

**Potential Impact of the Proposed Marshall/Newman  
Amendment to the Virginia Constitution**

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## EXECUTIVE SUMMARY

On November 7, 2006, Virginians will vote on the proposed Marshall/Newman Amendment to the Virginia Bill of Rights, the so-called “marriage amendment.” If a majority of voters approves this Amendment, which will be Ballot Question #1, it will become effective on January 1, 2007.

The potential impact of the proposed Amendment is extensive and severe for Virginia residents, nonresidents, Virginia businesses and the Commonwealth’s legal climate. The Amendment does not simply ensure that “activist judges” cannot overturn Virginia’s existing prohibitions against same-sex marriage, as supporters claim. Rather, the Amendment prohibits the government from recognizing legal rights and protections for all unmarried couples -- same-sex or opposite sex. Approximately 130,000 unmarried couples reside in Virginia, 89 percent of whom are heterosexual. Young couples, middle-aged couples with children, and elderly couples who have chosen not to marry all may be affected by the Amendment.

### The Language of the Amendment is Exceedingly Broad

The Amendment does not simply prohibit formal legal unions like marriage and civil unions. Rather, it prohibits state and local governmental bodies, including the courts, from giving effect to any “legal status” for relationships of unmarried persons that “intends to approximate the design, qualities, significance *or* effects of marriage,” or that otherwise confers the “rights, benefits, obligations, qualities *or* effects of marriage.” “Legal status” is an extremely broad term, which has been defined as any combination of rights, duties, liabilities or other legal relations. Consequently, by its terms, the Amendment could prohibit the courts from “recognizing” or giving legal effect to legal arrangements that provide to unmarried people rights, obligations or protections akin to those available through marriage.

This exceedingly broad and untested language is the most expansive such proposal ever to have been put before the voters of any state. The language goes well beyond existing Virginia law, which bans same-sex marriage and same-sex civil unions but does not apply to opposite sex couples nor prohibit “recognition” of any “legal status” approximating any aspect of marriage or to which is assigned any marriage-like rights or benefits.

### The Amendment Could Invalidate Domestic Violence Laws, Prevent Enforcement of Private Legal Arrangements and Adversely Affect Virginia Businesses

Based on a review of the Amendment, its legislative history, existing Virginia statutes and cases, and judicial interpretations of similar provisions in other states’ constitutions, we conclude that the Amendment could be interpreted by Virginia courts to have the following effects:

- Invalidate rights and protections currently provided to unmarried couples under Virginia’s domestic violence laws;

- Undermine private employers' efforts to attract top employees to Virginia by providing employee benefits to domestic partners, as the courts and public medical facilities may not be permitted to recognize those benefits; and
- Prevent the court's from enforcing --
  - private agreements between unmarried couples,
  - child custody and visitation rights, and
  - end-of-life arrangements, such as wills, trusts and advance medical directives, executed by unmarried couples.

The specific potential impacts of the Amendment are as follows:

Invalidating Protections for Unmarried Couples Under the Domestic Violence Laws. Virginia's domestic violence laws provide special protections for a "family or household member" subjected to or threatened with abuse. "Family or household member" expressly includes any individual who "cohabits" with the alleged abuser. The courts, and the Virginia Attorney General, have recognized that the laws were intended to protect those who live in marriage-like relationships. If the Amendment is approved, the Virginia courts could determine -- as courts in Ohio have done -- that by providing protections for individuals in marriage-like relationships, the legislature "recognized" a legal status for unmarried individuals that intends to approximate the attributes or effects of marriage, in violation of the Amendment.

The Provision of Employee Benefits to Domestic Partners of Employees. In 2005, the General Assembly enacted legislation that permits Virginia businesses to provide employee benefits to an employee's spouse, children and "[a]ny other class of persons as may mutually be agreed upon by the insurer and the group policyholder."

Virginia courts have recognized that being a beneficiary of an employee benefit plan is a "legal status." Benefits also are rights that traditionally are provided to spouses through marriage. If the benefit plan expressly provided benefits to a category of beneficiaries such as "domestic partners" or "cohabitants," the courts could find that a legal status was created or recognized for unmarried individuals that intends to approximate the attributes or effects of marriage. A court or a public medical facility could take the position that to give effect to workplace benefits provided to a domestic partner, would be to "recognize" a legal status to which is assigned the rights or benefits of marriage. Further, with respect to public employee benefit plans, the courts could hold that providing such benefits to a "domestic partner" of a government employee is an impermissible government recognition of a legal status for unmarried individuals that intends to approximate the attributes or effects of marriage.

Private Agreements and Court Orders Applicable to Unmarried Couples. Unmarried couples, particularly those with children, often enter into private legal arrangements to enable them to establish for themselves and their children some of the rights and protections afforded through marriage. The Amendment threatens to invalidate the enforcement of these agreements. Being a holder of rights under a contract is a recognized legal status. The provision of marriage-like rights and benefits through a private agreement could be challenged as an attempt to establish marriage-like rights and obligations that the courts are prohibited from "recognizing" by enforcing the agreement. The agreement would be particularly vulnerable if the couple referred to or otherwise acknowledged in the agreement their intent to provide marriage-like

protections to their family or their intent to approximate marriage by defining their private relationship in legal terms. Even if they did not make such express statements, any agreement between them would still be vulnerable to attack from a third party claiming that they have other evidence of the contract being an attempt to mimic marriage.

The Amendment also would prevent Virginia courts from continuing to recognize common law marriages entered into outside of Virginia, and from recognizing rights and duties that flow from such marriages, such as spousal and child support and child custody and visitation rights. Similarly, Virginia courts could take the position that they are prohibited from recognizing child custody and visitation rights conferred by courts in other states on the unmarried partner of a biological parent -- even when the partner's involvement in the child's life is in the best interest of the child. Recently, a judge in Virginia ruled that, because he was not permitted to recognize an out-of-state civil union, he would not recognize the out-of-state court's decision regarding the child visitation rights of a member of the couple. Passage of the Amendment would lead to a plethora of such challenges as members of former relationships come to Virginia to attempt to evade their obligations under private agreements or court orders issued in other states.

Wills, Trusts, Advance Medical Directives and Other End-of-Life Decisions. Under current law, Virginians have wide latitude to plan their affairs without government intrusion. The Amendment threatens to disrupt this state of affairs. The Amendment is likely to encourage family members and others unhappy with a person's decision to grant end-of-life decision-making or to bequeath property to a partner rather than to a blood relative, to challenge the legal document in court. Similarly, a government-affiliated medical facility could take the position that it is prohibited from recognizing a directive that gives marriage-like decision-making rights to a partner. Even if the courts ultimately decided that the conveyance of such rights did not "intend to approximate" the attributes or effects of marriage, the legal wrangling at such a critical juncture could have devastating effects on unmarried couples and their children.

### The Amendment Will Spawn Litigation

Given the breadth of the Amendment and its numerous, undefined terms, it is impossible to predict with any accuracy how the courts will interpret it. The experience in Ohio, Michigan and other states makes clear, however, that if the Amendment is approved by Virginia voters, court challenges to a wide-range of previously settled legal rights and obligations are likely to occur. The resulting uncertainty will cast a pall of suspicion over Virginia's legal system, discourage same-sex and opposite-sex unmarried couples from living and working in Virginia, adversely affect the ability of Virginia businesses to attract talented employees, and encourage individuals seeking to undo their legal obligations to flock to Virginia's courts for relief.

### Conclusion

Approval of the Amendment could cause significant disruption to settled legal rights, duties and protections in the Commonwealth, allow those seeking to escape their legal obligations elsewhere to clog our courts, and insert the courts into the private affairs of Virginians. These effects go far beyond the claimed purpose of the Amendment: to reserve marriage for one man and one woman..

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## I. INTRODUCTION<sup>1</sup>

On November 7, 2006, the proposed Marshall/Newman Amendment to the Virginia Bill of Rights, the so-called marriage amendment (the “Amendment”), will appear on the Virginia ballot as Ballot Question #1. If a majority of voters approves the Amendment, it will become effective on January 1, 2007. You have asked us to assess the potential impacts of the Amendment on Virginia residents, nonresidents, Virginia businesses, and the Commonwealth’s legal climate.<sup>2</sup>

In short, the potential impacts are extensive and severe. Notwithstanding claims by proponents that the Amendment simply seeks to ensure that “activist judges” do not overturn Virginia’s existing prohibitions against same-sex marriage,<sup>3</sup> the Amendment is not so limited. Unlike existing Virginia statutes that prohibit same-sex unions, the Amendment expressly applies to all unmarried couples, same-sex or opposite-sex. Moreover, by its terms, it does not simply prohibit formal “legal unions” like marriage and civil unions, as other states’ constitutional amendments have done.

Rather, it prohibits state and local governmental entities, including the courts, from giving effect to any “legal status” for relationships of unmarried persons that intends to approximate the design, qualities, significance or effects of marriage, or that otherwise confers the “rights, benefits, obligations, qualities or effects” of marriage.

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<sup>1</sup> The authors would like to thank the following individuals for their important contributions to this memorandum: Mahnu Davar, Matthew Johnston, William Liess, Meghan Martin, Ann Parker, John Polito and Paul Werner.

<sup>2</sup> This memorandum does not seek to prescribe one or more preferred interpretations of the Amendment. Rather, it endeavors to highlight significant impacts that could result from a reasoned reading of the Amendment.

<sup>3</sup> See [va4marriage.org](http://va4marriage.org), FAQs, at <http://www.va4marriage.org/faq.html> (last visited July 7, 2006).

This exceedingly broad and untested language is the most expansive such proposal ever to have been put before the voters of any state.<sup>4</sup> Based on our review of the Amendment's text and legislative history, existing Virginia statutes and case law, and judicial interpretations of similar amendments to other states' constitutions, we conclude that the Amendment could be interpreted by Virginia courts to have the following effects:

(1) Invalidate statutory rights, obligations, benefits and protections as applied to cohabitating unmarried couples, such as the protections afforded to members of cohabitating unmarried couples under Virginia's domestic violence laws; and

(2) Prevent the legal enforcement of (a) express and implied agreements between cohabitating unmarried couples, (b) certain child custody and visitation determinations, (c) end-of-life legal instruments, such as wills, trusts and advance medical directives, executed by members of cohabitating unmarried couples for the benefit of their partners, and (d) medical and other benefits provided by an employer for the domestic partner of an employee.

Given the breadth of the Amendment and the numerous, undefined terms contained therein, it is impossible to predict with any accuracy how the courts of Virginia will interpret it. The experience of the Ohio courts in interpreting that state's marriage amendment is instructive.

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<sup>4</sup> Eighteen states have adopted marriage amendments to date: Ala. Const. art. I, § 25; Ark. Const. amend. 83, § 1; Ga. Const. art. I, § 6; Haw. Const. art. I, § 23; Kan. Const. art. XV, § 16; Ky. Const. § 233; La. Const. art. 12, § 15; Mich. Const. art. I, § 25; Miss. Const. art. XIV, § 263; Mo. Const. art. I, § 33; Mont. Const. art. XIII, § 7; Nev. Const. art. I, § 21; Or. Const. art. XV, § 5; N.D. Const. art. IX, § 28; Ohio Const. art. XV, § 11; Okla. Const. art. 2, § 35; Tex. Const. art. 1, § 32; Utah Const. art. I, § 29. Alabama voters approved an amendment to the Alabama Constitution in June 2006, H.R. 109 (Ala. 2005). In addition, five other states (aside from Virginia) will have amendments on the November 2006 ballot: S.J. Res. 101, 58th Leg., 1st Reg. Sess. (Idaho 2005); S.J. Res. 3133, 116th Leg., Reg. Sess. (S.C. 2005); S.J. Res. 1001, 80th Leg., Reg. Sess. (S.D. 2005); S.J. Res. 81, 104th Leg., 2d Sess. (Tenn. 2005); S.J. Res. 53, 97th Leg., Reg. Sess. (Wis. 2005). An attempt to add an amendment to the November ballot in Illinois recently failed and is on appeal, S. Res. 869, 94th Leg., 2d Sess. (Ill. 2005). Efforts are underway in Arizona and Colorado to add an amendment to the November ballot in those states.

To date, seven Ohio appellate courts have taken widely divergent approaches to analyzing the effects of that state's amendment on the narrow issue of the enforceability of Ohio's domestic violence protections for cohabiting unmarried couples. If the Amendment is approved by Virginia voters, court challenges to a wide-range of previously settled legal rights and obligations are likely to occur. It could take years to clarify the Amendment's implications. The resulting uncertainty will cast a pall of suspicion over Virginia's legal system, discourage same-sex and opposite-sex unmarried couples from living and working in Virginia, adversely effect Virginia employers' efforts to attract talented employees and encourage individuals seeking to undo their legal obligations to flock to Virginia's courts for relief. The following will review the Amendment's text and legislative history, and then assess its potential impact in five areas: family law, domestic violence laws, estate planning, the ability to designate an agent to make healthcare and end-of-life decisions, and employee benefits.

## II. INTERPRETING THE AMENDMENT

The text of the proposed Amendment, divided into numbered sections for clarity in analysis, is as follows:

1. That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.
2. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage.
3. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.<sup>5</sup>

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<sup>5</sup> S. 526 (Va. 2006).

The first sentence simply reiterates current law, which prohibits same-sex marriage and renders all such marriages void in Virginia. Va. Code Ann. § 20-45.2. The second and third sentences go beyond current law, however, and contain a variety of undefined terms and untested phrases, all of which would have to be interpreted by the Virginia courts as a matter of first impression. Therefore, it is instructive, at the outset, to review and apply the primary principles of statutory interpretation that the courts would use to analyze the Amendment’s meaning and scope.

In construing a legislative enactment, the primary objective is to “ascertain and give effect to legislative intent.”<sup>6</sup> The courts in Virginia determine the General Assembly’s intent from “the words contained in the statute.”<sup>7</sup> In interpreting the words, the courts look to their usual meaning, as found in Black’s Law Dictionary and other dictionaries, compare the words to other words used in the phrase, and read the word in the context of the entire provision to enable all terms to be read in harmony.<sup>8</sup> “We must . . . assume that the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute.”<sup>9</sup> In addition, “it is well established that every act of the legislature should be read so as to give reasonable effect to *every* word.”<sup>10</sup> When the legislature uses different terms in the same act, it is presumed that they mean different things.<sup>11</sup>

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<sup>6</sup> See Turner v. Commonwealth, 309 S.E.2d 337, 338 (Va. 1983).

<sup>7</sup> Williams v. Commonwealth, 576 S.E.2d 468, 470 (Va. 2003); Vollin v. Arlington County Electoral Bd., 222 S.E.2d 793 (Va. 1976).

<sup>8</sup> Turner, 309 S.E.2d at 339.

<sup>9</sup> Epps v. Commonwealth, 616 S.E.2d 67, 77 (Va. 2005) (citation omitted).

<sup>10</sup> Id. (emphasis added).

<sup>11</sup> Klarfeld v. Salsbury, 355 S.E.2d 319, 323 (Va. 1987).

If the language of a legislative enactment is unclear or ambiguous, courts will look outside of the statute and consider information such as legislative history, the purpose of the legislative scheme, general public policy, and similar legislative enactments passed in Virginia and other states.<sup>12</sup> Language is ambiguous if it “admits of being understood in more than one way or refers to two or more things at the same time.”<sup>13</sup> Such ambiguity exists where the language is “difficult to comprehend or distinguish, is of doubtful import . . . or wanting clearness of definiteness.”<sup>14</sup> Finally, where the language of a Virginia statute is essentially the same as that of a sister state, Virginia courts may look to the interpretations of judges in that state.<sup>15</sup>

A. Plain Meaning of the Amendment

In keeping with the principles of statutory construction adopted by the Virginia courts, we look first to the plain meaning of key terms used in the Amendment. As the Amendment contains no definitions, we must look to other sources of authority.

Legal status. “Legal status” is an undefined term in Virginia law. Black’s Law Dictionary defines “status” as “[a] person’s legal condition, whether personal or proprietary; the sum total of a person’s legal rights, duties, liabilities, and other legal relations, *or any particular*

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<sup>12</sup> Martin v. Commonwealth, Record No. 1966-04-4, 2005 WL 2122112, at \*3 (Va. Ct. App. 2005) (citing United States v. Standard Oil Co., 384 U.S. 224, 225-26 (1966)); see also Schwartz v. Schwartz, 616 S.E.2d 59 (Va. Ct. App. 2005) (applying legislative history including a comparison of the versions of a statute formulated by a committee of the Virginia House and the final version of the statute).

<sup>13</sup> Lincoln Nat’l Life Ins. Co. v. Commonwealth Corrugated Container Corp., 327 S.E.2d 98, 101 (Va. 1985).

