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Message from the Chair

Alice Vickers
2015—2016 Chair
Public Interest Law Section
The Florida Bar

Keeping up with technology is harder than keeping up with the Joneses. My children, twins, are on the cusp between Millennials and Generation Z. Checking out a test to see where they fell, they were both surprised when they had no idea about the Generation Z social media platform called Whisper. I was also surprised. But that is how fast technology changes – even 22 year olds have to work to keep up.

I am excited to step into the role of chair of PILS this year and work with our members to push us forward into the technology waters. We are fast at work to create our website and jump into the social media swimming pool with the Bar and the other sections and committees. We plan for these new tools to allow us to share with the Bar wide community the work PILS has always done to advocate and enhance the "constitutional, statutory or other rights that protect the dignity, security, justice, liberty, or freedom of the individual or public."

Technology and social media are the perfect tools for PILS. We are a group of substantive committees – Civil Rights, Consumer and Tenant Protection, Disability, Homelessness, Children's Rights, Parent Advocacy, Immigration and Nonprofits. Under the leadership of Laura Boeckman, immediate past chair, we added new committees to meet the changing landscape of public interest advocacy with the addition of tenant, parents, immigration and nonprofit issues. Technology and social media will allow us to share the work our committees continue to do.

But gadgets and software only get us so far. We need an active membership to engage in the issues. I am calling on our members to join a committee – either an area of law in which you practice or an area you would like to learn more about. Even with technology, we still like to meet face to face and our next in person meeting for the committees is the January Bar meeting. Most of our committees also have periodic conference calls, which all members are encouraged to join. Watch your email (and soon social media) for notices.

Our year ahead will not be "out with the old and in with the new" but a melding of traditional sharing and networking with the ability to amplify what we do and the positive role we play in the legal community through social media. Sticking our toes into the social media water will not take the place of good old-fashioned building of relationships so please join us in Orlando on Friday, January 22nd. And bring your smart phone and tablet! ▪

This publication was produced on behalf of The Florida Bar Public Interest Law Section by the Public Interest Law Society of Nova Southeastern University Shepard Broad College of Law.

Hot Topics: News from Practice

Florida Takes Steps Towards Addressing the Ongoing Issue of Ineffective Counsel in Dependency Proceedings, But is it Enough?

By **Jessica Durant**
Student Writer

In the summer of 2015, the Supreme Court of Florida finally touched on the ongoing issue of ineffective assistance of parents in dependency cases in Florida. Unfortunately, in *J.B. v. Florida Department of Children and Families* ("DCF") the Court only scratched the surface regarding an indigent parent's right to counsel in termination proceedings and the lack of a procedural mechanism to challenge ineffective counsel. 170 So. 3d 780 (Fla. 2015).

Termination of Parental Rights Cases are essentially one of the worst-case scenarios where a parent or parents could potentially lose any rights they have to their child or children. With that being said, one could infer that having competent and effective counsel is an essential element to ensuring that a parent is given a fair and just chance in such a proceeding. Although *J.B.* was quite a milestone for indigent parents in Termination of Parental Rights cases, it begs the question how and when, if at all, can a parent subject to the dependency process raise an issue of ineffective counsel prior to termination proceedings?

In *J.B. v. Florida DCF*, the Court emphasized numerous times that the new process and procedure to be implemented in measuring a counsel's ineffectiveness could only be measured at the conclusion of the termination proceedings. A parent may not bring this claim until the end of the proceeding. It is true that once termination of parental rights proceedings have ensued, the Court has reached what it has deemed to be the end of the line. This could very well be the reason why the Court referred to the issue of ineffective counsel in termination proceedings and the lack of a procedural mechanism to be of great public importance.

Nonetheless, up until this case, Florida had no procedural mechanism to challenge ineffective assistance of counsel. The Court in *J.B.* ultimately created a temporary procedure for parents to challenge ineffective assistance of counsel and directed the creation of a committee to draft a permanent rule. The temporary procedure requires indigent parents to file a motion, pro se, in their circuit court claiming ineffective assistance of trial counsel in the Termination Proceedings. These steps must be done twenty days after the termination judgment is issued. In the motion, the parent shall identify specific acts or omissions in trial counsel's representation of the parent during the TPR proceedings. Such acts or omissions must constitute a failure to provide reasonable, professional assistance. The parent must explain how the errors or omissions prejudiced their case in the termination proceeding to the extent a contrary result would yield, absent the deficient performance. Though a step in the right direction, the issue with the temporary procedure is still an extraordinarily difficult process for an indigent parent to pursue pro se.

In January 2011, the American Bar Association ("ABA"), Center on Children and the Law conducted a survey of state Court Improvement Programs on parent representation in child welfare. The ABA addressed several important issues and allowed for surveyors to provide comments to the questions asked. The responses were received from 79 individuals, largely Court Improvement Programs staff and in some cases from committee members and consultants. The Responses represented 47 states, including Florida. In regards to Florida, when parents were asked to comment on the overall quality received from the appointed attorneys, a significant amount of the responses conveyed unimpressed opinions. In addition, commentator stated that in regard to private attorneys, "the need for them to defend their clients, and the clients' rights, are all too often not served by the attorney's desire to be paid for her/his work on the case." Furthermore, in response to questions regarding training requirements and standards in the state of the Florida, the Florida commentator response was "the answer of no must be qualified to the extent that all attorneys must represent clients according to the applicable code of ethics." The American Bar Association even went so far as to publish the "Standards of Practice Representing Parents in Abuse and Neglect Cases," with the intention of setting standards to help the parent attorney.

If Florida is to overcome the ongoing issue of ineffective counsel of parents in dependency cases, Florida must lead by example and implement its own set of guidelines and standards to be followed by parent attorneys. Implementing a procedural mechanism to challenge ineffective counsel is certainly a step in the right direction, but this present issue must be tackled on several fronts. In late November, the proposed rules developed by the Chief Justice's Select Committee shall be submitted to the Supreme Court of Florida. ▪

For more information on the Survey, see the full report at:

http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/ cip_survey_results_long.authcheckdam.pdf.

