.E.2d 1170, 1172 (Ill. App. Ct. 1984) (declining to apply a statute retroactively because to do so would violate "the general constitutional principle that the legislature may not enact laws which impair the obligation of contracts.").

60. 750 ILL. COMP. STAT. 75/60 (2011) (amended 2013).

61. *See In re* Marriage of Drag, 762 N.E.2d 1111, 1115 (Ill. App. Ct. 2002).

62. *See In re* Marriage of Riech, 566 N.E.2d 826, 831 (Ill. App. Ct. 1991).

contractual rights, applying the Civil Union Act retroactively would essentially rewrite the parties' rights in a way they did not bargain or plan for in 2002.[63] Marriage is a type of contract,[64] and blindly altering the terms of that contract nearly a decade after the parties entered into it is substantively unjust. Applying the Civil Union Act retroactively undoubtedly affects substantive rights rather than procedural rights as it is both creating and defining rights and is not a mere "mode of proceeding." Prior to the Civil Union Act, Richie and Homer had no right to one another's property under Illinois law. The Act is therefore substantive as it both creates and defines the right as the equitable distribution of marital property.

Therefore, the court should not apply the Civil Union Act retroactively. Without legislative guidance on the intended temporal reach of the Act, the court is bound to focus on the substantive implications of holding a statute to be retroactive. Because the Act is clearly substantive, the courts must apply the statute prospectively.

### *B. Marital Analogy*

In addition to a statutory analysis supporting a finding that Illinois courts should only apply the Civil Union Act prospectively, analyzing the situation as if it were a heterosexual marriage also supports that conclusion. The Act states that the courts should afford same-sex relationships the same "obligations, responsibilities, protections, and benefits afforded or recognized by the law of Illinois to spouses."[65] This means that the courts should construe the Act with the Marriage Act in mind.[66] Section 213 of the Marriage Act controls the validity of marriages that were invalid at the time of contracting.[67] That section states that all:

> marriages contracted within this State, prior to the effective date of this Act, or outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties, are valid in this State, except where contrary to the public policy of this State.[68]

Illinois courts have interpreted this section to mean that a marriage that is invalid at the time of contracting effectively becomes valid the moment the marriage becomes legal.[69] This is consistent with the common

63. *See* 805 N.E.2d at 694.
64. Larson v. Larson, 192 N.E.2d 594, 595 (Ill. App. Ct. 1963).
65. 750 ILL. COMP. STAT. 75/5 (2011).
66. *See* 750 ILL. COMP. STAT. 75/45.
67. 750 ILL. COMP. STAT. 5/213 (1977).
68. *Id.*
69. *See In re* Estate of Banks, 629 N.E.2d 1223, 1225 (Ill. App. Ct. 1994).

law's treatment of marriage after the removal of an impediment.[70] Generally, when a marriage is invalid at the time of its inception, "the parties to such a marriage who cohabit after the removal of such impediment are lawfully married *as of the date of the removal of the impediment*."[71] Although Illinois has not recognized common law marriage in over a century, Illinois courts still apply this concept. For instance, in *In re Estate of Banks*, the Fifth District of the Illinois Appellate Court held that an invalid out-of-state marriage became valid and effective the moment the couple resolved the situation that originally invalidated the marriage.[72] In that case, a man married a woman in Arkansas despite the fact that the divorce for his previous marriage was still pending.[73] Because Section 212(a) of the Marriage Act invalidates a marriage entered into before the dissolution of a previous marriage, the marriage was invalid in Illinois at the time it was contracted into.[74] A short time later, the first marriage's divorce became official, and the Illinois court was asked to rule on the validity of the second marriage.[75] The court ruled that, "prohibited bigamous marriages become valid marriages at the time the impediment to the marriage is removed."[76] This meant that the couple's effective marriage date was the date of the first marriage's divorce rather than the date of the second marriage's actual ceremony or the date they filed their marriage papers.[77] This legalization took effect automatically upon the removal of the impediment without any further action by the couple.[78]

