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# EXTENDING FAMILY BENEFITS TO GAY MEN AND LESBIAN WOMEN

MARY N. CAMELI\*

## INTRODUCTION

The status of family, with all of its attendant benefits and burdens, is currently available only to persons related through blood or marriage.<sup>1</sup> Providing opportunities to obtain family status to persons who live outside of traditional families is both equitable and worthwhile in advancing the goals traditionalists promote.<sup>2</sup> For gay men and lesbian women,<sup>3</sup> the problem of family status is exacerbated by public policy, and by statutes denying them marriage and criminalizing their sexual behavior.<sup>4</sup>

This Note begins by assessing the scope of discrimination suffered by gay and lesbian families. In Part II, the Note explores the avenues currently open to gay and lesbian couples to obtain family status. These include constitutional challenges to marriage statutes, and the use of contracts, adult adoption, as well as wills, living wills, and durable powers of attorney to obtain some semblance of family rights and responsibilities.

Finally, in Part III, the Note evaluates domestic partnership ordi-

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1. E. CARRINGTON BOGAN ET AL., *THE RIGHTS OF GAY PEOPLE: AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK* 80 (1983) [hereinafter *ACLU HANDBOOK*]. No state has ever knowingly allowed two persons of the same sex to marry. See Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 *YALE L.J.* 1783, 1783 n.2 (1988).

2. *ACLU HANDBOOK*, *supra* note 1, at 80-107. The idea of granting family status to gay and lesbian couples encompasses not only rights but responsibilities. As in marriage, the partners assume financial responsibility for each other, and for dependents. Child support and perhaps alimony would be granted at the dissolution of the relationship.

3. The terms "gay men" and "lesbian women" are used throughout the paper instead of the term "homosexual" for a number of reasons. Primarily, the use of the terms "gay men" and "lesbian women" connote a view of homosexuality as being a neutral difference or a social construct rather than an illness or manifestation of immorality. See *SEXUAL ORIENTATION AND THE LAW* 1-2 nn.5-6 (Editors of the Harvard Law Review 1989).

4. See *infra* notes 26-38 and accompanying text. See also Robb London, *Gay Groups Turn to State Courts to Win Rights*, *N.Y. TIMES*, Dec. 21, 1990, at B6. The article charts out which states have sodomy laws that apply to all people, which have sodomy laws that apply only to same-sex couples, and which have repealed such laws. The article details a new trend for state courts to hold these laws unconstitutional under state constitutions. However, nearly half the states retain such laws, and they are often used to evidence public policy against gay and lesbian relationships in other contexts, such as child custody, housing disputes, and employment discrimination.

nances, a recent development open to nontraditional families. Domestic partnership ordinances allow couples to register their relationships with a city or state, and thereby enjoy some of the benefits of marriage.<sup>5</sup> Throughout the Note, the case of *In Re Guardianship of Sharon Kowalski*<sup>6</sup> will be used to illustrate the concepts presented.

## I. THE IMPACT OF DENYING FAMILY BENEFITS TO NONTRADITIONAL FAMILIES

Family is a status given special accord in our society. Legal rights and responsibilities attach between family members.<sup>7</sup> For example, rights of inheritance are spelled out in the law, and in the absence of a will, family members receive priority in inheritance.<sup>8</sup> Certain family members are obliged to provide financial support for other family members, as in the case of parents and children.<sup>9</sup>

Marriage is the vehicle by which otherwise unrelated adults create the family relationship. The Supreme Court has called marriage a fundamental liberty, "one of the basic civil rights of man."<sup>10</sup> Typically, courts support the institution of marriage because it is "the foundation of the family and of society."<sup>11</sup> In the context of gay and lesbian unions, though, courts quickly sidestep the fundamental rights issue and instead rely on a view of marriage that is centered around procreation.<sup>12</sup> "[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race."<sup>13</sup> This argument concludes that because marriage of a same-sex couple in-

5. See *infra* notes 160-208 and accompanying text.

6. There are actually three decisions surrounding this guardianship dispute: *In re Guardianship of Kowalski*, 382 N.W.2d 861 (Minn. Ct. App.), *cert. denied*, 106 S. Ct. 1467 (1986) [hereinafter *Kowalski I*]; *In re Guardianship of Kowalski*, 392 N.W.2d 310, (Minn. Ct. App.), *rev. denied*, 1986 [hereinafter *Kowalski II*]; *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991) *rev. denied*, 1992 [hereinafter *Kowalski III*]. See also KAREN THOMPSON & JULIE ANDRZEJEWSKI, WHY CAN'T SHARON KOWALSKI COME HOME? (1988) [hereinafter THOMPSON & ANDRZEJEWSKI]. In that book, Thompson gives her viewpoint on the case, and describes her life with Kowalski.

7. See American Civil Liberties Union Public Education Department, *Legislative Briefing Series: Domestic Partnership 2* (1991) [hereinafter *ACLU Briefing Series*].

8. See *id.* at 2-4.

9. See *ACLU HANDBOOK*, *supra* note 1, at 80-81.

10. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

11. *Id.* at 384.

12. See *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

13. *Singer*, 522 P.2d at 1195. The *Singer* court also states that "society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." *Id.* Contrast this view of "society" with the fact that more than 15.5 million children do not live with two biological parents, and the fact that as many as 8 to 10 million children are born into families with a gay or lesbian parent. *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991).

volves no possibility of children born of the union,<sup>14</sup> a state is free to restrict marriage to male-female couples.<sup>15</sup>

What these courts fail to recognize is that marriage has never been restricted to couples capable of reproducing.<sup>16</sup> Furthermore, gays and lesbians are not any less fertile than the heterosexual population, and in fact are increasingly joining the ranks of parenthood.<sup>17</sup> Many have children from previous unions and some become parents within the context of their gay or lesbian relationships.<sup>18</sup> Finally, and most importantly, society favors the marital/family relationship for reasons other than procreation, and these reasons still exist in gay and lesbian relationships.<sup>19</sup>

Generally, the family, with its economic interdependence, is seen as "the foundation of a strong society".<sup>20</sup> Other groups of unrelated adults also form economically interdependent units that would both benefit and benefit from traditional family status. In fact, only 15% of Americans live in a traditional nuclear family, with a father providing financial support, and a mother tending to the home and child care.<sup>21</sup> With only 15% of the population living in the basic, stable family unit as viewed by traditionalists, society could benefit from expanding the status of family to include others. Recognizing other configurations of adults who choose to be economically interdependent, and encouraging such reliances, could further the societal stability traditionalists seek to promote.<sup>22</sup>

In addition to economic stability, families can provide emotional

14. Carried to its "logical" conclusion, this means that states can prohibit marriage between people unable to have children due to either age or physical condition.

15. *Singer*, 522 P.2d at 1195. See also *Baker*, 191 N.W.2d at 186.

16. ACLU HANDBOOK, *supra* note 1, at 81. Typically the only requirements for a marriage license are that the applicants must be of a certain minimum age, not closely related by blood, and free of certain forms of venereal disease. Taking the idea that marital privacy rights hinge on procreation to its limits means that states could prevent post-menopausal women or other infertile people from marrying.

17. See generally, DEL MARTIN & PHYLLIS LYON, *LESBIAN WOMAN*, ch. 5, (Revised ed. 1983).

18. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 461 n.2 (1990).

19. See *infra* note 23 and accompanying text.

20. Walter Isaacson, *Should Gays Have Marriage Rights? On Two Coasts, the Growing Debate Produces Two Different Answers*, TIME MAG., Nov. 20, 1989, at 101.

21. According to some studies, only 15% of the U.S. population lives in home consisting of "a working husband, homemaker wife, and children." See Laurie Becklund, *The Word 'Family' Gains New Meaning*, L.A. TIMES, Dec. 13, 1990, Part A, at 3.

22. See *supra* notes 20-21 and accompanying text. Columnist Anna Quindlen argues in favor of allowing same-sex marriage using a traditional values argument: "Love and commitment are rare enough; it seems absurd to thwart them in any guise." Quindlen argues that there is no secular reason to take a "patchwork approach of corporate, governmental and legal steps to guarantee what can be done simply, economically, conclusively and inclusively with the words 'I do.'" *Recognizing the Commitment of Same-sex Couples*, CHI. TRIB., Mar. 24, 1992, § 1, at 17.

stability. Allowing competent adults who wish to form a family to do so increases personal choice, and allows people who are already living in these stable family units to enjoy the privileges and protections traditional families currently enjoy.<sup>23</sup>

There is no reason to exclude persons who are not involved in a sexual relationship from forming family units. The key benefits provided to society by families are the economic and emotional benefits, and these benefits can be provided by any group of people who agree to live as a family for an indefinite period of time. However, many of the objections to allowing an expansion of the definition (and protections) of family status surround the gay and lesbian issue.<sup>24</sup> These objections are largely based on false stereotypes of gays and lesbians, and on ideas about morality and sexuality.<sup>25</sup>

The reluctance of courts and legislators to recognize an expanded definition of family has translated into an unwillingness to extend family rights and benefits to nontraditional families. These rights and benefits include employment benefits such as insurance and pensions, equal access to housing, status as next-of-kin in medical emergencies, guardianship preference for a disabled family member, preference in child custody and adoption, rights of inheritance, the power to make funeral arrangements for a family member, and the right to sue in tort for loss of consortium and mental duress upon injury of a family member.<sup>26</sup>

For example, a lesbian recently sued her deceased lover's employer for discrimination for refusing to pay her "death benefits" the company normally pays out to surviving spouses, children, and "other relatives who are dependant on the employee participant prior to his or her death who demonstrate financial need after death."<sup>27</sup> For the most part, employee benefits such as insurance, pensions, funeral leave, and death ben-

23. See ACLU HANDBOOK, *supra* note 1, at 80-81.

24. See, e.g., ROGER J. MAGNUSON, ARE "GAY RIGHTS" RIGHT? vii (1985).

25. See, e.g., *id.* at v - viii. There, the author states, using circular logic, that most gays, because they keep their sexuality private, do not suffer from discrimination. After citing the "health dangers" of the homosexual lifestyle, the author states that if gays are given civil rights, "many otherwise normal [sic] people beset by occasional thoughts, temptations, or inclinations, may be drawn into an overtly homosexual life-style that will victimize them physically, emotionally, and spiritually." He further states that homosexuals "frequently victimize" children, and engage in promiscuous and "peculiar" sexual practices. *Id.* On the contrary, the vast majority of child molestations are committed by heterosexual men, who comprise less than 50% of the population. See ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL 20 (1988).

