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# Adoption Law: Reform the Statutes to Reform the Lives

Lisa M. Simpson* and Lynette Michelle Scarry†

## I. Introduction

The practice of adoption law brings with it many experiences unique to the legal field. This is because adoptions are not merely a legal process, but a social service as well. In facilitating the process, one must continuously consider the best interests of the unborn child, the adopting family, and the birthmother. Monitoring the literal health and welfare of the unborn child while in the womb, as well as placing the child in the most caring and loving environment possible, is at the heart of the entire process. Protecting the adoptive family's legal rights, as well as their financial and emotional investment, is also of great importance. In addition, an investment should be made in the physical, economical, and emotional welfare of the birthmother in the hopes of eliminating the often times volatile social situations that plague many of the women seeking adoption services.

However, while this area of law provides a social service, it also exposes itself to the opportunity for fraud, perjury, and financial misappropriation. This is in part due to the ambiguity and disparity of the Arizona state adoption statutes. This article will discuss these statutory disparities and the need for refor-

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mation of the adoption laws pursuant to newborn placement and post-birth services provided through either a private adoption attorney or a private child placing agency. Part II of this article offers a general overview of the adoption process. Part III discusses how ambiguity within the statutory language often causes competition between adoption entities, and further harms adoptive families. Part IV discusses recommendations and suggestions for the utilization and implementation of greater resources for a birthmother both before and after the adoption process. The conclusion discusses how the intersection of reform in the adoption statutes and the utilization or implementation of greater resources for the birthmother will reform the adoption process in its entirety.

## II. A General Overview of Adoption

An adoption is a legal proceeding in which the court terminates the legal rights and obligations of a child's biological parents, and bestows those rights and obligations on new parents.[1] Oftentimes, the birthmother personally selects the adoptive parents from profiles of those who have been certified through the state as meeting the qualifications to adopt; thus, proving themselves to be emotionally, economically, and physically capable of caring for a child. The adopting parents, in many instances, provide medical and pregnancy related financial assistance to the birthmother in the form of monthly living expense payments.[2] Some states require that the birthmother undergo counseling to assure that she is aware of the legal ramifications of her decision and is emotionally capable of severing her rights to her biological child. A birthmother's decision does not become legally enforceable until a Consent to Adopt is signed.[3] Oftentimes, a mandatory waiting period must pass before a Consent can be signed by the birthmother. This is true of Arizona law whereby a Consent to Adopt cannot be signed until seventy-two hours after the birth of the child have passed.[4] Finalization of the adoption process occurs several months later after a Court approves all submitted documents.[5] In other instances, such as with matters that fall under the Indian Child Welfare Act, additional hearings must be attended in order to complete the severance of the biological parents' rights.[6] Once the adoption is complete, the court issues a new birth certificate for the child. There may be a possibility of post-adoption communication if previously agreed upon by the parties, and generally occurs in the form of pictures, letters, and visitation at various stages throughout the

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[1] Carol Sanger, *Separating from Children*, 96 Colum. L. Rev. 375, 441 (1996).
[2] *Id.* at 444.
[3] *Id.* at 443.
[4] Ariz. Rev. Stat. Ann. § 8-107(B) (2008).
[5] Ariz. Rev. Stat. Ann. § 8-115(A) (2008).
[6] 25 U.S.C. §§ 1901-1963 (1978).

child's life. Further, an adult adoptee may potentially have access to the adoption records.

## III. Problematic Statutes

Currently, in the state of Arizona, the adoption statutes do not provide any type of legal protection for adopting families. In fact, the ambiguity and disparity in the statutes actually lends to the likelihood of an adopting family falling victim to, in some instances, unnecessary financial and emotional stress and, in other instances, actual fraud. Three of the most common areas of fraud fueled by the ambiguity of the state adoption statutes are with regard to birthmother living expenses, notification of birthfathers, and the disclosure of health history, particularly substance abuse. The statutes regarding these areas are so ambiguous that it provides far too much interpretation at the hands of adoption entities. This, in turn, creates competition between said entities for representation of the birthmother in placing her child. In addition, this encourages a birthmother that is displeased with the services they receive from one entity to seek new representation from a different entity without regard for the adopting family with whom they had previously been matched.

Reformation of state statutes is necessary to create set standards for every step of the adoption process to ensure each entity is functioning under the same set of rules and regulations. A reformation in the statutes would not harm those birthmothers who genuinely want to proceed with an adoption plan. For those that genuinely want to proceed with a plan, the laws should not affect them. A reformation in the statutes would target those who have no intention of placing their child for adoption and who, through fraudulent means, are seeking monetary gain at another's expense.

### *A. Living Expense Statutes*

The Arizona statute on living expenses states that court approved financial assistance may be provided to the birthmother of a child placed for adoption if the requested expenses are both reasonable and necessary, and incurred in connection with the adoption.[7] However, rather than defining what the court deems to be "reasonable" and "necessary," the statute only provides factors which are to be considered when an entity is making a decision as to what form of expenses should and should not be allowed to a birthmother. These factors include the birthmother's standard of living, the standard of living necessary to preserve the health and welfare of the birthmother and the unborn child, and the existence of alternative financial resources for the birthmother.[8] The fact that

[7] Ariz. Rev. Stat. Ann. § 8-114(A) (2008).
[8] *Id.* § 8-114(B).

these factors are ambiguous and seemingly open for interpretation from entity to entity can create confusion and, sadly, competition.

### 1. Defining the Current Standard of Living of the Birthmother

Arizona Revised Statute § 8-114 states that in order to determine what living expenses are reasonable and necessary, the court shall consider "the current standard of living of the birthmother."[9] One stark reality in the adoption field is the fact that this area of law assists clients who are oftentimes in volatile social, economic, and emotional situations. Many of the women who seek out adoption services do so because they do not have the financial means to provide for a child. Oftentimes the women are unemployed, homeless, and receiving some form of government assistance. Some women carry criminal records that make even government assistance unattainable. Many are currently in environments of domestic violence, sexual assault, or prostitution. Additionally, in a majority of those cases of women seeking adoption services, the birthmother is either currently struggling, or has struggled in the past, with a drug addiction. In short, to attempt to define a "standard of living" for these situations would be an injustice to these women, as many of their lives currently have no standards of which to speak. In fact, the statute does not explain if the "current standard of living" is being considered to either aide these women in elevating their status, or simply to maintain them in the standard of living to which they have grown accustomed. If the latter, then the statute actually hints at the possibility of discrimination. Is this to say that previously defined "upper class" women seeking adoption services will in all actuality receive a higher amount of living expenses then those women who have struggled with socio-economic issues merely because that is the standard of living to which they have grown accustomed?

### 2. Determining What Standard of Living is Necessary to Preserve the Health and Welfare of the Birthmother and the Unborn Child

Arizona Revised Statute § 8-114 further states that in addition to considering the current standard of living, the court shall also consider "the standard of living necessary to preserve the health and welfare of the birthmother and the unborn child."[10] Unfortunately, "preservation" is not defined in the statute and this term is generally subjective and is further based upon the standard of living to which a birthmother has become accustomed. Furthermore, the statute uses

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[9] *Id.* § 8-114(B)(1).
[10] *Id.* § 8-114(B)(2).

the word "preserve" and not "advance." So by definition, if a birthmother is eating from food boxes and living in homeless shelters is she not technically being preserved? Does this statutory language make an allowance to elevate her health or welfare? Is it acceptable to utilize living expenses to promote her welfare and the welfare of the unborn child from one of preservation to one of advancement? Alternatively, if a birthmother is already stabilized and living in her own apartment, then according to the statute, to preserve her in that same apartment would be in the best interest of her and the unborn child. However, what if she is in a physically abusive relationship and her abuser is living in the same apartment? Is her health and welfare in this "elevated" economical state truly being preserved? Is the statute really allowing the health and welfare of the birthmother and the unborn child to be defined in monetary increments?

The result is that sometimes adoption entities will have drastic differences in their interpretations of the statute. One entity may attempt to capitalize on the ambiguity of the statute, as well as the desperate and volatile situation of the birthmother by providing the bare minimum in assistance. The reason being that the lower the projected amount of money necessary to maintain or preserve the birthmother, the easier it may be to match her with an adopting family for whom lower out-of-pocket costs would be most appealing. Other entities may interpret the statute to provide the highest level of living expenses for a birthmother to entice her to choose a particular family who is better suited financially to maintain her economic needs. This can create competition not merely between adopting families, but also between separate adoption agencies all fighting for the representation of the birthmother or the adopting family. In essence, the very statute designed to prevent "baby selling" by disallowing that a person be "directly or indirectly compensated for giving or obtaining consent to place a child for adoption" results in a competition revolving around financial assistance.[11]

In addition, the Arizona Revised Statute states that in determining what living expenses are reasonable and necessary, the court will consider the existence of alternative financial resources for the birthmother. This factor is also convoluted as the existence of alternative financial resources may depend entirely on the willingness of the birthmother to seek out such services, or more often, the willingness of the adoption entity to assist the birthmother in seeking out such services. This could result in one entity providing a birthmother with a higher monthly sum of $800 for food, toiletries, and staples without the requirement to first seek alternative financial assistance while another entity providing a sum of only $300 prior to exhausting all possible efforts to first seek alternative financial assistance.

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[11] *Id.* § 8-114(C).

3. Other Varying Categories of Adoption Assistance

There are other areas of financial assistance that fall outside of the statutory definitions of which can vary greatly amongst adoption entities. For example, one entity may allow for the payment of past due expenses so that the birthmother's financial stabilization is not jeopardized while another entity may deem all prior expenses as unrelated to the adoption. One entity may provide exuberant amounts of cab fare for the birthmother to attend doctors or counselling appointments, while another entity will only allow for a bus passes. One entity may elect to provide relocation expenses for the birthmother during the pregnancy while another entity may agree to provide expenses to a birthmother only after she has relocated.

4. The Solution

One solution would be for statutory language to set a cap on the maximum allowed monthly living expenses for a birthmother. For example, a cap of $1,200 per month would provide for the following: $800 for rent and utilities, $200 for food expenses, $50 for a bus pass, $50 for phone expenses and $100 for toiletry expenses. Perhaps the statute can include language to indicate that an adoption entity may provide food expenses to a birthmother only after providing proof of exhausting all means of public food assistance such as food stamps and Women, Infants, and Children ("WIC") support.

A statutory cap, in providing an actual definition as to what the court considers necessary, would shift the responsibility of interpretation from the entity to the State. This would, in effect, tie the hands of these adoption entities and prevent the possibility of enticement. Eligibility to receive the same amount of living expenses regardless of the entity providing them would prevent a birthmother from "shopping around." This would encourage the focus of the mother and the entity in placing the child in the most loving home rather than with the highest bidder. Furthermore, a statutory cap will limit the costs incurred by an adoptive family, and thus promote the success of the adoption.

Another solution would be to set a statutory provision for the way living expenses are disbursed. Some entities distribute living expenses by giving a birthmother a monthly cash sum, while others give the birthmother a check or money order. Some entities pay all expenses directly to the providers. Again, a birthmother who is not being truthful about her expenses will often opt to receive her expenses in cash. This option, again, creates competition amongst entities. For example, a birthmother utilizing the services of an adoption provider who discourages the distribution of cash may very well sever her relationship from the family with whom she was matched, upon learning that a cash option is available through a different adoption provider. A statutory disburse-

ment provision discouraging cash payments to the birthmother would prevent mismanagement or abuse of funds at the hands of the birthmother. It is not uncommon for a birthmother to claim that the cash living expense disbursement they previously received had been lost or stolen. Other times, a birthmother will contact the adoption agency asking for more money as she "ran out" without paying her expenses. This is far too often the case with birthmothers who are struggling with a drug addiction. Ultimately, most adoption agencies will opt to replace "lost" or mishandled expenses rather than allowing the birthmother to lapse on her necessary bills out of what they assume to be in the best interest of maintaining the welfare of the unborn child. However, in the case of a drug-addicted birthmother, how is the welfare of the unborn child being preserved if the adoption agency turns a blind eye to the fact that the birthmother is using her living expenses to fuel her addiction? Ultimately, this behavior promotes the likelihood that that child will be born drug-addicted as well. A statutory disbursement provision would prevent these types of situations.

### *B. Birthfather Notification Statutes*

The Arizona Revised Statutes state that a notarized affidavit signed by the birthmother listing all potential fathers must be filed with the Court. Additionally, "[t]he affidavit shall attest that all of the information contained in the affidavit is complete and accurate."[12] The statute also states that notice of the adoption "shall be served on each potential father as provided for the service of process in civil actions."[13] When the whereabouts of the potential father are unknown, proof of a due diligence attempt to locate the potential father is required.[14]

The extent of what constitutes "due diligence" is open to interpretation and varies amongst adoption entities. Some entities will require that the mother provide as much information as possible, including all social media sites of the birthfather. Some entities fear this may be overly intrusive and thus, require only the bare minimum amount of information on the potential father. Some entities require a mandatory interview with a private investigator while other adoption entities have no such requirement.

This disparity, like the disparity in living expense disbursements, causes many disruptions. If a birthmother does not approve of the process by which an adoption entity gathers information regarding the potential birthfather, she

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[12] Id. § 8-106(F).

[13] *Id.* § 8-106(G).

[14] This assertion is based on the author's experience in the area of adoption for over twenty years.

will simply seek the representation of an adoption agency with less intrusive procedures. This happens without regard for the emotional and financial repercussions to the adopting family with whom she had previously been matched.

#### 1. The Solution

Perhaps the statute could define a mandatory investigative process to include the release of all social media sites as well as require a mandatory interview with a private investigator to aide in locating the birthfather. A statutorily mandated investigative process would prevent a birthmother from seeking services with a seemingly less intrusive adoption entity if she understands that all entities are required to adhere to the same process. Thus, an adopting family would not have to fear losing their birthmother and their prospective child to an agency with less stringent practices.

### *C. Birthmother Accountability*

The lack of statutes enforcing birthmother accountability creates harm to potential adoptive families. Three particularly problematic areas are mendacity about a birthmother's medical/social history, including drug usage; perjury as to the identity of the potential birthfather or of the birthmother's marital status; and deceit about the viability of one's pregnancy.[15] Adoptive families have the right to make an informed decision before consenting to a match with a specific birthmother. However, there are no statutes designed to protect adoptive families by holding the birthmother accountable for providing the most accurate information.

Again, disparity exists from entity to entity in the investigative measures taken to validate the information provided by a birthmother. Some entities require that the birthmother see a healthcare provider at least once a month prior to receiving any monthly living expense disbursements. Other entities do not require that the birthmother ever see a healthcare provider. Some entities require that the birthmother submit to routine drug screening during the pregnancy, while other entities require only a one-time drug screen and others still, require no drug screening at all. Some entities will work vigorously to obtain obstetrical records to monitor the progress of the pregnancy, while others simply require review of the hospital delivery records in order to satisfy document preparation requirements.

Like disparity in the other problematic areas, disparity in these areas causes disruption in the adoption process. A birthmother who chooses not to comply with the requirements of one agency simply has the option to seek representa-

[15] This assertion is based on the author's experience in the area of adoption for over twenty years.

tion elsewhere, again, without regard for the adopting family with whom she had previously been matched.

1. The Solution

Perhaps the statutes could provide for a standard in any process undertaken to validate the information provided by the birthmother. For instance, the statutes could require that, in order to receive living expenses each month, the birthmother must provide evidence of a viable pregnancy. The statutes could also require that, in order to receive living expenses each month, the birthmother must submit to a drug screen.

While some may argue that this is an invasion against the birthmother's privacy, no one is forcing the mother to seek medical care or even submit to a urine drug screen. It simply becomes an election that the birthmother chooses to do in order to be able to receive living expenses. Statutes such as these would help to prevent a birthmother from engaging in services with one entity and then later seeking representation from another entity with less restrictive policies.

*D. Remedies for Fraudulent Occurrences*

The harsh reality is that due to the volatile and desperate social lifestyles of the birthmothers, the system all too often lends itself to manipulation and fraud. Failure to provide accurate health information, providing misinformation about the potential birthfather, or misrepresenting one's financial situation are all instances where a birthmother can commit fraud, be it consciously or through ignorance of the law. There have been occurrences when a birthmother has failed to report a miscarriage, or lied about ever being pregnant, merely for the chance to collect living expenses. Some birthmothers have even engaged in services with several different entities at the same time to receive financial assistance from multiple families. While a reform in the above statutes may help to curtail some of these actions, it is not enough. A better mechanism for providing remedies to the families that are left in emotional and financial devastation needs to be available.

1. The Solution

The adoption statutes should have a provision that states that if birthmother is untruthful about information she provides, it will be considered automatic fraud per se. The burden can be on the birthmother to prove that the information is truthful. If the information is found to be fraudulent, the birthmother must reimburse the adopting family for damages as a result of her dishonesty.

Attorney cooperation with investigations is critical. All too often, attorneys or agencies refuse to participate in criminal investigations out of fear of exposure to the general population of birthmothers as being litigious. Most hide behind the attorney-client privilege. However, there are exceptions:

> A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (2) to mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.[16]

This exception is created exactly for the situations described above. Unless attorneys are willing to assist in the investigation process, investigations of fraudulent birthmothers will continue to prove fruitless.

In addition, a nationwide birthmother database with mandatory reporting requirement should be established in order to create birthmother accountability. If a nationwide database were to be implemented, one would merely perform a name search to discover if a birthmother was seeking services with more than one entity at the same time. Opponents may argue that this too is an invasion of privacy; however, as it currently stands, many courts require that the birthmother's adoption plan be published in a newspaper of general circulation, even in cases where she has named a birthfather. Entering information on a nationwide database where only adoption entities have access is less invasive than a publication in a public newspaper.

## IV. Utilization or Implementation of Birthmother Resources

While many birthmothers are genuine about their placement decision and are to be commended for their actions, the sad reality is that many are not. Again, many of these clients come from volatile and desperate social situations. Many birthmothers feel as if they have no way out of their desperation and lack the tools and resources necessary to better their lives. Oftentimes, these birthmothers come from broken and damaged homes whereby no one has taught them a better way of life. However, many adoption entities are just as guilty as the birthmother in exploiting the adoption process. These entities sim-

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[16] Ariz. R. Prof'l conduct ER 1.6(d).

ply provide minimal services in order to complete the adoption without thinking about the true welfare of the birthmother. If greater efforts were directed toward utilizing available services and implementing new resources, many of the birthmothers who act from financial and social desperation would need not resort to fraud in an attempt to gain stabilization.

### *A. Utilization of Existing Resources*

There are a great many community resources available to birthmothers who are struggling with financial hardships. Food stamps, WIC, and food boxes are just a few of these available resources. Assistance with rent and utility payments are another form of resource available. Cash assistance and child support enforcement services are also oftentimes available to those in need.[17]

#### 1. The Solution

The problem with most birthmothers is that they oftentimes lack the initiative to seek out said services, or they have never been educated as to the extent of services available. Many adoption entities will simply ask for additional financial assistance from an adoptive family rather than take the time to assist the birthmother. Adoption is not just a legal process; it is also a social service. Helping a birthmother to apply for the Arizona Health Care Cost Containment System ("AHCCCS"), a Medicaid program, and food stamps, teaching them about financial planning, and introducing them to community advocates are all forms of long-term assistance that an adoption entity can secure for a birthmother while she is going through the adoption process. This would promote her financial success long after the adoptive parents cease paying for her living and medical expenses.

Adoption entities should be required to assist the birthmother to the fullest extent possible before asking an adoptive family for financial assistance. Perhaps some of these birthmothers could learn what it means to take responsibility for ones actions and reap the reward from healthy decisions. Responsibility is a powerful motivator toward life change noted by many:

> "The price of greatness is responsibility." —Winston Churchill.[18]
>
> What we call our destiny is truly our character, and that character can be altered. The knowledge that we are responsible for our actions and attitudes does not need to be discouraging,

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[17] *Food Stamps, Cash Assistance Article*, AZLAWHELP.ORG, http://www.azlawhelp.org/articles_info.cfm?mc=7&sc=41&articleid=55 (last visited Nov. 15, 2014).

[18] Winston Churchill, Address at Harvard University (Sept. 6, 1943), *reprinted in* NEVER GIVE IN! THE BEST OF WINSTON CHURCHILL'S SPEECHES 357 (2003).

> because it also means that we are free to change this destiny. One is not in bondage to the past, which has shaped our feelings, to race, inheritance, background. All this can be altered if we have the courage to examine how it formed us. We can alter the chemistry provided we have the courage to dissect the elements."[19]

In addition to assisting birthmothers with financial responsibility, adoption entities should make every effort to educate and aide birthmothers on issues such as escaping domestic violence situations, finalizing divorces, enrolling in GED or college programs, participating in drug rehabilitation programs, and providing transportation to recovery meeting centers. It is not merely enough to provide a sheet of paper with names and numbers. After more than twenty years in this field, it has been my experience that most birthmothers have the desire to better their lives, they just do not know where to begin. With the guidance of an adoption provider and the support of the adopting family, the adoption process could be the birthmother's chance at a new direction in life.

### *B. Implementation of New Resources*

Again, many birthmothers exhaust their monthly living expenses prior to the end of the month due to misappropriation. Most adoption entities will simply turn to the adopting family for the extra financial assistance. Most birthmothers do not intentionally put themselves in financial jeopardy; however, they have never been taught how to manage their money. During the adoption process birthmothers are suddenly entrusted with thousands of dollars which, for many, is far more money than they have ever been responsible for before.

#### 1. The Solution

Perhaps it would be beneficial to implement new statutory language that requires the birthmother to attend a financial planning seminar prior to being qualified to receive financial assistance from an adopting family. While this may be an initial expense for an adopting family, ultimately it would prevent duplicate expenses paid as a result of the birthmother's mishandling of her expenses.

Another new resource that could be statutorily mandated is with regard to daycare. Many birthmothers have other minor children for whom they are struggling to provide care for and are unable to pay any type of daycare expense. As a result, the birthmother often simply chooses not to work at all

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[19] ANAIS NIN, THE DIARY OF ANAIS NIN, VOL. 1: 1931-1934 126 (Ishi Press 2011).

during the pregnancy. Again, most adoption entities will simply turn to the adopting family for the extra financial assistance.

Instead, it may be more socially beneficial to assist these birthmothers with getting back into the workforce. Instead of paying a higher rate of living expenses to sustain her unemployment, it may be advantageous to pay for childcare services and professional clothing to enable the birthmother to work during the pregnancy. Other services to assist a birthmother in getting back into the workforce would include help filling out job applications, building resumes, and providing mock interviews. By law, birthmothers are entitled to receive post-birth living expenses for approximately six to nine weeks after the birth of the child. Statutory language that requires a birthmother to engage in some type of career-building skills workshop would promote her social advancement long after that post-birth expense allowance has been spent.

It is efforts such as these that will alleviate an adoptive family from the financial burden of having to support their birthmother, while encouraging her to become responsible and self-sustaining, both during the adoption process and afterwards. It is efforts such as these that will hopefully alter the motivation and actions of many birthmothers during the adoption process. It is efforts such as these that will truly provide a social service to the community.

## V. Conclusion

While reform in the statutory adoption provisions may better help protect adopting families, it is not enough. The utilization of existing resources, as well as the implementation of new statutory language, are vital components to the reformation of adoption law. Statutory standards will help the adoption community come together as a whole rather than making it a competitive industry. Statutory standards will help to weed out those birthmothers that have a genuine desire to do the right thing versus those that are fraudulent. Offering greater resources to birthmothers will also ensure that their motivating focus is on placing their unborn child in the most loving and caring home possible. Greater resources will also help the birthmother not just with her immediate situation, but also with her future actions and decisions. The legislature and the adoption community must come together in order to help all parties in the adoption process and to make an adoption plan the joyous event that it should be. Reformation of the laws would equate to the reformation of the lives of all involved. Thus, through the adoption process we can save one life, while changing many.

# Adoption by Same-Sex Couples in the United States: The Revolving Door into the Lives of Parentless Children

Ben John G. Atienza*

## I. Introduction

Adoption is not a right for any prospective parent, whether gay, lesbian, or straight.[1] The right to adopt is a statutory privilege granted to individuals by their home state.[2] Every state in the United States has an existing statute that dictates who is eligible to adopt children within that particular state.[3] However, the adoption statute or laws from many of these states are silent as to whether or not same-sex couples are included within the group of people legally permitted to adopt children.[4] In these states, the ability of same-sex couples to adopt children is left up to the discretion of welfare professionals or the determination of judges.[5]

This article will explore the development of same-sex couples' ability to adopt children within the United States. This article will also explore any effects, or potential effects, the recent Supreme Court decisions in *Windsor* and *Perry* may have on the statutory provisions regulating the ability of same-sex couples to adopt within the United States.[6] Further, this article will consider the existing shortcomings in laws relating to same-sex adoption in the United States and suggest alternative or possible directions for legislatures to take. "[R]esearch today shows that the majority of the population in the United States accepts homosexuality."[7] But, has the law reflected this change in socie-

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1 Cynthia R. Mabry, *Opening Another Exit From Child Welfare For Special Needs Children: Why Some Gay Men and Lesbians Should Have The Privilege to Adopt Children in Florida*, 18 St. Thomas L. Rev. 269, 275 (2005).

2 *Id.*

3 *Id.*

4 Elisa Rosman, *Adoptions by Same-Sex Couples Still on the Rise: The recent increase in gay and lesbian couples adopting in the U.S. explained*, Adoptive Families, http://www.adoptivefamilies.com/articles.php?aid=2321/ (last visited Oct. 8, 2014).

5 *Id.*

6 Windsor v. United States, 699 F.3d 169, (2d Cir. N.Y. 2012); Hollingsworth v. Perry, 133 S. Ct. 2652, (2013).

7 Karel Raba, *Recognition and Enforcement of Out-of-State Adoption Decrees Under The Full Faith and Credit Clause: The Case of Supplemental Birth Certificates,* 15 Scholar 293, 295 (2013).

tal attitude, or is there still a strong push against allowing same-sex couples to adopt as freely as opposite-sex couples?

## II. The Adoption Option: Factors Influencing Same-Sex Couples to Adopt

The motivation for adopting is not always so cut and dry. A couple of the reasons why same-sex couples adopt include the desire to provide a home for a child and the growing acceptance of gays and lesbians within the United States.[8] In a perfect world, adoption by same-sex couples would be evaluated with the same standards used in evaluating opposite-sex couples.[9] The best interest of the child should be the most important factor.[10] But, the sexual orientation seems to prompt caseworkers to conduct a stricter and more in-depth evaluation of same-sex couples.[11] Thus, for same-sex couples, the adoption process may prove to be more costly and even more invasive than it would normally for opposite-sex couples in similar shoes.

### *A. Open Arms and Loving Homes for Parentless Children*

Sexual orientation of the adoptive parents has been sufficient grounds to deny them the ability to adopt.[12] Despite research indicating that sexual orientation has no impact on a person's ability to be a good parent,[13] when prospective parents check the box indicating their sexual orientation, same-sex couples may never get the opportunity to demonstrate their ability to be suitable parents.[14] The overwhelming strength of ignorance and discrimination overpowers the children's need for a loving home and family. However, the idea of allowing adoption to provide a child with a family and a home is not a new concept.[15] In 1851, "Massachusetts passed the first adoption law focused on children's welfare."[16] The child's best interest has always been at the forefront of state priority when dealing with adoptions.[17] It is shocking that up until

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[8] Sabrina Tavernise, *Adoptions by Gay Couples Rise, Despite Barriers*, N.Y. Times (June 13, 2011), http://www.nytimes.com/2011/06/14/us/14adoption.html?pagewanted=all&_r=0.

[9] Mabry, *supra* note 1, at 290.

[10] *Id.*

[11] *Id.*; Vanessa A. Lavely, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. Rev. 247, 263 (2007).

[12] Lavely, *supra* note 11, at 264

[13] Rosman, *supra* note 4.

[14] Mabry, *supra* note 1, at 288-89 (listing the criteria that courts consider in determining suitability as a parent, including residence, income, community environment, health, availability to spend time with the child during the transition period, etc.).

[15] Raba, *supra* note 7, at 306.

[16] *Id.*

[17] Mabry, *supra* note 1, at 288.

2013, only eight of the states in the United States allow unmarried same-sex couples to jointly adopt,[18] and only eleven states, plus Washington D.C., explicitly allow the same-sex second-parent adoption by statute or court rulings.[19] "A second-parent adoption is 'an adoption by an unmarried cohabiting partner of a child's legal parent, not involving the termination of a legal parent's rights . . . .'"[20]

Joint adoptions, in the context of same-sex couples, are the process of "adopting a child from the child's biological parent(s)" or from "the custody of the state."[21] Unlike joint adoptions, same-sex second-parent adoptions commonly involve the adoption of the partner's biological or adoptive child.[22] Sometimes, these children may be a family member's, or a friend's, child who have lost one or more of his or her parents.[23] Same-sex couples that are trying to jointly adopt go through private agencies or foster care to adopt a child.[24]

Foster care is intended to be a short-term solution for children without any parents to adequately care for them.[25] Each year, thousands of these children will exit the foster care system without a family because they turn eighteen.[26] This is called "aging out."[27] When these teens become eighteen, they are too old to stay in foster care, and they are emancipated by the state.[28] These teens go into the world without support from any family and they have to make decisions that will make or break them.[29] Specifically, "each year approximately 24,000 American teens turn eighteen years old in foster care and head out into the world alone."[30] Despite this overwhelming statistic, some states,

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18 Arkansas, California, Colorado, Illinois, Indiana, Nevada, New Jersey, and Oregon. Raba, *supra* note 7, at 312.

19 Colorado, California, Connecticut, Illinois, Indiana, Maine, Massachusetts, New Jersey, New York, Pennsylvania, New York, and the District of Columbia as allowing second-parent adoptions. *Id.* at 314-15; *see also* Mabry, *supra* note 1, at 277 ("esp., an adoption in which a lesbian, gay man or unmarried heterosexual person adopts his or her partner's biological or adoptive child.").

20 Mabry, *supra* note 1, at 277.

21 Raba, *supra* note 7, at 311.

22 Mabry, *supra* note 1, at 277.

23 *Id.*

24 Rosman, *supra* note 4.

25 Julia O'Hanlon et al., *Aging Out of Foster Care: Background and Research Brief*, U. OF DEL. INST. FOR PUB. ADMIN. (Jul. 2012), http://www.ipa.udel.edu/publications/AgingOut_policybrief.pdf.

26 *Id.*; *see also The Aging out Dilemma and Foster Care in Florida,* FLA. COMMISSION ON THE STATUS OF WOMEN, http://www.fcsw.net/documents/Factsheets/revisedFosterCareandtheAgingOutDilemma.pdf (last visited Oct. 10, 2013 [hereinafter *FCSW*].

