Same Sex Marriage, Civil Unions, and Domestic Partnerships: Issues for Local Governments

A review of the current status of the law (US & Canada)

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Primary issues for consideration by local government attorneys:

Governments that issue marriage licenses: In a non-mini-DOMA state (see below,) are there court decisions in your state that deal with the question of the eligibility of a same sex couple for a license? If not, what do you advise your clerk or other license-issuing official?

Depending upon the political makeup of your local government's constitutency, your clerk may desire to issue a license upon application by a same sex couple. Presumably you will then be defending a lawsuit brought by the state attorney general or by a citizen/taxpayer group.

If your clerk does not issue licenses upon application, you will be required to defend a constitutional challenge brought by the applicants. Or your clerk may decide to seek a declaratory judgment concerning the issue, rather than approve or deny the license. In this case, if your clerk wants to take the position that such applications are approvable, then you will have to deal with the limitations upon your government's ability to attack the constitutionality of existing state law (Dillon's rule limits; standing limits; etc.)

From a review of the current litigation, whichever side you end up on, there will be lots of help from other governments as well as special interest groups.

In a mini-DOMA state, you will be confronted with the same range of options and strategies. However, the mini-DOMA law will seriously undermine any decision of your clerk to go ahead and issue licenses based upon the local official's or executive's determination that such mini-DOMA law is unconstitutional. (See *Lockyer v. City and County of San Francisco*, cited below, for a good example of how this plays out.)

Governments that do not issue marriage licenses: Principal issues here are going to concern whether to recognize the marriages, validly contracted at the time and in the place where contracted, for purposes of employee benefits, and citizen participation in government programs and services.

In employee benefit programs, for example, how do you treat married or unmarried same sex partners of employees for "dependent" purposes under your plan. If your government has a domestic partner policy/program, what are the limits to that program, and are those limits permissible? See, e.g., *Ross v. Denver Dept. of Health and Hospitals*, 883 P.2d 516 (Colo.App. 1994) (holding that, although City and County of Denver had a domestic partner policy that covered

certain health benefits, the choice to include or exclude certain benefits was discretionary with the City/County, and there is no equal protection violation vis-à-vis the provision of certain benefits solely to married opposite-sex couples.)
Note that the decision to extend such benefits to the employees of a local government have been held to be within the home rule authority of that government, notwithstanding any state law provisions limiting marriage. See *Schaefer v. City and County of Denver*, 973 P.2d 717 (Colo.App. 1998) (dismissing taxpayer lawsuit against the City/County adoption of domestic partner benefits policy as part of its employee benefit program, against argument that state law limiting marriage to one man and one woman precluded local government provision of domestic partner benefits.)
Employees' married same sex partners may have claims for retirement benefits where the local government provides a "spousal" benefit. See *In re Laurel Awishus*, case pending in NM trial court claiming wrongful denial of participation in spousal retirement benefit program administered by Prudential Financial, where same sex couple was validly wed in Canada and returned to New Mexico (which does not have a mini-DOMA law.)
Regarding citizen participation in programs and services, how do you treat those married couples, e.g., with respect to memberships in the city/county/district recreation facility. Some governments choose to avoid these questions by simply recognizing a "household" membership.
Any decision to recognize same sex partners, whether married or not, will be complicated by the existence of a mini-DOMA law in your jurisdiction.

<u>Background on the current status of same sex marriage, civil unions, and domestic partnerships</u>:

Defense of Marriage Act (federal) (DOMA):
1 USC §7: "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 wife."
Upheld as constitutional against 10th Amendment, due process and equal protection challenge: *In re: Kandu & Kandu*, US Bankruptcy Ct., WD Wash., 08-17-04 (holding that debtor could not file joint bankruptcy petition with woman she married in British Columbia, Can.) Homosexuals are not a suspect class, and although marriage is a fundamental right, only marriage between persons of the opposite sex is entitled to recognition as a fundamental right.

"Mini-DOMAs": state constitutional or statutory prohibitions on same sex marriages, generally worded similarly to the federal DOMA. 39 states have mini-DOMAs, including six (Alaska, Hawaii, Missouri, Nebraska, Nevada, and Louisiana) by state constitutional amendment. States currently without a mini-DOMA are: Connecticut, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Wisconsin, and Wyoming, and also the District of Columbia. Currently, state

constitutional amendments of the mini-DOMA variety are to be voted on in November, 2004 in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon and Utah, and subject to additional legislative action, in 2005 in Wisconsin, and in 2006 in Massachusetts and Tennessee.

Same sex marriages valid in jurisdiction where contracted:
[Residency requirement]
Massachusetts – by state Supreme Court decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003) (ordering state to begin issuing marriage licenses to same sex couple applicants based upon violation of state constitution equal protection (irrational classification based upon sex.)
Oregon (limited number) – trial court ruling holding those licenses issued valid, while enjoining further issuance, currently under appeal
Denmark
The Netherlands
Norway
Spain
Sweden

[No residency requirement]
British Columbia, Can. (by judicial decree: *Eagle Canada, Inc. v. Canada (Attorney General)*, 13 B.C.L.R. (4th) 1 (2003)(marriage statute's limitation to opposite sex couples violates equal protection under Canada's Charter of Rights and Freedoms.)
Manitoba, Can.
Ontario, Can. (by judicial decree: *Halpern v. City of Toronto*, 172 O.A.C. 276 (2003)(marriage statute's limitation to opposite sex couples violates equal protection under Canada's Charter of Rights and Freedoms.)
Quebec, Can.

