COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, SS. No. SJC-09436

SANDRA and ROBERTA COTE-WHITACRE, AMY ZIMMERMAN and TANYA WEXLER, MARK PEARSALL and PAUL TRUBEY, KATRINA and KRISTIN GOSSMAN, JUDITH and LEE MCNEIL-BECKWITH, WENDY BECKER and MARY NORTON, MICHAEL THORNE and JAMES THEBERGE, and EDWARD BUTLER and LESLIE SCHOOF,

Plaintiffs-Appellants

v.

DEPARTMENT OF PUBLIC HEALTH, CHRISTINE C. FERGUSON, in in her official capacity as COMMISSIONER OF DEPARTMENT OF PUBLIC HEALTH, REGISTRY OF VITAL RECORDS AND STATISTICS, and STANLEY NYBERG, in his official capacity REGISTRAR OF VITAL RECORDS AND STATISTICS,

Defendants-Appellees

ON DIRECT APPEAL FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT OF SUFFOLK COUNTY

BRIEF OF AMICI CURIAE OF PROFESSORS OF CONFLICT OF LAWS AND FAMILY LAW

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STATEMENT OF INTEREST[1]

The Amici Curiae joining this brief are Professors of Law Barbara Cox, Ian Ayres, Katharine Baker, Carlos Ball, Elizabeth Bartholet, Brian Bix, Jennifer Brown, Naomi Cahn, Dan Danielsen, Chai Feldblum, Joanna L. Grossman, Joan Hollinger, Herma Hill Kay, Charles Kindregan, Andrew Koppelman, Sylvia A. Law, Linda McClain, Mary O'Connell, Kermit Roosevelt, Katharine Silbaugh, Mark Strasser, Dominick Vetri, Jim Wilets, and Jennifer Wriggins. None of the Amici nor their counsel are connected to any party or any interest other than that of amicus in this case. A description of each of the Amici is contained in Addendum A to this brief.

The Amici have expertise in a wide range of issues relating to conflict of laws and family law. The Amici submit this brief to bring to this Court's attention the substantial body of law in support of the plaintiffs-appellants' position in this case.

SUMMARY OF ARGUMENT

The Commonwealth incorrectly argues that §§ 11 and 12 of Chapter 207 of the Massachusetts General Laws are necessary: (1) to ensure that there is an "approving state" to enforce the rights and obligations created by the marriage in Massachusetts of a non-resident, same-

[1] The Amici accept the Statement of Issues, Statement of the Case and Statement of Facts as set forth in the brief of the plaintiffs-appellants in *Cote-Whitacre et al. v. Dep't. of Health et al.*, No. SJC-09436.

sex couple; and (2) to protect the sovereign rights of other States to decide their own policies with respect to marriage for same-sex couples. *See* Commonwealth's Request For Direct Appellate Review, pp. 36-38. The Commonwealth's arguments reflect a misunderstanding of the conflict of laws doctrines applied by the States in determining whether to recognize a marriage legally celebrated in another State. (pp. 4-7)

In our federal system, each State may for itself decide whether to recognize a marriage of one its domiciliaries that is celebrated in Massachusetts, regardless of whether the couple is of the same or different sex. To date, the Supreme Court of the United States has interpreted neither the Constitution of the United States nor the United States Code to require a State to recognize a marriage -- of any kind -- celebrated in another jurisdiction. Under existing interpretations of federal law, the decision to recognize a marriage belongs to each State, for each to decide by applying its conflict of laws principles. Given this allocation of authority to the States, for each to apply its own unique law, there can be no guarantee in any particular case that a State will, or will not, recognize the validity of the marriage of one of its domiciliaries celebrated in another State. (pp. 4-7)

The States traditionally have recognized marriages celebrated outside their borders, because a marriage valid in the state in which it was celebrated is presumed to be valid everywhere. (pp. 7-12) Indeed, many States have even recognized marriages celebrated in other States where seemingly insurmountable public policies would prohibit those same marriages from being celebrated within the State; for example, states with anti-miscegenation laws prohibiting interracial marriage have recognized interracial marriages celebrated in states where those marriages were valid. (pp. 12-39) Therefore, it is untenable for the Commonwealth to argue or assume that there will be no "approving state," Record Appendix ("R.A.") 124, 128, that will recognize the rights and the obligations of a non-resident, same-sex couple married in Massachusetts. (pp. 40-41)

ARGUMENT

I. EACH STATE, APPLYING ITS OWN CONFLICT OF LAWS PRINCIPLES, MAY CHOOSE TO RECOGNIZE THE VALIDITY OF THE MARRIAGE OF ONE OF ITS DOMICILIARIES CELEBRATED IN MASSACHUSETTS.

Under existing interpretations of the Full Faith and Credit Clause of the Constitution of the United States, art. IV, § 1, and the Full Faith and Credit Act, 28 U.S.C. § 1738, no State is required to recognize the validity of a marriage celebrated in another jurisdiction, whether of a same or a different sex couple.[2] The Full Faith and Credit Clause provides in relevant part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The Full Faith and Credit Act, 28 U.S.C. § 1738, the statutory implementation of the Clause, provides that acts, records, and judicial proceedings "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, ... from which they are taken."

The Supreme Court has interpreted both the Clause and the Act to require a State to afford the "exacting"

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[2] Some scholars nonetheless have argued that, properly construed, the Full Faith and Credit Clause does not permit a State to decline to recognize a marriage valid in another State solely on the grounds that the marriage is contrary to the forum State's policy. *See, e.g.*, Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965, 1986 (1997).

obligations of full faith and credit only to a final judgment from a judicial proceeding issued by a court of competent jurisdiction. *Baker* v. *General Motors Corp.*, 522 U.S. 222, 233 (1998). With regard to state sources of law other than judgments, however, the Full Faith and Credit Clause "merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state."[3] *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953). Those minimum requirements are that a State may apply its law only if it has "'a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 312-0313 (1981) (plurality opinion)).

By extending licenses to non-resident couples, Massachusetts is acting within its constitutional sphere as a co-equal state in our federal system. *See, e.g., In re Burrus*, 136 U.S. 586, 593-94 (1890)

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[3] Obtaining a marriage license, unlike obtaining a divorce, does not present an adversarial judicial proceeding in family or civil court, which proceeding invokes the jurisdictional authority of a court over a person to render a judgment. *Cf. Sosna* v. *Iowa*, 419 U.S. 393, 407-408 (1975); *Williams* v. *North Carolina*, 325 U.S. 226, 229 (1945). Indeed, getting married neither requires the State to extend its power of jurisdiction over a person nor presents a controversy for judicial resolution, because each party to the marriage volunteers to travel to the State to be married.

("[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."). Along with the State of the couple's domicile, Massachusetts -- as the State where the marriage is celebrated -- has both contacts with the marital couple and an interest in the application of its law to a non-resident couple that marries within the borders of the Commonwealth. *See Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 436 (1943) ("[E]ach of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders."); *cf. Phillips Petroleum*, 472 U.S. at 823 ("[I]n many situations a state court may be free to apply one of several choices of law."). Even if the same-sex couple lives in another State, the couple could return to Massachusetts, thereby availing themselves of the protections, benefits, and obligations conferred by Massachusetts to all married couples within the territory of Massachusetts.[4] *See Goodridge* v. *Dep't of Public Health*, 440 Mass. 309, 313 (2003); *see also* Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 Stan. J.

[4] Massachusetts requires one year of residency within the State prior to obtaining a divorce. *See* M.G.L. c. 208, §§ 4-5.

Civ. Rights & Civ. Lib. (forthcoming 2005) (noting Massachusetts' interest in marriage of non-resident couples, because couple could rely upon Massachusetts law to "obtain a divorce and seek distribution of property and child support").

The State of a married couple's domicile also has both significant contacts and interests in the application of its law regarding the marriage. Because "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders," *Williams* v. *North Carolina*, 317 U.S. 287, 298 (1942), the principles of full faith and credit "do[] not ordinarily require [a state] to substitute for its own law the conflicting law of another state, even though that law is of controlling force in the courts of that state with respect to the same persons and events." Therefore, under existing interpretations of federal law, a State has the *option* to apply either the law of Massachusetts or the law of the domicile when assessing the validity of a marriage celebrated in Massachusetts.

II. SOME STATES WILL RECOGNIZE MARRIAGES OF SAME-SEX COUPLES PERFORMED IN MASSACHUSETTS, EVEN WHERE THOSE STATES HAVE STATUTORY OR CONSTITUTIONAL PROHIBITIONS AGAINST SUCH MARRIAGES.

There is no basis for the Commonwealth to presume that where a State has enacted a prohibition against marriage for same-sex couples, there will be no

"approving state" to that marriage. Commonwealth's Request For Direct Appellate Review, pp. 38, 41, and 46. The Commonwealth's position ignores a long history of recognition of interracial, consanguineous, and underage marriages legally celebrated in other jurisdictions by States that consider those marriages void when performed within the State.[5] Many States have applied traditional conflict of laws principles to determine whether to recognize a marriage celebrated in a foreign jurisdiction, even though by statute the marriage would be void if celebrated within the forum state. Some States set aside their public policies generally prohibiting the marriage and recognize the marriage, especially where a spouse sought recognition only of a particular "incident" of the marital relationship, such as the right to divorce, the obligation of spousal or child support, or the right to intestate succession. This history demonstrates that seemingly strong public policies prohibiting marriage

[5] Throughout American history citizens have crossed state lines to marry, even though the States have always had differing marriage eligibility rules. See, e.g., *Mazzolini* v. *Mazzolini*, 155 N.E.2d 206,209 (Ohio 1958) (recognizing marriage of first-cousins prohibited from marrying in Ohio who celebrated marriage in Massachusetts before returning to Ohio); *Inhabitants of Medway* v. *Inhabitants of Needham*, 16 Mass. 157 (1819) (Massachusetts residents traveling to Rhode Island to marry to avoid Commonwealth's anti-miscegenation restriction). Cross-border marriages exist, in part, because states have never had bona fide residency requirements for marriage.

may give way to the strong policies favoring recognition of marriage.

Indeed, even though many States ultimately recognized a marriage from a foreign jurisdiction, it was by no means certain at the time of celebration of the marriage that those States would do so. The common law process of conflict of laws analysis is such that there can be no certainty *ex ante* that the marriage of a non-resident couple will (or will not) be validated in whichever of the 50 States the couple may live over the course of their married life. That same process will repeat itself here: Some States will recognize the marriage of a same-sex couple, and others might not. The Commonwealth's demand for an *ex ante* guarantee of recognition is therefore unreasonable in light of the conflict of laws principles that will govern the recognition of the marriages of same-sex couples.

A. A Marriage Valid In The State In Which It Was Celebrated Is Presumed To Be Valid Everywhere Under Traditional Principles of Conflict of Laws.

A court determining which law to apply to decide the validity of a foreign marriage likely will start with the long-standing conflict of laws principle that a marriage valid where celebrated is valid everywhere. *See e.g., Inhabitants of Medway* v. *Inhabitants of Needham*, 16 Mass. 157, 159 (1819) ("[I]t is a principle adopted for general convenience and security, that a marriage, which is good according to the laws of the

country where it is entered into, shall be valid in any other country."). This general rule favoring the validity of marriages "has long been one of the staples" of conflict of laws principles.[6] Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition for Non-Traditional Marriages*, 32 Creighton L. Rev. 147, 154 (1998); *see also* William M. Richman & William L. Reynolds, *Understanding Conflict of Laws* § 119, at 398 (3d ed. 2000) (noting "an overwhelming tendency" in the United States to recognize validity of marriage based upon law where performed). Both the First Restatement and the Second Restatement of Conflict of Laws favor recognition of the validity of marriage. The First Restatement begins with the *lex loci celebrationis* rule, whereby a marriage that is valid where celebrated is valid everywhere. *Restatement of Conflict of Laws* § 121 (1934). Likewise, § 283 of the Second Restatement encourages courts to recognize out-of-state marriages, while permitting them to refuse to do so.

Many States determine the validity of marriage by reference to the law of the State of celebration due to the powerful policy justifications supporting such

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[6] For example, § 210 of the Uniform Marriage and Divorce Act, drafted in 1970 by the National Conference of Commissioners on Uniform State Laws and adopted by several States, provides: "All marriages contracted ... outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by domicile of the parties, are valid in this State."

universal recognition. The general validation rule "confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state." Richman & Reynolds, Understanding Conflict of Laws § 119 at 398. Especially in an age "of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere." *In re Lenherr's Estate*, 314 A.2d 255, 257 (Pa. 1974).

The vitality of the general validation rule also is apparent from the States' rejection of the Uniform Marriage Evasion Act, which provided the genesis for

M.G.L. c. 207 §§ 10-13, and 50.[7] The Uniform Marriage Evasion Act was superseded by the Uniform Marriage and Divorce Act, which embraced the general rule of marriage recognition.[8] The recognition that interstate comity with respect to marriage is advanced not by denying licenses to non-residents, but by recognizing marriages legally celebrated elsewhere, is implicit in the Uniform Marriage Evasion Act's failure to take

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[7] The National Conference of Commissioners on Uniform State Laws withdrew the Uniform Marriage Evasion Act in 1943, because it had been adopted by only five States and, without widespread adoption, "it merely tend[ed] to confuse the law." R.A. 464. Commentators have criticized the effectiveness of the Uniform Marriage Evasion Act because its operative provisions solely reached marriages expressly declared "void," not merely prohibited. *See* Mary E. Richmond and Fred S. Hall, *Marriage and the State: Based Upon Field Studies of the Present Day Administration of the Marriage Laws in the United States*, p. 196 (1929) (criticizing reverse evasion and evasion provisions because they were "limited to marriages that would be void in the home state, [and thus] of little or no effect" in marriages that home states preferred not occur); *See also* Chester G. Vernier, *American Family Laws: A Comparative Study of the Family Law of the Forty-eight American States, Alaska, the District of Columbia, and Hawaii (to Jan. 1, 1931)*, vol. 1, p. 210-11 (1931) ("This [uniform] act is designed to prevent evasion of the marriage laws of other states as well as the laws of states passing it, but it is limited in scope, being expressly confined to "void" marriages. Marriages are prohibited for many reasons but are void for few.").

[8] *See Unif. Marriage and Divorce Act* sec. 210, 9A U.L.A. 176 (1987) which states: Section 210 "expressly fails to incorporate the 'strong public policy' exception of the Restatement [Second] and hence may change the law in some jurisdictions. This section will preclude invalidation of many marriages which would have been invalidated in the past."

hold, its subsequent withdrawal, and its replacement with the celebration rule.[9]

B. There Is A "Public Policy Exception" To The Recognition Of Foreign Marriages, But That Exception Will Not Automatically Invalidate Marriages of Same-Sex Couples.

There is an exception to the general rule favoring the validity of a marriage: Each State may decline to validate a marriage from another State where the marriage would violate "the strong public policy of the forum." *Developments in the Law -- The Law of Marriage and Family: Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 Harv. L. Rev. 2028, 2035 (2003).[10] Indeed, each of the four dominant theories of conflict of laws -- the First and Second Restatements of Conflict of Laws, Professor Brainerd Currie's "governmental interest analysis," and

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[9] States have always expected that their domiciliaries could -- and would -- travel to marry in other States, notwithstanding (or in spite of) the prohibitions in their own laws. To the knowledge of Amici, no State has ever retaliated against the state of celebration for issuing a marriage license to a non-resident couple for a marriage that would contravene the prohibitions of the State of the couple's domicile. Despite numerous state laws expressly denying marriage rights to same-sex couples, no state has enacted any law signaling a willingness to retaliate against a sister state that marries its non-resident same-sex couples or, alternatively, a willingness to guarantee respect to the resident marriages of same-sex couples from a sister state that refuses to marry the same-sex couples domiciled in its own state.

[10] *See generally* Joseph Story, Commentaries on the Conflict of Laws § 113 (7th ed. 1972) (recognizing exception to general rule of recognition for marriages "positively prohibited by the public law of a country, from motives of policy"); George W. Stumberg, Principles of Conflict of Laws 262 (1937) ("[M]ost courts have felt free to hold a marriage invalid when it runs counter to what is regarded as a particularly strong policy at the domiciliary forum.").

Professor Robert Leflar's "choice-influencing considerations" -- counsel that a State generally should recognize a marriage performed in another jurisdiction, but permit a State to refuse to recognize an out-of-state marriage by that State's domiciliaries if doing so would violate the clear public policy of that State.

Sections 131 and 132 of the First Restatement establish exceptions to the general rule of recognition. In particular, §§ 132(a)-(d) provide a non-exhaustive list of exceptions to recognition of marriages that may "offend a strong public policy of the domicil," such as polygamous marriage, incestuous marriages, marriages between "persons of different races where such marriages are at the domicil regarded as odious," and marriage "of a domiciliary which a statute at the domicil makes void even though celebrated in another state." *Id.* at § 132, cmt. B.

The Second Restatement also contains a public policy exception to the general rule favoring recognition of marriage. Section 283(2) of the Second Restatement provides, "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized unless it violates the strong public policy of another state which had the most significant relationship to the

spouses and the marriage at the time of the marriage."[11] *Restatement (Second) of Conflict of Laws* § 283(2)(1971).[12]

Governmental interest analysis, developed by Professor Brainerd Currie in the 1950's and the 1960's, also refers courts to policy considerations to decide conflict of laws issues. *See* Brainerd Currie, *Selected Essays on the Conflict of Laws* 187 (1963). Professor Currie reasoned that the statutory and case law of a state express policy choices, which the state has an "interest" in applying in cases involving that state's domiciliaries. In a case concerning a Massachusetts marriage of a non-resident same-sex couple, Professor Currie would likely consider the question of which

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[11] In deciding whether to validate a marriage celebrated outside of the State, § 283(1) refers the court to "the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6." Section 6 in turn counsels a court to use "a statutory directive of its own state on choice of law," subject to constitutional restrictions. Where no statutory directive exists, § 6(2) directs the court to consider various factors, including: (a) the needs of the interstate and the international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of the parties' justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and (g) ease in the determination and application of the law to be applied.

[12] *See* Singer, *Same Sex Marriage*, 1 Stan. J. Civ. Rights & Civ. Lib. at 40 ("[I]t is elementary conflict of laws reasoning that the current domicile of the parties is almost certain to be the state that has the most significant relationship with the parties and the transaction. That is because the transient connection with Massachusetts does not give Massachusetts a greater interest in applying its law than the state where the parties reside.")

State's law applies to present a "false conflict" situation, because only the couple's common domicile, if one exists, has an interest in applying its law to the case. *See* Patrick J. Borchers, *The Choice-of Law Revolution: An Empirical Study*, 49 Wash. & Lee L. Rev. 357, 361 (1992). Therefore, under Professor Currie's analysis, even though the couple was married in Massachusetts, the law of their domicile would control the validity of their marriage in that State. *See* Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home*, 1994 Wis. L. Rev. 1033, 1090-1091 (1994).

Finally, Professor Robert Leflar's "choice-influencing considerations" theory focuses on those factors that influence courts in their choice-of-law analysis. *See* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts of Law*, 41 N.Y.U. L. Rev. 267 (1966). Professor Leflar's considerations include: (1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. *Id.* at 282. Leflar expected that judges might be led to use the forum's law, especially if foreign law might "interfere with fundamental local policies." *Id.* at 297. Leflar also believed, however, that judges are perfectly capable of realizing when

local forum law is not better, and should have the freedom to ignore the disfavored local law that would otherwise control in domestic cases. *Id.* at 299-300.

Conflict of laws analysis under all four traditional approaches is complex, intrinsically linked to the unique public policies and statutory laws of the forum State, and heavily influenced by the facts of the case. In every case, the analysis requires a determination of the public policy of the forum State, which is itself a complicated exercise. "It is not always easy to determine what is a positive state policy," because not every provision "of a statute prohibiting marriage, under certain circumstances, or between certain parties, is indicative of a state policy" for the purpose of applying conflict of laws principles." *Penneger* v. *State*, 10 S.W. 305, 309 (Tenn. 1899) (holding policy of prohibiting remarriage for adulterous spouses trumps presumption of "valid where solemnized, valid everywhere").

