SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

HEATHER ANDERSEN and, LESLIE CHRISTIAN; et al., Plaintiffs, v. KING COUNTY, et al., Defendants and Third-Party Plaintiffs, v. STATE OF WASHINGTON, Third-Party Defendant, and SENATOR VAL STEVENS, et al., Intervenor Defendants.	NO. 04-2-04964-4 SEA MEMORANDUM OPINION AND ORDER ON CROSS MOTIONS FOR SUMMARYJUDGMENT

INTRODUCTION

Whether or not same-sex marriage's day has arrived, the debaters of its attendant legal issues have now arrived in the courts of Washington. They do not arrive empty-handed.

Never could this or any court find itself more in tune with the lofty goals advanced by every party to a lawsuit. Here, one side is guided by the beacon of individual liberty, the cherished right of each of us to seek to live our lives in the way we find most personally fulfilling. On the other side, the view is toward the future generations to whom we will pass on our legacy and the stated goal is to enable them to enjoy the social advantages and psychological grounding that are unquestionably nurtured by a healthy family environment.

It is so, too, with the legal principles at the heart of the dispute. The equal application of the laws, championed on the one hand, is a principle at the very core of our shared societal values. The competing legal principle in this case - the separation of powers between branches of government - is fundamental to the structure of our ordered democratic society. It is the sworn task of the courts both to vigorously defend the equal rights of all individuals and also to sedulously support the laws duly enacted by the people through their representatives.

There are, of course, political ramifications to this wedlock deadlock and neither folly nor sense of duty could blind one to that circumstance. The social issue before the Court is one about which people of the highest intellect, the deepest morality and the broadest public vision maintain divergent opinions,

strongly held in good faith and all worthy of great respect. Resolving their disagreement is, to be frank, a matter too big to be addressed to a lone individual and this author would naturally like nothing better than to stop at this point and, with a warm and sincere pat on the back, to send all parties off to the State Supreme Court or the State legislature or both. Regrettably or not, such an abdication of responsibility is not an option. As this case and this debate pass by this way station, some impressions and conclusions must be recorded.

WHAT PLAINTIFFS SEEK

On the one hand, it may seem odd in the year 2004 to be taking a fresh judicial look at the institution of marriage, an institution that has served society well for many centuries with its presumptively inherent limitation to heterosexuals. Certainly, discrimination against homosexuals played no part at all in the origin of the longstanding traditions from which our modern marriage laws developed.

Yet, on the other hand, it can also be seen as entirely natural to find ourselves engaged in this exercise. As time marches inexorably on, human society – its collectively felt needs and its ability and inclination to provide for those needs – evolves. While it may be hoped that this change is always for the better, it is only the fact of change itself that is a certainty. With a view to keeping pace with these changes, our state constitution wisely mandates that "[a] frequent recurrence to fundamental principles is essential to the security of

individual right and the perpetuity of free government." Washington Constitution, Article 1, § 32.

Just last year, the United States Supreme Court reaffirmed that same proposition in stating that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." Lawrence v. Texas, 139 U.S. 553, 123 S. Ct. 2472, 2484, 156 L.Ed. 2d 508 (2003). In that case, which has obvious significance to the present one, the Court noted that the issue before it called for re-evaluation in the context of "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." 123 S. Ct. at 2480.

In the past two decades, there have been dramatic shifts in public attitudes toward homosexuality. This conclusion is readily apparent to anyone viewing primetime television entertainment, perusing the New York Times marriage announcements or hearing such news as the recent report that the 150,000 member American Psychological Association has now officially endorsed same-sex marriage (Seattle Post-Intelligencer, July 29, 2004). In addition to Lawrence, supra, many courts as well as legislatures across the United States, Canada and Western Europe have given new recognition to "gay rights", including key developments in the area of same-sex marriage. This societal change, coupled with the sound proposition that the courts have a key role in identifying an "emerging awareness" of the evolving parameters of

individual liberty, make it entirely appropriate that these plaintiffs now bring before this court the issue of their right to marry.

The plaintiffs are eight pairs of individuals, each pair sharing a mutual commitment and a wish to be married. In a basic sense of the word, they are already married but they seek something more and that is what brings them to court.

