

Subject: Re: Same-sex only versus gender-neutral dp in Vermont

Date: Tue, 21 Dec 1999 12:24:47 EST

From: ASLeonard@aol.com

To: tomcoleman@earthlink.net

Tom, I believe that the Court cited your draft in its opinion as an example of what the legislature might consider doing. I think this was in its reference to the Hawaii legislative committee report? Anyway, it also referenced various overseas domestic partnership schemes, such as Denmark. I wonder whether something along the lines of the French Civil Solidarity Pact would do it? I believe that one is open to all unmarried couples regardless of sex.

The big question, I guess, is whether one could read the Court's opinion as a mandate for open DP without regard to gender? the problem here would be the rationale embraced by the majority of three, versus the alternative theories posed by the concurrence and the concurrence/dissent. The last of these, using the Hawaii idea that this is sex discrimination, would hold out the most support for all-inclusive DP regardless of gender. The majority opinion would, I believe, pose the question whether there is a rational basis for limiting DP to same-sex couples, and might find such a rational basis in a desire by the state to avoid giving opposite sex couples any incentive to avoid the legal responsibilities of marriage while getting the rights and benefits. Of course, a properly-drafted comprehensive DP statute that fulfills the full equality requirement of the court's decision should impose all marital responsibilities in exchange for giving all marital benefits and rights. (That may result in deterring some folks from becoming formal DP's, but this makes sense as policy.)

Art



A M E R I C A N
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P.O. Box 65756 • Los Angeles, CA 90065 • (323) 258-8955
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December 22, 1999

Hon. William H. Sorrell
Attorney General of Vermont
109 State Street
Montpelier, VT 05609

✓ cc: All members of the Legislature

Re: Comprehensive Domestic Partnership Act

Dear Mr. Sorrell:

Your office is probably reviewing legislative options in response to the decision of the Supreme Court earlier this week in *Baker v. Vermont*. I would like to share some information and materials with you that may be helpful in this regard.

At page 39 of its opinion, the Supreme Court made the following reference:

“See Report, Hawaii Commission on Sexual Orientation and the Law (Appendix D-1B) (1995) (recommending enactment of ‘Universal Comprehensive Domestic Partnership Act’ to establish equivalent licensing and eligibility scheme and confer upon domestic partners ‘the same rights and obligations under the law that are conferred on spouses in a marriage relationship’)”

The Comprehensive Domestic Partnership Act proposed to the Legislature by the Hawaii Commission was based upon my testimony to the Commission in October 1995, my prior consultations with the staff member assigned to the Commission by the Legislative Reference Bureau, as well as a written framework and draft legislation I provided to the Commission at the request of its Chairperson.

I am sending you that framework and the model law proposed by the Commission when it issued its final report in December 1995. As you can see, the Commission recommended that all unmarried couples who meet various criteria (same-sex and opposite-sex couples alike) should be entitled to all of the benefits of marriage and family (and all of the obligations as well) under state law.

The model law is relatively short because of the method it uses to accomplish this result. It provides that wherever the terms “marriage,” “spouse,” “family,” “dependent,” or “household” are used in statutes, codes, regulations, or other state laws, they shall include and also refer to “domestic partnerships.” It also prohibits discrimination on the basis of “domestic partnership status.”

AASP

Vermont Attorney General

December 22, 1999

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The model law proposed by the Hawaii Commission was introduced in the Legislature when it convened in January 1996. Before the bill was heard in the Senate Judiciary Committee, I was one of three experts called to testify at an informational briefing to the Senate in February 1996.

The model law, with slight modifications, was passed by the full Senate that year. Unfortunately, because the gay and lesbian community in Hawaii did not lobby for the bill (they wanted full marriage and no substitutes) and because some religious leaders and many ultra-conservative groups lobbied against it (they did not want any reform whatsoever), the bill did not come up for a hearing in the House of Representatives. The Governor of Hawaii indicated that he would have signed a comprehensive domestic partnership law, but it never reached his desk. The next year, the legislature passed a "Reciprocal Beneficiaries Law" which the Governor reluctantly signed as it was the only option to give some rights and benefits to unmarried partners. However, that law has serious defects since it refused to acknowledge beneficiaries as "family members" and also failed to give them most of the benefits that "family" and "marriage" statutes confer.

I am also sending you a few pages taken from a law review article which I wrote on the subject now in question in Vermont, namely, legislative options when a court indicates that marriage statutes may be unconstitutional. That article, which was published by Tulane University School of Law in 1996 (although the official date says 1995), predicted that a supreme court might very well use the concept of "all deliberate speed" and give a legislature a reasonable amount of time to cure such a constitutional defect rather than judicially mandating the issuance of marriage licenses to same-sex couples.

There are many other aspects of that article which you, the Governor, and the Vermont Legislature might find useful should the Legislature decide to adopt a domestic partnership law rather than legalize same-sex marriage.

One of the questions which probably will arise in Vermont is whether a comprehensive domestic partnership law should be limited to same-sex couples or whether unmarried opposite-sex couples who meet all of the other criteria should be included in the definition of "domestic partners" as well. While the exclusion of opposite-sex couples might subject such a law to constitutional challenges (e.g., sex discrimination or a violation of religious liberty protections, etc.), in the first instance that issue is a policy matter for the Legislature to consider.

The State of Vermont has already decided this policy question in a slightly different context. For several years, Vermont has been giving benefits to the domestic partners of its state employees. That program includes same-sex and opposite-sex domestic partners. I believe that more than 60% of those who have signed up for this program are opposite-sex domestic partners. You may note that no state in the nation has adopted a domestic partner benefits plan which is limited to same-sex couples.

At least two cities in Vermont extend domestic partner benefits to municipal workers. Burlington and Middlebury, consistent with the state's plan, decided to include all domestic partners regardless of gender. The programs in these cities are consistent with the overwhelming majority of cities throughout the nation which have adopted domestic partner benefits plans.

AASP

Vermont Attorney General

December 22, 1999

Page Three

In the private sector, Ben & Jerry's was one of the first companies in the nation to extend domestic partner benefits to employees. It's program is also gender neutral and nondiscriminatory. While a considerable number of private employers in the nation have adopted discriminatory plans which exclude heterosexual domestic partners, the majority of private sector plans are gender neutral.

There are many reasons why unmarried heterosexual couples would choose domestic partnership instead of marriage. Rather than reiterating those reasons here, I would refer you to an article published on our website which discusses December 22, 1999 this issue in some detail. That article, and other relevant information about domestic partnership may be found at: singlesrights.com/dp-laws.html. The state would have no policy reason to deny heterosexual couples the option of participating in a truly secular institution such as domestic partnership, rather than forcing them to participate in a marriage which, despite the term "civil," carries religious connotations. Heterosexual couples who register as domestic partners would be assuming all of the obligations of marriage under state law.

Since you may not be familiar with AASP (formerly known as Spectrum Institute), I am taking the liberty of including some letters of reference which show our involvement with the issues of family diversity and domestic partnership over the years. They include letters from legislators, study commissions, business organizations, and nonprofit groups. A more complete set of such letters or excerpts may be found on our website at: singlesrights.com/comments.html.

I have been working in the field of family diversity, domestic partnership, and marital status discrimination for more than 25 years. I taught the first class in the nation on "Rights of Domestic Partners" at the University of Southern California in 1985-1988. You may find a short biography of my legal and professional involvements on our website at: singlesrights.com/ed-bio.html.

I hope this information will be useful to you, the Governor, the Legislature, and key staff people as you respond to the challenge you now face as a result of the Supreme Court's decision. If I may be of any additional help in this regard, please feel free to contact me. If you believe it would be valuable, I would be willing to come to Vermont to meet with you or others in person or to testify at legislative hearings on this issue.

What Vermont does this legislative session will have ramifications throughout the entire nation for many years. Any legislation which is adopted in Vermont could become a model for other states.

