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## Defining Decision

What a court in Iowa has to say on marriage.

By William C. Duncan

Like a number of similar decisions, last week's opinion of an Iowa trial court holding the state's marriage law unconstitutional is a little sparse on legal analysis but long on result. The court's conclusion is that the Iowa statute defining marriage as the union of a man and a woman "must be nullified, severed and stricken" from the state's law, such that all references to marriage will be "read and applied in a gender neutral manner so as to permit same-sex couples to enter into a civil marriage pursuant to said chapter."

The legal reasoning the court uses to reach this conclusion is expansive, novel, and disconnected from any relevant precedent.

The court essentially offers three legal arguments: First, the court argues that the fundamental right to marry recognized in previous cases, such as those invalidating racial restrictions on marriage, allows all "individuals to marry a person of their choosing." In other words, an individual possesses the right to define marriage by virtue of the fact that he or she is entitled to choose his or her marriage partner.

The court notes that no state or federal Supreme Court decision has embraced such an argument. In fact, though the court fails to mention it, even decisions from other states purporting to mandate same-sex marriages have rejected this rationale. The court, however, says the rights recognized in the Iowa constitution are "fluid" enough to allow the state's courts to stay "at the forefront of preserving the civil rights of their citizens in areas such as race, gender and sexual orientation."

The second argument that the court takes up is as follows: by virtue of its mere mention of the sex of spouses, and notwithstanding the marriage law's equal treatment of men and women, marriage as previously defined, is a form of sexual discrimination.

Finally, the court offers as a third defense of its position, the argument that defining marriage as the union of a man and a woman is entirely irrational and cannot possibly be understood as advancing any reasonable purpose.

Perhaps most interesting and enlightening about the court's opinion, however, is the long section preceding its short legal analysis where the court outlines its own assumptions about marriage, labeled as "Material Facts as to Which There is No Genuine Issue." This section reads like the brief of a most enthusiastic proponent of same-sex marriage.

Among the assertions in this section is that marriage "stigmatizes," "devalues and de-legitimizes" relationships between same-sex couples causing them to "suffer great dignitary harm." The court

believes marriage laws “amount to a badge of inferiority” if they do not include same-sex couples and create “second class status” for those excluded.

An additional “harm” caused by current marriage law, according to the court, is the prevention of same-sex couples from being able to call themselves “married” individuals. A consequence of this incapacity, the court argues, is that these individuals “are unable instantly or adequately to communicate the depth and permanence of their commitment to others, or to obtain respect for that commitment, as others do, simply by invoking their married status.” Similarly, unless allowed to marry, same-sex couples suffer “a painful frustration of their life goals and dreams, their personal happiness and their self-determination.”

Finally, the court identifies the “harm” inflicted on same-sex couples, who, deprived of the marriage status, also might be denied “the rights, obligations, benefits and privileges” the state makes available on the basis of marital status, including such things as presumptions of parentage, health care decision making and preferential tax treatment.

Regarding the matter of children, the court says that it “is well established that children do not need a parent of each gender to be well adjusted, that both men and women have the capacity to be good parents, and that children do not need male and female role models in the home to develop normally.” All of this question begging (what does the court mean by “well adjusted” or “normal”? how what this conclusion “established” since the court did not hold a trial with testimony as to these points?) is just to say that family structure doesn’t matter to children.

Even after ruling that the proposed testimony of Allan Carlson, a prominent historian of marriage, would not be helpful in the case, the court nonetheless brought in its own historical line of argument; Its arguments, predictably, are centered around the idea that “[m]arriage has evolved over time.” In fact, the court believes the adoption of no-fault divorce made marriage an entirely individualist concept, whereby spouses “exercise continuing choice over whether to be married, to set their own goals for the marriage and to evaluate for themselves whether their goals for the marriage were being met.”

While we don’t learn much about the law from a decision like this (other than how strikingly malleable it can be in some hands), we do learn a lot about what marriage must become in order to sustain the claims for redefining it to mean the union of any two persons.

In order for this judge to reach his conclusions about marriage he had to propound a view of marriage strikingly at odds with the inherited understanding of marriage, reflected in the law he struck down. The previous understanding was child-centered, based on a recognition that men and women can create children, and those children will, all other things being equal, best thrive if raised by their own mother and father who are committed to each other and to any children they create.

The understanding rejected by the court was based on the recognition that the law can help to channel behavior into norms beneficial to society and to its members, even if it cannot address every unique circumstance.

Our inherited understanding of marriage has also been based on the notion of the state recognizing a social status that preceded it and which provides meaning and provision independent of state control.

The court's understanding of the historical product of marriage's "evolution" is fundamentally at odds with this tradition. To the court, marriage has become a mere individual, adult arrangement not entirely different from a business partnership (in which participants are free to make individual goals and evaluate whether the relationship is meeting their needs). To be sure, the court believes recognition of new adult arrangements will benefit children, but that these benefits are ancillary to the benefits marriage will have for adults.

Indeed, the court rejects the logic of sex difference as it relates to procreative capacity. The implication is therefore that same-sex couples are just engaging in a different kind of "responsible procreation" by intentionally creating children whose biological mother or father will be deliberately excluded from, or offered only a supporting role in the child's life. The court gives short shrift to the idea that marriage can beneficially encourage those who may create children, without either intent or the involvement of third parties, to marry for the sake of the child created.

In the new portrait of marriage the state lays claim to the ownership of marriage, and then contorts marriage into a vehicle for conferring dignity and government benefits on all kinds of adult relationships and family structures.

Obviously space does not permit engaging every claim of the Iowa court or illustrating all of the dubious assertions in its opinion. The point is to note that redefining marriage requires a series of assumptions radically at odds with those on which current marriage laws are based. Indeed, this Iowa decision and others like it, raise a very serious question: When the courts are done redefining marriage, will there be anything left?

— *William Duncan is director of the Marriage Law Foundation.*

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