

PROTECTING THE RIGHTS OF SAME-SEX COUPLES: LIFE, LIBERTY, AND THEIR ATTEMPT AT THE PURSUIT OF HAPPINESS

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I. Introduction

The ever-evolving practice area of family law has seen dramatic changes over the past several years. However, one of the strongest commitments and changes is needed in an area of law based upon a human component, the love for an individual of the same sex. Same-sex couples have come under fire for attempting to lead the same day to day lives as their heterosexual counterparts by getting married.

Not only in the area of marriage are same-sex couples finding themselves more and more prohibited from the same equality of heterosexual couples. The evolving movement for protections and equality under the law includes parenting, including adoption and reproductive rights, as well as areas of sexual health. Now more than ever, the same-sex couple needs support from their government, their community, and more importantly, legal advocacy groups and attorneys to help protect their rights to enjoy familial relationships to the same extent as their heterosexual counterparts.

II. Same-Sex Relationships

For years in this country, classes of people had to struggle to acquire rights and protections under the law that most of us enjoy in our day to day lives. It took years for their struggles finally to be substantiated and for the most part, some of those struggles continue to this day. Now, the struggle continues. Across this nation, the same-sex couple is attempting to venture down the same path for the same protections under the law.

For years, homosexual individuals, let alone couples, had to maintain a “quiet” aspect to their lifestyle and sexual preferences. Today, it would not be uncommon to witness same-sex couples walking hand in hand down the street. Homosexual couples’ values often are no different from a heterosexual couple. They want the same loyalty, devotion, communication, and affection as would any individual in a relationship. The media, religious groups, politicians, and others have such countervailing points of view on the subject. It is almost inevitable that at some point in history, all classes of people will be subject to ridicule, segregation, or any other type of discrimination. It is essential that we

make protecting the rights of any class of people subject to such animosity a priority in our legal world.

1. Marriage, Civil Unions, or Domestic Partnerships . . . Who Decides?

What is the appropriate definition of marriage? This seems to generate the two contentious points as to why or why not same-sex couples should be allowed to marry. One stating that marriage is between a man and a woman, and the other adhering to the principle that marriage is a bond between two people in love.

The Defense of Marriage Act (DOMA),¹ which was introduced in May 1996 and signed into law by President Bill Clinton, attempted to “define and protect the institution of marriage.” DOMA proposed that states should decide for themselves the legal status of gay marriages, and to define “marriage” and “spouse” for the purpose of federal law. This act also grants states the right to deny the recognition of the marriage status if a couple is married in another state and then moves to that state.

The DOMA language on the definition of marriage reads:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.²

The basis for the definitions used in DOMA were directly derived from the Washington State case *Singer v. Hara*,³ in which the court ruled that the denial of a marriage license to two males did not violate the Equal Rights Amendment. The *Singer* court labeled marriage as the forum for procreation and the rearing of children, although the United States Supreme Court ruled that the idea of family is one “consisting in and springing from the union for life of one man and one woman in the holy state of matrimony”⁴ almost one hundred years earlier.

Washington has not been the only state to outlaw gay marriage and denote “marriage” as the unity between one man and one woman. There are eighteen (18) other states have laws that ban gay marriage and limit marriage to one man and one woman, but it is not in their constitutions.⁵ However, currently, twenty-six (26) states have a constitutional ban restricting marriage to one man and one woman.⁶

A current map of the United States with state designations of same-sex marriage laws is attached here and is available at http://en.wikipedia.org/wiki/Image:Samesex_marriage_in_USA.svg. The states

that have passed various gay marriage laws can be separated into distinct regions of the United States. The entirety of the states geographically located in the central United States and southern United States have passed state laws or constitutional amendments barring gay marriage. The westernmost states, including Washington, Oregon, and California, have all passed laws prohibiting gay marriage, but allow for domestic partnerships [a legal relationship between two individuals who live together and share a common domestic life] and grant state-level benefits. The same ban on gay marriage, but allowance of civil unions [union of two people similar to marriage] or domestic partnerships, is prevalent in the northeast, with Maine, New Hampshire, and Connecticut introducing laws banning same-sex marriage, but implementing civil unions or domestic partnerships in which same-sex couples register in the state and receive limited state-level benefits. New Jersey and Vermont are the only states in the United States that have passed laws legalizing civil unions and granting all state-level benefits. The only state to have passed any legislation to allow same-sex marriage has been Massachusetts.