To "marry" means to join together in a close and permanent way. The plaintiffs' sworn statements reflect that, within each pair, they have already made a close personal commitment to be joined together in a bond that is intended to be permanent. Thus, in a basic or linguistic sense, they are in fact now married.

Beyond the exchange of voluntary personal commitments that makes two people married, it has developed as social custom that public expression of this commitment will add to the strength of the bond. Over the centuries, this has frequently been treated as a religious rite. When pledges of personal commitment are tied together with matters of faith, they are considered "sacred vows" and they lead to a status that is regarded as "holy matrimony".

Just as all of the plaintiffs have exercised their natural right to marry in the linguistic sense, so too have a number of them exercised their right to marry in the eyes of their particular religion. In fact, two of the plaintiffs serve as Protestant ministers while another is a Jewish cantor and they routinely assist other couples in entering into the state of matrimony.

As a more recent historic development, record-keeping regarding the solemnizing of marriages and of their ongoing status has become a government

function. Such state recognition of a marriage is known as “civil marriage” and it is the right to marry in this third sense that the plaintiffs now seek.

Primarily within the past century, many legal rights and responsibilities have become tied into a person’s marital status. Under Washington’s community property laws (R.C.W. 26.16), for example, ownership of property and rights to income are determined with reference to marital status. Rights to inherit property may similarly be keyed into marital status (R.C.W. 11.04 and 11.28). When a civil marriage is dissolved, there is a right to court oversight to provide an orderly and equitable distribution of assets and obligations and to protect the best interests of any children involved (R.C.W. 26.09). The laws provide married people with benefits in the areas of employment (e.g., R.C.W. 77.65 which allows a surviving spouse to renew a deceased’s commercial fishing license), insurance (R.C.W. 48.44), retirement benefits (R.C.W. 41.40) and state taxes (R.C.W. 82.45) as well as rights to bring wrongful death actions (R.C.W. 4.20) and assert the spousal testimonial privilege in court (R.C.W. 5.60.060). These are but a few of the many instances where marital status, under Washington law, has a substantial effect on an individual’s rights and responsibilities. Plaintiffs’ counsel claims to have counted over 300 rights and responsibilities legally attached to the status of being civilly married and no one has offered any quibble over that figure.

The obstacle in the path of these plaintiffs, of course, is that each of these committed couples is made up of members of the same sex. Washington law on civil marriage, as amended in 1998, describes marriage as a “civil contract” but

then goes on to specify that such a contract is only valid if entered into “between a male and a female”. R.C.W. 26.04.010. The succeeding statute states the logical converse – that such a contract is prohibited for couples consisting of “other than a male and a female”. R.C.W. 26.04.020(1)(c).

The benefits of a civil marriage, plaintiffs argue, are privileges under the law that are not being made equally available to all citizens. This, they contend, violates the privileges and immunities clause of the Washington Constitution (Article 1, § 12). In addition, they argue that the laws prohibiting same-sex marriage deny them substantive due process rights to liberty and privacy and that this violates Article 1, § 3 of our state constitution. Finally, plaintiffs contend that the challenged laws make an unjustifiable distinction based upon gender in violation of Washington’s Equal Rights Amendment (Constitution, Article XXXI).

THE ISSUES PRESENTED

a. The privileges and immunities clause of the Washington Constitution, in pertinent part, provides as follows: “No law shall be passed granting to any citizen, [or] class of citizens … privileges or immunities which upon the same terms shall not equally belong to all citizens…” Washington Constitution, Article 1, § 12. Applying the appropriate level of scrutiny, the Court must answer this question: when R.C.W. 26.04.020(1)(c) denies the option of marriage for a loving and committed couple that is “other than a male and a female”, is there a privilege that is not being made equally available to all citizens upon the same terms?

b. Washington's due process clause states simply: "No person shall be deprived of life, liberty, or property, without due process of law." Washington Constitution, Article 1, § 3. Applying the appropriate level of scrutiny, the Court must answer this question: on the facts as described above, is there a liberty interest that has been denied without substantive (as opposed to "procedural") due process?

c. Adopted in 1972, Washington's Equal Rights Amendment provides: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." Washington Constitution, Article XXXI, § 1. Applying the appropriate level of scrutiny, the Court must answer this question: when the above-cited marriage statute denies a woman the right to marry her chosen life partner when that partner is a female, is a right being denied on account of sex?

