

**PENNSYLVANIA SENATE JUDICIARY COMMITTEE HEARING RE SB1250**

William C. Duncan, Marriage Law Foundation

April 10, 2008

Senate Bill 1250, Pennsylvania's proposed marriage amendment is simple. It advances a single purpose—the preservation of Pennsylvania's marriage policy as understood throughout the existence of the Commonwealth—by reaffirming the legal definition of marriage as the union of a man and a woman and, for emphasis, providing that marriage is not any other kind of relationship defined differently under a different name but with the equivalent legal status.

There have been and will be, regardless of all facts to the contrary, accusations that the amendment will do more than this. Opponents invoke a rhetorical “parade of horrors” where individuals in all kinds of relationships are denied benefits if the amendment is approved. The experience of the 27 states with marriage amendments, including 18 that include language addressing marriage equivalent statuses, should give this Committee a high level of confidence that the extreme scenarios described by the amendment's opponents are without foundation.

At the outset, it should be noted that despite the number of states with marriage amendments in their constitutions, there has been very, very little litigation premised on those amendments. The few cases that have arisen have either been decided in a way that contradicts the claims of amendment opponents or rely on amendments that are easily distinguishable from the Pennsylvania amendment. In fact, there seems to have been only one case that has invalidated a law based on a State's marriage amendment and that case is on appeal.

*Conflict of Laws*

It has been suggested that the proposed amendment would somehow violate the Federal Constitution's requirement that States give Full Faith and Credit to the valid judgments of courts in other states. There is no case in which such a scenario has played out because the accusation is baseless.

First, there is no reason to believe that a Pennsylvania court would interpret the amendment in a way that conflicts with the Federal Constitution.

Second, the amendment precludes recognition of a marriage but says nothing about another State's judgment even if related to a marriage that would be invalid in Pennsylvania. In other words, if a California court were to premise an alimony or wrongful death judgment on the existence of a same-sex marriage or civil union in another state, Pennsylvania would not have to recognize the California marriage or union in order to enforce the California judgment, it would just have to note that the California courts had jurisdiction and issued a valid judgment.

Finally, even if these highly unlikely scenarios were to occur, the Federal Defense of Marriage Act<sup>1</sup> would prevent a conflict between the state amendment and Federal constitutional requirements. The U.S. Constitution's Full Faith and Credit Clause<sup>2</sup> allows Congress to determine the effect of one State's judgment in other states and DOMA allows States to refuse to recognize judgments based on out-of-state same-sex marriages. It should be stressed again, however, that there is no reason that the Federal DOMA need be invoked since the Pennsylvania marriage amendment will not require Pennsylvania courts to decline recognition to valid judgments from other states.

### *Private Benefits*

Private parties do not create legal marriages and no court has held that a private employer cannot offer benefits to unmarried partners of its employees or that a private contract or similar arrangement is invalid just because it involves unmarried persons. When Virginia was considering a state marriage amendment, arguably broader in effect than Pennsylvania's, the Attorney General opined: "It is my opinion that passage of the marriage amendment will not affect the current legal rights of unmarried persons involving contracts, wills, advance medical directives, shared equity agreements, or group accident and sickness insurance policies."<sup>3</sup> There is nothing in the language of the proposed Pennsylvania amendment that would lead to a different result here.

The operative term "valid" refers to in-State legal validity and the term "recognized" refers to Pennsylvania recognition of another State's status. They mean that Pennsylvania will not give public recognition to a legal status. Individuals and private businesses are free to create any kind of arrangement they desire. The many benefits accessible through legal tools such as a power of attorney or through other private agreements will also be unaffected by the amendment.

### *Public Benefits*

The amendment will also leave State and municipal authorities free to provide (or continue to provide) benefits to unmarried persons or couples that are not contingent on marital status. The amendment only addresses a legal status that is "equivalent" to marriage. Thus, the extension to unmarried couples of a limited number of benefits, even if those benefits were typically afforded only to married couples, would not violate this provision. Of course, benefits that are generally provided to persons on a basis other than marriage (such as insurance coverage for dependents or visitation privileges in hospitals or prisons or even standing to bring an action for wrongful death) could be offered to unmarried persons without running afoul of the proposed amendment.