While across the country most state governments have done their best to diminish the possible avenues for same-sex marriage proponents, a few states like Massachusetts, Vermont, and New Jersey have done their best to make every possible avenue to marriage equality available for the same-sex couple. The problem, however, still exists in the recognition of other states' laws. If a couple from Connecticut travels to Massachusetts, which allows for same-sex marriage, what happens when the couple returns to Connecticut, which only allows for civil unions? These are traditional conflict of law questions that must be addressed, and in viewing examples below, the lack of uniformity across the U.S. negatively affects where same-sex couples have protected rights.

For example, a legal union of a same-sex couple other than marriage, validly performed in another jurisdiction, is substantially equivalent to a California domestic partnership. Civil unions, such as those performed in Vermont, Connecticut, and New Jersey, would most likely qualify as domestic partnerships in California. However, a valid same-sex marriage performed in Massachusetts would not be recognized in California as either a marriage or a domestic partnership due to the fact that a California statute prohibits recognition of another jurisdiction's validly performed same-sex marriage.

New Jersey recognizes civil unions from Connecticut or Vermont and would most likely treat a domestic partnership from California as a civil union. A marriage between people of the same sex performed in another state or country would also be treated as a civil union in New Jersey.

Connecticut and Vermont have civil unions, and will likely treat other civil unions as a civil union in those states, but will not recognize a same-sex marriage. In Connecticut, the court has gone as far as stating that it lacks subject matter jurisdiction to annul the civil, same-sex marriage between the two parties who, as

Connecticut residents, participated in a civil marriage in Massachusetts.⁷

Massachusetts allows marriage for same-sex couples, but it is unclear whether that state will recognize civil unions that are close to the legal equivalent of marriage, but are not called “marriage.” However, a same-sex marriage from Massachusetts would be recognized as such internationally.

Due to the diversity amongst the state laws, the courts are now becoming more and more attentive to defining the marriage rights of same-sex couples. Currently, there are lawsuits seeking marriage for same-sex couples pending in California (*In re Marriage Cases*), Connecticut (*Kerrigan v. State of Connecticut*), and Iowa (*Varnum v. Brien*). Depending upon the final adjudication, these cases may be the next rung on the ladder same-sex couples are climbing toward equality in marriage. But there is still work which needs to be done in order to effectively protect the rights of same-sex couples in a uniform manner.

There are a number of rights that come from being married. From tax deductions to employer and death benefits, “the heterosexual married couple will automatically receive these rights and protections, as well as countless others, while same-sex couples—even those in civil unions, domestic partnerships and marriages—do not.”⁸ Regardless of how completely their lives are intertwined or how deeply they care for each other, individuals in same-sex relationships frequently are treated like strangers under the law—and none are afforded full equality in this country.⁹

2. Parenting

To the extent that the State’s purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the statutes plainly exclude many same sex couples who are no different from opposite sex couples with respect to these objectives. If anything, the exclusion of same sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against.¹⁰

Besides the main issue of marriage, same-sex couples, whether in civil unions or domestic relationships, are fighting for their right to raise a family. Currently, there are roughly 250,000 children in the United States being raised by same-sex couples.¹¹ But are same-sex couples “good” parents? Does the fact that a child is being raised by same-sex parents cause that child to lean toward homosexual preferences?

The American Psychological Association in particular has stated that:

there is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children . . . research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish.¹²

The main opposition to same-sex couples' parenting rights are the politicians and activists who call themselves "pro-family." These individuals tend to express the thought that unless a mother and father are present in a family environment, the child will not succeed and develop properly. However, children, *on average*, do better when raised by *two parents*—not because single parents are bad or uncaring, but because two parents means more resources, more support, and more help. And those parents, experts including the Academy of Pediatrics agree, can be a mother and father, two mothers, or two fathers.¹³

3. Reproductive Rights and Sexual Health

Fears of the spread of HIV and AIDS have only added to the persistent stereotypes and discriminatory acts toward same-sex couples who are looking to explore alternative avenues for having children. The decision when and if they want to have a child is difficult for most heterosexual couples. When a same-sex couple decides to make the decision to have a child together, there is a totally different nuance to the idea.

Finding the appropriate health care providers can be a challenge. Most clinics may offer their services for a low cost to a same-sex couple who is desperate for help. However, why shouldn't a same-sex couple be as entitled to receive the services from a high-quality, culturally sensitive health care system as their heterosexual counterparts? Although rules exist for health care providers to provide services with dignity to same-sex couples and those who may be living with HIV, the stereotypes remain.

Furthermore, all providers must treat patients according to the medical standard of care, without imposing barriers to comprehensive reproductive and sexual health care because of their own prejudices or religious beliefs. This is not always the case.

4. Other Legal Issues

Besides the topics previously touched upon, same-sex couples are in need of assistance in obtaining the same protections under the law in various other areas.

