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Where the Rainbow Ends: Trying to Find a Pot of Gold for Same-Sex Couples in Pennsylvania

Maureen B. Cohon¹

I. INTRODUCTION

By all accounts, Carole and Barb and their twin boys, Reese and Robbie, are a regular family. The four of them live in Lancaster, Pennsylvania, along with George, the family Chihuahua.² Barb, the breadwinner, works for a local phone company, and Carole is a stay-at-home mom.³ The boys call Carole and Barb, Mama and Mimi, respectively.⁴ They watch Disney movies together, go to church on Sundays, and, for the boys' fourth birthday, their moms threw a ladybug-themed party in their backyard.⁵

This family, a typical family in all respects but one, recently moved one step closer to finding their pot of gold at the end of the rainbow. In August, 2002, the Pennsylvania Supreme Court ruled unanimously that the Pennsylvania Adoption Act allowed a lesbian or gay partner to adopt the other partner's children without requiring the termination of the partner's parental rights.⁶ With this ruling, gay and lesbian couples moved another step closer to full acceptance under Pennsylvania law. However, as one obstacle to legal acceptance fell by the wayside, still others remain.

As same-sex couples continue to search for full rights, it is useful to look at the current status of the law regarding gay and lesbian couples. This article surveys the current landscape of family law in Pennsylvania as it relates to gays and lesbians and their

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2. Caroline Tiger, *What's Wrong With This Family?* PHILADELPHIA MAG., May 2001, at 75-85.

3. *Id.*

4. *Id.*

5. *Id.*

6. *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195 (Pa. 2002); *See also* Mackenzie Carter, *Ruling Benefits Gays' Children*, PITTSBURGH POST-GAZETTE, August 22, 2002, at B-1, available at 2002 WL 21895372.

families. Many of the issues presented in the article have not yet been litigated in Pennsylvania or have been dealt with only superficially, so it remains uncertain how the courts will rule when they are ultimately faced with these issues.

II. SAME-SEX RELATIONSHIPS AND MARRIAGE

Pennsylvania law defines "marriage" as a "civil contract by which one man and one woman take each other for husband and wife."⁷ Accordingly, Pennsylvania, like the other 49 states and Washington, D.C., does not recognize same-sex marriages and therefore does not afford any of the benefits of marriage to same-sex couples.⁸ As a result, gay and lesbian couples have been forced to seek legal recognition of their relationships through other channels.⁹

A. *Civil Unions*

Although no state recognizes same-sex marriage,¹⁰ same-sex couples in Vermont can receive many of the rights and responsibilities of marriage by entering into a civil union.¹¹ These unions, however, are generally not recognized outside of Vermont,¹² and if

7. 23 PA. CONS. STAT. ANN § 1102 (West 2001).

8. *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); For a discussion of federal marriage rights, see generally David Chambers, *What If? The Legal Consequences of Marriage and Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 47 (1996).

9. According to an Associated Press report published in the *Wall Street Journal*, "nationally, households comprised of unmarried partner homes, regardless of sexual orientation, rose 72 %, from 3.2 million in 1990 to 5.5 million in 2000." *Same Sex Partner Home Jump in Census Figures*, WALL ST. J., June 14, 2001, at A10.

10. The Defense of Marriage Act, Pub. L. Co. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (Supp. V 1999) and 28 U.S.C. § 1738C (Supp. IV 1998)), allows states to refuse to give full faith and credit to same-sex marriages performed in another state. Thus, even if a state were to allow for gay marriages, the marriage would be invalid in any other state.

11. So far the closest any state has come to legalizing same-sex marriage is the Vermont Civil Union Law, VT. STAT. ANN. tit. 15, § 1204(a) (Supp. 2000). After signing the bill, Vermont Governor Howard Dean stated: "I believe it speaks to the notion...that all people are created equal and that no one group of Vermonters will get more benefits or fewer benefits than any other group of Vermonters." Adam Lisberg, *Dean Signs Civil Unions Into Law*, THE BURLINGTON FREE PRESS, April 27, 2000, at 1A. See also Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 15 (2000). The statute grants same-sex couples all of the benefits granted to spouses in marriage, including the right to inherit from each other, adopt a child, participate in spouse abuse programs, and at least twenty other enumerated rights. VT. STAT. ANN. tit. 15, § 1204.

12. Closely following the Vermont Civil Union Law, Hawaii enacted the Hawaii Reciprocal Benefits Law. HAW. REV. STAT. § 572C. Falling short of the rights afforded under a civil union law, the statute provides certain benefits to same-sex partners. Specifically, the law defines "reciprocal beneficiaries" as any two persons, 18 or older, not married or in another reciprocal beneficiaries' relationship, legally prohibited from getting married, who

one lives outside of Vermont it may be difficult to dissolve a civil union because Vermont has a one-year residency requirement.¹³ Specifically, Pennsylvania law provides that a "marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth."¹⁴ The conundrum, of course, is that civil unions are distinct from marriage and therefore are not technically governed by Pennsylvania or federal law.¹⁵ Proponents of civil unions have advocated that such relationships should be recognized under the Full Faith and Credit Clause of the United States Constitution,¹⁶ but the strength of that proposition has only recently been tested.¹⁷

