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Verdict

February 7, 2012

Joanna L. Grossman

The Beginning of the End of the Anti-Same-Sex-Marriage Movement



Washington State is currently poised to legalize same-sex marriage. The state senate passed **Bill 6239** (<http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Bills/6239-S.E.pdf>), by a vote of 28-21. That bill would repeal an existing statutory ban on same-sex marriage and replace it with an explicit authorization of such marriages. The state's house of representatives is expected to pass the bill by a wide margin, and the state's governor, Christine Gregoire, has stated publicly that she will sign the bill.

This development has significance beyond simply the fact that a seventh state will now offer marriage equality to gay and lesbian couples. (The other six are Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and New York; the District of Columbia also allows same-sex marriage.) This will be the first time, since the beginning of the modern same-sex marriage controversy, that a state legislature has reversed itself, moving from a statutory ban on same-sex marriage to a statutory authorization of same-sex marriage. And, given the typical timeline of social movements, this has happened in a relatively short period of time.

While Washington is not a conservative state and has, indeed, offered some form of domestic partnership to same-sex couples since 2007 (a robust form since 2009), this reversal still suggests that the powerful backlash that was triggered by the first signs of success in litigating for same-sex marriage may not be as entrenched as it seems. In this column, I will describe Washington's path through many different stages of the same-sex marriage controversy; the intricacies of the bill passed by the state senate; and the potential implications of the State of Washington's experience for the same-sex marriage movement more generally.

Washington State's History with Same-Sex Marriage: The First Wave

Washington State has played a role at every stage of the battle over same-sex marriage. The first wave was in the 1970s, when same-sex couples in a handful of states sought marriage licenses from unsuspecting city clerks and then sued when the licenses were refused. State marriage codes at that time were largely silent on gender; same-sex marriage was not contemplated and thus not mentioned. These couples thus argued that the statutory silence on gender meant that the clerks in these various states could not refuse to issue licenses to any particular couple because of the gender of the parties.

One of these first-wave cases was litigated in Washington State in 1974. In *Singer v. Hara* (http://scholar.google.com/scholar_case?case=5576229373244357890), two men sued to compel the King County Auditor to issue them a marriage license. The failure to do so, they argued, contravened the state marriage code (which was silent on gender), as well as the state and federal constitutions. But, as with the couples that brought similar cases in other states, their claims were rejected out of hand. Both the trial and appellate courts held that the existing law excluded gay couples from marriage, and that no constitutional provision was violated by the exclusion.

The Second Wave, as It Played Out in Washington State

The second wave of same-sex marriage litigation began in the early 1990s and saw its first success in Massachusetts in 2003, when the state's highest court ruled in *Goodridge v. Department of Public Health* (<http://law.justia.com/cases/massachusetts/supreme-court/volumes/440/440mass309.html>) that the legislature could not constitutionally prohibit same-sex couples from marrying. But long before that first full-fledged victory in Massachusetts, same-sex marriage proponents had glimpses of future success—the possibility of same-sex marriage in Hawaii in the mid-1990s and some promising litigation elsewhere.

Unfortunately, those encouraging signs triggered a swift and robust response from opponents of same-sex marriage. Congress passed the federal Defense of Marriage Act (DOMA) in 1996, which defined marriage for all federal law purposes as a union between a man and a woman, and purported to give states the right to refuse recognition to same-sex marriages from sister states.

Many states acted on cue and passed so-called mini-DOMAs, which took the form of statutory or constitutional bans on same-sex marriage. To date, more than 40 states have passed such laws. Washington State did so in 1998, with a law that expressly defines marriage as “a civil contract between a male and a female” and denies recognition to any same-sex marriage validly celebrated elsewhere. (Rev. Code Wash. §§ 26.04.010, 26.04.020).

This ban was challenged in *Andersen v. King County* (http://scholar.google.com/scholar_case?case=5319498457433853628), a lawsuit brought by gay and lesbian couples, arguing that the statutory ban on same-sex marriage ran afoul of state constitutional protections of the right to marry and of equal rights for men and women. Although the plaintiffs prevailed at the trial court level, the Washington State supreme court reversed in 2006, ruling that the ban was constitutional. In so ruling, it held that sexual-orientation classifications did not merit heightened scrutiny, and that the fundamental right to marry was not broad enough to include the right to marry someone of the same sex.