On behalf of all of the domestic partners in Vermont as well as those throughout the nation – at least two thirds of whom are seniors and other heterosexual unmarried couples – I wish you well as you and other state officials deliberate over this historic legislation.

Very truly yours,



Thomas F. Coleman
Executive Director

cc: Governor Howard Dean

To: Arthur
From: Tom
Re: Vermont A.G. letter
Date: December 26, 1999

We just arrived home last night from a Christmas trip to Oxnard and Ojai. We left Friday at noon and got home Saturday at 6pm. We are exhausted. Now we are making preparations for a New Years Eve party at our house. We expect 75 guests. Need I say more.

As for the Vermont letter, the Supreme Court issued its opinion on Monday, December 20. The newspapers reported on Wednesday morning that the Governor wanted a comprehensive dp law and the Attorney General and a few legislative leaders made similar remarks.

Since the Legislative session opens on January 4, the papers said that legislation was in the process of being drafted which would be introduced prior to Jan. 4. That meant that if we wanted to have an influence on the administration's bill, we had to get a letter on the desk of the Governor and the Attorney General by Thursday afternoon, December 23 or Friday morning, December 24. Also, copies needed to be on the desks of all 180 legislators by Monday, December 27. Meeting such a strict deadline, on such short notice, would insure that our views and recommendations would get noticed and considered before the bill or bills were introduced.

I did not want to have AASP's letter be one of the hundreds they will receive after January 2 when the rest of the world starts working again after the holidays are over. I wanted it to be one of the first letters they receive. I also wanted to influence the first bills to be introduced, not just be considered in connection with amendments to those bills later in January or February.

I could have justified putting this off for another week – the holidays, other things to do, bla bla bla. But I put my own personal life on hold and drafted a letter with 20 pages of attachments to be faxed on Wednesday afternoon with a fed-ex package to the gov and a.g. going out that same day to be received by them on Thursday afternoon. The copies to all 180 legislators went out in the mail on Wednesday afternoon, so they should be received by them on Monday, December 27.

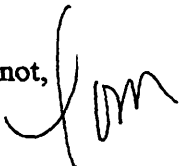
I knew that my letter would be subject to improvement. That is why I called you on Wednesday morning asking if you could take an hour to read it and give me some suggestions. Unfortunately, you had other priorities and so that was not possible.

It is too bad that when you are not available, I do not have someone else to work with on substantive issues like this. So, I must be prepared to do it alone when necessary.

I did e-mail Dorian and Marshall, suggesting that letters should be sent from them right away. The response I received said that they were preparing to go away for Christmas. Furthermore, they did not want to be perceived as lobbying for dp rather than full marriage in Vermont. As a result, nothing went out from ATM Project.

Please feel free to use my letter as a springboard for a letter from AAPP. Send it to the Governor and Attorney General whenever you have the time.

With whatever flaws mine had, the water has gone over the dam. Presumptuous or not, they have the necessary information to pass a gender-neutral law. Let's see what happens.



Subject: Vermont legislation.

Date: Tue, 28 Dec 1999 06:33:52 EST

From: Hontalittle@aol.com

To: unmarried@earthlink.net

CC: tlittle@lcclex.com

Mr. Coleman:

Greetings from Vermont. I have reviewed your 12/22 letter to Bill Sorrell. As Chair of the House Judiciary Committee, I have been asked to initiate the review of the General Assembly's options available to respond to Baker v. State. Your work would seem to be on point, and I would like to know about your availability to testify sometime in January 2000.

You can reach me at the following places:

e mail: this address, plus <tlittle@lcclex.com> (my law office); it is best to send items to both addresses..

telephone: (802) 862-6511 extension 17

Mail: P. O. Box 907, Burlington, VT 05402. Street address is 117 St. Paul Street, Burlington, VT 05401.

I have served in the Vermont House since 1992, and am a partner in a small law firm.

Thank you.

Sincerely,

Thomas A. Little

FAY
862-5645



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January 6, 2000

Thomas A. Little
Chair, House Judiciary Committee
Vermont Legislature

3 pages
ATTN: michelle chios

Re: Status of legal protections in Hawaii

Dear Representative Little:

I noticed that your committee was giving further review this week to the status of same-sex couples in Hawaii.

I came across an article bearing on this issue. Apparently the reciprocal beneficiary law expired in 1999 and was not renewed. As a result, same-sex couples in Hawaii are without legal protections.

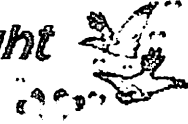
Here is the article. As for the current situation, you may want to speak with Senate Judiciary Committee co-chairs Avery Chumbley or Matt Matsunaga. They are also familiar with the situation for the past several years. You can probably ask either of them for the phone numbers of the other two former legislators I mentioned to you at lunch last week: Rey Graulty (former chair of the Senate Judiciary Committee in 1994-1996) and Mike McCartney (former Vice-President of the Senate and member of Senate Judiciary Committee in 1994-1996).

If there is any other information I can provide, please let me know.

I enjoyed spending the day with committee members last week. I felt it was a very productive session.



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Thursday, February 3, 2000

IN AND AROUND THE CAPITOL



Senators want to restore unwed partners' benefits

Electronic copy for the Honolulu
Life-Term Insurance
Bulletin

By Bruce Dunford
Associated Press



The co-chairmen of the Senate Judiciary Committee are moving to restore the "reciprocal beneficiary" benefits for public employees that were part of the compromise for breaking the emotional deadlock over the gay marriage issue.

The unmarried partners of about 60 public employees and retirees lost their health benefits at the end of June after the Legislature failed to extend the 1997 law providing coverage to domestic couples who, by law, cannot marry.

The Legislature approved the reciprocal beneficiary law to give gay couples some of the same benefits as married couples in anticipation of voter approval in 1998 of a state constitutional amendment banning gay marriages.

Although the Hawaii Supreme Court ruled last year that gay couples' claims they are entitled to receive marriage licenses was moot because of the new amendment, it left untouched its 1993 ruling that gay couples are entitled to the same rights and benefits as heterosexual couples.

Gay couples received some of those rights -- such as hospital visitation, property rights and family leave -- under the 1997 state law. Others -- such as health benefits, inheritance and adoption privileges -- were withheld.

Dan Foley, who represented the three gay couples whose lawsuit resulted in the 1993 ruling that they were entitled to marriage licenses, has warned that unless there is a comprehensive domestic partnership law, the legal case will continue.

Sen. Matt Matsunaga said the bill he and Judiciary Co-Chairman Avery Chumbley (D, Kihei) introduced would restore the health insurance benefits for public employees.

"Others want to go farther. They want a comprehensive domestic partnership law," Matsunaga (D, Palolo) said.

The House's Democratic majority has taken no position on reciprocal beneficiaries or domestic partnerships because there is no consensus on the issue among the 39 members.

Sen. Norman Sakamoto (D, Moanalua), who supported banning gay marriages, questioned the need to restore the reciprocal beneficiary benefits when it involves so few public employees.

He said lawmakers should concentrate on education and the economy instead of again taking up what would be a controversial issue.

Bill would require electronic pay for most new city employees

Star-Bulletin staff

▲▲▲

Most new city employees would be required to accept their pay via electronic transfer under a City Council bill.

Councilman Duke Bainum, who introduced the measure, said it would save the city as much

Subject: Re: Preference for day of testimony

Date: Sat, 08 Jan 2000 20:02:57 -0800

From: "Thomas F. Coleman" <tomcoleman@earthlink.net>

Organization: American Association for Single People

To: Hontalittl@aol.com

Dear Representative Little,

Thursday, January 27 would be a good time for me to testify, if that is available. Are the hearings in the morning or in the afternoon? As soon as you can send me an invitation for a specific date and time I will make my reservations. A two hour slot would be sufficient. Please fax the invitation at your earliest opportunity. My fax number is (323) 258-8099.

