STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION NO. 06-1

Hand Delivered

Honorable Lawerence Denney
Majority Leader
Idaho House of Representatives
STATEHOUSE

Per Request for Attorney General's Opinion
Regarding Proposed Amendment to the Idaho Constitution

Dear Representative Denney:

The Idaho Legislature is considering a proposed amendment to the Idaho Constitution concerning marriage. You have written that the proposed amendment is to ensure the State of Idaho's policy provides for and protects the traditional institution of marriage, and you have requested the Attorney General's opinion regarding several questions.

This opinion responds to your questions concerning the constitutionality of marriage laws and the potential impact of a constitutional marriage amendment on certain rights and benefits under current Idaho law. This opinion is not intended to address the particular language of the proposed marriage amendment currently under consideration.

QUESTIONS PRESENTED

For purposes of this opinion, your questions are summarized as follows:

1. Without a defense of marriage amendment, is it possible for the Idaho Supreme Court to recognize a marriage solemnized in another state that is not between a man and a woman?

2. Will a defense of marriage amendment directly conflict with any provisions of the United States Constitution?

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 334-2530
Located at 700 W. Jefferson Street, Suite 210

3. Will a defense of marriage amendment inhibit the ability of any individuals to conduct business of any nature via contract or interfere with powers of attorney?

4. Will a defense of marriage amendment interfere with the right of a person to leave property by a will to anyone of his or her choosing?

5. Will a defense of marriage amendment interfere with: (a) the rights of unmarried persons to cohabitate; (b) the rights of extended family members to help raise minor members of their family; (c) the rules regarding the making of medical care decisions by unmarried persons; or (d) the ability of unmarried persons to visit each other if one is hospitalized?

CONCLUSIONS

1. Idaho Code §§ 32-201 and 32-209 limit marriage under Idaho law to a marriage between a man and a woman. Without a marriage amendment, a couple who seeks to solemnize their relationship in Idaho could bring a lawsuit alleging that Idaho's marriage statutes violate the due process and equal protection clauses of the Idaho Constitution. Idaho Const. art. I, §§ 1-2. A couple that seeks recognition in Idaho of a relationship solemnized in another state could further claim that full faith and credit is due the relationship under the United States Constitution. U.S. Const. art. IV, § 1. Although the Idaho Supreme Court would probably reject these challenges under current law, a marriage amendment would bar a challenge under the Idaho Constitution and would strengthen Idaho's current statement of public policy rejecting same-sex marriages formed in other states.

2. Ultimately, the United States Supreme Court will face and probably uphold marriage laws that limit marriage to a man and a woman as constitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, but there are no guarantees given wide discrepancies in the current case law. U.S. Const. amend. XIV. In Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal dismissed Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972), the Supreme Court summarily dismissed on appeal, without discussion, a federal constitutional challenge to a marriage statute that limited marriage to a man and a woman. Some courts have held that Baker v. Nelson is determinative of a federal constitutional challenge, but other courts have questioned or ignored its precedential value. Numerous federal and state courts have addressed the constitutionality of marriage laws and reached opposite decisions on similar facts and arguments. A marriage law that not only defines marriage as between a man and a woman but also prohibits recognition of other domestic relationships faces additional federal constitutional hurdles.

3. A marriage amendment need not be drafted to inhibit the ability of individuals to conduct business via contract or powers of attorney. Contracts with third parties outside of a same-sex relationship should not be invalidated by a marriage amendment. A same-sex couple's contract with each other would more likely be upheld on contract principles than rejected as an unenforceable legal union akin to marriage. Powers of attorney are generally not dependent upon marriage and, therefore, should not be invalidated by a marriage amendment.

4. A marriage amendment need not be drafted to interfere with the right of a person to leave property by a will to anyone of his or her choosing. Because the right to leave property by a will is not dependent upon marital status, the right to leave property by a will should not be invalidated by a marriage amendment.

5. A marriage amendment need not be drafted to impair the decisions of unmarried persons to cohabitate, or the rights of extended family members to raise minor members of that extended family. A marriage amendment should not invalidate current statutes governing medical care decisions or hospital visitation rules. A marriage amendment that not only defines marriage as between a man and a woman but also prohibits recognition of other domestic relationships carries a higher risk of affecting relationships outside of traditional marriage.

BACKGROUND

In 1967, in Loving v. Commonwealth of Virginia, the United States Supreme Court established marriage as a fundamental right protected by the Fourteenth Amendment of the United States Constitution. 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). In Loving, the United States Supreme Court held that Virginia's miscegenation statutes which outlawed interracial marriages violated both the substantive due process and equal protection clauses of the Fourteenth Amendment. 388 U.S. at 12, 87 S. Ct. at 1824. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.*

Traditionally, the courts have refused to recognize any right of same-sex couples to marriage. In 1971, in Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed* Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972), a same-sex couple who were denied a marriage license claimed that they had a fundamental right to marry and that restricting marriage to couples of the opposite sex violated equal protection principles. On appeal, the Minnesota Supreme Court held that same-sex couples do not have a fundamental right to marry under the United States Constitution. 191 N.W. 2d at 186. The court reasoned: "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the

book of Genesis." *Id.* The court also rejected the couple's equal protection claim, holding that prohibiting same-sex marriage was not invidious discrimination. *Id.* at 187.

Several early cases are in accord with Baker v. Nelson. *See,* Adams v. Howerton, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980) (upholding prohibition of same-sex marriage under Colorado law and federal immigration law); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974), *rev. denied,* 84 Wash. 2d 1008 (1974) (upholding prohibition of same-sex marriage under Washington and federal law); Jones v. Hallahan, 501 S.W.2d 588, 588-89 (Ky. Ct. App. 1973) (citing Baker v. Nelson, finding no constitutional protection for right of marriage between persons of the same sex); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) ("Marriage is and always has been a contract between a man and a woman").

In 1993, however, the Hawaii Supreme Court made a stark departure from the traditional rule and held that prohibiting same-sex marriages violated the equal protection provisions of the Hawaii Constitution. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993), *superseded by constitutional amendment*, Smelt v. County of Orange, 374 F. Supp. 2d 861, 875 (C.D. Cal. 2005).

Congress responded to Baehr by proposing the Defense of Marriage Act ("DOMA") which was enacted in 1996. 1 U.S.C. § 7 (1996); 28 U.S.C. § 1738C (1996). DOMA defines marriage for purposes of federal law as limited to opposite-sex couples:

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

1 U.S.C. § 7. DOMA also allows states to refuse recognition of same-sex marriages recognized in other states:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C.

Many states followed suit and enacted defense of marriage statutes. Idaho already limited marriage to a man and a woman. *See* 1993 Idaho Att'y Gen. Ann. Rpt. 119, 132 ("The State of Idaho does not legally recognize either homosexual marriages or homosexual domestic partnerships."). However, Idaho modified its marriage laws to bar recognition of same-sex marriages formed in other jurisdictions. Idaho Code § 32-201(1) states:

> Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a license and solemnization as authorized and provided by law. Marriage created by a mutual assumption of marital rights, duties or obligations shall not be recognized as a lawful marriage.

