The Next Step in Marriage Equality: Indiana Restrictions on Marriage for Individuals Under Adult Guardianship

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Introduction

As shown by *Obergefell v. Hodges*, the Supreme Court continues to recognize the right to marriage as a fundamental right under the Constitution.[1] However, marriage is subject to reasonable regulation so long as it does not "interfere directly and substantially with the right to marry."[2] As marriage is a fundamental right, marriage restrictions can only be upheld if the restriction accomplishes a sufficiently important state interest and is narrowly tailored to only reach those interests.[3]

In some states, the right to marry may be restricted through the imposition of a guardian on an individual with an intellectual or developmental disability.[4] This restriction can be effectuated in a few ways, but perhaps most concerning are states where, unless reserved by court order, the individual's power to consent to marriage is restricted absent the guardian's consent. This Comment focuses on Indiana law that currently allows for delegation of the power to consent to marriage to the guardian unless the scope of the guardianship is limited to specifically reserve the right to marry.[5]

Part I of this Comment will discuss the basis of adult guardianship and general concerns surrounding the guardianship proceedings. Part II will then shift to state restrictions on marriage in guardianship proceedings, including the states' claimed interests and the three main types of restrictions, with an introduction to Indiana's restriction. Part III will explore the constitutional right to marriage and the state's

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1 Obergefell v. Hodges, 576 U.S. 644, 665-70 (2015).

2 Zablocki v. Redhail, 434 U.S. 374, 386-87 (1978).

3 *See* Turner v. Safley, 482 U.S. 78, 97-98 (1987); *Zablocki*, 434 U.S. at 388 (1978).

4 *See* Fla. Stat. § 744.3215(2)(a), (4)(c) (2020); D.C. Code § 21-2047.01(6) (2020); Ind. Code § 29-3-8-2 (2020).

5 Ind. Code § 29-3-8-2(a)(5) and (b) (2020); Ind. Code § 29-3-5-3(b) (2020).

ability to regulate marriage, as established by the Supreme Court. Next, this Comment analyzes Indiana's marriage restriction before determining that the restriction is not narrowly tailored to state interests and is not the least restrictive alternative means of furthering a valid state interest. Finally, this Comment recommends the ideal statutory framework and court procedures to protect the right of marriage in Indiana for as broad a class as possible, concluding that a tiered system based on an individual's capacity would allow a broad class of individuals to marry while preserving the state's interests.

BACKGROUND

I. ADULT GUARDIANSHIP

Although laws governing guardianship vary across the fifty states and the District of Columbia, a few common themes exist. First, the imposition of guardianship is based in the state's *parens patriae*. Second, most states follow a common general process involving a petition, notice, hearing, and order.

A. *Parens Patriae*

A court's ability to create and assign a guardianship is typically based in the state's *parens patriae* power.[6] The doctrine of *parens patriae* refers to the duty to serve as the protector for those who cannot care for themselves.[7] For individuals deemed incapacitated or disabled following an adjudication,[8] the state has an obligation under *parens patriae* to protect the individual from self-neglect, dangerous decisions, and potential abuse or exploitation from others.[9] The guardianship system allows the court to delegate decision-making

[6] Susan G. Haines & John J. Campbell, *Defects, Due Process, and Protective Proceedings: Are our Probate Codes Unconstitutional?*, 14 QUINN. PROB. L.J. 57, 73 (1999); Michael E. Bloom, Comment, *Asperger's Disorder, High-Functioning Autism, and Guardianship in Ohio*, 42 AKRON L. REV. 955, 960 (2009).

[7] Sydney J. Sell, Note, *A Potential Civil Death: Guardianship of Persons with Disabilities in Utah*, 19 UTAH L. REV. 215, 217 (2019).

[8] Guardianship proceedings are typically held before a local judge, although the jurisdiction of the court varies. Mary Joy Quinn and Howard S. Krooks, *The Relationship Between the Guardian and the Court*, 2012 UTAH L. REV. 1611, 1612 (2012). Guardianship proceedings are often handled by the family or probate court but may also be handled by judges with general jurisdiction. *Id.*

[9] Sell, *supra* note 7, at 229.

powers to another person on behalf of the individual to make sound legal decisions.[10]

The state's *parens patriae* interest has overcome a variety of important liberty interests and weighs heavily in favor of the state in a substantive due process analysis.[11] Courts have recognized that guardianship "implicates numerous liberty interests that are constitutionally protected," such as the right to marry and vote, but no court has ever wholly rejected the *parens patriae* of the guardianship institution.[12]

B. *General Process*

An adult guardianship case requires the balancing of the *parens patriae* power, the efficient use of court resources, and the protection of the individual's rights and well-being.[13] The guardianship process starts with a petition by an interested party.[14] The alleged incapacitated person must then receive notice of the petition.[15] Notice must be given in a method that the alleged incapacitated person will understand, and some states require large and bold letters, an explanation of rights, and plain language.[16] In addition, to ensure the individual is fully aware of the proceeding, many states require notice to be served on the individual's spouse, adult children, parents, nearest adult relative, or anyone who has the care or custody of the individual to ensure proper notice.[17] The court then sets a hearing and appoints an attorney for the alleged incapacitated individual, unless that individual is already represented.[18] Typically, unless excused for good cause, the petitioner, proposed guardian, and alleged incapacitated person should be present and participate in the appointment hearing.[19]

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[10] Robert Dinerstein, Esmé Grant Grewal, & Jonathan Martinis, *Emerging International Trends and Practices in Guardianship Law for People with Disabilities*, 22 ILSA J. INT'L & COMP. L. 435, 436 (2016).

