



2. I intend to offer information that will demonstrate that Pennsylvania's marriage exclusion disadvantages same-sex couples in Pennsylvania across a spectrum of legal issues. This report is not intended to provide an exhaustive list of these disadvantages; instead, it will highlight those that, in my opinion, impact the largest number of same-sex couples in Pennsylvania or impact couples in the most damaging ways. The disadvantages I will discuss in this report include, but are not limited, to: estate planning; taxation; health care; and family law. However, there are hundreds of laws in the Commonwealth that are impacted by marital status, any one of which may affect a given same-sex couple at any given time.

3. I further intend to offer information that will demonstrate that neither the *United States v. Windsor*<sup>2</sup> decision nor the federal government's response to that decision eliminates the disadvantages that I will describe. I will describe how, for certain Pennsylvania residents, federal recognition of their marriages in the face of Commonwealth non-recognition in fact creates additional layers of legal complication that only state-level recognition of their marriages will ameliorate.

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<sup>2</sup> 570 U.S. \_\_\_\_ (2013) (invalidating the federal Defense of Marriage Act on constitutional grounds).

## II BACKGROUND AND QUALIFICATIONS

4. I have been retained by Plaintiffs as an expert witness in the above-captioned matter.
5. My background and experience are summarized in my *curriculum vitae*, which is attached to this report as Exhibit 1.
6. I am employed as an Assistant Professor of Law at Temple University's James E. Beasley School of Law in Philadelphia. I have been employed in this capacity at Temple since July of 2008.
7. My academic specializations are in the areas of: sexual orientation, gender identity and law; public interest law generally; and legal research and writing. My current research focuses on the intersection between lawyering for disadvantaged communities and the LGBT (lesbian, gay, bisexual, and transgender) civil rights movement. I have spoken extensively on legal issues affecting LGBT people, as reflected in my *curriculum vitae*.
8. Prior to joining the Temple faculty, I worked as an attorney at Equality Advocates Pennsylvania, a Philadelphia-based nonprofit that provided, among other services, direct legal services to LGBT Pennsylvanians across a broad range of legal issues. Most of Equality Advocates' clients were low or low-middle income. I was employed at Equality Advocates from 2001-2008.

9. From 2005 until my departure in 2008, I was the legal director at Equality Advocates Pennsylvania. As legal director, I was tasked with supervising all Legal Department personnel, coordinating litigation on behalf of LGBT clients, representing clients in legal matters, fundraising, and determining allocation of resources within the Legal Department.

10. As Legal Director, I was responsible for analyzing the organization's intake statistics. I used aggregated numbers of requests for assistance that reached my office through our telephone hotline, e-mail, and walk-in office visits to determine which areas of legal need were most pressing for Pennsylvania's LGBT citizens. After analyzing that data I developed programs and services that would meet the most acute legal needs of our target population.

11. From 2003 until 2005, I was a staff attorney at Equality Advocates. From 2001 until 2003, I was employed there as an Equal Justice Works Fellow. As a Fellow, I represented LGBT victims of violence in Pennsylvania, including victims of hate crimes, intimate partner violence, and school bullying.

12. I currently serve on the Board of Directors and the Legal Advisory Board of the Mazzoni Center, an LGBT health and wellbeing nonprofit located in Philadelphia. The Mazzoni Center absorbed the legal department

of Equality Advocates Pennsylvania in 2009. In my capacity as Legal Advisory Board member, I provide technical assistance and advice to the Mazzone Center Legal Department on matters relating to LGBT-focused legal services in Pennsylvania.

13. In addition, I regularly consult with private attorneys across the state regarding the legal challenges faced by their LGBT clients; those challenges are often linked to those clients' inability to marry or have their marriages recognized in Pennsylvania.

14. I remain actively licensed to practice law in the Commonwealth of Pennsylvania. I was admitted to the bar of the Commonwealth in 2001. I received my *juris doctor* in 2000 from Temple University Beasley School of Law, where I received the Beth Cross Award for commitment to underserved populations. I received a Bachelor of Arts in American Studies from Rutgers, the State University of New Jersey, in 1995.

15. I have not previously served as an expert witness in any other matter.

16. For my work on this matter, I am being compensated at a flat rate of \$1,000 for my written report. In the event that I am deposed or called to testify at trial, I am being compensated at a rate of \$300 per hour.

17. My opinions in this matter are based upon my own research and upon my experience personally representing or supervising the representation of Pennsylvania's LGBT citizens.

**III PENNSYLVANIA'S MARRIAGE EXCLUSION STRIPS SAME-SEX SURVIVING PARTNERS OF THE RIGHT TO INHERIT A DECEASED PARTNER'S PROPERTY IF THE DECEDENT DIES WITHOUT A WILL.**

18. In Pennsylvania, the surviving spouse of an intestate decedent inherits the entire estate, unless there is a surviving child or parent of the decedent.<sup>3</sup> Even in the event that the intestate decedent is survived by parents or children, the surviving spouse still takes a share of the estate.<sup>4</sup>

19. However, Pennsylvania prohibits recognition of same-sex couples as spouses.<sup>5</sup> Thus, the protections available to the surviving spouses of intestate decedents are denied to same-sex partners, regardless of the financial interdependence of the relationship *or* the existence of a valid out-of-state marriage license.

20. As a consequence of the interaction between Pennsylvania's marriage exclusion and its intestate succession statute, same-sex couples (even those

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<sup>3</sup> 20 Pa. C.S.A. § 2102 (1).

<sup>4</sup> 20 Pa. C.S.A. § 2102 (2) – (5).

<sup>5</sup> 23 Pa. C.S.A. § 1704.

holding valid out-of-state marriage licenses) who fail to, cannot afford to, or do not know to execute reciprocal wills, will be totally disinherited upon the death of their partners.<sup>6</sup>

21. However, not all same-sex couples in the Commonwealth are aware of the need to execute reciprocal wills, despite vigorous public education efforts by LGBT advocacy groups. Of those who are aware, not all can afford the cost of obtaining professional-quality wills. Some free legal services are available (such as those that my office provided at Equality Advocates), but the nonprofits that provide such services are far too small and underfunded to meet the overwhelming demand for this service across a geographic area as large as the Commonwealth.<sup>7</sup>

22. The U.S. Supreme Court's recent invalidation of the federal Defense of Marriage Act in *Windsor*<sup>8</sup> does nothing to mitigate the harms suffered by the surviving partners of intestate decedents. Intestate succession is

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<sup>6</sup> 20 Pa. C.S.A. § 2103 (1) – (6) (in the absence of a surviving spouse, the order of intestate succession is as follows: issue; parents; brothers, sisters, or their issue; grandparents; uncles, aunts, and their children, and grandchildren; the Commonwealth).

<sup>7</sup> Over 22,000 couples in Pennsylvania self-identified as same-sex couples in the 2010 census, according to a report by UCLA's Williams Institute. Pennsylvania Census Snapshot: 2010, [http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot\\_Pennsylvania\\_v2.pdf](http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Pennsylvania_v2.pdf) (last accessed January 15, 2014).

<sup>8</sup> *Windsor*, *supra* note 2.

governed entirely by state statute, and is not affected by the recognition or non-recognition of marriages of same-sex couples by the federal government.

**IV PENNSYLVANIA’S MARRIAGE EXCLUSION DENIES SAME-SEX PARTNERS THE AUTOMATIC RIGHT TO MAKE HEALTH CARE DECISIONS FOR HOSPITALIZED PARTNERS WHO ARE INCAPACITATED.**

23. Pennsylvania’s marriage exclusion negatively affects the rights of same-sex partners to make decisions for and even visit their partners in the hospital. These negative effects are not fully ameliorated by recent changes to federal law.

**A. Pennsylvania’s marriage exclusion means that, even where a same-sex couple is validly married, the immediate families of incapacitated lesbian or gay patients can step in and override the decision-making authority of the patient’s spouse.**

24. In Pennsylvania, 20 Pa. C.S.A. § 5451 *et seq.* governs healthcare powers of attorney.

25. Healthcare powers of attorney in Pennsylvania confer broad power upon the healthcare agent to obtain information regarding the principal’s physical condition, and to make critical decisions regarding the principal’s health care (including decisions regarding treatment options, and the

withholding or withdrawing of life-sustaining treatment).<sup>9</sup> Normally, those powers do not go into effect until an attending physician determines that the principal is incompetent.<sup>10</sup>

26. In the absence of a pre-existing healthcare power of attorney naming an agent for an incompetent individual, Pennsylvania law provides for the naming of a “healthcare representative” who is vested with almost all of the powers of a healthcare agent.<sup>11</sup>

27. A competent patient who has not completed a power of attorney naming a healthcare agent is free, either orally or in writing, to designate a healthcare representative.<sup>12</sup>

28. In the event that a patient has not executed a power of attorney and also cannot communicate his or her wishes regarding the naming of a healthcare representative, Pennsylvania law provides an automatic order of priority for the naming of a healthcare representative. The order is as follows: spouse; adult child; parent; adult brother or sister; adult grandchild; and finally, “[a]n adult who has knowledge of the principal's preferences and

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<sup>9</sup> 20 Pa. C.S.A. § 5456.