THE ROLE OF JUDICIAL REVIEW

In our democracy, we are all governed by laws that are enacted by the people through their elected representatives. Those laws should effectuate the goals of society as seen by the majority of citizens. While the courts have a key role to play in seeing that these laws are fairly and consistently applied, the courts generally do not sit in judgment of the laws themselves.

When the court is asked to sit in judgment of a law, it is not to consider whether, in its view, the law is wise or consistent with sound policy. These are matters for the people and their chosen legislators to weigh. The court's role is

limited to holding the challenged law up to the state and federal constitutions – the foundations of our rule of law – to see if it satisfies the constitutional requirements. Rather than its own personal preferences, the court is required to apply a consistent, principled and reasoned analysis in evaluating the statute's constitutionality. Through this brilliant design, the constitutions empower the courts to ensure both that no group is singled out for special privileges and also that no minority is deprived of rights to which its members should be entitled. At the same time, respect for democratic lawmaking is maintained.

Proper respect for the separation of powers requires that, as to most laws subjected to challenge, the court will show great deference to the legislature. In most such cases, the court applies what is called "rational basis" review. Under this type of review, a statute will be found constitutional if it can be said that it is rationally related to a legitimate state goal or purpose.

Some challenged laws, however, call for what is called a "heightened scrutiny" by the courts. When the statute in question burdens a "fundamental right" or a "suspect class", it must pass a more rigorous test in order to satisfy the constitutions. The goal or purpose being sought must be deemed a "compelling state interest" and the means implemented toward that goal must be "narrowly tailored" toward that end.

THE STANDARD OF REVIEW HERE

In this case, the plaintiffs contend that the challenged statutes (R.C.W. 26.04.010 and 26.04.020(1)(c)) serve to deprive them, as members of a suspect class (homosexuals), of a fundamental right (the right to marry) and that, therefore, on both bases, the court should hold those statutes up to the higher constitutional standard.

As to the suspect class designation, the Court would simply note that, at this time, the substantial weight of appellate authority runs contrary to the plaintiffs' position. See, High Tech Gays v. Defense Industry Security Clearance Office, 895 F.2d 563 (9th Cir. 1990). Applying the traditional test for whether that designation should apply (see, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)), being appropriately "reluctant to establish new suspect classes" (Thomasson v. Perry, 80 F. 3d 915, 928 (4th Cir. 1996)) and in view of the record herein, this Court is not in a position to announce a potentially far-reaching new rule that homosexuality defines a suspect class for purposes of constitutional analysis. It will decline to do so.

Next, the Court must examine the question of whether or not a fundamental right of the plaintiffs' is being burdened. There is a fundamental difference in the parties' approach to identifying the putative fundamental right upon which this analysis should focus. Should the Court focus on the broad right to marry or should it, instead, focus on the more narrowly drawn right to marry someone of the same sex?

This is a crucial question because all agree that precedent firmly establishes the broad right to marry as a fundamental right. Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); Levinson v. Washington Horse Racing Commission, 48 Wn. App. 822, 740 P. 2d 898 (1987). However, no case stands for the proposition that that narrowly defined right, standing by itself, constitutes a fundamental right.

This is not surprising as a fundamental right is generally described as one that is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." Washington v. Glucksberg, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

In seeking to label the right at issue in this case, it is instructive to examine the way in which the earlier key "right to marry" cases were argued and decided.

There was no deeply rooted tradition of interracial marriage at the time of the U.S. Supreme Court's consideration of anti-miscegenation statutes in Loving v. Virginia, supra; yet, the Court analyzed the issue of their constitutionality in terms of the broad right to marry and found that right to have been infringed. There was no deeply rooted tradition of marriage while delinquent in child support payments at the time of the U.S. Supreme Court's consideration of statutes prohibiting this in Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978); yet, the Court analyzed the issue of their constitutionality in terms of the broad right to marry and found that right to have been infringed. There was no deeply rooted tradition of inmate marriage at the time of the U.S. Supreme Court's consideration of statutes restricting this in Turner v. Safley, 482

U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); yet, the Court analyzed the issue of their constitutionality in terms of the broad right to marry and found that right to have been infringed.