26. See *infra* note 55 and accompanying text.

27. See Michael Schachner, *Lesbian Partner Sues AT&T For Benefits*, CRAIN'S BUS. INS., Sept. 17, 1990, at 6. See also Tamar Lewin, *Suit Over Death Benefits Asks, What Is A Family?*, N.Y. TIMES, Sept. 21, 1990, at B7.

efits are not readily available to gay and lesbian partners of employees.<sup>28</sup> Although a few government employers now extend employment benefits to nontraditional families,<sup>29</sup> even fewer private employers have followed suit.<sup>30</sup>

Housing benefits are another problem area for gay and lesbian couples. Some zoning ordinances restrict the relationships of persons living in single-family homes in a particular area.<sup>31</sup> Courts have ruled such ordinances are valid<sup>32</sup> and lesbian and gay couples can be excluded on this basis. Other problems exist in the rental context, where landlords can refuse to rent to unmarried couples, whether heterosexual, gay, or lesbian.<sup>33</sup> In New York, where rent controlled apartments can be retained only by family members when the named tenant dies, gays and lesbians have only recently won the right to be considered "family" for the purposes of the rent control laws.<sup>34</sup> Even in this context, though, the status of family is not presumed but must be demonstrated using several court-defined criteria.<sup>35</sup>

Inheritance laws also favor traditional family members, even distant relatives, over a gay or lesbian partner if a gay man or lesbian woman dies intestate.<sup>36</sup> Marriage laws, of course, give the married partners certain rights of inheritance in the absence of a will.<sup>37</sup> Even when a gay man or lesbian woman has a will naming a partner, the will is more likely to

28. See *infra* notes 160-70 and accompanying text.

29. *Id.*

30. The American Psychological Association, American Friends Service Committee, National Organization for Women, ACLU National Office, ACLU of Northern California, Seattle Mental Health Institute, Worker's Trust, Lambda Legal Defense and Education Fund, and Albert Einstein College of Medicine/Montefiore Medical Center are private organizations which offer benefits to domestic partners voluntarily. See *ACLU Briefing Series, supra* note 7, at 6.

31. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), where the Supreme Court upheld an ordinance prohibiting unrelated people from living together in certain types of housing. *But see Moore v. City of East Cleveland*, 431 U.S. 494 (1977), where the Supreme Court struck down an ordinance which limited occupancy of a dwelling to immediate family in such a way that it was illegal for a grandmother to live with her son, his child, and the child's cousin. The distinction the Court drew was that the Belle Terre ordinance promoted family values, while the East Cleveland law was "slicing deeply into the family itself". *Id.* at 498.

32. See, e.g., *Boraas*, 416 U.S. 1.

33. See *State of Minnesota v. French*, 460 N.W.2d 2 (Minn. 1990), where the Supreme Court of Minnesota ruled that the Minnesota Human Rights Ordinance, which prohibits discrimination based on marital status, could not be interpreted to compel a landlord to rent to an unmarried couple as long as the state's fornication laws were in effect.

34. See *Braschi v. Stahl Associates*, 544 N.Y.S.2d 784, 789, (1989); *East 10th Street Associates v. Estate of Goldstein*, 552 N.Y.S.2d 257, 258 (N.Y. App. Div. 1990).

35. See cases cited *supra* note 34. The cases define family as "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." *Braschi*, 544 N.Y.S.2d at 211; *Goldstein*, 552 N.Y.S.2d at 258.

36. See generally Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981).

37. *Id.*

be challenged and overturned than a will favoring traditional family members.<sup>38</sup> The same holds true for life insurance claims where a lesbian woman or gay man has named a partner as beneficiary.

## II. ONE LESBIAN FAMILY'S PREDICAMENT

In November 1983, a drunk driver struck Sharon Kowalski's car.<sup>39</sup> As a result of the accident, Kowalski, then 27, suffered severe brain damage and other physical injuries, leaving her confined to a wheel chair<sup>40</sup>. Kowalski was unable to act on her own behalf, creating the need for the appointment of a guardian. Kowalski had been living in a closeted<sup>41</sup> lesbian relationship with Karen Thompson for four years before the accident.<sup>42</sup> The two had exchanged rings, and each had named the other as beneficiary on their life insurance policies.<sup>43</sup> Neither woman had revealed the nature of their relationship to their families.<sup>44</sup>

Immediately after the accident, Thompson had difficulty visiting Kowalski in the hospital, or even getting information on her condition.<sup>45</sup> Later, Thompson struggled to gain access to Kowalski to participate in her treatment, as Kowalski was repeatedly transferred from one facility to the next by her family. At each new juncture, Thompson met with opposition from the staff of the various facilities where Kowalski was placed and from Kowalski's parents.<sup>46</sup>

Eventually, a legal battle ensued between Thompson and Kowalski's father, Donald over the guardianship of Sharon Kowalski.<sup>47</sup> Mr. Kowalski disputed Thompson's assertion that she and Sharon Kowalski were

38. See *infra* notes 124-35 and accompanying text.

39. See THOMPSON & ANDRZEJEWSKI, *supra* note 6, at 1-8, (1988). See also Gina M. Torielli, Note, *Protecting the Nontraditional Couple in Times of Medical Crises*, 12 HARV. WOMEN'S L.J. 220 (1989).

40. See *Kowalski I*, *supra* note 6, at 862-63; *Kowalski II*, *supra* note 6, at 312; *Kowalski III*, *supra* note 6, at 791.

41. "Closeted" refers to gay and lesbian couples who choose not to make the nature of their relationship generally known. See THE ALYSON ALMANAC 90 (1989), which defines "closet" as "[t]he place where gay men or lesbians hide, figuratively speaking, if they do not want their homosexuality to be known." *Id.* There are different levels of being closeted: sometimes the information is kept from everyone, sometimes a few gay and lesbian friends know about the relationship. The latter was the case with Thompson and Kowalski.

42. See *Kowalski I*, *supra* note 6, at 863; *Kowalski III*, *supra* note 6, at 791. Also, see THOMPSON & ANDRZEJEWSKI, *supra* note 6, at 10-16.

43. See *Kowalski III*, *supra* note 6, at 791.

44. See THOMPSON & ANDRZEJEWSKI, *supra* note 6, at 14.

45. *Id.* at 4. Thompson was told the hospital could only give out information to immediate family members. She succeeded in getting information by telling a sympathetic priest that she was a close family friend, sent ahead by the family to determine Sharon's condition.

46. See *id.* at 47-49, 66-68, and 85-88.

47. See *Kowalski I*, *supra* note 6; *Kowalski II*, *supra* note 6; *Kowalski III*, *supra* note 6, at 791-92.

involved in a lesbian relationship, and the Minnesota trial court ruled that the relationship was "uncertain".<sup>48</sup> The court named Mr. Kowalski guardian and gave him complete rights to determine his daughter's visitors. Mr. Kowalski promptly cut off Thompson's visitation,<sup>49</sup> even though Sharon Kowalski expressed a consistent and reliable desire to continue the visits.<sup>50</sup> Thompson battled Donald Kowalski in court for more than three years before visitation was reinstated.<sup>51</sup> In the meantime, Mr. Kowalski had removed Sharon from a rehabilitation center, and placed her in a nursing home where her physical and mental capabilities regressed.<sup>52</sup>

Eventually, Donald Kowalski asked the court to remove him as guardian, due to his own medical problems.<sup>53</sup> Thompson again petitioned the court to name her as guardian. Instead, the court named as guardian Karen Tomberlin, a friend of Kowalski's parents who had not even filed a petition for guardianship. The court made the appointment without having a mandatory hearing to determine Tomberlin's fitness as a guardian.<sup>54</sup>

On appeal, the court reversed and granted Thompson's petition for guardianship of Sharon Kowalski.<sup>55</sup> In this unusually sharp opinion, the appellate court found that the court below abused its discretion when it denied Thompson's petition.<sup>56</sup> The appellate court opinion was the first to reveal that the evidence overwhelmingly supported the appointment of Thompson. Sixteen of Kowalski's health care providers testified that Thompson had outstanding interaction with Kowalski, had extreme interest and commitment in promoting Kowalski's welfare, had an exceptional understanding of Kowalski's physical and mental needs, and was

48. See *Kowalski I*, *supra* note 6, at 863.

49. *Id.* at 864; *Kowalski III*, *supra* note 6, at 791.

50. See THOMPSON & ANDRZEJEWSKI, *supra* note 6, at 152-53, 162, and 166. When interviewed by uninterested third parties using the limited means of communication to which Kowalski was accustomed, Sharon repeatedly said she felt her wishes were not being made known to the court, and that she wanted to be placed with Thompson. She further indicated that her relationship with Thompson was a gay relationship and that she understood gay to mean "Love same sex." Thompson reported that Kowalski regularly asked her to take her home to their house.

51. See Torielli, *supra* note 39, at 222.

52. *Id.* at 221-22.

53. See *Kowalski III*, *supra* note 6, at 791.

54. *Id.* at 791-92.

55. *Id.* at 797.

56. *Id.* at 796-97. "While the trial court has wide discretion in guardianship matters, this discretion is not boundless. The Minnesota guardianship statutes are specific in their requirement that factual findings be made on a guardian's qualifications. The statutes also consistently require the input of the ward where possible. Upon review of the record, it appears the trial court clearly abused its discretion in denying Thompson's petition and naming Tomberlin guardian instead." *Id.*



fully equipped to attend to Kowalski's social and emotional needs.<sup>57</sup>

The appellate court detailed Thompson's frequent visits to Kowalski, and her unique ability to motivate Kowalski in physical therapy and personal hygiene, which Kowalski sometimes found painful. Thompson had built a fully handicap-accessible home in hopes of bringing Kowalski home to live with her.<sup>58</sup> Tomberlin had testified that she was neither willing nor able to care for Kowalski in that manner and had hoped to supervise Kowalski's stay in institutions.<sup>59</sup> Most compelling to the appellate court was that Kowalski had consistently expressed her desire to live with Thompson and have Thompson as her guardian. The appellate court was the first willing to believe this evidence from the health care providers.<sup>60</sup>

Another important distinction the appellate court drew was that Thompson had not invaded Kowalski's privacy by revealing the nature of their relationship, and had not harmed Kowalski by bringing her to events in the women's community and the gay community, where they were both identified as lesbians.<sup>61</sup> The appellate court ruled that this was all irrelevant because Kowalski herself had revealed the nature of the relationship to health care providers and others as soon as she was able to communicate. Further, it was in Kowalski's best interests for Thompson to reveal the nature of the relationship to the health care providers so that the doctors could be fully aware of who the patient was before she became disabled.<sup>62</sup>

The dispute over Sharon Kowalski's guardianship lasted seven

57. See *Kowalski III*, *supra* note 6, at 793-94. The appellate court also pointed out that Karen Thompson was the only person willing or able to care for Sharon Kowalski outside of an institution. *Id.* at 794.

