



Family Law Co-Sponsors a Recommendation on Same Sex Marriages

The Section of Family Law has voted to co-sponsor with the Section of Individual Rights and Responsibilities a recommendation to go before the ABA House of Delegates at the ABA Midyear Meeting in San Antonio, TX.

The House of Delegates will meet on Monday, February 9, 2004 to consider the recommendation. Currently, both Sections are working to build support for the recommendation before the vote of the ABA House.

The recommendation is as follows:

RESOLVED, That the American Bar Association opposes any federal enactment that would restrict the ability of a state to prescribe the qualifications for civil marriage between two persons within its jurisdiction;

FURTHER RESOLVED, that the American Bar Association opposes any federal enactment that would restrict the ability of a state to give effect to a civil marriage validly contracted between two persons under the laws of another jurisdiction.

The following FAQs will outline the purpose of the recommendation and why the Section Council voted in support of co-sponsorship.

What is the purpose of the recommendation?

Efforts are underway to enact a federal constitutional amendment or other legislation that would prevent states from establishing, by court decision or legislation, a definition of marriage that would include marriages between two persons of the same sex.

The purpose of the recommendation is to oppose federal encroachments on the traditional state prerogative of determining the qualifications for civil marriage within the state and whether to give effect to civil marriages validly contracted between those from out of state.

What is the Association's interest in this issue?

The proposed resolution complements and seeks to preserve existing policies of the ABA. In August 1995, the ABA adopted a policy in support of legislation and implementation of public policies that would not bar parents from child custody or visitation privileges based on sexual orientation. In February 1999, the ABA adopted a policy in support of legislation and implementation of public policies that would not

restrict adoption based on sexual orientation. In August 2003, the ABA adopted a policy supporting legislation and court decisions permitting second-parent adoption by unmarried persons, including lesbian and gay partners.

Why is this recommendation necessary?

If the Federal Marriage Amendment pending in the Congress were ratified, it would have sweeping consequences for our federal system and millions of gay and lesbian Americans. It is likely that the amendment would nullify Vermont's civil union system, California's domestic partnership law, and scores of other laws and ordinances granting benefits to unmarried couples throughout the country. It would bar courts and legislatures from taking steps to permit same-sex couples to enter into civil marriage, and it would strip same-sex couples of the rights they now enjoy in some places, including the right to sue for wrongful death, hospital visitation rights, family medical leave, and even the right to control the disposition of remains.

The proposed resolution condemns this potential usurpation of state authority and supports the continuation of the robust dialogue currently underway regarding marriage of same-sex couples.

Why should the House of Delegates address this issue? And why now?

On November 18, 2003, in *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts held that barring gays and lesbians from entering into civil marriage violates the Massachusetts Constitution. The timing of the decision may make it more likely that Congress will act on the proposed constitutional amendment within the next year. The amendment poses a considerable threat to our federal system. Author of the Defense of Marriage Act (DOMA) and Former Representative Bob Barr (R-GA) has expressed his opposition to the amendment.

Marriage is a quintessential state issue. The Defense of Marriage Act goes as far as is necessary in codifying the federal legal status and parameters of marriage. A constitutional amendment is both unnecessary and needlessly intrusive and punitive...As any good federalist should recognize, [DOMA] leaves states the appropriate amount of wiggle room to decide their own definitions of marriage or other similar social compacts, free of federal meddling.

The proposed resolution affirms the principle that the states should be permitted to debate and develop their own answers to the issue of same-sex marriage and other critical questions of family law. This is a traditional state responsibility, and it should remain so.

Does the recommendation endorse marriage rights for same-sex couples?

No. The recommendation neither favors nor opposes marriage rights for same-sex couples. The sole concern of the recommendation is the preservation of our federal system, and the protection of the states' prerogative to determine which couples can enter into civil marriage. As Justice Brandeis famously stated, "It is one of the happy incidents of the federal system that a single courageous State may...serve as a laboratory; and try novel social...experiments without risk to the rest of the country."