Idaho Code § 32-209 states:

> All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.

Despite DOMA, over the past decade a growing number of state courts have followed Baehr and struck down marriage statutes that limit marriage to a man and a woman under their state constitutions. *See, e.g.,* Baker v. State of Vermont, 744 A.2d 864, 886 (Vt. 1999) (exclusion of same-sex couples from benefits and protections of marriage violated Vermont Constitution); Goodridge v. Dept. of Public Health, 798 N.E.2d 941, 969 (Mass. 2003) (limitation of marriage to persons of opposite sex violated equal protection principles under the Massachusetts Constitution).

In response, several states have passed defense of marriage amendments to their state constitutions.[1] Some marriage amendments only define marriage as between a man and a woman. Other marriage amendments define marriage as between a man and a

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[1] *See, e.g.,* Ala. Const. art. I, § 25 (1999); Ark. Const. amend. 83 (2004); Ga. Const. art. I, § 4 ¶ I (2004); Ky. Const. § 233A (2004); La. Const. art. XII, § 15 (2004); Mich. Const. art. I, § 25 (2004); Miss. Const. art. XIV, § 263A (2004); Mo. Const. art. I, § 33 (2004); Mont. Const. art. XIII, § 7 (2004); Nev. Const. art. I, § 21 (2002); N.D. Const. art. XI, § 28 (2004); Ohio Const. art. XV, § 11 (2004); Okla. Const. art. II, § 35 (2004); Or. Const. art. XV, § 52 (2004); Tex. Const. art. I, § 32 (2005); Utah Const. art. I, § 29 (2005).

woman and also prohibit legal recognition of other domestic relationships, such as same-sex marriages, domestic partnerships and civil unions. The broader the scope of the amendment, the more likely a constitutional challenge will be brought.

ANALYSIS

I.

EFFECTS OF THE PASSAGE OF A MARRIAGE AMENDMENT UPON SAME-SEX UNIONS ENTERED INTO IN OTHER STATES

You have asked whether, without a marriage amendment to the Idaho Constitution, the Idaho Supreme Court could recognize a marriage solemnized in another state that is not between a man and a woman. Your question actually poses two inquiries. First, without a marriage amendment, could the Idaho Supreme Court conclude that the prohibition of same-sex marriage under Idaho Code §§ 32-201 and 32-209 violates the Idaho Constitution? Second, even though same-sex marriages are not recognized under the Idaho Code, could the Idaho Supreme Court be required to recognize a same-sex marriage formed in another state?

It is unlikely that the Idaho Supreme Court would adopt marriage policies contrary to those articulated in Idaho Code §§ 32-201 and 32-209. However, as discussed below, a marriage amendment would preclude a state constitutional challenge and would reinforce Idaho's public policy against recognizing same-sex marriages solemnized in other states.

A. Without a Marriage Amendment, Whether a State Constitutional Challenge Could be Brought Against Idaho's Marriage Statutes

Without a marriage amendment, a challenge could be brought that prohibiting same-sex marriage under Idaho Code §§ 32-201 and 32-209 violates the due process and equal protection clauses of the Idaho Constitution. Idaho Const. art. I, §§ 1-2. A state constitutional challenge might be brought by a same-sex couple who wishes to solemnize a marriage or other domestic union (*e.g.*, a domestic partnership or civil union) in Idaho, or by a same-sex couple who asks Idaho to recognize a marriage or other domestic union solemnized in another state. Other courts have faced similar challenges.

A growing number of cases have struck down marriage statutes as unconstitutional. In 1993, in Baehr v. Lewin, same-sex couples who were denied marriage licenses claimed that Hawaii's marriage statute violated the Hawaii Constitution's equal protection provisions. 852 P.2d at 64. The Hawaii Supreme Court agreed and held that limiting marriage to opposite-sex couples discriminated against same-sex couples on the basis of sex. *Id.* The court concluded that the discrimination

was unlawful because the marriage statute was not narrowly drawn to support a compelling state interest. *Id.* at 67. The court reasoned that the equal protection provisions of the Hawaii Constitution were more "elaborate" than the equal protection provisions of the Fourteenth Amendment of the United States Constitution. *Id.* at 64.

In 1999, in Baker v. State of Vermont, the Vermont Supreme Court upheld the right of same-sex couples under the Vermont Constitution to receive the common benefits and protections that flow from marriage. The court reasoned that the Common Benefits Clause of the Vermont Constitution requires that the same benefits and protections afforded to married opposite-sex couples be afforded to same-sex couples. 744 A.2d at 887. The court did *not* hold that the same-sex couples had any right to a marriage license, but rather only to the common benefits and protections that flow from marriage under Vermont law. *Id.* at 878. The court distinguished its analysis from a federal constitutional analysis, holding that interpreting the Vermont Constitution must reflect an "inclusionary principle" rather than track a federal constitutional analysis. *Id.*

In 2003, in Goodridge v. Dept. of Public Health, the Massachusetts Supreme Court held that same-sex couples in Massachusetts are entitled to marry, on the grounds that prohibiting same-sex marriage does not satisfy substantive due process or equal protection requirements under the Massachusetts Constitution. 798 N.E.2d at 961. The court reasoned, "[t]he Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life." *Id.* at 948-49. The court's holding was challenged unsuccessfully in the federal courts, in Largess v. Supreme Judicial Court for the State of Massachusetts, 317 F. Supp. 2d 77 (D. Mass.), *aff'd*, 373 F.3d 219 (1st Cir.), *cert. denied*, 543 U.S. 1002, 125 S. Ct. 618, 160 L. Ed. 2d 461 (2004), which rejected an attempt by state legislators to enjoin enforcement of Goodridge on the grounds of judicial overreaching.

In 2004 and 2005, additional courts rejected state marriage statutes. Among them are two cases pending on appeal before the Washington Supreme Court. *See,* Castle v. State of Washington, No. 04-2-00614-4, 2004 WL 1985215, at **16-17 (Wash. Super. Sept. 7, 2004) (unpublished decision) (holding that DOMA violates the privileges or immunities clause of the Washington Constitution); Andersen v. King County, No. 04-2-04964-4, 2004 WL 1738447, at *11 (Wash. Super. Aug. 4, 2004) (unpublished decision) (holding that Washington's marriage statutes, which prohibit same-sex marriages, violate the privileges or immunities clause and due process clause of the Washington Constitution). The Washington Supreme Court held oral argument in March 2005 and a decision is pending. Six more cases are pending on appeal in a consolidated action before the California Court of Appeals. *See,* Judicial Council Coordination Proceeding

(Marriage Cases), No. 4365, 2005 WL 583129 (Cal. Super. Ct. March 14, 2005) (unpublished decision) (holding limitation of marriage to opposite-sex couples under California's marriage statute is unconstitutional under California Constitution). *See also,* Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006) (striking down Maryland's prohibition of same-sex marriages, under the equal protection and due process provisions of the Maryland Constitution).

