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SAME SEX MARRIAGE: IS MARYLAND READY?

Professor Mark F. Scurti¹

Get a license, say the words “I do”, and you have entered into an institution of over 1,100 federal and 240 Maryland state regulations, statutes, benefits, responsibilities, and liabilities applying only to married persons. Section 2-201 of the Family Law Article of the Annotated Code of Maryland provides that only a marriage between a man and a woman is valid in this state.

A recent lawsuit, *Deane & Polyak v. Conaway*, filed on July 7, 2004 in the Circuit Court for Baltimore City, seeks to challenge this law. The suit contends that §2-201 runs afoul of the guarantees of equality provided by the Maryland Constitution. Count one of the *Deane & Polyak* complaint alleges a violation of Article 46 of the Declaration of Rights, which protects against unjustified discrimination based on sex. Counts two, three, and four allege violations of Article 24, which provides for equal protection of laws and guards against unjustified discrimination in the exercise of fundamental rights.

After the landmark decision in *Goodridge v. Dept. of Public Health*,² decided in Massachusetts on May 17, 2004, same sex couples have been lining up to marry in that state and continue to do so through the date of this article. Massachusetts has become the first state in the country to grant same sex couples the legal right to marry. The Supreme Judicial Court of Massachusetts held that denying same sex couples that right was comparable to the prohibition against interracial marriage, as it “deprives individuals of access to an institution of fundamental legal, personal, and social significance.”³

Unfortunately, due to a 1913 state law, couples with a residence outside of Massachusetts cannot be married there. That

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² 798 N.E.2d 941 (2003).

³ 798 N.E.2d at 958.

statute dates back to the days of miscegenation laws, and was made in the interest of establishing older age requirements for marriage and differing controls for weddings between blood relatives. It prohibits the marriage of out-of-state couples where the home state would not recognize the marriage as valid or legal. Since same sex marriages are not recognized as valid anywhere else in the United States, non-residents of Massachusetts are turned away.

The whole issue of same sex marriages is not new. In fact, the first reported legal challenge, *Baker v. Nelson*,⁴ was filed in 1971 in Minnesota. The plaintiffs in that case argued unsuccessfully that since there was no prohibition on same sex marriages in the state, the state intended to recognize them. They further argued that if the right to marry was found to be available only to heterosexual couples, such an interpretation would deny the plaintiffs of liberty and property without due process of law and equal protection under the law as guaranteed by the Ninth and Fourteenth Amendments to the United States Constitution. The Supreme Court of Minnesota held that “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.”⁵

The first marriage licenses to same sex couples were originally issued to at least six couples in Boulder, Colorado in 1975 before the state attorney general was able to stop it and revoke the licenses. Colorado had no specific prohibition of same sex marriages and the clerk saw no reason not to issue the licenses. This set off a firestorm around the country, as same sex couples started arriving at clerks’ offices in other states demanding to be issued marriage licenses. The licenses issued, such as those in Phoenix, Arizona and Montgomery County, Maryland, were quickly revoked.

The history of the legal battle for same sex marriage documents the struggle of same sex couples to be recognized and to participate fully in society. Gays, lesbians, bisexuals, and transgendered individuals have experienced all forms of discrimination – whether in the workplace, at home, or from within their families. Recognition of same sex marriages would not deter the discrimination, but it would provide same sex couples with the power and protection of the law. No longer would same sex couples need to create a volume of contracts, powers of attorney, agreements, wills, and other legal documents in an attempt to formalize their relationships. All of the protections, rights,

⁴ 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

⁵ *Id.* at 186.

and responsibilities that come with marriage would be conferred upon them automatically.

The privileges afforded a married couple are more than you might think. They include the right to change your name and make decisions for one another; the right of inheritance and intestate succession, including survivor benefits; the right to access medical records; the right to visit in a hospital; the right to take sick leave under the Family Medical Leave Act; the right to establish pension benefits, including Qualified Domestic Relations Orders and pension rollover; life and automobile insurance coverage; health insurance, including COBRA; immigration status; filing of joint tax returns; transfer of property without taxation; and funeral arrangements and decisions concerning disposal of remains. Marriage provides the ability to have standing to file a wrongful death suit, loss of consortium action, and to claim an exemption of marital assets from certain creditors to protect property.

If an opposite sex married couple were to separate, divorce laws would provide a roadmap for dissolution of assets, custody, visitation, child support, guardianship rights, spousal support, and the use and possession of marital property. When a same sex couple separates, the law is inadequate to handle the dissolution. Pleadings creatively seek partition actions, quantum meruit, constructive trusts, contribution, and *de facto* parenting status in a weak attempt to mirror domestic relations laws.