The court's treatment of marriages entered into prior to their validity relates directly to Richie and Homer. At the time of the two parties' contacting into a civil union in Vermont in 2002, Illinois did not recognize those types of relationships, just as Illinois does not recognize bigamy. However, just as a subsequent legal action saved the eventual validity of the marriage in *Banks*, the parties' civil union in this case eventually had legal effect.[79] In *Banks*, the saving action was the formal dissolution of the

70. *See* 55 C.J.S. *Marriage* § 46 (2013), *available at* https://a.next.westlaw.com/Document/Id5bb6b91b67c11d9a49dec8cdbddd959/View/FullText.html?originationContext=docHeader&contextData=(sc.UserEnteredCitation)&transitionType=Document&docSource=b5aa0114220144b98675016b65d37442.

71. *Id.* (emphasis added).

72. 629 N.E.2d at 1225.

73. *Id.*

74. 750 ILL. COMP. STAT. 5/212(a) (2014).

75. *Banks*, 629 N.E.2d at 1225.

76. *Id.* at 1226.

77. *Id.*

78. *Id.*

79. *See id.*

first marriage.[80] For Richie and Homer, their legal relationship did not come to fruition until the Civil Union Act became effective on June 1, 2011. Illinois law does not recognize certain types of unions that it deems to be against public policy, but that does not mean that an invalid union is forever doomed.[81] Once the legislature determines that the union is no longer against public policy or the parties change the circumstances of the union to cure the problem, the state recognizes the relationship. Invalidity within the relationship does not destroy the union, but rather pauses it until the state is willing to accept it formally.

Because civil unions have the same rights and obligations as marriages, the parties' civil union requires state approval to be official. Therefore, Richie and Homer's union is effective from the time their relationship received legal validation, not from the time they actually entered into their relationship. Holding otherwise would lead the court to recognize a type of common law marriage, which has been illegal in Illinois since 1905.[82] Although Illinois generally recognizes marriages from other states, if a person is domiciled in Illinois and continues to be so, any marriage they enter into outside of Illinois must be valid under Illinois law.[83] Common law marriages are agreements showing that "the parties presently intend to become husband and wife, contemplating a permanent union, exclusive of all others."[84] Illinois may recognize common law marriages between two citizens of another state after they move to Illinois, but not two Illinois citizens who go to another state for the sole purpose of entering into a prohibited union.[85]

In our hypothetical fact pattern, because Illinois did not recognize same-sex civil unions in 2002, Richie and Homer went to Vermont to enter into their union and then returned to their domicile in Illinois. Common law marriages are inconsistent with the public policy of Illinois because they take the state out of the relationship and the state has no ability to control the relationship. Recognizing that Richie and Homer entered into a binding agreement in 2002 would essentially validate their contractual relationship, entered into without the state's consent, and recognize a type of common law marriage. This flies in the face of over a century of tradition.

80. *Id.*

81. *See* 750 ILL. COMP. STAT. 75/25 (2011).

82. 750 ILL. COMP. STAT. 5/214 (2013).

83. 750 ILL. COMP. STAT. 5/216; Stevens v. Stevens, 304 Ill. 297, 300 (1922) (holding that marriage contracted between citizens of Illinois in another state in disregard of the statutes of Illinois will not be recognized in the courts of the latter state though valid where contracted).

84. *In re* Enoch's Estate, 201 N.E.2d 682, 689 (Ill. App. Ct. 1964).

85. *See* Peirce v. Peirce, 39 N.E.2d 990, 993 (Ill. 1942).

In summary, using the limited marital case law as a guidepost creates a presumption that Illinois courts will not apply the Acts retroactively but rather prospectively from the point in which the parties' relationship became "perfected." This perfection occurs at the time the state legally recognizes the relationship. Holding otherwise would recognize a type of common law marriage in the interim between the time the couple formed their relationship and the date the state officially took notice and recognized the relationship.

