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Joanna L. Grossman

*Maurice A. Deane School of Law at Hofstra University*

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# Verdict

August 21, 2012

Joanna L. Grossman

## **Beware the Undissolved Civil Union: Massachusetts' Highest Court Says That A Subsequent Marriage is Polygamy**



Todd Warnken entered into a civil union with a man in Vermont in 2003. Without dissolving that relationship, he then married another man, Richard Elia, in Massachusetts in 2005, shortly after same-sex marriage became legal in that state. Was this a valid marriage? That depends on whether Massachusetts treats the civil union as a marriage for purposes of applying its bigamy laws, which prohibit a person with a living spouse from marrying another person.

In *Elia-Warnken v. Elia* (<http://law.justia.com/cases/massachusetts/supreme-court/2012/sjc-11023.html>), the Massachusetts Supreme Judicial Court ruled that civil unions from other states should be recognized, just as marriages are, on grounds of comity. This means that Todd's marriage to Richard was bigamous and thus void from the very start.

### **The Vermont Civil Union: Once Groundbreaking, but Now a Relic of the Past**

Vermont was the first state in the U.S. to provide formal legal recognition to same-sex relationships. The Vermont Supreme Court ruled in 1999, in *Baker v. State*, that it was a violation of the Common Benefits Clause of Vermont's Constitution to deny same-sex couples the right to marry or the right to enter into a substantially comparable, and legally-recognized, relationship. The court also gave the legislature a reasonable period of time to "craft an appropriate means of addressing this constitutional mandate."

The Legislature responded in 2000 by passing An Act Relating to Civil Unions, which created a novel legal status that was identical to marriage in every respect other than name. The status of the civil union itself eventually caught on in other jurisdictions, as well. Delaware, Hawaii, Illinois, New Jersey, and Rhode Island now offer civil unions, as did Connecticut before it moved to full marriage rights for same-sex couples, in 2008.

Nearly a decade after making history as the first state to provide marriage-like rights to same-sex couples, Vermont began to offer full marriage rights to such couples. The Vermont legislature, without a nudge from the courts, overrode a gubernatorial veto to enact into law *An Act to Protect Religious Freedom and Recognize*

*Equality in Civil Marriage*, which brought same-sex marriage to Vermont in 2009. Under the Act, existing Vermont civil unions will be recognized (and will not be automatically converted into marriages), but new civil unions cannot be established.

Part of the impetus to move from civil unions to full marriage equality was the legislature's recognition that life with a novel status was often complicated. (Many of the difficulties the civil-union status wrought for the couples that entered into them are explored in this [2007 report](http://www.leg.state.vt.us/workgroups/FamilyCommission/) (<http://www.leg.state.vt.us/workgroups/FamilyCommission/>) of the Vermont Commission on Family Recognition and Protection.) These difficulties were particularly keen for out-of-state residents, who established the large majority of Vermont civil unions. The first round of civil unionites discovered, for example, that it was virtually impossible to dissolve the union. Out-of-state couples could not divorce in Vermont because only residents can file for divorce there. And, for the most part, such couples could not file in their home states, either, because the law did not recognize the civil union or any other legal form of same-sex relationship. As I [discussed in 2003](http://writ.news.findlaw.com/grossman/20030520.html) (<http://writ.news.findlaw.com/grossman/20030520.html>), some individuals found a sympathetic court to dissolve the union based on "equitable principles," but many couples are still stuck in civil unions, despite having broken up more than a decade ago, because of this legal conundrum. Some civil union partners, thus, just walked away from broken relationships, rather than seeking the law's blessing for their break-up.

### **The Relevance of the Out-of-State Recognition of Civil Unions**

There are many situations in which it matters whether an out-of-state civil union or marriage will be recognized. Marital status drives hundreds, if not thousands, of legal consequences. There have thus been many lawsuits seeking recognition of civil unions and same-sex marriages by states other than those that allowed them to be celebrated in the first instance.

In *Elia-Warnken*, the case I introduced above, the issue was whether Todd could marry another man without first dissolving his Vermont civil union to someone else. When Todd initially filed for divorce, his husband, Richard, conceded in his answer to the complaint that he was married to the plaintiff and counterclaimed for divorce. But at some later point, Richard discovered that Todd had entered into—and had never dissolved – a civil union with another man, before Richard and Todd met. Richard thus amended his answer to ask that the complaint for divorce be dismissed.

