

**Report of the
Vermont Civil Union
Review Commission**

January 2002

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I. The Commission

The Vermont Civil Union Review Commission (“the Commission”) was established by Sec. 40 of No. 91 (H.847) of the Acts of 2000. (*See* Appendix A.)

The Commission consists of 11 members:

- two members of the House of Representatives, designated by the Speaker of the House: Rep. Thomas Little, Esq. (R-Shelburne) and Rep. William Lippert (D-Hinesburg);
- two members of the Senate, designated by the Senate Committee on Committees: Sen. Richard Sears, Jr. (D-Bennington) and Sen. John Bloomer, Jr., Esq. (R-Rutland);
- four members representing the public, appointed by the Governor: Stephen Reynes, Esq. (Chair), a Montpelier attorney and former House member and Senate member; Mary Kehoe, Esq. (Vice Chair), a Burlington family law attorney; Annette Cappy, Brattleboro Town Clerk; and Wendy Yoder, International Operations Manager for Ben and Jerry’s Homemade;
- one member appointed by the Chief Justice of the Vermont Supreme Court: Honorable Francis McCaffrey, Administrative Judge;
- the chair of the Human Rights Commission, or his or her designee: Harvey Golubock, Executive Director of the Human Rights Commission until October 31, 2001 and Robert Appel, Executive Director of the Human Rights Commission, beginning November 1, 2001; and
- the Attorney General, or his or her designee: Martha Csala, Assistant Attorney General, Civil Rights Division.

The Commission is staffed by Michele Childs, Legislative Counsel, and Katie Pickens, Committee Assistant.

II. The Commission’s Charge

Act 91 directs the Commission to:

A. Prepare and implement a plan to inform members of the public, state agencies, and private and public sector businesses and organizations about the act.

B. Collect information about the implementation, operation, and effect of the act, from members of the public, state agencies, and private and public sector businesses and organizations.

C. Collect information about the recognition and treatment of Vermont civil unions by other states and jurisdictions, including procedures for dissolution.

D. Evaluate the impact and effectiveness of the act, with particular attention to the Findings, Purpose, and Construction sections of the act.

E. Explore and propose methods and techniques, including existing and emerging forms of alternative dispute resolution, to complement the judicial system for the appropriate resolution of questions or disputes that may arise concerning the interpretation, implementation and enforcement of the act.

F. Examine reciprocal beneficiaries relationships and evaluate whether nonrelated persons over 62 years of age should be permitted to establish a reciprocal beneficiaries relationship, and whether the legal benefits, protections and responsibilities of a reciprocal beneficiaries relationship should be expanded.

G. Report its findings, conclusions and recommendations to the general assembly, periodically as deemed necessary by the Commission; however, the Commission shall report to the general assembly and governor, at least annually, by January 15 of the years 2001 and 2002.

III. Meetings and Witnesses

The Commission met six times in 2001: February 4, August 8, September 18, October 16, November 13, and December 19. The meetings were held at the State House in Montpelier. An opportunity for public comment was included in the public notice of the meetings held in February, September and October, and the opportunity was provided to members of the public during those meetings. In addition, the Commission has been open to receive public comments at any time during its existence. Comments may be sent to: Vermont Civil Union Review Commission, c/o Legislative Council, 115 State Street, Drawer 33, Montpelier, VT 05633-5301.

During 2001, the Commission heard from the following witnesses:

Mary Bonauto, Attorney, Gay & Lesbian Advocates & Defenders

Kathy Callaghan, Director, Employee Benefits and Wellness Division, Department of Personnel

Paula DeStabile, Attorney, Department of Banking, Insurance, Securities, and Health Care Administration

Eileen Elliot, Commissioner, Department of Prevention, Assistance, Transition, and Health Access

Representative Peg Flory, Chair, House Committee on Judiciary

Sally Fox, Director, Family Court Operations

Jacqueline Hughes, Attorney, Department of Banking, Insurance, Securities, and Health Care Administration

George Phillips, Policy Analyst, Department of Taxes
Leigh Tofferi, Director of Government and Public Relations, Blue Cross/Blue Shield of Vermont

In addition, the Commission received many written submissions that have been placed in the Commission record.

IV. Civil Union Review Commission Web Page

The Commission established a web page (<http://www.leg.state.vt.us/baker/cureview.htm>) to provide a variety of information on civil unions, as well as to keep the public updated on the activities of the Commission. This web page was established in 2000, and has been maintained and updated periodically with new information about the law and related developments.