[11] *See* Leslie Salzman, *Using Domestic Law to Move Toward a Recognition of Universal Legal Capacity for Persons with Disabilities*, 39 CARDOZO L. REV. 521, 551-52 (2017).

[12] *Id.*

[13] Eleanor Crosby Lanier, *Understanding the Gap Between Law and Practice: Barriers and Alternatives to Tailoring Adult Guardianship Orders*, 36 BUFF. PUB. INTEREST L. J. 155, 159 (2017-2019).

[14] *See*, *e.g.*, IND. CODE § 29-3-5-1(a) (2020); MINN. STAT. § 524.5-303(a) (2020).

[15] *See*, *e.g.*, IND. CODE § 29-3-6-1(a) (2020); MINN. STAT. § 524.5-304(d) (2020).

[16] Sell, *supra* note 7, at 219.

[17] *See, e.g.*, D.C. CODE § 21-2042 (2020).

[18] *See*, *e.g.*, IND. CODE § 29-3-5-1(c) (2020); MINN. STAT. § 524.5-304(a)-(c) (2020).

[19] *See*, *e.g.*, IND. CODE § 29-3-5-1(d)-(f) (2020); MINN. STAT. § 524.5-307(a) (2020).

If a court finds that the alleged incapacitated person requires the appointment of a guardian to control some or all the decision-making powers delegable under the statute, the court may appoint a guardian.[20] In general, courts examine personal decision-making abilities and financial management in determining what formal decision-making authority to grant a guardian in a proceeding.[21] Once appointed, a guardian has the power to make decisions in the best interest of the individual and substitutes their judgment for that of the individual.[22]

C. *Limited Guardianship*

Although state laws often require that courts tailor and limit a guardian's power to meet an individual's needs, in practice, most guardianship orders remove rights on a "wholesale basis."[23] Limited guardianships seek to remove decision-making power only in areas in which the individual needs assistance, such as medical decisions, financial purchases, or other important life decisions.[24] Although limited guardianships preserve significantly more rights than a "plenary" or full guardianship, the use of limited guardianships remains rare largely because of judicial economy interests.[25] Limited guardianship requires continuing determinations by the court regarding capacity, and additional time and resources are required to tailor the order.[26] However, the use of limited guardianships can be less restrictive and promote increased capacity and life skills.[27] Specifically, with regard to marriage, limited guardianships would ensure that the individuals retain the right to marry when appropriate while allowing the guardianship to provide support for other decisions.

II. RESTRICTIONS ON MARRIAGE IN ADULT GUARDIANSHIP

Marriage is one of the many rights that can be restricted by guardianship orders. States have a variety of interests, including *parens patriae* and efficiency, that result in three types of marriage

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20 *See*, *e.g.*, IND. CODE § 29-3-5-3 (2020); MINN. STAT. § 524.5-310(a)-(c) (2020).
21 *See* Lanier, *supra* note 13, at 159.
22 Dinerstein et al., *supra* note 10, at 440-41.
23 Lanier, *supra* note 13, at 156-57.
24 *See* Dinerstein et al., *supra* note 10, at 440-41.
25 Quinn & Krooks, *supra* note 8, at 1626-28.
26 *Id.*
27 *See* Bloom, *supra* note 6, at 980.

restrictions within the guardianship system. This Section first discusses the states' claimed interests before delineating the three types of marriage restrictions.

A. *States' Claimed Interests*

The state has a variety of interests that support marriage restrictions for individuals deemed incapacitated by the courts, but these interests center largely on the states' *parens patriae* duty and efficiency. First, the state's *parens patriae* duty requires the state to protect vulnerable populations from abuse, neglect, and exploitation.[28] However, it is important to note that the state also has a competing interest in preventing overreach into the "private lives and choices of its citizens and unnecessarily taking away their constitutional rights."[29]

The state also has an interest in judicial and societal efficiency.[30] Granting plenary guardianship powers from the outset allows the guardian to meet the current and future needs of the incapacitated person without additional hearings and deliberations.[31] In comparison, limited guardianship orders require the court to dedicate extra time to tailor the order to the specific needs of the individual, and added costs associated with increased procedure can outweigh significant liberty interests in some situations.[32] This efficiency interest carries over to third parties, as a plenary guardianship provides assurances that the party has the authority to conduct the activity in question.[33]

B. *Three Types of Marriage Restrictions*

As a result of these state interests, states have created three main categories of marriage restrictions. First, in some states, the incapacitated individual's right to marry may be removed, but cannot be delegated to the guardian.[34] For example, in Florida the right to marry is removable after a specific order, and "if the right to enter into a contract has been removed, the right to marry is subject to court

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28 *See* Sell, *supra* note 7, at 229.

29 *Id.*

30 *See* Bloom, *supra* note 6, at 991.

31 Quinn & Krooks, *supra* note 8, at 1626-28; *see* Bloom, *supra* note 6, at 990-91.

32 *See* Haines & Campbell, *supra* note 6, at 73; Quinn & Krooks, *supra* note 8, at 1626-28.

33 *See* Bloom, *supra* note 6, at 991; Quinn & Krooks, *supra* note 8, at 1627-29.