B. Domestic Partnership Agreements

In the absence of the ability to marry or enter into civil unions, many gay and lesbian couples have sought recognition as domestic partners.¹⁸ Domestic partners are unmarried couples (same- or

have declared themselves to be in such a relationship. HAW. REV. STAT. § 574C-4. The benefits the law provides include (1) hospital visitation and medical decision-making, (2) the right to bring a wrongful death action, (3) intestate inheritance rights, and (4) the ability to hold property as tenants by the entirety. See contra W. Brian Burnette, Note, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same-Sex Marriage*, 37 BRANDEIS L.J. 81, 87-88 (1998) (while arguing that this legislation was the only "viable alternative" available to lesbian and gay couples following the constitutional amendment in Hawaii restricting marriage to opposite-sex couples, Burnette notes that this bill only includes three of the fourteen rights and benefits enjoyed by married couples but denied to same-sex couples under Hawaii law, as listed by the Hawaii Supreme Court in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)).

13. See Fred A. Bernstein, *Gay Unions Were Only Half the Battle*, N.Y. TIMES, April 6, 2003, available at 2003 WL 18101406.

14. 23 PA. CONS. STAT. ANN § 1704 (West 2003).

15. Vermont law defines "marriage" as "the legally recognized union of one man and one woman," whereas a "civil union" occurs when "two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses." VT. STAT. ANN. tit. 15, § 1201 (Supp. 2000).

16. Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KY. L.J. 1075, 1096-1102 (2001). The Full Faith and Credit Clause states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

17. A lesbian mother whose visitation rights with her children are premised on the absence of the non-marital partner in her home wants a court to declare that her civil union partner's residence with her will not effect her visitation rights. See Rebecca McCarthy, *Vermont's Gay Union Law Faces Georgia Test*, ATLANTA CONSTITUTION, April 26, 2001, at A1.

18. See generally William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 B.Y.U. L. REV. 961 (2001). See Paula L. Ettelbrick, *Domestic*

opposite-sex) who live together and seek the economic and non-economic benefits granted their married counterparts.¹⁹ Many municipalities allow same-sex couples to register their relationships.²⁰ Registering can serve as proof of domestic partnership status for couples who wish to receive benefits from a private employer, and domestic partnership registration can be structured to include those rights that are most relevant to unmarried cohabitants.

Other couples choose to formalize their relationships by executing written partnership agreements, such as domestic partnership agreements or cohabitation agreements. These agreements can clearly document for a court and all other interested parties the "family nature" of the cohabiting parties' relationship and living arrangements.²¹ They may define the partners' financial obligations to one another and to their children, clarify the ownership of major assets such as real or personal property, and protect the partners' rights should they ever terminate their relationship.²² In the event of a separation, a domestic partnership agreement could save the parties the time and expense of litigating their rights and obligations, particularly with respect to property.²³ It may also prescribe alternative dispute resolution for issues concerning enforcement of provisions contained within the agreement.²⁴

Pennsylvania courts have yet to evaluate whether such agreements are enforceable, but courts in other jurisdictions have held that these types of agreements can create an enforceable contract between same-sex partners.²⁵ A Florida appellate court noted that "even though the state has prohibited same-sex marriages and

Partnership, Civil Unions, or Marriage: One Size Does Not Fit All, 64 ALB. L. REV. 905, 911 (2001); Charles R.P. Pouncy, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMP. POL. & CIV. RTS. L. REV. 363, 377 (1998).

19. HAYDEN CURRY et al., *A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 1/7* (10th ed. 1999).

20. Cities such as New York, San Francisco, Denver, and Tacoma Park have domestic partner laws, Daniel F. Drummond, *Give Metro Benefits to Gays*, WASH. TIMES, Oct., 13, 2000, at C1.

21. Brooke Oliver, *Contract for Cohabitation: Adapting the California Statutory Marital Contract to Life Partnership Agreements Between Lesbian, Gay or Unmarried Heterosexual Couples*, 23 GOLDEN GATE U. L. REV. 899, 904 (1993).

22. E. Todd Bennett & James D. Milko, *Gay and Lesbian Rights in Family Law: A Demographic Inevitability*, 35 MD. B.J. 24, 28 (2002).

23. Mary L. Bonauto, *Advising Non-Traditional Families: A General Introduction*, 40 BOSTON BAR J. 10 (1996).

24. *Id.*

25. *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Cal. App. Ct. 1988); *Posik v. Layton*, 695 So.2d 759 (Fla. Dist. Ct. App. 1997).

same-sex adoptions, it has not prohibited this type of agreement.²⁶ To be valid, domestic partner and cohabitation agreements must be in writing and they must make clear that the delivery of and payment for sexual services was not the primarily reason for the agreement.²⁷

Even if a domestic partner or cohabitation agreement cannot stand up in a court of law, the agreement may be written evidence of the parties' intent to determine their rights and interests with respect to their jointly and separately owned real estate and other property. If necessary, a same-sex couple or surviving partner could use the agreement to demonstrate their familial status in a court proceeding.²⁸

C. Adult Adoption

Another, albeit less frequent, way for same-sex couples to create a legally recognized relationship is through an adult adoption, whereby one partner adopts the other.²⁹ Unlike other states, which bar adult adoptions or specify a minimum age difference between the adoptive parent and child, in Pennsylvania, any individual may be adopted regardless of his age or residence.³⁰ Although Pennsylvania courts have not been called upon to interpret whether the adoption statutes permit this type of adoption, courts in other states have interpreted similar statutes to allow for adult adoptions. In two New York cases and one Delaware case, courts have allowed gay men to adopt their partners to facilitate estate

26. *Posik*, 695 So.2d at 761.