Recognition of foreign contracted same sex marriages:
New York – the New York Attorney General Elliot Spitzer ordered all town clerks in the state to stop issuing marriage licenses to same sex couples earlier this year. He did so based upon his formal opinion that, despite the lack of a mini-DOMA law in New York, the legislature in adopting its marriage licensing laws clearly intended them to only apply to opposite sex couples. In the absence of a final decision of a court of competent jurisdiction holding that such limitation is unconstitutional, the law as it was intended to apply must be followed by local officials.
However, the AG also opined that there could be a serious violation of equal protection impending, given that same sex couples can validly contract marriage in Massachusetts as well as Canada, and New York law has always recognized marriages as valid in New York if valid where contracted. Thus, same sex couples who get validly married elsewhere and return to New York will claim invidious discrimination if New York does not recognize their marriages for state law purposes when the foreign marriages of opposite sex New York couples would be recognized.

Civil unions valid where contracted:

Massachusetts: *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (2004) (state supreme court reviews pending bill in state legislature which adopts mini-DOMA-type prohibition of same sex marriage, but establishes Vermont-style civil unions instead; held: violates the equal protection and due process requirements of the state constitution.)

Vermont – (no residency requirement) legislated after state supreme court mandate in *Baker v. State*, 744 A.2d 864 (1999) (marriage statute's limitation violates state constitution's "common benefits" clause.)

Recognition of foreign contracted civil unions:
For purposes of marriage-type benefits: *Langan v. St. Vincent's Hosp. of N.Y.*, 765 N.Y.S.2d 411 (N.Y.Sup. 2003) (surviving spouse, from Vermont-contracted same sex civil union, permitted to bring wrongful death claim against hospital following death of spouse under New York law.)
For purposes of dissolution: inconsistent decisions: see *Salucco v. Aldredge*, 17 Mass.L.Rptr. 498, 2004 WL 864459, (Mass.Super. 2004) (grants dissolution of Vermont civil union to Massachusetts resident.) *Cf.* Rosengarten v. Downes, 802 A.2d 170 (Conn.App. 2002) (Vermont-contracted same-sex civil union was not a "marriage" under statute providing subject matter jurisdiction over dissolution of marriage.)

Statewide domestic partnership law:
California (valid in California only when contracted in California): The state's newly enacted law set to become effective January 1, 2005, has been upheld by a trial court in Sacramento against an argument by the Campaign for California Families that, based upon the extensive domestic partnership benefits/responsibilities provided under the new law, the law violates the voter-initiated mini-DOMA law approved several years ago.

New Jersey (valid in NJ only when contracted in NJ)

Recognition by foreign state:
None to date

Marriage licenses issued to same sex couples invalid/injunction against county clerk from issuing:
Lockyer v. City and County of San Francisco, No. S122923 & *Lewis v. Alfaro*, S122865, CA Supreme Court, Opinion filed 08-12-2004 (holding marriage licenses issued by county clerk invalid and enjoining defendant city and county from issuing further such licenses unless and until any final decision by court of competent jurisdiction has determined substantive question of constitutionality of limitation of licensing statute to couples of the opposite sex; court admonishes city/county and its officials that they are not entitled to presume the unconstitutionality of state statutes under which they operate, irrespective of the officials' oath of office swearing to uphold the state and federal constitutions.)

Recent judicial challenges to state law limitations on marriage licenses:

Alaska: *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562-CI, 1998 WL 88743 (Alaska Super. Ct., 02-27-98) (held: marriage statute's limitation to opposite sex couples violates state constitution's privacy clause; decision subsequently superseded by initiated amendment of Alaska Constitution, Art. I, §25.)

Arizona: *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz.App. 2003)(marriage statute's limitation does not violate state or federal constitutions' due process liberty interest mandates.)

Hawaii: *Baehr v. Lewin*, 852 P.2d 44 (Haw.1993) (marriage statute's limitation violates state constitution's equal protection clause; superceded by state constitutional amendment.)

Pending: New York: Several lawsuits currently pending in various trial courts, including New York County (*Hernandez v. Robles*, No. 103434/2004) (state constitutional equal protection challenge to New York City Clerk's refusal to issue marriage licenses to several same sex couples.)

Pending: New Jersey: *Lewis v. Harris*, Superior Court of New Jersey Appellate Division (filed 05-06-2004)(appeal of trial court ruling that state law limitation of marriage licenses to opposite sex couples is not a violation of due process or equal protection under state constitution.)

Pending: Washington state: *Andersen v. King County & State*, King County Superior Court No. 04-2-04964-4 SEA, mem. Opin 08-04-2004 (trial court holds state's limit of marriage licenses to opposite sex couples a violation of state constitution's equal protection clause); *Castle v. State*, Thurston County Superior Court No. 04-2-00614-4, Mem. Opin. 09-07-2004 (trial court holds state's limit of marriage to opposite sex couples a violation of state constitution's privileges and immunities clause.)