However, other courts have upheld marriage statutes. Several federal courts have upheld DOMA as compatible with the United States Constitution. *See,* In re Kandu, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004) (upholding DOMA and concluding that a lesbian couple who married in Canada could not jointly file a Chapter 7 bankruptcy); Smelt v. County of Orange, 374 F. Supp. 2d at 880 (upholding DOMA, finding no due process or equal protection violations); Wilson v. Ake, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (holding that DOMA does not violate Full Faith and Credit Clause or the due process or equal protection protections of the United States Constitution); *see also,* Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005) (upholding DOMA).

Also, several state courts have upheld state marriage statutes as compatible with state constitutions, holding that marriage is properly limited to opposite-sex couples. *See,* Li v. State of Oregon, 110 P.3d 91, 102 (Or. 2005) (upholding prohibition of same-sex marriages under Oregon law); Hernandez v. Robles, 805 N.Y.S.2d 354, 377 (N.Y. App. Div. 2005) (holding denial of same-sex marriage does not violate due process or equal protection provisions of New York Constitution); Standhardt v. Superior Court of Arizona, 77 P.3d 451, 464 (Ariz. Ct. App. 2004) (holding denial of same-sex marriage does not violate any fundamental due process or equal protection right under Arizona or United States Constitutions); Dean v. District of Columbia, 653 A.2d 307, 333 (D.C. Ct. App. 1995) (holding same-sex marriage is not a fundamental right protected by due process).

Given this wide split in the case law, there is no majority rule to guide the Idaho Supreme Court if a state constitutional challenge to Idaho's marriage statutes is brought. However, the court should consider federal cases upholding DOMA. *See,* In re Kandu, 315 B.R. at 148; Smelt v. County of Orange, 374 F. Supp. 2d at 880; Wilson v. Ake, 354 F. Supp. 2d at 1309. The Idaho Constitution is "separate and in many respects independent" from the United States Constitution, but Idaho courts can interpret the Idaho Constitution by considering federal court rulings interpreting the United States Constitution. Rudeen v. Cenarrusa, 136 Idaho 560, 568, 38 P.3d 598, 606 (2001), citing Thompson v. Engelking, 96 Idaho 793, 818, 537 P.2d 635, 660 (1975). "The majority of Idaho cases . . . state that the equal protection guarantees of the federal and Idaho Constitutions are substantially equivalent." *Id.* An Idaho court "is free to interpret its constitution as more protective than the United States Constitution." Garcia v. State Tax

Commission, 136 Idaho 610, 615, 38 P.3d 1266, 1271 (2002), citing State v. Thompson, 114 Idaho 746, 748, 760 P.2d 1162, 1164 (1988). However, "independent analysis under the Idaho Constitution does not mean that [the Idaho Supreme] Court will reach a different result from that reached by the U.S. Supreme Court under a similar constitutional provision." Garcia, 136 Idaho at 614, 38 P.3d at 1270.

The court could very well disregard case law from Hawaii, Vermont and Massachusetts that struck down state marriage statutes on the basis that the state constitutional provisions at issue were more protective than their federal constitutional counterparts. *See,* Baehr v. Lewin, 852 P.2d at 572 (holding the equal protection provisions of the Hawaii Constitution were more "elaborate" than the equal protection provisions of the Fourteenth Amendment); Baker v. State of Vermont, 744 A.2d at 878 (holding that interpretation of the Common Benefits Clause of the Vermont Constitution must reflect an "inclusionary principle" rather than track a federal constitutional analysis); Goodridge v. Dept. of Public Health, 798 N.E.2d at 948-49 ("The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life").

Thus, Idaho's marriage statutes are probably less vulnerable than the statutes challenged in Vermont, Hawaii and Massachusetts. However, a marriage amendment would articulate Idaho's marriage policy at a constitutional level and preclude a state constitutional challenge.

B. Without a Marriage Amendment, Whether the Idaho Supreme Court Would Be Required to Recognize Same-Sex Marriages Formed in Other States

You have asked whether, without a marriage amendment, the Idaho Supreme Court could be required to recognize a same-sex marriage formed in another state. The answer is most likely "no."

The Full Faith and Credit Clause of the United States Constitution generally requires that full faith and credit be given to the public acts, records and judicial proceedings of sister states, as follows:

> 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 by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

U.S. Const. art. IV, § 1. *See also* 28 U.S.C. § 1738; 28 U.S.C. § 1739 (implementing statutes governing attestation for recognition of, respectively, acts of legislature and

records and judicial proceedings of courts, and nonjudicial records or books of public offices). Pursuant to the Full Faith and Credit Clause, a valid judgment entered into in a sister state with jurisdiction is entitled to full faith and credit in Idaho. *See,* Mitchell v. Pincock, 99 Idaho 56, 58, 577 P.2d 343, 345 (1978) (upholding rights of birth mother in adoption dispute that was adjudicated in California, under Full Faith and Credit Clause).

The Full Faith and Credit Clause does not, however, create a license for a single state to create national policy regarding marriage. Wilson v. Ake, 354 F. Supp. 2d at 1309, citing Nevada v. Hall, 440 U.S. 410, 423-24, 99 S. Ct. 1182, 1189, 1190, 59 L. Ed. 2d 416 (1979). Idaho retains some attributes of sovereignty to enact its own laws and, in effect, define its own public policy. *See,* Pacific Emp. Ins. Co. v. Indus. Accident Comm. 306 U.S. 493, 501, 59 S. Ct. 629, 632 (1939); Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific RR Co., 393 U.S. 129, 142, 89 Ct. 323, 330, 83 L. Ed. 940 (1968) ("policy decisions are for the state legislature") (citation omitted). "[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." Nevada v. Hall, 440 U.S. at 422, 99 S. Ct. at 1189.

Several courts have held that the Full Faith and Credit Clause does not require one state to recognize a same-sex marriage formed in another state. *See* Wilson v. Ake, 354 F. Supp. 2d at 1309 (upholding Florida's right to reject a same-sex couple's marriage entered into in Massachusetts); Burns v. Burns, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (in child custody matter, holding that Full Faith and Credit Clause did not require Georgia to recognize a civil union formed in Vermont); Hennefeld v. Township of Montclair, 22 N.J. Tax 166 (2005) (in matter regarding disabled veteran's property tax exemption, holding that Full Faith and Credit Clause did not require New Jersey to recognize civil union formed in Vermont); Langan v. St. Vincent's Hospital of New York, 802 N.Y.S.2d 476, (N.Y. App. Div. 2005); (holding that Full Faith and Credit Clause did not require New York to allow a wrongful death action brought on behalf of the decedent's same-sex partner); Raum v. Restaurant Assoc., 675 N.Y.S.2d 343, 370 (N.Y. App. Div. 1998) (same); Rosengarten v. Downes, 802 A.2d. 170, 172, 174-75 (Conn. Ct. App. 2002) (rejecting demand that Connecticut provide a forum to dissolve a same-sex civil union formed in Vermont); *see also,* In re Kandu, 315 B.R. at 134 (rejecting claim for comity regarding same-sex marriage formed in Canada).