The Zablocki Court wryly noted that the couple before it, according to Supreme Court precedent, had "a fundamental right to seek an abortion of their expected child … or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings". 434 U.S. at 386. It then observed that "[s]urely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection." Id.

In Turner, supra, it was specifically argued that the Court should focus its attention on "inmate marriage" as opposed to the broader right to marry. The Court rejected this approach.

> First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

482 U.S. at 95-96.

It may be argued that the marriage contemplated in Turner, like those in Zablocki and Loving, was a heterosexual marriage. Yet, the hallmarks of the marital relationship to which the inmates and their intendeds aspired, are not linked to a capacity to procreate. It is to a non-coital relationship but one that was a supportive, committed, spiritually significant marriage with government benefits and property rights that the Supreme Court deemed them to have a fundamental right.

Recently, in looking at this same issue, the Massachusetts Supreme Court concluded "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." Goodridge v. Department of Public Health, 440 Mass. 309, 332, 798 N.E.2d 941 (2003).

The recent trend, both in our society and in the Supreme Court, has been to focus even more on the fundamental liberty of personal autonomy in connection with one's intimate affairs and family relations. In building on its 1992 analysis in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), the U. S. Supreme Court had this to say just last year:

> The Casey decision again confirmed that our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:
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> > "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty

> protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

Lawrence v. Texas, 123 S. Ct. at 2481. To this eloquent description of just what it is that is fundamental about fundamental rights, the Court added this: "Persons in a homosexual relationship may seek autonomy for these reasons just as heterosexual persons do." 123 S. Ct. at 2482.

Leaping backwards now, more than a century ago the United States Supreme Court characterized marriage as "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress." Maynard v. Hill, 125 U.S. 190, 211, 8 S. Ct. 723, 31 L. Ed. 654 (1888).

That, then, is the right being asserted by the plaintiffs here – the autonomous right to have such a "most important relation" in their lives and, in that relationship, to be able to make their own unique contribution to the foundation of society. That right – a right that is unquestionably burdened by the statutes in question - is the fundamental right to marry.

CONCLUSIONS ON THE ISSUES PRESENTED

The Court concludes that R.C.W. 26.04.010 and 26.04.020(1)(c) must be scrutinized as statutes negatively impacting the plaintiffs' fundamental right to marry. Accordingly, the restrictions of those statutes must be narrowly tailored to

serve a compelling state interest. If that is found not to be the case, then the statutes unconstitutionally deprive the plaintiffs of privileges guaranteed to be made equally available to all citizens and unconstitutionally restrict their liberty in violation of due process guarantees.

Alternatively, if what is being impacted is simply a bundle of rights of the plaintiffs that do not rise to the level of constituting a fundamental right, then the restrictions imposed by the statutes would simply need to rationally tend to promote a legitimate state interest. The Court will consider the statutes' restrictions under this standard as well.

The Court must first examine the nature of the state interest said to be served by the challenged statutes. In doing so, an important line must be drawn. Outside of legal circles, there are a number of justifications advanced for excluding same-sex partners from marriage. Each of these may have some superficial appeal but, as all counsel recognize, none is a factor in the constitutional analysis. Still, the present discussion would be incomplete if it did not address them. These arguments can be characterized as follows:

- "Morality requires it." In our pluralistic society, in which church and state are kept scrupulously separate, the moral views of the majority can never provide the sole basis for legislation. As Justice O'Connor observed in her Lawrence concurrence: "Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." 123 S. Ct. at 2486. As evidenced by those plaintiffs in this case who have

consecrated their bonds in religious ceremonies, as well as by the Amicus filing of "Multifaith Works and other religious groups and clergy", it is clear that Americans have differing views as to what morality requires in the definition of marriage. It is not for our secular government to choose between religions and take moral or religious sides in such a debate.

- "Tradition compels it." It is true that marriage has long been defined as the union of one man and one woman. It is equally true that the shape of marriage has drastically changed over the years. It took a very long time for the courts (with legislative bodies sometimes understandably following just a little behind) to break down the traditional stereotypes that relegated women to second class status in society and in the marital relationship.

