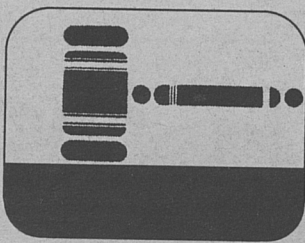


feature

LEGAL BRIEFS

by susan murray & beth robinson



So What Does Baker Mean?

By now, almost everyone is aware of the landmark December 20, 1999, ruling in *Baker v. State*. The Vermont Supreme Court unanimously concluded that same-sex couples in Vermont are entitled, under the Vermont Constitution, "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples."

In reaching this conclusion, the Court rejected every justification offered by the state for treating same-sex couples differently. It concluded that "none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law."

In so doing, the Court distinguished itself as this country's first state supreme court to rule unconstitutional laws providing different-sex couples with a broad array of legal protections unavailable to same-sex couples.

The Court concluded that "extension of the Common Benefits Clause [of the Vermont Constitution] to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity."

The decision represents a great step forward for same-sex couples and their families in Vermont and beyond.

What happens now?

Rather than requiring the state to issue civil marriage licenses to same-sex couples, the Court invited the Vermont Legislature to try to remedy the discrimination. It suggested the Legislature might have various response options, including extending marriage laws to include same-sex couples or creating some alternative to civil marriage.

As of press time, the House Judiciary Committee is taking testimony from lawyers, scholars, and others regarding history and operation of marriage laws, impact of the *Baker* deci-

sion, and options available to the Committee. Once it has crafted a bill, the full House of Representatives will likely consider it; once the full House has passed a bill, it will pass to the Senate, and the process will, to some extent, start again.

What did the Court say about "registered partnership?"

There is a common misperception that the Court's decision endorsed some alternative to civil marriage, such as "registered partnership." This simply isn't true.

The Court did not conclude same-sex couples are constitutionally entitled to a marriage license, but specifically did not conclude that they are *not* constitutionally entitled to a marriage license. It simply didn't decide that issue, deferring it to another day.

All the Court did conclude is that the plaintiffs are entitled under the Vermont Constitution to "the same benefits and protections afforded by Vermont law to married opposite-sex couples."

Would a "registered partnership" law satisfy the Court's mandate?

We believe not. For many reasons, some practical and some symbolic, we believe the legal status of civil marriage is one of the benefits and protections Vermont law affords to married opposite-sex couples.

On the practical side, the legal status of "marriage" is a gateway not only to state law benefits, but to private benefits, such as corporate health insurance for spouses, benefits in other states, and federal benefits. On the "symbolic" side, the legal status of civil marriage is widely understood throughout the community and society in a way no alternative could be.

How would private benefits differ if same-sex couples formed "registered partnerships" instead of "marriages?"

If same-sex couples were afforded the legal status of

civil marriage, then, for example, companies offering health insurance to spouses of employees would likely automatically include same-sex spouses. If same-sex couples otherwise labeled, they would not automatically get those same benefits.

Some have suggested the Legislature could simply pass a law requiring companies to treat same-sex couples the same as different-sex couples as far as benefits such as insurance. Unfortunately, federal law probably prevents the Legislature from requiring employers to do any such thing. (This isn't a "DOMA" issue; it involves a federal law commonly referred to as "ERISA.")

Would "registered partnerships" be more or less portable to other states than "marriages?"

Even if every state recognized the validity of a same-sex Vermont registered partnership, that legal status would not likely carry much, if any, weight in another state. Presently, no state has any legal status or institution substantially comparable to the scheme under consideration, so a valid Vermont registered partnership would not likely open the door to any benefits in any other state.

A valid Vermont marriage between same-sex partners will undoubtedly face challenges in some states—thirty have passed laws saying they won't recognize such marriages. On the other hand, some will likely follow the age-old rule that a marriage valid where celebrated is valid everywhere. Plus, we believe other states' laws refusing to recognize a valid marriage of same-sex partners are unconstitutional for a variety of reasons—including the same reasons Vermont's discrimination in marriage was recognized as unconstitutional.

One thing is clear: whatever "portability" challenges validly married same-sex couples may face when they venture out of Vermont, they pale in comparison to the alternatives' complete lack of portability.

What about federal benefits?

Many benefits of marriage flow from the federal government, not the state. If same-sex couples form "registered partnerships," they clearly won't be able to access federal benefits, since those are triggered by a valid state law marriage. If they form civil marriages, the federal government will likely attempt to deny same-sex couples federal benefits in reliance on the so-called "Defense of Marriage Act" — a law we believe unconstitutional for various reasons.

What about the "symbolic" issues?

For better or worse, and folks can and do debate it, the legal status of "marriage" has significance in our culture. If you doubt it, just consider the utter panic of those who oppose equal rights for same-sex couples at the thought that same-sex couples might be included in that legal institution. Or think about how most heterosexual married couples would react if we told them that, from now on, they will be called "registered partners" and not married spouses. No alternative label carries with it that social and cultural recognition and significance.

No doubt there are couples, gay and straight, who would rather *not* take on the baggage that comes with the

term "marriage." However, we believe that if gay and lesbian Vermonters are to be genuinely equal under Vermont's laws, then we should have the same legal choices, and our families the same legal status, as our heterosexual neighbors. Proponents of an alternative to civil marriage for same-sex couples in Vermont are anxious to maintain some legal distinction between same-sex couples and heterosexual couples in order to avoid genuine acknowledgment of our equality.

Just as Jim Crow laws were designed to perpetually stigmatize African Americans, we believe a "separate-but-equal" marriage law would be inherently unequal. We've been kept off the bus our whole lives, so the opportunity to climb on board is truly gratifying. However, that wouldn't lessen the sting of being asked to sit in the back of that bus. ▼

Susan Murray and Beth Robinson are attorneys at Langrock Sperry & Wool in Middlebury, Vermont, whose practices include employment issues, family matters, estate planning, personal injury and worker's compensation cases, and general commercial and civil litigation. If you'd like to see us cover a particular topic, please feel free to write OITM or call us at 388-6356.



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Attorney at Law

18 South Main Street, P.O. Box 1455,
Rutland, VT 05701

802-786-2251

e-mail: Sabu234@AOL.com



Real Estate, Wills & Trusts, General Practice

P.O. Box 875
90 Main Street

**BLACKWOOD
ASSOCIATES, PC**
attorneys
Burlington, VT 05402
802-863-2517

blackwldlaw@aol.com

fax: 802-863-0262

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