Also, Congress adopted DOMA pursuant to its powers under the Full Faith and Credit Clause to determine the effect of a marriage entered into in one state on other states. Wilson v. Ake, 354 F. Supp. 2d at 1303; *see* U.S. Const. art. IV, § 1 ("And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof"). DOMA expressly protects a state's right to reject same-sex marriages formed in other states. 28 U.S.C. § 1738C.

Idaho's public policy to limit marriage to a man and a woman and prohibit recognition of same-sex marriages and other domestic relationships is articulated in Idaho Code §§ 32-201 and 32-209. The Full Faith and Credit Clause and DOMA do not require an Idaho court to recognize domestic relationships that are contrary to this stated public policy.

However, although the public policy exception to the Full Faith and Credit Clause and DOMA *allow* an Idaho court to reject an out-of-state same-sex marriage or other domestic relationship, neither *mandate* that an Idaho court reject such a marriage or relationship. Thus, as discussed above, without a marriage amendment an Idaho court could consider a state constitutional challenge to Idaho Code §§ 32-201 and 32-209. (*See* Sec. I.A, *supra.*) Additionally, Idaho Code §§ 32-201 and 32-209 are limited to "marriages" and do not expressly prohibit civil unions, domestic partnerships or other marriage equivalents. Thus, under current Idaho law a court could recognize such a relationship formed in another state, as compatible with Idaho's marriage statutes. *See* Idaho Code §§ 32-201, 32-209 (addressing "marriage"). Adopting a marriage amendment would more clearly articulate Idaho's public policies concerning marriage, as well as bar a state constitutional challenge to Idaho Code §§ 32-201 and 32-209.

II.

POTENTIAL FEDERAL CONSTITUTIONAL CHALLENGES TO A MARRIAGE AMENDMENT

You have asked whether a defense of marriage amendment will directly conflict with any provisions of the United States Constitution. The United States Supreme Court will ultimately face and decide the constitutionality of marriage amendments. At that time, the Court will probably uphold their constitutionality, but there are no guarantees.

A. *Baker v. Nelson* May Preclude a Federal Constitutional Challenge

Baker v. Nelson, which upheld the prohibition of same-sex marriage, could preclude a federal constitutional challenge to Idaho's proposed amendment. Baker v. Nelson, 191 N.W.2d at 186-87, *appeal dismissed*, Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65. After the Minnesota Supreme Court rejected the plaintiffs' claim that same-sex marriages should be recognized, the plaintiffs sought review of the court's decision by invoking the mandatory appellate jurisdiction of the United States Supreme Court (since repealed). Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65. The Supreme Court summarily decided the case, without a full opinion on the merits, dismissing the appeal "for want of a substantial federal question." *Id.*

A dismissal for want of a substantial federal question is a decision on the merits that is binding on lower courts, except when doctrinal developments indicate otherwise. Smelt v. County of Orange, 374 F. Supp. 2d at 872, citing Hicks v. Miranda, 422 U.S. 332, 344-45, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975). The scope of this rule is narrow; the decision is dispositive only of "the specific challenges presented in the statement of jurisdiction." Smelt, 374 F. Supp. 2d at 872, citing Mandel v. Bradley, 432 U.S. 173, 176, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1977) (per curium). The rationale is to prevent "lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by the dismissal, but it does not affirm the reasoning or the opinion of the lower court whose judgment is appealed." Smelt, 374 F. Supp. 2d at 872, citing Mandel, and Washington v. Confederated Bands & Tribes, 439 U.S. 463, 476, n.20, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979).

The statement of jurisdiction in Baker v. Nelson presented the specific question of whether a "county clerk's refusal to authorize a same-sex marriage deprived plaintiffs of their liberty to marry and of their property without due process of law under the Fourteenth Amendment, their rights under the Equal Protection Clause of the Fourteenth Amendment, or their right to privacy under the Ninth and Fourteenth Amendments." Smelt, 374 F. Supp. 2d at 872, citing Baker v. Nelson, Jurisdictional Statement, No. 71-1027 (Oct. Term 1972).

Several courts have recognized Baker v. Nelson as binding precedent and, on that basis, have dismissed federal constitutional challenges to defense of marriage laws. In Wilson v. Ake, the court held, "The Supreme Court has not explicitly or implicitly overturned its holding in Baker or provided the lower courts, including this Court, with any reason to believe that the holding is invalid today." 354 F. Supp. 2d at 1305. *See also,* Morrison v. Sadler, 821 N.E.2d at 20 (finding no grounds for a Fourteenth Amendment challenge in light of Baker v. Nelson); Adams v. Howerton, 486 F. Supp. at 1124 (holding that Baker v. Nelson precluded claim to same-sex marriage).

Thus, a federal constitutional challenge to an Idaho marriage amendment could be dismissed under Baker v. Nelson for want of a substantial federal question. However, some courts have rejected Baker v. Nelson as binding precedent and other cases have ignored the decision. *See*, Smelt v. County of Orange, 374 F. Supp. 2d at 874 (holding Baker v. Nelson was not binding precedent); In re Kandu, 315 B.R. at 138 (same). Because a court addressing an Idaho marriage amendment might reject Baker v. Nelson as binding precedent, the potential federal constitutional challenges are discussed below.

B. Potential Challenges Under the Fourteenth Amendment

Courts addressing marriage laws under the Due Process and Equal Protection Clauses of the Fourteenth Amendment generally answer three legal questions: (1) whether

same-sex couples have a fundamental right to marry; (2) for purposes of equal protection, whether homosexuals are a suspect or quasi-suspect classification or whether marriage laws discriminate on the basis of sex, which is a suspect or quasi-suspect classification; and (3) depending on how a court answers the first two questions, whether the marriage law should be reviewed under the rational basis test or heightened scrutiny.

1. Whether There Is a Fundamental Right to Same-Sex Marriage

The Due Process Clause "protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" Wilson v. Ake, 354 F. Supp. 2d at 1305, quoting Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 2268, 138 L. Ed 2d 772 (1997). Fundamental rights are those liberties that are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Glucksberg, 521 U.S. at 721, 117 S. Ct. at 2268. "The Supreme Court has cautioned courts to 'exercise the utmost care' in conferring fundamental-right status on a newly asserted interest." In re Kandu, 315 B.R. at 140, citing Glucksberg, 521 U.S. at 720, 117 S. Ct. at 2268.

The United States Supreme Court has never held that same-sex couples have a fundamental right of marriage. Three years ago in Lawrence v. Texas, 539 U.S. 558, 575, 123 S. Ct. 2472, 2482, 156 L. Ed. 2d 508 (2003), the Court reversed longstanding precedent and held unconstitutional a Texas statute outlawing sodomy between two persons of the same sex. *Id.* (reversing Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), holding that the continuance of Bowers as precedent would "demean[] the lives of homosexual persons"). However, Lawrence declined to address the validity of same-sex marriage, concluding that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578, 123 S. Ct. at 2484.

