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SURVEYING THE LEGAL LANDSCAPE FOR PENNSYLVANIA SAME-SEX COUPLES

Anthony C. Infanti

INTRODUCTION

By spring 2009, a quick succession of advances in the battle over same-sex marriage in Connecticut, California, Iowa, Maine, New Hampshire, and Vermont had led some commentators to describe the moment using such hyperbolic phrases as “tipping point” and “potential watershed.” The legal and legislative wins in these states—however tentative—had created a sense of momentum in favor of lesbian and gay rights advocates in the battle over same-sex marriage. Yet jubilation over a string of victories should not

* Professor of Law, University of Pittsburgh School of Law. This paper updates and expands upon Maureen B. Cohon, Where the Rainbow Ends: Trying to Find a Pot of Gold for Same-Sex Couples in Pennsylvania, 41 DUQ. L. REV. 495 (2003). Thanks go to Maureen for suggesting that the time had come for someone to update her work.


2. See Editorial, Rethinking Marriage, BALTIMORE SUN, May 10, 2009, at 24A (“the momentum for change in marriage laws is building”). The May 2008 court victory in California that extended the right
obscure the larger perspective on this battle. We should not lose sight of the fact that in each of these jurisdictions, with the exception of Iowa, same-sex couples could obtain legal recognition for their relationships by entering into a domestic partnership or a civil union even before these latest legislative struggles. In other words, couples in all of these states (except Iowa) were not fighting to obtain legal recognition for their relationships, but rather to extricate themselves from a second-class status by obtaining access to marriage.

Important as such battles are, it should not be forgotten that most states still do not legally recognize same-sex relationships at all. Indeed, at the time of the 2000 census, only about 35% of all same-sex partner households in the United States resided in jurisdictions that currently (or soon will) provide some measure of formal legal recognition to same-sex relationships, whether that recognition comes in the form of a marriage, civil union, domestic partnership, or reciprocal or designated beneficiary relationship. Conversely, to marry to same-sex couples was quickly overturned at the ballot box the following November when California voters passed Proposition 8. CAL. CONST. art. I, § 7.5; Jesse McKinley & Laurie Goodstein, Bans in 3 States on Gay Marriage, N.Y. TIMES, Nov. 6, 2008, at A1. The California Supreme Court turned away legal challenges to Proposition 8, but did leave intact the marriages of those same-sex couples who were married in the short window between the court’s earlier decision and the passage of Proposition 8. Strauss v. Horton, 207 P.3d 48 (Cal. 2009). California recently enacted legislation that similarly recognizes out-of-state same-sex marriages entered into prior to the passage of Proposition 8, and it affords same-sex couples married out-of-state on or after the passage of Proposition 8 all of the rights and obligations of marriage—though it does not accord them the legal status of “marriage.” An Act to Amend Section 308 of the Family Code, 2009 Cal. Legis. Serv. ch. 625 (S.B. 54) (West).


this means that, at the 2000 census, about 65% of all same-sex partner households resided in jurisdictions that did not then, and do not now, formally legally recognize same-sex relationships. By way of illustration, I describe in this paper the legal obstacles and uncertainties currently faced by same-sex couples in Pennsylvania, which is both the state where I live and teach and one of the many states that do not formally legally recognize same-sex relationships. Part I describes the (rather small) extent to which same-sex relationships currently benefit from express legal recognition in Pennsylvania. Part II describes the alternative means that same-sex couples can employ to obtain a measure of legal and nonlegal recognition for their relationships in Pennsylvania. Part III covers issues relating to the establishment and breakup of families. Finally, Part IV describes a few miscellaneous, yet interesting recent cases relating to same-sex couples in Pennsylvania.


According to Simmons & O’Connell, supra, at 4 tbl.2, a total of 210,347 same-sex unmarried partners lived in these jurisdictions, out of a total of 594,391 same-sex unmarried partners in the United States.

Moreover, these two groups of same-sex couples—that is, the “haves,” who can seek formal legal recognition of their relationships, and the “have-nots,” who do not have that option in their home states—are not as separate as they might seem. In reality, the legal fortunes of these two ostensibly separate groups are closely intertwined, because the geographic boundaries that separate them are as porous as our society is mobile. In other words, the haves can become have-nots (and the have-nots can become haves) simply by crossing a state line, whether actually or virtually. As a result, from a legal planning perspective, the haves must be just as concerned with the legal treatment of the have-nots as they are with their own legal treatment under their own state’s laws. The haves must, therefore, plan not only with their home state’s laws in mind, but must also keep in mind the possibility that their relationship may be relevant under the law of a state that will not legally recognize their marriage, civil union, domestic partnership, or reciprocal beneficiary relationship. See generally Anthony C. Infanti, Taxing Civil Rights Gains, ___ MICH. J. GENDER & L. ___ (forthcoming 2010) (recharacterizing the costs that same-sex couples in legally recognized relationships must incur to plan for the possibility that their relationship might be relevant under another state’s law as a tax on lesbian and gay families).
I. RELATIONSHIP (NON)RECOGNITION IN PENNSYLVANIA

A. Marriage

In Pennsylvania, “marriage” is defined as “[a] civil contract by which one man and one woman take each other for husband and wife.” Pennsylvania is thus among the forty-five states that do not currently (and will not soon) allow same-sex couples to marry. Even before the end of common law marriage in Pennsylvania, the state’s superior court held that same-sex couples could not contract a valid common law marriage.

Pennsylvania is also among the forty-one states that, as of this writing, expressly refuse to recognize same-sex marriages celebrated elsewhere. In

5. 23 PA. CONS. STAT. § 1102 (2008).
6. As of this writing, Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont allow same-sex couples to marry. See supra note 3.
9. Twelve states have a statutory prohibition against the recognition of same-sex marriages, three states have a constitutional prohibition against the recognition of same-sex marriages, and twenty-six states have both a statutory and a constitutional prohibition against the recognition of same-sex marriages. INFANTI, supra note 3, at 157 tbl.6. Since I compiled this table, the California Supreme Court struck down that state’s statutory prohibition against same-sex marriage, In re Marriage Cases, 183 P.3d 384 (Cal. 2008), and California voters quickly replaced that statutory prohibition with a constitutional one (i.e., Proposition 8). CAL. CONST. art. I, § 7.5; McKinley & Goodstein, supra note 2. As mentioned above, the California Supreme Court turned away a constitutional challenge to Proposition 8, but held that same-sex marriages celebrated in California prior to the passage of Proposition 8 must continue to be legally recognized. Strauss v. Horton, 207 P.3d 48 (Cal. 2009). In addition, in November 2008, both Florida and Arizona added constitutional prohibitions against same-sex marriage to their existing statutory prohibitions. McKinley & Goodstein, supra note 2. Furthermore, the Connecticut Supreme Court effectively struck down that state’s statutory prohibition against same-sex marriage when it extended the right to marry to same-sex couples. Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407 (Conn. 2008). The Iowa Supreme Court did likewise when it extended the right to marry to same-sex couples. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). The legislatures of New Hampshire and Vermont eliminated their states’ statutory prohibitions against same-sex marriage when they approved legislation extending the right to marry to same-sex couples. Act of June 3, 2009, 2009 NH Adv. Legis. Serv. 59 (LexisNexis); Act of Apr. 7, 2009, 2009 Vt. Adv. Legis. Serv. 3 (LexisNexis).