<sup>10</sup> 20 Pa. C.S.A. § 5454.

<sup>11</sup> 20 Pa. C.S.A. § 5461.

<sup>12</sup> *Id.*

values, including, but not limited to, religious and moral beliefs, to assess how the principal would make health care decisions.”<sup>13</sup>

29. Pennsylvania law specifically provides that an individual with higher priority on the above list may displace an individual lower on the priority list as healthcare representative, even if the lower-priority individual has already assumed the role of representative.<sup>14</sup> Thus, Pennsylvania law inarguably reflects the determination that a spouse is the most appropriate person to act as healthcare representative, even where immediate family may wish to take on that role.

30. When the law regarding the automatic designation of healthcare representatives interacts with Pennsylvania’s ban on same-sex marriage, the result is this: if a lesbian or gay individual does not possess a valid healthcare power of attorney that names his or her partner as the healthcare agent, *and* the individual is incompetent or incapable of communicating a preference for a particular person as a healthcare representative, the partner will be *last* in order of priority to make medical decisions. Even if the couple is legally married in another state, Pennsylvania’s marriage exclusion acts directly to prevent recognition of the partner as a “spouse,” instead

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

relegating the same-sex spouse to the catch-all category at the bottom of the healthcare representative hierarchy.

31. Thus, as a direct result of Pennsylvania's same-sex marriage ban, an immediate family member of the incompetent partner may displace the same-sex partner or spouse as healthcare representative if no arrangements have been made prior to the patient's incompetency.

32. I have personally witnessed the result of Pennsylvania's marriage exclusion in the healthcare context. While employed as the legal director of Equality Advocates Pennsylvania, I attempted to assist a same-sex couple when one of the women, who had not executed a healthcare power of attorney, suffered a stroke. The stroke patient and her partner were a long-term committed couple, and the partner had initially cared for the patient at a hospital in the Lehigh Valley near their home. However, within a few days, the patient's estranged mother traveled from Philadelphia to the Lehigh Valley, and demanded to be named the healthcare representative over the objections of the partner. The patient, while conscious and aware, was unable to speak, so the hospital complied with the demand, and the patient's mother took the patient to Philadelphia and had her admitted to a rehabilitation hospital there against the partner's wishes. On the partner's request, I traveled to the rehabilitation hospital to assess the competence of

the patient, ascertain her wishes, and execute a healthcare power of attorney to place power back in the hands of her partner if that was the patient's wish. Although the patient was unable to verbally communicate and likely had experienced some cognitive deficit, it was clear to me after a lengthy interview (at which the partner was not present) that she was able to point to written words to indicate clear commitment to choices and that her answers were consistent and logical. She expressed her desire for her partner to make decisions regarding her care and for me to prepare a healthcare power of attorney. Convinced that the patient was competent and capable of expressing her wishes to me, I left, prepared the necessary documents, and returned a few days later with witnesses. However, I was prevented from finalizing the documents by the patient's mother and sister, who, with the support of a hospital social worker, forced me to leave against my client's wishes.

33. If Pennsylvania had not prohibited these women from marrying, the partner would have automatically been named healthcare representative. She would have been able to make decisions about where her partner should have been treated and the course of that treatment, and hospital staff would have been compelled by law to respect those decisions.

34. The recent Supreme Court decision in *Windsor* does nothing to alter Pennsylvania's refusal to recognize same-sex spouses for purposes of first priority designation as health care representatives.

**B. New federal regulations do not fully ameliorate the effects of Pennsylvania's marriage exclusion on hospital decision-making and visitation.**

35. In 2010, President Obama issued a memorandum directing the Department of Health and Human Services (HHS) to promulgate regulations that would require Medicare and Medicaid-funded hospitals to respect the rights of their patients to designate visitors without discriminating based upon sexual orientation. The Presidential Memorandum further directed HHS to promulgate regulations explicitly requiring federally funded hospitals to respect existent powers of attorney or other advance directives.<sup>15</sup>

36. In compliance with the Presidential Memorandum, HHS promulgated federal regulations that forbid visitation discrimination based upon sexual orientation and require hospitals to make patients aware of their rights with respect to designating visitors.<sup>16</sup> The new regulations also require hospitals

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<sup>15</sup> Presidential Memorandum – Hospital Visitation (April 15, 2010), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitiation> (last accessed January 15, 2014).

<sup>16</sup> 42 C.F.R. § 482.13(h) requires as follows:

to inform patients of their right to either personally participate in their plan of care, or have their designated healthcare representative do so on their behalf.<sup>17</sup>

37. This federal action is likely to create disincentives for hospitals to simply exclude same-sex partners or spouses from decision-making or visitation based on hospital staff's personal biases, and where there is otherwise no conflict about the partner/spouse's primary place in the life of the patient. However, the new rules contain a critical limitation that blunts their effectiveness in the event of a conflict between a same-sex partner/spouse and the patient's immediate family. As both the new

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Standard: Patient visitation rights. A hospital must have written policies and procedures regarding the visitation rights of patients, including those setting forth any clinically necessary or reasonable restriction or limitation that the hospital may need to place on such rights and the reasons for the clinical restriction or limitation. A hospital must meet the following requirements:

- (1) Inform each patient (or support person, where appropriate) of his or her visitation rights, including any clinical restriction or limitation on such rights, when he or she is informed of his or her other rights under this section.
- (2) Inform each patient (or support person, where appropriate) of the right, subject to his or her consent, to receive the visitors whom he or she designates, including, but not limited to, a spouse, a domestic partner (including a same-sex domestic partner), another family member, or a friend, and his or her right to withdraw or deny such consent at any time.
- (3) Not restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability.
- (4) Ensure that all visitors enjoy full and equal visitation privileges consistent with patient preferences.

*See also* 42 C.F.R. § 485.635(f) (similar rule for designated Critical Access Hospitals, which are rural community hospitals that receive cost-based federal reimbursement).

<sup>17</sup> 42 C.F.R. § 482.13(a), (b).

regulations and the Interpretive Guidelines from HHS’s Centers for Medicare and Medicaid Studies (CMS) make abundantly clear, the regulations - while intended to honor same-sex relationships where possible – are not intended to override state law.

38. The regulations empower the patient, “or when appropriate, the patient’s representative (as allowed under State law)” to make certain decisions about the patient’s care, thus deferring to each state’s law to identify the alternative decision-maker. The CMS Interpretive Guidelines to § 482.13(h)(1)&(2) – the portion of the regulation that forbids discrimination on the basis of sexual orientation – clarify that the regulations allow the naming of a so-called “support person” who is close to the patient, but who may not be the same person as the patient’s healthcare representative.<sup>18</sup> The “support person” may be a same-sex partner. That person may visit, and may, where there is otherwise no conflict, make certain decisions regarding the control of flow of other visitors.<sup>19</sup> However, as the Guidelines make clear, the regulations do not empower the support person’s wishes to

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<sup>18</sup> Centers for Medicare and Medicaid Studies, Interpretive Guidelines to §482.13(h)(1)&(2), available at <http://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R75SOMA.pdf> (last accessed January 30, 2014).

<sup>19</sup> *Id.*

supplant those of a person named as healthcare representative under state law.<sup>20</sup>

39. Thus, in Pennsylvania, where an incompetent patient has not expressed his or her wishes, and there is a conflict between the same-sex partner/spouse and the patient's immediate family, Pennsylvania's marriage exclusion will mean that immediate family may still displace a same-sex partner/spouse as the person who makes critical medical decisions, and may even allow the family to exclude the same-sex partner from visitation.<sup>21</sup>

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<sup>20</sup> "In the event that a patient has both a representative and a support person who are not the same individual, and they disagree on who should be allowed to visit the patient, the hospital must defer to the decisions of the patient's representative. As the individual responsible for making decisions on the patient's behalf, the patient's representative has the authority to exercise a patient's right to designate and deny visitors just as the patient would if he or she were capable of doing so. The designation of, and exercise of authority by, the patient's representative is governed by State law, including statutory and case law." *Id.*

<sup>21</sup> See <http://www.usatoday.com/story/news/nation/2013/11/14/same-sex-partner-banned-hospital/3524889/> (An Indiana woman was barred from visiting her unconscious partner in the hospital on the orders of the patient's mother, who did not approve of the relationship; the article notes the legal uncertainty inherent in such instances, even in the face of the new CFRs.).

**V PENNSYLVANIA’S MARRIAGE EXCLUSION CAUSES SAME-SEX PARTNERS AND SPOUSES TO INCUR SIGNIFICANT ADDITIONAL TAXES, RESULTING IN FINANCIAL INSTABILITY FOR LOW AND MIDDLE-INCOME FAMILIES.**

40. Pennsylvania’s refusal to allow or recognize same-sex marriages results in significant inequities in taxation, the most significant of which are described herein.