Most lower courts have found that same-sex couples do not have a fundamental right of marriage. *See,* Wilson v. Ake, 354 F. Supp. 2d at 1307 (no fundamental right to marry person of same sex); In re Kandu, 315 B.R. at 139-40 (same); Smelt v. County of Orange, 374 F. Supp. 2d at 879 ("the fundamental due process right to marry does not include a fundamental right to same-sex marriage"); Hernandez v. Robles, 805 N.Y.S.2d at 362 ("we reject plaintiffs' argument in support of a fundamental right"); Dean v. District of Columbia, 653 A.2d at 333 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977): "[W]e cannot say that same-sex marriage 'is deeply rooted in this Nation's history and tradition'"); Standhardt v. Superior Court of Arizona, 77 P.3d at 457 (rejecting claim by same-sex couple of fundamental right to marry). On the weight of the case law, there is most likely no fundamental right to same-sex marriage which would require heightened scrutiny of marriage laws.

2. Whether a Marriage Amendment Would Discriminate Against a Suspect or Quasi-Suspect Class

Most likely, marriage laws that reject same-sex marriages and related domestic relationships would not be found to discriminate on the basis of a suspect or quasi-suspect class.

The United States Supreme Court and the Ninth Circuit Court of Appeals have not recognized homosexuals as a suspect or quasi-suspect class for equal protection purposes. In Romer v. Evans, the United States Supreme Court applied a rational basis review to a constitutional amendment that discriminated against homosexuals. 517 U.S. 620, 631-32, 116 S. Ct. 1620, 1626-27, 134 L. Ed. 2d 855 (1996). In High Tech Gays v. Def. Indus. Sec. Clearance Office, the Ninth Circuit Court of Appeals held that homosexuality is not a suspect or quasi-suspect classification. 895 F.2d 563, 573-74 (9th Cir. 1990). In Smelt v. County of Orange, the court held that homosexuals are not a suspect or quasi-suspect class for purposes of evaluating whether DOMA violates equal protection principles. 374 F. Supp. 2d at 875, citing Romer, 517 U.S. at 631-32, 116 S. Ct. at 1626-27 and High Tech Gays, 895 F.2d at 573-74. In re Kandu reached the same conclusion, holding that homosexuals are not a suspect or quasi-suspect class. In re Kandu, 315 B.R. at 143-44, citing Lawrence v. Texas, 539 U.S. at 579-81, 123 S. Ct. 2472 (O'Connor, J., concurring) and High Tech Gays, 895 F.2d at 574. *But see*, Castle v. State of Washington, 2004 WL 1985215, at *13 (holding homosexuality is a suspect class for equal protection purposes; case pending appeal before the Washington Supreme Court). Thus, homosexuals are most likely not a suspect or quasi-suspect class.

Whether marriage laws discriminate on the basis of sex is less certain, but they probably do not. Several cases have held that defense of marriage laws do not discriminate on the basis of sex. *See,* Smelt, 374 F. Supp. 2d at 877 (holding DOMA does not discriminate on the basis of sex); In re Kandu, 315 B.R. at 143 ("There is no evidence from the voluminous legislative history or otherwise, that DOMA's purpose is to discriminate against men or women as a class"); Singer v. Hara, 522 P.2d at 1192-93 (holding that prohibiting same-sex marriages is not discrimination on the basis of sex). The rationale is that marriage laws do not make any distinctions on the basis of sex. Men and women are treated the same; neither men nor women receive the benefits of marriage in same-sex relationships. *Id.* at 1196 ("Appellants were not denied a marriage license because of their sex; rather they were denied a marriage license because of the nature of marriage itself").

Other courts have reached a contrary result, holding that marriage laws discriminate on the basis of sex. *See, e.g.,* Baehr v. Lewin, 852 P.2d at 63-64 (rejecting argument that there was no sex discrimination on the grounds that marriage statute

prohibited both men and women in same-sex relationships from marrying). *See also,* Loving v. Virginia, 388 U.S. at 9, 12, 87 S. Ct. at 1822-23 (rejecting claim that a law which punishes members of different races equally for entering into interracial marriages does not discriminate on the basis of race).

Thus, although the law is uncertain, several courts evaluating marriage amendments have refused to find the suspect classification of sex at issue. These cases are probably more closely aligned with Romer v. Evans, which applied a rational basis review to a constitutional amendment that discriminated against homosexuals. 517 U.S. at 631-32, 116 S. Ct. at 1626-27.

3. Whether a Marriage Amendment Would Satisfy Rational Basis Review

Because most courts refuse to find a fundamental right to same-sex marriage or discrimination on the basis of a suspect classification, courts typically evaluate the constitutionality of defense of marriage laws under rational basis scrutiny. It is under the rational basis test, however, where the wide breadth of judicial disagreement concerning defense of marriage laws is most evident. Courts have reached dramatically different conclusions when considering substantially similar state interests and arguments.

The rational basis test is stated as follows: "Where . . . a law does not make a quasi-suspect or suspect classification (the equal protection issue) and does not burden a fundamental right (the due process issue), it will be upheld if it is rationally related to a legitimate government interest." Smelt v. County of Orange, 374 F. Supp. 2d at 879 (citing Romer v. Evans, 517 U.S. at 631, 116 S. Ct. 1620). The burden is on the plaintiff challenging the defense of marriage law to negate "every conceivable basis" for support of the law. Smelt, 374 F. Supp. 2d at 880, citing Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973).

The plaintiff's burden is heavy and difficult to satisfy. "Courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. . . . A statutory classification fails rational-basis review only when it 'rests on grounds wholly irrelevant to the achievement of the State's objective.'" In re Kandu, 315 B.R. at 144, quoting Heller v. Doe, 509 U.S. 312, 321, 324, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). The rational basis scrutiny "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* (citation omitted). However, "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" Lawrence v. Texas, 539 U.S. at 583, 123 S. Ct. at 2486 (O'Connor, J., concurring), quoting Romer v. Evans, 517 U.S. at 633, 116 S. Ct. at 1620.

Many courts have applied the rational basis test and held that marriage laws are rationally related to a legitimate government interest. In Smelt v. County of Orange, the court found DOMA to be rationally related to the government's interest of encouraging the optimal union for procreation and for rearing children by both biological parents, and to communicate to citizens that opposite-sex relationships have special significance. 374 at F. Supp. at 880. In re Kandu held that DOMA is rationally related to the government's legitimate interest in promoting marriage to encourage stable relationships and facilitate the rearing of children by both biological parents. 315 B.R. at 146.

In Adams v. Howerton, the court upheld a marriage law under heightened strict scrutiny based upon a similar rationale: "In traditional equal protection terminology, it seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised." 486 F. Supp. at 1124. *See also*, Standhardt v. Superior Court, 77 P.3d at 464 (upholding marriage statute under rational basis test); Singer v. Hara, 522 P. 2d at 1191-92 (same).

However, other courts have held that denying same-sex couples the status or benefits of marriage does not satisfy a rational basis review. In Goodridge v. Dept of Public Health, the Massachusetts Supreme Court rejected the state's assertion that prohibiting same-sex couples from marrying promoted a favorable setting for procreation, promoted an optimal setting for child rearing in a two-parent family with one parent of each sex, and preserved scarce state and private financial resources. 798 N.E. 2d at 961-68. The court found there was no evidence that "forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children." *Id.* at 963.

