

Judiciary Committee  
Hearing on Raised Bill No. 5925  
Testimony of Mark W. Dost  
March 17, 2008

Good afternoon, House Chairman Lawlor, Senate Chairman McDonald, and other members of the Committee. My name is Mark Dost. I am a resident of Waterbury and an attorney in private practice. By way of credentials, I am a member of the executive committees of the Estates and Probate, Elder Law, and Human Rights and Responsibilities Sections of the Connecticut Bar Association. I am also a past chair of the Elder Law Section of the CBA and a fellow of the American College of Trust and Estate Counsel. This afternoon, I am speaking with regard to Raised Bill 5925, especially with regard to Section 3.

Section 3 seeks to recognize civil unions from other jurisdictions for purposes of Connecticut law. It also seeks to convert same-sex marriages from other jurisdictions into Connecticut civil unions. This bill is an improvement over the bills introduced in 2005 and 2006, which would have given same-sex couples willing to travel to Ontario for their marriage ceremony an easy method of circumventing Connecticut's policy limiting marriage to the union of one man and one woman.

A fundamental flaw is that by permitting a foreign same-sex marriage to trigger legal incidents in Connecticut, and by declaring the unions "valid," the bill would impair the policy of this state limiting marriage to the union of a man and a woman. Same-sex marriages from other jurisdictions should continue to be treated as void under Connecticut law.

If the legislature and the governor wish to allow same-sex marriages to be recognized as civil unions, the legislature will need to address a number of substantive and technical defects found in Section 3, which are addressed in a proposed substitute amendment to Section 3.

First, people who have entered into a same-sex "marriage" in Massachusetts or Canada should not be forced into a civil union if they do not want to be forced into a civil union, *especially* those who are no longer in relationship. My suggestion: do not create an automatic presumption in favor of civil unions for those who have married, but rather allow residents and nonresidents to opt into civil unions, if they so choose.

Second, the bill should not apply to those whose union has already been dissolved, nor to those whose union was illegal or void in their state of residence and who have since taken steps legally inconsistent with that union. For example, if A and B, residents of Connecticut, entered into a same-sex "marriage" in Canada and then broke up, and if B then entered into a civil union in Connecticut with C, A and B should not now be presumed to have entered into a civil union with one another. My proposal deals with that situation. It also deals with the situation of *Rosengarter v. Downes*, in which a Connecticut resident entered into a Vermont civil union and, only months later and until his death, sought to extricate himself from the union, but before Connecticut's civil union law took effect. Under my proposed substitute amendment, that union would not be given legal effect under Connecticut law.

Third, Section 3 the bill does not deal with divorce. This is an enormous omission, since divorce is the most important legal issue facing Connecticut same-sex couples who have married in Canada and other jurisdictions recognizing same-sex marriage. Right now -- without Section 3 -- Connecticut residents can obtain a judicial declaration that their same-sex marriage is void, because Connecticut law treats same-sex marriages contracted in other jurisdictions as void. If Section 3 passes in its current form, marriages entered into outside of Connecticut will multiply.<sup>1</sup> But even as they are multiplying, Connecticut courts, without enabling legislation, will likely no longer be able to void or even dissolve the marriage itself, but only the civil union created because of the marriage. My proposed substitute amendment permits those who have entered into same-sex marriages to void their marriages, and if they have already elected to have their marriage treated as a civil union, they would be entitled not only to have their civil union dissolved, without leaving the status of their "marriage" in limbo.

Fourth, RB 5925 needs to amend CGS §46b-38mm, dealing with civil unions performed in foreign countries. My proposed substitute amendment incorporates the conflict of law rules into that section.

Respectfully submitted,  
Mark W. Dost  
31 Gaylord Glen  
Waterbury, CT 06708  
203-596-9030; mdost@tnrdlaw.com

---

<sup>1</sup> Marriage ceremonies would multiply in Ontario and British Columbia, which impose no residency requirement. An argument may be made that if Section 3 of RB 5925 passes in its current form, Connecticut would no longer treat same-sex marriage as wholly "void," since foreign marriages would be recognized in Connecticut, albeit as civil unions, and thus Connecticut residents would thus be able to "marry" in Massachusetts. M.G.L. c. 207, §11, provides: "No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void." The argument may well fail, however, because M.G.L. c. 207, §12 references the word "prohibited," rather than "void." See *Cote-Whitacre v. Dep't of Public Health*, 446 Mass. 350 (2006).

PROPOSED SUBSTITUTE TO SECTION 3 OF RAISED BILL 5925

*Purpose: This substitute amendment recognizes as civil unions in Connecticut civil unions and domestic partnerships from foreign jurisdictions and converts out-of-state same-sex marriages to civil unions for those who wish to have their same-sex marriages converted to civil unions. This substitute bill also removes technical flaws in section 3 of RB 5925 and would continue to provide a vehicle for a Connecticut resident to terminate a same-sex marriage entered into in another jurisdiction.*

AN ACT CONCERNING CIVIL UNIONS AND MARRIAGE

Section 46b-38mm of the general statutes is repealed and the following is substituted in lieu thereof:

[All civil unions in which one or both parties are citizens of this state, celebrated in a foreign country, shall be valid, provided: (1) Each party would have legal capacity to contract such civil union in this state and the civil union is celebrated in conformity with the law of that country; or (2) the civil union is celebrated in the presence of the ambassador or minister to that country from the United States or in the presence of a consular officer of the United States accredited to such country, at a place within his or her consular jurisdiction, by any ordained or licensed member of the clergy engaged in the work of the ministry in any state of the United States or in any foreign country.]

