LAW AND THE FAMILY

"Same-Sex Marriage"

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A BIG BREAKTHROUGH for gay rights advocates came on Dec. 3 when Judge Kevin Chang offered hope to a growing group of individuals when he announced in Baehr v. Miike, that denying marriage licenses to same-sex couples was a form of sex discrimination under Hawaii's state Constitution. Despite staying his own ruling pending review by the state's Supreme Court, Judge Chang's revolutionary view has affected the nation and sent reverberations throughout the country.

The National Law Journal reported on Dec. 16 that proponents of same-sex marriages believe the first single-sex wedding may well take place in Hawaii as early as this year. Attorneys have speculated that a gay marriage boom in Hawaii is likely to mean an increased level of interest in the full faith and credit clause of the U.S. Constitution. Others believe the case being decided will be a forerunner on the issue since "[t]he law under that clause is quite sparse, so cases dealing with the question of marriage may come to be the leading full-faith-and-credit issues."

This strategy is at best, suspect, since full faith and credit is owed to judgments of sister states, not to contracts. The basis for this view stems from the U.S. Supreme Court, which proclaimed marriage a civil contract founded on the agreement of the parties. [FN1] Article IV, s1, of the U.S. Constitution provides that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." The marriage contract is plainly

not full faith and credit "territory" nor has it ever been construed to be.

Civil Contract With Third Party

A bit of history is in order. Marriage, considered by many to be a religious contract, is a civil contract subject to curiously odd principles. [FN2] It cannot be rescinded at the will of the parties [FN3] and is a status to which the state is a third party. The legislature has always exercised full control over the marriage status [FN4] and has regulated it by laws based on principles of public policy. [FN5]

The state has the power to determine the conditions on which a marriage may be contracted and dissolved. [FN6] It may be regulated, controlled and modified, and rights growing from it modified or even abolished by the legislature, bound only by the Equal Protection and Due Process provisions of federal and state constitutions. [FN7] Marriage may be regulated by the state without violating the impairment of the obligation of a Contract Clause of the Constitution. [FN8] The legislature has the right to determine the duties and obligations it creates and its effects upon the property rights of both parties. [FN9]

In determining the law governing the recognition of the validity of marriages where more than one jurisdiction is involved, the cases distinguish between "formal validity," that is, matters regarded as making a marriage voidable and "essential validity." [FN10] Insofar as matters of "formal validity" go, what is good for the goose is good for the gander. If a marriage is valid where it is celebrated, it is, as a general rule, valid in this state. [FN11] If it is not a valid marriage where it is celebrated, it is invalid in New York. [FN12] In contrast, New York puts the brakes on "essential validity" which speaks to an issue of strong public policy, such as incestuous or bigamous marriages, which usually make a marriage void.

The traditional conflicts of law principle is that such matters are governed by the law of the appropriate domicile, and if it condemned the marriage as "void," so will other jurisdictions. New York will not recognize the validity of marriages (even though they are valid where contracted) where they are incestuous in a degree regarded generally as within the prohibition of natural law, or polygamous.

Moreover, the courts will not recognize the validity of marriages even though they are valid where contracted when they are contrary to the express prohibitions of a mandatory, as distinguished from a directory, statute, [FN13] or the public policy. [FN14] In addition,

where a particular marriage is abhorrent to local public policy, it will be denied recognition regardless of its validity in accordance with the law of the place of ceremony or appropriate domicile or both.

Path of Sister States

With this background in mind, New York can easily choose to follow the path of sister states. The Court of Appeals has held that "ordinary marriage relations" is a basic obligation of the marriage contract. That annulment may be granted for physical incapacity evinces a strong predilection in our public policy that the creation of children is at the heart of marriage. [FN15] This lays the groundwork for our courts to deny recognition of gay marriages on public policy grounds. Equally important, is that the legislature has the power to enact a law denying recognition to such marriages.

