STATE OF VERMONT
COUNTY OF CHITTENDEN, SS.

STAN BAKER and PETER HARRIGAN, Plaintiffs v. STATE OF VERMONT and TOWN OF SHELBURNE, Defendants NINA BECK and STACY JOLLES, Plaintiffs v. STATE OF VERMONT and CITY OF SOUTH BURLINGTON, Defendants LOIS FARNHAM and HOLLY PUTERBAUGH, Plaintiffs v. STATE OF VERMONT and TOWN OF MILTON, Defendants	CHITTENDEN SUPERIOR COURT DOCKET NO. S1009-97 CnC

OPINION AND ORDER

This action is before the Court on Defendants' Motion to Dismiss Plaintiffs' Complaint for failure to state a claim pursuant to V.R.C.P. 12(b)(6). Plaintiffs cross-move for Judgment on the Pleadings pursuant to V.R.C.P. 12(c). Defendants are represented by Assistant Attorney Generals Eve Jacobs-Carnahan and Timothy B. Tomasi; Plaintiffs are represented by Susan Murray, Esq., Beth Robinson, Esq., and Mary L. Bonauto, Esq..

The purpose of Rule 12(b)(6) is to "test the law of a claim, not the facts which support it." Levinsky v. Diamond, 140 Vt. 595, 600 (1982). In order to grant a V.R.C.P. 12(b)(6) motion to dismiss, it must be "beyond doubt that there exist no circumstances or facts which the plaintiff could prove about the claim made in his complaint which would entitle him to relief." Assoc., Haystack Property Owners v. Sprague, 145 Vt. 443, 446 (1985) (quoting Levinsky, 140 Vt. at 600-601). Where a novel or extreme theory of liability is presented, the court should be "especially reluctant to dismiss." Id. In deciding on the law of the claim, the court must assume the factual allegations in plaintiff's pleading to be true, as are all reasonable inferences that can be drawn from the pleadings; all contrary assertions in the movant's pleading are assumed to be false. White Current Corp. v. State, 140 Vt. 290, 292 (1981).

A Rule 12(c) motion may be granted if the movant is entitled to judgment as a matter of law on the basis of the pleadings. Thayer v. Herdt, 155 Vt. 448, 456 (1990). The parties agree that no factual dispute exists and that judgment may be made as a matter of law.

I. INTRODUCTION

In this action, members of Vermont's homosexual population seek to obtain from this Court the right to have same-sex unions recognized by the State as marriages. The State contends that, as a matter of law, 18 V.S.A. § 5137 and related statutes do not

authorize the issuance of marriage licenses to two individuals of the same sex. In addition, the State contends that those statutes do not violate the Vermont Constitution. Plaintiffs counter that Vermont's marriage statutes should be interpreted to allow marriages between persons of the same gender, and that the State's refusal to allow Plaintiffs to marry their chosen life partners improperly infringes upon their constitutional rights. Both sides have presented thorough and compelling arguments in support of their respective positions. Because of the complexity and the nature of the issues involved, we will analyze each claim in turn.

II. THE DUTY TO RESOLVE THIS DISPUTE LIES WITH THE COURTS

Although the legislature "formulates and enacts the laws," such as the marriage laws at issue here, "the judicial power interprets and applies" those laws. In re D.L., 164 Vt. 223, 228 (1995). All of Vermont's statutes must be reviewed in light of the Vermont Constitution, and when a law allegedly violates a person's Constitutional rights, the judicial branch, not the legislative branch, must examine the law. Beecham v. Leahy, 130 Vt. 164, 172 (1972). "Even if a statute purports to have been enacted for the protection of public health, safety or morals, if it has no just relation to such objects, or is a plain and palpable invasion of constitutional rights, the courts have a duty to so adjudge and thereby give effect to the Constitution."

Id. (citing Board of Health v. St. Johnsbury, 82 Vt. 276, 285 (1909).