I will be preparing the outline of my presentation next week and should be able to send you a draft of it by January 14.

Were you able to open the attachment to my last message? I tried to send it in Wordperfect and Word formats.

The House Judiciary Committee is facing a tremendous challenge. I know that you are taking this task very seriously and that you will attempt to fashion a solution which properly balances constitutional, policy, and political considerations. It would be hard enough to do this type of delicate analysis under ordinary circumstances, but working in a fishbowl and under an international spotlight certainly must increase the pressure.

I will bring as much relevant information to your committee as possible, highlighting various legislative options. Since many people will be pressing for the legalization of same-sex marriage and others will insist on maintaining the status quo, I will focus most of my attention on areas that would otherwise be neglected or downplayed, such as a comprehensive domestic partnership act, the need to show respect for family diversity, passing additional marital status nondiscrimination protections, the concept of acting "to cure constitutional violations with "all deliberate speed," the principle of "equity" versus "identicality," and suggesting reasons the legislature may want to develop short term and intermediate solutions which avoid or minimize conflict with the federal government and with other states.

I look forward to receiving a formal invitation to testify on a date certain and to working with you to respond to the Baker decision in a responsible and timely manner.

Very truly yours,

Thomas F. Coleman

Hontalittl@aol.com wrote:

note of Little to me ↓

- > I believe we can give you that Thursday or Friday, say a two hour slot.
- >
- > At present, we are not examining any particular bill structure (e.g.,
- > marriage vs. domestic partnership). We will be in the process of making that
- > significant determination the week of January 24. We are devoting the week
- > of the 11th to examining the Baker decision, and most of the week of the 17
- > to the existing marriage laws in Vermont (and a history of marriage law in
- > Vermont and in the U. S.). Can you forward a synopsis of your presentation?
- >
- > Tom Little

Subject: Re: Preference for day of testimony

Date: Sat, 8 Jan 2000 21:54:51 EST

From: Hontalittl@aol.com

To: tomcoleman@earthlink.net

I believe we can give you that Thursday or Friday, say a two hour slot.

At present, we are not examining any particular bill structure (e.g., marriage vs. domestic partnership). We will be in the process of making that significant determination the week of January 24. We are devoting the week of the 11th to examining the Baker decision, and most of the week of the 17 to the existing marriage laws in Vermont (and a history of marriage law in Vermont and in the U. S.). Can you forward a synopsis of your presentation?

Tom Little



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Spectrum Institute, Research and Policy Division
P.O. Box 65756 • Los Angeles, CA 90065 • (323) 258-8955
Fax (323) 258-8099 • www.singlepeople.org • unmarried@earthlink.net

January 21, 2000

Hon. Tom Little
House Judiciary Committee
115 State Street
Montpelier, VT 05633

Re: Submission of eight exhibits (400 pp.) in support of my testimony

Dear Representative Little:

Yesterday I received a telephone call from Michelle Childs, Legislative Counsel to the House Judiciary Committee which you chair. She confirmed that I will testify before the committee at 9:00 a.m. on Thursday, January 27, 2000. You had previously indicated that you were setting aside at least two hours for my presentation and a discussion of the issues with committee members.

My presentation is entitled "Responding to *Baker v. State*: Legislative Options and Potential Consequences." My oral presentation and the written materials I am submitting for the record will focus on seven primary options which I have identified and the likely consequences of those options.

Along with this letter I am sending you eight documents to be distributed to each member of the committee and to your legislative counsel. The documents are color coded and numerically identified. Please feel free to give them to committee members as soon as you receive them (hopefully by Tuesday). If members review the first 19 pages of the white document, they will get the gist of my testimony.

I would like to emphasize that I do not view my role as an advocate for any particular result. Rather, I am offering my assistance to the committee as an educator, consultant, and expert witness. I do not oppose the legalization of same-sex marriage nor am I advocating for it. Many other witnesses who have testified before your committee have adequately filled those advocacy roles.

I believe that your committee has several procedural and substantive options which it should seriously consider. I will do my best to assist the committee in identifying those alternatives and to examine the potential consequences of each of them. I am grateful to be a part of this historic process.

Very truly yours,

Thomas F. Coleman
Executive Director

cc: all committee members

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 Rep. Bill Lippert, Vice-Chair
 Rep. Diane Carmolli
 Rep. John Edwards
 Rep. Steve Hingtgen
 Rep. Michael Kainen
 Rep. Judy Livingston
 Rep. Bill Mackinnon
 Rep. Alice Nitka
 Rep. Michael Vinton
 Rep. Cathy Voyer

STATE OF VERMONT

HOUSE OF
 REPRESENTATIVES

HOUSE JUDICIARY COMMITTEE

AGENDA

January 25, 2000

Room 30, State House

Tuesday, January 25

10:00 a.m.

Baker v State

Joint Fiscal Office: Resources for economic analysis

Court Administrator's Office: Family Court impacts

1:15 p.m.

CAUCUS

3:00 p.m.

Committee Discussion

7:00 p.m.

Public Hearing - Baker v State

Wednesday, January 26

10:00 a.m.

Baker v State

Committee Discussion - Baker v State

Thursday, January 27

9:00 a.m.

Baker v State

Thomas Coleman - "Legislative options and potential consequences" - domestic partnerships for single persons

10:30 a.m.

Gil Kujovich, Esq., VT Law School

Friday, January 28

To be announced



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Embargoed Until Release Date
Release date: January 27, 2000

Contact: Thomas F. Coleman (323) 258-8955
or on January 27 at (802) 223-5252

Vermont Legislature Has Options in Gay Marriage Debate

Expert witness explains details of domestic partnership and other choices

Testifying at the invitation of the House Judiciary Committee, a legal expert on family diversity advised committee members they had several options as they respond to the political hot potato thrown to them by the Vermont Supreme Court with its decision in *Baker v. State*.

On December 20, 1999, the court ruled that it was unconstitutional for the state to deny same-sex partners the benefits and protections that marriage laws afford to heterosexual married couples. However, the court stopped short of ordering marriage licenses for all couples regardless of gender. Instead, the court left it up to the Legislature to decide whether to legalize gay marriage or to create a parallel institution of domestic partnership.

Legislative leaders decided to give the House Judiciary Committee the first opportunity to address this issue. The committee has been holding hearings for the past three weeks to gather the facts necessary to make this historic decision.

Thomas F. Coleman, executive director of the American Association for Single People, made a presentation today to the committee entitled "Responding to *Baker v. State*: Legislative Options and Potential Consequences." Coleman is an attorney with 26 years of experience dealing with legal, political, and economic issues involving family diversity, domestic partnership, and marital status discrimination. In 1985, he taught the first law school class in the nation on rights of domestic partners. He also was invited by the Hawaii Legislature to testify as an expert on domestic partnership issues when that legislative body was grappling with the same issue in 1996.

Today, Coleman advised legislators they have at least seven logical options. He said that two of them – doing nothing or putting a constitutional amendment on the ballot – were possible in theory but that neither of these alternatives seemed to have support in the Legislature. Most of his time was focused on realistic alternatives, namely, legalizing same-sex marriage or passing a comprehensive domestic partnership act. Other options were also discussed. He suggested that if legislators needed more time to make a final decision on the matter, they might study the issues further and reserve final judgment until next year. The Supreme Court directed the Legislature to act within a "reasonable" time.

"The Vermont Supreme Court has suggested that it may accept a comprehensive domestic partnership act as a constitutional alternative to same-sex marriage," Coleman told committee members. "It pointed the Legislature to model legislation that was developed in Hawaii a few years ago," he added.

