



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Robert F. McDonnell
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

September 14, 2006

The Honorable Stephen D. Newman
Member, Senate of Virginia
P.O. Box 480
Forest, Virginia 24551

The Honorable David B. Albo
Member, House of Delegates
6350 Rolling Mill Place, Suite 102
Springfield, Virginia 22152

The Honorable Kathy J. Byron
Member, House of Delegates
523 Leesville Road
Lynchburg, Virginia 24502

The Honorable John A. Cosgrove
Member, House of Delegates
P.O. Box 15483
Chesapeake, Virginia 23328

The Honorable Robert G. Marshall
Member, House of Delegates
P.O. Box 421
Manassas, Virginia 20108

Dear Senator Newman and Delegates Albo, Byron, Cosgrove and Marshall:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether House Joint Resolution 41¹ and Senate Joint Resolution 92,² the proposed Virginia constitutional amendment to ban same-sex marriage, civil unions, or comparable relationships (“marriage amendment”), would affect the current legal rights of unmarried persons involving contracts,

¹See 2006 H.J. Res. 41, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+HJ41>. Resolution 41 passed the House of Delegates by a vote of 73 yeas to 22 nays and passed the Senate by a vote of 29 yeas to 11 nays. See *id.* (status), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hj41>.

²See 2006 S.J. Res. 92, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+SJ92>. Resolution 92 passed the Senate by a vote of 28 yeas to 11 nays and passed the House of Delegates by a vote of 76 yeas to 22 nays. See *id.* (status), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=sj92>.

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wills, advance medical directives, shared equity agreements, group accident and sickness insurance policies, or could modify the application of domestic violence laws.

Response

It is my opinion that passage of the marriage amendment will not affect the current legal rights of unmarried persons involving contracts, wills, advance medical directives, shared equity agreements, or group accident and sickness insurance policies, or alter any other rights that do not “approximate the design, qualities, significance, or effects of marriage” or create “the rights, benefits, obligations, qualities, or effects of marriage.” It further is my opinion that passage of the marriage amendment will not modify the application and enforcement of Virginia’s domestic violence laws.

Background

In accordance with the procedures outlined in the Constitution of Virginia, the 2005 Session of the General Assembly passed a constitutional amendment defining marriage as the “union between one man and one woman.”³ After the intervening elections for the House of Delegates in November 2005, the General Assembly returned for its 2006 Session and again considered the constitutional amendment defining marriage.⁴ The 2006 Session of the General Assembly again passed the marriage amendment in its identical form, requiring it to be placed on the November 2006 ballot for voters to approve or reject.⁵ The proposed marriage amendment provides:

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. 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.^[6]

The General Assembly’s clear and express intent in passing the marriage amendment, as announced in its official explanation,⁷ is to preserve traditional marriage as solely between one man and one woman, while not infringing upon the current legal rights of unmarried individuals to execute

³See 2005 Va. Acts chs. 946, 949, at 1857, 1860, respectively.

⁴See 2006 H.J. Res. 41, *supra* note 1; 2006 S.J. Res. 92, *supra* note 2.

⁵See *supra* notes 1 and 2.

⁶*Id.*; see also 2005 Va. Acts chs. 946, 949, *supra* note 3.

⁷See *infra* note 8.

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contracts, wills, advance medical directives, or shared equity agreements, or lessening protections under domestic violence laws.⁸

Applicable Law and Discussion

The General Assembly must comply with Article XII, § 1 of the Virginia Constitution when seeking to amend the Constitution. Article XII, § 1 provides that:

Any amendment or amendments to this Constitution may be proposed in the Senate or House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, the name of each member and how he voted to be recorded, and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates. If at such regular session or any subsequent special session of that General Assembly the proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the voters qualified to vote in elections by the people, in such manner as it shall prescribe and not sooner than ninety days after final passage by the General Assembly. If a majority of those voting vote in favor of any amendment, it shall become part of the Constitution on the date prescribed by the General Assembly in submitting the amendment to the voters.