34 *See* FLA. STAT. § 744.3215(2)(a) (2020).

approval."[35] Next, other states allow delegation of the incapacitated person's ability to consent to marriage to a guardian only after a specific court order.[36] This power may be delegated at the time of appointment or at a subsequent hearing.[37] The individual retains the right to marry unless the order specifically removes the right and places the power to consent in the guardian's appointing order.[38] Finally, some states, including Indiana, delegate the power to consent to marriage to the guardian without a specific order.[39]

C. *Indiana*

1. General Guardianship Proceedings

Indiana's guardianship proceedings can be initiated by any interested party by filing a petition stating general information about the subject and petitioner.[40] Indiana requires that the alleged incapacitated individual be given appropriate notice, hearing, and a court-appointed attorney if the individual is not already represented.[41] In addition, the alleged incapacitated person must be present at the hearing unless for good cause.[42]

In determining who to appoint as a guardian, the Indiana Code provides that a court shall appoint a qualified person or persons "most suitable and willing to serve."[43] Courts must give "due regard" to a request by the alleged incapacitated person for the appointment of a specific guardian.[44] However, Indiana law provides a list of statutory priorities and considerations for appointment, and courts may weigh the statutory considerations and the best interest of the alleged incapacitated individual to select the person "it considers best qualified to serve as guardian."[45]

Ind. Code § 29-3-5-3(b) provides that a guardianship may be limited in scope if "it is alleged and the court finds that the welfare of an

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35 *Id.*
36 D.C. CODE § 21-2047.01(6) (2020); *see also* MINN. STAT. § 524.5-120(11) (2020).
37 D.C. CODE § 21-2047.01(6) (2020).
38 *See id.*; *see also* MINN. STAT. § 524.5-120(11) (2020).
39 IND. CODE § 29-3-8-2(a)(5), (b) (2020).
40 IND. CODE § 29-3-5-1(a) (2020).
41 IND. CODE § 29-3-5-1(b)-(c) (2020).
42 IND. CODE § 29-3-5-1(d) (2020).
43 IND. CODE § 29-3-5-4 (2020).
44 *Id.*
45 IND. CODE §§ 29-3-5-4 and -5 (2020).

incapacitated person would be best served by limiting the scope of the guardianship."[46] However, the only guidance courts receive is to determine a scope that will "encourage development of the incapacitated person's self-improvement, self-reliance, and independence" or "contribute to the incapacitated person's living as normal a life as that person's condition and circumstances permit without psychological or physical harm to the incapacitated person."[47] The court can add or limit the responsibilities and powers of a guardian throughout the appointment at the request of the protected person or *sua sponte*.[48]

2. A Guardian's Power to Consent to Marriage

In Indiana, a "marriage is void if either party to the marriage was mentally incompetent when the marriage was solemnized."[49] As a civil contract, the validity of marriage may be challenged in court.[50] However, the challenger bears the burden to prove that a party was "incapable of understanding the nature of the marriage contract."[51] The courts have a strong presumption in favor of the validity of "a marriage consummated according to the forms of law."[52]

However, once an adult is deemed incapacitated, the individual's right to marry is subject to their guardian's consent.[53] Although this power may be removed at the time of appointment or at a later date, the statute does not provide any guarantee that the incapacitated individual will regain control over the right to marry.[54] If an individual already deemed mentally incompetent by a court applies for a marriage license, a clerk of a circuit court cannot issue the license if either of the applicants has been found mentally incompetent unless "the clerk finds that the adjudication is no longer in effect."[55] Implied

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46 IND. CODE § 29-3-5-3(b) (2020).

47 *Id.*

48 IND. CODE § 29-3-8-8 (2020).

49 IND. CODE § 31-11-8-4 (2020).

50 In re Estate of Holt, 870 N.E.2d 511, 514 (Ind. Ct. App. 2007).

51 *Id.*

52 Bruns v. Cope, 105 N.E. 471, 473 (1914), *overruled in part on other grounds by* Nat'l City Bank of Evansville v. Bledsoe, 144 N.E.2d 710 (1957).

53 IND. CODE §§ 29-3-8-2(a)(5), (b) (2020). Guardians over incapacitated adults have the same powers that a guardian of a child does. *Id.*

54 *See* IND. CODE § 29-3-8-8 (2020).

55 IND. CODE § 31-11-4-11 (2020). This limitation is imposed on individuals under the influence of alcohol or drugs, lifetime sex or violent offenders, and those declared mentally incompetent. *Id.*

within the guardian's power to consent to the individual's marriage is the assumption that a clerk would accept the guardian's consent at the time of the marriage.[56]

III. *The Constitutional Right to Marriage*

For years, the Supreme Court has recognized marriage as an important American institution and as a part of the "right to privacy" protected by the Fourteenth Amendment. Furthermore, specific classes of individuals have had their right to marry confirmed even when limited by valid and compelling state interests.

A. *Marriage as an Institution*

Although marriage is often referred to as a civil contract, it is more than a "mere contract" as the law imposes a variety of obligations and liabilities on the relationship.[57] In *Griswold v. Connecticut*, the Supreme Court described marriage as "a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred," while also promoting a way of life through loyalty to a partner.[58] The Supreme Court has also recognized marriage as "fundamental to the very existence and survival of the race."[59] Despite the long tradition and fundamental nature of marriage, the institution remains subject to legislative control.[60]

However, in *Obergefell v. Hodges* the Supreme Court recognized four principles that solidify the right to marry as essential and limit legislative intrusion: (1) the right to personal choice is inherent in individual autonomy, (2) marriage "supports a two-person union unlike any other in its importance to the committed individuals," (3) marriage safeguards children and families and is related to other familial rights, and (4) marriage serves as a keystone of our social order.[61] These principles demonstrate that "decisions concerning marriage are

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[56] *See* IND. CODE §§ 29-3-8-2(a)(5), (b) (2020); *see also* IND. CODE § 31-11-4-11(1) (2020).