Yet, in July 2009, the District of Columbia began to recognize same-sex marriages celebrated in other jurisdictions. D.C. Vote Puts Gay Marriage Before Congress, BOSTON GLOBE, Apr. 9, 2009, at 2; Nikita Stewart, How Gay Marriage Recognition Works, WASH. POST, July 7, 2009, at B2. And it is expected that legislation permitting same-sex marriages to be celebrated in the District of Columbia itself will take effect in spring 2010. See supra note 3. Despite a favorable opinion from the New York attorney general, that state’s courts have issued mixed decisions on the question of whether same-sex marriages, civil unions, and
1996, the Pennsylvania General Assembly enacted its defense of marriage act, which 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.” In 2008, an attempt to amend the Pennsylvania Constitution to prohibit same-sex marriage—as well as any same-sex union that is the functional equivalent of marriage—failed in the state legislature. However, it would not be surprising to see this (or a similar) proposal resurface in the future.


In 2008, the governor of New York issued an order directing state agencies to recognize same-sex marriages celebrated in other jurisdictions; however, this order will have no effect on the (still) mixed signals that have been sent by the state courts, and, even with respect to state agencies, its validity has been cast in doubt by several state legislators and the Alliance Defense Fund, who have together filed a lawsuit challenging the governor’s actions on constitutional grounds. Jeremy W. Peters, New York to Back Same-Sex Unions from Elsewhere, N.Y. TIMES, May 29, 2008, at A1; Jeremy W. Peters, Suit Seeks to Block State Policy on Same-Sex Unions, N.Y. TIMES, June 4, 2008, at B3. The New York Supreme Court, which is a trial-level court, dismissed this suit; however, the plaintiffs immediately indicated their intent to appeal this ruling. Nicholas Confessore, Court Backs Paterson Regarding Gay Unions, N.Y. TIMES, Sept. 3, 2008, at B5.

10. 23 PA. CONS. STAT. § 1704 (2008). At the same time, the Pennsylvania legislature added the definition of marriage quoted supra text accompanying note 5.

B. City Registries

Nevertheless, three Pennsylvania cities now have domestic partnership registries: Philadelphia and Harrisburg have life partnership registries, and Pittsburgh has a domestic partnership registry. In Pittsburgh and Harrisburg, registration is open to both same-sex and different-sex unmarried couples. In Philadelphia, only same-sex couples may register as life partners.

In all three cities, there are a series of requirements that must be satisfied as a prerequisite to registration. Though these requirements are loosely patterned after those that apply to marriages in Pennsylvania, the requirements to register a partnership go beyond what is required of different-sex couples who wish to marry. In particular, domestic or life partners—but not different-sex couples who wish to marry—are required to affirm or demonstrate their financial interdependence as a prerequisite to being eligible for registration. The couple must also have been together for a minimum of six months prior to registration in Philadelphia. In Pittsburgh, city employees who wish to have their partners covered under their fringe benefits packages must demonstrate that they have been together for a minimum of one year. Harrisburg does not impose a waiting period on registration.

At best, however, registration provides only limited benefits. In Pittsburgh and Harrisburg, domestic partners and life partners have the same hospital visitation rights as spouses. In Harrisburg, employees get the same bereavement leave for the death of a life partner as for a spouse and, in residential leases in that city, the word “family” is to be interpreted to include life partners. In Pittsburgh, life partners get the same access to city facilities

15. Id.; HARRISBURG, PA. CODE § 4-201.3 (2009); PITTSBURGH, PA. CODE § 186.04-.05 (2008).
19. HARRISBURG, PA. CODE § 4-201.3 (2009).
20. Id. § 4-205.1; PITTSBURGH, PA. CODE § 186.08(2) (2008).
as spouses. And, in all three cities, registration can be used as evidence of commitment to gain access to public- or private-employer-provided benefits.

In Philadelphia, a life partnership can be terminated simply by filing a termination statement, which will be effective 60 days from the date of filing. In Pittsburgh and Harrisburg, a domestic partnership or life partnership can be terminated by executing a notice of termination. None of these termination provisions contains a mechanism for distributing the property of the parties or dealing with other breakup-related issues. Except when one partner dies, there is a waiting period of twelve months in Philadelphia and Pittsburgh before either partner can enter into a new registered partnership.

In Devlin v. City of Philadelphia, the Pennsylvania Supreme Court ruled that the City of Philadelphia had acted within its authority when it created its life partnership registry. Yet the court’s decision underscores the limited nature of the benefits provided by these registries, because the court’s decision was based on the fact that “life partnership” status “is, in essence, merely a label that the City can use to identify individuals to whom it desires to confer certain limited local benefits.” The court further described the rights and benefits of life partners as “but a small fraction of what marriage affords to its participants.”

At the same time, however, the court struck down Philadelphia’s inclusion of “life partnership” as a protected category in the city’s nondiscrimination ordinance. The court held that the City had improperly exercised its authority beyond the city limits by, in essence, requiring individuals who neither work nor live in Philadelphia to register their partnerships with the city in order to receive full protection under the city’s nondiscrimination ordinance. The court further struck down the City’s exemption from realty transfer tax for transfers between life partners as a

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23. Id. § 186.08(3); HARRISBURG, PA. CODE § 4-205.2, .5 (2009); Phila. Comm’n on Human Relations, supra note 12.
25. HARRISBURG, PA. CODE § 4-203.2 (2009); PITTSBURGH, PA. CODE § 186.06(2) (2008). In Harrisburg, if only one partner executes the notice of termination, then the City Clerk must send a copy of the notice to the other life partner and the termination will take effect thirty days after the execution of the notice of termination. HARRISBURG, PA. CODE § 4-203.2 (2009).
28. Id.
29. Id. at 1247–48.
violation of the Uniformity Clause of the Pennsylvania Constitution, which requires all taxes to be uniform on the same class of subjects.30

II. ALTERNATIVE MEANS OF OBTAINING LEGAL RECOGNITION

Without access to marriage and only limited legal recognition under city registries, Pennsylvania same-sex couples must take other steps to obtain recognition for their relationships. To partially replicate the legal rights and obligations associated with marriage,31 same-sex couples will need to draft a number of documents, including domestic partnership agreements, wills and will substitutes, powers of attorney, advance directives, and hospital visitation authorizations. To further signal their commitment to each other, the couple may wish to change one or both of their surnames. These documents and the judicial procedure for name changes will each be discussed separately below.