<sup>14</sup> Ayres v. Harleysville Mut. Cas. Co., 2 S.E.2d 303, 307 (Va. 1939).

<sup>15</sup> See, e.g., Gen. Acc. Fire & Life Assurance. Corp. v. Cohen, 127 S.E.2d 399 (1962) cited in 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 52:02 (6th ed. 2000).

*group of them separately considered.*”<sup>16</sup> Thus, under the plain meaning rule, virtually any combination of rights, duties or liabilities could constitute a legal status.

An Ohio court defined “legal status” for purposes of interpreting Ohio’s similar amendment as follows: “[L]egal status defines the rights available under the law to somebody falling within that category. Every legal status is imposed by law based on the underlying facts.”<sup>17</sup> Although the Virginia courts have not defined “legal status,” they have used the term to describe the state of having rights, duties or liabilities that flow from a particular statute, legal instrument or category. For example, the courts have said that being a party to a contract is a legal status, as are the legal categories of “parent,” “guardian,” “at-will employee” and “beneficiary” of an employee benefit plan.<sup>18</sup> Similarly, the Virginia Code recognizes certain categories as legal statuses conferring rights, duties and liabilities, such as legal custodian of a child.<sup>19</sup> In summary, based on its broad definition and the numerous and varied contexts in

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<sup>16</sup> Black’s Law Dictionary (8th ed. 2004) (emphasis added).

<sup>17</sup> State v. McKinley, No. 8-05-14, 2006 WL 1381635, at \*6 (Ohio Ct. App. May 22, 2006).

<sup>18</sup> See, e.g., Powell v. Tilson, 170 S.E. 750, 753 (Va. 1933) (holding that being a “party to a contract” is a legal status that is unaffected by a change in a statute); Fredericksburg Dep’t. of Social Servs. v. Brown, 533 S.E.2d 12, 16 (Va. Ct. App. 2000) (stating that “parent” and “guardian” each constitute a legal status); Thacker v. TNT Insulations Co., No. 3111-99-4, 2000 WL 949479, at \*2 (Va. Ct. App. July 11, 2000) (“at-will employee” is a legal status that enables someone to “be fired for any time for any reason or no reason”); Crosby v. Crosby, 986 F.2d 79, 81 (4th Cir. 1993) (ERISA benefits may be paid where a good faith determination of an individual’s legal status as the decedent’s widow is made); Fears v. Va. State Bar, No. LE-1283-3, 2000 WL 249247, at \*8 (Va. Cir. Ct. Mar. 1, 2000) (when title to property passes, the lender obtains proper legal status, primarily with respect to the obligations secured by the property.”); Billy v. Lopez, 434 S.E.2d 908, 911 (Va. Ct. App. 1993) (stating that citizenship status is a legal status).

<sup>19</sup> E.g. Va. Code. Ann. § 16.1-228 (“‘Legal custody’ means (i) a legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine and redetermine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities or (ii) the legal status created by court order of joint custody as defined in § 20-107.2.”) In addition, in interpreting Ohio’s domestic violence laws, some Ohio courts have said that the state of cohabitating is a legal status for purposes of

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which it is used in Virginia, legal status appears to refer to any legal category that confers rights, duties or liabilities.

Government Recognition of a Legal Status. The Amendment prohibits the state and localities from *recognizing* any legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage, or to which is assigned the rights, benefits, obligations, qualities, or effects of marriage. While no Virginia case defines what it means for the state or localities to “recognize” a person’s “legal status,” other states that have addressed the question in interpreting their own constitutional amendments regarding marriage have looked to broad, dictionary definitions of the term. For example, in State v. McKinley,<sup>20</sup> the court sought to determine whether the state of Ohio had “*recognized* the legal status of cohabitation” through its domestic violence laws, which applied to unmarried couples that lived together, in violation of Ohio’s constitutional amendment. The court looked to the Webster’s Dictionary definition of “recognize,” which was “to acknowledge in some definite way: take notice of ... to admit the fact or existence of.”<sup>21</sup> Relying on that definition, the court found that the domestic violence laws did, in fact, recognize a legal status for cohabitation.<sup>22</sup>

In interpreting the Michigan marriage amendment, which states that “the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union ...” the Michigan Attorney General argued that “recognize” should be given its ordinary

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that state’s domestic violence laws. McKinley, 2006 WL 1381635, at \*6; State v. Ward, No. 2005-CA-75, 2006 WL 758540, at \*8 (Ohio Ct. App. Mar. 24, 2006).

<sup>20</sup> 2006 WL 1381635, at \*6-10.

<sup>21</sup> Id. at \*8.

<sup>22</sup> Id. at \*10.

meaning, i.e., “to acknowledge the existence, validity, authority or genuineness of.” Applying the ordinary meaning, the Attorney General said that any benefit provided by a state or locality to an unmarried couple based on the existence of a relationship between them would amount to recognition of the relationship.<sup>23</sup> One Michigan trial court rejected the Attorney General’s analysis, holding that the provision of employee benefits is not equivalent to “recogniz[ing] a union.”<sup>24</sup>

The Nebraska Attorney General adopted an interpretation similar to that of the Michigan Attorney General in an opinion interpreting the Nebraska amendment. In response to a query from the state legislature concerning the constitutionality of proposed legislation to afford domestic partners the right to dispose of a deceased partner’s remains and donate his or her body parts, the Attorney General opined that the statute would violate the amendment’s prohibition on giving recognition to same-sex relationships.<sup>25</sup> The legislation did not attempt to confer the bundle of rights and duties conferred by marriage, simply the authority to dispose of a loved one’s remains.<sup>26</sup> Nonetheless, the Attorney General said that since such decisions were traditionally reserved for the surviving spouses, granting domestic partners such rights would be akin to recognizing same-sex unions.<sup>27</sup>

Government “recognition” of a legal status clearly may flow from adoption of a statute that provides rights, duties, benefits or protections. In addition, impermissible government

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<sup>23</sup> Mich. Att’y Gen. Opinion No. 7171 (2005).

<sup>24</sup> Nat’l Pride at Work, Inc. v. Granholm, No. 05-368-CZ, 2005 WL 3048040, at \* 4 (Mich. Cir. Ct. Sept. 27, 2005), appeal docketed No. 265870 (Mich. Ct. App. Oct. 18, 2005) (briefing and argument has been completed).

<sup>25</sup> Neb. Att’y Gen. Opinion No. 03004 (2003).

<sup>26</sup> See id.

<sup>27</sup> Id.

recognition may flow from court enforcement of a prohibited legal status. For example, in a related line of cases, the courts have held that court enforcement of certain private contracts amounted to impermissible state action under the 14th Amendment to the U.S. Constitution. In the landmark case in this area, Shelley v. Kraemer,<sup>28</sup> the U.S. Supreme Court found that while a private, restrictive covenant prohibiting non-Caucasians from owning certain property did not itself violate the 14th Amendment, judicial enforcement of the restrictive covenant did, because the enforcement constituted action by the state.<sup>29</sup> State action, the court held, “extends to manifestations of state authority in the shape of laws, customs, or judicial or executive proceedings.”<sup>30</sup> In addition, the Court noted that the fact that the judicial action concerned a private agreement was irrelevant as to whether state action had occurred.<sup>31</sup>

This principle -- that the court’s enforcement of a private agreement could constitute impermissible state action -- has significant potential implications for the enforcement of private contracts, conveyances or other legal instruments between or regarding unmarried couples under the Amendment. Under this analysis, a court could determine that the state or locality would be “recognizing” a prohibited legal status for unmarried couples if the court enforced or otherwise took judicial cognizance of an legal arrangement intending to approximate the rights or effects of marriage or otherwise conferring attributes or effects of marriage to members of unmarried couples. In such a case, the Amendment could go beyond prohibiting direct state conferrals of rights, duties or benefits of marriage to unmarried couples -- through legislation or otherwise --

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<sup>28</sup> 334 U.S. 1 (1948).

<sup>29</sup> Id. at 18-19.

<sup>30</sup> Id. 14-15 (internal quotations omitted).

<sup>31</sup> Id. at 19.

but also prevent the enforcement of private agreements between unmarried couples and between employers and employees regarding the provision of benefits to any unmarried couples, including domestic partners.

*“A legal status for unmarried relationships that intends to approximate the rights, design, qualities, significance, or effects of marriage.”* The primary interpretive issue raised by this phrase is what it means for a legal status to intend to approximate the attributes or effects of marriage. The Ohio courts have split on this question in the context of interpreting that state’s domestic violence statute. Some Ohio courts have held that even if the statute does not attempt to convey all the attributes and effects of marriage to unmarried couples, it can violate the amendment by expressly treating cohabitants who live like spouses as spouses are treated under the law.<sup>32</sup> Other Ohio courts have found a lack of intent to approximate the attributes or effects of marriage because the statute itself did not intend to approximate marriage and the purpose of the amendment was to protect marriage not to interfere with the application of the domestic violence laws.<sup>33</sup>

However, in Arlington County v. White, the Supreme Court of Virginia struck down the county’s conferral of employee benefits to domestic partners. Although the case was decided on narrow, statutory interpretation grounds, three concurring justices looked to the intent of the county in creating the program, stating that the conferral was a “disguised effort” by the county to “recognize common law marriages or same-sex unions” in violation of Virginia’s statutory

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<sup>32</sup> For example, in State v. McKinley, the Ohio Court of Appeals looked to the cohabitation relationship to determine whether it intended to approximate marriage. 2006 WL 1381635, at \*8-10.

<sup>33</sup> See State v. Nixon, 845 N.E.2d 544, 549 (Ohio Ct. App. 2006), State v. Newell. No. 2004-CA-00264, 2005 WL 1364937, at \* 5 (Ohio Ct. App. May 31, 2005).

prohibitions.<sup>34</sup> Consequently, three justices of the Supreme Court of Virginia, including the current chief justice, have opined that government efforts to provide benefits to domestic partners evince an intent to approximate marriage, regardless of whether the legislative body expressed such an intent or otherwise conferred the entire basket of rights and obligations conveyed by virtue of marriage.

Further, the Amendment provides no guidance on what the “rights, design, qualities, significance, or effects of marriage” are. In 2004, the United States Government Accountability Office (“GAO”) concluded that there are 1,138 federal rights provided to married couples by virtue of their married status that are not similarly available to unmarried couples.<sup>35</sup> Proponents of the Amendment have argued that it simply seeks to prevent the courts from recognizing “marriage-like” unions. But that is not what the Amendment says. If the General Assembly intended to limit the scope of the Amendment to barring same-sex marriage, civil unions and other such legal unions, they could have drafted it to do just that, as other states have done.<sup>36</sup>

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<sup>34</sup> 528 S.E.2d 706, 720, 721 (Va. 2000) (Hassell, J., dissenting in part and concurring in the judgment) (internal quotation marks omitted).

<sup>35</sup> See Letter from GAO General Counsel to Bill Frist, U.S. Senate, at <http://www.gao.gov/new.items/d04353r.pdf>. The rights catalogued by GAO include social security benefits, tax-related benefits, Family Medical Leave Act coverage, immigration status, employee benefits, health care coverage, family services, domestic violence protections, veterans benefits, and housing benefits. See also 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, 511 (Spring 2003).

<sup>36</sup> See Ga. Const. art. I, § 6 (“[n]o union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage”); see also Mich. Const. art. I, § 25 (“the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose”); Tex. Const. art. 1, § 32 (“a marriage between persons of the same sex or a civil union is . . . void”); Utah Const. art. I, § 29 (“[m]arriage consists only of the legal union between a man and a woman. No other domestic union . . . may be recognized as a marriage or given the same or substantially equivalent legal effect.”).

Because the Amendment’s prohibitions are not limited to the recognition of marriage-like legal unions, the courts will have to determine how many marriage rights a status or other legal instrument would have to extend to unmarried couples for an impermissible status to have been created. The Nebraska Attorney opined that simply permitting members of same-sex couples to dispose of their partners’ remains and donate their organs was enough to create “marriage-like” rights.<sup>37</sup> A court in Ohio said that giving one effect of marriage to persons living in a “de facto marriage” of cohabitation violates that state’s amendment.<sup>38</sup> Further, the court said, it would be unreasonable to conclude that the legislature’s intent in drafting that state’s marriage amendment was to ban statutes that provide to unmarried cohabitants all the rights of marriage, but not to ban individual statutes that each confer one or two marriage rights.<sup>39</sup>

The court also found the legislature’s use of the disjunctive “or” in the Amendment significant.<sup>40</sup> The courts assume that the legislature intended the grammar it chose.<sup>41</sup> It is not necessary for a legal instrument to confer all the rights or effects of marriage, or only those attributes or effects that belong exclusively to marriage. As the court said in Ward, a legal status intended to confer some effects of marriage would be implicated.

*“Other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.”* This sentence contains no intent requirement, but rather prohibits the creation or recognition of a legal category to which is given the rights, benefits, obligations,

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<sup>37</sup> See supra n.25.

<sup>38</sup> See State v. Ward, No. 2005-CA-75, 2006 WL 758540, at \*4 (Ohio Ct. App. Mar. 24, 2006).

<sup>39</sup> See id. at \*4-5.

<sup>40</sup> See id. at \*4.

<sup>41</sup> See, e.g., Boynton v. Kilgore, 623 S.E.2d 922, 925-26 (Va. 2006); Davenport v. Little-Bowser, 611 S.E.2d 366, 371 (Va. 2005); see also supra Section II.

qualities or effects of marriage. Once again, the disjunctive is used. The category need not convey all the attributes of marriage or attributes that only belong to marriage. Any legal category that confers any rights, benefits, obligations, or effects of marriage arguably falls within this provision.

*Application of the Amendment to Heterosexual Unmarried Couples.* The application of the Amendment to unmarried heterosexual couples is clear. The second sentence applies specifically to all “unmarried individuals.” The target of the third sentence is not named, but neither is it limited in any way.

#### B. Legislative History

As previously discussed, only where the language is ambiguous will Virginia courts look outside the language of the statute or constitution to determine the legislative intent. Virginia courts are reluctant to turn to legislative history and other extrinsic sources unless there is clear ambiguity in a statute’s meaning.<sup>42</sup> Moreover, Virginia courts generally decline to rely on legislative history to interpret a constitutional amendment.<sup>43</sup>

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<sup>42</sup> Brown v. Lukhard, 330 S.E.2d 84, 87 (Va. 1985) (“When an enactment is clear and unequivocal, general rules for construction of statutes of doubtful meaning do not apply. Therefore, when the language of an enactment is free from ambiguity, resort to legislative history and extrinsic facts is not permitted because we take the words as written to determine their meaning. And, when an enactment is unambiguous, extrinsic legislative history may not be used to create an ambiguity, and then remove it, where none otherwise exists.”) (citations omitted).

<sup>43</sup> See Thomson v. Robb, 328 S.E.2d 136, 139 (Va. 1985) (declining to rely on legislative history to interpret constitutional provision regarding the appointment of officers to the State Corporation Commission); Town of South Hill v. Allen, 12 S.E.2d 770, 774 (Va. 1941) (declining to rely on legislative history to interpret constitutional provision regarding municipal bonds); Scott v. Commonwealth, Case No. HC-77-1, 1992 WL 885029, at \*3 (Va. Cir. Ct. Nov. 20, 1992) (declining to rely on legislative history to interpret constitutional provisions regarding public education and stating “Courts follow the rule that, if a constitutional provision is free of ambiguity, construction is impermissible and resort to legislative history or other extrinsic evidence is not allowed.”) (internal quotations omitted).

In only one reported case has a Virginia court considered legislative history in interpreting a provision of the state Constitution. In that 1917 case about Prohibition, Pine v. Commonwealth,<sup>44</sup> the Supreme Court of Virginia looked to the floor debates of the Virginia Constitutional Convention in determining that the state Constitution did not occupy the field of regulating intoxicating liquors, so the General Assembly could enact a prohibition statute.<sup>45</sup> The Court found that the debates showed an intent by the framers of the state Constitution to permit the General Assembly to enact such a statute.<sup>46</sup>

It is similarly rare for Virginia courts to examine legislative history in construing statutes. In Simerly v. Virginia, the court looked to previous versions of the enacted statute (along with a report issued prior to the enactment of the original law and presented to the governor by the Commission charged with investigating sex offender law) in order to determine whether the Virginia law under which the defendant was convicted considered the defendant's behavior sexual abnormality.<sup>47</sup> Additionally, in interpreting the word "residence," the court in Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, also looked to previous versions of the statute, as well as a Staff Report made part of the legislative record, which detailed the changes in the zoning ordinances during the enactment process.<sup>48</sup>

In summary, Virginia courts rarely review legislative history in interpreting the acts of the General Assembly, preferring instead to look to the plain meaning of the words selected by

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<sup>44</sup> Pine v. Commonwealth, 93 S.E. 652 (1917).