[57] Maynard v. Hill, 125 U.S. 190, 210-11 (1888).

[58] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[59] Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 541 (1942).

[60] *See Maynard*, 125 U.S. at 205 (the legislature may prescribe the age, procedure, and form to define marriage, as well as the duties, obligations, and rights of the parties).

[61] Obergefell v. Hodges, 576 U.S. 644, 665-69 (2015).

among the most intimate that an individual can make," and that marriage is "inherent in the concept of individual autonomy."[62]

B. *Marriage as a "Right to Privacy" under the Fourteenth Amendment*

Marriage lies "within the zone of privacy created by several fundamental constitutional guarantees."[63] Perhaps most importantly, the Fourteenth Amendment creates a "right to privacy, no less important than any other right carefully and particularly reserved to the people."[64] This "right to privacy" expands to many aspects of family life, affording both substantive and procedural protection from state interference.[65] Although the state can regulate family life, including marriage, courts must carefully examine the "importance of governmental interests and the extent to which they are served by the challenged regulation."[66]

C. *Marriage Rights of Specific Classes in the Supreme Court*

Since 1967, the Supreme Court has rejected outright restrictions on marriage for certain classes based on their identities or race as a violation of the Equal Protection Clause.[67] However, the Supreme Court has recognized the ability of the legislature to regulate marriage for certain groups so long as the restriction addresses a significant,

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[62] *See id.* at 665-66.

[63] *Griswold*, 381 U.S. at 485; *see also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) ("This court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

[64] *Griswold*, 381 U.S. at 485 (citing Mapp v. Ohio, 367 U.S. 643, 656 (1961)).

[65] Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816, 842 (1977) (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)); *see also* U.S. CONST. amend. XIV, § 1 ("nor shall any state deprive any person of life, liberty, or property, without due process of law").

[66] *See* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (citing Poe v. Ullman, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting)); *Meyer*, 262 U.S. at 399-400.

[67] *See Obergefell*, 576 U.S. at 675 (holding that marriage restrictions on same-sex couples unequally restrict the right to marry in violation of the Equal Protection Clause and rejected the state's claimed interest as uncompelling); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that marriage restrictions based solely on race are inherently unconstitutional under the Equal Protection Clause).

legitimate, state interest and does not overstep what is necessary to meet these interests.[68]

For example, in *Zablocki v. Redhail*, the Supreme Court ruled that a marriage restriction on fathers who owed child support payments unnecessarily impeded the right to marry, while the state's claimed interest in ensuring fathers contributed to child support payments fell flat because less restrictive means of achieving the state interest existed.[69] The Court found the restriction created an overly broad classification because some fathers would never be able to satisfy the state requirements to obtain a court order for marriage either because of income or an inability to prove their child would not become a ward of the state.[70] The Court reasoned that those who met the statutory requirements were sufficiently burdened in seeking the court's permission to marry.[71] Furthermore, the requirements imposed a "serious intrusion into their freedom of choice in an area in which [the Court has] held such freedom to be fundamental."[72]

The Court also observed that the state already had means of encouraging child support payments, including compelled collection and adjusting funding requirements to prevent public charges.[73] The Court recognized that restricting marriage may prevent the increased well-being of individuals and the ability to pay child support payments as marriage provides increased financial benefits, like shared benefits and two-income households.[74]

Similarly, the Supreme Court ruled in *Turner v. Safley* that marriage restrictions in prisons were not reasonably related to the penological interests advanced by the state and were an "exaggerated response" that "sweeps much more broadly than can be explained by [the state's] penological objectives."[75] The prison's policy of refusing marriage permission to inmates "absent a finding of a compelling reason to allow the marriage" exceeded what was necessary to ensure the

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68 *See* Turner v. Safley, 482 U.S. 78, 91 (1987); Zablocki v. Redhail, 434 U.S. 374, 390-91 (1978); *see also* Califano v. Jobst, 434 U.S. 47, 55-58 (1977) (holding that marriage discrimination in the implementation of Social Security benefits was a legitimate state interest and was conducted in the least restrictive manner possible).

69 *Zablocki*, 434 U.S. at 386-94.

70 *Id.* at 387-88.

71 *Id.* at 387-90.

72 *Id.* at 387.

73 *Id.* at 389-90.

74 *Id.* at 390.