Information available on the web page includes:

- Agendas and minutes of Commission meetings
- Commission reports
- Selected proposed and final administrative rules affecting civil unions
- “Civil Unions in Vermont,” a pamphlet published by the Department of Health
- “Completing the Marriage or Civil Union Certificate,” instructions published by the Department of Health
- “Reciprocal Beneficiary Relationships in Vermont,” a pamphlet published by the Department of Health
- “The Vermont Guide to Civil Unions,” a guide published by the Secretary of State
- “Justice of the Peace Guide,” a guide published by the Secretary of State
- “Vermont’s Civil Union and Public Accommodations Laws,” a handbook published by the Vermont Human Rights Commission
- Insurance information
- Tax information
- Text and summaries of Act 91
- Legislative history of Act 91
- Text of Vermont Supreme Court Decision, Baker v. State
- Text of Washington Superior Court Decision, Brady v. Dean
- Text of Vermont Supreme Court Decision, Brady v. Dean

V. Commission's Findings

FINDING 1 – TERMINATION OF SUPREME COURT'S JURISDICTION IN BAKER V. STATE OF VERMONT

Pursuant to a stipulation by the parties, on January 16, 2001, the Vermont Supreme Court issued an entry order terminating the Court's retention of jurisdiction in Baker v. State of Vermont. The entry order became final on February 6, 2001. In the Baker decision, the Court retained jurisdiction over the case, pending legislative action, to see if the General Assembly, in due course, would enact a statutory remedy to the constitutional defect declared by the Court. The Baker decision made it clear that, following General Assembly action or failing such action, the Baker plaintiffs would be permitted to petition the Court for further relief if they believed that the General Assembly's enactment (or lack of enactment) fell short of the constitutional principle established in the case. The January 16, 2001 termination of jurisdiction under the Baker case eliminated this possibility.

FINDING 2 – STATUS OF BRADY SUIT CHALLENGING HOUSE VOTE ON ACT 91 (H. 847) AND CONSTITUTIONALITY OF ACT 91 AS IT RELATES TO TOWN CLERKS

On December 26, 2001, in the case of Brady v. Dean, the Vermont Supreme Court affirmed a lower court ruling dismissing a challenge to Act 91. The plaintiffs/appellants, a collection of taxpayers, members of the Vermont House of Representatives, and three town clerks, challenged the constitutionality of Act 91, and appealed a Washington County Superior Court decision granting the defendants' motion to dismiss. The defendants/appellees are: Governor Howard Dean; former Speaker of the House of Representatives Rep. Michael Obuchowski; President Pro Tem of the Senate Sen. Peter Shumlin; and Vermont Attorney General William Sorrell.

The taxpayer and legislator plaintiffs claimed that an alleged \$14 betting pool, conducted by some legislators in connection with a preliminary House vote on Act 91, provided a basis for the court to declare Act 91 invalid and enjoin its enforcement. The town clerk plaintiffs alleged the Act was unconstitutional because it required them to issue civil union licenses in violation of their religious beliefs. All plaintiffs moved for a preliminary injunction to enjoin the Act prior to its July 1, 2000 effective date. Washington County Superior Court Judge Martin denied the motion, concluding that the plaintiffs did not show irreparable harm. Plaintiffs then filed a motion for summary judgment, and Judge Martin denied the motion on the same basis.

Defendants then moved to dismiss, arguing that: (1) the plaintiffs lacked standing; (2) the plaintiffs failed to state a claim upon which relief can be granted; and (3) plaintiffs' claims were barred by the separation of powers and related doctrines. On October 24, 2000, Washington County Superior Court Judge Katz granted the defendants' motion to

dismiss, concluding: (1) the taxpayer plaintiffs lacked standing because “they allege at best a generalized harm and speculative causation”; (2) the legislator plaintiffs lacked standing because they cannot allege that their votes were nullified; (3) the town clerks lacked standing because they are permitted to appoint an assistant to issue licenses; (4) the claims relating to the vote on Act 91 presented a nonjusticiable political question, and judicial intervention would express a “lack of respect due the legislature”; and (5) the town clerks failed to state a claim because they “may not become a law unto themselves and hold the State’s neutral and generally applicable laws hostage to [their] religious beliefs.” After the superior court dismissed the plaintiffs’ claims, the plaintiffs filed a notice of appeal.

On appeal, the Supreme Court affirmed the lower court’s dismissal of the case. According to the Court, the doctrines of standing and separation of powers are inextricably linked. Citing the Vermont Constitution, the Rules of the House of Representatives, and Mason’s Manual of Legislative Procedure, the Court found that the issue of whether the legislators who had participated in the betting pool should have been disqualified was an issue for the House to decide, not the Court. To decide the issue in the judicial branch would be a violation of the separation of powers doctrine. According to the Court, “[p]rudent exercise of judicial restraint and deference to the independence of a coordinate governmental branch is compelled by the facts and circumstances of this case.” Therefore, because the issue presented to the Court was a nonjusticiable political question, it precluded the taxpayer and legislator plaintiffs’ challenge to the civil union vote.

