

## Undocumented Immigrants and the Right to Marry\*

County clerks in a number of states have refused to issue marriage licenses to undocumented immigrants.<sup>1</sup> The clerks argue that federal law requires marriage license applicants to provide a Social Security number. Undocumented immigrants, who are not eligible to apply for a Social Security number, are therefore denied marriage licenses. This article explains why states cannot deny marriage licenses to undocumented immigrants.

### **Why Do County Clerks Ask For a Social Security Number?**

Some county clerks believe that federal law requires an applicant for a marriage license to provide a Social Security number. This belief stems from an incorrect reading of one section of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), a federal law enacted in 1996 in an effort to reform the public benefits system.<sup>2</sup> As part of that effort, Congress took steps to increase the effectiveness of child support enforcement. PRWORA required each state to create a plan for enforcing child and spousal support orders.<sup>3</sup> As part of each plan, states were required to record the Social Security numbers of applicants for certain licenses.<sup>4</sup> The relevant section reads:

[42 U.S.C. § 666] (a). In order to satisfy § 654(20)(A) of this title [requirement for a state plan], each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part: ...

...

#### **(13) Recording of social security numbers in certain family matters.—**

Procedures requiring that the social security number of—

- (A) any applicant for a professional license, driver's license, occupational license, recreational license, or marriage license be recorded on the application;
- (B) any individual who is subject to a divorce decree, support order, or paternity determination or acknowledgment be placed in the records relating to the matter; and
- (C) any individual who has died be placed in the records relating to the death and be recorded on the death certificate.<sup>5</sup>

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\* This document was prepared on January 12, 2009. The information contained in this document is for general informational purposes only. It is not intended to serve as legal advice and it does not substitute for legal counsel.

<sup>1</sup> See Rick Brundrett, *Judges: Clamp down on weddings for illegal immigrants*, The State, Dec. 13, 2008; and Travis Loller, *Some immigrants denied marriage licenses*, The Associated Press, July 12, 2007.

<sup>2</sup> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA, Pub.L. 104-193, 110 Stat. 2105, enacted August 22, 1996).

<sup>3</sup> 42 U.S.C. § 654.

<sup>4</sup> 42 U.S.C. § 666(a)(13).

<sup>5</sup> 42 U.S.C. § 666(a)(13).

## **Does PRWORA Require States To Deny Licenses to Applicants Who Fail to Provide a Social Security Number?**

As one can see from the text above, PRWORA simply directs states to record Social Security numbers in certain family matters; it does not specify how states should treat applicants who will not or cannot provide a Social Security number. Due to the ambiguity of the statute, a number of state attorneys general, state courts, and at least one federal agency have analyzed this section to determine Congress's intent. Each analysis has found that Congress's intent when it drafted this section was to facilitate the enforcement of child support orders. Congress did not intend for this section to be used to deny licenses to applicants without a Social Security number. Instead, this section requires applicants who have been issued a Social Security number to provide their number. Applicants who do not have a Social Security number can provide an affidavit stating that they have not been issued a Social Security number.

### **Has the Federal Government Provided Guidance on this Issue?**

In 1999, the Commissioner of the federal Office of Child Support Enforcement issued an interpretative guidance on the issue of Social Security numbers and license applications.<sup>6</sup> The complete text of the guidance is:

It has come to our attention that there is some confusion regarding the issue of inclusion of social security numbers on license applications and other documents.

Section 466(a)(13) of the Social Security Act (Act) requires States to implement procedures requiring that the social security number(s) of any applicant for a professional, driver's, occupational, recreational or marriage license be recorded on the application. In addition, section 466(a)(13) of the Act requires procedures requiring that the social security number(s) of any individual subject to a divorce decree, support order or paternity determination or acknowledgment be placed in the records relating to the matter and that the social security number(s) of any individual who has died be placed in the death records and recorded on the death certificate. Some States have asked how this requirement applies to those applicants or individuals that do not have social security numbers. We interpret the statutory language in section 466(a)(13) of the Act to require that States have procedures which require an individual to furnish any social security number that he or she may have. Section 466(a)(13) of the Act does not require that an individual have a social security number as a condition of receiving a license, etc. We would advise States to require persons who wish to apply for a license who do not have social security numbers to submit a sworn affidavit, under penalty of perjury, along with their application stating that they do not have a social security

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<sup>6</sup> PIQ-99-05, July 14, 1999. Available online at <http://www.acf.hhs.gov/programs/cse/pol/PIQ/1999/piq-9905.htm>.

number. Such an affidavit should also be required for divorce, support or paternity matters where an individual indicates that he or she does not have a social security number or in death cases where a family member, next of kin indicates that the deceased did not have a social security number.