For more information on the Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases published by the American Bar Association, you can view the full ABA Policy at:

http://www.americanbar.org/content/dam/aba/publications

CIRRT Reporting and Accountability with the Florida Department of Children and Families

By **Daniel Zarnowski**
Student Writer

On February 7, 2015, a nine-year-old girl named Jenica Randazzo, was bludgeoned to death with a tire iron by her uncle Jason Rios. In the same incident he murdered Jenica's grandmother, was seconds away from killing Jenica's younger sister, and attempted to drill a hole in his own neck. Jason suffered from mental illness for years. The Florida Department of Children and Families ("DCF") had been involved with Jenica since 2011, when she was removed from her mother, and placed with her grandparents.

On September 13, 2012, Jenica was removed from the care of her grandparents for undisclosed reasons. After a series of incidents at foster homes, her grandparents stepped forward again to get Jenica and her siblings back. According to the Miami Herald, in February 2012, the court-ordered Guardian ad Litem (GAL) wrote an email to the family's Case Manager, which entailed a vague reference to "anger problems;" however, redactions make it impossible to determine who was angry. "I know the state prefers placement with family, but I wonder if the maternal grandparents are the best choice," the GAL wrote.

Despite this and opposition from the foster family, Jenica was returned to her grandparents in June of 2014. That same month, Governor Rick Scott signed into law major changes for Florida's child welfare system. The changes make DCF investigations more extensive, providing more accountability for the state's community-based care providers and shifting the focus of the state's child welfare program from reunification first to serving the manifest best interests of the child.

This change was in part instigated in reaction to "Innocents Lost," a series of Miami Herald stories focusing on the 477 children who lost their lives from 2008-2013 while involved with DCF and community-based care services. The public demanded more accountability, as well as a quick response and public disclosure when fatalities do occur.

One facet of the initiative requires a Critical Incident Rapid Response Team ("CIRRT") investigation for all child fatalities reported to DCF, in which the deceased child or another child in the family was the subject of a verified report of abuse or neglect during the previous year. The team is comprised of at least five professionals with expertise in child protection, child welfare, and organizational management. The goal is to ensure there is an appropriate amount of accountability when there is a child fatality and child welfare services is involved with the family. The initiative also requires a better method of disclosure and reporting of child fatalities, which can now be found on the DCF website. The CIRRT is now codified in Florida Statutes Section 39.2015, and the public reporting requirements for child fatalities reported are delineated in Fla. Stat. § 39.2022.

So far in 2015, there have been 346 child fatalities reported to the child abuse hotline. Approximately 30 of those warranted a critical rapid response investigation under the 2014 statute. Jenica was not on that list. In Jenica's case there was no verified report of abuse or neglect during the previous year despite DCF involvement dating back to 2011, therefore the new statute did not apply. The challenge for Children's Rights attorneys and the public is to speak for those who do not have a voice and create more accountability to foster positive outcomes for all children involved in this system. ▪

The 50th Anniversary of the Voting Rights Act and Felon Disenfranchisement in Florida

By **Faith Middlebrooks**
Student Writer

The Voting Rights Act, a law passed by Lyndon B. Johnson in 1965 allowing African Americans to vote under the 15th amendment of the United States Constitution, reached its 50th anniversary this year in August. Although the Act is seen as a milestone to some, others feel there is a modern day barrier prohibiting African Americans from voting, especially in the state of Florida. While many congregated to celebrate such a purposeful occasion, others were reminded of the rights they no longer possess due to felonies they received at the hands of the judicial system. The same system that recently received public scrutiny for police brutality and the unfair treatment of African Americans in this country.

Roughly twenty-five percent of the African American adult population in the United States have a felony conviction, while only six percent of non-African American adults have felonies. In the state of Florida, approximately thirty-five percent of African Americans have felonies. There are only two states in the United States where an incarcerated felon retains their rights to vote. Forty-four states automatically restore the rights of a convicted felon either upon their release from prison and payment of fines or completion of probation depending on the type of conviction. However, Florida is one of four states that compels a felon to petition or apply to a state agency. After fulfillment of a sentence, satisfaction of the waiting period for a non-violent eligible felony, and completion of the application, the Governor and Clemency Board must agree to reinstate the individual's rights. Since their time of release and completion of probation, parole, and payment of fines, an individual who has completed their sentence must show that they are citizens that are competent and capable of the chance to vote.

Statistics show that although many never petition, some due to lack of awareness others lengthy delay, those who do are rarely given back their voting rights. About nine percent of Floridians – about 1.6 million – do not have the right to vote, hold office, or serve on a jury. The percentage of felons without rights in most other states is less than two percent. Since 2011, roughly 1,500 petitioners have been granted their voting rights while almost 11,000 are still waiting or have been denied. Sweeney, D., Choi, A., Schallom, R., & Huriash, L., *Florida Among Nation's Toughest Places to Have Voting Rights Restored,* SUN SENTINEL, Jan. 25, 2015.

Florida is among the nation's toughest places to have voting rights restored. Statistics also show that the amount of petitioners granted their right largely depends on the Governor's stance on incarceration for violent crime. After much negative attention from the media and advocates, state senators have filed to make an amendment on the constitutional ballot for 2016 which will enable non-violent felons to have their rights restored upon completion of their prison sentence, parole, and/or probation. The Florida Voting Rights Restoration for Felons Initiative would give felons the ability to vote upon completion of their sentence for eligible crimes. Florida Attorney General Pam Bondi opposes the amendment changes, but is open to types of reform. *Florida Among Nation's Toughest Places to Have Voting Rights Restored*. State senators argue that if they wish for felons to be released and become upstanding citizens, they must treat them as such.