With regard to the town clerks’ challenge, the Court held that the civil union law did not substantially burden the town clerks’ rights to freely exercise their religion. The Court noted that the civil union law made an accommodation for clerks who might object to the law on religious grounds by providing them with the authority to appoint an assistant to perform the duties. The Court found the proposition that a public official could retain public office while failing to perform a generally applicable duty of the office on religious grounds highly questionable. However, even assuming such a proposition for the sake of analysis, the town clerks did not prove that the law burdened their right to freely exercise their sincerely held religious beliefs in any constitutionally significant way. Therefore, the Court held that the town clerks failed to allege a claim upon which relief could be granted.

The Vermont Supreme Court’s decision is not appealable.

FINDING 3 – 2001 CIVIL UNION DEPARTMENT OF HEALTH STATISTICS

The Office of Vital Records (“Vital Records”) within the Department of Health compiles statistics about civil unions, as it does with marriages. The civil union statistics for 2001 are contained in the Appendix to this Report.

As of January 4, 2002, there have been 4,371 civil unions filed with Vital Records. According to Bill Apao, Director of Vital Statistics, after the initial surge in civil unions when the law went into effect, the number of civil unions has declined by one-third. During August 2000 through October 2000, there were 948 civil unions recorded compared to 645 during the same time period in 2001. Mr. Apao said that, although the numbers for November and December are incomplete, he expects a total of around 2,000 civil unions for 2001.

Most civil unions have involved parties who are nonresidents. The proportion of civil unions involving Vermont residents continues to decrease. In July 2000, 29% of civil unions involved Vermont residents. This number dropped to 22% in August and September of 2000, and, currently, 11% of people entering civil unions are Vermonters. Residents from 48 states, the District of Columbia, Canada and several other countries have established civil unions in Vermont. Besides Vermont, the largest numbers of civil union parties have been residents of New York, Massachusetts and California. (*See Appendix B, Table I-1.*)

The largest number of Vermont residents who have established a civil union are from Chittenden County (182), followed by Windham County (72) and Washington County (70). Essex County (2), followed by Grand Isle County (12) and Orleans County (15), have the fewest Vermont residents in a civil union. (*See Appendix B, Table I-2.*)

Most parties to a civil union, whether male or female, tend to be between 35-39 years of age. Parties to a civil union tend to be of similar age. The average age difference between civil union partners is 5.7 years. Sixty-six percent of civil unions are between female partners. (*See Appendix B, Table I-3.*)

Civil union partners tend to be highly educated, with 63% having completed at least four years of college. (*See Appendix B, Table I-4.*) Seventy-seven percent of civil union partners had not been previously married or in a civil union. (*See Appendix B, Table I-5.*)

Windham County issued the most civil union licenses (849), followed by Chittenden County (741) and Bennington County. This distribution does not reflect the resident population distribution, as most civil union licenses were issued to nonresidents, and nonresidents can obtain a civil union license from any town clerk in the state. Data shows an increase in civil unions during the summer and fall months. (*See Appendix B, Table I-6.*)

FINDING 4 – IMPACT OF ACT 91 ON STATE GOVERNMENTAL AGENCIES AND DEPARTMENTS

On September 27, 2001, the Commission issued a letter to state agencies requesting an assessment of any impact the civil union law has had on either the obligations or duties of the agency or the area of the agency's regulatory jurisdiction. Most agencies reported

negligible or no impact. Five agencies reported minimal impact: the Department of Health (“DOH”), the Office of the Secretary of State (“Office”), the Department of Banking, Insurance, Securities, and Health Care Administration (“BISHCA”), the Department of Personnel (“Personnel”) and the Department of Taxes (“Department”). The initial civil union implementation efforts by these agencies, with the exception of Personnel, were reported in the 2001 Report of the Vermont Civil Union Review Commission, dated January 2001. All agency responses are on file at the Office of Legislative Council.

Since the issuance of the last Commission report, DOH has continued to keep a weekly total of civil unions and a separate count of in-state vs. out-of-state participants. DOH currently receives an average of 1-2 calls per week requesting this information. DOH has responded to several public information requests for data files and research copies of civil union certificates. DOH keeps statistics on civil unions and dissolutions, as well as marriages and divorces. William Apao, Public Health Statistics Director, went beyond the annual calculations, and periodically updated statistical tables for the Commission so that it could monitor the pace and demographics of civil unions during the year. Birth and death certificates were also amended to reflect a person’s civil union status. Commissioner Jan Carney reported that the initial implementation of the civil union law weighed heavily on the Vital Records staff, but DOH has been able to handle the workload without requiring additional staff.

