How Will the California Legislature Respond if Same-Sex Marriage is Legalized in Hawaii?

Some legal experts predict that by early 1997 at the latest the State of Hawaii will allow same-sex couples to get legally married in that jurisdiction. No doubt, the legality of such marriages will be tested in California when California residents travel to Hawaii, get married, and then return home. Test cases might also arise when residents of Hawaii get married there and then move to or travel to California and demand that their same-sex marriage be given legal recognition.

How will the California Legislature respond? Will lawmakers take preemptive measures before the Hawaii marriage case is final? Will they wait to take action until the first marriage license is issued to a same-sex couple by the State of Hawaii? If they respond, will legislative reaction be moderate or will it be punitive? Or, will the California Legislature do nothing and simply allow California courts to decide if a Hawaii same-sex marriage is valid in California? No one knows the answers to these questions. But legislative and judicial precedents provide clues as to how the State of California may officially respond to the impending legalization of same-sex marriage in Hawaii.

Existing Legislative Policies

About 20 years ago, same-sex couples were confronting county clerks in various parts of California. They were demanding marriage licenses. The couples pointed out that relevant statutes did not limit marriage to a man and woman or to a husband and wife. Rather, the statutes defined marriage as a contract between two "persons." At the request of the County Clerks Association of California, the Legislature responded by amending the state's marriage laws in 1977. The law was amended by an overwhelming vote of both houses of the Legislature to clarify that marriage is a contract between a man and a woman. As a result of this measure, the Family Code now states in relevant part:

> Section 300: "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, except as provided by Section 425 and Part 4 (commencing with Section 500)."

> Section 500: "When an unmarried man and an unmarried woman, not minors, have been living together as husband and wife, they may be married pursuant to this chapter by a person authorized to solemnize a marriage under Chapter 1 (commencing with Section 400) of Part 3, without the necessity of first obtaining health certificates."

As the law now stands, section 300 does not authorize county clerks to issue a marriage license to a same-sex couple. Nor may a same-sex couple enter into a "confidential marriage" under section 500. Although there is no published appellate opinion on the subject, a recent challenge to these laws was summarily rejected by a Superior Court judge and one panel of the Court of Appeal in 1994.

However, another statute suggests that California might recognize a Hawaii same-sex marriage as valid in California, even though same-sex couples may not legally marry inside of the boundaries of the Golden State. Section 308 of the Family Code states:

> "A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state."

Judicial Precedents

If Hawaii legalizes same-sex marriage, it is probable that California residents will fly there and get married. When they return home with a marriage certificate in hand, will California law recognize their marriage as valid here? Judicial precedents concerning "evasion" and "public policy" and "odious" marriages provide some insight into this question.

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"EVASION" EXCEPTION

In *Estate of Perez* (1950) 98 Cal.App.2d 121, a marriage was challenged on the theory of evasion. The couple in question were residents of California. They could not obtain the necessary health certificate as required by California law because the wife-to-be had a communicable disease. So the couple went to Arizona, were married, and returned to California. A year later, the wife died. A dispute arose between her husband and her children. The children claimed that the marriage between their mother and her husband was not valid under California law because the couple had contracted the marriage out of state for the specific purpose of evading the laws of California. The Court of Appeal upheld the validity of the marriage, stating:

> "If parties, who are residents of and domiciled in California, where their marriage would have been invalid, are married in another state in conformity with the laws of such state, even though they have entered such state with the avowed purpose of evading the laws of California, such motive does not invalidate the marriage."

As precedent for its conclusion, the court cited *McDonald v. McDonald* (1936) 6 Cal.2d 457, 459. In *McDonald,* the California Supreme Court discussed a well-settled rule that "a marriage which is contrary to the policies of the laws of one state is yet valid therein if celebrated within and according to the laws of another state." The court found that "motive in the minds of parties will not change the operation of that rule." This language would give hope to those advocating the legalization of same-sex marriages. However, there is other language in the *McDonald* opinion acknowledging some exceptions to the general rule that the legality of a marriage is determined solely by the place where the ceremony occurs.