In a state that is arguably the most difficult to have voting rights reinstated, many find that it is imperative to revisit the means by which felons are able to become voting citizens again. With all of the public statistics, it is only natural for many people to believe that there is a modern day system still preventing many African Americans from voting. ▪

Pro Bono Work Outside the Courtroom:

Helping with the Legal Needs of Nonprofit Organizations

By **Jeffrey Fromknecht, Esq.,**
Guest Writer
Managing Attorney at Side Project Inc., and
Leighton Regis,
Student Writer

Most lawyers are familiar with the Public Service rules of Professional Conduct. Lawyers often take individuals on as pro bono clients, assisting them with pending civil or criminal legal issues. Pro bono service can be, and is often, provided to organizations rather than individuals. Lawyers with skills in corporate, transactional and regulatory legal matters can play an important role in social change efforts by supporting chartable nonprofit organizations.

The Florida Bar's Professional Rules of Conduct Rule 4-6.1 Pro Bono Public Service describes, among other issues, community service suggestions and mandatory reporting requirements. The Rule encourage all lawyers in Florida to: (1) Render pro bono legal services to the poor and (2) Participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor.

The rules provide two examples of how to satisfy these requirements: (1) Annually providing at least 20 hours of pro bono legal service to the poor; or (2) Making an annual contribution of at least $350 to a legal aid organization.

These rules have always been aspirational, rather than mandatory. A lawyer cannot be sanctioned by the Bar for failure to comply, nor is there any reward for compliance. This is similar to the ABA Model Rule of Professional Conduct 6.1 and in-line with other state bars. Under the ABA Model Rule, every lawyer has a professional responsibility to provide legal services to those unable to pay. However, the suggested requirement is 50 hours of pro bono public legal services per year. The Model rule is also only suggestive, providing encouragement to volunteer, but with teeth to enforce the suggestion.

While the community service requirement is optional, reporting one's pro bono service is mandatory. Florida joins Hawaii, Maryland, Illinois, Indiana, Mississippi, Nevada, New Mexico and New York as the only nine states to have mandatory reporting requirements. New York and California are the closest to implementing mandatory requirements. So far, these two states require prospective attorneys to register at least 50 hours of pro bono service in order to be eligible for admission to the state bar. This rule does not apply to current members of the state bar, and no state mandates its attorneys to provide pro bono hours.

Given the current access to justice issues, especially for civil legal matters, an argument for mandatory pro bono requirements is noble. In practice, any benefits associated with this type of requirement would likely be over shadowed by the administrative difficulty in implementing it. Forced volunteerism undermines the spirit of giving back. In Positional Conflicts and Pro Bono Publico the authors hypothesize that "in most cases, the factor that moves lawyers to this service is not an oath or rules, but rather, a call from the heart." (Yochum, M. and Fromknecht, J., Positional Conflicts and Pro Bono Publico, 16(2) *Florida Coastal Law Review* 233 (2015)). Over the past twenty years, the pro bono activity of Florida lawyers has been increasing steadily each year; July 1st, 2013 through June 30th, 2014 saw the most hours, lawyers in Florida registered 1,881,396 hours of pro bono service and donated $4,891,433 to legal aid organizations. PRO BONO PUBLICO: Facts and Statistics, The Florida Bar. (Revised Jul. 15th 2014),

Many attorneys give back by providing pro bono services that involve "civil proceedings given that government must provide indigent representation in most criminal matters." Rule 4-6.1 Pro Bono Public Service. However, there are a number of practice areas that are not involved in litigation on a regular basis. What are transactional attorneys with a call from the heart supposed to do? Is courtroom representation the only option? "Lawyers are often driven to use their talents for not just gain, but good…[t]he lawyer may seek out charity work within" his comfort level and practice area. Yochum at 234. The Comments to the Rules suggest that lawyers may also provide:

Legal services to charitable, religious, or educational organizations whose overall mission and activities are designed predominately to address the needs of the poor. (Rule 4-6.1 Pro Bono Public Service)

This comment explains that lawyers may volunteer their time to support nonprofit, charitable, religious, and educational organizations. While many large nonprofits have legal departments, small and medium size organizations often have a variety of unmet legal needs and issues. Many of these organizations have similar legal issues as for profit businesses including routine compliance and regulatory issues, employment law issues, and negotiating contracts and intellectual property rights.

Volunteering your pro bono hours to an organization creates a ripple effect in the community. It allows that organization to dedicate more time, talent and treasure to its mission and the people it is supporting. It also instills confidence in the organization's Board of Directors, staff, and stakeholders that the organization is operating in compliance with all of the rules and regulations governing its work. This helps the organization secure more donations and resources, which allows the organization to help even more people.

Interpreting statutory and regulatory compliance issues is second nature to many lawyers, and their skills sets will easily transfer to supporting a nonprofit organization. Others may be unfamiliar with these issues and want to seek guidance and training before volunteering his/her time. The Public Interest Law Section has recently launched the "Nonprofit Legal Issues Committee" to help members of the section and the Bar understand the unique legal issues that nonprofits face, provide them with resources and trainings on these issues, and encourage pro bono service focused on macro change—helping the organizations that are making a difference in the community.

If you are interested in joining this committee, please contact Committee Co-Chairs Jeffrey Fromknecht and John Copelan. ▪

Outlook: Perspectives on Law and Practice

Dealing with the Recent Supreme Court Decision *Obergefell v. Hodges*

The Aftermath of *Obergefell*– Love Wins

By **Celina Collado**
Student Writer

The *Obergefell v. Hodges* decision extended the fundamental right to marry to same-sex couples, allowing a unity of love to be shared widely among the sexes. This decision created new rights and obligations for same-sex couples that choose marriage. It also raises new questions: Will society respect and carry out the law or will society continue to hide behind rigid ideologies? How will different groups in society respond, particularly religious groups who have publicly had the strongest objections?

While many have embraced the *Obergefell* decision as one of the greatest Supreme Court rulings regarding family since *Loving v. Virginia*. Others have deemed the decision as a gateway to the de-institutionalization of marriage. According to an Associated Press GFK poll, just a few weeks after the Obergerfell decision 42 percent of Americans support same-sex marriage and 40 percent oppose it.