27 O'Hanlon et al., *supra* note 25.

28 FCSW, *supra* note 26.

29 *Id.*

30 *Id.*

such as Kentucky, Mississippi, Nebraska, Ohio, and Michigan still continue to bar same-sex couples from joint or second-parent adoption.[31] It is a logical and practical solution to allow qualified same-sex couples to adopt these parentless children to prevent them from aging out of the foster care system. Otherwise, more and more children will end up homeless or involved with drugs and turn to a life of crime.[32]

### *B. The Social Movement and the "Gayby Boom"*

Social acceptance of same-sex couples has led to groundbreaking developments over the past couple of decades.[33] Today, most of the American population accepts homosexuality,[34] or at least tolerates it. In 2012, 60% of Americans reported having a gay friend or close acquaintance; a drastic jump from the 22% reported in 1985.[35] This change in societal views of gays and lesbians could influence more same-sex couples to try to adopt and start families. The homosexual community has accomplished a great deal in its fight for marriage equality and equal protection.[36] In 2013, only thirteen states and the District of Columbia allowed same-sex marriage.[37] Today, thirty-seven states, plus the District of Columbia, allow same-sex marriage.[38] "The next logical step in the fight for gay rights is national recognition of the familial relationships of homosexuals."[39]

The addition of children to same-sex households through adoption and other alternative means of conception such as artificial insemination and surrogacy is referred to as the "gayby boom."[40] The movement to allow same-sex adoption gained momentum in the early 1990s as acceptance of homosexuality

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[31] *States where same-sex couples are barred from doing joint and/or second parent adoptions statewide,* AM. CIV. LIBERTIES UNION (June 12, 2012), https://www.aclu.org/files/assets/aclu_map 3.pdf.; A map on *Parenting Laws: Joint Adoption,* THE HUM. RTS. CAMPAIGN, http://www.hrc .org/state_maps (last visited April 5, 2015) [hereinafter *HRC Joint Adoption Map 2015*](shows states with joint same-sex adoption).

[32] FCSW, *supra* note 26.

[33] Raba, *supra* note 7, at 294.

[34] *Id.* at 295.

[35] *Id.*

[36] *Id.* at 296.

[37] Erin McClam and Pete Williams, *Supreme Court strikes down Defense of Marriage Act, paves way to gay marriage to resume in California,* NBC NEWS, (June 26, 2013, 7:04 AM), http:// nbcpolitics.nbcnews.com/_news/2013/06/26/19151971-supreme-court-strikes-down-defense-of-marriage-act-paves-way-for-gay-marriage-to-resume-in-california?lite.

[38] Phillip Bump, *It's come to this: Which state will be the last to allow same-sex marriage?*, THE WASHINGTON POST, (Apr. 10, 2015), http://www.washingtonpost.com/blogs/the-fix/wp/2015/ 02/10/its-come-to-this-which-state-will-be-the-last-to-allow-same-sex-marriage/.

[39] Raba, *supra* note 7, at 296.

[40] *Id.* at 305.

in America grew.[41] In 2000, the census reported that roughly "10% of same-sex unmarried couples were raising an adopted child."[42] By 2009, this number nearly doubled and a reported 19% of unmarried same-sex couples were raising an adopted child.[43] The first recorded same-sex second-parent adoptions occurred in 1991 in the District of Columbia and the state of Vermont.[44] The courts found that there was no need for the biological parent to terminate her parental rights in order for her lesbian partner to adopt the biological child of the other.[45] This movement toward the recognition of same-sex parenting has led courts to reconsider the definition of the word "family."[46] Although gays and lesbians have come a long way in their fight for equality, there is still a long and difficult journey ahead.

## III. Development of Same-Sex Adoption in the United States

The intent behind modern adoption law stemmed from two main societal goals: to provide a family for a child and to provide adults with an heir.[47] Massachusetts provided the first law dealing with the adoption of children in 1851.[48] However, the rule created by the state of Massachusetts was silent on how to deal with same-sex adoptions.[49] The opinion of same-sex relationships remained negative for over a century after the passing of the Massachusetts adoption law.[50] Homosexuality was considered a mental disorder as late as 1973, and each state prohibited sodomy until 1962.[51] Since adoption did not exist under common law,[52] the right to adopt is only available through a statutory privilege.[53] It was abundantly clear that the new law about child adoption did not extend to same-sex couples.[54] It was not until the 1990s that adoption by same-sex couples began to gain traction.[55]

Adoption by same-sex couples first became the topic of court conversation in the 1970s.[56] For the first time, courts were debating the idea of same-sex

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41 *Id.* at 307; *see* Lavely, *supra* note 11, at 265.
42 Raba, *supra* note 7, at 308.
43 *Id.* at 308-09.
44 Lavely, *supra* note 11, at 265.
45 *Id.*
46 *Id.* at 266.
47 Raba, *supra* note 7, at 306.
48 *Id.*
49 *Id.*
50 *Id.* at 306-07.
51 *Id.*
52 Lavely, *supra* note 11, at 263.
53 *Id.*
54 Raba, *supra* note 7, at 307.
55 *Id.* at 308.
56 *Id.* at 307.

adoption, and it was not long before state legislatures joined in on the debate.[57] In 1993, states with adoption statutes that were silent as to the ability of same-sex couples to adopt children began to interpret their state statutes more broadly.[58] Massachusetts, New Jersey, and Vermont were among some of the states that applied a broader meaning to their adoption statutes.[59] "The 1990s started a legal revolution in gay rights"[60] that tremendously impacted the fight toward achieving nationwide recognition for the "familial relationships of homosexuals."[61]

This legal revolution opened the door for same-sex couples to adopt children in the United Sates.[62] In 1993, the Supreme Court of Massachusetts extended the right to adopt children to same-sex couples and held that the state statute did not prohibit unmarried cohabitants from adopting.[63] Additionally, that court found that the Massachusetts statute did not prohibit the adoption of a child on the basis of the potential parents' sexual orientation.[64] This statutory privilege to adoption grants, to the adoptive parents, "all the legal rights and responsibilities associated with parenthood."[65] Vermont similarly applies a broad interpretation of their adoption statute.[66] The language of the Vermont statute stated, "'[a] person or husband and wife together' could adopt a child."[67] The court interpreted the plain language of the statute to allow unmarried couples to adopt a child.[68] Therefore, it does not exclude same-sex couples from having the right to adopt.[69] Finally, the state of New Jersey found that the state's adoption statute should also be interpreted broadly.[70]

While a change in social acceptance of same-sex adoption of a child may have been taking a positive turn in the early 1990s, the courts have not always been sympathetic to the concept of same-sex parenthood.[71] Several states

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[57] *Id.*

[58] Mabry, *supra* note 1, at 278-79.

[59] *Id.* at 278.

[60] Raba, *supra* note 7, at 295.

[61] *Id.* at 296.

[62] *Id.* at 308.

[63] Mabry, *supra* note 1, at 279 (discussing the decision of a Massachusetts court in *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993)).

[64] *Id.*

[65] Lavely, *supra* note 11, at 263.

[66] Mabry, *supra* note 1, at 279; *But see* VT. STAT. ANN. TIT. 15A, 1-102(a) (2013) (indicating the current statutory language; previously 15 V.S.A. § 431 as discussed in In re B.L.V.B., 160 Vt. 368 (1993)).

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 280; *But see* N.J. STAT. ANN. 9:3-43 (West 2013) (indicating the current statutory language; cited by In re Adoption of a Child by J.M.G., 632 A.2d 550 (N.J. Ch. 1993)).

[71] Lavely, *supra* note 11, at 264.

enacted statutes that expressly prohibited same-sex couples from adopting children.[72] In the 1970s, Washington, Florida, and New Hampshire took turns trying to prohibit the ability of same-sex couples to adopt children and become parents.[73]

One of the major questions in all adoption cases is whether or not the potential parent is a good match for the child he or she is trying to adopt.[74] In determining whether the potential parent is a good fit for the child, courts apply the "best interest of the child" test.[75] Some of the factors courts consider include the marital status, experience in caring for children, income, residence, health, and availability to spend time with the child of the potential adoptive parent.[76] Although the fair thing to do is to apply the same standard for heterosexual couples and homosexual couples, in reality, same-sex couples are more likely to face discrimination during the adoption process on the basis of their sexual orientation.[77]

In 1975, the state of Washington denied a homosexual couple the ability to adopt a child because the court believed that allowing same-sex couples to become parents "'offends the traditional concept of what a family is.'"[78] Following Washington's lead, the state of Florida enacted a statute in 1977 expressly prohibiting same-sex couples from being able to adopt.[79] Although the issue of same-sex adoption was introduced to the courts in the 1970s, there is no record that any openly gay couples were able to successfully adopt throughout that decade.[80] The 1980s proved to be equally prohibitive[81] despite lawyers and academics creating an alternative method for same-sex couples to adopt: the second-parent adoption.[82] Since no states allowed same-sex marriage in the 1970s and 1980s,[83] joint adoptions were not available to same-sex couples and second-parent adoptions became a creative way for children raised

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72 *Id.*

73 *Id.*

74 Mabry, *supra* note 1, at 288.

75 *Id.*; *see also* Lavely, *supra* note 11, at 263 (the "best interest of the child" standard was first applied by Judge Cardozo in Finlay v. Finlay, 148 N.E. 624 (N.Y. 1925)).

76 *Id.* at 289 (other factors include: "the child's wishes and specific inquiries about the prospective parents," "willingness to adopt siblings," "commitment to respect and appreciate the child's racial and ethnic heritage and to educate the child about his or her background," and "moral character").

77 *Id.* at 288.

78 Lavely, *supra* note 11, at 264.

79 *Id.*

80 *Id.*

81 *Id.*

82 Raba, *supra* note 7, at 313

83 Lavely, *supra* note 11, at 265.

by same-sex couples to have two legal parents.[84] The first reported cases of second-parent adoption by a same-sex couple were not until 1991, in Vermont and the District of Columbia.[85]

## IV. ADOPTION LAWS BEFORE *WINDSOR* AND *PERRY*

Today, a total of thirty-eight states and the District of Columbia allow same-sex couples to adopt, either through joint adoptions or second-parent or stepparent adoption.[86] A total of eleven states still present barriers that prohibit same-sex couples from adopting in any way.[87] Most of the states are still silent on the issue and handle adoption petitions on a case-by-case basis.[88] Same-sex adoption is still not a nationally accepted idea.[89] As recently as 2010, three states in the United States expressly prohibited same-sex couple adoptions.[90] Florida, Utah, and Mississippi all enacted statutes that prevented same-sex couples from adopting.[91] In September 2010, the Third District Court of Appeals of Florida found that the 1977 statute passed by the state prohibiting adoption by same-sex partners was unconstitutional.[92] The Mississippi statute is the only statute in the United States today that expressly prohibits same-sex couples from adopting.[93] The statute was amended in 2000 to expressly restrict same-sex adoptions.[94] That statute still stands today.

In 2013, states such as Utah and Louisiana had statutes that do not expressly ban same-sex couple adoption.[95] Utah prevented cohabiting couples

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[84] Raba, *supra* note 7, at 314.

[85] Lavely, *supra* note 11, at 265; *see* Raba, *supra* note 7, at 315 (listing the known states that currently allow same-sex second-parent adoptions).

[86] *HRC Joint Adoption Map 2015*, *supra* note 31; A map on *Parenting Laws: Second-Parent or Stepparent Adoption*, THE HUM. RTS. CAMPAIGN, http://www.hrc.org/state_maps (last visited Apr. 10, 2015) [hereinafter HRC *Second-Parent Adoption Map*] (shows states with second-parent or stepparent adoption).

[87] HRC Second-Parent Map - *Id.* (showing the states that pose a barrier to joint same-sex adoption); HRC Second-Parent or Stepparent Adoption Map, *supra* note 85 (shows states with barriers to same-sex second-parent or stepparent adoptions).

[88] HRC *Second-Parent or Stepparent Adoption Map*, *supra* note 86.

[89] Lavely, *supra* note 11, at 266.

[90] *Id.*

[91] *Id.*

[92] Fla. Dep't of Children and Families v. Adoption of X.X.G., 45 So.3d 79, 92 (2010) (finding that F.S.A. § 63.042(3) prohibition on adoption by homosexuals is a violation of the Equal Protection clause of the State Constitution); John Schwartz, *Florida Court Calls ban on Gay Adoptions Unlawful*, N.Y. TIMES (Sep. 22, 2010, 11:16 PM), http://www.nytimes.com/2010/09/23/us/23adopt.html.

[93] Raba, *supra* note 7, at 312; MISS. CODE. ANN. § 93-17-3(5) (2013) ("Adoption by couples of the same gender is prohibited).

[94] Lavely, *supra* note 11, at 266.

[95] Raba, *supra* note 7, at 312.

that are not legally married from adopting[96] while the Louisiana statute does not permit unmarried couples to adopt.[97] Utah's federal circuit court has since held the state's ban on same-sex marriage to be unconstitutional, however that battle is still ongoing.[98] Since Utah's adoption laws are directly related to it's marriage laws, same-sex adoption in Utah hinges on the state's final decision to allows same-sex marriage. The state of Louisiana expressly prohibits same-sex marriage, and continues to do so today, and does not acknowledge the validity of same-sex marriages performed in other states, the state's adoption statute becomes a blanket ban on same-sex couples' ability to adopt.[99] Oklahoma had similar restrictions on their adoption laws.[100] Unmarried couples are not allowed to adopt, and because Oklahoma does not grant same-sex marriages, homosexual couples are ultimately banned from adopting.[101]

In many states, the ability of same-sex couples to adopt is dependent on that state's laws regarding same-sex marriage.[102] Since many states in the country do not allow same-sex marriage,[103] limiting joint adoptions to only married couples effectively bars same-sex couples from being able to adopt.[104] Some couples have tried to go around the marriage requirement by taking advantage of the Full Faith and Credit Clause.[105] The Full Faith and Credit Clause requires that a state recognize judgments from other states but allows the state recognizing the judgment to use its own state laws in the enforcement and execution of that judgment.[106] In other words, same-sex couples that live in states where they are not allowed to adopt go to other states where same-sex adoption is permissible, and after successfully adopting, they try to have their own state recognize that valid adoptions from other states.

In a 2007 Oklahoma case, *Finstuen v. Crutcher*,[107] a lesbian couple, Lucy and Jennifer Doel, successfully obtained a supplemental birth certificate from

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96 *Id.*

97 *Id.* at 324.

98 Ashton Edwards, *Utah officials react: Same-sex marriage legal in Utah, for now*, Fox 13 News (Apr. 6, 2015, 9:50 PM), http://fox13now.com/2014/10/06/utah-officials-react-same-sex-marriage-legal-in-utah-for-now/.

99 Raba, *supra* note 7, at 324.

100 *Id.*

101 *Id.* at 320.

102 *Id.* at 316.

103 Erin McClam and Pete Williams, *Supreme Court strikes down Defense of Marriage Act, paves way to gay marriage to resume in California,* NBC News, (June 26, 2013, 7:04 AM), http://nbcpolitics.nbcnews.com/_news/2013/06/26/19151971-supreme-court-strikes-down-defense-of-marriage-act-paves-way-for-gay-marriage-to-resume-in-california?lite.

104 Raba, *supra* note 7, at 316.

105 *Id.* at 322-23.

106 *Id.* at 319.

107 Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007).

the state of Oklahoma to recognize their adoption of a child from California.[108] The court of appeals, upon finding that there was a valid judgment from California, pointed out that Oklahoma was merely required to recognize the adoptive relationship between same-sex parents and the child, and the state was still free to "define the rights and obligations that flow from an adoptive relationship."[109] Because Oklahoma grants the same rights and responsibilities to adoptive families as it does to naturally related families, Lucy and Jennifer were able to enjoy the privileges granted to other families in Oklahoma.[110] The fact that the Doels had to use the Full Faith and Credit Clause to obtain recognition of their status as parents is proof that same-sex couples are presented with unique obstacles that couples of the opposite sex do not have to face.

## V. Development of Social Recognition for Equality for Same-Sex Couples

The meaning of the word "marriage" has been difficult to pin down to one specific definition.[111] But, in order to solve the question of whether a marriage between two people of the same sex could be a legally valid marriage, it is crucial to find an accurate and acceptable definition of marriage. To do that, it is important to consider the history of the word and the role it plays in the current debate for marriage equality.[112] Although history can arguably be considered a concrete fact, the interpretation of history can pull people in opposite directions.[113]

Those who oppose same-sex marriage have interpreted the history of marriage very simply—it has consistently been a union between one man and one woman.[114] Opponents of same-sex marriage shed little light on the dramatic changes that the concept of marriage has gone through in history in order to deemphasize its relevance to the current debate.[115] Their justification for this discriminatory interpretation of the history of marriage is the unfounded claim that the state's inability to prevent gays and lesbians from marrying would essentially deprive all states of the right to put limitations on who may marry.[116] In other words, opponents of same-sex marriage are making the that if states allowed gays and lesbians to marry, it would create a slippery slope in

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108 Raba, *supra* note 7, at 322-24; Crutcher, 496 F.3d at 1154.
109 *Id.* at 323; Crutcher, 496 F.3d at 1154.
110 Raba, *supra* note 7, at 323; Crutcher, 496 F.3d at 1154.
111 Lavely, *supra* note 11, at 254.
112 *Id.* at 255.
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*

which states would be surrendering their right to regulate marriages altogether, including incestuous or polygamous marriages.

On the other hand, proponents of same-sex marriage have highlighted the protean and evolving history of marriage.[117] Proponents of same-sex marriage puts emphasis on the inclusion of "previously excluded forms of marriage" to show that marriage should be similarly interpreted to include same-sex couples.[118] The case of *Loving v. Virginia* is arguably one of the most famous amendments to marriage rights when the United States Supreme Court found that prohibiting marriage between interracial couples violates an individual's fundamental right to marry.[119] Advocates of marriage equality for same-sex couples argue that the rationale for granting interracial couples the right to marry parallels the reasoning for allowing same-sex marriages.[120] This difference in interpretation on the history of marriage has forced the judicial forum to get more involved in shaping the concept of marriage in the United States.[121] And, for over a century, Federal and state courts have heavily disputed the meaning of marriage[122] and what it means for same-sex couples' right to marry.

Up until 2007, the Massachusetts Supreme Court was the only state Supreme Court that allowed couples of the same sex to marry.[123] Some states merely allowed them to enter into civil unions or domestic partnerships.[124] Although these policies are well intentioned, the fact that some states have developed a different category for same-sex couples just further fosters the idea that same-sex couples are not worthy to become part of the institution of marriage. Advocates of same-sex marriage have interpreted this action to be a "declaration that gays and lesbians are 'not good enough to be included in civil marriage.'"[125]

In late 2006, several states amended their constitution to explicitly ban same-sex couples from having the right to marry.[126] By the end of that year, there were twenty-six states in total that enacted constitutional amendments defining marriage to be a union between one man and one woman.[127] In 2000, California passed Proposition 22, which limited marriage to only opposite sex

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117 *Id.*
118 *Id.*
119 *Id.*; Loving v. Virginia, 388 U.S. 1 (1967).
120 Lavely, *supra* note 11, at 255.
121 *Id.* at 256.
122 *Id.*
123 *Id.*
124 *Id.* at 257.
125 *Id.*
126 *Id.*
127 *Id.*

couples.[128] This statute was later invalidated in *In Re Marriage Cases*,[129] where the California Supreme Court found that Proposition 22 was an unconstitutional violation of Article 1, Section 7 of the California Constitution and was therefore invalid.[130] Although it seems that there are several states going backwards on the issue of gay marriage, there are states that have extended the right to marry to same-sex couples.[131] As of the beginning of 2013, nine states plus the District of Columbia granted same-sex couples the right to marry.[132] Since then, other states amended their state legislation or their courts granted decisions that would allow same-sex couples to marry.

### *A.* Windsor *And The Defense Of Marriage Act (DOMA)*

In *Windsor v. United Sates*,[133] Edith Windsor was denied the benefit of spousal deduction for federal estate taxes after the death of her spouse in 2009.[134] In its decision favoring Windsor, the United States Supreme Court struck down Section 3 of the Defense of Marriage Act ("DOMA"), a 1996 law signed by President William "Bill" Clinton.[135] The Court found that Section 3 was a violation of a person's constitutional right to equal protection and rendered it unconstitutional.[136] Section 3 of DOMA states:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[137]

In addition, under DOMA, gay couples that are legally married in one state may not be recognized as legally married by other states, and certainly not legally married in the eyes of the Federal government.[138]

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128 Perry v. Brown, 671 F.3d 1052, 1065 (9th Cir. 2012).

129 In Re Marriage Cases, 183 P.3d 384 (Cal. 2008).

130 In Re Marriage Cases - *Id.* at 453.

131 Raba, *supra* note 7, at 297-298.

132 Raba, *supra* note 7, at 297-99.

133 Windsor, 699 F.3d at169-70.

134 *Id.* at 175.

135 Dylan Matthews, *The Supreme Court struck down part of DOMA: Here's what you need to know*, WASH. POST (June 26, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/26/the-supreme-court-struck-down-doma-heres-what-you-need-to-know/.

136 *Windsor*, 699 F.3d at 188; McClam and Williams, *supra* note 103.

137 1 U.S.C.A. § 7 (2014), *held unconstitutional by Windsor*, 699 F.3d 169.

138 Bump, *supra* note 38; McClam and Williams, *supra* note 103.

The decision of the U.S. Supreme Court to invalidate a portion of DOMA opened the door for same-sex couples to be treated with equality.[139] The court found that requiring marriage to be between a man and a woman did not have a rational basis and was not supported by any legitimate state interest.[140] The Court examined the standard of review required on the issue of same-marriage and found that "homosexuals as a group have historically endured persecution and discrimination."[141] It also found that sexual orientation, specifically being a homosexual, had no correlation to a person's ability to contribute to society and that the same-sex couples remain a "politically weakened minority" in the United States.[142] Finally, the majority of the U.S. Supreme Court found that "homosexuals are a discernable group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriage."[143]

In the Court's discussion examining the history of discrimination, the majority stated that homosexuals have suffered discrimination since the 1920s.[144] Approximately ninety years of discrimination was found to be sufficient evidence that homosexuals have indeed been historically subject to persecution and discrimination.[145] In relation to same-sex couples' ability to contribute to society, the Court rejected the argument that same-sex couples have a "diminished ability to discharge family roles in procreation and the raising of children."[146] The majority found that homosexuality poses no impairment in a person's ability to perform or contribute to society.[147] Further, the majority examined same-sex couples' political power as of today.[148] Although homosexuals have gained political advances compared to the past, they are still not in the position to protect themselves against the political powers of the majority.[149] Finally, the Court examined the distinguishing characteristics of same-sex couples.[150] The majority opinion stated that homosexuals possess characteristics that when manifested to the public, such as when filing for a marriage license or applying for adoption, invite discrimination.[151]

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139 Matthews, *supra* note 135.

140 *Id.*; Windsor, 699 F.3d at 188.

141 Windsor, 699 F.3d at 181.

142 *Id.* at 182.

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.* at 183.

147 *Id.* at 182.

148 *Id.* at 184.

149 *Id.* at 185.

150 *Id.* at 183.

151 *Id.* at 184.

The majority of the justices found that "a state may enforce and dissolve a couple's marriage, but it cannot sanctify or bless it."[152] As a result of the Court's ruling, Windsor was awarded damages of $363,053,[153] but more importantly, she was awarded the recognition and validation of her marriage. Windsor's ruling effectively grants same-sex couples the ability to receive federal benefits[154] involving more than 1,100 federal laws, programs, and the ability to petition the government for a green card.[155] The Court all but classified same-sex couples are a suspect class in need of the highest protection from the constitution.

### *B. California's Proposition 8: A Constitutional Right to Discriminate*

California has been at the forefront of the battle for same-sex equality for the past few years. In 2008, California voters approved Proposition 8 ("PROP 8").[156] PROP 8 was a measure that effectively banned gay marriage in California[157] and was created as a response to the pending case of *In Re Marriage Cases*.[158] There, the California Supreme Court granted same-sex couples the right to marry.[159] Four months later, in November 2008, PROP 8 was passed and terminated the right granted by *In Re Marriage Cases*.[160] The passing of PROP 8 amended the California Constitution to reinstate the same language of Proposition 22, denying same-sex couples the legal right to marriage.[161]

*Hollingsworth v. Perry*, was a U.S. Supreme Court case that granted same-sex couples in California the right to marry.[162] However, the case itself did not rule on the issue of same-sex marriage.[163] Instead, *Hollingsworth* was decided on an issue of procedural technicality—the case lacked standing to be before the U.S. Supreme Court.[164] As a result, the decision from *Brown,* where District Judge Vaughn Walker ruled that PROP 8 was unconstitutional and in direct violation of the Equal Protection and Due Process Clauses,[165] became

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[152] *Id.* at 188.

[153] Matthews, *supra* note 135.

[154] Robert Barnes, *Supreme Court clears way for same-sex marriage in California*, WASH. POST (June 26, 2013), http://articles.washingtonpost.com/2013-06-26/politics/40195684_1_proposition-8-california-voters-california-constitutional-amendment.

[155] *Id.*; McClam and Williams, *supra* note 103.

[156] *Id.*

[157] *Id.*; McClam and Williams, *supra* note 103.

[158] Brown, 671 F.3d at 1078.

[159] In Re Marriage Cases, 183 P.3d at 453.

[160] Perry v. Brown, 671 F.3d 1052, 1079 (9th Cir. 2012).

[161] Barnes, *supra* note 154.

[162] Hollingsworth, 133 S. Ct. at 2652; Barnes, *supra* note 154.

[163] *See Hollingsworth,* 133 S. Ct. 2652; McClam and Williams, *supra* note 103.

[164] *Hollingsworth,* 133 S. Ct. at 2668; Barnes, *supra* note 154.

[165] *Brown*, 671 F.3d at 1096.

the guiding rule of same-sex marriage in California.[166] In *Brown*, the Ninth Circuit Court of Appeals found that the state of California cannot amend its state constitution to add a provision that "has no more practical effect than to strip gays and lesbians of their right to use the official designation that the State and society give to committed relationships."[167] Simply put, California once again recognized and allowed marriages between same-sex couples.

## VI. ADOPTION LAWS AFTER *WINDSOR* AND *PERRY*

To date, thirty-seven states and the District of Columbia allow same sex marriage.[168] Voters from the state of Maryland passed a ballot that allowed for same-sex marriage in 2012.[169] Six other states started granting same-sex marriage licenses soon thereafter, including California,[170] Delaware,[171] Rhode Island,[172] Minnesota,[173] New Jersey,[174] and Hawaii[175] have allowed same-sex couples to marry through statute, popular vote, or court decision.[176] And by April 2015, thirty-seven states allow same-sex marriage by court decision, legislature, or popular vote.[177] In addition to allowing same-sex marriage, most of

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166 *Barnes*, *supra* note 154; McClam and Williams, *supra* note 103.

167 *Brown*, 671 F.3d at 1096.

168 Bump, *supra* note 38.

169 Jennifer Rizzo, *Maryland upholds same-sex marriage law*, CNN POLITICS, (Nov. 7, 2012, 12:46 AM), http://politicalticker.blogs.cnn.com/2012/11/07/maryland-upholds-same-sex-marriage-law/.

170 *Id.* at 169; Hollingsworth, 133 S. Ct. at 2652; Erik Eckholm, *Delaware, Continues a Trend, Becomes the 11th State to Allow Same-Sex Unions*, N.Y. TIMES (May 7, 2013), http://www.nytimes.com/2013/05/08/us/delaware-to-allow-same-sex-marriage.html?_r=0; *Rhode Island Legalizes Same-Sex Marriage*, FOX NEWS (May 2, 2013), http://www.foxnews.com/politics/2013/05/02/rhode-island-legalizes-same-sex-marriage/; Baird Helgeson and Jim Ragsdale, *Minnesota to become 12th state to legalize gay marriage*, StarTribune, (May 14, 2013, 9:59 AM), http://www.startribune.com/politics/statelocal/207313571.html?page=all&prepage=1&c=y#continue; Ed Payne, *Same-sex marriages start in New Jersey, 14th State to recognize such unions,* CNN U.S. (Oct. 21, 2013, 11:13 AM), http://www.cnn.com/2013/10/21/us/new-jersey-same-sex-marriage/; Soumya Karlamangla, *With the Governor's signature, Hawaii legalizes gay marriage*, LOS ANGELES TIMES (Nov. 13, 2013, 1:04 PM), http://www.latimes.com/nation/nationnow/la-na-nn-hawaii-gay-marriage-20131113,0,4215077.story#axzz2kZThK5wi.

171 Eckholm, *supra* note 169.

172 *Rhode Island Legalizes Same-Sex Marriage*, *supra* note 169.

173 Helgeson and Ragsdale, *supra* note 169.

174 Payne, *supra* note 169.

175 Karlamangla, *supra* note 170.

176 Eckholm, *supra* note 169; *Rhode Island Legalizes Same-Sex Marriage*, *supra* note 169; Helgeson and Ragsdale, *supra* note 169; Payne, *supra* note 169; Karlamangla, *supra* note 170.

177 PROCON.ORG. (Apr. 10, 2015). *37 States with Legal Gay Marriage and 13 States with Same-Sex Marriage Bans*. Retrieved from http://gaymarriage.procon.org/view.resource.php?resourceID=004857 [hereinafter *ProCon*].

these states also allow same-sex joint adoption.[178] As of April 2015, there are thirty-nine states in America that allow same-sex couples to adopt either jointly or as second parents.[179] Mississippi and Michigan continue to ban same-sex couples from adopting in any way.[180] Although same-sex marriage acceptance throughout the country is on the rise, with thirty-nine states plus the District of Columbia now allowing same-sex marriage, same-sex adoption laws in some of these states remain unaffected. Thirty-five of the thirty-nine states allow both joint and second-parent adoption for homosexuals. Alabama and Kansas now allow same-sex marriage but still poses a ban on same-sex adoption altogether.[181] Despite the fact that *Windsor* struck down Section 3 of DOMA, its effects has not always granted same-sex couples the ability to obtain full legal parental rights over their children.[182] In addition, "state courts have ruled that second-parent adoptions are not available under current law in Kentucky, Nebraska, Ohio, Michigan, and Mississippi."[183] Since adoption law is the domain of state courts and legislatures, the ruling from *Windsor* does not affect whether or not courts will grant same-sex couples the same legal parental rights as opposite-sex couples.[184] For some same-sex households, although their marriages are now legally recognized by the Federal government, their rights to adopt children or their partners' biological children is still heavily restricted.[185]

## VII. Desperate Times Call for Equality: Allow Same-Sex Couples to Adopt Nationally

Eleven states in the United States plus the District of Columbia allow both joint same-sex adoption and second-parent adoption.[186] Four other states allow one but not the other.[187] That is a total of thirty-nine states that allow some form of same-sex adoption. It is obvious that the idea of same-sex adoption is a not a novel issue–most of the country has figured it out. Allowing same-sex

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[178] *HRC Joint Adoption Map 2015*, *supra* note 86; *HRC Second-Parent Adoption Map*, *supra* note 86.

[179] *Id.*; HRC *Second-Parent Adoption Map*, *supra* note 86.

[180] *Id.*; *HRC Second-Parent Adoption Map*, *supra* note 86; Bump, *supra* note 38.