Bill Dalton, Deputy Secretary of State, reported that the Office has received inquiries from town clerks, potential officiants, and the general public about the process for obtaining a civil union. The Office has fielded calls from in-state, out-of-state and numerous countries. During the last six months of 2001, inquiries have diminished significantly and amount to “no more than two or three a week.” The Office maintains civil union information on its website.

Jacqueline Hughes, General Counsel for BISHCA, reported that there have been few inquiries and no complaints regarding the incorporation of civil unions into the areas that the department administers. In 2000, bulletins in each area were issued, and insurance regulations were developed in accordance with Act 91. BISHCA also developed a brochure with the Department that addresses common civil union questions covered by the departments. This brochure, along with bulletins and additional information, is available on BISHCA’s website. BISHCA assisted the Commission in examining how federal insurance law affects benefits of civil union couples. (*See Finding 9.*)

According to Personnel Commissioner Patricia McDonald, the civil union law has had little effect on the department, with the exception of the administration of insurance plans offered to employees. The Benefits and Wellness Division was entrusted with ensuring that medical and dental insurance were made available to civil union partners of state employees and their dependents. Most of this work had been addressed previously because the state has offered its employees same-sex and opposite-sex domestic partnership coverage since 1994. According to Commissioner McDonald, the basic issue of eligibility was made somewhat easier by civil unions because Personnel can rely on

the formality of the civil union process, and does not need to obtain documentation to prove eligibility for a domestic partnership. However, calculating and reporting the taxation of benefits for civil union partners has required some work on the part of Personnel because of the unique status of civil unions. (See Finding 10.) The Benefits Division and the Payroll and Information Systems Division were required to make different reports for federal and state tax authorities. According to Ms. McDonald, “[t]he process of updating reporting systems and creating forms created some work and expense for Personnel, but now that the changes are part of the landscape, there should not be significant work or expense for our benefits program that arises from the civil union law.”

According to Tax Commissioner Janet Ancel, the Department has made the necessary changes in policy, procedure and forms to implement the tax provisions of Act 91. Because the tax provisions of the Act had an effective date of January 1, 2001, the Department has not yet processed income tax returns affected by Act 91. The Department’s 2001 returns, which will be filed in 2002, recognize both civil union partners and spouses as potential joint return filers, and references to “spouse” have been changed throughout the tax instruction booklets and the forms. To complete the Vermont return, civil union partners are instructed to prepare a federal return, apply the federal rules as if they were married, and complete the standard Vermont return using income based upon the specially prepared federal return, rather than the one actually filed with the IRS. Commissioner Ancel does not “anticipate any particular problems with this approach as other filers, such as taxpayers receiving government interest, have been using similar 1040s prepared for their Vermont returns.” In addition, the Department revised its withholding tax procedures so that an employee could show a filing status and number of exemptions for Vermont purposes which was different from the federal W-4. According to Commissioner Ancel, “[a]lthough [the Department] will undoubtedly have additional technical questions raised as civil union partners prepare their 2001 returns, we do not expect a significant impact from Act 91.”

FINDING 5 – IMPACT OF ACT 91 ON FAMILY COURTS AND ALTERNATIVE DISPUTE RESOLUTION PROGRAMS

Between July 1, 2000 and December 31, 2001, the Family Courts issued one civil union dissolution, the equivalent of a divorce in a marriage. It is too early for meaningful statistics about civil union dissolutions, but the current rate causes no adverse impact on the Family Courts.

The Family Courts offer a variety of programs for dispute resolution in domestic relations cases. These services have typically been used by parties in divorce cases, but are also available to parties to a civil union who are seeking a dissolution. Sally Fox, Director of Family Court Operations, testified that the impact of civil unions on the Family Court has been negligible to date, and recommended no changes.

FINDING 6 – IMPACT OF ACT 91 IN OTHER STATES

Currently, in the case of Burns v. Burns pending before the Georgia Court of Appeals, a woman is seeking to have her Vermont civil union recognized in Georgia as a marriage for the purpose of amending the custody agreement for her children.

Susan Burns of Atlanta has three sons from a marriage that ended in divorce in 1995. A 1998 visitation order signed by Ms. Burns and her ex-husband, Darian Burns, prohibits visitation by the children with either parent if such parent is cohabiting or having overnight stays with an adult to whom such parent is not married or related.

On July 4, 2000, Ms. Burns and her partner, Debra Freer, entered into a civil union in Vermont. Upon returning to Georgia, Ms. Burns visited with her children in the home she shares with Ms. Freer. On September 12, 2000, Mr. Burns filed a contempt motion in Floyd County, Georgia, alleging that Ms. Burns had violated the visitation order. On January 30, 2001, the superior court held that the relationship between Ms. Burns and Ms. Freer was not a relationship recognized by the terms of the order, and that Ms. Burns had violated the order.