Since the decision, same-sex couples wishing to marry have seen obstacles to have their right to marry acknowledged. County Clerk Kim Davis of Rowan County, Kentucky, was arrested on September 3, 2015, after refusing to issue marriage licenses to same-sex couples. Her refusal to issue marriage licenses to same-sex couples is based on her strong religious convictions. Other clerks have followed her example. Davis' stance has even received attention from religious leader Pope Francis. The Pope was quoted saying "I can't have in mind all the cases that can exist about conscientious objection, but, yes, I can say that conscientious objection is a right that is a part of every human right. It is a right. And if a person does not allow others to be a conscientious objector, he denies a right."

Select businesses in the wedding planning sector are excited for the new activity that will be generated and many are happily marketing themselves as lesbian and gay friendly. However, not all find the possibility of the new clients appealing. A Louisiana bakery, Caro's Cakes and Catering, recently refused to design a wedding cake for a gay couple on the basis of his faith. In order to avoid these types of complications between businesses and consumers, many states are passing non-discrimination ordinances to protect LGBT consumers. Washington, Oregon, Iowa, Vermont, Colorado, and New Mexico all currently have consumer protection laws that prohibit discrimination based on sexual-orientation. Supporters of LGBT rights are ready to face the next frontier for equality by passing more laws against employment, housing and public accommodation discrimination. Currently, twenty-two states and the District of Columbia have such laws in place. Florida is absent from both of these lists. However, nine counties have passed ordinances protecting against employment discrimination based on sexual orientation and gender identity, including Alachua, Broward, Leon, Miami-Dade, Monroe, Orange, Palm Beach, Pinellas, and Volusia counties.

Although it seems that the American society is not embracing the idea of same-sex marriage as openly as supporters would hope, progress is and steady and at the end of the day...love wins. ▪

The Impact of Same-Sex Marriage on Divorce

By **Tim Arcaro**
Guest Writer
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Same-sex marriage is an easy concept to digest as a matter of law. Two people of the same gender can now walk into a courthouse and legally obtain a license to wed if they otherwise meet the statutory requirements of capacity and intent to marry. If the marriage is successful and they live happily ever after, then we wish them the very best. Conversely, if they decide to divorce, they must comply with the procedural and substantive legal standards in their jurisdiction to obtain a divorce.

This relatively simple construct of marriage and divorce really applies only to a minority of cases, given that same-sex marriage was legalized well before states could move to amend existing divorce laws designed to accommodate opposite-sex partners. Legislators around the country are hurriedly amending statutes and promulgating new legislation to respond to the dynamics of same-sex marriage. This is particularly true in the areas of procreation, parentage rights, and alimony. The first order of business is to rewrite existing domestic relations laws moving from gender specific roles to what should now be gender-neutral language. Additionally, same-sex married couples will need scientific intervention if they plan to have children, prompting a review and revision of reproductive laws. Lastly, post-divorce alimony rules may also need updating given the changing dynamic of the American family.

Beyond the simple construct of marriage and divorce, there are far more complex questions about what constitutes a marriage prior to the recent U.S. Supreme Court decision in May 2015 legalizing same-sex marriage. Many same-sex couples had engaged in a variety of civil ceremonies, from commitment ceremonies to civil unions to domestic partnerships to what looked like traditional marriage. For these couples, the inevitable question follows: Did my relationship qualify as a valid marriage for recognition and enforcement? There is no clear guideline or existing legislation that answers this question with uniformity. The path to recognition may be an unsteady one with unpredictable results, making it difficult to clearly answer the question until courts around the country have had an opportunity to digest the issue.

While it's fairly easy to stop the clock ticking as to what constitutes marital property for purposes of divorce, the tricky questions are when, where, and how does the clock begin to run on the various state approaches that were offered on a jurisdictionally specific basis? Marital-type relationships that existed prior to the Supreme Court's ruling will surely face the question of retroactive recognition, and for some the answer may not be inclusive.

The paradigm used to resolve custodial disputes was predicated on gender roles from the midcentury. Biology has been a critical lynchpin in establishing or denying familial relationships. What will be the new paradigm when same-sex couples decide to have children and start a family? It will take time for the law to catch up with the dramatic social changes flowing from same-sex marriage. ▪

How *Obergefell* Affects Employment Law

By **John Sanchez**
Guest Writer
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After the Supreme Court ruled that same-sex marriage is a fundamental right under the Constitution, the following federal and state employment-related statutes must be revised to include spouses in same-sex marriages.

1. The Family and Medical Leave Act (FMLA) entitles eligible employees of covered employees to take unpaid, job-protected leave for specified family and medical reasons. The Department of Labor is revising the definition of spouse under the FMLA to include same-sex spouses.

2. More same-sex couples will be recognized as married for purposes of determining entitlement to Social Security benefits or eligibility for Supplemental Security Income (SSI) payments. The Social Security Act provides for widow's benefits only to women who were married to the deceased for at least nine months before his death. The definition of widow must be revised to include the surviving spouse of a same-sex marriage. Also, when a spouse files for Social Security benefits before "her" full retirement age, "her" benefits are commonly based on "her" work record. If, however, "she" also qualifies for a spousal benefit and that benefit exceeds the amount based on "her" work record, then "she" receives a combination of the two benefits for a total equal to the spousal benefit. The term spouse must be revised to include same-sex spouses.

3. The Equal Employment Opportunity Commission and courts are claiming that Title VII of the Civil Rights Act may be used to protect gay persons from employment discrimination. In the past, courts generally held that that sexual orientation discrimination in employment is not covered by Title VII. In a recent case, a federal district court ruled that a gay employee may bring a claim under Title VII's ban on sex discrimination because an employer views an employee's sexual orientation as "not consistent with… acceptable gender roles." EEOC Commissioner Chai Feldblum wrote in the New York Times. "[A]ssume a male employee is fired because he marries another man. The reason for that employee's firing makes reference to the sex of the people involved, and the antipathy to marriage by a same-sex couple is deeply embedded in a history of gender roles and sex stereotypes. From my perspective, that is a simple case of sex discrimination."

