

Informational Hearing
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For six years, the Marriage Law Project has been deeply involved in the debate regarding the legal redefinition of marriage to include same-sex couples. This has involved, among other things, analyzing the laws of every state to determine the likelihood of that state being required to recognize a same-sex "marriage" or similar legal status contracted in another state. In some ways, that question has not been urgent until recently. Recent national and international developments have made the question one that is of great importance to every state.

On December 21, 1999, the Vermont Supreme Court decided that the Vermont Constitution's "Common Benefits Clause" required the state to offer all the *benefits* of marriage to same-sex couples and *ordered the Vermont Legislature* to provide a way for same-sex couples to enjoy the benefits of marriage. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). In a period of just over two months, the Vermont House Judiciary Committee put forward and the Legislature approved a bill creating a new status of "civil unions" that conferred on same-sex couples all the benefits of marriage. 2000 Vt. Act No. 91. The law, which has no residency requirement, took effect on July 1, 2000. According to the Vermont Secretary of State's office, 4406 civil unions were registered between July 1, 2000 and August 15, 2002. Of these, 710 were from Vermont. The rest (83.9%) involved 3696 couples representing all 50 states.¹ The percentage of civil unions going to out-of-state couples has risen gradually since the law was adopted. Vermont is going national.

In addition, on April 1, 2001, the Netherlands became the first country to "open up" marriage to same-sex couples. Under the new law, only one of the two "spouses" is required to be a permanent resident or citizen of the Netherlands. Stb. 2001, No. 9 ("Act on the Opening Up of Marriage") (Bill 22672) (Dec. 21, 2000).² Therefore an American citizen could go to the

¹ Phone message from Vermont Department of Health to Margaret Nell, Marriage Law Project (Aug. 15, 2002).

² For an English summary of the bill, see Netherlands Department of Justice, *Same-Sex Couples to Be Able to Marry*, at www.minjust.nl:8080/a_beleid/fact/samesexm.htm (last visited on Nov. 10, 2000).

Netherlands and marry a Dutch citizen anytime on or after April 1, 2001, and then return seeking recognition. There are already reports of same-sex couples who have married in the Netherlands and subsequently moved to the United States. Sooner or later a couple will force the issue.

The issue could rise to the forefront even more quickly if the Massachusetts Supreme Judicial Court requires that marriage licenses be issued to same-sex couples. *Goodridge v. Dept. of Public Health* is currently pending before the SJC, with oral arguments scheduled for February 2003 and a decision expected sometime next summer. *Goodridge v. Dept. of Public Health*, Docket # SJC-08860, Supreme Judicial Court of Massachusetts.

In Canada, there are three lawsuits pending in which activists are trying to force the federal and various provincial governments to redefine marriage to include same-sex couples. At the provincial trial courts, the province of British Columbia upheld the federal marriage law against a constitutional challenge while courts in Ontario and Quebec have declared the marriage law unconstitutional, giving the Parliament two years to rectify the violation. *Egale v. Attorney General of Canada*, 2001 BCSC 1365 (British Columbia); *Halpern v. Toronto*, 60 O.R.3d 321 (Ont. Div. Ct. 2002); *Hendricks c. Quebec*, 2002 Carswell Que 1890, 2002 WL 1608180 (Cour Super., Montreal, Quebec, Sept. 6, 2002) (no official English translation).

Connecticut has not yet enacted a law that specifically denies recognition to out-of-state marriages that would violate the public policy of the State. This creates the possibility for citizens of Connecticut to travel to another jurisdiction (such as Vermont), "marry" or contract a "civil union," and return to their home state to demand recognition of their same-sex "marriage." This is essentially the scenario which gave rise to *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. 2002) (denying Connecticut dissolution of Vermont civil union), cert. granted, 261 Conn. 936 (plaintiff passed away in early November, leaving status of appeal in doubt). In *Rosengarten*, two men traveled to Vermont and entered into a civil union, taking advantage of the fact that the civil union law has no residency requirement. Thereafter, they separated and sought to dissolve their civil union. The obstacle, however, arose in that Glen Rosengarten lived in Connecticut while his partner lived in New York. Vermont law requires that at least one party to a civil union reside in Vermont for a year before the divorce will be granted. Glen Rosengarten brought suit in Connecticut court seeking to have his civil union dissolved under Connecticut domestic relations law. The trial court and court of appeals denied his petition, concluding that (a) Connecticut law had no device by which to recognize and dissolve a civil union and (b) Connecticut law did not recognize same-sex "marriages." The Connecticut Supreme Court had accepted the case for review before Mr. Rosengarten passed away, leaving the status of the litigation in doubt.

Activist groups have said that they favor litigation aimed at securing recognition of same-sex "marriage" where they are unable to do so legislatively? This scenario is particularly troubling

¹See Mary L. Bonauto, *Civil Unions Update: The September Primaries: Analysis and Action*, at <http://www.glad.org/> (Sept. 27, 2000) ("Regardless of the outcome of the elections, we believe lawmakers should file marriage legislation, and, in some cases, also file

because it could lead to the radical redefinition of Connecticut's marriage law-not by the Connecticut legislature, but by the courts or legislature of another state! Such an end-run around the democratic procedure of the home state is clearly not in the best interest of Connecticut. It would upset the settled expectation of the legislature which has enacted numerous laws assigning rights and benefits based on the status of marriage, assuming that marriage would remain a relationship between a man and a woman.

The U.S. Congress sought to prevent this possibility by enacting the Defense of Marriage Act, which provides that a state cannot be forced to recognize an out-of-state same-sex "marriage." (Pub. L. 104-199 sec. 2, 100 Stat. 2419 (Sep. 21, 1996) *codified at 28 U.S.C. §1738C (1997)*). But DOMA does not prevent such recognition, it only makes it non-mandatory. It is up to each individual state to decide what marriages will be recognized in that state. That decision is clearly the business of the legislature. To this point, 36 states have sought to protect traditional marriage by preventing the recognition of out-of-state same-sex "marriages" and several more states are considering such laws. The Connecticut Legislature now has a chance to make the same decision for itself before the courts of Connecticut take that opportunity away from it.

comprehensive civil union legislation. It may not pass right away, but the only way to get what you want is to ask for it. And of course, advocates should continue to explore well-planned and well-placed litigation."); Mary L. Bonauto, *A Historic Victory: Civil Unions for Same-Sex Couples, What's Next!*, Gay & Lesbian Advocates and Defenders, June 2000, at <http://www.glad.org/Publications/CivilRightProject/HistoricVictory.PDF> ("We regard [laws providing that only marriages between a man and a woman will be recognized] as unconstitutional and are carefully considering how best to secure their limitation over time. . . We must proceed collectively and carefully, moving forward the best cases in the best places at the best times.").