27. *Id.* at 762.

28. Oliver, *supra* note 21, at 905.

29. See *In re the Adoption of Swanson*, 623 A.2d 1095, 1099 (Del. 1993); *Rickard v. McKesson*, 774 So. 2d 838, 841 (Fla. Dist. Ct. App., 2000) (gay adult adoption subsequently challenged in inheritance dispute between surviving adopted partner and blood relatives); *Phuong Ly, Gay Man Makes Legal Tie, Adopts His Partner*, WASH. POST, May 26, 2001, at B2 (where Montgomery County (Md) Circuit Judge DeLawrence Beard had approved a petition by a gay man to adopt his same-sex partner of 32 years in order to establish a legal family relationship, mainly for purposes of inheritance and being able to make legally enforceable decisions about each other's medical care. The attorney for the two men, who wished to remain anonymous, stated that they were a middle-aged couple, and that the younger man had adopted the older one, whose parents are deceased and thus could not object. The order approving the adoption requires that a new birth certificate be issued to the older man, listing the younger man as his parent.) *C.f.* *Matter of Adoption of Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984) (finding that New York's adoption law was intended to imitate nature, thus precluding its use for an adoption where a sexual relationship rather than a parent-and-child relationship was contemplated between the parties).

30. 23 PA. CONS. STAT. ANN. § 2311 (West 2001).

planning and to obtain suitable housing.³¹ In another case, however, the New York Court of Appeals held that a 57-year-old man could not adopt his 50-year-old partner because the purpose of the adoption statute was to legalize the relationship of parent and child, not to provide a means to evade existing inheritance laws.³²

Not surprisingly, there are significant disadvantages to such an arrangement. First, although sodomy is no longer illegal in Pennsylvania, a sexual relationship between a parent and child is considered incest under Pennsylvania law.³³ Second, once a parent-child relationship is formalized through adoption, it cannot be rescinded if the partners later decide that they want to dissolve their relationship.³⁴ Finally, the rights of the adoptee's biological parents must terminate when he or she is adopted,³⁵ which could not only be destructive to that relationship but which also severs "the adoptee's right to inherit from his or her biological parents" or relatives.

III. ADOPTION AND PARENTING

Adoption presents two types of issues. First, may gays and lesbians adopt children that are not biologically related to either prospective parent? Second, are "second-parent" adoptions permitted?³⁶ Pennsylvania's statutory scheme, like that of most states, does not specifically address either issue.³⁷ As a result, the ability

31. *In re Adoption of Swanson*, 623 A.2d 1095 (Del. 1993); *In re Adoption of Adult Anonymous II*, 452 N.Y.S.2d 198 (N.Y. Sup. Ct. 1982); *In re Adoption of Adult Anonymous*, 106 Misc. 2d 792 (N.Y. Fam. Ct. 1981).

32. *In re Adoption of Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984).

33. 18 PA. CONS. STAT. ANN. § 4302 (West 1983) ("A person is guilty of incest, a felony of the second degree, if that person knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood or an uncle, aunt, nephew or niece of the whole blood. The relationships referred to in this section include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.").

34. See Lisa R. Zimmer, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681, 692 (1990); Gwendolyn L. Snodgrass, *Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoptions Among Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75, 83-84 (1997); *Rebecca Lynn C. v. Michael Joseph B.*, 2002 W.VA. LEXIS 201, at * 30 (Albright, J. dissenting).

35. 20 PA. CONS. STAT. ANN. § 2901 (West 2001).

36. For reviews of the literature on gay and lesbian parenthood, see Cheryl A. Parks, *Lesbian Parenthood: A Review of the Literature*, 68 AM. J. ORTHOPSYCHIATRY 376-89 (1998); Charlotte Patterson, *Children of Lesbian and Gay Parents*, 19 ADVANCES IN CLINICAL CHILD PSYCHOL. 235-82 (1997).

37. 23 PA. C.S. § 2901. See e.g. Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 347 (2002).

of gay and lesbian people to adopt children is entirely dependant on judicial interpretation.³⁸

A. *Pennsylvania Adoption Law*

In Pennsylvania, a child that is not the biological child of one partner can be legally adopted by both partners in a same-sex relationship.³⁹ The Pennsylvania Adoption Act provides that "any individual" can adopt.⁴⁰ Given the discretion that individual judges possess, absent a specific provision forbidding such adoptions, a child can be adopted by two same-sex individuals.⁴¹

Until recently, however, "second-parent" adoptions in a same-sex relationship (an adoption of children by the same-sex partner of a biological parent without terminating the parental rights of the biological parent) were forbidden. In a landmark ruling, the Pennsylvania Supreme Court, in August of 2002, interpreted the Pennsylvania Adoption Act to allow for same-sex second-parent adoptions given a showing of cause by the adopting-parent.⁴²

The decision reversed two earlier Pennsylvania Superior Court rulings that had interpreted the Pennsylvania Adoption Act to bar