In the Circuit Court for Baltimore City on any given adoption day, same sex couples are adopting each other's children or adopting children through other means, including surrogacy. Statistically, some of these couples will "divorce" and end up back in court struggling over their legal rights and responsibilities. Without same sex marriages, these couples are left with very little recourse and judges are left with little legal guidance.

Civil unions – called "marriage lite" in gay and lesbian circles – have been offered by many as an alternative to marriage for same-sex couples, but they are not the same as legal marriage. What they accomplish, in fact, is the establishment of a second-class citizenship. My partner and I entered into a civil union on September 8, 2001 in Vermont. We were issued a license and had the ceremony performed by a justice of the peace in front of our family and friends.

As symbolic as the ceremony was for us, it currently has no legal significance outside of Vermont. A civil union confers no federal protections or benefits and is only recognized in the state where it was

performed. Should other states offer civil unions to same sex couples, those states may choose to recognize civil unions performed elsewhere under the Full Faith and Credit Clause of the United States Constitution.

Because civil unions have no legal significance outside of Vermont, the process of dissolving it should be simple and of no consequence, but it is not. Couples from other states who entered into civil unions have tried to dissolve them in their home states with no success. Cases in which judges decreed the unions to be dissolved based on the mutual consent of the parties have been appealed by state attorneys general, challenging the authority of judges to order dissolution of a union that the state does not recognize.

A district court judge in Texas, for example, granted and then dismissed a request to dissolve a Vermont civil union when the attorney general intervened on the ground that Texas did not recognize civil unions. An appeal was not taken and the case remained dismissed.⁶

Similarly, a Connecticut trial judge ruled against dissolving a civil union in 2001. That decision was affirmed by the state intermediate appellate court a year later. The death of one of the parties ended the appeal to the state Supreme Court.⁷

Alternatively, in West Virginia, a family court judge in Marion County dissolved the civil union of two women.⁸ The case was not appealed, so the order remains. On January 11, 2005, arguments were heard on a challenge to a decision of a lower court judge's dissolution of a civil union before the Iowa Supreme Court.⁹ The decision is pending.

Still wanting marriage for myself and my partner, and after hearing that the Mayor of San Francisco was ordering marriage licenses to be issued to same sex couples, we flew to San Francisco on February 22, 2004. We waited in line with hundreds of couples from around the country for our opportunity to get married. We finally did get married on February 24, 2004 at City Hall, the very day President

⁶ See Office of the Attorney General for the State of Texas at <http://www.oag.state.tx.us/newspubs/releases/2003/20030328samesex.shtml>.

⁷ *Rosegarten v. Downes*, 802 A.2d 170 (Conn. App. 2002), *cert. granted*, 261 Conn. 936 (2002).

⁸ *In re Marriage of Gorman and Gump*.

⁹ *Alons v. Iowa District Court for Woodbury County*, Case No. 03-1982, Woodbury County No. CDCD119660.

George W. Bush announced his support for a Federal Constitutional Amendment against same sex marriage:

Marriage in the U.S. shall consist only of the union of a man and a woman. Neither this Constitution nor the constitution of any state, nor state or federal law, shall be construed to require that marital status of the legal incidents thereof be conferred upon unmarried couples or groups.¹⁰

This announcement simply made us all the more determined to join the married population for the first time in our lives. Our marriage license, issued by the City of San Francisco, was only registered with the City and not the State of California, as the validity of same sex licenses was being challenged in California courts at the time.

Ultimately, on August 12, 2004, 170 days later, our marriage license was invalidated, along with 4,037 others that had been issued to same sex couples. The California Supreme Court still has to tackle the constitutional challenge that will come before the court later this year. The validity of my marriage – at least in the eyes of the law – hangs in the balance.

On January 1, 2005, the California Domestic Partner Rights and Responsibilities Act of 2003 became effective for same sex couples. This legislation was passed to provide some benefits to same sex couples married in California, recognizing our relationships and need for protection. Essentially, all partners who are registered with the State of California, a community property state, will have all the legal rights of married couples. Property owned by either is now owned by both, and debts are equally shared. The Act gives standing to a partner upon dissolution of the registration to seek spousal and child support; however, it is neither civil union nor marriage, as registered partners are not recognized outside of California.

In 1977, Hawaii passed the Reciprocal Beneficiary Relationship law in response to a same sex marriage challenge in that state, providing some benefits to same sex couples, but not legal marriage. Other states are considering similar action to side-step same sex marriages. In contrast, the results of the 2004 elections produced

¹⁰ H.J. Resolution 56.

eleven states passing constitutional amendments banning same sex marriages.