This is consistent with the position we took in PIQ-97-04 regarding the requirement for inclusion of social security numbers on voluntary paternity acknowledgement affidavits. In PIQ-97-04 we stated that, although section 452(a)(7) of the Act specified that the social security number of each parent is one of the minimum requirements of an affidavit to be used for the voluntary acknowledgment of paternity, the omission of one or both of the social security numbers would not invalidate the acknowledgment.<sup>7</sup> [emphasis added]

In brief, the federal Office of Child Support Enforcement found that states should not deny a license to applicants who have not been issued a Social Security number.

#### **Have State Attorneys General Issued Official Opinions on this Issue?**

As of January 2009, eight state attorneys general have issued legal opinions regarding whether a state can deny a marriage license to an applicant who does not have a Social Security number. Each attorney general found that a state cannot deny a license to applicants who do not have a Social Security number. The following sections elucidate the reasoning of the state attorneys general.

#### **Analysis: Following Federal Guidance**

In his analysis of the statute, the Michigan Attorney General looked to guidance from the federal government. He pointed to the guidance by the federal Office of Child Support Enforcement, discussed above. Based on that guidance, the Michigan Attorney General found that county clerks should not deny marriage licenses to applicants who do not have a Social Security number.<sup>8</sup>

Using similar reasoning, the Attorney General of Virginia found that the law requires Social Security numbers only from individuals who have been issued Social Security numbers. He wrote that the statute “does not deny the right of marriage to those who have no such numbers, nor does the statute contemplate that applicants must obtain such a number before applying for a marriage license.”<sup>9</sup>

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<sup>7</sup> PIQ-99-05, July 14, 1999. Available online at <http://www.acf.hhs.gov/programs/cse/pol/PIQ/1999/piq-9905.htm>.

<sup>8</sup> Op. Mich. Att’y Gen. No. 7212 (March 19, 2008).

<sup>9</sup> Op. Va. Att’y Gen. (February 26, 1999).

**Analysis: State’s Interest in Protecting the Institution of Marriage**

In his advisory opinion on this matter, the Attorney General of South Carolina stressed the intent of the legislature and the important public policy of protecting the institution of marriage. He wrote:

The requirements of a Social Security number and alien identification number were included in the statute as part of the state and federal government's ongoing efforts relating to child support enforcement. In our opinion, the General Assembly did not intend that these requirements would serve as a basis for denial of a marriage license in these instances in which an alien is unable to obtain either an SSN or an alien identification number. Further, it is the policy of the State of South Carolina to preserve and protect the institution of marriage in its traditional sense. Accordingly, it is our advice that in those situations in which all other requirements for a marriage license are met, and the Probate Judge is satisfied that the alien applicant is unable to obtain a Social Security number or alien identification number, the marriage license should be granted.<sup>10</sup>

**Analysis: Social Security Number Not a Condition Precedent**

In 2001, the Ohio Court of Appeals heard a lawsuit filed by a number of Ohio residents who were denied marriage licenses because they did not have Social Security numbers. In finding that the plaintiffs were eligible for marriage licenses, the court pointed out that marriage license applications ask for a variety of information about the applicants. The court found that:

When it enacted R.C. 3101.01, the Ohio Legislature enacted a statute which encourages couples to become married by placing only minimal impediments in the way of couples who wish to be married. The male should be at least eighteen years of age. The female should be at least sixteen years of age. The parties should not be nearer in kinship than second cousins. Neither party should be married to someone else. A minor must obtain parental consent in most circumstances.

Under the circumstances, we do not believe that the Ohio legislature intended to make the information requested in R.C. 3101-05 for the license application into legal requirements for a marriage license being issued. If the information requested in RC 3101-05 were all legal requirements for the issuing of a marriage license, then no Ohio citizen could marry a citizen of another country and have the marriage performed in Ohio because the foreign citizen would have no SSN. No homeless person could be married because that person had no residence. No person without an occupation could be married. No person who did not know his or her own age could be married. No one who did not know her or his

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<sup>10</sup> Op. S.C. Att’y Gen. (June 15, 2004).

father's name could be married. No person who was unaware of the place of his or her birth could be married.<sup>11</sup>

### **Analysis: Constitutional Right to Marry**

The opinions of several Attorneys General followed the Canon of Constitutional Avoidance, that is, that if a statute is susceptible to more than one reasonable construction, courts should choose an interpretation that avoids raising constitutional problems.

