The State of Marriage in America —and in Virginia

by Lynne Marie Kohm

You are a lawyer—you may even be a family law attorney. Can you explain the state of marriage today in America? Many lawyers ask themselves that question. Few people are able to follow changes that have happened at near-breakneck speed over the past decade.

Marriage in America has been within the domain of the government for the last several hundred years. Until about ten years ago, marriage was state regulated and inherently (if not statutorily) defined as the legally protected commitment between one man and one woman. Vast changes have occurred in American law and culture since then. The perplexity started in Hawaii in 1993. Several same-sex couples applied for marriage licenses on the grounds that Hawaii's constitution guaranteed liberties to all, regardless of sex.[1] The plaintiffs claimed discrimination on the basis of "sex," which they defined as sexual orientation rather than gender. Hawaii courts and commissions, the legislature and the Hawaiian people wrestled for five years over the issue, and finally amended the state constitution to define marriage as the legally sanctioned relationship between one man and one woman. A new statutory code provided for certain benefits to be afforded to domestic partners.[2]

Alaska became the next forum. In 1998, when litigation was about to begin, Alaskans beat litigators to the punch by passing a state constitutional amendment that, again, defined marriage as the legally sanctioned relationship between a man and a woman. From there, the action moved to Nebraska, where voters passed a similar amendment in record numbers. Nevada followed, and by 1999 four states had passed marriage amendments.

During all these events, federal winds began to blow. In 1966, Congress passed and President Bill Clinton signed into law the Defense of Marriage Act (DOMA), which allows states to decide for themselves the legal definition of marriage and guarantees that no state has to honor the marriage of another state against the forum state's public policy.[3] This seemed sensible in light of what had been happening in the western United States.

Following the Federal DOMA, states passed their own so-called state or mini-DOMAs. Soon, thirty-nine states had their own acts in defense of marriage.[4]

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Then litigation moved to Vermont. In the 1999 case of *Baker v. Vermont,* several same-sex couples filed a successful claim similar to that filed in Hawaii. But *Baker* was based on the Vermont constitution's "common benefits" clause. The court ordered the legislature to create a parallel marriage statute for same-sex couples.[5] This litigation was intriguing. In 1999 the Vermont legislature enacted 15 Vt. Stat. ch. 1 sec. 8, which limited marriage to a man and a woman. In the wake of *Baker*, the Vermont legislature was forced to establish a new legal relationship called a civil union.[6] Civil unions could be entered into and dissolved in Vermont for Vermont citizens. These unions were thought to be a step above domestic partnerships, and on a parallel track with marriage. But those who entered into civil unions in Vermont found their unions were not necessarily valid in other states.[7]

In 2003, Massachusetts became the forum for same-sex litigation. Again, several same-sex couples petitioned the court to be granted marriage licenses based on the state's constitution. The highest court in Massachusetts wrestled with its own constitution and with emerging international trends and, in a 4 to 3 decision, ordered the state legislature to guarantee nothing short of full and complete legal marriage to same sex-couples who choose marriage.[8] The legislature tried unsuccessfully to establish a rational basis for marriage between a man and a woman only. Today, Massachusetts is the only state that recognizes a marriage between two people of the same sex. The legislature has drafted a proposal that would amend the state constitution to define marriage as between a man and a woman and create a parallel civil union track, but the legislation must pass the legislature twice and cannot be placed before voters until 2006.

States are divided over how to receive civil unions and Massachusetts same-sex marriages. This conundrum arises under the United States Constitution's Full Faith and Credit Clause, which requires states to give full honor and credit to laws of all other states. The only exception would be when a state has an already existing strong public policy against the behavior sanctioned by another state's law.

Virginia saw the ramifications of the conflicts of these laws in the recent *Miller-Jenkins* case heard in Fredericksburg. The court ruled that a Vermont civil union has no bearing on Virginia law. The court viewed the incidents of the civil union not as the incidents of marriage but as a pure custody issue, and awarded full custody to the natural mother of the child, disregarding the civil union.[9] The Vermont judge ruled conversely and held the Virginia litigant in contempt.

The 2004 Marriage Protection Act resolution and the Affirmation of Marriage Act, signed into law by Governor Mark Warner, denies legal recognition in Virginia to all same-sex or civil unions.[10]

Surveys report that Virginians believe equal liberties ought to be available for all, regardless of sexual orientation. Virginians also believe that equality does not exclude the regulation of marriage as between one man and one woman. Much of this thinking appears to be based on the concept that a child's best interests are served by having a mother and father married to each other.

Furthermore, all these changes are happening in a global context. The Netherlands has strong same-sex marriage legislation, as does Belgium, Sweden and several other European countries, most recently Spain. Canada likewise has judicially established same-sex marriage recognition. All these nations, however, place certain limits on same-sex relationships. They control or restrict parenting in ways much more restrictive than those applied to marriage between a man and a woman who wish to build a family.[11]

An attempt to establish marriage as a legal union between one man and one woman on a federal level failed this summer, when the proposed Federal Marriage Amendment (FMA) was declined for a vote by the United States Congress.