58. *Id.* at 794.

59. *Id.* In fact, the appellate court noted that Tomberlin rarely visited Kowalski. Tomberlin stated that her primary goal was to relocate Kowalski away from Thompson and nearer to Kowalski's parents. Apparently this goal was set without regard to Kowalski's actual needs, because such a move would have cut her off from available physical therapy, and placed her in a nursing home. This was, in fact, what Kowalski's father had done with her when he initially gained custody.

60. *Id.* at 793. The appellate court revealed for the first time evidence in the record from physicians' reports that Sharon Kowalski consistently indicated a desire to return home, and that Sharon defined home as the house she shared with Karen Thompson. The appellate court pointed out that even though no contradictory evidence was presented, the trial court concluded that Sharon had not reliably expressed a preference for guardianship. The appellate court called this conclusion "clearly erroneous."

61. *Kowalski III*, *supra* note 6, at 795-96. The trial court had concluded that these visits to events in the gay community were harmful to Kowalski even though the court itself had authorized these excursions. The only evidence the trial court had about the allegedly negative effect of these excursions was speculation from Kowalski's sister that Sharon would not enjoy such events.

62. *Id.* Physicians had testified that it was not only appropriate but necessary for Thompson to reveal to them that Kowalski was a lesbian, because "it is crucial for doctors to understand who their patient was prior to the accident, including that patient's sexuality."

years.<sup>63</sup> The case demonstrates the magnitude of the problems suffered by nontraditional couples when the legal system fails to meet their needs. In the age of AIDS, when many gay couples face medical and legal battles, Karen Thompson and Sharon Kowalski represent the lack of legal protection afforded nontraditional families in medical emergencies and in long-term guardianship situations.

Because marriage is not available to lesbian and gay couples,<sup>64</sup> many of the protections and benefits of marriage were unavailable to Thompson and Kowalski. As discussed earlier, the benefits that are difficult or impossible to obtain for lesbian and gay couples include employment benefits, housing benefits, next-of-kin status in medical emergencies, guardianship preference for disabled family members, preference in child custody cases, rights of inheritance, and the right to make funeral arrangements for family members.<sup>65</sup>

### III. THE ROADS TO FAMILY STATUS

Lesbians and gay men have tried conventional and unconventional avenues to overcome the presumption against their family status. Among these approaches are constitutional challenges to marriage laws, contracts, adult adoption, and state and local statutes. Each will be considered in turn and the effectiveness of each will be evaluated.

#### A. *Family by Marriage: Constitutional Challenges to Marriage Laws*

The most direct route to obtaining the benefits and protections of marriage is to get married. Several gay and lesbian couples have tried to do just that. In the 1970s, gay men<sup>66</sup> and lesbians attempted to challenge marriage laws with constitutional claims. These claims were based on the First, Ninth, and Fourteenth Amendments, as well as the Equal Rights Amendment (ERA) in states that adopted it as part of their state constitutions.

63. See Louis Weisberg, *Thompson Named Guardian*, WINDY CITY TIMES, Dec. 26, 1991, at 1. Thompson said the appellate court decision granting her custody was not a victory, but a just decision that should have been made years earlier. Because of the delay, Thompson said, Kowalski lost things she will never regain because her parents put her in a nursing home instead of a rehabilitation center. See also *Lesbian Wins Guardianship of Injured Lover*, CHI. TRIB., December 18, 1991, at 4. After the decision, Thompson told reporters, "There aren't words to express the hell the system has put us through."

64. See *infra* notes 66-81 and accompanying text.

65. See Barbara Case, *Repealable Rights: Municipal Civil Rights Protection for Lesbians and Gays*, 7 LAW & INEQ. J. 441, 441-42 (1989).

66. All of the cases found on point involved gay male couples. There is no reason to believe the results would be any different for lesbians challenging marriage laws on constitutional grounds.

In *Baker v. Nelson*,<sup>67</sup> a gay male couple filed for a writ of mandamus to compel the county clerk of Hennepin County, Minnesota, to issue them a marriage license. The trial court quashed the writ and the Minnesota appellate court affirmed.<sup>68</sup> The men based their claim on legislative intent, and in the alternative, on the First, Eighth, Ninth, and Fourteenth amendments to the Constitution.<sup>69</sup> The appellate court dismissed the legislative intent argument, saying that common usage of the term "marriage" refers to a union between persons of the opposite sex, and the legislature presumably was using the term as it is commonly understood.<sup>70</sup> The court rejected, without discussion, the First and Eighth Amendment claims.<sup>71</sup>

The men argued that they had a fundamental right to marry under the Ninth Amendment, made applicable to the states through the Fourteenth Amendment.<sup>72</sup> Further, they argued that they were being deprived of liberty and property without due process and were denied equal protection of the laws. The court stated that inherent in these arguments is the belief that the right to marry without regard to the sex of the parties is a fundamental right.<sup>73</sup> Citing *Skinner v. Oklahoma*<sup>74</sup> and *Griswold v. Connecticut*,<sup>75</sup> the court concluded that the right to marry is tied to privacy in procreation and traditional family life.<sup>76</sup> Thus, there is no fundamental right to marry a person of the same sex.

An attempt to use the state of Washington's Equal Rights Amendment to argue that the state's refusal to issue a marriage license to two men was sex discrimination was rejected in *Singer v. Hara*.<sup>77</sup> Two men argued that the marriage law was discriminatory in that it allowed a man to marry a woman, but did not allow a man to marry a man.<sup>78</sup> The

67. 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

68. *Id.*

69. *Id.* at 186.

70. *Id.* at 185-86.

71. *Id.* at 186 n.2.

72. *Id.* at 186.

73. *Id.*

74. 316 U.S. 535 (1942).

75. 381 U.S. 479 (1965).

76. *See Baker*, 191 N.W.2d at 186-87. *See also Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) ("the main justification . . . [for] marriage is procreation, perpetuation of the race."), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982). The Adams opinion ends with a remarkable statement from the court which foreshadows domestic partnership laws: "The time may come, far in the future, when contracts and arrangements between persons of the same sex who abide together will be recognized and enforced under state law. . . . But in my opinion, even such a substantial change in the prevailing mores would not reach the point where such relationships would be characterized as 'marriages'. . . . For that result to obtain, an affirmative enactment of Congress will be required." *Id.* at 1125.

77. 522 P.2d 1187 (Wash. Ct. App. 1974).

78. *Id.* at 1190.

Washington appellate court rejected this argument, and agreed with the government that as long as the law discriminated equally against male pairs and female pairs, the ERA was not violated. The government's argument was that the ERA would only be violated if the state allowed, for example, gay men to marry, but did not allow lesbians to marry.<sup>79</sup>

The *Singer* court similarly rejected equal protection arguments in which the men tried to draw an analogy between invalid racial classifications in marriage laws and invalid sex classifications. The court found that the appellants were not being denied a marriage license because of a classification based on sex, but rather because of the definition of marriage as relationship entered into by persons of the opposite sex.<sup>80</sup> The court also cited public policy reasons for not permitting the issuance of a marriage license to the men.<sup>81</sup>

This rationale that the men could not marry because marriage is defined as a relationship between persons of the opposite sex is circular. In light of the rulings allowing interracial marriage, the court was inconsistent in its application of the ERA. The court ruled, as stated above, that the ERA prohibited only disparate treatment of male couples and female couples. In the racial context, this "logic" would mean that states could prohibit whites from marrying whites, and Blacks from marrying Blacks, as long as the state discriminated "equally" against white pairs and Black pairs. In other words, a state could mandate interracial marriage, prohibit intraracial marriage, and still comply with the Fourteenth amendment. This was clearly not the message of the miscegenation cases.

Also, defining marriage as a relationship between two persons of the opposite sex is no more legitimate than defining marriage as a relationship between two persons of the same race. The justification that marriage exists for the purposes of procreation and therefore gays and lesbians should be excluded cannot stand up under even a traditional view of marriage. The ability to procreate is not a prerequisite for a marriage license, and marriage is certainly not a prerequisite for procreation. Many gays and lesbians have children, some from prior heterosexual relationships, and some within a lesbian or gay relationship. Procreation

79. *Id.* at 1190-91.

80. *Id.* at 1192.

81. *Id.* at 1190 n.5 (citing examples of opposition to the ERA when it was initially on the ballot). "Homosexual and lesbian marriage would be legalized, with further complication regarding adoption of children into such a 'family.' People will live as they choose, but the beauty and sanctity of marriage must be preserved from such needless desecration."

appears to be a red herring, not an actual justification for denying same-sex marriage.

Sharon Kowalski and Karen Thompson never challenged the Minnesota marriage statute.<sup>82</sup> Had marriage been available to them, many of their problems could have been resolved outright. Although there are some cases where parents challenge a spouse for guardianship of a disabled adult, the legal presumption is in favor of the spouse. In order to take advantage of the benefits of marriage, Thompson and Kowalski would have been required to publicly acknowledge their relationship. This is a "catch-22" for many gays and lesbians: in order to receive societal benefits, they must publicly declare their relationship, but once they publicly declare their relationship they are open to prosecution under sodomy laws,<sup>83</sup> and persecution from the homophobic society in which they live.<sup>84</sup> Marriage as a solution for gay and lesbian families presupposes the repeal of sodomy laws and general societal acceptance. By the same token, marriage for gays and lesbians would probably lead to general societal acceptance<sup>85</sup> and the repeal of sodomy laws.<sup>86</sup>

82. Such a claim would have likely been rejected. The *Baker* case, discussed in notes 67-76 and accompanying text, was decided by an appellate court of Minnesota, Thompson's and Kowalski's home state. No such claim has ever been successful. Recently, the supreme court in Hawaii heard arguments in a case brought by three same-sex couples seeking the right to marry in that state. Apparently Hawaii's state constitution has provisions concerning privacy, due process and equal protection that the couples argue give broader rights to gays and lesbians than does the U.S. Constitution. See Rex Wockner, *Hawaii Supreme Court Hears Gay Marriage Case*, OUTLINES, Nov. 1992, at 13.

