

STATE OF INDIANA)
)
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CIVIL DIVISION
CAUSE NO. 49D13-0211-PL-001946

RUTH MORRISON, *et al.*)
)
)
Plaintiffs,)
)
v.)
)
DORIS ANNE SADLER, *et al.*,)
)
)
Defendants,)
)

FILED

18

MAY 07 2003

Erin Anne Sadler
CLERK OF THE
MARION CIRCUIT COURT

ORDER ON MOTION TO DISMISS

On March 30, 2003, the Court held a hearing on the Motion to Dismiss filed by Intervenor and Defendants. Present were the plaintiffs, by their counsel, Kenneth J. Falk; defendant Doris Anne Sadler, by her counsel, Anthony W. Overholt; and Intervenor Steve Carter, by Special Counsel Thomas M. Fisher of the Attorney General's Office. Neither Sharon Dugan nor her counsel, Gregory E. Steurwald, were present.

The Plaintiffs' Second Amended Complaint challenges the constitutionality of Indiana Code Section 31-11-1-1, which defines marriage as being between a man and a woman and which declares same-sex marriages to be void. The Court, having considered the arguments and briefs of the parties, and being duly and fully advised, now ENTERS the following Order GRANTING the Motion to Dismiss.

FACTS ASSERTED IN THE COMPLAINT

For purposes of the Motion to Dismiss, all well pleaded allegations of the plaintiffs' Second Amended Complaint are taken as true. Therefore, the Court makes the following findings solely for purposes of the Motion to Dismiss.

1. Ruth Morrison and Teresa Stephens live in Indianapolis as partners in a long-term, intimate, committed relationship. (Second Amended Complaint ["Compl"]. ¶10)
2. Ms. Morrison and Ms. Stephens share joint finances, including financial accounts. They share the expenses of their home and they have jointly purchased and jointly own various personal property. (Compl. ¶11)
3. Ms. Morrison and Ms. Stephens consider themselves to be spouses and hold themselves out to their families, friends and community as spouses in a committed, loving relationship. (Compl. ¶12)
4. Ms. Morrison and Ms. Stephens would marry one another in the State of Indiana if same sex marriage was not prohibited. (Compl. ¶13)
5. Except for the fact that they are of the same sex, Ms. Morrison and Ms. Stephens are legally qualified to marry under the laws of Indiana. (Compl. ¶ 14)
6. Each is over the age of eighteen (18), each is mentally competent, they are not related to each other by blood and neither is married to anyone else. (*Id.*)
7. In order to formalize their commitment to one another and to acknowledge their desire to accept the full responsibilities of a spousal relationship, Ms. Morrison and Ms. Stephens established a civil union in the State of Vermont on October 30, 2000. (Compl. ¶15)
8. David Wene and David Squire have been a couple for more than four (4) years. They live in Indianapolis as partners in a long-term, intimate, committed relationship. (Compl. ¶16)
9. David Wene and David Squire share joint finances, including financial obligations and the expenses of their home. (*Id.*)
10. For a period of approximately one year, Mr. Wene financially supported Mr. Squire so that Mr. Squire could serve as a full time volunteer at a church. (Compl. ¶17)

11. They consider themselves to be spouses and hold themselves out to their families, friends and community as spouses in a committed, loving relationship. (Compl. ¶18)
12. Mr. Wene and Mr. Squire would marry one another in the State of Indiana if same-sex marriage was not prohibited. (Compl. ¶19)
13. Except for the fact that they are of the same sex, Mr. Wene and Mr. Squire are legally qualified to marry under the laws of Indiana. Each is over the age of eighteen (18), each is mentally competent, they are not related to each other by blood and neither is married to anyone else. (Compl. ¶20)
14. In order to formalize their commitment to one another and to acknowledge their desire to accept the full responsibilities of a spousal relationship, Mr. Wene and Mr. Squire established a civil union in the State of Vermont on December 13, 2000. (Compl. ¶21)
15. Charlotte Egler and Dawn Egler have been a couple for more than five (5) years. They live in Camby, Indiana as partners in a long-term, intimate, committed relationship. (Compl. ¶22)
16. Charlotte Egler and Dawn Egler own their home together and share joint expenses and joint finances, including financial accounts. They have jointly purchased and they jointly own various personal property. (Compl. ¶23)
17. Charlotte Egler and Dawn Egler consider themselves to be spouses and hold themselves out to their families, friends and community as spouses in a committed, loving relationship. (Compl. ¶24)
18. Charlotte Egler and Dawn Egler have decided to bear a child together and to raise that child as co-parents. (Compl. ¶ 25)
19. Charlotte Egler gave birth to a child in May 2002. The child was conceived by the fertilization of Dawn Egler's egg through an anonymous sperm donor, which was then implanted in Charlotte Egler who carried the child to term. (*Id*)