38. Historically, the courts have been slow to respond to the changing composition of families. Embracing the values associated with the traditional nuclear family, family law has been reluctant to stray from that traditional model. For example, the courts did not recognize the constitutional rights of unwed fathers until 1972 when the U.S. Supreme Court decided *Stanley v. Illinois*. Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 647 (1993). Dolgin noted that the Supreme Court recognized the constitutional rights of unwed fathers in their relationships with their children for the first time in *Stanley v. Illinois*, 405 U.S. 645 (1972). The case extended constitutional protection to an unwed father who had lived with his children and their mother sporadically for eighteen years. The mother died, and due to the presumption that unwed fathers were unfit, Illinois law required the state to take custody of the children. The Court noted that the father was a member of a family unit, consisting of himself, the mother, and the children, and determined that the statute deprived the father of due process and equal protection by not allowing him a hearing.

39. *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195, 1202 (Pa. 2002).

40. 23 PA. C.S. § 2901.

41. "There is no language in the Adoption Act precluding two unmarried same-sex partners (or unmarried heterosexual partners) from adopting a child who had no legal parents." *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195, 1202 (Pa. 2002). Nothing in the law prevented a homosexual couple from jointly adopting a child, but if one member of a partnership already was a parent, the other partner could not adopt. Thus, many couples considered first terminating one partner's parental rights so that both partners could adopt the child together. However, the thought of terminating parental rights to one's child was obviously frightening. As one parent stated prior to the Pennsylvania Supreme Court ruling allowing second parent adoptions, "Do you even for half a second want to give up parental rights and chance the state sweeping in and taking her?" Kathy Boccella, *A Court Ruling Now Allows Gay Couples in Pennsylvania to be Just That*, THE PHILADELPHIA INQUIRER, Sept. 4, 2002, at E1.

42. *In re Adoption of R.B.F.*, 803 A.2d at 1202.

same-sex second-parent adoptions across the board.⁴³ The Act itself does not place any restrictions on who may adopt a child,⁴⁴ but it does say that, unless the court determines otherwise, a final decree of adoption may not be entered unless the natural parent or parents' rights have been terminated.⁴⁵ The only exception to this rule is that a parent does not have to relinquish his or her rights when consenting to the adoption of his or her child by a spouse, known as a second-parent adoption.⁴⁶ In 1982, the Act was amended to allow a trial court, "upon cause shown," to waive any statutory requirement, including ostensibly the termination of parental rights requirement.⁴⁷

Two different Pennsylvania Superior Court rulings had interpreted these provisions to mean that only couples in legally recognized marital relationships could obtain second-parent adoptions. In two nearly identical 6-3 rulings, *In re Adoption of C.C.G and Z.C.G.* and *In re Adoption of R.B.F. and R.C.F.*, the superior court held that people in same-sex relationships cannot adopt their partners' children because they do not qualify as spouses as required by the Adoption Act.⁴⁸ Moreover, the superior court noted that the legally recognized parents had not terminated their parental rights pursuant to section 2711(d), noting that "the clear and unambiguous provisions of the Adoption Act do not permit a non-spouse to adopt a child where the legal parents have not relinquished their respective parental rights."⁴⁹ Regarding the "cause shown" language, the court narrowly interpreted the dis-

43. See *In re Adoption of C.C.G and Z.C.G.*, 762 A.2d 724 (Pa. Super. Ct. 2000); *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d 739 (Pa. Super. Ct. 2000). Previous to the two Superior Court decisions, Pennsylvania took a patchwork approach to second-parent adoptions. For instance, Allegheny County allowed second parent adoptions, while Montgomery County did not.

44. 23 PA. CONS. STAT. ANN. § 2312 (West 2003) ("Any individual may become an adopting parent.") (emphasis added).

45. § 2901.

46. § 2903. There are three types of adoption: (1) second-parent adoption, (2) agency adoption, and (3) private placement adoption. Second-parent same-sex adoptions occur when a lesbian or gay man legally adopts the biological or adoptive children of his or her parent as might a stepmother or stepfather in a heterosexual family. Agency adoptions refer to the adoption of a child through a state child welfare agency, whereas private placement adoptions refer to the adoption of a child through a private agency or consensual arrangements between private parties. LAMBDA LEGAL DEFENSE AND EDUCATION FUND, ADOPTION BY LESBIANS AND GAY MEN: AN OVERVIEW OF THE LAW IN THE 50 STATES 1 (1996).

47. 23 PA. CONS. STAT. ANN. § 2901 (2001).

48. *In re Adoption of C.C.G and Z.C.G.*, 762 A.2d 724 (Pa. Super. Ct. 2000); *In re Adoption of R.B.F. and R.C.F.*, 762 A.2d 739 (Pa. Super. Ct. 2000).