<sup>45</sup> Id. at 656.

<sup>46</sup> Id. at 657.

<sup>47</sup> 514 S.E.2d 387, 389-91 (Va. Ct. App. 1999).

<sup>48</sup> Law No. 150970; Law No. 150851, 1997 WL 1070562, at \*3 (Va. Ct. App. Apr. 7, 1997).

the legislature. When they have reviewed the legislative history, they generally have looked to prior versions of the legislation to determine what the legislature intended by making a change. If the courts were to examine the legislative history of the Amendment, they would find that three significant changes were made in the final Amendment from an earlier version. The version that will be before the voters in November was first included in the conference reports for House Joint Resolution 586 (HJ 586) and Senate Joint Resolution 337 (SJ 337) submitted to and adopted by both houses of the legislature on the last day of the 2005 Session, and codified respectively in chapters 0946 and 0949 of the 2005 Acts of Assembly.<sup>49</sup>

The first House-passed version of HJ 586 said:

That in this Commonwealth, a marriage shall consist exclusively of the union of one man and one woman. Neither the Commonwealth nor its political subdivisions shall create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

Any other right, benefit, obligation, or legal status pertaining to persons not married is otherwise not altered or abridged by this section.<sup>50</sup>

The final sentence in this version is a “savings clause” designed to limit the application and scope of the Amendment.

The first House-passed version of HJ 586 also contained a preamble, which expressly recited the legislature’s intent to protect the institution of marriage.<sup>51</sup> Finally, the first House-

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<sup>49</sup> The identical language was included in House Joint Resolution 23, and House Joint Resolution 41 introduced for consideration in the 2006 General Assembly Session as required under the amendment process.

<sup>50</sup> The first Senate-passed version of SJ 337 said:

That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage.

passed version of HJ 586 contained a title, which characterized the Amendment as “relating to the institution of marriage and prohibiting any other *legal union* that purports to grant the rights, benefits, obligations, qualities, or effects of marriage.”

In the version of HJ 486 and SJ 337 adopted by the General Assembly, the savings clause, the preamble and the title contained in the first House-passed version all were deleted. The combination of these changes could be interpreted to mean that the legislature intended to expand the Amendment’s prohibitions beyond banning formal “legal unions” like marriage to prohibit the extension of rights, duties or benefits conferred through marriage to unmarried couples through legal instruments such as statutes and private agreements.

Supporters of the Amendment will point to the “official” explanation of the Amendment (approved by the House and Senate Committees on Privileges and Elections by divided votes) as an authoritative statement of the Amendment’s meaning and scope.<sup>52</sup> This explanation says, in part: “The proposed amendment does not effect relationships or rights that do not intend ‘to approximate the design, qualities, significance, or effects of marriage’ or bestow the ‘rights, benefits, obligations, qualities, or effects of marriage,’ including but not limited to, such relationships or rights as are established by Advance Medical Directives (Code of Virginia § 54.1-2981), Domestic Violence laws (Code of Virginia § 18.2-57.2), ownership of real

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<sup>51</sup> The preamble read: “That marriage is essential to the liberty, happiness, and prosperity of a free and virtuous people and is, among other things, the natural and optimal institution for uniting the two sexes in a committed, complementary, and conjugal partnership; for begetting posterity; and for providing children with the surest opportunity to be raised by their mother and father.” H. J. Res. 586.

<sup>52</sup> Virginia law requires that “when a proposed amendment is to be submitted to the people for their approval and ratification ... copies of an explanation of such amendment” are to be printed and supplied to “interested” voters at voting sites, and that the explanation is to be published on the State Board of Election’s website, as well as in daily newspapers. Va. Code Ann. § 30-19.9. Additionally, the explanation “shall be limited to a neutral explanation ... [and] shall not include arguments submitted by either proponents or opponents of the proposal.” Id.

property as joint tenants with or without a right of survivorship (Code of Virginia § 55-20.1), or disposition of property by will (Code of Virginia §64.1-46).”

The General Assembly’s Division of Legislative Services (DLS), which is given primary responsibility for drafting the explanation under the Code of Virginia, Section 30-19.9,<sup>53</sup> expressed concern to the Committees about whether the statement in the explanation quoted above complies with the statutory requirement that the explanation published for the voters be a “neutral” statement and not include the arguments of advocates.<sup>54</sup> DLS recommended an alternate version of the explanation, which excluded the language quoted above.<sup>55</sup>

In interpreting the Amendment, if a court felt the need to look to legislative history, it might take the explanation approved for publication into account. However, the court also likely would consider the statement by the agency tasked with drafting the explanation that it is not neutral but advocacy. Ultimately, if the Amendment is approved, the courts will review the text of the Amendment and come to their own conclusions about what it means.

C. The Amendment’s Relationship to Current Prohibitions on Same-Sex Couples

Virginia has in place two statutes that ban same-sex unions. The Amendment would effectively expand the restrictions applicable to same-sex couples, and extend them to opposite-sex couples.

Va. Code Ann. § 20-45.2 provides as follows:

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<sup>53</sup> “The Division of Legislative Services, in consultation with such agencies of state government as may be appropriate, including the Office of Attorney General, shall prepare an explanation for such proposal . . . .” Va. Code Ann. § 30-19.9.

<sup>54</sup> Letter from Jack Austin, Division of Legislative Services, to Members of the Senate Privileges and Elections Committee (Apr. 18, 2006).

<sup>55</sup> Id.

A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.

Va. Code Ann. § 20-45.3 provides as follows:

A civil union, partnership contract or other arrangement between persons of the same sex *purporting to bestow the privileges or obligations of marriage* is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable. (Emphasis added.)

Current law clearly bans same-sex marriage, civil unions and domestic partnerships. It also bans other arrangements “purporting to bestow” the privileges and obligations of marriage. The Random House Webster’s Unabridged Dictionary defines “purport” as “to present, esp. deliberately, the appearance of being; profess or claim, often falsely.”<sup>56</sup> While no Virginia court has interpreted the highlighted language in a reported case, by its terms it applies only to arrangements that expressly claim to bestow privileges or obligations of marriage upon same-sex couples. So, for example, a legal arrangement between members of the same sex that does not expressly claim to bestow privileges or obligations of marriage may comport with Section 20-45.3. However, under the Amendment, this arrangement could be seen as creating or recognizing “a legal status” that intends to approximate the attributes or effects of marriage, regardless of whether it so purports. Moreover, it could be regarded as a legal status to which is assigned some attribute or effect of marriage. In both cases, recognition of the legal status could be deemed unconstitutional and, thus, the Amendment could extend beyond the restrictions on legal arrangements between same-sex couples in existing law.

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<sup>56</sup> Webster’s Unabridged Dictionary (Random House 1994).

### III. THE AMENDMENT'S POTENTIAL IMPACT ON FAMILY LAW MATTERS

In the area of traditional family law matters, i.e., marriage, divorce, child custody and support, and agreements between cohabitants, the Amendment could significantly impact the rights and obligations of cohabitating unmarried couples in a number of areas. Given recent trends in American attitudes and behaviors regarding marriage and cohabitation, these impacts could be substantial. The number of unmarried couples living together in the United States is at an all-time high.<sup>57</sup> In 1970, there were approximately 523,000 unmarried heterosexual couples cohabiting in the United States.<sup>58</sup> As of 2005, the number of unmarried heterosexual couples living together had risen to 4.85 million couples.<sup>59</sup> Of this number, 1.95 million couples lived with a child of which at least one cohabitant was a parent.<sup>60</sup> In 2000, there were 594,000 unmarried same-sex couples cohabiting in the United States, approximately 11% of the total number of unmarried cohabiting couples in that year.<sup>61</sup>

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<sup>57</sup> The 2000 U.S. Census reported a 72% increase in the last decade in the total number of heterosexual and same-sex unmarried couples living together, from 3.2 million to 5.5 million. Christopher Marquis, Total of Unmarried Couples Surged in 2000 U.S. Census, N.Y. TIMES, Mar. 13, 2003, at A1.

<sup>58</sup> U.S. Census Bureau, Table UC-1, Unmarried-Couple Households, by Presence of Children: 1960 to Present (2006), available at <http://www.census.gov/population/socdemo/hh-fam/uc1.pdf>. This figure includes opposite-sex cohabitants who did not self-identify as partners (e.g. opposite sex roommates), and thus could overestimate the number of unmarried heterosexual couples in 1970. U.S. Census Bureau, Table UC-1, Unmarried-Couple Households, by Presence of Children: 1960 to Present (2006), available at <http://www.census.gov/population/socdemo/hh-fam/uc1.pdf>.

<sup>59</sup> U.S. Census Bureau, Table UC-3, Opposite Sex Unmarried Partner Households by Presence of Own Children Under 18, and Age, Earnings, Education, and Race and Hispanic Origin of Both Partners: 2005, available at <http://www.census.gov/population/www/socdemo/hh-fam.html>.

<sup>60</sup> Id.

<sup>61</sup> Tavia Simmons & Martin O'Connell, U.S. Census Bureau, Married Couples and Unmarried Partner Households: 2000, available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

It is estimated that 7% of the nation's couples live together but remain unmarried and approximately one-fourth of the adult population has cohabited at some time.<sup>62</sup> These large numbers confirm that cohabitation has emerged as a common family form in the United States.<sup>63</sup>

While many assume that the majority of unmarried committed partners are homosexual, this is not the case. In Virginia, 89% of such couples are heterosexual.<sup>64</sup> Couples choosing to cohabitate are increasingly diverse, including young couples who delay marriage as well as older couples who have been previously married and are hesitant to remarry.<sup>65</sup> It is a varied group of individuals that makes up the approximately 130,000 unmarried couples in Virginia.<sup>66</sup> But what they all have in common is the potential loss of important rights and protections if the Amendment is approved. Thus, any effects that the proposed Amendment might have on unmarried couples would impact a large and growing number of couples and families.

The Amendment threatens the rights of unmarried couples both in Virginia and across the United States. This threat arises because the enforcement of a number of existing rights could be deemed a recognition of a legal status that in some way intends to approximate the attributes or effects of marriage or to which is assigned some attribute or effect of marriage. The Amendment could materially and adversely alter the rights and obligations of unmarried individuals, couples, and their families in three primary areas of family law: (1) express and implied agreements between unmarried couples living together, formed both inside and outside Virginia, (2) common

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<sup>62</sup> Jennifer K. Robbennolt et al., Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach, 41 ARIZ. L. REV. 417, 418 (Summer 1999).

<sup>63</sup> Id.

<sup>64</sup> Simmons, supra n.62, at 4.

<sup>65</sup> Robbennolt, supra n.61, at 419.

<sup>66</sup> Simmons, supra n.61, at 4.

law marriages formed outside Virginia, and (3) child custody and visitation determinations made both inside and outside Virginia.

Passage of the Amendment could result in increased litigation in Virginia, restrictions on private contract rights between adults, the establishment of Virginia as a refuge for those fleeing legal responsibilities elsewhere and harm to vulnerable significant others, spouses and children. In the context of family law, it is clear that the potential impacts of the Amendment extend far beyond those acknowledged by the Amendment's supporters.

A. Rights and Obligations of Unmarried Cohabitants

The Amendment could render unenforceable express and implied agreements between unmarried couples who live together, which are formed both inside and outside of Virginia and detail property rights and obligations, and other rights and obligations between the parties. This effect could be felt by both same-sex and opposite-sex couples.

1. Agreements Between Cohabitants: Background

Historically, courts refused to enforce contractual agreements regarding property rights between unmarried cohabitants.<sup>67</sup> However, in response to the rapid increase in the number of unmarried individuals choosing to live together, a majority of states now recognize express contracts between cohabitants, which are often called cohabitation agreements.<sup>68</sup> While such express contracts typically allocate property rights in the event of a relationship's dissolution,

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<sup>67</sup> See 46 AM. JUR. PROOF OF FACTS 2d 495 §1.

<sup>68</sup> Those states are Arizona, Alaska, California, Connecticut, Florida, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See Katherine C. Gordon, Note, The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them - A State Survey, 37 BRANDEIS L.J. 245, 248-253 (1998).

they often contain a range of additional provisions.<sup>69</sup> Further, in the absence of an express agreement, a significant minority of state courts will find implied contractual rights between unmarried cohabitants.<sup>70</sup> To determine the existence of such an implied agreement, these courts seek to decipher the parties' intent from their conduct during their relationship.<sup>71</sup>

In the landmark case of Marvin v. Marvin,<sup>72</sup> the California Supreme Court articulated the public policy rationale for giving legal effect to cohabitation agreements. First, recognizing that cohabitation between unmarried individuals has become common and accepted, the court stated that it “cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.”<sup>73</sup> Second, cohabitants are “competent . . . to contract respecting their earnings and property rights,” and thus “may order their economic affairs as they choose.”<sup>74</sup> Finally, the court noted that failure to find implied agreements between unmarried cohabitants would actually undermine the institution of marriage, because such failure would “cause the income producing partner to avoid marriage and thus retain the benefit of all of his or her accumulated earnings.”<sup>75</sup>

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<sup>69</sup> Such agreements often govern support following dissolution, the payment of debts, medical decision-making in the event of incapacitation, and other rights between unmarried individuals. See Living Together and Cohabitation Agreements, <http://www.equalityinmarriage.org/bmagreements.html> (last visited July 7, 2006).

<sup>70</sup> Those states are Arizona, Alaska, California, Connecticut, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Nevada, New Jersey, North Carolina, Oregon, Pennsylvania, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See Gordon, *supra* n.68 at 248-50.

<sup>71</sup> See Beal v. Beal, 577 P.2d 507, 510 (Or. 1978).

<sup>72</sup> 18 Cal.3d 660 (1976).

<sup>73</sup> Id. at 684.

<sup>74</sup> Id. at 674.

<sup>75</sup> Id. at 683. In addition to recognizing implied contracts between couples living together, *Marvin* held that the theories of implied agreements of partnership or joint venture, constructive or resulting trust, quantum meruit, and other remedies are available to support such rights when they would best serve the reasonable expectations of the parties. 18 Cal.3d at 684. To the extent

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Indeed, in a state that does not recognize rights between cohabitants, an individual with greater wealth and sophistication than his or her partner might avoid marriage altogether in order to escape any chance of having to share his or her property with a spouse following a divorce.<sup>76</sup> This could leave the unsophisticated partner, and potentially the couple's children, at risk of becoming wards of the state.<sup>77</sup> An example of such a situation is provided by Carlson v. Olson.<sup>78</sup> There, an unmarried couple lived together for twenty-one years and raised a son. All of the couple's property was paid for by the man, Oral, as the woman, Laura, did not work outside the home. When Laura wished to end the relationship, she sued for a division of the couple's property. In response, Oral sued Laura for twenty-one years of back rent and for her ejection from the property. Using the Marvin court's reasoning, the Supreme Court of Minnesota upheld Laura's right to a portion of the couple's property.<sup>79</sup>

## 2. Virginia Law Regarding Agreements Between Cohabitants

The law in Virginia regarding the rights and obligations of unmarried cohabitants is uncertain. By statute, cohabitation by unmarried individuals is illegal in Virginia.<sup>80</sup> However, this statute is almost never enforced.<sup>81</sup> Virginia practitioners advise that express agreements

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that express and implied contracts are threatened by the Amendment (see below), so are these other vehicles for the enforcement of cohabitants' rights and obligations.

<sup>76</sup> J. Thomas Oldham & David S. Caudill, A Reconnaissance of Public Policy Restrictions Upon Enforcement of Contracts Between Cohabitants, 18 FAM. L.Q. 93, 115 (1984).

<sup>77</sup> Id. at 96.

<sup>78</sup> 256 N.W.2d 249 (Minn. 1977).

<sup>79</sup> Following the *Marvin* court's suggestion that courts may use a wide range of legal theories to best determine the expectations of the parties, the court in *Carson* upheld the use of the theory of irrevocable gift to support the division of assets between Laura and Oral. 256 N.W.2d at 256.

<sup>80</sup> Va. Code Ann. § 18.2-345.