A. Domestic Partnership Agreements

In the absence of a comprehensive set of legal rights and obligations, a same-sex couple may formalize their relationship by entering into a private, contractual arrangement, which may alternatively be called a “domestic partnership,” “cohabitation,” or “living together” agreement (here, I opt for “domestic partnership agreement”). A domestic partnership agreement may cover a number of different subjects. It may address, for example, the pooling of income during the relationship; the division of responsibilities for household chores and expenses; and/or the division of property, support payments, and dispute resolution upon the couple’s separation.

No reported decision in Pennsylvania specifically addresses the enforceability of a domestic partnership agreement between same-sex partners. In Knauer v. Knauer, however, the Pennsylvania Superior Court held that an agreement between unmarried partners is enforceable so long as it is “not predominantly based on sexual consideration.”32 In an unreported

30. Id. at 1248–51.
31. Even the most diligent couple can never precisely duplicate all of the legal rights and obligations of marriage. There are certain rights and obligations of marriage that only the state itself can grant (e.g., exemptions from taxation and immunity from being called to testify against a spouse).
32. Knauer v. Knauer, 470 A.2d 553, 566 (Pa. Super. Ct. 1983). It is worth noting that, under Pennsylvania’s Uniform Written Obligations Act, “[a] written release or promise . . . made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.” 33 PA. STAT. § 6 (2008).
decision citing *Knauer*, the Court of Common Pleas for Northampton County enforced a property settlement agreement between same-sex partners and, in doing so, held that the agreement was not against public policy.\(^{33}\)

Regardless of its enforceability, a domestic partnership agreement evidences the familial nature of the relationship between the partners. It may also provide evidence of the parties' intent regarding the sharing and titling of property. Indeed, in *Swails v. Haberer*, a federal court in a diversity suit applied Pennsylvania law to distribute a same-sex couple's jointly owned property "after the dissolution of their same-sex domestic partnership."\(^{34}\) There was some dispute in that case about the nature of the property interest that the parties intended to create when they purchased their home. A domestic partnership agreement might have aided the court in determining whether the parties truly intended to create a joint tenancy with right of survivorship with respect to their home.

**B. Wills and Will Substitutes**

1. **Wills**

   a. **Avoiding Intestate Succession**

   If a member of a same-sex couple dies without a will (or without a comprehensive will), the laws of intestate succession will apply.\(^ {35}\) In Pennsylvania, a surviving different-sex spouse inherits the entire estate if the decedent dies intestate and has no surviving parent or issue.\(^ {36}\) If the decedent dies intestate and is survived by a parent or issue, then the surviving different-sex spouse is entitled to receive a portion of the estate.\(^ {37}\)

   Any portion of the decedent's estate not passing to a surviving different-sex spouse passes, in the following order, to: (1) issue, (2) parents, (3) siblings and their issue, (4) grandparents and their issue, (5) uncles and aunts and their issue, or (6) the Commonwealth of Pennsylvania.\(^ {38}\) Obviously, laws governing intestate succession make no provision for inheritance by same-sex partners or by the decedent's nonbiological, nonadopted children. If a lesbian or gay

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35. 20 PA. CONS. STAT. § 2101(a) (2008).
37. Id.
38. 20 PA. CONS. STAT. § 2103 (2008).
man wishes to provide for his/her partner and any nonbiological, nonadopted children upon his/her death, it will therefore be necessary to execute a will that expresses those intentions.

b. Testamentary Guardianships of Minor Children

In addition, if a same-sex couple has children and only one partner is legally recognized as a parent, the legal parent's death without a will could also jeopardize the surviving partner's ability to continue as guardian because it would fall to the courts to appoint a guardian. Through a will, the legally recognized parent can, in this situation, appoint the surviving partner as the testamentary guardian of the child. In construing the legal force of the statute permitting a sole surviving parent to appoint a testamentary guardian, the Pennsylvania Superior Court has explained:

[T]he statute necessarily raises a prima facie presumption in favor of the testamentary appointment. However, the presumption, as with similar presumptions in favor of the parent, is not irrebuttable. The appointment may be defeated upon a showing of convincing reasons as to why it should not stand. The challenging party bears the burdens of production and persuasion; that burden is a heavy one.

c. Control of Decedent's Remains

A further question may arise concerning who will have the authority to dispose of a partner's remains after death. By statute, a surviving different-sex spouse is granted "the sole authority in all matters pertaining to the disposition of the remains of the decedent." If there is no surviving different-sex spouse, then, "absent an allegation of enduring estrangement, incompetence, contrary intent or waiver and agreement which is proven by clear and convincing evidence," the next of kin of the decedent have the sole authority to dispose of the remains. For this purpose, "next of kin" is defined as the decedent's spouse and blood relatives, in the order that they would take the decedent's estate under the laws of intestate succession.

40. 20 PA. CONS. STAT. § 2519 (2008).
42. 20 PA. CONS. STAT. § 305(b) (2008).
43. 20 PA. CONS. STAT. § 305(c).
44. 20 PA. CONS. STAT. § 305(e).
Neither a same-sex partner nor a nonbiological child of the decedent would qualify as next of kin under this definition. Nevertheless, in a decision that predates the current statute, the Pennsylvania Supreme Court stated, "[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."\(^4\)\(^5\)

With regard to the need under the current statute to prove enduring estrangement or incompetence in order to overcome the preference for next of kin, it would seem that the circumstances would truly need to be exceptional for a surviving same-sex partner to be given control of the deceased partner's remains.

More promising, however, is the possibility of proving that the statutory preference for a surviving different-sex spouse or next of kin does not reflect the decedent's wishes. At common law, it had been said that "how far the desires of the decedent should prevail against those of a surviving husband or wife is an open question, but as against remoter connections, such wishes especially if strongly and recently expressed, should usually prevail."\(^4\)\(^6\) By its own terms, the current statute seems to go further by specifying that its directions concerning who shall have control of the decedent's remains are "subject to the provisions of a valid will executed by the decedent."\(^4\)\(^7\) It may thus be useful to express burial wishes in a will. Although, as a practical matter, a will may not be located or read until burial arrangements have already been made and completed.

It would, therefore, be wise to take additional steps to specify a wish that a surviving same-sex partner have authority to dispose of one's remains. The statutory preference for a surviving different-sex spouse or next of kin can be defeated through a showing, by clear and convincing evidence, of a contrary intent on the part of the decedent.\(^4\)\(^8\) A "contrary intent" is defined as "[a]n explicit and sincere expression, either verbal or written, of a decedent adult or emancipated minor prior to death and not subsequently revoked that a person other than the one authorized by this section determine the final disposition of his remains."\(^4\)\(^9\) To take advantage of this exception, same-sex partners should probably each execute a separate written document expressing their wishes concerning who should have custody of their remains and, perhaps, keep that document with their advance directives or other documents.
likely to be located and read near the time of death. Verbal expressions of these same wishes to each partner’s next of kin would also be advisable, so as to ensure that the decedent’s wishes are, to paraphrase the statute, explicitly and sincerely communicated to those most likely to object to allowing a surviving partner to take control of the decedent’s remains. If this exception applies, then the court is empowered to “enter an appropriate order regarding the final disposition which may include appointing an attorney in fact to arrange the final disposition.”