The complexity of this conflict of laws/public policy analysis is exacerbated by the variety of the States' common law, statutory, and constitutional law regarding the rights of same-sex couples. For example, it may be difficult to ascertain the domicile's public policy, as expressed in both its statutes and case law because policies disfavoring recognition of the marriage of a same-sex couple may conflict with

policies in statutes validating foreign marriages (e.g., certainty, predictability, comity), policies in favor of providing benefits and protections to married couples, case law recognizing other out-of-state marriages despite statutory prohibitions, or other expressions of state public policy concerning the rights of same-sex couples in general or rights of the couple involved in the litigation.

For this reason, inquiry into a state's public policy for these purposes cannot begin and end with mere citation to a marriage restriction existing in any one state. For example, Maine (where plaintiffs-appellants Michael Thorne and James Theberge reside), statutorily prohibits same-sex couples from marrying within the State, declares such marriages to be void, and exempts all marriages of same-sex couples from the general rule of recognition of foreign marriages. *See* 19-A Me. Rev. Stat. Ann. §§ 650, 701, 750. However, Maine also affirmatively recognizes same-sex relationships and, in many instances, statutorily ensures that same-sex couples have access to key rights under state law.[13] *See* 18-A Me. Rev. Stat. Ann. §§ 2-

[13] Maine law also provides meaningful protections for non-marital couples generally. *See* 18 Me. Rev. Stat. Ann. §§ 5-506 (establishing right to appoint durable power of attorney for health care decision-making), 5-501, 508 (establishing right to appoint durable power of attorney for financial decisions); 22 Me. Rev. Stat. Ann. §§ 1711D (allowing patient to designate persons for visitation rights), 2843-A (authorizing designation of person to make funeral arrangements and select final resting place).

102 et seq. (extending laws of intestacy to domestic partners), 3-203, 5-309, 5-405, 5-410 (recognizing legal priority for domestic partners in probate proceedings concerning guardianship, conservatorship, and administration of estate); 19-A Me. Rev. Stat. Ann. §§ 4002 et seq. (protecting domestic partners against domestic abuse); 22 Me. Rev. Stat. Ann. §§ 2843 (extending right to disposition of remains to surviving domestic partner); 24 Me. Rev. Stat. Ann. §§ 2319-A, 2741-A, 2832-A, 4249 (requiring insurance carriers to offer health care coverage to domestic partners).

If a surviving same-sex spouse in Maine were to seek to vindicate the policy interests expressed in one of these statutes, then a Maine court would evaluate these other public policies favoring the rights of a same-sex couple together with the State's restriction upon the marriage of same-sex couples. Because any particular incident of marriage may implicate a multitude of competing policy interests, the requisite analysis of a State's public policy with respect to recognition of a foreign marriage is highly complex, and the outcome of that analysis cannot be predicted with any certainty in the abstract.

The complexity inherent in the application of the public policy exception cannot be overstated, as evidenced in two exemplar cases: *Penneger* and *In re Lenherr's Estate*. In *Penneger*, the Supreme Court of

Tennessee considered the marriage of a woman who was divorced on grounds of adultery and who went to Alabama to marry the man with whom she had committed adultery. 10 S.W. at 305. Tennessee law prohibited such a marriage during the life of the woman's ex-husband. *Id.* The court recognized that the "well-being of society ... demands that one state or nation shall recognize the validity of marriage had in other states or nations, according to the laws of the latter, unless some positive statute or pronounced public policy of the particular state demands otherwise." *Id.* at 309.

The court then analyzed which statutes embody "distinctive state policy" that should prevent recognition despite this general rule.

> It will not do to say that every provision of a statute prohibiting marriage, under certain circumstances, or between certain parties, is indicative of a state policy in the sense in which it is used in this connection. To so hold would be to overturn this most solemn relation .... Each state or nation has ultimately to determine for itself--what statutory inhibitions are by it intended to be imperative, as indicative of the decided policy of the state concerning the morals and good order of society, to that degree which will render it proper to disregard the *jus gentium* of 'valid where solemnized, valid everywhere.'

10 S.W. at 309. The court concluded that the policy embodied in the prohibition against the marriage of adulterous spouses was to protect the sensibilities of the innocent ex-spouse and to prevent an affront to public decency. The court held these policy interests

of sufficient moment to render the marriage invalid. *Id.*

In re Lenherr's Estate, the Supreme Court of Pennsylvania addressed whether a widow was entitled to the marital exemption to the State's inheritance tax. Each spouse had been married previously, but their previous marriages had ended in divorce due to their adultery with each other. 314 A.2d at 256-57. After their divorces, the couple traveled from their residence in Pennsylvania to West Virginia to marry, because Pennsylvania law prevented those guilty of the crime of adultery from marrying the person with whom the adultery was committed during the life of the former spouse. *Id.* at 257. Thirty-two years later, the husband had since passed away, and the court was confronted with whether the marriage performed in West Virginia was valid in Pennsylvania.

Relying upon the Second Restatement approach to the conflict of laws, the court weighed the policies favoring (1) uniform recognition of marriage based upon the law of the place of celebration and (2) award of the inheritance tax to protect the reasonable reliance interests of the surviving party upon the death of a spouse against the public policy expressed by Pennsylvania's prohibition of the marriage at issue here. 314 A.2d at 257. The court concluded, similarly to the court in *Penneger*, that the policy behind

Pennsylvania's prohibition was not to punish an adulterous spouse, but to protect the sensibilities of an innocent husband or wife and the public decency. *Id.* at 259.

Denying the surviving spouse the marital tax exemption to the inheritance tax, however, would not further Pennsylvania's policies, because any affront caused by the West Virginia marriage ended with the husband's death. 314 A.2d at 259. Even if Pennsylvania's policy interests would be significant in a case concerning ongoing cohabitation within the State, its interests for prohibiting the marriage are less where the marriage has already ended due to the death of one spouse. The court further concluded that applying the policy of the prohibition would "frustrate[]" the policy behind providing the transfer tax exemption: recognizing the surviving spouse's interest in property created by the couple's joint investment in the marriage. *Id.* Therefore, the court recognized the West Virginia marriage as valid, and held that the widow could invoke the marital exemption to the State's inheritance tax.

In sum, application of public policy exceptions will vary from State to State. Each State likely will decide whether to validate the marriage of a same-sex couple celebrated in Massachusetts by examining the common law precedent in the State regarding the

recognition of foreign marriages, the interpretation and weight given to statutory or constitutional prohibitions against marriage of same-sex couples, the types of public policies embodied in both the laws prohibiting marriage of same-sex couples and in the statutes relevant to the particular marital right(s) asserted by the couple, and the specific circumstances provided by each particular case.

C. Some States, Applying Traditional Conflict Of Laws Principles, Will Recognize The Marriage Of A Same-Sex Couple Celebrated In Massachusetts.

Some States likely will recognize the foreign marriage of a same-sex couple, even though the complexity of conflict of laws principles makes it difficult to know *ex ante* whether any particular State will recognize a foreign marriage. For starters, some States without statutes prohibiting the marriage of same-sex couples have already recognized same-sex relationships entered into by their domiciliaries outside the State. *See Langan* v. *St. Vincent's Hosp.*, 765 N.Y.S.2d 411, 422 (N.Y. Sup. Ct. 2003) ("New York's public policy does not preclude recognition of a same-sex union entered into in a sister state."). Non-resident same-sex couples from States that have not enacted statutory or constitutional prohibitions against marriages of same-sex couples, such as Connecticut, New Jersey, New Mexico, New York, Wisconsin and Rhode Island, have a very reasonable

prospect that their domiciles will likewise recognize their marriage in Massachusetts. Indeed, some States have expressed that they will recognize the marriages of same-sex couples for certain purposes. *See* Connecticut Att'y Gen. Op. (Aug. 2, 2004) (Addendum B) (establishing that marriage licenses from Massachusetts of same-sex spouse would be recognized in Connecticut to change name on driver's license and car registrations); 2004 N.Y. Att'y Gen. Op. 1, 16 (Mar. 3, 2004) (Addendum C) (stating that New York will recognize marriages of same-sex couples legally performed elsewhere); Rhode Island Att'y Gen. Op. (Oct. 19, 2004) (Addendum D) (stating that same-sex spouse married in Massachusetts would be eligible to receive spousal benefits under teacher's retirement system).

In other States, statutory and constitutional prohibitions erected to prohibit the marriages of same-sex couples in other States predictably will influence the application of conflict of laws principles. *See, e.g.*, Va. Code Ann. § 20-45.2 ("Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable."). There is no basis to assume (as does the Commonwealth) that those prohibitions will be outcome determinative given the complexity of conflict of law analysis. The mere

enactment of so-called "Defense of Marriage" laws may "not foreclose the case-sensitive balancing of relevant factors and interests characteristic of modern choice of law reasoning." Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 Quinnipiac L. Rev. 105, 108 (1996).

Indeed, the public policy prohibitions of many States are not expressly extended to marriages of same-sex couples celebrated in other jurisdictions; or are not quite so strong; or may be trumped by still other public policy concerns, such as the need to support children or to enforce the obligations of marriage. *See Singer*, Stan. J. Civ. Rights & Civ. Lib. at 47. The prior validation of interracial marriages by Southern States with criminal anti-miscegenation penalties, and also prior validation of adulterous and consanguineous marriages, and the recognition of civil unions celebrated in Vermont, demonstrate that even strong public policies against a marital relationship may very well yield in some cases.

1. **Absent a statute expressly prohibiting recognition of a foreign marriage, many state courts have construed public policy statutes as applying only to marriages celebrated within the State.**

It is likely that courts in some States will apply prohibitions against the marriage of same-sex couples to foreign marriages of same-sex couples only where the prohibitions also expressly apply to marriages

celebrated outside of the State. In many States that have enacted statutory and constitutional impediments to the marriage of a same-sex couple, the State's public policy pronouncements "do[] not by express terms regulate a marriage solemnized in another State where, as in our present case, the marriage was concededly legal." *In re May's Estate*, 305 N.Y. 486, 114 N.E.2d 4, 6 (1953). *See, e.g.*, Haw. Rev. Stat. §§ 572-1 & 572-3; Md. Code Ann., Family law § 2-201; Mont. Code Ann. § 40-1-401; S.C. Code Ann. §§ 20-1-10 & 15; Vt. Stat. Ann. Title 15 § 8; Wy. Stat. § 20-1-101. Thus, the mere existence of a statute or constitutional provision expressing a state's disapproval of marriage rights for same-sex couples does not indicate that such policy will be interpreted to deny recognition to the marriages of same-sex couples legally celebrated outside of the State.

Therefore, these States likely will follow, as they have in the past, the "clear statement" canon of statutory interpretation applicable to the recognition of foreign marriages:

> A marriage which is prohibited here by statute because contrary to the policy of our law is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the state shall have no validity here.

Commonwealth v. *Lane*, 113 Mass. 458, 464 (1873) (Gray, C.J.). Indeed, absent a "statute expressing clearly the Legislature's intent to regulate within this States marriages of its domiciliaries solemnized abroad," the general rule of recognition applies. *In re May's Estate*, 114 N.E. 2d at 6; *see also In re Loughmiller's Estate*, 229 Kan. 584, 590, 629 P.2d 156, 161 (1981) (validating foreign first-cousin marriage, notwithstanding evasive trip to Colorado to celebrate marriage, where Kansas statute prohibiting such marriages did not expressly apply to foreign marriages).

The policy underlying the general rule of recognition is itself so strong that "in the absence of express words, a legislative intent to contravene the *jus gentium* under which the question of the validity of a marriage contract is referred to the *lex loci contractus* cannot be inferred." *State* v. *Hand*, 87 Neb. 189, 126 N.W. 1002, 1002-1003 (1910); *see also In re Miller's Estate*, 239 Mich. 455, 214 N.W. 428 (1927) (following general rule of recognition because Legislature did not expressly apply to foreign marriages statute declaring first-cousin marriages void); *Garcia* v. *Garcia*, 25 S.D. 645, 127 N.W. 586 (1910) (noting lack of legislative intent to apply to foreign marriages statute prohibiting first-cousin marriages within State). Therefore, even some States

with public policies against the marriage of same-sex couples likely will recognize such a marriage if valid in another jurisdiction.

2. States with anti-miscegenation laws recognized marriages of interracial couples performed in other States.

Some States, notably some in the South, recognized interracial marriages celebrated in other jurisdictions, notwithstanding their own positive law declaring such marriages void -- and in some cases, a crime -- if performed within the State. For example, in *State* v. *Ross*, 76 N.C. 242 (1877), the Supreme Court of North Carolina recognized an interracial marriage celebrated in South Carolina that would not have been valid if celebrated in North Carolina. A white woman, who was a resident of North Carolina, moved to South Carolina, where she married a black man residing there. *Id.* at 243. At that time, North Carolina prohibited interracial marriage, but South Carolina did not. *Id.* Approximately three months later, the couple moved to North Carolina, where they were charged with illegal fornication and adultery. *Id.*

A divided Supreme Court held that the South Carolina marriage was valid and provided a defense to the charges. Although the North Carolina Court made plain that interracial marriages were "revolting to us," it nonetheless recognized the marriage under the general rule that a marriage valid where celebrated

must be treated as valid everywhere because the majority felt bound by "obligations of comity to our sister States." *Id.* at 246-247.[14]

In *Inhabitants of Medway*, this Court held that an interracial marriage "solemnized in Rhode Island, where it was not unlawful," would be recognized in Massachusetts, where such a marriage was unlawful, "even when it appears that the parties went into another state to evade the laws of their own country." 16 Mass. at 159; *but see* M.G.L. c. 207, § 10. And in *Pearson v. Pearson*, 51 Cal. 120, 125 (1875), California recognized the validity of an interracial marriage celebrated in Utah despite a California statute declaring such a marriage a nullity if celebrated within the State. Applying California's statute requiring recognition of a marriage valid in the State

[14] The Court rejected the State's argument that the woman had moved to South Carolina to evade North Carolina's law because the State had not proven that she left North Carolina solely to evade its law. *Ross*, 76 N.C. at 243. By contrast, that same year the North Carolina Supreme Court declined to recognize an interracial marriage celebrated in South Carolina where (unlike in *Ross*) two North Carolina domiciliaries traveled to South Carolina "for the purpose of evading the law of North Carolina which prohibited their marriage." *See State* v. *Kennedy*, 75 N.C. 251 (1877) (finding marriage void because North Carolina's prohibition against interracial marriage "is a personal incapacity which follows the parties wherever they go so long as they remain domiciled in North Carolina"). That the Supreme Court of North Carolina arrived at different results in *Ross* and *Kennedy* (i) illustrates the complexity of conflict of laws analysis; (ii) confirms the ability of each state to undertake for itself the analysis with respect to the validity of marriage celebrated elsewhere; and (iii) exposes the illogic of the Commonwealth's position that Massachusetts could and should prejudge outcomes in the forty-nine other states.

in which it was performed, the Supreme Court of California held that the interracial marriage must be recognized within California. *Id.*

At bottom, the recognition by States of foreign interracial marriages in the face of strong contrary public policies demonstrates that some States will again recognize marriages, such as marriages of same-sex couples, that appear to be contrary to public policy.

3. Many States have validated adulterous, consanguineous, and underage marriages performed in other jurisdictions, notwithstanding forum public policies against those marital relationships.

In many other cases a court has recognized an out-of-state marriage despite a forum statute prohibiting that same marriage within the State. For example, in *Loughran* v. *Loughran*, 292 U.S. 216, 223 (1934), the Supreme Court of the United States, applying the general rule favoring recognition of marriage, held that a Florida marriage of residents of the District of Columbia should be recognized for the purposes of awarding alimony and dower rights, even though the marriage would have been "absolutely void" if performed within the District of Columbia. Notwithstanding allegations that the couple married in Florida to evade the District's prohibition against remarriage following the commission of adultery, the Court held that the District's statute was inapplicable because that

statute did not specifically reference adultery as a disqualification for marriage within the District. *Id.* at 223-224. Therefore, the Court concluded that the District's prohibition "does not invalidate a marriage solemnized in another state in conformity of the laws thereof." *Id.* at 223. Though the District had a statute declaring evasive marriages illegal and void, the Court refused to apply the evasion law to the couple where the District's evasion law did not specifically reference the marital prohibition that disqualified the putative wife from remarriage within the District. *Id.* at 223-24.

Many State courts similarly have validated consanguineous marriages celebrated in other States notwithstanding an apparently strong forum policy to the contrary. In *Etheridge* v. *Shaddock*, 706 S.W.2d 395, 396 (1986), the Supreme Court of Arkansas upheld the validity of a marriage between first cousins, because such marriages do not create "much social alarm," notwithstanding the couple's evasive trip to Texas to get married. Similarly, in *Staley* v. *State*, 89 Neb. 701, 131 N.W. 1028, 1029-1030 (1911), the Supreme Court of Nebraska validated the marriage of first cousins in Iowa, in holding that the husband could be charged with bigamy. *See also In re May's Estate*, 114 N.E.2d at 7 (recognizing as valid, despite contrary statute in New York, marriage in Connecticut

between uncle and niece, because parties' reasonable expectations after 32 years of marriage deserved protection).

Finally, applying the general rule validating an out-of-state marriage, the highest courts in some States also have upheld the out-of-state marriage of two underage residents despite contrary statutory law in the domicile. In *McDonald* v. *McDonald*, 6 Cal. 2d 457, 58 P.2d 163, 164 (1936), the Supreme Court of California upheld the marriage of an underage couple. The Court stated:

> Even though the parties here, resident of and domiciled in California, went to the state of Nevada to be married, and with the avowed purpose of evading our laws relating to marriages, such a motive, if in the minds of the parties, would not change the operation of the well-settled rule that a marriage which is contrary to the policies of the law of one state is yet valid therein if celebrated within and according to the laws of another state.

Id. Along similar lines, the Supreme Court of Arkansas affirmed the validity of a marriage of two underage residents of Arkansas performed in Mississippi, because the policy against underage marriage expressed in an Arkansas statute did not provide a sufficient basis to void entirely the marriage. *See State* v. *Graves*, 307 S.W.2d 545, 549-550 (1957).

4. Some States have recognized civil unions performed in Vermont, notwithstanding prohibitions upon the marriage of same-sex couples.

Although a Vermont civil union lacks an analog in most other states, some courts have recognized a civil union for certain purposes, such as dissolution of the union and the right to bring an action for wrongful death. *In re KJB and JSP*, No. CDCD 119660 (Woodbury County Dist. Ct. Iowa, Nov. 14, 2003), Supreme Court of Iowa *sub nom Alons v. Iowa Dist. Ct. for Woodbury Cty.*, No. 03-1982. (Addendum E), and *In re M. G. and S. G.*, No. 02-D-292 (Fam. Ct. W.Va., Jan. 3, 2003) (Addendum F), the respective family courts of Iowa and West Virginia recognized the parties' civil unions for the limited purpose of entering a judicial decree dissolving the unions. Of course, to dissolve the civil unions each court first had to recognize the validity of the civil unions. Both courts did this, notwithstanding statutory provisions in each State providing that marriages by same-sex couples would not be recognized for any purpose.[15]

[15] *See* W. Va. Code Ann. § 43-2-603 (stating that a "public act" or "record" from any other state "respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state.... or a right or claim arising from such a relationship, shall not be given effect by this state"); Iowa Code Ann. §§ 595.2(1) ("Only a marriage between a male and a female is valid.") and 595.20 (recognizing legal marriage from another jurisdiction only "if the parties meet the requirements for validity pursuant to 595.2, subsection 1").