The court in *McDonald* cited Civil Code section 63 [the then-equivalent of today's Family Code section 308], that declared that all marriages contracted outside of California which are valid under the laws of that jurisdiction shall be valid in California. The court found that, in the absence of a California statute expressly declaring such under-age marriages to be an exception to this general rule, the law of the marriage ceremony shall govern. The court indicated that the Legislature is not without power to alter the general rule, noting: "Each state may follow its citizens into another state and regulate the status of its own citizens, especially such a status as the marriage relation."

This holding suggests that the general rule respecting the validity of out-of-state marriages might not apply to same-sex marriages if the Legislature were to enact a specific statute creating an exception to section 308. The Legislature could do this in several ways. It could adopt an "evasion" statute, similar to those enacted in several other states.[1] However, that would not cover the situation where persons who are not residents of California get married in Hawaii and then move to California. To have those marriages declared invalid in California, the Legislature might amend section 308 by declaring that same-sex marriages entered into in another jurisdiction shall not be considered valid in California -- an approach that is currently under consideration in Utah.[2]

"ODIOUS" MARRIAGE EXCEPTION

The court in *McDonald* observed that a more fundamental rule might preclude an out-of-state marriage from being considered valid in California, even if no legislative action was taken to create exceptions to the general rule respecting out-of-state marriages. The court indicated that notwithstanding the general rule accepting marriages from other states, California would not be required to do so if "the marriage is considered as odious by common consent of nations, e.g., where it is polygamous or incestuous by the laws of nature." Since no nation currently recognizes same-sex marriages as legally valid, it is possible that such marriages might be considered "odious" or repugnant by courts in California.

"PUBLIC POLICY" EXCEPTION

Courts have also ruled that "A marriage is generally recognized as valid in any state if it was valid in the state where it was celebrated, at least unless it collides with some strong public policy of the state of residence." (*Barrons v. United States* (Ninth Cir. 1951) 191 F.2d 92, 95.[3] As the court in *Barrons* noted, this rule is followed in California. At least one court has ruled, however, that such a "public policy" exception would only apply if, after the marriage, the couple cohabited in California. (*Estate of Bir* (1948) 83 Cal.App.2d 256, 261.)

In *Crouch v. Crouch* (1946) 28 Cal.2d 243, 251-252, the California Supreme Court drew a distinction between what California does as a matter of comity or respect for the family and marriage law of other states, and its constitutional authority to reject a family status conferred by another state. The court indicated that, despite the Full Faith and Credit Clause of the federal Constitution,' "A state undoubtedly has a constitutional right to declare and maintain a policy in regard to marriage and divorce or any other family relationship, at least as to persons domiciled within its borders." A similar principle was expressed in *Roberts v. Roberts* (1947) 81 Cal.App.2d 871, 879-880, where the court said:

> "In all domestic concerns each state of the Union is to be deemed an independent sovereignty. As such, it is its province and its duty to forbid interference by another state as well as by any foreign power with the status of its own citizens."

These cases suggest that the Legislature may have authority to refuse to recognize same-sex marriages performed in Hawaii, at least in situations where the parties to the marriage were California residents at the time of the ceremony.

Restatement of Law

The Restatement of Conflict of Laws discusses the general rule regarding the validity of out-of-state marriages, and exceptions thereto. It summarizes the law as follows:

> "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid 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." (See § 283, p. 233.)

The Restatement implies that a strong public policy may exist even without a specific statute or judicial precedent on the subject. This is not unlike the principle discussed in the *McDonald* case regarding jurisdiction to reject "odious" marriages. (Id, at p. 239.)

Full Faith and Credit

Although same-sex couples who marry in Hawaii will not doubt raise the full faith and credit clause of the federal Constitution as an argument in support of the validity of their marriage in other states, it is not a foregone conclusion that other states will be required to respect Hawaii same-sex marriages.

As the nation's highest court once observed in *Pacific Employers Ins. Co. v. Industrial Accident Commission* (1939) 306 U.S. 493:

> "It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy." (Id., at p. 502.)

Other language from that case suggests the constitution may limit the legal effect a Hawaii marriage ceremony might have when the couple enters into the jurisdictional territory of another state. The Supreme Court cautioned that "Full faith and credit does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." (Id., at p. 504-505.)