_d. Will Contests_

Even where both partners have executed a comprehensive will, there is still the possibility of a will contest by a disgruntled relative on the grounds of undue influence or lack of testamentary capacity. The recent case of *Estate of Meade Easby*\(^5\) represents an interesting twist on the usual will contest scenario. In that case, a disgruntled distant relative, oblivious to the relationship between a wealthy gay man and his long-time partner, took his case to the Pennsylvania attorney general because a charity had been a larger beneficiary under the decedent’s prior will. The relative managed to convince the attorney general’s office to get involved in the case in its role as protector of charitable organizations.

In *Estate of Meade Easby*, based on an exhaustive review of the facts, the court ultimately rejected the claim that the decedent’s long-time partner had exerted undue influence over him. In rejecting the claim, the court noted the irony that the couple’s intermingling of their finances—as specifically contemplated by their registration as life partners with the City of Philadelphia—had been used as evidence of undue influence.\(^5\) In a lesson for those who prepare wills for same-sex couples, the attorney who wrote the decedent’s will took care to lay the groundwork for defending the will against claims of undue influence and lack of testamentary capacity by meeting with the testator both with his partner and then separately from his partner; moreover, the attorney conducted a separate meeting to go over the will’s

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50. 20 PA. CONS. STAT. § 305(d)(1).
52. _Id._ at *60–61.
terms one last time right before it was signed.\textsuperscript{53} In addition, the attorney had the testator sign the will outside the presence of his partner.\textsuperscript{54}

\textbf{2. Living Trusts}

A so-called "living trust" is an alternative to a will for directing the distribution of property at death while retaining control over it during life. In Pennsylvania, a trust can be created through a "transfer of property under a written instrument to another person as trustee during the settlor's lifetime."\textsuperscript{55} A trust can be created for any lawful purpose; however, the same person cannot be the sole trustee and sole beneficiary of a trust.\textsuperscript{56}

In its function as a will substitute, a living trust typically involves the transfer of a portion of the settlor's property in trust with the retention of income from the trust during life. Any remaining property is distributed to specified individuals at the settlor's death as dictated by the terms of the trust. The settlor retains control of the property during her life by naming herself trustee and retaining the right to revoke or amend the trust during life.\textsuperscript{57}

The advantages of a living trust include: (1) the ability to avoid the probate and administration process, (2) the ability of a co-trustee or successor trustee to easily take over management of the trust in the event of the settlor's incapacitation, and (3) the decreased possibility of challenges on the basis of undue influence or lack of capacity.\textsuperscript{58} With regard to this last advantage, living trusts are thought to be less susceptible to challenge both because they are more difficult to detect—unlike wills, they are not open to public inspection\textsuperscript{59}—and, if established well in advance of death, because the transferor "can be shown to have exercised dominion and control and an awareness of the trust's terms."\textsuperscript{60}

\textsuperscript{53} Id. at *31-33.
\textsuperscript{54} Id. at *34.
\textsuperscript{55} 20 PA. CONS. STAT. § 7731(1) (2008).
\textsuperscript{56} 20 PA. CONS. STAT. §§ 7732, 7734 (2008).
\textsuperscript{57} In Pennsylvania, the right to revoke or amend a trust exists "unless the trust instrument expressly provides that the trust is irrevocable." 20 PA. CONS. STAT. § 7752(a) (2008).
\textsuperscript{58} 20 PA. CONS. STAT. § 7736 (2008).
\textsuperscript{59} See 20 PA. CONS. STAT. § 7754 (2008), Joint State Gov't Comm. cmt. ("[T]here is no requirement that a trust instrument be filed with the Register of Wills or elsewhere in the public records . . . .").
\textsuperscript{60} Matthew R. Dubois, Note, Legal Planning for Gay, Lesbian, and Non-Traditional Elders, 63 ALB. L. REV. 263, 322 (1999); see also Jennifer Tulin McGrath, The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples, 27 SEATTLE U. L. REV. 75, 93 (2003).
The disadvantages of a living trust include: (1) the cost of establishing and administering the trust, including attorney’s fees to prepare the trust and the cost of transferring title of assets to the trust; (2) the need for a will to pass any property not transferred to the trust; and (3) the need for a will to appoint a testamentary guardian for the settlor’s minor children. It is also worth noting that a living trust provides no federal or state tax advantages over a will. During life, the trust property should continue to be treated as if the settlor owned it herself for federal and state income tax purposes. At death, the trust property should be included in the settlor’s gross estate for federal estate tax purposes and should be subject to Pennsylvania inheritance tax.

3. Joint Tenancy with Right of Survivorship

In Pennsylvania, same-sex couples can hold title to property either as tenants in common or as joint tenants with right of survivorship. If property is held as tenants in common, a deceased partner’s share of the property passes under her will or state intestacy laws to her beneficiaries or heirs, making the property subject to the probate and administration process. In contrast, if the property is held as joint tenants with right of survivorship, then the deceased partner’s share of the property automatically passes to the survivor by operation of law, avoiding the probate and administration process. Because of the automatic nature of this transfer, joint tenancies with right of survivorship are another alternative for directing the distribution of property at death.

In Pennsylvania, there is a statutory presumption against the creation of a joint tenancy with right of survivorship. The Pennsylvania Supreme Court has held that the intent to create a right of survivorship “must be expressed with sufficient clarity to overcome the statutory presumption that survivorship is not intended.” The question is essentially one of the intent of the parties, and “no particular form of words is required to manifest such an intention.”

61. See supra note 40 and accompanying text.
64. 68 PA. STAT. § 110 (2008).
65. Zomisky v. Zamiska, 296 A.2d 722, 723 (Pa. 1972); see also In re Estate of Quick, 905 A.2d 471, 474 (2006) (stating that a joint tenancy with right of survivorship “must be created by express words or by necessary implication”).
66. Zomisky, 296 A.2d at 723; see also In re Estate of Quick, 905 A.2d at 474 (indicating that “courts have found the intent to create a [joint tenancy with right of survivorship] trumps the use of imprecise or improper language in creating it”).
Thus, although joint tenancies have the advantage of being essentially free to create, it is necessary to ensure that the intent to create the right of survivorship is clearly expressed. As mentioned earlier, a domestic partnership agreement that sets forth the partners' intent in the titling of their assets and the sharing of property might be a useful tool for avoiding disputes about otherwise ambiguous language. Like living trusts, joint tenancies are thought to be less susceptible to attack on grounds of undue influence. Weighed against these advantages, however, are potential tax disadvantages, because the creation of a joint tenancy may have federal gift tax consequences and the property may also be subject to state inheritance tax—as well as potentially adverse federal estate tax consequences—at the death of a co-owner.

C. Durable Powers of Attorney

A durable power of attorney allows the named agent to act even after the principal becomes incapacitated. The durable power of attorney can take effect immediately or it can “spring” into effect at a specific time or upon the happening of a specific event (e.g., the incapacity of the principal). Without a durable power of attorney, a guardian of the estate would have to be appointed for the incapacitated individual in order to administer her finances.