The State argues that the legislature, as the State's most democratic institution, is "uniquely suited to assess the appropriateness of social change through legislative hearings and debate." However, separation of powers principles requires our court system to protect individual civil rights by interpreting and reviewing the law in light of the Constitution. Consequently, this Court must assume the responsibility of resolving the issue at hand.

III. UNDER VERMONT STATUTES MARRIAGE LICENSES MAY ONLY BE ISSUED TO A MAN AND A WOMAN

All the tools of statutory construction have one common goal -- to determine the legislative intent behind the statute. Defendants contend, and the Plaintiffs concede, that the first principle of statutory construction is to look at the plain meaning of the words chosen by the Legislature. Smith v. Town of St. Johnsbury, 150 Vt. 351, 355 (1988). As the State correctly asserts, this Court is not at liberty to make law by finding a meaning not reflected in the plain language of the statute.

Marriage is now, and has traditionally been, defined as a union between the sexes. See, e.g., Dean v. District of Columbia, 653 A.2d 307, 312-316 (D.C. App. 1995); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971); Singer v. Hara, 522 P.2d 1187, 1191 (Wash. App. 1974); Storrs v. Holcomb, 645 N.Y.S.2d 286, 287-88 (N.Y. Sup. Ct.

1996). The American Heritage Second College Edition Dictionary (1985) defines marriage as follows:

> 1. a. The state of being married; wedlock. b. The legal union of a man and woman as husband and wife . . .

The statutes regulating the issuance of marriage licenses appear in Title 18, Chapter 105. The statutes governing the marriage relationship are codified in Title 15. The State proffers that throughout other titles of Vermont statutes are references to marriage which use gender-based language, begging the conclusion that marriage is the union of one man and one woman. For example, references to "bride" and "groom" in 18 V.S.A. § 5131, and the gender-based language in Vermont consanguinity statutes, 15 V.S.A. §§ 1-3, indicate that the Legislature only contemplated marriage between a man and a woman. In addition, Defendants argue that the dozens of other statutes which use the words "husband" and "wife" when specifying rights and duties that attach to marriage demonstrate the legislative intent to treat marriage as a state into which only opposite-sex couples are eligible to enter.

Plaintiffs argue that the "plain meaning" rule must be applied in the context of determining the underlying purpose of the law. Lubinsky v. Fair Haven Zoning Board, 148 Vt. 47, 50 (1987). The Vermont Supreme Court has explicitly ruled that when the literal words of a statute conflict with its underlying purpose, the plain meaning cannot be applied. State v. Therrien, 161 Vt. 26, 31 (1993).

Plaintiffs rely on In re B.L.V.B., 160 Vt. 368 (1993), to support their position. In examining the then-existing adoption law, the Vermont Supreme Court held that, despite the literal words in the statute, a woman who was co-parenting two children with her same sex partner should be allowed to adopt the children as a step-parent in order to create a legal relationship between the children and both of the adults. The Court found that the underlying purpose of the adoption law was to provide legal security for children, and since the requested adoptions were "entirely consistent" with the functional purpose of the adoption laws, the Court ruled that they must be allowed. Id. at 372-73. The Court acknowledged that it was unlikely that the Legislature had ever contemplated the prospect of adoptions by same gender couples when it enacted the adoption laws in the 1940's. Id.

While we agree that the Court in In re B.L.V.B. read an exception to the adoption statute more broadly than its plain meaning, we also find that the result was a reading more consistent with the underlying legislative purpose than the literal words themselves provided. A literal construction of the statute would have meant that the natural mother's parental rights would have terminated upon the adoption, which would have been an absurd result.

In contrast, the plain meaning of the words "bride" and "groom" reflect the legislative intent that marriage requires the union of one man and one woman. In the instant case, plaintiffs do not meet these qualifications. Also notable, though less

significant, is the fact that a literal reading of the marriage statutes is consistent with the rest of the statutory scheme regarding marriage.

Having concluded that Vermont's marriage laws do not allow civil marriages between partners of the same gender, we must now determine whether or not those laws are constitutional.