[181] ProCon, *supra* note 177; *HRC Joint Adoption Map 2015*, *supra* note 86; *HRC Second-Parent Adoption Map*, *supra* note 86.

[182] Rebecca Ruiz, *For Same-sex couples, end of DOMA doesn't adoption equality*, Today News (July 20, 2013, 7:17 AM), http://www.today.com/news/same-sex-couples-end-doma-doesnt-mean-adoption-equality-6C10687368.

[183] HRC *Joint Adoption Map 2015*, *supra* note 86; *HRC Second-Parent Adoption Map*, *supra* note 86; Bump, *supra* note 38.

[184] Ruiz, *supra* note 182.

[185] *Id.*

[186] *HRC Joint Adoption Map 2015*, *supra* note 86; *HRC Second-Parent Adoption Map*, *supra* note 86.

[187] *Id.*; *HRC Second-Parent Adoption Map*, *supra* note 86.

couples to adopt does not have to rest on the state's willingness to recognize same-sex marriage. There are states that allow same-sex adoption in some way, but do not allow same-sex marriage.[188] Arkansas and Kansas, for example, are some of those states – they allow joint same-sex adoptions but currently ban same-sex marriage.[189] Both states allow any unmarried adult to adopt a child, without regard to sexual orientation.[190] In effect, same-sex couples are legally able to adopt jointly, without being married. However, the state of Kansas would ban any married same-sex couples from adopting based on its current law.[191] While the battle for acceptance of same-sex marriage continues, children should not have to suffer while society decides. It is possible to protect these children's future and increase the likelihood of being part of a stable family even if the state is not ready to accept same-sex marriage.

The state of Indiana's adoption law allows a resident of Indiana to adopt a child by filing a petition for adoption with the clerk of the court in which the "petitioner" lives.[192] While the statute plainly allows for a "resident" to adopt, the word "petitioner" has left the door open for state courts to interpret the statute to exclude same-sex couples. While more states have opened their adoption policies to include same-sex couples, some states' statutes still remain ambiguous and open to an interpretation that excludes same-sex couples or homosexual individuals. Adding unambiguous language that expressly prohibit discrimination for adoption based on sexual orientation would go a long way in providing parentless children a loving home and family. There are too many children aging out of the foster care system.[193] These are desperate times for these parentless children. The older they get, the less likely they are to get adopted. It is time for the rest of the country to acknowledge the needs of these children and adopt a policy that thirty-five other states have applied - allow same-sex couples to adopt.

## VIII. Conclusion

*Windsor* and *Hollingsworth* did wonders for same-sex couples' ability to marry. Thirty-seven states now have laws in support of same-sex marriage. But even this number is deceiving. Some of these states only recently have started

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188 HRC Joint Adoption Map - *Id.*; Raba, *supra* note 7, at 297-98.

189 ProCon, *supra* note 177; *HRC Joint Adoption Map 2015*, *supra* note 86; *HRC Second-Parent Adoption Map*, *supra* note 86; ARK. CODE ANN. § 9-9-204 (West 2015); KAN. STATUTES ANN. § 59-2113 (West 2015).

190 ARK. CODE ANN. § 9-9-204 (West 2015); KAN. STATUTES ANN. § 59-2113 (West 2015).

191 KAN. STATUTES ANN. § 59-2113 (West 2015).

192 IND. CODE ANN. § 31-19-2-2(a) (West 2013).

193 FCSW, *supra* note 26.

to allow same-sex marriage. Since 2013, twenty-nine states have started to acknowledge same-sex marriage – nineteen of them did so in 2014. In some of these states, especially where the law is by court decision, appeals are in progress to repeal the allowance of same-sex marriage. Homosexual couples' right to get married is often the precursor to their right to adopt. Parentless children should not have to be forced to rely on the rights of others in order to increase their chances of getting adopted.

While *Windsor* and *Perry* opened the door for same-sex couples have the ability to petition for a joint or second-parent adoption, it did not secure that right. Many states retained their adoption laws, and the ability of homosexuals to adopt was a mere consequence of that state's new marriage laws. So if any a state decided to repeal its acceptance of same-sex marriage, the right to adopt for homosexuals would similarly be affected. This means that qualified same-sex couples still do not have a secure ability to start a family because they choose to be with someone of the same sex. More importantly, it means that children who would have otherwise had a loving family are denied the ability to have parents. These children are denied the love and support of ready and willing couples simply because these couples are of the same sex. There are too many children ending up homeless or turning to crime as a result of not having the support of a loving family. Studies and court decisions have already indicated that same-sex couples are equally able to provide for children as heterosexual couples, and same-sex couples are equally able to contribute to society. Yet, state legislatures view same-sex couples as inferior citizens when it comes to adopting.

As the old saying goes, the children are our future. Our future is almost destined be a dark one if we continue to allow children to remain in the foster care system and eventually age out. The government must give children a better chance at a great future so they can in turn be better contributors to society. This starts by amending adoptions laws to expressly prohibit discrimination based on sexual orientation and allowing same-sex couples and individuals to petition for adoption.

# Guardianship of the Person and Property of Disabled Adults: What Parents Need to Know

Kristin Moyé*

When a child with cognitive disabilities is born, parenting may take on an unexpected meaning. Instead of spending 18 years preparing a child to leave the family nest, a parent has a different sort of lifelong commitment. But, against whose "life" is this commitment judged? To be sure, there exists the possibility of a day that the child outlives her parents. Or, there may come a day when the parents themselves are disabled and cannot care for themselves let alone a now adult child who has come to rely and depend on them. This article will explore what parents of children with cognitive disabilities need to know. It will examine the applicable laws of guardianship and conservatorship and also examine the issues that arise. The article will conclude by proposing solutions to many of the legal problems that parents face.

This article discusses what the parents of unmarried disabled adults can do in order to ensure that their children are taken care of when the parents become incapacitated, elderly, or otherwise unable to care for their disabled child. Part I discusses the background of the roles of conservators and guardians, particularly which laws govern them. Part II sets forth the factors that may lead a parent to choose a guardianship or conservatorship for his or her disabled adult child. Part II also differentiates between general and limited guardianships. Part III examines the selection of particular people to serve guardian or conservator. Part IV looks at what is required of a person appointed guardian or conservator. Part V examines the duties, roles, and powers of guardians and conservators with particular emphasis on how the two positions interact with one another. Part VI discusses how a person is removed from the position of guardian or conservator, whether voluntarily or involuntarily. Part VII concludes the analysis, and summarizes the main points that parents of disabled adults should consider in undertaking the formal protection of their disabled adult child. This paper uses the laws of the state of Arizona as the context in which these important issues are discussed.

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* Kristin Moyé, J.D., LL.M. To P.L. my favorite Estate Planning study partner.

## I. Background

The Arizona laws of guardianships and conservatorships are covered by two different uniform laws, the Uniform Probate Code (UPA)[1] and the Uniform Guardianship and Protective Proceedings Act (UGPPA).[2] The pertinent sections of the UPA deal extensively with conservators and only generally with guardians.[3] The second act, UGPPA, is more comprehensive in its treatment of guardians.[4] By adopting these uniform acts, Arizona established the notion that it would follow a standardized set of laws that apply to guardians and wards in conjunction with the laws of a number of other states.[5]

The purpose of these acts is to promote a uniform system for those concerned with protecting incapacitated people.[6] This uniformity is important in the context of guardians and wards given that a ward's parents may have died in one state, yet the ward may be institutionalized in another. It is helpful that several states have maintained consistency by adopting uniform acts when the question arises as to which state's law applies.[7]

## II. Choosing a Guardianship or Conservatorship

In whether contemplating for his own death or making the transition with a disabled child from childhood into adulthood, a parent needs to make some decisions about safeguarding the child's welfare. One such decision is if a guardianship, conservatorship, or both are appropriate mechanisms to protect the adult child's interests. Conservators and guardians are similar in that they are charged with caring for another's interests; however, conservator and guardian are two terms with distinct meanings.[8] A parent, court, or other interested party will find a guardianship appropriate where the adult child needs

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[1] Unif. Probate Code § 5-301 (1969) (amended 2010). The UPA sections pertinent to disabled adults are found in Article V, Part 3.

[2] Unif. Guardianship and Protective Proceedings Act §§ 1-101 to -504 (1982) (amended 2007).

[3] Unif. Probate Code §§ 5-301 to -318.

[4] Unif. Guardianship and Protective Proceedings Act §§ 1-101 to -504 .

[5] Unif. Guardianship and Protective Proceedings Act (1982)*, Table of Jurisdictions* (Supp. 2007); *See also* Uniform Guardianship & Protective Proceedings Act (1997/1998), Nat'l Conf. of Commissioners on Uniform St. Ls. (1996), http://www.uniformlaws.org/shared/docs/guardianship%20and%20protective%20proceedings/UGPPA_2011_Final%20Act_2014sep9.pdf (last visited Oct. 15, 2014). Alabama, Alaska, District of Columbia, Idaho, Maine, Montana, Nebraska, New Mexico, North Dakota, South Carolina, and Utah have also adopted the UGPPA. *Id.* Colorado, Minnesota, and Hawaii have adopted the more recent 1997 version of the act. Unif. Guardianship and Protective Proceedings Act § 1-102 (1997) (Supp. 2007).

[6] Unif. Guardianship and Protective Proceedings Act § 1-102(2) (1982); Unif. Probate Code. §§ 5-301 to -318.

[7] Unif. Probate Code §§ 5-301 to -318.

[8] Westerdale v. Johnson, 215 N.W.2d 102, 103 (Neb. 1974).

someone to make decisions for the child's personal needs.[9] Conservators, on the other hand, are appointed when a person's finances require management by someone else.[10]

### *A. Conservatorships*

The function of conservators is to manage the estate of a protected person.[11] Unlike the ward of a guardian,[12] a person with a conservator has not necessarily been declared incapacitated.[13] The reason a conservator need not have been incapacitated is because a conservator's primary duty is to ensure the safety of the estate's assets, not of the ward, thus a conservator may be appointed where the adult is capable of caring for himself but incapable of being responsible for his finances.[14] A court will appoint a conservator when a person is unable to manage his estate and affairs for reasons such as "mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance."[15] In addition, that person's property must either be in danger of being wasted unless properly managed, or the funds are necessary

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[9] ARIZ. REV. STAT. ANN. § 14-5304(B)(2) (2005).

[10] *Id.; See also* UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT §1-201(3) (discussing the role of conservators).

[11] UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT §§ 1-201(5), 203(3) (ULA 1982) (defining "estate" to include the property of a protected person).

[12] § 14-5304(B)(2).

[13] ARIZ. REV. STAT. ANN § 14-5101(2) (2005); *See, e.g.,* ARIZ. REV. STAT. ANN § 14-5401(A)-(B) (2013) (exemplifying there is no incapacity requirement to appoint guardian). Section 14-5401(A)(2) states: "Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines both of the following: (a) The person is unable to manage the person's estate and affairs effectively for reasons such as mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power or disappearance. (b) The person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds." *Id.* The reasons for appointment of a conservator are similar to the definition for incapacity with some additions but incapacity is not expressly mentioned. *Id.* Also, the last phrase of incapacity is missing, "to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person." ARIZ. REV. STAT. ANN. § 14-5101(1) (2005).

[14] § 14-5401(B).

[15] § 14-5101(1). Incapacity is a term with a number of meanings dependent upon the context. 62 Am. Jur. Proof of Facts 3d 197 (2001) (discussing the use of the term "incapacity" in a variety of contexts ranging from ability to contract to stand trial, and the burden of proof required for such a determination along with the trend of statutes in how such a determination is made in the context of guardianship and conservatorship).

to provide for the individual's welfare, and protecting these funds is an effective way to do so.[16]

The person or entity given responsibility over a person's estate is responsible for its safekeeping and preservation.[17] Unlike a guardian of the person, the conservator is not required to maintain a close relationship with the ward.[18]

Although conservators are court-appointed, the court will give some preference to whomever a parent has nominated in his or her will.[19] Conservators are directly accountable to the court, rather than to the parent and have much discretion.[20] Because of this lack of control, a parent may choose an alternative mechanism to influence expenditures made on the adult's behalf. Carefully crafted estate plans will take the creation of trusts into account given this lack of accountability to the parent's wishes as a trust is one such alternative to the issue of whose intent and wishes control, the parent who nominated the conservator or the court.[21]

### *B. Guardianships*

Because financial caretakers such as conservators and trustees serve a businesslike, financial function, parents may still need someone to care for the well-

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[16] § 14-5401(A)(2)(b).

[17] In re Cosden, 467 P.2d 928, 930 (Ariz. 1970); *see also* discussion *infra* Part VI.A-B.

[18] *Cosden*, 467 P.2d. at 930.

[19] ARIZ. REV. STAT. ANN. § 14-5410(A)(6) (2012); *see also* discussion *infra* Part III.D.

[20] ARIZ. REV. STAT. ANN § 14-5424(C) (1998).

[21] *See generally* BUDNER, 110 TRUSTS & EST. 346 (1971). Creating a trust allows trust assets to be administered for the benefit of the beneficiary. GEORGE GLEASON BOGERT, TRUSTS AND TRUSTEES 2ND ED. §231, at 5 (1992). A parent can make arrangements through a trust such that the trust assets fund the child's care and support. *Id.* Having such trust provisions may make the appointment of a conservator unnecessary. *Id.* A parent who creates a trust to provide for the disbursement of funds to his or her disabled child will be able to retain ultimate discretion and choose how the proceeds from the trust will be administered. *Id.* at 7. Parents may have options as to the type of trust they choose. *Id.* One such option is a special needs trust. *Id.* The purpose of a special needs trust is to provide for a disabled child's supplemental needs while continuing to maintain eligibility for public benefit programs. *See* 42 U.S.C. § 1396(d)(4)(A) (2007); *see aslo* 42 U.S.C. §1382(a)(3) (2007) (defining disabled adult). *See generally* GEORGE GLEASON BOGERT, TRUSTS AND TRUSTEES 2ND ED. §237 (1992) (discussing funding such trusts). The Uniform Trust Code (UTC) is another uniform act that Arizona, along with twenty other states, have adopted. Benjamin D. Patterson, *The Uniform Trust Code Revives the Historical Purposes of Trusts and Reiterates the Importance of the Settlor's Intent*, 43 CREIGHTON L. REV. 905 (2010). Section 801 of the UTC provides that trustees, those who administer the trust, have a duty to administer such a trust in accordance with its terms rather than with provisions that a court determines. UNIF. TRUST CODE § 801 (2000). The comments to this section of the UTC reiterate the commitment to follow a settlor's intent. *Id.* A settler of a trust in this context is likely to be a parent who has undertaken setting up a trust. *Id.* "[A] primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith. Only if the terms of a trust are silent or for some reason invalid on a particular issue does this Code govern the trustee's duties." *Id.*

being of the child, not just the child's finances. A guardian serves a more personal function by caring for the person of another.[22] Guardianships are established when a person has been declared incapacitated.[23] A guardian has the duty to care for a person who, because of his lack of understanding or self control, is incapable of taking care of his own affairs.[24]

In cases where the adult child, for one reason or another, has not yet been declared incapacitated and there is no formal guardianship, a parent should consider having a declaration of incapacity made.[25] By forcing a formal establishment of incapacity during the parent's life, parents will preserve their ability to exercise testamentary appointment of a guardian upon the parent's death or incapacitation.[26]

In order for parents to have their adult children declared incapacitated, the adult child must be so impaired that "he" or "she" cannot care for his or her personal safety, or provide himself with life's necessities such as food, shelter, clothes, and medical care.[27] This inability may result in sickness or injury.[28] A person lacks capacity when he or she is not a minor and "lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person."[29] Examples of incapacitated people include persons impaired by mental illness, deficiency or disorder; physical illness or disability; chronic use of drugs and intoxication; or any other incapacitating cause.[30]

Arizona recognizes two different types of guardianships, limited and general.[31] A parent will have to decide which type is best for his or her child.

### 1. General Guardianships

A general guardian is "entrusted with the general care and supervision of either the person or the estate of his ward or both."[32] A parent will probably

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[22] ARIZ. REV. STAT. ANN. § 14-5304 (B)(2) (2005).

[23] ARIZ. REV. STAT. ANN. § 14-5101(2) (2005); *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-5401(A)-(B) (2013); *see also* statutes and accompanying text cited *supra* note 13.

[24] UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 2-102 (1982) (amended 2007).

[25] *Id.*; *See infra* Part III.C-D.

[26] UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT (1997) § 2-102. *See also* discussion *infra* Part III.C (discussing that the statute gives special treatment to a person appointed by a parents will in that no petition or hearing is necessary but that a ward may object to such appointment).

[27] In re Reyes, 731 P.2d 130, 131 (Ariz. 1986).

[28] *Id.*

[29] ARIZ. REV. STAT. ANN. § 14-5101(1) (2005).

[30] *Id.* Incapacity may not occur as a result of being a minor. *Id.*

[31] ARIZ. REV. STAT. ANN. § 14-5303(B) (2005).

[32] Johnson v. Johnson, 544 P.2d 65, 72 (Alaska 1975). Alaska follows UGPPA. UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT (1982), *Table of Jurisdictions* (Supp. 2007).

choose a general guardianship in cases where the disabled adult is completely unable to care for himself and his finances.

2. Limited Guardianships

A limited guardianship allows a guardian to be appointed to manage only aspects of life that the ward is unable to manage without help.[33] Thus, limited guardianships are more flexible than general guardianships because the guardianship is shaped "to meet the particular needs of the incapacitated person." The guardian only bears responsibility for acting on the ward's behalf in matters where the incapacitated person is incapable of acting.[34]

## III. Selecting a Guardian and Conservator

### *A. Appointment of a Parent as Guardian*

When there has not yet been a formal determination that a person is incapacitated, a parent[35] can petition for the appointment of a guardian.[36] The parent's petition needs to inform the court why the appointment of guardian is necessary.[37] At this time the parent should indicate whether he or she requests a limited or general guardianship and the reason for that choice.[38]

After the court has received the parent's request for appointment of guardian, the court will set a hearing.[39] The disabled child will be given an attorney if he does not already have one.[40] The court will appoint an investigator and medical professional to interview and examine the adult in order to determine whether he or she is incapacitated such that a guardianship is appropriate.[41] The investigator will also interview the parent,[42] visit the place where the allegedly incapacitated person resides, and the place where the allegedly incapacitated person will reside should he or she be determined incapacitated.[43] The

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33 In re Hedin, 528 N.W.2d 567, 570 (Iowa 1995).

34 *Id.*

35 A petition to establish guardianship may also be brought by "[t]he alleged incapacitated person himself or any person interested that person's affairs." § 14-5303(A).

36 The petition must include several items such as: (1) Personal identifying information such as the subject's name and address; (2) The alleged incapacitated person's nearest relative and conservator if there is one or if they are known to the petitioner; (3) The petitioner should also include a general list of the alleged incapacitated person's property, compensation, insurance, or any other allowance that to which the allegedly incapacitated person is entitled. § 14-5303(B).

37 *Id.*

38 *See supra* Part II.B.

39 § 14-5303(C).

40 *Id.*

41 *Id.*

42 The person seeking appointment as guardian must be interviewed. *Id.*

43 *Id.*

medical professional will assess the person's physical and psychological state.[44] This includes an assessment of the person's functional impairments.[45] The investigator will submit a report to the court with his findings upon the conclusion of his examination.[46]

The adult child has the right to be present at the hearing as well as to examine any evidence about his condition that the court finds.[47] He or she will also have the opportunity to present evidence and cross examine witnesses, including the court-appointed medical professional, and investigator.[48] He or she has the right to a trial by jury.[49] The proceedings can be private as well since they may be closed if requested.[50]

When the court is ready to make its final determination that a person is incapacitated and a guardian should indeed be appointed, the standard of proof that the court will apply is clear and convincing evidence.[51] The evidence must show that the person is incapacitated and appointment of a guardian is necessary to provide for the person's needs.[52] The court must also determine that no less restrictive ways to provide for the person's needs exist, such as through the use of a limited guardianship.[53]

Although parents are not automatically appointed, there is a scheme of statutory priority in many states, including Arizona.[54] A parent's ability to be appointed is subordinate to someone already recognized as guardian or conservator in another jurisdiction, any individual or corporation that the person has already specified as long as the person had enough capacity to do so, an individual named in the person's most recent durable power of attorney, the person's spouse, and the person's adult child.[55] Under the statute, a parent is placed sixth in this line of people with priority.[56] Regardless of priority, the

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[44] § 14-5303(D)(1).

[45] Functional impairments are those that "may prevent that person from receiving or evaluating information in making decisions or in communicating informed decisions." § 14-5303(D)(2).

[46] *Id.*

[47] § 14-5303(C).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] ARIZ. REV. STAT. ANN. § 14-5304 (2005). A court has great discretion as the trier of fact. In re Kelly, 910 P.2d 665, 669 (Ariz. Ct. App. 1996). The court may weigh the evidence and decide based upon whether the evaluation is convincing. *Id.*

[52] In re Kelly, 910 P.2d at 669.

[53] § 14-5304(B). This may include "appropriate technological assistance." *Id.* The court may also choose to appoint a limited guardian if the court decides that a limited guardianship is in the ward's best interest. *Id.*

[54] *See generally* ARIZ. REV. STAT. ANN. § 14-5311(B)(6) (2012).

[55] *Id*.

[56] *Id*. The individuals given seventh statutory priority are any relative "with whom the incapacitated person has resided for more than six months." §14-5311(B)(7).

court can pass over any person "for good cause" and instead appoint someone with lower or no priority.[57] At all times the ward's best interest will prevail.[58]

### *B. Appointment of a Parent as Conservator*

Petition and notice are also required for appointment of a conservator.[59] The petition must be made for cause.[60] The statute sets forth a two part test as the general standard to determine whether to appoint a conservator.[61] First, the court must find that the person is unable to effectively manage his estate for reasons such as mental illness, deficiency, or disability.[62] Second, the court must find that the person's property will be wasted unless it is properly managed or that these funds are necessary for the allegedly disabled person's "support, care, and welfare" and that protection is necessary to protect these funds.[63]

In addition to identifying information[64], the parent petitioner should also provide a general statement of his child's estate, such as its value, any estimated compensation, as well as any other income from sources such as pensions or insurance.[65] Finally, the petition should inform the court why appointment of a conservator is necessary.[66] Although there will be a hearing to determine the subject's level of capacity, a finding of incapacity is not required.[67]

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[57] § 14-5311(D).

[58] *See, e.g.,* In re Kelly, 910 P.2d 665 (Ariz. Ct. App. 1996).

[59] ARIZ. REV. STAT. ANN. § 14-5404(A)-(B) (2005). This petition can be filed by the individual allegedly in need of the protection, anyone interested in that person's estate including his parents or a guardian, or anyone else who might be adversely impacted by improper management of the person's estate. § 14-5404(A). The petition should include what interest the petitioner has the outcome, personal identifying information about the person allegedly in need of protection, the person suggested to be appointed, information about the person's guardian if there is one, personal identifying information about the person's nearest relative if known, a general statement about the assets of the estate, and a reason why appointment of a conservator is necessary. § 14-5404(B).

[60] ARIZ. REV. STAT. ANN. § 14-5401(2013).

[61] §14-5401(2)(A)-(B).

[62] § 14-5401(2)(A).

[63] § 14-5401(2)(B).

[64] The petition should include the subject's name, age, residence, and address. § 14-5404(B). It should also include identifying information as the person who should be appointed guardian. *Id.* The name and address of the subject's closest relative should also be included. *Id.*

[65] *Id.*

[66] ARIZ. REV. STAT. ANN. § 14-5405(A)-(B) (2005). The parents and adult children are only informed if the person does not have a spouse. *Id.* Any person who is already serving as the guardian but in the capacity of guardian of the person will also need to receive notice of guardian proceedings. *Id.* In addition, anyone who has filed a demand for notice will need to obtain notice. *Id.*

[67] § 14-5401.

After the court receives the petition for appointment of a conservator, the court will set a date of hearing.[68] The subject will have counsel appointed for him unless he already has his own counsel.[69] The court will also appoint an interviewer to investigate the subject's abilities.[70] This may compel the need for a medical or psychological evaluation.[71] The person is to be present at the hearing, represented by counsel, and may also present evidence as well as cross-examine all witnesses.[72] This cross-examination includes the ability to cross examine any court appointed investigator.[73] If the court determines that, absent the appointment of a conservator, the person's funds will be wasted and those funds are necessary for the person's support based upon the evidence presented at the hearing, then a conservator will be appointed.[74]

### *C. Parent's Role in Choosing a Guardian*

When an adult has already been adjudicated incapacitated, his or her parent may appoint a guardian by will or deed.[75] Thus in this instance, both parents must be either deceased or incapacitated themselves.[76] The adult must also be unmarried.[77] If both parents are deceased, the will of the parent that died later has priority unless it is terminated by formal probate proceedings.[78] In the case of a deceased parent who lives in a different state from the adult incapacitated child, Arizona will recognize a testamentary appointment when an acceptance of appointment has been filed where the will was probated.[79]

A guardian who has been appointed in this way has a relatively easy process to follow. Such a person need only to file an acceptance of appointment along with a copy of the will.[80] Notice must be provided to the incapacitated person along with the person or place with custody of the person and notice to

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[68] ARIZ. REV. STAT. ANN. § 14-5407(B) (2012).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] § 14-5407(D).

[73] *Id.*

[74] *Id.*

[75] ARIZ. REV. STAT. ANN. § 14-5301(A) (2011). The potential guardian must file an acceptance in the court where the will is probated. *Id. Also see* Comment to U.L.A., Uniform Guardianship and Protective Proceedings Act of 1997 § 302. A parent may also make a testamentary appointment upon the parent's own incapacitation. See discussion *supra* note 26 and accompanying text.

[76] § 14-5301(A).

[77] *Id.*

[78] *Id.*

[79] ARIZ. REV. STAT. ANN. § 14-5401(C) (2013).

[80] ARIZ. REV. STAT. ANN. § 14-5301.01(A) (2011).

the person most closely related to the incapacitated individual.[81] The question then becomes how a parent's appointment is treated as to other relatives. This issue arises, for example, in instances where the parent chooses to appoint a family friend rather than a relative with statutory priority.[82] Testamentary appointment is given more priority than the incapacitated person's relatives.[83] Thus, a relative who was not appointed in the will does not supersede a testamentary appointee and thus does not have any priority regardless of whether the appointee is unrelated to the ward.[84] The appointment will only become effective after notice is given to the incapacitated person and his nearest adult relative, who may have statutory priority over the one appointed.[85] Although the statute does not expressly offer the relative the opportunity to object to the appointment, the notice requirement seems to serve as an opportunity for the relative to object since the notice must include the time and date of the hearing.[86] Even considering the opportunity for objection as well as testamentary appointment having priority over a relative, is not determinative since the question of whether or not a particular guardian should be appointed turns on serving the ward's best interests.[87]

The appointment becomes effective after the guardian has accepted the appointment and written notice was given to both the incapacitated person and that person's nearest adult relative of the appointee's intention to accept the appointment.[88] This is a relatively simple process in that little else is required of the accepting guardian especially when compared to non-testamentary appointments.[89] Such a person should bear in mind, however, that by accepting appointment the guardian consents to jurisdiction of that court in any proceeding instituted by an interested party as to the guardianship of the ward.[90]

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[81] § 14-5301.01(B).

[82] See *supra* notes 53-57 and accompanying text.

[83] ARIZ. REV. STAT. ANN. § 14-5311(B)(3) (2012).

[84] *Id.*

[85] *Id.* This notice is to include the time and date of the hearing, presumably so that the relative may object to the appointment. ARIZ. REV. STAT. ANN. § 14-1401(A) (2005).

[86] *Compare* § 14-1401(A) *with* ARIZ. REV. STAT. ANN. § 14-5301(D) (2011).

[87] See *supra* Part III.E.

[88] *Id.*

[89] *Id. See also supra* Part III.A.

[90] ARIZ. REV. STAT. ANN. § 14-5305 (2005).

### *D. Parent's role in Selecting a Conservator*

A parent may also appoint a conservator either in his will[91] or in the parent's place.[92] Thus in order to choose a person to be conservator, the parent does not have to be deceased. The legislature also anticipated that a parent may appoint someone without statutory priority.[93] Such an appointee is given priority even over the adult's relatives.[94] The court may intervene and choose whoever the court finds "best qualified to serve."[95] The court also retains discretion in that it may choose someone who has lower or no priority thereby passing over an individual with priority.[96] The legislature's treatment as to a parent's ability to nominate a conservator is interesting. It is worth noting, however, that unlike the expedited, informal process of testamentary appointment of guardians, appointment is made in the context of a full-fledged hearing.[97] Also, the statute states that a parent may choose a person to serve as conservator in the parent's place. Similar to guardians, upon acceptance of appointment the conservator consents to that court's jurisdiction as to the ward.[98]

### *E. Court's Role in Choosing a Guardian or Conservator*

Arizona statute sets forth a list of people who are given priority in being appointed guardian and conservator. The first choice under the statutory scheme is intuitive. The court gives priority to a guardian or conservator who has been appointed or recognized by another appropriate court.[99] The second choice person under the statutory scheme allows the disabled adult to have some discretion in who is chosen to be his or her guardian. The incapacitated person is actually given the ability to nominate a potential guardian or conservator.[100] However for the court to give this effect, the court must find that the incapacitated person has or had sufficient mental capacity to do so.[101] The

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91 ARIZ. REV. STAT. ANN. § 14-5410(A)(6) (2012).

92 *Id.* A parent's ability to appoint a conservator to serve during the parent's life may become important when the parent is impaired, elderly, or otherwise unwilling or unable to act as his or her child's conservator.

93 § 14-5410(B). This is similar to what the legislature provided for in the appointment of a guardian by a parent. See *supra* Part III.C.

94 § 14-5410(A)(6).

95 *Id.*

96 *Id.*

97 ARIZ. REV. STAT. ANN. § 14-5407(A)-(E) (2005). The scheme of priority is nearly identical to Arizona Revised Statutes section 14-5311. ARIZ. REV. STAT. ANN. § 14-5311(B)(6) (2012).

98 ARIZ. REV. STAT. ANN. § 14-5413 (2005).

99 *See* § 14-5311(B)(1); *see also* ARIZ. REV. STAT. ANN. §14-5410(A)(1) (2012). This refers to a guardian or conservator appointed in another jurisdiction. § 14-5311(B)(1); § 14-5410(A)(1).

100 § 14-5311(B)(2); § 14-5410(A)(2).