20. Charlotte Egler and Dawn Egler would marry one another in the State of Indiana if same-sex marriage was not prohibited. Except for the fact that they are of the same sex, Charlotte Egler and Dawn Egler are legally qualified to marry one another under the laws of Indiana. Each is over the age of eighteen (18), each is mentally competent, they are not related to each other by blood and neither is married to anyone else. (Compl. ¶26)

21. Charlotte Egler and Dawn Egler established a civil union in the State of Vermont on July 5, 2000 in order to formalize their commitment to one another and to acknowledge their desire to accept the full responsibilities of a spousal relationship. (Compl. ¶27)

22. Doris Anne Sadler is the Clerk of the Marion Circuit and Superior Courts and is charged with, among other things, issuing marriage licenses to residents of Marion County. (Compl. ¶ 8)

23. Sharon Dugan is the Clerk of the Hendricks Circuit and Superior Courts and is charged with, among other things, issuing marriage licenses to residents of Hendricks County. (Comp. ¶ 9)

24. Defendants Ms. Sadler and Ms. Dugan will not, and cannot, issue marriage licenses to the Plaintiff couples because they are same-sex couples. (Compl. ¶30)

25. Any finding of fact shall be deemed to be a conclusion of law to the extent necessary.

CONCLUSIONS OF LAW

1. This matter is before the Court on a Motion to Dismiss the Plaintiff's Second Amended Complaint filed jointly by the Defendants and Intervenor (hereinafter collectively referred to as "the State").

2. A motion to dismiss under Rule 12(B)(6) of the Indiana Rules of Trial Procedure tests the legal sufficiency of a claim, not the facts supporting it. *Phelps v. Sybinsky*, 736 N.E.2d 809, 813 (Ind. Ct. App. 2000), *trans. denied*. The trial court must view the complaint in the light most favorable to the non-moving party, drawing every reasonable inference in that party's favor.

Town of Plainfield v. Town of Avon, 757 N.E.2d 705, 710 (Ind. Ct. App. 2001), *trans. denied*.

The trial court must dismiss “if it is apparent that the facts alleged in the complaint are incapable of supporting relief under any set of circumstances.” *Id.*

3. Indiana Code § 31-11-1-1 provides that:

- (a) Only a female may marry a male. Only a male may marry a female.
- (b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.

4. The effect of Ind. Code § 31-11-1-1 is to prevent the Plaintiffs from marrying solely because they are same-sex couples.

5. Plaintiffs assert that Indiana Code Section 31-11-1-1 is unconstitutional under three separate State constitutional provisions: Article 1, Section 1, Article 1, Section 12, and Article 1, Section 23.

6. “[W]hen the validity of a statute is challenged, [the court] must begin with a ‘presumption of constitutionality.’” *State v. Lombardo*, 738 N.E.2d 653, 655 (Ind. 2000) (quoting *State v. Downey*, 476 N.E.2d 121, 122 (Ind. 1985)). “The burden to rebut this presumption is upon the challenger, and all reasonable doubts must be resolved in favor of the statute’s constitutionality.” *Id.*

Plaintiffs’ Claims Under Article 1, Section 1 Must Fail As A Matter Of Law

1. Article 1, Section 1 of the Indiana Constitution provides as follows:

WE DECLARE that all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government.

2. The Indiana Supreme Court has said that Section 1, like the remainder of the Indiana Bill of Rights, merely expresses an overall design to protect the “natural rights” of citizens. *See, e.g., Price v. State*, 622 N.E.2d 954, 958-59 & n.4 (Ind. 1993).

3. In reviewing Section 1 claims, courts must “examine the text and history [of the Indiana Constitution] to determine whether a given interest is of such a quality that the founding generation would have considered it fundamental or ‘natural.’” *Id.* at n.4 Indiana courts will recognize only those rights “which have their origin in the express terms of the constitution or which are necessarily to be implied from those terms.” *O'Brien v. State*, 422 N.E.2d 1266, 1270 (Ind. Ct. App. 1981).

4. Plaintiffs claim that the Section 1 protects the “core value” of being able to marry whomever one wishes, including a member of the same sex.