The Virginia Constitution does not define marriage. Current statutory law, however, prohibits marriage between certain individuals, including a brother and sister;⁹ a couple where one of the parties is married to another person;¹⁰ and “persons of the same sex.”¹¹ The 1997 Session of the General Assembly

⁸Section 30-19.10 directs the Division of Legislative Services to provide a “neutral” explanation “in plain English” of proposed ballot questions. The House Committee on Privileges and Elections (by a vote of 12-6-3) and the Senate Committee on Privileges and Elections (by a vote of 9-5-1) directed the State Board of Elections to include in its official explanation of the marriage amendment the following statement: “There are other legal rights, benefits, and obligations which will continue to be available to unmarried persons, including the naming of an agent to make end-of-life decisions by an Advance Medical Directive (Code of Virginia § 54.1-2981), protections afforded under Domestic Violence laws (Code of Virginia § 18.2-57.2), ownership of real 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).” See VIRGINIA STATE BOARD OF ELECTIONS, PROPOSED CONSTITUTIONAL AMENDMENT TO BE VOTED ON AT THE NOVEMBER 7, 2006, ELECTION (Final Copy), *2, available at http://www.sbe.virginia.gov/cms/documents/2006_Constitutional_Amendments/2006ques_marriage_APPROVED.pdf.

⁹VA. CODE ANN. § 20-38.1 (2004).

¹⁰*Id.*

¹¹Section 20-45.2 (2004); see also §§ 20-38.1 to 20-40, 20-43, 20-45.1 to 20-45.3, 20-48 to 20-49 (2004) (“Unlawful Marriages Generally”).

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enacted § 20-45.2,¹² which provides that “[a]ny 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.”

In 2004, the General Assembly enacted legislation prohibiting civil unions, partnership contracts, and like arrangements between persons of the same sex.¹³ Section 20-45.3 provides that:

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.¹⁴

Thus, on several occasions, the General Assembly has prohibited marriage between persons of the same sex, as well as civil unions, partnership contracts, or other arrangements that purport to create a legal union approximating marriage between individuals of the same sex.¹⁵ The state courts in four states, Vermont,¹⁶ Massachusetts,¹⁷ Hawaii,¹⁸ and Maryland,¹⁹ have altered or struck down statutory definitions of marriage. Apparently, to prevent similar judicial actions from occurring in Virginia, the General Assembly acted to affirm the Commonwealth’s long-standing statutory policy by elevating to the Virginia Constitution the definition of marriage as solely between one man and one woman.²⁰

¹² See 1997 Va. Acts chs. 354, 365, at 513, 513, 538, 538, respectively.

¹³ See 2004 Va. Acts ch. 983, at 1920, 1920 (adding § 20-45.3 to Affirmation of Marriage Act).

¹⁴ Section 20-45.3 (2004).

¹⁵ See *supra* notes 9-11, 13-14 and accompanying text.

¹⁶ *Baker v. State of Vermont*, 170 Vt. 194, 744 A.2d 864 (1999) (holding that Vermont was constitutionally required to provide same-sex couples with benefits and protections of marriage; court charged Vermont legislature with task of creating appropriate remedy).

¹⁷ *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003).

¹⁸ *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993). The Supreme Court of Hawaii ordered that the lower court conduct an equal protection analysis of Hawaii’s marriage statute. It held that the marriage statute was subject to strict scrutiny and was presumed to be unconstitutional unless the state demonstrated that the statute was narrowly drawn and a compelling state interest in prohibiting same-sex marriage existed. The lower court determined that the marriage statute was unconstitutional and that the state was required to issue marriage licenses to same-sex couples. The State of Hawaii subsequently passed a constitutional amendment limiting the right of marriage to heterosexual couples. Therefore, the Hawaii Supreme Court reversed the lower court in *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999).

¹⁹ *Deane v. Conaway*, Case No: 24-C-04-005390 (Cir. Ct. Baltimore City, Md. Pt. 30, entered Jan. 20, 2006).

²⁰ Once before, the General Assembly has acted to elevate a statutory and public policy position to constitutional standing. The 1995 Session of General Assembly passed a constitutional amendment regarding the rights of victims of crime. See 1995 Va. Acts chs. 706, 710, at 1165, 1165, 1168, 1168-69, respectively (adding § 8-A to Article I of Virginia Constitution). At that time, Virginia had a victims’ rights statute encompassing the provisions included in the constitutional amendment. See VA. CODE ANN. § 19.2-11.01 (1995). The amendment was referred to the 1996 session, was again agreed to, and was submitted to the voters. See 1996 Va. Acts chs. 33, 488, 906, 910, at 39, 818, 1736, 1740, respectively. The constitutional amendment was ratified November 5, 1996, and became effective January 1, 1997. See VA. CONST. art. I, § 8-A annot.