Other States such as Connecticut and Texas, have taken the opposite approach. In *Rosengarten* v. *Downes*, 802 A.2d 170 (Conn. Ct. App. 2002) (Addendum G), and *In re R.S. and J.A.*, No. F-185063 (Dist. Ct. Jefferson County, Tex., Mar. 3, 2003) (Addendum H), the courts refused to recognize the parties' civil unions even for the limited purpose of dissolving the unions. Although Texas has a statute prohibiting same-sex marriage in the State, *see* Tex. Fam. Code § 6.204, Connecticut lacked such a statute. *See Rosengarten*, 802 A.2d at 182 (noting that state policies prohibiting discrimination based upon sexual orientation and permitting second parent adoptions by nonbiological parents in same-sex relationship would not alter its decision).

The courts in still other States are split with respect to whether a person in a Vermont civil union could be treated as a "spouse" under state law for the purposes of a custody dispute and a wrongful death action. In *Burns* v. *Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002), the Georgia Court of Appeals refused to treat a mother's same-sex partner as her marital partner after the couple entered into a Vermont civil union. The court therefore found the mother in violation of an earlier custody decree that prohibited "overnight stays with any adult to which such party is not legally married." *Id.* at 48-49. Georgia's statute prohibiting

marriage of same-sex couples within the State, *see* Ga. Code Ann. § 19-3-3.1(a), and its statute declaring that a marriage license issued to a same-sex couple by another State "shall be void in this state," Ga. Code Ann. § 19-3-3.1(b), persuaded the court that Georgia would not recognize a Vermont civil union.

By contrast, the Supreme Court of Nassau County in the State of New York held in *Langan* that a surviving civil union partner should be treated as the deceased partner's spouse, based upon the parties' Vermont civil union, for the purposes of bringing a wrongful death suit. *Id.* at 422. Relying upon the general rule that a marriage that was valid where celebrated is valid everywhere, the court concluded from the public policies expressed in various New York statutes and case law that "New York's public policy does not preclude recognition of a same-sex union entered into in a sister state." *Id.* at 416. Because the public policy of New York did not preclude recognition of the civil union, and because there was no statutory prohibition of marriages of same-sex couples, the court held that the legislative purpose behind New York's wrongful death statute was to compensate Langan as "[t]he person most likely to have expected support and to have suffered pecuniary injury." *Id.* at 419.

The split among the States concerning the recognition of civil unions foretells the likely result

should Massachusetts permit same-sex couples domiciled in other States to marry in the Commonwealth. The already-existing conflict of laws principles empower the courts of each State to make their own decisions - by applying their own law, and continuing their own public policies - regarding whether, in a specific case, to recognize the marriage of a same-sex couple celebrated in Massachusetts.

D. Even If Some States Would Not Recognize A Foreign Marriage Of A Same-Sex Couple As Valid For All Intents and Purposes, Many States Will Recognize A Marriage As Valid For Particular Incidents Of Marital Rights And Obligations.

Although some married same-sex couples may seek universal recognition of their ongoing relationship, other couples may seek recognition only of a limited aspect of their relationship. A State may be unwilling to recognize the marriage of a same-sex couple for all purposes, but the State may be willing to recognize the marriage for the purposes of a particular "incident of marriage" -- a benefit, right, or obligation of a spouse -- without recognizing the validity of the marriage entirely. As the Supreme Court of Tennessee stated, "It will not do to say that every provision of a statute prohibiting marriage, under certain circumstances, or between certain parties, is indicative of a state policy in the sense in which it is used in this connection." *Penneger*, 10 S.W. at 309.

More recently, courts "have begun to recognize that the enjoyment of different incidents of marriage involves different policies. Consequently, a uniform reference to a single statute to resolve all choice-of-law questions involving marriage cannot be expected." Eugene F. Scoles, Peter Hay, Patrick J. Borchers, & Symeon C. Symeonides, *Conflict of Laws* § 13.2, at 545-546 (3d ed. 2002). Therefore, a court in the State of the couple's domicile may -- and perhaps will -- hold that marriage to be valid for some of the many incidents of marriage, if not all, even where the marriage of a same-sex couple is void within the forum.

For example, southern States' anti-miscegenation policies were no less strong than modern public policies against marriage of same-sex couples, yet those States did not make "a blunderbuss" of their own public policy in determining whether an interracial marriage could be recognized for certain incidents of marriage.[16] Koppelman, *The Miscegenation Precedents*, 16 Quinnipiac L. Rev. at 108. Instead, courts in those States weighed the interests of the parties in their marriage and in the particular legal protection sought with regard to the marriage, as well as the

[16] Many of these restrictions were stronger than those leveled against the marriage of same-sex couples, because they attached criminal penalties to a prohibited marriage, including felony status and prison sentences. *See* Koppelman, *The Miscegenation Precedents*, 16 Quinnipiac L. Rev. at 109. No State has taken the step of criminalizing marriages of same-sex couples.

countervailing policies of the forum expressed by the prohibitions contained in its laws. *Id.* at 106.

In cases involving both interracial marriage and polygamous marriage, courts have granted a particular incident (benefit) of the marital relationship to the spouse(s), even where the forum State might have refused recognition of the marriage upon a universal basis. In *Miller* v. *Lucks*, 36 So. 2d 140, 142 (Miss. 1948), the Supreme Court of Mississippi recognized an interracial couple's out-of-state marriage for the purposes of intestate succession, even though the Constitution and the statutes of Mississippi prohibited interracial marriage within State. The court concluded that the purpose of Mississippi's anti-miscegenation laws was only "to prevent persons of Negro and white blood from living together in this state in the relationship of husband and wife." *Id.* However, because one spouse had died, the court held that Mississippi's public policy would not prevent recognition of the marriage for that limited incident, *i.e.* the surviving spouse's right to intestate succession. *See id.*

Similarly, *In re Dalip Singh Bir's Estate*, 188 P.2d 499, 502 (Cal. App. 1948), a California appellate court held that California's "public policy" against polygamous marriage did not prohibit two wives (both residing overseas), from inheriting equal shares of

their husband's estate under California probate law. The court found that California's public policy "would apply only if decedent had attempted to cohabit with his two wives in California." *Id.*

Finally, *In re Lenherr's Estate*, the Supreme Court of Pennsylvania held that Pennsylvania's public policy against marriages resulting from adulterous affair, did not prohibit a widow of such a marriage from enjoying the limited incident of the marital exemption to the transfer inheritance tax, even though the married couple had evaded Pennsylvania law to marry in West Virginia. 314 A.2d at 259. The court noted that the purpose of the restriction against remarriage of those who commit adultery is not to punish adultery, but to protect the sensibilities of the former spouse hurt by the adultery. *See id.; see also Penneger*, 10 S.W. at 309. Applying the Second Restatement framework, the court concluded that, however significant Pennsylvania's policy might be significant in cases of ongoing cohabitation, "denying the marital exemption would be all but fruitless" in achieving that policy in a case where the surviving spouse would no longer be cohabiting with her husband. *Id.* Therefore, there was no reason to apply Pennsylvania's law to deny the spouse the tax exemption.

Furthermore, some courts addressing legal issues concerning Vermont civil unions entered into by same-

sex couples domiciled outside Vermont have applied this same incident of marriage analysis. *In re KJB and JSP*, No. CDCD 119660 (Woodbury County Dist. Ct, Iowa Nov. 14, 2003), Supreme Court of Iowa *sub nom Alons v. Iowa Dist. Ct. for Woodbury Cty.*, No. 03-1982, and *In re M. G. and S. G.*, No. 02-D-292 (Fam. Ct. W.Va. Jan. 3, 2003), the Iowa and West Virginia family courts recognized the civil unions for the limited purpose of dissolving them. And in *Langan*, the court held that a surviving partner of a Vermont civil union should be treated as a "spouse" for purposes of Langan's wrongful death suit under New York law. 765 N.Y.S. 2d at 422. Because New York's public policy did not preclude recognition, *see id.* at 416, and because no anti-marriage statute existed that prevented such recognition, the court held that the legislative purpose behind New York's wrongful death statute was to compensate Langan as "[t]he person most likely to have expected support and to have suffered pecuniary injury." *Id.* at 419.

* * *

In sum, there is good cause to expect that other States will recognize a marriage celebrated in Massachusetts, or some incident of that marriage. In any event, the Commonwealth certainly cannot demonstrate *ex ante* that no such marriages will be recognized. The Commonwealth cannot know in advance

what issue(s) may be most important to the same-sex couple, such that that they will find it necessary to litigate their marital rights and obligations in court. As in *Langan*, a question about a spouse's marital status may not arise until after his same-sex spouse has died; in such a case the only legal issue would be whether to recognize the surviving spouse for the purposes of estate and tort law and it would be irrelevant whether a State would recognize his marriage for any other purposes. Similarly, many other cases will also arise where the incident of marriage at issue is one that the court can grant to the married couple, because to do so will promote that State's interests in both protecting the expectations of its citizens and providing specific rights to couples who have made legal commitments to each other, but would not undermine the policies expressed in its anti-marriage statutes.

CONCLUSION

For the foregoing reasons, this Court should reject the Commonwealth's arguments that §§ 11 and 12 of M.G.L. c. 207 somehow are necessary to protect the ability of other States to decide their own policies with respect to marriage for same-sex couples. Each of the other states already has its own conflict of laws principles that it can apply itself, and a unique context of its own public policy, when called upon to

determine the validity of a marriage in a given case. Thus, the Commonwealth's demand to know the identity of the "approving state" at the time of marriage is unreasonable and unnecessary. Almost two hundred years of experience in the application of traditional principles of the conflict of laws to other relationships once considered an affront to public policy demonstrates that there will be many "approving states" to enforce the rights and obligations of same-sex couples married in Massachusetts.

Respectfully submitted,

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Date: March 11, 2005

CERTIFICATE OF SERVICE

I, Maura T. Healey, hereby certify pursuant to Massachusetts Rule of Appellate Procedure 13(d) that on this 11th day of March, 2005, I served the within document by causing two copies thereof to be mailed, by first-class mail, postage prepaid, to:

Mary Bonauto, Esq., counsel to plaintiff-appellants Sandra and Roberta Cote-Whitacre, Amy Zimmerman and Tanya Wexler, Mark Pearsall and Paul Trubey, Katrina and Kristin Grossman, Judith and Lee McNeil-Beckwith, Wendy Becker and Mary Norton, Michael Thorne and James Theberge, and Edward Butler and Leslie Schoof, at Gay & Lesbian Advocates & Defenders, 30 Winter Street, Suite 800, Boston, MA 02108-4608;

Kevin Batt, Esq., counsel to the Clerk of the City of Somerville, the Clerk of the City of Worcester, the Clerk of the Town of Acton, the Clerk of the Town of Burlington, the Clerk of the City of Cambridge, the Clerk of the Town of Nantucket, the Clerk of the City of Northampton, the Clerk of the Town of Plymouth, the Clerk of the Town of Sherborn, the Town of Westford, the Clerk of the Town of Revere, and the Clerk of the Town of Marblehead, at Palmer & Dodge LLP, 111 Huntington Avenue, Boston, MA 02199-7613;

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Peter Sacks, Esq., Assistant Attorney General of the Commonwealth of Massachusetts, the Department of Public Health, Christine C. Ferguson, in her official capacity as Commissioner of the Department of Public Health, the Registry of Vital Records and Statistics, and Stanley Nyberg, in his official capacity as the Registrar of Vital Records and Statistics, at Attorney General's Office, One Ashburton Place, Room 2019, Boston, MA 02108-1698

Signed under the pains and penalties of perjury.

Maura T. Healey

ADDENDUM A

Description of Amici

Ian Ayres

Ian Ayres is The William K. Townsend Professor of Law at Yale Law School, where he teaches a variety of courses including Civil Rights, Contracts, and Law and Economics. A former Research Fellow of the American Bar Foundation, Professor Ayres held previous teaching appointments as Professor, Stanford University, as Assistant Professor of Law at Northwestern University, as Visiting Professor at the University of Virginia, University of Illinois, and Yale, and as Lecturer at the Moscow State Institute of International Relations. Professor Ayres has authored numerous articles and books including *Pervasive Prejudice?: Non-Traditional Evidence of Race and Gender Discrimination* (2002), *Studies in Contract Law* (1997), and *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, (Harvard Law Review, 1991). A former Law Clerk to Judge James Logan of the U.S. Court of Appeals for the Tenth Circuit, Professor Ayres received his Ph.D. from M.I.T., his J.D. from Yale Law School, and his B.A. from Yale University.

Katharine K. Baker

Katharine K. Baker is Professor of Law and Associate Dean at Chicago-Kent College of Law, where she teaches courses in Family Law, Property, Feminism, and Evidence. She has also been a visiting professor at Yale Law School and the University of Pennsylvania Law School. A former Law Clerk for Judge Edward Becker of the Third Circuit Court of Appeals and former Trial Attorney for the Environmental Enforcement Section of the United States Department of Justice, Professor Baker's legal scholarship has focused on gender issues in the family, natural resource valuation, and the intersection of formal contract law concepts and principles with family law and marriage issues. She has authored numerous law review articles and books including *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection* (Ohio St.L.J. 1999), *Biology for Feminists* (Chi-Kent L.Rev. 2000), and *Power, Gender and Juggling the Work/Family Conflict* (1999). Professor Baker received her J.D. with honors from the University of

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Carlos A. Ball

Carlos A. Ball is Professor of Law at The Dickinson School of Law, Penn State University, and author of the book The Morality of Gay Rights: An Exploration in Political Philosophy (2003), which assesses the connection between gay rights and broader questions of law and morality. Previously he was a Professor of Law at the University of Illinois College of Law, a Trial Attorney with the New York Legal Aid Society, and Special Counsel for HIV and Tuberculosis Policy for the New York City Department of Health. Professor Ball is the author of numerous law review articles in the areas of gay rights and disability law, including "This is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist Perspective," *Harvard Women's Law Journal*, 2005 (forthcoming), and "The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of *Lawrence v. Texas*" (*Minnesota Law Review*, 2004). Professor Ball received his L.L.M. from Cambridge University, his J.D. from Columbia University, and his B.A. from Tufts University.

Elizabeth Bartholet

Elizabeth Bartholet is The Morris Wasserstein Public Interest Professor of Law and Faculty Director of the Child Advocacy Program at Harvard Law School, where she teaches Civil Rights and Family Law. She is the recipient of numerous honors and awards including the 1999 Sullivan Lecture at Capital University Law School, the 1998 Award for Advocacy on Behalf of Foster Children from the Massachusetts Appleseed Center, the Radcliffe College Humane Recognition Award (1997) and the Media Achievement Award from the Catholic Adoptive Parents Association, 1994. Professor Bartholet has authored numerous books and journal articles, including *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative* (1999) and *Beyond Biology: The Politics of Adoption & Reproduction* (Duke J. Gender L. & Pol'y, 1995). A former Director and President of the Legal Action Center of New York, and Counsel for New York's Vera Institute of Justice, Professor Bartholet also worked as a Staff Attorney for the NAACP

Legal Defense and Educational Fund and as Staff Counsel to the President's Commission on Law Enforcement and Administration of Justice. She received her J.D. *magna cum laude* from Harvard Law School and her B.A., *cum laude*, from Radcliffe College.

Brian Bix

Brian Bix is The Frederick W. Thomas Professor of Law and Philosophy at University of Minnesota, where he teaches in the areas of Family Law, Contract Law, and Jurisprudence, and holds a joint appointment at the Law School and the Philosophy Department. He has authored many scholarly publications, including (with Ira Ellman, Paul Kurtz, Elizabeth Scott & Lois Weithorn) *Family Law: Cases, Text, Problems* (4th ed., 2004), *A Dictionary of Legal Theory* (2004); *Jurisprudence: Theory and Context* (3rd ed., 2003), *State Interests in Marriage, Interstate Recognition, and Choice of Law* (Creighton Law Rev., forthcoming, 2005), *The Public and Private Ordering of Marriage* (University of Chicago Legal Forum, 2004), *State Interest and Marriage - The Theoretical Perspective* (Hofstra Law Rev. 2003), *Choice of Law and Marriage: A Proposal* (Family Law Quarterly 2002), and *Reflections on the Nature of Marriage* (in *Revitalizing the Institution of Marriage for the 21st Century*, 2002). Professor Bix served as Law Clerk to Justice Benjamin Kaplan at the Massachusetts Appeals Court, to Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals, and to Justice Alan Handler of the New Jersey Supreme Court. He received his D.Phil. from Balliol College, Oxford University, his J.D. from Harvard Law School, and his B.A. from Washington University.

Jennifer Gerarda Brown

Jennifer Gerarda Brown is Director of the Center on Dispute Resolution at Quinnipiac University School of Law, where she has taught courses on Alternative Dispute Resolution, Lawyers' Professional Responsibility, and Civil Procedure. Her scholarship, focusing on these issues and on their intersection with gay and lesbian legal issues, includes journal articles on judicial bias on the basis of sexual orientation and on exploring the applicability of consensus building to debates about equal marriage rights for same-sex couples. She has authored numerous articles and book chapters including "The Inclusive Command: Voluntary Integration of Sexual Minorities into the United States

Military" (*Michigan Law Rev., 2004, with Ian Ayres)* and "Debate and Decision-Making About Marriage Rights in Connecticut: Envisioning a Third Way" (Quinn. Law Rv. 2004). She is co-author with Ian Ayres of the forthcoming book *Straightforward: Mobilizing Heterosexual Support for Gay Rights* (Princeton U. Press 2005). Professor Brown received her J.D. from the University of Illinois, and her B.A. from Bryn Mawr College.

Naomi R. Cahn

Naomi R. Cahn is Professor of Law at The George Washington University Law School and co-author of the book *Families By Law: An Adoption Reader* (2004). Professor Cahn was formerly a Visiting Professor of Law at Georgetown University Law Center and Assistant Director of its Sex Discrimination Clinic. A former Staff Attorney with Philadelphia's Community Legal Services, Professor Cahn is also the author of numerous law review articles in the areas of family law, adoption, employment discrimination, domestic and international women's rights, and children's rights, including "Children's Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (and Whom) Do I Come From? (Georgetown Journal of Gender and Law, 2000). Professor Cahn received her L.L.M. from Georgetown University, her J.D. from Columbia University, and her B.A. from Princeton University.

Barbara J. Cox

Barbara J. Cox is Professor of Law and the former Associate Dean for Academic Affairs at California Western School of Law. A national authority on sexual orientation and the law, and women and the law, Professor Cox served as a Commissioner on the Madison Equal Opportunities Commission in Wisconsin where she helped draft one of the earliest domestic partnership ordinances in the country. She is the author of numerous law review articles on interstate recognition of marriage and civil unions of same-sex couples, including "Interjurisdictional Recognition of Same-Sex Unions: Full Faith and Credit and Choice-of-Law Issues", in *Anthology on Marriage and Same-Sex Unions* (2002),and "But Why Not Marriage: Some Thoughts on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal" (Vermont Law Rev. 2000). Professor Cox is a

past Chair of the Association of American Law Schools (AALS) Section on Women and the Law, past Chair of the AALS Section on Gay and Lesbian Issues, and former Deputy Director for the AALS. A former Law Clerk for Judge Charles Dykman of the Wisconsin Court of Appeals, Professor Cox received her J.D. *cum laude* from the University of Wisconsin and her B.A. *cum laude* from Michigan State University.

Dan Danielsen

Dan Danielsen is a Professor of Law at Northeastern University School of Law. He is an experienced lawyer and scholar with dual interests in legal academia and the world of legal practice. He teaches Conflict of Laws, International Business Regulation, International Law, Corporations, and Law and Economic Development. Prior to joining the Faculty, Professor Danielsen was Executive Vice President and General Counsel of Europe Online Networks S.A., a pioneer in the provision of broadband Internet and interactive multimedia services to consumers across Europe. Previously, Professor Danielsen was a partner at Foley, Hoag & Eliot LLP in Boston where his practice focused on the representation of US and European public and privately held business with respect to corporate finance, mergers and acquisitions, strategic partnerships and joint ventures, content and technology licensing and corporate strategy. Throughout his time in legal practice, Professor Danielsen regularly taught as an Adjunct Professor at Northeastern University School of Law, where, in addition to his current course offerings, he taught Torts and Modern Legal Theory. He also taught a course entitled "Law, Sex and Identity" for two years at Harvard Law School. Professor Danielsen is the coauthor of a book entitled *After Identity: A Reader in Law and Culture* (Routledge Press, 1994) and has written a number of law review articles.