In his opinion, the Attorney General of Tennessee reasoned that requiring a Social Security number as a condition precedent to issuing a marriage license would likely infringe on an individual's fundamental right to marry.<sup>12</sup> Using similar reasoning, the Attorney General of North Dakota wrote that

...requiring an applicant for a marriage license to first obtain a social security number before being issued that license would risk imposing an unconstitutional barrier on the fundamental right of marriage. That interpretation would also be inconsistent with the legislative purpose of the enactment and contrary to its administrative construction.<sup>13</sup>

### **Analysis: Intent of the Legislature**

When the Florida Attorney General provided an opinion on this issue, he pointed out that under standard rules of statutory interpretation, a court's primary duty is to follow the intent of the legislature.<sup>14</sup> Therefore, he wrote that the law requiring a Social Security number from a license applicant should be construed in light of its intended purpose of facilitating the enforcement of child support orders. Using this analysis, he stated that the statute should not be construed as to prohibit an individual who had not been issued a Social Security number from obtaining a marriage license.

When the Attorney General of North Carolina issued an opinion on this matter, he found that it was illogical to ask an undocumented immigrant for a Social Security number, when undocumented immigrants are ineligible to receive a Social Security number. He wrote:

The General Assembly amended § 51-8 to comply with the federal law requiring stricter and more efficient means of enforcement of child support laws....

As earlier noted, aliens may not lawfully receive a social security number unless admitted "for permanent residence or under other authority of law permitting them to engage in employment in the United States. [citations omitted.] To read § 51-8 in such a way that would deny an alien a

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<sup>11</sup> State ex rel. Ten Residents v. Belskis, 755 N.E.2d 443 (Ohio 2001).

<sup>12</sup> Op. Tenn. Att'y Gen. No. 98-005 (January 9, 1998).

<sup>13</sup> Op. N.D. Att'y Gen. No. F-10 (September 27, 2002).

<sup>14</sup> Op. Fla. Att'y Gen. No. 99-71 (November 9, 1999).

marriage license because he cannot provide a social security number which he may not legally obtain would make a mockery of the law. Certainly, that was not the intent of Congress or the General Assembly.<sup>15</sup>

### **Could a State Enact a Law Denying Marriage Licenses to Undocumented Immigrants?**

Immigrants, including undocumented immigrants, are protected by the United States Constitution.<sup>16</sup> The U.S. Supreme Court has held that the right to marry is of fundamental importance.<sup>17</sup> In Loving v. Virginia, the Court noted that, “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.”<sup>18</sup> In Maynard v. Hill, the Court characterized marriage as “the foundation of the family and of society, without which there would be neither civilization nor progress.”<sup>19</sup>

When a state enacts a statute that infringes on a fundamental right, the statute must be justified by a compelling state interest and be narrowly tailored to achieve that interest.<sup>20</sup> For example, a state might enact a law prohibiting individuals without a Social Security number from marrying, using the justification that the law helps track earnings and assists in enforcing child support orders. It is true that children’s welfare is an important state interest. However, a prohibition on marriage for those lacking a Social Security number is not narrowly tailored to achieve that interest. States can find another, less restrictive, way to enforce child support orders.

It would be very difficult for a state to enact a law prohibiting undocumented immigrants from marrying that would pass Constitutional muster. An analogous case arose in Pennsylvania, where a county clerk denied a marriage license to an applicant who could not prove that he was lawfully present. The court found that this policy unconstitutionally infringed on the fundamental right to marry of both the undocumented immigrant and his U.S. citizen fiancé.<sup>21</sup>

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<sup>15</sup> Op. N.C. Att’y Gen. (August 14, 1998).

<sup>16</sup> *See, for example*, Mathews v. Diaz, 426 U.S. 67, 77, “There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law... Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.” *citing* Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950), Wong Wing v. United States, 163 U.S. 228, 238 (1896), Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931). *See also* Plyler v. Doe, 457 U.S. 202, 210 (1982), *citing* Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953), Wong Wing v. United States, 163 U.S. 228, 238 (1896), and Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

<sup>17</sup> *See inter alia* Loving v. Virginia, 388 U.S. 1 (1967), Maynard v. Hill, 125 U.S. 190 (1888), and Meyer v. Nebraska, 262 U.S. 390 (1923).

<sup>18</sup> Loving, 388 U.S. at 12.

<sup>19</sup> Maynard, 125 U.S. at 211.

<sup>20</sup> Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

<sup>21</sup> Buck v. Stankovic, 485 F.Supp.2d 576 (M.D. Pa. 2007).

### **Conclusion**

The federal law requiring a Social Security number from marriage license applicants requires applicants who have been issued a Social Security number to provide their number. Applicants who do not have a Social Security number may be asked to provide an affidavit stating that they have not been issued a Social Security number.

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