5. Neither Section 1, nor any other provision of the Indiana Constitution, protects any such right, certainly not as it relates to same-sex marriage.

6. First, no text of the Constitution contains any provision specifically guaranteeing even traditional marriage, much less same-sex marriage.

7. Indeed, the 1850 Constitutional Convention voted down a provision that would have precluded the General Assembly from passing a law “impairing the unity and sacredness of the marriage relation.” *Convention Journal*, 896. This indicates that the Constitution’s framers were unwilling to enshrine any particular view of marriage into the Constitution, and thus that they left regulation of marriage to the General Assembly.

8. Second, the Indiana Supreme Court has explicitly held that “there is no constitutional provision protecting the marriage itself.” *Noel v. Ewing et al.*, 9 Ind. 37, 1857 WL 3556, *8 (1857). It has also held that “[t]he relations, duties, obligations, and consequences flowing from the marriage status are so vital alike to the individuals concerned, the issue therefrom, society

and the state, that they are essentially subject to legislative control.” *Pry v. Pry*, 225 Ind. 458, 468, 75 N.E.2d 909, 913 (1947). Thus, “[t]here can be no doubt that the Legislature may prescribe who may marry; the age at which they may marry; the procedure and form essential to constitute marriage [and] the duties and obligations created by marriage” *Sweigart v. State*, 213 Ind. 157, 165, 12 N.E.2d 134, 138 (1938).

9. Against this backdrop, there is no historical or textual basis for finding a right to marry whomever one chooses, to the extent such a right may include the right to engage in a same-sex marriage, in the state Constitution.

10. Plaintiffs attempt to bolster their Section 1 argument by reference to marriage rights protected by the Fourteenth Amendment of the United States Constitution. However, whatever scope the Fourteenth Amendment’s right to marry may have, it does not include the right to marry a member of the same sex. See *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972). Thus, it is clear that there is no federal right to enter into a same-sex marriage.

11. Plaintiffs also briefly compared the restrictions against same-sex marriage at issue here with the anti-miscegenation law invalidated in *Loving v. Virginia*, 388 U.S. 1, 12 (1967), though they backed off that comparison during the hearing. Other courts have already rejected this analogy, even the Vermont Supreme Court, which ruled that the Vermont Constitution required some alternative to marriage for same-sex couples. See *Baker v. State*, 744 A.2d 864, 880 n.13, 887 (1999); see also *Nelson*, 191 N.W.2d at 187; *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974); *Goodridge v. Department of Pub. Health*, 2002 WL 1299135, at *10 n.22 (Mass. Super. May 7, 2002), *appeal pending*, No. SJC-08860 (Mass.).

12. This Court rejects the analogy to anti-miscegenation laws as well. Unlike anti-miscegenation laws, restrictions against same-sex marriage reinforce, rather than disrupt, the

traditional understanding of marriage as a unique relationship between a woman and a man.

Marriage traditionally and definitionally has had to do with the sex of each participant. Section 31-11-1-1 and similar laws simply enshrine that traditional definition and traditional understanding of marriage into statutory law.

13. Anti-miscegenation laws, because they interfered with the traditional marriage relationships in pursuit of opprobrious racial segregation policies, had no legitimate connection to the institution of marriage itself. *Loving* in no way held that the right to marry means the right to marry whomever one wishes. Its import is far more focused: that whatever else marriage is about, it is not about racial segregation. *See Loving*, 388 U.S. at 12; *see also Singer*, 522 P.2d at 1191 (“The operative distinction [with *Loving*] lies in the relationship which is described by the term ‘marriage’ itself, and that relationship is the legal union of one man and one woman.”); *see also Goodridge*, 2002 WL 1299135 at *10 n. 22 (“By contrast, statutory restrictions on interracial marriage . . . did not have such deep historical roots.”).

14. Apart from whether the Indiana Constitution theoretically provides a right to marry whomever one wishes, it is clear that a two-part test governs all Section 1 claims: (1) Does the law tend to promote the health, peace, morals, education, good order and welfare of the people? (2) If so, does the law bear a reasonable and substantial relationship to accomplishing the legislative purpose? *City of Indianapolis v. Clint’s Wrecker Service, Inc.* 440 N.E.2d 737, 741-42 (Ind. Ct. App. 1982) (quoting *Crane Towing, Inc. v. Gorton*, 570 P.2d 428, 433 (Wash. 1977)); *see also Dep’t of Financial Institutions v. Holt*, 231 Ind. 293, 301, 108 N.E.2d 629, 633 (1952) (observing that freedoms protected by Section 1 “may be restricted by legislation constituting a proper exercise of the police powers of the state in protecting the public health, safety, morals, and welfare”).