**A. Pennsylvania (Commonwealth and Municipal) Realty Transfer Tax**

41. In Pennsylvania, transfers of real estate are ordinarily subject to realty transfer taxes, usually at both the Commonwealth and municipal level.

42. The Commonwealth realty transfer tax rate is 1% of the value of the realty transferred.<sup>22</sup>

43. The Commonwealth, however, exempts some transactions from the transfer tax when the transfer either occurs under a certain set of enumerated circumstances, or where the transfer occurs between certain family members.<sup>23</sup> Spouses are included as “family members” for this purpose, but unmarried cohabitants are not.<sup>24</sup>

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<sup>22</sup> 72 P.S. § 8102-C.

<sup>23</sup> 72 P.S. § 8102-C.3.

<sup>24</sup> 61 Pa. Code § 91.193 specifies that transfers between the following family members are exempt from tax: husband and wife; lineal ascendent--parent, grandparent, great grandparent and the like--and lineal descendent--child, grandchild, great grandchild and

44. Pennsylvania’s marriage exclusion thus acts to prohibit same-sex couples (even if validly married) from adding one another’s name to the deed to property without having to pay a Commonwealth tax in the amount of 1% of the value of the transferred property.

45. Municipalities may impose additional realty transfer taxes subject to the same limitations as the Commonwealth.<sup>25</sup>

46. The rate of realty transfer taxes assessed by municipalities varies. For instance, the realty transfer tax is 3% in Philadelphia<sup>26</sup>, but the tax in Allentown is 1%.<sup>27</sup>

47. The Pennsylvania Supreme Court in *Devlin v. City of Philadelphia* has determined that municipalities may not attempt to take into consideration the fact that same-sex couples are forbidden to marry in order to specifically provide those couples with tax exemptions normally reserved

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the like; children of the same parent—siblings; a lineal ascendent—parent, grandparent, great grandparent and the like—of a child and the spouse of the child, unless the child is deceased and the child's spouse has remarried; an individual and the individual's sibling's spouse, unless the sibling is deceased and the sibling's spouse has remarried; and persons who were previously married but who have since been divorced, if the transferred realty was acquired by both spouses or by either spouse before or during their marriage.

<sup>25</sup> 72 P.S. § 8101-D.

<sup>26</sup> <http://www.phila.gov/Revenue/individuals/taxes/Pages/RealtyTransferTax.aspx>.

<sup>27</sup> [http://www.lehighcounty.org/Departments/ClerkofJudicialRecords/RecorderofDeeds/FAQs/tabid/1314/Default.aspx#What\\_is\\_realty\\_transfer\\_tax](http://www.lehighcounty.org/Departments/ClerkofJudicialRecords/RecorderofDeeds/FAQs/tabid/1314/Default.aspx#What_is_realty_transfer_tax).

for married couples or immediate family.<sup>28</sup> Municipalities may only provide a realty transfer tax exemption to *all* unmarried couples, including heterosexual couples who have chosen not to marry, or not provide it at all.<sup>29</sup>

48. A recently filed Pennsylvania Department of Revenue appeal demonstrates how the Commonwealth's refusal to recognize same-sex marriages can create considerable tax burdens for Pennsylvanians who attempt to add financially interdependent same-sex partners to deeds.<sup>30</sup> Donna Torrisi and Judith Palmer have resided together for over thirty years in Pennsylvania. They have raised two children together, and were validly married in New York. When Torrisi added Palmer's name to the deed of their shared residence, they attempted to file the deed as spouses, but were assessed over \$4,000 in taxes by the Pennsylvania Department of Revenue, including charges for municipal taxes that the municipality itself had *agreed to waive*.<sup>31</sup>

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<sup>28</sup> 862 A.2d 1234 (Pa. 2004) (providing a waiver of Philadelphia's real estate transfer tax to same-sex couples but not unmarried heterosexual couples violates the Uniformity Clause of the Pennsylvania Constitution).

<sup>29</sup> Philadelphia has provided a realty transfer tax exemption to both opposite-sex and same-sex unmarried financially interdependent persons. Phila. Code §19-1402(28).

<sup>30</sup> Donna L. Torrisi & Judith Palmer's Appeal to the Board of Appeals, Pennsylvania Department of Revenue, for Pennsylvania Realty Transfer Tax Notice of Assessment, Control Number 2013-3249-46.

<sup>31</sup> *Id.*

49. Pennsylvania practitioners report that title companies hired to manage deed transfers frequently mishandle the realty transfer tax when transferring property between same-sex couples who are validly married. Some title companies assume that the taxes do not apply, and will pass this erroneous information on to the property owners, who then unexpectedly owe the taxes once the error is detected.

**B. Pennsylvania Inheritance Tax**

50. The Commonwealth of Pennsylvania assesses taxes on inherited property. The rate of tax is dependent upon the relationship between the decedent and the individual inheriting property. Spouses pay no inheritance tax, other family members pay a tax ranging from 0% to 12%, and all other persons pay the highest rate of 15%.<sup>32</sup>

51. Pennsylvania prohibits same-sex couples from being considered as “spouses” for purposes of assessing inheritance taxes owed to the Commonwealth.

52. Thus, a surviving same-sex partner or spouse who inherits under a will faces a 15% tax burden compared to 0% for a surviving opposite-sex spouse.

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<sup>32</sup> 72 P.S. § 9116.

53. Another recently filed Pennsylvania Department of Revenue appeal illustrates the effect of Pennsylvania's marriage exclusion in the inheritance tax context.<sup>33</sup> Catherine Burgi-Rios and Barbara Baus were same-sex partners who lived together in a committed relationship for over 15 years. They were legally married in Connecticut, titled their property jointly, and executed wills leaving property to one another. Upon Ms. Burgi-Rios' death from cancer, the Commonwealth assessed the taxes owed by Ms. Baus at over \$10,000, reflecting the rate of 15% owed by legal strangers instead of 0% owed by spouses.

54. The imposition of the statewide realty transfer tax and the 15% inheritance tax places same-sex couples in a very difficult position with respect to planning for the death of a partner or spouse, particularly where only one of them is the owner of the primary residence that the couple shares. While I was employed at Equality Advocates, I responded to many requests for assistance from low- and middle- income Pennsylvanians who were the sole owners of a primary residence in which the owner resided with a same-sex partner. The callers wished to ensure that their partners or spouses would not lose their primary residence upon the death of the owner.

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<sup>33</sup> *In re Estate of Catherine C. Burgi-Rios, Deceased*, Northampton County Orphan's Court No. 1310 of 2012. The author of this Report is co-counsel in the referenced matter.

Their choices in Pennsylvania were limited and fraught with difficulty. To ensure the partner received title to the property, the owner could add the partner/spouse's name to the deed, but that would result in an immediate and potentially prohibitive transfer tax bill. (This was a particular problem if the property had significantly appreciated since it was purchased or inherited.) And such a transfer would not, because of Pennsylvania's marriage exclusion, avoid the inheritance tax on the inherited half of the property's value. The owner could instead choose to name the partner/spouse as the beneficiary of the property in a will, but that still would not avoid the imposition of inheritance taxes (in this instance for the full value) upon the surviving partner/ spouse, who might be unable to pay the taxes without selling the property.

55. I often advised same-sex couples to purchase additional life insurance policies for the sole purpose of obtaining money upon one partner's death to use to pay the 15% inheritance tax to the Commonwealth. Such life insurance policies might cost couples hundreds of dollars per year, and may be unaffordable to low-income couples or those on fixed incomes who might still own valuable property as a result of appreciation. And even where couples can afford this expense, it means that the proceeds from the life insurance policy that would otherwise go to helping the widow or widower

have financial security in his or her senior years must be paid to the Commonwealth.

56. The difficulties and additional expenses described above exist *solely* as an effect of Pennsylvania's refusal to either recognize or allow same-sex marriage. Were Pennsylvania to allow same-sex marriage, same-sex partners could pass property to one another through a will without incurring inheritance tax, and they could add a partner's name to the deed of their residence without incurring realty transfer tax.

57. The recent Supreme Court decision in *Windsor* does nothing to alter Pennsylvania's tax treatment of same-sex couples.

**VI PENNSYLVANIA'S MARRIAGE EXCLUSION  
DESTABILIZES FAMILIES BY DENYING FAMILIES  
FORMED BY SAME-SEX COUPLES THE PRESUMPTION OF  
PARENTAGE THAT COMES WITH MARRIAGE.**

58. The Commonwealth's refusal to issue marriage licenses to or acknowledge the valid marriages of same-sex couples creates legal uncertainty with regard to the relationship between the couple and the children born into the family. The process by which the marriage exclusion directly results in a legally uncertain parent-child relationship is described below.