IV. VERMONT'S MARRIAGE STATUTES DO NOT REQUIRE HEIGHTENED SCRUTINY ANALYSIS

Plaintiffs claim that Vermont's marriage statutes violate Chapter I, Articles 1 and 7 of the Vermont Constitution. The latter provision, also known as the "Common Benefits Clause", provides in part:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . .

Vt. Const., Ch. I, Art. 7.

To determine whether a challenged classification violates the Common Benefits Clause, the Vermont Supreme Court has used the analytical framework developed through federal equal protection law. Brigham v. State, 692 A.2d 384, 395-96 (1997)(holding that the clause is generally coextensive with the equal protection guarantees of the United States Constitution and follows a similar method of analysis). The first step is to decide what level of scrutiny applies to the statutory classification. If plaintiffs can establish that a "fundamental right" is implicated, or that they are members of a "suspect

class" either due to their sexual orientation or gender, then the Court must review the statute under a heightened scrutiny analysis. Otherwise, the very deferential standard of review, known as rational-basis review, applies.

A. Vermont Marriage Statutes Do Not Violate Plaintiffs' Fundamental Rights

If the right with respect to which classifications are drawn is "fundamental", then the court must determine whether "any discrimination occasioned by the law serves a compelling governmental interest, and is narrowly tailored to serve that objective." Brigham, 692 A.2d at 396.

The Vermont Supreme Court has taken a cautious approach in finding fundamental rights under our State Constitution. The Court has indicated that such rights must be "'so rooted in the traditions and conscience of our people to be ranked as fundamental'" and are "'implicit in the concept of ordered liberty.'" Veilleux v. Springer, 131 Vt. 33, 40 (1973)(citations omitted).

The United States Supreme Court has set forth its most detailed discussion of the fundamental right to marry in Zablocki v. Redhail, 434 U.S. 374 (1978). Zablocki involved a Wisconsin statute that prohibited any Wisconsin resident with minor children "not in his custody and which he is under obligation to support" from obtaining a marriage license until the resident demonstrated that he was in compliance with his child support obligations. Zablocki, 434 U.S. at 376. The Court invalidated

the statute as violative of the fourteenth amendment to the United States Constitution. Id. at 390-91. The Zablocki Court underscored the federally recognized fundamental right of marriage as follows:

> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to enter the relationship that is the foundation of the family in our society. The woman,whom appellee desired to marry had a fundamental right to seek an abortion of their expected child . . . or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings. . . . Surely, a decision to marry and raise a child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.

Id. at 384-86. The Hawaii Supreme Court accurately interpreted Zablocki:

> Implicit in the Zablocki court's link between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion, and child rearing, on the other, is the assumption that the one is simply the logical predicate of the others.

Baehr v. Lewin, 852 P.2d 44, 56 (Hawaii 1993). Indeed, on the federal level, where the right to marry has been found fundamental, the Supreme Court has consistently linked marriage to procreation. See Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)("institution of family deeply rooted in the Nation's history and tradition"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)("marriage and procreation are fundamental to the very existence and survival of the race"); Maynard v. Hill, 125

U.S. 190, 211 (1888)(marriage is the "foundation of the family and of society, without which there would be neither civilization nor progress").

This Court is now faced with the question of whether or not to extend the present boundaries of the fundamental right of marriage to include same-sex couples. In light of the foregoing federal and Vermont standards, we do not believe that a right to same sex marriage is "so rooted in the traditions and conscience of our people to be ranked as fundamental." Veilleux, 131 Vt. at 40 (quotations and citations omitted). In various discussions regarding marriage, the Vermont Supreme Court has consistently spoke of opposite-sex relationships, and has recognized the link between marriage, sexual intercourse, and procreation. Ryder v. Ryder, 66 Vt. 158, 161-62 (1894)(woman "incapable of entering into the marriage state" where she could not have sex or bear children); Le Barron v. Le Barron, 35 Vt. 365, 369 (1862)(male impotence grounds for annulment).

Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage.