15. This is a test for bare rationality, and when reviewing the state's use of the police power, in a Section 1 claim, courts "must accord 'considerable deference' to the judgment of the legislature, inasmuch as the decision as to what constitutes a public purpose is first and foremost a legislative one." *Whittington v. State*, 669 N.E.2d 1363, 1369 (Ind. 1996) (quoting *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994)).

16. Indiana's prohibition against same-sex marriage easily passes this test. It is substantially related to three compelling legislative objectives.

17. First, permitting marriage between opposite sex couples promotes the state's interest in encouraging procreation to occur in a context where both biological parents are present to raise the child.

18. Several courts in the United States have recognized this principle. *Singer v. Hara*, 11 Wash. App. 247, 259, 522 P.2d 1187, 1195 (1974), *reh'g denied*, ruled that Washington's policy limiting marriage to a man and a woman "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." *Singer* held that

This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.

Id. Other courts in the United States have also embraced this rationale. See *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982) (observing that a "state has a compelling interest in encouraging and fostering procreation of the race"); *Goodridge v. Department of Pub. Health*, 2002 WL 1299135, at *13 (Mass. Super. May 7, 2002), *appeal pending*, No. SJC-08860 (Mass) ("because same-sex couples are unable to procreate on their own and therefore must rely on inherently more cumbersome means of having

children, it is also rational to assume that same-sex couples are less likely to have children or, at least, to have as many children as opposite-sex couples.”); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995) (finding that this “central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples”) (Ferren, J., concurring and dissenting); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972) (“The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”).

19. The General Assembly was therefore well within its power to encourage potentially procreative couples to bind themselves together for the good of their children and to form traditional families.

20. Furthermore, this justification for marriage does not extend to same-sex couples, which can never reproduce on their own. And while not all opposite-sex couples may be able to reproduce on their own, or may wish to have children at all, the state is not required to inquire of every opposite sex couple concerning their ability or intent to procreate in order to permit them to marry. The General Assembly is entitled to generally provide for marriage between the only couples that can even theoretically procreate: opposite sex couples.

21. The ability of same-sex couple to adopt children, or to conceive children using donor-assisted reproductive technology, does not undermine the state’s interest in recognizing marriage for opposite-sex couples only. The General Assembly may believe that the traditional family context is the best environment for procreating and for raising children, yet still rationally understand that such arrangements do not always work and therefore permit other family arrangements. The objective of marriage law is to encourage potentially procreative couples to

marry, and thereby to prefer that context for procreation and child rearing, not to create a rigid family construct that permits only one type of domestic living unit.

22. Plaintiffs cite social science evidence for the supposition that same-sex couples can raise children with as much success as opposite sex couples and otherwise fulfill some of the policies of the state's family law statutes. Even assuming that evidence is true, however, it makes no difference for purposes of evaluating the state's marriage law whether same-sex partners make good parents. The point is that the General Assembly is entitled to prefer procreation and child rearing where both biological parents are present, and to do this by enabling opposite-sex couples to marry. No amount of proof concerning the suitability of same-sex homes for rearing children can undermine this rational basis for Section 31-11-1-1.

23. Second, permitting marriage between opposite-sex couples vindicates the related interest in promoting the traditional family as the basic living unit of our free society. This interest is related to the interest in promoting procreation in the context where children are raised by both biological parents, but focuses on the public dimension: The traditional family fosters a sense of voluntary duty reflected in the husband-wife marital commitment and their unquestioning devotion to their biological children. Again, the theoretical ability of opposite-sex couples to procreate is the key.

24. Courts have historically recognized the connection between traditional marriage and our free society. The United States Supreme Court has itself recognized the connection between marriage and free society, referring to traditional marriage over 100 years ago as "the foundation of the family and society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Justice Holmes observed that "some form of permanent association between the sexes" is one of the rudimentary characteristics of civilization. Oliver Wendell Holmes, Jr. *Natural Law*, 32 Harv. L. Rev. 40, 41 (1918).

25. Other courts have also recognized that “the structure of society itself largely depends upon the institution of marriage The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.” *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976). The Indiana Supreme Court long ago observed that “[i]n every enlightened government [marriage] is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern.” *Noel v. Ewing*, 9 Ind. 37, 1857 WL 3556 *8 (1857). According to *Noel*, marriage “giv[es] character to our whole civil polity.” *Id.*

26. In light of these principles and the history of traditional marriage as a critical component of Western Civilization, it is rational for the General Assembly to recognize opposite-sex marriage in order to promote traditional families as the bedrock of society. Same-sex marriage has not played a similar historical role, so the General Assembly has no similar reason to recognize same-sex marriage.