Chai R. Feldblum

Chai R. Feldblum is Professor of Law and Founder & Director of the Federal Legislation Clinic at Georgetown University Law Center, where she teaches courses in Legislation, Administrative Law, and a Legal Seminar on Sexuality, Gender, and the Law. As a former lawyer for the ACLU AIDS

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Joan Heifetz Hollinger

Joan H. Hollinger is Lecturer in Residence at Boalt Hall School of Law, University of California, Berkeley. A

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Herma Hill Kay

Herma Hill Kay is The Barbara Nachtrieb Armstrong Professor of Law at Boalt Hall School of Law, University of California, Berkeley, and former Dean of Boalt Hall. A past recipient of the UC Berkeley Distinguished Teaching Award, Professor Kay was named in 1998 by the *National Law Journal* as one of the 50 most influential female lawyers in the country. She has served as President of the Association of American Law Schools, Secretary of the American Bar Association Section on Legal Education and Admissions to the Bar. Professor Kay has been a Fellow at the Center for Advanced Study in Behavioral Sciences and a Visiting Professor at Harvard University, Lewis & Clark University, and Hamline University, and served on the faculty of the Salzburg Seminar on American Law in 1987. She has been the recipient of many major awards including the Society of American Law Teachers Teaching Award, the 1990 American Bar Foundation Research Award, and the 1992 Margaret Brent Award to Women Lawyers of Distinction from the ABA Commission on Women in the Profession. In 2000 she was elected to membership in the American Philosophical Society. Professor Kay is a past or present member of 12 different governing or advisory boards, including the Russell Sage Foundation, Equal Rights Advocates, Inc.,

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Charles P. Kindregan, Jr.

Charles P. Kindregan, Jr. is Professor of Law and former Associate Dean at Suffolk University Law School, where he teaches courses in a variety of subjects including Domestic Relations, Equity, Family Law, and Professional Responsibility. He is co-author or author of numerous books and law review articles, including the forthcoming chapter *Same-Gender Marriage* (*Family Law Update*, 2005) and *Same Sex Marriage and Divorce Subject Matter Jurisdiction* (*Divorce Litig. J.* 2004 with Monroe Inker) and *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 Family Law Quarterly 427 (2004). A former Instructor at Virginia Military Institute, Professor Kindregan has been a featured Speaker at numerous legal conferences including the National Continuing Legal Education Conference (2001), and the Conference of the American Bar Association Family Law Section on Ethics and Negotiations (1997). Professor Kindregan has served on numerous legal boards and associations including service as Co-reporter for the Association of Family and Conciliation Courts Conference on Family Violence (1996), Member, Massachusetts Bar Association Task Force on the Model Rules of Professional Conduct, and Co-chair, Committee on the Probate & Family Court, Massachusetts Bar Association (1994-1997), Co-chair, ABA Committee on Law and Family Planning (1973-1974), Member of the Advisory Board of Editors, ABA Family Law Quarterly, and the Committee on Legal Education, MA Supreme Judicial Court (1979-1982). He is currently Vice-Chair of the ABA Committee on Reproductive Technology and Genetics. Professor Kindregan received his L.L.M. from Northwestern University, his J.D. from Chicago-Kent College of Law of the Illinois Institute of Technology, and his M.A. and B.A. from LaSalle University.

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Sylvia A. Law is The Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry, and Co-Director of the Arthur Garfield Hays Civil Liberties Program at New York University School of Law, where she teaches courses in Constitutional Law, Family Law, and Health Law. One of the nation's leading scholars in the fields of health law, women's rights, poverty, and constitutional law, she has been active in and served as a past President of the Society of American Law Teachers, and was selected as their Law Teacher of the Year in 2001. In 1984, Professor Law became the first lawyer in the United States selected as a MacArthur Prize Fellow. She is the author of numerous law review articles including *Homosexuality and the Social Meaning of Gender* (1988 *Wisc. L. Rev.*) and *Rethinking Sex and the Constitution* (1984 U. of Pa. L. Rev.), and has testified before Congress and state legislatures on a range of issues. Professor Law received her J.D. from New York University School of Law, and her B.A. from Antioch College.

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Linda C. McClain is the Rivkin Radler Distinguished Professor of Law at Hofstra University School of Law, where she teaches courses in Property, Child, Family and State, Feminist Legal Theory, Jurisprudence, Law and the Welfare State, and Sex-Based Discrimination. Professor McClain is a former Faculty Fellow in Ethics at the Harvard University Center for Ethics and the Professions, and has been a Visiting Professor of Law at Harvard Law School and at the University of Virginia Law School. Professor McClain is the author of *The Place of Families* (Harvard University Press, forthcoming 2005) and has authored many scholarly articles. She was awarded Hofstra University's Stessin Prize for Outstanding Scholarship for her article "'Irresponsible' Reproduction" (Hasting Law Journal 1996). Professor McClain has served on the Committee on Women in the Profession at the Association of the Bar of the city of New York. She currently serves on the Advisory Board for the Ford Foundation-funded project "Feminist Sexual Ethics: Creating Debate on How to Respect the Full Human Dignity of All Persons". Professor McClain received her L.L.M. from New York University, her J.D. from Georgetown University, her A.M. from the University of Chicago, and her A.B. from Oberlin College.

Mary E. O'Connell

Mary E. O'Connell is Professor of Law at Northeastern University School of Law, where she teaches courses in the fields of Family Law, Children's Law, and Property, and serves on the Editorial Board of the interdisciplinary journal *Family Court Review*. She has authored numerous law review articles including "On The Fringe: Rethinking the Link Between Wages and Benefits" (Tulane Law Review 1993) and *The Rugged Feminism of Sandra Day* O'Connor (Co-author, Indiana Law Rev. 1999). Professor O'Connell teaches regularly in the Postdoctoral Forensics Program at the University of Massachusetts Medical School, and teaches an annual seminar to the Judges of the Massachusetts Probate and Family Court. She also serves as an Advisor to the Court's Steering Committee on Administrative Reform. A former Law Clerk to the Supreme Judicial Court of the State of Maine, Professor O'Connell received her J.D. from Northeastern University School of Law and her A.B. from Brandeis University.

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Kermit Roosevelt is Assistant Professor of Law at the University of Pennsylvania Law School, where he teaches courses in Conflict of Laws and Constitutional Law. A former Law Clerk to U.S. Supreme Court Justice David Souter and Member of the Human Rights Advisory Board of the Kennedy School of Government, Harvard University, Professor Roosevelt has written numerous books and law review articles including the forthcoming *Guantanamo and the Conflict of Laws: Rasul and Beyond* (U. Pa. L. Rev., 2005) and *The Myth of Choice of Law: Rethinking Conflicts* (Mich. L. Rev. 1999). Professor Roosevelt received his J.D. from Yale Law School and his A.B., *summa cum laude*, from Harvard University.

Katharine Silbaugh

Katharine Silbaugh is Professor of Law and Associate Dean for Academic Affairs at Boston University School of Law, where she teaches courses on Family Law, Women and the Law, and Torts, and serves as Advisor to the Law School's *Public Interest Law Journal*. A former Law Clerk to Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, Professor Silbaugh collaborated with Judge Posner on *A Guide to America's Sex Laws*, a reference guide to sexual regulation in the United States. The author of numerous journal articles including *After Goodridge: Will Civil Unions Do? (Jurist, 2004)*, Professor Silbaugh has produced pioneering work in the emerging legal literature on the work-family conflict. She received her J.D. with high honors and Order of the Coif from the University of Chicago Law School, and her B.A. *magna cum laude* from Amherst College.

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Mark P. Strasser is Trustees Professor of Law at Capital University Law School where he teaches courses in Constitutional Law, Family Law, Sexual Diversity and the Law, and Bioethics. He is the author of numerous journal articles and books including *On Same-Sex Marriages, Civil Unions, and the Rule of Law: Constitutional Interpretation at the Crossroads* (2002) and *Marriage and Same-Sex Unions: A Debate* (co-editor, 2003). A former Professor of

Philosophy with teaching appointments at Illinois State University, University of Texas at Arlington, and Washington University in St. Louis, Professor Strasser also was the Visiting Tyler Haynes Chair Professor of Law at the University of Richmond School of Law and a Visiting Professor of Law at the University of Maryland School of Law. A frequent speaker and presenter at national and international conferences, he also spoke before the Vermont House Judiciary Committee on the interstate implications of Vermont recognizing same-sex marriages or domestic partners. Professor Strasser received his J.D. from Stanford University, his Ph.D. and M.A. from the University of Chicago, and his B.A. from Harvard College.

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Dominick Vetri is The B.A. Kliks Professor of Law at the University of Oregon School of Law, where he teaches courses in Gay & Lesbian Legal Issues, and Torts. A specialist in the topics of Torts, Product Liability, Rights of Privacy, and Gay and Lesbian Civil Rights, he has authored articles many journal articles, and also co-authored and published the second edition of the casebook *Tort Law and Practice* in 2002. Professor Vetri created the school's original Moot Court Program and developed the school's Civil Law Clinic in conjunction with Lane County Legal Services. He is a recipient of the University's prestigious Burlington Northern Award, the School's Orlando John Hollis Faculty Teaching Award, and the Charles E. Johnson Memorial Award for exceptional contribution to the university and the community. Professor Vetri held a Trial Court Clerkship with Chief Judge Harold Kolovsky of the New Jersey Superior Court, and was a Scholar in Residence at the Universities of Florence and Geneva. He is a member of the American Law Institute and serves as Consultative Group Member for the Restatement of Torts, Third, He received his L.L.B. from the University of Pennsylvania School of Law where he was elected to the Order of the Coif, and his B.S. from New Jersey Institute of Technology.

James D. Wilets

James D. Wilets is Professor of Law and Chair of the Inter-American Center for Human Rights at Nova Southeastern University, Shepard Broad Law Center, where his teaching

includes courses in Human Rights, International Business and Comparative Law. He has worked as an attorney for the International Human Rights Law Group in Romania, as a representative of the National Democratic Institution on human rights mission to Liberia in conjunction with the Carter Center, and assisted with the drafting of a proposed Basic Law for a future Palestinian state. He prepared, at the request of the UN Secretary-General, the first two drafts of a proposal for reforming the human rights functions of the United Nations. Professor Wilets writes extensively on international and comparative law with a particular focus on Human Rights, and recently completed two chapters in the book *The Marriage and Same-Sex Unions Debate: An Anthology*, and a chapter on War Crimes Tribunals for the *Encyclopedia of Forensic and Legal Medicine*. He received his M.A. from Yale University, his J.D. from Columbia University School of Law (where he was a Harlan Fiske Stone Scholar), and his B.A. from the University of Washington.

Jennifer Wriggins

Jennifer Wriggins is Professor of Law and the Glassman Faculty Research Scholar at the University of Maine School of Law, where she specializes in Family Law, Torts and Jurisprudence. She is currently a visiting professor at Harvard Law School and Boston University School of Law. A former Law Clerk to U.S. District Court Judge Edward T. Gignoux, Professor Wriggins received her J.D. from Harvard University and her A.B. from Yale University. A former Assistant Attorney General of the Civil Rights Division of the Massachusetts Attorney General's Office, she litigated many civil rights cases and co-authored a Supreme Court amicus brief in the case of UAW v. Johnson Controls. She served on the Board of Cambridge-Somerville Legal Services, the Boards of the Maine Civil Liberties Union and the Massachusetts Civil Liberties Union, and serves currently on the Board of Pine Tree Legal Assistance. Professor Wriggins is the author of many scholarly articles including "Marriage Law and Family Law: Autonomy, Interdependence and Couples of the Same Gender" (Boston College Law Review 2000).

ADDENDUM B

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August 2, 2004

Honorable Gary J. DeFilippo
Commissioner
Department of Motor Vehicles
Rowland Government Center, 55 West Main Street
Waterbury, CT 06702-5501

Dear Commissioner DeFilippo:

I have been asked whether same sex couples, who have been married legally in Massachusetts pursuant to Massachusetts law, may use the marriage license or certificate issued by Massachusetts as evidence of identity to support a change of name on their Connecticut drivers' licenses and auto registrations. Based on statutes, your agency's regulations, and the purpose underlying the proof of identity requirement, I believe that Connecticut law would permit such documentary evidence for this purpose.

Applicants for drivers' licenses and motor vehicle registrations are required to provide proof of identity. Conn. Agency Reg. § 14-137-63 provides:

> (a) No motor vehicle or motorcycle operator's license shall be issued to an applicant without presentation of documents furnishing satisfactory evidence of the identity of such applicant, and the date of birth of such applicant, as more specifically provided in this regulation.
>
> (b) Except as otherwise provided in subsection (c), the commissioner shall presume that the name of the applicant as shown on the applicant's birth certificate, or other primary document submitted as evidence of the applicant's identity, is the legal name of the applicant, and the commissioner shall not place any other name on a motor vehicle operator's license unless the applicant presents an order of the superior court, or other court of competent jurisdiction, pertaining to a change of the applicant's name.
>
> (c) Notwithstanding the provisions of subsection (b), the commissioner shall accept an original or certified copy of a

marriage license or divorce decree for the purpose of establishing the applicant's legal name to be placed on an operator's license issued to the applicant.

Under the terms of this regulation, the purpose of the requirement for documentation to permit a name change on a license is to establish the identity of the person requesting the change. In other words, the Department of Motor Vehicles (DMV) seeks to ensure that the person requesting the name change is in fact who he or she claims to be, and is not seeking a change in name on the document for an illegitimate purpose. Since a driver's license is the primary method of identification for many purposes, and identity theft is a growing problem, such caution is reasonable and prudent.

An original or certified copy of an official marriage license or certificate of marriage valid in the state of issuance provides evidence of identity sufficient to satisfy the purpose of the regulation. Acceptance of such a document for this purpose does not require a determination of whether the underlying marriage would be recognized as valid in this state. Since the document is being provided simply as evidence of identity, its validity in the state of issue is sufficient to fulfill the purpose of the requirement.

For the same reasons, an original or certified copy of an official marriage license or certificate of marriage valid in the state of issuance should equally satisfy the requirement of proof of identity for a change of name on a motor vehicle registration.

I understand that your office is currently reviewing this regulation and others to determine whether any changes are warranted. We are available to assist you in this review. If you would like to discuss this further, please feel free to contact me.

Very truly yours,

RICHARD BLUMENTHAL

ADDENDUM C

C.P.L.R. § 4502; CIVIL RIGHTS LAW § 40-c(2); DOMESTIC RELATIONS LAW ART. 2, 3, 9, 10-12, §§ 3, 6, 7, 8, 10, 11, 11-a, 12, 13, 14, 15, 15-a, 16, 17, 23, 33, 35, 140, 170, 200, 221, 236, 248; EDUCATION LAW § 313; ESTATES, POWERS & TRUSTS LAW, §§ 4-4.1, 5-1.1; EXECUTIVE LAW § 296; INSURANCE LAW §§ 240.30, 485.05, 2701; PENAL LAW ART. 210, §§ 240.30, 255.00, 485.05; 9 N.Y.C.R.R. § 2204.6; 18 N.Y.C.R.R. § 421.16; L. 1907, CH. 742; L. 1896, CH. 272; ALASKA CONSTITUTION ART. I, § 25; VERMONT STAT. ANN. TIT. 15 §§ 1201 et seq.

The language of the New York State Domestic Relations Law indicates that the Legislature did not intend to authorize same-sex marriages.

March 3, 2004

Informal Opinion
No. 2004-1

Darrin B. Derosia
Corporation Counsel
City of Cohoes
City Hall
97 Mohawk Street
Cohoes, New York 12047-2897

Peter Case Graham
Town Attorney
Town of Olive
479 Washington Avenue
Kingston, New York 12401

Dear Mr. Derosia and Mr. Graham:

You each have written to our office regarding the issue of same-sex marriages. In particular, the Town of Olive has asked whether the Town Clerk may "issue a marriage license to two persons who claim to be of the same sex." The City of Cohoes has asked whether "there [are] any circumstances under which same sex marriage would be valid in New York State, and if so, what are those circumstances?" During the past several weeks, our office has also received related inquiries from other elected officials.

In view of the significant public interest in this matter, we have expedited our review and are issuing this opinion to address certain legal questions regarding the scope and meaning of the New York Domestic Relations Law ("DRL"). The Attorney General's Office traditionally does not issue opinions on the constitutionality of state laws, and we do not today opine on whether the federal or state constitutions require the State to

permit same-sex marriage. New York courts have not yet ruled on this issue, and they are the proper forum for resolution of this matter. However, because these constitutional concerns are integral to the questions you raise, we outline them here to assist you in advising the local officials you represent.

A. Overview of the Domestic Relations Law

The Domestic Relations Law provides the statutory framework for marriage, including identifying those marriages deemed void and voidable (Article 2); setting forth the requirements for solemnization, issuance of marriage licenses, and proof of eligibility for marriage (Article 3); and providing for annulment and voidability of marriages (Article 9), and for divorce, separation, and dissolution on grounds of absence (Articles 10-12).

1. Formal Requirements for Marriage

a. Qualifications for Marriage

The DRL sets forth only two qualifications for marriage: (1) a minimum age requirement, see DRL § 15-a; and (2) "the consent of parties capable in law of making a contract," id. § 10.

Article 2 defines those relationships that constitute "void" or "voidable" marriages. Specifically, incestuous and bigamous marriages are void. See id. §§ 5, 6. That is, such unions are void from their inception, and no judgment or other judicial action is required to make it so. See McCullen v. McCullen, 162 A.D. 599, 601 (1st Dep't 1914). Certain other marriages are "voidable," i.e., void only if so "declared by a court of competent jurisdiction." DRL § 7. Voidable marriages include those in which either party is under eighteen years old, see id. § 7(1); cannot consent to the marriage "for want of understanding," id. § 7(2); cannot enter "into the married state from physical cause," id. § 7(3); consents to the marriage "by reason of force, duress or fraud," id. § 7(4); or has been "incurably mentally ill for a period of five years or more," id. § 7(5).

b. Licensure and Solemnization

Article 3 sets forth the formal requirements for marriage, which include licensure and solemnization. The DRL requires that "all persons intended to be married in New York state . . .

obtain a marriage license from a town or city clerk," and deliver the license within sixty days "to the clergyman or magistrate who is to officiate before the marriage ceremony may be performed." DRL § 13. In the case of a marriage by written contract, the license must be delivered to the judge "before whom the acknowledgment is to be taken." Id. Town or city clerks are "empowered to issue marriage licenses to any parties applying for the same who may be entitled under the laws of this state to apply therefor and to contract matrimony." Id. § 14.

In order to be valid, a marriage must be solemnized by an individual who falls within one of the categories enumerated in the statute. Persons who may solemnize marriages include ministers, clergy, mayors, county executives, and federal and state judges. See id. § 11.

Persons who solemnize a marriage in the absence of a marriage license or with knowledge that either party is legally incompetent to contract marriage may be subject to prosecution for a misdemeanor, as may a clerk who issues or files a marriage license improperly. See DRL § 17 (misdemeanor to solemnize marriage where parties have not presented license or with knowledge that either party is legally incompetent to contract matrimony); id. § 22 (misdemeanor for city or town clerk to violate DRL art. 3); Penal Law § 255.00 (misdemeanor to solemnize marriage without statutory authorization, or, if authorized to do so, to perform a marriage knowing that a legal impediment to the marriage exists).[1]

The DRL does not, however, penalize individuals who participate in a marriage ceremony without first obtaining a license. But see DRL § 16 (providing that any person who "wilfully and falsely" swears in regard to "any material fact as to the competency of any person for whose marriage the license in question or concerning the procuring or issuing of which such affidavit or statement may be made shall be deemed guilty of perjury"); see also Penal Law art. 210 (perjury).