(Continued on other side)



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To: Representative Tom Little (Attention: Michelle Childs)

From: Thomas F. Coleman

5 pages

Re: Framework for Domestic Partnership Act

VIA FAX

Date: January 26, 2000

By the time you receive this fax I will probably already be on my way to the Los Angeles airport. I trust that everyone survived the marathon public hearing last night.

Yesterday I spent several hours drafting a Basic Framework of a Domestic Partnership Act for the State of Vermont. A copy of that four-page document is being faxed along with this cover memo.

After all of the background materials and general information is considered by committee members and committee staff, a decision may be made to draft a comprehensive domestic partnership act for discussion by the committee. To assist you in streamlining this process and simplifying this otherwise complicated task, I thought it would be helpful for participants to review a basic framework for an act that may satisfy the mandate of the Supreme Court.

In drafting this new document, I relied in part on the framework which I had submitted in 1995 to the Hawaii Commission on Sexual Orientation and the Law. However, that framework had to be modified substantially to respond to some of the specific language contained in the *Baker* decision.

With that decision as a guide, I modified the Hawaii framework to meet the specific conditions now present in Vermont.

Rather than starting from scratch, I used S248 (the only domestic partner bill now pending in Vermont) as an initial point of analysis. While S248 has its strengths, it also has several major deficiencies. The attached framework discusses those defects and makes suggestions regarding how they may be corrected.

Please feel free to distribute this framework to committee members today (Wednesday) in case any members might want to review it prior to my testimony on Thursday. I will bring additional copies for distribution at the hearing.

Finally, I would like to emphasize that the purpose of my testimony is to present the committee with information necessary to make an informed choice as to how the Legislature should respond to *Baker*. The outline I submitted of my testimony is only a guide. If the committee would like me to ignore some sections of my proposed presentation and place more emphasis on others, please let me know. Assuming that people have reviewed the written materials you received on Monday, at the hearing I plan to spend **most of my time on: (1) consequences to the state of gay marriage versus domestic partnership, (2) the framework attached to this memo; and (3) answering questions of committee members.**

Basic Framework of a Domestic Partnership Act for the State of Vermont

The House Judiciary Committee of the Vermont Legislature is concluding three weeks of testimony concerning legislative options in response to the recent decision of the state Supreme Court in *Baker v. State*. One of the options is the passage of a comprehensive domestic partnership act.

The Legislature has several alternatives. It could take no action at all, or defer final decision-making until next year. It could begin the process of putting a constitutional amendment on the ballot to give voters an opportunity to reverse the *Baker* decision. It could pass a bill removing the current gender restriction from the state's marriage laws, thereby legalizing same-sex marriage in Vermont. Another alternative would be to pass a comprehensive domestic partnership act giving unmarried couples who meet eligibility criteria all the benefits and obligations of marriage under *state law*.

In the event the Legislature chooses a domestic partnership alternative, it would be helpful for lawmakers to review the basic framework for such an act as a starting point for their deliberations on the substantive provisions of such legislation. This memo is intended to serve such a purpose.

Title

This section would state that the act shall be known as the "Comprehensive Domestic Partnership Act of 2000" or whatever other name may be selected.

Purpose and Findings

This section would describe the purpose of the act and would contain factual findings made by the Legislature in support of the passage of this act.

1. Language from Baker v. State

A paragraph could state that the act was adopted in response to the decision of the Vermont Supreme Court in *Baker v. State*. It could be followed by several passages from the court's opinion which the Legislature considers relevant to this act.

In *Baker*, the Supreme Court held that "the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage *under Vermont law*." (emphasis added.)

The court also stated that "[w]hether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative, rests with the Legislature."

The court stressed that "[w]hatever system is chosen, however, must conform with the constitutional imperative to afford *all Vermonters* the common benefit, protection, and security of the law." (emphasis added)

The court suggested that the common benefits clause of the Constitution may not be violated by a comprehensive domestic partnership act "if a case of necessity can be established."

Other language from the opinion indicates that a decision to adopt a domestic partnership act rather than legalizing same-sex marriage would be constitutional if the legislation had a "reasonable relation to the public purpose in the light of contemporary circumstances."

The court was not unmindful that “[a] sudden change in the marriage laws or the statutory benefits traditionally incidental to marriage may have disruptive and unforeseen consequences.”

Finally, the court concluded that it would not:

“purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as ‘domestic partnership’ or ‘registered partnership’ acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners.”

This section could state that the Legislature considered these specific passages from the court’s decision during its deliberations in response to *Baker v. State*.

2. Legislative Findings

This section would contain specific factual findings which the Legislature believes justifies its decision to establish a comprehensive domestic partnership act, deferring a final decision as to whether to legalize same-sex marriage to some future legislative session which may find that circumstances warrant such action.

A paragraph could make reference to the three weeks of testimony taken by the House Judiciary Committee, listing some of the witnesses who testified and briefly summarizing the topics covered during their testimony.

The section could then list the factual findings made by the Legislature, as a result of these hearings and its own independent research, which justify its decision to enact this statute. It could summarize some of the potential adverse consequences to the state, e.g., ongoing conflict and litigation with the federal government and other states which express prohibit recognition of same-sex marriages, if Vermont were to legalize same-sex marriage *at this time*.

A paragraph could emphasize that the Legislature is attempting to comply with the mandate of the court “with all deliberate speed” but that current circumstances (e.g. DOMA, interstate compacts, uniform state laws) necessitate passage of this act because there are strong policy reasons that currently dictate against legalizing same-sex marriage at this time.

This section could also include any other findings which would support a legislative decision to make the domestic partnership act less than fully parallel to marriage law. In other words, if the minimum age is different in any respect, or if any benefits and obligations which normally are associated with marriage are not going to be associated with domestic partnership, factual findings could be included to justify such a decision.

For example, the Legislature may establish 18 the minimum age for domestic partnership and not include a provision for a 16 or 17 year old to register as a domestic partner with the permission of one parent. If this deviation exists, some justification would be required, such as the fact that the current provision for marriage by a 16 or 17 year old was intended for use in situations when a prospective bride is pregnant and the prospective groom was is biological father. Such a situation would not exist for same-sex partners.

Finally, although there would be no need to justify its decision to do so, the Legislature might want to include some factual findings as to why it decided to make domestic partnership gender neutral. For example, it could state that the Legislature is trying to make the situation in Vermont as equal as possible for same-sex and opposite-sex couples and that it is primarily the federal and interstate conflicts with same-sex marriage that necessitated continuing the gender restriction in the state's marriage laws *at this time*. However, since there would be no conflict with the federal government or other states in a gender-neutral domestic partnership act, there is no necessity to exclude opposite-sex couples from the domestic partnership act. Furthermore, since opposite-sex couples would be assuming all state-law obligations of marriage by registering as domestic partners, there is no valid policy reason to eliminate this option for opposite-sex couples. Furthermore, the Legislature could indicate that evidence from domestic partnership registries and employment benefits programs, including some in Vermont, demonstrate that many opposite-sex couples want domestic partnership protections and are willing to assume the obligations required by these programs.

Substantive Provisions

A comprehensive domestic partnership act would contain, in addition to a statement of purpose and findings, various substantive provisions, including: (1) a section containing **definitions**, including eligibility criteria for domestic partnership; (2) a section describing how a domestic partnership is **established**; (3) a section describing how a domestic partnership is **dissolved**; (4) a section describing the **rights and obligations** of domestic partners; (5) a section **preempting** state and local laws to the contrary; (6) a section authorizing the **commissioner of health** to perform certain functions with respect to this act; (7) a section **prohibiting discrimination** on the basis of marital status and domestic partnership status; (8) a section dealing with **reciprocity**; and (9) a section dealing with **religious organizations**.

Provisions of S248

A proposed domestic partnership bill is pending. While **S248** is a good point of reference, it is **deficient in several respects** and as a result it may not comply with the mandate of the court in *Baker*. It could be amended or a new bill could be filed which would correct these defects.