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In considering the prospective application of the marriage amendment to contracts, wills, advance medical directives, shared equity agreements, accident and sickness insurance policies, and other ordinary legal rights of Virginia citizens, the dispositive analysis is to determine whether the rights in question are derived from a legal relationship 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.”²¹ The application of the marriage amendment language to the specific documents and rights about which you inquire demonstrates that passage of the marriage amendment will have no impact on such contractual and other statutory rights not created by or imitating marriage.²²

Additionally, most of the rights, benefits, and obligations created solely by a lawful marriage, to which unmarried persons of either sex are not entitled, are defined by statute or long-standing case law. Among the legal benefits unique to marriage are a spouse’s share of a decedent’s estate,²³ the right to hold real property as tenants by the entirety,²⁴ the authority to act as a “spouse” to make medical decisions in the absence of an advance medical directive,²⁵ the right as a couple to adopt children,²⁶ and the enumerated rights and obligations included in Title 20 of the *Code of Virginia* regarding marriage, divorce, and custody matters. The general legal rights to enter into contracts, wills, advance medical directives, shared equity agreements, and other legal instruments, are not rights that arise from marriage. Rather, such general rights find their sources in other statutes or common law. Thus, these rights would remain unaffected after enactment of the marriage amendment. Any Virginian, subject to any other existing legal limitations, may enter into any lawful contract, dispose of property to any person of his choosing by will or deed, or appoint any person to act on his behalf pursuant to a power of attorney or advance medical directive.

Finally, Virginia’s laws are presumed to be constitutional.²⁷ The Supreme Court of Virginia has concluded that “reasonable doubt as to the constitutionality of a legislative enactment must be resolved in favor of its validity. The courts will declare the legislative judgment null and void only when the statute is plainly repugnant to some provision of the state or federal constitution.”²⁸ Therefore, any challenges to

²¹ See *supra* notes 1, 2.

²² I note that in this context, similar questions concerning the enforceability of § 18.2-57.2 – regarding contracts, wills, advance medical directives, and shared equity agreements – were raised when the 2004 Session of the General Assembly considered and passed House Bill 751 prohibiting civil unions. See 2004 H.B. 751, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+HB751ER>; see also 2004 Va. Acts ch. 983, *supra* note 13, at 1920. The facts show that Virginia courts have not diminished or altered these legal rights in the almost two years that the prohibition against civil unions has been law.

²³ VA. CODE ANN. §§ 64.1-13(A); 64.1-16.1 (2002).

²⁴ VA. CODE ANN. § 55-20.2 (Supp. 2006).

²⁵ VA. CODE ANN. § 54.1-2986(A) (2005).

²⁶ VA. CODE ANN. § 63.2-1201 (Supp. 2006).

²⁷ *Coleman v. Pross*, 219 Va. 143, 246 S.E.2d 613 (1978).

²⁸ *Blue Cross of Va. v. Commonwealth*, 221 Va. 349, 358, 269 S.E.2d 827 (1980).

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Virginia's existing or future statutes relating to contracts, wills, advance medical directives, financial issues, accident and sickness insurance policies, and domestic violence would succeed only if the respective statute is "plainly repugnant" to the marriage amendment. As discussed in detail below, the statutes governing such matters do not "approximate the design, qualities, significance, or effects of marriage" or assign the "rights, benefits, obligations, qualities, or effects of marriage."²⁹ Consequently, these statutes are not repugnant to the marriage amendment and would survive any constitutional challenge to their validity.

1. Contract Law

You relate that in passing the marriage amendment it was not the intent of the General Assembly to infringe on contractual or other legal rights of two unmarried individuals of either sex. The plain language of the amendment and the official explanation support that intent. The basic elements of a contract are offer, acceptance, and consideration.³⁰ Unless a contract is void for a specific policy reason under existing law, any competent individual may enter into a contract, regardless of his marital status. The Virginia Supreme Court has held that:

Generally speaking every adult person has a right to contract with respect to his property rights and when they have done so, courts are without authority to annul their obligations thus assumed unless they have been entered into under such circumstances as to indicate that their procurement had been brought about by fraud.^[31]

Moreover, "[t]he law presumes that there is in everyone [the] capacity to contract."³² Therefore, the right to contract, pursuant to well-established and long-standing principles of contract law,³³ is not a right that finds its origin in the "design, qualities, significance, or effects of marriage," nor the "rights, benefits, obligations, qualities, or effects of marriage." Passage of the marriage amendment would not, therefore, infringe upon the rights of unmarried individuals to enter into or enforce lawful contracts.