4. Florida's ban on marital status discrimination in employment must be revised to include a ban on discrimination based on same-sex marriage. Marital status discrimination occurs when an employee is discriminated against either because the employee is married or is single.

5. Employers who only recognize domestic partnership status for gay employees might decide to eliminate this benefit because now gay people may marry. But for employers that allow both heterosexual and homosexual domestic partnership agreements, nothing changes.

6. The Comprehensive Omnibus Budget Reconciliation Act of 1985 (COBRA), requires employers with 20 or more employees that offer health benefits to offer continued coverage to former employees, their spouses, among others, for 18 or 36 months or until coverage begins under another plan. COBRA notification rules must be revised to include same-sex spouses.

7. The Employee Retirement Income Security Act of 1974 (ERISA) is the primary federal law of employee benefits. A defined benefit pension earned during marriage is generally considered to be a joint asset of both husband and wife. A court approved property settlement that provides for a pension plan to make payments to a former spouse is called a domestic relations order. Under ERISA, a "Qualified Domestic Relations Order" allows payments to be made for the life of the employee or retiree and also after death. The definition of spouse under ERISA must be revised to include same-sex spouses. ▪

Effects of *Obergefell* in the Florida Constitution and Florida Statutes

By **Claudia Gallego**
Student Writer

The U.S. Supreme Court opened the full "constellation of benefits" associated with the institution of marriage to same-sex married couples that not long ago was only granted to opposite-sex married couples. *Obergefell v. Hodges,* 135 S. Ct. 2584, 2602 (2015). A clear effect on the Florida Constitution is positive affirmation of prior federal and state court rulings that declared Art. X, § 27 of the Florida Constitution unconstitutional. Another more significant effect is the preemption effect which bars state legislatures from enacting laws that "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell* at 2591. The ruling also declared that the State laws banning same-sex marriage are now invalid.

From the ruling it must be understood that § 27, Art. X of the Florida Constitution is no longer a source for many provisions contained in the domestic relations Florida Statutes. These statutes contain many provisions that expressly confer rights only to husband and wife. Section 742.091 establishes that if the parents of any child born out of wedlock marry after the birth of the child, the "child shall in all respects be deemed and held to be the child of the husband and wife." Likewise, §742.11, states that a child conceived by means of artificial or in vitro insemination or donated eggs, is "irrebuttably presumed to be the child of the husband and wife." Some state laws are now facially invalid and the phrase "husband and wife" will have to be read differently in the reign of *Obergefell*.

This landmark ruling does not equate to an end of the legal war for same-sex couples. Conversely, it has opened up a host of new legal fights for the recognition of the "benefits" that come with marriage. The ruling did not come with a set of guidelines or with a direct order for the state legislatures to modify domestic relations statutes. Therefore, same-sex married couples are in a legal limbo with only two plausible solutions for filling the gap left by the ruling. One requires the action of the state legislature. However, the history of cases in Florida and the history of legislative intent favoring same-sex couples promise little hope that lawmakers will voluntarily modify existing statutes.

The second requires that same-sex married couples take action demanding the recognition of the full "constellation of benefits" associated with the institution of marriage in the courts. In Florida, three same-sex married couples have already taken action. On August 13, 2015, they jointly filed a lawsuit in the Northern District of Florida against the Surgeon General, State Registrar, and Secretary of Health for the State of Florida. This suit challenged the State's refusal to "issue accurate two-parent birth certificates to children born to same-sex spouses pursuant to Section 382.013 (2)(a) of the Florida Statutes." *Chin v. Armstrong, et al.,* 4:15-cv-00399-RH-CAS (N.D. Fla. 2015).

Not surprisingly, the U.S. Supreme Court anticipated these legal implications of its ruling when it reasoned that "[t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right…the idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials…." *Obergefell* at 2605-2606. There is no doubt that *Obergefell* has brought, and will bring, a drastic change on States' laws regulating domestic relations, and most likely, the courts will have the last word as more same-sex married couples move to seek the protection of their rights. ▪

Obergefell's Impact on Real Property in Florida

By **Maxwell Sawyer**
Student Writer

On June 26, 2015, the Supreme Court of the United States decided *Obergefell v. Hodges.* The Court in *Obergefell* held that same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015). Additionally, the Court held there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character. It is axiomatic that this decision will profoundly impact Fundamental Rights, Equal Protection, and Due Process. However, this decision will have far reaching implications beyond Constitutional law. The Court's holding will have a sweeping impact on a variety of laws across the country, including the area of real property.

In Florida a husband and wife can hold property as tenants by the entirety. Tenants by the entirety is a unique form of title which requires certain unities to exist simultaneously. First, there must be a unity of possession, which is joint ownership and control. Second is the unity of interest, which requires the marriage participants to possess identical interests. Third is the unity of title, which requires both interests to have originated in the same instrument. Fourth is the unity of time, which is the interest must have commenced simultaneously. The Fifth is a right of survivorship, which means in the event of a death of one tenant, the property automatically passes to the surviving tenant. The Sixth and final unity is the individuals be married, which means there must be valid marriage at the time the property became titled in their joint names.

This form of title can be extremely valuable for Florida spouses because of the accompanying legal ramifications that arise simply from possessing property as tenants by the entirety. The most notable legal benefit married couples having this title enjoy is general exemptions from creditors. The idea under the entireties doctrine is that each tenant essentially owns an undivided one hundred percent interest in the property. The effect of this is granting each spouse an undivided right to the whole property. Thus, the creditor of one spouse cannot reach the property that is owned wholly by the other spouse. Accordingly, the debt of one spouse in most circumstances will not allow a creditor to penetrate the tenants by the entireties ownership as to the interest of the remaining spouse, leaving the entire parcel of land unreachable by the creditor.

