IS NEW JERSEY RIPE FOR THE EXPANSION OF GAY RIGHTS?

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A recent lawsuit by the Lambda Legal Defense and Education Fund, an organization seeking equality for non-matrimonial couples, (lesbian, gay, bisexual and transgendered people) has made the public once more aware of their quest for marital rights equal to those of heterosexual married couples.

They seek in their suit which is based on the rights to privacy and equal protection the right to marry by compelling the state to grant them marriage licenses. Only full marital status will give them the same rights that attach to married heterosexuals. They believe that the granting of a marriage license will give them the additional rights and obligations which belong to married couples such as the following:

The same tax obligations and benefits as married couples.

Rights of inheritance.

Social security benefits

Work related benefits - pension plans, rights and access to partner health care coverage, medical leave

Rights to custody of non-biological children

Hospital visitation and termination of life support rights

Court appointment or guardians for a partner who is mentally incompetent

This case coached in constitutional language states that demand of marriage licenses to same sex partners denies them:

The right to equal protection of the New Jersey Constitution

The right to privacy under the New Jersey Constitution

The many rights and protections married couples enjoy

Standing to sue for wrongful death of a partner

Plaintiffs ask that the state give legal recognition to their relationship and grant them civil marriage licenses.

HISTORY

This suit is but one in the long line of attempts throughout the country to legitimize gay relationships. At this time no state currently allows same sex couples to marry. In 1993 the Hawaii Supreme Court rendered a ruling that prohibited same sex couples for marrying as being a violation of Hawaii's constitutional ban on sex discrimination. The Court remanded the case for determination if the State had a compelling interest to preclude the granting of licenses. Subsequently in 1996, the Hawaii Trial Court ruled that prohibiting same sex couples for marrying was not justified for any reason, much less a compelling reason as specified by the Supreme Court; and further ruled that these couples should therefore be allowed to marry.

As the case was heading to the Hawaii Supreme Court, a referendum went was passed by the voters of Hawaii to amend the Constitution to allow the State Legislature to restrict marriage to men and women only. As a result, Hawaii's couples lawsuit was ended and the State restricted marriage solely to that of men and women.

In 1998, an Alaskan Trial Court ruled that choosing a marital partner is a fundamental right and cannot be interfered with by the State absent a compelling reason.

Later that year the voters amended the Alaska Constitution to require that all marriages be between a man and a woman, which like Hawaii, ended the Alaskan couples lawsuit.

In 1999, the Vermont Supreme Court ruled that same sex couples are entitled under the Vermont Constitution to all the protection and benefits provided through marriage. Unlike the prior two states, the Vermont Legislature passed a law subsequently signed by the Governor creating civil unions for same sex couples, giving these couples all the rights and benefits of marriage under Vermont law, but does not give per se marriage licenses.

In 2001 in Massachusetts, gay and lesbian couples filed state court lawsuits seeking the right to marry which was dismissed by the Trial Court, and is presently on appeal.

IN THE DISTRICT OF COLUMBIA

In 1992, a law was initially passed but never implemented until last year, 10 years later, allows gay couples to register themselves as domestic partners. By so

registering, it allows certain qualifying partners to receive healthcare insurance coverage, visitations at hospitals, final say over funeral procedures and allows unpaid leaves to take care of the funeral of a domestic partner. This only applies to Washington, DC government employees.

Contrary to this, the Federal Government passed the Defense of Marriage Act (DOMA) which states the federal position against same sex marriage and reads:

"...the word marriage means only a legal union between one man and one woman as husband and wife, and the word "spouse" only refers to a person of the opposite sex..."

STATISTICS IN NEW JERSEY

The statistics as to same sex couples, as reported by Lambda legal are as follows:

There are same-sex couples living together in every county in New Jersey, and in 548 of the state's 566 cities, towns and boroughs. (There are same-sex couples in 99% of the counties in the U.S.)

The 2000 Census reported a 366% increase in the number of same-sex households in New Jersey over the previous ten years. (The national increase was 314%).

The 2000 Census reported 594,391 same-sex couples living together across the country;

71.9% of adults living in New Jersey have been married at least once.

53.5% of households in New Jersey include a married couple.