Opponents have raised three examples to argue that the proposed Pennsylvania amendment will prevent public employees or other citizens from receiving benefits

---

<sup>1</sup> Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996) codified at 28 U.S.C. §1738C.

<sup>2</sup> U.S. Const. Art. IV, sec. 1.

<sup>3</sup> Opinion of the Virginia Attorney General at 2, Sept. 14, 2006 (requested by Sen. Stephen Newman, et al.) (available at <http://www.vaag.com/OPINIONS/2006opns/06-003Newmanetal.pdf>).

because they are unmarried. They claim that the amendments of Idaho, Kentucky and Michigan have produced this result.

In fact, only one of these three states has experienced litigation over the question. The other state examples involve Attorney General opinions. Each State's experience, however, is distinguishable from the Pennsylvania amendment.

In Idaho, the attorney general relied on unique language in that State's amendment that the attorney general believed prohibited recognizing a "domestic legal union."<sup>4</sup> The Pennsylvania amendment, of course, is much narrower, prohibiting only the "functional equivalent" of marriage. Thus, unlike the attorney general interpretation of Idaho's amendment, a legal status would have to be just like a marriage, not a mere "legal union" to be affected by Pennsylvania's amendment.

In Kentucky, the attorney general said statute universities *could* offer health insurance coverage to "domestic partners" as long as the benefits were not conditioned "upon a legal status defined in a manner substantially similar to that of marriage."<sup>5</sup> This is hardly an imposition on the state since it can easily be complied with and Kentucky's "similar" language is arguably broader than Pennsylvania's "equivalent" language.

A Michigan court of appeals did hold a public university could not use a status similar to marriage to determine eligibility for employment benefits. The specific wording relied on by the Michigan court ("or similar union for any purpose") is significantly broader than the Pennsylvania amendment, thus a Pennsylvania court would be expected to come to a different conclusion. In any event, the Michigan decision is still being appealed to that State's supreme court.

In fact, municipalities in many states with marriage amendments (even those that do more than merely define marriage) have allowed benefits to unmarried persons living with public employees. During the 2008 legislative session, the Utah Legislature specified how cities could extend benefits to unmarried partners of public employees.<sup>6</sup> Even the fact that legislation was enacted to reach this result makes clear that the legislature believed the State's marriage amendment did not decide the matter. The Human Rights Campaign reports that municipalities in states like Georgia, Ohio, and Wisconsin all offer domestic partner benefits to public employees.<sup>7</sup> These states all have marriage amendments similar to or even broader than the proposed Pennsylvania amendment.

The Florida Supreme Court recently ruled in regard to a proposed amendment to the Florida Constitution using the language "marriage or the substantial equivalent thereof" that: "The plain language of the proposed amendment is clear that the legal union of a

---

<sup>4</sup> Idaho Attorney General Opinion No. 08-21508 (February 4, 2008).

<sup>5</sup> Kentucky Attorney General Opinion, OAG 07-004 (June 1, 2007).

<sup>6</sup> 2008 Utah Senate Bill 299 (signed by Governor, March 14, 2008).

<sup>7</sup> Human Rights Campaign, Employers That Offer Domestic Partner Health Benefits: City and County Governments (April 9, 2008) at

[http://w3.hrc.org/CustomSource/WorkNet/srch\\_list\\_pdf.cfm?RequestTimeout=500&QUERY\\_STRING=Section=Search\\_the\\_Database&Template=/CustomSource/WorkNet/srch\\_list.cfm](http://w3.hrc.org/CustomSource/WorkNet/srch_list_pdf.cfm?RequestTimeout=500&QUERY_STRING=Section=Search_the_Database&Template=/CustomSource/WorkNet/srch_list.cfm).

same-sex couple that is not the ‘substantial equivalent’ of marriage is not within the ambit of this constitutional provision.”<sup>8</sup>

The issue is even clearer in Pennsylvania because of previous litigation over the City of Philadelphia’s benefits for “life partners” of public employees. The Supreme Court of Pennsylvania said that “the City did not legislate in the area of marriage” by offering these benefits and the City’s actions were not “preempted by the Marriage Law.”<sup>9</sup>

In any event, a cautious municipality or legislature could easily avoid any potential conflict with the Pennsylvania amendment by making benefits available to the unmarried based on criteria other than similarity to marriage, for instance, on dependence or resource sharing.