2. Wills

You inquire whether the marriage amendment would impede the ability of an individual to execute a will leaving property to another individual of either sex. It is an accepted principle of Virginia law that a testator may, by will, dispose of his property as he desires. Section 64.1-46 provides:

Every person not prohibited by § 64.1-47 may, by will, dispose of any estate to which he shall be entitled, at his death, and which, if not so disposed of, would devolve upon his

²⁹ See *supra* notes 1 and 2.

³⁰ *Adams v. Hazen*, 123 Va. 304, 319, 96 S.E. 741, 745 (1918) (noting that written contracts must contain essential elements: competent parties; legal subject matter; valuable consideration; and mutual assent).

³¹ *Moore v. Gregory*, 146 Va. 504, 523, 131 S.E. 692, 697 (1925).

³² *Chesapeake & Ohio Ry. Co. v. Mosby*, 93 Va. 93, 94, 24 S.E. 916, 916 (1896) (quoting 1 Chitty on Contracts 186).

³³ See *supra* notes 30, 31 and accompanying text.

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heirs, personal representative or next of kin. The power hereby given shall extend to any estate, right or interest to which the testator may be entitled at his death, notwithstanding he may become so entitled subsequently to the execution of the will.

The Virginia Supreme Court has explained that wills are designed, by statute, to permit individuals to leave property in the manner they choose:

“It may be safely stated that as a general rule the right of a testator to dispose of his estate as he likes depends neither on the justice of his prejudice nor the soundness of his reasoning. He may do what he will with his own; and, as to his relatives, all that is required of him at the time of making his will is that he shall possess ability to comprehend those who appear as the natural objects of his bounty and appreciate the duty which recommends them to consideration.”³⁴

The Court clearly indicates that the motivations of the testator (the “justice of his prejudice” and “the soundness of his reasoning”) have no effect on the disposition of his estate.³⁵ The right of an individual to dispose of property by will in any legal manner he desires is not created by marriage, nor does that right “approximate the design, qualities, significance, or effects of marriage” or assign the “rights, benefits, obligations, qualities, or effects of marriage.” Thus, the marriage amendment will not affect the ability of unmarried persons to execute or inherit under a lawful will.³⁶

3. Advance Medical Directives

You also inquire about the effect of the marriage amendment upon advance medical directives. The procedure for making an advance medical directive is set out in the Health Care Decisions Act.³⁷ Specifically, § 54.1-2983 of the Act provides, in part, that:

Any competent adult may, at any time, make a written advance directive authorizing the providing, withholding or withdrawal of life-prolonging procedures in the event such person should have a terminal condition. A written advance directive may also appoint *an agent* to make health care decisions for the declarant under the circumstances stated in the advance directive if the declarant should be determined to be incapable of making an informed decision. [Emphasis added.]

The Health Care Decisions Act does not require that the agent be related to the declarant by blood or marriage.³⁸ Further, the process of making an advance directive and naming an agent to carry out the instructions of the declarant are acts established by the General Assembly apart from the marriage statutes

³⁴ Wohlford v. Wohlford, 121 Va. 699, 706, 93 S.E. 629, 631 (1917) (quoting McDonald’s Ex’rs v. McDonald, 117 Am. St. Rep. 582 (1905)).

³⁵ *Id.*

³⁶ See § 64.1-1 (2002) (outlining the rights of a spouse in absence of a will).

³⁷ See §§ 54.1-2981 to 54.1-2993 (2005).

³⁸ “‘Agent’ means an adult appointed by the declarant under an advance directive, executed or made in accordance with the provisions of § 54.1-2983, to make health care decisions for him ...” Section § 54.1-2982.

