COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11023

TODD ELIA-WARNKEN,
Plaintiff-Appellant,

v.

RICHARD ELIA,
Defendant-Appellee.

ON RESERVATION AND REPORT FROM
THE WORCESTER PROBATE AND FAMILY COURT

BRIEF OF DEFENDANT-APPELLEE RICHARD ELIA

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Statement of the Question Reported

Whether or not a Vermont civil union must be dissolved before either party to that civil union can enter into a valid marriage in Massachusetts to a third party.

Statement of Facts[1]

On April 9, 2003, Appellant Todd Elia-Warnken ("Mr. Warnken") obtained a license to enter into a civil union in Vermont with Christopher Baker ("Mr. Baker"). R.A. 16. Mr. Warnken and Mr. Baker became spouses in a ceremony in Brattleboro, Vermont, officiated by a Justice of the Peace, on April 19, 2003, and it was registered with the Brattleboro Town Clerk on April 22, 2003. Id. Mr. Warnken and Mr. Baker are still united in a civil union, as that legal relationship has never been dissolved. R.A. 14.

In October 2005, Mr. Warnken obtained a license to enter into a marriage in Massachusetts with Appellee Richard Elia ("Mr. Elia"). R.A. 18. Mr. Warnken and Mr. Elia attempted to become spouses in a ceremony in Worcester, Massachusetts, officiated by a

[1] Appellee accepts the Statement of the Case set forth in the brief of the Appellant.

Justice of the Peace, on October 17, 2005, and it was registered with the Worcester City Clerk. Id. At the time Mr. Warnken and Mr. Elia attempted to marry, Mr. Warnken had a valid civil union with Mr. Baker. R.A. 14.

Mr. Warnken and Mr. Elia lived together as spouses until December, 2008. R.A. 4, 8. Mr. Warnken filed for divorce on April 15, 2009. R.A. 4. Although Mr. Elia initially answered the complaint and counterclaimed for divorce, R.A. 7-8, upon learning of the existence of Mr. Warnken's undissolved civil union to Mr. Baker, Mr. Elia filed motions to amend that answer and to dismiss the divorce complaint. R.A. 9-13.

Summary of the Argument

A Vermont civil union must be dissolved before either party to that civil union can enter into a valid marriage in Massachusetts with a third party. General Laws c. 207, §§ 4 and 8 render any such subsequent marriage void because a party to an undissolved Vermont civil union has a living spouse. Applying established principles of statutory interpretation, the plain meaning of §§ 4 and 8

renders the parties' marriage void in light of the spousal relationship created by Mr. Warnken's civil union. (p. 4-8). Moreover, to the extent any ambiguity exists about that plain meaning, these provisions must be construed to fulfill the principles underlying the Commonwealth's restrictions on having multiple spouses, and to avoid the absurd result of two people being able to claim both the status and the protections and obligations of being Mr. Warnken's spouse. (p. 9-12).

This understanding of §§ 4 and 8 is consistent with existing practice in the Commonwealth, as applied by the agency charged with their enforcement and the court most commonly called upon to construe them. Massachusetts already treats a party to a civil union as having an existing spouse, both as an impediment to marriage and for purposes of dissolution. (p. 12-15).

Recognition of civil union spouses as preventing a subsequent marriage to a third party is mandated by comity, which applies with respect to the legal spousal relationships of same-sex couples entered into in other jurisdictions, regardless of whether that couple could have entered into the same relationship in Massachusetts. (p. 15-18).

Finally, reading G.L. c. 207, §§ 4, 8 to respect the spousal relationship established by a civil union fulfills Massachusetts public policy on many fronts. Not only would it accomplish the goals of the polygamy provisions themselves, but it would sustain the underlying purposes of comity both in regard to the parties to the relationship receiving recognition and in regard to the respect among sister states, and it would further the Commonwealth's commitment to equal treatment for same-sex couples and their legal commitments. (p. 18-21).

Argument

The marriage between the parties was void ab initio. The validity of a marriage entered into in the Commonwealth turns in part on whether the parties seeking to marry are free to do so.[2] A party to an undissolved civil union is not free to marry because he already has a legal spouse, and therefore any subsequent marriage is made void by Gen. L. c. 207, §§

[2] "In Massachusetts, the legal impediments to marriage include (1) consanguinity or affinity; (2) polygamy (except as specifically provided); (3) age (except as specifically provided); and (4) the presence of communicable syphilis in one of the parties. See G.L. c. 207, §§ 1, 2, 4, 6, 7." Cote-Whitacre v. Dep't of Pub. Health, 446 Mass. 350, 360 n.9 (2006).

4 and 8 (collectively, "the polygamy provisions"). These provisions render the marriage of the parties void.

I. THE PROHIBITION OF MARRIAGES ENTERED WHEN EITHER PARTY ALREADY HAS A SPOUSE APPLIES TO CIVIL UNION SPOUSES.

Section 4 declares void any marriage "contracted while either party thereto has a former wife or husband living[.]" Gen. L. c. 207, § 4. Section 8 echoes this declaration of voidness, clarifying that a marriage solemnized while either party has a former wife or husband living requires no judgment to declare it void. It is simply void ab initio. Gen. L. c. 207, § 8.[3] These provisions make clear that no valid marriage can be established when either intended spouse already has a spouse living.

As a party to a civil union, Mr. Warnken established a legal spousal relationship with Mr. Baker. It is undisputed that that legal relationship remains in effect. R.A. 14. The existence of that

[3] Polygamy –- defined as marrying or continuing to cohabit with a second person when one has "a former husband or wife living" -- is also a criminal offense punishable by up to five years in prison, up to two and one half years in jail, or a fine of up to $500. G.L. c. 272, § 15.

relationship directly implicates the statutory prohibitions of a subsequent marriage under fundamental principles of statutory interpretation.

> "The general and familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated."

Commonwealth v. Millican, 449 Mass. 298, 300 (2007) (quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934)).

A. The Plain Meaning Of Gen. L. c. 207, §§ 4, 8 Prohibits A Marriage Entered When A Party Has A Civil Union Spouse.

Starting with the language of the statutes, although the polygamy provisions use the words "husband" and "wife," those words must be construed to mean "spouse." As the Supreme Judicial Court stated in Goodridge v. Dep't of Pub. Health,

> [T]he statutory provisions concerning consanguinity or polygamous marriages shall be construed in a gender neutral manner. See Califano v. Westcott, 443 U.S. 76, 92-93, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979) (construing word 'father' in unconstitutional, underinclusive provision to mean 'parent'); Browne's Case, 322 Mass. 429, 430, 77 N.E.2d 649 (1948) (construing masculine pronoun 'his' to include feminine

> pronoun 'her'). See also G.L. c. 4, § 6, Fourth ('words of one gender may be construed to include the other gender and the neuter unless such construction would be "inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute"').

