

IN THE SUPREME COURT OF THE STATE OF OREGON

MARY LI and REBECCA KENNEDY;
STEPHEN KNOX, M.D. and ERIC WARSHAW,
M.D.; KELLY BURKE and DOLORES DOYLE;
DONNA POTTER and PAMELA MOEN;
DOMINICK VETRI and DOUGLAS DEWITT;
SALLY SHEKLOW and ENID LEFTON; IRENE
FARRERA and NINA KORICAN; WALTER
FRANKEL and CURTIS KIEFER; JULIE
WILLIAMS and COLEEN BELISLE; BASIC
RIGHTS OREGON; and AMERICAN CIVIL
LIBERTIES UNION OF OREGON,

Plaintiffs-Respondents, Cross-Appellants,

and

MULTNOMAH COUNTY,

Intervenor-Plaintiff-Respondent, Cross-Appellant,

v.

STATE OF OREGON; THEODORE
KULONGOSKI, in his official capacity as
Governor of the State of Oregon; HARDY
MYERS, in his official capacity as Attorney
General of the State of Oregon; GARY WEEKS, in
his official capacity as Director of the Department
of Human Services of the State of Oregon; and
JENNIFER WOODWARD, in her official capacity
as State Registrar of the State of Oregon,

Defendants-Appellants, Cross-Respondents,

and

DEFENSE OF MARRIAGE COALITION, CECIL
MICHAEL THOMAS, NANCY JO THOMAS,
DAN MATES, and DICK JORDAN OSBORNE,

Intervenors-Defendants-Appellants,
Cross-Respondents.

Multnomah County Circuit
Court Case No. 0403-03057

SC S51612

**PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS'
ANSWERING BRIEF
ON EFFECTS OF MEASURE 36 ON THIS APPEAL**

Appeal from a Judgment of the Circuit Court of Multnomah County
Honorable Frank L. Bearden, Judge

NOVEMBER 2004

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INTRODUCTION

All of the parties agree that the amendment will not render this case moot. Specifically, the parties, with the exception of DOMC, agree that the amendment will not render moot plaintiffs' first claim for relief, which seeks the extension of the advantages of marriage to same-sex couples, and all of the parties agree that the amendment will not render moot plaintiffs' second, third, or fourth claims, which seek the registration of the marriage records of same-sex couples. The parties, with the exception of DOMC, are correct in their assertion that the amendment will not render any of plaintiffs' claims for relief moot.

ARGUMENT

I. The amendment will not render plaintiffs' first claim for relief moot.

In apparent anticipation of an argument to the contrary, the State and DOMC expend considerable energy arguing that, once the amendment takes effect, it will preclude the Court from extending the advantage of the status of marriage to same-sex couples. In light of the amendment, plaintiffs no longer seek the extension of the status of marriage to same-sex couples.¹ Thus, the Court need not reach the State's and DOMC's anticipatory arguments.

Significantly, the State explicitly (State Opening Supp Br at 11) and DOMC implicitly (DOMC Opening Supp Br at 2-3) concede that the

¹ As set forth in section II, plaintiffs continue to seek the extension of the status of marriage to married individual plaintiffs, whose claims for relief must be assessed under the law prior to the amendment. Because both unmarried individual plaintiffs and married individual plaintiffs brought plaintiffs' first claim for relief, plaintiffs' assignments of error on cross-appeal are not entirely moot.

amendment will not preclude the Court from extending the advantage of the benefits of marriage to same-sex couples.² DOMC argues only that it would be procedurally improper for the Court to extend the benefits of marriage to same-sex couples because, it contends, plaintiffs never asked the Court to do so (DOMC Opening Br on Measure at 2-3). DOMC's argument grossly mischaracterizes plaintiffs' amended complaint and overall argument.³

Plaintiffs' prayer for relief seeks, "[o]n their first claim for relief, a judgment declaring that the failure of the Oregon statutory code to permit marriages of same-sex couples violates Article I, section 20 of the Oregon constitution" (ER 41). It does not address the way in which the constitutional violation should be remedied. Its overall context, however, makes clear that plaintiffs seek the extension of not only the status of marriage but also the benefits of marriage to same-sex couples: "The fact that the Oregon statutory code does not permit marriages of same-sex couples has the practical effect of directly and substantially harming all plaintiff couples in that it excludes them from marriage, the social validation that it confers, and the hundreds of rights, responsibilities, benefits, and obligations that it affords" (ER 35-ER 36 at ¶ 107) (emphasis added); see also, e.g., (ER 12-ER 13 at ¶ 5); ORCP 12 A ("All

² Plaintiffs use the phrase "benefits of marriage" to mean the complete set of benefits, obligations, rights, responsibilities, and protections conferred on married couples and their children by state constitutional, statutory, regulatory, sub-regulatory, and common law, as well as a gateway to them.