Ms. Burns appealed the superior court's order, and the case was argued before a three-judge panel of the Georgia Court of Appeals on October 10, 2001. Vermont legislators filed amicus briefs on both sides of the appeal. Several Vermont legislators filed an amicus brief with the Court of Appeals, agreeing with the lower court ruling and asserting that a civil union is clearly not a marriage under Vermont law. Other Vermont legislators filed their own amicus brief in support of the appellants. This brief argued that parties to a civil union are legally recognized as related to one another, at least as closely as certain relatives by affinity are recognized under Georgia law, and, therefore, Ms. Burns is related to Ms. Freer, and not in violation of the order for having her children visit her while living with Ms. Freer.

Legal briefs filed in Burns v. Burns are available for review in the Office of Legislative Council.

FINDING 7 – PUBLIC COMMENT AT COMMISSION MEETINGS

A period for general public comment was scheduled during the Commission meetings held in February, September and October 2001. The commission agenda was published on the General Assembly website, and notice of the public comment period was sent to a variety of Vermont media outlets around the state. One person testified at the February meeting to note an error in the Department of Health statistical tables (this had already been addressed by the Commission). No one appeared to testify at either the September or October meetings.

FINDING 8 – IMPACT ON COUPLES WHO HAVE ENTERED INTO CIVIL UNION

In addition to the public comment periods addressed in Finding 7, an additional public comment session was held at the October meeting of the Commission specifically for couples who had established a civil union. To evaluate the effects of the act, the Commission determined it was necessary to hear about the experiences of civil union couples. This Commission agenda was also published on the General Assembly website, and notice of the public comment period was sent to Vermont media outlets around the state.

Letters were submitted to the Commission on behalf of two couples, one from Woodstock, VT, another from Middlebury, VT, who wished to testify, but could not appear in person. The Commission listened to testimony from seven Vermont residents who had established civil unions. The consensus among these witnesses was that their civil unions have had a very positive impact on their lives in numerous ways.

The benefits of civil union for the witnesses included both legal and societal benefits. More than one couple was faced with the hospitalization of a partner. These couples were able to tell the hospital they were civil union partners, and they were consequently treated to the same rights and benefits as spouses regarding the ability to provide and receive medical information, medical decision-making and hospital visitation. Other couples testified that their insurance rates had dropped. Apparently, many insurance companies now view civil union status as a signal of stability in the same way they do marriage, and drop rates for couples in a civil union. Jacqueline Hughes, General Counsel for BISHCA, confirmed this practice. One couple discussed the security of being able to own their shared home as tenants by the entirety, as married couples do. They were not able to do this prior to civil unions, and would have been required to pay a significant property transfer tax (.05% of first \$100,000 in value; 1.25% of value above \$100,000) to put the home in both partners' names.

All couples testified as to the stability afforded by the relationship, from the ability to form a lasting commitment recognized not only by the state, but by family, co-workers, friends and the community. Much in the same way that people view girlfriends and boyfriends differently from husbands and wives, the couples testified that establishing a civil union signaled the seriousness and permanency of their relationship. Some of the couples testified that they were treated differently by others once they became civil union partners, and that people were more accepting of them as life partners. Some said their civil union created a greater sense of security in the relationship, and they have closer connection and bond.

Some of the couples have children through birth, adoption or foster care. Under Act 91, a party to a civil union legally becomes the stepparent to his or her partner's children if the party has not already adopted the children. These parents feel that the legal legitimacy of their relationship has a substantial impact on their children. It validates their relationship and eases their child's concerns about public acceptance of their family. Young children especially are assured of the legitimacy of their parents' relationship, which makes it

easier for them at school and provides them with peace of mind. Recognition of both partners as legal parents also facilitates contact and communication with the school system.

FINDING 9 – HEALTH INSURANCE FOR CIVIL UNION PARTNERS

Act 91 required insurance companies doing business in Vermont to make insurance products offered to married couples, spouses and families available to parties to a civil union and their families.

The Department of Banking, Insurance, Securities, and Health Care Administration reported that administration of the changes to insurance practices after the passage of Act 91 has operated well in 2001. BISHCA prepared for the changes during 2000 in anticipation of the changes taking effect in January 2001. (*See* Report of the Vermont Civil Union Review Commission, January 2001.) In 2001, the Consumer Services section of BISHCA received “no complaints and just a few inquiries.” BISHCA reported that insurance companies indicated that the impact of civil unions was negligible. Leigh Tofferi, Director of Government and Public Relations for Blue Cross/Blue Shield of Vermont, testified that there has been such imperceptible impact by civil unions on the insurance company that it has chosen not to track it.