B. Vermont's Marriage Laws Do Not Discriminate Against a Suspect Class Comprised of Homosexuals

Strict scrutiny review also would apply if legislation were to discriminate against a "suspect class". Brigham, 692 A.2d at 396. Though the Vermont Supreme Court has never fashioned a test for determining what constitutes a suspect class under the Vermont Constitution, numerous federal courts have concluded that

homosexuals do not constitute a suspect class. Traditionally, to qualify as a suspect class, a group must: (1) have been historically discriminated against; (2) exhibit obvious, immutable, or distinguishing characteristics that define them as a unique group; (3) demonstrate that they are a politically powerless minority. Lyng v. Castillo, 477 U.S. 635, 638 (1986).

We do not argue the contention that homosexuals, unfortunately, have been the subject of historical discrimination. Nonetheless, this characteristic alone does not qualify homosexuals as a suspect class and, as a group, they are unable to meet the remaining portions of the Lyng test.

Clearly, homosexuality is not a characteristic that is as readily determinable by third parties as race, gender or alienage. High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 573-74 (9th Cir. 1990). In addition, gays have not been denied access to the political system, and cannot be seen as politically powerless. Vermont has passed a number of anti-discrimination laws specifically providing protections on the basis of sexual orientation. We agree with the State that homosexuals simply cannot say that "they have no ability to attract the attention of lawmakers." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445 (1985).

The U.S. Supreme Court has rarely granted a group suspect-class status and has counseled against widespread designation of groups as suspect classes. As a result, U.S. Circuit Courts of Appeals have consistently rejected claims that homosexuals should

be deemed a suspect class. Thomasson v. Perry, 80 F.3d 915, 927-28 (4th Cir.), cert. denied, 117 S. Ct. 358 (1996); High Tech Gays, 895 F.2d at 571-72; Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Padula v. Webster, 822 F.2d 97, 103-04 (D.C. Cir. 1987); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1035 (1986).

We find no justification that indicates homosexuals should be afforded suspect-class status under the Vermont Constitution when they have not be given that status under the federal constitution. Accordingly, we hold that Vermont's marriage laws do not discriminate against a suspect class comprised of homosexuals.

C. Vermont Marriage Statutes Do Not Unconstitutionally Discriminate On The Basis Of Gender

Similar to the issue of sexual orientation, the Vermont Supreme Court has never expressly held that gender-based classifications are subject to heightened scrutiny. Nevertheless, in applying the Common Benefits Clause the Court has regularly drawn guidance from the United States Supreme Court's application of the federal Equal Protection Clause, which has held that the party seeking to uphold government action based on gender must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." Mississippi Univ. For Women v. Hogan, 458 U.S.

718, 724 (1982). Consequently, we agree with Plaintiffs that it would be anomalous if the Vermont Constitution did not subject gender-based distinctions to scrutiny as searching as that required under the United States Constitution's Equal Protection Clause of the Fourteenth Amendment. However, we do not agree that the Vermont marriage statutes constitute gender-based discrimination.

As discussed previously, same-sex unions simply fall outside the definition of marriage, which is premised on uniting one member of each sex. As a result, an individual's gender is irrelevant to the application of the marriage statutes:

> There is no analogous sexual classification involved in the instant case because appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.

Singer, 522 P.2d at 1192.

In addition, Vermont's laws do not treat similarly situated males and females in a different manner; the statutes apply even-handedly to both sexes. No benefit is conferred nor burden imposed upon one sex and not the other. Requiring a member of each sex to create a marriage does not favor one sex over the other, and does constitute invidious discrimination based on gender. Singer, 522 P.2d at 1191-95; Jones, 501 S.W.2d at 589-90.

Accordingly, we hold that Vermont marriage statutes do not unconstitutionally discriminate on the basis of gender.

"Absent the involvement of a fundamental right or a suspect class, a legislative enactment is presumed to be constitutional." Choquette v. Perrault, 153 Vt. 45, 51 (1989). As a result of the foregoing analysis, we find that the appropriate standard of review for the statutes in question is the "rational basis" test. It is the same test used by the federal courts under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Brigham, 692 A.2d at 395. The Court has held that to meet this test, "state law need only reasonably relate to a legitimate public purpose in order to be a valid enactment under the state's police powers." Choquette, 153 Vt. at 52.