67. See supra text accompanying note 34.
68. If a court finds any doubt as to the meaning in the terms of a grant, such ambiguous terms should:
   receive a reasonable construction, and one that will accord with the intention of the parties; and,
   in order to ascertain their intention, the court must look at the circumstances under which the grant was made. It is the intention of the parties which is the ultimate guide, and, in order to ascertain that intention, the court may take into consideration the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject-matter of the agreement.
   In re Estate of Quick, 905 A.2d at 474–75 (quoting Hindman v. Farren, 44 A.2d 241, 242 (Pa. 1945) (citation omitted) (emphasis omitted)).
70. I.R.C. § 2040 (2006); Treas. Reg. § 25.2511-1(h)(5) (as amended in 1997); 72 PA. STAT. § 9108 (2008). The federal estate tax consequences are potentially adverse because the entire value of the property will be included in the gross estate of the first co-owner to pass away, unless her executor can demonstrate the extent to which the survivor actually contributed (out of the survivor’s own funds) to the purchase or improvement of the property. Treas. Reg. § 20.2040-1(a)(2) (as amended in 1960). In the case of property held for many years (possibly even decades), this can be a difficult burden to bear and may result in over taxation of the property.
71. 20 PA. CONS. STAT. § 5604(b) (2008).
72. 20 PA. CONS. STAT. § 5604(a).
Whether the person’s same-sex partner could be named guardian would depend on whether the partner’s interests are found to conflict with those of the incapacitated person. Though a family relationship, by itself, will not amount to a conflict, there are no reported decisions regarding same-sex partners.

In case it proves necessary to appoint a guardian even when a durable power of attorney has been executed, the principal can nominate a guardian (e.g., her same-sex partner) in the durable power of attorney itself. A court must follow a nomination in a power of attorney absent disqualification or a showing of good cause. Naturally, the same questions exist regarding whether a same-sex partner’s interests will be found to conflict with those of the incapacitated person, resulting in disqualification of the same-sex partner from being appointed guardian. Nonetheless, the courts have stated that a nomination of guardian in a durable power of attorney “is given paramount importance.”

D. Advance Directives

In Pennsylvania, any individual who is of sound mind and who is at least eighteen years old, a high school graduate, married, or an emancipated minor can specify her wishes concerning the administration or withholding of life-sustaining treatment in a living will. Such an individual can also execute a durable health care power of attorney to name a health care agent who can make medical decisions on her behalf in the event she becomes incompetent to do so herself.

Without an advance directive, it has been held that a “close family member,” in conjunction with two physicians, can terminate life-sustaining treatment for someone in a persistent vegetative state. There are no reported decisions on whether a same-sex partner qualifies as a “close family member.” This creates uncertainty as well as the potential for costly battles with the incapacitated partner’s family. These problems can be avoided by executing

73. 20 PA. CONS. STAT. § 5511(f) (2008).
74. Id.
75. 20 PA. CONS. STAT. § 5604(c)(2).
76. Id.
78. 20 PA. CONS. STAT. § 5442 (2008).
a living will and a durable health care power of attorney (or a single document combining them both).\textsuperscript{81}

Short of such a dire situation, it may be necessary to appoint a guardian for an incapacitated person, leading to the same problems described above in connection with the appointment of a guardian to administer an incapacitated person's finances. In case it proves necessary to appoint a guardian—even when an advance directive has been executed—the principal can nominate a guardian (e.g., her same-sex partner) in the directive itself.\textsuperscript{82} Again, a court must follow a nomination in a power of attorney absent disqualification or a showing of good cause.\textsuperscript{83}

\textit{E. Hospital Visitation}

Patients in Pennsylvania hospitals have a long list of rights.\textsuperscript{84} However, the right to be visited by whomever they wish is not among those rights, as it is in other states.\textsuperscript{85} But a patient does have the right to access to a person authorized to act on her behalf.\textsuperscript{86} In addition, as mentioned earlier, registered domestic partners and life partners in Pittsburgh and Harrisburg have the same hospital visitation rights as spouses in those cities. Otherwise, it is up to the hospital to establish its own visitation policies.\textsuperscript{87}

Lesbian and gay rights organizations often encourage same-sex couples to execute documents authorizing them to visit each other in the hospital. Though not legally binding, such a hospital visitation authorization, which should be made to look as official as possible (i.e., it should be dated, witnessed, and, if possible, notarized), can be used to persuade the hospital to allow a same-sex partner to visit. It would also be wise to enlist the help of the patient's doctor and the hospital's patient advocate when making a plea to ease visitation restrictions.

\textsuperscript{81} 20 PA. CONS. STAT. § 5471 (2008).
\textsuperscript{82} 20 PA. CONS. STAT. § 5460(b) (2008).
\textsuperscript{83} 20 PA. CONS. STAT. § 5460(b).
\textsuperscript{84} 28 PA. CODE § 103.22 (2009).
\textsuperscript{85} INFANTI, supra note 3, at 174–75.
\textsuperscript{86} 28 PA. CODE § 103.22(b)(21) (2009).
\textsuperscript{87} E.g., 28 PA. CODE §§ 133.31(b)(10) (special care units), 137.21(b)(10) (obstetrics) (2009).
F. Name Changes

To formally, legally change their surnames, a same-sex couple must apply for court approval.\(^8\) In one case, a Court of Common Pleas judge in York County refused to allow a woman to change her surname to that of her same-sex partner, because to do so would offend law and public policy by creating the appearance of a legal marriage between the couple.\(^9\) On appeal, the Superior Court held that the trial court judge had abused his discretion when denying the name change petition.\(^9\) In reversing the trial court's decision and granting the petition, the Superior Court cited Pennsylvania's liberal name change policy, the lack of intent to defraud creditors, and cases from New Jersey and Ohio that had granted similar name change petitions.\(^9\)

III. Establishing a Family

For same-sex couples, there are three general paths to having children: foster parenting, adoption, and assisted reproductive technology (ART) (i.e., intrauterine insemination and/or in vitro fertilization for lesbian couples and surrogacy for gay couples). Same-sex couples might also pursue a combination of these paths to establish a family. For example, foster parenting might be followed by an adoption of the foster child or a nonbiological parent might adopt a child conceived by a couple through the help of ART. Each of these different paths (or potential combination of paths) to establishing a family will be discussed separately below.

A. Foster Parenting

In Pennsylvania, the minimal requirements for foster parenting include: (1) being at least 21 years old, (2) passing a medical screening, and (3) passing child abuse and criminal history clearances.\(^9\) No mention is made in these requirements of excluding individuals or couples on the basis of sexual orientation or unmarried cohabitation. In fact, in its frequently asked questions about foster parenting, the Pennsylvania State Resource Family Association states that a foster parent can be "single, married, divorced or in a

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90. Id. at 1214.
91. Id. at 1210–13.
partnership. Thus, in contrast to states such as Alabama, Arkansas, Mississippi, Nebraska, North Dakota, and Utah, Pennsylvania does not explicitly restrict the ability of same-sex couples to serve as foster parents.