It may be of more than passing interest to note here that the above-cited case of Maynard v. Hill, supra, involved Seattle pioneer Doc Maynard who had left his wife Lydia and two children behind in Ohio to come west. Although he had promised to send them money and then to send for them, he did neither. Instead, what he did was to convince the 1852 territorial legislature to pass a bill declaring him divorced. He then remarried. Lydia had been given no notice of all this and, as the Supreme Court noted, it was a time when the old tradition of parliamentary or legislative divorce was in the process of giving way to having such matters dealt with by the courts with more rights accorded the marital parties. Nonetheless, despite Maynard's "loose morals and shameless conduct", the divorce was upheld and Lydia and the children received nothing. Today, with

new traditions having replaced the old, we can all be assured they would have fared better.

As the Massachusetts Supreme Court has noted "it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." Goodridge v. Department of Public Health, 440 Mass. 309, 332 n. 23, 798 N.E.2d 941 (2003). While not to be ignored, the backward view toward tradition must neither be treated as binding nor allowed to be blinding. Serving tradition, for the sake of tradition alone, is not a compelling state interest.

- "The institution of marriage is threatened." Some declaim that the institutions of marriage and family are weak these days and, in fact, stand threatened. Any trial court judge who regularly hears divorce, child abuse and domestic violence cases deeply shares this concern. It is not difficult, however, to identify both the causes of the present situation and the primary future threat. They come from inside the institution, not outside of it. Not to be too harsh, but they are a shortage of commitment and an excess of selfishness. Before the Court stand eight couples who credibly represent that they are ready and willing to make the right kind of commitment to partner and family for the right kinds of reasons. All they ask is for the state to make them able.

Is there a good and sufficient reason for the state's current negative response? That is the issue before the court. In 1998, when the Legislature enacted its Defense of Marriage Act, it offered this statement as to the requisite compelling state interest: "It is a compelling interest of the state of Washington to

reaffirm its historical commitment to the institution of marriage as a union between a man and a woman as husband and wife and to protect that institution." Laws of 1998, ch. 1, §1. As noted above, the reference to history is unavailing and that to protection too non-specific to be helpful.

The defendants and intervenors have done a somewhat better job of articulating interests the same-sex marriage prohibition is said to serve. Chief among these are encouraging procreation and the raising of children in a healthy, nurturing environment.

The link between civil marriage and procreation is not what it was when the laws prohibited both adultery and ready access to contraception. Then, it could well be said that love, marriage and baby carriage would come in predictable sequence. The laws of today recognize the reality that a substantial amount of procreation occurs outside of the marital relationship. See, R.C.W. 26.26, the Uniform Parentage Act. Of course the laws never have placed a requirement on marriage that the parties procreate nor do they prohibit from marriage those who are unable or disinclined to procreate. Many families today are created through adoption, the foster parent system and assisted reproduction technologies. This last point, by the way, is well illustrated by some of the plaintiffs who, thanks to government recognition of the fact that their sexual orientation is no bar to good parenting, are presently able to enjoy family lives with children.

The legal question is not whether heterosexual marriage is good for the replenishment of the species through procreation. It is. The precise question is

whether barring committed same-sex couples from the benefits of the civil marriage laws somehow serves the interest of encouraging procreation. There is no logical way in which it does so.

Today the law and society fully recognize (as well they should) the value of children who join the human family by means of in vitro fertilization, sperm donation, egg donation or surrogacy or who join a new family by way of adoption. It rationally serves no state interest to harm certain of those children by devaluing the immediate families that they have joined.

State action to maintain and strengthen the institution of marriage for heterosexual couples is decidedly a means that is rationally related to promoting stable families and is something that is good for children. Again, the precise question before the Court, however, is whether not having the same state-supported relationship available as an option for homosexual couples furthers this same interest. In other words, would adding this benefit for the second group (and their children) injure that legitimate state interest in the support of families and the nurturance of children? Again, there is no logical way in which it would be so.