Outside the United States, other countries are also tackling same sex marriage issues. The Netherlands became the first country in the world to offer same sex couples the opportunity to marry in 2001, followed by Belgium in 2003 and Canada in 2004. It is expected that South Africa, which in November 2004 recognized common law same sex marriages, and Spain, which offers health care benefits, pensions, adoption, survivor benefits and alimony for those registered, will be next to follow. Other countries, such as Brazil, Bulgaria, Czech Republic, Denmark, Fiji, Finland, France, Germany, Greenland, Hungary, Iceland, Israel, New Zealand, Norway, Portugal, Sweden, Switzerland, and the United Kingdom have court orders or statutes providing various protections to same sex couples, ranging from providing health insurance benefits to adoption to inheritance rights. Many cities in foreign countries – such as Buenos Aires and Río Negro in Argentina – have offered greater benefits than the country as a whole.¹¹

An Israeli district court, for example, in November 2004, held that surviving same sex partners shall be afforded inheritance rights.¹² In January 2005, the Israeli Supreme Court allowed a lesbian couple legally to adopt each other's children.¹³

Whether it is through Vermont's civil unions, California's Domestic Partner Rights and Responsibilities Act¹⁴, marriage in Massachusetts, or some other unique twist, same sex couples will continue to fight to protect themselves and their families. We will continue to seek recognition at the state and federal levels as married couples.

The Maryland General Assembly has never passed a state version of the Defense of Marriage Act (DOMA), nor has a constitutional amendment been passed; thus, Maryland is one of the few states that could provide a safe harbor for same sex couples seeking to be married. As the Circuit Court for Baltimore City hears arguments on the challenges to the Maryland Constitution, the debate will continue.

¹¹ Compiled by the International Lesbian & Gay Association and the International Lesbian & Gay Human Rights Commission.

¹² *In the Matter of the Estate of S.R. and In the Matter of A.M. v. The Attorney General for the General Custodian*, Civil Appeal 3245/03 (November 10, 2004).

¹³ See <http://www.haaretzdaily.com/hasen/spages/525296.html>.

¹⁴ This Act became effective as of January 1, 2005.

Maryland is ready to embrace same sex marriage. Allowing same sex marriages in this state would have a dramatic impact on the state's economy, as couples from other states would come by the thousands to stay in our hotels, spend money at our restaurants, and hire our caterers, florists, and musicians. One need only look to Massachusetts for proof of the economic impact of same sex marriages.¹⁵

Same sex marriages actually already exist in Maryland and across the United States from within the transgendered community. A person born male can marry a person born female. If one person transitions to an opposite gender through various medical processes and has not divorced their spouse, they have a legal same sex marriage. Maryland has not and should not void such marriages simply because the gender of one party has changed. Many such couples exist in Maryland and across the country.

Based on the 2000 Census, it is estimated that there are 26 million gays and lesbians in the United States, and more than 594,000 couples in same sex relationships. The estimated combined disposable income for these couples is 450 billion dollars. The Census further identified over three million children living with gay or lesbian parents, and over two million gay or lesbian couples having children either from a prior heterosexual relationship or through adoption or surrogacy. It is projected that this number will increase to over 3.4 million by the end of 2004.¹⁶

These numbers only reflect information from individuals who are able to self identify. There is a whole underground of individuals and same sex couples who are afraid to be identified for fear of losing their jobs, their children, or being the victims of other forms of harassment and abuse.

Same sex marriages in Maryland will not deter heterosexuals from getting married. There have been no less opposite sex couples getting married anywhere since this became a national issue. It is ironic to think that two men or two women getting married is a threat to the institution of marriage, as many have argued in opposition.

¹⁵ For a report on the economic impact in Maryland, see <http://www.iglss.org/pubs/maryland.html>, last visited on March 26, 2005. For a report on Connecticut, see <http://www1.law.ucla.edu/~williamsprof/pdf/CountingOnCouples.doc>, last visited on March 26, 2005. For a report on the economic impact in Vermont, see <http://www.iglss.org/media/files/techrpt981.pdf>, last visited on March 26, 2005.

¹⁶ U.S. Census Bureau 2000, taken from Witeck-Combs Communications Study.

Same sex marriages will only strengthen the civil meaning of marriage by creating the necessary legal ties of responsibilities and obligations upon one another.

How states ultimately handle our relationships will be determinative of the future of the value of our individual rights and its relationship to the institution of marriage.