

TESTIMONY ON PROPOSED NEW MEXICO SENATE BILL 12

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This proposed domestic partner legislation would have serious implications for family law in the areas of parenting and marriage.

The bill extends to domestic partners all of “the same protections and benefits as are afforded or recognized by the laws of the State to spouses” and does not exclude from this broad language parenting rights. Assuming this result is intended, it would significantly alter current law on such matters as presumptions of paternity, joint adoption, custody and visitation. For instance, the legislation would seem to allow an unmarried partner of a child’s mother to seek visitation of her children or be presumed a father of her child or be allowed to adopt a child jointly with her merely by filing a domestic partnership affidavit.

As family scholars have noted, one of the major reasons, the law privileges married couples in regards to parenting is “the commitments inherent in formal families do increase the likelihood of stability and continuity for children. Those factors are so essential to child development that they alone may justify the legal incentives traditionally given to permanent kinship units based on marriage. The same factors can justify the denial of legal protection to unstable social patterns that threaten children's developmental environment.”¹

Social science research indicates that cohabiting relationships are on average less stable and more likely to involve risk factors for children than are marriages.² Marriage has long been society’s way of encouraging those who may create children to commit to one another and to the children their relationships brings into being. It makes more likely children’s opportunity to know and be raised by their own mother and father or at least to have a mother and father when they are deprived of a relationship with their own biological parents. It would be very unwise to abandon this longstanding policy by equating cohabiting couples with married couples for purposes of parenting laws.

The experience of other states makes clear that creating legal statuses for unmarried couples such as domestic partnerships and civil unions also threatens the longstanding legal definition of marriage as the union of a man and a woman in at least two ways.

First, courts in Massachusetts, California and Connecticut have specifically held that those States’ decisions to “draw no distinction between married couples and domestic partners with regard to the legal rights and responsibilities relating to children raised within each of these family relationships, [means] the asserted difference in the effect on children does not provide a justification for the differentiation in nomenclature set forth

in the challenged statutes.”³ In other words, by granting parenting rights to domestic partners, the State had undercut the traditional role of marriage as a way of providing an opportunity for children to know and be raised by their own mother and father. Thus, the courts saw no reason they should not entirely sever the link between marriage and childrearing by redefining marriage.

Second, the creation of alternative legal statuses for the unmarried was understood by these courts as evidence that sexual orientation deserved heightened judicial scrutiny. This finding, in turn, was used by the court to discount the State interests in marriage as the union of a man and a woman.⁴

Neither is a statutory disclaimer likely to prevent a court from reaching these conclusions. When the Massachusetts Legislature approved sexual orientation discrimination in 1989 it specified that “[n]othing in this act shall be construed so as to legitimize or validate a ‘homosexual marriage’, so-called.”⁵ In its decision redefining marriage in Massachusetts, the majority did not even take note of this language, though it was quoted in a dissenting opinion.⁶

If the proposed legislation is merely meant to provide benefits to individuals who are dependent on one another, it need not create a new legal status defined by “a relationship of mutual caring and support.” In fact, this definition, coupled with the exclusion of related persons from the status suggests that the bill would not help those in dependent relationships as much as endorse cohabiting relationships.

I believe others will address the serious religious liberty implications of the proposed legislation, so I will not discuss them except to note that the existing disclaimer is vague and does not respond to specific concerns that creating a legal status for unmarried couples will create obligations for third parties that will interfere with their conscientious objections to treating unmarried couples as if they were married.

Thank you for the opportunity to raise these concerns with the existing proposal.

Notes

¹ Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy* 81 MICH. L. REV. 463, 475-476 (1983).

² Much of this research is collected in William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation* 82 OREGON L. REV. 1001 (2003).

³ In re Marriage Cases, 183 P.3d 384, 452 note 72 (Cal. 2008); see also Goodridge v. Department of Public Health, 798 N.E.2d 941, 962 (Mass. 2003); Kerrigan v. Department of Public Health, 2008 WL 4530885, *15 (Conn. 2008).

⁴ In re Marriage Cases, 183 P.3d at 428; Goodridge, 798 N.E.2d at 967; Kerrigan, 2008 WL 4530885 at *15.

⁵ Mass. General Laws Ann. 151B §4.

⁶ Goodridge, 798 N.E.2d at 977 (Spina, J., dissenting).