*(a) A legal union of two persons of the same sex validly entered into in another state or jurisdiction in conformity with the law of such other state or jurisdiction shall be valid and recognized in this state as a civil union under sections 46b-38aa to 46b-38pp, inclusive, of the general statutes, provided the requirements for entering into such legal union in such other state or jurisdiction, and the benefits, protections and responsibilities deriving therefrom, are substantially equivalent to the requirements for entering into, and the benefits, protections and responsibilities deriving from, a civil union in this state under said sections.*

*(b) Subsection (a) shall not validate a legal union of two persons of the same sex entered into outside of Connecticut, (1) unless in the case of a union celebrated before October 1, 2005, (a) one or both parties were domiciled in the state or other jurisdiction in which the union was celebrated or were then or thereafter domiciled in a state or other jurisdiction that recognized their union as valid or (b) both parties cohabited or otherwise held themselves out as parties to a civil union or similar arrangement on October 1, 2005 or (c) both parties to the union file a declaration that their union will be recognized as a civil union for purposes of Connecticut law or, in the case of a same-sex marriage, file the declaration set forth in subsection (c), or (2) if the union has been annulled or declared void by a court of competent jurisdiction, or (3) if one or both parties has thereafter lawfully entered into a marriage as defined in sections 45a-727a and 46b-38nn, but before the application of subsection (a) to their union.*

*(c) In the case of a same-sex marriage entered into and authorized under the laws of another state or jurisdiction, subsection (a) shall not apply unless and until both of the*

*parties to the union file a declaration that their union will be recognized as a civil union for purposes of Connecticut law.*

*(d) Declarations under subsections (b) or (c) shall be made under penalty of perjury on forms to be provided by the Department of Public Health and shall be filed with the registrar of vital statistics of the town in which one or both parties to the union reside or, if neither party resides in Connecticut, with the Department of Public Health.*

*(e) A civil union in which one or both parties are citizens of this state, which would not be prohibited by the laws of this state, and which is celebrated in a foreign country in the presence of the ambassador or minister to that country from the United States or in the presence of a consular officer of the United States accredited to such country, at a place within his or her consular jurisdiction, by any ordained or licensed member of the clergy engaged in the work of the ministry in any state of the United States or in any foreign country, shall be valid.*

*(f) A resident of this state who has married another person of the same sex, whether or not pursuant to the law of a state or other jurisdiction recognizing same-sex marriage and regardless of whether a resident of this state when he or she entered into said marriage, may petition the Superior Court to have his or her marriage annulled pursuant to sections 46b-40 and 46b-42 or to have his or marriage declared void in an action for declaratory judgment under section 52-29. In the case of a same-sex marriage previously recognized as a civil union by reason of subsections (a) and (c), such annulment or declaratory judgment shall not constitute a dissolution of their civil union unless and until the union of the parties has been dissolved by a court of competent jurisdiction.*

*(g) This Act shall be effective as of October 1, 2005, except that in cases in which a declaration must be filed in order for subsection (a) to apply to a union, this Act shall not apply until such declaration is filed.*

#### Comments:

Subsection (a) would validate for purposes of Connecticut law all civil unions entered into in States such as Vermont and New Jersey and similar unions, such as California domestic partnerships. It would also recognize same-sex marriages as civil unions, if both parties opted to have their same-sex marriage recognized as a civil union.

Subsection (b) recognizes that same-sex couples who may have entered into unions years ago, before the enactment of Connecticut's civil union law, may have changed their legal position based on laws of their domiciles, which did not recognize the unions. If the union was not valid under the law of either party's domicile or did not become valid under the law of either party's domicile, then the couple wishing to have their union now treated as a civil union would be required to file a declaration to that effect in order for Connecticut law to treat the union as valid. Further, the law would not validate a union that had previously been annulled or declared void by a court of competent jurisdiction. For example, if a Connecticut couple entered into a Vermont civil union in 2001 and one of the parties thereafter lawfully married before the effective date of this statute (October 1, 2008), the new law would not apply to validate the Vermont civil union. Nor would it validate the type of union described in the case of *Rosengarten v. Downes*, in which one

party, before his death had sought to terminate the union before Connecticut's civil union law became effective.

Subsection (c) requires that both parties to a same-sex marriage consent to have their union recognized as a civil union pursuant to Connecticut law. Some partners to a same-sex marriage will not wish to treat their "marriage" as a civil union on grounds of principle or for other reasons (for example, the couple is no longer living together).

Subsection (d) directs the Department of Public Health to supply the forms called for in subsections (b) and (c).

Subsection (e) permits residents of this State to have their same-sex marriages annulled or declared void, a right already existing under Connecticut law. However, in the case of a couple that has elected to treat their "marriage" as a civil union pursuant to subsection (c), the annulment or voiding of the marriage would not dissolve the civil union.

(e) Subsection (e) gives retroactive effect to this choice of law rule, since most Connecticut couples who had entered into civil unions in other states before and after October 1, 2005 believed their civil unions to be valid. In the case of couples electing to treat their civil same-sex marriages as civil unions or couples who had entered into civil unions before October 1, 2005, but who had separated as of October 1, 2005, the Act would not validate their union until they filed the declaration.