101 § 14-5311(C)-(D); § 14-5410(B)-(C).

incapacitated person is also given additional discretion in the statutorily set priority number three of potential guardians since the third choice guardian is the person that the incapacitated person nominated in his or her most recent durable power of attorney.[102] The fourth choice in the statute is the incapacitated person's spouse.[103] The next in line is the person's adult child.[104] The court's decision as to which adult child should be appointed, in the case where there is more than one, becomes complicated, and instances of litigation have arisen as a result.[105]

The sixth person with priority is the parent of the incapacitated person.[106] At this place in the statute, the legislature gives effect to the wishes of a parent of an incapacitated person. The legislature includes not only the incapacitated person's parent but also "[includes] a person nominated by will or other writing signed by a deceased parent."[107]

Next in line is any relative with whom an incapacitated person has lived with for more than six months before a petition for guardianship has been filed.[108] Eighth is "the nominee of a person who is caring for or paying benefits to the incapacitated person."[109] This may be the government. Ninth is the Department of Veteran Services if the person is a veteran, the spouse of a veteran, or the minor of a veteran.[110] Finally, fiduciaries such as guardians or conservators have tenth priority.[111]

However, regardless of appointment the statute affords the court the opportunity to exercise discretion. This is evidenced by the statute's language, "[f]or

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[102] § 14-5311(B)(3); § 14-5410(A)(3). A durable power of attorney is a designation by a principal that another should be his attorney in fact. UNIF. PROBATE CODE § 5-501 (2007). A durable power of attorney must be in writing and must include language that makes it clear that the power of attorney does not become effective until the Principal's disability or incapacity. *Id.* A durable power of attorney names one or more entities or individuals to act as an agent on the behalf of the person who signed the document in furtherance of the specific matters set fourth in the durable power of attorney. *Acting for Adults who become Disabled*, ST. B. OF MICH. 4 (2002), https://www.msu.edu/user/betz/estateplanning/2004%20EstatePlnning/Mich%20Bar%20Disabled%20Adults.pdf. A durable power of attorney can become effective upon the signing of the instrument or upon the happening of a stated occurrence, such as incapacity. *Id.* One can also execute a durable medical power of attorney naming a person to act on his behalf in the event of incapacity. *Id.* Arizona also has this durable power of attorney provision. ARIZ. REV. STAT. ANN. § 14-5501(A) (2014).

[103] § 14-5311(B)(4); §14-5410(A)(4).

[104] § 14-5311(B)(5); §14-5410(A)(5).

[105] *See, e.g.,* In re Kelly, 910 P.2d 665 (Ariz. 1996).

[106] § 14-5311(B)(6); § 14-5410(A)(6).

[107] *See supra* Part III.C – D.

[108] § 14-5311(B)(7); § 14-5410(A)(7).

[109] § 14-5311(B)(8); § 14-5410(A)(8).

[110] § 14-5311(B)(9); § 14-5410(A)(9) .

[111] § 14-5311(B)(10); §14-5410(A)(10).

good cause the court may pass over a person who has priority and appoint a person who has lower priority or no priority."[112] One such example of a court passing over people with statutory priority in order to carry out the disabled adult's best interest is *In re the Matter of the Guardianship of Kelly*.[113] Mr. Kelly's wife, and mother to Kelly's adult children, died.[114] Mrs. Kelly, a registered nurse, had been taking care of her husband and managing the couple's finances.[115] When she died, their adult daughter and adult son both sought to be their father's guardian.[116] The evaluation team told the probate court that Mr. Kelly suffered from dementia, probably brought on by Alzheimer's.[117] The evaluators disagreed as to how much supervision Mr. Kelly needed, with one stating twenty-four hours and another stating Mr. Kelly only needed help with meals, transportation, and laundry.[118] The geriatric evaluator told the court that Mr. Kelly needed so much help that a guardian should be appointed for him.[119] A psychologist and a court-ordered geriatric evaluator agreed that the guardian should not be a member of the family because of the ongoing conflict in the family.[120] The probate court found by the clear and convincing evidence standard in A.R.S. 14-5304 and 14-5101, that Mr. Kelly required the appointment of a guardian for his welfare and that it was in his best interest that the guardian be a third party regardless of the statutory priorities set forth in the statute.[121] Both of the adult children appealed the ruling of the probate court.[122]

The appellants argued that a third party cannot be appointed unless a person with priority is disqualified.[123] Under A.R.S. 14-5311, an adult child of the incapacitated person has such priority.[124] However, the appellate court found that the statute provides two other means besides express disqualification to pass over a family member.[125] One way to pass over a family member is if the incapacitated person has communicated a wish that the family member not be appointed.[126] The other way to pass over a family member is if it is not in the

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112 § 14-5311(D) (2012); § 14-5410(B).
113 In re Kelly, 910 P.2d 665 (Ariz. 1996).
114 *Id.* at 667.
115 *Id.*
116 *Id.* at 668.
117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.*
121 Kelly, *supra* note 113*;* see also ARIZ. REV. STAT. ANN. § 14-5311, for a discussion of the statutory priorities.
122 *Id.* at 668-70.
123 *Id.* at 670.
124 *Id.*
125 *Id.*
126 *Id.*

incapacitated person's best interest "as determined by the court."[127] This second method is in accordance with:

> [t]he cardinal consideration governing the court in its appointment of a guardian for the person and estate of a ward [which is] how to serve most effectively the best interests and temporal, moral, and mental welfare of a living person.[128]

Therefore, the appellate court found that by appointing a third party, the Probate court was protecting Mr. Kelly from his family's hostilities and that this was in his best interest despite the statutory priorities.[129] Thus, the lower court did not abuse its discretion because there was enough evidence that appointing a family member is contrary to Mr. Kelly's best interest.[130] The rule from this case seems to be that regardless of statutory priorities, a court may exercise discretion in the appointment of a guardian as long as it is in the ward's best interest.[131] Therefore, a parent should not hesitate to appoint whichever person the parent feels will act in his child's best interest since this best interest consideration prevails over statutory priority.

## IV. Requirements for Becoming Guardian or Conservator

### *A. Disclosures*

An appointee must make certain disclosures to the court before being able to become a guardian or conservator.[132] However, it is unclear which appointees must make these disclosures.[133] A potential guardian who has been convicted of a felony must furnish the court with information about that felony as well as a reason why the potential guardian or conservator should not be disqualified because of the conviction.[134] The appointee must also give the court the number of people and the length of time for whom the appointee has served

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[127] *Id.*

[128] *Id*. (*quoting* Countryman v. Henderson*,* 496 P.2d 861, 863).

[129] *Id*.

[130] *Id.* at 671.

[131] *Id.*

[132] Ariz. Rev. Stat. Ann. § 14-5106(A) (2005).

[133] *Id.* Although the statute states that "every proposed appointee" must make these disclosures, these disclosures are probably only required when there is an original petition for appointment of the first and original conservator. For example, A.R.S. section 14-5301, which deals with a parent's appointment of a conservator, only requires notice to be given to interested parties and acceptance of the appointment. Ariz. Rev. Stat. Ann. §14-5301(A)-(B) (2011). Additionally, the statute expressly excludes certain entities such as title companies and banks from this requirement. Ariz. Rev. Stat. Ann. § 14-5411(B) (2005).

[134] Ariz. Rev. Stat. Ann. § 14-5106(A)(1) (2005).

as guardian within the past three years.[135] This includes apprising the court as to whether the guardian has filed the requisite accounting reports as guardian or conservator to previous or current wards.[136] The appointee must also disclose if he has ever been removed as guardian or conservator.[137] The guardian must tell the court whether he has "a working knowledge"[138] of the position.[139] The appointee must also give information about devises, gifts, and bequests the appointee has received.[140]

The court is especially concerned with whether or not the appointee has received such gifts from wards unrelated to the appointee by blood or marriage.[141] The appointee must disclose whether he or any enterprise with which the appointee is affiliated is listed in the elder abuse registry.[142] Finally, the appointee must disclose whether he or she has an interest "in any enterprise providing housing, health care, or comfort care services to any individual and the extent of each interest."[143] The statute then reserves to the court the ability to impose restrictions upon these disclosed activities in order to "provide for the appropriate care and supervision of its wards or protected persons."[144]

After meeting the prerequisites, a guardian may accept an appointment by filing acceptance of appointment with the court.[145] When the guardian accepts, the guardian submits himself or herself to the appointing court's jurisdiction.[146]

### *B. Bond*

All conservators, except national banks, are required to furnish a bond.[147] The statute specifies a complex formula by which the amount of this bond is to

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135 § 14-5106(A)(2).

136 *Id.*

137 *Id.*

138 §14-5106(A)(3). This working knowledge requires knowing the duties, powers, and liabilities required in serving as guardian or conservator. § 14-5106(A)(3).

139 *Id.*

140 § 14-5106(A)(9).

141 *Id.*

142 § 14-5106(A)(5). The Department of Economic Security maintains a registry of verifiable reports of "abuse, neglect and exploitation of vulnerable adults." ARIZ. REV. STAT. ANN. §46-459(A) (2006). This registry includes personal identifying information such as names and birth dates of people who have "abused, neglected or exploited a vulnerable adult." § 46-459(B). It also includes a description of the allegation. *Id.*

143 *Id.*

144 *Id.*

145 ARIZ. REV. STAT. ANN. § 14-5304(D) (2015).

146 ARIZ. REV. STAT. ANN. § 14-5305 (1974).

147 ARIZ. REV. STAT. ANN. § 14-5411(A) (2006).

be calculated.[148] Essentially, it is based on the value of the ward's estate.[149] The bond serves as an insurance guaranty between the insurer and court to protect the ward's estate from any loss that may result from the guardian or conservator's wrongful acts.[150] Thus, for good cause, the court can eliminate the bond requirement.[151] Furthermore, although parents are not necessarily precluded from this bond posting requirement, courts retain discretion and may waive it if the ward's best interests are served.[152] Additionally, some jurisdictions have held that the bond may be waived when a guardian or conservator has been appointed by will or deed and the instrument provides for its waiver, such as in the case of a parent's testamentary appointment.[153] Thus, a parent's exercise of appointment may allow the conservator to be able to bypass some typical prerequisites.

### *C. Inventory*

Within ninety days of appointment, a conservator must prepare an inventory of the protected person's estate.[154] This inventory must be filed with the court.[155] The inventory must include a reasonably detailed list of inventory along with the fair market value of each item.[156] If the ward has sufficient mental capacity to understand the list then the conservator is to provide the ward with a list.[157] The conservator must also provide the guardian and parent with the list of inventory.[158]

## V. Duties, Roles, and Powers

### *A. General Powers of Guardian in Absence of Conservator*

The overarching theme in the statute that describes a guardian's powers over his ward is that the guardian should think of how best to prepare the ward

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148 Bond is to be calculated "in the amount of the aggregate capital value of the property of the estate in the conservator's control plus one year's estimated income minus the value of securities deposited under arrangements requiring an order of the court for their removal and the value of any land which the fiduciary, by express limitation of power, lacks to sell or convey without court authorization." *Id*.

149 *Id.*

150 Fengya v. Fengya, 383 A.2d 1170, 1172 (N.J.Super. Ct. App. 1978).

151 Ariz. Rev. Stat. Ann. § 14-5410(B) (2012).

152 *Id.*

153 *See, e.g.,* Hatch v. Ferguson, 68 F.43 (9th Cir. 1895); In re Deming's Guardianship, 73 P.2d 764 (Wash. 1937).

154 Ariz. Rev. Stat. Ann. § 14-5418(B) (2012).

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

for the long term both in managing the ward's finances and facilitating the ward's education so that the ward can be as independent as possible.[159] A parent guardian of an incapacitated adult person has the same rights, duties, and powers that the parent had when the adult was a minor child.[160] A guardian has certain enumerated rights and powers because of the guardianship but these can be limited by court order.[161] As guardian, a parent[162] is charged with the care of the person of the ward and may establish where the ward lives.[163] Arizona law does not require that a ward and guardian live in the same state.[164] An example of this may be a situation where a ward lives in a care facility in another state. The guardian must make specific provisions for the ward's "care, comfort, and maintenance."[165] This includes facilitating the ward's education where appropriate, such as in the case where a parent wants to prepare his disabled adult child to live with only minimum assistance and there is an educational program which may help the adult child learn these skills.[166] The guardian also is charged with the duty of taking care of the ward's personal property such as his clothes, furniture, or vehicle(s).[167] If the guardian charged with the care of the ward's person finds it necessary, the guardian may institute proceedings to establish protection of the ward's property.[168] The guardian also may make medical decisions for the ward by giving any necessary consent or approval to medical treatment.[169] A guardian must find any appropriate medical, psychological and social services available to the ward.[170]

A guardian may commence any legal action necessary to compel someone who has a duty to support the ward financially to do so.[171] The guardian is also to use money received on the ward's behalf for the ward's "support, care, and education."[172] The guardian may not use any of the proceeds to compensate himself, his spouse, or his children for room and board he provides the ward unless doing so has been specified by court order.[173] Thus a parent who wants

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159 ARIZ. REV. STAT. ANN. § 14-5312(A)(7) (2014).

160 ARIZ. REV. STAT. ANN. § 14-5312(A)(1) (2014). Unlike a parent, "a guardian is not liable to third persons for acts of the ward solely by reason of the guardianship." *Id.*

161 *See supra* notes 33-34 and accompanying text.

162 This applies to any other interested person. ARIZ. REV. STAT. ANN. §14-5416(A) (2011).

163 ARIZ. REV. STAT. ANN. § 14-5312(A)(1) (2014).

164 *Id.* The ward may live either in the state of Arizona or outside of Arizona. *Id*.

165 § 14-5312(A)(2).

166 § 14-5312(A)(7).

167 § 14-5312(A)(2).

168 *Id.*

169 § 14-5312(A)(3).

170 § 14-5312(A)(9).

171 § 14-5312(A)(4)(a).

172 § 14-5312(A)(4)(b).

173 *Id.*

to charge his or her child for room and board must seek a court order to do so. The guardian must "conserve any excess for the ward's needs."[174] Therefore, the guardian has a duty to properly conserve and manage the ward's finances so that the ward is provided for in the future.[175] The guardian also has a duty to report on the ward's status as well as the status of the estate as required by the court.[176]

The guardian has a duty to monitor a ward's progress. If appropriate, the statute directs the guardian to encourage a ward to be self-reliant, and develop his self-reliance and independence with an eye toward ending the guardianship at some point or finding an alternative to guardianship.[177] Another indication of the legislature not wanting a guardianship to be indefinite is a guardian's charge to "make reasonable efforts to secure appropriate training, education and social and vocational opportunities for his ward in order to maximize the ward's potential for independence."[178]

Guardians of developmentally disabled[179] wards are given special consideration. They are to make decisions in the ward's best interest to provide the best opportunity to allow the ward to reach his full potential, and provide the ward with a residential program that is safe and dependable but consider the ward's age, type and degree of disability, other handicapping conditions, and the guardian's ability.[180] This charge seems less concerned with providing for the ward's ability to gain competence and more to make sure that the ward has the best quality of life possible. This is perhaps because the legislature realizes that there is a slim likelihood for someone born with a developmental disability to ever gain full capacity.

Thus a guardian of a ward who does not have an appointed conservator has a very broad set of powers but at all times are to consider the ward's values and

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174 *Id.*

175 *Id.*

176 § 14-5312(A)(5).

177 § 14-5312(A)(7).

178 *Id.*

179 The United States Department for Health and Human Services defines a developmental disability as "severe, chronic disability of an individual that . . . is manifested before the individual attains age 22." *The Developmental Disabilities Assistance and Bill of Rights Act of 2000*, U.S. DEP'T FOR HEALTH AND HUM. SERVICES http://www.acl.gov/Programs/AIDD/DDA_BOR_ACT_2000/p2_tI_subtitleA.aspx (last modified Sept. 19, 2013). Developmental disabilities results in substantial limitations in three or more areas of major life activities: capacity for independent living, economic self-sufficiency, learning, mobility, receptive and expressive language, self-care, self-direction. *Id.*

180 § 14-5312(A)(7).

desires.[181] Such a guardian is the sole manager of the ward's estate but is still accountable to the court.[182]

### *B. General Powers of Conservators*

A parent may be appointed conservator and is in fact sixth-in-line in the statutory scheme.[183] With some of the powers that a parent conservator exercises, he or she essentially acts on the court's behalf.[184] A conservator may make financial gifts on his or her adult child's behalf.[185] In doing so, however, the parent conservator must take into consideration the adult's best interest, such as by looking at the potential tax savings, future income, and expenses.[186] The court may also choose to limit the parent conservator's role and encourage the adult to build self-reliance and independence skills by allowing the person to handle some of his or her money or property without the conservator's consent.[187] This ability may be muddled however, since a parent may be both conservator and guardian. In such an instance the parent may put his or her foot down and prohibit the adult child from acting on his own behalf but this must be balanced with the court-mandated duties of conservators.

The conservator is entitled to receive compensation.[188] Such compensation is payable from the estate.[189] The conservator must keep records on the contents and fair market value of the estate.[190] The conservator also must account to the court yearly for the administration of the estate and the contents of the estate.[191] A conservator may invest the funds of the estate.[192]

Conservators and guardians have the type of intimate relationship with their beneficiary that is considered a fiduciary relationship.[193] Guardians, like trustees, "are required to work for their beneficiaries with single-minded loyalty, to exclude all private gain, and to exhibit high candor and good faith in direct dealings with the one represented, and to perform personally the impor-

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[181] § 14-5312.

[182] § 14-5312(A)(5).

[183] See *supra* note 56 and accompanying text.

[184] ARIZ. REV. STAT. ANN. § 14-5408(A) (1997).

[185] § 14-5408(A)(4).

[186] *Id.*

[187] § 14-5408(C).

[188] ARIZ. REV. STAT. ANN. § 14-5414 (A) (2011).

[189] *Id.*

[190] ARIZ. REV. STAT. ANN. § 14-5418(B) (2012).

[191] ARIZ. REV. STAT. ANN. § 14-5419(A) (2013).

[192] ARIZ. REV. STAT. ANN. § 14-5424(B) (1998). A conservator of a minor whose parents do not have parental rights to the ward nor has a guardian appointed has the same duties and powers of a guardian minor. § 14-5424(A).

[193] GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, TRUSTS & TRUSTEES §13, at 148 (2006).

tant functions of their positions."[194] A conservator is held to the standard of reasonable skill and prudence.[195] Thus it may be difficult for a disabled adult's parent who lacks education or knowledge of financial matters to perform his duties as conservator properly. Such may be the case where the disabled adult became disabled as a result of an accident and received a settlement and now has more money than the parent knows how to manage. Nonetheless, the parent conservator is still held to this high standard of reasonable skill and prudence and may need to take classes in order to perform up to this standard.[196]

### *C. Interaction between Guardians and Conservators*

There are differing powers for guardians of wards with an appointed conservator. In such case, a guardian is in control of the ward's custody and care while the conservator, not the guardian, is responsible for the preservation and maintenance of the ward's estate.[197] This guardian is also entitled to receive reasonable sums for his services and for any room and board the guardian furnishes to the ward.[198] This is different from a guardian of a ward who has not had a conservator appointed.[199] Because of this difference, a parent who wishes to be reimbursed for the room and board provided to the adult child may want a conservator appointed.

However, a guardian with an appointed conservator has additional duties. For example, the guardian must remit any excess funds to the conservator that exceeds the amount the guardian spends on the ward's current expenses in paying for the ward's support, care, and education.[200] The guardian also has to make an accounting to the conservator as to how the funds were expended.[201]

The guardian also has a mechanism by which to ensure that the conservator is acting appropriately.[202] The guardian can petition the court for an order that requires there to be an increase in the bond that the conservator must post, or even have the bond reduced.[203] The parent guardian[204] may petition the court to have the conservator prepare an accounting for the disabled adult's estate.

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194 *Id.*

195 *Id.*

196 *Id.*

197 ARIZ. REV. STAT. ANN. § 14-5312 (2014); ARIZ. REV. STAT. ANN. §14-5401(2) (2013).

198 *Id.*

199 *See infra* Part V.A.

200 ARIZ. REV. STAT. ANN. § 14-5312 (2014). The guardian can also request the conservator to use the ward's estate to pay other people or institutions besides the guardian to pay for the ward's care and maintenance. *Id.*

201 *Id.*

202 *See generally* ARIZ. REV. STAT. ANN. § 14-5416 (2011).

203 §14-5416(A)(1).

204 Or any other interested person including a parent who is not also a guardian. §14-5416(A).

The parent may choose to do this if they want to know the status of their adult child's estate. A parent who feels that the conservator is not doing an adequate job may also petition the court for the conservator's removal.[205] Additionally, the adult child's parent (as parent) and parent guardian have a right to receive an inventory of the ward's property within ninety days of the conservator's appointment.[206] Any interested person, to include the parent guardian, has a right to request records as to the estate from the conservator.[207] The conservator has a duty to provide the parent and guardian with an accounting from the estate at least every year by the anniversary date of the conservator's appointment.[208]

Guardians have a duty to provide the ward, ward's conservator, the ward's spouse, the ward's parents if the ward is unmarried, the ward's court appointed attorney, and anyone else who files a demand with an annual report.[209] The guardian must provide this written report on each anniversary of the date that the ward was qualified as guardian, or when the guardian was removed, or when the ward's disability is terminated.[210] This report must include where the ward is living or the facility where the ward lives and the person in charge of the facility.[211] The report must contain the number of times that the guardian has seen the ward in the last twelve months, including the last date that the guardian saw the ward.[212] Thus, a parent guardian has additional formal steps and records that he or she must keep as to his or her adult child.

The report must also include the last date that the ward saw a physician and the name and address of the physician.[213] The guardian should include a summary of the ward's physical and mental condition according to the physician if the physician does not provide this himself or herself.[214] The guardian should state any major changes in the ward's physical or mental conditions within the last year.[215] Since the guardian's role is to determine the needs of the ward the guardian must communicate those needs to the conservator. Complying with all of these statutory requirements will ensure that the conservator can make sure there are adequate funds so that the services can be arranged and paid for.[216]

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205 § 14-5416(A)(4).
206 ARIZ. REV. STAT. ANN. § 14-5418(B) (2012).
207 § 14-5418(B). The conservator has a duty to keep these records up to date. *Id.*
208 ARIZ. REV. STAT. ANN. § 14-5419(B) (2013).
209 ARIZ. REV. STAT. ANN. § 14-5315 (2013).
210 *Id.*
211 *Id.*
212 *Id.*
213 *Id.*
214 § 14-5315.
215 *Id.*
216 BRADLEY GELLER, HANDBOOK FOR CONSERVATORS OF ADULTS, Part 5B (4th ed. 2003).

The guardian's report should also summarize the services that a government agency has provided to the ward and the name of the individual responsible for the ward's affairs within the agency.[217] Finally, the guardian should give his or her opinion as to whether or not the guardianship should be continued.[218] Both guardians[219] and conservators are entitled to compensation by the estate.

## VI. REMOVAL

### *A. Simple Termination*

There are several ways in which guardianships and conservatorships may be terminated.[220] Termination occurs automatically if the guardian has himself been adjudicated as incapacitated or has died.[221] The court may also remove the guardian if it decides that doing so is in the ward's best interest.[222] Once again, the ward's best interest prevails.[223] The guardian may also resign from his or her duties by petitioning the court.[224] A final option is that a ward may regain capacity and no longer be considered incapacitated.[225]

Before a guardian is removed, the court can send an investigator to the guardian's residence in order to ensure that removal is actually in the ward's best interest.[226] Upon termination of a conservatorship, the title and assets will be transferred back to the control of the formerly protected person.[227]

### *B. Involuntary Termination*

A guardian or conservator may only be removed for good cause.[228] In the case of *In re Estate of Cosden*, the ward sought to have the guardian of his

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217 *Id.*

218 *Id.*

219 ARIZ. REV. STAT. ANN. § 14-5314(A) (2011).

220 Before a guardian is removed in any way, a court may send an investigator to the guardian's residence or the ward's residence for evaluation. ARIZ. REV. STAT. ANN. § 14-5307 (2015). No matter how the guardianship is terminated, the guardian will not be absolved of prior bad acts. ARIZ. REV. STAT. ANN. § 14-5306 (2012). Conservatorships are terminated after findings consistent with the way they were established. ARIZ. REV. STAT. ANN. § 14-5430 (2011).

221 § 14-5306.

222 § 14-5307. A ward's dissatisfaction with his guardian is not enough to terminate removal. In re Cosden's Estate, 467 P.2d. 928 (1970). Nor is a guardian of his ward's personal property required to keep a close relationship with his ward. *Id.*

223 *See supra* note 57.

224 *Id.*

225 § 14-5307.

226 *Id.*

227 ARIZ. REV. STAT. ANN. § 14-5430 (2011).

228 *In re Cosden*, 467 P2d at 929.

finances removed.[229] The ward, Mr. Cosden, felt that he encountered too many delays in getting his money from the bank, which was serving as the guardian of his estate.[230] The ward obtained his money from Mr. Rogers, the guardian of his person.[231] Mr. Cosden was also dissatisfied with the necessity of the bank needing to get approval from others before giving him the money.[232] The court found, however,

> A guardian should not be removed except for good cause or for the most cognate reasons, and he may not be removed at the mere caprice of the court or the complaining party. The ward's dissatisfaction with the guardian is not enough to remove him when the dissatisfaction is baseless, as here where the true dissatisfaction should be with the guardian of his person who failed to properly explain to his ward, the process and reasons for delays in obtaining his money.

Here, there is no evidence to show that the guardian is unsuitable or performing his duties incorrectly.[233]

The state may also choose to intervene and have a guardianship terminated or changed. Employees of Adult Protective Services can appear before the court and request special visitation warrants.[234] The court will limit its granting of such warrants to situations where the adult incapacitated person is believed to be neglected or abused.[235] These warrants are to be filed in the probate division at superior court.[236]

A conservator is responsible for the "safekeeping and preservation of [the ward's] estate."[237] Thus, a conservator, even if it is a parent, will be terminated for mismanaging the protected person's funds.[238]

## VII. CONCLUSION

A parent has many options in deciding what to do with his or her disabled adult child. By having the adult child declared incapacitated and beginning a

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229 *Id.*
230 *Id.*
231 *Id.*
232 *Id.*
233 *Id.* at 930.
234 ARIZ. REV. STAT. ANN. § 14-5310(1) (2012).
235 *Id.*
236 *Id.*
237 *In re Cosden*, 467 P.2d. at 928.
238 *See, e.g.,* In re Farson's estate, 269 P.2d. 600 (Ariz. 1954) (holding that a conservator may be removed if a court finds the annual accounting unsatisfactory especially when analyzing the expenditures made from the ward's estate by the conservator).

formal process of conservatorship and guardianship, the parent will preserve his testamentary ability to nominate a successor upon the parent's death or inability to serve. A parent has additional duties, such as making formal reports to the court, associated with being a guardian or conservator. But being guardian or conservator will allow the parent to maintain control over his or her child's finances and decisions about the child's physical well-being.

# How Civil Disobedience Tactics in the Same-Sex Marriage Movement Threaten Democracy†

Jeana J. Hallock*

## I. Introduction

Gay rights and same-sex marriage advocates have employed a variety of tactics[1] in order to achieve the level of social and legal change in favor of same-sex marriage that they have within such a short period of time.[2] One frequently and increasingly used strategy is for same-sex couples to request a marriage license from the local government office responsible for issuance, generally a county clerk's office.[3] When the license is denied, the couple then has likely established the requisite injury required for standing to bring a legal challenge to the state's marriage laws.[4] This approach satisfies our judicial system's requirement of an injury before a case can be considered or a remedy afforded. In the event that a marriage license is issued by the clerk contrary to the state law—though the opportunity for the couple to legally challenge the law is likely lost—same-sex marriage advocates are satisfied because the

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† *Editor's note: This article was selected for publication in April 2014 and represents the state of the law at that time. The legal landscape surrounding same-sex marriage is rapidly changing. As such, statistics stated in this article may no longer reflect the number of states allowing same-sex marriage.*

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[1] *See, e.g.*, *About Us*, Human Rights Campaign, http://www.hrc.org/the-hrc-story/about-us (last visited Jan. 27, 2014) (indicating that Human Rights Campaign [HRC] "advocates . . ., mobilizes grassroots actions in diverse communities, invests strategically to elect fair-minded individuals to office and educates the public about LGBT issues."); s*ee also* Gerald N. Rosenberg, *Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage*, 42 J. Marshall L. Rev. 643, 666 (2009) (discussing the National Gay and Lesbian Task Force executive director's comments on the movement's "legal strategy" as compared to its "political and legislative strategy.").

[2] Consider that Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating Texas' criminal sodomy law as unconstitutional), was decided just ten years before United States v. Windsor, 133 S.Ct. 2675, 2695-96 (2013) (requiring federal recognition of state same-sex marriages). Consider also the rapidly changing legal landscape in regards to the number of states in which same-sex marriage is legal between the time of the drafting and publication of this article.

[3] *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 49 (Haw. 2004); Goodridge v. Dep't Pub. Health, 798 N.E.2d 941 (Mass. 2003); Baker v. Vermont, 744 A.2d 864, 867 (Vt. 1999).

[4] *See* Lockyer v. San Francisco, 95 P.3d 459, 485 (Cal. 2004). *See also* Li v. State, No. 0403–03057, 2004 WL 1258167, at *2-*3 (Or. Cir. Ct. Apr. 20, 2004), *overruled on other grounds by* Li v. State, 110 P.3d 91 (Or. 2005) (en banc).

couple receives what they were seeking, and the issuance of a marriage license in the face of contrary state laws undoubtedly produces a newsworthy story that can be used to encourage public discourse on the issue.[5] These two strategies are to be expected given the nature of our legal system. It is similarly unsurprising when same-sex marriage advocates carefully elect to sue state defendants who share their views[6] and, thus, will be unlikely to give the state laws a full defense.[7] Indeed, such collusive litigation has become the norm with regards to many same-sex marriage cases.[8] But more recently, some same-sex marriage advocates have begun employing a different, third tactic that goes beyond questions of same-sex marriage and directly threatens to undermine the rule of law in our society.[9]

In 2011, Campaign for Southern Equality began its "WE DO Campaign."[10] The WE DO Campaign "involves LGBT couples requesting marriage licenses

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[5] *Cf.* David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L. Q. 523, 525 (1999) (noting that plaintiffs in Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) and Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) now acknowledge "[t]hey demanded [marriage] licenses primarily as a way to gain attention for gay and lesbian issues").

[6] *See, e.g.*, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); s*ee also* Perry v. Schwarzenegger, 630 F.3d 898, 908 (9th Cir. 2011) (Reinhardt, J., concurring) (noting that "preeminent counsel and the major law firms of which they are a part failed to" "file[ ] an action against a broader set of defendants" whereby "Plaintiffs could have obtained a statewide injunction.").

[7] *See, e.g.*, Press Release, Pennsylvania Attorney General, Attorney General Kane will not defend DOMA (July 11, 2013), *available at* https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=913.