Prior to *Obergefell,* same-sex married couples in Florida were not entitled to hold property as tenants by the entirety because the element of marriage, defined as marriage between a man and a woman, was consistently found to be invalid. Although civil unions were issued in other states, Florida was under no obligation to recognize those unions and bestow the benefits of tenants by the entirety onto same-sex married couples owning property together. It seems that *Obergefell* will cause Florida to fall into compliance with the Court's decision and entitle same-sex married couples to the benefits of a tenancy by the entirety.

Now, in light of *Obergefell* recognizing the validity of same-sex marriages, a new class of spouses will be accorded the opportunity to access this type of tenancy. However, *Obergefell* is silent on whether its decision is retroactive, leaving open a wide range of questions as to the property rights of same-sex couples who were lawfully married, but the state in which they own property did not recognize their marriage prior to the Supreme Court's decision. The implication of *Obergefell* on the area of real property will ensure that lawyers will continue to have to seek the guidance of the court in protecting and establishing the parameters of the property rights of same sex couples. ▪

Case Notes

Bell v. City of Boise:

The Eighth Amendment & the Prohibition of Sleep

By **Kevin Sellar**
Student Writer

In *Bell v. City of Boise,* Case No. 1:09-cv-00540-REB (D. Idaho), numerous plaintiffs challenged a Boise anti-camping ordinance, claiming it violated their Eighth Amendment rights. The Boise Municipal Codes criminalized sleeping on the streets, in parks, or in public places at any time. The Code also stated; "It shall be unlawful for any person to use any of the streets, sidewalks, parks or public places as a camping place at any time", and "Any person who violates the provisions below is guilty of a misdemeanor Occupying, lodging or sleeping in any building, structure or place, whether public or private, or in any motor vehicle without the permission of the owner or person entitled to possession or in control thereof…" Boise City Code § 9–10–02 (1993) (the "Camping Ordinance").

The plaintiffs argued that the ordinance punished them for being homeless, which is cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution. In addition, the shelters do not always have space for them and could be inaccessible to people with various disabilities. Other arguments outlined the fact the homeless may be unwilling to stay at a particular shelter due to religious beliefs, or prevented to stay at a shelter because of previous rule violations which force them to have to sleep out in public. The plaintiffs in the case sought a permanent injunction from the enforcement of the code sections that criminalize sleeping in public places.

The Department of Justice ("DOJ") filed a statement of interest in Bell, arguing against punishing people for sleeping in public when no space in shelters exist. The DOJ took the position that punishing conduct that is an unavoidable consequence of being a human violates the Eighth Amendment, because sleep is required to sustain life and with no available space in shelters, the Code criminalizes people for being homeless. Additionally, the DOJ argued that the needless punishment of homeless people does nothing to break the cycle of homelessness. It merely further burdens the judicial and correctional systems, and has long lasting and devastating effects on the individuals' lives. The federal government insisted that instead of criminalizing homelessness the focus should be on providing the services to the people in need to try and fix the situation.

Bell v. City of Boise was recently dismissed by the federal district court for lack of standing after a revision of the Code was released. This version stated the ordinance is only enforceable when there is availability of lodging in any of the shelters. The judge ruled these plaintiffs no longer had standing under the new version of the ordinance, since none of them have been cited since it went into effect. As a result, plaintiffs lack an actual injury, and the judge ruled that there was no substantial risk that the harm would occur for two reasons. One, the code was revised and two, the City of Boise said they will enforce it. The new writing of the code is interpreted to only punish those sleeping in public places when there is space in a shelter. The police have been told if they come across people sleeping in a public area that they should direct them to a shelter that has space, and the shelters would notify the police when the shelter was filled. While the judge did dismiss this case for lack of standing he said that there could be someone in the future who could potentially have standing.

However, the DOJ's statement of interest filed in *Bell* will continue to have lasting effects as it represents the federal government's position on the proper legal framework for analyzing the constitutionality of sleeping ordinances under the Eighth Amendment. It sets forth a clear argument that can be utilized by lawyers across the country seeking to challenge these types of ordinances. ▪

Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc. - 135 S. Ct. 2507 (2015)

By **Candace Coletti**
Student Writer

In 2009, the Inclusive Communities Project ("ICP"), a non-profit organization, sued the Texas Department of Housing and Community Affairs ("TDHCA") under the federal Fair Housing Act (FHA). This disparate impact claim alleged TDHCA disproportionately granted tax credits to developments in minority neighborhoods, denying such credits to Caucasian neighborhoods. ICP argued that, as a result, a high concentration of low-income housing propagated the unwanted segregation in violation of the FHA.

The District Court found that ICP's evidence of the statistical allocation of tax credits constituted a prima facie case for disparate impact. The Court then procedurally required TDHCA to establish the allocation of tax credits were founded on a compelling government interest where no less discriminatory alternate existed. Due to TDHCA's failure to establish that there was no less discriminatory alternative method, the District Court found in favor of ICP. TDHCA appealed, claiming the wrong standard was applied is assessing disparate impact. The Fifth Circuit Court of Appeals affirmed the lower court's decision, stating the standard was promulgated by the Department of Housing and Urban Development, the agency tasked with implementing the FHA. Once again the case was appealed.

The U.S. Supreme Court granted certiorari review to address whether the District Court used the proper standard for evaluating a FHA claim of discrimination based on disparate impact.

In a 5 to 4 decision Justice Kennedy delivered the majority opinion. Here, the Court looked to the statutory language of the FHA. They concluded the language in the FHA focused on the consequences of the actions rather that the actor's intent. The Court also discussed both the similarities in language used in Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, because both were enacted around the same time as the FHA. Most importantly, both statutes include disparate-impact liability.