It appears clear that in this "battle of the sexes" Congress is preparing for full scale war. On Sept. 21, PL 104-199, otherwise known as the "Defense of Marriage Act," was signed into law. It enacts 28 USC 1738C, which encourages states to refuse to recognize same-sex marriages and appears to beef up existing law. It provides that no state shall be required to give effect to any public act, record, or judicial proceeding of any other state respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state, or a right or claim arising from such relationship. It also enacted 1 USC 7, which defines "marriage" and "spouse" for purposes of determining the meaning of any Act of Congress. "Marriage" means "only a legal union between one man and one woman as husband and wife," and "spouse" refers "only to a person of the opposite sex who is a husband or a wife."

Baehr v. Miike was tried following a ruling from Hawaii's Supreme Court in Baehr v. Lewis, [FN16] in which it held the state was required to prove it had a compelling interest in banning same-sex marriage by a sex-based classification.

In Baehr v. Lewis the Hawaii Supreme Court distinguished between the equal protection clauses of the United States and Hawaii Constitutions "... which are not mirror images of one another" and based its determination partly on this distinction. The Fourteenth Amendment to the United States Constitution provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws."

Hawaii's counterpart, Article 1, s5, of the Hawaii Constitution, provides that "[n]o person shall ... be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry." The court found that, unlike the US Constitution, the Hawaii Constitution prohibited state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex and that discrimination against any person in the exercise of his or her civil rights on the basis of sex was a "suspect category" for purposes of equal protection, subject to its "strict scrutiny" test.

This is the first decision of its kind. Other state courts have taken a contrary position. In Baker v. Nelson, [FN17] the Minnesota Supreme Court, upheld the refusal of a marriage license clerk to issue a license to two male applicants solely on the grounds that they were of the same sex, resisting the applicants' attack on due process and equal protection grounds. The court held that the statute that governed "marriage," employed that term as one of common usage, meaning the state of union between persons of the opposite sex. It reasoned that the institution of marriage, as a union of man and woman uniquely involving the procreation and rearing of children within a family, was as old as the book of Genesis.

New York has followed other states and addressed this issue directly in the recent decision of Storrs v. Holcomb, [FN18] when two men sought to compel the City Clerk to issue a marriage license to them. The Supreme Court held that while the right to marry, by opposite sex couples, is protected under the Fourteenth Amendment as a matter of substantive due process, same-sex marriage is not currently recognized under the laws of any state of the Union. The court, believing its hands tied by the ruling of the Second Department in Matter of Cooper, concluded that New York does not recognize or authorize same- sex marriage and, that the City Clerk correctly refused to issue the license.

In Matter of Cooper [FN19] the court held that the survivor of a homosexual relationship, alleged to be a "spousal relationship," was not entitled to a right of election against the decedent's will, pursuant to EPTL 5-1.1. The court found that the Legislature expressly defined a "surviving spouse" in EPTL 5-1.2, as a husband or wife.

The court reasoned that this interpretation is inescapable even in the absence of any express definition of the term because "[t]he language of a statute is generally construed according to its natural

and most obvious sense ... in accordance with its ordinary and accepted meaning ...."

The court rested its conclusion on the definition of marriage in Baker v. Nelson. [FN20] The petitioner argued that a narrow definition of the term "surviving spouse" was unconstitutional in violation of the Equal Protection Clause of the State Constitution and that this directly derived from the State's unconstitutional conduct in interpreting the Domestic Relations Law as prohibiting members of the same sex from obtaining marriage licenses.

The Appellate Division explained that the U.S. Supreme Court reviews equal protection challenges by three standards: "strict scrutiny," "heightened scrutiny" and "rational basis" review and that the lower court correctly used the "rational basis" standard in reviewing this equal protection challenge. Under this standard, the legislation or government action is presumed to be valid and will be sustained if the classification is rationally related to a legitimate state interest.