### *Domestic Violence Protection*

A particularly baseless charge, really a red herring, is that the proposed amendment would remove domestic violence protection from the unmarried. In fact, Pennsylvania’s domestic violence statute extends its protection to cohabitants not based on any legal status but on the fact of sharing a household including being “current or former sexual or intimate partners.”<sup>10</sup> It strains credulity to suggest that this mere notice of the fact of a relationship creates a marital or marriage-like status.

A broader amendment than Pennsylvania’s, enacted in Ohio, has been held not to limit or revoke domestic violence protections for the unmarried.<sup>11</sup> Ohio had been the only State in which a case had arisen where a court had suggested a potential conflict. An earlier submission to this Committee had mentioned Utah but no Utah case has so held and, in fact, Utah’s Legislature has recently enacted legislation allowing law enforcement tracking of domestic violence statistics involving cohabitants—clear evidence that the Legislature believes the domestic violence law applies to cohabitants despite the marriage amendment.<sup>12</sup>

### *Unnecessary*

A marriage amendment is necessary to prevent a redefinition of marriage or the imposition of an alternative legal status meant to approximate marriage. In 2003, the Massachusetts Supreme Judicial Court judicially redefined marriage for that State.<sup>13</sup> In 1999 and 2006, the highest courts of Vermont and New Jersey, respectively, ordered those State’s legislatures to create a legal status equivalent to marriage in all but name, in both instances called a civil union.<sup>14</sup>

---

<sup>8</sup> Advisory Opinion to the Attorney General Re: Florida Marriage Protection Amendment, 926 So. 2d 1229 (2006).

<sup>9</sup> *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1241 (Pa. 2004).

<sup>10</sup> 23 Pa. C.S. §6102.

<sup>11</sup> *State v. Carswell*, 871 N.E.2d 547 (Ohio 2007).

<sup>12</sup> 2008 Utah Senate Bill 242 (signed by Governor March 18, 2008).

<sup>13</sup> *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>14</sup> *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

It is true that a number of State courts have recently issued decisions rejecting the idea that redefining marriage is mandated by the constitutional guarantees. In almost every instance, however, these decisions have involved only one-vote margins. In addition, unlike a constitutional amendment, these decisions can be reversed at any time without any input from the citizens of the States.

Pennsylvania's marriage statute, standing alone, will not constrain a court from ordering a redefinition of marriage. Courts in Washington, Iowa and California have all held that existing marriage statutes were unconstitutional.<sup>15</sup> The Washington decisions were reversed and the Iowa and California decisions are being appealed.

In the event of an adverse action that would threaten the state's marriage law, the appropriately long and deliberative process for amending the constitution (requiring approval in two legislative sessions and a vote in a general election<sup>16</sup>) would not allow for a timely response and the effects of such an action could be widespread before the people of the state are given the opportunity to weigh in formally.

#### *Importance of the Constitution*

Some have argued that a constitution is too important a document to be amended to include protection for marriage. This argument is a *non sequitur*. The Pennsylvania Constitution contains an amendment mechanism precisely to allow the people of the State to make changes when necessary. In fact, the advocates of redefining marriage have shown little hesitance about "changing" constitutions through judicial interpretation, it seems the real disagreements about who gets to make decisions about what the Constitution means. Enacting a marriage amendment in Pennsylvania means the people of the State will be making the decision. There is no reason a decision of this import need be delegated to a branch of government that is not responsible for making public policy.

#### *Conclusion*

If enacted, the proposed marriage amendment would merely reaffirm the State's legal definition of marriage and prevent the imposition of an alternative legal status that approximates marriage in all but name. It will not remove, or prevent state or local government from offering, benefits to those who are not currently married on some basis other than marriage or an exact equivalent. Furthermore, it secures the right of the people of the Pennsylvania to act to preserve the unique and uniquely beneficial understanding of marriage inherited from countless generations of human experience.

---

<sup>15</sup> Andersen v. King County, 2004 WL 1738447 (Wash. Super. Ct. 2004) reversed, 138 P.3d 963 (Wash. 2006); Varnum v. Brien, Case No. CV5965 (Iowa District Court 2007); City & County of San Francisco v. California, 2005 WL 583129 (S.F. Super. Ct. 2005).

<sup>16</sup> Pa. Const., Art. XI, sec. 1.