## IV. PARTY INTENT

If a court agrees with the arguments listed above and is not inclined to hold that the Civil Union Act applies retroactively, Homer does have one arrow in his quiver. In Illinois, courts may look to party intent in determining whether attained property is marital.[86] Looking at party intent is typical in other areas of law, most notably contract law, but is relatively unheard of in distributing marital property. Indeed, only Colorado, Illinois, Missouri, and New Jersey allow courts to consider party intent by asking whether parties purchased the pre-marital property in contemplation of marriage.[87] The doctrine most often comes into play when a couple buys a house before their actual marriage but after they began making marriage arrangements.[88] Illinois courts have interpreted the Marriage Act as a "legislative preference . . . for the classification of property as marital" and allowing party intent to extend marital property to property acquired prior to the marriage is consistent with that interpretation.[89]

In contract law, the court's principal objective in construing "a contract is to determine and give effect to the intention of the parties at the time they entered into the agreement."[90] The court is not required to go inside the minds of the parties in question, but instead bases decisions on the objective manifestations of the parties' intent.[91] When a contract contains ambiguity, the court is required to go beyond the four corners of the contract and look elsewhere to find the parties' intent.[92]

Illinois courts apply a similar doctrine to the marriage contract. Even so, the contemplation of marriage doctrine is narrowly focused and very

86. TURNER, *supra* note 4, at 4.
87. *Id.*
88. *See In re* Marriage of Jacks, 558 N.E.2d 106, 109 (Ill. App. Ct. 1990).
89. *See In re* Marriage of Smith, 427 N.E.2d 1239, 1244 (Ill. 1981).
90. Urban Sites of Chi., L.L.C. v. Crown Castle U.S.A., 979 N.E.2d 480, 489 (Ill. App. Ct. 2012).
91. *Id.* at 496.
92. Highland Supply Corp. v. Ill. Power Co., 973 N.E.2d 551, 558 (Ill. App. Ct. 2012).

limited.[93] The courts generally state that the timeline of the parties' marriage is not determinative and "[p]roperty is not rendered non-marital simply because a contract for its purchase was signed before the marriage."[94] For property to qualify as marital within the contemplation of marriage doctrine, it generally must be used for a familial purpose[95] and as the name implies, is only relevant if the parties were actually contemplating marriage at the time they acquired the property in question.[96] Although the vast majority of cases invoking the contemplation of marriage doctrine involve housing or real estate, it may also apply to other types of property.[97] This means the courts look to fact-based inquires to help objectively determine whether the parties' intended[98] to purchase the property for the marital estate.[99] One of the key factors in determining if parties purchased the property in contemplation of marriage is the temporal nearness between the purchase and the marriage.[100] The less time between the two, the more likely the court will find the property to be marital property.[101] Ultimately, the determination of whether an asset is marital property is a question of fact based on testimony of the witnesses and the parties with the party seeking to prove that the pre-marriage property is marital property carrying the burden of proof.[102]

The contemplation of marriage doctrine substitutes a strict reading of the Marriage Act for a more flexible reading. Rather than starting the marital property clock the instant the couple walks down the aisle, the court flexibly attempts to consider intent. A quintessential example of this doctrine occurred in *In re Marriage of Jacks*.[103] In that case, a couple purchased a house shortly after their engagement but prior to their marriage.[104] The wife's name appeared on the offer sheet, but the title was solely in the

93. TURNER, *supra* note 4, at 4–5 (laying out the requirements and criticism of the doctrine).

94. *In re* Marriage of Dann, 973 N.E.2d 498, 515 (Ill. App. Ct. 2012).

95. *See In re* Marriage of Tatham, 527 N.E.2d 1351, 1361–62 (Ill. App. Ct. 1988) (holding that a farm tractor acquired before marriage is not comparable to a familial home).

96. TURNER, *supra* note 4, at 4.

97. *In re* Marriage of Schriner, 410 N.E.2d 572, 574 (Ill. App. Ct. 1980) (holding that bedroom furniture was purchased in contemplation of marriage and for familial use).