27. Third, Section 31-11-1-1 is substantially related to the goal of protecting the integrity of traditional marriage. The General Assembly may rationally believe that, by definition, members of the opposite sex are the only pairing that can properly enter into a state of “marriage.” Other state courts are in accord with this belief. See *Burns v. Burns*, 560 S.E.2d 47, 48-49 (Ga. Ct. App. 2002) (finding a same-sex “union” not the same as marriage); *Rosengarten v. Downes*, 802 A.2d 170, 175 (Conn. App. Ct.), cert. granted, 806 A.2d 1066 (Conn. 2002) (finding that a civil union is not a marriage recognized under Connecticut law because it was not entered into between a man and a woman). The General Assembly could therefore rationally conclude that it would undermine the meaningfulness and sanctity of opposite-sex marriages to recognize same-sex marriages as well.

28. Furthermore, it is also worth observing that Plaintiffs have not posited a principled theory of marriage that would include members of the same sex but still limit marriage to couples.

There is no inherent reason why their theories, including the encouragement of long-term, stable relationships, the sharing of economic lives, the enhancement of the emotional well-being of the participants, and encouraging participants to be concerned about others, could not equally be applied to groups of three or more.

29. The state's theories of marriage, by contrast, focus on the uniqueness of the male-female couple for purposes of procreating and rearing children and establishing the traditional building blocks of society, and thereby include an inherent limitation on the types of relationships deserving of state recognition as marriage.

30. The state's legitimate goals promote the "peace, safety and well-being" of society and the "public health, morals, safety, or welfare." Indiana Code § 31-11-1-1 is thus by no means arbitrary or untethered to any legitimate public interest. It is a legitimate use of the police power, and Plaintiffs' claim under Section 1 must fail as a matter of law.

Plaintiffs' Claims Under Article 1, Section 12 Must Fail As A Matter Of Law

31. Plaintiffs also assert that Indiana Code Section 31-11-1-1 violates Article 1, Section 12 of the Indiana Constitution. Section 12 provides as follows:

All courts shall be open; and every person, for injury done to him in his person, property or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay.

32. Plaintiffs claim that that Section 12 "guarantees the privacy of Indiana's citizens, which includes the right to marry" and that Indiana Code Section 31-11-1-1 "unnecessarily invades this zone of privacy . . ." Second Amended Complaint ¶ 62.

33. The due course of law clause, similar to its federal 14th Amendment due process counterpart, does protect substantive rights at some level. *McIntosh v. Melroe Co.*, 729 N.E.2d

972, 976 (Ind. 2000). But no substantive rights protected by the Indiana Constitution are at stake here, and even if any such rights were at stake, the General Assembly nonetheless had sufficient justifications for enacting Section 31-11-1-1 to overcome those rights.

34. As discussed above, the Indiana Constitution does not provide a right to engage in same-sex marriage.

35. In any event, the only standard that the Indiana Supreme Court has ever articulated for “substantive” section 12 claims is the rational basis test: “[T]here is no state constitutional ‘substantive’ due course of law violation [if the] legislation has been held to be . . . rationally related to a legitimate legislative objective.” *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 976 (Ind. 2000).

36. For the reasons explained above, Section 31-11-1-1 is rationally related to legitimate state interests in promoting child procreation and child rearing in a context where both biological parents are present; in promoting traditional families as the bedrock of society; and in protecting the integrity of traditional marriage. Plaintiffs therefore do not have a viable Section 12 challenge as a matter of law.

Plaintiffs’ Claims Under Article 1, Section 23 Must Fail As A Matter Of Law

37. Finally, Plaintiffs have asserted a claim under Article 1, Section 23 of the Indiana Constitution that Section 31-11-1-1 deprives them of equal privileges.

38. Under Section 23, Plaintiffs bear the burden “to negative every conceivable basis which might have supported the classification.” *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994). A “conceivable basis” is one in which the distinction is “reasonably related to inherent characteristics which distinguish the unequally treated classes.” *Id.* The relevant “inherent characteristics” are those “inherent differences in situation related to the subject-matter of the legislation which require, necessitate, or make expedient different or exclusive legislation with

respect to members of the class.” *Id.* at 78. Furthermore, when they apply Section 23 analysis, “courts must accord considerable deference to the manner in which the legislature has balanced the competing interests involved.” *Id.* at 79-80.