[8] *See* United States v. Windsor, 133 S. Ct. 2675 (2013) (indicating that federal defendants weighed in against the Defense of Marriage Act); *Hollingsworth*, 133 S. Ct. at 2668 (holding the Court lacked standing to consider the merits because the state defendants, who elected not to defend the law, had not appealed the lower court's decision invalidating California's Proposition 8); Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1073 (D. Haw. 2012) (indicating that defendant, Governor Abercrombie, who prevailed at the district court, filed a notice of appeal claiming he was an appellant because he believed Hawaii's marriage laws to be unconstitutional and wanted to see them overturned); Darby v. Orr, Case No. 2012 CH 19718 (Cook Cnty. Ch. Div., IL) (indicating that state attorney general refused to defend the state marriage laws and filed briefs attacking those laws as unconstitutional); Whitewood v. Corbett, Case No. 13-cv-01861(M.D. PA Oct. 4, 2013) (indicating that attorney general refused to defend the state marriage laws). *See also* Therese M. Stewart & Mollie M. Lee, *The Role of Public Law Offices in Marriage Equality Litigation*, 37 N.Y.U. REV. L. & SOC. CHANGE 187, 187-88 (2013).

[9] *See A Second County in Oregon Votes to Issue Marriage Licenses to Same-Sex Couples*, AM. CIV. LIBERTIES UNION (Mar. 17, 2004), https://www.aclu.org/lgbt-rights_hiv-aids/second-county-oregon-votes-issue-marriage-licenses-same-sex-couples-aclu-urges- (indicating this tactic is not altogether new and that the American Civil Liberties Union gave assent to such a tactic in 2004).

[10] Yamiche Alcindor, *Gay-marriage supporters take aim at the South*, USA TODAY (Jan. 16, 2013), http://www.usatoday.com/story/news/nation/2013/01/15/gay-marriage-south-opposition/1821359/?utm_source=dlvr.it&utm_medium=twitter&dlvrit=384245 ("The first couple with the group to request a marriage license did so in October 2011."); Jasmine Beach-Ferrara, *Op-Ed:*

in their hometowns across the South,"[11] in jurisdictions where they "are not legally entitled to be wed."[12] In autumn of 2013, the WE DO Campaign launched "[a] new phase."[13] The new "strategy" is to actively seek a "local elected official in the South who will grant a marriage license to a LGBT couple" in contravention of state law.[14] This "resistance," as it is aptly called by Jasmine Beach-Ferrara, Executive Director of the Campaign for Southern Equality,[15] is the type of civil disobedience tactic in which advocates on both sides of the same-sex marriage debate should be concerned, because it is the type of tactic that, when translated beyond the instant struggle, could have devastating effects on our current system of government.

This article will examine the civil disobedience tactic of recruiting government officials, who are charged with ministerial duties, to upend state laws based on their personal interpretation of the state or federal constitutions, and explore policy reasons why this tactic should not be encouraged. Specifically, determinations by local government officials threaten to (1) create unpredictability and lack of uniformity between geopolitical subdivisions, the state, and the federal government, thereby producing legal uncertainty resulting in antitherapeutic consequences for the intended beneficiaries of those actions; (2) negatively impact the three branches of government by subverting the careful consideration of important social and constitutional issues by the legislature and judiciary in favor of an individual's personal and oftentimes politically motivated viewpoint; and (3) attenuate the benefits that accrue in our federal system by subverting the state as laboratory.

## II. History of Illicit Same-Sex Marriage Licenses

In order to examine the dangers involved in recruiting local government officials to knowingly violate existing law and refuse to perform ministerial duties, this section will consider what has happened historically when local government officials have elected to illegally issue same-sex marriage licenses, spontaneously or on request.[16]

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*How Resistance Will Change the South*, Advocate.com (Sept. 9, 2013), http://www.advocate.com/commentary/2013/09/09/op-ed-how-resistance-will-change-south?page=0,1 (indicating that "the We Do Campaign launched two years ago").

[11] *WE DO Campaign*, Campaign for Southern Equality, http://www.southernequality.org/we-do-campaign/ (last visited Jan. 28, 2014).

[12] Alcindor, *supra* note 10.

[13] *WE DO Campaign*, Campaign for Southern. Equality, http://www.southernequality.org/we-do-campaign/ (last visited Jan. 28, 2014).

[14] *Id.*

[15] Beach-Ferrara, *supra* note 10.

[16] *See* Lockyer v. San Francisco, 95 P.3d 459, 465 (Cal. 2004) (indicating that under direction of the Mayor, the county clerk designed a gender neutral form and began issuing marriage licenses

### *A. Round One: 1975*

Clerks have been unilaterally issuing marriage licenses to same-sex couples from as early as 1975.[17] Although there are recorded instances of requests by same-sex couples for marriage licenses beginning in the early 1970s, those requests were denied and some of them resulted in litigation.[18] In 1975, six same-sex couples requested marriage licenses from the clerk in Boulder, Colorado.[19] Colorado had no *express prohibition* preventing the clerk from issuing the licenses to same-sex couples, so the clerk issued them.[20] After they were issued, same-sex couples in other jurisdictions, including Phoenix, Arizona and Montgomery County, Maryland, sought licenses and were granted them.[21] All of the 1975 same-sex marriage licenses were eventually declared invalid.[22] In Colorado, the clerk stopped issuing licenses after the "Attorney General expressed his opposition to the licenses' validity."[23]

While the issuance of same-sex marriage licenses has generally happened in a clustered fashion, as described here in the 1975 occurrences, there have also been isolated instances that may be more difficult to account for. For example, the plaintiff couple at issue in *Baker v. Nelson*,[24] the United States Supreme Court's only decision on the merits[25] of a claim by a same-sex couple to a right of marriage issued by a state, was granted a license by a clerk[26]

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to same-sex couples). *See, e.g.*, Li v. State, 110 P.3d 91, 94 (Or. 2005) (indicating that the issuance of marriage licenses had a spontaneous element in that the "Chair of the Multnomah County Board of Commissioners ordered the Records Management Division of Multnomah County . . . to issue marriage licenses to same-sex couples" on request.). *See also* Chris Gentilviso, *D. Bruce Hanes, Montgomery County Pa. Official, to Issue Marriage Licenses Against State's Gay Marriage Ban*, HUFFINGTON POST (July 24, 2013 10:35 AM), http://www.huffingtonpost.com/2013/07/24/d-bruce-hanes_n_3644096.html.

[17] *See* Mark F. Scurti, *Same Sex Marriage: Is Maryland Ready?*, 35 U. BALT. L.F. 128, 129 (2005). *See also* Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974). *Cf.* Chambers, *supra* note 5 at 524-25.

[18] Chambers, *supra* note 5, at 524-25; David L. & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L. Q. 523, 524-25 (1999). *See also* Baker, 191 N.W.2d at 185; Jones, 501 S.W.2d at 589; Singer, 522 P.2d at 1188.

[19] Scurti, *supra* note 17, at 129.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-sex Marriage*, 154 U. PA. L. REV. 565, 567 n. 11 (2006).

[24] Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971), *appeal dismissed*.

[25] A summary dismissal is treated as a decision on the merits. *See* Mandel v. Bradley, 432 U.S. 173, 176 (1977); Hicks v. Miranda, 422 U.S. 332, 344 (1975).

[26] *See* Adrienne K. Wilson, *Same-sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539, 547 n. 53 (1991) (documenting issuance of marriage license by Blue Earth County Court Clerk); *see also* Christopher L. Kannady, *Note: The State, Cherokee Nation, and Same-Sex Unions: In Re:*

during the pendency of another legal case, *McConnell v. Nooner*.[27] "From the mid-1970s until the late 1980s, no gay male or lesbian couples in the United States appear to have requested a marriage license or filed a case demanding a right to one."[28] The Supreme Court's ruling in *Bowers v. Hardwick*[29] in 1986, affirming the constitutionality of Georgia's criminal sodomy statute, suppressed the idea that same-sex marriage licenses would be issuing any time soon.[30] In the 1990s, several same-sex couples were denied marriage licenses in various jurisdictions.[31]

### *B. Round Two: Post-*Lawrence *and* Goodridge*: 2004*

It was not until 2004 that another flurry of same-sex marriage licenses were issued by state administrative officials in violation of existing marriage laws.[32] It is debatable what inspired this round of issuance, but President George W. Bush's 2004 State of the Union Address, in which he affirmed his commitment to one-man one-woman marriage,[33] as well as the Massachusetts Supreme Court's *Goodridge v. Department of Public Health*[34] decision,[35] finding same-sex marriage required under the Massachusetts Constitution, may have played a part.[36] Three months before Massachusetts began issuing marriage licenses to same-sex couples, San Francisco Mayor Gavin Newsom directed the county clerk to modify the form used for processing marriage license applications and begin issuing marriage licenses to same-sex couples in California.[37] Ultimately, the California Attorney General sought an order from the Supreme Court of California to stop the clerk and the registrar (and the mayor) from

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*Marriage License of McKinley & Reynolds*, 29 AM. INDIAN L. REV. 363, 366 (2004) (marriage license issued by deputy clerk of the Cherokee Nation to same-sex couple in court clerk's absence).

[27] McConnell v. Nooner, 547 F.2d 54, 55 (8th Cir.1976).

[28] Chambers, *supra* note 5, at 525.

[29] Bowers v. Harwick, 478 U.S. 186 (1996) (upholding Georgia's law criminalizing sodomy).

[30] Chambers, *supra* note 5, at 525.

[31] *Id.* at 526 ("Same-sex couples applied for licenses at clerk's offices in Hawaii, Alaska, New York, the District of Columbia, and Vermont and, when denied, filed cases in state courts.").

[32] Lockyer v. San Francisco, 95 P.3d 459 (Cal. 2004); Li v. State, 110 P.3d 91 (Or. 2005). *See also* Kathleen E. Hull, *Book Review: America's Struggle for Same-Sex Marriage by Daniel R. Pinello,* 41 LAW & SOC'Y REV. 748, 749 (2007).

[33] *See Text of President Bush's 2004 State of the Union Address*, WASHINGTON POST, Jan. 20, 2004, *available at* http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html.

[34] Goodridge v. Dep't Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[35] Gerald N. Rosenberg, *Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage*, 42 J. MARSHALL L. REV. 643, 654 (2009).

[36] Hull, *supra* note 32.

[37] Kate Kendall, *The Right to Marry and the San Francisco Experience*, 44 FAM. CT. REV. 33, 37 (Jan. 2006).

issuing and recording the licenses.[38] The clerk issued over 4,000 marriage licenses to same-sex couples before a court order enjoined further issuance of such licenses.[39]

Other jurisdictions, including Sandoval County, New Mexico; Multnomah County, Oregon; and New Paltz, New York, followed San Francisco's lead and began issuing marriage licenses to same-sex applicants.[40] Sandoval County began issuing licenses on February 20, 2004.[41] That very day the New Mexico Attorney General issued an advisory letter[42] warning that county clerks should not issue marriage licenses to same-sex couples because "those licenses would be invalid under current law."[43] Ultimately, the New Mexico Attorney General filed a petition for a permanent injunction and was granted a temporary restraining order preventing Sandoval County from issuing marriage licenses to same-sex couples.[44] The action was eventually dismissed because the clerk was not re-elected.[45] In total, about sixty-four licenses were issued to same-sex couples in New Mexico.[46] The validity of those licenses has never been adjudicated.[47]

A single marriage license was issued to a same-sex couple in Asbury Park, New Jersey, whose ceremony was held at City Hall on March 8, 2004.[48] On March 10, 2004, the City Council voted "to stop accepting marriage license applications from same-sex couples, but to file a lawsuit asking a court to rule on the issue instead."[49]

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[38] *Id.* at 38; Lockyer v. San Francisco, 95 P.3d 459, 464, 499 (Cal. 2004).

[39] Kendall, *supra* note 37; Lockyer, 95 P.3d at 465.

[40] Hull, *supra* note 32, at 749.

[41] Liz Seaton, *The Debate over the Denial of Marriage Rights and Benefits to Same-Sex Couples and Their Children*, 4 MARGINS: MD. L.J. RACE, RELIGION, GENDER & CLASS 127, 130-31 (2004).

[42] Advisory Letter from Patricia A. Madrid, N.M Att'y Gen., to Timothy Z. Jennings, Sen. (Feb. 20, 2004), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCYQFjAA&url=http%3A%2F%2Fwww.abqjournal.com%2Fnews%2Fpdf%2Fmadridletter02-20-04.pdf&ei=MIA7U53mFoTM2AWe2IHQBQ&usg=AFQjCNG3depXrd-WS5TPPX6nuX9qjunwmg&bvm=bv.63934634,d.b2I.

[43] Seaton, *supra* note 41, at 130-31.

[44] *Id.;* Karen Moulding & National Lawyers Guild, Lesbian, Gay, Bisexual and Transgender Committee, *Same-Sex Marriage, Civil Unions, and Other Protections for Couples*, 1 SEXUAL ORIENTATION & LAW § 2:21 (2013). *See also* Docket Report N.M. Att'y Gen. Patricia A. Madrid v. Victoria Dunlap, Case No. D-1329-CV-200400292 (Bernalillo Dist. Ct. 2004), *available at* https://caselookup.nmcourts.gov/caselookup/app?component=cnLink&page=SearchResults&service=direct&session=T&sp=SD-1329-CV-200400292 (last visited Mar. 8, 2014).

[45] *Id.*

[46] Moulding, *supra* note 44.

[47] *Id.*

[48] Seaton, *supra* note 41, at 131.

[49] *Id.* at 131-32.

In Multnomah County, Oregon, "the Chair of the Multnomah County Board of Commissioners ordered the Records Management Division of Multnomah County to issue marriage licenses" to same-sex applicants and, as a result, approximately 3,000 same-sex couples participated in marriage ceremonies.[50] However, the State Registrar refused to register the marriage licenses, citing the Attorney General's assessment of state law as constitutional and the Governor's directive not to give effect to such marriages.[51] Couples who had received licenses from Multnomah County, along with couples who had been denied licenses by two other county clerks, sued the Governor, Attorney General, Director of the Department of Human Services, and the State Registrar for declaratory relief, seeking to have marriage licenses issued and/or registered.[52] The trial court found the "marriage statutes . . . violated . . . the Oregon Constitution" because they denied "the benefits of marriage" to same-sex couples;[53] thus, the court's remedy attempted to extend the benefits of marriage, but not the right of marriage to same-sex couples.[54] The state appealed the trial court's ruling, and the court of appeals, rather than hear the case itself, certified the case to the Oregon Supreme Court.[55] The Oregon Supreme Court reversed the trial-court ruling and held that the marriage licenses that had been issued by Multnomah County to same-sex applicants were issued "without authority and were void."[56]

In New Paltz, New York, the mayor performed a marriage ceremony for twenty-five same-sex couples on February 27, 2004.[57] The mayor was prevented from performing more marriages because he was charged with the crime of "solemnizing marriages for individuals who had not obtained marriage licenses,"[58] because the State Health Department "refused to grant the licenses, saying New York's law expressly forbid[ ]" doing so.[59] Two ministers continued performing same-sex marriages and were also charged with the same crime.[60] New York's Attorney General, in an effort to stop the marriage cere-

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[50] Li v. State, 110 P.3d 91, 94 (Or. 2005) (en banc).

[51] *Id.* at 95.

[52] *Id.* at 94.

[53] *Id.* at 96.

[54] *Id.* at 96.

[55] *Id.* at 94.

[56] *Id.* at 102.

[57] Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. C. R. & C. L. 1, 17 (2007).

[58] People v. West, 780 N.Y.S.2d 723 (N.Y. J. Ct. 2004).

[59] Marc Santora, *Same-Sex Marriage: The Law; Spitzer's Opinion Mixed on Status of Gay Marriage*, N.Y. TIMES (Mar. 4, 2004), http://www.nytimes.com/2004/03/04/nyregion/same-sex-marriage-the-law-spitzer-s-opinion-mixed-on-status-of-gay-marriage.html?src=pm&pagewanted=2

[60] Law, *supra* note 57, at 16-17.

monies, issued an opinion indicating that, despite "serious constitutional concerns," state law did not permit the issuance of same-sex marriage licenses.[61] A member of the Board of Trustees of the Village of New Paltz filed proceedings to "enjoin [the mayor] from performing marriages for which no valid license had been issued."[62] The court issued a temporary restraining order and ultimately a preliminary injunction to prevent the mayor from performing marriages for same-sex couples.[63] During the litigation, the Board of Trustees appointed two different marriage officers; each "proceeded to solemnize same-sex marriages."[64] A second proceeding enjoined "all Village officers, employees[,] and marriage officers from solemnizing marriages without licenses."[65] On appeal, the appellate division declined to *affirmatively* void the marriages that were performed, noting that the couples involved were not parties to the litigation.[66] The court indicated, however, that other pending cases, which "*properly* present[ed]" the merits question, would "control whether the marriages of these couples may become legally cognizable."[67] Although the validity of the New York marriage licenses is less than clear, overall the vast majority of the marriage licenses issued to same-sex couples in 2004 were "eventually voided by courts."[68]

### *C. Round Three: Post-*Windsor*: 2013*

Another wave of marriage licenses were issued to same-sex applicants by clerks in 2013 in the wake of *United States v. Windsor*.[69] Since that decision, clerks in Pennsylvania and New Mexico began issuing marriage licenses. The Clerk of the Orphans' Court of Montgomery County, Pennsylvania, issued a press release on July 23, 2013, indicating that he would issue marriage licenses to same-sex couples.[70] His announcement came after the Pennsylvania Attorney General declined to defend Pennsylvania's marriage laws against a constitutional challenge brought by same-sex couples in federal court based on the attorney general's assessment that the state's marriage laws were unconstitutional.[71] Ultimately the Pennsylvania Department of Health filed suit, seeking

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61 Santora, *supra* note 59.

62 Hebel v. West, 25 A.D.3d 172, 174 (N.Y. App. Div. 2005).

63 *Id.*

64 *Id.* at 175.

65 *Id.*

66 *Id.* at 179.

67 *Id.* at 179-80.

68 Hull, *supra* note 32, at 749. *See also* Lockyer v. San Francisco, 95 P.3d 459, 494-95 (2004); Li v. State, 110 P.3d 91, 102 (2005).

69 United States v. Windsor, 133 S. Ct. 2675 (2013).

70 Commonwealth v. Hanes, 78 A.3d 676, 680 (Pa. Commw. Ct. 2013).

71 *Id.*

a writ of mandamus to compel the clerk to comply with the state marriage law.[72] On September 12, 2013, the Commonwealth Court of Pennsylvania granted the writ of mandamus.[73] The clerk had issued 174 licenses.[74] He appealed to the Supreme Court of Pennsylvania.[75] As of this writing, the appeal has been fully briefed.[76]

In New Mexico, on August 21, 2013, "the Dona Ana County Clerk voluntarily began issuing marriage licenses to" same-sex couples.[77] Several other clerks in other counties followed suit.[78] Around the same time, same-sex couples initiated lawsuits in state court seeking a judicial determination as to whether state law permitted marriage licenses to be issued to same-sex couples.[79] As a result of these suits, some clerks were court ordered to begin issuing marriage licenses, but some of these clerks, despite being court ordered to issue same-sex marriage licenses, still refused.[80] A number of lawsuits resulted.[81] The New Mexico Association of Counties, "as the organizational representative"[82] of the county clerks, filed a petition with the New Mexico Supreme Court.[83] At the time of its filing, "eight New Mexico counties were issuing marriage licenses to same-gender couples, while twenty-four were not."[84] At the time of oral argument, "over 1,466 marriage licenses had been issued" to same-sex couples statewide.[85] The court took control of the pending cases and considered the merits of the same-sex couples' claims.[86] The court held that the Equal Protection Clause of the New Mexico Constitution required

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[72] *Id.* at 680-81.

[73] *Id.* at 693-94.

[74] Peter Jackson, *Montco clerk urges state to allow him to issue gay marriage licenses*, MERCURY NEWS (Dec. 2, 2013 3:51 PM), http://www.pottsmerc.com/general-news/20131202/montco-clerk-urges-state-to-allow-him-to-issue-gay-marriage-licenses.

[75] Pennsylvania v. Hanes, No. 77 MAP 2013 (docketed).

[76] *Id.*

[77] Griego v. Oliver, 316 P.3d 865, 872 (N.M. 2013).

[78] *Id.*

[79] *Id.*

[80] Billy Hallowell, *County clerk refuses to follow judge's order to issue marriage license to lesbian couple*, THEBLAZE.COM (Sept. 4, 2013, 3:23 PM), http://www.theblaze.com/stories/2013/09/04/county-clerk-refuses-to-follow-judges-order-to-issue-marriage-license-to-lesbian-couple/

[81] *Griego*, 316 P.3d at 872.

[82] *Id.*

[83] *Id.* The court held: "Our exercise of superintending control is appropriate in this case . . . . we exercise our power of superintending control 'to control the course of ordinary litigation in inferior courts . . . even when there is a remedy by appeal, where it is deemed to be in the public interest to settle the question involved at the earliest moment.'" *Id.* at 873 (internal citation omitted).

[84] *Id.* at 873.

[85] *Id.*

[86] *Id.*

that same-sex couples be allowed to marry and to receive all of "the rights, protections, and responsibilities of civil marriage."[87] This was the first instance in which the unilateral issuance of same-sex marriage licenses by local government officials resulted in the judicial resolution of the merits question.[88]

## III. Discussion

### *A. The History Shows the Issuance of Same-Sex Marriage Licenses by Local Government Officials Contrary to State Law Undermines Citizens' Respect for the Existing Rule of Law.*

#### 1. Lack of Uniformity

When low level state executive officials exercise the power of constitutional review with regard to ministerial duties, it produces inconsistent application of the law in question in different locales and at different levels of state government.[89] In Oregon, though Multnomah County began issuing marriage licenses, two other counties—Lane and Benton County—continued enforcement of the existing laws and denied marriage licenses to same-sex couples who applied for them.[90] Similarly, in New Mexico in 2013, prior to the New Mexico Supreme Court decision, eight counties issued same-sex marriage licenses, while twenty-four did not.[91] If the state marriage law can be enforced in one locale and disregarded in another based on an individual official's decision to exercise constitutional review over a ministerial duty, then presumably other state statutes can be similarly enforced or not enforced for similar reasons. Consider some of the examples raised by the California Supreme Court in the opening of the *Lockyer* decision such as gun laws and building permit regulations.[92] Though such laws implicate the important, fundamental rights to bear arms and to hold property, respectively, once duly enacted, citizens rely and base their conduct on the uniform enforcement of those laws as promulgated.

A recent example of non-enforcement of a law by a local official in a context outside of the same-sex marriage debate further illustrates the problem. During the recent foreclosure crisis, the Sheriff of Cook County, Illinois, who had proposed a law that the state legislature had declined to adopt, later decided

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[87] *Id.* at 889.

[88] C*f.* Li v. State, 110 P.3d 91 (Or. 2005); Lockyer v. San Francisco, 95 P.3d 459 (Cal. 2004).

[89] *See* Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-sex Marriage*, 154 U. Pa. L. Rev. 565, 571-77 (2006), for a discussion of the distribution of executive power that makes this intra-executive controversy possible.

[90] *Li*, 10 P.3d at 94 n.2.

[91] Griego v. Oliver, 316 P.3d 865, 873 (N.M. 2013).

[92] *Lockyer*, 95 P.3d at 462-63 (Cal. 2004).

to "suspend[ ] all foreclosure evictions"[93] in spite of his enforcement duties, in an effort to elicit action by the legislature or judiciary. Ultimately, new eviction notice requirements were enacted as a result of the sheriff's actions.[94] In 2010, the Cook County Sheriff again suspended the foreclosure evictions of three major lenders after employees of those lenders had admitted to robo-signing foreclosure documents.[95] The sheriff requested that the banks provide his office with affidavits affirming that the foreclosures to be effectuated by his office were processed legally.[96] News reports indicate that the Cook County Sheriff ultimately resumed these evictions after Cook County State's Attorney told him he must enforce court eviction orders.[97]

The actions of the Cook County Sheriff created an economic disadvantage to the landlords whose properties were located in Cook County and a corresponding economic advantage to landlords whose properties were just across the Cook County line.[98] This selective enforcement of the law poses particular concerns in an economy based on competition such as ours.[99] Selective law enforcement should not be amongst the competition variables in a free marketplace.

The unpredictable application of state law, dependent only on the independent assessments of the local officials tasked with ministerial duties in a given region, should create genuine concern for citizens because it undermines and calls into question *all* laws. Additionally, depending on how a law is administered, the lack of uniform enforcement between the political subdivisions of a state may create equal protection problems because citizens in one locale are receiving benefits not available to citizens of the same state in a different locale.[100] This should be particularly concerning for those on both sides of the

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[93] Thomas J. Dart, *Cook Cnty. Sheriff, Cook Cnty. Sheriff Suspends Foreclosure Evictions*, COOK CNTY. SHERIFF'S OFF. (Oct. 8, 2008), http://www.cookcountysheriff.org/press_page/press_evictionSuspension_10_08_08.html.

[94] Thomas J. Dart, Cook Cnty. Sheriff, *Dart to Suspend Foreclosure Evictions Filed by Leading Banks*, COOK CNTY. SHERIFF'S OFF. (Oct. 19, 2010), http://www.cookcountysheriff.org/press_page/press_DartSuspendForclosures_10_19_2010.html.

[95] *Id.*

[96] *Id.*

[97] *Sheriff Dart to resume foreclosure evictions*, ABC, INC. (Nov. 19, 2010), http://abclocal.go.com/wls/story?section=news/local&id=7799547.

[98] Kevin S. Marshall, *Free Enterprise and the Rule of Law: The Political Economy of Executive Discretion (Efficiency Implications of Regulatory Enforcement Strategies)*, 1 WM. & MARY BUS. L. REV 235 (2010).

[99] *Id.* (providing a full discussion of how "executive discretion" endangers a free market economy).

[100] *Id.* at 285-86.

same-sex marriage debate because whenever inequity in the application of law is permitted, "minority groups . . . have the most to lose."[101]

The inconsistencies in the law's application can extend beyond mere jurisdictional differences and can create inconsistency between the state and its political subdivisions. In Oregon, the law was applied inconsistently between the counties and the state because the state registrar, following the governor's directive to state agencies "not to give legal effect to marriage licenses issued to same-sex couples," refused to register the licenses that Multnomah County had issued.[102] The Oregon Attorney General had determined that the marriage law in Oregon validly defined marriage as between one man and one woman.[103] Here, the chief executive officers of the state reached one conclusion regarding the constitutionality of the law, while the Chair of the Multnomah County Board of Commissioners—sometimes acting alone and sometimes with the support of other board members[104]—reached the contrary conclusion.

Similarly, in California, though the Mayor of San Francisco had asked the County Clerk to modify the marriage license application form in order to accept marriage licenses from same-sex couples,[105] the State Registrar of Vital Statistics issued a directive to the county recorders not to accept "marriage certificates submitted by same-sex couples on forms other than those approved by the State of California."[106] When laws are interpreted and enforced—or not enforced—in such varying degrees between the state and its political subdivisions, citizens will not know which entity to look to for the proper understanding of what the law is; citizens may construe, rely, and act on a false conception of rights and duties. When that conception is judicially righted, their respect for the rule of law may be undermined.

Inconsistencies between state and local governments in applying state laws further create confusion for the application of federal law that may be dependent on those policies. In California, due to San Francisco's issuance of same-sex marriage licenses, the federal government called into question applications received by the Social Security Administration for requests of name changes.[107] One of the same-sex couples, with a marriage license issued by the Boulder County Colorado Clerk, applied with the U.S. Immigration and Naturalization Service seeking permanent residency for one of the licensees who

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101 Lockyer v. San Francisco, 95 P.3d 459, 499 (Cal. 2004).

102 Li v. State, 110 P.3d 91, 95 (Or. 2005).

103 *Id.*

104 *Id.* at 94 n.1.

105 *See Lockyer*, 95 P.3d at 465.

106 *Id.* at 466.

107 *Id.*

was an Australian citizen.[108] This created confusion over whether the couple was validly married and whether the licensee could be afforded permanent residency.[109] The Court of Appeals for the Ninth Circuit declined to determine the validity of the marriage under Colorado law and instead decided the case on other grounds.[110]

More recently, the federal government has elected to recognize same-sex marriages performed in states that are actively engaged in litigation over the constitutionality of their state marriage amendments. The federal government is recognizing marriages that were performed after the states' marriage laws were struck down by federal district court judges, but before a stay was put in place by reviewing courts, despite the fact that those states have appealed those decisions and may not recognize the same-sex marriages performed in their jurisdictions unless judicially forced to do so.[111] Historically, clerks' actions contrary to the laws of their states have created unnecessary confusion for various federal departments whose policies are related to state policies, while since the *Windsor* decision, the federal government has elected to recognize same-sex marriages, which may or may not be recognized by the jurisdictions in which they were performed. When federal law hinges on a status determined by state laws, non-uniform enforcement of those laws will create unnecessary confusion and inconsistency between the local, state, and federal government.

### 2. Legal Uncertainty Creates Antitherapeutic Consequences

The inconsistencies in recognition of unauthorized same-sex marriage licenses, as described above, between different political subdivisions, the state, and various federal departments, create unnecessary legal uncertainty. In San Francisco, the marriage license application form, as modified by the clerk, included a warning indicating that other jurisdictions may not recognize the

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[108] Margalit Fox, *Same-Sex Spouse Who Sued U.S., Dies at 65*, N.Y. TIMES (Dec. 24, 2012), http://www.nytimes.com/2012/12/25/us/richard-adams-who-sued-us-after-1975-gay-marriage-dies-at-65.html.

[109] Adams v. Howerton, 673 F.2d 1036, 1038-39 (9th Cir. 1982).

[110] *Id.*

[111] Sari Horwitz, *Obama administration to recognize same-sex marriages in Michigan*, WASH. POST (Mar. 28, 2014), http://www.washingtonpost.com/world/national-security/obama-administration-to-recognize-same-sex-marriages-in-michigan/2014/03/28/9ad9fb76-b678-11e3-b84e-897d3d12b816_story.html (discussing Attorney General Holder's decision to recognize same-sex marriage performed in Michigan and Utah); Chris Gautz & Chad Halcom, *Snyder: Michigan won't recognize same-sex marriages*, CRAINS DETROIT BUS. (Mar. 26, 2014), http://www.crainsdetroit.com/article/20140326/NEWS01/140329897/snyder-michigan-wont-recognize-same-sex-marriages (indicating that the state will not provide any marriage benefits until the case reaches a final resolution); Jennifer Dobner, *Utah puts same-sex marriage on hold pending appeal*, CHI. TRIB. (Jan. 8, 2014), http://articles.chicagotribune.com/2014-01-08/news/sns-rt-us-usa-utah-gaymarriage-20140108_1_mormon-state-utah-marriages.

marriage as valid and "encouraged" same-sex couples to "seek legal advice regarding the effect of entering into marriage."[112] Indeed, because the licenses are issued contrary to the existing state law, the question arises as to what legal effect—if any—the licenses have under state law.[113] That question generally must be adjudicated. But as the *Lockyer* court recognized, the legal uncertainty created affects both the recipients of the marriage license—creating antitherapeutic results—and "third parties, such as employers, insurers, or other governmental entities."[114] Because of the obligations and benefits dependent on the status of the marriages, the *Lockyer* court felt it unwise to leave "the validity of [the] marriages [in question] in limbo."[115]

When local government officials exercise discretion over ministerial duties and issue same-sex marriage licenses contrary to state law, their actions may cause injury to the very constituents that they are trying to help. Therapeutic jurisprudence is an interdisciplinary approach to the law that considers how "[l]egal rules, legal procedures, and . . . legal actors" act as "social forces" that "produce therapeutic or antitherapeutic consequences," with the objective of discovering ways to minimize antitherapeutic consequences and to maximize therapeutic ones.[116] By spontaneously issuing marriage licenses to same-sex couples in contravention of state law, local officials create legal uncertainty. In most of the instances reviewed, state attorneys general sought judicial resolution on the question of whether the local government had the authority to interpret the constitution and choose not to enforce the state marriage law.[117] When courts determine these issues, they often also decide the validity of the marriage licenses that have been issued.[118] The fact that recipients of these licenses are forced into adjudication is itself antitherapeutic, but the results of the adjudication are generally even more so. As the California Supreme Court expressed, when an individual believes a law unconstitutional and brings it before the courts for adjudication, he does so "at his peril." However, when a local official with a purely ministerial duty refuses to enforce a law he perceives as unconstitutional, he "takes no such risk . . . because he subjects himself to no penalty if his opinion as to the unconstitutionality of an act is not sustained by the courts."[119] This makes it particularly unfair that a local offi-

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112 Lockyer v. San Francisco, 95 P.3d 459, 465 (Cal. 2004).