The Supreme Court has also declared that the full faith and credit clause does not compel the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state. (*Williams v. North Carolina* (1942) 317 U.S. 287, 296.)

More recently, in *Nevada v. Hall* (1979) 440 U.S. 410, 424, the high court reiterated that the full faith and credit clause of the federal Constitution does not require a forum state to give effect to the laws of another state if those laws are "obnoxious" to public policy in the forum state.

Even though some or all states may pass statutes against same-sex marriage, the United States Supreme Court will make the ultimate decision as to whether the federal Constitution would require every state in the nation to consider Hawaii same-sex marriages as valid. While a ruling in favor of same-sex marriage is a technical possibility, it would seem unlikely that a court that has allowed the states to criminalize intimate sexual relations between consenting

same-sex couples in their own home – such sodomy laws still exist in 22 states – would interpret the federal Constitution to require every state to accept Hawaii same-sex marriages.

Legislative Options

The California Legislature may respond in one or more ways to the impending legalization of same-sex marriage in Hawaii.

Legalize Same-Sex Marriage. Of course, the Legislature could pass a statute legalizing same-sex marriage. However, that it extremely unlikely since, just a few years ago, a bill to allow same-sex marriages failed in committee when not one legislator would cast a vote in favor of the bill.

Do Nothing. Legislators could take no action and instead allow the courts to decide whether California must recognize such marriages as valid. That is possible, but not probable.

Pass an Evasion Statute. The Legislature could pass an evasion statute refusing to recognize same-sex marriages of California residents who marry in Hawaii and then return home.

Create an Exception to Section 308. Despite the general rule of section 308 recognizing out of state marriages as valid in California, the Legislature could amend that statute to create an exception for same-sex marriages. This approach is pending in Utah.

Make a Public Policy Declaration. Nowhere does California law specifically state that same-sex marriages are invalid and contrary to public policy in California. This type of a statute has been enacted in a few other states.

Pass a Constitutional Ballot Measure. While a simple statutory statement of policy might suffice, the Legislature could engage in overkill by putting a state constitutional amendment on the ballot. Such a measure (ACA-28) failed to get out of committee in 1991. Among other restrictive provisions, ACA-28 would have constitutionally defined marriage as "a legal relationship defined by law and available only to individuals of the opposite sex." A similar bill (SCA-42) died in committee in 1992. However, the make-up of the Legislature has changed considerably since then. If this approach is tried again, there is a danger that other negative proposals might be included in the ballot measure and that these add-ons could reverse much of the progress made by the gay and lesbian community on family rights and domestic partnership benefits. A proposed ballot measure to amend a state constitution to prohibit same-sex marriage has not surfaced in any other state.

Community Strategies

No one knows how the California Legislature will respond to the prospect of same-sex marriage. However, given the current political make-up of both legislative houses and public opinion running strongly against same-sex marriage, the gay and lesbian community must quickly develop a strategy to minimize the potential backlash in Sacramento.

Strategic measures might include: (1) Encouraging the Hawaii Legislature and Governor to pass a domestic partnership act, thereby eliminating discrimination against same-sex couples in Hawaii and thus decreasing the chance of a court-mandated same-sex marriage law that will cause an automatic confrontation with Cogress and each of the other 49 states; (2) educating California legislators about the concept of domestic partnership and encouraging support for AB-687 as a small step to protect same-sex couples in times of illness and death; (3) working with conservative legislators to discourage them from voting to place a constitutional amendment on the ballot and encouraging them to either wait for the courts to decide the issue or to voice their opposition to same-sex marriage through a statutory amendment.

Endnotes

1. The Vermont statute, for example, states: "If a person residing and intending to continue to reside in this state is prohibited from contracting marriage under the laws of this state and such person goes into another state or country and there contracts a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state." (Vt.Stat.Ann. tit. 15, §5 (1993).

2. H.B. 366 was introduced in February 1995 in Utah.

3. In one case dealing with full faith and credit, a federal court ruled that "public policy" was equivalent to "the public good," which the court defined as "Anything that tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel is against public policy." (*Magee v. McNAnny* (W.D. Penn. 1950) 10 F.R.D. 5, 12.)

4. Article IV, § 1 of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may be general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

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