It is good for children to be raised in stable families with a father and a mother. There is not the slightest question about this. It is a situation to be encouraged by the state. But, can it be said that fewer children will have this stability because couples consisting of two men or two women are allowed to have a relationship that is state-sanctioned? There is no reasonable explanation for why this would be so. There is no reasonable expectation that, should such a

legal result come to pass, married fathers and mothers will abdicate their parental responsibilities or young would-be parents will defect from the ranks of heterosexuals.

On the other hand, when one peers into the future, one circumstance is far more certain to occur. Many, many children are going to be raised in the homes of gay and lesbian partners. Present social trends will undoubtedly continue. Gay and lesbian couples will feel the human instinct to wish to raise children, they will have available either the supportive adoption laws or the technological means to begin raising a family and they will enjoy the increasing public acceptance of such families. All this is certain.

One, then, must try to envision two categories of future children. The first category consists of those whose heterosexual parents will either neglect them or never conceive them because same-sex marriage has been legalized. The second category is those children who will be raised in a home with same-sex adult partners and who would enjoy enhanced family stability and social adjustment if these adults were granted the benefits of civil marriage. The only reasonable conclusion is that the very real second category greatly outnumbers the first theoretical one. Therefore, the goal of nurturing and providing for the emotional wellbeing of children would be rationally served by allowing same-sex couples to marry; that same goal is impaired by prohibiting such marriages.

The above conclusion is inescapable when one looks objectively and dispassionately at the properly framed question. It is the same conclusion reached by the Vermont Supreme Court in 1999. “If anything, the exclusion of

same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against." Baker v. State, 170 Vt. 194, 219, 744 A. 2d 864 (1999) (emphasis in original). It is the same conclusion reached by the Massachusetts Supreme Court in 2003. "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of 'a stable family structure in which children will be reared, educated, and socialized.'" Goodridge v. Department of Public Health, 440 Mass. 309, 335, 798 N.E.2d 941 (2003).

It has also been suggested that the statutory ban on same-sex marriage serves the interest of protecting children from the harms that may be caused by being raised in a non-traditional family. Although many may hold strong opinions on the subject, the fact is that there are no scientifically valid studies tending to establish a negative impact on the adjustment of children raised by an intact same-sex couple as compared with those raised by an intact opposite-sex couple. The offered studies, anecdotal experiences and opinions regarding children from broken homes or children raised by a single parent have no logical relevance. Unlike the documented impact of children's exposure to domestic violence and substance abuse in the homes of lawfully married heterosexual couples, as to children raised by intact same-sex couples there is no science, only questionable assumptions based on stereotypes.

The Court concludes that the exclusion of same-sex partners from civil marriage and the privileges attendant thereto is not rationally related to any legitimate or compelling state interest and is certainly not narrowly tailored toward such an interest.

It is true that some (though not all) of the benefits of civil marriage can be procured by plaintiffs through legal representation and the devices of contracts, wills, powers of attorney, adoptions, etc. That they should have to pay for these privileges while others do not, is not supported by the "real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act in respect to which the classification is made" as required by Washington's privileges and immunities clause. State ex rel. Bacich v. Huse, 187 Wash. 75, 83-4, 59 P. 2d 1101 (1936), overruled on other grounds, Puget Sound Gillnetters Association v. Moos, 92 Wn. 2d 939, 603 P. 2d 819 (1979).

The privilege of civil marriage and the various privileges legally conferred by that status are not being made equally available to all citizens. The plaintiffs are entitled to have judgment entered declaring that R.C.W. 26.04.010 and 26.04.020(1)(c) are violative of Article 1, §12 of the Washington Constitution.

The denial to the plaintiffs of the right to marry constitutes a denial of substantive due process. The plaintiffs are entitled to have judgment entered declaring that R.C.W. 26.04.010 and 26.04.020(1)(c) are violative of Article 1, §3 of the Washington Constitution.

. . .

The Equal Rights Amendment argument presented by plaintiffs is an intriguing one. However, that argument, in legal essence, has previously been rejected by the Washington Court of Appeals in the case of Singer v. Hara, 11 Wn. App. 247, 522 P.2d 1187 (1974). See, also, Baker v. State, 170 Vt. 194, 215 n. 13, 744 A.2d 864 (1999). Although the Washington Supreme Court may freely do so, this Court does not find itself in a position to overrule the Singer decision nor, in light of its conclusions above, does it see a need to address the ERA argument further.