113 *See, e.g.*, *Adams*, 673 F.2d at 1038-39.

114 *Lockyer*, 95. P.3d at 497.

115 *Id.*

116 DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (1996).

117 *See, e.g.*, *Lockyer*, 95. P.3d at 465.

118 *Id.* at 464.

119 *Id.* at 490.

cial can subject others to such antitherapeutic consequences as a result of his or her actions, while experiencing no identifiable repercussions personally.

Historically, the majority of marriage licenses issued contrary to state law have been invalidated.[120] Because of the type of litigation that usually results, which is focused on the authority of the public officials to take certain actions as opposed to the merits questioned, the same-sex couples affected may not even be parties to the litigation that determines their legal status.[121] The *Lockyer* court declared the marriage licenses issued by San Francisco to same-sex applicants "void and of no legal effect."[122] Kate Kendell, Executive Director of the National Center for Lesbian Rights, which is located in San Francisco,[123] noted in her article, *The Right to Marry and the San Francisco Experience,* "[f]or many couples, that portion of the [California Supreme] Court's ruling felt like a personal attack and was unnecessarily cruel."[124] While the government officials who issued the marriage licenses intended to benefit the recipients, the reality is that their actions in most instances resulted in additional harm when the licenses were invalidated.[125] The actions of local officials exercising executive review resulted in legal uncertainty that produced antitherapeutic consequences. In other words, those local officials made a promise they could not keep.

As discussed above, when some officials enforce laws as written, and other government officials do not, the inconsistent application of the law creates legal uncertainty as to the legal effect of those officials' actions. In the context of the issuance of same-sex marriage licenses, this has produced confusion, chaos, and undoubtedly disappointment for those who believed they were married at one point, only to be told by courts that they were not. If this tactic of recruiting government officials who are willing to subvert the current law based on

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120 *See, e.g.*, Li v. State, 110 P.3d 91, 102 (Or. 2005); Lockyer v. San Francisco, 95 P.3d 459, 464 (Cal. 2004).

121 *See Lockyer*, 95 P.3d at 509 (J. Werdegar concurring and dissenting); *see also* Hebel v. West, 25 A.D.3d 172, 179 (N.Y. App. Div. 2005) (declining to address whether "the same-sex marriages that were performed should be declared void . . . since the same-sex couples were not parties").

122 *Lockyer*, 95 P.3d at 464.

123 *Kate Kendell, Esq. Executive Director,* NAT'L CENTER FOR LESBIAN RTS., http://www.nclrights.org/about-us/staff/kate-kendell-esq/ (last visited March 8, 2014).

124 Kate Kendell, *Special Issue on the Evolution of Marriage: The Right to Marry and the San Francisco* experience, 44 FAM. CT. REV. 33, 39 (Jan. 2006).

125 *Id.*; *see also* Jennifer Dobner, *Utah puts same-sex marriages on hold pending appeal*, REUTERS (Jan. 8, 2014), http://www.reuters.com/article/2014/01/09/us-usa-utah-gaymarriage-idUSBREA0716R20140109 (quoting a party to a same-sex marriage license as saying "'I'm hurt, very hurt,'" in response to Utah's decision not to recognize any of the same-sex marriage licenses issued after the district court's ruling invalidating Utah's marriage amendment but before the Supreme Court stayed the decision pending final resolution of the case on appeal).

their own constitutional interpretation, political preferences, or agenda—as in the situation involving the Cook County Sheriff—is translated to other contexts, the results will likely be the same—lack of certainty and harm. Because some government officials will continue to follow the law, and because courts may find that those officials who took action in violation of the law lacked authority to do so, legal uncertainty would abound. By its very nature, legal uncertainty is antitherapeutic because it is the antithesis of what constituents expect from the law—stability and certainty.[126] As John Locke expressed, "[g]overnment . . . being only for the good of the society . . . ought not to be *arbitrary* . . . so it ought to be exercised *by established and promulgated laws*; that both the people may know their duty, and be safe and secure within the limits of the law; and the rulers too kept within their bounds . . . ."[127]

When translated into other contexts, the tactic of locating state administrative officials who are willing to act in contravention of their statutory, ministerial duties will have devastating effects on the rule of law because it will jettison uniform application of the law—the very purpose of a ministerial duty—and legal certainty. The lack of uniformity and legal certainty will likely result in judicial conflict, as has been the case in the context of the issuance of marriage licenses, and the outcome of the cases will undoubtedly produce antitherapeutic results for those involved. Because this civil-disobedience tactic creates lack of uniformity, legal uncertainty, and antitherapeutic results, it should not be employed.

### *B. The History Shows the Issuance of Marriage Licenses to Same-Sex Applicants by Local Government Officials Contrary to State Law Negatively Impacts All Three Branches of Government.*

Our federal system relies on a presumption that each of the branches of government acts in accordance with the Constitution. Indeed, the acts of the legislature are presumed constitutional.[128] Our federal system is also designed such that each of the branches of government maintains a separate function, for which it is uniquely qualified. The legislature is uniquely equipped to enact laws.[129] The judiciary is the final arbiter of what the law is.[130] The executive

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[126] *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT, OF CIVIL GOVERNMENT § 137 (Whitmore and Fenn, Corrected ed., London 1821).

[127] *Id.* (emphasis in original).

[128] Heller v. Doe, 509 U.S. 312, 320 (1993); s*ee also* Lockyer v. San Francisco, 95 P.3d 459 (Cal. 2004).

[129] United States v. Brown, 381 U.S. 437, 445 (1965) (citation omitted) ("'It is the peculiar province of the legislature to prescribe general rules for the government of society'"); *see also Lockyer*, 95 P.3d at 463.

[130] Marbury v. Madison, 5 U.S. 137, 177 (1803); *see also Lockyer*, 95 P.3d at 463.

enforces the statutes created by the legislature.[131] Beyond the separation of powers, the subject of marriage itself is also a matter that is generally under the control of the state legislature.[132] As a matter under the control of the legislature, marriage is to be uniformly enacted across the state, rather than controlled or determined by individual localities.[133] As the *Lockyer* court explained, "a public official faithfully upholds the Constitution by complying with the mandates of the Legislature, leaving to courts the decision whether those mandates are invalid."[134] Indeed, since the beginning of our government it has been understood, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."[135] When local officials "disregard presumptively valid statutes and take action in violation of such statutes on the basis of [their] own determination of what the Constitution means" they subvert, rather than support, our constitutional system.[136]

The 2013 New Mexico situation demonstrates the degree of chaos that results when local government officials feel empowered to make their own determinations concerning the constitutionality and interpretation of state laws. In New Mexico, not only were some county clerks issuing licenses to same-sex couples, while others were refusing to issue them, but a clerk also refused to follow a court order directing her to issue a license to a same-sex couple.[137] Because local officials felt empowered to make their own determinations on whether to follow the law, they felt equally empowered to disregard court directives. Similarly, the *Lockyer* court noted that the San Francisco County Recorder had not followed the directive of the state Registrar of Vital Statistics to cease "registering marriage certificates submitted by same-sex couples on forms other than those approved by the state of California."[138] The exercise of power over the law by local officials created disregard for the power of the other branches of government.

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131 Tennessee v. U.S. Dep't of Transp., 326 F.3d 729 (6th Cir. 2003) ("[I]t is . . . the duty and prerogative of administrative agencies in the executive branch of our constitutionally tripartite form of government to enforce [the] law"); *see also Lockyer*, 95 P.3d at 463.

132 *See Lockyer*, 95 P.3d at 467-68; Li v. State, 110 P.3d 91, 99 (Or. 2005). *See also* Windsor v. United States, 133 S. Ct. 2675 (2013).

133 Lockyer v. San Francisco, 95 P.3d 459, 471 (Cal. 2004).

134 *Id.* at 485.

135 THE FEDERALIST NO. 47 (James Madison).

136 *Lockyer*, 95 P.3d at 486.

137 Hallowell, *supra* note 80.

138 *Lockyer*, 95 P.3d at 466.

1. Substitutes Individual Judgment for that of the Legislature

The legislature is uniquely equipped as a body of representatives of the people to carefully consider the needs of the populous and to adopt laws consistent with a desirable social policy.[139] Because of the nature of the legislative process, laws that are enacted represent a compromise of varying political perspectives achieved through a process of debate.[140] Similarly, the judicial system is an adversarial system designed to bring forth robust advocacy for competing positions, accompanied by an appellate review process through which judicial decisions can be further refined. In contrast, the judgment of an individual local official on the basis of "his or her own constitutional determination"[141] does not involve the type of robust, adverse consideration by a neutral arbiter that produces optimal results.[142]

2. Forces the Executive into the Fray

When local administrative officials act in contravention of state law based on their own determinations of the law's constitutionality, they force the hand of the executive. The executive branch of the state is not united, like the federal executive branch.[143] For example, a governor does not usually have the powers of appointment and removal that the President does, nor does a governor have the same power to "control and influence" state administrative officials' legal opinions because state law does not always require that the state attorney general represent such officials.[144] As a result, the state executive does not have the ability to control actions of administrative officials in order to present a united position on controversial issues.[145] This creates a particularly interesting milieu because many local and state government positions are elected[146] and local officials' defiance of statutory law is most likely to occur in a politically charged controversy. A local government official therefore may

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139 United States v. Brown, 381 U.S. 437, 445 (1965); Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co., 470 U.S. 451, 466 (1985) ("[T]he principal function of a legislature is . . . to make laws that establish the policy of the state.").

140 Rodriguez v. United States, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice").

141 Lockyer v. San Francisco, 95 P.3d 459, 491 (Cal. 2004).

142 *Id.*

143 *See generally* Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-sex Marriage*, 154 U. PA. L. REV. 565 (Jan. 2006).

144 Federal law generally leaves "legal guidance" and defense to the U.S. Department of Justice. *Id.* at 572.

145 *Id.* at 572-74.

146 *Id.* at 573-74.

be able to force the chief executive officers to take a side on a controversial issue, such as same-sex marriage, for purely political objectives.[147]

In most of the examples considered the executive branch of the state was forced to become involved—either by issuing a legal memo from the office of the attorney general concerning the validity of the local official's actions or through seeking a writ of mandamus to stop the local official's actions.[148] This process can involve even further conflict between the executive officials of the state, such as between the governor and attorney general of a state, because elected officials may have differing views on controversial issues and may stand to gain from undermining the other's authority.[149] Additionally, this wastes state resources because different officials who are parties to the litigation may advance antithetical positions.[150] The state executive's time and resources are not best served by being forced to police the actions of local officials.

### 3. Creates a Risk of Inconsistent Application of the Law by the Executive Over Time

One of the dangers of replacing legislative authority with the judgments of local government officials is the potential inconsistency that may result in the application of the law. Because the role of the executive branch is only to enforce the law,[151] in the event that the executive official determines not to enforce a law, but the law remains on the books, there can be no finality or certainty in the state of the law over time.[152] By contrast, when the legislature repeals or amends a law, there is finality in what the state of the law is until

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147 *Id.* at 574.

148 Marc Santora, *Same-Sex Marriage: The Law; Spitzer's Opinion Mixed on Status of Gay Marriage*, N.Y. TIMES (Mar. 4, 2004), http://www.nytimes.com/2004/03/04/nyregion/same-sex-marriage-the-law-spitzer-s-opinion-mixed-on-status-of-gay-marriage.html?src=pm&pagewanted=2 (New York Attorney General issuing legal opinion in an effort to stop local officials from performing more same-sex marriages); Advisory Letter from Patricia A. Madrid, *supra* note 42; Docket Report N.M. Att'y Gen. Patricia A. Madrid v. Victoria Dunlap, Case No. D-1329-CV-200400292 (Bernalillo Dist. Ct. 2004; Commonwealth v. Hanes, No. 379 M.D. 2013, at 7 (Pa. Commw. Ct. Sept. 2013); Li v. State, 110 P.3d 91, 95 (Or. 2005) ("[t]he Attorney General had concluded that Oregon's marriage statutes currently defined marriage as a union between a male and a female and, for that reason, . . . the Governor had directed state agencies not to give legal effect to marriage licenses issued to same-sex couples"); Lockyer v. San Francisco, 95 P.3d 459, 466 (Cal. 2004) ("[t]he Attorney General filed . . . a petition for an original writ of mandate").

149 *Id.*

150 *See* infra section I(c) discussing the fallout of marriage license issuance in Pennsylvania.

151 Certainly, executives must also interpret laws in order to enforce their true intent and meaning. However, where laws are clear, such as marriage laws defining marriage as one man and one woman, the only duty of the executive is to enforce that law.

152 Williams, *supra* note 143, at 596.

such time as the law is further amended or repealed, or until a court determines the law to be unconstitutional. Similarly, when the judiciary makes a determination about a law, there is finality in the decision. However, when an executive official chooses not to enforce a law, a subsequent elected or appointed official can make a different determination, leaving the law in a continual state of flux.[153]

4. Creates Premature Litigation or Fait Accompli

The 2013 New Mexico litigation clearly shows that the chaos that resulted from the lack of uniformity across the state due to various local government officials issuing same-sex marriage licenses circumvented the traditional adjudicatory process.[154] The *Griego v. Oliver* case was originally filed as a petition for a writ of mandamus at the New Mexico Supreme Court, but the court had refused to grant review and had directed the plaintiffs to file at the district court and build a record.[155] Later, however, upon inspecting the statewide chaos created by the varying individual interpretations of the law, the New Mexico Supreme Court was forced to take jurisdiction over the various lawsuits without the benefit of the full appellate review process.[156] The complete judicial process is designed to aid the judiciary in reaching a fully apprised decision. But here, the court was robbed of that opportunity because of the results of the administrative officials' actions.

When a county official makes a determination about the constitutionality of a law and then begins acting in conformance with his or her assessment, that official's actions can negatively impact the judiciary's ability to fully and fairly evaluate the issue. In each of the cases discussed above, the issuance of marriage licenses to same-sex couples in contravention of state law placed the judiciary in an untenable position. Because of the nature of these officials' actions in granting something that is statutorily prohibited, those who desire the prohibited item flock to the officials who are granting it. As the circuit court noted in the *Li* decision, the Multnomah County Clerk's issuance of marriage licenses presented the judiciary with "a fait accompli"[157] because so many licenses had already been issued. Similarly, the lower courts in California refused to issue a temporary order enjoining the continued issuance of marriage licenses by San

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153 *Id.* at 596.

154 Griego v. Oliver, 316 P.3d 865, 873 (N.M. 2013).

155 *Id.* at 872.

156 *Id.* at 872-73. *See also* Li v. State, 110 P.3d 91, 94 (Or. 2005) (Oregon Supreme Court accepting certified appeal from the Oregon Court of Appeals); Lockyer v. San Francisco, 95 P.3d 459, 466-67 (Cal. 2004) (Supreme Court accepting a petition for original writ of mandate).

157 Li v. State, No. 0403–03057, 2004 WL 1258167, at *10 (Or. Cir. Ct. Apr. 20, 2004), *overruled on other grounds by* Li v. State, 110 P.3d 91 (Or. 2005) (en banc).

Francisco, so the California Supreme Court was faced with a situation in which over 4,000 couples were affected.[158] The chaos and legal uncertainty that local officials' actions create often compel the judiciary to expedite its review.[159] Local officials' actions circumvent the judicial process and provide the judiciary with a fait accompli, which may produce hasty, ill-considered and antitherapeutic decisions.

As was discussed previously, the judiciary's consideration of these issues, when pressed by a local official's disregard for existing law, may be circumscribed such that a truly optimal result is not accomplished due to the expedited nature of the proceedings. Additionally, the legislature is the branch of government best equipped to craft social policy, but its function is usurped by the local official's actions, and then by the judiciary, which is forced to step in.

### *C. Local Officials' Actions in Contravention of State Law Attenuate the Benefits that Accrue in our Federal System by Subverting the State as Laboratory.*

A well-established strength of our federal system is that the states can serve as laboratories for social policy. As one scholar noted, federalism provides two benefits in this context: (1) it "permits pragmatic testing of novel policy proposals;" and (2) it "operates to edify and engage the citizenry."[160] Over the last number of years, the benefits of the federal social laboratory have been readily seen in the changing social policies concerning family structures throughout the several states; some states adopted civil unions, some adopted domestic partnerships, some enacted constitutional protections enshrining marriage as between one man and one woman, and still others enacted same-sex marriage. When local officials make individual determinations about the constitutionality of the law in their state and make an independent determination of whether to enforce the law as the legislature has enacted it, they attenuate the benefits of our federal system as laboratory. By making a contrary determination, they usurp the legislature's power and remove the discussion from the citizenry and the electoral process. Their actions inevitably also halt whatever social system

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[158] *Lockyer*, 95 P.3d 459.

[159] Li v. State, No. 0403–03057, 2004 WL 1258167, at *1 (Or. Cir. Ct. Apr. 20, 2004) ("The present case arrives before this court on an expedited basis. Some concerns have been voiced about a 'rush to judgment,' but circumstances compel this court to shorten the normal progression of this lawsuit to resolve what has turned out to be a rather unsettling and divisive issue which arose quite suddenly and basically without warning."); Commonwealth v. Hanes, No. 379 M.D. 2013, at 7, 12 (Pa. Comm. Ct. Sept. 2013) (the mandamus petition was filed on August 5, 2013 and oral argument was held less than one month later); *Lockyer*, 95 P.3d at 467 (establishing "an expedited briefing schedule").

[160] Akhil Reed Amar, *Five Views of Federalism: Converse-1983 In Context*, 47 VAND. L. REV. 1229, 1234 (1994).

was percolating in the crucible of their state and risk that the nation will not be able to assess the strengths or ills of that policy because its duration of experimentation was cut short.

## IV. Conclusion

The debate over same-sex marriage is the type of social and constitutional question best suited to resolution by the legislature and judiciary. While advocates of same-sex marriage are seeking to advance their cause by multiple means and mediums, the most recent civil disobedience tactic of recruiting government officials who are willing to defy duly enacted laws by issuing marriage licenses to same-sex couples is a dangerous one. This tactic undermines the rule of law generally, displaces the branches of government that are best equipped to address the merits of the issue, and attenuates the benefits of our democratic system of social experimentation, while simultaneously producing antitherapeutic consequences for the very individuals same-sex marriage advocates are seeking to benefit. Because this tactic threatens the very foundations of our democratic system, this tactic should not be employed—in this context or in any context.

# Splitting the Baby: The Gap in Arizona's Adoption and Paternity Laws That Split the Bench

Lori Rush*

## I. Introduction

Until the United States Supreme Court decided *Stanley v. Illinois*[1] in 1972, fathers of children born out of wedlock were not even entitled to notice of a pending adoption of their children, much less the right to object.[2] Since then, unwed fathers generally have gained the right to receive notice of a potential adoption of their child;[3] however, some states have created a number of requirements that the potential father must meet in order to assert his paternal rights to the child.[4]

Currently, Senate Bill ("S.B.") 1061 is being considered by the Arizona Legislature. This bill would change the notice requirements for unwed fathers associated with the potential adoption of their children.[5] Specifically, S.B. 1061 attempts to address an inconsistency in the number of days an unwed father has to assert a paternity action after he receives notice of his child's potential adoption.[6] Additionally, S.B. 1061 would allow a mother to keep her contact information confidential by listing her adoption attorney or adoption agency's contact information on the notice sent to the father, if the mother so chooses.[7]

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1 Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972).

2 Ann M. Haralambie, *Unmarried Father's Rights To Object To Adoption,* Handling Child Custody, Abuse and Adoption Cases § 3:12, (West 2013).

3 Ann M. Haralambie, *Unmarried Fathers,* Handling Child Custody, Abuse and Adoption Cases § 14:6, (West 2013).

4 Haralambie, *supra* note 2 ("Some state laws have a prerequisite that in order to be entitled to notice or to have the right to object to adoption of the child, unmarried fathers file a notice of their paternity claim within a certain period of time following the child's birth or that a putative father register on the putative father's registry. Failure to timely register may preclude the right to notice of any subsequent adoption unless paternity had already been adjudicated.").

5 Fact Sheet: S.B. 1061, 51st Leg., 2d Reg. Sess. (Ariz. 2014).

6 *Id.*

7 *Id.* (The mother's, attorney's, or adoption agency's contact information is used when the father serves notice of his paternity action).

The inconsistency in current adoption and paternity laws has lead to a split of authority in Maricopa County family courts.[8] This conflict may have arisen because adoption cases are heard in juvenile court and paternity actions are heard in family court.[9] Recently, some family court judges have allowed unwed fathers to assert a paternity claim in family court more than thirty days after the father received notice of the adoption.[10] These decisions are in conflict with Arizona's adoption law, which requires fathers to assert a paternity claim within thirty days of receiving notice of the potential adoption.[11] However, the decisions do not violate Arizona's paternity laws, which permit fathers to assert a claim within 120 days of receiving notice.[12] Despite one's opinion of the rights of unwed fathers in adoption cases, S.B. 1061 will positively impact those involved in adoption cases because it will (1) resolve an inconsistency in the law, (2) address the split of authority in Maricopa County, and (3) provide a simpler way for the father to serve the mother in the paternity action.

This comment evaluates current Arizona adoption and paternity laws with regard to the notice requirements of unwed fathers. Additionally, this comment will discuss the "narrow gap"[13] in the timeframe for filing a paternity action under Arizona's adoption and paternity laws and the three cases that fell within that gap, splitting the family court bench. Finally, this comment will analyze S.B. 1061 for its application to adoption and paternity cases, as well as the impact on an unwed father's rights in adoption cases.

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[8] *Paternity; Hearing on S.B. 1061 Before the Senate Health and Human Servs. Comm.*, 51st Leg., 2d Reg. Sess. (Ariz. 2014) at 24:55, http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=13220.

[9] *Id.* at 24:57.

[10] *Id.* at 24:50.

[11] *See* Ariz. Fact Sheet: S.B. 1061. *See also*, Thomas A. Jacobs, *Consents*, 5 Ariz. Prac. Juv. Law & Practice §7:9, (West 2013) (The father must bring the paternity action within 30 days from the time he received notice of the potential adoption).

[12] *Id., See also*, ARIZ. R. Civ. P. 4(i).

[13] Hearing, *supra* note 8, at 22:38 (Proponents of the bill indicate that the gap in the two laws is narrow because it only applies to the specific situation where an unwed father may desire to assert parental rights to a child facing an adoption. This situation is covered by adoption code, but not specifically referenced in paternity code).

## II. Background: The Current Gap in Adoption and Paternity Laws

### *A. Current Arizona Laws Governing Paternity Actions*

#### 1. Arizona Adoption Law

The Arizona laws governing adoption are found within Title 8, Chapter 1, and provide timeframes required to assert a paternity claim for a child pending adoption.[14] Normally, the mother and father's consent is required before an Arizona juvenile court can grant a child's adoption.[15] Arizona's adoption laws require potential fathers to receive notice of the pending adoption proceeding[16] whenever the father and mother were unmarried at the time of the child's birth, paternity has not been established by the court, or the father has not adopted the child.[17]

The father's notice must contain the mother's name and address, unless the mother proves to the court that her safety will be at risk if her address is provided to the father.[18] Notice is important because it provides the father with the following information: (1) an adoption of his child is planned and he has the right to consent or withhold his consent; (2) he has the right to seek custody of that child; (3) if paternity is established, he is obligated to provide child support; and, (4) if he does not initiate paternity proceedings within thirty days following his receipt of the notice, he is barred from asserting any interest in his child.[19] After the father receives notice, if he fails to file a claim of paternity within the thirty-day timeframe: (a) his consent to the adoption is no longer required; (b) he loses his right to receive any additional notifications of his child's future adoption hearings;[20] and, most importantly, (c) he is forever barred from bringing any claim asserting his paternity rights for that child.

#### 2. Arizona Paternity Law

Paternity proceedings are contained within Title 25, Chapter 6,[21] and provide timeframes in which fathers may initiate a paternity proceeding. Under paternity law, a potential father may bring a paternity proceeding by filing a

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14 Fact Sheet: S.B. 1061, 51st Leg., 2d Reg. Sess. (Ariz. 2014).

15 Ariz. Rev. Stat. Ann. § 8-106 (a)(1-2).

16 Ariz. Rev. Stat. Ann. § 8-106 (g).

17 Ariz. Rev. Stat. Ann. § 8-106 (a)(2).

18 Ariz. Rev. Stat. Ann. § 8-106 (h) & (i).

19 Thomas A. Jacobs, *Consents*, 5 Ariz. Prac., Juv. Law & Practice §7:9, (West 2013).

20 *Id.*

21 *See, e.g.*, Ariz. Rev. Stat. Ann. § 25-803.

petition during the mother's pregnancy or after the child is born.[22] Paternity law also indicates that the procedure for filing "shall be as in other civil cases."[23] According to Arizona Rules of Civil Procedure, the timeframe for service of a complaint in a civil action is 120 days.[24] In other words, under Arizona paternity law, an unwed father can institute the paternity action while the mother is pregnant or after the child is born, as long as the father serves the mother within 120 days from the date he filed the petition.

### *B. The Narrow Gap in Arizona Laws Governing Paternity Actions*

Arizona's paternity code does not cross-reference the adoption code or the thirty-day timeframe, creating a "very narrow gap"[25] in the paternity laws regarding the amount of time the unwed father has to assert a paternity claim for a child who will potentially be adopted.[26] Since 2012, some family court judges in Maricopa County have failed to recognize the adoption law's thirty-day timeframe because the adoption law's thirty-day timeframe is not referenced in the paternity statutes.[27] In those cases, family court judges have allowed potential fathers to file paternity actions after the expiration of the thirty-day timeframe.[28]

## III. Arizona Courts' Split on Paternity Action Requirements: Three Cases

During the hearing on S.B. 1061 before the Senate Health and Human Services Committee (the "Committee"), attorney Phillip "Jay" McCarthy, Jr. stated that in Maricopa County, a split of authority has emerged among trial judges because the adoption law is not referenced in the paternity law.[29]

Proponents of S.B. 1061, like Mr. McCarthy, informed the Committee of three Maricopa County cases since 2012 where the family court allowed paternity actions to proceed based on paternity law, despite the adoption law's thirty-day restriction.[30] In the first case, a family court judge allowed an unwed father to serve the paternity action on the mother after the thirty-day

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22 Fact Sheet: S.B. 1061, 51st Leg., 2d Reg. Sess. (Ariz. 2014).; *See also*, Ariz. Rev. Stat. Ann. § 25-804.

23 *Id.*; *See also*, Ariz. Rev. Stat. Ann. § 25-806 (c).

24 *Id.*; *See also*, Ariz. R. Civ. P. 4(i). (Stating that service of the summons and complaint upon the defendant must be done within 120 days from the date the complaint was filed).

25 Hearing, *supra* note 8, at 22:38.

26 Hearing, *supra* note 8, at 22:46.

27 Hearing, *supra* note 8, at 24:55.

28 Hearing, *supra* note 8, at 25:48, 26:30, & 29:57.

29 Hearing, *supra* note 8, at 36:02.

30 Hearing, *supra* note 8, at 36:02.

timeframe elapsed because the adoption code was inconsistent with the rules of procedure governing family court actions.[31] This case was appealed, and in an unpublished decision the court of appeals acknowledged a conflict in the laws that needed resolution.[32] In the second case, the judge did not recognize the adoption law's thirty-day requirement, and stated that an unwed father has the right to file a paternity action at any time, without restriction.[33] In the third case, an unwed father received notice and agreed with the mother's adoption plan for their child. But two weeks after the child was born, seventy days after receiving notice, the father filed a paternity action, which was allowed by the family court judge.[34] This split has caused confusion among professionals in the adoption field, and uncertainty for birth parents and adoptive parents involved in an adoption.[35]

## IV. Analysis: Proposed Changes and Impact

### *A. Allowing a Substitute to Receive Notice of the Father's Paternity Action*

Currently, A.R.S. section 8-106 requires the affidavit submitted by the mother containing the potential father's name and contact information to also include the biological mother's address.[36] This affidavit is sent to the unwed father.[37] The one exception to this requirement applies only if the mother submitts an application to the court for permission to omit her address and proves "to the court's satisfaction" that it was "necessary to protect her safety."[38]

Senate Bill 1061 eliminates the biological mother's burden to prove that her safety would be at risk if she included her contact information on the affidavit to the court naming the potential father.[39] Additionally, S.B. 1061 allows the mother to opt out of including her address for no reason at all, as long as another agent, such as the adoption agency, or the mother's licensed attorney agrees to accept service on her behalf.[40]

The substitution of an agency or attorney to receive service on behalf of the mother is "designed to assist a birth father" who wants to assert his paternity rights and contest the adoption plan, because "it removes the [father's] argu-

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[31] Hearing, *supra* note 8, at 25:48.
[32] Hearing, *supra* note 8, at 25:57.
[33] Hearing, *supra* note 8, at 26:30.
[34] Hearing, *supra* note 8, at 29:55.
[35] Hearing, *supra* note 8, at 31:19.
[36] Ariz. Rev. Stat. Ann. § 8-106.
[37] *Id.*
[38] *Id.*
[39] Fact Sheet: S.B. 1061, 51st Leg., 2d Reg. Sess. (Ariz. 2014).
[40] *Id.*

ment" that the mother could not be located and served within thirty-days.[41] Proponents of this change say it is highly important because "many women who are considering adoption are transient," and do not have a permanent or consistent address.[42] This issue could arguably benefit both parents because it allows the father to more easily serve the mother via her attorney or adoption agent, both of whom would presumably have a permanent address, and allows the mother to receive service she may not otherwise receive.