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and are not acts that intend “to approximate the design, qualities, significance, or effects of marriage” or assign the “rights, benefits, obligations, qualities, or effects of marriage.” While a lawful marriage creates in one spouse the legal right by default to make medical decisions without a written instrument for the other spouse, an unmarried individual may, by executing an advance medical directive, affirmatively grant the same right to any person of his choosing. It is, therefore, my opinion that the marriage amendment would not affect the legitimacy of any properly executed advance medical directive³⁹ giving authority to any person to act as agent.

4. Financial Issues

You inquire whether passage of the marriage amendment will invalidate shared equity agreements.⁴⁰ The General Assembly has established that “[a]ny persons may own real or personal property as joint tenants with or without a right of survivorship.”⁴¹ A mortgage, properly called a deed of trust, is a conveyance of real property from the owners to a trustee to secure payment of a note to a lender.⁴² The act of borrowing money and the right to hold and convey property⁴³ are not regulated by statutes related to marriage and thus are not intended “to approximate the design, qualities, significance, or effects of marriage” or assign the “rights, benefits, obligations, qualities, or effects of marriage.” Persons of the same sex or any unmarried persons can hold and transfer real estate and borrow money against real property under current law and may continue to do so should the marriage amendment be adopted.

Joint bank accounts are agreements between multiple parties, regardless of marital status. Banks hold the money of the depositors, honor demands on the account, and disburse the funds in the account pursuant to the agreement entered into between the depositors and the bank. “Every financial institution in [Virginia] offering joint accounts” must clearly label the accounts “[Joint Account With Survivorship]”

³⁹The General Assembly has provided a procedure for obtaining substitute consent in the absence of an advance directive appointing an agent. *See* § 54.1-2986(A). Decisions in such cases may be made by statutorily defined persons in a specified order of priority. *Id.* Thus, no person, whether of the same sex or opposite sex, may make decisions regarding treatment if that person does not fall into one of the statutorily created classes. Any person could, however, petition an appropriate court to be appointed guardian or conservator. *See* VA. CODE ANN. § 37.2-1002(A) (Supp. 2006). The duties of a guardian or conservator are not acts that intend “to approximate the design, qualities, significance, or effects of marriage” or assign the “rights, benefits, obligations, qualities, or effects of marriage.” *See* § 37.2-1020 (2005) (setting forth duties and powers of guardians).

⁴⁰Virginia law does not specify what constitutes a “shared equity agreement.” For purposes of this opinion, the term “shared equity agreement” includes deeds of trust and joint bank accounts.

⁴¹*See* § 55-20.1 (2003).

⁴²A “deed of trust” “resembles a mortgage” and is “[a] deed conveying title to real property to a trustee as security until the grantor repays a loan” *See* BLACK’S LAW DICTIONARY 445 (8th ed. 2004).

⁴³The holding of real and personal property as tenants by the entirety is limited to a husband and wife. *See* § 55-20.2; *see also supra* note 24 and accompanying text.

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or “[Joint Account – No Survivorship].”⁴⁴ The acts of maintaining an account with another person, entering into an agreement with a bank, making demands on the account, and naming a beneficiary are not related to marriage and are not relationships that intend “to approximate the design, qualities, significance, or effects of marriage” or assign the “rights, benefits, obligations, qualities, or effects of marriage.”

Group accident and sickness insurance coverage provided by private companies to its employees and their designated beneficiaries likewise will not be invalidated by the marriage amendment. The General Assembly established in 2005⁴⁵ that coverage under a group accident and sickness insurance policy may be extended to insure “[a]ny other class of persons as may mutually be agreed upon by the insurer and the group policyholder.”⁴⁶ Thus, the creation of such a policy is a private contractual matter between an insurer and the policyholder. The fact that unmarried individuals involved in a same-sex relationship may receive benefits pursuant to such a policy is not recognition by the Commonwealth of “a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage.”⁴⁷ This conclusion further is supported by the fact that in 2005 the General Assembly enacted the new statutory expansion of accident and sickness insurance coverage with full knowledge of Virginia’s existing statutory prohibitions on same-sex marriage and civil unions⁴⁸ and concurrently passed the marriage amendment for the first time.⁴⁹ The General Assembly, in passing a new law or amending an existing law, “is presumed to act with full knowledge of the law as it stands.”⁵⁰ In addition, when new provisions are added to existing legislation by amendment, a presumption arises “that in making the amendment the legislature acted with full knowledge of, and in reference to, the existing law upon the same subject and the construction placed upon it by the courts.”⁵¹

