

Vermont Legislative Council

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MEMORANDUM

To: Vermont Commission on Family Recognition and Protection

From: Michele R. Childs

Date: December 10, 2007

Subject: Recognition of Out-of-state Same-Sex Marriages in Vermont

Below is an analysis provided by chief counsel Bill Russell and myself to legislators in 2004 regarding recognition of same-sex marriages performed in other jurisdictions. We have not taken up the issue since that time and have reserved making any changes to our position until after the commission completes its hearings. However, as of now, we do not believe our analysis has changed.

You asked how a same-sex marriage established in Massachusetts or Canada might be treated in Vermont. We believe that it is most likely that Vermont's courts would grant parties to a same-sex marriage from another jurisdiction all of the same legal rights as parties to a civil union in this state - without recognizing them as "married." This is because to do so would be in accord with the state's policy for equal treatment of same-sex couples as expressed in the Supreme Court's *Baker* decision¹ and the Legislature's enactment of the civil union statute.²

However, we find nothing in those authorities or other law that clearly, and with certainty, requires this result. Neither expressly prevents the courts of this state from giving "full faith and credit" to a same-sex marriage from another jurisdiction nor from refusing to grant any recognition at all to a same-sex marriage from another jurisdiction.

Recognizing the legal rights of a same-sex married couple from another state

In the *Baker* decision, the Supreme Court held that same-sex couples are entitled under the Vermont Constitution "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples." The Court stated that the granting of these benefits and protections did not have to take the form of inclusion within the marriage laws, but could be done through "a parallel 'domestic partnership' system or

¹ *Baker v. State*, 170 Vt. 194 (1999).

² No. 91 of the Acts of the 1999 Adjourned Session (2000).

some equivalent statutory alternative” that conforms with “the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.” Thus, under *Baker*, Vermont courts likely would be required to recognize the legal benefits and responsibilities of marriage of a same-sex couple who married in another state, but not constitutionally required to recognize a same-sex marriage as such. Denying any legal benefits and protections of marriage to a same-sex married couple who moved to Vermont likely would run afoul of the Vermont Constitution as interpreted in *Baker*.

In 2000, the Vermont legislature complied with the *Baker* ruling by enacting the civil unions law, recognizing the validity of same-sex unions by granting same-sex couples the legal benefits of marriage. The legislative findings from the civil union statute state the policy reasons that form the basis of the act and affirm that “[t]he state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple. Without the legal protections, benefits and responsibilities associated with civil marriage, same-sex couples suffer numerous obstacles and hardships.”³ Thus, failure to recognize an out-of-state same-sex marriage at all for the purpose of legal rights and responsibilities would go against state policy as expressed in statute as well.

Recognizing “marriage” of a same-sex couple from another state

Still at issue is whether state or federal law allows or requires Vermont to recognize same-sex marriages performed in another state as a “marriage” in Vermont. Under the federal constitution’s “Full Faith and Credit Clause,”⁴ the laws of one state generally must be recognized and honored in another. While states generally recognize marriages performed in other states, there is an exception to this “place of celebration” rule if the marriage is contrary to the forum state’s public policy.⁵ If a state has a clear public policy on an issue that strongly conflicts with the policy of another state, it can choose to apply its own law.⁶

Thus, the question is whether a court in this state would find that Vermont has such a strong public policy against permitting same-sex unions to be designated as “marriage” sufficient to offset any constitutional obligation to give full faith and credit to the marriage laws of another jurisdiction.

³ §1, Legislative Findings, No.91 of the Acts of the 1999 Adjourned Session (2000).

⁴ Article IV, § 1 of the U.S. Constitution.

⁵ Vermont courts have held that a marriage contract will be interpreted in this state according to the laws of the state in which it was entered into, so long as to do so does not violate Vermont public policy. See *Poulos v. Poulos*, 169 Vt. 607, 737 A.2d 885, 886 (1999).

⁶ See Restatement (Second) of Conflict of Laws § 283 (1971). Also, the federal defense of marriage act (DOMA) specifically exempts states from having to recognize a same-sex marriage or similar union performed in another state. 28 U.S.C. §1738C and 1 U.S.C. § 7. However, DOMA’s constitutionality is questionable in that it appears to violate a state’s obligations under the full faith and credit clause. Even if DOMA were found unconstitutional, however, the full faith and credit clause still permits states to refuse to recognize another state’s laws or judgments if they violate the public policy of the state in which recognition is sought. Therefore, notwithstanding DOMA, the issue remains whether a strong public policy against recognition of same sex marriages exists in Vermont.

Vermont law contains more than one provision expressing a policy against permitting same-sex couples to “marry.” Act 91 clearly stated that marriage in Vermont is the “legally recognized union of one man and one woman.”⁷ Although Act 91 conveyed the legal benefits, protections and responsibilities of civil marriage to same-sex couples, it did not bestow the status of civil marriage to same-sex couples.⁸ These provisions appear to suggest a policy against same sex-marriage that would permit Vermont to decline to recognize such marriages entered into in another state without violating the full faith and credit clause.

On the other hand, the legislative history of Act 91 reveals that in enacting the civil union statute, the Vermont House considered but then declined to directly address the status of an out-of-state same-sex marriage under Vermont law. On March 16, 2000, the Vermont House approved an amendment to H.847 (which became Act 91) defining marriage as the union between a man and a woman, but defeated an amendment that declared that the state “shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction regarding legal marriage that does not also meet the requirements of [Vermont’s marriage law].”⁹

The House’s intention in defeating this amendment could be interpreted two ways. It can plausibly be argued that in doing so, the House chose not to ban recognition of out-of-state same-sex marriages, and therefore, implied that such marriages may be recognized as such in Vermont. However, it is often misleading to base statutory interpretations on negative implications. The amendment’s failure could as well be interpreted to mean that while the legislature did not intend to recognize a same-sex marriage as a marriage, it did not want to prohibit the recognition in this state of the legal rights that flow from the marriage. Acceptance of the amendment would have required the state to treat the marriage as if it had never existed, thereby denying the parties to an out-of-state same-sex marriage *any* of the legal rights afforded to married couples and couples in a civil union in Vermont, contrary to the accepted policy of providing families based upon a same-sex couple with benefits and protections under the law.

Conclusion

Recognition of either a marriage or a civil union usually occurs only when a couple asserts its legal rights as such, most often before a court. In this context, we believe that Vermont courts would most likely recognize the legal rights, but not the status, of a married same-sex couple, in keeping with the policy stated by the legislature in Act 91.

While we believe a same-sex marriage most likely will be recognized for the purpose of legal benefits and protections, some have expressed a concern as to whether the relationship will be recognized as a marriage or a civil union. From a legal perspective only, it makes little difference at the state level. The legal rights are

⁷ See 15 V.S.A. § 8, 15 V.S.A. § 1201(4) and 1999, No.91 (Adj. Sess.), § 1, Legislative Findings.

⁸ See 15 V.S.A. § 1204 and 1999, No. 91 (Adj. Sess.), §1, Legislative Findings.

⁹ See Journal of the House, Thursday, March 16, 2000.

essentially the same. However, we recognize that to many people it is very important whether the relationship would be considered a marriage or a civil union. Unfortunately, the status of an out-of-state same-sex marriage in Vermont has not been made explicitly clear in the law. We believe it is likely that Vermont courts would either recognize the rights without addressing the issue of whether the union is a marriage or a civil union, or they would recognize the union as a civil union. We believe it is unlikely a Vermont court would recognize it as a valid marriage in this state, though it is of course impossible to predict with certainty how a court would rule.