75 Turner v. Safley, 482 U.S. 78, 97-98 (1987).

prison's security interest.[76] This restriction was particularly problematic due to the "compelling reason" exception, as pregnancy or birth of a child were the only compelling reasons considered in approving a marriage.[77]

The Court continued that "there are obvious, easy alternatives to the Missouri regulation that accommodate the right to marry while imposing a *de minimis* burden on the pursuit of security objectives."[78] In both *Turner* and *Zablocki*, the state's claimed interest, while valid, did not require the imposition of marriage restrictions to achieve the state interest.[79]

As a result, when considering if a marriage restriction passes constitutional muster, a court must consider: (1) if the restriction is justified by a compelling state interest, (2) if the restriction is narrowly tailored to achieve the goal or interest, and (3) if the restriction is the least restrictive means for achieving the state interest.[80]

ANALYSIS

Indiana relies on its *parens patriae* power to take away marriage rights for incapacitated adults. The restriction mirrors those in *Zablocki* and *Turner* rather than an outright restriction based on a person's identity or race. As a result, Indiana's restriction likely would not trigger an Equal Protection Clause claim, but rather would trigger a test similar to those in *Zablocki* and *Turner* based in Substantive Due Process. When Indiana's marriage restriction is reviewed under the *Zablocki* and *Turner* test for marriage restrictions, it fails to pass constitutional muster.

I. IS INDIANA'S MARRIAGE RESTRICTION JUSTIFIED BY A COMPELLING STATE INTEREST?

Under the tests established in *Zablocki* and *Turner*, a court would likely find Indiana's marriage restriction is based in a valid and compelling state interest. First, the state's *parens patriae* duty to protect individuals from the abuse and exploitation that drives the crea-

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76 *Id.* at 98.
77 *Id.* at 96-97.
78 *Id.* at 98.
79 *See id.* at 97-98; *Zablocki*, 434 U.S. at 389-90.
80 *See Zablocki*, 434 U.S. at 388.

tion of the guardianship system rings stronger given the nature and institutions of marriage, including the financial and property rights pre-conditioned on marriage.[81] Although everyone has the potential to make life-altering poor decisions surrounding marriage, the *parens patriae* responsibility ensures that the state protects those more susceptible to abuse and exploitation.[82] The state is acting in the "best interests" of the individual by deeming them legally incapacitated and appointing a guardian to assist in making these decisions.[83]

In addition, the state has a compelling interest in judicial economy.[84] The costs associated with adjudicating individual capacity to marry for individuals subjected to guardianship may be enough to overcome a significant liberty interest.[85] Furthermore, the state also has an interest in ensuring third parties will accept the marriage as legitimate.[86] As marriage serves as a pre-condition for a variety of benefits and life experiences, third parties may want to ensure that the marriage is valid before proceeding in their interactions and financial dealings with the individual.[87] There are additional transaction costs to confirm a marriage is valid, as clerks cannot grant marriage licenses when an individual is adjudicated incapacitated because marriages conducted when one party is deemed incapacitated are void.[88] As a result of the state's *parens patriae* and efficiency interests, a court would likely find Indiana's marriage restriction is based in a valid and compelling interest.

II. IS INDIANA'S MARRIAGE RESTRICTION NARROWLY TAILORED TO ACHIEVE THE GOAL OR INTEREST?

For Indiana's marriage restriction to be constitutional, it must be narrowly tailored to achieving the state's interest.[89] The driving state interest in the marriage restriction is ensuring individuals are making

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[81] For examples of financial and property rights pre-conditioned on marriage, see *Turner*, 482 U.S. at 95-96.

[82] *See* Dinerstein et al., *supra* note 10, at 436.

[83] Haines & Campbell, *supra* note 6, at 73.

[84] *See* Quinn & Krooks, *supra* note 8, at 1626-28; *see also* Bloom, *supra* note 6, at 991.

[85] *See* Haines & Campbell, *supra* note 6, at 73-78.

[86] *See* Quinn & Krooks, *supra* note 8, at 1626-28; *see also* Bloom, *supra* note 6, at 991.

[87] For examples of important attributes of marriage, see Turner v. Safley, 482 U.S. 78, 95-96 (1987).

[88] IND. CODE § 31-11-4-11(1) (2020); IND. CODE § 31-11-8-4 (2020).

[89] *See Turner*, 482 U.S. at 97-98.

decisions in their own best interest.[90] In addition to concerns about self-neglect and dangerous decisions that impact the individual, the state is also worried about the potential for exploitation and abuse by others.[91]

The Indiana restriction on marriage is an absolute removal of rights absent a finding by the court that a limited guardianship, or no guardianship, would be appropriate.[92] Like the right to marry for individuals in *Zablocki*, the right to marry for incapacitated individuals is subject to court permission.[93] The court must make a specific finding that the individual is not incapacitated in their ability to consent to marriage before limiting the scope of guardianship.[94] The number of individuals subject to the Indiana marriage restriction may be reduced by the imposition of limited guardianships, but as previously discussed,[95] courts are hesitant to tailor orders to the specific needs of an individual.[96]

Similar to the presumption against marriage absent a special finding found in *Turner*, the court removes the right to marry unless the judge makes a finding of limited or full capacity to make decisions.[97] Furthermore, guardianship by its very nature is dependent on an individual's capacity to make a variety of decisions.[98] Imposing a marriage restriction, or compelling an individual to demonstrate a capacity to understand and consent to marriage, without regard to that individual's specific level of capacity, is an unduly broad solution to achieve the state's interest in preventing abuse.[99]

Given the similarities between the Indiana statutes and the laws invalidated in *Turner* and *Zablocki*, the restriction on marriage for individuals subject to guardianship is unduly broader than is necessary to achieve the state interests. The Indiana statute imposes a restriction on a broad class of individuals and does not require individual-

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90 *See* Dinerstein et al., *supra* note 10, at 436.