First, it does not contain any **statement of purpose** and findings. Such a section would be crucial to support the validity of a domestic partnership act.

Second, it contains one major requirement for domestic partners that is not required of married couples, namely, that they must share a **common residence**. Spouses may be legally married even though one of them leaves a common residence and does not intend to return. Imposing a common residence requirement for same-sex couples or other domestic partners may be unconstitutional since such a requirement is not imposed on married couples under current law.

Third, the **preemption** clause of this bill does not preempt local laws that are contrary to the act. Preemption of inconsistent local laws may be desirable.

Fourth, since Vermont grants **reciprocity** to out of state marriages, S248 is deficient because it does not grant reciprocity to domestic partnerships registered under a similar comprehensive domestic partnership scheme in other states. Although no such statutes currently exist, it is reasonable to assume that one or more states will enact a similar statute in the near future. It may be inappropriate, however, for a comprehensive domestic partner statute in Vermont to grant full reciprocity within Vermont to domestic partners from other states who have registered under **limited** domestic partnership laws. Such couples did not intend to assume all of the obligations of marriage when they registered in order to obtain limited benefits in their own states. Imposing *all*

marital obligations on such couples when they move to or visit Vermont could be viewed as punitive. Any reciprocity clause would have to take this into account.

Fifth. S248 does not prohibit the state, local governments, and private businesses from discriminating on the basis of marital status or domestic partnership status. If same-sex marriage were legalized, public agencies and private businesses operating inside Vermont would have to treat same-sex and opposite-sex married couples alike. To satisfy the mandate of *Baker*, a comprehensive domestic partnership act (or ancillary legislation enacted at the same time) would have to create the same result. This could be accomplished by adding "marital status" and "domestic partner status" to state civil rights statutes prohibiting discrimination in employment, housing, insurance, credit, other business practices, and government services. However, this would still not prohibit private employers from discriminating against domestic partners in employee benefits since most benefits programs are immune from state civil rights statutes. The most that Vermont could do to eliminate such discrimination by private businesses would be to enact an Equal Benefits Act, similar to laws recently adopted by San Francisco, Los Angeles, and Seattle. The law would prohibit businesses which contract with the State of Vermont or with municipalities within Vermont from discriminating against domestic partners in any of their employment or other business practices. In other words, if such businesses grant benefits or privileges to spouses of employees or customers, they would be required to do the same to domestic partners or employees or customers. Any attempt by the state to directly regulate employee benefits programs of businesses which do not contract with the state or local municipalities within the state would be preempted by federal law (ERISA).

Sixth. S248 excludes from its protections two unmarried adults who are **blood relatives**. Such a restriction in marriage law may be appropriate because marriage presumes a sexual relationship between the parties. However, the same is not true for domestic partnership. For example, the recent "Equal Benefits Ordinance" laws in Seattle and Los Angeles do not exclude unmarried blood relatives from their provisions. Unmarried blood relatives may register as domestic partners with the public registry of the County of Los Angeles. The domestic partner benefits plans at Bank of America, Nations Bank, Merrill Lynch, and Bank Boston, do not exclude unmarried blood relatives. Canada is considering extending its "common law spouse" statutes to cover all "relationships of dependency" including same and opposite-sex couples as well as two blood relatives who are interdependent. Vermont could adopt a broad definition of "domestic partnership" which would allow any two adults who meet the eligibility criteria, including blood relatives, to register and obtain protections. By doing so, the state would be removing the presumption of sexual conduct from domestic partner relationships, recognizing that such relations may or may not have a sexual dimension. The state would also be making a policy decision that close family relationships which are nonsexual are as deserving of legal protection as relationships which have a sexual component.

Conclusion

The Legislature may decide to legalize same-sex marriage during this legislative session. However, if it chooses the other alternative suggested by the Supreme Court, namely, domestic partnership, the issues discussed in this memo may provide guidance in drafting a constitutional law.

Prepared by:
Thomas F. Coleman
Executive Director

Submitted to:
House Judiciary Committee
on January 27, 2000

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Responding to *Baker v. State*: Legislative Options

Outline of Presentation of Thomas F. Coleman
(Draft)

I. Historical and Contextual Background

A. Family and Household Demographics

- Vermont
- National
- Trends

B. National Public Opinion

- Definition of Family
- Definition of Marriage
- Domestic Partner Benefits
- Trends

C. Legislative responses to family diversity in other states

- Commissions and Task Force Studies
- Domestic Partnership Legislation
- Restrictive Legislation

D. International responses to family diversity

- Canada
- Europe
- Australia

II. Procedural Options

A. Decline to take any formal action

B. Case-Specific Analysis in 2000 / Action in 2001

- Legislature must act in a "reasonable" amount of time
- Committee hearings / Jan - April 2000
- Convene a Joint Select Task Force / May - Nov 2000
- Task Force Report / file with Legislature in Dec 2000
- Resume committee hearings / Jan - Mar 2001
- Action by Legislature and Governor / April 2001

C. Broaden the Review: Convene Task Force on the Changing Family

- Review Baker in larger context of all changing family structures
- Convene Task Force on Family Diversity (public and legislative members)
- Have Task Force review same-sex couples within this broader context
- Study and Hearings by Task Force from April 2000 to September 2001
- Final Report filed by October 2001
- Final legislative decisions in 2002

D. Enact responsive legislation this year

III. Substantive Options

A. Some policy considerations

1. Intergovernmental relations

- Avoiding confrontation with the federal government (DOMA)
- Avoiding confrontation with other states (30 mini-DOMAs)
 - * Interstate compacts
 - * Uniform Codes

2. Effects on businesses in Vermont

- If same-sex marriage is legalized
- If domestic partnership law is enacted

3. Effects on existing marriages

- If same-sex marriage is legalized, will the federal government, Some other states, and out-of-state businesses require Vermont marriages to be accompanied by proof of m-f relationship with evidence such as birth certificates?

4. Distancing the state from religious disputes

- “Marriage” as a civil status as well as a religious sacrament
- “Domestic partnership” as a purely secular institution

5. Equity versus Identicality

- Seeking injunctive relief calls equity jurisprudence into play
- Similar treatment versus identical treatment
- Three separate classes involved: m-f / m-m / f-f

6. Responding to Baker with “All Deliberate Speed”

- Initial experiment with domestic partnership
- Revisiting same-sex marriage in three or four years

B. Specific Legislative Actions and Their Implications

1. Legalizing Statutory (Ceremonial) Same-Sex Marriage

2. Legalizing Common Law Marriage (without gender restriction)

3. Passing Domestic Partnership Laws

- Scope of the law
 - * comprehensive dp
 - * limited dp law
 - * both types
- Eligibility for inclusion
 - * same-sex only
 - * opposite-sex too
 - * blood relatives too
- Registration versus Canadian-style laws

4. Adding “Marital Status” Protections to Civil Rights Statutes

To: Lloyd Rigler
From: Tom Coleman
Re: Summary of Vermont Trip
Date: January 31, 2000

2 pages

I wanted to give you a short summary of what happened in Vermont while things are still relatively fresh in my mind.

The trip was very successful.

I was scheduled to testify before the House Judiciary Committee on Thursday, January 27, from 9am to 10:30 a.m. There are 11 members on the committee. All but three were there. The chairman (who had invited me) was not there due to some business meeting. Another member of the committee (the only openly gay person) chaired the meeting.

I could tell that the temporary chair (the gay guy) was not really happy I was there. He and the gay rights people obviously want gay marriage and my presence was perceived as a threat to their goal. Therefore, while he was polite on the surface, could tell he had anger and frustration bubbling under the surface.

When I was about 20 minutes into my presentation, the chair could tell that I was rushing things a bit due to the 90 minute limit. He then told me that the other presenter would not be there until the afternoon. He asked if I could stay until noon. I told him I could stay all day. As a result, I was able to have 3 full hours for my presentation, including questions and answers.