<sup>81</sup> Doe v. Duling, 782 F.2d 1202, 1204-1205 (4th Cir. 1986) (observing that it appears that no one has been convicted of cohabitation since 1883, and no one has been arrested since 1976).

between cohabitants are formed in Virginia by both opposite-sex and same-sex couples.<sup>82</sup> While it is clear that these agreements exist, Virginia courts have not ruled directly on the enforceability of either express or implied cohabitation agreements.<sup>83</sup> Some commentators<sup>84</sup> have concluded that Virginia's courts likely would recognize such agreements, citing Cooper v. Spencer<sup>85</sup> in support of this view. In that case, a man and woman, during the process of separating from each other, discovered that their marriage had never been valid. The putative wife brought an action for division of business assets on the theory that the couple had an implied partnership. Although the court held that the putative wife failed to provide sufficient evidence to meet her burden of proof, the court recognized that a cause of action to establish an express or implied agreement between cohabiting parties could exist.<sup>86</sup>

3. Effect of the Amendment on Agreements Between Cohabitants Created in Virginia

Passage of the Amendment could render unenforceable both express and implied agreements between unmarried Virginia couples that attempt to establish their respective rights and obligations in the context of their relationship. Implied agreements found by courts are given the same effect as these express agreements.<sup>87</sup> The holding of rights under either type of agreement would appear to be a "legal status." Because the rights delineated in an express or

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<sup>82</sup> Conversation with Mina Ketchie, Esq., May 26, 2006. Indeed, some law firms advertise their practice of drafting cohabitation agreements by name. See, e.g., Knight & Stough LLP, Cohabitation Agreement Attorney, Northern Virginia, <http://www.knightstough.net/Cohabitation.shtml> (last visited July 7, 2006).

<sup>83</sup> Va. Prac. Family Law § 3.3 (2006 ed.).

<sup>84</sup> See Peter N. Swisher, Lawrence D. Diehl and James R. Cottrell, Va. Prac. Family Law § 4:1 (2006).

<sup>85</sup> 238 S.E.2d 805 (Va. 1977).

<sup>86</sup> Id. at 806.

<sup>87</sup> See Dietz et al., 17A AM. JUR. 2D CONTRACTS § 12.

implied agreement between unmarried cohabitants, e.g., property rights, survivorship rights, rights to make medical decisions on behalf of another, are those traditionally provided through marriage, such an agreement would seem to be a legal status “to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.”

Further, a court might find that an agreement intends to approximate the attributes or effects of marriage, particularly if the agreement expressly recites the parties’ commitment to each other and their intent to provide legal protections to their family unit like those traditionally conferred through marriage.

In interpreting the terms of a contract, Virginia courts first and foremost rely on the plain language used in an agreement to discern the contracting parties’ intent.<sup>88</sup> Therefore, any agreement expressing an intent by the parties to convey rights, obligations or benefits akin to those conferred through marriage could be held by the court to provide a legal status for unmarried relationships to which the courts may not give legal effect under the Amendment.

But even if the agreement did not expressly recite such an intent, it could still be deemed unenforceable. “[W]hen language admits to being understood in more than one way,” the court may rely on parol evidence to discern the parties’ meaning, so long as that evidence is not in contravention of the intention expressed in the contract.<sup>89</sup> For example, in Eure v. Norfolk Shipbuilding & Drydock Corp., the court permitted trial testimony by one of the parties to the

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<sup>88</sup> See, e.g., Musselman v. Glass Works, L.L.C., 533 S.E.2d 919, 921 (Va. 2000); Pollard & Bagby, Inc. v. Pierce Arrow, L.L.C., 521 S.E.2d 761, 763 (Va. 1999); Waynesboro Village, L.L.C. v. BMC Props., 496 S.E.2d 64, 67 (Va. 1998).

<sup>89</sup> See, e.g., Modern Cont’l South v. Fairfax County Water Auth., No. 225019, 2006 WL 408412, at \*20 (Va. Cir. Ct. Feb. 9, 2006) (internal quotations omitted); see also Golding v. Floyd, 539 S.E.2d 735, 737 (Va. 2001).

agreement, along with admission of two letters regarding the agreement, as parol evidence to determine the intent of the parties with respect to a health care benefits agreement.<sup>90</sup>

Similarly, were the courts to conclude that the Amendment requires them to inquire into the intent of parties to private contracts, they could consider parol evidence where the intent was unclear. Statements and actions by the couple evincing their intent to use the legal instrument to provide to themselves and their children rights and protections provided through marriage could lead to a court determination that the agreement is unenforceable under the Amendment.

It is important to note that third party challengers to contracts can make expansive use of parol evidence to inform the court as to the parties' intent underlying the agreement. "It is well settled that the parol evidence rule which makes a written instrument conclusive proof of what the parties have agreed to, thus merging in it all prior negotiations, applies only to a controversy between the parties to the instrument. It does not apply to a controversy between third parties, or to a controversy between a third party and one of the parties to the instrument. This is so because the stranger, not being a party to the instrument, is not bound thereby and is free to vary or contradict it, and consequently his adversary must be equally free to do so."<sup>91</sup> In McComb v. McComb, the husband in a divorce proceeding used parol evidence to show that his in-laws had intended to make both he and his wife parties to a loan issued by the in-laws, despite the fact that only he had signed the loan documents.<sup>92</sup> The court stated that since it would have been

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<sup>90</sup> 561 S.E.2d 663, 666 (Va. 2002); see also Durham v. Nat'l Pool Equip. Co. of Va., 138 S.E.2d 55, 59 (Va. 1964) (allowing the use of an additional oral agreement as parol evidence regarding the terms of a contract for pool equipment and labor).

<sup>91</sup> McComb v. McComb, 307 S.E.2d 877, 880 (Va. 1983) (internal citations omitted and emphasis removed).

<sup>92</sup> Id. at 878-81.

permissible for the wife to use parol evidence to demonstrate intent because she was a stranger to the note, it was therefore permissible for him to do so as well.<sup>93</sup> Thus, in cases where a third party, such as a parent or sibling of one of the parties, seeks to challenge a cohabitation agreement, the challenger would be permitted to offer parol evidence to establish the fact that the same-sex couple intended to provide rights, obligations or benefits that approximate those provided through marriage.

If a court were to give legal effect to such an agreement, it would “recognize” this legal status.<sup>94</sup> Thus, a court could take the position that it was prohibited by the Amendment from enforcing an express agreement created by an unmarried couple or finding an implied agreement based on the nature of their relationship or their conduct within it.

The potential consequences for unmarried heterosexual Virginians are significant.

- First, passage of the Amendment could render private contracts entered into by consenting adults unenforceable, thereby impinging upon their freedom to contract and allowing individuals to escape responsibilities to their former live-in partners that they freely assumed.
- Second, courts could be barred from finding implied agreements between unmarried couples. This would incentivize sophisticated individuals to choose cohabitation rather than marriage in order to avoid having to support the less sophisticated partner following a break-up.

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<sup>93</sup> Id.

<sup>94</sup> See supra Section II.A (discussing the legal meaning of the term “recognize”).

- Finally, such a rule would leave many unmarried individuals who tend to the couple's children and homes unprotected from the opportunistic behavior of more sophisticated wage-earning partners.

The consequences for same-sex couples are also potentially serious. It is currently unclear whether and under what conditions agreements detailing the rights of cohabiting same-sex couples would be seen as “purporting to bestow the privileges or obligations of marriage,” and thus be deemed unenforceable under Va. Code Ann. § 20-45.3. Apparently, no such agreement has been challenged to date under the statute. However, if such agreements do not expressly claim to bestow the privileges or obligations of marriage, they probably fall outside Virginia's current proscription. Thus, the Amendment's broad language regarding recognition of a legal status to which is assigned the rights, benefits or effects of marriage threatens to expand the law's current restrictions on same-sex couples, and subject them to the same adverse impacts that unmarried heterosexuals may face.

#### 4. Effect of the Amendment on Out-of-State Agreements

As indicated above, the majority of states enforce agreements between unmarried cohabitants in some form. The Amendment would threaten the validity of these agreements in Virginia, thereby making the state an attractive destination for individuals seeking to escape their obligations under express cohabitation agreements or court orders finding implied agreements. In any event, the Amendment likely will increase the amount of litigation in Virginia, clogging the Commonwealth's courts with lawsuits seeking to undo legal obligations created and recognized elsewhere. Thus, the Amendment may export its prohibitions to other individuals and families across the country, all to the detriment of relatively unsophisticated cohabitants and children who were previously protected by the laws of their states.

## B. Common Law Marriage

The proposed amendment prohibits Virginia's courts from recognizing common law marriages entered into by heterosexual couples in other states. This may encourage individuals who incurred legal support and other obligations upon divorce to come to Virginia to attempt to evade their obligations, to the detriment of vulnerable spouses and children.

### 1. Virginia Law Governing Common Law Marriages

A common law marriage is one that was never officially celebrated or licensed but exists because "two people capable of marrying live together as husband and wife, intend to be married, and hold themselves out to others as a married couple."<sup>95</sup> The parameters of what arrangement may constitute a common law marriage is dependent on the law of the state in which the common law marriage is formed. Eleven states and the District of Columbia recognize common law marriages formed within their jurisdictions.<sup>96</sup> While Virginia does not allow common law marriages to be formed within its jurisdiction,<sup>97</sup> it does recognize common law marriages formed in jurisdictions where such marriages are permissible, so long as the individuals in question would be allowed to marry officially in Virginia.<sup>98</sup>

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<sup>95</sup> BLACK'S LAW DICTIONARY (8th ed. 2004); see also *Cann v. Cann*, 632 A.2d 322 (Pa. Super. Ct. 1993) ("'Common-law marriage' is marriage by express agreement of parties without ceremony, and usually without witness, and verba de praesenti, uttered with purpose of establishing relation of husband and wife.").

<sup>96</sup> Sonya C. Garza, Common Law Marriage: A Proposal For the Revival of a Dying Doctrine, 40 NEW ENG. L. REV. 541, 545 n.27 (2006) (stating that those jurisdiction that recognize common law marriage are Alabama, Colorado, District of Columbia, Idaho, Iowa, Kansas, Montana, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah).

<sup>97</sup> See *Offield v. Davis*, 40 S.E.2d 910 (Va. 1902).

<sup>98</sup> See *Kelderhaus v. Kelderhaus*, 467 S.E.2d 303 (Va. Ct. App. 1996). Because no state that currently recognizes common law marriage also recognizes same-sex marriage, and because members of the same sex are not capable of marrying in Virginia, this section of the memorandum applies only to heterosexual couples.

While Virginia’s approach comports with the general rule that marriages (other than same-sex marriages) that are valid where performed are valid everywhere,<sup>99</sup> Virginia also takes the position that “[n]o state is bound . . . to give effect in its courts to the marriage laws of another state, repugnant to its own laws and policy.”<sup>100</sup> Historically, Virginia has not found common law marriages so repugnant to its laws or public policy as to withhold recognition from these marriages when they are recognized under the laws of another state.

## 2. Effect of the Amendment on Common Law Marriages

The Amendment likely would prohibit Virginia’s courts from recognizing out-of-state common law marriages. Being married is certainly a “legal status”<sup>101</sup> to which is assigned “the rights, benefits, obligation, qualities, or effects of marriage.” Moreover, that status clearly “intends to approximate the design, qualities, significance, or effects of marriage.” If a Virginia court were to give effect to such a marriage, it would certainly be “recognizing” this legal status. Thus, passage of the Amendment likely would prohibit Virginia’s courts from recognizing out-of-state common law marriages and, in effect, nullify the existence of such a marriage upon the parties’ entry into Virginia.

If the recognition of common law marriages were deemed unconstitutional, Virginia could become the destination of choice for individuals seeking to escape their duties under a divorce decree in another state. For example, if a man and woman in Texas agreed to be

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<sup>99</sup> 12B MITCHIE’S JURISPRUDENCE OF VIRGINIA & WEST VIRGINIA, Marriage § 5 (2003).

<sup>100</sup> Hager v. Hager, 349 S.E.2d 908, 909 (Va. Ct. App. 1996) (quoting Toler v. Oakwood Smokeless Coal Corp., 4 S.E.2d 364 (Va. 1939)). For example, as discussed in Section II.C., supra, Virginia law expressly bans the recognition of same sex marriages or civil unions entered into elsewhere.

<sup>101</sup> See Shields v. Madigan, 783 N.Y.S.2d 270, 277 (N.Y. Sup. Ct. 2004) (“Marriage is a legal status subject to the control of the Legislature.”); see also Maynard v. Hill, 125 U.S.190 (1888).

married, lived together as man and wife, and represented to others that they were married, Texas would consider the couple to be legally married even though they never actually solemnized the marriage in a ceremony.<sup>102</sup> If the wife sued for divorce and a judge ordered the husband to make alimony payments, the husband could move to Virginia to try to escape his responsibilities to his wife. Under the Amendment, a court could hold that the Texas divorce decree is void in Virginia because it flowed from a marriage that the Virginia courts are not permitted to recognize. Thus, the Amendment could invalidate the divorce decrees of other states. Further, this possibility could lead to increased litigation in Virginia courts over settled legal decisions made in other states, giving Virginia the dubious distinction of being a refuge for a class of divorcees attempting to escape their responsibilities.

### C. Custody and Visitation Disputes

The Amendment threatens the rights of certain unmarried Virginians involved in custody disputes and could undermine custody and visitation determinations made by the courts of other states. The result could be relitigation of prior determinations, the stripping of rights from deserving caregivers, and harm to children whose best interests could take a back seat to the court's assessment of the relationship between two potential caregivers.

#### 1. Law Governing Virginia Custody and Visitation Disputes

In making custody and visitation determinations in Virginia, “the court shall give primary consideration to the best interests of the child.”<sup>103</sup> In determining a child's best interests, a court must “give due regard to the primacy of the parent-child relationship.”<sup>104</sup> However, a court can

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<sup>102</sup> See Reynolds v. Reynolds, Case No. CH00-17823, 2003 WL 21278869, at \*5 (Va. Cir. Ct. June 4, 2003).

<sup>103</sup> Va. Code Ann. § 20-124.2B.

<sup>104</sup> Id.

award custody or visitation to “any other person with a legitimate interest” upon a showing of clear and convincing evidence that such an award is in the child’s best interest.<sup>105</sup> A “person with a legitimate interest” is “broadly construed to accommodate the best interest of the child.”<sup>106</sup> This classification “includes, *but is not limited to* grandparents, stepparents, former stepparents, blood relatives and family members.”<sup>107</sup> Thus, under current law, any person whose presence in a child’s life is important to that child’s wellbeing is entitled to petition for custody or visitation.

## 2. Law Governing Interstate Custody Disputes in Virginia

Interstate jurisdictional conflicts in child custody and visitation determinations are governed by the Parental Kidnapping Prevention Act (PKPA)<sup>108</sup> and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).<sup>109</sup> Congress enacted the PKPA to reduce interstate conflict in child custody and visitation matters that “shift[] . . . children from State to State with harmful effects on their well-being” and to “deter interstate abductions and other unilateral removals of children undertaken to obtain custody.”<sup>110</sup> The PKPA requires that states “afford full faith and credit to valid child custody determinations entered by a sister State’s courts.”<sup>111</sup>

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<sup>105</sup> Id.

<sup>106</sup> Va. Code Ann. § 20-124.1.

<sup>107</sup> Id. (emphasis added).

<sup>108</sup> 28 U.S.C. § 1738A.

<sup>109</sup> Adopted by Virginia and codified at Va. Code. Ann. § 20-146.1 et seq.

<sup>110</sup> Pub. L. No. 96-611 § 7(c)(5)-(6), 94 Stat. 3566 (1980).

<sup>111</sup> Thompson v. Thompson, 484 U.S. 174, 174 (1988).

The UCCJEA was drafted by the National Conference of Commissioners on Uniform State Law and has been adopted by all 50 states. Virginia adopted its version of the UCCJEA to reduce jurisdictional conflict with other states, avoid relitigation of custody decrees, and prevent the abduction and geographic shifting of children for the purpose of gaining custody.<sup>112</sup> If a court makes a custody or visitation determination consistent with the provisions of the UCCJEA, it retains “exclusive, continuing jurisdiction, as long as the child, the child’s parent, or any person acting as a parent” resides in that state.<sup>113</sup> The sum effect of the PKPA and the UCCJEA is that when a court makes a custody or visitation determination in accordance with state law and the provisions of the acts, it is to be accorded full faith and credit by all other state courts.

3. Effect of Virginia’s Ban on Same-Sex Unions on Child Custody and Visitation

In order to understand the potential effects of the Amendment in the areas of child custody and visitation, it is helpful to first understand the impact of Virginia’s ban on same-sex unions. As indicated above, a “civil union, partnership contract, or other arrangement . . . purporting to bestow the privileges or obligations of marriage . . . entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.”<sup>114</sup> A recent Virginia case, *Miller-Jenkins v. Miller-Jenkins*,<sup>115</sup> demonstrates how this statute has been used to attempt to circumvent Virginia law governing the custody and visitation rights of non-biological parents

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<sup>112</sup> Va. Code Ann. § 20-146.38.

<sup>113</sup> Id. § 20-146.13.