In its 2001 report, the Commission noted that there are a number of benefits commonly available to married couples that may not be available to civil union couples by operation of federal law. Jacqueline Hughes, General Counsel for BISHCA, testified that, while the implementation of Act 91 in the area of insurance had gone smoothly, there are still questions about whether federal law will recognize a civil union partner as a spouse for insurance purposes. This means that parties to a civil union may not be covered by continuation benefits (Consolidated Omnibus Reconciliation Act of 1985 and later amendments, or “COBRA”) or limitations on preexisting conditions (Health Insurance Portability and Accessibility Act, or “HIPPA”). Continuation rights enable employees and their dependents who would otherwise lose their employer-sponsored health coverage for a variety of reasons to keep it for a period of time by paying for it themselves. Limitations on preexisting conditions prohibit discrimination in determining eligibility based on health status and related factors. At the request of the Commission, BISHCA prepared a detailed analysis of questions regarding civil unions and federal rights under COBRA and HIPPA. (*See* Appendix C.)

FINDING 10 – INCOME TAXATION ISSUES

Due to lack of recognition of civil union partners as spouses by federal tax law, an employer’s contribution to coverage of an employee’s civil union partner or the partner’s dependents must be considered imputed income for federal tax purposes. However, Vermont does not consider the employer’s contribution to be income, and the employee is not taxed at the state level for the employer’s contribution.

Under federal tax law, the value of benefit premiums paid by the employer for coverage of nonfamily members of employees is considered taxable income. Federal law and the Internal Revenue Service do not consider parties to a civil union or domestic partners to be family members. Since the State of Vermont began offering domestic partnership coverage to its employees in 1994, the state has been calculating the value of the domestic partner coverage and reporting it as income to the employee. According to Personnel Commissioner Patricia McDonald, this task became more complicated with civil union partners because the civil union law prohibits the state from discriminating between civil union couples and married couples. Thus, Vermont does not consider the benefit the state pays for the partner coverage as income to the employee, while the Internal Revenue Service does. The Commissioner addresses this by filing different W-2 tax reports with state and federal tax authorities.

FINDING 11 – LEGISLATIVE ACTIVITY IN OTHER STATES

In 2001, the general assemblies in Connecticut, Rhode Island, Washington, Hawaii and California considered legislation recognizing or permitting same-sex marriage or domestic partnerships. The Rhode Island legislation was modeled after Vermont's civil union law.

California enacted a law on October 14, 2001 which expanded the benefits afforded to domestic partners. Same-sex couples and opposite-sex couples who are over the age of 62 are permitted to register as domestic partners in California. Some of the marital benefits extended to domestic partners by Chapter 893 include the ability to sue for wrongful death, permission to make health care decisions, sick leave, tax benefits, stepparent adoption, and expanded health care benefits for public employees. Although California law does not grant to same-sex couples all of the same benefits, protections and responsibilities afforded to married couples, it grants more benefits than any other state except Vermont.

FINDING 12 – BALLOT INITIATIVES IN OTHER STATES CONCERNING ACT 91

Ballot initiatives relating to the recognition of civil unions are currently being pursued in Maine and Massachusetts.

The Christian Civic League in Maine is leading the effort to gather 42,101 signatures before January 28, 2002 to qualify its initiative to be placed on the November 2002 ballot. The questions reads: "Do you want to ban the use of public funds and void any state and local laws that provide insurance and other benefits to couples that are not married?" The initiative provides that the legal rights and privileges of marriage may be afforded only to married couples. Legal recognition of "civil unions," "domestic partnerships" or any other similar relationship would be prohibited. State revenues would not be permitted to fund benefits for civil union partners or domestic partners.

Massachusetts Citizens for Marriage is an organization promoting a state constitutional amendment which prohibits same-sex marriage and prevents extension of marital benefits to same-sex couples (Petition E: Protection of Marriage Amendment). The ballot language bars the recognition of Vermont civil unions in Massachusetts: “Any other relationship [other than between one man and one woman] shall not be recognized as a marriage or its legal equivalent, nor shall it receive the benefits or incidents exclusive to marriage from the Commonwealth...”

If the signatures are certified, the initiative will be placed before the Massachusetts legislature. To be placed on the ballot, two successively-elected legislatures must hold a joint session, and at least 25% (50) of the 200 legislators must vote in favor of the initiative. The legislature can choose to take no vote before the session ends, in which case the ballot initiative dies. The earliest this ballot question could be placed before the voters of Massachusetts is 2004.

The Massachusetts Attorney General has an open investigation into fraudulent signature-gathering concerning Petition E.

The Maine and Massachusetts ballot initiatives are available for review in the Office of Legislative Council.

FINDING 13 – RECIPROCAL BENEFICIARIES RELATIONSHIPS

Act 91 provided that two related persons can establish a reciprocal beneficiaries relationship so they may receive certain limited benefits and protections granted to spouses, such as medical decision-making, simply by registering with the Department of Health and paying a \$10.00 filing fee. No one has registered for such a relationship.