Nor does the lack of a marriage license affect the validity of a marriage. See DRL § 25 ("Nothing in this article contained shall be construed to render void by reason of failure to procure a marriage license any marriage solemnized between persons of full age."); see also Persad v. Balram, 187 Misc. 2d 711, 714

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[1] DRL § 23 provides that violations of the DRL are to be reported to the District Attorney in the county where the marriage took place.

(Sup. Ct. Queens County 2001); Berenson v. Berenson, 198 Misc. 398 (Fam. Ct. N.Y. County 1950); Heller v. Heller, 188 Misc. 608 (Sup. Ct., Special Term, N.Y. County 1947); In re Estate of Levy, 168 Misc. 464 (Sur. Ct. N.Y. County 1938).

2. Annulment and Divorce

Section 140 of the DRL provides for judgments declaring the nullity of void marriages, and for judgments annulling voidable marriages. An action to declare the nullity of a void marriage, while not necessary to terminate the marriage, is often brought to provide the parties with certainty about its status. See Alan D. Scheinkman, Practice Commentaries to DRL § 140, 14 McKinney's Cons. Laws of N.Y. at 332 (1999). A bigamous marriage, which is void pursuant to section 6 of the DRL, may be declared null in an action maintained by either party to the marriage or "by the former husband or wife." DRL § 140(a). Actions to annul one of the voidable marriages enumerated in section 7 of the DRL may be brought by one of the parties to the marriage, or in some instances by a parent, guardian, or relative of a party to the marriage, see id. § 140(b)-(d), and actions for divorce or separation may be brought "by a husband or wife," id. §§ 170, 200.

B. Application of Statutory Provisions to Same Sex Couples

We can provide no certain guidance as to how New York courts will ultimately rule with respect to whether New York law permits or prohibits marriage by same-sex couples. Although the DRL does not explicitly prohibit same-sex marriages, it is our view that the Legislature did not intend to authorize same-sex marriage. The exclusion of same-sex couples from eligibility for marriage, however, presents serious constitutional concerns, which we outline below.

We also address whether, as a matter of New York's longstanding common-law rule of recognition, New York courts must recognize the spousal status of parties to same-sex unions performed in other jurisdictions. Our view is consistent with that of the only New York court to have addressed the issue, which held that parties to Vermont civil unions must be treated as "spouses" for purposes of the Estates, Powers, and Trusts Law ("EPTL").

1. Statutory Language

While the text of the DRL does not expressly bar marriage of same-sex couples, the inclusion in the DRL of gender-specific

terms to describe parties to a marriage, as well as the historical context of its enactment, indicates that the Legislature did not intend to authorize same-sex marriage.

The DRL includes no express requirement that married persons be of the opposite sex. Nor does it declare invalid marriages between persons of the same sex; the provisions enumerating marriages that are "absolutely void" or "voidable" make no mention of same-sex marriage. See DRL §§ 5-7.[2] In the absence of an explicit prohibition against same-sex marriage, canons of statutory construction instruct that "courts [should not] correct supposed . . . omissions or defects in legislation." Statutes § 73, 1 McKinney's Cons. Laws of N.Y. at 147-48 (1971).

But notwithstanding the lack of any explicit bar on same-sex marriage, the historical context of the DRL's enactment suggests that the Legislature intended only to authorize marriage between persons of the opposite sex. At the time of the DRL's initial enactment in 1896 and its amendment in 1907 to provide for marriage licenses, the statute referred to marriage in gender-specific terms. See Act of April 17, 1896, Ch. 272, 1896 N.Y. Laws Vol. 1, 216-22; Act of July 26, 1907, Ch. 742, 1907 N.Y. laws Vol. 2, 1744-45. While the legislative history of the relevant DRL provisions does not address same-sex marriage, that silence is presumably due to the apparent lack of any practice of same-sex marriage at the time of enactment and amendment. In general, "the literal meaning of the words used must yield when necessary to give effect to the intention of the Legislature." Statutes § 111, 1 McKinney's Cons. Laws of N.Y. at 225 (1971). Accordingly, even absent an express prohibition, courts could read such a restriction into the DRL to give effect to the Legislature's apparent intent.

The inclusion of gender-specific references to married persons in the DRL is consistent with this conclusion. For example, section 15(1)(a) of the DRL requires the town or city clerk to obtain certain information from the "groom" and the "bride." Another provision requires that the parties to a

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[2]While Section 7(3) of the DRL provides that a marriage is voidable if either party "[i]s incapable of entering into the marriage from physical cause," courts have ruled that this provision refers to capacity to consummate a marriage. See Lapides v. Lapides, 254 N.Y. 73, 80 (1930); cf. Hatch v. Hatch, 58 Misc. 54 (Sup. Ct., Special Term, Erie County 1908) (declining to annul marriage where, because of advanced age, "desire for support and companionship" motivated marriage).

marriage "solemnly declare . . . that they take each other as husband and wife." DRL § 12; see also id. § 5 (voiding marriage between "brother and sister" or between "[a]n uncle and niece or an aunt and nephew"); id. § 6 (voiding marriage contracted by "a person whose husband or wife by a former marriage is living," unless certain conditions exist); id. § 200 (action for separation "may be maintained by a husband or wife"); id. § 221 (a petition for dissolution on the ground of absence "shall allege that the husband or wife of such party has absented himself or herself for five successive years"); id. § 248 (directing manner for modifying final judgment in action for divorce, annulment or declaration of nullity upon "application of the husband" and proof of marriage "of the wife"); cf. CPLR § 4502(b) ("A husband or wife shall not be required, or, without consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage.").

The DRL does also refer to married persons in gender-neutral terms. Several provisions mention the "party" or "parties" to a marriage. See, e.g., DRL § 7 ("either party"); id. § 8 ("either party"); id. § 11(4) (authorizing solemnization by written contract of marriage signed by, inter alia, "both parties"); id. § 11(5) ("where either or both of the parties is under the age of eighteen years"); id. § 11-a(1)(b) (referring to "persons to whom the city clerk of any such city of the first class shall have issued a marriage license"); id. § 13 ("either party to the marriage"); id. § 15-a ("either party"). It is our view, however, that these references are not sufficient to suggest a legislative intent to authorize same-sex marriage, in light of other evidence to the contrary.

The decisions of courts in other states with statutes that lack an express prohibition of same-sex marriage accord with our construction of New York's DRL. For example, Massachusetts' highest court held that the state's marriage statute did not allow same-sex marriage because the everyday definition of the word "marriage" is "'the legal union of a man and woman as husband and wife.'" Goodridge v. Department of Pub. Health, 798 N.E.2d 941, 952 (Mass. 2003) (quoting Black's Law Dictionary 986 (7th ed. 1999)). The court noted that this definition derived from the common law, to which Massachusetts courts turn for guidance regarding the validity of marriages when the statutes are silent. See id. at 952. The court also looked to the statute's consanguinity provisions since they used gender-specific terms. See id. at 953; see also Singer v. Hara, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974) (citing provision of the Washington marriage statute referencing "the male" and "the

female" to "dispel[] any suggestion that the legislature intended to authorize same-sex marriages"); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (Minnesota marriage statute did not authorize same-sex marriage because the "common usage" of "marriage" means "union between persons of the opposite sex" and the statute used words of "heterosexual import" such as "husband and wife" and "bride and groom").

2. New York Decisional Law

While New York's highest court has not spoken definitively on the question of whether the DRL authorizes or prohibits same-sex marriage,[2] existing New York precedent is consistent with our view that the DRL does not authorize same-sex marriage. This precedent, however, does not squarely address the questions you raise, nor does it confront the constitutional considerations we identify below.

Several state courts have stated that same-sex marriage is not permitted in New York. For example, in Anonymous v. Anonymous, 67 Misc. 2d 982 (Sup. Ct. Queens County 1971), the plaintiff sought a declaration of his marital status with the defendant, who was not a female at the time of the marriage ceremony. See id. at 983-84. The court held that the marriage ceremony did not create a legal relationship between them because one of the "two basic requirements for a marriage contract, i.e., a man and a woman . . . was missing." Id. at 984.

Similarly, in Francis B. v. Mark B., 78 Misc. 2d 112 (Sup. Ct. Kings County 1974), the plaintiff, a woman, sought to annul her marriage to the defendant, who allegedly misrepresented herself to be a man and thereby induced the plaintiff into marriage. In its decision, the court noted: "New York neither specifically prohibits marriage between persons of the same sex nor authorizes issuance of marriage license to such persons." Id. at 117. However, the court stated, "marriage is and always has been a contract between a man and a woman." Id. (citation omitted).

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[2] We note that in Levin v. Yeshiva University, a case regarding whether a housing preference for married students had an impermissible disparate impact on homosexual students, the Chief Judge, dissenting in part, observed that "homosexual students . . . cannot marry." 96 N.Y.2d 484, 503 (2001) (Kaye, C.J.) (dissenting in part).

Anonymous and Francis B. are not dispositive of the question presented here, though. They rest in part on the assumption that marriage exists for the purposes of fostering procreation. See Anonymous, 67 Misc. 2d at 984 (noting "'public policy that [sexual] relationship [in a marriage] shall exist with the result and for the purpose of begetting offspring'" (quoting Mirizio v. Mirizio, 242 N.Y. 74, 81 (1926))); Francis B., 78 Misc. 2d at 117 (citing Mirizio). But physical incapacity, for the purposes of voiding marriage under DRL section 7(3), does not include the "inability to bear children." See supra n. 2. Francis B. also rests on the distinct ground, not presented here, that the plaintiff was fraudulently induced into marriage. See 78 Misc. 2d at 113.

Additionally, these rulings pre-date the development of U.S. Supreme Court precedent holding that the Equal Protection Clause requires heightened judicial scrutiny where the government uses a gender-based classification, see United States v. Virginia, 518 U.S. 515, 531 (1996); Mississippi University for Women v. Hogan, 458 U.S. 718, 724-26 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976), as well as more recent cases restricting the ability of states to discriminate on the basis of sexual orientation, see Lawrence v. Texas, 123 S. Ct. 2472 (2003) (striking down Texas ban on homosexual sodomy as unconstitutional intrusion on liberty to engage in private sexual conduct that is protected by the Due Process Clause); Romer v. Evans, 517 U.S. 620 (1996) (holding that amendment to Colorado state constitution barring any legislative, judicial or executive action designed to protect "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" violated the Equal Protection Clause). As discussed below, these cases raise new questions regarding the constitutionality of prohibiting same-sex marriage.

We also note that both the First and Second Departments have interpreted the term "spouse" as used in the EPTL to exclude same-sex partners, but neither court has analyzed the question of the validity of same-sex marriages under the DRL. See Raum v. Restaurant Associates, Inc., 252 A.D.2d 369 (1st Dep't 1998) (unmarried same-sex partner of decedent cannot bring wrongful death action); In re Estate of Cooper, 187 A.D.2d 128 (2d Dep't 1993) (surviving partner of a same-sex couple cannot assert spousal rights against deceased partner's will because he is not a "surviving spouse" under the EPTL).

Raum and Cooper are of limited utility here, because the surviving same-sex partners in those cases did not claim any statutory right to marry under the DRL. But see Storrs v. Holcomb, 168 Misc. 2d 898, 899 (Sup. Ct. Tompkins County 1996)

("ratio decidendi forged by the Court" in Cooper includes the holding that "marriage, in this State, is limited to opposite sex couples"), dismissed on appeal, 245 A.D.2d 943 (3d Dep't 1997) (dismissed for failure to join a necessary party). Moreover, the term "spouse," as used in the EPTL provision authorizing wrongful death actions, has recently been construed to include the surviving same-sex partner to a Vermont civil union. See Langan v. St. Vincent's Hospital of New York, 196 Misc. 2d 440 (Sup. Ct. N.Y. County 2003).

3. Constitutional Considerations

The question of whether the DRL authorizes or permits same-sex marriage must be analyzed in light of an ongoing and rapidly shifting debate about whether it is constitutional to deny eligibility for marital status to same-sex couples. We believe that while the DRL does not authorize same-sex marriage, this interpretation raises constitutional concerns.

Before outlining these concerns, we note that courts may respond to any perceived constitutional infirmity in two different ways. First, it remains possible that they might construe the DRL to permit same-sex marriages in order to avoid declaring relevant portions of the statute unconstitutional. It is well-settled that a "statute should be construed when possible in a manner which would remove doubt of its constitutionality." People v. Barber, 289 N.Y. 378, 385 (1943); see also Rachelle L. v. Bruce M., 99 A.D.2d 765 (3d Dep't 1982) (substituting gender-neutral language in section 532 of Family Court Act to avoid constitutional infirmity); Lisa M. UU v. Mario D. VV, 78 A.D.2d 711 (3d Dep't 1980) (reading section 514 of Family Court Act in gender-neutral manner to preserve constitutionality); Goodell v. Goodell, 77 A.D.2d 684, 685 (3d Dep't 1980) (reading DRL § 236 in gender-neutral manner to include "wife" as well as "husband" to

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[4]At least one unpublished case has held in dictum that New York marriage law does not preclude same-sex marriage, but the court nonetheless found that a surviving gay partner could not inherit from the deceased's estate when there was neither a will nor a marriage license. See In re Petri, N.Y.L.J. April 4, 1994 at 29 (Sup. Ct. N.Y. County) ("Section 13 of the [DRL] has no requirement that applicants for a marriage license be of different sexes.")

[5]The validity of same-sex marriages already performed will likely depend on the outcome of litigation relating to issues identified in this opinion.

"preserve its constitutionality"). Alternatively, the courts might find that the DRL prohibits such marriages and declare the relevant provisions unconstitutional on that ground. See, e.g., People v. Liberta, 64 N.Y.2d 152, 170-171 (1984) (severing gender classification from state rape statute after holding that portion of statute unconstitutional). Of course, the courts might uphold the statute in its entirety.

a. Equal Protection Clause

One question is whether the DRL, if interpreted to prohibit same-sex marriages, comports with the equal protection clauses of the federal and New York State constitutions.[6] A court might treat the DRL as imposing a gender-based classification. Such classifications are subject to heightened scrutiny; they must "serve[] important governmental objectives" and "the discriminatory means employed [must be] substantially related to the achievement of those objectives." Virginia, 518 U.S. at 533 (citation omitted); Liberta, 64 N.Y.2d at 168. Even if New York courts applied the less stringent "rational basis review" on the assumption that a prohibition against same-sex marriage is a classification based on sexual orientation, the courts would need to find the prohibition supported by a legitimate state interest in order to uphold it.

Several state interests might be proffered in support of a prohibition on same-sex marriage, including promoting procreation and the welfare of children, and maintaining the traditional understanding of marriage as a union between a man and a woman.

With respect to procreation, the DRL declares voidable a marriage in which either party "[i]s incapable of entering into the married state from physical cause." DRL § 7(3). This provision, however, has long been construed to refer to physical incapacity to consummate marriage, not incapacity to bear children. See supra n.2.

As to the welfare of children who might be raised by same-sex partners, the DRL already permits the same-sex partner of a child's biological parent, who is raising the child together with the biological parent, to become the child's second parent by means of adoption. See In re Jacob, 86 N.Y.2d 651 (1995);

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[6]The protections afforded by the State Equal Protection Clause are "as broad as" the protections afforded by the Equal Protection Clause of the Fourteenth Amendment. Brown v. State, 89 N.Y.2d 172, 190 (1996).

cf. 18 N.Y.C.R.R. § 421.16(h)(2) (providing that qualified adoption agencies shall not reject applicants "solely on the basis of homosexuality").

Whether New York's courts would uphold a same-sex marriage prohibition based on an interest in preserving traditional notions of marriage is a closer question. In examining this issue, we briefly review Supreme Court precedent, New York's treatment of same-sex relationships, and decisions from other jurisdictions.

Supreme Court Precedent

The Supreme Court has held that a desire to disadvantage homosexuality cannot be a legitimate government interest. See Romer, 517 U.S. at 634-35. Justice O'Connor's concurrence in Lawrence v. Texas stresses this point; she notes that "moral disapproval" of homosexuals cannot be a "legitimate state interest." 123 S.Ct. at 2486 (O'Connor, J., concurring in the judgment); see also United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (noting that the "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

At issue in analyzing a prohibition on same-sex marriage is whether preserving tradition constitutes something more than mere disapproval of same-sex relationships. A majority of the Supreme Court has made clear that it does not believe this question is answered by Lawrence. See Lawrence, 123 S.Ct. at 2484; id. at 2487-88 (O'Connor, J., concurring in the judgment); cf. id. at 2483 (recognizing that "'neither history nor tradition could save a law prohibiting miscegenation from constitutional attack'" (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))). In his dissent to Lawrence, however, Justice Scalia suggests otherwise. See Lawrence, 123 S.Ct. at 2496.

New York's Treatment of Same-Sex Relationships

New York law has recognized the legitimacy of committed same-sex relationships in numerous ways, thereby drawing into question the State's interest in maintaining the historical understanding of marriage as confined to opposite-sex partners. The New York Court of Appeals has held that unmarried same-sex partners are protected against eviction. See Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 211-213 (1989) (long-term interdependent relationship between same-sex partners rendered plaintiff a "family member" of tenant for purposes of 9

N.Y.C.R.R. § 2204.6(d), which prohibits eviction of "any member of the tenant's family" under specified circumstances). Additionally, the New York Legislature has enacted numerous provisions barring discrimination and enhancing penalties for crimes involving animus on the basis of sexual orientation. See N.Y. Civ. Rts. Law § 40-c(2); N.Y. Exec. Law § 296; N.Y. Educ. Law § 313; N.Y. Ins. Law § 2701(a); N.Y. Penal Law §§ 240.30(3), 485.05(1).

Decisions From Other Jurisdictions

Over thirty years ago, the Minnesota Supreme Court held that same-sex marriages were neither authorized by that state's marriage statute, nor constitutionally compelled. See Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). The Minnesota court found that there was no equal protection impediment to denying same-sex couples the right to marry because such discrimination was not irrational or invidious. See id. at 187; see also Standhardt v. Superior Court, 77 P.3d 451, 465 (Ariz. Ct. App. 2003) (prohibition against same-sex marriage does not violate federal equal protection principles); Dean v. District of Columbia, 653 A.2d 307, 361-64 (D.C. 1995) (finding no equal protection impediment to prohibiting same-sex marriage) (opinions of Terry and Steadman, Assoc. J.J., concurring); Singer v. Hara, 522 P.2d 1187, 1189-1197 (Wash. Ct. Appeals 1974)(same).

In Baker v. Nelson, the appellants, a same-sex couple who were refused a marriage license, had challenged this refusal as violative of the federal Equal Protection Clause. See Baker v. Nelson, 191 N.W.2d at 187. The U.S. Supreme Court dismissed an appeal from this case, which again raised the equal protection challenge, for want of a substantial federal question. 409 U.S. 810 (1972); Jurisdictional Statement, Baker v. Nelson, No. 71-1027, at 3. While considered rulings on the merits, such dismissals lack the same precedential value as Supreme Court decisions reached after briefing and oral argument on the merits. See Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 478 n.20 (1979). They represent "no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision." Id. It does not reflect the Court's agreement with the opinion of the court whose judgment is appealed. See id.