<sup>114</sup> Va. Code Ann. § 20-45.3.

<sup>115</sup> No. CH04-280 (Va. Cir. Ct. Aug. 24, 2004), appeal filed, No. 0688-06-4 (Va. Ct. App. May 15, 2006).

and sidestep the requirements of the PKPA and the UCCJEA. In this case, a same-sex couple from Virginia, Janet and Lisa Miller-Jenkins, entered into a legally recognized civil union in Vermont. After returning to Virginia, Lisa became pregnant via artificial insemination and gave birth to a daughter, Isabella. The couple then moved to Vermont to raise their family. A year later, the couple separated, and Lisa returned to Virginia with her biological daughter. Lisa then filed for dissolution of the civil union in Vermont, requesting that Janet be awarded parent-child contact with Isabella. A Vermont court then allocated parental contact between the two women.<sup>116</sup>

Immediately after passage of Section 20-45.3, Lisa sought a redetermination by a Virginia court of the former couple's custody rights.<sup>117</sup> Despite the fact that the PKPA and UCCJEA seemingly require that Vermont retain jurisdiction over the matter, the Virginia judge ruled in favor of Lisa, not mentioning the PKPA in doing so.<sup>118</sup> Moreover, he dismissed the requirements of the UCCJEA by stating that because the Virginia statute renders "civil unions . . . void in all respects . . . as far as Virginia is concerned, nothing has taken place in Vermont."<sup>119</sup>

While the ultimate resolution of this dispute is unknown, the implications of the case are clear. First, by failing to recognize the right of a member of a same-sex union to petition for

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<sup>116</sup> Br. of Pet. at 6-7, Miller-Jenkins v. Miller-Jenkins, No. 0688-06-4 (Va. Ct. App. filed May 15, 2006), available at [http://www.acluva.org/docket/pleadings/miller-jenkins\\_openingbrief.pdf](http://www.acluva.org/docket/pleadings/miller-jenkins_openingbrief.pdf).

<sup>117</sup> Id. at 7.

<sup>118</sup> Hr'g Tr. at 24-25, Miller-Jenkins v. Miller-Jenkins, No. CH04-280 (Va. Cir. Ct. Aug. 24, 2004).

<sup>119</sup> Id. at 27. Subsequently, the court issued an order completely divesting Janet of her visitation rights. Final Order of Parentage, Miller-Jenkins v. Miller-Jenkins, No. CH04-280 (Va. Cir. Ct. Frederick County Chancery Oct. 15, 2004).

custody or visitation as a person with a legitimate interest in the child, the court jeopardized the ability of homosexual Virginians to remain in the lives of children when this is in the child's best interest. Second, by ignoring out-of-state custody determinations with regard to same-sex unions, the court's decision makes Virginia an attractive legal destination for any unmarried persons unhappy with their initial allocation of parental rights.<sup>120</sup> This will cause time-consuming relitigation in Virginia courts, and potentially the setting aside of lawful custody determinations.

#### 4. The Amendment's Extension of Child Custody Restrictions to Heterosexuals

The Amendment could affect heterosexual couples involved in custody and visitation in the same way that current law has been interpreted to affect same-sex couples. Specifically, members of unmarried couples who are not the biological parent of the child in question could be stripped of their child custody and visitation rights. Moreover, because the language of the Amendment is broader than the statutory restrictions with respect to same-sex couples, same-sex couples could be placed at an even greater risk of losing their rights.

In re Robin N.<sup>121</sup> illustrates the type of relationship threatened by the proposed Amendment. In this case, Gary, a long time partner to the mother of a child, Robin, was present when Robin was born and cared for her throughout her life. After the relationship between the mother and Gary ended, a court granted Gary visitation rights despite the fact that he was neither married to the mother nor related in any way to Robin. When the mother appealed this decision,

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<sup>120</sup> Joseph R. Price, General Counsel of Equality Virginia, noted, "Virginia could become the Las Vegas of gay divorces. You would simply pack up and move to Virginia, and your partner would have no rights, according to this Virginia law." S. Mitra Kalita, Vt. Same-Sex Union Null in Va., Judge Says, WASH. POST, Aug. 25, 2004, at B1.

<sup>121</sup> 7 Cal.App.4th 1140 (1992).

seeking to deny Gary his visitation rights, the court refused, stating that Gary is the child's "de facto father," has "always . . . been Robin's psychological father," and that "[i]t is imperative for Robin's emotional well being and growth that Gary . . . have continuing, regular and significant contact with Robin."<sup>122</sup>

Relationships between de facto parents like Gary and children like Robin, both inside and outside Virginia, are threatened by the Amendment. The court in Miller-Jenkins used the statutory prohibition on civil unions to deny any custody or visitation rights to an individual without any inquiry into whether that person has a legitimate interest in the child based on her relationship with that child. Similarly, a custodial parent could attempt to use the Amendment to deny custody or visitation rights to a former live-in partner who is not the biological parent of the child. Indeed, eligibility to petition for custody or visitation rights is seemingly a "legal status." Such eligibility for an unmarried, unrelated caregiver could be seen as a legal status "to which is assigned the rights, benefits, obligations, qualities, or effects of marriage." Similarly, one could argue that those who attempt to assert their eligibility for custody or visitation based on having lived as part of an unmarried family unit "intend[] to approximate the design, qualities, significance or effects of marriage." Thus, litigants could argue that to award custody or visitation rights to such an individual would be an impermissible recognition of this legal status and a violation of Virginia's Constitution.

In addition, the rights of members of same-sex couples in Virginia could be restricted to a greater extent than they already are. Under current law, if a same-sex couple is composed of one biological parent and one non-biological parent and the couple is not joined by any civil union,

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<sup>122</sup> Id. at 1143.

partnership, or other arrangement expressly claiming to bestow the privileges or obligations of marriage, the non-biological parent might fall outside the same-sex union restrictions as interpreted by the Miller-Jenkins court and maintain his or her rights as a person with a legitimate interest in the child. Under the Amendment's broader language, the non-biological parent would be susceptible to the same restrictions that threaten heterosexual individuals like Gary from In re Robin N.

The Amendment also threatens to undermine custody and visitation determinations entered elsewhere. Just as the court in Miller-Jenkins used the current restrictions on same-sex relationships to sidestep the PKPA and the UCCJEA, so could a court use the language of the Amendment to circumvent these statutes in the context of unmarried relationships more generally. Like Virginia, many other states have statutes allowing non-parents to file for custody of or visitation with a child. For example, Minnesota allows any individual with whom a child has lived for two or more years to petition for "reasonable visitation rights to the child."<sup>123</sup> If a court in Minnesota were to award visitation rights to a person in Gary's situation, the mother of the child could move to Virginia and challenge this custody determination, arguing that its enforcement by a Virginia court would violate the state constitution.

In summary, passage of the Amendment would threaten the custodial and visitation rights of a broader class of unmarried individuals by expanding the effects of the same-sex union restrictions of current law. Individuals whose relationship with a child grew out of a non-marital relationship with a child's biological parent could be barred from petitioning for custody or visitation even when they are an important part of that child's life and when the biological parent

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<sup>123</sup> M.S.A. § 257C.08 Subd. 4.

is unfit to care for the child. This could harm children, as their best interests would take a back seat to the nature of the relationship between two potential caretakers. Moreover, unsatisfied disputants in other states may come to Virginia, uprooting their families to the detriment of their children, hoping that Virginia courts will vacate prior court determinations. Thus, the Amendment likely will lead to increased litigation and could jeopardize the best interests of children by eliminating the rights of deserving caregivers.

#### IV. POTENTIAL IMPACT ON DOMESTIC VIOLENCE LAWS

If the Amendment is approved, the application of the Commonwealth's family abuse or domestic violence laws to unmarried couples likely will be challenged by alleged or convicted abusers. Currently, cohabitants and their children are protected under family abuse provisions.<sup>124</sup> Such protection for cohabitants may be barred, if the Amendment passes, as an unconstitutional recognition of a legal status for unmarried persons that intends to approximate the attributes or effects of marriage. Regardless of how the courts ultimately resolve the issue, Virginians likely will experience a period of disruption during which it is not clear whether the protections of the family abuse laws are available to unmarried cohabitants.

##### A. Virginia's Domestic Abuse Law

Virginia employs specific statutes to combat domestic abuse. These provisions apply when a person subjects a "family or household member" to abuse, or the threat of abuse.<sup>125</sup>

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<sup>124</sup> The issue of whether Virginia's domestic abuse statutes apply to same-sex relationships has not been decided by a Commonwealth court in a published decision. In 1994, however, the Attorney General of Virginia issued an advisory opinion stating that cohabitation under domestic abuse law extended only to unrelated persons of the opposite sex that were "living as husband and wife." 1994 Op. Att'y Gen. Va. 60, at \*2 (July 22, 1994). The Attorney General's opinion is entitled to deference by the courts but is not controlling. See County Board of Arlington v. Brown, 329 S.E.2d 468, 472 (Va. 1985)

<sup>125</sup> E.g. Va. Code Ann. §§ 16.1-278.14, 18.2-57.2.

Persons suspected of perpetrating such abuse may be restricted by mandatory emergency protective orders that prohibit contact with family or household members, and required to vacate a shared dwelling (protections that are not available to assault and battery victims).<sup>126</sup> Law enforcement officers are empowered to arrest, upon probable cause and without warrant, persons that appear to have committed acts of domestic violence or violated protective orders.<sup>127</sup> In some cases, warrantless arrest is mandatory.<sup>128</sup> Persons charged with domestic violence offenses must be fingerprinted, may be subject to probation and treatment, and cannot have the charges expunged.<sup>129</sup> Criminal defendants may also be required to pay for the crisis shelter care of family or household members.<sup>130</sup> Furthermore, criminal penalties for assault and battery are more severe when committed against family or household members.<sup>131</sup>

For the purposes of these provisions, the General Assembly defined a “family or household member” of a person as, *inter alia*, “any individual who cohabits or who, within the previous 12 months, cohabitated with the person, and any children of either of them” residing in the person’s home.<sup>132</sup> The statute does not define “cohabit.”

The Supreme Court of Virginia has not defined cohabitation under domestic abuse law, but has examined the term in other contexts.<sup>133</sup> In Schweider v. Schweider,<sup>134</sup> the court resolved

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<sup>126</sup> Id. § 16.1-253.4(B).

<sup>127</sup> Id. § 19.2-81.3.

<sup>128</sup> Id. § 19.2-81.3(B).

<sup>129</sup> Id. § 18.2-57.3.

<sup>130</sup> Id. § 16.1-278.14

<sup>131</sup> Id. § 18.2-57.2.

<sup>132</sup> Id. § 16.1-228.

<sup>133</sup> Schweider v. Schweider, 415 S.E.2d 135, 137 (Va. 1992); Petachenko v. Petachenko, 350 S.E.2d 600, 602 (Va. 1986); see also Frey v. Frey, 416 S.E.2d 40, 43 (Va. Ct. App. 1992).

<sup>134</sup> 415 S.E.2d 135 (Va. 1992).

a dispute over a property settlement agreement under which a husband's payments to his wife would terminate if she remarried.<sup>135</sup> The agreement defined "remarriage" to include "cohabitation with a male," with the appearance of marriage, for more than thirty days.<sup>136</sup> The wife began living continuously with another man, and sued the husband for breach when he terminated the payments.<sup>137</sup>

The court defined "cohabit" to mean living "together in the same house as married persons live together, or in the manner of husband and wife."<sup>138</sup> Sexual relations and the "continuing condition" of living together with shared responsibilities were factors for consideration.<sup>139</sup> Under this standard, the court reversed a lower ruling and found that the couple was cohabitating as a matter of law.<sup>140</sup>

In 2000, the Court of Appeals interpreted heterosexual cohabitation in the domestic abuse context as a matter of first impression. In Rickman v. Commonwealth,<sup>141</sup> a defendant was convicted for assault and battery of a family or household member under § 18.2-57.2.<sup>142</sup>

To define cohabitation under § 16.1-228, the court took guidance from Schweider but noted that the term has different meanings in different contexts.<sup>143</sup> Domestic abuse was unique

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<sup>135</sup> Id. at 136.

<sup>136</sup> Id.

<sup>137</sup> Id.

<sup>138</sup> Id. at 137 (citation omitted). This definition was cited with approval by the Virginia Attorney General in his 1994 opinion: "In my opinion, therefore, the use of 'cohabits' indicates a legislative intent that the definitions of 'family or household member' in §§ 16.1-228 and 18.2-57.2 encompass unrelated persons in the same household only if they are of opposite sexes and are living as husband and wife." 1994 Op.Att'y Gen. Va. 60 (July 22, 1994).

<sup>139</sup> Id.

<sup>140</sup> Id.

<sup>141</sup> 535 S.E.2d 187, 190 (Va. Ct. App. 2000).

<sup>142</sup> Id. at 188.

in that it “arises out of the nature of the relationship itself, rather than the exact living circumstances of the victim and perpetrator.”<sup>144</sup>

The Rickman court adopted a totality-of-the-circumstances test to determine the nature of the relationship under consideration.<sup>145</sup> The essential elements of cohabitation were (1) the sharing of “familial or financial responsibilities,” and (2) “consortium.”<sup>146</sup> Factors such as the provision of household necessities and the commingling of assets informed the first element, and factors such as mutual respect, fidelity, comfort, and conjugal relations informed the second.<sup>147</sup> Under this approach, the court upheld the domestic violence conviction, finding that the defendant was a member of the victim’s household at the time of the assault.<sup>148</sup>

Although the exact contours of cohabitation under domestic abuse statutes may not be firmly settled, it is clear that Virginia law attaches legal significance to certain unmarried heterosexual relationships with certain attributes of marriage. The Commonwealth protects

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Footnote continued from previous page

<sup>143</sup> Id. at 190 (citing State v. Yaden, 692 N.E.2d 1097, 1100 (Ohio Ct. App. 1997); Elizabeth Trainor, Annotation, ‘Cohabitation’ For the Purposes of Domestic Violence Statutes, 71 A.L.R. 5th 285, 294 (1999)).

<sup>144</sup> Id. at 190-91 (quoting State v. Williams, 683 N.E.2d 1126, 1129 (Ohio 1997) (interpreting the inclusion of cohabitation under Ohio Rev. Code. Ann. 2919.25 and related domestic violence provisions)).

<sup>145</sup> Id. at 191.

<sup>146</sup> Id.

<sup>147</sup> Id. (citing Williams, 683 N.E.2d at 1130).

<sup>148</sup> Id. at 191-92. Subsequent unpublished decisions viewed the Rickman approach to heterosexual cohabitation favorably. See Cowell v. Commonwealth, Record No. 3198-03-1, 2005 WL 221238, at \*1-3 (Va. Ct. App. Feb. 1, 2005) (ruling lower court did not abuse its discretion in rejecting a jury instruction that violated the “clear mandate of Rickman” by focusing narrowly on specific factors); Harris v. Commonwealth, Record No. 2818-01-4, 2002 WL 31300941, at \*2 (Va. Ct. App. Oct. 15, 2002) (holding evidence sufficient under Rickman for jury to find cohabitation where assailant and victim maintained a long-term relationship and lived together in a motel room). Rickman thus has support, but remains subject to Virginia Supreme Court review.

cohabitating persons, and their children, from domestic abusers. The Amendment may render such protection unconstitutional.

B. Challenges to the Domestic Violence Laws

1. Relevant Language of the Amendment

Sentences two and three of the Amendment contain language that may impact Virginia's family abuse law. The second sentence is virtually identical to language in the Ohio Constitution under which domestic violence laws have been struck down, and this language is considered first. The third sentence is unique to the Virginia proposal, and its potential effect is considered subsequently.

2. Potential Impact of the Amendment's Second Sentence

The second sentence of the Amendment provides that the "Commonwealth and its political subdivisions shall not create or *recognize a legal status* for relationships of unmarried individuals that *intends to approximate* the design, qualities, significance, or effects of marriage." (emphasis added). Ohio's amendment is virtually identical.<sup>149</sup> Ohio's domestic violence statute also mirrors Virginia's in applying to harm caused to "family or household members," including those "cohabitating" with the assailant.<sup>150</sup> Numerous challenges to the constitutionality of Ohio's domestic violence statute have been brought under the Ohio amendment. Seven intermediate appellate courts (out of twelve) have now ruled on such challenges, with two invalidating the statute and five upholding it. The Ohio courts' reasoning is

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<sup>149</sup> In relevant part, the Ohio amendment says that the "state and its political subdivisions shall not create or recognize a legal status for relationships of un-married individuals that intends to approximate the design, qualities, significance or effect of marriage." Ohio Const. art. XV, § 11.