The following year, in 2007, the Washington State legislature adopted a domestic partnership law, granting same-sex couples the right to register for a formal status that came with some, but not all, of the rights and obligations of marriage. In 2009, however, the legislature “upgraded” its domestic partnership status to carry out its intent that “for all purposes under state law, state registered domestic partners shall be treated the same as married spouses.” (Oregon and Nevada also made similar moves around that time, joining California, which had upgraded its domestic partnership status to a true marriage equivalent in 2005.)

The National Landscape for Same-Sex Marriage

Because of the wild burst of activity both for and against same-sex marriage that took place between 1996 and 2012, the national landscape is now quite checkered. Seven jurisdictions—Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, the District of Columbia, and New York—grant full marriage equality to same-sex couples. Another five—Vermont, New Jersey, Illinois, Delaware, and Hawaii—recognize “civil unions,” which are identical to marriage in all but name. Moreover, four states (California, Oregon, Nevada, and Washington) allow robust domestic partnerships. Overall, this means that same-sex couples have access to marriage or a marriage-like status in fifteen states and the District of Columbia.

In virtually every other state, there is an explicit ban on the celebration or recognition of same-sex marriage. Even in the four states that grant robust domestic partnership, there is a statutory or constitutional ban on same-sex “marriage.” The same is true in some of the civil union states as well. Washington State was one of the

states that banned same-sex marriage, but gave effect to a virtually equivalent status.

The Ins and Outs of Washington's Same-Sex Marriage Bill

In its core provision, the bill that will now go to the Washington House of Representatives redefines marriage to be “a civil contract between two persons,” and directs that all references in state statutes to gender-specific terms such as husband and wife “must be construed to be gender neutral and applicable to spouses of the same sex.”

As is the case in many of the other states that authorized same-sex marriage by voluntary legislative action, rather than by court order, Washington State's bill also carves out a religious exemption, although it is a relatively narrow one. It states that no religious organization is required to host or facilitate same-sex weddings, nor is any “minister . . . priest, imam, rabbi, or similar official of any religious organization” required to solemnize or recognize any marriage.

This religious exemption, notably, is narrower than the exception set forth in the similar bill adopted in June 2011 in New York. As I discussed in a [prior column \(http://verdict.justia.com/2011/06/27/same-sex-marriage-is-legal-in-new-york-the-in-state-and-national-ramifications\)](http://verdict.justia.com/2011/06/27/same-sex-marriage-is-legal-in-new-york-the-in-state-and-national-ramifications), the New York legislature not only immunized religious organizations and their leaders from liability for refusing involvement in same-sex weddings, but also purported to allow religious entities “to limit employment or sales or rental of housing accommodations or admission to or give preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.” In other words, in New York, religious organizations can refuse to associate not only with same-sex weddings, but also with people who have availed themselves of the right of same-sex marriage.

(As an interesting side note, the Washington bill adopts a “mock priest” rule, which validates marriages that are performed by someone without the authority to solemnize weddings, as long as at least one of the parties had a good faith belief that the officiant did, in fact, have such authority. This would seem to moot any challenge to the validity of marriages performed by Universal Life Church or other online-ordained ministers. However, as I've discussed in columns [here \(http://verdict.justia.com/2011/11/01/can-universal-life-church-ministers-officiate-at-weddings-in-some-states-the-answer-is-no\)](http://verdict.justia.com/2011/11/01/can-universal-life-church-ministers-officiate-at-weddings-in-some-states-the-answer-is-no) and [here \(http://verdict.justia.com/2011/11/21/can-laypersons-ordained-online-as-universal-life-church-ministers-or-the-like-officiate-at-weddings\)](http://verdict.justia.com/2011/11/21/can-laypersons-ordained-online-as-universal-life-church-ministers-or-the-like-officiate-at-weddings), the consequences of using online-ordained ministers in other states can be grave, for marriages at which such “ministers” officiate may be deemed invalid, and that invalidity may lead to problems down the road.)