440 Mass. 309, 343 n.34 (2003).

A party to a civil union is a spouse, and is treated as such for all purposes under Vermont law. See 15 Vt. Stat. Ann. § 1201 (2) ("'Civil union' means that two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses."). More specifically,

> (a) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a civil marriage.
>
> (b) A party to a civil union shall be included in any definition or use of the terms "spouse," "family," "immediate family," "dependent," "next of kin," and other terms that denote the spousal relationship, as those terms are used throughout the law. …

15 Vt. Stat. Ann. § 1204. As the Vermont Supreme Court held, "The Legislature's intent in enacting the civil union laws was to create legal equality between relationships based on civil unions and those based on

marriage." Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 968 (Vt. 2006).

Vermont's treatment of parties to a civil union as spouses is underscored by its own prohibitions from entering into a subsequent marriage while still joined in civil union. See 15 Vt. Stat. Ann. §§ 4, 511. These provisions mirror the language of the Commonwealth's polygamy provisions, and make clear that under Vermont law, the parties' marriage is void.[4] Given the clear spousal status established by Vermont law, it is plain that a party to a civil union is a spouse within the meaning of the Massachusetts polygamy provisions.

[4] 15 Vt. Stat. Ann. § 4 states, "Civil marriages contracted while either party is legally married or joined in civil union to a living person other than the party to that marriage shall be void." 15 Vt. Stat. Ann. § 511 states, "(a) Civil Marriages prohibited by law on account of consanguinity or affinity between the parties or on account of either party having a wife or husband living, if solemnized within this state, shall be void without decree of divorce or other legal process."

Vermont also has a parallel criminal polygamy provision, the language of which also mirrors Massachusetts law. See 13 Vt. Stat. Ann. § 206 ("A person having a husband or wife living who marries another person, or continues to cohabit with such second husband or wife in this state, shall be imprisoned not more than five years. …").

B. Gen. L. c. 207, §§ 4, 8 Must Be Construed To Prohibit A Marriage Entered When A Party Has A Civil Union Spouse In Order To Fulfill Their Statutory Objectives And To Avoid Absurd Results.

Even if, arguendo, the Court considers it ambiguous whether "spouse" includes a party to a civil union, these provisions must be interpreted to fulfill their objectives and to avoid the absurd result of allowing the Appellant to have a spousal relationship to two people with equivalent rights and obligations. See Providence & Worcester R.R. Co. v. Energy Facilities Siting Bd., 453 Mass. 135, 142 (2009) (court is not constrained to follow even unambiguous meaning when "following the Legislature's literal command would lead to an absurd result, or one contrary to the Legislature's manifest intention.") (internal quotation omitted).

Including civil union spouses within the meaning of "husband" and "wife" in the polygamy provisions "'is necessary to accomplish the purpose indicated by the words as a whole, [and] such interpretation is to be adopted rather than one which will defeat that purpose.'" See Champigny v. Commonwealth, 422 Mass. 249, 251 (1996) (quoting Lehan v. North Main St. Garage, 312 Mass. 547, 550 (1942)). The polygamy

prohibitions were aimed at clearly establishing spousal relationships and obligations for the sake of the parties involved, their children, and the public at large. See, e.g., Smith v. Smith, 13 Gray 209, 1859 WL 7299, at *2-3 (Mass. 1859); cf. Inhabitants of Medway v. Inhabitants of Needham, 16 Mass. 157, 159, 160-61 (1819) (importance of validating marriages entered in other jurisdictions "to avoid the public mischief, which would result from the loose state, in which people so situated would live."). The prevention of polygamy was considered to be of such high importance – "so essential to the peace of families and the good order of society" – that ignorance of an absent spouse's being alive or an honest belief in his or her death is not a defense to the crime of polygamy. Commonwealth v. Mash, 48 Mass. 472, 473, (1844)[5] Ignoring the spousal relationship created by Mr. Warnken's civil union would defeat these purposes, allowing two people to claim both the status and the protections and obligations of being

[5] See also Vermont v. Ackerly, 64 A. 450, 451 (Vt. 1906) ("The consequences of an invalid marriage to society and to innocent parties are so serious that the law may well take measures calculated to insure the procurement of the most positive evidences of death before the contracting of another marriage….").

Mr. Warnken's spouse. Rather than clearly establishing the one valid spousal relationship to which Mr. Warnken is a party, such a construction of the polygamy provisions would create confusion and chaos, not only for the two different men who have made commitments to Mr. Warnken, but for any public or private entity attempting to administer or enforce the protections and obligations that flow from those spousal relationships.[6] See Goodridge, 440 Mass. at 323-25 (recognizing that "[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death[,]" and

[6] "[I]t is crucial to see that the refusal to recognize the legal incidents of the marriage allows one of the parties to escape economic and legal obligations that remain valid under the law of the place of celebration and which could be vindicated there should the parties ever return to that state." Joseph William Singer, Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation, 1 Stan. J. Civ. Rts. & Civ. Liberties 1, 30 (2005). Singer poses the following example of the chaos that could ensue from "the possibility of moving to another state and acquiring an additional spouse (one under [Vermont] law and one under Massachusetts law)":

> Suppose Lily is married to Anne in Massachusetts but to Josh in [Vermont]. Lily owns real property in Cape Cod and holds money market accounts in a New York bank. After Lily's death, who is considered the surviving spouse? Does Anne get the Massachusetts house and Josh get any property not located in Massachusetts?

Id. at 29.

setting forth a sampling of the "'hundreds of statutes' [that] are related to marriage and to marital benefits"); 15 Vt. Stat. Ann. § 1204 (setting forth a lengthy, "nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union"). Such an absurd result cannot be sustained, and in order to "interpret the statute so as to render the legislation effective, consonant with reason and common sense[,] "Cote-Whitacre, 446 Mass. at 358, the Court should construe "spouse" to include the spousal relationship created by a civil union, and thus declare the marriage of the parties to be void.

II. RECOGNIZING THAT A PARTY TO A CIVIL UNION HAS A SPOUSE IS CONSISTENT WITH EXISTING MASSACHUSETTS PRACTICE.

This construction of G.L. c. 207, §§ 4 and 8 comports with current practice in the Commonwealth. In practical terms, Massachusetts already treats a party to a civil union as having an existing spouse both as an impediment to marriage and for purposes of dissolution. While not binding on this Court's interpretation of these statutes, it nonetheless bears noting that both the Department of Public Health and

the Probate and Family Courts –- entities charged with enforcing and interpreting these provisions –- have recognized the spousal relationship created by a civil union.