B. Adoption

In Pennsylvania, “[a]ny individual may become an adopting parent.” Normally, however, a legal parent must relinquish parental rights before a nonspouse can adopt the child. Strictly construed, this requirement would prevent one of the parents in a lesbian or gay family from ever being legally recognized.

1. Second-Parent Adoption

Fortunately, in a unanimous decision, the Pennsylvania Supreme Court joined the appellate courts of a handful of other states in broadly reading the Pennsylvania adoption laws to afford courts the discretion to waive statutory requirements for an adoption where cause is shown. In Adoption of R.B.F. and R.C.F., the Pennsylvania Supreme Court opened the door to second-parent adoptions (and, it seems, to joint adoptions) by same-sex couples whenever (1) cause can be shown to waive the requirement that the existing parents’ rights must be terminated and (2) the adoption is in the best interest of the child.

In that case, the parents argued that cause existed for waiving the statutory requirement because the waiver was necessary to preserve family integrity. In the routine adoption, it is necessary to require the existing legal parents to relinquish their parental rights in order to preserve the integrity of the adoptive family. However, in the case of a second-parent adoption—as
in the case of a stepparent adoption—enforcing the statutory requirement would actually undermine family integrity by requiring one parent to relinquish her parental rights so that the other parent might be legally recognized. Thus, in the context of a second-parent adoption, preserving the existing legal parent’s rights is the only way to guarantee the integrity of the family, which means that waiving the statutory requirement is the only means of assuring that its purpose is achieved.

While this is certainly a salutary development, there is reason to be cautious. The court’s decision still affords trial courts significant discretion in granting second-parent adoptions. It also takes time to complete a second-parent adoption and, during that time, one parent will not be a legally recognized parent. Furthermore, it is unsettled whether other states must recognize adoptions by same-sex couples. Accordingly, it may be advisable to prepare backup documentation to help ensure that the parent-child relationship will be legally recognized. Such documentation would include a shared- or co-parenting agreement, a nomination of guardian, and powers of attorney. Of these documents, shared-parenting agreements and standby guardianships merit further discussion below.

102. Id.
103. Id.
104. INFANTI, supra note 3, at 222 (discussing an unsuccessful attempt by the State of Oklahoma and an on-going attempt by the State of Louisiana to refuse recognition to adoptions by same-sex couples). The federal district court ruled in favor of the adopting parents in the Louisiana case, but the state has appealed that decision and the case is currently pending before the U.S. Court of Appeals for the Fifth Circuit. Bill Barrow, House Votes to Restrict Revised Birth Certificates, TIMES-PICAYUNE, May 13, 2009, at 4. Thumbing its collective nose at the federal district court’s decision, the Louisiana House of Representatives passed a bill that would prohibit birth certificates from being revised to show the names of two adoptive parents who are unmarried. Id. That bill died in the Louisiana Senate. La. State Legislature, Final Disposition of House Bills: 2009 Regular Legislative Session, http://www.legis.state.la.us/ (last visited Nov. 5, 2009) (reporting that House Bill 60 died on the Senate calendar).
105. 20 PA. CONS. STAT. § 5601(a) (2008) (allowing all powers that may be delegated to an agent to be the subject of a power of attorney); see In re Adoption of Wolfe, 312 A.2d 793, 796–97 (Pa. 1973) (“The performance of parental duties does not mean that a parent must personally take care of the child. The responsibility of performing parental duties may be met if the parent has made reasonable arrangements for the temporary care of the child.”); E.A.L. v. L.J.W., 662 A.2d 1109, 1111 & n.1 (Pa. Super. Ct. 1995) (mentioning that a child’s biological mother had executed a “power of attorney over minor children” and an “authorization to consent to medical and dental treatment for minor children” in favor of her parents when she effectively transferred care and custody of the children to her parents).
2. Shared-Parenting Agreement

A shared-parenting agreement sets forth the rights and responsibilities of the parents, addressing custody, visitation, and support issues in the event of a breakup. There is some question about whether a shared-parenting agreement is enforceable in Pennsylvania. Nevertheless, in Pettinger v. Serino, the court relied on Knauer v. Knauer to find that enforcing a child support agreement between unmarried heterosexual cohabitants would not violate public policy.

Even if not specifically enforceable, a shared-parenting agreement may nevertheless provide evidence to bolster the nonlegal parent’s case for applying existing legal doctrines (e.g., in loco parentis) to obtain custody or visitation. The agreement can also be a useful tool for convincing third parties (e.g., schools) to respect intact lesbian and gay families and to communicate and interact with both parents.

3. Standby Guardianship

The custodial parent, legal custodian, or legal guardian of a child can designate a standby guardian for the child. The designation can be made contingent upon the occurrence of a triggering event (e.g., the incapacity or death of the parent), and different standby guardians can be designated for different triggering events. However, the consent of the child’s other parent is necessary if her parental rights have not been terminated, her whereabouts are known, and she is willing and able to care for the child. Upon the

107. Pettinger v. Serino, 36 Pa. D. & C.4th 324 (Pa. Ct. C.P. 1996). The court did, however, find the terms of the child support agreement in Pettinger to be unconscionable. Under the agreement, the father had agreed to pay child support equal to three times what he would owe under state guidelines. But the court did not set aside the agreement on that ground, deciding instead to reform the terms of the contract.
109. See J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996) (pointing to the legal documents executed by two lesbian partners as evidence of intent to create a parent-child relationship between the nonbiological mother and the child and noting that the biological mother did not execute a shared-parenting agreement only because she was advised that it would be unenforceable).
111. 23 PA. CONS. STAT. § 5611(c)(1).
112. 23 PA. CONS. STAT. § 5611(a)-(b).
occurrence of the triggering event, the standby guardian has the authority to act as the child’s guardian (in the event of the death of the parent) or coguardian (in the event of, for example, the incapacity of the parent).

A petition for court approval of the designation of the standby guardian must be filed no later than sixty days after the occurrence of a triggering event; otherwise, the standby guardian loses the legal authority to act as guardian or coguardian of the child.

In the case of a coguardianship, the commencement of the standby guardianship will not, by itself, divest the parent of any parental rights; rather, the standby guardian will merely obtain “concurrent or shared custody of the child.” Indeed, the standby guardian must “assure frequent and continuing contact with and physical access to the child and shall further assure the involvement of the parent, to include, to the greatest extent possible, in the decision making on behalf of the child.” Once the parent has regained capacity, as determined by a licensed physician, the standby guardian’s authority to act ceases and the standby guardian must return the child to the parent’s care. A designation of standby guardian can be revoked either before or after a petition for court approval has been filed.

C. Assisted Reproductive Technology

1. Intrauterine Insemination/In Vitro Fertilization

Pennsylvania has not adopted section 702 of the Uniform Parentage Act, which unequivocally states that a “donor is not a parent of a child conceived by means of assisted reproduction.” Without a statute dealing with paternity in the case of intrauterine insemination or in vitro fertilization, it has been left to the courts to develop the applicable rules in this area.