In Baker v. State of Vermont, the Vermont Supreme Court held that the laudable government goal of promoting the commitment of married couples to ensure the security of their children provided no reasonable basis for denying the benefits of marriage to same-sex couples. 744 A.2d at 884. The court reasoned that many opposite-sex couples marry for reasons unrelated to procreation and, therefore, there was no logical connection to the stated governmental purpose. *Id.* at 881. *See also*, Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006) (unpublished decision, p. 15) ("This Court, like others, can find no rational connection between the prevention of same-sex marriages and an increase or decrease in the number of heterosexual marriages or of children born to those unions"). Under a heightened strict scrutiny standard, similar state arguments have been closely examined and rejected. *See,* Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *on remand from* Baehr v. Miike, 852 P.2d 44 (Haw. 1993) (finding under heightened scrutiny standard that there was no causal link between allowing same-sex marriage and adverse effects on children).

The enforceability of marriage laws is a highly disputed area of law, which will remain so until the United States Supreme Court resolves the issue. Thus, states that adopt marriage amendments should anticipate and be prepared to defend legal challenges.

C. A Marriage Amendment That Precludes Recognition of Other Domestic Relationships Could Face Additional Constitutional Challenges

A marriage amendment that both defines marriage and also bars recognition of domestic relationships outside of marriage furthermore could be challenged under the recent case of Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005). In Citizens for Equal Protection, a federal district court struck down Nebraska's constitutional marriage amendment, which bans recognition of same-sex civil unions, domestic partnerships, and other similar relationships. *Id.* at 989.

At issue in Citizens for Equal Protection was Nebraska's marriage amendment, which provides:

> Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

Neb. Const. art. I, § 29. The court held that the Nebraska amendment's broad scope violated the First and Fourteenth Amendments of the United States Constitution by imposing "significant burdens on both the expressive and intimate associational rights of the plaintiffs' members and creat[ing] a significant barrier to the plaintiffs' right to petition or to participate in the political process." Citizens for Equal Protection, 368 F. Supp. 2d at 995. The court also held that the amendment was an illegal bill of attainder because it singled out gays and lesbians for legislative punishment by limiting their access to lobby for benefits and protections. *Id.* at 1008. In reaching these conclusions, the court reasoned that the scope of the amendment was too broad: "The amendment goes far beyond merely defining marriage as between a man and a woman." *Id.* at 995.

In support of these holdings, the court cited Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). In Romer v. Evans, the United States Supreme Court struck down, under a rational basis review, an amendment to Colorado's constitution that precluded all state and local government action designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." 517 U.S. at 620, 116 S. Ct. at 1622. The Court held that the Colorado amendment violated the equal protection clause of the Fourteenth Amendment by singling out homosexuals and imposing barriers that made it more difficult for them to seek aid from the government. 517 U.S. at 633, 116 S. Ct. at 1628.

Citizens for Equal Protection is on appeal to the Eighth Circuit Court of Appeals and may not be upheld; oral argument is scheduled for later this month. (Case No. 05-2604). However, the case is notable for its criticism of a marriage amendment with a broad scope.

Under Romer, a constitutional amendment may not single out homosexuals and impose barriers that make it more difficult for them to seek aid from the government. Attorney General Opinion No. 93-11, dated November 3, 1993, reached a similar conclusion. 1993 Idaho Att'y Gen. Ann. Rpt. 119. In that opinion, former Idaho Attorney General Larry EchoHawk evaluated a proposed initiative to articulate state policies concerning homosexuals. The Attorney General opined that the initiative's proposal to preclude any grant of minority status to persons engaging in homosexual activities barred the homosexual community from obtaining anti-discrimination laws and thus violated equal protection principles, by "denying homosexuals equal access to the political process." *Id.* at 132. However, the Attorney General also recognized that "[t]he State of Idaho does not legally recognize either homosexual marriages or homosexual domestic partnerships." *Id.*

Romer and Attorney General Opinion No. 93-11 should not invalidate marriage amendments that simply limit marriage to a marriage between a man and a woman. In re Kandu rejected a challenge under Romer, distinguishing Romer and holding that DOMA is "not so exceptional and unduly broad as to render the . . . reasons for its enactment 'inexplicable by anything but animus' towards same sex couples." In re Kandu, 315 B.R. at 147-48. *See also,* Standhardt v. Superior Court of Arizona, 77 P.3d at 465 (rejecting a Romer analogy, holding that a marriage statute was not enacted to make same-sex couples unequal).

The inapplicability of Romer and Opinion No. 93-11 becomes less clear, however, regarding a marriage amendment that furthermore bans any legal recognition of all non-marital domestic relationships. However, Romer addressed a constitutional amendment that precluded *all* legislative, executive or judicial action at any level of state or local government designed to protect the status of homosexuals. Romer, 517 U.S. at 620, 116 S. Ct. at 1622. Citizens for Equal Protection likely stretches Romer too far by applying the principles of Romer to the limited context of marriage laws.

III.

UNDER PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION, COURTS ARE UNLIKELY TO RULE THAT A MARRIAGE AMENDMENT GOVERNS RELATIONSHIPS THAT ARE UNLIKE MARRIAGE

Several of your questions focus on the effect of a constitutional amendment on current rights and benefits of domestic relationships outside of marriage. An amendment should not cancel current rights and obligations that are not dependent upon the status of marriage.[2] However, an amendment that not only defines marriage but also bars recognition of other domestic relationships carries a greater risk of claims of interference with such relationships. Terms in marriage amendments adopted by other states, such as "domestic union," "legal union," "identical or substantially similar to marriage" or "approximate " to marriage, may require judicial interpretation to determine their effect on other domestic relationships. *See, e.g.,* Ky. Const. § 233A (2004); La. Const. art. XII, § 15 (2004); N.D. Const. art. XI, § 280 (2004); Ohio Const. art. XV, § 11 (2004).

General principles of statutory construction apply to the construction of the Idaho Constitution. State v. Blaine County, 139 Idaho 348, 350, 79 P.3d 707, 709 (2003); Keenan v. Price, 68 Idaho 423, 437, 195 P.2d 662, 670 (1948). Where the language is plain and unambiguous, an Idaho court must give effect to the provision as written without engaging in statutory construction. State v. Knott, 132 Idaho 476, 478, 974 P.2d 1105, 1107 (1999). Where, however, the language of a constitutional provision or statute is not plain and unambiguous, a court must ascertain the legislative intent and give effect to that intent. *Id.* at 478, 974 P.2d at 1107. "All statutes must be liberally construed with a view to accomplishing their aims and purposes, and attaining substantial justice, and courts are not limited to the mere letter of the law, but may look behind the letter to

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[2] "The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death." Goodrich v. Department of Health, 798 N.E.2d at 955. Goodrich identified a list of numerous rights arising out of marriage under Massachusetts law, including, for example, joint income tax filing, rights to inherit property from a spouse without a will, certain health care, pension and veteran benefits for spouses, presumptions of parentage of children born to a married couple, evidentiary protections for private marital conversations, bereavement and medical leave to care for family members, a preference for family members to make medical decisions about an incompetent or disabled spouse, and predictable rules of child custody, visitation, support and removal out of state upon a divorce. *Id.* at 955-56. *See also*, Baehr v. Lewin, 852 P.2d at 59 (listing the more "salient" of a "multiplicity of rights and benefits that are contingent upon [marital] status," including, for example, community property rights, rights regarding the disposition of property upon a spouse's death, awards of child custody and support payments in divorce proceedings, post-divorce rights regarding support and property division, evidentiary benefits for the spousal privilege and confidential marital communications, exemptions of real property from attachment or execution and the right to bring a wrongful death action upon a spouse's death).

determine its purpose and effect, the object being to determine what the legislature intended, and to give effect to that intent." Keenan, 68 Idaho at 438, 195 P.2d at 670. "To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history." State v. Rhode, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999).