91 Sell, *supra* note 7, at 221-22.

92 *See* IND. CODE § 31-11-8-4 (2020); IND. CODE § 31-11-4-11(1) (2020); IND. CODE § 29-3-8-2(a)(5) (2020).

93 *See* Zablocki v. Redhail, 434 U.S. 374, 387-390 (1978).

94 *See* IND. CODE § 29-3-5-3 (2020).

95 *See infra* Background II.C.

96 *See* Nina A. Kohn, Jeremy A. Blumenthal, & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1117-18 (2013).

97 *See* IND. CODE § 29-3-8-2(b) (2020); IND. CODE § 29-3-5-3 (2020).

98 *See* Lanier, *supra* note 13, at 156-57.

99 *See id.*

ized orders to narrowly tailor guardianship restrictions to the individual.

III. IS INDIANA'S MARRIAGE RESTRICTION THE LEAST RESTRICTIVE MEANS FOR ACHIEVING THE STATE INTEREST?

Even if a court finds that Indiana's restriction of marriage is narrowly tailored to the state interest, the marriage restriction would need to be the least restrictive means for achieving that interest.

Here, Indiana restricts the right to marry despite valid alternatives. In cases where a guardian is imposed, the state already has a support system in place to protect the individual from abuse during marriage: the guardian.[100] The guardian's responsibilities include "the incapacitated person's care and custody and for the preservation of the incapacitated person's property to the extent ordered by the court."[101] This includes continued "sufficient contact" to know the "capabilities, disabilities, limitations, needs, opportunities, and physical and mental health."[102] The imposition of a neutral guardian serves as an extension of the *parens patriae* duty to protect the individual from abuse, and the guardian's responsibilities allow for continued monitoring of the individual's well-being even if the individual is married.

There are alternative marriage restrictions that impede less on individual rights than the Indiana statute.[103] Other states, like Florida, presume capacity to marry and do not allow the ability to consent to marriage to be delegated to the guardian.[104] Even states whose laws are not as permissive as Florida start with a presumption that the individual retains the right to marry, only allowing delegation after a specific court order to the guardian.[105] Although these statutes may not provide as much access to marriage as the Florida statute, they represent less restrictive alternatives that demonstrate the overly restrictive nature of the Indiana statute.

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100 *See* IND. CODE § 29-3-8-1(b) (2020).

101 *Id.*

102 IND. CODE §§ 29-3-8-1 (2020).

103 *See* FLA. STAT. § 744.3215(2)(a) (2020); *see also* D.C. CODE § 21-2047.01(6) (2020); MINN. STAT. § 524.5-120(11) (2020).

104 *See* FLA. STAT. § 744.3215(2)(a) (2020).

105 *See* D.C. CODE § 21-2047.01(6) (2020); MINN. STAT. § 524.5-120(11) (2020).

Finally, institutional alternatives other than guardianship can promote individual decision making and community support rather than substituted decision making. These alternatives include supported decision making, limited guardianships, and informal support networks that focus on assisting individuals to make choices in their best interests, rather than removing individual autonomy.[106] Although individuals may continue to need support to ensure their best interests are protected, adequate support and services can be constructed outside of the guardianship system.[107]

Overall, between the current systems in place and the examples of less restrictive alternatives in other states, the Indiana restriction on marriage is not the least restrictive means of achieving the state interest.

IV. INDIANA'S MARRIAGE RESTRICTION OVERREGULATES THE RIGHT TO MARRY

Although Indiana's marriage restriction for incapacitated individuals furthers a valid and compelling state interest, the marriage restriction is not narrowly tailored and is not the least restrictive means of achieving the state interest. If Indiana wants to continue to regulate the right to marry for individuals subject to guardianship and incapacitation findings, Indiana must either narrow the class and rights affected or move to a less restrictive means to protect individuals from abuse and exploitation in marriage.

V. RECOMMENDATIONS

Because of the individualized nature of guardianship and the varying degrees of capacity across the guardianship system, no one recommendation would expand the right to marry to a broad class of individuals while still protecting the state's interest.[108] However, a tiered system based on the individual's capacity would allow the courts to expand the right to marry to a broad and diverse class of individuals that otherwise would be subject to Indiana's restriction on

106 *See, e.g.,* Dinerstein et al., *supra* note 10, at 441-42; Karen Andreasian et al., *Revisiting S.C.P.A. 17-A: Guardianship for People with Intellectual and Developmental Disabilities*, 18 CUNY L. REV. 287, 294-95 (2015).

107 Salzman, *supra* note 11, at 554.

108 *See* Lanier, *supra* note 13, at 156; *see also* Andreasian et al., *supra* note 106, at 314-15.

marriage. This system: (1) borrows statutory protections from Florida to require a presumption of capacity and specific findings of facts, (2) emphasizes an increased reliance on supported decision making, and (3) when necessary, alters the marital relationship within the guardianship system to accommodate the individualized capacity to participate in marriage.

A. *Statutory Protections in the Guardianship Process and the Right to Marry*

Adopting procedural and substantive protections would limit the negative impact of the marriage restriction for individuals in Indiana who have been adjudicated incapacitated. This includes the presumption of capacity to marry, specific findings of fact in removing rights, and court oversight of the marriage right in cases where the right to marry is removed.