Title VII states "[i]t shall be an unlawful employer practice for an employer (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a).The Court looked to *Griggs,* which reasoned that disparate-impact liability furthered the purpose and design of the statute. *Griggs v. Duke Power Co.,* 401 U.S. 424, (1971).The Court explained that, in § 703(a)(2), Congress "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." For that reason, the Court held Congress fixed the thrust of § 703(a)(2) to the penalties of employment practices, not simply the motivation. In applying this analysis, to the instant case, the Supreme Court held that a disparate impact claim can be properly brought when the operation yields a discriminatory result, even in the absence of discriminatory intent.

Justice Clarence Thomas wrote a dissent in which Justice Roberts and Justice Scalia joined. He argued the majority incorrectly interpreted Title VII as enabling disparate-impact liability. Thomas also argued that racial imbalance alone is not sufficient to prove unlawful conduct. In his separate dissent, Justice Samuel A. Alito, Jr. wrote that the FHA did not encompass disparate-impact liability upon its creation and no further precedent or amendment has shaped such liability. Alito states the language of the statute clearly focuses on intentional discrimination rather than the racial disparity itself and looking to the above statutes for guidance is unnecessary.

This case will have significant impacts on litigation in the future as it clearly establishes that disparate impact claims are viable under the FHA. ▪

HUD Releases New Rule Affirmatively Furthering Fair Housing

By **Nathan Nelson**
Student Writer

On July 16, 2015, the U.S. Department of Housing and Urban Development ("HUD") revealed its final rule, *Affirmatively Furthering Fair Housing* (AFFH) that will help the public meet fair housing criteria in order to receive, and continue receiving, HUD funds. Heather Fluit, HUD *Announces Final Rule on Affirmatively Furthering Fair Housing,* U.S. Dep't of Hous. & Urban Dev. Press Release, Hud.gov (July 8, 2015). Originally, the Fair Housing Act of 1968, required HUD to make affordable housing more accessible in order to "promote fair housing and equal opportunity" to every American, despite race, color, national origin, religion, sex, disability or familial status. *Id.* This rule was created after recommendation of stakeholders, HUD program participants, and a Government Accountability Office report from 2010 that requested "clearer guidance, more technical assistance, better compliance and more meaningful outcomes." The suggestions were integrated into the final rule, which now provides better guidelines and tools to help achieve the standards necessary to qualify and maintain funds.

A major focus of the rule requires communities "to conduct an 'Assessment of Fair Housing' to scrutinize their current patterns of integration and segregation, evaluate areas of poverty, and identify disparities in equal access and disproportionate housing." HUD Publishes Affirmatively Furthering Fair Housing Rule, HRC Blog (July 9, 2015), This assessment is reviewed by HUD, which then requires the community set goals to change their housing patterns, if necessary.

Additionally, AFFH helps to clarify previous fair housing laws by, "creat[ing] a streamlined Assessment of Fair Housing planning process, which will help communities analyze challenges to fair housing choice and establish their own goals and priorities to address the fair housing barriers in their community." *Id.* The final rule took effect 30 days after its publication; however, it has not yet been fully implemented. HUD has also stated that they will provide support to those that request it, to ensure compliance with the rule.

This country's enduring battle with discrimination is well documented; however, the implementation of rules such as AFFH will help America continue to move in the right direction. In light of the Supreme Court's recent decision to allow same-sex couples to be married, access to fair housing is even more evident for LGBT communities. According to research conducted by HUD, "same-sex couples [and transgender people] experience significant levels of discrimination when responding to advertised… housing nationwide." *Id.* While the rule doesn't explicitly mention the LGBT community, many civil rights groups have gone on record approving of the final rule. ▪

King v. Burwell: U.S. Supreme Court Upholds The Affordable Care Act Once Again - 2015 WL 2473448 (2015)

By **Mario Brito**
Student Writer

On June 25, 2015, the U.S. Supreme Court held that the federal exchanges created under the Patient Protection and Affordable Care Act ("ACA") constitute exchanges created by the individual states for purposes of the Act. Due to the Court's affirmative answer, the federal exchanges created in the absence of state exchanges may keep offering subsidies to qualified individuals under the ACA. Justice Roberts wrote for the majority of the Court, in a 6-3 decision to which Justices Breyer, Ginsburg, Kagan, Kennedy, and Sotomayor joined.

Petitioners were Virginia citizens who did not wish to purchase health insurance. But-for the tax credits provided to them by the IRS to purchase insurance through Virginia's federal exchange, a purchase of health insurance would constitute more than 8% of their total income. This would effectively exempt them from the requirement to purchase health insurance. Their argument to the court stressed for ACA purposes, the federal exchange in place in Virginia did not constitute "an exchange established by the state," as stated in §36B of the act.

The Court reasoned that granting *Chevron* deference to the IRS was not proper as Congress did not intend to delegate the matter before the Court to the agency's discretion. If Congress wished to delegate authority on this matter, then it would have expressed such intent. Despite the Court's acknowledgment of both the ambiguity and "unartful drafting" of §36B's language, it nonetheless applied the cannon of statutory construction to provide meaning to §36B's words within the statutory context.

The Court scrutinized the words of §36B, and juxtaposed them against several other provisions of the ACA. In doing so, the Court held that the words "an exchange established by the state" must necessarily include federal exchanges in order to prevent a "death spiral" of the statute. In the absence of an exchange created by Virginia, the IRS must necessarily provide tax credits to qualified individuals for usage in the federal exchange created within Virginia; otherwise, the ACA would fail to function as Congress intended.

The Court pointed out to three major reforms upon which Congress based the ACA: 1) the guaranteed issue and community rating requirements, 2) the requirement that individuals buy health insurance, or otherwise make payments to the IRS, and 3) that tax credits be provided to qualified individuals between 100 percent and 400 percent of the federal poverty line. The reading petitioners urged the court to adopt would render the third reform impossible to accomplish, while substantially limiting the second reform. 87% of people who purchased health insurance in 2014 through a federal exchange did so with tax credits provided through the IRS; therefore, a reading as petitioners urged would have rendered all of those individuals effectively exempt from buying insurance. Because Congress could not have intended a death spiral of the ACA, the language of §36B must be read to include federal exchanges when read in context with the statuary scheme. The tax credits are necessary for the survival of the statute.