49. *C.C.G. and Z.C.G.*, 762 A.2d at 728; *R.B.F. and R.C.F.*, 762 A.2d at 742.

cretion given to the trial court, ultimately finding that “the best interests of the child” was not an appropriate consideration and consequently appellants had failed to demonstrate cause.⁵⁰

The superior court decisions were appealed to the Pennsylvania Supreme Court which, in a unanimous opinion, held that the Pennsylvania Adoption Act permitted a gay or lesbian partner to adopt his or her partner’s child.⁵¹ As to the findings of the superior court, the Pennsylvania Supreme Court agreed that same-sex partners were not “spouses” under Pennsylvania law, and that a legal parent must relinquish his or her parental rights to consent to the adoption of a child by a non-spouse.⁵² However, in ultimately deciding for the appellants, the court stated “[a]fter careful consideration, we agree with the appellants that there is no reasonable construction of the Section 2901 ‘cause shown’ language other than to conclude that it permits a petitioner to demonstrate why, in a particular case, he or she cannot meet the statutory requirements.”⁵³ A gay or lesbian couple, therefore, is permitted to demonstrate why they are unable to meet the statutory requirement and, upon a finding of cause, a court has discretion to grant an adoption petition if it is in the best interest of the child.⁵⁴

The decision in *In Re R.B.F. and R.C.F.* extends a variety of potential legal benefits to children in same-sex households.⁵⁵ An adjudication of legal parentage entitles a child to receive child support, qualify as a dependant on a parent’s health insurance plan, collect Social Security benefits from a parent, sustain an action for wrongful death, recover under a state’s workers compensation law, and inherit from a parent.⁵⁶ Finally, it gives the adopting parent the right to make medical and education decisions for the adopted child.⁵⁷

B. Co-Parenting Agreements

Because it is too early to fully realize the practical result of the courts decision to allow same-sex adoptions, a co-parenting

50. *Id.*

51. *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195, 1202 (Pa. 2002).

52. *Id.* at 1199.

53. *Id.* at 1202 (Pa. 2002).

54. *Id.* at 1202-03.

55. See L. Stuart Ditzen, *Pa. Court Ends Ban on Gay Adoptions*, PHILADELPHIA INQUIRER, August 21, 2002, at A1.

56. *Id.*

57. *Id.*

agreement, signed by both the legal and non-legal parent of the child, may still be a desirable option to secure full parentage responsibilities.⁵⁸ The purpose of these agreements is to clearly set forth the rights and responsibilities of each parent. Although their validity has never been explicitly litigated in Pennsylvania, dicta in several cases suggest that Pennsylvania courts would find such agreements to be unenforceable. For example, in one case, the trial court noted that "even had the parties entered into the 'co-parenting' contract, it would have been void as against the weight of the law and the public policy of the Commonwealth of Pennsylvania."⁵⁹ The decision was reversed on appeal because the court found that the appellant stood *in loco parentis* to the child and therefore had standing to petition for custody,⁶⁰ but the appellate court noted that the parties had not signed a co-parenting agreement because their attorneys had advised them that they were not enforceable in Pennsylvania.⁶¹

C. *Standby Guardianship*

Parents, particularly those with life-threatening illnesses, may use the Standby Guardianship Act to designate a standby guardian, whose authority to act on behalf of the parent takes effect following the occurrence of some specified triggering event, such as when the parent is incapacitated, dies, or is otherwise unable to care for his or her child.⁶² If the triggering event is the death of the parent, the designated standby guardian may also be appointed as the children's permanent guardian if the parent indicates such a desire in the document designating the standby guardian.⁶³

Designations of standby guardians must be in writing and are not valid if the minor has another living parent whose whereabouts are known and who is willing and able to raise the child.⁶⁴

58. Co-parenting agreements have continued significance because the R.B.F. decision leaves a substantial amount of discretion to judges, therefore, various counties may impose burdensome procedures and long delays to sidetrack second-parent adoptions. Moreover, some courts have indicated that they want a substantial amount of evidence and witnesses as proof that the adoption is in the child's best interests. Meeting of the Pennsylvania Council for Second-Parent Adoption, Sept. 27, 2002.

59. J.A.L. v. E.P.H., 31 Phila. Co. Rptr. 528, 532 n.2 (Pa. Com. Pl. 1985).

60. J.A.L. v. E.P.H., 682 A.2d 1316 (Pa. Super. Ct. 1996).

61. *Id.* at 1317.

62. 23 PA. CONS. STAT. ANN. § 5601-15 (West 2001).

63. § 5611(c).

64. § 5611(a).

IV. CHILD CUSTODY AND SUPPORT

Although most of the controversy surrounding gay and lesbian relationships deals with defining and protecting long-term commitments, the issue of what happens when these relationships end is equally important.⁶⁵ Because lesbian and gay couples cannot marry, they cannot divorce. Custody and support of the their children is nevertheless an issue.

A. *Dissolution of a Same-Sex Marriage*

In the 2001 case of *T.B. v. L.R.M.*, the Pennsylvania Supreme Court determined that a former same-sex partner could use the doctrine of *in loco parentis* to gain standing when seeking partial custody for purposes of visitation.⁶⁶ This doctrine recognizes that a person who has performed the duties and acquired the status of a parent has a substantial, direct, and immediate interest in the custody of the child he or she has parented and that severing those relationships inflicts severe distress and lasting harm on children.⁶⁷ The rights and liabilities arising out of an *in loco parentis* relationship are exactly the same as between a biological or adoptive parent and child.⁶⁸

In *T.B. v. L.R.M.*, two women in an exclusive relationship decided to have a child and L.R.M. became pregnant and gave birth.⁶⁹ Although they did not enter into a formal parenting agreement, the three lived together as a family unit with T.B. assuming the role of co-parent.⁷⁰ When the child was three, T.B. ended her relationship with L.R.M. and filed for shared legal and partial custody and visitation.⁷¹ The court noted that *in loco parentis* status refers to a person who assumes the obligations incident to parenthood without going through the formal adoption process.⁷² The fact that T.B. could not marry the child's biological

65. See generally, Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 632 (1996); see also Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 868-69; Elizabeth Trainor, Annotation, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 62 A.L.R.5th 591, 600 (1998).