### *B. Incorporating the Adoption Law's Timeframe into Paternity Law: "A Small Fix"?*

According to the S.B. 1061 Fact Sheet, SB1061: (1) "[c]larifies that a potential father who fails to file and serve the mother within thirty-days[43]. . . waives his right to be notified of any adoption proceeding or the termination of his parental rights" and waives his consent to adoption or termination; (2) states the father is "prohibited from bringing or maintaining any legal proceeding to assert any interest in the child," including a paternity action, unless he files a paternity action within thirty-days; and (3) "[r]equires the court to dismiss any proceeding that is barred pursuant to A.R.S. § 8-106 subsection J."[44]

At the hearing before the Committee, adoption attorney Rita Meiser explained that S.B. 1061 will address the gap between the adoption and paternity laws, and ensure that the provision in the adoption code will govern in the family court "only in this narrow situation where notice of a potential adoption has been served upon the father."[45] Ms. Meiser further explained that the adoption laws and the associated thirty-day timeframe, "created a defined and secure process for adoptive placements," that has been relied upon since 1994,[46] when the Arizona legislature first enacted the adoption laws.[47] Senator Nancy Barto referred to S.B. 1061 as "a small fix to the language [of the paternity law]."[48]

But is S.B. 1061 more than a "small fix"? Did the judges who allowed paternity actions filed according to paternity law–within 120 days–get it right?

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[41] Statement by Rita Meiser, who also mentioned that the mother could still include her contact information and be served directly. Hearing, *supra* note 8, at 27:20.

[42] *See* Statement by Phillip "Jay" McCarthy, Hearing, *supra* note 8, at 36:40.

[43] Fact Sheet: S.B. 1061, 51st Leg., 2d Reg. Sess. (Ariz. 2014) (The thirty-day timeframe begins when the father is served with notice by the mother).

[44] *Id.*

[45] Hearing, *supra* note 8, at 26:03.

[46] Hearing, *supra* note 8, at 25:05.

[47] Hearing, *supra* note 8, at 23:20.

[48] Hearing, *supra* note 8, at 22:10.

Or are those three cases errors according to a twenty-year history of family courts following the adoption law's thirty-day timeframe?

### *C. Other Arizona Counties and Other States*

Mr. McCarthy stated during the Committee hearing that no other Arizona counties have allowed paternity actions to proceed in adoption cases after thirty days, and that Yavapai, Mohave, Coconino and Navajo County judges do not "ignore" the adoption law if a father brings a paternity action in family court.[49] Additionally, proponents of the bill stated that the thirty-day timeframe in the adoption code is consistent with U.S. Supreme Court decisions[50] and "is consistent throughout the U.S." because several states have identical or similar laws.[51]

### *D. Legislative Intent*

According to Ms. Meiser, in 1994 the Arizona legislature created the procedure to address an unwed biological father's constitutional rights in adoption proceedings.[52] The legislative intent behind the 1994 adoption laws was to allow unwed mothers to make a secure, timely adoption plan for the child in a situation where the father has expressed no interest in parenting or being responsible for the child.[53] Attorney Phillip "Jay" McCarthy informed the Committee that judges "ignoring" the adoption law's thirty-day timeframe in family court was "a great injustice" and "never the intent" of the legislature.[54]

If this was the Arizona Legislature's intent, it could be argued that S.B. 1061 will have no negative impact on an unwed father's rights in adoption cases, because the father never had the right to assert a paternity claim after thirty days in the first place. Therefore, it appears that in those three cases where fathers were permitted to assert paternity claims after thirty days in adoption cases, the court created a right for those fathers that never actually existed due to a simple failure of the Arizona legislature to cross-reference two Arizona laws: adoption law and paternity law.

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[49] Hearing, *supra* note 8, at 35:50.

[50] Hearing, *supra* note 8, at 23:50 (The United States Supreme Court recognizes an unwed father's right to due process, notice and opportunity to be heard, if that father desires asserting a custodial interest in his child).

[51] Hearing, *supra* note 8, at 37:19 (Mr. McCarthy indicated that states such as Illinois, Texas, Utah, and Oregon have the thirty-day timeframe like Arizona's adoption laws).

[52] Hearing, *supra* note 8, at 23:20.

[53] Hearing, *supra* note 8, at 24:05.

[54] Hearing, *supra* note 8, at 34:30.

## V. Conclusion

The question remains whether S.B. 1061 is merely "a small fix to the language"[55] of two Arizona statutes, or if S.B. 1061 will significantly reduce the amount of time an unwed father has to assert his right to a child facing an adoption. According to proponents of the bill, because most Arizona family courts have applied the adoption law's timeframe and the legislature intended this thirty-day timeframe for these situations, S.B. 1061 does nothing more than fill a small gap in the two laws. On the other hand, one could see how family court judges applying paternity laws to paternity actions would apply the 120-day timeframe associated with those paternity laws. Despite the position one takes on an unwed father's rights in adoption cases, S.B. 1061 will positively impact those involved in adoption cases for the simple fact that it will resolve an inconsistency in Arizona law, address the split of authority in Maricopa County's family court, and provide a simpler way for the father to serve the mother in the paternity action.

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[55] Hearing, *supra* note 8, at 22:10.

# The Value of a Life: Inequality in Surviving Spouse Benefits for Same-sex Marriages†

David Keys-Nunes*

> *A spirited and controversial debate is underway regarding who may enjoy the right to marry in the United States of America. America has pursued a journey to make and keep our citizens free. This journey has never been easy, and at times has been painful and poignant. The ultimate exercise of our freedom is choice. Our Constitution declares that "all men" are created equal. Surely this means all of us. While ever-vigilant for the wisdom that can come from the voices of our voting public, our courts have never long tolerated the perpetuation of laws rooted in unlawful prejudice. One of the judiciary's noblest endeavors is to scrutinize laws that emerge from such roots.*[1]

## I. Introduction

While the debate over same-sex marriage rages throughout the country, more and more couples are legally marrying in the increasing number of states that allow same-sex marriage.[2] These couples represent a cross-section of society that bridges all socio-economic and racial gaps. They are raising families together, supporting their aging parents together, buying homes together, and planning on retiring together. Inevitably, some of these same-sex couples find themselves in the position of having one or both spouses employed by state or municipal governments.

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† *Editor's note: This article was selected for publication in April 2014 and represents the state of the law at that time. The legal landscape surrounding same-sex marriage is rapidly changing. As such, statistics stated in this article may no longer reflect the number of states allowing same-sex marriage.*

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1 Bostic v. Rainey, No. 2:13CV395, 2014 WL 561978, at *460 (E.D. Va. Feb. 13, 2014).

2 *See infra* notes 5-7.

For some same-sex couples, their status as a same-sex couple presents few or no challenges in seeking employment benefits from their state. This is especially true for those individuals who are able to marry in their state of domicile. But many same-sex couples must travel in order to become lawfully married as a result of statutory or constitutional bans on same-sex marriage in their home states.[3]

Presently, the number of states that allow same-sex marriage is seventeen, plus the District of Columbia.[4] Some of these states have passed same-sex marriage through legislative or referendum actions.[5] Others began to recognize same-sex marriage based on constitutional interpretations within their courts.[6] Most recently, some states are being compelled to recognize same-sex marriage by the federal courts on the premise that the denial of same-sex marriage on the basis of sexual orientation violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment.[7] Many speculate that it will still be a number of years before the matter is ultimately resolved by the United States Supreme

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[3] *Marriage Center*, HUM. RTS. CAMPAIGN, http://www.hrc.org/campaigns/marriage-center (last visited Nov. 15, 2014) (33 states currently prohibit same-sex marriage).

[4] *Id.*

[5] Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington.

[6] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Garden State Equal. v. Dow, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013), *stay denied*, 79 A.3d 1036 (N.J Sup. Ct. 2013); Griego v. Oliver, 316 P.3d 865 (N.M. 2013).

[7] California's Supreme Court ruled that the state constitution did not allow prohibition of same-sex marriage. *In re* Marriage Cases, 183 P.3d 384, (Cal. 2008). Proposition 8 passed shortly thereafter and amended the California Constitution to prohibit same-sex marriage. CAL. CONST. art. I, § 7.5. Same-sex couples filed a federal lawsuit to challenge the amendment. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010). This decision was affirmed by the Ninth Circuit in Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), but the Ninth Circuit's opinion was later vacated by the Supreme Court in Hollingsworth v. Perry, 133 S.Ct. 2652 (2013), (holding that the proponents of Proposition 8 lacked standing to appeal the order of the district court). The district court ruled that Proposition 8's amendment was unconstitutional. *Id.* The following cases have been stayed pending appeal: DeBoer v. Snyder, No. 12-CV-10285, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014); De Leon v. Perry, No. SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014); Bostic v. Rainey, No. 2:13CV395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (holding Kentucky must recognize legally performed out-of-state same-sex marriages); Bishop v. United States *ex rel.* Holder, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014); Kitchen v. Herbert, No. 2:13-CV-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013); *see also* Obergefell v. Wymyslo, No. 1:13-CV-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013) (limited ruling that Ohio must honor legally performed out-of-state same-sex marriages on death certificates because Ohio constitutional and statutory bans on same-sex marriage violate the Due Process and Equal Protection Clauses of the United States Constitution).

Court.[8] In the meantime, there is often little or no recognition of those marriages that were legally performed in a state other than the couple's home state when the home state has a ban on same-sex marriage.[9]

Many states require that their own employees and the employees of their municipalities participate in a pension system.[10] The survival of the system depends upon current members' contributions in order to pay obligations owed to retired members.[11] This mandatory payment is often codified in state and local law and does not allow members to opt out of payment.[12] The state or municipal employer will often have its own contribution requirements to its employees' plans as well.[13] For this reason, pension benefits represent a large part of an employee's compensation package.[14]

One of the benefits of paying into the pension system is the security provided to a member's surviving spouse in the event the member predeceases his or her spouse.[15] In states that do not recognize same-sex marriages, the statutory language surrounding the pension becomes vital.[16] Many states that have prohibited same-sex marriage have defined "spouse" as a member of a marriage between one man and one woman.[17] This definition would exclude from death benefits any legally married same-sex spouse if the benefit is exclusively for "spouses."[18] What is left is often a lump sum payout, available to any designated beneficiary that is significantly less than the benefit that is conferred upon opposite-sex couples.[19] States that refuse benefits on the basis of a same-

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[8] *E.g.*, The Times Editorial Board, *Same-sex marriage at the Supreme Court, again*, L.A. TIMES, (Jan. 29, 2014), http://articles.latimes.com/2014/jan/29/opinion/la-ed-gay-marriage-utah-supreme-court-20140129.

[9] Letter from Ivy Voss, Asst. Att'y Gen., Ariz. Att'y General's Office, to author (July 24, 2013) (on file with author).

[10] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 38-727, 847.01, 884 (2014); Erika Becker-Medina & Katheryn Brigham, *Public Pensions: State Administered Defined Benefit Data Summary Report: 2012*, U.S. CENSUS BUREAU (Aug. 2013), https://www.census.gov/content/dam/Census/library/publications/2013/econ/g12-cg-spp-st.pdf.

[11] *See* S.B. 1609, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (changed employee contribution rate to the Public Safety Personnel Retirement System from 7.65% to 11.65% to help bring system back into solvency).

[12] *See, e.g.*, ARIZ. REV. STAT. ANN. § 38-843 (2014).

[13] *Id.*

[14] *Id.* (the employee and employer contributions combine to fund the defined benefit system, which provides the employee with the guaranteed benefit for life).

[15] ARIZ. REV. STAT. ANN. § 38-846 (2014).

[16] *Compare* ARIZ. REV. STAT. ANN. § 38-846 (provides that benefits are payable to a "spouse," which under Arizona law is limited to a person of the opposite sex), *with* ARIZ. REV. STAT. ANN. § 38-762 (benefits are payable to a designated beneficiary without use of the term "spouse").

[17] *See Marriage Center*, *supra* note 3; *see also* ARIZ. CONST. art. XXX, § 1.

[18] Voss, *supra* note 9.

[19] ARIZ. REV. STAT. ANN. § 38-846.

sex marriage ban effectively place a price tag on the value of that fallen public servant's life.

As additional states continue to recognize and allow same-sex marriages, the number of married same-sex couples will continue to grow. This will increase pressure, and likely litigation, within states that still prohibit same-sex marriages to express how they will treat legally married same-sex couples seeking equal treatment compared with their legally married opposite-sex counterparts. This issue has only begun to take shape within the last decade due to the rapid increase in states allowing same-sex marriage.[20] As a result, the case law surrounding the issue is minimal, but this will also change as the incidence of married couples of the same sex moving to non-same-sex marriage states increases. Beginning in December 2013, the wave of litigation regarding same-sex marriages (including those legally performed out-of-state and not recognized in-state) has dramatically increased.[21] Several federal district courts have begun striking down state bans on same-sex marriage as unconstitutional.[22]

This article will first provide a brief outline of the evolution of same-sex marriage in Part II.[23] In Part III, it will illustrate the differences between state and private pension plans, paying particular attention to the large portion of an employee's compensation package that a state pension plan represents.[24] Part IV will evaluate the disparate treatment of same-sex couples juxtaposed with their opposite-sex counterparts through discussion of the difficulties created by the differing treatment in family planning and estate resolution.[25] Equal protection and due process issues are generated when some states fail to recognize same-sex marriages celebrated in other states.[26] Part V will briefly discuss the rapid expansion of same-sex marriage among the states.[27] Part VI will discuss available case law and will emphasize the importance of recognizing legal same-sex marriages for benefit purposes and the harm that is done by failure to treat those couples equally.[28] Recommended solutions and protections for legally married same-sex couples will be provided in Part VII.[29] This article will conclude with the assertion that non- same-sex marriage states' failure to grant surviving spouse benefits to same-sex couples is a denial of equal protec-

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[20] *See infra* Part IV.

[21] *See* cases cited *supra* note 7.

[22] *Id.*

[23] *See infra* Part II.

[24] *See infra* Part III.

[25] *See infra* Part IV.

[26] *Id.*

[27] *See infra* Part V.

[28] *See infra* Part VI.

[29] *See infra* Part VII.

tion under the law.[30] Arizona law will be used as a case study of a problem that exists in all states that refuse to recognize same-sex marriage.

## II. The Recognition of Same-sex Marriage is Brief, but Rapidly Gaining Momentum Within the Courts

Whether or not to allow people of the same sex to marry has been an issue before the courts for more than forty years.[31] States did not aggressively begin to take steps to prohibit, through statutory and constitutional measures, same-sex marriage until 1993.[32] It was then that Hawaii's Supreme Court held that a prohibition of same-sex marriages must pass a strict-scrutiny test, as the Hawaii statute prohibiting same-sex marriage was a sex-based classification.[33] The court based its decision on the application of the Hawaii Equal Protection Clause.[34] In 1996, on remand, the trial court determined that Hawaii's statute failed to meet the high burden of strict scrutiny and enjoined state officials from refusing to grant marriage licenses on the basis of applicants being of the same sex.[35] Hawaii then amended its constitution to allow the legislature to limit marriage to opposite-sex couples; thus, the decision in *Baehr* was rendered moot.[36]

In response to the possibility that courts might begin to find that same-sex marriage was a legal practice, states around the nation began to pass statutes and amend their constitutions to prohibit it.[37] Among those states, in 1996, Arizona prohibited same-sex marriage and the recognition of same-sex marriages that were performed in other jurisdictions.[38] The only prohibition for the next twelve years appeared in the Arizona Revised Statutes; there was no constitutional amendment.[39] It was not until 2008 (after a failed attempt in 2006)

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[30] *See infra* Part VIII.

[31] One of the first cases in the history of same-sex marriage was *Baker v. Nelson*, in which the Minnesota Supreme Court held that prohibitions on same-sex marriage did not violate the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution. Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971). The Supreme Court of the United States dismissed an appeal because the issue did not present a substantial federal question. Baker v. Nelson, 409 U.S. 810 (1972). This is likely no longer controlling precedent, given the Supreme Court's willingness to address same-sex marriage in *United States v. Windsor*, 133 S.Ct. 2675 (2013). Kitchen v. Herbert, No. 2:13-CV-217, 2013 WL 6697874, (D. Utah Dec. 20, 2013).

[32] Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. Cal. L. Rev. 1153, 1184-87 (2009).

[33] Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993).

[34] Haw. Const. art. I, § 5; Baehr v. Lewin, 852 P.2d at 68.

[35] Baehr v. Lewin, No. 91-1394, 1996 WL 694235, at *22 (Cir. Ct. Haw. Dec. 3, 1996).

[36] Haw. Const. art. I, § 23.

[37] Schacter, *supra* note 32, at 1185-86.

[38] S.B. 1038, 42d Leg., 2d Reg. Sess. (Ariz. 1996).

[39] Ariz. Rev. Stat. Ann. §§ 25-101(C), 25-112(A) (2014).

that Arizona amended its constitution to limit marriage to one man and one woman.[40] But even before that, Arizona's statutory prohibition had been upheld by the Arizona Court of Appeals in 2003.[41] In reaching its decision, the Arizona Court of Appeals held that there was not a fundamental right under both the Arizona and United States Constitutions to marry someone of the same sex.[42] The court applied rational-basis review in reaching its decision.[43]

Among the state interests advanced by Arizona, the court agreed that procreation, child-rearing, and encouraging opposite-sex couples to marry were sufficient to pass rational-basis review.[44] While acknowledging the argument that there are opposite-sex couples incapable of procreation, the appellate court explained that there was a fundamental right to opposite-sex marriage which would require a compelling government interest and narrowly tailored approach to ban it.[45] Thus, it appears that the court viewed same-sex marriage as separate from the fundamental right to marriage that exists in federal case law, and it declined to find a new fundamental right to same-sex marriage.

The conflict regarding whether there was already a fundamental right to marriage, regardless of the gender of the spouses, or whether same-sex marriage constituted a new fundamental right, or whether there was no right to marry someone of the same sex at all had become a major point of contention among the courts. Approaches to those basic questions evolved over the following decade.[46] Near the time that the Arizona Court of Appeals was deciding *Standhardt*, the Massachusetts Supreme Judicial Court held that a ban on same-sex marriage was unconstitutional.[47] It did not reach the question of whether strict scrutiny applied to sexual orientation.[48] Instead, the court said that the Massachusetts prohibition of same-sex marriage could not even survive rational basis review under a due process or equal protection analysis.[49] This has generally been the conclusion of the courts that subsequently have overturned state bans on same-sex marriage post-*Windsor*.[50]

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[40] ARIZ. CONST. art. 30, § 1; *see also Proposition 107*, ARIZ. SEC'Y OF STATE (Sept. 2006), http://www.azsos.gov/election/2006/Info/PubPamphlet/Sun_Sounds/english/Prop107.htm.

[41] Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003).

[42] *Id.* at 460.

[43] *Id.* at 460-64.

[44] *Id.*

[45] *Id.* at 462.

[46] *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Garden State Equal. v. Dow, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013), *stay denied*, 79 A.3d 1036 (N.J. Sup. Ct. 2013); Griego v. Oliver, 316 P.3d 865 (N.M. 2013).

[47] *Goodridge*, 798 N.E.2d at 975.

[48] *Id.* at 961.

[49] *Id.*

[50] *See* cases cited *supra* note 7.

## III. State Pension Plans Differ Greatly From Private Pension Plans

Some might suggest that pensions are an anachronism, but pensions are still being offered in the private and public sectors.[51] A recent survey found that 30% of companies offer pensions to new hires.[52] Of those, 70% plan to offer the pensions for at least the next five years.[53] Every state in the United States offers at least one government pension program to some of its employees: Louisiana and Massachusetts offered the most pension programs at fourteen apiece.[54],[55] There were 17,519,221 people enrolled in state-run pension plans in 2012.[56] This represented a slight increase from 2011.[57] Additionally, there were 7,603,954 beneficiaries of such systems in 2012, which represented a 3.7% increase over 2011.[58] The census defines beneficiaries as "retirees and

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[51] *See infra* notes 52-54.

[52] Jerry Geisel, *Fewer Employers Offering Defined Benefit Pension Plans to New Salaried Employees*, Workforce, (Oct. 2013), http://www.workforce.com/articles/fewer-employers-offering-defined-benefit-pension-plans-to-new-salaried-employees.

[53] Jonelle Marte, *You can still get a job with a pension*, Marketwatch (Nov. 13, 2013), http://www.marketwatch.com/story/you-can-still-get-a-job-with-a-pension-2013-11-13.

[54] Beckham-Medina & Brigham, *supra* note 10.

[55] In 1974, the United States Congress recognized the importance of protecting pensions for those employees who had paid into the system counting on their contributions to carry them through retirement. David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. Pitt. L. Rev. 427, 443-48 (1987); *see generally* Employee Retirement Income Security Act, 29 U.S.C.A. §§ 1001-1461 (2012). As a result of several pensions being unable to pay their obligations, Congress enacted the Employee Retirement Income Security Act ("ERISA") as a means of carrying out this protection. Gregory, *supra*, at 444-45. ERISA went so far as to create the Pension Benefit Guaranty Corporation ("PBGC") to ensure that pension payments were being made to employees whose plans were unable to fulfill their obligations. *Id.* at 448. Congress has amended this law several times since its enactment in 1974. Michael S. Sirkin, *The 20 Year History of ERISA*, 68 St. John's L. Rev. 321, 322-23 (1994). When signing one such amendment in 2006, President Bush remarked, "Americans who spend a lifetime working hard should be confident that their pensions will be there when they retire." Peter Baker, *Bush Signs Sweeping Revision of Pension Law*, Wash. Post (Aug. 18, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/08/17/AR2006081700139.html. This emphasizes the important role that pensions play in retirement planning. For all the protections that ERISA provides to private sector employees, its coverage does not extend to public sector employees. 29 U.S.C. § 1003(b)(1) (2012). That does not alter the importance of public sector pensions in retirement planning for those employees. In fact, it has been suggested that Congress should extend ERISA to government employees or create a new act that confers the same type of benefits upon public employees. James Allen, Jr., & Richard Bales, *ERISA Failures and the Erosion of Workers' Rights: The Urgent Need to Protect Private & Public Workers' Pensions and Benefits*, 75 Alb. L. Rev. 449, 478 (2012).

[56] Becker-Medina & Brigham, *supra* note 10, at 7.

[57] *Id.* at 7, 16.

[58] *Id.*

survivors of deceased retirees."[59] Pension plans are a measure of security that are relied upon by millions of Americans, and they are designed to provide benefits until death.

Public employees are often required to participate in the pension plans maintained by the states.[60] Most often these requirements are found within statutes that establish the pension programs.[61] Pensions are funded in different ways, but in many cases this funding comes from a combination of member contributions and employer contributions.[62] In essence, member contributions help to pay for current retiree benefits, banking on future members' contributions paying for them once they enter retirement. This is one reason for pension membership being a mandatory element of public sector employment.

Member contributions vary from state to state and system to system. In Arizona, the legislature passed a measure to increase required member contributions to the Public Safety Retirement System from 7.65% to 11.65% of their compensation.[63] That contribution rate is closely aligned with the recommended savings rate in the private sector to retire at age 67.[64] A report by Aon Hewitt, a risk management and human resources consulting firm, estimates that a 25-year-old employee should save 9% of her pay in order to retire with "adequate resources" at age 65.[65] In another report by the Center for Retirement Research at Boston College, the same 25-year-old retiring at 67 would be required to sock away at least 12% per year.[66]

Arguably, the amount of required savings by the private sector employee is similar to that which is automatically withheld from the public safety employee. The problem lies in the reality that many public safety employees do not pay into the social security system; thus, they will not have the ability to draw social security.[67] The estimated savings above account for social security replacing 41% of the private sector employee's final earnings.[68] A result of

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[59] *Id.*

[60] ARIZ. REV. STAT. ANN. §§ 38-727, 38-847.01, 38-884 (2014).

[61] *Id.*

[62] *See, e.g.*, ARIZ. REV. STAT. ANN. § 38-843 (2014).

[63] *See* S.B. 1609, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

[64] *The Real Deal: 2012 Retirement Income Adequacy at Large Companies*, AON HEWITT 3, http://www.aon.com/attachments/human-capital-consulting/The_2012_Real_Deal_Report.pdf (last visited Nov. 23, 2014); Alicia Munnell et al., *How Much to Save for a Secure Retirement*, CENTER FOR RETIREMENT RESEARCH AT BOSTON COLLEGE (Nov. 2011), http://crr.bc.edu/wp-content/uploads/2011/11/IB_11-13-508.pdf; *see also* Ann Carrns, *Savings Gauge For Retirement*, N.Y. TIMES, Sept. 15, 2012 at B4.

[65] The Real Deal, *supra* note 64, at 3.

[66] Munnell et al., *supra* note 64, at 3.

[67] *State Governments' Public Safety Retirement Plans*, NAT'L CONF. OF ST. LEGISLATURES (2012), http://www.ncsl.org/documents/employ/pension-public-safety-table-8-6-12.pdf.

[68] Munnell et al., *supra* note 64, at 2.

this is an intense reliance upon the public sector pension plan to pay benefits for life.

Retirement planning is a complex task that requires immense forethought. One factor in the equation—not to be overlooked—is the care of one's spouse through the pensioner's retirement years and the spouse's. Many pension systems account for this by providing a "surviving spouse" benefit.[69] While these benefits vary, they often allow for payment of the pensioner's benefits to the surviving spouse until the spouse's death.[70] These are statutory obligations, designed to protect the people who paid into a system from which they could not opt out.[71]

By virtue of their status as statutorily established pensions, all aspects of input and output are controlled by state legislatures. Arizona's pension systems are codified in Title 38 of the Arizona Revised Statutes.[72] Three out of four pension systems have surviving spouse provisions within them: the Public Safety Personnel Retirement System, the Corrections Officer Retirement Plan, and the Elected Officials Retirement Plan.[73] All three plans are managed by the Public Safety Personnel Retirement System, but each has its own obligations under Arizona law.[74] The Arizona State Retirement System, which includes teachers and non-public safety positions has a beneficiary system that does not rely on spousal definitions.[75]

Benefits paid to legally married same-sex spouses under state pension plans turn upon the approval or disapproval of the legislative body in the state.[76] While more and more states are allowing same-sex marriage, there are several states that do not.[77] States have taken different approaches to same-sex marriage. Some states recognize only the union of one man and one woman as a valid marriage, while other states have a complete ban on recognizing any other relationship that is similar to a same-sex marriage.[78] Regardless, a pen-

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[69] *See, e.g.*, ARIZ. REV. STAT. ANN. § 38-846 (2014).

[70] *Id.*

[71] *See* ARIZ. REV. STAT. ANN. §§ 38-727, 38-846, 38-847.01, 38-884 (2014); *see also* Becker-Medina & Brigham *supra* note 10.

[72] ARIZ. REV. STAT. ANN. §§ 38-711 to 38-794 (Arizona State Retirement System), 38-801 to 38-822 (Elected Officials Retirement Plan), 38-842 to 38-860 (Public Safety Personnel Retirement System), 38-881 to 38-912 (Corrections Officer Retirement Plan).

[73] ARIZ. REV. STAT. ANN. §§ 38-801 to 38-822, 38-842 to 38-860, 38-881 to 38-912.

[74] ARIZ. REV. STAT. ANN. §§ 38-803, 38-848, 38-883 (2014).

[75] ARIZ. REV. STAT. ANN. § 38-762 (2014).

[76] Voss, *supra*, note 9; Statement from Mayor Greg Stanton, City of Phoenix, Same-sex Pension Benefits (Feb. 6, 2014) (on file with author).

[77] *See Marriage Center*, *supra* note 3.

[78] *Compare* ARIZ. CONST. art. XXX, § 1 ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state."), *with* N.D. CONST. art. XI, § 28 ("Marriage consists only of the legal union between a man and a woman. No other domestic union, however

sioner who is legally married in one state, but resides in a non-same-sex marriage state would not have the statutory protections of a surviving spouse benefit available to their legal spouse.[79] The pensioner would not be able to opt out of the 11.65% (in Arizona) contribution to the pension system in order to invest in another type of retirement planning that could provide security in retirement for their spouse (e.g. 401(k), IRA, etc.).[80] Any investment into another account would be in addition to the money paid into the state pension fund.

## IV. Same-sex Spouses Are Severely Injured by a State's Refusal to Recognize Legal Out-of-State Marriages Compared to Opposite-sex Spouses

In 1996, Congress passed the Defense of Marriage Act which, among other things, provided a federal definition of marriage.[81] During the 2013 term of the Supreme Court of the United States, it handed down a landmark ruling in *United States v. Windsor* regarding the restriction of marriage to one man and one woman.[82] In *Windsor*, a lesbian couple was legally married in Canada in 2007 after being involved in a relationship for forty years.[83] When Edie Windsor's wife, Thea Spyer, died in 2009, Windsor was subjected to a federal estate tax due to the federal government's definition of marriage.[84] Had the federal government recognized Windsor's marriage, she would have been exempt from the tax.[85]

In striking down Section 3 of the Defense of Marriage Act, Justice Kennedy discussed in great detail the harm done to same-sex couples by the federal government's refusal to recognize lawful same-sex marriages.[86] However, *Windsor* only impacts Section 3 of the Defense of Marriage Act (definition of spouse), not Section 2, which allows states to refuse to recognize valid marriages performed in other states.[87] The Court in *Windsor* also avoided declar-

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denominated, may be recognized as marriage or given the same or substantially equivalent legal effect.").

79 Voss, *supra* note 9.

80 Ariz. Rev. Stat. Ann. § 38-843 (2014).

81 1 U.S.C. § 7 ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.").

82 United States v. Windsor, 133 S.Ct. 2675 (2013).

83 *Id.* at 2682.

84 *Id.* at 2683.

85 *Id.*

86 *Id.* at 2693-96.

87 *Id.* at 2696.

ing which level of scrutiny should be applied to same-sex couples.[88] Why Justice Kennedy did not clearly state what level of scrutiny applies is unknown.

While the Supreme Court did not elucidate the level of scrutiny to be applied in cases of discrimination based on sexual orientation, the Ninth Circuit Court of Appeals recently ruled that heightened scrutiny is the appropriate standard to apply.[89] In reaching its conclusion, the Ninth Circuit held that while not expressly invoking heightened scrutiny, the *Windsor* decision was a clear application of heightened scrutiny analysis that binds the lower courts to this determination.[90] The Ninth Circuit also acknowledged that this represents a departure from its traditional sexual orientation analysis.[91]

Like Edie Windsor's situation, same-sex spouses of police officers or fire fighters in a non-same-sex marriage state would find themselves severely burdened by the disparate treatment from the state following the death of their spouse: the state would refuse to pay the surviving spouse benefit paid to opposite-sex spouses. The constitutionality of same-sex marriage is a critical factor when it is applied to benefits that are derived from the marital relationship, such as pensions.[92] After the *Windsor* decision, the Arizona Attorney General's Office has declared that Arizona's constitutional and statutory bans on same-sex marriage would still apply in the case of surviving spouses of public pension plan members.[93] The advice offered by the Attorney General's office to those spouses who would find themselves in that situation is to ensure that they are listed as the beneficiary on the member's account in order to ensure that they receive some benefit.[94]

In Arizona, the surviving spouse of a police officer killed in the line of duty is entitled to the "member's average monthly benefit compensation."[95] That monthly benefit compensation is based upon the average of the highest three consecutive years of contributions.[96] Assume the officer was an active member of the Arizona Public Safety Personnel Retirement System and made $80,000 per year and had made $80,000 for three years prior to his death. The pension he would be entitled to is $40,000; therefore, the surviving opposite-sex spouse would be entitled to the same amount for the remainder of her life.[97]

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[88] *Id.*

[89] SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014).