83. Minnesota is one of 24 states in which homosexual acts between consenting adults are still illegal. The other states are Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Virginia. See LEIGH W. RUTLEDGE, *THE GAY BOOK OF LISTS 134* (1987) (list compiled as of 1987).

84. Hate crimes against gays and lesbians have increased an average of 42% in six major metropolitan areas in the last year. A total of 1588 incidents of anti-gay violence were reported in Minneapolis/St. Paul, Boston, New York City, San Francisco, Los Angeles, and Chicago. The incidents included "physical assaults, acts of harassment, bomb threats, and instances of vandalism and arson." See Chris Bull, *Group's Survey Says Hate-Crime Reports Rose in Six Areas*, THE ADVOCATE, Apr. 9, 1991 at 14. The statistics were compiled by the National Gay and Lesbian Task Force. Hate crimes are crimes committed against a minority group because of the characteristic that makes the group a minority.

85. There is some dispute in the gay and lesbian community about whether marriage is too much assimilation into "straight" life. Many gays and lesbians feel that heterosexual marriage is an inherently oppressive model. This is one of the reasons domestic partnership laws have gained more acceptance in the gay and lesbian community than marriage laws. Domestic partnership laws are seen as creating something "other" than marriage, which has many negative connotations for gays and lesbians.

86. See generally MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR & HATRED OF GAYS IN THE 90'S* (1990). The authors of this controversial book suggest that gays have been too hasty in their rejection of "family" living situations because of the oppression gays have suffered in traditional families. They suggest that if gays return to the idea of "traditional gay families" as existed in ancient Greece, gays would be more acceptable to mainstream America. The traditional gay family, in this view, is comprised of two same-sex partners

## B. Family by Agreement

One way to gain the benefits of family status is to create relationships by contracts which mimic family rights and responsibilities as closely as possible. The most useful documents for this purpose are cohabitation contracts, durable powers of attorney, wills, and living wills.

### 1. Cohabitation Contracts

Cohabitation contracts first entered the public consciousness when Michelle Triola Marvin sued Lee Marvin for "palimony" in 1970.<sup>87</sup> Triola alleged that when she began living with Marvin in 1964, they made an oral agreement to combine their efforts and earnings, sharing equally any property accumulated as a result of their efforts, whether individual or combined. They further agreed to hold themselves out to the general public as husband and wife, and that Triola would provide services to Marvin as companion, homemaker, housekeeper and cook.<sup>88</sup> The trial court dismissed Triola's complaint for failure to state a claim upon which relief can be granted. The appellate court affirmed, but the California supreme court reversed and remanded for trial.<sup>89</sup>

The supreme court concluded that Triola had a claim for breach of an express contract.<sup>90</sup> Further, the court noted that such an agreement relating to earnings, property, and expenses was not invalid merely because the parties contemplated engaging in a nonmarital relationship when they entered into it.<sup>91</sup> The court stated it would not enforce such an agreement if based on sexual services as consideration, but added that even if sexual services were part of the consideration, it would still enforce any severable portion of the contract supported by independent consideration.<sup>92</sup>

In 1988, a California court of appeals extended this concept of cohabitation contracts to homosexual relationships. *Whorton v. Dilling-*

with a significant age differential, where the older partner helps the younger partner not only financially, but "by shaping his character and increasing his wisdom." *Id.* at 370. The emphasis will then be away from the sexual aspect of the relationship. This author thinks Kirk and Madsen are incredibly naive to believe that mainstream America will find such relationships more palatable; if anything, ageist attitudes combined with homophobic attitudes will make these relationships much less palatable to mainstream America. This concept plays into the negative gay stereotype of older gay men preying on very young men and children. Another problem with Kirk's and Madsen's idea is that it is based strictly on a male model. There is no historical parallel for lesbians.

87. IRVING J. SLOAN, *LIVING TOGETHER: UNMARRIEDS AND THE LAW* 16 (1980).

88. *Id.* at 15-16.

89. *Id.* at 16.

90. *Id.* at 16.

91. *Id.* at 17.

92. *Id.*

ham<sup>93</sup> presents a fact situation that parallels *Marvin v. Marvin* in many respects. Whorton and Dillingham, a gay male couple, began living together in 1977. They made an oral contract that Whorton, who was a student, was to give up his studies and become Dillingham's "chauffeur, bodyguard, social and business secretary, partner and counselor in real estate investments" and was to "appear on his behalf when requested."<sup>94</sup> Further, Whorton was to work for Dillingham's business endeavors, and be his "constant companion, confidant, travelling and social companion, and lover." As consideration, Dillingham was to give Whorton a one-half interest in real estate and property acquired together, to financially support Whorton, and give him access to checking and savings accounts, and to engage in a sexual relationship with Whorton.<sup>95</sup>

Whorton performed his part of the contract until 1984 when Dillingham terminated the relationship. Dillingham then refused to perform his part of the agreement by giving Whorton the half interest in real estate and property.<sup>96</sup> The court quoted *Marvin v. Marvin* extensively, saying that such agreements are enforceable, unless expressly and inseparably based on illicit consideration of sexual services. Still citing *Marvin*, the court stated that even if sexual services<sup>97</sup> were part of the consideration, any severable portion of the contract supported by independent consideration would be enforced.<sup>98</sup> Most importantly, the court said *Marvin* is applicable to same-sex partners, and that there was no legal basis to make a distinction between heterosexual and same-sex couples.<sup>99</sup>

The major barrier to the enforcement of cohabitation contracts is the inclusion of sexual services as part of the consideration.<sup>100</sup> In *Whorton*, the court distinguished the case *Jones v. Daly*,<sup>101</sup> where the services provided as consideration in the contract between gay lovers consisted of "lover, companion, homemaker, travelling companion, housekeeper, and cook."<sup>102</sup> Because services as "lover" were included in the agreement, the court found that sexual services and the services

93. 248 Cal. Rptr. 405 (Ct. App. 1988).

94. *See id.* at 406-07.

95. *Id.* at 407.

96. *Id.*

97. This is an important consideration for gay and lesbian couples. Because of the stereotype of gay and lesbian relationships as being primarily sexual in nature, lesbians and gays must overcome this presumption in courts which find sexual services to be non-severable and fatal to any contract. *See DEL MARTIN & PHYLLIS LYON, LESBIAN WOMAN 5* (rev. ed. 1983)

98. 248 Cal. Rptr. at 407-08.

99. *Id.* at 408 n.1.

100. SEXUAL ORIENTATION AND THE LAW at 2-9, § 2.04 (Roberta Achtenberg, ed. 1989).

101. 176 Cal. Rptr. 130 (Ct. App. 1981).

102. *Whorton* 248 Cal. Rptr. at 410 (citing *Jones*, 176 Cal. Rptr. 130 (1981)).

which flowed from the sexual relationship were inseparable parts of the consideration, and the agreement was thus unenforceable.<sup>103</sup>

The *Jones* court seemed to believe that the sexual relationship was the primary basis of the agreement. In part, this ruling is probably based on a stereotype of gay and lesbian relationships as primarily, or even solely, sexual in nature.<sup>104</sup> However, even in heterosexual cohabitation agreements, courts will sometimes find the entire agreement invalid because of the inclusion of sexual services as part of the consideration.<sup>105</sup>

Even when courts enforce cohabitation contracts, these agreements are of limited utility to gay and lesbian couples attempting to enjoy the benefits and protections of marriage. While they protect the couple against each other,<sup>106</sup> they extend no benefits in the public realm. For example, cohabitation contracts are no aid in getting the employment benefits of a gay or lesbian partner. Even if a couple contracts for child custody, or guardianship preference, courts are free to disregard the agreement entirely in order to make a "best interests" analysis.<sup>107</sup> Further, the cohabitation contract itself provides no protection for inheritance, no power to act for a partner in a medical emergency, and no ability to provide funeral arrangements for a deceased partner. At best, a cohabitation contract can serve as proof that a serious relationship exists.

For Thompson and Kowalski, a cohabitation contract could have provided proof of the nature of the relationship.<sup>108</sup> However, too much "proof" of the nature of the relationship could have led the court to the conclusion that the contract was void for including sexual services as part of the consideration. In any case, a court battle would not have been

103. *Jones*, 176 Cal. Rptr. at 130 (cited in *Whorton*, 248 Cal. Rptr at 410).

104. For an example of this view of gays and lesbians, see ROGER J. MAGNUSON, ARE "GAY RIGHTS" RIGHT? 13 (1985), where the author answers the question "Who are homosexuals?" with the following explanation: "'Homosexuals' or 'homophiles' seek orgasmic satisfaction from simulated sexual behavior with members of the same sex rather than from normal sexual behavior with members of the opposite sex." While it is unclear what the author means by "simulated" versus "normal" sexual behavior, it is clear that his view of homosexuals is limited strictly to sexuality.

105. See *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979), where a woman who lived in a common law marriage with a man for fifteen years was denied any property from the relationship. She had made her claim under contract law and the court held that the contract was void because such an agreement was based in part on sexual services as consideration. The court ruled that an agreement based even in part on "illicit sexual services" was illegal.

106. See *supra* notes 93-99 and accompanying text.

107. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO L.J. 459, 542-72 (1990).

108. Although, it is not clear why the judge seemed to want to find a sexual relationship before he would legitimately recognize Thompson's interest in Kowalski's care and guardianship. The appellate court focused rather on Thompson's steady commitment to Kowalski's care during the seven years following the accident, ignoring as irrelevant claims that Thompson had entered into other relationships during that time period. *Kowalski III*, *supra* note 6, at 796.



avoided merely by the existence of such a document. Donald Kowalski was not likely to view the relationship favorably merely because of the existence of a document. A cohabitation contract probably carries little weight in a guardianship hearing where the court is assessing the best interests of the ward.<sup>109</sup>

## 2. Durable Powers of Attorney and Wills

For the benefits of family status in times of emergency, the most useful documents are durable powers of attorney, living wills<sup>110</sup>, and wills.<sup>111</sup> In some states, a statutory provision also allows a person to express a preference for a long-term guardian.<sup>112</sup> A durable power of attorney is a document where one person, the principal, authorizes another person, the attorney in fact, to act on the principal's behalf if and when the principal becomes incompetent.<sup>113</sup> A durable power of attorney differs from a regular power of attorney in that a regular power of attorney allows the attorney to act on the principal's behalf up to the time that the principal becomes incompetent. With a durable power of attorney, the document generally becomes effective when the principal becomes incompetent.