5. Domestic Violence

Finally, you inquire whether passage of the marriage amendment would provide a defense to a party charged with domestic assault and battery pursuant to § 18.2-57.2, which prohibits assault and battery against “a family or household member.” You question whether, pursuant to this statute, the prosecution of a person involved in a same-sex relationship with another person would amount to

⁴⁴ See VA. CODE ANN. § 6.1-125.15(A) (1999). All matters pertaining to multiple party accounts are addressed in Chapter 2.1 of Title 6.1, §§ 6.1-125.1 to 6.1-125.16 (1999).

⁴⁵ See 2005 Va. Acts ch. 871, at 1516, 1516 (adding subsection A 2 to § 38.2-3525).

⁴⁶ VA. CODE ANN. § 38.2-3525(A)(2) (Supp. 2006).

⁴⁷ See *supra* note 6 and accompanying text.

⁴⁸ See 2005 Va. Acts ch. 871, *supra* note 45 (adding subsection A 2 to § 38.2-3525); 2004 Va. Acts ch. 983, *supra* note 13 (adding § 20-45.3); 1997 Va. Acts chs. 354, 365, *supra* note 12 (adding § 20-45.2).

⁴⁹ See 2005 Va. Acts chs. 946, 949, *supra* note 3.

⁵⁰ See *Sch. Bd. v. Patterson*, 111 Va. 482, 487-88, 69 S.E. 337, 339 (1910).

⁵¹ *City of Richmond v. Sutherland*, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).

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recognition of such a relationship as one “that intends to approximate the design, qualities, significance, or effects of marriage,” thus invalidating the application of the statute to unmarried couples of the same sex.

The General Assembly has the authority to create and define by statute a class of potential victims for which enhanced punishment for assault and battery will be available. Section 18.2-57.2(A) provides that “[a]ny person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor.” Section 18.2-57.2(D) provides that “[t]he definition of ‘family or household member’ in § 16.1-228 applies to this section.” Section 16.1-228 provides that:

“Family or household member” means (i) the person’s spouse, whether or not he or she resides in the same home with the person, ... or (vi) any individual who cohabits or who, within the previous 12 months, cohabited with the person, and any children of either of them then residing in the same home with the person.

Therefore, subsection “i” clearly covers a victim who is a spouse. Additionally, in determining the protections for unmarried domestic violence victims, cohabitation is the key element in the definition of “household member” in subsection “vi” of § 16.1-288. In customary legal usage, “cohabitation” means “[t]he fact or state of living together, esp[ecially] as partners in life, usu[ally] with the suggestion of sexual relations.”⁵² The Virginia Supreme Court has held that the term “cohabit” means “to live together in the same house as married persons live together, or in the manner of husband and wife”⁵³ and “imports the continuing condition of living together and carrying out the mutual responsibilities of the marital relationship.”⁵⁴ More recently, the Court of Appeals of Virginia offered extensive guidance regarding the determination of cohabitation.

In determining in *Rickman* whether the evidence was sufficient to sustain the defendant’s conviction for domestic assault and battery under *Code § 18.2-57.2*, we noted that “the essential elements of ‘cohabitation’ are (1) sharing of familial or financial responsibilities and (2) consortium.” *33 Va. App. at 557, 535 S.E.2d at 191* (quoting *State v. Williams, 79 Ohio St. 3d 459, 1997 Ohio 79, 683 N.E.2d 1126, 1130 (Ohio 1997)*). We also noted that “possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets” and that “factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations.” *Id.* (quoting *Williams, 683 N.E.2d at 1130*) We further noted, however, that “domestic violence arises out of the nature of the

⁵²BLACK’S LAW DICTIONARY, *supra* note 42, at 277.

⁵³*Schweider v. Schweider*, 243 Va. 245, 248, 415 S.E.2d 135, 137 (1992) (quoting *Johnson v. Commonwealth*, 152 Va. 965, 970, 146 S.E. 289, 291 (1929)).

⁵⁴*Id.* (quoting *Petachenko v. Petachenko*, 232 Va. 296, 299, 350 S.E.2d 600, 602 (1986)).