V. THE LEGISLATIVE CLASSIFICATION IMPLICIT IN THE MARRIAGE STATUTES IS JUSTIFIED UNDER THE RATIONAL BASIS TEST

In evaluating a statute, the Court "must look to any of the purposes that are conceivably behind" it. Smith v. St. Johnsbury, 150 Vt. 351, 357 (1988). If there is any legitimate public policy objective supporting the marriage statutes then the Plaintiffs' constitutional claims must be dismissed. Andrews v. Lathrop, 132 Vt. 256, 262 (1974). It is primarily due to the highly deferential nature of this standard of review that we are able to draw the conclusion that the marriage statutes are constitutional.

The State posits seven possible justifications for the statutory exclusion of same-sex couples from marriage. For the most part, we agree with the Plaintiffs that these rationales do

not reasonably relate to a valid public purpose under the Common Benefits Clause. For example, we are in full accord with Plaintiffs that the State's proclaimed interests in uniting men and women to "bridge their differences" and to promote a setting which provides both male and female role models are invalid because they are clearly premised upon improper presumptions about the roles of men and women.

Further, we agree with Plaintiffs that the State's interest in preserving the institution of marriage for no other reason than to preserve a time honored institution is invalid. A bare desire to preserve tradition and resist change is not a valid public purpose. In addition, the State's purported interest in ensuring that its marriages are recognized in other states to avoid conflict-of-laws issues doesn't appear to even approach a valid public purpose. The State of Vermont does not need the consent of all the other states to guarantee rights ensured by its own Constitution. Vermont has historically licensed marriages which were or are not uniformly licensed by other states. Speculation about possible discrimination should not be used to justify discrimination against same-sex couples in Vermont now.

The State's so-called interest in preserving the Legislature's authority to channel behavior and make normative statements through its legislation is a difficult concept to grasp, mainly because the State has neglected to explain precisely what those statements are. Without such an

explanation, it is impossible to evaluate the connection between the goal and its chosen means. Finally, the State's argument that the exclusion of same-sex couples from marriage is rationally related to minimizing the use of modern fertility treatments in order to avoid increased child custody and visitation disputes is without any common sense or logical basis.

The above analysis of the State's claimed interests was intended to show that most of these interests have no rational relationship to the exclusion of same-sex couples from the institution of marriage. Nonetheless, we are bound by the highly deferential nature of the rational basis test, whereby "distinctions will be found unconstitutional only if similar persons are treated differently on wholly arbitrary and capricious grounds." Brigham, 692 A.2d at 395-96 (citations and quotations omitted).

We now turn to the State's purported interest in furthering the link between procreation and child rearing. "[M]arriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman." Singer v. Hara, 522 P.2d 1187, 1197 (Wash. App. 1974). While all of the Plaintiffs' arguments claiming the State's public purpose is invalid are clear and sensible, none is persuasive enough for this Court to determine that the Legislature is unjustified in using the marriage

statutes to further the link between procreation and child rearing.

"The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971). The Plaintiffs concede that the State's desire to promote parental responsibility and two parent families constitute a valid public purpose. They also agree that the Legislature's interest in ensuring maximum support for children is a valid one. The courts in Baker and Singer recognized that furthering the link between procreation and child rearing is a valid public purpose. Though not flawless, we find that limiting the protection of Vermont's marriage laws to the legal union of one man and one woman is reasonably related to the State's interest in furthering the link between procreation and child-rearing.

Accordingly, the legislative classification implicit in the marriage statutes is justified under the rational basis test.

ORDER

Defendants' Motion to Dismiss is GRANTED.

Plaintiffs' Motion for Judgment on the Pleadings is DENIED.

Dated at Burlington, Vermont, this 19th day of December, 1997.

Linda Levitt, Presiding Judge