59. In Pennsylvania, a child born into an intact marriage is presumed to be the natural child of both parents. This is a common-law doctrine in the

Commonwealth, the main purpose of which is to prevent intact families from being disrupted by outsiders claiming to be the actual biological parents of children born to marriages.<sup>34</sup>

60. According to the Pennsylvania Supreme Court, “the presumption of paternity embodies the fiction that regardless of biology, the married people to whom the child was born are the parents.”<sup>35</sup> Consequently, “the presumption of paternity is un rebuttable when, at the time the husband's paternity is challenged, mother, her husband, and the child comprise an intact family wherein the husband has assumed parental responsibilities for the child. ... *Under other circumstances*, the presumption may be overcome by clear and convincing evidence that either of the following circumstances was true at the time of conception: the presumptive father, *i.e.*, the husband, was physically incapable of procreation because of impotency or sterility, or the presumptive father had no access to his wife, *i.e.*, the spouses were physically separated and thus were unable to have had sexual relations.”<sup>36</sup>

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<sup>34</sup> See *K.E.M. v. P.C.S.*, 38 A.3d 798, 809 (Pa. 2012) (“The legal fictions perpetuated through the years (including the proposition that genetic testing is irrelevant in certain paternity-related matters) retain their greatest force where there is truly an intact family attempting to defend itself against third-party intervention.”).

<sup>35</sup> *Brinkley v. King*, 701 A.2d 176, 180 (Pa. 1997).

<sup>36</sup> *Vargo v. Schwartz*, 940 A.2d 459, 463 (Pa. Super. Ct. 2007) (citations omitted) (emphasis added).

61. Other states that permit the recognition of same-sex relationships have permitted same-sex couples to enjoy the parentage presumption on the same footing as heterosexual couples.<sup>37</sup>

62. In Pennsylvania, no doctrinal impediment exists in family law that would preclude the application of the presumption of parentage to a non-biological parent in a same-sex couple. The only law that prevents the presumption from applying to same-sex couples is Pennsylvania's prohibition on same-sex marriage.

63. Without access to the parentage presumption, children born to same-sex-headed households are placed in a legally tenuous position.

64. For example, two women may together decide to have a child by one partner conceiving with anonymously donated sperm and giving birth to a child that both women would raise. Without the parentage presumption, when that child is born, he or she will have only one legal parent. The other woman will be a legal stranger to the baby, regardless of her intent to parent *and* regardless of any marriage to the birth mother.

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<sup>37</sup> See e.g. *Gartner v. Iowa Dept. of Public Health*, 830 N.W. 2d 335 (Iowa 2013) (holding that Iowa's presumption of parentage must be applied equally to same-sex parents regardless of gendered statutory language); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 971 (Vt. 2006) (Supreme Court of Vermont, while not resolving the question of whether the statutory presumption must apply in the instance of a civil union, did find that, "in accordance with the common law, the couple's legal union at the time of the child's birth is extremely persuasive evidence of joint parentage.").

65. As another example, two women may together decide to have a child using the assistance of a known sperm donor. Without the parentage presumption, when that child is born, the baby will have no legal relationship to the woman who intended to be a parent but did not give birth to the child. Instead, under certain circumstances, the child's second parent would be the sperm donor, a person who likely had no intention to raise or financially support the baby.<sup>38</sup> In either case, the partner would have no parental rights unless the couple pursued additional legal protections.

66. In order to create the stability and predictability that usually accompanies the presumption of parentage, same-sex couples must instead undergo the significant expense and time commitment of effectuating a second-parent adoption. The child lacks legal ties to one of his or her parents until the adoption is completed.<sup>39</sup>

67. The cost of second parent adoptions in Pennsylvania varies from county to county but generally falls between the range of \$2,000.00 and \$5,000.00, inclusive of attorney fees and court costs. The process may take

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<sup>38</sup> See *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. Super. Ct. 2007) (known sperm donor considered parent and liable for child support).

<sup>39</sup> See *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002) (clarifying that second-parent adoption is available in Pennsylvania).

between 2 and 12 months to complete.<sup>40</sup> Some judicial districts within Pennsylvania require a home study, in which a social worker visits the family home and conducts an investigation into the background of the couple to determine if it is a suitable environment for the child.<sup>41</sup> This adds significantly to the time and expense of the second parent adoption process.

68. Because of these costs and the scarcity of pro bono counsel for these often-complex proceedings, some families are unable to afford to obtain a second parent adoption and the child is left without a legal relationship with one of his or her parents.

69. Because the presumption of parentage is unavailable and families must consequently undergo second-parent adoptions for children born to intact same-sex relationships, courts must expend resources that might otherwise be conserved.

70. Some same-sex headed families move to Pennsylvania from jurisdictions that recognize same-sex marriage.<sup>42</sup> These families may not

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<sup>40</sup> This information, although difficult to independently ascertain, was supplied by experienced adoption practitioners.

<sup>41</sup> For example, Chester County requires a home study, while Lehigh County does not.

<sup>42</sup> According to the 2010 United States Census, over 3,000 same-sex couples identified as “husband or wife,” as opposed to “unmarried partner.” A portion of those couples have likely moved from marriage equality states.  
[http://williamsinstitute.law.ucla.edu/wpcontent/uploads/Census2010Snapshot\\_Pennsylvania\\_v2.pdf](http://williamsinstitute.law.ucla.edu/wpcontent/uploads/Census2010Snapshot_Pennsylvania_v2.pdf) (last accessed February 7, 2013).

have completed second parent adoptions given the presumption of parenthood they enjoyed under their former state's law.<sup>43</sup> They may be moving to the Commonwealth without any legal protection for their families except for their marriages. Thus, not only may these couples find their marriages invalidated upon arriving in the Commonwealth, they may also lose the legal relationship between the non-biological parent and the child.<sup>44</sup>

71. Families that move from states that recognize a presumption of parentage will not be informed upon relocating that the legal relationship between the non-biological parent and the child has been severed. There is no Commonwealth administrative agency that accepts the responsibility for informing relocating same-sex couples that they have been stripped of all of their marriage-based rights. Particularly with regard to the parent-child relationship, the effects are not intuitively understandable. Only the most

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<sup>43</sup> In fact, a New York trial court recently *refused* to allow a same-sex couple to complete a second-parent adoption under the theory that New York's presumption of parentage rendered second-parent adoption redundant. *N.Y. Judge Alarms Gay Parents By Finding Marriage Law Negates Need for Adoption*, [http://www.nytimes.com/2014/01/29/nyregion/ny-judge-alarms-gay-parents-by-finding-marriage-law-negates-need-for-adoption.html?\\_r=0](http://www.nytimes.com/2014/01/29/nyregion/ny-judge-alarms-gay-parents-by-finding-marriage-law-negates-need-for-adoption.html?_r=0) (last accessed February 13, 2014).

<sup>44</sup> *Miller-Jenkins v. Miller-Jenkins*, *supra*, is instructive here. In that case, a couple lived in Vermont, which recognized their relationship as a civil union, and thus recognized the nonbiological mother as a parent under the parental presumption. When the couple, the biological mother moved with the child to Virginia, which did not recognize the relationship. She then attempted to move jurisdiction over the custody action to Virginia, which would not have recognized the parentage of the non-biological mother because it stemmed from recognition of the relationship. Several years of bitter litigation ensued, after which the biological mother fled to South America with the child.

well-informed couples will even understand that they must suddenly seek out a second-parent adoption for a child with whom they have both had legal parent-child relationships for years.

72. For families that are unable to establish a legal parent-child relationship through second-parent adoption, and those that are unaware that they need to do so when moving across state lines, the consequences are significant and troubling. For example:

- i. The non-legal parent may not be able to make decisions on behalf of the child, such as consenting to medical treatment or even signing permissions slips for school field trips.
- ii. If the sole legal parent dies or is incapacitated, it is unclear whether the child would even be permitted to remain with the non-legal parent, particularly where there is conflict with the biological parent's family.
- iii. The child may not be eligible for coverage under the non-biological parent's medical insurance.
- iv. If the couple breaks up and there is a custody dispute, the court will not be permitted under Pennsylvania law to treat the non-biological parent equally. The non-biological parent would have to first prove that he or she even has standing to proceed, by

establishing that he or she stands *in loco parentis* to the child. This requires significant additional factual findings and can add a layer of complication onto custody proceedings, during which time the non-biological parent may be cut off from access to the child.<sup>45</sup>

- v. Even where the non-biological parent can establish that he or she has standing to proceed, the “scales are tipped” toward the biological parent being awarded primary custody. This “tipping” can only be overcome with *clear and convincing evidence* – a higher evidentiary standard than the normal “preponderance of evidence” standard- that the child ought not to primarily reside with the biological parent.<sup>46</sup> Thus, a court may believe itself to be constrained to award primary custody to the biological parent even though the non-biological parent may actually be a more preferable choice.

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<sup>45</sup> See *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001).

<sup>46</sup> *Jones v. Jones*, 884 A.2d 915 (Pa. Super. Ct. 2005) (where same-sex couple had not effectuated a second-parent adoption, non-biological mother was able to obtain primary custody of children after demonstrating by clear and convincing evidence that such an arrangement was in the children’s best interests).