While Baker v. Nelson was cited by the Appellate Division to support its conclusion that construing EPTL § 5-1.1 to exclude a homosexual life partner as a "surviving spouse" did not violate the Equal Protection Clause of the New York Constitution, see In re Cooper, 187 A.D.2d 128, 134 (2d Dep't 1993), Baker v. Nelson

no longer carries any precedential value with respect to the federal Equal Protection Clause. At the time of Baker, a gender classification could comport with the Equal Protection Clause simply by bearing "a rational relationship to a state objective" sought to be advanced. Reed v. Reed, 404 U.S. 71, 76 (1971). However, contemporary equal protection doctrine, which emerged several years after Baker v. Nelson, see, e.g., Hogan, 458 U.S. at 724-26; Craig, 429 U.S. at 197, demands that the government demonstrate that a gender-based classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. See Virginia, 518 U.S. at 533 (citations omitted). Moreover, only after Baker v. Nelson did the United States Supreme Court expressly hold that, even under rational basis review, moral disapproval of homosexuals as a class cannot be a legitimate government interest. See Romer, 517 U.S. at 635.[7]

More recently, in 1999, the Vermont Supreme Court held that the Common Benefits Clause of the Vermont Constitution required Vermont to extend to same-sex couples the same benefits and protections afforded persons married under Vermont law. See Baker v. State, 744 A.2d 864 (Vt. 1999); see also Goodridge, 798 N.E.2d at 968 (same-sex marriage exclusion violates state constitution's equal protection clause because it is "rooted in persistent prejudices against persons who are . . . homosexual"); id. at 972-73 (Greaney, J., concurring)(rejecting "tradition" as a justification for same-sex marriage exclusion).[8]

Prior to the Massachusetts and Vermont decisions, the Hawaii Supreme Court held that the state marriage statute confining marriage to a union between one man and one woman was subject to strict scrutiny as a gender-based classification under the equal protection provision of the Hawaii Constitution. See Baehr v. Lewin, 852 P.2d 44, 64, 67 (Haw. 1993). On remand, the lower

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[7]As noted above, rational review would apply if a prohibition against same-sex marriage were considered a classification based on sexual orientation, rather than gender.

[8]The Massachusetts Supreme Court made clear in Goodridge that the Massachusetts Constitution "is, if anything, more protective of individual liberty and equality than the Federal Constitution." 798 N.E. 2d at 948-49. Similarly, the New York Court of Appeals has "not hesitated" to grant relief under the New York Constitution when it "concluded that the Federal Constitution . . . fell short of adequate protections for our citizens." Cooper v. Morin, 49 N.Y.2d 69, 79 (1979).

court found that the State failed to demonstrate that the statute was narrowly tailored to advance a compelling state interest. See Baehr v. Miike, 1996 WL 694235, at *21 (Haw. Cir. Ct. 1996).

Other recent lower state court decisions, however, have found that the equal protection clauses of their respective state constitutions permit a prohibition on same-sex marriage. See Standhardt, 77 P.3d at 465 (prohibition against same-sex marriage not so unduly broad as to be "inexplicable by anything but animus"); Morrison v. Sadler, No. 49D13-0211-PL-001946, 2003 WL 23119998 at *9-10 (Ind. Super. Ct. May 7, 2003) ("inherent" distinctions between same-sex and opposite-sex couples, including ability to reproduce, warrant different treatment for purposes of "equal privileges" under state constitution); Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114 at *23, 26 (N.J. Super. Ct. Nov. 5, 2003) (same-sex couples not similarly situated to opposite-sex couples for purposes of access to marriage; rational for state to conclude that rights of gay and lesbian citizens could be protected without altering the traditional institution of marriage).

b. Fundamental Right to Marry

Another question that might be raised is whether excluding same-sex couples from marriage violates the fundamental right to marry protected under the Due Process Clause of the Fourteenth Amendment. See Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

In Baker v. Nelson, discussed above, the Minnesota Supreme Court also held that the state's prohibition of same-sex marriage did not violate the fundamental right to marry under the federal Due Process Clause. See Baker v. Nelson, 191 N.W.2d at 186; see also Dean, 653 A.2d at 331-33. The precedential value of the U.S. Supreme Court's dismissal of the appeal from Baker v. Nelson, however, is limited with regard to this portion of the decision, as well. The Supreme Court in Lawrence failed to cite to Baker at all, and treated as unsettled the question of whether a State could restrict the rights of same-sex couples to marry without violating the Fourteenth Amendment. See Lawrence, 123 S. Ct. at 2484 ("The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."). But see Standhardt, 77 P.3d at 460 (finding no fundamental right to marry for same-sex couples under federal Due Process Clause, even after Lawrence);

Morrison, 2003 WL 23119993 at *4 (citing Baker v. Nelson for proposition that there is no federal constitutional right to same-sex marriage).

Other recent lower state court decisions have also found no fundamental right to marry in their respective state constitutions that would be violated by a prohibition on same-sex marriage. See Standhardt, 77 P.3d at 455-60; Morrison, 2003 WL 23119998, at *4-8; Lewis, 2003 WL 23191114, at *16.

In contrast, the Massachusetts Supreme Judicial Court recently held that "[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples" violates the liberty to choose whether and whom to marry that is protected by the Massachusetts Constitution. Goodridge, 798 N.E.2d at 968; see also Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (proposed civil union scheme for same-sex couples is insufficient to remedy denial of marriage status to same-sex couples); cf. Brause v. Bureau of Vital Statistics, No. 3A-95-6562 CI, 1998 WL 88743, at *4-5 (Alaska Super. Ct. Feb. 27, 1998) (finding that "the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy" under the Alaska Constitution), superceded by Alaska Const. art. I, § 25 (effective Jan. 3, 1999) (providing that valid marriage "may exist only between one man and one woman").

4. Recognition of Same-Sex Unions Performed Out-of-State

Whether the Domestic Relations Law permits same-sex marriages performed in New York has no bearing on whether New York will recognize as spouses those parties to a same-sex marriage (or its legal equivalent, see, e.g., Vt. Stat. Ann. tit. 15 § 1201 et seq.) validly performed under the law of other jurisdictions. We therefore address this circumstance separately.

In general, New York common law requires recognizing as valid a marriage, or its legal equivalent, if it was validly executed in another State, regardless of whether the union at issue would be permitted under New York's Domestic Relations Law. The only exceptions to this rule occur where recognition has been expressly prohibited by statute, or the union is abhorrent to New York's public policy. See, e.g., Mott v. Duncan Petroleum Trans., 51 N.Y.2d 289, 292 (1980) (recognizing Georgia common law marriage); In re Estate of May, 305 N.Y. 486, 490-93 (1953) (recognizing Rhode marriage between an uncle and a niece that would have been void if performed in New York); Fernandes v. Fernandes, 275 A.D. 777 (2d Dep't 1949) (marriage by proxy); In

re Probate of the Will of Valente, 18 Misc. 2d 701, 704-05 (Sur. Ct. Kings County 1959) (same). The abhorrence exception is so narrow that only marriages involving "polygamy or incest in a degree regarded generally as within the prohibition of natural law" have been deemed abhorrent by the courts. Estate of May, 305 N.Y. at 491.

Applying this New York common law rule of recognition, the only New York court to have addressed the question recently held that a party to a Vermont civil union must be treated as a "spouse" within the meaning of EPTL § 4-4.1(a), and therefore could bring a wrongful death action. See Langan, 196 Misc. 2d 440. The court concluded that New York's public policy does not preclude recognition of Vermont unions in light of the expansive benefits and protections afforded same-sex couples under the laws of the State, see id. at 446-47, and that denying such recognition where the legal incidents of such unions are coextensive with the legal consequences of marriage would run afoul of the federal and state equal protection clauses, see id. at 454. Langan is currently on appeal to the Appellate Division, Second Department.

Conclusion

We conclude that the Legislature did not intend to authorize same-sex marriages. This interpretation of the statute, however, raises constitutional concerns, which are best resolved by the courts of this State.

Because the purpose of the marriage licensing process is to "provide[] a definite, well-chartered procedure for entrance into marriage, so that parties following the statutory requirements can have a fair degree of certainty in their marital status," Practice Commentaries to DRL § 13 at 149, we recommend that clerks not issue marriage licenses to same-sex couples, and officiants not solemnize the marriages of same-sex couples, until these issues are adjudicated by the courts.

Finally, we note that the issue of recognizing same-sex unions from other jurisdictions presents a distinct legal question. Consistent with the holding of the only state court to have ruled on this question, New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law.

The Attorney General issues formal opinions only to officers and departments of State government. Thus, this is an informal

opinion rendered to assist you in advising the municipality you represent.

Sincerely,

CAITLIN HALLIGAN
Solicitor General

ADDENDUM D

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Patrick C. Lynch, Attorney General

October 19, 2004

The Honorable Paul J. Tavares
General Treasurer
The State House
Providence, Rhode Island 02903

Re: Receipt of Spouse's Benefits Under Teacher's Retirement System

Dear Treasurer Tavares:

I am writing in response to your letter of September 28, 2004 wherein you advise that two retired teachers, who are receiving retirement benefits from the Employees' Retirement System of Rhode Island (ERSRI), have requested that their same sex spouses be named as the beneficiaries of their teacher's survivor benefit. You have inquired whether a party to a same-sex marriage, validly performed in Massachusetts, is eligible to be named as a beneficiary and, thus, to receive "spouse's benefits" under Rhode Island General Law § 16-16-26.

We issue this opinion under the assumption that parties to these marriages were residents of Massachusetts at the time of the marriages, and that there is no reason to doubt the validity of the marriage under Massachusetts law.

As discussed in further detail below, as long as the individual in question satisfies the prerequisites for a qualifying spouse, as defined in R.I. Gen. Laws § 16-16-1(11)(i)-(iv), I believe that he or she would be eligible for spouse's benefits under Section 26.

I. The Teachers' Retirement System Survivor Benefits

Chapter 16 of the Rhode Island General Laws governs the membership of teachers[1] in the Employees Retirement System created under R.I. Gen. Laws § 36-8-1 et

[1] A "Teacher" is defined in Rhode Island General Laws Section 16-16-1(a)(12) as "a person required to hold a certificate of qualification issued by or under the authority of the board of regents for elementary and secondary education and who is engaged in teaching as his or her principal occupation and is regularly employed as a teacher in the public schools of any city or town in the state, or any formalized, commissioner approved, cooperative service arrangement. The term includes a person employed as a teacher, supervisor, principal, assistant principal, superintendent, or assistant superintendent of schools, director, assistant director, coordinator, consultant, dean, assistant dean, educational administrator, nurse teacher, and attendance officer or any person who has worked in the field of education or is working in the field of education that holds a teaching or administrative certificate and any teacher who serves during a school year at least three-quarters (¾) of the number of days that the public schools are required by law

seq. That statutory scheme defines persons who are eligible for membership in the retirement system (R.I. Gen. Laws §§ 16-16-2 through 16-16-4) ("Members"), how "service" time is calculated, (R.I. Gen. Laws §§ 16-16-5 through 16-16-8.1), the benefits available to teachers and when they are eligible to receive them (R.I. Gen. Laws §§ 16-16-11 through 16-16-20), and the contributions that the teachers must make to the Employees Retirement System (R.I. Gen. Laws §§ 16-16-22 through 16-16-22.1).

Sections 16-16-25 through 16-16-38 outline various benefits (above and beyond those payable under the Rhode Island State Employees Retirement System) available to teachers of any city, town, or regional school district that has not "elected coverage under the federal Social Security Act, 42 U.S.C. § 301 et seq." R.I. Gen. Laws § 16-16-38. These additional benefits include "Spouse's Benefits." Under § 16-16-26, following the death of a Member, a spouse who has reached the age of sixty (60) is entitled to certain benefits so long as the spouse was living with the Member at the time of the Member's death and so long as the spouse does not remarry.[2] *See* R.I. Gen. Laws § 16-16-26(a)-(d).

II. ***Statutory Interpretation***

To determine whether a Massachusetts resident who is party of a same-sex marriage performed in Massachusetts is eligible to receive Spouse's Benefits under § 16-16-26, one must first look to the statute itself. Statutory interpretation begins—and often ends—with the plain language of the statute. Indeed, it is presumed that the legislature intends significance to every word, sentence, and provision of a statute, In re Bernard H., 557 A.2d 864, 866 (R.I. 1989), and, if a statute is clear and unambiguous, a court "should give effect to all of its parts" and give the words contained therein their "plain and ordinary meaning." Direct Action For Rights And Equality v. Gannon, 819 A.2d 651, 659 (R.I. 2003). It is only when a statute is susceptible to more than one plausible interpretation that a court will look beyond the language of a statute in order to ascribe meaning to it. See State v. Calise, 478 A.2d 198, 210 (R.I. 1984).

The term "spouse" is defined in R.I. Gen. Laws § 16-16-1(11) as "the surviving *person* who was married to a deceased member" and who (i) was married to the deceased Member for

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to be in session during the year. In determining the number of days served by a teacher the total number of days served in any public school of any city or town in the state may be combined for any one school year. The term also includes a school business administrator whether or not the administrator holds a teaching or administrative certificate, and also includes occupational therapists and physical therapists licensed by the department of health and employed by a school committee in the state, or by any formalized, commissioner approved, cooperative service arrangement."

[2] "A spouse is deemed to have been living with the deceased member if they were both members of the same household on the date of the deceased member's death, or the spouse was receiving regular contributions from the deceased member toward support on that date, or the deceased member had been ordered by a court to contribute to the spouse's support." R.I. Gen. Laws § 16-16-26(c).

not less than one year prior to the Member's death; (ii) is the mother or father of the deceased Member's child(ren); (iii) legally adopted the deceased Member's children while married to the deceased Member and while said children were under the age of eighteen; or (iv) was married to the deceased Member at the time that both of them legally adopted a child(ren) under the age of eighteen. R.I. Gen. Laws § 16-16-1(11) (*emphasis added*). This gender-neutral provision does not specially define the term "marriage" or otherwise restrict its application to marriages between members of the opposite sex.

In short, while it is impossible to predict how a Rhode Island court might ultimately interpret the scope of R.I. Gen. Laws § 16-16-26, the plain language used in that Section (read in conjunction with § 16-16-1) suggests that a Massachusetts resident who is party to a same-sex marriage validly performed in Massachusetts would be eligible to receive Spouse's Benefits so long as he or she met the other statutory requirements set forth in §16-16-1(11).

III. Conclusion

For the reasons above, I answer your question in the affirmative. Please note that this opinion is based upon the specific facts as outlined in this request, and is limited to the legal issue you presented.

I hope this satisfactorily answers your inquiry. Please contact me if you wish to discuss the basis for this opinion in further detail, or if I can be of further assistance.

Very truly yours,

Patrick C. Lynch
Attorney General

ADDENDUM E

IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

IN RE: THE MARRIAGE OF KIMBERLY JEAN BROWN AND JENNIFER SUE PEREZ

UPON THE PETITION OF	)	
	)	EQUITY NO. CDCD119660
KIMBERLY JEAN BROWN,	)	
	)	
Petitioner,	)	*AMENDED DECREE*
	)	
AND CONCERNING	)	
	)	
JENNIFER SUE PEREZ,	)	
Respondent.	)	

'03 DEC 24 AM 7:45

The Court issues this Decree *sua sponte* on the 24th day of December, 2003. The Court having examined the pleadings filed herein, including the "Decree of Dissolution of Marriage" entered herein on November 14, 2003, and having knowledge that the parties entered into a civil union under the laws of the State of Vermont, and recognizing that subject matter jurisdiction can be raised at anytime, and upon further consideration and research, FINDS:

1. The Court has jurisdiction of the parties and has subject matter jurisdiction.

2. However, the Court does not have subject matter jurisdiction to grant a dissolution of marriage from a Vermont civil union under Chapter 598 of the Code of Iowa.

3. Pursuant to ***Metten vs. Benge***, 366 N.W.2d 577 (Iowa 1985) and the general equity powers of the Court, the Court does have equitable subject matter jurisdiction to declare the status and rights of these parties.

4. The "Decree of Dissolution of Marriage" entered herein on November 14, 2003, should be and hereby is vacated in part, and the following equitable relief is granted.

THE COURT, THEREFORE, GRANTS THE FOLLOWING EQUITABLE RELIEF:

1. The Vermont civil union is terminated and both parties are free of any obligations incident thereto.

2. The Petitioner and Respondent are declared to be single individuals with all the rights of an unmarried individual, including, but not limited to, the right to marry.

3. All of the terms, provisions and agreements set out and contained in Paragraphs 4 through 13, inclusive, of the Stipulation entered into by and between the parties, and filed of record in this matter are hereby ratified, confirmed and approved and made a part of this Decree to the same extent as though fully set out herein.

IT IS SO ORDERED.

JUDGE, Third Judicial District

cc:
Kimberly Jean Brown
Jennifer Sue Perez
Dennis R. Ringgenberg, attorney for Petitioner - hand delivered 12-24-2003
Clerk of Supreme Court - FAXED COPY 12-24-2003 (1-515-242-6164)

ADDENDUM F

IN THE FAMILY COURT OF MARION COUNTY, WEST VIRGINIA

IN RE

Civil Action No 02-D-292

THE MARRIAGE of

MISTY GORMAN, and SHERRY GUMP
Petitioner Respondent

ORDER DISSOLVING CIVIL UNION

On the 19th day of December, 2002, came the petitioner, in person but without counsel, and came the respondent, in person but without counsel, before the undersigned Family Court Judge, whereupon the Court proceeded to hear the evidence offered by the parties and the representations of the parties in regards to the issues presented in the above-styled civil action Upon consideration of all of which and the pleadings heretofore filed in this action the Court makes the following findings of fact

I The petitioner and respondent celebrated civil union on the 3rd day of July, 2000, in Bennington, Vermont

II Petitioner filed complaint alleging irreconcilable differences on the 29th day of July, 2002 and that the respondent filed an answer on the 19th day of December, 2002 The Court specifically finds that irreconcilable differences have arisen between the petitioner and respondent

III Petitioner has resided in West Virginia for more than one year prior to the commencement of this action and the parties last lived together in Marion County, West Virginia

IV There were no children born to or adopted by either of the parties during this union

ENTERED 1-3-03

ORDER BOOK 37 55

V The petitioner and respondent represented to the Court that all matters of division and distribution of property had been resolved and that there were no issues concerning the settlement of property remaining between them

VI The petitioner and respondent represented to the Court that all issues except the issue of whether or not petitioner and respondent should be granted a divorce or a dissolution of the civil union have been resolved

VII Alimony was not requested by either party

VIII By the definition of Section 1201(3) of the Vermont Statutes, Annotated, Title 15, Chapter 23 a "civil union" means that two eligible persons have established a relationship pursuant to this chapter and may receive the benefits and protections and be subject to the responsibilities of spouses "

Under Section 1202(2), the parties to a Civil Union must be of the same sex

By definitions in Subsection 1201(4), a marriage is the legally recognized union of one man and one woman

IX Because Vermont law does not define a Civil Union as a marriage, the provisions of W Va Code Chapter 48, Article 2, Section 603 are not applicable to this action The parties are citizens of West Virginia in need of a judicial remedy to dissolve a legal relationship created by the laws of another state

WHEREFORE the Court concludes as a matter of law and ORDERS as follows

1 The Civil Union between petitioner and the respondent shall be dissolved upon the grounds of irreconcilable differences as specified in petitioner's complaint and respondent's answer It appears from the record in this action that the matter has matured for trial The parties have no further legal responsibility or relationship with each other

2 Respondent is restored to and may resume the use of her former name of Sherry Nicole Gump

3 For the purposes of appeal this order is a final order Any party aggrieved by this order may appeal either to the Circuit Court of Marion County or to the West Virginia Supreme Court of Appeals A petition to appeal to the Circuit Court may be filed by either party within thirty (30) days of the entry date of this order To appeal to the Supreme Court of Appeals directly both parties must file within fourteen (14) days of the entry date of this order a joint notice of intent to appeal and a waiver of right to appeal to the Circuit Court

4 The Clerk of this Court shall prepare certified copies of this order and deliver the same to the parties named in this action

ENTER 19 December 2002

JUDGE

A COPY TESTE:

CLERK OF THE CIRCUIT CLERK
MARION COUNTY, WEST VIRGINIA

ADDENDUM G

GLEN ROSENGARTEN *v.* PETER DOWNES
(AC 22253)

Foti, Flynn and Dupont, Js.

Argued March 28—officially released July 30, 2002

(Appeal from Superior Court, judicial district of Stamford-Norwalk, Shay, J.)

Gary I. Cohen, for the appellant (plaintiff).