The Commission was charged with examining reciprocal beneficiaries relationships and evaluating whether nonrelated persons over 62 years of age should be permitted to establish a reciprocal beneficiaries relationship, and whether the legal benefits, protections and responsibilities of a reciprocal beneficiaries relationship should be expanded.

The Commission invited representatives from the Coalition of Vermont Elders (COVE), the Vermont Chapter of the American Association of Retired Persons (AARP), the Vermont Chamber of Commerce, and the Vermont State Employees’ Association to testify regarding expansion of reciprocal beneficiaries relationships, but they declined to take a position on the matter or to appear before the Commission at that time.

The Commission received testimony from Ms. Hughes from BISHCA, Mr. Tofferi of BC/BS of Vermont, and Kathy Callaghan, Director of Employee Benefits with the Department of Personnel, on the potential impact of expansion of insurance benefits to

persons in reciprocal beneficiaries relationships. All three witnesses expressed concern about such a proposal.

The Commission was advised that such a proposal would have an adverse affect on the insurance markets in Vermont. The Vermont insurance market, which Ms. Hughes characterized as “small and fragile”, has few carriers for individual and nongroup products. Vermont residency is not required to enter a reciprocal beneficiaries relationship, and it is very easy to enter and exit such a relationship. Therefore, it is difficult to calculate the number of people who may be interested in establishing such a relationship. According to this testimony, large unknowns make companies nervous, and initial reaction to the proposal from insurance companies was that pricing will dramatically increase and insurance products would need to be repriced. If repricing is too expensive, companies will be forced to stop writing insurance in Vermont.

These witnesses also testified that adverse selection would be likely to occur if insurance benefits were extended to reciprocal beneficiaries. Unlike a party to a civil union, a person entering a reciprocal beneficiaries relationship is primarily doing so to obtain legal benefits. A person may enter a reciprocal beneficiaries relationship solely to obtain insurance benefits for an elderly or ill relative, and that could make insurance more expensive for everyone. If benefits were extended to reciprocal beneficiaries, insurers would expect to get a disproportionate number of persons who are a “bad risk”, requiring significant repricing. Ms. Hughes said companies that are concerned about extension of coverage to reciprocal beneficiaries did not have the same reaction to civil unions because they believed the numbers for civil unions would be small and the effect negligible.

House Bill 502, which passed the House in the spring of 2001 and is pending before the Senate, repeals the civil union law and replaces it with system of reciprocal partnerships under which two people who are prohibited from marrying could receive the same benefits, protections and responsibilities as married couples. This would be available to two related persons, such as a father and daughter or two brothers, or two persons of the same sex who are not related. Representative Peg Flory, Chair of the House Committee on Judiciary, testified in support of the bill before the Commission. Rep. Flory testified that most people who were interested in obtaining benefits through H.502 were interested in the health insurance benefits and the ability to own property as tenants by the entirety. Rep. Flory testified that few related couples would be likely to participate in an expanded reciprocal beneficiary status because of the responsibilities involved, and, therefore, there would be minor impacts on health insurance benefits.

Other than Rep. Flory, the Commission, which provided publicized opportunities for public comment, did not receive any correspondence or testimony in support of H.502 or in favor of expanding reciprocal beneficiaries relationships in any other way.

VI. Commission's Conclusions and Recommendations

CONCLUSION 1 – ACT 91 HAS HAD MINIMAL IMPACT ON STATE GOVERNMENT OPERATIONS

After an assessment and review of the activities of state agencies regarding the implementation, operation and effect of Act 91, the Commission concludes that the civil union law has had a minimal impact on the operations of state government. Some agencies were assigned specific obligations by the act, and this necessitated additional staff time and resources, yet these obligations were met without requiring additional staffing or funding. Time and resources dedicated to civil unions by the agencies were concentrated during the first six months after enactment, and has dropped significantly since.

Overall, implementation of the civil union law by state government was efficient and successful. Agencies were creative and diligent in determining how to apply the law in their area of government, and did so in a timely manner. The law is operating effectively, agencies are carrying out their obligations under the law, and civil union couples are being provided with the benefits and protections afforded by state programs.

RECOMMENDATION 1 – CONTINUING COMMUNICATION BETWEEN STATE AGENCIES AND THE COMMISSION

The Commission recommends that state agencies continue to communicate with the Commission regarding application of the civil union law and any problems that may arise. Under Act 91, the Commission's existence ends on April 26, 2002. If the General Assembly chooses not to continue the Commission's existence, state agencies should themselves establish a central point of contact for collecting information about the successes and failures of Act 91, and disseminating that information to each other and to the public.

