

SAME SEX COUPLES DENIED CONSTITUTIONAL RIGHTS UNDER CURRENT MARRIAGE LAWS

The case on everyone's mind these days is *Baker v. State of Vermont*, No. 98-032 (Entry Order, December 20, 1999). In this recent case, the Vermont Supreme Court ruled that the State is required to extend to same-sex couples the "common benefits and protections" that flow from marriage under Vermont law. This article will briefly recap the Court's lengthy decision.

The case began when three same-sex couples applied for marriage licenses in their respective municipalities, Milton, Shelburne, and the City of South Burlington. The licenses were refused under the Vermont marriage statutes. The couples then sued the State and the three municipalities, arguing that the refusal to issue them a license violated the marriage statutes and the Vermont Constitution.

The Court first discussed the plaintiffs' claim that they should have been issued licenses under the Vermont marriage statutes. It noted that the plain and ordinary meaning of "marriage" is the union of a man and woman as husband and wife. The marriage license statute, 18 V.S.A. § 5131(a), uses the terms "bride" and "groom," which are gender-specific terms. The Court thus easily concluded that the Legislature assumed that marriage under the Vermont statutes consists of a union between a man and a woman, and it rejected the plaintiffs' statutory claim.

The plaintiffs won the case on their constitutional claim. Chapter I, Article 7 of the Vermont Constitution contains the Common Benefits Clause, which states in pertinent part:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community, . . .

In discussing the history of the clause's interpretation, the Court observed that "Vermont case law has consistently demanded . . . that statutory exclusions from publicly-conferred benefits and protections must be 'premised on an appropriate and overriding public interest'[citation omitted]." In other words, the State would have to have very strong reasons for denying same-sex couples the benefits and protections of marriage.

The Court then looked at the purposes that the State argued were served by the exclusion of same-sex couples from marriage. The State's main argument was that marriage between a man and a woman serves the government's interest in "furthering the link between procreation and child-rearing." The Court concluded that the statutory exclusion was significantly under-inclusive, because many opposite-sex couples either choose not to have or cannot have children. Furthermore, many children today are being raised by same-sex couples, and some of these children are conceived by these parents through various techniques of assisted reproduction.

The Court then asked whether the exclusion of same-sex couples from the benefits and protections of marriage violated Article 7 of the Constitution. It found a violation, in part because the freedom to marry has been recognized as a "vital personal right" for a long time, and ". . . the marriage laws transform a private agreement into a source of significant public benefits and protections." These benefits include inheritance rights, workers' compensation survivor benefits, homestead rights, and hospital visitation rights, to name just a few. The Court therefore concluded that the statutory exclusion of same-sex couples from these benefits could not be justified, because none of the State's reasons in support of the exclusion were strong enough to overcome the injustice of the exclusion.

The Court's holding was that under Article 7 of the Constitution, the plaintiffs are entitled to the *same benefits and protections* given by Vermont law to married, opposite-sex couples. Turning to the question of how to remedy the situation, the Court passed the ball to the Legislature. (Justice Johnson dissented from this portion of the Court's opinion, arguing that the Court should issue an injunction so that the plaintiffs could obtain marriage licenses.) The majority of the justices reasoned that because a sudden change in the marriage laws could have "disruptive and unforeseen consequences," they would allow the current statutory scheme to remain in effect for a reasonable period of time to allow the Legislature to enact remedial legislation in an "orderly and expeditious fashion." The Court suggested that this legislation could be (but does not have to be) modeled on laws from other states establishing "domestic partnership" or "registered partnership" arrangements. Alternatively, the Legislature could, of course, decide to allow same-sex couples to obtain a marriage license.

For the time being, therefore, the law remains unchanged, and town clerks may not issue marriage licenses to same-sex couples. All indications are that the Legislature will work hard on this issue during the session. We will keep you posted.

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