I told them some of the adverse the consequences to the state if they were to legalize gay marriage. I advised them on how they could pass a comprehensive dp law that would satisfy their supreme court. Every committee member asked questions, some of them asked many questions. One of the members asked if the sergeant of arms could arrest me so they could keep me in Vermont for the next three weeks.

The real chairman came to the meeting at about 11:40 a.m. He invited me to lunch so we could talk. I spent about 30 minutes with him at lunch.

In the afternoon, the first presentation was by a law professor. He spoke for 2 hours, including questions and answers. The committee then asked me to come back to the witness seat to comment on what the professor had said and to wrap up the session. I was on for another 30 minutes.

They liked me. I was helpful to them. In fact, I told them things that no one else would and which some of the activists did not want them to hear.

The bottom line is this. It is clear to me that the Legislature will not be legalizing gay marriage. They will pass a comprehensive dp law. They will probably put off a vote on dp until next January (to get them past the November elections). The papers say that the Governor wants a gender-neutral dp law and it seemed clear to me that some of the committee members were very open to a more inclusive law.

I also made a good impression on the attorney for the Catholic bishop. The attorney came up to me three times to talk with me. In the afternoon, he gave me his card and asked if he could call me at my office next week. I had told the committee how other bishops had supported dp when it was defined broadly enough to include any two unmarried adults, including blood relatives. When relatives are included, the presumption of sexual conduct is removed from dp. When that happens, there is no need for the Catholic church to oppose dp. I think we might be able to steer things in this direction and thus get the bishop to withdraw opposition to dp.

I would say that the trip went beyond my hopes and expectations. The governor and legislature now know about AASP, most of them like the dp approach, and it looks as though dp will become gender neutral and inclusive, rather than a gay-only bill.

I am in Michigan now. I stopped here on my way home so that I could work with my sister Carolyn to create an accounting program for AASP on computer. She is the treasurer of AASP. She also has set up computerized accounting systems for businesses. This will make it easier for me to manage the finances and membership of AASP.

I fly back to Los Angeles tomorrow afternoon. I hope my trip back is easier than my trip to Vermont. I left my house on Wednesday at 7am and did not check into the hotel in the capital (Montpelier) until 10:30 p.m. I got to sleep at midnight and had to get up at 6am on Thursday so that I would be ready to perform at 9am in the legislature. I spent the whole day in the legislature, went to bed at 9pm and then got up at 6am on Friday to catch at 9am flight out of Burlington (a one hour ride from the capital). There were numerous problems with my flights and I did not arrive at my sister's house in Michigan until 7pm on Friday. While I have had a little time to socialize, much of my time has been spent on AASP work while I have been here.

Anyway, despite pressure, stress, and travel problems, it was a successful trip. We have something to offer legislators which no one else does — a broad perspective of human rights and expertise in the areas of family diversity, domestic partnership, and marital status discrimination.

I'll keep you posted on further developments when they occur.

A handwritten signature in cursive script, appearing to read "Tom".



A M E R I C A N
A S S O C I A T I O N F O R
S I N G L E P E O P L E

Permission granted to reprint as commentary or op-ed

For immediate release / March 7, 2000

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'Civil Union' Bill Unfairly Excludes Heterosexual Seniors and Others

by Thomas F. Coleman

Earlier this month, the House Judiciary Committee endorsed a bill to create two new procedures in Vermont designed to give legal protections to some segments of the adult population. While the intent of the bill is good, the overall framework is discriminatory and unfair to those who are excluded.

The main portion of H-847 would allow two people of the same sex to enter into a "civil union" and thereby gain all of the protections and benefits associated with marriage under *state* law. Blood relatives and heterosexual unmarried partners would not be allowed to participate in this new secular institution. Civil unions would be the *exclusive* territory of gay and lesbian relationships.

The bill would also create another new legal structure for "reciprocal beneficiaries." Persons who register under this procedure would be given a few legal protections to safeguard their rights in case of a serious illness or death. Only close blood relatives would be eligible for these safeguards. A senior citizen would *not* be able to name an unmarried partner or even a close friend or neighbor as a beneficiary.

The bill, which was narrowly approved by the Ways and Means Committee on a 5 to 4 vote, is supposed to end discrimination. However, its eligibility rules are illogical and unfair.

While it appears that a majority of people in Vermont may favor limiting "marriage" to opposite-sex couples, there is nothing to indicate that most people would support the creation of *new* government programs that exclude large segments of the population from eligibility.

Many public and private employers, including the State of Vermont and some of its cities, have already initiated some limited reform to protect the rights of unmarried couples. These domestic partner benefits programs are not restricted to Vermont. Several dozen cities in the nation, a few states, and thousands of private employers currently give benefits to employees with domestic partners. Some cities have local registries where these couples can declare their family status and gain certain rights, such as hospital visitation access.

The majority of these laws and programs, including all of them in Vermont, apply equally to same-sex and opposite-sex couples. Why should the Legislature break with this tradition of inclusion and create a new registration system that excludes the majority of domestic partners? After all, two-thirds of unmarried couples are heterosexual.

(continued on other side)

Many adults have chosen domestic partnership rather than formal marriage for a variety of economic, religious, political, philosophical, or personal reasons. They have agreed to assume obligations to each other as a “family” but they just do not want the “marriage” label. Should these folks be punished and denied legal protections for making this choice?

Some heterosexual seniors fall into this category. They want domestic partnership rather than marriage for valid reasons. The American Association of Retired Persons (AARP) in California has lobbied for domestic partnership legislation for several years. Seniors were included in the domestic partnership bills signed into law in California last year. The national AARP has recognized the desire of some seniors for this alternative to marriage and therefore began to offer gender-neutral domestic partner benefits to its own employees.

When I testified before the House Judiciary Committee in Vermont last month, I mentioned that some current domestic partner legislation (such as bills pending in California and Florida) include unmarried blood relatives and heterosexual couples in their provisions. I suggested that Vermont might want to pass a super-inclusive domestic partnership law which would allow same-sex couples, heterosexual couples, and unmarried blood relatives all to participate equally.

That suggestion was ignored. On March 1, the Judiciary Committee voted in favor of H-847 and two days later a fiscal committee moved it to the House floor. As currently written, the bill *totally* excludes seniors who are living with a person of the opposite sex in an unmarried family relationship.

The “civil union” portion of the bill gives all rights and obligations of marriage (only under state law) to same-sex couples who participate in a state-sanctioned ceremony. They would not be considered married under federal law. Some seniors in Vermont may want these state-law protections for their opposite-sex relationship but still be considered unmarried for purposes of federal law. As a result, they would not suffer any “marriage penalty” under social security law, pension survivor programs, etc.

The “reciprocal beneficiary” portion of the bill would confer a more limited number of legal protections to registrants in case of a serious illness or death, but only to close blood relatives. Some seniors in Vermont might like to designate someone other than a blood relative – such as their domestic partner or close friend or neighbor – to be their “reciprocal beneficiary.” Some younger people, such as those with HIV or AIDS, who do not want to marry or create a “civil union” for fear of losing some government financial assistance if they do, would also benefit if they could participate in the “reciprocal beneficiary” law. A marriage or civil union would make them financially ineligible for some programs.

Why would the Legislature insist on excluding opposite-sex couples from the “civil union” law, especially since the parties must assume all of the state-law obligations of marriage if they participate in this new secular institution? What possible reason could there be to limit “reciprocal beneficiary” protections to blood relatives when other worthy citizens could use the same protections?

The definition of “marriage” historically has been restricted. While the gender restriction could be removed, it appears that most Vermonters are not ready to make that change – at least not yet.