We point out that under the "heightened scrutiny" test, which is applied to classifications based on gender and illegitimacy, the legislation or government action is presumed valid and will be sustained if the classification serves important government objectives and is substantially related to achievement of those objectives. Under the "strict scrutiny" test, which is applied to classifications based on race, alienage and national origin, the statute is presumed to be unconstitutional unless the state shows the legislation is suitably tailored to serve a compelling state interest that justifies the classification. [FN21]

The Court noted that the rational basis standard has also been applied in similar instances where equal protection challenges have been raised to classifications based on sexual orientation. It noted that the appeal in Baker v. Nelson to the U.S. Supreme Court was dismissed for want of a substantial federal question [FN22] and that such a dismissal is a holding that the constitutional challenge was considered and rejected. [FN23]

With leading-edge reasoning, the Hawaii court in Baehr construed the marriage relation as "a partnership to which both partners bring their financial resources as well as their individual energies and efforts." It applied a "strict scrutiny test" and rejected, as circular, the argument that by definition and usage "marriage" is only a relationship between a man and a woman, and that persons of the

same sex are biologically unable to satisfy the definition of the status to which they aspire.

In contrast, New York cases have defined marriage as a relationship of one man and one woman under the obligation to discharge to each other those duties imposed by law on the relationship of husband and wife. It has applied "rational basis" test to similar equal protection claims and may continue to do so.

FN1. Maynard v. Hill, (1888) 125 US 190, 31 L Ed 654, 8 S Ct 723

FN2. Fearon v. Treanor, 272 NY 268, 5 NE2d 815 (1936)

FN3. Clayton v. Wardell, (1850) 4 NY 230.

FN4. Cropsey v. Ogden, (1854) 11 NY 228.

FN5. Wade v. Kalbfleisch, (1874) 58 NY 282.

FN6. Cropsey v. Ogden, supra.

FN7. Hanfgarn v. Mark, (1937) 274 NY 22, 8 NE2d 47.

FN8. Fearon v. Treanor, supra.

FN9. Maynard v. Hill, supra.

FN10. Re May's Estate (1953) 305 NY 486, 114 NE2d 4; Van Voorhis v. Brintnall (1981) 86 NY 18].

FN11. Cunningham v. Cunningham, (1912) 206 NY 341, 99 NE 845; Thorp v. Thorp, (1882) 90 NY 602

FN12. Cruickshank v. Cruickshank, (1048) 193 Misc 366; Wilcox v. Wilcox, (1887, NY) 46 Hun 32.

FN13. Van Voorhis v. Brintnall, supra

FN14. Bell v. Little (1923) 204 App Div 235, 197 NYS 674, affd 237 NY 519, 143 NE 726; Re May's Estate, supra.

FN15. Mirizio v. Mirizio, 242 NY 74 (1924).

FN16. 852 P2d 44

FN17. (1971) 291 Minn 310, 191 NW2d 185.

FN18. 168 Misc2d 898, 645 NYS2d 286

FN19. 187 AD2d 128, 592 NYS2d 797 (2d Dept. 1993)

FN20. Other decisions in accord with Baker v. Nelson include: Singer v. Hara, (1974) 11 Wash App 247, 522 P2d 1187, review den 84 Wash 2d 1008; Jones v. Hallahan, (1973 Ky) 501 SW2d 588, 63 ALR3d 1195; DeSanto v. Barns, 328 Pa.Super 181, 476 A2d 952; Frances B. v. Mark B., 78 Misc2d 112, 355 NYS2d 712; Anonymous v. Anonymous, 67 Misc2d 982, 325 NYS2d 499.

FN21. Craig v. Boren, 429 U.S. 190; Cleburne v. Cleburne Living Ctr., 473 US 432.

FN22. Baker v. Nelson, 409 US 810, 34 L. Ed2d 65, 93 S.Ct. 37.

FN23. Hicks v. Miranda, 422 US 332.

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