98. *See In re* Marriage of Olbrecht, 597 N.E.2d 635, 638 (Ill. App. Ct. 1992).

99. *See In re* Marriage of Smith, 638 N.E.2d 384, 386 (Ill. App. Ct. 1994).

100. *See In re* Marriage of Jacks, 558 N.E.2d 106, 109 (Ill. App. Ct. 1990).

101. *Compare id.* at 111 (finding that the parties purchased a house one hour before their marriage in contemplation of marriage), *with In re* Marriage of Leisner, 579 N.E.2d 1091, 1097 (Ill. App. Ct. 1991) (holding that a home bought 19 months before marriage was separate property).

102. *See In re Marriage of Smith*, 638 N.E.2d at 387.

103. 558 N.E.2d at 109.

104. *Id.* at 111.

husband's name.[105] After analyzing the Marriage Act, the court held that the house was property acquired in contemplation of marriage and therefore qualified as marital property.[106] The court viewed such a holding in line with legislative intent and consistent with contract law's reliance on party intent.[107] In determining the parties' intent, the court looked at the totality of the circumstances.[108] For instance, the parties actually lived in the house, purchased the house due to its size and the size of the family, purchased the house only an hour before the wedding, and made mortgage payments with marital assets.[109]

Applying the contemplation of marriage doctrine to Richie and Homer's situation is not perfect, but the same reasoning applies. Richie and Homer may have purchased a house, among other property, prior to their legal "marriage" when the Illinois legislature passed the Civil Union Act in 2011, but they did so with the knowledge that they may never have a legal relationship. The couple also used much of the property, most notably Richie's successful business, for non-familial purposes. Finding that starting a business qualifies as property acquired in contemplation of marriage would be a significant expansion of the doctrine. In addition, Richie and Homer purchased much of their property well before 2011, so if a court looks at the totality of the circumstances, it is likely to find that the doctrine does not apply.

Even though applying the actual contemplation of marriage doctrine to this situation is like fitting a square peg in a round hole, the reasoning behind the doctrine still applies. Contemplation of marriage is designed to consider parties' intent and hold them accountable for their intended actions. In the same way, a court should take Richie and Homer's intent into account when equitably dividing their property. If Richie and Homer truly meant to enter into a binding relationship in 2002 and structured their lives to that end, Richie should not benefit just because the state technically did not recognize their relationship until 2011. This would be a windfall for Richie and would not recognize Homer's contributions to the relationship or the commitment the two made to each other. Just as in applying contemplation of marriage, the court could look to the totality of the circumstances to determine if intent should apply to Richie and Homer. Did the two truly live with the expectation that the state would eventually recognize their

105. *Id.* at 108.
106. *Id.* at 111.
107. *Id.*
108. *Id.*
109. *Id.*

legal relationship? Did they treat all of their property as jointly held? Was Richie's business discussed as a joint venture or as Richie's sole property and endeavor? Taking intent into account will allow the court to reach an equitable solution that can more flexibly take the unique facts of this case into account.

While Richie and Homer's situation does not fit within the narrow framework of the contemplation of marriage doctrine, a court seeking an equitable remedy and wishing to hold the parties to their intended agreement could use party intent as a reason to do so. The two formed a contract in 2002, and if the court finds that they intended it to be binding, it is possible the court would hold them to that agreement regardless of the retroactive application of the Civil Union Act.

## V. RETROACTIVE APPLICATION OF SAME-SEX CIVIL UNIONS IN OTHER CONTEXTS

The issue of dividing marital property is far from the only one of contention in determining the retroactive effect of legalizing same-sex unions. Particularly, it is useful to look at how courts and legislators are treating two other areas of law: employee benefits and child custody. If civil unions have retroactive effect in these contexts, it makes sense to continue that practice and apply civil unions retroactively for purposes of marital property.