But the two legal institutions created by H-847 are totally new. They have no history or tradition of exclusion. The only sensible and fair approach would be to allow *any* two unmarried adults to enter into a “civil union” or a “reciprocal beneficiary” relationship. Why not respect freedom of choice?

Or are lawmakers going to put everyone in neat little categories? One box for heterosexuals (marriage). Another box for homosexuals (civil union). And a third box for blood relatives (reciprocal beneficiary). Nice little bundles of discrimination. ♦♦♦

Thomas F. Coleman is executive director of the American Association for Single People. AASP promotes the well being and human rights of all unmarried adults. It has members in 19 states, including Vermont. For more information, write to P.O. Box 65756, Los Angeles, CA 90065.



STATE OF VERMONT
SENATE CHAMBER
115 STATE STREET
MONTPELIER, VT
05633-5201

February 3, 2000

THOMAS F COLEMAN EXEC DIR
PO BOX 65756
LOS ANGELES CA 90065

Dear Mr. Coleman:

I am writing in connection with the debate spawned by the Vermont Supreme Court decision in Baker vs. State of Vermont, No. 98-032, decided in December.

As a member of the Senate Judiciary Committee, I am very interested in hearing all comments on this issue and related legislation. In that regard, your comments are welcome.

If and when the General Assembly acts on this issue, the legislation must comport with the Vermont Supreme Court's interpretation of the Vermont Constitution, providing equal rights and privileges to couples, regardless of sex. I don't believe we have any other choice.

If we do not act, I believe the Supreme Court will legalize same-sex marriage.

I oppose same-sex marriage.

I have co-sponsored a constitutional amendment with Senator Julius Canns to define marriage as a union between a man and woman, but it is going nowhere fast. I have also introduced a domestic partnership bill.

Unfortunately, most people do not understand the posture in which the General Assembly finds itself as a result of the Baker decision.

Legislators have only two real choices. One is to authorize same-sex marriage. The other is to enact a domestic partnership law.³³

A third choice would be to amend the Vermont Constitution to define "marriage" as a relationship between a man and woman. However, it takes 20 out of 30 votes in the Senate to pass a constitutional amendment, and that would only define "marriage." As a co-sponsor of that amendment, I know we don't have 20 votes to pass it.

February 3, 2000
page 2

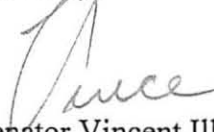
Even if that constitutional amendment were to pass, the General Assembly is still required by the Vermont Supreme Court to provide same-sex couples with equal rights. That still means a domestic partnership law or same-sex marriage.

That's the long and short of it.

Enclosed is a copy of S.248, my domestic partnership legislation, which is one of several proposals under consideration, and a copy of the proposed constitutional amendment.

Thank you.

Sincerely,



Senator Vincent Illuzzi
Chair, Senate Institutions Com.
Tel.: 1-800-322-5616 or 802-723-3010
Tel. Pager: 283-9436 (Local Call)
E-mail: VILLUZZI@LEG.STATE.VT.US

VI:djc

Enclosures

P.S. Nice chart/list of options



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Summary: Work of the House Judiciary Committee for the week of January 11 – 14, 2000.

The Committee started its study of the meaning and import of the Supreme Court's *Baker v. State* decision of December 20, 1999. Testimony was taken from a variety of witnesses, including the attorneys on both sides of the case and a constitutional law professor from Vermont Law School. This is part of the Committee's general strategy to carefully study the Constitutional and statutory law applicable to marriage before deciding how to respond to the Supreme Court decision. The following is a concise summary of the testimony taken by the Committee.

1. Susan Murray and Beth Robinson

Attorneys from the law firm of Langrock, Sperry & Wool, Middlebury and Burlington, and attorneys for the plaintiffs in the *Baker* case. Ms. Murray and Ms. Robinson stressed to the committee that in their view, the issue before the Court and legislature concerns civil marriage (and the benefits and privileges conferred by the state), not "religious" marriage. They explained that the Court decision does not require any church or religious organization to perform a marriage for any persons it does not wish to marry.

Murray and Robinson reviewed the Court's decision, and the three separate opinions with the Committee, and detailed the constitutional analysis used by the Supreme Court Justices. Ms. Murray and Ms. Robinson said that the Court specifically did not decide the issue of whether the Vermont Constitution mandates that committed, same-sex couples are, or are not, entitled to a state marriage license. However, they explained that the Court ruled that same-sex couples are entitled to the same benefits and protections afforded to married opposite-sex couples. They stated that they believe that an alternative statutory system of domestic partnerships may raise numerous "red flags" in terms of compliance with the Vermont Constitution, and that what they described as a "separate but equal" system of benefits is, in their view, inherently unequal and would not pass Constitutional muster.

2. Bill Griffin and Bridget Asay

Chief Assistant Attorney General and Assistant Attorney General, respectively. Mr. Griffin and Ms. Asay reviewed the ruling in the *Baker* case for the Committee and made it clear that while the Court did hold that the State "is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law," the Court did not hold that same-sex couples are necessarily entitled to a marriage license. The Office of the Attorney General takes no position on whether the legislature should (i) expand the

marriage laws to include same-sex couples or (ii) create an alternative legal structure such as domestic partnership. However, Mr. Griffin did say that he believes that the marriage option might be easier to defend legally.

3. Peter Teachout

Professor at Vermont Law School and constitutional law scholar. Professor Teachout reviewed what he believed to be the five options for the legislature: 1) include same-sex couples in the marriage laws; 2) create a broad domestic partnership structure for same-sex couples; 3) create a broad domestic partnership structure for same-sex and opposite-sex couples; 4) create domestic partnerships but also amend marriage laws; and 5) create more than one "class" of marriage. He did not promote one option over the others. Teachout said whatever option is chosen must confer the same benefits and privileges of marriage and any system that allowed significant differences in treatment would not stand. He believes that the Court's holding clearly applies to governmentally bestowed benefits and may also reach private actions if they are intertwined with government action. He reviewed the Court's three opinions and explained the differences between the constitutional analysis used in two of the opinions. Appended to this report is a summary of Professor Teachout's explanation of these differences.

4. Tom McCormick

Partner at the Burlington law firm of McCormick, Fitzpatrick, Kasper & Buchard. Filed an amicus brief in *Baker* on behalf of the Church of Latter Day Saints. Mr. McCormick stated that he believes that the Court violated the separation of powers and advocates legislative restraint or a constitutional amendment.

5. Hal Goldman

Attorney in Burlington and doctoral candidate in history who filed an amicus ("friend of the court") brief in *Baker* on behalf of Take It To the People, a Vermont organization opposed to same-sex marriage. Mr. Goldman believes that the Baker opinion, which held that a constitutional violation exists, but referred the matter to the legislature for a remedy, is a "bizarre and illegal attempt by the Court to usurp the power of the General Assembly." Mr. Goldman considers *Baker* to be an advisory opinion and believes that the legislature should not take any action to remedy the constitutional violation found by the Court. Mr. Goldman said that homosexuals in Vermont "do not labor under any kind of oppression [and therefore] [t]here is no need for radical, revolutionary solutions."

6. William O'Brien

An attorney in O'Brien Law Offices, Winooski, Vermont, who filed an amicus brief in *Baker* on behalf of the Roman Catholic Church. Mr. O'Brien discussed the *Baker* decision rationale, and stated that the discussion of *Baker* should focus not only on the legal issues but must also involve a discussion of ethics and morality.

7. William Dorsch

A Burlington attorney who filed an amicus brief in *Baker* on behalf of the Vermont chapter of the National Organization for Women and a lesbian civil rights group. Mr. Dorsch advised that the denial of the right to marry for same-sex couples is sex discrimination which should be subject to strict judicial scrutiny. He noted that the plaintiffs in the case have been delivered a unfair mixed message: their state constitutional rights have been violated, but they must wait for the legislature to fashion an appropriate remedy.