Opinion

FLYNN, J. This is an appeal from the trial court's judgment dismissing an action to dissolve a same sex

civil union for lack of subject matter jurisdiction, which union the plaintiff, Glen Rosengarten, claims was entered into with the defendant, Peter Downes, in Vermont, pursuant to Vt. Stat. Ann. tit. 15, § 1201 et seq. (2001).[1] Service of process over the defendant, who apparently resides in New York, was accomplished by certified mail in accordance with an order of notice. The trial court dismissed the action because it concluded that General Statutes § 46b-1 and Practice Book § 25-2 grant powers to the Superior Court to hear and decide actions for dissolution of marriages between a man and a woman and the Vermont civil union did not fall into the category of other family relations matters set out in General Statutes § 46b-1 (17).

The court determined that it was not empowered with " 'plenary and general subject matter' jurisdiction," much less the ability to exercise its broad statutory equitable powers to dissolve a civil union. On appeal, the plaintiff does not claim that the civil union may be dissolved as a marriage. Instead, he claims that the trial court improperly sua sponte dismissed the action for lack of subject matter jurisdiction because § 46b-1 (17) grants the Superior Court subject matter jurisdiction over "all such other matters within the jurisdiction of the Superior Court concerning children or family relations as may be determined by the judges of said court" and that the dissolution of a Vermont civil union is a matter relating to family relations. The plaintiff further claims that principles of full faith and credit demand that Connecticut recognize civil unions entered into under the laws of Vermont, and thereby the right to dissolve them in a Connecticut forum, because Connecticut has a public policy in favor of recognizing civil unions and, therefore, the court improperly dismissed this action seeking a dissolution of such a union for lack of subject matter jurisdiction. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The plaintiff commenced this action by writ, summons and complaint, dated July 11, 2001. The complaint alleged that the plaintiff and the defendant were joined in a civil union in Vermont on December 31, 2000, pursuant to the statutes of the state of Vermont, that the civil union had broken down irretrievably and that the plaintiff had resided in Connecticut for at least one year preceding the commencement of the action. Pursuant to the complaint, the plaintiff sought "[a]n order dissolving the civil union of the parties" and "[s]uch other and further relief to which the Plaintiff may be entitled in law or equity." Without holding a hearing, the court ordered the action dismissed on August 8, 2001, holding: "There is no subject matter jurisdiction under [General Statutes] § 46b-1 and the matter is hereby dismissed sua sponte pursuant to § 25-14 of the Connecticut Practice Book." Practice Book § 25-14 provides: "Any claim of

lack of jurisdiction over the subject matter cannot be waived; and whenever it is found after suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the judicial authority shall dismiss the action." See also *Figueroa* v. *C & S Ball Bearing*, 237 Conn. 1, 4–5, 675 A.2d 845 (1996). This appeal followed. At the time of the dismissal, the defendant had not filed an appearance in the trial court and he has not filed an appearance in this appeal.

On February 25, 2002, this court issued two orders. First, we ordered the parties to file supplemental briefs addressing the following issue: "Was it plain error for the trial court to dismiss this action without notice and a hearing, and should the dismissal be reversed accordingly, with an order directing the trial court to hold a hearing to determine whether it has jurisdiction over this matter?" The only responsive brief filed was that of the plaintiff, who argued that the trial court could raise the issue of subject matter jurisdiction sua sponte and that no hearing was necessary because jurisdictional facts were not in dispute, citing our holding in *Pinchbeck* v. *Dept. of Public Health*, 65 Conn. App. 201, 782 A.2d 242, cert. denied, 258 Conn. 928, 783 A.2d 1029 (2001). The plaintiff argued in his brief that "[t]here was simply nothing that any testimony regarding the plaintiff's claim for relief, i.e., dissolution of civil union, could have added to the court's understanding of the jurisdictional issue: does the Connecticut Superior Court have subject matter jurisdiction in this case, a complaint for dissolution of a civil union, a matter which concerns 'family relations matters'?" The plaintiff did not mention his second prayer for relief, which requested that the court grant any other "relief to which the Plaintiff may be entitled in law or equity."

We agree with the plaintiff that under *Pinchbeck* v. *Dept. of Public Health*, supra, 65 Conn. App. 201, the court did not need to hold an evidentiary hearing to aid in determining whether it had jurisdiction to dissolve a civil union. "When issues of fact are necessary to the determination of a court's jurisdiction, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." *Standard Tallow Corp.* v. *Jowdy*, 190 Conn. 48, 56, 459 A.2d 503 (1983). In *Pinchbeck*, however, we explained that "[i]n the absence of any disputed facts pertaining to jurisdiction, a court is not obligated to hold an evidentiary hearing before dismissing an action for lack of jurisdiction." *Pinchbeck* v. *Dept. of Public Health*, supra, 209.

In the present case, there are no factual issues in dispute and the factual record before us, though sparse, is sufficient to determine whether there is jurisdiction to dissolve the plaintiff's Vermont civil union. There is nothing in the complaint to indicate that both parties to the purported union are of the same sex and no

gesting that jurisdiction may be found under subsection 17 of § 46b-1, the plaintiff himself recognizes the difficulty of fitting his claim for relief under subsection (1) of General Statutes § 46b-1. Section 46b-1 provides in relevant part: "Matters within the jurisdiction of the Superior Court deemed to be family relations matters shall be matters affecting or involving: (1) Dissolution of marriage . . . ." Clearly this civil union is not a marriage recognized under § 46b-1 because it was not entered into between a man and a woman. See General Statutes §§ 45a-727a (4) and 46b-21. Nor is it a marriage under our sister state of Vermont's definition of marriage found in § 1201 (4) of title 15 of the Vermont Statutes Annotated because it too limits the definition of marriage to those entered between "one man and one woman."

The court held that because the dissolution of a civil union was not a family relations matter as set forth in either § 46b-1 or Practice Book § 25-1, it lacked subject matter jurisdiction to dissolve such a union and was, therefore, required to dismiss the plaintiff's action. In his appeal to this court, the plaintiff challenges the validity of the trial court's construction of § 46b-1. He contends that jurisdiction was vested in the court by § 46b-1, which provides in pertinent part that "[m]atters within the jurisdiction of the Superior Court deemed to be family relations matters shall be matters affecting or involving . . . (17) all such other matters within the jurisdiction of the Superior Court concerning children or family relations as may be determined by the judges of said court." Thus, the court's determination that it lacked subject matter jurisdiction turned on its construction of § 46b-1.

Because statutory construction raises an issue of law, our review is plenary. *Alvarado* v. *Black*, 248 Conn. 409, 414, 728 A.2d 500 (1999); *Davis* v. *Norwich*, 232 Conn. 311, 317, 654 A.2d 1221 (1995). The scope of our plenary review is governed by well established principles. "It is axiomatic that the process of statutory interpretation involves a reasoned search for the intention of the legislature. . . . In seeking to discern that intent, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Citations omitted; internal quotation marks omitted.) *Giaimo* v. *New Haven*, 257 Conn. 481, 493, 778 A.2d 33 (2001).

Implicit in the plaintiff's argument that jurisdiction exists under § 46b-1 (17) is that we must recognize the validity of the Vermont civil union as a matter concerning family relations. If Connecticut does not recognize the validity of such a union, then there is no res to address and dissolve.

We begin our construction of § 46b-1 by first examining the text of the statute itself. Section 46b-1 provides: "Matters within the jurisdiction of the Superior Court deemed to be family relations matters shall be matters affecting or involving: (1) Dissolution of marriage . . . (2) legal separation; (3) annulment of marriage; (4) alimony, support, custody and change of name incident to dissolution of marriage, legal separation and annulment; (5) actions brought under section 46b-15;[3] (6) complaints for change of name; (7) civil support obligations; (8) habeas corpus and other proceedings to determine the custody and visitation of children; (9) habeas corpus brought by or in behalf of any mentally ill person except a person charged with a criminal offense; (10) appointment of a commission to inquire whether a person is wrongfully confined as provided by section 17a-523;[4] (11) juvenile matters as provided in section 46b-121; (12) all rights and remedies provided for in chapter 815j;[5] (13) the establishing of paternity; (14) appeals from probate concerning: (a) Adoption or termination of parental rights; (b) appointment and removal of guardians; (c) custody of a minor child; (d) appointment and removal of conservators; (e) orders for custody of any child; (f) orders of commitment of persons to public and private institutions and to other appropriate facilities as provided by statute; (15) actions related to prenuptial and separation agreements and to matrimonial decrees of a foreign jurisdiction; (16) custody proceeding brought under the provisions of chapter 815o; and (17) all such other matters within the jurisdiction of the Superior Court concerning children or family relations as may be determined by the judges of said court."

Clearly, subdivisions 2 through 16 have no applicability to the issues in this case because those subsections relate to legal separations; annulments; alimony, support, custody and change of name incident to a dissolution of marriage; relief from physical abuse; changes of name; civil support; habeas corpus and other proceedings to determine custody and visitation of children; habeas corpus petitions brought on behalf of persons with psychiatric disabilities; commissions investigating claims of wrongful confinement; certain juvenile matters; proceedings concerning all rights and remedies brought under chapter 815j; paternity matters; appeals from probate concerning: adoption or termination of parental rights, appointment or removal of guardians, custody of minor children, appointment or removal of conservators, orders for custody of any child and orders of commitment to institutions or other statutorily approved facilities; actions related to prenuptial and separation agreements and to matrimonial decrees of foreign jurisdictions; and custody proceedings brought under chapter 815o, the Uniform Child Custody Jurisdiction Act. We note, in passing, that subdivision (12) concerning rights and remedies provided for in chapter 815j is not claimed as a source of jurisdiction

by the plaintiff, nor could it be, because it neither confers the right he claims nor does it authorize the remedy he seeks. We also note that subdivision (1) of § 46b-1 defines dissolution of marriage as a family relations matter but the plaintiff does not claim to have been married either under the laws of the state of Connecticut or the laws of the state of Vermont. Nor does he claim entitlement to relief under that subdivision.

The plaintiff does claim that subdivision (17) of § 46b-1 permits the court to exercise jurisdiction. We first observe that the plain words of § 46b-1 define two categories of family matters. Subdivisions (1) through (16) statutorily define specific kinds of family matters "within the jurisdiction" of the court. Subdivision (17) is a catchall provision "concerning children or family relations" as may be determined by the judges of the Superior Court. The matter before us does not involve children and, therefore, that part of subdivision (17) does not provide a basis for the exercise of jurisdiction. Additionally, the judges of the Superior Court have not enacted any rule of practice that would define foreign civil unions as a family matter either. We therefore find nothing in the text of § 46b-1 (17) or in the rules of the Superior Court pertaining to family matters, Practice Book §§ 25-1 through 25-69, inclusive, that would support the plaintiff's claim that jurisdiction exists.

We next examine the legislative history of the enactment of subdivision (17) of § 46b-1, the statutory provision relied on by the plaintiff in this appeal, and the legislative policy it was designed to implement. During the senate proceedings, it was noted that the reason for the enactment of § 46b-1 (17), which was part of the court merger bill of the Connecticut Court of Common Pleas and the Superior Court, was to eliminate the waste of judicial personnel caused by "ill-defined jurisdictional lines causing duplication of efforts" and "to provide for the unification, simplification, flexibility and effective responsible control of the administration of the courts of the state of Connecticut." 19 S. Proc., Pt. 7, 1976 Sess., p. 2652, remarks of Senator David Neiditz. Our review of the legislative history of § 46b-1 revealed nothing that would support the plaintiff's expansive interpretation of § 46b-1 (17). Instead, its obvious intent was to collect all matters that had previously been divided between the old Common Pleas Court and the old Superior Court, into the newly merged Superior Court.

Finally, we examine the provisions of § 46b-1 (17) in relationship with existing legislation and common-law principles to determine whether the recognition of civil unions and the corresponding right to dissolve such unions was contemplated as a family relations matter by our legislature. General Statutes §§ 45a-727b and 46a-81r, both of which are discussed in greater detail later in this opinion, expressly state that Connecticut

does not endorse or authorize, respectively, civil unions or any other relationship between unmarried persons. On the basis of these enactments, we conclude that because the legislature expressly refused to endorse or authorize such unions it could not have intended civil unions to be treated as family matters within the jurisdiction of the Superior Court pursuant to § 46b-1 (17).

Moreover, common-law principles left the issue about who might marry generally to the ecclesiastical courts. See 1 W. Blackstone, Commentaries on the Laws of England (5th Ed. 1773), p. 453. It is plain from a reading of Blackstone, which speaks of husband and wife, and his discussion of the common law as applied to husband and wife, that by using terms like husband and wife or, its Norman French equivalent, baron and feme, the understanding of English common law was that marriage was a contract entered into by a man and a woman. Id., 453, 457. Judge Swift, in his discussion of the common law of Connecticut regarding rights arising out of marital status, makes clear that this legal relation contemplated a contract made between a man and a woman. 1 Z. Swift, A Digest of the Laws of the State of Connecticut (1822), p. 18. This is also clear when one reads Judge Swift's discussion of limitations on marriage within certain degrees of kindred, which are prohibited on the ground "that such incestuous connection is repugnant to the law of nature." Id., 19. The examples he gives are all of men then unable to marry women of various degrees of kindred. Id.

In determining that the legislative intent in the adoption of subdivision (17) of § 46b-1 was not to make Connecticut courts a forum for same sex, foreign civil unions, we, therefore, conclude that the text itself, the rules of court, the legislative history, the strong legislative policy against permitting same sex marriages and the relationship between other statutes, legislative enactments of state policy and the common law are all in accord with that view.

We note that the court based its determination that it lacked jurisdiction to dissolve a civil union, in part, on its conclusion that the Vermont legislature cannot legislate for the people of Connecticut. We agree with the court that the statutes of Vermont do not have extraterritorial effect; *Olmsted* v. *Olmsted*, 216 U.S. 386, 395, 30 S. Ct. 292, 54 L. Ed. 2d 530 (1910); and analyze this full faith and credit claim.

The constitution of the United States, article four, § 1, requires that: "Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. . . ." "[W]here statute or policy of the forum State is set up as a defense to a suit brought under the statute of another State . . . the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause and thus compelling courts of each State to subordinate its own

statutes to those of others but by *appraising the governmental interest of each jurisdiction and deciding accordingly*. That is, the full faith and credit clause, in its design to transform the States from independent sovereigns into a single unified Nation, directs that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty, but because the forum State is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests. The clause (and the comparable due process clause standards) obligate *the forum State to take jurisdiction and to apply foreign law, subject to the forum's own interest in furthering its public policy. In order 'for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'* " (Emphasis added.) Congressional Research Service, Library of Congress, The Constitution of the United States of America, Analysis and Interpretation (J. Killian & G. Costello eds. 1996) Art. IV, Sec. 1, pp. 855–56, citing *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981); *Nevada* v. *Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979); *Carroll* v. *Lanza*, 349 U.S. 408, 75 S. Ct. 804, 99 L. Ed. 1183 (1955); *Alaska Packers Assn.* v. *Industrial Accident Commission*, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).

We conclude that the plaintiff in the present case has a significant set of contacts with this state because he is a resident of Connecticut and has chosen a Connecticut court as the forum in which he seeks the dissolution of this civil union. The only record before us, based on the plaintiff's pleadings, is that, other than having entered the civil union in Vermont, neither party to the civil union has any other significant contact with that state.

The plaintiff contends, "Connecticut public policy clearly favors the conclusion that the Superior Court has subject matter jurisdiction to dissolve the civil union entered into in Vermont." He claims that principles of full faith and credit demand that Connecticut recognize Vermont's civil union statutes unless recognition would violate some strong public policy of Connecticut. He further claims that Connecticut does not have a strong public policy against recognition of civil unions but, instead, that Connecticut public policy favors the recognition of civil unions and the right to dissolve them. We disagree. We conclude that Connecticut public policy does not support that conclusion.[6]

The plaintiff first points to General Statutes §§ 46a-81a through 46a-81r, which prohibit discrimination on

the basis of sexual orientation as evidence of Connecticut's clear public policy in favor of recognizing the right of homosexuals to enter into a marriage-like relationship and the corresponding right to dissolve such relationships in Connecticut courts. He claims that, in keeping with Connecticut's public policy prohibiting discrimination based on sexual orientation, we should extend to homosexual citizens of this state all of the same relief we extend to heterosexual citizens when dissolving a marriage or marriage-like relationship. We disagree that the statutory sections cited to by the plaintiff support his position that Connecticut has a clear public policy in favor of the recognition of the right to enter same sex unions or the right to dissolve them in the Superior Court.

General Statutes § 46a-81r, one of the sections of Title 46a on which the plaintiff relies, provides in relevant part: "Nothing in sections . . . 46a-81a to 46a-81q, inclusive . . . shall be . . . construed . . . (1) to mean the state of Connecticut condones homosexuality or bisexuality or any equivalent lifestyle . . . (4) to authorize the recognition of or the right of marriage between persons of the same sex, or (5) to establish sexual orientation as a specific and separate cultural classification in society."

One of the sources of law is custom and tradition.[7] When § 46a-81r, on which the plaintiff relies, clearly states that "[n]othing in sections . . . 46a-81a through 46a-81q . . . shall be . . . construed . . . to authorize . . . the right of marriage between persons of the same sex," we fail to see how those sections, embodying custom, require Connecticut to provide a forum for recognition and dissolution of a same sex civil union that our law does not authorize.[8] The trial court was entitled to rely on statutes based on that customary source of our law. It does not constitute invidious discrimination simply because a state places some restraints on who may marry. For example, some societies allow polygamous marriages[9] but Connecticut does not allow such marriages[10] and neither does Vermont.[11] Connecticut has exercised the power to limit by law who may marry since the beginning of the colony. Other than to cite title 46a, which we conclude stands for the opposite proposition of that which he argues, the plaintiff has failed to brief the issue of the Connecticut legislature's power to restrict the right to marry or enter into marriage-like relationships in terms of discrimination based on sexual orientation. Accordingly, we conclude that §§ 46a-81a through 46a-81r do not evidence a clear public policy in favor of recognizing same sex civil unions or the right to dissolve them.

The plaintiff next claims that the Connecticut legislature has evinced a willingness to recognize civil unions both by recently amending the adoption laws, found in General Statutes §§ 45a-724 through 45a-737, inclusive,

to allow adoptions by same sex partners and by its refusal to enact its own version of the Defense of Marriage Act. Again, we disagree.

General Statutes § 45a-727a entitled "State policy re best interests of child; public policy re marriage," is a clear statement of public policy embodied in a statute which should be enforced and upheld despite contrary statutory enactments in the state of Vermont. See General Statutes § 45a-727a (4).

Although our General Assembly has on occasion adopted preambles to some of the enactments, it is not the usual case. However, there have been statutory enactments in which the legislature has expressly stated a particular policy. See, e.g., General Statutes §§ 22a-91 and 22a-92 (a) of the Coastal Management Act. Section 45a-727a of the General Statutes is unusual in that it is completely devoted to a declaration of legislative policy. Subsection (4) of § 45a-727a provides: "It is further found that the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman."

The legislative history of the enactment of General Statutes § 45a-727a shows that members of the General Assembly were initially reacting to what had become known as the *Baby Z.* case. *In re Baby Z.*, 247 Conn. 474, 724 A.2d 1035 (1999). The court in *In re Baby Z.* held that General Statutes § 45a-727 of our then existing adoption laws did not permit a child with a natural or adoptive legal parent to be adopted by a second person other than that parent's spouse. Id., 498–522. In response to the decision in *In re Baby Z.*, the General Assembly enacted No. 00-228 of the 2000 Public Acts. In speaking against a proposed amendment to House Bill 5830, which ultimately passed without the amendment and became Public Act 00-228 and which amendment he found unnecessary, Senator Donald Williams, the senate chair of the judiciary committee, in floor debate said that what some had termed the "gay adoption" bill did "not change our policy on marriage in the state of Connecticut." 43 S. Proc., Pt. 8, 2000 Sess., pp. 2456–57. In floor debate, he stated that the bill had "protections" which made that "absolutely clear." Id., 2457. He pointed to § 1 of the bill stating that "it is further found that the current public policy of the State of Connecticut is now limited to a marriage between a man and a woman." Id. He also pointed to the last section of the bill, § 5, which provided that "nothing in this act shall be construed to establish or constitute an endorsement of any public policy with respect to marriage, civil union or any other form of relation between unmarried persons or with respect to any rights of or between such persons other than their rights and responsibilities to a child who is the subject of an adoption." Id.