<sup>150</sup> Ohio Rev. Code Ann. § 2919.25 (A), (F).

widely divergent, thus signaling the type of confusion that may ensue in Virginia if its much broader Amendment is enacted.

In State v. Ward,<sup>151</sup> the court upheld the trial judge's dismissal of a charge against an alleged abuser, holding that the statute impermissibly provides the protection afforded to a spouse under the domestic violence laws to someone living in a relationship like marriage. While noting a strong presumption in the law that statutes should be construed as being constitutional, the court argued that this rule did not require the court to interpret the Ohio Constitution in a way that would render the statute constitutional. The Constitution is the "supreme law of the land" and it not appropriate to construe it differentially based on the statute at issue.<sup>152</sup> The court also rejected the argument that a statute must give all the effects of marriage to a quasi-marital relationship to run afoul of the amendment. The purpose of the amendment was to prevent legal recognition of "quasi-marital relationships," and statutes, common law ruling and rulemaking that confer rights based on that status violate that purpose. If the protection were given to all persons sharing residential quarters, the statute would be permissible, the court said.<sup>153</sup>

In State v. McKinley,<sup>154</sup> the court reversed the domestic violence conviction of a man who physically abused his girlfriend, with whom he was concededly "cohabitating."<sup>155</sup> The court held that cohabitation is a legal status intended to approximate marriage and by extending

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<sup>151</sup> No. 2005-CA-75, 2006 WL 758540 (Ohio Ct. App. Mar. 24, 2006).

<sup>152</sup> Id. at \*2.

<sup>153</sup> Id. at \*5.

<sup>154</sup> No. 8-05-14, 2006 WL 1381635, at \*6 (Ohio Ct. App. May 22, 2006).

<sup>155</sup> Id. at \* 8.

the protections of the statute to cohabitants, the statute impermissibly recognized that legal status. The court reasoned that a “legal status defines the rights available under the law” to a person falling within a category defined by certain facts.<sup>156</sup> The state could not constitutionally extend protections to unmarried persons based on their categorization as cohabitants.<sup>157</sup> Judge Shaw, concurring in the result, said that by criminalizing an assault by a “person living as a spouse,” the legislature *created and recognized* a legal status in direct conflict with the Amendment.<sup>158</sup>

Five other intermediate appellate courts have upheld Ohio’s domestic violence law as constitutional, on a variety of different bases. In State v. Adams,<sup>159</sup> the court looked beyond the text of the amendment to its alleged purpose of prohibiting same-sex marriage. The court noted that Ohio’s domestic violence laws had been in effect since 1979, and that, in interpreting constitutional amendments, Ohio courts presume the body enacting the amendment was aware of existing statutes and their interpretation. “Therefore, had the proponents intended to alter Ohio’s domestic violence law, they would have drafted the marriage Amendment accordingly.”<sup>160</sup> In State v. Rexroad,<sup>161</sup> the court simply held that the appellant had not offered the evidence required to sustain an “as applied” challenge to the statute, and held that a facial challenge must fail because the statute clearly was not infirm as applied to spouses, children and people related by

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<sup>156</sup> Id. at \*7.

<sup>157</sup> Id. at \*8-10.

<sup>158</sup> Id. at \*10.

<sup>159</sup> No.2005CA00103, 2005 WL 3196850 (Ohio Ct. App. Nov. 28, 2005).

<sup>160</sup> Id. at \*3 (internal citations omitted).

<sup>161</sup> No. 05-CO-36, 2005 WL 3489726 (Ohio Ct. App. Dec. 13, 2005).

consanguinity. In State v. Nixon,<sup>162</sup> the court found that the purpose of the statute was to prohibit same-sex marriage, and that there was no intent to alter the domestic violence law. Finally, in State v. Rodgers,<sup>163</sup> the court affirmed the lower court's conviction noting the strong presumption of constitutionality conferred on statutes, and holding that the appellant had not established that the statute was unconstitutional beyond a reasonable doubt.

Finally, in State v. Carswell,<sup>164</sup> the court reversed the trial court's invalidation of the statute finding that the amendment did not expressly overrule the domestic violence laws as applied to unmarried cohabitants. The court also employed the definition of "status" in Webster's 3d Dictionary: "the condition . . . of a person that determines the nature of his legal personality, his legal capacities, and the nature of the legal relations to the state or other persons."<sup>165</sup> Because the statute did not attempt to determine the overall nature of the legal relationships or legal capacities cohabitants have, it did not intend to approximate marriage.<sup>166</sup> In April 2006, the Ohio Supreme Court agreed to take up Carswell's appeal of the decision.<sup>167</sup> Interestingly, the self-described "driving force" behind efforts to approve the Ohio amendment, Citizens for Community Values,<sup>168</sup> recently filed a brief urging the court to invalidate Ohio's

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<sup>162</sup> 845 N.E.2d 544 (Ohio Ct. App. 2006).

<sup>163</sup> No. 05AP-446, 2006 WL 827411 (Ohio Ct. App. Mar. 30, 2006).

<sup>164</sup> No. CA2005-04-047, 2005 WL 3358882 (Ohio Ct. App. Dec. 12, 2005), appeal docketed, No. 2006-0151 (Ohio Jan. 24, 2006).

<sup>165</sup> Id. at \*2.

<sup>166</sup> Id. at \*3.

<sup>167</sup> The defendant appealed, and on April 26, 2006, the Ohio Supreme Court agreed to hear the case. The proceeding currently is in the briefing phase. Decision, State v. Carswell, No. 2006-0151 (Ohio Apr. 26, 2006).

<sup>168</sup> Citizens for Community Values is an affiliate of the advocacy group, Focus on the Family. See Br. Amicus Curiae of Citizens for Community Values, State v. Carswell, Case No. 2006-0151 (filed June 19, 2006)

domestic violence laws as applied to unmarried cohabitants.<sup>169</sup> The group argues that by providing protections to those in a relationship that approximates marriage, the state impermissibly recognized a legal status for such relationships.<sup>170</sup> Their position is in stark contrast to the position the group took during the campaign to win approval of the amendment, when the Executive Director of CCV referred to concerns that the amendment would affect the domestic violence laws as “absolutely absurd.”<sup>171</sup>

The Ohio litigation<sup>172</sup> is indicative of the extent of litigation that may ensue if Virginia’s even broader amendment is approved, and of the risk that Virginia’s domestic violence laws may be invalidated as applied to cohabitants. The Ohio amendment and the second sentence of the Virginia proposal employ the same operative language, and the two states have statutes designed to protect cohabitating victims of domestic violence. Virginia should therefore expect similar challenges. Even if the Ohio Supreme Court ultimately finds the Ohio statute to be compatible with that state’s marriage amendment, there is no guarantee that Virginia would follow suit.

### 3. Potential Impact of the Amendment’s Third Sentence

The third sentence of the Amendment does not appear in the Ohio amendment. It says that the Commonwealth and its political subdivisions shall not “create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations,

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<sup>169</sup> See id.

<sup>170</sup> Id. at 6-10.

<sup>171</sup> Marc Spindelman, The Honeymoon’s Over: Cultural Conservatives Stumble Legally in Campaign to Ban Same-Sex Marriage, LegalTimes, June 12, 2006.

<sup>172</sup> Arkansas, Kentucky, Louisiana, and Texas adopted constitutional marriage amendments that contain analogous “legal status” language, but, to date, there does not appear to be any reported litigation of related domestic abuse issues in those jurisdictions. See Ark. Const. amend. 83, § 2; Ky. Const. § 233A; La. Const. art. XII, § 15; Tex. Const. art. I, § 32.

qualities, or effects of marriage.” Challengers to the domestic abuse provisions could argue that the additional sentence expands the application of the Virginia proposal beyond that of Ohio’s amendment because the provision does not require a finding of intent to approximate the attributes or effects of marriage. If a challenger could establish that protection under domestic abuse law is a right, benefit, or effect of marriage, and that the statute recognizes a “legal status” for cohabitants, application of the law to unmarried persons would be unconstitutional regardless of intent because it assigns the benefits of marriage to unmarried victims. Thus, the third sentence would give litigants grounds on which to challenge Virginia’s domestic abuse law that are unavailable to litigants in Ohio.

#### V. POTENTIAL IMPACT ON ESTATE PLANNING ARRANGEMENTS

Estate planning could be impacted significantly by the Amendment. Broadly stated, estate planning entails “setting goals and objectives and developing strategies for disposing of assets and providing for family members, friends, and charities at death.”<sup>173</sup> While many assume that estate planning involves only death, comprehensive estate planning touches far more, as its goals, objectives, and strategies affect the financial planning process during life.<sup>174</sup> Estate planning can include the establishment of living trusts, the execution of a durable power of attorney, and the formation of wills directing the disposition of property.

A key underpinning of estate planning is freedom. In virtually all states, an individual is entirely free to order his or her affairs in the way he or she desires without government interference. With regard to property, “the property owner decides what to do with the property -

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<sup>173</sup> CCH FINANCIAL AND ESTATE PLANNING GUIDE ¶ 101 (13th ed. 2001).

<sup>174</sup> Id.

whether to keep it, sell it, exchange it, or give it away.”<sup>175</sup> With regard to the individual personally, she is free to determine how to structure her financial and business affairs as well as determine who can handle those affairs in the event of her incapacity.<sup>176</sup>

The Amendment could restrict the freedoms unmarried Virginia residents currently enjoy with respect to estate planning. Unmarried couples are particularly vulnerable to the Amendment’s potential contraction of private rights, given their increased need to rely upon the legal instruments of estate planning to order their personal affairs and provide some of the benefits that married couples automatically receive as a result of their married status. At present, there are few laws that govern couples living together outside of marriage and in most states, unmarried couples have no automatic legal protection.<sup>177</sup> By contrast, there are an estimated 1,138 federal rights associated with civil marriage that are accordingly unavailable to couples who either choose not to marry or are prevented from doing so due to the prohibition on same-sex marriage.<sup>178</sup> Because of this disparity in treatment, unmarried couples often enter into legal arrangements that “create rights and responsibilities as a matter of contract between the person executing the documents and designated others,” usually, that individual’s partner.<sup>179</sup> These arrangements inevitably are personal, addressing life-planning issues that touch upon the most personal of concerns and wishes, and do everything from defining property rights to bestowing

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<sup>175</sup> Id.

<sup>176</sup> Id. ¶ 2505.07.

<sup>177</sup> Id. ¶ 101.

<sup>178</sup> See 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, 511 (2003).

<sup>179</sup> Ellen D.B. Riggle et al., The Execution of Legal Documents by Sexual Minority Individuals, 11 PSYCHOL. PUB. POL’Y & L. 138, 139 (2005).

hospital visitation privileges, as discussed below.<sup>180</sup> Estate planning has therefore become the way that unmarried committed couples - same sex and heterosexual, young and old - smartly and effectively manage their personal lives together.

The Amendment could change this by casting uncertainty over estate planning by unmarried couples. Individuals who have formed agreements with their partners to have some of the benefits and stability of marriage could see those currently lawful arrangements invalidated or rendered void. To understand how estate planning could be impacted by the Amendment, it is necessary to understand the tools used by unmarried couples to establish rights for themselves and the current treatment of these agreements under Virginia law.

A. Law Governing Wills and Trusts

A will is a document of conveyance that specifies who receives property when an individual dies. Generally, an individual can use a will to devise property to whomever he or she chooses and a court will uphold such a conveyance, no matter how unconventional.<sup>181</sup> In the absence of a will, inheritance rights are established by state statutes governing intestate succession, meaning that a decedent's estate passes to relatives in the precise order set forth in the statute.<sup>182</sup> For a member of a married couple without a will, the decedent spouse's property passes to the surviving spouse. But this does not occur for a member of an unmarried couple without a will because intestacy laws currently only recognize marital, blood, or adoptive

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<sup>180</sup> Joan M. Burda, ESTATE PLANNING FOR SAME-SEX COUPLES 19-28 (ABA 2004).

<sup>181</sup> Robbennolt, supra n. 62, at 423 (noting that “[t]he system of property succession in the United States is based on the premise that individuals ought to be able to freely dispose of their property”).

<sup>182</sup> Cohon, supra n.178, at 508. In Virginia, this results in one's property going to one's “next of kin,” which is first a surviving spouse, followed by children, parents and other related persons as applicable. Virginia Intestate Succession Laws, CCH FINANCIAL PLANNING TOOLKIT, [http://www.finance.cch.com/pops/c50s10d190\\_VA.asp](http://www.finance.cch.com/pops/c50s10d190_VA.asp).

relationships in defining the heirs of the person who dies intestate.<sup>183</sup> Thus, while it is important for members of married couples to have a will to best ensure that their property is distributed in accordance with their wishes, it is crucial for unmarried committed partners.<sup>184</sup> Under current Virginia law, without a will, the surviving partner likely will have no claim to inherit the decedent partner's assets.<sup>185</sup>

Like wills, trusts are instruments of conveyance that can be used by members of unmarried couples as an effective way to distribute property to a partner, either during life or upon death. Commonly used trusts include testamentary trusts that come into effect upon the death of the trustor<sup>186</sup> and revocable living trusts that function by placing property of the trustor in an account that is administered by that person until his or her death, at which time the named trustee takes control of the assets in the trust and manages them for the benefit of the named beneficiaries.<sup>187</sup> As with wills, a trustor is entirely free to choose the beneficiary of the trust he or she has created. For example, such beneficiaries can be strangers, organizations or even pets.<sup>188</sup>

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<sup>183</sup> Robbennolt, supra n.62, at 424.

<sup>184</sup> As Jennifer Robbennolt notes in her study on the legal protections available for unmarried committed partners, “[i]n the absence of state law provisions to include unmarried committed partners in intestacy statutes, committed partners must execute wills to protect their testamentary preferences if those preferences include their partners.” Id. at 424.

<sup>185</sup> Cohon, supra n.178, at 508.

<sup>186</sup> Burda, supra n.180, at 40.

<sup>187</sup> Riggle, supra n. 179, at 139.

<sup>188</sup> A Virginia court upheld a testamentary trust providing that “[a]ll dogs and cats or other living pets owned and maintained by me at my residence at my time of my death shall be kept during the period of the...trust fund at said residence for the duration of their natural lives, and said residence, including the contents thereof, shall be maintained in substantially the same manner as it was maintained at the time of my death....” In re Estate of Raab, Case No. 96-369, 1998 WL 972301, at \*2 (Va. Cir. Ct. Aug. 19, 1998)

Currently, those executing valid wills and trusts in Virginia generally may rest assured that their wishes, as expressed in those documents, will be honored if that conveyance is later challenged in court. So long as wills and trusts do not create unreasonable restraints on alienation or offend public policy, the Virginia courts generally will uphold them.<sup>189</sup> Further, so long as the individual creating the will or trust “was mentally capable of understanding the disposition which he was making of his property, and acted freely, it is immaterial to whom he gives his property.”<sup>190</sup> Virginia courts are guided by the principle that “[i]t is not the policy of the law to seek grounds for avoiding devises and bequests.”<sup>191</sup> Rather, as the Supreme Court of Virginia stated 80 years ago:

All of the refinements of law must yield to the power of the testator to dispose of his property as he desires. When this intention, which is the guiding star, is ascertained and can be made effective, the quest is ended and all other rules become immaterial.<sup>192</sup>

Moreover in Baliles v. Miller,<sup>193</sup> the Supreme Court of Virginia articulated the fundamental rule that “[i]f the language of a will is plain and ambiguous, extrinsic evidence is never admissible to contradict or alter its meaning.” Thus, under current Virginia law, an individual executing a will or trust is afforded wide latitude to dispose of his property in whatever manner he chooses, and in the absence of ambiguity, courts will not inquire into the intent motivating the disposition.<sup>194</sup>

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<sup>189</sup> See 1-4 MICHIE’S JURISPRUDENCE OF VIRGINIA & WEST VIRGINIA, Estates § 39 (Matthew Bender 2004).

<sup>190</sup> Id.

<sup>191</sup> Id. § 75.

<sup>192</sup> Wornom v. Hampton Normal & Agric. Inst., 132 S.E. 344, 347 (Va.1926).

<sup>193</sup> 340 S.E.2d 805 (Va. 1986) (citation omitted).

<sup>194</sup> See Michie on Estates, supra n.189 § 39.

B. Potential Impact of Amendment

As the preceding discussion indicates, Virginia estate planning law is well-settled and allows individuals freely to manage their estates with minimal restrictions placed upon them by the Commonwealth. This treatment does not appear to have been impacted by the 2004 passage of Section 20-45.3, which prohibits “[a] civil union, partnership contract or other arrangement between persons of the same sex *purporting to bestow the privileges or obligations of marriage,*” and renders all contract rights created by any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state void and unenforceable.”<sup>195</sup> No Virginia court has interpreted this provision to invalidate a will or trust. Moreover, such estate planning instruments are not contracts, but are instead instruments of conveyance governed by the general law of gratuitous transfers.<sup>196</sup> Thus, the statute has not had the effect of unsettling the law governing trusts and estates.