Issues which need to be brought to the attention of the public include: discrimination in housing or public accommodations; equitable division of property upon separation or death of one of the members of the relationship; fair treatment in areas of taxation; and even domestic violence protections.

Even younger same-sex couples face big challenges. Courts have held that schools must have a rational basis for discriminating against gay or lesbian students.¹⁴ The Romer Court held that schools cannot place restrictions on same-sex couples, such as requiring parental permission before attending prom, that they do not place on coed couples. Unfortunately, same-sex couples who may attend and participate in their high school dance or prom may face harassment from other students. However, federal courts have held schools liable when they failed to stop anti-gay harassment. In April 2003, a federal appeals court took this precedent a step further and said that teachers and administrators must take action to eliminate harassment when they learn that lesbian and gay students are being abused at school.¹⁵

III. What Can Be Done

So what is our duty to act in these situations? What can possibly be done to help advance, not special rights of same-sex couples, but the same rights that heterosexual couples maintain?

A national poll on same-sex marriage in the United States was conducted in June 2006 by ABC News.¹⁶ The poll found that the majority (58%) of Americans remained opposed to same-sex marriages, while the minority (36%) support them. However, on the question of a constitutional amendment, more are opposed than for it. The majority (51%) of Americans say the issue should be left for the states to decide, while 43% would agree with amending the Constitution.¹⁷

So the problem lies within society itself. One way for people to change their opinions about same-sex marriage is for those who support it to do everything in their power to inform those who oppose it. Only education and advocacy will lead to change.

There are a significant number of high powered organizations who support same-sex marriage with which you can involve yourself. Advocacy groups supporting same-sex marriage include the American Civil Liberties Union, the Human Rights Campaign, Lambda Legal, the Human Rights Watch, National Gay and Lesbian Task Force, and the National Organization for Women, to name a few.

There are also major elections coming in November 2008, on both a national and local level. Review the candidates in your state and their views on all of the issues mentioned here. Support for these issues does not mean placing any group above another, it means making everyone equal.

IV. Conclusion

The classification of same-sex couples as an alternative lifestyle needs to be narrowed by the actions of our communities, our governments, and most of all our legal system. When two people who love each other decide to devote their lives to each other and go so far as to keep a sacred vow between them, shouldn't society support them?

It is not a matter of when same-sex couples will start to be treated as their counterpart heterosexual couples by being afforded the same basic rights and protections. It is now just a matter of making everyone equal by offering uniform laws across the nation to these couples who strive for "valid" and "legal" relationships. After all, isn't equality and justice what the Constitution calls for?

Attachment

http://en.wikipedia.org/wiki/Image:Samesex_marriage_in_USA.svg#file

Endnotes

¹Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996).

²1 U.S.C. § 7; 28 U.S.C. § 1738C.

³11 Wash. App. 247, 522 P.2d 1187 (Wash. Ct. App. 1974).

⁴Murphy v. Ramsey, 114 U.S. 15 (1885).

⁵Arizona, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, New Hampshire, North Carolina, Pennsylvania, Vermont, Washington, West Virginia, Wyoming.

⁶Alabama, Alaska, Arkansas, Colorado, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin.

⁷Lane v. Albanese, 2005 WL 896129 (Conn. Super. 2005).

⁸www.lambdalegal.org/our-work/issues/marriage-relationships-family/marriage.

⁹*Id.*

¹⁰Baker v. Vermont, 170 Vt. 194, 744 A.2d 864 (Vt. 1999).

¹¹www.lambdalegal.org/our-work/issues/marriage-relationships-family/parenting.

¹²American Psychological Association, APA Policy Statement on Sexual Orientation, Parents & Children (July 28 & 30, 2004), www.apa.org/pi/lgbc/policy/parents.html.

¹³EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY* 89 (Simon & Schuster 2004).

¹⁴*Romer v. Evans*, 517 U.S. 620 (1996).

¹⁵*Flores v. Morgan Hill Unified School District*, 324 F.3d 1130 (9th Cir. 2003).

¹⁶Prior to this poll, Gallup conducted a poll on the issue through May 2006. The poll found opposition to same-sex marriage had fallen slightly, as other polls found a sharper dip. In the poll, when asked if marriages between homosexuals should be recognized by law as valid, with the same rights as traditional marriages, 58% (down 1 point from August 2005, and 9 points from March 1996) of Americans responded that they should not be recognized. 39% (up 2 points from August 2005, and 12 points from 1996) felt same-sex marriages should be recognized by law. If "homosexuals" is replaced with "same-sex couples," 42% back same-sex marriage, while 56% oppose it.

¹⁷Wyatt Buchanan, *Resistance to Same-Sex Marriage Drops Across U.S.*, SAN FRANCISCO CHRONICLE, Mar. 24, 2006.