**VII PENNSYLVANIA’S MARRIAGE EXCLUSION DENIES SEPARATED COUPLES ACCESS TO THE MECHANISM OF DIVORCE AS A MEANS FOR THE EFFICIENT RESOLUTION OF DISPUTES ARISING FROM THEIR SEPARATION, AND PREVENTS VALIDLY MARRIED SAME-SEX COUPLES FROM LEGALLY ENDING THE SPOUSAL RELATIONSHIP.**

73. Like other couples, same-sex couples are sometimes able to build lifelong intimate partnerships that only terminate with the death of a partner. However, like other couples, same-sex couples sometimes break up.

74. When married couples in the Commonwealth no longer wish to remain together, they have access to the mechanism of divorce to sort out their affairs.

75. The purpose of divorce is to effectively, fairly, and efficiently dissolve a relationship in a manner that affords the parties dignity and carefully considers the needs of children. According to 23 Pa. C.S.A. § 31(a), the public policy behind an orderly divorce process is as follows:

The family is the basic unit in society and the protection and preservation of the family is of paramount public concern. Therefore, it is the policy of the Commonwealth to:

- (1) Make the law for legal dissolution of marriage effective for dealing with the realities of matrimonial experience.
- (2) Encourage and effect reconciliation and settlement of differences between spouses, especially where children are involved.
- (3) Give primary consideration to the welfare of the family rather than the vindication of private rights or the punishment of matrimonial wrongs.
- (4) Mitigate the harm to the spouses and their children caused by the legal dissolution of the marriage.

(5) Seek causes rather than symptoms of family disintegration and cooperate with and utilize the resources available to deal with family problems.

(6) Effectuate economic justice between parties who are divorced or separated and grant or withhold alimony according to the actual need and ability to pay of the parties and insure a fair and just determination and settlement of their property rights.

76. The public policies underlying the divorce process apply with equal force to same-sex couples, who may also need assistance with the orderly unwinding of long-term relationships. However, because Pennsylvania prohibits same-sex couples from marrying and refuses to acknowledge valid same-sex marriages from other jurisdictions, courts have refused to allow same-sex couples to use the mechanism of divorce to divide assets and resolve disputes stemming from the dissolution of a relationship.<sup>47</sup>

77. Married same-sex couples who wish to divorce in the Commonwealth but are prohibited from doing so face two significant categories of problems. The first category of problems stems from the couple's inability to access the normal procedure that has been established for dissolving a relationship. The second category of problems stems from the fact that the couple will continue to be viewed by the federal government and other states as a married couple. These two categories of problem are discussed below.

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<sup>47</sup> See, e.g., *Kern v. Taney*, 11 Pa. D. & C. 5th 558 (Pa. Com. Pl. 2010) (trial court refused to take jurisdiction of a same-sex marriage for the purposes of divorce due to the operation of Pennsylvania's marriage prohibition).

**A. Pennsylvania couples who cannot access divorce are left without a fair and efficient structure for dividing assets following a breakup.**

78. As noted above, Pennsylvania's divorce laws are intended to create fairness, efficiency, and certainty in the process of dissolving a relationship. However, same-sex couples are prohibited from accessing divorce by operation of Pennsylvania's same-sex marriage prohibition. As a result, couples wishing to dissolve their relationships face confusion and uncertainty, and their dissolution-related litigation creates inefficiencies in Pennsylvania's court system, for reasons described below.

79. First, couples whose relationships are dissolving have no access to any of the methods of support that Pennsylvania has established for ensuring that both parties in a dissolving relationship remain financially stable. For example, couples cannot receive:

- i. *Alimony pendente lite*: This type of support is granted to a spouse during the pendency of a divorce proceeding.<sup>48</sup>
- ii. *Alimony*: This temporary type of support is granted to an ex-spouse in conjunction with a final divorce decree.<sup>49</sup>

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<sup>48</sup> 23 Pa. C.S.A. § 3103.

<sup>49</sup> *Id.*

iii. Spousal support: Spouses are obligated to financially support one another during a marriage.<sup>50</sup> Consequently, a spouse may file for support at any time; if filed separate from a divorce action, this demand for support is called “spousal support,” and if filed in conjunction with a divorce, it is called “alimony *pendente lite*.”<sup>51</sup> The obligation to support may require spouses to pay for one another’s reasonable healthcare expenses.<sup>52</sup>

80. Second, couples in a dissolving relationship have little opportunity to fairly divide their assets. They cannot, for instance, take advantage of Pennsylvania’s scheme for the equitable distribution of property.

Pennsylvania domestic relations courts will divide “marital property” property during a divorce. The definition of “marital property” is very broad, encompassing, with limited exceptions, all property acquired by either party during the marriage, and the increase in value of non-marital property.<sup>53</sup> Rather than simply splitting the property according to a rigid formula, Pennsylvania law follows a flexible “equitable distribution” model,

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<sup>50</sup> 23 Pa. C.S.A. § 4321.

<sup>51</sup> *See Calibeo v. Calibeo*, 663 A.2d 184 (Pa. Super. Ct. 1995).

<sup>52</sup> 23 Pa. C.S.A. § 4324.

<sup>53</sup> 23 Pa. C.S.A. § 3501.

which takes into account a number of different factors, including the length of the marriage, the sources of income available to both parties, and many other considerations.<sup>54</sup> There is no analogue under Pennsylvania law for unmarried couples who require a court's assistance in obtaining an equitable property division in case of a separation. Same-sex couples are also barred from seeking a Qualified Domestic Relations Order. Pennsylvania courts will issue this type of order in comportment with federal law to divide a retirement account upon the divorce of spouses (see further discussion *infra*), but will not issue such an order where there is no recognition of the marriage.

81. Third, the lack of access to divorce creates enormous confusion for couples, and actually impacts Pennsylvania's court system outside of the domestic relations context. The Domestic Relations Code not only provides substantive protections that are denied same-sex partners, it also provides a forum through the mechanism of divorce that has been designed to contend with the reality of separation in a holistic manner than encompasses both substance and procedure. Pennsylvania divorce laws are specifically designed to promote efficiency, fairness, and financial stability in the event

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<sup>54</sup> 23 Pa. C.S.A. § 3502.

of a separation. The law seeks to consolidate all disputes arising from the separation in a single court. The Pennsylvania courts design rules, forms, and policies that are intended to be clear enough to allow *pro se* filings. Mediation is frequently made available. Where couples wish to split amicably, the courts encourage quick and affordable filing and speedy resolutions. Divorce filing fees vary by county, but generally range from less than one hundred up to a few hundred dollars.<sup>55</sup> Depending on the circumstances, an uncontested divorce may not even require an appearance before a judge.<sup>56</sup>

82. In contrast, because same-sex couples are prohibited from accessing the system of divorce, their disputes are either outside the jurisdiction of

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<sup>55</sup> See, e.g., <http://www.adamscounty.us/Dept/Prothonotary/Lists/Fee/AllItems.aspx> (Adams County, \$180.00 to file divorce complaint); [http://www.co.berks.pa.us/Dept/Prothy/Documents/2013%20FEE%20BILL\(7-1-13\).pdf](http://www.co.berks.pa.us/Dept/Prothy/Documents/2013%20FEE%20BILL(7-1-13).pdf) (Berks County, \$215.50 to file divorce complaint); <http://www.buckscounty.org/government/RowOfficers/Prothonotary/DRFeeSchedule> (Bucks County, \$349.00 to file divorce complaint); <http://www.dauphincounty.org/government/Publicly-Elected-Officials/Prothonotary/Pages/Fee-Listing.aspx> (Dauphin County, \$297.00 to file divorce complaint); <http://www.lycolaw.org/court/prothonotary.htm> (Lycoming County, \$120.00 to file divorce complaint); <http://www.montcopa.org/DocumentCenter/View/276> (Montgomery County, \$268.00 to file divorce complaint); <http://www.montourco.org/SiteCollectionDocuments/fees.pdf> (Montour County, \$115.00 to file divorce complaint); [http://www.pottercountypa.net/prothonotary\\_court.php](http://www.pottercountypa.net/prothonotary_court.php) (Potter County, \$72.00 to file basic divorce complaint); <https://yorkcountypa.gov/courts-criminal-justice/court-courtrelated-offices/prothonotary/fees.html> (York County, \$263.25 to file divorce complaint).

<sup>56</sup> 23 Pa. C.S.A. § 3301(c-e).