[90] *Id.* at 480-84.

[91] *Id.* at 484.

[92] *See* Voss, *supra* note 9.

[93] *Id.*

[94] *Id.*

[95] ARIZ. REV. STAT. ANN. § 38-846 (2014).

[96] *Id.*

[97] *Id.*

However, same-sex spouses are not eligible for the surviving spouse benefit in Arizona—they are only entitled to a lump-sum payout.[98] Taking the same officer, assume that the officer had been employed for ten years and received annual 8% raises until maxing out at $80,000 per year in year eight. After contributing the statutory requirement of 11.65% for ten years, the officer would have contributed $75,350 to the retirement system. This is the only benefit paid to the same-sex surviving spouse of the police officer killed in the line of duty.[99]

In 2013, the nationwide average age of a police officer's line of duty death was forty-two years old.[100] Assume that men in the United States live until age seventy-six on average. Using these figures, there are thirty-four years of benefits payable to a male surviving spouse in an opposite-sex couple.[101] That equates to $1,360,000 in benefits in today's dollars. In comparison, a same-sex surviving spouse of a police officer killed in the line of duty is entitled to 5.5% of what his similarly situated opposite-sex widower receives in state pension benefits.[102]

Arguably, the same-sex spouse could simply invest the lump-sum payout and perhaps the number would not be so severe. This is true, but at a moderate interest rate of 5% per year, the value of the benefit still remains at $395,840—or 29% of the lifetime benefit provided to an opposite-sex spouse. The numbers very clearly illustrate the devastating impact failure to recognize same-sex marriages for payment of surviving spouse benefits has on same-sex couples. Due to the fact that contributions into the pension system are mandatory, same-sex couples are robbed of the ability to form an alternative plan in the event of a line-of-duty death. Without the obligation to contribute to the state retirement system, the same-sex couple could invest money in a traditional retirement account where they have control over the interest rates and returns.

One of the most important functions in family planning is retirement planning. The transition to a fixed-income requires adequate savings for many different contingencies.[103] Married couples accomplish this through retirement planning that involves accounting for one another's needs when ultimately one predeceases the other. In the case of a same-sex couple, where the public safety official is a retired member of the pension system, the benefits cease

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[98] *Id.*; Voss, *supra* note 9.

[99] ARIZ. REV. STAT. ANN. § 38-846; Voss, *supra* note 9.

[100] *2013 Honor Roll of Heroes*, OFFICER DOWN MEMORIAL PAGE, http://www.odmp.org/search/year?year=2013 (last visited Apr. 7, 2014).

[101] Multiply $40,000 per year (surviving spouse benefit) by 34 years.

[102] Divide the $75,350 lump sum payout to same-sex surviving spouse by $1,360,000 lifetime benefit to an opposite-sex surviving spouse.

[103] *See, e.g.*, Jonas Elmerraji, *Retirement Planning: Why Plan for Retirement?*, INVESTOPEDIA, http://www.investopedia.com/university/retirement/retirement1.asp (last visited Apr. 7, 2014).

upon that member's death with a lump-sum payment to the surviving spouse of any remaining contribution by the member.[104] A surviving spouse of the opposite sex would be entitled to four-fifths of the benefit being paid to the retired member until the death of the surviving spouse.[105]

The average yearly benefit paid to a member of the Public Safety Personnel Retirement System is $48,842.00.[106] A surviving opposite-sex spouse could expect to receive a benefit of $39,074.00 annually for the remainder of her life.[107] However, a same-sex spouse, if named as the beneficiary as recommended by the Arizona Attorney General's Office,[108] would only be entitled to whatever remained of her deceased spouse's contributions to the retirement system, if anything at all.[109] Essentially, this leaves the surviving same-sex spouse of a retired member of the retirement system with little more than an unpredictable benefit, while an opposite-sex spouse has a benefit until death upon which she can rely.

Some Arizona cities protect sexual orientation as a class; however, their hands are tied by the applicable pension statutes.[110] The City of Phoenix is one such city that is bound by state law.[111] Mayor Greg Stanton made the following statement regarding the current status of the law denying benefits to same-sex surviving spouses:

> Marriage equality is overdue. As a society we no longer can afford to treat people unfairly or differently. We need all the talent we can get, regardless of race, religion, gender, gender identity, disability, or who a person loves. It's the right thing morally, but it is imperative in order to attract and keep talented people in Phoenix. The City of Phoenix has passed laws to the extent it can to put an end to discrimination. As an employer, the City of Phoenix also has comprehensive non-discrimination policies and benefits parity, including domestic partner insurance benefits. However, marriage and related benefits largely are issues of state and federal law over which Phoenix has no control. The recent Supreme Court case requires cities and states to recognize marriage equality for

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104 ARIZ. REV. STAT. ANN. § 38-846 (2014).

105 *Id.*

106 Letter from Diane A. Ouellette, CFP, to author 1 (Mar. 27, 2014) (on file with author).

107 *Id.*

108 Voss, *supra* note 9.

109 ARIZ. REV. STAT. ANN. § 38-846; Letter from Diane Ouellette to author, *supra* note 106, at 2.

110 *See, e.g.*, Phoenix City Code § 18-10.01 (2014).

111 *Id.*

> federal purposes, but Arizona has not done so for state and local purposes. That means the City cannot legally recognize same-sex marriages other than when federal law requires it. I strongly support legislation to allow recognition of same-sex marriages and domestic partners for pension and other purposes because it will allow Phoenix to do the right thing and to compete economically.[112]

## V. The Incidence of Same-sex Marriage is Increasing Throughout the United States as a Result of an Increasing Number of States Allowing Same-sex Marriage

Massachusetts was the first state to offer full marriage equality to same-sex couples in 2003.[113] It was joined by Connecticut and (temporarily) California in 2008.[114] Three more states and the District of Columbia recognized same-sex marriages in 2009: Iowa, Vermont, and New Hampshire.[115] New York joined the growing list in 2011, as well as Washington, Maine, and Maryland in 2012.[116] In 2013, the pace of states recognizing same-sex marriage increased dramatically with the addition of Rhode Island, Delaware, Minnesota, New Jersey, Hawaii, Illinois, and New Mexico.[117] This places approximately 38% of the United States' population in same-sex marriage states.[118]

A June 2013 Pew Research poll estimated that there were more than 71,000 same-sex marriages in the United States.[119] This number did not account for Maryland, Rhode Island, Delaware, Minnesota, New Jersey, Hawaii, Illinois, New Mexico, or marriages performed in California following the Supreme Court's dismissal of *Hollingsworth v. Perry*, the challenge to Pro-

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112 Statement from Mayor Greg Stanton, City of Phoenix, Same-sex Pension Benefits (Feb. 6, 2014) (on file with author).

113 Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

114 Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

115 D.C. Code § 46-401 (2014); N.H. Rev. Stat. Ann. § 457:1-a (2014); Vt. Stat. Ann. tit. 15, § 8 (2014); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

116 Me. Rev. Stat. tit. 19-A, § 650-a (2014); Md. Code Ann., Fam. Law § 2-201 (LexisNexis 2014); N.Y. Dom. Rel. Law § 10-a (McKinney 2014); Wash. Rev. Code § 26.04.010 (2014).

117 Del. Code Ann. tit. 13, § 129 (2014); Haw. Rev. Stat. § 572-1 (2014); Minn. Stat. § 517.01 (2014); R.I. Gen. Laws § 15-1-1 (2014); Garden State Equal. v. Dow, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013), *stay denied*, 79 A.3d 1036 (2013); Griego v. Oliver, 316 P.3d 865 (N.M. 2013); S.B. 10, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).

118 Annual Estimates of Resident Population, U.S. Census Bureau (2013).

119 Drew DeSilver, *How Many Same-sex Marriages in the U.S.? At least 71,165, probably more*, Pew Research Center (Jun. 26, 2013), http://www.pewresearch.org/fact-tank/2013/06/26/how-many-same-sex-marriages-in-the-u-s-at-least-71165-probably-more/.

position 8.[120] Same-sex couples from non-same-sex marriage states also may choose to travel to these states to be legally married.

Following *Windsor*, same-sex marriage bans in Utah, Oklahoma, Texas, and Michigan have been declared unconstitutional in federal district court.[121] Additional challenges to same-sex marriage bans have been filed in several states throughout the nation.[122] Notably, a class action lawsuit was filed in Arizona.[123] Another case was recently decided in favor of marriage equality in Virginia, led by Ted Olson and David Boies, the attorneys who successfully argued against Proposition 8 in California.[124] The increased access nationwide to states that will perform same-sex marriages will continue to grow the number of same-sex marriages being performed.

The fall of the Defense of Marriage Act allowed access to over 1,000 benefits of marriage to same-sex couples.[125] These benefits include areas such as tax benefits and social security.[126] Beyond the federal incentives to be legally married, there are legal ramifications to decisions by same-sex couples choosing not to be married. Failure to legally marry in a state that recognizes it could deprive the surviving spouse of the opportunity to sue for benefits afforded to opposite-sex couples in state courts of non-same-sex marriage states.[127]

In Missouri, the same-sex partner of a highway patrolman who was killed in the line of duty was denied surviving spouse benefits.[128] He brought a suit alleging an equal protection violation and claimed that Missouri's ban on same-sex marriage prevented him from marrying his partner.[129] The Missouri Supreme Court dismissed the lawsuit for lack of standing because he was not a spouse in any state; therefore, he could not qualify as a surviving spouse.[130] However, the Missouri Supreme Court left the door open to a potential claim

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120 *Id.*

121 DeBoer v. Snyder, No. 12–CV–10285, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014); DeLeon v. Perry, No. SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014); Bishop v. United States *ex rel.* Holder, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014); Kitchen v. Herbert, No. 2:13-CV-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013).

122 *See, e.g.*, Grimsley v. Scott, No. 4:14-CV-00138-RH-CAS (N.D. Fla. Mar. 12, 2014).

123 Amended Complaint for Permanent Injunction and Declaratory Judgment, Connolly v. Roche, No. 2:14-CV-00024-JWS (D. Ariz. Feb. 10, 2014).

124 Bostic v. Rainey, No. 2:13CV395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014).

125 *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, CONGRESSIONAL BUDGET OFFICE, http://www.cbo.gov/sites/default/files/06-21-samesexmarriage.pdf 1 (June 21, 2004).

126 *Id.*

127 Glossip v. Mo. Dept. of Trans., 411 S.W.3d 796, 803-04 (Mo. 2013).

128 *Id.* at 799.

129 *Id.*

130 *Id.* at 803-04.

by a surviving same-sex spouse who had been legally married in another state where same-sex marriage was authorized.[131]

States prohibiting same-sex marriage rely on statutory or constitutional prohibitions to deny same-sex couples the benefits afforded to opposite-sex married couples.[132] Because this area of the law is relatively new within the last decade, there is no significant case law to guide the courts in their decision-making processes. The constitutional questions of equal protection and due process will likely continue to be addressed for the next several years.

## VI. Recent Case Law Supports Equal Protection From Marriage Inequality Based on Sexual Orientation Classifications

When the Supreme Court decided *Windsor*, it discussed the negative impact that imposing a second-tier status upon same-sex marriages would produce.[133] Specifically, the Court addressed the message that second-tier status sent to the children of same-sex couples.[134] One of the key arguments advanced—in nearly every case—by those seeking to ban same-sex marriage is the protection of children.[135] When Arizona's same-sex marriage prohibition was challenged, the state interests advanced by Arizona revolved heavily around the protection of children and procreation.[136] Similarly, Massachusetts argued that procreation and child-rearing, plus preserving the state fisc, were its legitimate purposes that justified its ban on same-sex marriage.[137]

In fact, these are the state interests that have been advanced in most of the major decisions surrounding the legality of prohibiting same-sex marriage.[138] Many courts have discussed in some detail what level of scrutiny should be applied to laws that are based on sexual orientation as they look toward these factors because the Supreme Court has never directly addressed it.[139] However, most courts have held that they need not reach a decision on which level of scrutiny to apply because laws prohibiting same-sex marriage fail to meet even the most deferential standard of review—rational basis.[140] In the lawsuits against states prohibiting same-sex marriage decided post-*Windsor*, every dis-

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131 *Id.* at 804.

132 *See infra* Part VI, §§ A-C; Voss, *supra* note 9.

133 United States v. Windsor, 133 S.Ct. 2675, 2694 (2013).

134 *Id.*

135 *See infra* Part VI, § B.

136 Standhardt v. Superior Court, 77 P.3d 451, 461 (Ariz. Ct. App. 2003).

137 Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003).

138 *See, e.g.*, Kitchen v. Herbert, No. 2:13–CV–217, 2013 WL 6697874 (D. Utah Dec. 20, 2013).

139 *Id.* at *24.

140 *Id.*

trict court has ruled that disparate treatment of same-sex couples runs afoul of the United States Constitution.[141]

### *A. The States' Interest in Procreation Lacks a Rational Relationship to a Ban on Same-Sex Marriage.*

One of the reasons most frequently cited for supporting bans on same-sex marriage is that bans advance the states' interest in promoting responsible procreation.[142] However, advocates of continuing bans on same-sex marriage have routinely failed to demonstrate how a ban encourages opposite-sex couples to procreate or how an allowance of same-sex marriage discourages procreation.[143] In *Kitchen*, the district court found that a ban, in effect, worked against the state's purpose by encouraging sexual activity outside of marriage because same-sex couples could not marry.[144] "Any relationship between [a same-sex marriage ban] and the State's interest in responsible procreation 'is so attenuated as to render the distinction arbitrary or irrational.'"[145]

### *B. The State's Interest in Child-rearing Lacks a Rational Relationship to a Ban on Same-Sex Marriage.*

Raising children in an optimal environment is another often-cited state interest in supporting bans on same-sex marriage.[146] The message being sent to same-sex couples raising children—and their children—is that they are somehow a part of a lower class of family.[147] After a substantial trial to decide the fate of Proposition 8, the trial court found that there was no evidence to support the notion that children raised in opposite-sex households were better off than children raised in same-sex households.[148] Beyond that, prohibiting same-sex marriage has not stopped same-sex couples from raising children, nor has it prevented single parents from raising children, single parents from adopting children, or states from granting foster care licenses to single parents.[149] Thus, courts routinely find that there is no rational link between the prohibition of same-sex marriage and optimal child-rearing.

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141 *See* cases cited *supra* note 7.

142 *See, e.g.*, *Kitchen*, 2013 WL 6697874, at *25.

143 *Id.*

144 *Id.*

145 *Id.* (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985)).

146 *Id.*

147 United States v. Windsor, 133 S.Ct. 2675, 2694 (2013).

148 Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 980-85 (N.D. Cal. 2010).

149 *See id.* at 968; *see also* ARIZ. REV. STAT. ANN. § 8-103 (2014).

Arizona's public safety pension has a beneficiary provision for the children of a deceased member or retired member.[150] It ensures that the children of a deceased member will receive some income to benefit their needs. However, the amount provided is only 10% of what their deceased parent would have been eligible to receive.[151] Based on the average yearly benefit for retired members of the Public Safety Personnel Retirement System in 2011,[152] one child would be entitled to $4,884 per year. The benefit caps at two children, so in cases where there are three or more children of the deceased member, the 20% capped benefit is split into equal shares.[153] Should the other parent adopt the child after their spouse's death, the benefit would cease altogether.[154]

Arizona does not allow two parents who are unmarried to adopt a child jointly.[155] Supposing that the deceased parent was the sole adoptive parent, the surviving spouse would risk severing the child's and guardian's benefit by choosing to adopt their child.[156] The annual expenditure of raising one child in a single-parent home in 2012 was upward of $10,260.[157] Failure to provide surviving spouse benefits removes from the surviving spouse the ability to receive a meaningful pension benefit that can be used to replace their lost spouse's income to help care for and raise the child of a deceased member should they choose to adopt their child.

### *C. Additional Arguments Such as Tradition, Preservation of the State's Fiscal Resources, and Taking a Cautious Approach Similarly Lack a Rational Link to the State's Interest in Prohibiting Same-sex Marriage.*

Promoting traditional marriage, as advanced by proponents of a ban on same-sex marriage, is an insufficient reason to support a ban on same-sex marriage.[158] Its very definition has changed several times within the last sixty years.[159] As a fundamental right, the United States Supreme Court has routinely struck down limitations on the right to marry.[160] A state's fear of the

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150 ARIZ. REV. STAT. ANN. § 38-846 (2014).

151 ARIZ. REV. STAT. ANN. § 38-846(F)(H) (2014).

152 Letter from Diane Ouellette to author, *supra* note 106.

153 ARIZ. REV. STAT. ANN. § 38-846(H) (2014).

154 ARIZ. REV. STAT. ANN. § 38-846(F).

155 ARIZ. REV. STAT. ANN. § 8-103.

156 ARIZ. REV. STAT. ANN. § 38-846(F). The other same-sex parent would have become eligible to adopt their child upon the death of the adoptive spouse. A.R.S. § 8-103.

157 U.S. DEPT. OF AGRIC., EXPENDITURES OF CHILDREN BY FAMILIES, 2012 16 (2013).

158 *See, e.g.*, Kitchen v. Herbert, No. 2:13–CV–217, 2013 WL 6697874 at *16-17 (D. Utah Dec. 20, 2013).

159 *See* Loving v. Virginia, 388 U.S. 1 (1967).

160 *Id.*; Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978).

negative consequences that allowing same-sex marriage may bring has also failed to be a legitimate reason for the denial of the right to marry to same-sex couples, and the courts have found the fear to be "unfounded."[161]

Additionally, the fear that allowing same-sex marriages will have a negative impact on the state's financial health has no support.[162] In Massachusetts, proponents of a same-sex marriage ban argued that it would place an additional burden on the state through increased access to employer benefits.[163] Opponents of marriage equality advanced a similar argument in Arizona to support removing domestic partner benefits from state employees.[164] The impact of allowing same-sex couples access to state benefits is minimal compared to the overall use of the benefits by opposite-sex couples.[165] Beyond that, a failure to allow access to benefits by same-sex couples could increase the costs to the state by requiring the uncovered spouse to seek coverage elsewhere.[166] For example, an uncovered spouse who stays at home to raise the couple's children may have to seek health insurance through the state's Medicaid program.[167] There is no rational basis to support a ban on same-sex marriage, so any denial of surviving spouse benefits based on the marital definition fails to meet any standard of review.

## VII. Recommended Solutions and Protection for Same-sex Spouses

It is unlikely that the states that currently prohibit the recognition of same-sex marriages performed out of state will allow the payment of benefits to surviving spouses of public pension members. Where many state legislatures may not be in a position to advance a bill authorizing same-sex marriage, they may be able to advance a bill that removes the marriage requirement in pension payment schemes. By removing the marriage requirement, states would allow same-sex couples to be treated like opposite-sex couples with regard to pension payments. Same-sex couples that face the potential loss of pension income

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161 *See Kitchen*, 2013 WL 6697874, at *27 ("In an amicus brief submitted . . . by the District of Columbia and fourteen states that currently permit same-sex marriage, the states assert that the implementation of same-sex unions in their jurisdictions has not resulted in any decrease in opposite-sex marriage.").

162 Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 964 (Mass. 2003).

163 *Id.*

164 Collins v. Brewer, 727 F. Supp. 2d 797, 814 (D. Ariz. 2010).

165 *Id.*

166 *Id.* at 813.

167 *Id.* ("This 'back of the bus' treatment relegates [same-sex couples] to a second-class status by imposing inferior workplace treatment on them, inflicting serious constitutional and dignitary harms that after-the-fact damages cannot adequately redress" (quoting *In re* Golinski, 587 F.3d 956, 960 (9th Cir. 2009))).

should not wait for the states to change their position. Instead, same-sex couples should take steps to ensure that they are in the best position possible to weather the death of their spouse.

One step that same-sex couples should take is planning for retirement individually. By planning for retirement individually and not relying on their spouse's pension continuing past that spouse's death, same-sex couples can better withstand the loss of pension income. While it adds an additional burden on same-sex couples by requiring additional savings, the alternative is much harsher. There is always hope that the laws will change in non-same-sex marriage states before the death of a spouse occurs, but nothing is certain.

Another step that same-sex couples should take is legally marrying one another in a state that allows same-sex marriage. Change may be forced upon the non-same-sex marriage states through the courts, but in order to ensure that a surviving same-sex spouse has standing to file a lawsuit, same-sex couples should be legally married. Commitment ceremonies or marriage-like forms of celebration will likely be insufficient. It is not a guarantee of success, but a legal marriage allows the surviving spouse the option to challenge the benefit denial where otherwise there would be no choice but to accept it.

## VIII. Conclusion

Same-sex marriage made its first large court appearances in the 1970s. The United States Supreme Court held that marriage equality issues did not pose a federal question at the time. In 1993, after it appeared that the Hawaii Supreme Court was going to require the state to grant same-sex marriages, there was a rapid increase in the number of state statutory and constitutional bans on same-sex marriage throughout the United States. Arizona was one such state, enacting a statutory ban on same-sex marriage that was upheld in 2003. Five years later, in 2008, Arizona amended its constitution to ban same-sex marriage. However, in less than one decade, those bans began to fall through judicial and legislative action. The rate at which same-sex marriage is being legalized is increasing rapidly, with greater than 38% of the population of the United States now living in a same-sex marriage state.

Beyond action by the individual states, in 2013, the United States Supreme Court ruled that a federal restriction of marriage to one man and one woman violated the Equal Protection and Due Process Clauses of the United States Constitution. After that decision, every federal court to consider the question of whether state bans on same-sex marriage violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment has ruled that such laws are unconstitutional. Still, it is unclear how long it will take until the United States Supreme Court speaks definitively to the legality of same-sex marriage bans nationwide.

In the meantime, the harm that the United States Supreme Court spoke of in *Windsor* of a two-tier marriage system is felt by same-sex couples living in non-same-sex marriage states. Widows of a fallen police officers or fire fighters of the same sex are entitled to an incredibly small benefit upon the death of their spouses, unlike the widows and widowers of opposite-sex couples. In the case of Arizona spouses, the same-sex surviving spouse may receive 5% of the benefit that a similarly situated opposite-sex surviving spouse would receive. In some cases, the same-sex surviving spouse would receive nothing at all.

State refusal to recognize valid same-sex marriages that have been performed in other states has created this situation. As a result, non-same-sex marriage states have placed price tags on the lost lives of their public servants. The message is loud and clear: you are worth less than your heterosexual colleagues. In addition, the issues raised in this article are more than mere speculation: the Arizona Attorney General's Office has declared that their interpretation of the controlling law in the state does not allow payment of surviving spouse benefits to same-sex spouses of fallen police officers and fire fighters.

Refusal to pay a surviving spouse benefit to a legally married widow or widower of a state employee is unconstitutional. In order to remedy this situation, states should pay surviving spouse benefits to legally married surviving spouses, regardless of sexual orientation. This solution, though simple, is unlikely given the political climate that has surrounded the same-sex marriage cases over the last decade. State legislatures could take steps to remedy this by removing language that only pays survivor benefits to a "spouse" and replacing it with a beneficiary designation. As a measure to protect themselves, same-sex partners should legally marry in order to preserve the right to challenge a denial of benefits should the need arise.

At times, it can be difficult to distinguish when unequal treatment rises to the level of a constitutional violation. Occasionally, however, there are instances where the injustice is so extreme and has such harmful potential that the question raises little doubt. Refusal to care for the widow of a fallen police officer solely because of their sexual orientation is one such case.

# Expanding on the Notice Requirement for Child Relocation: How Far is too Far?

Alan Mooshekh*

## I. Introduction

Divorce places children in an extremely difficult position. At a young age, they are faced with the harsh reality that their parents will no longer live together. No longer will holidays, birthdays, or social gatherings remain the simple tradition they once were. The amount of contact they maintain with their parents will now depend on guidelines provided by a court order. Because of this, parents may no longer have the same meaningful relationship they once had with their child. Making matters more complicated, what happens if one parent is required to move to a different city, or even worse, a different state? This comment discusses the issues parents face regarding the laws to notify the other parent before moving.

The current law in Arizona requires parents, who both live in the state, with joint legal decision-making or unsupervised parenting time, to notify the other parent at least sixty days before moving if they: (1) relocate the child outside the state, or (2) relocate the child more than 100 miles from the current residence.[1] Within thirty days, the non-moving parent may petition the court to prevent relocation of the child.[2] The court shall determine whether to allow the parent to relocate the child in accordance with the child's best interest.[3] The burden is on the relocating parent to prove relocation is in the child's best interest.[4] There is a rebuttable presumption that the parenting plan, or any other written agreement, is in the child's best interest.[5] In determining the child's best interest, the court shall consider all relevant factors prescribed by statutory law.[6]

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1 Ariz. Rev. Stat. Ann. § 25-408(A) (2013).

2 Ariz. Rev. Stat. Ann. § 25-408(C) (2013).

3 Ariz. Rev. Stat. Ann. § 25-408(F) (2013).

4 *Id.*

5 Ariz. Rev. Stat. Ann. § 25-408(G) (2013).

6 Ariz. Rev. Stat. Ann. § 25-403 (2013); Ariz. Rev. Stat. Ann. § 25-408(H) (2013).

## II. Background

Senate Bill 1038 creates stricter guidelines for parents wishing to relocate.[7] The new bill requires notice by a parent wishing to relocate for *any* move, regardless of the distance, to a parent with court-ordered legal decision-making, parenting time, or visitation rights.[8] The relocating parent must provide notice forty-five days in advance and include the following information:

1) The effective date of the change of residential address.
2) The proposed residential address unless the proposed residential address is not known in which case the notice must include an explanation of the reason that the residential address is not known and when it will be known.
3) The school that the child will attend.
4) The reason that the party is proposing to change the party's residential address.
5) A statement that indicates whether the change will require a modification of an existing court order.[9]

Additionally, if the relocation significantly impacts a court order regarding legal decision-making, parenting time, or visitation, the relocating parent must file and serve a petition for modification or a stipulated order signed by all the parties at least forty-five days before the move.[10] The bill defines "significant impact" as any material change of circumstances affecting the child's best interest, including: change in school, decrease in time with any parent because of travel, change in routine, or a move outside of the state.[11] There is a rebuttable presumption that address changes less than two miles do not result in a "significant impact."[12] The court shall then determine any modification to legal decision-making, parenting time, or visitation in accordance with the child's best interest by considering the following factors:[13]

1) The past, present and potential future relationship between the parent and the child.
2) The interaction and interrelationship of the child and the child's parent or parents, the child's siblings and any

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[7] S.B. 1038, 51st Leg., 2d Reg. Sess. (Ariz. 2014).

[8] *Id.*

[9] *Id*.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Ariz. Rev. Stat. Ann. § 25-403 (2013).

other person who may significantly affect the child's best interest.

3) The child's adjustment to home, school and community.
4) If the child is of suitable age and maturity, the wishes of the child as to legal decision-making and parenting time.
5) The mental and physical health of all individuals involved.
6) Which parent is more likely to allow the child frequent, meaningful and continuing contact with the other parent. This paragraph does not apply if the court determined that a parent is acting in good faith to protect the child from witnessing an act of domestic violence or being a victim of domestic violence or child abuse.
7) Whether one parent intentionally misled the court to cause an unnecessary delay, to increase the cost of litigation or to persuade the court to give a legal decision-making or a parenting time preference to that parent.
8) Whether there has been domestic violence or child abuse pursuant to section 25-403.03.
9) The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding legal decision-making or parenting time.
10) Whether a parent has complied with chapter 3, article 5 of this title.
11) Whether either parent was convicted of an act of false reporting of child abuse or neglect under section 13-2907.02.[14]

The burden is on the relocating parent to prove, by a preponderance of the evidence that the modification is in the child's best interest.[15]

## III. Opposition to the Bill

Critics of this bill are concerned that the bill does not provide enough protection for victims of domestic violence.[16] For instance, women needing to relocate to a shelter due to abuse may be required to disclose the location of the shelter.[17] Additionally, even if women are protected from disclosing their

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[14] *Id.*

[15] S.B. 1038

[16] Parenting Time; Child Relocation: *Hearing on S.B. 1038 Before the S. Health and Human Services Committee,* 51st Leg., 2d Reg. Sess. (2014) (statement of Amber Witter).

[17] *Id.* (statement of Sen. Hobbs).

addresses, they will still need to provide the location of the child's school.[18] This creates an opportunity for the parent to follow the child from school and discover the residence.

The bill also creates an unnecessary burden on parents when a dispute does not exist.[19] Even in situations where both parents are completely amicable, the bill still requires the parents to notify and file a petition with the courts.[20] Hiring a process server and paying filing fees is not only burdensome, but also creates unnecessary costs.[21] These additional requirements create extra work for the courts and will potentially clog the system.[22]

## IV. Proponents of the Bill

There is consensus among legislators that the current rule does not work and needs to change.[23] A parent may relocate the child within 100 miles and never provide the new address. It provides very little protection or legal recourse for the non-moving parent. The new rule requires the moving parent to provide notice to the non-moving parent, regardless of the distance. If the move significantly impacts the current parenting plan, the non-moving parent may petition against it.

Furthermore, the current bill does provide protection for victims of domestic violence.[24] The current bill does not require the moving parent to notify the non-moving parent if the court grants a request to protect the address pursuant to the Arizona Rules of Family Law Procedure or the Arizona Rules of Protective Order Procedure.[25] The current bill also provides a remedy for parents required to move in emergency situations.[26] A parent may obtain a court order to temporarily move before the forty-five days due to circumstances related to health, safety, employment, or an involuntary change of residence.[27]

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[18] *Id.*

[19] *Id.* (statement of Rep. Davis).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* (statement of Sen. Smith).

[24] *Id.* (statement of Rep. Lesko).

[25] *Id.*

[26] S.B. 1038, 51st Leg., 2d Reg. Sess. (Ariz. 2014) ("A party who is required to relocate in fewer than forty-five days after written notice has been given to the other party because of circumstances related to health, safety, employment or an involuntary change of residence of that party or of that party's spouse may temporarily move with the child . . .").

[27] *Id.*

## V. Conclusion

Unless there is a valid reason, parents have a right to know where their children are at all times. The current law allows a parent with custodial rights to move without notifying the other parent.[28] This is extremely unfair and prone to abuse. Senate Bill 1038 provides a remedy for both parents by requiring notice for all moves.[29] It protects victims of domestic violence by allowing an exception by court order.[30] It also provides exceptions in situations where a move is required before the forty-five days.[31] The bill will, however, create a burden on amicable parents who are not disputing a move. It will also create a burden by potentially clogging the courts. To remedy this, the legislature should pass this bill with a provision that provides an exception for amicable parents who agree to the move in writing.

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[28] Ariz. Rev. Stat. Ann. § 25-408 (A) (2013).
[29] S.B. 1038
[30] *Id.*
[31] *Id.*