MISCEGENATION

The Lambda Legal Defense Team argues that the prohibition against same-sex marriage should be likened to the early laws on miscegenation which prohibited a

marriage of a white person to a person of color and other states followed. The California Supreme Court in 1948 was the first state to remove the ban on interracial marriage and culminated in 1967 U.S. Supreme Court decision, which overturned bans on interracial marriages and declared that freedom to interracially marry belongs to all Americans. Thus, Lambda argues, to follow the Court's rationale, the freedom to choose who to marry should also belong to same-sex individuals.

NEW JERSEY LAW

In the year 2000, the case of V.C. v. M.J.B., our Supreme Court extended the right of a former lesbian partner to have visitation with her partners biological children. The initial question was whether there was jurisdiction to pursue the case, questioning whether the mothers same-sex former domestic partner qualified as a statutory "parent" enabling availment statutorily. A unanimous Court stated:

"Although the case arises in a context of a lesbian couple, the standard we enunciate is applicable to all persons who have willing, and with the approval of the legal parent, undertaken the duties of a parent to a child not related by blood or adoption." (At pg. 205-206).

The Court noted that the statute in question, talks in terms of "parents" and that there is no statute explicitly addressing whether a former unmarried domestic partner has standing to seek custody or visitation with her former partner's biological children.

The Court also noted that N.J.S.A. 9:2-4 states the public policy of this state is to assure minor children frequent contact with both parents and declaring the legislative intent that in a proceeding involving custody of a minor child the rights of both parents are to be equal.

The crux of the courts expansion of rights of parents, to domestic partners, and in this case same-sex domestic partners, was the open ended nature of the act which stated:

"although the statutory definition of parents focuses on natural and adoptive parents, it also includes the phrase, 'when not otherwise described by the context.' That language evinces a legislative intent to leave open the possibility that individuals other than the natural or adoptive parents may qualify as 'parents' depending on the circumstances."

Thus, the Court said that the legislative obviously envisioned cases where there was a specific relationship between a child and a person not specifically denominated by a statute would qualify as parents under the act.

THE NEXT STEP?

Using this rationale, could the rights of gay couples be extended under existing New Jersey Law, or need the statutes be amended? Some examples follow.

The New Jersey Advanced Directors for Healthcare Act, provides a methodology for terminating a person's life, by withdrawing life sustaining treatment when both an advanced directive is in place, i.e., living will; or in the absence of these directives.

In the preamble, paragraph 9, it provides:

"If an instruction directive does not specifically cover a patient's medical condition, the attending physician shall, in consultation with patient's family members, exercise reasonable judgment to effectuate the wishes of the patient giving consideration to the intent and spirit of the directive."

Although the act defines various acts and people, such as the "declarant", "healthcare representative" "for life sustaining treatment", and "patient", it does not define what are "patient's family members". It can also be argued that a logical extension of V.C. v. M.J.B., a domestic partner can make this decision, either in accordance with, or contrary to that, of a natural parent or child. Family members can be interpreted as a domestic partner there being no limitation in the acts to "Husbands", "Wives", etc.

Can these rights be extended under our Intestate Succession Act, which allows an intestates estate go to spouses and surviving issue but makes no provision for domestic partner or extended rights to wrongful death actions which has been prohibited? In Sikes v. Propane Power Corporation, (a case that is more than a decade old) an unmarried co-habitant is barred from recovering under the Wrongful Death Act. The argument is that said denial offends the right of equal protection to both the co-habitant and the children born of the marriage was neglected. Will we be seeing a challenge or revision of this rationale in the future?

Under Social Security Unemployment Benefits, N.J.S.A. 43:21-3, it specifically applies to "all married individuals" and collection of benefits specifically are determined by that status. There is very little room for interpretation under the nomenclature, unless the present suit is successful.

Under the Federal Tax Law, neither domestic partners, or non-biological children of your domestic partner qualify as dependent deductions under the State or Federal definition of relationship or a member of a household test. Again, no room for interpretation unless a re-specification of spouse, or altering of the law.

Those in favor of the expansion of these rights do not ask for moral approval, or a sanctioning of their lifestyle by the government, but what they see as an equality of rights with heterosexual couples. Those who oppose expansion, have factions within them who use morality and old fashioned pulpit stomping to oppose the measures,

but centuries of history and tradition are not easily overcome by the movement of the moment.