39. Based on the legitimate government objectives discussed above that underlie opposite-sex marriages but not same-sex marriages, there are inherent distinctions between same-sex couples and opposite-sex couples related to Section 31-11-1-1. These inherent distinctions include the impossibility of same-sex couples to produce offspring born of the union versus the possibility that opposite-sex couples may reproduce as husband and wife, and the reality that a same-sex couple represents a departure from historical traditions of marriage in contrast to opposite-sex couples’ firmly entrenched place in those traditions. Section 31-11-1-1 thus easily passes the first requirement of *Collins* that a law’s classification “be reasonably related to inherent characteristics which distinguish the unequally treated classes.” *Collins*, 644 N.E.2d at 80.

40. Furthermore, Plaintiffs cannot claim that the preferential treatment in this case amounts to sex discrimination. Section 31-11-1-1 is sex neutral: It does not separate men and women as the discrete classes subject to purportedly unequal treatment. Instead, the statute states that a marriage is between one man and one woman and that marriage between “persons of the same gender is void.” Ind. Code § 31-11-1-1.

41. Other courts have rejected the assertion that similar statutes amount to sex discrimination. Even the Vermont Supreme Court, which required some alternative to marriage for same-sex couples, determined that sexual discrimination analysis does not provide a “useful analytic framework” for determining whether same-sex couples have been denied the equal protection of the law. *Baker v. State*, 744 A.2d 864, 880 n. 13 (Vt. 1999); see also *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974) (“There is no . . . sexual classification . . . because appellants

are not being denied entry into the marriage relationship because of their sex . . ."). A claim of sex discrimination is no more plausible here.

42. *Collins* also requires that "any privileged classification must be open to any and all persons who share the inherent characteristics which distinguish and justify the classification," *i.e.*, that "the preferential treatment must be uniformly applicable and equally available to all persons similarly situated." *Collins*, 644 N.E.2d at 79, 80. However, this is not a demand that a legislative classification be perfectly narrowly tailored to vindicate the government's purpose. *Id.* at 80 ("A classification having some reasonable basis is not to be condemned merely because it is not framed with such mathematical nicety as to include all within the reason of the classification and to exclude others.")

43. Therefore, it does not matter that the state permits elderly opposite-sex couples, or other opposite-sex couples who cannot reproduce, to marry even though the main purpose of marriage is to encourage procreation and child rearing in a context where both biological parents are present. The state is not required to screen opposite-sex couples for their interests in reproduction or their capacity to reproduce before granting them marriage licenses. The state is permitted generally to permit opposite sex couples to marry because they are the only types of couples that can reproduce. And because Section 31-11-1-1 does not discriminate among opposite-sex couples, all opposite-sex couples, *i.e.*, those who are similarly situated, are treated equally.

44. Same-sex couples are not similarly situated with opposite-sex couples who cannot reproduce because same-sex couples can never reproduce on their own as a categorical matter. Opposite-sex couples at least theoretically can, even if some particular opposite-sex couples cannot. These are inherent differences that justify Section 31-11-1-1, and all who share the inherent characteristics are treated the same. The legislature drew a line "based upon substantial

distinctions with reference to the subject matter," so its line-drawing is valid. *See Collins*, 644 N.E.2d at 78 (quoting *Chaffin*, 261 Ind. at 701, 310 N.E.2d at 869). Plaintiffs, therefore, do not have a viable Section 23 claim.

Dismissal Is Appropriate

45. In light of the legal insufficiency of all of Plaintiffs claims, Plaintiffs are incapable of succeeding under any set of facts, and their Second Amended Complaint must be dismissed for failure to state a claim on which relief can be granted.

|

ORDER

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendants' Intervenor's Motion to Dismiss is GRANTED. The Plaintiffs' Second Amended Complaint, and hence this entire action, is hereby DISMISSED with prejudice.

Dated: 5-7-03



Judge, Marion County Superior Court

Copies to:

Thomas M. Fisher
Office of Attorney General
Indiana Government Center South
Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204-2770

Anthony Overholt
Office of Corporation Counsel
1601 City-County Building
200 East Washington Street
Indianapolis, IN 46204

Gregory E. Steuerwald
Deckard & O'Brien
106 N. Washington Street
P.O. Box 503
Danville, IN 46122

Kenneth J. Falk
Indiana Civil Liberties Union
1031 E. Washington Street
Indianapolis, IN 46202