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relationship itself, rather than the exact circumstances of the victim and perpetrator” and emphasized that “[t]he factors to be applied ‘are *unique to each case* and how much weight, *if any*, to give to each of these factors must be decided on a case-by-case basis by the trier of fact.’” *Id. at 557, 535 S.E.2d at 191* (first emphasis added) (quoting *Williams, 683 N.E.2d at 1129-30* (second emphasis added)) Thus, as we indicated in *Rickman*, the trier of fact must employ a “totality-of-the-circumstances analysis” to determine whether the victim of the assault and battery and the defendant “cohabited,” “as that term is used in *Code § 18.2-57.2*.” *Id. at 558, 535 S.E.2d at 191.*^[55]

Thus, while the institution of marriage provides an illustrative and objective standard by which “cohabitation” may be identified by a trier of fact, the use of marriage as a comparative standard does not confer upon the cohabiting relationship any of the “rights, benefits, obligations, qualities, or effects of marriage,” nor is it a recognition of a relationship “that intends to approximate the design, qualities, significance, or effects of marriage.” Were such a construction plausible, a prosecution pursuant to § 18.2-57.2 could not be maintained against an individual involved in an unmarried heterosexual relationship. Such construction would implicitly recognize a common-law marriage, which, like same-sex marriage, is not permitted in Virginia.⁵⁶ In addition, in defining “family or household member,” the General Assembly specifically listed “spouse” in a distinct and separate subsection of § 16.1-228 and placed individuals who cohabit in another subsection. This distinct placement clearly indicates that the General Assembly wished to establish a new and distinct class of potential domestic violence victims among unmarried, cohabiting persons other than spouses. Finally, customary legal usage also distinguishes between “cohabitation” and “matrimonial cohabitation.”⁵⁷ Thus, Virginia’s existing law does not confer a legal right unique to marriage on another class of persons that might be invalidated by the marriage amendment, but rather creates five distinct classes of potential victims (other than spouses) of domestic violence.

It is my opinion that “cohabitation” is determined by a variety of factors, and that the institution of marriage may be used as an illustrative and objective standard to determine whether unmarried parties are cohabiting. Applying this standard pursuant to § 18.2-57.2 does not confer upon the cohabiting relationship any of the “rights, benefits, obligations, qualities, or effects of marriage,” nor is it a recognition of a relationship “that intends to approximate the design, qualities, significance, or effects of marriage.” Passage of the amendment, therefore, would not prevent prosecution of an individual

⁵⁵ *Cowell v. Commonwealth*, Record No. 3198-03-1, 2005 Va. App. LEXIS 42, *8-9 (Va. Ct. App. 2005) (unpublished mem. op.).

⁵⁶ See *infra* note 58.

⁵⁷ BLACK’S LAW DICTIONARY, *supra* note 42, at 277. As such, the opinion of the Attorney General in 1994 Op. Va. Att’y Gen. 60 has been superseded by the *Cowell* opinion and customary legal usage of the term “cohabitation.”

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cohabitating in a same-sex or other unmarried relationship for assault and battery of the other individual pursuant to § 18.2-57.2.⁵⁸

