AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **SLI Supporters**

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From: **A. Eric Johnston**

Re: **Full Faith and Credit to Same Sex Laws From Other States? The First Shot Over the Bow**

With same sex relationships being legal in approximately 35 states, we can expect fallout for not only the question of who may be married, but how does this affect all of the other laws in our legal system related to interpersonal relationships? These include divorce, child custody and visitation, inheritance, adoption, rights to make legal claims for one's spouse, *etcetera.*

The Sixth Circuit Court of Appeals (covering Tennessee, Kentucky, Ohio and Michigan) was the first intermediate appellant court to uphold traditional marriage, while others have not. This now creates a conflict among the circuit courts of appeal and the primary basis for the U.S. Supreme Court granting review. That court had denied review just weeks before, since there was no split between or among the circuits. It is possible, though unlikely, they will review some of the various circuit cases during the present term. While that possibly leaves us in limbo a while longer, the likely outcome is a decision striking down all traditional marriage laws, at least by June 2016.

In the meantime, we are already seeing development of issues that will have effect in all fifty states. The Alabama Court of Civil Appeals on October 24, 2014, decided the case of *E. L. v. V. L.* In that case, a Georgia woman petitioned the Jefferson County Family Court to enforce a Georgia adoption order that she had obtained as a result of a same sex relationship she had had with a natural mother of a child, now residents of Alabama. Though the Family Court awarded visitation (a grievous and unmitigated error), the Court of Civil Appeals did not enforce the order, but the reasoning is a harbinger of things to come.

Subject matter jurisdiction is one of the most important requirements for a court to have authority to make a decision. The Court of Civil Appeals inquired into the Family Court's decision to enforce the Georgia court order, finding that because Georgia had no subject matter jurisdiction, then Alabama could not enforce the order.

The basis for the Georgia custody order was an adoption by the lesbian partner of the natural mother's child. Under the Georgia Adoption Code, there is no authority for a same sex partner to adopt, although a Georgia court erroneously had allowed the adoption. Adoption therefore could only be true if the parental rights of the natural parent were terminated, which they had not. Otherwise, "second parent" adoptions are not permitted. The court said "because Georgia does not recognize same-sex marriages, even those validly made in foreign jurisdictions . . . [the woman] did not stand in the position of a spouse of the mother [of the child]." Consequently, the purported adoption under Georgia law is invalid. Therefore, it would not be a judgment that could be validly enforced in Alabama.

However, this case begs the question of what happens then if someone comes to Alabama with a custody or visitation order from a same sex relationship rendered by a court in a state that recognizes same sex relationships, either as a marriage, a civil union, for adoption, or some other valid legal reason? Alabama sidestepped the issue in *E. L. v. V. L.* Next time, the answer may not be so easy.

It is incumbent upon the courts in Alabama to abide by our clearly stated public policy on marriage, custody, visitation, adoption and related laws. What we fear is that one or more courts, including appellant courts, will succumb to the idea that they must give full faith and credit to the judgment of sister state courts where same sex marriage and flowing rights are recognized. In other words, the court would say the sister state court has subject matter jurisdiction because the same sex relationship is legal in that state; therefore, we must give full faith and credit to the sister state judgment and enforce it in Alabama.

Of course, that is not correct under present law. First, the U.S. Supreme Court in *Nevada v. Hall*, 440 U.S. 410 (1979), *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), along with the Alabama Supreme Court's decision in *Osoinach v. Watkins*, 180 So. 577 (Ala. 1938) have held that a forum state is not constitutionally required to apply the law of another state which conflicts with the forum's state legitimate public policy. Second, the American and Alabama Laws for Alabama Courts Amendment ("AALAC") reminds our Alabama judges they are not to enforce laws from other states that conflict with our laws. Specifically, while Alabama does not recognize same sex relationships, we must not give full faith and credit to a conflicting sister state judgment, as the Jefferson County Family Court did.

But we expect this to change, however, when the U.S. Supreme Court strikes down traditional marriage laws. That will adversely affect all of the other laws related to marriage. In *Romer v. Evans*, 517 U.S.620 (1996), the U.S. Supreme Court held the State of Colorado could not ban anti-gay discrimination municipal ordinances passed by Colorado cities. This reasoning may extend to states refusing to recognize same sex rights from other states. We further expect additional lawsuits to be brought to keep Alabama, along with other states, from enforcing statutes and court precedents following our traditional laws against same sex relationships, adoptions, *etcetera.* While AALAC will not ultimately prohibit the supremacy of federal law over state law, as judges, lawyers and policymakers navigate these difficult legal waters, they must be diligent in favoring Alabama's law for as long as possible.