66. 786 A.2d 913 (Pa. 2001).

67. *Rosado v. Diaz*, 624 A.2d 193 (Pa. Super. Ct. 1993).

68. 786 A.2d at 917.

69. *Id.* at 915.

70. *Id.* at 914-15.

71. *Id.* at 915.

72. *Id.* at 917.

mother or legally adopt the child did not interfere with her standing to seek partial custody for purposes of visitation.⁷³

In a case with similar facts, the Pennsylvania Superior Court noted that a biological parent's rights "do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so."⁷⁴

B. Custody of Children from a Previous Marriage or Relationship

A related issue arises when a gay or lesbian parent seeks custody of children from a previous marriage or other heterosexual relationship. Occasionally one parent will attempt to use the other parent's sexual orientation to block him or her from obtaining custody.⁷⁵ Although Pennsylvania courts have held that "homosexuality per se is not a basis for denying visitation or partial custody to a parent," the parent's sexual orientation is nevertheless a factor in the court's decision regarding the best interests of the child.⁷⁶ An appellate court noted that there are "significant social, moral and legal distinctions between the traditional heterosexual family relationship and the illicit homosexual relationship."⁷⁷ Furthermore, the burden is on the parent who is involved in the gay or lesbian relationship to prove that the child will not be harmed if the parent is awarded custody.⁷⁸ In one case, a court found that a father's homosexual relationship had an adverse effect on the emotional well-being of his children and affirmed the family court's order granting him only limited partial custody of his children.⁷⁹ In another case, the court found that there was no

73. *T.D.*, 786 A.2d at 917-18.

74. *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1322 (Pa. Super. Ct. 1996).

75. *See, e.g., J.A.D. v. F.J.D.*, 978 S.W.2d 336, 338-39 (Mo. 1998) (holding that a "homosexual parent is not ipso facto unfit for custody of his or her child" in affirming the trial court's award of custody to the heterosexual father) (The Missouri Supreme Court further indicated that no reported Missouri case had ever held that a gay parent was ipso facto unfit.) *But c.f. S.L.H. v. D.B.H.*, 745 S.W.2d 848, 849 (Mo. Ct. App. 1888) (holding that "[w]e agree that placing primary custody of a minor child with the non-homosexual parent is in the best interests of the child" in awarding custody to the mother who had denied the rumor of being a lesbian); *Pulliam v. Smith*, 501 S.E.2d 898, 904 (N.C. 1998) (holding that "the mere homosexual status of a parent is [not] sufficient, taken alone, to support denying such parent custody of his or her child" when affirming the trial court's modification of custody from the gay father to the mother).

76. *Constant A. v. Paul C.A.*, 496 A.2d 1, 8 (Pa. Super. Ct. 1985).

77. *Id.* at 10.

78. *Barron v. Barron*, 594 A.2d 682 (Pa. Super. Ct. 1991). *See also Constant A.*, 496 A.2d at 5 (noting that "the presumption of regularity. . . applies to a heterosexual family").

79. *Pascarella v. Pascarella*, 512 A.2d 715 (Pa. Super. Ct. 1986).

evidence that the fact that a child's mother was a lesbian was harmful to him and that limiting his relationship with his mother "fails to permit him to confront his life situation, however unconventional it may be."⁸⁰

V. DOMESTIC VIOLENCE

Although underreported by victims and downplayed by the media, violence and abuse are as troublesome a problem among gay and lesbian couples as among heterosexual couples.⁸¹ In Pennsylvania, a protection from abuse ("PFA") order may be issued "to bring about a cessation of abuse of the plaintiff"⁸² by "family or household members, sexual or intimate partners or persons who share biological parenthood."⁸³ In the case of *D.H. v. B.O.*, the Superior Court held that the petitioner could seek a PFA order against his former same-sex partner.⁸⁴ Thus, although Pennsylvania law does not recognize same-sex couples for most purposes, it does acknowledge that same-sex relationships carry just as much potential for violence as do heterosexual relationships.

VI. ESTATE PLANNING

Although every family's needs are unique, all same-sex couples should have a number of core legal documents in place to protect their families in the event that one of the partners dies.⁸⁵

80. *Blew v. Verta*, 617 A.2d 31, 36 (Pa. Super. Ct. 1992).

81. See generally, Kathleen Finley Duthu, *Why Doesn't Anyone Talk About Gay and Lesbian Domestic Violence?* 18 T. JEFFERSON L. REV. 23 (1996); Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582 (1996); Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325 (1999); Ruthann Robson, *Lavender Bruises: Intralesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990); Angela West, *Prosecutorial Activism: Confronting Heterosexism in a Lesbian Battering Case*, 15 HARV. WOMEN'S L.J. 249 (1992); Carla M. da Luz, Note, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN'S STUD. 251 (1994); David S. Dupps, Note, *Battered Lesbians: Are They Entitled to a Battered Woman Defense?*, 29 J. FAM. L. 879 (1991); Nancy E. Murphy, Note, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335 (1995).