Such a document would have been instrumental in Karen Thompson's dispute with Donald Kowalski because it would have shown Sharon Kowalski's intent to have Karen Thompson act on her behalf.<sup>114</sup> One problem Thompson and Kowalski faced was that, in the appointment of a guardian, courts engage in a "best interests" analysis.<sup>115</sup> Courts attempt to determine which person to appoint as guardian in light

109. Consider, for example, the surrogacy contract in the case of "Baby M". See *In re Baby M*, 537 A.2d 1227 (N.J. 1988). The court in that case decided that a contract between the natural parents agreeing on the custody of the child was not determinative, but rather only the best interests of the child could be considered in determining custody. In the case of a guardianship proceeding for an adult, a court is not bound to the ward's wishes expressed when still competent. The court is free to act paternally and decide for an adult which guardian would be in that adult's best interest.

110. See, e.g., ILL. REV. STAT. ch. 110 1/2, para. 701-710 (1988). A living will act typically allows a person to specify what medical procedures she or he would authorize if she or he became disabled and unable to communicate. These statutes also allow a person to designate someone who will transfer that person to the care of a physician who will comply with that person's wishes.

111. See Gina M. Torielli, Note, *Protecting the Nontraditional Couple in Times of Medical Crisis*, 12 HARV. WOMEN'S L.J. 220 (1989) for a complete analysis of each of these protections. Torielli also discusses the case of Sharon Kowalski and Karen Thompson. *Id.* at 220-22.

112. See, e.g., ILL. REV. STAT. ch. 110 1/2, para. 802-1 to 802-11 (1988).

113. THOMPSON & ANDRZEJEWSKI, *supra* note 6, App. B.

114. *Id.*

115. See generally *Kowalski I* and *Kowalski II*, *supra* note 6. In *Kowalski III*, *supra* note 6, at 792-93, the appellate court laid out the statutory considerations for the court to use in deciding the best interests of the ward, including the ward's preference, the interaction between the proposed guardian and the ward, and the interest and commitment of the proposed guardian in the ward's physical, social, educational, and rehabilitative needs.

of the ward's best interest. Because Kowalski was evaluated as having the cognitive abilities of a four- to six-year-old child<sup>116</sup>, the trial court made its determination the same as it would in a child custody dispute.<sup>117</sup> In child custody cases, courts almost never find that it is in a child's best interests<sup>118</sup> to be placed with a gay or lesbian parent.<sup>119</sup> Sometimes a court will make its determination solely on the parent's sexuality.<sup>120</sup> The trial court ruled for Donald Kowalski because, as Sharon's father, he had "unconditional parental love" for his daughter.<sup>121</sup>

The trial court acknowledged that if Sharon Kowalski had reliably expressed a desire to have Thompson as her guardian when she was still competent, the court would be obliged to give weight to that preference.<sup>122</sup> The appellate court pointed out that the trial court ignored ample evidence that Kowalski *had* reliably expressed her wish to have Thompson as her guardian. However, the primary consideration in choosing a guardian is the ward's best interests, even if this somehow conflicts with the ward's reliably expressed wishes.<sup>123</sup> Certainly a durable power of attorney executed by Kowalski when she was still competent would have served as proof of Kowalski's wish to have Thompson as

116. A fact Thompson vehemently disputes from her own extensive experience with Kowalski's abilities.

117. Clearly, if Kowalski and Thompson had been married the court would not have followed this same analysis, with a presumption in favor of a parent over a partner. Donald Kowalski argued vigorously that he felt his daughter would be sexually abused by Kowalski, an assumption for which he had no proof beyond his own prejudices. If Thompson had been Kowalski's spouse, the court would not have given credence to any such argument.

118. *But see* *Palmore v. Sidoti*, 466 U.S. 429 (1984), where a unanimous Court rejected the best interests analysis when custody of the child was taken away from a mother because she married a man of another race. The Court rejected the lower court's justification that the child should be removed from an interracial home because the child would be subject to social stigmatization. The Court stated with no uncertainty that while the Court could not control biases, it would not tolerate them. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 433. Applying this reasoning to gay and lesbian guardianship disputes, the courts should not enforce private biases against gays by giving them legal effect.

119. *See, e.g., Roe v. Roe*, 324 S.E.2d 691, 693 (Va. 1985), where the court said placement of the child with a gay parent "flies in the face of society's mores" and that it could not condone exposing minor children to an illicit relationship. *See also McGinnis v. McGinnis*, 567 So. 2d (Ala. Civ. App. 1990), where custody was denied to a lesbian mother who had unsuccessfully attempted to conceal the relationship from her children.

120. *See* Haugland, *Illinois Appeals Court to Rule on Lesbian Mom Custody Battle*, OUTLINES, Apr. 1991, at 22. The trial court's decision to deny custody to the mother was based solely on her sexual orientation. The judge also restricted the mother's visitation, saying the mother could not visit with her daughter in the presence of any woman with whom the mother is living.

121. *See Kowalski I, supra* note 6, at 865.

122. *Id.*

123. Thompson maintains that Kowalski has repeatedly expressed her wish to live with Thompson. *See THOMPSON & ANDRZEJEWSKI, supra*, note 6. The appellate court acknowledged that the trial court ignored ample evidence that this was the case, even when there was no contradictory testimony.

her guardian, but it would not have bound the court to appoint Thompson.

Wills also can be a problematic area for gays and lesbians. If a gay man or lesbian dies intestate, the partner will not have an automatic claim to the estate<sup>124</sup> as would a spouse.<sup>125</sup> Having a will might not help the situation at all. One commentator has concluded that "a homosexual testator who bequeaths the bulk of his estate to his lover stands in greater risk of having his testamentary plans overturned than does a heterosexual testator who bequeaths the bulk of his estate to a spouse or lover."<sup>126</sup> The author attributes this phenomenon to homophobia<sup>127</sup> in the courts and in the families of the testators.

The grounds for challenging a will, in general, are improper execution, mental incompetence of the testator, undue influence, and fraud.<sup>128</sup> When the testator and beneficiary were involved in a gay relationship, the most likely challenge is on the grounds of undue influence.<sup>129</sup> Undue influence consists of physical coercion or threats of physical harm or duress so powerful as to overcome the will of the testator and substitute the will of another.<sup>130</sup> There is no evidence that undue influence occurs with greater frequency in the gay population than in the non-gay population.<sup>131</sup> Rather, this seems to be another example of homophobia at work in the courts.<sup>132</sup>

There are steps a lesbian or gay partner can take to protect against such challenges to a will. One measure of protection is to periodically draft a new will without destroying prior versions.<sup>133</sup> This will discourage a challenge because a successful challenge to the last will merely means the previous will is in effect.

Sharon Kowalski and Karen Thompson owned property together. They lived in a house which was purchased in Thompson's name for financial reasons.<sup>134</sup> If Kowalski had been killed in the accident, her parents would have been free to take her personal property from Thomp-

124. The most notorious example of this is when Gertrude Stein died and left Alice B. Toklas, her life-companion penniless. At the time Stein was extremely wealthy because of her associations with various artists who gave their works to her.

125. See *supra* note 36 and accompanying text.

126. Sherman, *supra* note 36, at 267.

127. Homophobia is an irrational fear and hatred of homosexuality and of gay men and lesbians. See Sherman, *supra* note 36, at 225 n.2.

128. See *ACLU HANDBOOK*, *supra* note 1, at 88.

129. *Id.*; see also Sherman, *supra* note 36.

130. See *ACLU HANDBOOK*, *supra* note 1, at 88.

131. See Sherman, *supra* note 36.

132. See *ACLU HANDBOOK*, *supra* note 1, at 88, and accompanying footnotes.

133. *Id.* at 89.

134. See THOMPSON & ANDRZEJEWSKI, *supra* note 6, at 9.

son's home. If Thompson had died, Kowalski could have been left entirely without a claim for the house, even though she contributed to the purchase and payments. A will would have been effective in keeping the personal and real property in the hands of the surviving partner. Any undue influence challenge to the will probably would have been based on the nine-year age difference between the women and the fact that Kowalski had once been a student in Thompson's class at the university where Thompson teaches.<sup>135</sup>

### C. Family by Adult Adoption

Adult adoption is a drastic and often irreversible step toward solving the problem of family status for gay and lesbian couples. As the term implies, "[a]dult adoption is the adoption of an adult by another adult."<sup>136</sup> The relationship created by adult adoption is that of parent and child, with the exception that the "parent" has no legal duty to support the "child".<sup>137</sup>

One effect of adult adoption is that the legal relationship between the "child" and his or her natural parents is severed. For this reason, gays and lesbians can use adult adoption to nullify the status of blood relatives so that they will not have standing to challenge a will.<sup>138</sup> Adult adoption also can help with other situations in which next-of-kin status is critical. As discussed above, such status is needed when making medical decisions for an incapacitated partner, gaining access to the partner and the partner's records in the hospital, and making funeral arrangements. Further, parent-child status fits within the bounds of family for zoning ordinances and rent control laws.<sup>139</sup>

At first glance, adult adoption seems to be the solution to most family status problems.<sup>140</sup> However, there are major hurdles to overcome in using adult adoption. First, some jurisdictions disapprove of adult adoptions involving gays and lesbians as being against public policy and contrary to legislative intent, and refuse to grant them.<sup>141</sup> Another problem is that with very few exceptions, adult adoptions are not revocable.<sup>142</sup> Thus, "[t]he adoptee will continue to be the adoptor's legal heir forever, unless by chance or design the adoptee is subsequently adopted by some-

135. *See id.* at 12.

136. SEXUAL ORIENTATION AND THE LAW, *supra* note 100, at 1-81.

137. *Id.* at 1-83.

138. *Id.* at 1-85 thru 1-86.

139. *Id.* at 1-87 thru 1-88.

140. It still does not help in gaining employment benefits available to spouses and dependents.

141. *See* SEXUAL ORIENTATION AND THE LAW, *supra* note 100, at 1-82 n.168.2.