1. Presumption of Capacity to Marry

In Florida, courts presume the individual retains the capacity to marry and offers a series of procedural protections.[109] First, Florida law explicitly lists the rights of persons deemed incapacitated.[110] Next, the requirement to examine specific findings of fact prevents courts from removing the right to marry without thorough consideration of the individual's capacity to retain and exercise the right.[111] Finally, to remove the right to marry, the court must find there is "clear and convincing evidence that he or she is incapacitated with respect to that right."[112]

Indiana does have a strong presumption in favor of the validity of a marriage.[113] However, this presumption relates to marriages already created.[114] For individuals seeking to initiate a marriage through an application for a marriage license, clerks cannot grant a marriage license for individuals adjudicated incapacitated unless they find the

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109 FLA. STAT. § 744.3215(2)(a) (2020); FLA. STAT. § 744.331(6)(a) (2020); Smith v. Smith, 224 So. 3d 740, 743 (Fla. 2017).

110 FLA. STAT. § 744.3215 (2020).

111 FLA. STAT. § 744.331(6)(a) (2020).

112 *Smith*, 224 So. 3d at 743.

113 Bruns v. Cope, 105 N.E. 471, 473 (1914), *overruled in part on other grounds by* Nat'l City Bank of Evansville v. Bledsoe, 144 N.E.2d 710 (1957).

114 *Id.*

incapacitation is no longer in effect.[115] Creating a strong presumption in favor of capacity requires court review of individuals' capacity to marry but would place the burden on the challenger to prove that a party is "incapable of understanding the nature of the marriage contract."[116]

2. Specific Findings of Fact: The Individual's Actual Level of Capacity

Florida guardianship proceedings require that a petition for guardianship state the rights the alleged incapacitated person is incapable of exercising.[117] Next, the court appoints an examining committee that conducts individual examinations and provides reports that outline the capabilities of the alleged incapacitated person and describe any rights the person lacks the capacity to exercise.[118]

After conducting a hearing, the court must issue an order that determines the "exact nature and scope of the person's incapacities," the "specific legal disabilities to which the person is subject," and "the specific rights that the person is incapable of exercising."[119] This specific finding of facts that are supported by expert opinions allows the court to directly determine what the alleged incapacitated person is able to do and allow for individually tailored orders.

When looking for a standard of capacity to determine an individual's ability to consent to marriage, courts should look to the institutions and principles of marriage recognized by the Supreme Court. Using these recognized principles of marriage as a standard of capacity would allow courts to have an ascertainable understanding of what the individual understands about marriage. In particular, a court can observe where the individual may fall short in their understanding and ability to consent to the various aspects of marriage, including its impact on property rights and the implications it has on future family life.[120]

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115 IND. CODE § 31-11-4-11(1) (2020).

116 *See In re* Estate of Holt, 870 N.E.2d 511, 514 (Ind. Ct. App. 2007).

117 FLA. STAT. § 744.3201(2)(f) (2020).

118 FLA. STAT. § 744.331(3)(g)(4) (2020).

119 FLA. STAT. § 744.331(6)(a) (2020).

120 For the complete list of principles, institutions, and rights associated with marriage, see Obergefell v. Hodges, 576 U.S. 644, 665-70 (2015); *see also* Turner v. Safley, 482 U.S. 78, 95-96 (1987).

For example, an individual who understands the significance of the two-person union, the religious and spiritual significance, and the property rights and financial benefits that come with marriage should be allowed to participate in this fundamental institution.[121] A specific finding of fact based on a recognized understanding of marriage would allow courts to determine an individual's capacity to participate in marriage, and would, when necessary, assist the court in tailoring the guardianship orders to meet individualized needs.

3. Court Oversight of the Marriage Right

Finally, upon a finding of incapacity to consent to marriage, Florida's placement of the right to marry in the hands of the court, rather than those of a guardian, protects the individual interest and the state interest simultaneously. Although the right to marry may be removed from the individual, it cannot be delegated to a guardian, creating a limited guardianship.[122] If the right to enter into a contract has been removed, the right to marry is subject to court review and approval, meaning those adjudicated incapacitated to contract may still enjoy the right to marry pending court approval.[123] Court approval can also allow for later ratification of an incapacitated individual's marriage, as it "upholds the ward's fundamental right to marry to the greatest extent possible by allowing for the possibility of ratification."[124]

Following Florida's lead, if Indiana courts find that the right to marry must be removed from the individual, they should not place the right to marry within the powers of a guardian. Rather, the right to marry should be subject to judicial review. Judicial review of a potential marriage allows the individual to participate in the right to marry, while still advancing both the individual's interest in retaining the right to marry and the state's interest in preventing abuse or exploitation.[125] In addition, the court's review and approval of a marriage also provides assurances to third parties that the marriage is legitimate and valid in the eyes of the law, ensuring protection of the third-party interest in a clear and valid marriage contract.[126]

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121 *See id.*

122 FLA. STAT. § 744.3215(2)(a) (2020).

123 *Id.*

124 Smith v. Smith, 224 So. 3d 740, 750 (Fla. 2017).

125 *Id.*

126 *See* Quinn & Krooks, *supra* note 8, at 1627-28.