The Commonwealth's Registrar of Vital Records and Statistics recognizes that an undissolved civil union serves as an impediment to marriage. In accordance with G.L. c. 207, § 20, the Registrar provides a Notice of Intention of Marriage form "containing such information as is required by law and also a statement of absence of any legal impediment to the marriage, to be given before such town clerk under oath by both of the parties to the intended marriage." Id. This form requires parties intending to marry to indicate if they have previously been party to a civil union and, if so, whether that spousal relationship was dissolved. See Commonwealth of Massachusetts Department of Public Health Registry of Vital Records and Statistics, Notice of Intention of Marriage, Form R-202 02/2010, available at http://www.glad.org/uploads/docs/publications/intention-of-marriage-form.pdf,(Addendum p. 7).[7],[8] This information is part

[7] The version of the form that was in use at the time the parties attempted to marry had the same

of the same section of the form that requires applicants to indicate the number of their marriage and the disposition of any previous marriages. See id., §§ 7, 15. The only reason to include this information on the Notice of Intention is to ensure that no impediment exists to the parties' marriage under G.L. c. 207, § 4.

In addition, the Probate and Family Court has consistently recognized that a party to a civil union has a spousal relationship that may be dissolved by that court. See, e.g., Myers v. Campbell, No. PL10E0030QC (Mass Prob. & Fam. Ct., Plymouth County Aug. 16, 2010); Finger v. Roberts, No. 04E0015GC (Mass. Prob. & Fam. Ct., Hampshire County Dec. 1, 2004); Hindus v. Frank, No. 04E0087 (Mass. Prob. & Fam. Ct., Suffolk County Sept. 21, 2004); Salucco v. Alldredge, No. 02E0087GC1, 17 Mass. L. Rptr. 498, 2004 WL 864459 (Mass. Prob. & Fam. Ct., Essex County Mar. 19, 2004). In Salucco, the court plainly recognized

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provisions. See Commonwealth of Massachusetts Department of Public Health Registry of Vital Records and Statistics, Notice of Intention of Marriage, Form R-202 m 05/04, available at http://www.nahant.org/townhall/forms/Clerk/Intent_To_Marry.pdf

[8] Marriage license forms in Vermont also reflect the need to have dissolved previous civil unions. See 18 Vt. Stat. Ann. § 5131.

that the legal spousal commitments of different-sex couples and same-sex couples must be treated the same under constitutional equality principles, regardless of the different labels for their spousal relationships, and therefore an action to dissolve a civil union must lie. 2004 WL 864459, at *4. This practice of granting full recognition to the spousal relationship established by a civil union further supports construing such a relationship to render a subsequent marriage void.

III. RECOGNIZING THAT THE SPOUSAL RELATIONSHIP CREATED BY A CIVIL UNION PROHIBITS A SUBSEQUENT MARRIAGE TO A THIRD PARTY IS MANDATED BY COMITY.

In addition to principles of statutory construction and the existing practices of the Commonwealth, established comity law requires recognition of a party to a civil union as a spouse.

As a general matter,

> [i]nterstate comity . . . is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Cote-Whitacre v. Dep't of Pub. Health, 446 Mass. 350, 368-69 (2006) (internal citations omitted). Comity requires that Massachusetts recognize a spousal relationship as valid so long as it was valid where it was entered. See, e.g., Cote-Whitacre, 446 Mass. at 359; Commonwealth v. Graham, 157 Mass. 73, 75 (1892); Commonwealth v. Lane, 113 Mass. 458, 463 (1873). The SJC has made clear that principles of comity apply to the spousal relationships of same-sex couples, just as they do to opposite-sex couples. See Cote-Whitacre, 446 Mass. at 368-369, 373.

A. Comity Applies To Recognize Civil Union Spouses Regardless Of Whether The Couple Could Have Entered Into The Same Relationship In Massachusetts.

That the same type of spousal relationship –- a civil union –- could not have been celebrated in the Commonwealth does not prevent the recognition of the spousal status established by a civil union.

> It is a well settled principle in our law, that marriages celebrated in other States or countries, if valid by the law of the country where they are celebrated, are of binding obligation within this Commonwealth, although the same might, by force of our laws, be held invalid, if contracted here. This principle has been adopted, as best calculated to protect the highest welfare of the community in the preservation of the purity and happiness of the most important domestic relation in life.

Sutton v. Warren, 51 Mass. 451, 452 (1845). Comity applies to validly entered spousal relationships even where such relationships are prohibited in Massachusetts. See, e.g., Lane, 113 Mass. at 463 (validating out-of-state marriage by adulterer prohibited from remarrying in Massachusetts); Boltz v. Boltz, 325 Mass. 726 (1950) (validating a common-law out-of-state marriage that was prohibited in Massachusetts).

Specifically with regard to spousal statuses like civil unions, which are parallel to marriage but do not grant the status of marriage, Supreme Judicial Court Justice Duffly, when sitting as a Single Justice of this Court, held that the difference in the status creating the spousal relationships does not undermine comity. See Hunter v. Rose, Docket No. 09-J-0084, Order (Mass. App. Ct. Mar. 16, 2009) (Duffly, J.). ("That our courts have determined that same sex partners are entitled to marry, does not preclude a determination that another State's laws cloaking same sex partners with all the attributes of a spousal relationship, while not extending them the rights of marriage, can still be recognized by Massachusetts courts.") (Addendum p. 9).

Other states have reached the same result, extending comity to the spousal status established by civil unions despite civil unions not being available in those states. See, e.g., Debra H. v. Janice R., 930 N.E.2d 184, 197 (N.Y. 2010) (extending comity to civil union for purposes of recognizing parentage of child born thereto); Dickerson v. Thompson, 897 N.Y.S.2d 298 (N.Y. Sup. Ct. App. Div. 2010) (extending comity to civil union for purposes of dissolution); Brown v. Perez, Equity No. CDCD119660 (Iowa Dist. Ct. Dec. 24, 2003) (same) (Addendum p. 19); In re Marriage of Gorman and Gump, No. 02-D-292 (W. Va. Fam. Ct. Dec. 19, 2002) (unpublished) (same) (Addendum p. 21).

B. Extending Comity To Respect The Spousal Status Created By A Civil Union Furthers Massachusetts Public Policy.

Recognizing that a civil union creates a spousal relationship that would render a subsequent marriage void furthers the public policies of the Commonwealth, not only with regard to preventing the establishment of multiple spousal relationships, but as they relate to the animating principles behind comity, and to the Commonwealth's commitment to equal treatment for the legal commitments of same-sex couples.