In Ferguson v. McKiernan, a woman approached a man with whom she had formerly been romantically involved, asking him to donate sperm to her for use in conceiving a child. The man and woman entered into an oral agreement patterned after those used in anonymous sperm donor

113. 23 PA. CONS. STAT. § 5613(a) (2008).
114. 23 PA. CONS. STAT. § 5613(b).
115. 23 PA. CONS. STAT. § 5613(a), (c).
116. 23 PA. CONS. STAT. § 5613(a).
117. 23 PA. CONS. STAT. § 5613(d).
118. 23 PA. CONS. STAT. § 5614 (2008).
arrangements. Under the agreement, the man’s role in the conception was to be kept a secret (i.e., he was to be an anonymous donor to all but the mother). The woman agreed never to seek financial support from the man and to raise the children on her own. Conception occurred in a clinical setting through the use of in vitro fertilization because the woman had previously undergone an irreversible tubal ligation.

In its decision, the Pennsylvania Supreme Court noted that “there appears to be a growing consensus that clinical, institutional sperm donation neither imposes obligations nor confers privileges upon the sperm donor.”

Concerned that a contrary holding would throw the treatment of all anonymous sperm donor arrangements in doubt, the court held that the agreement not to seek support was enforceable. However, a known donor who is involved in the child’s life as a parent may have a support obligation.

2. Surrogacy

There are two types of surrogacy arrangements: “traditional” surrogacy and “gestational” surrogacy. In traditional surrogacy, conception is normally achieved through intrauterine insemination, making the surrogate both the birth mother and biological mother of the child. In gestational surrogacy, a donor’s egg is fertilized using in vitro fertilization and then implanted in the surrogate, making the surrogate the birth mother but not the biological mother of the child. Beginning in the mid-1990s, gestational surrogacy “overwhelmingly became the preferred arrangement.”

As one court has put it, “the law [in Pennsylvania] has not yet caught up with the science that makes conception by in vitro fertilization . . . using a gestational carrier possible.” There are no Pennsylvania statutes concerning surrogacy specifically; however, the Department of Health does have a policy on obtaining an assisted conception birth certificate where a gestational carrier is used and the child is born in Pennsylvania. To obtain a birth certificate listing the intended parents’ names, the parents must submit the following documents to the Division of Vital Records of the Pennsylvania Department.

120. Id. at 1246.
123. Id.
124. Id. at 16.
of Health: (1) a Certificate of Live Birth (Form H105.142), (2) a Supplemental Report of Assisted Conception (Form H105.030), and (3) a certified copy of a court order stating that certified copies of the child's birth records must reflect the names of the intended parents.\textsuperscript{126}

Whenever possible, the intended parents are advised to obtain a prebirth order from the relevant court:

A pre-birth order clarifies the rights of those involved and aids hospital staff in regard to whom to release the child at time of discharge and for the purpose of hospital staff or a physician obtaining consent or input in the unlikely event of medical complications. A pre-birth order also allows the Division of Vital Records to provide a birth certificate more promptly soon after birth than a post-birth order would allow. This could be important especially in an instance where the parents are from out of state or from another country, and the parents need to make travel arrangements to get the newborn home with them.\textsuperscript{127}

According to the Department of Health, “most courts seem willing to issue an order in advance of the birth”; however, “the situation in Pennsylvania is somewhat unsettled,” with some counties apparently refusing to entertain petitions to have the intended parents' names entered on the birth certificate.\textsuperscript{128} In counties where petitions are entertained, the Division of Vital Records is amenable to reviewing completed petitions (with exhibits) and, unless they “have concerns or comments, sign[ing] the Stipulation and return[ing] it to petitioners' counsel” for filing with the court.\textsuperscript{129}

Pennsylvania remains an unattractive jurisdiction in which to enter into these contracts, since it is unclear whether Pennsylvania courts will hold surrogacy contracts valid and enforceable.\textsuperscript{130} In the absence of legal authority affirming the validity of surrogacy contracts, it is necessary to be mindful of the general legal restrictions in Pennsylvania regarding the expenses that adopting parents may permissibly pay\textsuperscript{131} as well as the criminal punishment that exists for “trading, bartering, buying, selling, or dealing in infant children.”\textsuperscript{132} These restrictions can be especially relevant when the parents are

\textsuperscript{127} Letter from Stephanie Michel-Segnor, Senior Counsel, Office of Legal Counsel, Pa. Dep't of Health (Nov. 4, 2005) (on file with author).
\textsuperscript{128} \textit{Id.} at 1--2.
\textsuperscript{129} \textit{Id.} at 3.
\textsuperscript{131} 23 PA. CONS. STAT. § 2533(d) (2008).
\textsuperscript{132} 23 PA. CONS. STAT. § 4305 (2008).
located in a county that does not entertain assisted conception birth certificate petitions and instead requires the child to be adopted.\textsuperscript{133}

Notwithstanding the outstanding questions concerning the validity of surrogacy contracts in Pennsylvania, in \textit{J.F. v. D.B.}, the court held that a gestational surrogate had no legal standing to challenge the biological father’s custody of the children to whom she gave birth.\textsuperscript{134} The court held that the surrogate, acting in defiance of the father, was neither the legal mother nor stood \textit{in loco parentis} with respect to the children.

In another case, the Orphans’ Court issued a decree directing the biological father of twins being carried by a married gestational surrogate to be named as the sole parent on the birth certificate.\textsuperscript{135} Before Taiwan would grant the children dual citizenship through their biological father, it required a judicial declaration that the surrogate and her husband had no parental rights. The Superior Court held that the Orphans’ Court had the authority to modify its earlier decree to indicate that the surrogate and her husband had no parental rights with regard to the children.

IV. BREAKUP OF FAMILIES

\textit{A. Lesbian and Gay Families}

In the absence of a second-parent adoption or a shared-parenting agreement, the Pennsylvania Supreme Court held in \textit{T.B. v. L.R.M.}\textsuperscript{136} that the former same-sex partner of a child’s biological mother had standing to seek custody or visitation using the \textit{in loco parentis} doctrine. Whether custody or visitation will be awarded depends on the child’s best interest.\textsuperscript{137} To obtain primary custody, the partner must overcome the legal parent’s prima facie right to custody and prove by clear and convincing evidence that the award of custody is in the best interest of the child.\textsuperscript{138}

\textsuperscript{133} Letter from Stephanie Michel-Segnor, \textit{supra} note 127, at 4.
\textsuperscript{134} \textit{J.F. v. D.B.}, 897 A.2d at 1276–77, 1279, 1280. In a later appeal, the Superior Court held that the father had no right to return of the child support that he had paid during the time that the surrogate was caring for his children. \textit{J.F. v. D.B.}, 941 A.2d 718 (Pa. Super. Ct. 2008).
\textsuperscript{135} \textit{In re I.L.P.}, 965 A.2d 251 (Pa. Super. Ct. 2009). The biological father in this case was a party to a New Jersey registered domestic partnership.
In loco parentis status not only affords a nonlegal parent standing to pursue custody or visitation of a former same-sex partner’s child, but also comes with potential child support obligations. In L.S.K. v. H.A.N., the court held that the legal parent’s former partner was equitably estopped from asserting that she had no obligation to support their five children when she had taken on a parental role, cared for the children, and sought custody of them following the breakup of the relationship.