142. *Id.* at 1-91 thru 1-92.

one else."<sup>143</sup>

If Thompson and Kowalski had successfully overcome the barriers to adult adoption, such a relationship would have been very useful in a time of medical emergency, and for the purposes of guardianship. If Thompson had adopted Kowalski, Kowalski's relationship with her parents would have been legally severed and the court would have had to give Thompson the same deference granted to Kowalski's natural parent. However, if Kowalski had adopted Thompson, then Kowalski's relationship with her parents would still be in tact, and the court battle would have been between the natural parents and the adopted "child".

The outcome of a case like this is difficult to predict. It is not hard to imagine that public policy would be invoked against the adopted person if the true nature of the relationship was before the court. For this reason, gay men and lesbians using adult adoption to create the family relationship should probably determine which partner's natural family would be more resistant to the relationship, and have that person be the adoptee. The unpredictability of this path of action limits its usefulness.

#### D. *Family by Judicial Fiat*

On a few occasions, courts have resolved disputes between gay partners in a way that parallels the resolution of disputes between married couples. Two cases of particular interest involve property disputes, in one case between two gay male partners, and in the other case between a gay man and his deceased partner's family. In *Bramlett v. Selman*,<sup>144</sup> a gay man who was in the process of divorcing his wife, turned over \$7,000 to his male partner to hide the assets from his wife. The partner used the funds to purchase a house in his own name, as the partners had agreed. When the two men separated shortly thereafter, the purchaser refused to turn over any rights to the house, saying the \$7,000 had been a gift.<sup>145</sup>

The Arkansas chancery court held otherwise, ruling that the purchaser held title to the property as a constructive trustee for his partner.<sup>146</sup> The court ordered the "trustee" to convey title to his partner, and ordered the partner to reimburse the trustee for his expenses.<sup>147</sup>

The supreme court of Arkansas affirmed the decision, saying that a "confidential relationship" had existed between the parties, and that they

143. *Id.* at 1-91. While it may be possible to nullify the inheritance effect of the adoption with a will, other aspects of the family status remain in effect. For example, this person is still next-of-kin.

144. 597 S.W.2d 80 (Ark. 1980).

145. *Id.* at 81-82.

146. *Id.* at 82.

147. *Id.*

had a fiduciary responsibility to each other.<sup>148</sup> The court reasoned that such a relationship exists when one person has gained the confidence of another and purports to act with the other's interest in mind.<sup>149</sup> The court said that not all homosexual relationships create a fiduciary relationship, but there was such a relationship in this case. The court based its finding on the fact that the two had been lovers for a year and had lived together for most of that year.<sup>150</sup> In an unusual decision, the court concluded that "[a]ll homosexual involvements are not as a matter of law confidential relationships sufficient to support a constructive trust, but a court of equity should not deny relief to a person merely because he is a homosexual."<sup>151</sup>

The court protected one gay partner against another in *Bramlett*. The other case, *Weekes v. Gay*,<sup>152</sup> involved a dispute between a gay man and his deceased partner's family over two pieces of property the men owned together. The dead man's heirs claimed a half-interest in one of the properties, which the two owned as co-tenants, and a full interest in another property which was in the decedent's name only.<sup>153</sup> A Georgia trial court found that the surviving partner had supported the decedent and had supplied most of the purchase price for both properties.<sup>154</sup> Further, the trial court found that the men had lived together for six years in a homosexual relationship.<sup>155</sup> The trial court agreed with the surviving partner that he had an interest in the property as the result of an implied trust that arose from his having furnished the funds for purchase.<sup>156</sup>

The appellate court affirmed, saying that equity prevented the blood heirs from a windfall recovery when the beneficial interest should flow to the partner.<sup>157</sup> Further, the court rejected the family's argument that the surviving partner should be denied relief because of the nature of the relationship. However, the court reached this conclusion by saying that the evidence was inconclusive as to the exact nature of the relationship, even though the trial court made a finding that the two were in a homosexual relationship.<sup>158</sup>

148. *Id.* at 84.

149. *Id.*

150. *Id.*

151. *Id.* at 85.

152. *Weekes v. Gay*, 256 S.E.2d 901 (Ga. 1979).

153. *Id.* at 902.

154. *Id.* at 903.

155. *Id.*

156. *Id.* at 904.

157. *Id.*

158. *Id.* It is unclear why the appellate court did this. One explanation is that they did not want to set a precedent advantageous to gays and lesbians, that would be deemed against public policy.

These cases indicate that at least some courts are willing to use concepts of equity to overcome presumptions against gay and lesbian partners. However, these decisions are rare, and courts will more often point to public policy to deny relief to lesbian and gay litigants.<sup>159</sup> Property rights cases seem to be the exception to the rule.

Judicial remedies are an uncertain method of protecting the non-traditional family, as Karen Thompson and Sharon Kowalski discovered. Thompson spent seven years in court fighting for her right to care for her disabled lover. In the end, an appellate court found that the trial court abused its discretion in denying Thompson's petition for guardianship. Abuse of discretion is normally a very difficult standard to overcome. It is questionable whether Thompson would have ever gained guardianship of Kowalski had Donald Kowalski not voluntarily relinquished his exercise of "unconditional parental love." Equitable remedies are inadequate protections for gay and lesbian families. First, it is preferable to prevent a dispute from getting to this point. Second, courts point to public policy when rendering decisions, and public policy is almost always adverse to the interests of gay men and lesbians. Finally, for Thompson and Kowalski, the main issue was not the protection of property rights but rather guardianship rights, and courts are reluctant to extend equity into this arena.

### III. FAMILY BY LAW: MUNICIPAL ORDINANCES AND OTHER LOCAL LAWS

A large number of cities<sup>160</sup> and one state<sup>161</sup> have laws that prohibit discrimination on the basis of sexual orientation. The ordinances typically cover housing and public employment. Some cities extend coverage to education and private employment as well.<sup>162</sup> While these ordinances provide protection from discrimination, they do not give gays and lesbians affirmative rights, or status as family.

#### A. *Protections Offered by Domestic Partnership Laws*

Recently, six cities<sup>163</sup> passed "domestic partnership" ordinances,

159. See Note, *Custody Denials to Parents in Same-sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 621 n.20 (1989).

160. Barbara Case, *Repealable Rights: Municipal Civil Rights Protection for Lesbians and Gays*, 7 LAW & INEQ. J. 441, 445 n.25 (1989), noting that in 1989, 61 cities had ordinances prohibiting discrimination based on real or perceived sexual orientation.

161. WIS. STAT. ANN. §§ 111.31-111.32 (West 1988).

162. Case, *supra* note 160, at 450.

163. The cities that have passed domestic partnership laws are Berkeley, California; Ithaca, New York; Madison, Wisconsin; Minneapolis, Minnesota; San Francisco, California; and West

which give affirmative rights and statuses to gay and lesbian couples. The benefits and responsibilities under the ordinances are varied. In West Hollywood, California, the benefits include medical insurance for partners of city employees, hospital and jail visitation rights, and protection from housing discrimination.<sup>164</sup> Berkeley, California grants major medical, dental and leave benefits to the partners of city employees.<sup>165</sup> The city of Ithaca, New York, has an ordinance with symbolic meaning only. Partners file an Affidavit of Domestic Partnership with the city stating that they are unmarried, share a residence, and have a relationship of mutual support and commitment. However, there are no material benefits attached to the partnership.<sup>166</sup>

Medical, dental, and vision benefits, as well as sick and bereavement leave are provided for the domestic partners of Santa Cruz, California employees.<sup>167</sup> The approach in Takoma Park, Maryland was to include domestic partners in the definition of "immediate family" in the city code. The result is that housing and employment benefits extended to traditional families are now extended to domestic partners.<sup>168</sup> In Los Angeles, sick and bereavement leave are available to the domestic partners of city employees.<sup>169</sup> The use of sick leave to take care of a domestic partner and funeral leave to attend the funeral of a domestic partner are approved in Seattle, Washington, the largest city to date to recognize domestic partnerships.<sup>170</sup>

The Madison, Wisconsin ordinance<sup>171</sup> gives broader rights and privileges than most domestic partnership ordinances.<sup>172</sup> The Madison Ordinance was passed in June 1990. The law allows any two adults, regardless of gender, and their dependents to register with the city clerk as a domestic partnership for a fee of \$25, as long as they satisfy certain requirements.<sup>173</sup> Thus, the partnership can consist of two adults, or two

Hollywood, California; Ann Arbor, Michigan; Cambridge, Massachusetts; East Lansing, Michigan; Laguna Beach, California; Los Angeles, California; New York City, New York; Santa Cruz, California; Seattle, Washington; Shorewood Hills, Wisconsin; Takoma Park, Maryland; Washington D.C.; and West Palm Beach, Florida all give some benefits to nontraditional families, but do not provide for a registry of relationships. See Ann Belser, *Rights, Privileges, and Gay Lovers*, THE ADVOCATE, Feb. 25, 1992, at 57.

164. *ACLU Briefing Series*, supra note 7, at 5.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 6.

169. *Id.*

170. *Id.*

171. MADISON WIS., GENERAL ORDINANCES, §§ 3.23(2), 3.23(5)(a)(b), 3.23(10) (1990).

172. *ACLU Briefing Series*, supra note 7, at 6. The briefing packet summarizes the main benefits made available in each city with domestic partnership legislation.

173. MADISON WIS., GENERAL ORDINANCES, § 3.23(10) (1990).



adults and their children or other dependents.

The couple is required to be "in a relationship of mutual support, caring and commitment" and must "intend to remain in such a relationship in the immediate future."<sup>174</sup> They cannot be married (except to each other) or legally separated. Further, they must wait six months after any annulment or divorce preceding in which either was a party before applying for a domestic partnership.<sup>175</sup>

Neither domestic partner can currently be registered in a domestic partnership with a different domestic partner. As in the case of prior divorces and annulments, the parties must wait six months after the dissolution of a domestic partnership before filing for a new one.<sup>176</sup> Both partners must be eighteen years of age or older<sup>177</sup> and must be competent to contract.<sup>178</sup> The partners must occupy the same dwelling unit as a single, nonprofit household.<sup>179</sup> Finally, the relationship between the partners must be "of permanent and distinct domestic character."<sup>180</sup> The relationship cannot be "merely temporary, social, political, commercial or economic in nature."<sup>181</sup>

The American Civil Liberties Union recommends that domestic partnerships should be available to "any two people who have expressed a mutual obligation of support for their common welfare."<sup>182</sup> The benefit of this approach is that the partnership is based not on sexual orientation or sexual involvement, but rather on the level of commitment between the partners.<sup>183</sup> As minimum requirements for entering into a partnership, the ACLU recommends that the partners be required to swear in an affidavit that they live together and have done so for some period of time, that they are not married, that they are eighteen years or older, that they

174. MADISON WIS., GENERAL ORDINANCES, § 3.23(2)(aa)(1) (1990). Thus, Madison has no explicit requirement that this be a sexual relationship. But see *infra* note 181.