First, extending comity to the spousal relationship created by a civil union honors the settled expectations of the parties who took on the status. See, e.g., Richardson v. Richardson, 246 Mass. 353, 355 (1923) (recognition would "secure the existence and permanence of the family relation"); Milliken v. Pratt, 125 Mass. 374, 381 (1877) (marriage entered in other jurisdiction "permanently affects the relations and the rights of two citizens"); Putnam v. Putnam, 25 Mass. 433, 448-49 (1829) ("The condition of parties thus situated, the effect upon their innocent offspring, and the outrage to public morals, were considered as strong and decisive reasons for" extending comity to marriage lawfully entered in other jurisdiction). As the SJC stated in Inhabitants of Medway v. Inhabitants of Needham,

> If the marriage takes place in a state whose laws allow it, the marriage is certainly good there; and it would produce greater inconveniences than those attempted to be guarded against, if a contract of this solemn nature valid in a neighboring state, could be dissolved at the will of either of the parties, by stepping over the line of a state[.]

16 Mass. at 159. This same interest in clarity regarding the legal status and obligations of spouses underlies the Commonwealth's interest in preventing

polygamy, as discussed supra at 8-11. Recognizing a civil union spouse as prohibiting a subsequent marriage fulfills these interests.

Second, recognizing and enforcing the spousal status established by a civil union promotes convenience and mutual respect among sister states. See Cote-Whitacre, 446 Mass. at 373 ("if [the Commonwealth] adheres to principles of comity and respects the laws of other jurisdictions, then other jurisdictions will correspondingly respect the laws of Massachusetts and recognize same-sex marriages of Massachusetts couples lawfully celebrated in this Commonwealth."). To disregard the spousal relationship established in Vermont here would be tantamount to other states' refusals to respect the marriages validly entered here. Just as Massachusetts has an interest in ensuring that the valid spousal relationships established here receive the utmost respect and enforcement,[9] so, too, does Vermont, and ensuring that a party to a civil union does not enter

[9] The Commonwealth is currently fighting against such disrespect for marriages validly entered here at the hands of the federal government. See Mass. v. U.S. Dep't of Health and Hum. Servs., 698 F. Supp. 2d 234 (D. Mass. 2010), on appeal.

an additional spousal relationship furthers the mutual respect between Massachusetts and Vermont.

Finally, recognizing the spousal relationship established by a civil union is consistent with the Commonwealth's commitment to equal treatment for same-sex couples. See Goodridge, 440 Mass. at 309. Allowing a same-sex couple to marry when one spouse has a pre-existing spousal commitment would craft an exception to established Massachusetts law only for same-sex couples. Such an exception is antithetical to equal treatment under the law.[10]

Conclusion

Wherefore, the Appellee, Richard Elia, respectfully requests that the Court answer the question reported by the Probate and Family Court to

[10] It bears noting that there is no public policy *against* recognizing the spousal status created by a civil union. The Massachusetts Legislature rejected attempts to prevent such recognition on three separate occasions. See H. 3190, 183rd Gen. Ct. (Mass. 2003) (as introduced) (same-sex relationship "shall not be recognized as a marriage or its legal equivalent"); H.4840, 182nd Gen. Ct. (Mass. 2002) (same-sex relationship "shall not be recognized as a marriage or its legal equivalent, nor shall it receive the benefits or incidents exclusive to marriage"); H.3375, 182nd Gen. Ct. (Mass. 2001) (prohibiting same-sex relationships from being recognized "as a marriage, or its legal equivalent, or receive the benefits exclusive to marriage in the Commonwealth of Massachusetts as a matter of public policy.").

conclude that a Vermont civil union must be dissolved before either party to that civil union can enter into a valid marriage in Massachusetts with a third party, and therefore construe G.L. c. 207, §§ 4, 8 to declare the marriage of the parties void ab initio.

Richard Elia

By his counsel,

Date: June 22, 2011 _____

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Certification of Counsel

I, Karen L. Loewy, hereby certify that the forgoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Date: June 22, 2011

_____
Karen L. Loewy

Certificate of Service

I, Karen L. Loewy, hereby certify that I have this day served the within Brief of Defendant-Appellee Richard Elia by first class mail on Nicholas J. Plante, Esq., Law Office of Russell P. Schwartz, 300 Main Street, 2nd Floor, Worcester, MA 01608, attorney for Todd Elia-Warnken.

_____
Karen L. Loewy

Dated: June 22, 2011

Addendum

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Statutes Considered

Mass. Gen. Laws c. 207, § 4

§ 4. Polygamy

A marriage contracted while either party thereto has a former wife or husband living, except as provided in section six and in chapter two hundred and eight, shall be void.

Mass. Gen. Laws c. 207, § 8

§ 8. Marriages void without judgment

A marriage solemnized within the commonwealth which is prohibited by reason of consanguinity or affinity between the parties, or of either of them having a former wife or husband living, shall be void without a judgment of divorce or other legal process.

15 Vt. Stat. Ann. § 4

§ 4. Civil marriage contracted while one in force

Civil marriages contracted while either party is legally married or joined in civil union to a living person other than the party to that marriage shall be void.

15 Vt. Stat. Ann. § 511

§ 511. Void civil marriages; consanguinity, affinity, or living spouse

(a) Civil Marriages prohibited by law on account of consanguinity or affinity between the parties or on account of either party having a wife or husband living, if solemnized within this state, shall be void without decree of divorce or other legal process.

(b) When the validity of a civil marriage is uncertain for causes mentioned in subsection (a) of this section, either party may file a complaint to annul

the same. Upon proof of the nullity of the marriage it shall be declared void by a decree of nullity.

15 Vt. Stat. Ann. § 1201

§ 1201. Definitions

As used in this chapter:

(1) “Certificate of civil union” means a document that certifies that the persons named on the certificate have established a civil union in this state in compliance with this chapter and 18 V.S.A. chapter 106.

(2) “Civil union” means that two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses.

(3) “Commissioner” means the commissioner of health.

(4) Repealed by 2009, No. 3, § 12, eff. Sept. 1, 2009.

(5) “Party to a civil union” means a person who has established a civil union pursuant to this chapter and 18 V.S.A. chapter 106.

15 Vt. Stat. Ann. § 1204

§ 1204. Benefits, protections and responsibilities of parties to a civil union

(a) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a civil marriage.

(b) A party to a civil union shall be included in any definition or use of the terms “spouse,” “family,” “immediate family,” “dependent,” “next of kin,” and

other terms that denote the spousal relationship, as those terms are used throughout the law.

(c) Parties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons.

(d) The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.