82. 23 PA. CONS. STAN. ANN. § 2101-14 (West 1975).

83. § 6102(a). "Family or household members" is further defined as, among others, "current or former sexual or intimate partners." *Id.*

84. 734 A.2d 409 (Pa. Super. Ct. 1999).

85. See generally, Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299 (1997).

A. *Wills and Trusts*

The importance of a well-drafted will to carry out an individual's wishes upon his or her death cannot be overstated for gay and lesbian couples. Without a will, inheritance rights are established by statutes governing intestate succession,⁸⁶ meaning that a decedent's estate passes to relatives in the precise order set forth in the statute.⁸⁷ Although courts have extended inheritance rights in the absence of a will to those who have entered into a common law marriage,⁸⁸ neither the intestate succession statutes nor the courts have expanded these rights to unmarried domestic partners. Therefore, without a will, the surviving partner may have no claim to inherit the decedent partner's assets.⁸⁹

Children may also be adversely affected if a parent dies intestate. If the couple has not completed a second-parent adoption, the death of the legally recognized parent could cause the surviving partner to lose standing to continue as the child's guardian. Thus, it is crucial for the legally-recognized parent to nominate the surviving partner as the child's guardian.⁹⁰ Conversely, if the partner who is not legally recognized as a parent dies intestate, his or her estate will not pass to the children because they have no legal relationship to the partner.

For some reasons, a "living trust" may be more desirable than a will for the transfer of assets at death, especially when minor children are to be the beneficiaries. These include the desire to keep the nature and value of the estate private, to retain individual

86. See, e.g., 20 PA. CONS. STAN. ANN. § 6108 (West 2001).

87. § 2102-03. The estate, if there is no surviving spouse, passes to the decedent's next-of-kin in the following order: issue; parents; brothers, sisters, or their issue; grandparents; uncles, aunts, and their children and grandchildren; and the Commonwealth. § 2103.

88. See *In re Estate of Gower*, 284 A.2d 742 (Pa. 1971); *In re Stauffer's Estate*, 94 A.2d 726 (Pa. 1953).

89. A domestic partnership agreement may act as a will substitute upon the death of one of the partners. Many domestic partners have entered into some type of agreement regarding the acquisition of assets and the payment of expenses during their relationship. Such domestic partnership "agreements" can serve as a backstop for the estate plan and can also include provisions for how the couple will divide property and conduct themselves in the unfortunate event of a breakup. Merrienne E. Dean, *Estate Planning for Nontraditional Families*, 309 PLI/Est 1087 (2001).

90. 20 PA. CONS. STAN. ANN. § 2519 (West 1975) ("A person competent to make a will, being the sole surviving parent or adopting parent of any unmarried minor child, may appoint a testamentary guardian of the person of such child during his minority, or for any shorter period.").

control of assets, or to provide for more complex control of assets after death.⁹¹

B. Durable Power of Attorney

A durable power of attorney is a written authorization that can allow one member of a same-sex couple to appoint his or her partner (or other designated individual) as agent, thereby authorizing one partner to make business and financial decisions on the other partner's behalf.⁹² Unlike a "non-durable" power of attorney, a durable power of attorney does not terminate when the principal becomes incapacitated but rather allows the agent to attend to matters such as withdrawing and receiving the income or corpus of a trust, engaging in real property transactions, and entering safe deposit boxes even after the principal's incapacity.⁹³

Similarly, a durable power of attorney for health care authorizes the agent to consent, refuse, or withdraw consent to any medical care, treatment, or procedure.⁹⁴ In the event that the principal is unable to make decisions about his or her own medical care, a close family member usually assumes the role of substitute decision maker,⁹⁵ but gays and lesbians in committed relationships may prefer that their partner perform this function. However, because a same-sex partner is not legally recognized as "family" for these purposes, a partner may be denied the opportunity to make health care decisions for his or her partner or even to visit in

91. Merrienne E. Dean, *Estate Planning for Nontraditional Families*, 309 PLI/Est 1087 (2001). Revocable or "living trusts" are used in many states to facilitate transfer of assets upon death. Basically, the individual transfers all or a substantial portion of his assets to a trust in which he is the sole or primary beneficiary while reserving the right to amend the trust or withdraw or add property at any time. Generally, the individual serves as sole initial trustee. The trust can serve as a will substitute. Upon the individual's death, the trust can continue, in whole or in part, for the benefit of other designated beneficiaries or the trust may terminate and the assets distributed to such beneficiaries without the necessity of a succession proceeding. Joel Mender, *The Nonprobate Revolution*, 50 LA. BAR. 274, 282 (2002).

92. 20 PA. CONS. STAT. ANN. § 5604 (West Supp. 2002).

93. § 5602, 04(b).

94. See *In re Duran*, 769 A.2d 497 (Pa. Super. Ct. 2001) (holding that the appointment for an emergency guardian to authorized blood transfusions for a patient was improper because the patient had already named a health care agent in a durable power of attorney and was not therefore in need of a guardian).