The passage of the Amendment, however, could unsettle Virginia estate planning in a number of ways. First, the Amendment would create an atmosphere of uncertainty and suspicion regarding wills and trusts entered into by members of unmarried couples, which could result in these agreements being challenged in court. Estate planning documents and other private contracts entered into by unmarried couples are sometimes challenged by disgruntled blood relatives of the individual executing the document.<sup>197</sup> Even if a court ultimately were to uphold a challenged agreement, the parties would have to contend with the painful prospect of a protracted lawsuit. Not only is this time-consuming and expensive, but it is inevitably an

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<sup>195</sup> Va. Code Ann. § 20-45.3 (2006).

<sup>196</sup> See Restatement (Third) of Property (Wills & Donative Transfers) § 10.01 (2003).

<sup>197</sup> Adam Chase, Tax Planning for Same-Sex Couples, 72 DENV. U.L. REV. 359, 394-395 (1995).

unwanted intrusion into one's personal life at a particularly vulnerable time.<sup>198</sup> For the surviving member of a same-sex couple, such challenges mean being "faced with the prospect of losing everything simply because someone does not like the gender of the person with whom one sleeps."<sup>199</sup>

More worrisome, however, is the real risk that courts would no longer be able to uphold otherwise valid wills and trusts because the Amendment would render them unenforceable. While that outcome would be a far-reaching one, it is not an altogether far-fetched one. If a court held that a will or trust provided a legal status (1) for relationships of unmarried individuals that intends to approximate the designs, qualities, significance, or effects of marriage, or (2) to which is *assigned* the rights, benefits, obligations, qualities, or effects of marriage (regardless of intent), then the will or trust could be unenforceable under the Amendment.

As discussed above, key term is "legal status," which is undefined in the Amendment and in Virginia law, but defined in Black Law's Dictionary as any group of rights, duties or liabilities conferred by law.<sup>200</sup> An Ohio court that have grappled with this issue in interpreting that state's marriage amendment<sup>201</sup> has adopted a broad interpretation of the meaning of "legal status" as defining "rights available under the law to someone falling within [a] category."<sup>202</sup>

Naming an individual as a beneficiary of a will or trust gives that individual certain rights under the law -- specifically, the right to inherit property. A spouse has this right as a matter of

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<sup>198</sup> CCH FINANCIAL AND ESTATE PLANNING GUIDE ¶ 625.

<sup>199</sup> Burda, supra n.180, at 53.

<sup>200</sup> See supra Section II.A.

<sup>201</sup> Ohio's amendment provides: "This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." OHIO CONST., Art. XV, § 11 (2004).

<sup>202</sup> State v. McKinley, No. 8-05-14, 2006 WL 1381635, at \*6 (Ohio Ct. App. May 22, 2006).

intestacy laws. Thus, the question for the courts will be whether the Amendment prohibits conveyances intended, expressly or in fact, to convey rights provided through marriage to a beneficiary falling into a particular category -- unmarried partner of the decedent. It is possible that a Virginia court could interpret naming one's partner the beneficiary of one's estate as conferring upon the beneficiary a legal status that intends to approximate the design, qualities, significance, or effects of marriage -- particularly if the bequest recites the couple's long history together and expresses an intent to bestow benefits based on that relationship.

It is also possible that a court could bypass the "intent" component of the second sentence of the Amendment and, pursuant to the third sentence, conclude that merely being named the beneficiary of a partner's estate is a legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage. If a court were to arrive at either conclusion in the context of a will contest, it could be precluded from recognizing the named beneficiary's inheritance rights under the will or trust.<sup>203</sup> Under such a scenario, any will or trust bestowing rights upon an individual in an unmarried couple could not be upheld by Virginia courts.

Moreover, while it is clear, as discussed above, that extrinsic evidence is not admissible to contradict or alter the meaning of an unambiguous will or trust, it is also clear that extrinsic evidence is admissible when ambiguities exist. In Baliles v. Miller, in the context of determining the proper recipient of a testamentary bequest, the court enumerated the extrinsic facts and circumstances to which a court may look when called upon to discern a testator's intent: the state of the testator's family and property, the testator's relations to persons and things, the

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<sup>203</sup> See supra Section II.A (discussing the legal meaning of the term "recognize").

testator's opinions and beliefs, the testator's hopes and fears, and the testator's habits of thought and of language.<sup>204</sup>

Consequently, when a Virginia court is presented with an ambiguous provision in a will, it is given an opportunity to inquire into the testator's relationships, opinions and beliefs. If, as a result of such inquiry, the court were to conclude that the testator's intent with respect to the will was to create for her partner a legal status that intends to approximate the design, qualities, significance, or effects of marriage, it could invalidate the will on that basis. Thus, the Amendment appears to create a new "intent" test for courts called upon to interpret wills and trusts. Whereas the traditional inquiry into intent ends with a determination as to which property the testator wished to convey, and to which beneficiaries she wished to convey it, the Amendment could result in courts inquiring into the testator's motivation in disposing of her estate in a particular manner.

Finally, it is possible that the Amendment would give Virginia courts a basis for voiding wills and trusts on public policy grounds. As noted above, while courts typically strive to effectuate the intent of the testator or trustor, provisions that impose certain conditions and restrictions have been held void as against public policy. Examples of such provisions are those that condition a bequest on the separation or divorce of the prospective beneficiary,<sup>205</sup> those that condition a bequest on a prospective beneficiary remaining unmarried,<sup>206</sup> and, in some cases, those that require a prospective beneficiary to adhere to the tenets of a particular religion.<sup>207</sup> As

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<sup>204</sup> 340 S.E.2d at 810-11 (citing C. Graves, Extrinsic Evidence in Respect to Written Instruments, 14 VA. L. REG. 913 (1909)).

<sup>205</sup> See Restatement (Third) of Property (Wills & Donative Transfers) § 7.1 (2003).

<sup>206</sup> See id. § 6.1.

<sup>207</sup> See id. § 8.1.

discussed below in the context of employee benefits, it is conceivable that a court could invoke public policy as a basis for voiding one or more provisions of a will or trust naming the testator's or trustor's unmarried partner as beneficiary.

In summary, rather than upholding the testator's or trustor's decisions for his estate as Virginia law now does, the Amendment could result in those decisions being ignored. The likelihood of this would increase if the testator expressly referred to his partner as "partner," "domestic partner," "companion," or any other term indicating that the two had a conjugal relationship and evincing an intent to make the bequest based on this relationship. In this way, the Amendment could have peculiar results, such as invalidating wills and trusts naming an unmarried partner as a beneficiary, but upholding identical conveyances that name a cat or dog as the primary beneficiary.<sup>208</sup>

## VI. POTENTIAL IMPACT ON MEDICAL POWERS OF ATTORNEY AND OTHER END-OF-LIFE DECISIONS

Like wills and trusts, a power of attorney is a planning tool that can provide security for unmarried committed partners. A power of attorney is "a written instrument by which one person appoints another as his agent or attorney-in-fact and confers upon him authority to perform certain specified acts."<sup>209</sup> The individual executing the power of attorney is known as the principal. The authority granted by a power of attorney usually falls within one of two broad categories: the authority to make decisions relating to the principal's healthcare and the authority to make decisions relating to the principal's financial matters.

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<sup>208</sup> See *supra* n.188.

<sup>209</sup> 1-16 MICHIE'S JURISPRUDENCE OF VIRIGINIA & WEST VIRGINIA, ESTATES § 2 (Matthew Bender 2004).

A comprehensive healthcare power of attorney typically includes a living will (also known as an advance medical directive) in which the principal specifies the types of medical treatment he does and does not wish to have performed should he become incapacitated and unable to communicate his wishes to healthcare providers. A healthcare power of attorney is a particularly useful tool for unmarried couples, because it can provide legal certainty with respect to precisely who is authorized to make decisions on behalf of the incapacitated individual, a frequent area of disagreement between unmarried couples and their blood relatives.<sup>210</sup> A healthcare power of attorney containing an advance medical directive is even more useful, because, in addition to appointing an agent, it sets forth guidelines for that agent to follow.

In addition to provisions relating to medical treatment, comprehensive healthcare powers of attorney contain provisions relating to the management of the incapacitated individual's personal property during the period of incapacity, disposition of remains upon the death of the incapacitated person, arrangement of funeral and memorial services and organ donation. It is particularly important for a member of an unmarried couple to execute a healthcare power of attorney conferring upon his or her partner the authority to handle all of these matters, because, in the absence of the power of attorney, the individual's next of kin will have that authority. In addition, it is important that the power of attorney expressly address hospital visitation rights, because most hospitals have policies that, in the absence of a power of attorney, limit visitation rights to immediate family only.<sup>211</sup> Because a non-married partner is not legally recognized as family and may therefore be denied the opportunity to make healthcare decisions for his or her

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<sup>210</sup> Gwendolyn L. Snodgrass, Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoption Among Gay and Lesbian Partners, 36 BRANDEIS J. FAM. L. 75, 78 (1997 - 1998).

<sup>211</sup> Burda, supra n.180, at 73.

partner, to visit the partner, or even to handle funeral arrangements for the partner, members of an unmarried couple rely on comprehensive healthcare powers of attorney.<sup>212</sup>

In order to ensure that his or her partner will have the authority to deal with financial matters during the period of incapacity, a member of an unmarried couple also must execute a durable financial power of attorney. Like a healthcare power of attorney, a durable financial power of attorney can be used by unmarried couples to ensure that their bank accounts, property, and other assets are properly managed if they become unable to do so.<sup>213</sup> As with healthcare powers of attorney, these agreements allow an individual to appoint anyone he or she wishes to serve as his or her agent in the whatever capacity the particular agreement dictates.<sup>214</sup>

Like wills and trusts, courts strictly construe powers of attorney to ensure that the “object to be accomplished” by the instrument -- be it healthcare or financial decision-making -- is honored as far as possible.<sup>215</sup> Powers of attorney can be as specialized or unconventional as an individual wishes and, generally, there is no cause for concern that a Virginia court will invalidate the designation.<sup>216</sup>

The impact of the Amendment upon healthcare and financial powers of attorney could be as serious as the impact on wills and trusts. Although Virginia’s Health Care Decisions Act<sup>217</sup> states that a healthcare agent may be any adult appointed by the principal so long as certain

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<sup>212</sup> Cohon, supra n.178, at 509-510.

<sup>213</sup> Burda, supra n.180, at 77.

<sup>214</sup> Cohon, supra n.178, at 509.

<sup>215</sup> 1-16 MICHIE ON ESTATES, supra n.209 § 4.

<sup>216</sup> Id. § 2 (“[T]he general rule is that the donor may impose particular conditions and requirements upon the power and the manner in which it must be exercised.”)

<sup>217</sup> Va. Code Ann. § 54.1-2981 et seq.

formalities are met, the Amendment's inquiry into the intent of a legal status presents the possibility that a court would look to express or extrinsic evidence in order to determine whether the principal, by his execution of the power of attorney, intended to approximate the design, qualities, significance or effects of marriage. As discussed above, the Nebraska Attorney General concluded that according domestic partners the right to dispose of a deceased person's remains and donate organs violated Nebraska's prohibition on recognizing same-sex relationships. It is possible that, in the context of a challenge to a power of attorney, a Virginia court would similarly construe an individual's designation of his unmarried partner as attorney-in-fact as conferring upon the attorney-in-fact a legal status (i) that intends to approximate the designs, qualities, significance, or effects of marriage, or (ii) to which is assigned the rights, benefits, obligations, qualities, or effects of marriage. If this occurred, the court would, as with wills and trusts, be barred from recognizing the validity of that power of attorney. As with wills and trusts, the more explicit the description of the principal's relationship with the attorney-in-fact, the more likely it would be for the court to refuse to give legal effect to the document.

It is also possible that a state-run medical facility or other governmental entity would take the position that it is prohibited from giving effect to an otherwise valid power of attorney on the basis that the principal, by designating his unmarried partner as attorney-in-fact, intended to approximate the design, qualities, significance or effects of marriage. Regardless of the ultimate disposition of the matter before a court, the validly appointed agent would be forced to endure potentially critical delay and intrusion into his personal affairs at a time when he should be allowed to focus on furthering the express wishes of his partner.

In the absence of an enforceable healthcare power of attorney, the incapacitated person is deemed not to have expressed any wishes with respect to the medical treatment he should receive

in the event of a terminal illness, coma or end-stage condition. An illustration of the adverse effects of this state of affairs was the legal battle over Terri Schiavo's medical care, where her husband and her parents battled in the courts, legislatures and executive branches of government because she never executed an advance directive or living will.<sup>218</sup> This situation could arise in Virginia with the approval of the Amendment, even if, unlike Terri Schiavo, an incapacitated individual in Virginia executes a living will articulating his or her wishes for medical treatment, if courts are required by the Amendment to ignore those wishes.

Similarly, troublesome results can ensue when a hospital visitation rights designation is ignored, as illustrated by the story of partners Bill Flanigan and Robert Daniel.<sup>219</sup> In October 2000, Bill's partner of five years, Robert, was admitted to the hospital while the two were in Washington, DC on a family trip. Bill was kept in the waiting area and not allowed to see Robert or confer with his doctors because of the hospital's rule that only family members were allowed to visit patients; partners did not qualify. Shortly after being admitted to the hospital, Robert tragically died with no one by his side and with his partner Bill unable to say goodbye.

The passage of the Amendment could make the tragic situations suffered by Terri Schiavo and Robert Daniel a reality for unmarried couples in Virginia. Individuals with the foresight to plan for life emergencies could become vulnerable to their wishes for their personal finances and medical treatment being ignored, and could risk leaving a surviving partner to contend with a lawsuit to determine what those wishes were.

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<sup>218</sup> Brett Kingsbury, A Line Already Drawn: The Case for Voluntary Euthanasia After the Withdrawal of Life-Sustaining Hydration and Nutrition, 38 COLUM. J.L. & SOC. PROBS. 201, 201-202 (2004).

<sup>219</sup> Rebecca K. Glatzer, Equality at the End: Amending State Surrogacy Statutes to Honor Same-Sex Couples' End-of-Life Decisions, 13 ELDER L.J. 255, 255-56 (2005).

Proponents of the Amendment argue that the potential impacts on wills, trusts and powers of attorney reviewed above are illusory. Indeed, the House and Senate Privileges and Elections Committees of the General Assembly approved (by a divided vote) an explanation of the Amendment to be provided to voters in November, which says that, under the Amendment, rights, benefits and obligations, including the naming of an agent to make end-of-life decisions by advance medical directive and disposition of property by will shall still be available to unmarried couples under the Amendment.<sup>220</sup> While Virginia courts may take cognizance of this explanation,<sup>221</sup> they are not required to do so. Further, if the courts did consider it, they also would be likely to consider the fact that the General Assembly's Division of Legislative Services expressed concern that the explanation violated the statutory requirement that such explanations not contain "advocacy," but instead constitute a neutral statement of the Amendment's meaning. Ultimately, if the Amendment is approved, the courts will review the text of the Amendment and come to their own conclusions about what it means.

## VII. POTENTIAL IMPACT ON EMPLOYEE BENEFITS FOR DOMESTIC PARTNERS

The Amendment could have a substantial impact on whether private or public employers can extend employee benefits to the domestic partners of their employees. Were the Amendment to pass, colorable constitutional challenges could be mounted to any such employee benefit plan offered by a public employer. While the Amendment would not bar private employers from offering employee benefits for domestic partners of employees, courts could take the position that they were prevented from enforcing such benefit plans when challenged.

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<sup>220</sup> Explanation of Amendment (May 9, 2006)

<sup>221</sup> See supra Section II.B.

A. Impact on Employee Benefits Provided by Public Employers

1. Virginia law permits public employers to extend employee benefits only to spouses and federal tax dependents.

Under current Virginia law, public employers may extend benefits only to an employee's spouse or "dependent."<sup>222</sup> The Supreme Court of Virginia has held that dependent means federal tax dependent.<sup>223</sup> In Arlington County, the county had adopted a benefits plan that extended benefits to domestic partners who were not necessarily federal tax dependents of employees.<sup>224</sup> The county's plan permitted "coverage of one adult dependent, who can be an employee's spouse, domestic partner, or other adult who is claimed as a dependent on the employee's federal income tax return."<sup>225</sup> Domestic partners were required by the plan to have finances "interdependent" with the finances of the covered employee.<sup>226</sup> Federal tax dependency, by contrast, required that a dependent receive over half of his or her financial support from the taxpayer who claimed the dependent.<sup>227</sup> The county's definition of domestic partner did not therefore require that the domestic partner be a federal tax dependent of the employee.