(e) The following is a nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union:

(1) laws relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety (parties to a civil union meet the common law unity of person qualification for purposes of a tenancy by the entirety);

(2) causes of action related to or dependent upon spousal status, including an action for wrongful death, emotional distress, loss of consortium, dramshop, or other torts or actions under contracts reciting, related to, or dependent upon spousal status;

(3) probate law and procedure, including nonprobate transfer;

(4) adoption law and procedure;

(5) group insurance for state employees under 3 V.S.A. § 631, and continuing care contracts under 8 V.S.A. § 8005;

(6) spouse abuse programs under 3 V.S.A. § 18;

(7) prohibitions against discrimination based upon marital status;

(8) victim's compensation rights under 13 V.S.A. § 5351;

(9) workers' compensation benefits;

(10) laws relating to emergency and nonemergency medical care and treatment, hospital visitation and notification, including the Patient's Bill of Rights under 18 V.S.A. chapter 42 and the Nursing Home Residents' Bill of Rights under 33 V.S.A. chapter 73;

(11) advance directives under 18 V.S.A. chapter 111;

(12) family leave benefits under 21 V.S.A. chapter 5, subchapter 4A;

(13) public assistance benefits under state law;

(14) laws relating to taxes imposed by the state or a municipality;

(15) laws relating to immunity from compelled testimony and the marital communication privilege;

(16) the homestead rights of a surviving spouse under 27 V.S.A. § 105 and homestead property tax allowance under 32 V.S.A. § 6062;

(17) laws relating to loans to veterans under 8 V.S.A. § 1849;

(18) the definition of family farmer under 10 V.S.A. § 272;

(19) laws relating to the making, revoking and objecting to anatomical gifts by others under 18 V.S.A. § 6009;

(20) state pay for military service under 20 V.S.A. § 1544;

(21) application for early voter absentee ballot under 17 V.S.A. § 2532;

(22) family landowner rights to fish and hunt under 10 V.S.A. § 4253;

(23) legal requirements for assignment of wages under 8 V.S.A. § 2235; and

(24) affirmance of relationship under 15 V.S.A. § 7.

(f) The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

Form R-202 02/2010

Intention No._____

The Commonwealth of Massachusetts
DEPARTMENT OF PUBLIC HEALTH
REGISTRY OF VITAL RECORDS AND STATISTICS

NOTICE OF INTENTION OF MARRIAGE

The following notice of intention of marriage is hereby given in compliance with law.

1. _____, 20_____

2. TO THE CLERK OF _____, MASSACHUSETTS

PARTY A (Please Print)

3. PRESENT NAME: (First, Middle, Last)

3A. SURNAME TO BE USED AFTER MARRIAGE:

4. DATE OF BIRTH: (Month,Day,Year) 4A. AGE:

5. OCCUPATION: _____

6. RESIDENCE: _____
(Number and Street)

_____
(City/Town, State/Country, Zip Code)

7. THIS MARRIAGE # (1st, 2nd, 3rd):____

7A. Status of last marriage
☐ Widowed ☐ Divorced
☐ Void or annulled by court order
☐ Void, under former GL c.207/§11 or by operation of law at time of marriage
If void, please provide clerk with evidence (see reverse)

7B. Am/was member of: ☐ Civil Union ☒ Domestic Partnership

(State/Country)_____

7C. If so, dissolved? ☐Yes ☐No

8. BIRTHPLACE : (City/Town) (State/Country)

9. NAME MOTHER/PARENT (First, Middle, Last) (Surname of birth or adoption)

10. NAME FATHER/PARENT (First, Middle, Last) (Surname of birth or adoption)

22. SEX ☐ Male ☐ Female

24. RELATED by blood or marriage to Party B? ☐ Yes ☐ No
If yes, how? _____

PARTY B (Please Print)

11. PRESENT NAME: (First, Middle, Last)

11A. SURNAME TO BE USED AFTER MARRIAGE:

12. DATE OF BIRTH (Month,Day,Year) 12A. AGE:

13. OCCUPATION: _____

14. RESIDENCE: _____
(Number and Street)

_____
(City/Town, State/Country, Zip Code)

15. THIS MARRIAGE # (1st, 2nd, 3rd):____

15A. Status of last marriage
☐ Widowed ☐ Divorced
☐ Void or annulled by court order
☐ Void, under former GL c.207/§11 or by operation of law at time of marriage
If void, please provide clerk with evidence (see reverse)

15B. Am/was member of: ☐ Civil Union ☐ Domestic Partnership

(State/Country)_____

15C. If so, dissolved? ☐Yes ☐No

16. BIRTHPLACE : (City/Town) (State/Country)

17. NAME MOTHER/PARENT (First, Middle, Last) (Surname of birth or adoption)

18. NAME FATHER/PARENT (First, Middle, Last) (Surname of birth or adoption)

23. SEX ☐ Male ☐ Female

25. RELATED by blood or marriage to Party A? ☐ Yes ☐ No
If yes, how? _____

PENALTY: MG.L. c.207 §52 "...whoever falsely swears or affirms in making any statement required...shall be punished by a fine..."

I have reviewed a list of impediments to marriage and hereby state that there is an absence of any legal impediment to this marriage and do hereby depose and say that all of the statements as set forth in the above notice whereof I could have knowledge are true and are made under the penalties of perjury (M.G.L. c.4 §6, Rule 6 General Laws).

Party A (Signature)_____ Party B (Signature)_____

Subscribed and sworn to, before me, this _____ day of _____, 20_____

Registrar, Clerk, or Assistant Clerk designated to administer oaths:_____

Marriage Certificate Issued: _____, 20_____ Not Valid After: _____, 20_____
(60 days from date intention is filed. M.G.L. c.207 §20)

NOTICE OF INTENTION OF MARRIAGE
(Reverse)

Last Marriage Void or Annulled
If last marriage was void or annulled (questions 7A and 15A) count the number of this marriage (item 7) as if the void/annulled marriage never occurred. Check below for evidence provided:

Party A	Party B
☐ Last marriage was previously determined to be void or annulled and the certificate on file with the Massachusetts clerk who issued the license and with the Registry of Vital Records and Statistics was marked accordingly.	☐ Last marriage was previously determined to be void or annulled and the certificate on file with the Massachusetts clerk who issued the license and with the Registry of Vital Records and Statistics was marked accordingly.
☐ Court Order of Annulment	☐ Court Order of Annulment
☐ Court Order Voiding Last Marriage	☐ Court Order Voiding Last Marriage
☐ A certified copy of the last Notice of Intention of Marriage that contains sufficient information to determine that last marriage was void under former M.G.L. c.207 §11 (repealed) or by operation of law at the time of marriage. ☐ Affidavit if intended parties are different.	☐ A certified copy of the last Notice of Intention of Marriage that contains sufficient information to determine that last marriage was void under former M.G.L c.207 §11 (repealed) or by operation of law at the time of marriage. ☐ Affidavit if intended parties are different.
☐ Other evidence sufficient to determine that the last marriage was void under former M.G.L. c.207 §11 (repealed) or by operation of law at the time of marriage. *Specify:*_____ ☐ Affidavit if intended parties are different.	☐ Other evidence sufficient to determine that the last marriage was void under former M.G.L. c.207 §11 (repealed) or by operation of law at the time of marriage. *Specify:*_____ ☐ Affidavit if intended parties are different.

