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Opinion No. 06-145

Applicability of Tennessee Marriage Amendment to Same Sex Civil Unions or Domestic Partnerships

QUESTION

Will the proposed Tennessee Marriage Amendment affect the future possibility for civil unions and/or domestic partnerships?

OPINION

To the extent that a civil union or domestic partnership is intended to be a contract providing the rights and privileges of marriage, the proposed Marriage Amendment, if passed, would preclude recognition. The plain language of the Marriage Amendment, however, does not preclude other types of domestic partnerships that do not purport to provide the status or rights, privileges and responsibilities of marriage.

ANALYSIS

The "Marriage Amendment" has been placed on the November 7, 2006 ballot for a ratification vote. This amendment provides:

> SECTION ---. The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by provisions of this section, then the marriage shall be void and unenforceable in this state.

The plain language of this amendment demonstrates an indisputable intent to require the legal status of marriage to be defined as only a contract or legal relationship between one man and one woman. Thus, to the extent that the term "civil union" or "domestic partnership" is defined as a legal relationship between two persons of the same sex that grants the same rights, privileges and responsibilities of marriage, such union or partnership would be precluded by the proposed Marriage Amendment. *See* Op. Tenn. Att'y Gen. No. 04-066 (April 19, 2004).

On the other hand, the plain language of the Marriage Amendment does not preclude a domestic partnership between two persons of the same sex that does not purport to provide the status or same rights, privileges and responsibilities of marriage. Thus, all domestic partnerships are not necessarily precluded by the proposed Marriage Amendment.

Courts in other states have recently recognized that legislation granting certain legal rights and responsibilities to domestic partnerships did not conflict with constitutional amendments or statutes prohibiting same sex marriages. *Knight v. Superior Court*, 128 Cal. App. 4th, 14, 26 Cal. Rptr. 3d 687 (3d District 2005) (same sex domestic partnerships not precluded by initiative stating: "only marriage between a man and a woman is valid or recognized in California"); *Devlin v. City of Philadelphia*, 580 Pa. 564, 862 A.2d 1234 (2004) (Life Partnership legislation upheld on basis only afforded certain limited rights and benefits that spouses also enjoy and therefore, was not unlawful "marital status" between same sex partners). *See also Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781 (Alaska 2005) (Marriage Amendment precludes same sex marriages but held not to preclude same sex domestic partners from challenging government policies that discriminate between married and unmarried couples).

Accordingly, the proposed Marriage Amendment, if passed, would not necessarily preclude the future possibility for domestic partnerships. To the extent that a future domestic partnership law does not purport to provide the status or rights, privileges and responsibilities of marriage, it could be constitutionally defensible.

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