³ Moreover, DOMC's argument contradicts itself with DOMC asserting that the question of whether same-sex couples are impermissibly denied the benefits of marriage under the analysis set forth in Tanner v. OHSU, 157 Or App 502, 971 P2d 435 (1998), "remains live" (DOMC Opening Supp Br at 9).

pleadings shall be liberally construed with a view of substantial justice between the parties.”).

Plaintiffs’ briefs have consistently borne this out as well (see e.g., Pls Opening Br at 1, 28-29; Pls Answering Br at 4, 5, 31, 51). And plaintiffs’ First Assignment of Error is in regard to the trial court’s implicit denial “in part” of “plaintiffs’ motion for partial summary judgment on the First Claim for Relief” when the trial court “issued an opinion and order that holds that the exclusion of same-sex couples from the state-conferred benefits of marriage, as opposed to the exclusion of same-sex couples from marriage itself” violates Article I, section 20 (Pls Opening Br at 21-22, emphasis added).⁴

For the foregoing reasons, as well as those set forth in plaintiffs’ opening supplemental brief, it would be procedurally proper for the Court to extend the benefits of marriage to same-sex couples.⁵

II. The amendment will not render plaintiffs’ second, third, or fourth claims for relief moot.

Both the State (State Opening Supp Br at 11) and DOMC (DOMC Opening Supp Br at 8) concede that the amendment will not render moot plaintiffs’ second, third, or fourth claims for relief, which seek the registration of the marriage records of same-sex couples.

⁴ Prior to the amendment, plaintiffs argued that the constitutional violation could be fully remedied in only one way – the extension of both the status of marriage and the benefits of marriage to same-sex couples. In light of the amendment, they no longer seek the extension of the status of marriage to unmarried same-sex couples in this case. They continue, however, to seek the extension of the benefits of marriage to same-sex couples.

⁵ Amicus Liberty Counsel’s argument simply echoes DOMC’s argument.

The trial court adjudicated plaintiffs' fourth claim for relief, in the alternative to plaintiffs' second and third claims for relief (ER 424-ER 425). As the record demonstrates, the parties stipulated that the State Registrar did not register the marriage records of same-sex couples "for the sole reason that they are same-sex couples" (ER 57, emphasis added). In other words, the State Registrar would have registered the marriage records of same-sex couples but for her view that the law prior to the amendment permitted the State to deny same-sex couples both the status of marriage and the benefits of marriage. Because her view of the law prior to the amendment was incorrect, a writ of mandamus may issue.⁶ State ex rel. Maizels v. Juba, 254 Or 323, 331, 460 P2d 850 (1969) ("[M]andamus may be used to decide disputed and difficult questions of law."); see also Henkel v. Bradshaw, 257 Or 55, 57, 475 P2d 75 (1970); Parks v. Board of County Comm'rs, 11 Or App 177, 198-99, 501 P2d 85 (1972). Because the Court must reach the question of whether same-sex couples were impermissibly denied both the status of marriage and the benefits of marriage under the law prior to the amendment, neither the question of whether the status of marriage is a privilege or immunity, nor the question of whether the Court must extend both the status of marriage and the benefits of marriage to same-sex couples is entirely moot.

For the foregoing reasons, as well as those set forth in plaintiffs' opening supplemental brief, the amendment will not render plaintiffs' first, second,

⁶ Plaintiffs' alternative arguments – (1) the couples married in good faith, and (2) the County executive had a constitutional duty to issue the licenses to the couples – are set forth in plaintiffs' answering brief on the merits.

third, or fourth claims for relief moot, and DOMC's motions based on mootness (see DOMC Opening Supp Br at 1-2) should be denied.⁷

CONCLUSION

For the foregoing reasons, as well as those set forth in plaintiffs' opening supplemental brief, the amendment will not render any of plaintiffs' claims for relief moot.

Dated this 30th day of November, 2004.

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⁷ DOMC correctly asserts that the question of whether the State Registrar must register the marriage records of same-sex couples is a question of law that is appropriate for resolution by the Court on appeal (DOMC Opening Supp Br at 8). Thus, the Court need not address DOMC's alternative request (DOMC Opening Supp Br at 9) that the Court remand this case to the trial court to adjudicate DOMC's counterclaim under the Public Meetings Law.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that I served the foregoing **PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS' ANSWERING BRIEF ON EFFECTS OF MEASURE 36 ON THIS APPEAL** on November 30, 2004, by directing to each party VIA U.S. FIRST CLASS MAIL two true, exact, and full copies thereof addressed as follows:

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