REMEDY

There are a couple different potential remedies that flow from the constitutional violations found by this Court and there is one overarching practicality. That practical consideration is that all parties have stipulated that review of this case by the State Supreme Court will occur and be expeditiously pursued. That body will, as it should, write indelibly on the same slate on which this Court has been scratching. Whether it agrees with some, all or none of what this Court has said, there can be no doubt that the Supreme Court will clearly articulate to the parties, to the legislature and to the public what should next occur. It also may well be that during the pendency of this appellate review, the legislature will enact some changes in the laws that could impact the Supreme Court's analysis. Since these are issues purely of law, that circumstance should not necessitate a remand without issuance of some definitive high court ruling.

If the finding of a due process violation were to stand, the logical remedy would be to direct the issuance of marriage licenses to the plaintiff-applicants so that they can become civilly married.

As to the privileges and immunities deprivation, the logical remedy would be to make available to the plaintiffs all of the benefits under the law that flow to a couple that is civilly married. The mechanism of this remedy could take different forms (i.e., marriage or a newly created "civil union" status) so long as the plaintiffs, and others similarly situated, were receiving precisely the same benefits under the law that marriage makes available.

The Court is inclined to offer this perhaps gratuitous observation. If there is indeed any outside threat to the institution of marriage, it could well lie in legislative tinkering with the creation of alternative species of quasi-marriage. With the creation of "civil unions", "domestic partnerships" or other variations on the theme including, worst of all, something like a "five year plan with opt-out", there could be a real danger. When cohabiting heterosexual couples can sign up for a renewable or revocable fixed term contract to define the terms of their state-recognized relationship, then marriage, as an institution, could be weakened. Better, perhaps, (in terms of simplicity, fairness and social policy) to allow all who are up to taking on the heavy responsibilities of marriage, with its exclusivity and its "till death do us part" commitment, to do so – not lightly, but advisedly.

Having indicated its thoughts on the subject of remedies, this Court will issue no order directing a specific remedy at this time since, by agreement, the matter will now be stayed pending review by the Washington Supreme Court.

FINAL COMMENTS

Certainly these plaintiffs have been carefully handpicked to serve as suitable standard bearers for the cause of same-sex marriage. Their lives reflect hard work, professional achievement, religious faith and a willingness to stand up for their beliefs. They are law-abiding, taxpaying model citizens. They include exemplary parents, adoptive parents, foster parents and grandparents. They well know what it means to make a commitment and to honor it. There is not one among them that any of us should not be proud to call a friend or neighbor or to sit with at small desks on back-to-school night. There is no worthwhile institution that they would dishonor, much less destroy.

One may fairly ask if it clouds the Court's view to decide a test case with a view to parties who may rise above the median in so many respects. In a word, "no". While recognizing the imperfection of human nature, it is still beneficial to contemplate what we all should be rather than what we, too often, are. The delineation of rights is best done with a view to human potentialities rather than in fear of our shortcomings. The characteristics embodied by these plaintiffs are ones that our society and the institution of marriage need more of, not less. Let the plaintiffs stand as inspirations for all those citizens, homosexual and heterosexual, who may follow their path.

In the final analysis, the Court must return to the conflicting pole stars offered by the two sides. After long and careful reflection, it is this Court's firm conviction that the effect of today's ruling truly favors *both* the interest of

individual liberty and that of future generations. As to the conflicting legal principles at issue, it is true this Court's favoring the equal rights of all citizens (as have courts in Vermont, Hawaii, Oregon, Massachusetts, British Columbia and elsewhere before it and in other jurisdictions to come) may place the judicial branch of government briefly at odds with the legislative. That this may be so is not at all regrettable. Rather, it is fully consistent with sound constitutional principle, with the wise structural design of our government and with the realities of the dynamic of healthy social progress.

Judgment shall be deemed entered for the plaintiffs, on the terms outlined in this Memorandum Opinion and Order, and the matter shall be certified under Civil Rule 54(b) for immediate appeal.

DATED this 4th day of August 2004.

/S/

HON. WILLIAM L. DOWNING

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516 Third Avenue
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