### *A. Retroactive Effect of Legalizing Same-Sex Unions in Employment Benefits Law*

Turning first to employee benefits, this topic became a huge point of contention following the Supreme Court's ruling in *United States v. Windsor* on June 26, 2013.[110] In this case, the Supreme Court reviewed the constitutionality of DOMA, discussed further *infra*. Section 3 of DOMA amended the Dictionary Act to define marriage as "only a legal union between one man and one woman" and spouse as "a person of the opposite sex who is a husband or a wife."[111] Until the *Windsor* decision, DOMA had the effect of denying federal benefits, such as Social Security or employee benefits protected by the Employee Retirement Income Security Act (ERISA),[112] to same-sex couples as they could not meet the definition of

110. *See generally* Windsor v. United States, 133 S. Ct. 2675 (2013).
111. 1 U.S.C. § 7 (2012).
112. 29 U.S.C. §§ 1001a–1461 (2012).

"spouse" under those statutes.[113] While *Windsor* did not strike down DOMA as a whole, the Court did find Section 3 unconstitutional.[114] This means that federal law no longer defines marriage as heterosexual. It also opens up the door for same-sex spouses to receive the same federal benefits as heterosexual spouses.

Unfortunately, *Windsor* created as many questions as it answered in terms of sorting out the practical effect of this new definition and left administrative agencies to their own devices in interpreting the decision's effect.[115] For instance, the Office of Personnel Management issued a notice on July 8, 2013, stating that it would recognize all same-sex marriages for benefit coverage, but not civil unions.[116] A month later, the Department of Labor issued guidance stating that it would look to the laws of the state of residence to determine whether a particular couple is eligible for benefits.[117] Most observers eagerly await forthcoming Internal Revenue Service (IRS) guidance on this issue.[118] Specifically, observers expect the IRS to provide guidance on the extent that the federal government will apply *Windsor* retroactively.[119] The IRS has indicated that it will apply *Windsor* retroactively for tax purposes to some extent, but so far it has only released rules with a prospective effect.[120] In the rules already released, the IRS has adopted *Windsor*'s definition of "spouse" to include same-sex couples and also stated that it recognizes the validity of such unions based on the laws of the state they are entered into rather than the state of domicile.[121] However, these rulings are only applied prospectively as of September 16, 2013.[122]

In one of the first cases to consider *Windsor*'s retroactive effect, the District Court for the Eastern District of Pennsylvania applied federal sur-

113. *Windsor*, 133 S. Ct. at 2694 (stating that DOMA controlled over 1,000 statutes in denying benefits to same-sex couples).

114. *Id.* at 2695–96.

115. Susan Hoffman et al., *Same-Sex Marriages and Benefit Plans after Windsor*, 28 WESTLAW J. EMP. 1, 3 (2013).

116. Benefits Administration Letter from John O'Brien, Dir. for Healthcare and Ins., Office of Pers. Mgmt. (July 17, 2013), *available at* https://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf.

117. Hoffman et al., *supra* note 115, at 2 n.4.

118. *Implications of Supreme Court's DOMA Decision on Retirement Plans*, CCH INC. (2013), *available at* 2013 WL 4521259.

119. *Id.*

120. Rev. Rul. 2013-17, 2013-38 I.R.B. 204.

121. *Id.* at 202, 203.

122. *Id.* at 204.

vivor benefits retroactively.[123] In that case, *Cozen O'Connor, P.C. v. Tobits*, a same-sex couple entered into marriage in 2006 in Canada and were married and domiciled together until one partner's death from cancer in 2010.[124] Both the surviving spouse and the decedent's parents requested death benefits in accordance with ERISA, but a conclusion of the litigation was postponed given the Supreme Court's imminent ruling in *Windsor*.[125] In light of the *Windsor* decision, the court quickly and emphatically held that the surviving partner was the deceased partner's "spouse" and entitled to the death benefits.[126] Interestingly, the court purported to apply Illinois law to the case and held that "[t]here can be no doubt that Illinois, the couple's place of domicile, would consider" the survivor the decedent's spouse.[127] In support of this conclusion, the court cited the Civil Union Act as well as an order from an Illinois probate court declaring the civil union valid and the surviving partner the sole heir to the estate.[128] The district court reasoned that the probate court's decision, entered into in 2011, equaled Illinois' retroactive acceptance of the couple's 2006 Canadian marriage.[129]