⁵⁸In 2005, Ohio passed a constitutional amendment similar to Virginia's proposed marriage amendment. Defendants charged with violating Ohio's domestic violence statute have challenged whether the domestic violence laws may be enforced against unmarried couples in light of Ohio's marriage amendment. As of September 12, 2006, ten of Ohio's twelve appellate courts have addressed whether Ohio's domestic violence law is constitutional in light of the marriage amendment. Eight of the ten appellate courts have concluded that Ohio's domestic violence law is constitutional, and the Ohio marriage amendment does not provide a defense to a party charged with assault pursuant to Ohio's domestic violence law. The eight appellate courts have concluded that the term "person living as a spouse" is a descriptive term useful in determining the applicability of the statute, but does not create a legal status prohibited by the marriage amendment. In addition, these Ohio courts found that the legislature intended to protect household violence in all forms and in doing so did not create a legal status that approximates marriage. See *State v. Goshorn*, 2006 Ohio 2755, 2006 Ohio App. LEXIS 2593 (May 23, 2006); *State v. Newell*, 2005 Ohio 2848, 2005 Ohio App. LEXIS 2658 (May 31, 2005); *State v. Rodriguez*, 2006 Ohio 3378, 2006 Ohio App. LEXIS 3289 (June 30, 2006); *Gough v. Triner*, 2006 Ohio 3522, 2006 Ohio App. LEXIS 3436 (June 28, 2006); *State v. Burk* 164 Ohio App. 3d 740, 843 N.E.2d 1254 (2005), *discretionary appeal accepted*, 2006 Ohio 2226, 847 N.E.2d 5 (2006); *State v. Nixon*, 165 Ohio App. 3d 178, 845 N.E.2d 544 (2006); *State v. Rodgers*, 2006 Ohio 1528, 2006 Ohio App. LEXIS 1391 (Mar. 30, 2006); *State v. Carswell*, 2005 Ohio 6547, 2005 Ohio App. LEXIS 5903 (Dec. 12, 2005), *discretionary appeal accepted*, 109 Ohio St. 3d 1423, 2006 Ohio LEXIS 1033 (Apr. 26, 2006). An Ohio appellate court has also determined the domestic violence statute was facially constitutional. See *State v. Rexroad*, 2005 Ohio 6790, 2005 Ohio App. LEXIS 6114 (Dec. 13, 2005). Two Ohio appellate courts have reached a contrary conclusion. See *State v. Ward*, 2006 Ohio 1407, 2006 Ohio App. LEXIS 1318 (Mar. 24, 2006), *discretionary appeal accepted* 2006 Ohio 3862, 2006 Ohio LEXIS 2298 (Aug. 2, 2006); *State v. McKinley*, 2006 Ohio 2507, 2006 Ohio App. LEXIS 2379 (May 22, 2006). The *Ward* court in direct contravention to the holding of the eight other appellate courts, determined that Ohio's domestic violence statute created a "quasi-marital relationship" because the statute protected a class of citizens defined as "person[s] living as a spouse." *Ward*, 2006 Ohio at 1407, 2006 Ohio App. LEXIS, at *16. As such, the court ruled that "cohabitation" equated to a "person living as a spouse." *Id.* at 1407, 2006 Ohio App. LEXIS, at *15-16. The *McKinley* court determined that the section of Ohio's domestic violence statute relating to "person[s] living as a spouse" "clearly categorize[d] victims based on marital-type relationships" and that cohabitation under Ohio law intends to approximate marriage. *McKinley*, 2006 Ohio at ___, 2006 Ohio App. LEXIS, at *14-15; see also *id.* at ___, 2006 Ohio App. LEXIS, at *15-18. Since the *McKinley* decision conflicts with cases in other appellate courts, the court certified "the record ... to the Ohio Supreme Court for review and final determination" regarding the constitutionality of the domestic violence statute. *Id.* at ___, 2006 Ohio App. LEXIS, at *33. The conclusion of the *Ward* and *McKinley* courts could not be reached in Virginia. Virginia law does not equate cohabitation to a legal status similar to marriage, nor does its domestic violence statute categorize victims based on marital-type relationships. See *supra* notes 52-55 and accompanying text. Similarly, Virginia law does not provide for the establishment of common-law marriage or any other "quasi-marital relationship" within the Commonwealth. See VA. CODE ANN. § 20-13 (2004) (providing that every marriage in Commonwealth is under license and officially solemnized); see also *Offield v. Davis*, 100 Va. 250, 263, 40 S.E. 910, 914 (1902) (enactment of § 2222, predecessor to § 20-13, abrogated common law marriage); cf. *Kelderhaus v Kelderhaus*, 21 Va. App. 721, 725-26, 467 S.E.2d 303, 305 (1996) (noting that Commonwealth does not recognize common-law marriages; however, it extends comity to such unions that are valid under laws of jurisdiction where relationship was created).

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Conclusion

Accordingly, it is my opinion that passage of the marriage amendment will not affect the current legal rights of unmarried persons involving contracts, wills, advance medical directives, shared equity agreements, or group accident and sickness insurance policies, or alter any other rights that do not “approximate the design, qualities, significance, or effects of marriage” or create “the rights, benefits, obligations, qualities, or effects of marriage.” It further is my opinion that passage of the marriage amendment will not modify the application and enforcement of Virginia’s domestic violence laws.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. McDonnell", written in a cursive style.

Robert F. McDonnell