B. Straight Families

Custody and visitation issues can also arise when a lesbian or gay man has children from a former heterosexual relationship. For decades, the case law regarding such custody and visitation issues was overtly hostile to lesbians and gay men. In Constant A. v. Paul C.A., a panel of the Pennsylvania Superior Court held that, though homosexuality was not a per se basis for denying visitation or partial custody, it was always a relevant consideration in making custody and visitation decisions. Where each of the parents was in a relationship, the heterosexual parent’s “traditional” (whether marital or nonmarital) family environment benefited from a “presumption of regularity.” In contrast, the lesbian or gay parent had to prove that there was no adverse effect on the child from his/her same-sex relationship, creating a presumption against custody or visitation for the lesbian or gay parent.

Applying this standard in Pascarella v. Pascarella, the court upheld an order granting a gay father partial custody of his children, but restricting him from visiting with his children in the presence of his same-sex partner. But in Blew v. Verta, the court held that other people’s reactions to a mother’s lesbian relationship could not, alone, serve as a basis for restricting her custody.

Fortunately, in an en banc decision, the Pennsylvania Superior Court has now overruled these earlier decisions. In M.A.T. v. G.S.T., the court stated in no uncertain terms:

141. Id. at 5, 10.
[W]e overrule both the holding and the reasoning in *Constant* and its progeny (including *Pascarella* and *Barron*), and conclude that a homosexual parent bears no special evidentiary presumption in a child custody case. . . .

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In establishing an evidentiary presumption against a parent involved in a homosexual relationship, the three-judge panel in *Constant* violated the basic precept that the sole focus of a child custody proceeding should be on the best interests of the child—without either parent bearing the burden of proof. Moreover, *Constant’s* evidentiary presumption is based upon unsupported preconceptions and prejudices—including that the sexual orientation of a parent will have an adverse effect on the child, and that the traditional heterosexual household is superior to that of the household of a parent involved in a same sex relationship. Such preconceptions and prejudices have no proper place in child custody cases, where the decision should be based exclusively upon a determination of the best interests of the child given the evidence presented to the trial court.\(^4\)

As described above,\(^6\) for some time now, the Pennsylvania courts have been relatively good at handling legal issues involving lesbian and gay families (e.g., by interpreting state adoption law to permit second-parent adoptions and by applying the in loco parentis doctrine to allow a former same-sex partner with no legal connection to a child of the relationship to nonetheless obtain custody or visitation). This resulted in a significant dissonance between the advancing state of the law concerning the breakup of lesbian and gay families and the stagnant (notice that *Constant* and *Pascarella* both date back to the 1980s) state of the law concerning the breakup of a relationship between a man and a woman, one of whom happens to be lesbian or gay. Though long overdue, the decision in *M.A.T.* begins to bring these two areas of family law into line by overruling antiquated cases that had placed the focus in child custody cases not on what is best for the child involved, but on expressing hostility toward lesbians and gay men.

V. MISCELLANY

A. Alimony

In *Kripp v. Kripp*,\(^7\) a divorcing couple entered into a property settlement agreement under which the husband would pay the wife alimony for up to five years. After two years, however, payments would cease “should wife


\(^{146}\) See *supra* Parts III.B.1, IV.A.

Husband stopped making payments after two years because wife was cohabitating with a woman.149 Wife contended that the term “cohabitate” should have the meaning ascribed to it by Pennsylvania domestic relations law and should only apply to living with someone of the “opposite sex.”150 Husband contended that the term was ambiguous, especially given that wife’s involvement in a same-sex relationship contributed to their divorce.151 The court held that the term was ambiguous and that the trial court had not erred by (1) admitting parol evidence on its meaning; and (2) on that basis, ruling that husband’s alimony obligation ended after the guaranteed two-year period.152

B. Unemployment Benefits

An individual is not entitled to unemployment benefits if she “voluntarily leav[es] work without cause of a necessitous and compelling nature.”153 Under the “following the spouse doctrine,” a married individual (but not an unmarried cohabitant) can show necessitous and compelling cause to leave a job to follow a spouse if (1) the spouse moved for reasons beyond her control and “the decision to move was reasonable and made in good faith,” and (2) “the couple would face an economic hardship in maintaining two residences or the move has resulted in an insurmountable commuting problem.”154

In Procito v. Unemployment Compensation Board of Review,155 the court faced the question of whether the “following the spouse doctrine” applies to same-sex couples, who do not have the option to marry in Pennsylvania. The majority sidestepped the issue by holding that, even if the doctrine applied, Procito’s partner did not leave her job for reasons beyond her control.156 A dissenting judge disagreed and concluded that excluding same-sex couples from the benefit of the doctrine violates the guarantee of equal protection of the law.157

148. Id. at 1160.
149. Id.
150. Id. at 1164; see 23 PA. CONS. STAT. § 3706 (2008).
151. Kripp, 849 A.2d at 1162, 1164.
152. Id. at 1165.
153. 43 PA. STAT. § 802(b) (2008).
155. Id. at 263.
156. Id. at 266–67.
157. Id. at 274 (Friedman, J., dissenting).
C. Same-Sex Felons

Steven Roberts and Daniel Mangini were in a committed relationship for eighteen years. 158 They were arrested for, and pleaded guilty to, trafficking in methamphetamines. 159 As a condition of their release, they were each prohibited from associating with convicted felons (including each other). 160 They asked to have that condition waived by their probation officer, but that request was denied. 161

In United States v. Roberts, the court held that this condition must be modified to allow them to associate with each other. 162 In reaching its decision, 163 the court relied upon both the relevant provisions of federal criminal law and the couple’s rights to intimate association and equal protection of the law under the 5th Amendment’s Due Process Clause, as interpreted by the Supreme Court in Lawrence v. Texas. 164

CONCLUSION

The legal landscape for lesbians, gay men, bisexuals, and transgender individuals across the country seems to be in perpetual motion. The situation is no different in Pennsylvania. In this Article, I have provided a snapshot of the current legal landscape in Pennsylvania for same-sex couples. In some areas, same-sex couples have benefited from helpful legal developments. In other areas, the legal developments have been less than salutary. Overall, this snapshot demonstrates that Pennsylvania same-sex couples—like same-sex couples in many other parts of the country—continue to face significant obstacles and uncertainties in obtaining even a measure of legal recognition for their relationships.

159. Id. at *3.
160. Id. at *4.
161. Id. at *6.
162. Id. at *16–17.
163. Id. at *18–32.