In addition, when a guardianship is imposed but limited in scope, the guardian can serve as a check and extension of the state to ensure the incapacitated individual is not subject to exploitation and abuse within a marriage. The guardian's responsibilities include protecting the incapacitated person's property and well-being and ensuring the individual is not subject to neglect, abuse, or exploitation.[127] This includes continued "sufficient contact" to know the individual's "capabilities, disabilities, limitations, needs, opportunities, and physical and mental health."[128] If a court is concerned that an individual's marriage may result in abuse, neglect, or exploitation, the guardian's supervision and powers may be extended by court order to ensure the protection of the individual without impeding a fundamental right to marry.[129]

B. *Increased Reliance on Supported Decision Making*

If a court finds an incapacity to consent and participate in marriage in some manner, the court should consider if a Supported Decision Making Agreement would provide the necessary support to meet that individual's needs, thus avoiding the need for any form of court-appointed guardianship. Supported decision making allows a team of people to assist the individual in making their own decisions, aiming to give individuals the tools to foster self-autonomy.[130] This agreement would not need to be formal, but a court may recognize that an individual has a group of people who provide sufficient support so that the individual is adequately protected against potential abuse and exploitation.[131] However, if the court would prefer a formalized agreement to provide assurances to third parties or provide accountability to a legal document, supported decision making can be formalized.[132]

Using supported decision making assures that individuals remain safe from abuse and exploitation, but also "promotes self-determination, independence, productivity, and integration and inclusion in all

127 IND. CODE § 29-3-8-1 (2020).

128 IND. CODE § 29-3-8-1 (2020).

129 *Id.*

130 *See* Dinerstein et al., *supra* note 10, at 441; Sell, *supra* note 7, at 224.

131 *See* Dinerstein et al., *supra* note 10, at 442.

132 *See id.*

facets of community life."[133] Supported decision making in the context of marriage would allow the individual's support network to provide guidance and input on the decision, ranging from a potential spouse to the nature of the relationship, but let the final decision ultimately remain with the individual.[134]

C. *Altering the Marital Relationship to Accommodate Individual Capacity*

As a last resort to preserve the right to marry, courts could alter the marital relationship to preserve and protect the state interest while allowing increased participation in marriage as an institution. This analysis can be based in the benefits and institutions discussed in *Obergefell* and *Turner*, including property rights and access to preconditioned benefits.[135] The restructuring of the marital relationship to meet the individual needs of the incapacitated individual allows the court to both protect the individual's rights and autonomy and prevent abuse and exploitation.[136]

As marriage results in a variety of opportunities and institutions, the marital relationship could be altered to allow partial participation in the marriage that is specifically tailored to the individual's needs. The Supreme Court has recognized a variety of tenets and traditions that compose the right to marry: (1) a personal choice inherent in individual autonomy, (2) a two-person unity unlike any other, (3) a safeguard of children and families, and (4) marriage is the keystone of our social order.[137] Marriage can also represent: (1) expressions of emotional support and public commitment, (2) religious and spiritual significance, and (3) a pre-condition for the receipt of various benefits, property rights, and other less tangible benefits.[138] These principles and institutions serve as a guideline to what marriage can be, and each element allows the individual to participate and benefit from marriage in a different way.

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133 *Id.* at 459.

134 *See* Sell, *supra* note 7, at 224.

135 For the complete list of principles, institutions, and rights associated with marriage, see Obergefell v. Hodges, 576 U.S. 644, 665-70 (2015); *see also* Turner v. Safley, 482 U.S. 78, 95-96 (1987).

136 *See* Eleanor M. Crosby & Rose Nathan, *Adult Guardianship in Georgia: Are the Rights of Proposed Wards Being Protected? Can We Tell?*, 16 QUINN. PROB. L. J. 249, 251-52 (2003).

137 *Obergefell*, 576 U.S. at 663-71.

138 *Turner*, 482 U.S. at 95-96.

As a result, creating unique, limited orders based on which elements and purposes of the marital relationship the individual does have the capacity to understand would recognize the limits of the individual's capacity at a given time and provide opportunities to participate in a fundamental institution.[139] For example, if a court was concerned that a potential spouse for an individual is seeking to exploit the incapacitated individual for their property, a court could condition the approval of the marriage only if a prenuptial agreement is established, thus ensuring the individual's property remains safely under the control of the individual. If the court was concerned about the individual's living situation, tailoring the limited guardianship order to require more frequent check-ins and specific housing requirements would assist the court in preventing and responding to potential abuse or neglect.

Although no boilerplate arrangement would be possible, the prior requirements of specific findings of fact relating to the capacity to marry would allow courts to determine which aspects of marriage an individual can safely participate in. In addition, other legal arrangements, like prenuptial agreements and the guardianship system itself, can prevent abuse and exploitation while still allowing increased participation in the fundamental marriage institution. These orders can, and should, be tailored to alter the marital relationship to allow the individual to participate in the right to marry as much as possible while ensuring adequate protection of the individual and the state's interest in *parens patriae*.

CONCLUSION

Indiana's statute restricting the right to marry for individuals deemed incapacitated by a court, although driven by a compelling state interest, extends beyond what is necessary to achieve that interest and is not the least restrictive means of pursuing the state's *parens patriae* duty. Thus, in its current form, the Indiana restriction is an unconstitutional restriction on the right to marry. To protect the interest and expand the fundamental right to marry to a larger class, Indiana should adopt statutory language requiring a presumption of capacity, specific findings of incapacity, and place the power to con-

139 For a discussion of capacity's rarely static nature, see Andreasian et al., *supra* note 106, at 314-15.

sent with the courts rather than a guardian. In addition, increased reliance on supported decision-making agreements and, as a last-ditch effort, altering the marital relationship to fit the individual's capacity, would allow the state to ensure the *parens patriae* responsibility is met in the least restrictive manner on the right to marry.