It becomes clear from a careful reading of the floor

debate on this legislation in both houses, that a number of legislators were opposed to adoption of this legislation if it were to be used later in any way as a wedge by appellate or trial courts to require recognition of civil unions in Connecticut in the manner they ascribed to the Vermont Supreme Court in *Baker* v. *State*, 170 Vt. 194, 744 A.2d 864 (1999). Members of the General Assembly in their floor debate in each house did not make explicit mention of *Baker*. It is clear, however, that several legislators were concerned, as a result of the Vermont experience, that in overriding the ruling in the *In re Baby Z.* case by permitting adoption of a child who already had a natural or adoptive parent by another person of the same sex who was not lawfully married to that parent, they did not allow an appellate court to use that legislative enactment as a wedge to bring down the laws of Connecticut concerning who may marry. See, e.g., 43 S. Proc., supra, p. 2451–52. The *Baker* court had done just that by citing the Vermont legislature's enactment of a same sex couple adoption law as one of the reasons why there was no proper governmental purpose under the common benefits clause of the Vermont constitution to restrict marriage to unions between a man and a woman. *Baker* v. *State*, supra, 218–19. After discussing what it termed the "reality" that some persons in same sex relationships were conceiving children by artificial means, the Vermont court so used the enactment by the Vermont legislature of that change in the law when it stated: "The Vermont Legislature has not only recognized this reality, but has acted affirmatively to remove legal barriers so that same-sex couples may legally adopt and rear the children conceived through such efforts. See 15A V.S.A. § 1-102 (b) (allowing partner of biological parent to adopt if in child's best interest without reference to sex)." Id., 218.

In the debate on the adoption of General Statutes §§ 45a-727a and 45a-727b, in answer to pointed questions from Senator Winthrop Smith, Senator Williams agreed that (1) the "finding of fact" at the beginning of the bill is a statement of public policy of the state of Connecticut and was established as such by its placement in the statutes and not through a legislative dialogue; 43 S. Proc., supra, p. 2472; (2) the language on the lines 11 through 13 in the bill establish that the public policy of Connecticut is that a marriage is defined as being between one man and one woman; id., p. 2473; (3) after a legislature has established and recognized a policy like this that a court could not alter that policy without the legislature first making a change; id.; and (4) the language of the bill precluded a court from reaching a conclusion that Connecticut public policy would allow same sex marriages or unions. Id., 2474–75.

In addition, contrary to the plaintiff's assertions, the legislative history reveals that the legislature failed to enact its own version of the Defense of Marriage Act not

because it intended to evince a willingness to recognize civil unions but because it thought such an enactment unnecessary. During the senate debate, the following colloquy took place between Senators Smith and Williams. Senator Smith asked: "This amendment is the one that we've been calling DOMA, the defens[e] [of] marriage act, and based on the language we've just talked about in the underlying bill and the questions that we've just had, my question to you was, would the addition of this to the bill in front of us now be superfluous?" 43 S. Proc., supra, p. 2476. Senator Williams responded: "Exactly. I believe that this amendment would be superfluous." Id. Furthermore, section 5 of Public Act 00-228, now codified at General Statutes § 45a-727b, expressly provides: "Nothing in this section and sections 45a-724, 45a-727, 45a-727a and 45a-731 shall be construed to establish or constitute an endorsement of any public policy with respect to marriage, civil union or any other form of relation between unmarried persons or with respect to any rights of or between such persons other than their rights and responsibilities to a child who is a subject of an adoption as provided for in sections 45a-724 and 45a-727." We therefore conclude that the Connecticut legislature has not demonstrated a willingness to recognize civil unions by either its amendment of the adoption statutes or by its failure to enact its own version of the Defense of Marriage Act.

Finally, the plaintiff relies on *Boland* v. *Catalano*, 202 Conn. 333, 521 A.2d 142 (1987), in support of his argument that Connecticut recognizes nontraditional relationships and affords the parties to such relationships a judicial remedy for the dissolution of those relationships. Specifically, he argues that under *Boland* this court can offer dissolution relief to the parties of this civil union under the theory that the partners to the union entered into an express contract, the terms of which are defined by § 1201 et seq. of title 15 of the Vermont Statutes Annotated. We disagree for the reasons already stated and because the plaintiff did not plead any express or implied contract to share earnings or assets.

In his second claim for relief, the plaintiff sought any relief to which he may be entitled in law or equity. If under any facts provable under a complaint, a court of law has jurisdiction to grant any one of the claims for relief set out in a plaintiff's complaint, then the plaintiff's action should not be dismissed sua sponte for lack of jurisdiction. See *Pamela B.* v. *Ment*, 244 Conn. 296, 308, 709 A.2d 1089 (1998). In *Boland*, our Supreme Court adopted the holding of the California Supreme Court in *Marvin* v. *Marvin*, 18 Cal. 3d 660, 665, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), that "[t]he courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. . . . In the absence of an express contract,

the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties." (Internal quotation marks omitted.) *Boland* v. *Catalano*, supra, 202 Conn. 340–41. The *Boland* court also expressly ruled, in adopting *Marvin*, that the court may also employ "equitable remedies" when warranted by the facts of the case. Id., 341. If before or during purportedly entering the Vermont civil union, the parties to this action entered an implied or express contract to "share their earnings and the fruits of their joint labor," the court had jurisdiction to grant relief in law or equity as to that claim. Id., 342. "Ordinary contract principles are not suspended . . . for unmarried persons living together, whether or not they engage in sexual activity." Id., 339.

In evaluating whether the complaint here permits jurisdiction to be exercised on the second claim for relief, we do not evaluate what agreements, if any, the plaintiff and defendant entered, explicitly or implicitly, regarding the sharing of assets or income of one with the other and whether such agreements are enforceable because, unlike *Marvin* v. *Marvin*, supra, 18 Cal. 3d. 660, and *Boland* v. *Catalano*, supra, 202 Conn. 333, no such express or implied agreements are alleged in the complaint. Nor has the plaintiff distinctly claimed on appeal that jurisdiction might be exercised on this ground.

Finally, *Boland* is not authority for the proposition that Connecticut must recognize civil unions between same sex partners and provide a forum for their dissolution in the state of Connecticut. "The rights and obligations that attend a valid marriage simply do not arise where the parties choose to cohabit" without entering a valid marriage relationship. *Boland* v. *Catalano*, supra, 202 Conn. 339.

The plaintiff also cites Practice Book § 25-2[12] as further grounds for the exercise of jurisdiction. This provision merely sets forth the necessary allegations of a complaint for dissolution of marriage, legal separation or annulment where jurisdiction already exists, but does not confer jurisdiction.

For all of the foregoing reasons, we conclude that a civil union is not a family relations matter and, therefore, the court was correct in determining that it had no subject matter jurisdiction to dissolve the civil union under § 46b-1 (17).

The judgment is affirmed.

In this opinion the other judges concurred.

[1] Section 1202 of title 15 of the Vermont Statutes Annotated provides: "For a civil union to be established in Vermont, it shall be necessary that the parties to a civil union satisfy all of the following criteria:

"(1) Not be a party to another civil union or a marriage.

"(2) Be of the same sex and therefore excluded from the marriage laws

of this state

"(3) Meet the criteria and obligations set forth in 18 V.S.A. chapter 106."

[3] Practice Book § 25-1, entitled "Definitions Applicable to Proceedings on Family Matters," provides: "The following shall be 'family matters' within the scope of these rules: Any actions brought pursuant to General Statutes § 46b-1, including but not limited to dissolution of marriage, legal separation, dissolution of marriage after legal separation, annulment of marriage, alimony, support, custody, and change of name incident to dissolution of marriage, habeas corpus and other proceedings to determine the custody and visitation of children except those which are properly filed in the superior court as juvenile matters, the establishing of paternity, enforcement of foreign matrimonial judgments, actions related to prenuptial and separation agreements and to matrimonial decrees of a foreign jurisdiction, actions brought pursuant to General Statutes § 46b-15, custody proceedings brought under the provisions of the Uniform Child Custody Jurisdiction Act and proceedings for enforcement of support brought under the provisions of the Uniform Interstate Family Support Act."

[4] General Statutes § 46b-15 (a) provides: "Any family or household member as defined in section 46b-38a who has been subjected to a continuous threat of present physical pain or physical injury by another family or household member or person in, or has recently been in, a dating relationship who has been subjected to a continuous threat of present physical pain or physical injury by the other person in such relationship may make an application to the Superior Court for relief under this section."

[5] General Statutes § 17a-523 provides: "Any judge of the Superior Court, on information to him that any person is unjustly deprived of his liberty by being detained or confined in any hospital for psychiatric disabilities, or in any place for the detention or confinement of persons with psychiatric disabilities, or in custody and control of any individual under an order of a court of probate, may appoint a commission of not fewer than two persons, who, at a time and place appointed by them, shall hear any evidence offered touching the case. Such commission need not summon the party claimed to be unjustly confined before it, but shall have one or more private interviews with him and shall also make inquiries of the physicians and other persons having charge of such place of detention or confinement, and within a reasonable time thereafter report to such judge the facts and its opinion thereon. If, in its opinion, such person is not legally detained or confined in such place, or is cured, or his confinement is no longer beneficial or advisable, such judge shall order his discharge; but no commission shall be appointed with reference to the same person more often than once in six months. The judge before whom any of the proceedings provided for in this section are had may tax reasonable costs at his discretion."

[6] Chapter 815j, comprised of General Statutes §§ 46b-40 through 46b-87a, inclusive, sets out rights and remedies arising from dissolution of marriage, legal separation and annulment.

[7] We note that our legislature has recently had the opportunity to authorize same sex marriages and civil unions and has not done so. On February 6, 2002, House Bill No. 5001, which would have authorized two persons to enter into marriage regardless of sex, and House Bill No. 5002, which would have authorized the establishment of civil unions and granted the parties to a civil union the same benefits, protections and responsibilities as granted to spouses in a marriage, were referred to the judiciary committee. A public hearing on that proposed legislation was held on February 11, 2002. No action was taken and the bills died in committee.

[8] Blackstone wrote: "Some have divided the common law into two principal grounds or foundations: 1. Established customs . . . and 2. Established rules and maxims . . . . But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage; and the only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it." 1 W. Blackstone, Commentaries on the Laws of England (5th Ed. 1773) p. 68.

[9] "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." *Maynard* v. *Hill*, 125 U.S. 190, 205, 8 S. Ct. 723, 31 L. Ed. 654 (1888).

[9] "At common law, the second marriage was always void . . . and from the earliest history of England polygamy has been treated as an offense against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil, the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offenses against the rights of marriage; just as they were for testamentary causes and the settlement of the estates of deceased persons." *Reynolds* v *United States*, 98 U.S. 145, 164–65, 25 L. Ed. 244 (1878).

[10] See General Statutes § 53a-190 (c), which makes bigamy a class D felony.

[11] See Vt. Stat. Ann. tit. 15, § 5, declaring bigamous marriages "null and void for all purposes," and Vt. Stat. Ann. tit. 13, § 206, which provides that a person who commits the offense of bigamy "shall be imprisoned not more than five years."

[12] Practice Book § 25-2 provides: "(a) Every complaint in a dissolution of marriage, legal separation or annulment action shall state the date and place, including the city or town, of the marriage and the facts necessary to give the court jurisdiction.

"(b) Every such complaint shall also state whether there are minor children issue of the marriage and whether there are any other minor children born to the wife since the date of marriage of the parties, the name and date of birth of each, and the name of any individual or agency presently responsible by virtue of judicial award for the custody or support of any child. These requirements shall be met whether a child is issue of the marriage or not and whether custody of children is sought in the action. In every case in which the state of Connecticut or any town thereof is contributing or has contributed to the support or maintenance of a party or child of said party, such fact shall be stated in the complaint and a copy thereof served on the attorney general or town clerk in accordance with the provisions of Sections 10-12 through 10-17. Although the attorney general or town clerk shall be a party to such cases, he or she need not be named in the writ of summons of summoned to appear.

"(c) The complaint shall also set forth the plaintiff's demand for relief and the automatic orders as required by Section 25-5."

ADDENDUM H

NO. F-185,063

IN THE MATTER OF THE MARRIAGE OF	§	IN THE DISTRICT COURT
	§	
	§	
R. S.	§	279TH JUDICIAL DISTRICT
AND	§	
J. A.	§	JEFFERSON COUNTY, TEXAS

AGREED FINAL DECREE OF DIVORCE

On 3-3, 2023 the Court heard this case.

1 Appearances

Petitioner, R. S., appeared in person and through attorney of record, RONNIE J. COHEE, and announced ready for trial.

Respondent, J. A., appeared in person and through attorney of record, TOMMY GUNN, and announced ready for trial.

2. Record

The making of a record of testimony was waived by the parties with the consent of the Court.

3. Jurisdiction and Domicile

The Court finds that the pleadings of Petitioner are in due form and contain all the allegations, information, and prerequisites required by law. The Court, after receiving evidence, finds that it has jurisdiction of this case and of all the parties and that at least sixty days have elapsed since the date the suit was filed. The Court finds that, at the time this suit was filed, Petitioner had been a domiciliary of Texas for the preceding six-month period and a resident of the county in which this suit was filed for the preceding ninety-day period. All persons entitled to citation were properly cited.

and privileges, past, present, or future, arising out of or in connection with the operation of the business.

9. The business known as J.R.A. Ventures, Inc., including but not limited to all furniture, fixtures, machinery, equipment, inventory, cash, receivables, accounts, goods, and supplies; all personal property used in connection with the operation of the business; and all rights and privileges, past, present, or future, arising out of or in connection with the operation of the business.

10. The business known as Smalltown Auctions, including but not limited to all furniture, fixtures, machinery, equipment, inventory, cash, receivables, accounts, goods, and supplies; all personal property used in connection with the operation of the business; and all rights and privileges, past, present, or future, arising out of or in connection with the operation of the business.

Division of Debt

Debts to R. S.

IT IS ORDERED AND DECREED that R. S., shall pay, as a part of the division of the estate of the parties, and shall indemnify and hold J. A. and I. A.'s property harmless from any failure to so discharge, these items:

1. The balance due, including principal, interest, and all other charges, on the promissory note payable to Ford Motor Credit, and given as part of the purchase price of and secured by a lien on the 2001 Chevrolet Silverado pickup motor vehicle awarded to R. S.

2. The following debts, charges, liabilities, and obligations:

a. The entire balance owed to Dell Financial.

3. Any and all debts, charges, liabilities, and other obligations incurred solely by R. S. from and after June 9, 2002 unless express provision is made in this decree to the contrary.

Debts to J. A.

IT IS ORDERED AND DECREED that J. A., shall pay, as a part of the division of the estate of the parties, and shall indemnify and hold R. S. and R. S.'s property harmless from any failure to so discharge, these items:

1. The balance due, including principal, interest, and all other charges, on the promissory note payable to Mobil Oil Federal Credit Union, and given as part of the purchase price of and secured by a lien on the 1993 Nissan ZX motor vehicle awarded to J. A.

2. The following debts, charges, liabilities, and obligations:

a. The entire balance owed to Conseco Finance.
b. The entire balance owed to Mobil Oil Federal Credit Union.
c. The entire balance owed to Best Buy.
d. The entire balance owed to Citifinancial.
e. The entire balance owed to Goodyear.
f. ABC Distributing
Account No. 7770126480 3 in the name of Heaven's Helpers.
Balance $121.89.

3. Any and all debts, charges, liabilities, and other obligations incurred solely by J. A. from and after June 9, 2002 unless express provision is made in this decree to the contrary.

Notice

IT IS ORDERED AND DECREED that each party shall send to the other party, within three days of its receipt, a copy of any correspondence from a creditor or taxing authority concerning any potential liability of the other party.

Attorney's Fees

To effect an equitable division of the estate of the parties and as a part of the division, each party shall be responsible for their own attorney's fees incurred as a result of legal representation in this case.

Confirmation of Separate Property

IT IS ORDERED AND DECREED that the following described property is confirmed as the separate property of R. S.:

1. Eureka Boss vacuum;
2. Hoover steam cleaner;
3. JVC VCR;
4. Compaq 5050 PC with CUP, 15" color monitor, printer, software, speakers, scanner and keyboard;
5. Hewlett Packard HP700 fax;
6. Six-foot floral sofa with matching love seat;
7. 45 gallon fish aquarium with wood stand and complete accessories;
8. CD music collection, app. 60 discs;
9. Video tape collection, app. 30 tapes;
10. Silver automatic rotisserie;
11. Bread machine;
12. Sterling flatware collection;
13. Black and Decker space saver coffee pot;
14. Black and Decker mixer;
15. Aluminum 8-piece Chef Magic pots and pans set;
16. All of R.S.'s clothing and accessories;
17. All of R.S.'s son's clothing;
18. Kenwood AM/FM receiver, 5-disc CD changer, tape deck with 4 speakers;
19. 4-piece surround sound system with sub-woofer
20. Misc. framed prints and art;
21. Antique telephone desk;
22. Briggs and Stratton gas weed eater;
23. Gold nugget size 9 men's ring;
24. Sony cordless telephone with answering machine;
25. Homelite chainsaw;
26. Cast iron birdbath;
27. Cannon owl 35mm camera;
28. Two-drawer white filing cabinet;

29. Misc. Waterford and Mikasa crystal;
30. Sanyo bookshelf AM/FM/CD stereo;
31. Ten assorted hanging potted plants;
32. Two men's 2-tone Fossil watches;
33. 19" Sanyo television with built-in VCR/DVD player.
34. Cherry pine bedroom suite consisting of cannonball headboard, footboard, rails, queen-size mattress and box springs; 6-foot, 6-drawer dresser with 5-foot mirror and double-door TV/entertainment center.
35. The 2001 Chevrolet Silverado motor vehicle, vehicle identification number 1GCEC14W1Z135901, together with all prepaid insurance, keys, and title documents.

9. *Transfer and Delivery of Property*

Delivery of Property

The Court finds that the parties agreed that J. A. would deliver to R. S. on October 8, 2002 at 10:00 a.m. at Lisotta's Storage on College Street all items in the possession of J. A. belonging to R. S. and that all property belonging to R. S. is in the possession of R. S. at the time this decree is entered.

10. *Additional Provisions*

The Court further finds that the parties agreed to equally pay the cost of the storage facility at Lisotta's Storage for October 2002 and that said cost has been paid at the time this decree is entered.

The Court further finds that R. S. has agreed to close R.S.'s private mail box by October 11, 2002 and that said private mail box (P.M.B.) has been closed as of the date this decree is entered.

11. *Court Costs*

IT IS ORDERED AND DECREED that costs of court are to be borne by the party who incurred them.

12. *Clarifying Orders*

Without affecting the finality of this Final Decree of Divorce, this Court expressly reserves the right to make orders necessary to clarify and enforce this decree.

13. *Relief Not Granted*

IT IS ORDERED AND DECREED that all relief requested in this case and not expressly granted is denied.

14. *Date of Judgment*

SIGNED on 3-03, 2003

JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

RONNIE F. COHEE, Attorney for Petitioner
State Bar No. 00783850

TOMMY GUNN, Attorney for Respondent
State Bar No. 08623699

APPROVED AND CONSENTED TO
AS TO BOTH FORM AND SUBSTANCE:

R. S., Petitioner

J. A., Respondent

FILED
DISTRICT COURT
JEFFERSON CO., TEXAS
03 MAR -3 A9:52
LOLITA RAMOS
DISTRICT CLERK