Thus, if an Idaho court concludes that the language of a marriage amendment is not plain and unambiguous, the court should consider the context of the amendment, the public policy behind the amendment and its legislative history. The context should include references to marriage within the text of the amendment and current limits on marriage articulated in Idaho Code §§ 32-201 and 32-209. Consideration of public policy behind the amendment should include any statement of purpose for the proposed amendment as well as the public debate on this topic. The legislative history also will be relevant. These guidelines should discourage an Idaho court from upholding a marriage amendment's unintended consequence to relationships that are dissimilar to marriage. With these principles in mind, answers to your questions are provided below.

A. Contract Rights and Powers of Attorney

The language of a marriage amendment need not interfere with individuals conducting business via contract or executing enforceable powers of attorney. Both the United States Constitution and the Idaho Constitution prohibit the enactment of laws that impair the obligations of contracts. U.S. Const. art. I, § 10; Idaho Const. art. I, § 16. Therefore, a marriage amendment should not be interpreted to automatically impair all existing contract rights. *See,* Steward v. Nelson, 54 Idaho 437, 32 P.2d 843, 846-47 (1934). Additionally, contracts with third parties outside of a domestic relationship should not be affected. For example, employers and employees should continue to be allowed to contract for the provision of, for example, health care benefits or leave benefits to be provided to same-sex couples where one of the individuals works for the employer.

Same-sex couples would likely continue to enter into enforceable contracts that document their obligations to each other. One partner might later allege that a contract between a same-sex couple is an unenforceable legal union or legal relationship under a marriage amendment. However, under the statutory construction principles discussed above, this challenge should fail. The determinative issue in a same-sex couple's contract dispute should be the enforceability of the contract rather than the status of their domestic relationship. A remark in the amendment or its statement of purpose that the marriage amendment is not intended to interfere with contracts would support this conclusion.

Idaho Code §§ 15-5-501, *et seq.,* governs durable powers of attorney under Idaho law. Idaho Code § 39-4510 governs durable powers of attorney for health care. Neither

statutory scheme makes a distinction between married and unmarried persons. There "is no presumption of agency between husband and wife in dealing with each other's property resulting from the mere fact of the marital relationship." 41 C.J.S. Husband and Wife § 58. "An agency relationship between husband and wife will not be established merely by virtue of their marriage." Zukowski v. Dunton, 650 F.2d 30, 34 (4th Cir. 1981). Thus, because marital status does not control powers of attorney, a marriage amendment should not interfere with powers of attorney under Idaho law. To avoid potential challenges, the amendment's statement of purpose and the legislative history can make clear that the amendment is not intended to interfere with powers of attorney.

B. The Disposition of Property Upon Death

A marriage amendment should not interfere with the right of a person to leave property by a will to anyone of his or her choosing. The Uniform Probate Code, at title 15 of the Idaho Code, governs wills. Because the right to dispose of property by will is not dependent upon marriage, a marriage amendment will most likely not affect that right. A statement of purpose that the amendment is not intended to interfere with the right of a person to provide for the disposition of their property at death will support this result.

The Uniform Probate Code gives some preferences based upon marriage and divorce that will not be available to unmarried couples. For example, Idaho Code § 15-2-301 favors a surviving spouse who marries a testator after the execution of his or her will but is omitted from the will. Idaho Code § 15-2-508 provides that if a testator divorces after executing a will, the divorce revokes the will's disposition of property to the former spouse. These statutes are compatible with a constitutional marriage amendment and thus should not be affected by adoption of an amendment.

C. Other Relationships

You have also asked about the potential for interference with other relationships, such as existing rights of unmarried persons to cohabitate, existing rights of extended family members to help raise minor members of that extended family, rules regarding the making of medical care decisions by unmarried persons, and whether it would be more difficult for unmarried persons to visit each other if one is hospitalized. A marriage amendment probably would not be interpreted to cancel the rights and benefits of these relationships. However, the broader the net that a marriage amendment casts over domestic relationships outside of marriage, the more uncertain the amendment's effect will be on the types of relationships you have described.

1. Unmarried Couples and Cohabitation

An unmarried couple's decision to cohabitate should not be impaired. Interpreting a marriage amendment to prohibit any and all cohabitation would be a slippery slope towards prohibiting ordinary roommate arrangements. This interpretation would stretch too far the context and public policy of the amendment. *But see*, Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d at 995-96 (holding that breadth of Nebraska's marriage amendment threatened relationships such as "roommates, co-tenants, foster parents, and related people who share living arrangements, expenses, custody of children, or ownership of property").

A related question is whether a marriage amendment would invalidate Idaho's domestic violence statute as applied to unmarried couples who cohabitate. Idaho Code § 18-918(2) makes it a felony for one household member to inflict a traumatic injury upon another household member. A household member includes a "spouse, former spouse, or a person who has a child in common regardless of whether they have been married or a person with whom a person is cohabiting, whether or not they have married or have held themselves out to be husband or wife." Idaho Code § 18-918(1)(a). In State v. Hart, the court held that Idaho's domestic violence laws apply even where a domestic relationship no longer exists. 135 Idaho 827, 830, 25 P.3d 850, 853 (2001).

In the unpublished case of State v. Burk, a criminal defendant asserted that Ohio's domestic violence statute as applied to unmarried couples who cohabitate was unconstitutional under Ohio's marriage amendment. No. 86162, 2005 WL 3475812, at *1 (Ohio Ct. App. Dec. 20, 2005) (unpublished decision). Ohio's marriage amendment bars recognition of any legal status for "relationships or unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." *Id.*, citing Ohio Const. art. XV, § 11. The trial court held that Ohio's domestic violence statute was invalid because it "confers a legal status upon cohabiting, unmarried individuals that approximates 'the design, qualities, significance or effect of marriage' simply because a 'family or household member' includes a person 'living as a spouse.'" *Id.* at *2. However, the appellate court reversed the decision, holding instead that Ohio's domestic violence statute properly protects household relationships outside of marriage, including persons living as spouses, parents, children and blood relatives of the offender. *Id.* at *4. The court reasoned, "[w]hile 'cohabitation' defines a relationship between people, that status is factual not legal. 'Cohabitant' is therefore not a legal status, let alone a legal status that 'intends to approximate the design, qualities, significance or effect of marriage'" within the meaning of Ohio's marriage amendment. *Id.* (citation omitted).