Pennsylvania courts entirely, or subject to a confusing patchwork of laws that may spread their disputes out across multiple courts and even multiple jurisdictions. For example, same-sex couples with children may not be able to access the same court for resolution of both property division and custody issues. Pennsylvania’s Family Courts, which exist in Pennsylvania’s more populous counties, are designed to deal with the dissolution of marital relationships *and* related custody issues at the same time, and they have judges who specialize in or are very experienced in these issues.<sup>57</sup> Same-sex couples, however, must use existent Family Courts for custody issues, but then are not permitted to resolve property division disputes in that same court. They may file a separate action for the limited purpose of partitioning *jointly titled* real property.<sup>58</sup> Couples file those partition actions in civil courts of general jurisdiction, as opposed to Family Courts. However, proper venue in a partition action is not only not heard in the same court as custody,

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<sup>57</sup> For example, the Pennsylvania Constitution provides that in Allegheny County: “[T]he court of common pleas shall exercise jurisdiction in the following matters through the family court division: (i) Domestic Relations: Desertion or nonsupport of wives, children and indigent parents, including children born out of wedlock; proceedings, including habeas corpus, for custody of children; divorce and annulment and property matters relating thereto. Pa. Const. art. V, § 17.

<sup>58</sup> “The purpose of a partition action is to allow joint owners of property, who no longer desire to own that particular property, to divest themselves of ownership for fair compensation.” Partition, 23 Standard Pennsylvania Practice 2d § 122:1. Note that a partition action, in contrast to equitable distribution in divorce, is unavailable when only one party’s name is on the deed.

it *may not even be in the same county* as the custody litigation.<sup>59</sup> Thus, a couple with children seeking to partition real property may find themselves litigating two separate matters in two different counties.

83. Even where a couple is not forced to access multiple courts to resolve disputes arising out of a separation, the court that they *are* permitted to access may be forced to resolve the dispute under a set of standards that does not make sense in the context of relationship dissolution. For example, same-sex couples are often advised in Pennsylvania to draft cohabitation agreements. The purpose of these agreements is to identify ownership of property, divide financial obligations, and provide an agreed-upon resolution to property disputes that might arise in the context of a separation.

However, in the event of a separation, disputes arising from interpretation of the cohabitation agreement must be heard in civil court according to the law of contract. They are essentially treated under the law like any other

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<sup>59</sup> “An action for the partition of real property, including an action in which the Commonwealth is a party, may be brought in and only in a county in which all or any part of any property which is the subject matter of the action is located.” Pa. R.C.P. 1552.

contract, even though they are much more analogous in their intent to a prenuptial agreement.<sup>60</sup>

**B. Pennsylvania couples who have valid marriages frequently cannot divorce in any jurisdiction, and will consequently still be viewed as married in many jurisdictions.**

84. Pennsylvania couples who are validly married in other jurisdictions, but who wish to divorce, frequently cannot do so in the state where they were married. This stems from the fact that many of the jurisdictions that allow same-sex marriages have a residency requirement in order to assume jurisdiction over a divorce.<sup>61</sup> Only certain states that allow same-sex marriage allow non-resident same-sex spouses to divorce there (and usually only if the couple's state of residence will not recognize the marriage in order to dissolve it).<sup>62</sup> This is true regardless of whether the couple

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<sup>60</sup> “While the damages awarded [in an action on an agreement between cohabitators] may to some extent parallel a property settlement following a divorce, the two are not the same.” *De Santo v. Barnsley*, 476 A.2d 952, 955 (Pa. Super. Ct. 1984).

<sup>61</sup> States that grant marriages to same-sex couples but will not exercise jurisdiction over divorce unless at least one member of the couple resides in that state include: Iowa; Maine; New Hampshire; Maryland; Massachusetts; New Jersey; New Mexico; New York; Rhode Island; Washington State. The length of residence required to file for divorce varies from state to state, but is one year for many states close to Pennsylvania. *See, e.g.*, Md. Code Ann., Family Law § 7-101 (one year residency requirement in Maryland); Mass. Gen. Laws ch. 208, § 5 (one year residency requirement in Massachusetts); N.J. Stat. Ann. § 2A:34-10 (one year residency requirement in New Jersey).

<sup>62</sup> States that allow non-resident same-sex couples to divorce are: California; Delaware; Hawaii; Illinois (as of June 2014); Minnesota; Vermont (only if the couple has no children and all issues in the divorce are already resolved); Washington, D.C.; and

originally lived in the state in which they were married. Thus, even a couple who once lived and married in Massachusetts but then moved to Pennsylvania will not be permitted to divorce - in either Massachusetts or Pennsylvania. This leaves many Pennsylvania couples with *no* ability to access divorce. They are, to use a recently coined phrase, “wedlocked” – forced to remain married against their wishes.<sup>63</sup>

85. Wedlocked couples face serious risks and disadvantages. Under state law, wedlocked couples may find that:

- i. Neither person will be able to enter into a new marriage (whether to a same-sex or opposite-sex partner) without running the risk of a bigamy prosecution in a state that recognizes same-sex marriages;
- ii. Neither person may be able to adopt a child without the consent of the spouse, even if the couple is separated;<sup>64</sup>

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Canada. National Center for Lesbian Rights, *Divorce for Same-sex Couples who Live in Non-Recognition States: A Guide for Attorneys*, [http://www.nclrights.org/wp-content/uploads/2013/07/Divorce\\_in\\_DOMA\\_States\\_Attorney\\_Guide.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/Divorce_in_DOMA_States_Attorney_Guide.pdf) (last accessed February 1, 2014).

<sup>63</sup> See generally Mary Patricia Byrn and Morgan L. Holcomb, *Wedlocked*, 67 U. Miami L. Rev. 1 (2012).

<sup>64</sup> 23 Pa. C.S.A. § 2711(a)(2) (consent of spouse required unless the spouse joins in the petition). Adoption agencies may choose to recognize a marriage even if the Commonwealth does not, and have refused to allow Pennsylvanians to adopt a child because they were wedlocked to a former partner.

iii. Wedlocked spouses may continue to accrue state law-based rights and responsibilities for the duration of the time in which they cannot divorce. For example, Pennsylvania equitably divides property in divorce based upon a number of factors, including “the length of the marriage.”<sup>65</sup> Thus, a very short marriage that cannot be dissolved may at some point in the future, if the marriage is eventually recognized, lead to an unfair distribution of property.

86. Following the *Windsor* decision, wedlocked spouses also will continue to be viewed as married for many federal purposes. For example:

i. Following *Windsor*, the IRS issued a ruling that same-sex couples holding valid marriage licenses *from any jurisdiction* are now considered married for the purposes of filing federal income taxes.<sup>66</sup> Thus, wedlocked couples who live apart must, until they are able to finally divorce, file federal income tax returns, whether jointly or separately, as married persons.

ii. Following *Windsor*, the U.S. Department of Labor issued a Technical Release determining that same-sex couples holding valid

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<sup>65</sup> 23 Pa. C.S.A. § 3502(1).

<sup>66</sup> IRS Revenue Ruling 2013-17, <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf> (last accessed February 2, 2014).

marriage licenses *from any jurisdiction* are now considered married for the purposes of ERISA-governed employee benefit plans.<sup>67</sup> Thus, wedlocked couples may find, for example, that they cannot remove their spouse's name as a beneficiary from an ERISA-governed retirement account.<sup>68</sup>

**XIII PENNSYLVANIA'S SAME-SEX COUPLES CAN REPLICATE ONLY A FRACTION OF THE LEGAL RIGHTS THAT ACCOMPANY MARRIAGE, AND EVEN THEN, ONLY AT A SIGNIFICANT COST.**

87. As the Pennsylvania Supreme Court has observed, marriage brings with it myriad rights and responsibilities, some of which cannot be

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<sup>67</sup> United States Department of Labor Technical Release No. 2013-4, available at <http://www.dol.gov/ebsa/newsroom/tr13-04.html>.

<sup>68</sup> For a very helpful summation of this very complicated area of law, *see generally* 2 ERISA Practice and Procedure § 4:44, *Requirement of Joint and Survivor Annuity and Preretirement Survivor Annuity* (2013). In order to remove a spouse as beneficiary from an ERISA-governed retirement plan, an individual must obtain written consent from the spouse. *Id.* Absent consent, the only way to remove the spouse is through a court order that memorializes a property settlement agreement. These orders, called Qualified Domestic Relations Orders, or QDROs, must satisfy strict formal requirements and must follow the resident state's domestic relations law. Thus, a state that does not allow divorce and does not recognize the marriage will not issue a QDRO. *See generally* United States Department of Labor, *Frequently Asked Questions: Qualified Domestic Relations Orders*, available at [http://www.dol.gov/ebsa/faqs/faq\\_qdro.html](http://www.dol.gov/ebsa/faqs/faq_qdro.html) (last accessed February 2, 2014).

replicated using any existing mechanism under law, and some of which can only be replicated at considerable expense.<sup>69</sup>

88. Couples in Pennsylvania often call attorneys, and ask how they can replicate as many legal protections of marriage as possible.