Let's connect the dots: If Todd's prior civil union counts as a "marriage" under Massachusetts law, then Todd's marriage to Richard is bigamous. If the marriage is bigamous, it is *void ab initio*—that is, it is invalid from the outset. A bigamous marriage cannot be dissolved through divorce because it never existed in the eyes of the law. And for a marriage that, in the law's eyes, never existed in the first place, there can be no divorce, nor any of the protections of divorce such as a court's distribution of marital property or award of spousal support.

These consequences, which follow when no marriage is recognized, underline the importance of the following question: Is a civil union, in the law's eyes, a marriage?

### **Marriage Celebration Versus Marriage Recognition**

It's important when thinking about same-sex marriage to distinguish between (1) the law governing the celebration of marriage—that is, addressing whether a particular state will let couples within its borders marry—and (2) the law governing the recognition of marriage—that is, addressing whether a particular state will give effect to a marriage that it would not have permitted itself, had it been performed in that state, but that was validly celebrated in another jurisdiction.

The standard approach relies on the "place of celebration" rule. In a nutshell, this means that if a marriage is valid where it was celebrated, it is accepted as valid everywhere. The converse principle is also true: If a marriage is void where it was celebrated, then it is void everywhere.

This pro-marriage-recognition approach is designed to minimize conflicts between the states, and to make marriages "portable," ensuring that married couples do not suddenly become unmarried just by crossing a state

line, and to ensure that children do not become illegitimate because their parents' marriage is not recognized, and so on.

These traditional rules of marriage recognition derive from the notion of comity—respect for sister states—rather than expressly from full faith and credit principles. States therefore have discretion to pick and choose among marriages, with respect to which they will, and will not, recognize, as long as they comply with any federal constitutional standards (which, for example, do not allow states to refuse recognition to interracial marriages).

Most states have declined to follow these traditional rules when considering the validity of same-sex marriages. They have, instead, adopted by statute or constitutional amendment blanket rules of non-recognition. (Congress has done the same thing through the federal Defense of Marriage Act, also known as DOMA, a statute that, as I discuss [here \(http://verdict.justia.com/2012/08/07/the-defense-of-marriage-act-doma-takes-another-bullet\)](http://verdict.justia.com/2012/08/07/the-defense-of-marriage-act-doma-takes-another-bullet), is under constant challenge.)

The questions about the possible recognition of alternative types of unions, then, arise in states that themselves allow domestic partnerships, civil unions, or same-sex marriages. But even in those more liberal states, the law can be complicated. And the law is even more complicated for marriage equivalents than it is for marriage itself.

### **The Out-of-State Recognition of Civil Unions: An Uncertain Landscape**

In states that allow the creation of civil unions, there is no distinction between civil unions and marriages. Parties to either status are entitled to the same benefits and subjected to the same obligations.

The same is generally true for states that offer robust domestic partnership—another marriage equivalent for same-sex couples. Most domestic partnership statutes provide that similar statuses from other states will be recognized. Out-of-state civil unions and same-sex marriages will be recognized as domestic partnerships, with all that that entails under the state's law.

As discussed in the previous section, moreover, states that do not allow same-sex marriages or civil unions will typically refuse to recognize any same-sex marriage or marriage-equivalent, given the widespread adoption of statutory and constitutional amendments designed to preclude both the celebration and recognition of same-sex marriages and equivalent statuses. (The law of marriage recognition and a discussion of applicable state laws are available [here \(http://writ.news.findlaw.com/scripts/prINTER\\_friendly.pl?page=grossman/20090804.html\)](http://writ.news.findlaw.com/scripts/prINTER_friendly.pl?page=grossman/20090804.html).) The non-recognition of both same-sex marriages and civil unions arises from disapproval of same-sex relationships and a reluctance to equalize the law's treatment of homosexual and heterosexual couples.

But what about states that either allow, or give effect to, same-sex marriages? Should civil unions be treated as marriages in those states?

Logic would suggest that the answer should be yes, given that a state that allows same-sex marriages clearly has no public policy objection to the formal recognition of a same-sex relationship. But marriage-equality states have nonetheless been hesitant to grant full recognition to civil unions, perhaps because they misunderstand the nature of the civil union and believe it to be a less committed status than marriage is.

For example, before New York passed a law to allow same-sex marriage in 2011, courts had given effect to same-sex marriages from other states, but not to civil unions from other states. A New York appellate court, in *Langan v. St. Vincent's Hospital* (discussed [here \(http://writ.lp.findlaw.com/grossman/20051020.html\)](http://writ.lp.findlaw.com/grossman/20051020.html)), refused to give recognition to a couple's civil union because only *marriages* were entitled to comity and to the benefit of the traditional rules of recognition.