Persons under Age 18 (M.G.L. c.207 §§24, 25, 33A)
The clerk or registrar shall not receive a notice of intention of marriage of a person under 18 unless there is court authorization.

If court authorization was obtained pursuant to M.G.L. c.207 §25, please check below:
☐ Party A ☐ Party B

If legal age is in doubt, proof of age or parental consent is required pursuant to M.G.L. c.207 §33A. Please check below:

Party A	Party B
☐ certified copy of a record of birth.	☐ certified copy of a record of birth.
☐ certified copy of a baptismal record.	☐ certified copy of a baptismal record.
☐ passport.	☐ passport.
☐ life insurance policy.	☐ life insurance policy.
☐ employment record.	☐ employment record.
☐ school record.	☐ school record.
☐ immigration record.	☐ immigration record.
☐ naturalization record.	☐ naturalization record.
☐ court record.	☐ court record.
☐ parental consent.	☐ parental consent.

I am satisfied with the documentary evidence presented.

_____ _____
(Registrar, Clerk, or Assistant Clerk designated to administer oaths) Date

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

A.C. 09-J-0084
(Probate & Family Court
Docket Nos. ES08D-2586CS
ES08D-2741DR, ES08E-0132QC

AMY E. HUNTER

vs.

MIKO ROSE.

ORDER

The defendant-petitioner, Miko Rose, has filed this petition pursuant to G. L. c. 231, §§ 117, 118 (first para.),[1] and Mass.R.A.P. 6(a). The petitioner seeks an order staying temporary orders of the Probate & Family Court dated February 2, 2009 and February 18, 2009, entered in complaint filed by the plaintiff, Amy E. Hunter.[2] These orders provide for, and govern

[1] Section 118 provides, in part: A party aggrieved by an interlocutory order of the trial court justice in the . . . probate and family court department may file, . . . a petition in the appropriate appellate court seeking relief from such order. A single justice of the appellate court may, in his discretion, grant the same relief as an appellate court is authorized to grant pending an appeal under section one hundred and seventeen."

Section 117, provides: "After an appeal has been taken from a final judgment of the superior court . . the appellate court may, by an order, on terms or otherwise, suspend the execution or operation of the final judgment appealed from, pending the appeal, and may modify or annul any order made for the protection of the rights of the parties, pending the appeal."

[2] Three complaints are pending in the Probate Court: a complaint for custody (ES08D-2586CS), a complaint seeking dissolution of a domestic partnership (ES08E-0132QC), and a

#6

the terms of, visitation by the plaintiff of a child born to the defendant on August 6, 2007.

To prevail, the petitioner must establish that (1) she is likely to succeed on the merits; (2) absent a stay, she will suffer irreparable injury; (3) no substantial harm will come to other interested parties; and (4) a stay will do no harm to the public interest. See Martinez Rodriguez v. Jiminez, 537 F.2d 1, 2 (1st Cir. 1976).[3]

Background. This summary of the proceedings and factual circumstances is taken from the parties' verified pleadings and motions (including verified equity complaint ES08E-0132QC), and the memorandum of decision of the Probate Court judge dated February 2, 2009. In 2001, while residing in Massachusetts, the parties began a romantic relationship and began living together. In 2002, they moved to California. As residents of that State, they entered into a registered domestic partnership in accordance with § 297 of the Family Code of the State of California that has not been dissolved. The parties purchased a home; the defendant was admitted to medical school and began taking classes in the

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complaint for divorce (ES08D-2741DR). The petitioner's motions to dismiss the complaints were denied.

[3] Our cases have identified factors that justify a stay pending appeal under Mass.R.A.P. 6(a) as similar to those supporting injunctive relief under the cognate Federal rule, Fed.R.A.P. 8. See Cartledge v. Evans, 67 Mass. App Ct. 577, 579 (2006). See also Oakville Development Corp. v. Commonwealth Mortgage Co., 32 Mass. App. Ct. 445, 448 n.5 (1992) (equating relief under G. L. c. 231, §§ 117, 118 with Mass.R.A.P. 6).

Fall of 2005; they made efforts to conceive a child. Initially, the plaintiff pursued those efforts, but they proved unsuccessful. With the plaintiff's consent, the defendant underwent alternative insemination procedures resulting in her becoming pregnant in November 2006. As set forth in the memorandum of the Probate Court judge:

> "Plaintiff was involved with nearly every aspect of the pregnancy process, including attending doctor's appointments and ultrasounds. In preparation for [the child's] arrival, plaintiff registered for an infant class, shopped for necessary items, arranged the nursery, and attended two baby showers hosted in the parties' honor by their friends in California and plaintiff's family in Vermont, respectively."

Mem. 3. The parties returned to Massachusetts in April, 2007, and the child was born August 6, 2007.

> "Plaintiff was present during the labor, birth, and two-day hospitalization period required for defendant's recovery. Plaintiff's mother and sister were present at the hospital when Jordan was born. Plaintiff was the first person, other than hospital personnel, to hold Jordan. The parties named Jordan together and a birth announcement was circulated showing her name as Jordan "Rose-Hunter." With the knowledge and encouragement of defendant, plaintiff took leave from work following Jordan's birth, and was intimately involved in every aspect of Jordan's care, including bottle feeding, bathing, changing, diapering, soothing, and putting Jordan to bed."

Mem. 4. The plaintiff assertedly performed more of the parenting and caretaking functions for the child while the parties were together in Massachusetts, provided significant financial support, was acknowledged as the child's co-parent by others, and called "mama" by the child. E.Comp. at 5-6

> "In January 2008, the parties sought to establish plaintiff as Jordan's legal parent through adoption proceedings for the extra security a co-parent adoption afforded, such as health benefits through plaintiff's federal employer. During the Spring of 2008, after making significant progress with the adoption, the parties' adoption lawyer, Maureen Monks, was appointed as a Justice of the Probate and Family Court, thus delaying further proceedings on the adoption. In connection with plaintiff's agreed-upon adoption of Jordan, the parties gathered several affidavits from persons who had knowledge of plaintiff's role in Jordan's life, including professionals, family, and friends." . . .
>
> "From Jordan's birth until her removal to Oregon, plaintiff performed both parenting functions and caretaker functions for Jordan. Plaintiff, with the knowledge and encouragement of defendant, developed a significant parental relationship with Jordan." . . .
>
> "While defendant attended a medical school rotation in Maine from August 24 through September 20, 2008, she left Jordan in Haverhill, Massachusetts in the care of plaintiff."