89. When I was in practice, I recommended to callers that they should take several legal steps, including:

- i. Execution of reciprocal wills;
- ii. Execution of reciprocal healthcare powers of attorney and living wills;

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<sup>69</sup> In *Devlin v. City of Philadelphia*, the Court determined that Philadelphia's establishment of a domestic partner registry did not violate Pennsylvania's prohibition on same-sex marriage, asserting that:

Indeed, even though the Legislation affords Life Partners certain limited rights and benefits that spouses also enjoy, those rights and benefits are but a small fraction of what marriage affords to its participants. As the City emphasizes, Life Partners who separate cannot take advantage of the domestic relations laws that govern, among other things, divorce, alimony, child support, child custody, and equitable distribution... Likewise, Life Partnership under the current Legislation does not somehow extend to Life Partners numerous other spousal benefits, including: (1) the rights and protections that come with holding marital property in a tenancy of the entirety... (2) the marital exemption from paying any transfer tax on inheritance from a spouse... (3) a guaranteed share of an intestate spouse's estate... (4) the testimonial privilege between husband and wife... (5) the right to file joint tax returns... (6) the first right to receive workers' compensation when the spouse dies... (7) employment preferences afforded to the spouses of veterans... and (8) the right to bring a wrongful death action on behalf of one's deceased spouse.

*Devlin*, *supra* note 28 at 1243-44 (internal citations omitted).

- iii. Effectuating a second-parent adoption of any children born to the relationship;
- iv. Obtaining life insurance policies that would cover the costs of inheritance taxes;
- v. Entering into a private cohabitation agreement that set forth the terms under which property would be divided in the event of a breakup; and
- vi. Traveling to a state that recognizes same-sex marriage and marrying there, in case their marriage would ever be recognized under federal law or the law of a state where they might one day reside.

90. The costs of obtaining these protections are influenced by several factors, including: the number of children; the couple's county of residence; the complexity of the couple's estate planning or cohabitation contract needs; the amount of any hourly wages lost by the couple as a result of multiple attorney visits and court dates; and the cost of traveling to a different state from the couple's residence.

91. In addition, I always advised callers that the unique situation of same-sex couples requires that the couple retain an attorney with familiarity in the area. Couples who attempt to cut corners by, for example, drafting a will

from a form found online, may find themselves incurring very significant legal fees when the resulting document is challenged in court.

92. Low-income couples can have some court costs waived, but qualified *pro bono* assistance for these services is very difficult to find. In all likelihood, a couple will have to spend several hundred to several thousand dollars, depending on their situation and the availability of qualified legal counsel, to replicate even a part of the legal rights and protections that are automatic for couples whose marriages are recognized by the Commonwealth.

93. In contrast, a marriage license in Pennsylvania costs less than \$100.<sup>70</sup>

## **IX PENNSYLVANIA'S MARRIAGE EXCLUSION CREATES LEGAL CONFUSION AND UNCERTAINTY FOR COUPLES IN THE COMMONWEALTH.**

94. With regard to federal law, the rapid changes in law in the wake of the *Windsor* decision offer some benefits to married same-sex couples who live in Pennsylvania, but also create a confusing and highly fluid legal landscape

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<sup>70</sup> See e.g. <http://www.alleghenycounty.us/wo/plan.aspx> (last accessed February 7, 2014) (marriage license costs \$80 in Allegheny County); [http://www.northamptoncounty.org/northampton/lib/northampton/depts/courtservices/wills\\_orphans/marriagepre.pdf](http://www.northamptoncounty.org/northampton/lib/northampton/depts/courtservices/wills_orphans/marriagepre.pdf) (last accessed February 7, 2014) (marriage license costs \$50 in Northampton County); [http://www.tiogacountypa.us/Departments/Register\\_Recorder/Pages/ObtainingyourMarriageLicense.aspx](http://www.tiogacountypa.us/Departments/Register_Recorder/Pages/ObtainingyourMarriageLicense.aspx) (last accessed February 7, 2014) (marriage license costs \$35 in Tioga County).

that is challenging even for experts to stay abreast of, and practically impossible for average same-sex couples to understand. There are over 1000 federal laws that are impacted by marital status. However, under the current system, there is no uniform scheme under federal law for determining when a marriage is legally recognized for federal purposes. For some federal programs, a marriage is valid if it is recognized in the place of celebration; for other federal programs, the validity of a marriage is determined by the laws of the state whether the person resides. For some federal laws these distinctions are determined by statute, for some by formal administrative rulemaking, and for others by internal administrative directive.

95. Pennsylvania couples with marriages from other states will, under the current regime, therefore find themselves married for some federal purposes, unmarried for other federal purposes, and unmarried for the purposes of their state of residence. There is no easy way for these couples to determine whether they are married or unmarried for a particular purpose, and any information they are able to locate may be out-of-date by the time they rely upon it. Even if a couple possesses the means to seek out the advice of counsel, it is my experience that there are a very few lawyers who fully grasp the entirety of the ramifications of a couple being married for some

federal purposes, married for no state purposes in their state of residence, but married for all purposes in states that recognize same-sex marriage.

96. Until Pennsylvania's marriage exclusion is eliminated, the unclear status of Pennsylvania same-sex couples who have valid marriages from other jurisdictions creates enormous legal uncertainty and complexity that will cause some to lose out on benefits and could lead to errors and potential legal liability for others. This uncertainty permeates the lives of same-sex couples attempting to complete even the most mundane, everyday tasks. For example:

- i. In Pennsylvania, spouses must now file personal income taxes as "Married" for federal purposes, and "Single" for state purposes. In Pennsylvania, married couples file personal income tax returns using a different categorization scheme than unmarried couples.<sup>71</sup> Married opposite-sex couples are permitted to file as either Married, Filing Jointly, or Married, Filing Separately. Unmarried people may only file as Single.<sup>72</sup> By prohibiting the recognition of

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<sup>71</sup> 72 Pa. C.S.A § 7331, 61 Pa. Code 117.2.

<sup>72</sup> See e.g. Form PA-40 2013: Pennsylvania Income Tax Return, available at [http://www.revenue.state.pa.us/portal/server.pt/community/personal\\_income\\_tax/14692](http://www.revenue.state.pa.us/portal/server.pt/community/personal_income_tax/14692) (last accessed January 26, 2014) (form permits filing for a living person only under the following categories: Single; Married Filing Jointly; Married, Filing Separately).

same-sex relationships as marriages, Pennsylvania law operates to prevent same-sex partners from filing personal income tax returns under either the Married, Filing Jointly or the Married, Filing Separately category. However, following the *Windsor* decision, the IRS issued Revenue Ruling 2013-17, which determined that the marriages of same-sex spouses would be recognized for federal income tax purposes, so long as those marriages were performed in a state that authorizes the performance of such marriages.<sup>73</sup>

Although this ruling harmonizes state and Federal income taxation for couples residing in states where their same-sex marriages are recognized, the converse is true in states like Pennsylvania. In Pennsylvania, a same-sex couple validly married in another state now must file federal personal income taxes as married spouses and Commonwealth personal income taxes under the Single category. Couples may be incredibly confused by this new reality, and may now find it impossible to file their taxes without assistance. However, it is unclear if all tax preparers in the

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<sup>73</sup> <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf> (last accessed January 26, 2014).

Commonwealth will even be able to determine how to prepare such returns without themselves committing costly errors.

- ii. Married same-sex couples living in Pennsylvania may find themselves utterly confounded by any official form that asks them to designate their marital status. The couple must essentially attempt to guess who the entity is who is asking the question and what the purpose of the question is before even checking a simple box. For example, when filling out patient information at a doctor's office, a patient often must fill out several forms that may ask for the patient's marital status. Each of these forms may correspond to different entities and governing laws. Couples may be afraid to answer "married" because they know that in Pennsylvania, the law does not recognize the marriage. But for some purposes, they may lose benefits to which they would otherwise be entitled by answering that they are unmarried. For these couples, the simple act of form-filling may become Kafkaesque: *any answer they give may be wrong.*

97. This uncertainty and confusion about federal rules and benefits only adds to the complex legal reality that already dominates the lives of same-sex couples. The legal issues identified in this report, and the hundreds of

other legal distinctions that turn on marriage under Pennsylvania law, present same-sex couples with legal and financial challenges that can only be understood with a very high level of education and sophistication. Most couples do not have that level of education and sophistication – indeed, in my experience, most lawyers do not have the education and sophistication needed to properly advise same sex couples about their legal rights.

98. The vast majority of same-sex couples, like the vast majority of opposite-sex couples, do not possess the legal and financial knowledge and sophistication, much less the financial means, to protect themselves and their families from the consequences of Pennsylvania’s marriage exclusion. These couples are, in almost every area of their lives, at a disadvantage that few can overcome, solely because of Pennsylvania’s marriage exclusion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of February, 2014.

  
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Leonore F. Carpenter

## LEONORE F. CARPENTER

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### EDUCATION

**Temple University James E. Beasley School of Law**, Philadelphia, PA.

*Juris Doctor*, May 2000.

Awards & Achievements:

Beth Cross Graduation Award, May 2000.

Dean's List: Fall 1997, Fall 1998, Spring 1999, Fall 1999, Spring 2000.