CONCLUSION 2 – NEGLIGIBLE IMPACT ON STATE COURTS

There has been little impact on the courts in Vermont at this time. Alternative dispute resolution programs are currently available through the courts. It is far too early to know whether the rate of dissolutions will ever rival the rate of divorces; however, the Commission concludes dissolutions will make no discernable impact on the courts within the next few years.

RECOMMENDATION 2 – NO INCREASE IN ALTERNATIVE DISPUTE RESOLUTION PROGRAM NEEDED IN STATE COURTS

The Commission recommends that no action be taken at this time to institute additional alternative dispute resolution programs to address dissolutions.

CONCLUSION 3 – NEGLIGIBLE IMPACT IN OTHER STATES

The impact of civil union in courts in other jurisdictions has been minimal. The Commission is aware of only one case, Burns v. Burns, in Georgia, in which an out-of-state couple has attempted to have its Vermont civil union recognized in a court in its state of residence.

RECOMMENDATION 3 – ONGOING MONITORING OF IMPACT IN OTHER STATES

The Commission recommends that the state continue to observe and monitor the ways in which Act 91 is addressed in other states.

CONCLUSION 4 – NO INTEREST IN EXPANDING RECIPROCAL BENEFICIARY STATUS, AND COST CONCERNS

There appears to be little or no interest among Vermonters in expanding reciprocal beneficiaries relationships in any way. The Commission specifically sought out advocacy groups who might have a stake in expansion of reciprocal beneficiaries relationships, and such groups declined. The Commission publicized that it was holding a public comment period specifically on the expansion of reciprocal beneficiaries relationships, and no one attended that hearing.

Expansion of the benefits afforded to reciprocal beneficiaries relationships, especially health insurance, would be costly and difficult to administer. Adverse selection would occur, placing an additional burden on Vermont's insurance market. These costs would spread across various plans and likely increase insurance costs for many Vermonters.

RECOMMENDATION 4 – NO EXPANSION OF RECIPROCAL BENEFICIARIES RELATIONSHIPS

Considering there have been no reciprocal beneficiaries relationships established to date, the clear lack of interest among advocacy groups and the general public in expansion, and the likely increased costs and danger to the insurance market in Vermont, the Commission recommends that the reciprocal beneficiaries relationship not be extended to unrelated persons over 62 years of age, and that the legal benefits, protections and responsibilities of a reciprocal beneficiaries relationship not be expanded. If the reciprocal beneficiaries law continues to be unused, the General Assembly may want to consider its repeal.

CONCLUSION 5 – CIVIL UNION COUPLES SHOULD EXPECT CONTINUED NONRECOGNITION UNDER FEDERAL LAW

The State of Vermont has taken steps to create equality for civil union couples under state law. However, in those areas where state and federal law are intertwined, absent significant federal statutory or court-ordered changes, civil union couples will continue to be excluded from the legal benefits and responsibilities that would derive from federal recognition of civil union couples as spouses.

RECOMMENDATION 5 – ONGOING REVIEW OF FEDERAL LAW

The Commission recommends that the state monitors developments in federal law for changes in impacts on Vermont civil union couples.

CONCLUSION 6 – ACT 91 IS WORKING AS INTENDED

The Commission's examination of the first eighteen months following the effective date of the civil unions law reveals that the law is working as intended in Act 91. Act 91 satisfies the constitutional mandate of the Baker decision by providing to eligible same-sex couples who choose to join in civil union the benefits, protections and responsibilities that married couples have under Vermont law. In addition, Act 91 has brought no material adverse impacts on state government, on Vermonters, on the Vermont economy or the state generally.

RECOMMENDATION 6 – NO CHANGE TO ACT 91

The Commission finds no basis to recommend changes to Act 91. No one has identified drafting errors in the Act nor brought to the Commission's attention any areas of the Vermont statutes that were overlooked or require revision.

CONCLUSION 7 – VALUE OF THE COMMISSION

The Commission will cease to exist in April 2002 unless reauthorized by the General Assembly. The Commission members believe that the Commission has been useful to Vermont during the implementation of Act 91. The role played by the Commission should be carried on by some part of state government.

RECOMMENDATION 7 – FUTURE OF THE COMMISSION

The Commission recommends that the General Assembly reviews this report and determines whether it is in the best interest of the people of Vermont to continue the Commission, possibly with a revised mission. In the alternative, the General Assembly may determine that the work of the Commission can be effectively handled through some other means, including by an existing division of state government.

2002 REPORT OF THE VERMONT
CIVIL UNION REVIEW COMMISSION

/s/ Stephen Reynes
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/s/ Mary P. Kehoe
MARY P. KEHOE, VICE-CHAIR

/s/ John H. Bloomer, Jr.
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