The Washington State bill retains domestic partnership as a status, but makes it available only to couples where at least one party is age 62 or older. This is designed to allow a formal commitment to be made between older individuals, without compromising their Social Security or other retirement benefits, which sometimes turn on marital status.

What about current domestic partners who are not old enough to qualify under the new version of domestic partnership? Their unions will automatically be converted to full-fledged marriages on June 30, 2014 if they are not dissolved prior to that date. The Secretary of State will be charged with notifying each person in a registered domestic partnership of that pending conversion—and also of the right to opt out through dissolution of the domestic partnership.

The Washington State bill also adopts explicit rules about the recognition of marriage-equivalent statuses from other states. Same-sex marriages from elsewhere will be recognized since they will now be allowed in Washington. But what about marriage-equivalent statuses like civil union and domestic partnership? Any validly formed union that provides “substantially the same rights, benefits, and responsibilities as a marriage” will be treated as a marriage in Washington State. But couples that become permanent residents of Washington State must marry in Washington within one year after establishing residency to benefit from this recognition for same-sex marriages and marriage-equivalents from other states. In addition, if the out-of-state status is not substantially similar to marriage, but does resemble Washington State's domestic partnership status, then it can be recognized as a domestic partnership.

The Continuing Battle Over Same-Sex Marriage

As I suggested in the introduction to this column, I believe that the impending authorization of same-sex marriage in Washington State is significant. We have seen other states move through various stages with respect to same-sex marriage—and not always in a linear direction. Maine, for example, was poised to authorize same-sex marriage pursuant to legislative adoption of a marriage equality bill, but the voters then denounced same-sex marriage by referendum, which took precedence. Something similar, although drastically more complicated, happened in California, which has seemingly adopted every possible angle on same-sex marriage over the last decade. Now, the fate of same-sex marriage in California is wrapped up in litigation over the constitutionality of Prop. 8, an initiative constitutional amendment that banned it.

Other states have gone from having no law at all on same-sex marriage, to a compromise position, and then to full-fledged marriage equality. Vermont, for example, has never banned same-sex marriage. It was dragged into the same-sex couple recognition business by a court ruling, in *Baker v. State* (<http://law.justia.com/cases/vermont/supreme-court/1999/98-032op.html>), which mandated that same-sex couples must receive equal “benefits” to married couples. The legislature thus invented the civil union and then, of its own volition, moved to full marriage equality many years later. New Hampshire was never spurred to action by a court ruling, but also went from recognizing civil unions to full marriage equality. New York also never had an explicit ban on same-sex marriage, although its highest court said it constitutionally could have one in *Hernandez v. Robles* (<http://law.justia.com/cases/new-york/court-of-appeals/2006/2006-05239.html>). The legislature, however, jumped right in at the same-sex marriage level, with a marriage-equality bill, in 2011 (passed, somewhat surprisingly, by a Republican-controlled senate).

But Washington State is different. There, legislators—little more than a decade ago—decided to ban same-sex marriage. And the state’s highest court, in *Andersen v. King County*, affirmed the legislature’s right to do so, without violating the state constitution. But with this current bill, the Washington State legislature will now, on its own, reverse itself on this controversial issue. (Interestingly, too, although it was not clear at the outset whether the proponents had the requisite number of votes, the bill was debated in the state senate for only 90 minutes.) One might have expected that more time might have had to pass for the furious opposition to same-sex marriage to dissipate. Indeed, one might have predicted that older legislators would have had to be gradually replaced with younger ones, for the legislature to accept same-sex marriage. (Young people are dramatically more likely to support same-sex marriage than older ones, regardless of political affiliation.) That Washington State was able to embrace same-sex marriage now is thus surprising, as well as heartening.

Meanwhile, same-sex marriage bills are working their way through a variety of other state legislatures, including New Jersey’s and Maryland’s.

Same-sex marriage is an inevitable, eventual reality. But as in a game of Othello, the chips are starting to flip. Polls show ever-growing support for same-sex marriage, and even deeply entrenched opposition may dissipate sooner than we thought.



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