175. MADISON WIS., GENERAL ORDINANCES, § 3.23(2)(aa)(2).

176. *Id.*, at § 3.23(2)(aa)(3).

177. *Id.* at § 3.23(2)(aa)(4).

178. *Id.* at § 3.23(2)(aa)(5).

179. *Id.* at § 3.23(2)(aa)(6).

180. *Id.*

181. MADISON WIS., GENERAL ORDINANCES, §§ 3.23(2)(aa)(7) and 3.23(10). It is difficult to imagine what has been left off of this list except "sexual." Thus, while the Madison ordinance does not specifically require that the parties be involved in a sexual relationship, platonic friendship is presumably not an adequate basis for forming a domestic partnership. It is unclear why the initial requirement that the parties be engaged in a relationship of mutual support, caring, and commitment was not a sufficient definition. Presumably, the city is trying to prevent fraud; that is, it is trying to prevent persons who are not in a more permanent relationship from taking advantage of these benefits on a short term basis. This leads into another debate about why our society discriminates against single people, but that debate is beyond the scope of this paper.

182. *ACLU Briefing Series, supra* note 7, at 3.

183. *Id.*

are not related by blood closer than would be allowed for marriage in that state, and that they are mentally competent to contract.<sup>184</sup>

Further, the ACLU recommends that the partners should be required to swear that they are each other's sole domestic partner and are responsible for their common welfare. Partners should be required to notify the appropriate authority if any of the relevant circumstances of the relationship change. The ACLU recommends that all of this be affirmed under penalty of perjury.<sup>185</sup> Presumably, these recommendations are meant to prevent abuse of the system of domestic partnerships.<sup>186</sup>

The Madison ordinance defines domestic partner as "those adults in a domestic partnership."<sup>187</sup> The "mutual support" required means that "the domestic partners contribute mutually to the maintenance and support of the domestic partnership throughout its existence."<sup>188</sup>

Domestic partners in Madison must agree to notify the city clerk of any change in the status of their domestic partner relationship. After verifying the application, the clerk issues a registration certificate. The partnership is terminated 30 days after one or both partners file a written notice of the termination.<sup>189</sup>

The Madison ordinance protects persons in a domestic partnership in several ways. First, the ordinance provides that it is unlawful for anyone to deny someone access to or charge a higher price for any public accommodation or place of amusement on the basis of his or her domestic partnership status.<sup>190</sup> Second, organizations which operate public accommodations and which sell memberships based on family status are required to provide the same benefits to domestic partnerships as are provided to other families.<sup>191</sup> Third, the ordinance prohibits the publication, display, circulation or mailing of any written communication which is to the effect that any of the facilities of any public place of accommodation or amusement will be denied to any person by reason of her or his domestic partnership status or that the patronage of a person is unwelcome, objectionable or unacceptable on the basis of that person's domestic part-

184. *Id.*

185. *Id.*

186. *Id.* at 4.

187. MADISON WIS., GENERAL ORDINANCES, § 3.23(2)(bb). A dependent, for the purposes of this law, is a biological child of a domestic partner, or a dependent as defined in IRS regulations, or a ward of a domestic partner as determined in a guardianship proceeding, or a person adopted by a domestic partner. *Id.* at § 3.23(2)(cc).

188. *Id.* at § 3.23(2)(dd).

189. *Id.* at § 3.23(10).

190. *Id.* at § 3.23(5)(a).

191. *Id.*

nership status.<sup>192</sup>

The ordinance is tied to Madison's human rights law, which prohibits discrimination based on many factors, including sexual orientation, in the areas of housing,<sup>193</sup> employment, public accommodations, and city facilities.<sup>194</sup> The ordinance provides for enforcement of the provisions through an "Equal Opportunity Commission."<sup>195</sup> The Commission is empowered to receive complaints and attempt to remedy any violation "by means of conciliation, persuasion, education, litigation, or any other means."<sup>196</sup> The Commission can request the city attorney to intervene and seek enforcement of the ordinance in appropriate courts.

Other cities have similar requirements for persons wishing to register as domestic partners. For example, in Laguna Beach, California, partners are required to sign an affidavit stating that they have lived together for at least six months, plan to live together indefinitely, are not related by blood, are mentally competent, and will notify the city if the relationship dissolves.<sup>197</sup>

One typical use of domestic partnership laws is to extend health and other employment benefits to the domestic partners of city workers.<sup>198</sup> Extended employment benefits include unpaid leave to take care of ill family members,<sup>199</sup> and funeral leave on the death of a domestic partner.<sup>200</sup> In many cities, opposition to these measures takes the form of complaints about potential costs. Many people apparently assume that lesbians<sup>201</sup> and gay men will be the main users of the law and that because of AIDS, costs will be high.<sup>202</sup> However, in at least one city, the employee pays the costs of his or her dependent's premiums, and in another, which was forced to self-insure because of fear of AIDS costs, the

192. *Id.* at § 3.23(5)(b).

193. *Id.* at § 3.23(4). This includes the obtaining of credit to purchase housing.

194. *Id.* at § 3.23(1).

195. *Id.* at § 3.23(9).

196. *Id.*

197. See Carla Rivera, *Partners of Gays To Receive City Medical Benefits*, L.A. TIMES, Aug. 9, 1990, Part B, at 1. See also, *California*, USA TODAY, Aug. 10, 1990, News section.

198. The California cities of Laguna Beach, Berkeley, and West Hollywood all extend health insurance benefits to domestic partners of city employees. See Ann Belsler, *Rights, Privileges, and Gay Lovers*, THE ADVOCATE, Feb. 25, 1992, at 57.

199. See Michael Abramowitz, *D.C. Council Panel Backs Limiting Officeholders' Terms*, WASH. POST, Oct. 12, 1990, § 1, at A1.

200. See *Few In Signup Are Homosexual*, SEATTLE TIMES, Apr. 28, 1990, Northwest Section, at A14.

201. Lesbians comprise one of the lowest risk groups for AIDS and they account for half of the gay couples who would presumably use domestic partnership laws to gain insurance benefits. See *ACLU Briefing Series*, *supra* note 7, at 4.

202. See Isaacson, *supra* note 20, at 102.

cost of insurance for the city went down.<sup>203</sup> Further, most of the couples who register for domestic partnerships are heterosexual.<sup>204</sup> Insurance companies would actually benefit from increased premiums, paid either by the employee or the employer, and insurance companies that have provided domestic partnership coverage report no increased costs.<sup>205</sup>

Domestic partnership ordinances do not currently create legally enforceable obligations between the partners. However, such obligations are completely consistent with the rationale for creating domestic partnerships. State law would be controlling in this area, and no state has enacted a domestic partnership law.<sup>206</sup> Once enacted, case law involving marital obligations could be extended to domestic partnerships.

The utility of domestic partnership ordinances is not limited to their terms. In court proceedings such as Sharon Kowalski's guardianship hearings, a certificate of domestic partnership would have provided to the court proof of the relationship.<sup>207</sup> The court would also have to accept the clear legislative intent in favor of such arrangements when making its decision. In jurisdictions that have no such laws, or in jurisdictions where the laws indicate legislative intent against same-sex relationships,<sup>208</sup> partners have to overcome "public policy" arguments when trying to enforce the terms of their relationships. The battle for guardianship takes place in state court, however, and the ordinance evidences the intent of city lawmakers only. This is one of the problems with passing domestic partnership laws on a city-wide basis.

### B. *Limitations of Domestic Partnership Ordinances*

One problem with domestic partnership ordinances is that they are subject to repeal efforts. Many cities with human rights ordinances prohibiting discrimination based on sexual orientation have been targeted by religious and other "pro-family" groups trying to repeal the laws.<sup>209</sup>

203. *Id.* Isaacson cites the case of the city of West Hollywood, which was forced to self-insure, actually resulting in a drop in costs.

204. *See Few in Signup Are Homosexual*, *supra* note 200, at A14, stating that only 28% of Seattle city employees who applied for health insurance for a domestic partner are gay or lesbian.

205. *See ACLU Briefing Series*, *supra* note 7, at 4.

206. *Id.* at 3.

207. *Id.* The ACLU contends that the ordinances will help legitimize gay relationships. Instead of being seen as transitory or unstable, gay relationships will gain legal recognition. Also, the ordinances could be helpful in the growing number of custody disputes in gay and lesbian families.

208. Twenty-five states have sodomy laws which criminalize certain sexual behaviors generally associated with the gay and lesbian community. *See Philip S. Gutis, Small Steps Toward Acceptance Renew Debate on Gay Marriage*, N.Y. TIMES, Nov. 5, 1989, § 4, at 24. Courts sometimes use these laws to conclude that public policy and legislative intent is against same-sex relationships. The first step toward domestic partnership in these states would be repeal of the sodomy laws.

209. *Case*, *supra* note 65, at 451-53.

Similar attacks have been mounted on the few domestic partnership laws in effect.<sup>210</sup> Another problem is that the laws are difficult to pass in the first place, often facing opposition from influential religious leaders.<sup>211</sup> Further, passing and then defending such laws city by city is an arduous, costly task.<sup>212</sup>

A legislative solution, however, still has benefits over a judicially imposed one. Judicial decisions can be overturned just as easily as laws. Further, judges are not typically subject to the same political pressures as legislators, and gays will have little to no control over the result of the judicial process. Because lawmakers can sometimes legislate around judicial decisions, advances made in the courts can be undone in the legislatures. For these reasons, it might be preferable to gain support in the legislature.<sup>213</sup>

Some of the most serious limitations on the effectiveness of domestic partnership and other municipal ordinances are constitutional and congressional limits. If a municipal ordinance conflicts with a state or the federal constitution, the constitutional provision will, by virtue of the supremacy clause, take precedence. When municipal ordinances are perceived by courts to violate the congressional intent of a federal law, federal law will preempt the ordinance.