With the Court's ruling, the ACA survived yet another challenge to its provisions. ▪

Florida's Charlotte's Web Law:

Administrative Hurdles Delay Access to Medical Marijuana

By **Mario Brito**
Student Writer

There is a trend amongst states towards the legalization of marijuana. The effect of the trend is limited on a state-to-state level by each state's individual laws, and relative degree to which marijuana has been legalized. For example, marijuana has been fully legalized in Washington, Oregon, and Colorado, as well as the District of Columbia. It has been made a lesser infraction in a number of states, including California and New York, with varying degrees of penalties and permitted usages. However, marijuana use remains illegal in most state jurisdictions on a criminal level, including Florida. Though marijuana use is still illegal under federal law, Florida in particular is rather draconian in its laws criminalizing such use when compared to states such as California or New York.

Here in Florida, a constitutional amendment to completely legalize medical marijuana failed last November. Regardless, the Florida Legislature enacted a law enabling limited medical access to marijuana for people suffering from specific conditions, such as severe epilepsy and terminal cancer. The marijuana approved under this law, signed by Governor Rick Scott, is known as Charlotte's Web. Charlotte's Web is a specific kind of marijuana that is low in THC, the compound that produces a high on users of the substance.

Despite the legalization of Charlotte's Web, it has yet to reach those individuals for whom the bill was intended to help. A series of administrative hurdles has slowed the de facto legalization of this drug. One such hurdle has come indirectly, from growers who wish to tap into the budding marijuana drug market within the State of Florida. Florida has largely left the formation of agency rules to their Department of Health.

The last administrative decision on the matter came down on May 27, 2015. The agency adjudication was based on a Florida nursery that challenged the promulgation of a series of final agency rules by the Florida Department of Health. *Baywood Nurseries Co., Inc., v. Dep't of Health;* (May 27, 2015) (on file with Clerk, Div. of Admin. Hearing). The agency determined through a special committee that the application fee for plant growers seeking approval under Charlotte's Web law would be set at $60,036.00.This amount was projected in accordance with the estimated low amount of applicants to be received.

The petitioner challenged the estimates of the state, insisting more growers would seek approval by the state for the subsequent growth of Charlotte's Web marijuana. The agency determined that the petitioner had failed to prove a nefarious intent on the part of the state to artificially decrease its estimates as to the amount of applicants it would receive, and in turn inflate the fee due on the state applications. Likewise, the agency determined that it did not have the power to refund any fee application in line with its limited spending authority.

The petitioner lost in the adjudicative proceeding, and the market for the marijuana production will remain limited to those applicants who can pay the large price tag established by the state. There is currently a limit set permitting five nurseries to apply for the special license under the Charlotte's Web law. It is estimated the drugs will not come into the market until after December 2015. ▪

Up to date: Committee Reports

Committee Conference Call Schedule

Committee	Committee Chair	Call Scheduled	Dial In Information
Children's Rights	Robin Rosenberg Robin.rosenberg@mac.com	3rd Wednesday of each month	888-376-5050 Participant Code: 4201030652
Civil Rights	Martha Pardo mpardo@latinojustice.org	TBA - Contact Chair	888-376-5050 Participant Code: 4201030652
Consumer Protection	Alice Vickers alicevickers@flacp.org	3rd Monday of each month	888-376-5050 Participant Code: 4201030652
Disability Law	Sara Sullivan ssullivan@fcsl.edu	TBA - Contact Chair	888-376-5050 Participant Code: 4201030652
Homelessness	Kirsten Clanton kirsten.clanton@southernlegal.org	TBA - Contact Chair	888-376-5050 Participant Code: 4201030652
Nonprofits	John Copelan colbun@live.com & Jeff Fromknecht jeff@sideprojectinc.org	TBA - Contact Chair	888-376-5050 Participant Code: 4201030652
Parents' Advocacy	Craig McCarthy CAM@CraigMcCarthyLaw.com	Last Friday of each month	888-376-5050 Participant Code: 4201030652

Civil Rights Committee Report

By **Martha Pardo, Esq.**
Committee Chair

The Civil Rights Committee has been busy this year. Committee members worked diligently on legislative positions presented to the Executive Council during the Florida Bar's annual meeting in June. The proposed positions address rights restoration for disenfranchised felons, death penalty issues and barriers affecting individuals with arrest and/or criminal records when seeking employment and housing.

If you are interested in joining the Civil Rights committee, please contact Martha Pardo, at: mpardo@latinojustice.org. ▪

The Florida Public Interest Journal: *Call for Submissions*

Do you have a topic you want to write about? PILS is seeking interested members willing to write about public interest law issues. Send us tips about cases, issues, or topics we should be covering.

Contact Kirsten Clanton, Esq. if you are interested at Kirsten.clanton@southernlegal.org.

Get on board: *Join a Committee*

The Executive Council of PILS has established a **Long-Range Planning Committee** to develop a strategic plan to guide our Section over the next several years. Contact Alice Vickers, Chair, if you are interested (alicevickers@flacp.org).

The **CLE Committee** works to put together quality continuing legal education as a section service. Additional programs are in the planning stages. Contact Kathy Grunewald, if you are interested in joining the Committee (Kathy@floridalegal.org).

The **Legislative Committee is** responsible for the Section's legislative advocacy efforts. Contact Laura Boeckman, if you are interested in joining the Committee (laura.boeckman@myfloridalegal.com).

Our substantive committees are an excellent way to connect to other public interest lawyers and work together on relevant legal issues.

Please contact the Chair of the Committee you wish to join for further information:

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Interested in developing a new committee in an area of law not listed here?

Contact Alice Vickers, Chair of the Section. ▪

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