Mem. 5-6. In April 2008, the plaintiff also conceived, using sperm from the same donor used to conceive the child that is the subject of these proceedings (the child has since been born to the plaintiff). In August, 2008, the parties' relationship suffered an irretrievable breakdown; they continued to reside together in what is described as a "nesting arrangement" until termination of their lease in October, 2008. At the end of October, 2008, the defendant traveled with the child to Oregon to visit her mother and to attend a brief medical school rotation, indicating her intent to return with the child to Massachusetts at the end of four to six weeks. "As plaintiff was unable to travel to Oregon due to the advanced stage of her pregnancy defendant agreed to reduce the impact of the temporary visit to

Oregon on [the child] and plaintiff by maintaining regular communication by phone, web camera and email. . . . Defendant's representation to plaintiff that she intended to return to Massachusetts by early December was false and misleading." Mem. 6. By early November, all communication and access between the plaintiff and child was abruptly terminated and the plaintiff commenced the within actions in the Probate Court.

Discussion. Likelihood of prevailing on the merits. The defendant-petitioner argues the plaintiff will be unable to establish that 1) the amount and quality of her caretaking functions are sufficient to meet the requirements that will establish her as a de facto parent under A.H. v. M.P., 447 Mass. 828, 839-843 (2006); 2) the complaint fails to claim such a status; 3) there is an insufficient factual basis in the record to support the temporary orders of visitation; and 4) our courts will not extend full faith and credit to California's domestic partner registration law.

The complaint alleges facts that would suffice to support a theory of de facto parenting. See Eigerman v. Putnam Investments, Inc., 66 Mass. App. Ct. 222, 223 (2006) (motion to dismiss "must be denied unless it is certain that no set of provable facts could entitle the plaintiff to relief"). See also Iannacchino v. Ford Motor Company, 451 Mass. 623, 633 (2008). As we said in In re Guardianship of Estelle, 70 Mass. App. Ct. 575,

583 (2007):

> "'A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent.' E.N.O. v. L.M.M., 429 Mass. 824, 829, cert. denied, 528 U.S. 1005 (1999). 'Caretaking functions' are considered to be that part of the parenting process 'that involve[s] interaction with the child or that direct[s], arrange[s], and supervise[s] the interaction and care provided by others,' and that 'involve[s] the direct delivery of day-to-day care and supervision of the child.' A.H. v. M.P., 447 Mass. 828, 839 (2006), quoting from American Law Institute, Principles of the Law of Family Dissolution § 2.03(5) & comment g (2002)."

"The court [deciding A.H.] made clear that the central inquiry must be the best interests of the child." Smith v. Jones, 69 Mass. App. Ct. 400, 402-403 (2007).

Whether or not an eventual evidentiary hearing will establish that the level, amount and quality of the caretaking and parenting functions allegedly administered by the plaintiff, are sufficient by themselves to support the conclusion that the plaintiff is the child's de facto parent[4], based on the record

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[4] In her memorandum in support of the petition the petitioner specifies "material 'facts'. . . which [she] has directly controverted." These include, e.g., challenges to the assertion that the plaintiff took "leave" from work to care for the child; was responsible for finding a day care center; was responsible for the majority of the day care pick-up and drop-off; prepared the majority of the child's meals; directed the child's bed time routine; and was in plaintiff's exclusive care from August 24 to September 20, 2008. The petitioner's answer/motion to dismiss, Tab 9, reflects that what is controverted is generally not that the care was provided, but for how long. For example, she avers that the plaintiff took off only two weeks from work and was home for only three; the plaintiff visited the child care center with the defendant, who

before me I conclude that the petitioner is not likely to prevail on the merits of her claim. This is because the level of caretaking and parenting that was provided the child by the plaintiff that is not controverted, in combination with the parties' status as registered domestic partners under California law, support the judge's determination that it is in the child's best interests to retain the status quo ante, by providing ongoing contact between the plaintiff and the child including via a so-called web camera, and to permit the plaintiff to refer to herself in the child's presence as "mommy."

By establishing and remaining in a registered domestic partnership in California, the parties created a legal relationship under California law to which all of the rights and obligations of marriage attached. West's Ann. Cal. Fam. Code § 297.5.[5] Among those many rights and responsibilities are those of legal parentage. Id. Children born within a registered

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made the final choice; assisted with pick-ups and drop-offs and in the preparation of the child's food, but less than the majority of time; assisted with the child's night-time routine but only for two months. The petitioner agrees that she worked in Maine from August 24 to September 20, but avers that she worked a shorter week to be with and care for her daughter.

[5] This section provides:

"Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other sources of law, as are granted to and imposed upon spouses." West's Ann. Cal., Fam. Code § 297.5

domestic partnership are the children of both parties. Id.; West's Ann. Cal. Fam. Code §§ 7540, 7613.

Although the precise issue has not been determined, it appears likely that the parties' domestic partnership status will be recognized in Massachusetts as a legal spousal relationship akin to, while not the same as, the status of marriage. That our courts have determined that same sex partners are entitled to marry, does not preclude a determination that another State's laws cloaking same sex partners with all the attributes of a spousal relationship, while not extending to them the rights of marriage, can still be recognized by Massachusetts courts. Principles of comity apply here. "The notions of comity demanded by our Federal system require us to concede that the courts of our sister States, even when they reach a different decision than we would have, are endowed with an equal measure of wisdom and sympathy," such that "Massachusetts generally will recognize and enforce valid judgments rendered by a foreign court." Cote-Whitacre v. Dep't of Pub. Health, 446 Mass. 350, 369 (2006)(internal citations omitted).[6] Comity requires that

[6] I note that "[i]nterstate comity is 'neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.' Perkins v. Perkins, 225 Mass. 82, 86, 113 N.E. 841 (1916), quoting Hilton v. Guyot, 159 U.S. 113, 163, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895)." Cote-Whitacre v. Dep't of Pub. Health, 446

Massachusetts recognize a spousal relationship so long as it was valid where entered. See, e.g., id. at 359, 368. Principles of comity apply to the parties' spousal status regardless of whether they could have entered into the same spousal relationship in the Commonwealth. Cf. Commonwealth v. Lane, 113 Mass. 458 (1873) (validating out-of-state marriage by adulterer prohibited from remarrying in Massachusetts); Boltz v. Boltz, 325 Mass. 726 (1950) (validating a common-law out-of-state marriage that was prohibited in Massachusetts).

Second, extending comity will protect a couple who has undertaken to cloak their relationship with a legally recognized status, honors the settled expectations of the parties and protects the children born into the relationship. See, e.g., Inhabitants of Medway v. Inhabitants of Needham, 16 Mass. 157, 160-161 (1819) (extending comity to out-of-state marriages "to prevent the disastrous consequences to the issue of such marriages"); Richardson v. Richardson, 246 Mass. 353, 355 (1923) (general approach to validate marriages entered into in good faith and where recognition would "secure the existence and performance of the family relation").