**Rutgers, the State University of New Jersey**, New Brunswick, NJ.

*Bachelor of Arts*, American Studies, May 1995.

Editor-in-Chief, *The Medium* Student Newspaper, 1993 — 1994.

### TEACHING EXPERIENCE

**Temple University James E. Beasley School of Law**, Philadelphia, PA.

*Assistant Professor*. July 2009 – Present.

*Visiting Assistant Professor*. July 2008 – June 2009.

Courses: Introduction to Public Interest Law; Legal Research & Writing; Sexual Orientation, Gender Identity, and the Law.

**Temple University James E. Beasley School of Law**, Philadelphia, PA.

*Adjunct Clinical Instructor*. September 2004 — June 2008.

Created and taught “Lesbian, Gay, Bisexual and Transgender Law,” a clinical course that instructs law students in the effective representation of lesbian, gay, bisexual and transgender (LGBT) clients through hands-on training at Equality Advocates Pennsylvania.

### SCHOLARSHIP

*Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in the LGBT Rights Movement*, 17 U. PENN. J. LAW AND SOCIAL CHANGE \_\_\_\_ (forthcoming 2013).

“We’re Not Running a Charity Here”: Rethinking Public Interest Lawyers’ Relationships with Bottom-Line-Driven Pro Bono Programs, 29 BUFF. PUB. INT. L. J. 37 (2011).

### AWARDS

National LGBT Bar Association, 40 Best LGBT Lawyers Under the Age of 40. September 2012.

## PROFESSIONAL EXPERIENCE

### **Equality Advocates Pennsylvania, Philadelphia, PA.**

*Legal Director.* September 2005 — June 2008.

Directed Equality Advocates' legal department. Coordinated statewide LGBT-rights litigation strategy. Supervised two attorneys, one intake manager and more than twelve law students each year. Oversaw telephone intake hotline. Maintained own caseload. Engaged in extensive public speaking on topics related to the civil rights of the LGBT community. Cultivated and maintained relationships with *pro bono* attorneys. Planned strategically for new fellowship opportunities, recruited potential fellows, and developed proposals.

*Staff Attorney.* September 2003 — August 2005.

Represented clients in administrative proceedings, trial and appellate litigation in a wide variety of legal issues, including: relationship recognition; police misconduct; family law; estate planning; and employment matters. Continued to direct Pennsylvania Anti-Violence Project.

*Equal Justice Works Fellow.* September 2001 — August 2003.

Awarded two-year Equal Justice Works fellowship to launch and direct the Pennsylvania Anti-Violence Project. Advocated for LGBT victims of domestic violence and hate crimes, and youth victims of school-based harassment. Represented clients, created and presented public education programs, and supervised student interns performing client intake and legal research.

### **New Jersey Superior Court, Appellate Division, Trenton, NJ.**

*Law Clerk to the Honorable Harold B. Wells, III, J.A.D.* September 2000 — August 2001.

## BAR ADMISSIONS

United States Court of Appeals for the Third Circuit, 2007.

United States District Court for the Eastern District of Pennsylvania, 2003.

Supreme Court of Pennsylvania, 2001.

## LAW SCHOOL SERVICE

*Member,* Strategic Planning Committee, November 2012 – Present.

*LRW Coordinator,* June 2012 – June 2013.

*Faculty Advisor,* Temple Law Student Disciplinary Advocacy Service, August 2011 – Present.

*Chair,* Faculty Public Interest Committee, August 2011 – August 2013.

*Member,* Ad-Hoc Committee on Gender Identity, 2010 – 2011.

*Co-Chair,* Faculty Public Interest Committee, August 2010 – August 2011, August 2013 – Present.

*Faculty Advisor,* OUTLAW Law Students Group, 2009 – Present.

*Member,* Curriculum Committee, 2009-2010.

*Member,* Graduation Prizes Committee, 2009 -2010.

*Member,* Upper Level Curriculum Initiative Committee, 2009-2010.

*Member,* Judicial Clerkship Clinical Committee, 2011, 2013.

**PROFESSIONAL ACTIVITIES**

*Member*, The Legal Writing Institute, 2010 – Present.

*Board of Directors*, The Mazzone Center, 2010 – Present.

*Member*, *Legal Advisory Board*, The Mazzone Center, 2009 – Present.

*Member*, Sexual Orientation and Gender Identity Committee, ABA, 2008 – Present.

*Member*, LGBT Committee, Interbranch Commission for Racial, Gender and Ethnic Fairness, 2007 – Present.

*Member*, National Center for Lesbian Rights National Family Law Advisory Council, 2005 — Present.

*Board of Directors*, National Coalition of Anti-Violence Programs, 2003 — 2005.

*Nominating Committee Chair*, City of Philadelphia Police Department LGBT Liaison Committee, 2003 — 2005.

*Co-Chair*, Philadelphia Bar Association Committee on the Legal Rights of Lesbians and Gay Men, 2002 — 2004.

**PRESENTATIONS & CONFERENCES (SELECTED)**

**Pennsylvania Bar Institute**, Philadelphia, PA.

*Continuing Legal Education Seminar Course Faculty*, “Frontiers in LGBT Family Law: Marriage and Beyond.” October 10, 2013.

**National LGBT Bar Association**, San Francisco, CA.

*Facilitator*, “Teaching Sexual Orientation, Gender Identity and the Law: A Roundtable Discussion,” Lavender Law Conference. August 2013.

*Moderator*, “Queering Legal Services: Making Equality Gains Accessible to All” Panel, Lavender Law Conference. August 2013.

**The Philadelphia Trans-Health Conference**, Philadelphia, PA.

*Continuing Legal Education Seminar Faculty*, “Client vs. Movement – How Do We Choose?” June 14, 2013.

**The Mazzone Center**, Philadelphia, PA.

*Continuing Legal Education Seminar Faculty*, “Rights and Challenges for LGBT Clients.” February 27, 2013.

**Legal Writing Institute / New York Law School**, New York, NY.

*LWI One-Day Workshop Presenter*, “There’s Nothing ‘Soft’ About Professional Development, Cultural Competency, Ethics and Social Justice.” December 7, 2012.

**Philadelphia Bar Association**, Philadelphia, PA.

*Continuing Legal Education Seminar Moderator*, “Marriage (In)Equality: Update on the Legal Recognition of Same-Sex Couples and the Future of the Defense of Marriage Act.” November 29, 2012.

**Legal Writing Institute / Georgetown University Law Center**, Washington, DC.

*Capital Area Legal Writing Conference Presenter*, “Diversity in the LRW Classroom.” March 10, 2012.

**Legal Writing Institute / Brooklyn Law School**, Brooklyn, NY.

*Workshop Presenter*, LWI One-Day Workshops. December 2, 2011.

**National LGBT Bar Association**, Los Angeles, CA.

*Panelist*, “Junior Scholars” Panel, Lavender Law Conference. September 2011.

*Moderator*, “Intimate Partner Violence” Panel, Lavender Law Conference. September 2011.

**University of Pennsylvania**, Philadelphia, PA.

*Faculty Respondent*, GASWorks (Gender and Sexuality Works-in-Progress) Seminar Series. December 3, 2010.

**University of Pennsylvania**, Philadelphia, PA.

*Faculty Respondent*, “Future/NO Future: Graduate Student Conference, Gender and Sexuality Studies.” September 16-17, 2010.

**Temple University James E. Beasley School of Law**, Philadelphia, PA.

*Forum Moderator*, “Queering Borders: Issues in LGBT Immigration.” November 19, 2009.

**Pennsylvania Bar Institute**, Philadelphia, PA.

*Continuing Legal Education Seminar Faculty*, “The New Jersey Civil Union Law.” June 12, 2007.

**National Sexual Assault Law Institute**, Boston, MA.

*Course Material Author and Presenter*, “The Fifth National Sexual Assault Law Institute - Why Race, Ethnicity and Sexual Orientation Matter: Representing Sexual Assault Victims From Underserved Communities.” June 2, 2006.

**Temple University James E. Beasley School of Law**, Philadelphia, PA.

*Symposium Presenter*, “Law and Adolescence: The Legal Status, Rights, and Responsibilities of Adolescents in the Child Welfare, Juvenile, and Criminal Justice Systems.” March 18, 2006.

**Pennsylvania Bar Institute**, Philadelphia, PA.

*Continuing Legal Education Seminar Course Material Author and Faculty*, “Domestic Violence: Protection from Abuse.” March 16, 2006.

**Widener University School of Law**, Wilmington, DE.

*Symposium Presenter*, “Battered Again? Revictimizing Victims of Domestic Violence.” April 1, 2005.

**Pennsylvania Bar Institute**, Philadelphia and Pittsburgh, PA.

*Continuing Legal Education Seminar Course Material Author and Faculty*, “Understanding and Representing Transgender Clients.” July 8, 2004 and December 12, 2004.

**National Gay & Lesbian Law Association**, Philadelphia, PA.

*Panelist, Host Committee Member*, Lavender Law Conference. October 2002.