As has already been discussed at some length, this conclusion is far from a sure thing as the district court assumes. The fact that Illinois no longer forbids same-sex unions does not mean that such unions have a retroactive effect. Despite the fact that the couple in this case was never legally unionized, either by Illinois or federal standards, during the decedent's lifetime, should have raised a serious discussion regarding the civil union's timeline. It did not, and the court merely assumed that *Windsor* applied retroactively and put those same words in the Illinois judiciary's collective mouth. This may be an example of the court finding an equitable solution and working backwards to find reasoning to support that conclusion.

Richie and Homer's situation is substantially different from the retroactive application of ERISA benefits, but this case shows that at least some federal courts are willing to find that same-sex unions have retroactive legalization dates. However, regardless of this one decision in Pennsylva-

123. Cozen O'Connor, P.C. v. Tobits, No. 11-0045, 2013 WL 3878688, at *1 (E.D. Pa. July 29, 2013).

124. *Id.*

125. *Id.*

126. *Id.* at *4.

127. *Id.*

128. *Id.* n.29; Order Declaring Heirship, *In re* Estate of Farley, No. 2010P006742 (Ill. Prob. Ct. 2010), *available at* http://www.cookcountyclerkofcourt.org (follow "Online Case Info" to "Probate Docket Search"; then search by case number using "2010" for year, "P" for division code, and "006742" for case number) (last visited Nov. 10, 2014).

129. *Cozen O'Connor, P.C.*, 2013 WL 3878688, at *4 n.29.

nia, it is yet unclear whether employee and federal benefits will have a prospective or retroactive effect in the wake of *Windsor*. Once the IRS stakes out its position, this question should become much clearer.

### *B. Civil Unions and Parental Rights*

Another grey area in the new arena of same-sex civil union law is in parental rights. Prior to the Act's passage, for both parties in a same-sex union to have parental rights, the non-biological partner had to follow normal adoption procedures (in the case of one party being the biological parent), or both parties had to individually go through adoption proceedings.[130] Regarding parental rights, the Civil Union Act essentially applies Section 303 of the Marriage Act, which outlines procedures for handling parental rights, to civil unions.[131] Unfortunately, the Civil Union Act does not provide guidance regarding the effect of having children in a union prior to the passage of the Acts.[132]

Regardless of the Act's silence, it is likely that both parties to the union have some parental rights regardless of the Act's retroactivity.[133] Given same-sex couples' obvious inability to procreate as a heterosexual couple does, it is impossible to directly apply traditional laws designed for heterosexual couples. However, that has not stopped Illinois courts from attempting to adapt these traditional laws for same-sex couples. For instance, in *In re T.P.S.*, the court used common law contract doctrine to hold that a person could not deny parental rights to a former same-sex partner when the two raised the children in question jointly.[134] In that case, the court concluded that the Illinois legislature did not intend to deny children the support of their caregivers or create an inflexible standard when it passed legislation relating to heterosexual couples using artificial insemination.[135] The couple in this case never entered into a union or marriage, but both parties were still given parental rights based on the common law.[136]

Applying this analogy, as well as the federal benefits analogy, to Richie and Homer does little to clear the waters. In an important issue of first impression, it is unlikely that an Illinois court will be as willing as the

130. Carolyn D. Jansons, *Meeting New Challenges in Same-Sex Civil Union and Maintenance Cases*, *in* STRATEGIES FOR FAMILY LAW IN ILLINOIS, 2014 EDITION (2013), *available at* 2013 WL 5755115.

131. *Id.*

132. *Id.*

133. *Id.*

134. *In re* T.P.S. and K.M.S., 978 N.E.2d 1070, 1084–85 (Ill. App. Ct. 2012).