In the November 2004 elections, voters in eleven states easily passed marriage-defining constitutional amendments. Seventeen states now have amendments that define marriage as between one man and one woman: Alaska, Arkansas, Georgia, Hawaii, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon and Utah. California was set to implement comprehensive benefits to same-sex domestic partners, but that law is currently in litigation in the California courts, as it appears to collide

with the fact that the state also has a comprehensive and defining marriage law which limits marriage and its benefits to legal relationships consisting of one man and one woman. Finally, the American Bar Association Family Law Section has issued a white paper in support of same sex marriage trends, and the ABA has opposed the Federal Marriage Amendment.

What ought a Virginia lawyer look for in the future?

- Expect that more states will move toward constitutional amendments.
- Pay attention to what will happen with the proposed Federal Marriage Amendment. Congress may move away from interfering with the rights of states to regulate marriage. Or momentum for the amendment might build as federal lawmakers look at how states stand on the issue. Challenges to DOMA in state and federal courts may work to hasten FMA progress. Currently, challenges are pending in eleven states (California, Connecticut, Florida, Indiana, Maryland, Nebraska, New Jersey, New York, Oregon and Washington).
- The judiciary and the legislature will continue to struggle over the issue. After several months in court, Louisiana just recently settled its marriage amendment litigation in favor of placing the affirmed amendment permanently in Louisiana's constitution. Ohio remains in litigation over the constitutionality of its marriage amendment. As DOMA litigations are ruled on, other strategies will take shape. Florida courts recently ruled to uphold that state's DOMA in favor of marriage between a man and a woman.
- Look for a case to come before the U.S. Supreme Court. The high Court has already denied *cert* on a review of the Massachusetts ruling, but the Court has federalized so much family law over the past one hundred years[12] that states have increasing difficulty regulating family law matters. The Supreme Court might still be reluctant, however, to decide such a critical family law issue that so many Americans have decided on a state level—even in the wake of the Court's landmark decision invalidating a state sodomy prohibition in *Lawrence v. Texas* in 2003.[13]

Virginia seems solidly placed in the camp of limiting marriage to one man and one woman. Its constitutionality rests on judicial authority, but there is a constitutional amendment now being considered by the General Assembly.

Virginia attorneys—and particularly family law attorneys—need to understand court rulings and legislation on marriage. Additional sources include **www.stateline.org** for a fifty-state listing of marriage laws and information provided by the Institute of Marriage and Public Policy at **www.imapp.org**.

Endnotes:

1 The case originally filed was *Behr v. Lewin*, 852 P.2d 44 (1993).

2 This is also known as the Hawaii Reciprocal Benefits Act.

3 P.L. 104-199, *28 USCS § 1738C.*

4 States that have mini DOMAs include Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and West Virginia.

5 *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

6 VT. STAT. ANN. tit. 15 § 1204 (Supp. 2004).

7 *Rosengarten v. Downes*, 71 Conn. App. 372; 802 A.2d 170; 2002 Conn. App. LEXIS 407 (where the Connecticut Court of Appeals affirmed a lower court's dismissal of case holding that because neither Connecticut nor Vermont recognized civil unions of out-of-state residents, there was no factual dispute that would require an evidentiary hearing; because the litigants were not Vermont residents, Vermont did not have jurisdiction over their petition for dissolution. Without remedy in their home state or in the state granting them a civil union, the civil union litigants were truly faced with "till death do us part"). See also *Burns v. Burns*, 560 S.E. 2d 47 (Ga. Ct. App. 2002)(ruling that the Georgia DOMA precluded a Georgia court from recognizing a civil union as a marriage when offered as a stability factor in custody).

8 *Goodridge v. Dept. of Pub. Health*, 798 N.E. 2d 941 (2003).

9 *Lisa Miller-Jenkins v. Janet Miller-Jenkins*, No. CH04-280 (Frederick Co., Va., Cir. Ct.) (where Virginia judge awards sole custody of child to Lisa Miller-Jenkins, the child's biological mother, despite a previous temporary order given by Vermont judge that awarded custody to Lisa and visitation rights to Janet). *See also* Andrew Martel, *Vermont Ruling Will Not Change Child Custody*, WINCHESTER STAR, Dec. 1, 2004 discussing the Miller-Jenkins case.

10 *See* **http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+HB751**.

11 *See generally*, Lynn D. Wardle, *The Forest and The Trees: Issues in Domestic and International Adoption*, available at **http://www.lawrights.asn.au/docs/wardle2001.pdf** (2001).

12 *See* David Wagner, *The Family and American Constitutional Law*, 1 LIFE, LIBERTY & FAM. 145 (1994).

13 123 S. Ct. 2472 (2003). In fact, in December of 2004 the Supreme Court denied *cert* on an appeal of *Goodridge*.

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