The Human Rights Act of Washington D.C. came into direct con-

210. See Robert T. Nelson, *Live-in Partner Policy Likely Headed To Ballot*, SEATTLE TIMES, Apr. 14, 1990, at A1, stating that a group called "Citizens for Family" collected signatures to put a repeal on the ballot. The reasons given for opposing the domestic partnership law were "financial, social, and moral." See also Robert T. Nelson, *Initiative 35 Opponents Bracing For Tough Fight*, SEATTLE TIMES, Sept. 7, 1990, at B6. Initiative 35 is the measure "Citizens for Family" managed to place on the ballot for November 6, 1990 elections.

211. Isaacson, *supra* note 20. The author states that voters rejected domestic partnership legislation in San Francisco after "vocal opposition from the city's archbishop and other religious leaders." See also *U.S. Bishops Urged To Fight Gay Measure*, CHI. TRIB., July 18, 1992, at 3. The Vatican directed U.S. Catholic leaders to oppose any gay rights legislation that would make it illegal to discriminate against gay men and lesbian women in adoption proceedings, or in hiring for certain jobs. The Vatican stated that homosexuality was an "objective disorder" and that discriminating against homosexuals was necessary to protect the common good. The Vatican told the bishops that discrimination against gays was not only allowable, but is sometimes "obligatory." In Chicago, the passage of a human rights ordinance was delayed because of opposition from local Catholic leaders.

212. See Case, *supra* note 65, at 452. Reactionary groups in at least three cities and four states have attempted ballot measures which would prevent city councils and legislatures from enacting laws to protect gays and lesbians. These unusual attempts to thwart the democratic process generally denounce homosexuality, and seek to forbid any government action that will "promote or legitimize" homosexuality. See Mary Newcombe, *LAMBDA Fights Against Homophobic Ballot Initiatives*, LAMBDA UPDATE, (LAMBDA Legal Def. and Educ. Fund, N.Y.), Spring 1992, at 25. The legal defense and education group states that these ballot initiatives are draining resources of the gay community and fanning homophobia.

213. A full analysis of whether the answer for gay and lesbian families lies with the courts or with the legislature is beyond the scope of this Note. Because it is a significant issue, I have included some discussion on it. Ultimately, a legislative solution with popular support is probably preferable because it would result in more widespread and permanent changes.

flict with the free exercise clause of the first amendment in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*.<sup>214</sup> The Human Rights Act prohibited discrimination based on sexual orientation, among other factors. The Act also forbade practices having a disparate impact on protected groups, including gays and lesbians. Under the provisions of this Act, a gay and lesbian student group sought to compel the Catholic university to grant it official university recognition.<sup>215</sup>

The university resisted on constitutional grounds arguing that recognition would be tantamount to endorsement of the group, and the university should not be compelled, under the free exercise clause of the first amendment, to endorse a homosexual group against Catholic teachings.<sup>216</sup> The court of appeals agreed that the university could not be forced to recognize the group, but held that the university could be compelled to provide the same services and facilities to the group as it did for other student groups.<sup>217</sup>

The court drew a distinction between endorsement, which could infringe on the university's free exercise of religion, and the provision of tangible benefits. The court found that providing services to the group constituted a slight burden on the university's free exercise of religion, but the District of Columbia's compelling interest in eradicating discrimination based on sexual orientation overrode that burden.<sup>218</sup>

Similarly, *United States v. City of Philadelphia*<sup>219</sup> demonstrated the limit that federal law imposes on municipal ordinances. Two law students at Temple University sued the university for allowing the Judge Advocate General (J.A.G.) Corps of the Army to use the university's placement office for recruitment. The suit alleged that the University was aware that the J.A.G. Corps discriminated on the basis of sexual orientation, in violation of the Philadelphia Fair Practices Ordinance.<sup>220</sup> As a result of the students' complaint, the Philadelphia Commission on Human Relations ordered the university to stop cooperating with the J.A.G. Corps.<sup>221</sup>

At that point, the United States intervened and filed, together with the university, a complaint claiming that the Commission's order vio-

214. 536 A.2d 1 (D.C. 1987).

215. *Id.* at 4-5.

216. *Id.*

217. *Id.* at 39.

218. *Id.* at 38-39.

219. 798 F.2d 81 (3d Cir. 1986).

220. *Id.* at 84.

221. *Id.*

lated the supremacy clause of the U.S. Constitution. The district court agreed, saying the Commission was attempting to regulate the conduct of the United States. The appellate court affirmed, saying that Congress had expressed clear intent that the military have full access to college campuses for the purpose of recruiting. In light of Congressional intent, the city could not prohibit the J.A.G. Corps from recruiting on campus. The court acknowledged that the city had an important interest at stake in eradicating employment discrimination, but federal law preempted the ordinance nonetheless.<sup>222</sup>

In terms of benefits for domestic partners, preemption problems would probably arise mostly in relation to religious organizations and the military. Neither could presumably be required to provide the same benefits to domestic partners as to married partners. Neither religious organizations nor the military could be prohibited from discriminating against a person on the basis of their sexual orientation or their status as a domestic partner. To the degree that the military and religious organizations are employers, educators, and housing suppliers they can have some preemptive effect on domestic partnership laws.

A new, but predictable,<sup>223</sup> objection to domestic partnership laws is that these laws provide "special rights" for homosexuals. Conservative politicians seize on these ordinances as an example of the breakdown of the family.<sup>224</sup> Domestic partnership laws are especially vulnerable to such attack because they may appear to give the benefits of marriage without requiring the accompanying obligations. Although this interpretation is incorrect, these laws rarely get a full hearing in the mainstream press. However, any attempt by gay men and lesbian women to obtain basic civil rights is open to this kind of attack as long as homophobia

222. *Id.* at 84-85.

223. Such an attack is predictable because it has followed every civil rights movement this country has seen. A recent example is the women's movement, where some conservatives attempted to portray the movement as seeking superior rights for women, not just equal rights. The goal of the tactic is to portray the motives of the movement as less than honorable, and to make those in the majority feel the movement will take something away from them.

224. See Ann Devroy, *Bush Says He Opposes Gay Rights Legislation*, CHI. SUN-TIMES, Apr. 22, 1992, at 26. George Bush told a group of evangelical christian leaders that he opposes "special laws to protect homosexuals" including domestic partnership ordinances. Bush requested this meeting because the religious leaders were upset that Bush's campaign chair, Robert Mosbacher, had met with leaders of gay and lesbian groups. Mosbacher's adult daughter is an open lesbian, and had arranged the initial meeting. Bush was asked by the religious group to reiterate his support for "traditional values," and to state his opposition to the the so-called "homosexual agenda." In this election year, Bush gladly obliged. See also Perot Rules Out Homosexuals For Certain Cabinet Positions, CHI. TRIB., May 28, 1992, at 15. While Ross Perot was still in the running for the presidency in 1992, he stated that having homosexuals in Cabinet positions would distract the public from the tasks at hand, and that allowing homosexuals in the military was unrealistic.

prevails.<sup>225</sup> Conservatives are not likely to view a change to marriage laws to include same-sex marriage any more favorably than domestic partnership laws. Thus, even though domestic partnership laws have proved very vulnerable to this kind of attack, any civil rights effort will be subject to some level of criticism on these grounds.

Finally, while domestic partnership laws remain untested in the courts, nondiscrimination laws have been somewhat ineffective due to constitutional challenges and preemption by federal law, as described above. There is no reason to expect that domestic partnership laws will not be met with the same challenges. Domestic partnership laws on a municipal level are, overall, an expensive and ineffective solution to the larger problem.<sup>226</sup>

Domestic partnership laws should be passed on a state-wide level to be cost-effective. Also, in addition to employment benefits such as insurance and bereavement leave, domestic partnership laws should provide to lesbian and gay couples more of the benefits and protections available through marriage. Because these laws have met with a considerable amount of resistance,<sup>227</sup> they might be most useful as a bridge to public acceptance of the full legitimacy of gay and lesbian relationships through marriage.

The best solution is the inclusion of gays and lesbians in the marriage laws. Gays and lesbians would then have, all at once, the same protections their heterosexual counterparts enjoy. Although these efforts have not yet been successful in any state, a concentrated effort in one liberal state could achieve the desired effect for the entire country. If gay and lesbian marriage is legitimized in any state, other states would be forced to recognize gay marriages conducted in that state through the full faith and credit clause of the Constitution. It is not difficult to imagine that a domino effect would be created, as gays and lesbians through-

225. See *Military Discharges National Guard Colonel for Being A Lesbian*, CHI. TRIB., May 29, 1992, at 8. Colonel Margarethe Cammermeyer had served in the military for 26 years, was a decorated Vietnam veteran, and held a doctorate in nursing. Although the Washington National Guard opposed her discharge, the National Guard felt obliged to discharge her because of the Defense Department policy that states that homosexuality is incompatible with military service and causes morale problems. The military is a microcosm of the homophobia present in American society at large.

226. See *supra* notes 209-22 and accompanying text.

227. According to a TIME/CNN survey conducted by Yankelovich Clancy Shulman, 54% of Americans agreed that homosexual couples should be allowed to receive medical insurance and life insurance benefits from their partner's insurance policies. However, 69% disapproved of making "gay marriage" legal, and 75% disapproved of gay couples adopting children. So while the country is getting more tolerant of gay and lesbian relationships in some respects, the majority still disapproves of full legitimacy for gay and lesbian relationships. See Isaacson, *supra* note 20.



out the country flocked to the state that would marry them, and then returned to their home state, which would be forced to honor the union.

#### IV. CONCLUSION

Lesbian women and gay men attempting to gain the benefits and protections of family status have few avenues available to that end. Currently, a combination of contractual and statutory provisions come closest to granting the same protections heterosexuals can obtain through marriage. Domestic partnership laws are a step in the right direction. In addition to the direct benefits of these laws, they can provide indirect benefits as well. A certificate of domestic partnership can provide proof to a court of the nature of a relationship for gay and lesbian couples. Domestic partnership laws can be a bridge to greater inclusion in the law for gay men and lesbian women.

Also, having such a law on the books evidences public policy in favor of such living arrangements. Overall, though, domestic partnership laws provide only a beginning to the solution of the problems for nontraditional families. Only inclusion in the marriage laws themselves will result in the same protections for gays and lesbians as their heterosexual counterparts.