8. David Coolidge

Director of the Marriage Law Project, an organization based in Washington, D.C. at The Catholic University that is opposed to same-sex marriage. Mr. Coolidge recently published an article in the weekly Standard entitled "What the Vermont Court Has Wrought: We are now on the way to a radical redefinition of marriage, but it's not too late to save the institution from its enemies." Mr. Coolidge stated that the goal of the Marriage Law Project is to reaffirm the legal definition of marriage as the union of one man and one woman. He urged that the legislature should assert its prerogatives in defining marriage and explained that he believes that same-sex committed relationships destabilize conventional marriage and, therefore, destabilize our communities and culture.

9. Greg Johnson

Professor at Vermont Law School whose scholarship focuses on the civil rights issues of gender and sexual orientation. He described his involvement in the Alaska litigation over same-sex marriage rights, and gave his perspective on the constitutional analyses employed in the *Baker* case. He gave an opinion that only a marriage structure would completely satisfy the Court's ruling.

10. Paul Gillies

A partner at the Montpelier law firm of Tarrant, Marks & Gillies and former Vermont deputy secretary of state for 12 years. He gave an overview of the history of civil marriage in Vermont from the 1770's forward. He described a variety of changes in the institution of marriage since then, including substantial changes in the rights of married women to own property and make contracts in their own names (i.e., on their own behalves). He also described the elimination of the various waiting periods before a marriage could be legalized (down to the 1986 elimination of a 3-day waiting period).

Note: the foregoing is the Chair's summary, designed to give a general sense of the scope and diversity of the testimony presented to the House Judiciary Committee. The details have been omitted. Every effort has been made to avoid editorializing.

II. Practical differences between the two approaches.

A. Assume that the General Assembly were to pursue a broad domestic partnership structure for the legislation, and that the legislation results in at least some difference in treatment between heterosexual couples (marriage) and homosexual couples (domestic partnership).

B. Under the Amestoy “balancing” approach, the magnitude of the differential treatment would be balanced against the magnitude of the state’s interest in the differences. The state’s interests might include concerns about societal impacts, the desirability of a smooth transition, or impacts on the family courts, for example. This approach would tend to place the burden on the party trying challenge the law that created the differences.

C. Under the Dooley “strict scrutiny” approach, there is no balancing, and the state would be required to carry the heavy burden of establishing a compelling reasons for the differences in order to uphold the law that created the differences.

III. In any particular future case, it is problematic to predict which approach the Supreme Court would use to analyze a challenge to legislation enacted in response to *Baker*.

Note: This summary was prepared by the Chair, and reflects his notes and impressions of Professor Teachout’s presentation.

SENATE CHAMBER
PROPOSED AMENDMENT TO THE CONSTITUTION
OF THE STATE OF VERMONT

Offered by Senator Canns of Caledonia County, Senator Bahre of Addison
County, Senator Costes of Franklin County, Senator Crowley of
Rutland County, Senator Greenwood of Essex-Orleans County,
Senator Ide of Caledonia County, Senator Illuzzi of Essex-Orleans
County, Senator Maynard of Rutland County and Senator
Morrissey of Bennington County

Subject: Marriage; definition

PROPOSAL 6

Sec. 1. PURPOSE

This proposal would clarify the definition of marriage.

Sec. 2. Chapter I, Article 22nd of the Vermont Constitution is added to read

ARTICLE 22ND. [DEFINITION OF MARRIAGE]

That marriage is a special label for a partnership between a man and a
woman.

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S.248

Introduced by Senator Illuzzi of Essex-Orleans County

Referred to Committee on

Date:

Subject: Domestic relations; domestic partnerships

Statement of purpose: This bill proposes to recognize domestic partnerships as a union between two persons who have committed themselves to one another and who shall have the same rights and obligations under the law as married persons.

AN ACT RELATING TO DOMESTIC PARTNERSHIPS

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 15 V.S.A. chapter 23 is added to read:

CHAPTER 23. DOMESTIC PARTNERSHIPS

§ 1201. DEFINITIONS

As used in this chapter:

(1) "Basic living expenses" means food and shelter. It also means any other cost, such as medical care, if some or all of the cost is paid as a benefit because a person is another person's domestic partner.

(2) "Commissioner" means the commissioner of health.

1 (3) "Domestic partners" means two adults who have established a valid
2 domestic partnership.

3 (4) "Declaration of domestic partnership" means a statement in a form
4 issued by the commissioner of health that declares the intent of two adults to
5 enter into a valid domestic partnership. By signing it, two adults swear under
6 penalty of perjury that they meet the requirements for a valid domestic
7 partnership.

8 (5) "Have a common residence" means that two people are cohabitants.
9 It is not necessary that the legal right to possess the common residence be in
10 both cohabitants' names. Two people are cohabitants even if one or both
11 persons have additional residences. Domestic partners do not cease to be
12 cohabitants if one partner leaves the common residence but intends to return.

13 (6) "Joint responsibility" means that each partner agrees to provide for
14 the other partner's basic living expenses if the partner is unable to provide for
15 himself or herself. It does not mean that the partners need to contribute equally
16 to basic living expenses. Anyone to whom these expenses are owed can
17 enforce the responsibility established by this chapter.

18 § 1202. REQUISITES OF A VALID DOMESTIC PARTNERSHIP

19 For a domestic partnership to be established in Vermont, it shall be
20 necessary that the parties satisfy all of the following criteria:

21 (1) Have a common residence.

1 (2) Consider themselves to be members of each other's immediate
2 family.

3 (3) Agree to be jointly responsible for one another's basic living
4 expenses.

5 (4) Neither be married nor a member of another domestic partnership.

6 (5) Not be related by blood in a way that would prevent them from
7 being married to each other as prohibited by chapter 1 of this title.

8 (6) Each be at least 18 years old.

9 (7) Each be competent to enter into a contract.

10 (8) Each sign a declaration of a domestic partnership as provided for in
11 section 1203 of this title.

12 § 1203. ESTABLISHING A DOMESTIC PARTNERSHIP

13 Two persons who meet the criteria set forth in section 1202 of this title may
14 establish a domestic partnership by presenting a signed, notarized declaration
15 of domestic partnership to the commissioner. The commissioner shall file the
16 declaration and give the partners a certificate of domestic partnership showing
17 that the declaration was filed in the names of the parties.

18 § 1204. RIGHTS AND OBLIGATIONS OF DOMESTIC PARTNERS

19 (a) Upon the issuance of a certificate of domestic partnership by the
20 commissioner, the parties shall have the same rights and obligations under
21 state law that are conferred on spouses in a marriage.

1 (b) A domestic partner shall be included in any definition or use of the
2 terms "spouse," "family," "immediate family" or "dependent," as those terms
3 are used throughout the law.

4 (c) Domestic partners may not enter into a marriage or another domestic
5 partnership while they are in a domestic partnership.

6 § 1205. DISSOLUTION OF DOMESTIC PARTNERSHIPS

7 The family court shall have jurisdiction over the dissolution of domestic
8 partnerships. The dissolution of domestic partnerships shall follow the same
9 procedures and be subject to the same substantive rights and obligations that
10 are involved in the dissolution of marriage.

11 § 1206. COMMISSIONER OF HEALTH; DUTIES

12 (a) The commissioner shall keep a record of all declarations of domestic
13 partnership.

14 (b) The commissioner shall establish a filing fee for declarations of
15 domestic partnership. but in no case shall the fee exceed the fee for a marriage
16 license. The fee shall cover the state's costs of administering this chapter.

17 § 1207. PREEMPTION

18 This chapter shall supercede any state law to the contrary.

1 § 1208. PRIVATE SOLEMNIZATION NOT REQUIRED

2 Nothing in this chapter shall be construed to require any religious
3 organization to solemnize a domestic partnership that does not recognize a
4 domestic partnership in their ideology.