Applying comity to the parties' legal spousal relationship fulfills both of the underlying purposes. Based on the foregoing, I conclude that the petitioner has not established a

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Mass. 350, 368 (2006).

likelihood of prevailing on the merits.

Contact between the plaintiff and the child, and permitted the plaintiff to continue to refer to herself as "mommy", will maintain the status quo pending a final determination. I see no basis to conclude that the petitioner will suffer irreparable harm as a consequence of the court-ordered arrangement. There is also nothing in the record to support a claim that the existing relationship between the plaintiff and the child is harmful to the child. To the extent public policy considerations are relevant, this consideration mitigates in favor of denying the request for a stay, as it would be in the public interest to support recognition of ongoing parental ties where the parties have entered into a legally cognizable spousal relationship.

The petition is DENIED.

By the Court (Duffly, J.),

Lena M. Wong
Assistant Clerk

Entered: March 16, 2009

IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

IN RE: THE MARRIAGE OF KIMBERLY JEAN BROWN AND JENNIFER SUE PEREZ

UPON THE PETITION OF	)	
KIMBERLY JEAN BROWN,	)	EQUITY NO. CDCD119660
Petitioner,	)	*AMENDED DECREE*
AND CONCERNING	)	
JENNIFER SUE PEREZ,	)	
Respondent.	)	

03 DEC 24 PM 2:45

The Court issues this Decree *sua sponte* on the 24th day of December, 2003. The Court having examined the pleadings filed herein, including the "Decree of Dissolution of Marriage" entered herein on November 14, 2003, and having knowledge that the parties entered into a civil union under the laws of the State of Vermont, and recognizing that subject matter jurisdiction can be raised at anytime, and upon further consideration and research, FINDS:

1. The Court has jurisdiction of the parties and has subject matter jurisdiction.
2. However, the Court does not have subject matter jurisdiction to grant a dissolution of marriage from a Vermont civil union under Chapter 598 of the Code of Iowa.
3. Pursuant to ***Metten vs. Benge***, 366 N.W.2d 577 (Iowa 1985) and the general equity powers of the Court, the Court does have equitable subject matter jurisdiction to declare the status and rights of these parties.
4. The "Decree of Dissolution of Marriage" entered herein on November 14, 2003, should be and hereby is vacated in part, and the following equitable relief is granted.

THE COURT, THEREFORE, GRANTS THE FOLLOWING EQUITABLE RELIEF:

1. The Vermont civil union is terminated and both parties are free of any obligations incident thereto.

2. The Petitioner and Respondent are declared to be single individuals with all the rights of an unmarried individual, including, but not limited to, the right to marry.

3. All of the terms, provisions and agreements set out and contained in Paragraphs 4 through 13, inclusive, of the Stipulation entered into by and between the parties, and filed of record in this matter are hereby ratified, confirmed and approved and made a part of this Decree to the same extent as though fully set out herein.

IT IS SO ORDERED.

JUDGE, Third Judicial District

cc:
Kimberly Jean Brown
Jennifer Sue Perez
Dennis R. Ringgenberg, attorney for Petitioner - hand-delivered 12.24.2003
Clerk of Supreme Court - FAXED COPY 12-24-2003 (1-515-242-6164)
- mailed 12.29.03

IN THE FAMILY COURT OF MARION COUNTY, WEST VIRGINIA

IN RE

Civil Action No 02-D-292

THE MARRIAGE of

MISTY GORMAN, and SHERRY GUMP
Petitioner Respondent

ORDER DISSOLVING CIVIL UNION

On the 19th day of December, 2002, came the petitioner, in person but without counsel, and came the respondent, in person but without counsel, before the undersigned Family Court Judge, whereupon the Court proceeded to hear the evidence offered by the parties and the representations of the parties in regards to the issues presented in the above-styled civil action Upon consideration of all of which and the pleadings heretofore filed in this action the Court makes the following findings of fact

I The petitioner and respondent celebrated civil union on the 3rd day of July, 2000, in Bennington, Vermont

II Petitioner filed complaint alleging irreconcilable differences on the 29th day of July, 2002 and that the respondent filed an answer on the 19th day of December, 2002 The Court specifically finds that irreconcilable differences have arisen between the petitioner and respondent

III Petitioner has resided in West Virginia for more than one year prior to the commencement of this action and the parties last lived together in Marion County, West Virginia

IV There were no children born to or adopted by either of the parties during this union

ENTERED 1-3-03

ORDER BOOK 37 55

V The petitioner and respondent represented to the Court that all matters of division and distribution of property had been resolved and that there were no issues concerning the settlement of property remaining between them

VI The petitioner and respondent represented to the Court that all issues except the issue of whether or not petitioner and respondent should be granted a divorce or a dissolution of the civil union have been resolved

VII Alimony was not requested by either party

VIII By the definition of Section 1201(3) of the Vermont Statutes, Annotated, Title 15, Chapter 23 a "civil union" means that two eligible persons have established a relationship pursuant to this chapter and may receive the benefits and protections and be subject to the responsibilities of spouses "

Under Section 1202(2), the parties to a Civil Union must be of the same sex

By definitions in Subsection 1201(4), a marriage is the legally recognized union of one man and one woman

IX Because Vermont law does not define a Civil Union as a marriage, the provisions of W Va Code Chapter 48, Article 2, Section 603 are not applicable to this action The parties are citizens of West Virginia in need of a judicial remedy to dissolve a legal relationship created by the laws of another state

WHEREFORE the Court concludes as a matter of law and ORDERS as follows

1 The Civil Union between petitioner and the respondent shall be dissolved upon the grounds of irreconcilable differences as specified in petitioner's complaint and respondent's answer It appears from the record in this action that the matter has matured for trial The parties have no further legal responsibility or relationship with each other

2 Respondent is restored to and may resume the use of her former name of Sherry Nicole Gump

3 For the purposes of appeal this order is a final order Any party aggrieved by this order may appeal either to the Circuit Court of Marion County or to the West Virginia Supreme Court of Appeals A petition to appeal to the Circuit Court may be filed by either party within thirty (30) days of the entry date of this order To appeal to the Supreme Court of Appeals directly both parties must file within fourteen (14) days of the entry date of this order a joint notice of intent to appeal and a waiver of right to appeal to the Circuit Court

4 The Clerk of this Court shall prepare certified copies of this order and deliver the same to the parties named in this action

ENTER 19 December 2002

JUDGE

A COPY TESTE:

CLERK OF THE CIRCUIT CLERK
MARION COUNTY, WEST VIRGINIA