Rhode Island took a similar stance before it passed a civil union law, allowing same-sex couples to use its family courts to dissolve out-of-state same-sex marriages, but not to dissolve out-of-state civil unions.

### **The Ruling in *Elia-Warnken v. Elia*: A Civil Union Is a Marriage**

The question for the highest court in Massachusetts in this case was whether a civil union constitutes a marriage

for purposes of applying the state's bigamy laws. Every state prohibits bigamy, a rule enforced through marriage laws (second, concurrent marriages are invalid) and through criminal penalties. In this case, only the civil prohibition was in play to determine whether Todd was validly married to Richard and could sue for divorce.

The court sided with Richard, ruling that the prior civil union was equivalent to marriage. Thus, Todd was ineligible to marry Richard because he was already married at the time they celebrated their union.

The court's ruling was rooted foremost in Massachusetts' treatment of same-sex marriage. Since 2004, Massachusetts has allowed the celebration of same-sex marriages. The state's highest court ruled, in *Goodridge v. Department of Public Health*, that it violated the state's constitutional guarantees of equal protection and due process to deny same-sex couples the right to marry. The state senate drafted a civil-union law and then requested an advisory opinion from the court (a type of opinion that federal courts are not allowed to provide, as their jurisdiction is limited to cases and controversies) as to whether civil unions were sufficient to cure the constitutional violation. In [a strong rebuke \(http://writ.news.findlaw.com/grossman/20040206.html\)](http://writ.news.findlaw.com/grossman/20040206.html), in a decision known as *Opinion of the Justices*, the court said no. Only a grant of full marriage equality would deliver on the relevant constitutional guarantees.

Todd argued that the court could not now treat civil unions as equivalent to marriages, given that it had once rejected the same claim. But the court disagreed, and rightly so. It rejected civil unions after *Goodridge* because the state senate was deliberately withholding the label of "marriage" as a way of maintaining a hierarchy that was constitutionally invalid. The same argument does not apply to leveling up—treating civil unions as marriages when it benefits the participants. To the contrary, the court in *Elia-Warnken* explained, recognizing the civil union as a marriage in this context "removes any discriminatory treatment of same-sex couples that might flow from a civil union," while "refusing to recognize a civil union would be inconsistent with the core legal and public policy concerns articulated in *Goodridge*."

The court's conclusion also relied on Vermont's definition of civil union and the traditional marriage recognition principles, described above. The Vermont legislature made clear that parties to a civil union were to be treated as spouses for all state-law purposes, and that civil unions themselves were to be treated as marriages. And under Vermont law, even though civil unions can no longer be created, a party to an existing civil union cannot marry someone else without first dissolving the civil union.

The court then discussed comity and the laws of marriage recognition. It noted the place of celebration rule and saw no reason to differentiate between civil unions and marriages when granting recognition. The court in *Goodridge* defined marriage as "the voluntary union of two persons as spouses, to the exclusion of all others"; civil unions meet that definition. Vermont's decision to legalize civil unions is, moreover, entitled to the same level of respect as its later decision to legalize same-sex marriage.

Certainly, the purposes of the bigamy law are better served by a broad definition of marriage. The emphasis of bigamy laws is restricting individuals to a single spouse. And, as the court explained,

if we do not recognize the plaintiff's civil union, he would have two legal spouses, each of whom could expect virtually the same obligations from him, such as spousal or child support, inheritance, and healthcare coverage. Likewise, the plaintiff could demand the same obligations from each of his spouses. Preventing complications such as these is one of the purposes of the polygamy statutes.

Civil-union partners are thus wearing the same ball-and-chain in Massachusetts that spouses are; their unions, too, must be legally dissolved before they may move on to the next legally-sanctioned relationship.

### **Conclusion: Marital Portability Is Surely to Be Desired, and Civil Unions Should Be Included**

Early adopters of the civil union faced many quandaries as they tried to have their civil unions recognized outside of Vermont. The situation has only gotten more complicated as a greater number of states have staked out their positions on same-sex marriage—creating a spectrum with many points. Marital status should be portable, and Massachusetts has set a good example for other states to follow. As history has proven many times, states can

maintain marital prohibitions, but still give effect to marriages validly celebrated elsewhere. The same is true when it comes to civil unions, and states ought to act accordingly.



Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of [Inside the Castle: Law and the Family in 20th Century America](#) (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of [Gender Equality: Dimensions of Women's Equal Citizenship](#) (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

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