135. *Id.* at 1077–79.

136. *Id.* at 1079.

Pennsylvania court to blindly accept the retroactivity of civil unions. The Pennsylvania court's assumption that entering into a marriage relationship should be binding regardless of the state's law is reasonable enough, but the parties' substantive rights still must be taken into account. Unfortunately, the parenting analogy provides even less insight. Unlike *T.P.S.*, an Illinois court cannot fall back to common law to find an equitable remedy as Illinois explicitly refused to recognize common law marriages over 100 years ago. The one helpful thread from these cases is that courts throughout the country have shown a willingness to find a path to an equitable solution. The equitable solution in this case, seemingly, is to hold the parties to their commitment, so it is possible that an Illinois court will merely start with that conclusion and work backwards until a solution presents itself.

## VI. FULL FAITH AND CREDIT

In light of the aforementioned *Windsor* decision, it is also worth pointing out that Illinois is not constitutionally required to recognize out-of-state same-sex relationships and was not required to do so after Richie and Homer's unionization in 2002. Generally, the states are required to give one another's acts, records, and judgments the same weight as their own under the Full Faith and Credit Clause found in Article IV of the Constitution.[137] However, the Full Faith and Credit clause also allows Congress to prescribe the manner and effect of this full faith and credit.[138] Congress did just this by passing DOMA in 1996.[139]

DOMA was a direct response by Congress to a growing push for the legalization of same-sex relationships.[140] As discussed above, Section 3 of DOMA defined marriage under federal law. That section is no longer relevant after the *Windsor* decision held it unconstitutional. However, Section 2 remains, and it allows states to choose not to recognize same-sex marriages or unions originating in sister states.[141] The Illinois legislature took advantage of Section 2 by enacting legislation clearly stating that same-sex relationships are against public policy under Illinois law.[142] Section 2 of DOMA states that:

137. U.S. CONST. art. IV, § 1.

138. *Id.*

139. *See* Windsor v. United States, 133 S. Ct. 2675, 2682–83 (2013); Wilson v. Ake, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005).

140. ANN M. HARALAMBIE, *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, *in* HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 8:7 (updated Nov. 2013).

141. 28 U.S.C. § 1738C (2012).

142. 750 ILL. COMP. STAT. 5/213 (1996) (repealed 2013).

> No State, territory, or possession of the United States . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe or a right or claim arising from such a relationship.[143]

As noted, the Illinois legislature used this caveat to pass legislation stating, "[a] marriage between 2 individuals of the same sex is contrary to the public policy of this State."[144] This legislation, when combined with DOMA, effectively trumps the Full Faith and Credit Clause. This language was removed from Illinois law with the Fairness Act in 2013.[145]

Regardless of Section 2's protection against forced interstate same-sex recognition prior to the Fairness Act, the possibility of such an action remained a point of contention in several states, including Illinois. In 1999, the Vermont Supreme Court struck down bans on same-sex civil unions as unconstitutional under the state's constitution,[146] and the Vermont legislature followed that decision by legalizing same-sex civil unions a year later.[147] In the aftermath of these events in Vermont, Illinois lawmakers raised the question of whether the Vermont decision would force Illinois to recognize unions formed by Illinois same-sex couples in Vermont. In response, former Illinois Attorney General James Ryan sent an interpretive letter to an Illinois state senator in 2000.[148] In the letter, Ryan stated that Illinois was not required to recognize the Vermont unions because DOMA explicitly limits the application of full faith and credit in regards to same-sex unions.[149] Because, at the time, Illinois statutorily considered same-sex unions as against public policy, DOMA protected Illinois lawmakers from being forced to recognize Vermont same-sex unions. Although the Supreme Court struck down Section 3 of DOMA as unconstitutional in *United States v. Windsor*, it upheld Section 2.[150] Therefore, a state's ability to determine the validity of other states' same-sex unions is still possible.