Burk is an unpublished decision that is not binding on an Ohio court, much less an Idaho court, facing the same issue. However, the reasoning in Burk is persuasive. The public health and welfare is not advanced by limiting the right to be free from family violence to those relationships connected by marriage and excluding unmarried couples from such protection. Idaho's domestic violence laws, which recognize domestic relationships outside of marriage, should not be invalidated by a marriage amendment.

2. Extended Families

Your question as to whether a marriage amendment would interfere with existing rights of extended family members to help raise minor children of the extended family is more difficult. Terms such as "legal union" or "domestic union" in marriage amendments arguably apply to grandparent-grandchild, uncle-nephew, sibling or other familial relationships. However, a legal challenge arising out of such terms should be defeated based upon the context, public policy and legislative history of a marriage amendment.

Various sections of the Idaho Code address parental and other child custody relationships. Title 32 of the Idaho Code governs child custody issues arising out of marriage and divorce. *See,* Idaho Code §§ 32-1001, *et seq.* (Parent-Child Relations); Idaho Code §§ 32-11-101, *et seq.* (Uniform Child Custody Jurisdiction and Enforcement Act). Title 16 of the Idaho Code governs juvenile proceedings. *See,* Idaho Code §§ 16-1501, *et seq.* (Adoptions); Idaho Code §§ 16-1601, *et seq.* (Child Protective Act). It is unlikely that a marriage amendment would be construed to invalidate these statutes or the familial relationships sanctioned by them.

Also, Idaho courts will not invalidate a parent-child relationship solely because one parent is in a same-sex relationship. The recent case of McGriff v. McGriff addressed a divorced father's shared custody of his children, after the father moved in with another man. 140 Idaho 642, 644, 99 P.3d 111, 113 (2004). The Idaho Supreme Court held that parental custody can not be determined solely based upon a parent's sexual orientation. The court reasoned, "only when the parent's sexual orientation is shown to cause harm to the child, such that the child's best interests are not served, should sexual orientation be a factor in determining custody." *Id.* at 648, 99 P.3d at 117. The court held that custody was properly transferred to the mother based on conduct in the record, such as inappropriate conduct by the father's partner toward the children's mother and the father's failure to cooperate in communicating his lifestyle to the children. *Id.* at 648-52, 99 P.3d at 117-21.[3]

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[3] Idaho case law recognizes familial relationships outside of marriage between a man and a woman in a variety of circumstances. For purposes of determining gratuitous services to family members (for which no wages are due), Idaho law defines a family relationship as "a collective body of persons who form one household under one head and one domestic government, and who have reciprocal, natural

Thus, a marriage amendment should be generally compatible with the current Idaho laws discussed above governing parental, child custody and familial statuses.

3. Medical Decisions and Hospital Visitation

Your concerns about medical care decisions and hospital visitation are common in the public debate about marriage laws. The adoption of a marriage amendment to the Idaho Constitution should not interfere with current rights regarding these issues.

The making of health care decisions for a loved one implicates federal and state law. The privacy regulations under the federal Health Insurance and Portability Accountability Act ("HIPAA"), at 45 C.F.R. § 164.510, allow a health care provider to disclose certain protected health care information about a patient to a family member, relative or other "close friend," where the patient is unable to consent or object to the disclosure. 45 C.F.R. § 164.510. A state constitutional marriage amendment would not interfere with this federal right to obtain protected health information.

Idaho Code § 39-4503 establishes the order of persons who may give consent to health care treatment for minors and other persons who are incapable of deciding for themselves. The order gives priority, in part, first to a legal guardian, then to a person named in a Living Will and Durable Power of Attorney for Health Care, then to a spouse, then to a parent, then to another relative who is responsible to act under the circumstances and then to any other competent individual who is responsible for the health care of the patient. Idaho Code § 39-4503. A marriage amendment should not mandate a change in this order. Unmarried couples can execute Living Wills and Durable Powers of Attorney for Health Care to protect their rights to make health care decisions.

Some states have enacted statutes to recognize rights to hospital visitation. *See e.g.,* HRS § 323-2 LSA-R.S. 40:2005 (Louisiana statute providing that adult patient may designate individuals who will be denied access to hospital visitation); 22 M.R.S.A. § 1711-D (Maine statute providing that a hospital patient may designate persons to be considered immediate family members for purposes of visitation). However, Idaho has no comparable statutory scheme governing hospital visitation. Thus, a marriage amendment should not interfere with current rules in Idaho regarding hospital visitation.

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and moral duties to support and care for one another." McMahon v. Auger, 83 Idaho 27, 39, 357 P.2d 374, 381 (1960). As discussed above, Idaho's domestic violence laws protect household members, even where a domestic relationship no longer exists. State v. Hart, 135 Idaho at 830, 25 P.3d at 853.

IV.

CONCLUSION

If Idaho adopts a marriage amendment to the Idaho Constitution, Idaho will join a growing number of states that are taking similar action.

Importantly, the scope of an adopted marriage amendment must accurately reflect the legislature's intended state policy regarding marriage. Enforcement issues for a marriage amendment that only defines marriage as between a man and a woman are limited to whether prohibiting same-sex marriage is constitutional. However, an amendment that only defines marriage will not prohibit courts, future legislatures or the state's political subdivisions from recognizing domestic partnerships, civil unions or other relationships that approximate marriage. Accordingly, a narrow amendment is insufficient to articulate a public policy that seeks not only to define marriage as between a man and a woman but also to prohibit recognition of other relationships such as same-sex marriages, civil unions and domestic partnerships. The trade-off is that marriage laws that prohibit recognition of relationships outside of marriage contain an inherent degree of ambiguity as to scope and therefore pose a greater risk of a successful legal challenge.

When the United States Supreme Court ultimately addresses marriage laws under the United States Constitution, the Court will probably defer to state rights to govern marriage and uphold the traditional view that a marriage is between a man and a woman. However, given the unsettled state of the law, there is no guarantee that a proposed marriage amendment to the Idaho Constitution would comply with all requirements of the United States Constitution.

AUTHORITIES CONSIDERED

1. United States Constitution:

Art. I, § 10.
Art. I, § 16.
Art. IV, § 1.
First Amendment.
Fourteenth Amendment.

2. Idaho Constitution:

Art. I, § 1.
Art. I, § 2.
Art. I, § 16.

3. United States Code:

1 U.S.C. § 7.
28 U.S.C. § 1738.
28 U.S.C. § 1738C.
28 U.S.C. § 1739.

4. Idaho Code:

§ 15-2-301.
§ 15-2-508.
§ 15-5-501.
§ 16-1501.
§ 16-1601.
§ 18-918(1)(a).
§ 18-918(2).
§ 18-6605.
§ 32-11-101.
§ 32-201.
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DATED this 8th day of February, 2006.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

EMILY A. MAC MASTER
Deputy Attorney General