The court rejected the county's benefit plan because the county's definition of dependent would have extended to domestic partners who were not federal tax dependents. The court stated more generally that benefits could only be extended to two categories of non-employees:

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<sup>222</sup> Va. Code Ann. § 51.1-801.

<sup>223</sup> Arlington County v. White, 528 S.E.2d 706 (Va. 2000).

<sup>224</sup> See 528 S.E.2d at 708.

<sup>225</sup> Id. (internal citation and punctuation omitted).

<sup>226</sup> See id. at 709.

<sup>227</sup> See 26 U.S.C. § 152(a).

individuals who met that federal definition of tax dependent,<sup>228</sup> and spouses, who were not necessarily tax dependents but who were offered benefits as a “long[-]standing” practice.<sup>229</sup>

The three of seven justices concurring in the judgment but dissenting from the majority opinion, including the current chief justice, argued that the county’s benefit structure was a “disguised effort” by the county to “recognize common law marriages or same-sex unions.”<sup>230</sup> These justices would have found Arlington County’s plan void on public policy grounds pursuant to Section 20-45.2, which prohibits same-sex marriages.<sup>231</sup> In rejecting the analysis of the three justices, Justice Kinser pointed out its broad reach and potential to invalidate the application of other laws to unmarried couples, such as the state income tax deduction for domestic partners who qualify as tax dependents:

If, as the dissent asserts, “[t]he County’s expanded definition of eligible dependents is nothing more than a disguised effort to confer health benefits upon persons who are involved in either common law marriages or ‘same-sex unions,’” then the allowance of an income tax deduction in Virginia based on the Internal Revenue Code’s definition of “dependent” could also be deemed a “disguised effort” to confer a governmental benefit on taxpayers involved in the same kinds of relationships. Aside from the requirement of financial interdependence, as opposed to dependency, an individual satisfying Arlington County’s definition of “domestic partner” could also qualify as a “dependent” under 26 U.S.C. Section 152(a)(9).<sup>232</sup>

Justice Kinser went on to state that same-sex unions violate the public policy of Virginia:

I do not intend in any way to suggest that I condone common law marriages or “same-sex unions.” Nor do I question that such relationships do, indeed, violate the public policy of Virginia. However, neither my personal beliefs nor Virginia’s public policy make it

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<sup>228</sup> See 528 S.E.2d at 709.

<sup>229</sup> Id.

<sup>230</sup> Id. at 713 (Hassell, J., dissenting and concurring in the judgment) (internal quotation marks omitted).

<sup>231</sup> See id.

<sup>232</sup> Id. at 716.

necessary to decide this appeal on grounds that could call into question other sections of Virginia's laws.<sup>233</sup>

Because the majority opinion in Arlington County voided the county's benefit plan on the basis of its impermissible application of the statutory term "dependent" and not based on the same-sex marriage union bans, the statutes have not been found to prohibit extension of benefits by a public employer to a tax dependent who happens to be a same-sex partner of an employee. However, the Amendment could provide grounds for preventing the extension of such benefits.

2. The Amendment could prevent public employers from extending benefits to domestic partners of employees

The Amendment forbids creation or recognition of a legal status that "intends to approximate the design, qualities, significance, or effects of marriage" or "to which is assigned the rights, benefits, obligations, qualities, or effects of marriage."<sup>234</sup> Since the Amendment was modeled in part on Ohio's amendment, Ohio's interpretation of the term "legal status" in its amendment is persuasive authority.<sup>235</sup> According to a recent Ohio appellate decision, "[l]egal status defines the rights available under the law to somebody falling within [a] category. Every legal status is imposed by law based on the underlying facts."<sup>236</sup> Because eligibility for an employee benefit plan defines whether an individual is granted benefits or privileges, eligibility would fit within the definition of legal status endorsed by the McKinley court.

The term "legal status" is also used in employee benefits cases to describe a determination as to whether an individual meets legal or regulatory requirements so as to qualify

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<sup>233</sup> Id.

<sup>234</sup> See supra Section II.

<sup>235</sup> See supra n.n.159-171.

<sup>236</sup> State v. McKinley, No. 8-05-14, 2006 WL 1381635, at \*6 (Ohio Ct. App. May 22, 2006).

for employer-provided benefits.<sup>237</sup> A party's eligibility for benefits, consonant with the Ohio definition, defines the party's rights available under the benefit plan.

Assuming that eligibility for employee benefits is a legal status that provides benefits, if employee benefits are "benefits . . . of marriage" then employee benefits are implicated by the plain language of the third clause of the proposed amendment. Employee benefits can be plausibly characterized as benefits of marriage, particularly in light of the statements by the concurring justices in Arlington County.

A lower court could forbid extension of employee benefits under the proposed amendment under the decision in Arlington County. Both the majority and the justices concurring in the judgment characterized employee benefits as a benefit properly made available to spouses.<sup>238</sup> Lower courts could use Arlington County v. White to support a determination that the extension of employee benefits to the domestic partners of employees creates a legal status to which has been assigned the benefits of marriage, in violation of the Amendment's third sentence.

Employee benefits also have been characterized as benefits of marriage by several governmental entities outside the Commonwealth of Virginia, providing further support for such

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<sup>237</sup> See, e.g., Crosby v. Crosby, 986 F.2d 79, 81 (4th Cir. 1993) (sanctioning past payment of benefits under ERISA due to an Maryland employer's good-faith determination of a party's "legal status as [the decedent's] widow"); Keleher v. Dominion Insulation, Inc., 976 F.2d 726 (Table), 1992 WL 252508, at \*2 (4th Cir. Oct. 5, 1992) (per curiam) (characterizing a district court's determination that a Virginia employee was not an ERISA plan participant as a "conclusion as to [appellant's] legal status").

<sup>238</sup> See, e.g., 528 S.E.2d at 708 ("[E]ven in the absence of financial dependence, there can be no dispute that the General Assembly contemplated that a spouse would be included for coverage under local benefit plans."); id. at 713 (Hassell, J., dissenting and concurring in the judgment) (internal quotation marks omitted) (accusing Arlington County of assuming "the power to recognize common law marriages or same-sex unions" when it extended employee benefits to domestic partners).

a determination. When asked to “identify federal laws in which benefits, rights, and privileges are contingent on marital status” and to identify “laws . . . in which marital status is a factor, even though some of these laws may not directly create benefits, rights, or privileges,” the federal Government Accountability Office (GAO) identified “laws that address the rights of employees under employer-sponsored employee benefit plans.”<sup>239</sup>

Citing the GAO’s report, Michigan’s Attorney General issued an opinion that a locality’s extension of employee benefits to same-sex partners was a grant of some of the financial benefits of marriage, and therefore, violated the state’s marriage amendment.<sup>240</sup> These legal analyses would support an argument that employee benefits are benefits of marriage within the meaning of the proposed amendment’s third sentence.

If such benefits are benefits of marriage, then a colorable claim could be made that extension by a public employer of employee benefits to anyone not a spouse is in violation of the Amendment might occur even if that individual is a federal tax dependent under 28 U.S.C. § 152. Virginia law requires that some public employers extend benefits to “dependents,”<sup>241</sup> but under Arlington County, the definition of “dependents” is subject to judicial construction and is not required to include all federal tax dependents.<sup>242</sup> A challenge to benefits offered by a public

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<sup>239</sup> See Letter to the Honorable Henry Hyde, Chairman, House Committee on the Judiciary from the Office of General Counsel, General Accounting Office, at 1 (Jan. 31, 1997), at <http://www.gao.gov/archive/1997/og97016.pdf>; *id.* at Enclosure I, p. 5

<sup>240</sup> See Mich. Att’y Gen. Opinion No. 7171 (2005) (arguing that “conferring [employee] benefits [on domestic partners] constitutes recognition or the acknowledgement of the validity of these same-sex relationships”). But see Nat’l Pride at Work, 2005 WL 3048040, at \*4 (rejecting Mich. Att’y Gen. Opinion No. 7171 and arguing that “[h]ealth care benefits are not among the statutory rights or benefits of marriage.”).

<sup>241</sup> See, e.g., Va. Code Ann. § 2.2-1204 (“The Department *shall* establish . . . health insurance coverage for employees of local governments . . . *and the dependents of such employees . . .*”) (emphases added)

<sup>242</sup> See, e.g., Arlington County v. White, 528 S.E.2d at 708.

employer could seek to constrain the definition of dependent on the theory that extension of employee benefits to some federal tax dependents created a legal status with the benefits of marriage.<sup>243</sup>

In addition, the provision of benefits to the domestic partners of public employees could be challenged as an attempt to create or recognize a legal status that intends to approximate the rights and benefits of marriage. In Ohio, a lawsuit has been filed against Miami University of Ohio claiming that, by providing domestic partner benefits to employees of a public university, the University “seeks to provide a legal status which approximates marriage to those in a relationship whose composition disallows it to qualify for status as a marriage,” in violation of that state’s marriage amendment.<sup>244</sup>

Challenges to eligibility for employee benefits under the Amendment could be directed at both same-sex and opposite-sex relationships. While existing statutes forbid “[a] marriage between persons of the same sex,”<sup>245</sup> and “[a] civil union, partnership contract or other arrangement between persons of the same sex,”<sup>246</sup> the Amendment’s second clause reaches all “relationships of unmarried individuals,” potentially including a legal status incident to a relationship between an employee and the employee’s unmarried opposite-sex partner or same-sex partner.

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<sup>243</sup> Public employers in Virginia may be required, though, to continue to extend benefits to tax dependents of retired employees who have a vested entitlement to those benefits. See Pitts v. City of Richmond, 366 S.E.2d 56, 59 (Va. 1988). Though ERISA may require that certain benefits, if already available to dependents, continue to be offered, it generally does not apply to “group health plans established or maintained by governmental entities . . . .” U.S. Department of Labor - Find It By Topic - Health Plans & Benefits ERISA, at <http://www.dol.gov/dol/topic/health-plans/erisa.htm> (last visited July 8, 2006).

<sup>244</sup> Complaint at 4, Brinkman v. Miami University, CV 2005 11 3736 (filed Nov. 22, 2005).

<sup>245</sup> Va. Code Ann. § 20-45.2.

<sup>246</sup> Va. Code Ann. § 20-45.3.

B. Potential Impact on Benefits Private Employers Provide for Domestic Partners

Under current law, private employers in Virginia may extend coverage under a group accident and sickness policy to an employee's spouse, children, and "[a]ny other class of persons as may mutually be agreed upon by the insurer and the group policyholder."<sup>247</sup> The legislation enacting this provision, SB 1338, was passed in 2005 at the urging of several employers who, after moving to Virginia from another jurisdiction, learned that they had lost the ability to continue providing domestic partner benefits.<sup>248</sup> Prior to passage of the bill, Virginia had been the only state in the country to restrict private companies with respect to the class of individuals to whom coverage under a group accident and sickness policy could be extended.<sup>249</sup> According to the bill's supporters, such restrictions had placed Virginia employers at a competitive disadvantage with respect to attracting and retaining talented employees.<sup>250</sup>

The Amendment does not expressly prohibit private employers from extending employee benefits to domestic partners. However, if adopted, it would render any such benefits far less attractive, because any action by the Commonwealth, its localities, agencies<sup>251</sup> or courts to recognize the existence of such a benefit plan could be the subject of a constitutional challenge. Many state and local medical facilities are government entities. Some medical facilities are

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<sup>247</sup> Va. Code Ann. § 38.2-3525. The effective date of this law was July 1, 2005.

<sup>248</sup> See Ken Hausman, Va. Says Business Can Insure Domestic Partners, PSYCHIATRIC NEWS, Apr. 1, 2005, available at <http://pn.psychiatryonline.org/cgi/content/full/40/7/6>, last visited July 8, 2006.

<sup>249</sup> See Adam Ebbin, Delegate Ebbin's Richmond Report: General Assembly Finalizes 2005 Actions (April 11, 2005), at <http://www.adamebbin.com/041105.html>, last visited July 8, 2006.

<sup>250</sup> See Hausman, supra n.248.

<sup>251</sup> The proposed amendment applies to the "Commonwealth and its political subdivisions." Government agencies performing governmental functions would also be implicated under an agency theory. Cf. Va. Elec. & Power Co. v. Hampton Redev. & Hous. Auth., 225 S.E.2d 364, 369 (Va. 1976) (characterizing actions by a government agency to "protect[] . . . the life, health, property, and peace of the citizens" as governmental actions under the police power).

explicitly denoted as political subdivisions by the Code of Virginia.<sup>252</sup> A state or local medical facility could take the position that it was prohibited from upholding or applying employee benefits extended to a domestic partner under the Amendment because it would be recognizing a legal status for unmarried couples that gave rise to benefits of marriage. Further, if the benefit plan expressly provided benefits to a category of beneficiaries like “domestic partners,” or “cohabitants,” the court could find that a legal status was provided for unmarried individuals that intends to approximate the attributes or effects of marriage. As previously discussed, the Ohio Circuit Court in McKinley defined “recognize” as “to acknowledge in some definite way, take notice of; to admit the fact or existence of.”<sup>253</sup> For example, were a governmental healthcare provider to submit a bill to an insurance company on the basis of insurance extended by a private employer to a domestic partner, the healthcare provider could be characterized as having recognized a legal status to which the benefits of marriage were assigned, in violation of the Amendment.

A state or local court could be similarly constrained, in that it could take the position that it was not permitted under the Amendment to require third parties who contract to deliver medical services to deliver those benefits to domestic partners. Action by a state court is action by the state, even when the court is merely enforcing a private contract.<sup>254</sup>

It is also conceivable that a Virginia court could sustain a challenge to a private employer’s provision of benefits to the domestic partners of its employees on the basis that

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<sup>252</sup> See, e.g., Va. Code Ann. § 23-50.16:3 (establishing the Virginia Commonwealth University Health System Authority).

<sup>253</sup> 2006 WL 1381635, at \*7.

<sup>254</sup> See Shelley v. Kraemer, 334 U.S. 1, 19 (1948); see also supra Section II.A (discussing the legal meaning of “recognize”).

providing such benefits violates Virginia’s clearly expressed public policy against the recognition of same-sex unions and other legal statuses that approximate marriage. The three justices who concurred with the holding in Arlington County but dissented from the reasoning, provided a clear roadmap for a subsequent court seeking to prohibit domestic partnership benefits on public policy grounds -- regardless of whether such benefits are provided by public or private employers.

Referring to the issue before it as one of “great importance to the citizens of [the] Commonwealth,”<sup>255</sup> the justices characterized the question as whether Arlington County’s policy of extending health insurance benefits to the unmarried domestic partners of Arlington County employees violated state public policy favoring the marriage of two adults over the unmarried cohabitation of two adults.<sup>256</sup> Calling Arlington County’s attempt to expand the definition of “dependent” as “nothing more than a disguised effort to confer health benefits upon persons who are involved in either common law marriage or ‘same-sex unions,’”<sup>257</sup> the justices concluded that Arlington County had violated Virginia’s public policy against unmarried cohabitation. If approved, the Amendment will provide additional evidence of Virginia’s public policy against recognition of unmarried relationships and increase the likelihood that courts will decide that conferring employee benefits on the unmarried partners of employees is void as against that public policy, regardless of whether such benefits are provided by public employers or private employers.

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<sup>255</sup> 528 S.E.2d at 711 (Hassell, J., dissenting and concurring in the judgment) (internal quotation marks omitted). See also supra Section VII.A.

<sup>256</sup> See id.

<sup>257</sup> Id. at 713.

## VIII. CONCLUSION

If approved by Virginia voters in November, the Amendment's impact on Virginia residents, nonresidents, Virginia businesses and the Commonwealth's legal climate could be extensive and severe. The Amendment does not simply ensure that "activist judges" cannot overturn Virginia's existing prohibitions against same-sex marriage, as supporters claim. Rather, the Amendment prohibits the government from recognizing legal rights and protections for all unmarried couples -- same-sex or opposite sex.

The Amendment could invalidate rights and protections currently provided to unmarried couples under Virginia's domestic violence laws, undermine private employers' efforts to attract top employees to Virginia by providing employee benefits to domestic partners, and prevent the court's from enforcing private agreements between unmarried couples, child custody and visitation rights, and end-of-life arrangements, such as wills, trusts and advance medical directives, executed by unmarried couples. It certainly will spur litigation, discourage same-sex and opposite-sex unmarried couples from living and working in Virginia, adversely affect the ability of Virginia businesses to attract talented employees, and encourage individuals seeking to undo their legal obligations to flock to Virginia's courts for relief.