95. *In re Fiori*, 673 A.2d 905, 912 (Pa. 1996). The court explained that family members are best for this role because they are the most knowledgeable about the patient's preferences, goals, and values. *Id.*

the intensive care unit.⁹⁶ Using a durable power of attorney for healthcare can help ensure that all healthcare decisions are made in accordance with the patient's wishes and in his or her best interest.⁹⁷

C. *Life Insurance*

Life insurance can be a means by which gay and lesbian couples can accomplish a variety of estate planning goals. Life insurance owned by the beneficiaries or by an irrevocable trust can pay the estate tax due upon death without using the corpus of the estate or requiring the sale of real estate or a business.⁹⁸ It can also provide income for a surviving partner or child by reducing an estate's assets to avoid probate while still providing a commensurate amount of money to a chosen beneficiary.⁹⁹ Importantly, using life insurance as an estate planning tool greatly increases the likelihood that the amount of a provision for a partner or child can remain confidential if so desired.¹⁰⁰

Many insurance companies take the position that unmarried partners do not have an insurable interest in each other. Thus, an individual can buy a policy of his or her own life and name a partner as beneficiary, but cannot buy a policy on a partner's life unless the parties represent that the nature of their relationship is that of business partners.¹⁰¹

D. *Burial Arrangements*

Under both Pennsylvania common and statutory law, a surviving spouse has sole authority over the disposition of the decedent's remains.¹⁰² If the decedent is not survived by a spouse, the next of

96. *In re Guardianship of Kowalski*, 382 N.W.2d 861 (Minn. Ct. App. 1986) (upholding the appointment as guardian the father of a woman seriously injured in a car accident rather than her partner. The decision was reversed six years later, 478 N.W.2d 790 (Minn. Ct. App. 1992)).

97. *Id.* at 506 ("When a patient has executed a [durable power of attorney] and named a personal representative, that choice is given paramount importance.").

98. Matthew R. Dubois, *Estate Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263, 324-27 (1999).

99. *Id.*

100. *Id.*

101. CURRY, *supra* note 19, at 2/16. A couple can claim to be business partners if they own any property together. *Id.*

102. 20 PA. CONS. STAT. ANN. § 305(b) (West Supp. 2002); *Pettigrew v. Pettigrew*, 56 A. 878, 880 (Pa. 1904).

kin has this authority.¹⁰³ These rules are based on the presumption that either a spouse or the decedent's family will best understand the decedent's wishes with respect to the disposition of his or her remains, but they effectively disregard relationships between same-sex couples.¹⁰⁴

If a decedent has left explicit written instructions giving another person control over funeral and burial arrangements, a court will usually respect those wishes.¹⁰⁵ But without written instructions, the disposition of the body as well as funeral arrangements may proceed without any input from the decedent's partner.¹⁰⁶ In *Pettigrew v. Pettigrew*, the Pennsylvania Supreme Court suggested that "a more distant relative, or even a friend, not connected by ties of blood, may have a superior right, under exceptional circumstances, to one nearer of kin."¹⁰⁷ At least one commentator has suggested that this caveat may allow a same-sex partner to control disposition of a decedent's body in the absence of specific instructions to that effect, but the "exceptional circumstances" standard is rarely applied by the courts.¹⁰⁸

CONCLUSION

According to the 2000 Census, nearly 1.2 million residents of the United States identify themselves as part of a gay or lesbian couple.¹⁰⁹ Yet these couples and their families are denied the approximately 1,200 rights and responsibilities associated with civil marriage¹¹⁰ because state and federal law fail to recognize their relationships. At present, gay and lesbian couples must take special care to ensure that their families are protected as much as

103. 20 PA. CONS. STAT. ANN. § 305(c) (West Supp. 2002).

104. Jennifer E. Horan, Note "When Sleep at Last Has Come": Controlling the Disposition of Dead Bodies for Same-Sex Couples, 2 J. GENDER RACE & JUST. 423, 424-25 (1999).

105. See *Hodge v. Cameron*, 200 A. 238, 241 (Pa. Super. Ct. 1938) ("Unquestionably, the declarations of the decedent expressing a wish as to burial were admissible, and under ordinary conditions courts will see to it that the expressed wishes are, as far as it is possible, carried out.").

106. See generally, Tanya K. Hernandez, *The Property of Death*, 60 U. PITT L. REV. 971 (1999). But see *Stewart v. Schwartz Brothers-Jefferson Memorial Chapel, Inc.*, 606 N.Y.S.2d 965 (N.Y. Sup. Ct. 1993) (holding that the partner of a man who had died without having left instructions regarding his funeral could make decisions rather than the decedent's family because of their "spouse-like relationship").

107. *Pettigrew v. Pettigrew*, 56 A. 878, 880 (Pa. 1904) (noting that the decedent's wishes should be entitled to "respectful consideration").

108. Horan, *supra* note 104, at 429.

109. Bennett & Milko, *supra* note 22, at 29.

110. Defense of Marriage Act, *Letter Report*, GAO/OGC-97-16 (Jan. 31, 1997), available at <http://www.gao.gov>.

possible, but as society continues to refine its notions of what constitutes a family—and as couples continue to challenge the laws themselves in courts and in the legislatures—issues concerning same-sex couples and their children will no doubt move to the forefront of family law as same-sex couples continue to search for their “pot of gold.”