For these reasons, Richie and Homer's civil union was not valid in Illinois upon its creation in Vermont in 2002. Illinois was not required to—and in fact for a decade did not—recognize same-sex relationships it

143. § 1738C.

144. 750 ILL. COMP. STAT. 5/213.

145. S.B. 10, 98th Gen. Assemb. 1st Reg. Sess. 4 (Ill. 2014).

146. Baker v. State, 744 A.2d 864, 886 (Vt. 1999).

147. VT. STAT. ANN. tit. 15, §§ 1201–02 (2000).

148. Letter from Jim Ryan, Ill. Att'y Gen., to Edward Petka, Ill. State Sen. (Dec. 29, 2000), *available at* http://illinoisattorneygeneral.gov/opinions/2000/00-017.pdf.

149. *Id.* at 6–11.

150. *See* Windsor v. United States, 133 S. Ct. 2675, 2682 (2013).

deemed contrary to its public policy under Full Faith and Credit case law thanks to Section 2 of DOMA.[151] Until 2011, Illinois law clearly stated that same-sex civil relationships were contrary to public policy, meaning Illinois did not recognize Richie and Homer's Vermont civil union.[152] While that changed after the Illinois legislature passed the Civil Union Act and Illinois began recognizing civil unions entered into both in Illinois and other states, it does not change the fact that Illinois did not consider Richie and Homer to be in a legal relationship until 2011. That brings the discussion back to the retroactivity questions discussed *supra*. Both the case law and the letter to the Illinois senator demonstrate that Illinois never intended to recognize unions prior to the passage of the Civil Union Act. To find that the couple unionized in 2002 instead of 2011 would be to rewrite over a decade of history and create a number of substantive and procedural dilemmas for the courts.

## CONCLUSION

Based on these arguments, Illinois courts should find that the Civil Union Act applies only prospectively for purposes of dividing marital property. This means that couples such as Richie and Homer began acquiring marital property on June 1, 2011, the date that the Civil Union Act became effective. Illinois law requires substantive laws to have only a prospective effect without a clear temporal order from the legislation. The Civil Union Act lacks any temporal guidance, so a court should rule that the legislature did not intend the Civil Union Act to have a retroactive effect.

In addition, because the Civil Union Act requires civil unions to have the same legal obligations and recognition as marriages, the Marriage Act's treatment of invalid marriages is guiding. The Marriage Act allows invalid marriages that subsequently become valid to have legal effect from the date of the validation, and civil unions should follow the same pattern. In marriages, the purpose of this rule is to ensure that the state is not allowing common law marriages. In the same way, allowing the Civil Union Act to have a retroactive effect will take the state out of the contractual relationship between the parties and allow a kind of quasi common law civil union.

One exception to the prospective application of the Civil Union Act arises out of party intent. In the event that the parties clearly entered into what they considered a binding marriage relationship and began acquiring

151. *See* Nevada v. Hall, 440 U.S. 410, 422 (1979).

152. 750 ILL. COMP. STAT. 5/213 (1996) (repealed 2013).

property for joint use, equity may demand that the court apply the Act retroactively. While this contemplation of marriage doctrine is extremely limited, a court seeking an equitable remedy may rely on it to reach a just conclusion.

Finally, Illinois is not required to give full faith and credit to the Vermont civil union registration because Congress effectively legislated the effect, or lack thereof, of-out-state same-sex marriage through DOMA. Because Illinois law at the time of Richie and Homer's unionization in Vermont clearly stated that such unions were against public policy, the state did not recognize the Vermont ceremony as permitted under Section 2 of DOMA. While the Civil Union Act reversed this public policy sentiment, and Illinois now recognizes civil unions from other states, it did so only from June 1, 2011, onward.

Unfortunately for Homer, it is unlikely that he is entitled to any portion of Richie's successful business unless he can convince the court to rely solely on party intent. The question of marital property in this case so clearly implicates a substantive right that any such argument will need to be very persuasive indeed.