

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2011-P-0069

TODD ELIA-WARNKEN,
Plaintiff-Appellant,

v.

RICHARD ELIA,
Defendant-Appellee,

ON RESERVATION AND REPORT
FROM THE WORCESTER PROBATE AND FAMILY COURT

AMICI CURIAE BRIEF OF VERMONT FAMILY LAW
AND ESTATE PLANNING ATTORNEYS

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STATEMENT OF INTEREST¹

The *Amici Curiae* joining this brief are Vermont Attorneys² with knowledge of a wide range of issues relating to family law and estate planning matters in Vermont. Having witnessed, first-hand, how the benefits, protections, and responsibilities of civil unions have manifested in a variety of legal and practical settings, the *Amici* are uniquely situated to bring to this Court's attention: (1) the substantial body of law in support of Appellee's position in this case; and (2) the significant negative practical ramifications if this Court were to rule in favor of Appellant. None of the *Amici*, nor their counsel, are connected to any party or any interest other than that of amicus in this case.

SUMMARY OF ARGUMENT

Vermont civil unions create a spousal relationship that is legally equivalent to marriage and that includes the responsibility to refrain from marrying anyone other than one's own civil union spouse. Thus,

¹ The *Amici* accept the Statement of Issues, Statement of the Case, and Statement of Facts as set forth in the brief of Appellee, Richard Elia, in *Elia-Warcken v. Elia*, No. 2011-P-0069.

² The *Amici* are described in Addendum A attached hereto.

under Vermont law, the marriage entered into by Appellant, Todd Elia-Warnken ("Mr. Warnken"), and Appellee, Richard Elia ("Mr. Elia") is void as a matter of law, given that Mr. Warnken was still joined in a Vermont civil union with Christopher Baker ("Mr. Baker") when Mr. Warnken married Mr. Elia.

If Mr. Warnken's marriage to Mr. Elia is found to be valid, there will exist two legal spouses (Mr. Baker and Mr. Elia), each of whom can simultaneously derive legal benefits and protections via his marital relationship with Mr. Warnken; it will also allow Mr. Warnken simultaneously to derive legal benefits and protections both from his civil union with Mr. Baker and from his marriage to Mr. Elia. Such a scenario would create legal confusion, uncertainty, and unfairness for Mr. Warnken and for both of his spouses, and is against Vermont public policy.

ARGUMENT

- I. VERMONT CIVIL UNIONS CREATE A SPOUSAL RELATIONSHIP THAT IS LEGALLY EQUIVALENT TO MARRIAGE AND INCLUDES THE RESPONSIBILITY TO REFRAIN FROM MARRYING ANYONE OTHER THAN ONE'S OWN CIVIL UNION SPOUSE.

A. Couples joined in a Vermont Civil Union are spouses for all Vermont state purposes and are afforded all of the same benefits, protections, and responsibilities as are granted to married couples.

Vermont civil unions were explicitly established for the specific purpose of: (1) creating a legal spousal relationship between two same-sex partners; and (2) providing civil union spouses with all of the same benefits, protections, and responsibilities under Vermont law as are afforded to married couples in Vermont. See *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 462, 912 A.2d 951, 968 (2006) ("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."); see also *Baker v. State*, 170 Vt. 194, 226, 744 A.2d 864, 887 (1999) ("We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law".).

The legislative intent of the Vermont General Assembly was codified by 2000 Vt. Acts & Resolves 91 (the "Vermont Civil Union Act") as follows:

This act shall be **construed broadly** in order to secure to eligible same-sex couples the option of a legal status with the benefits

and protections of civil marriage ...
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.

15 V.S.A. § 1204(a) (2011) (emphasis provided).

The Vermont Civil Union Act further requires that:

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 V.S.A. § 1204(b).

Thus, for all Vermont state law purposes, a
civil union spouse is a "marital" spouse - the civil
union creates a legal spousal relationship.

**B. Vermont civil unions entered into prior to
September 1, 2009 are still valid and in
effect, notwithstanding the enactment of
same-sex marriage in Vermont.**

On April 7, 2009, by legislative override of the
governor's veto, Vermont Senate Bill 115, the "Vermont
Same-sex Marriage Act," became law. See 2009 Vt. Acts
& Resolves 3. With the passage of the Vermont Same-sex
Marriage Act, same-sex couples were afforded the
following options for legal recognition of their
relationship: (1) same-sex couples who were not
already joined in civil union could no longer join in

civil union, but rather could join in civil marriage; (2) same-sex couples who were already joined in civil union could join in civil marriage without having to dissolve their civil union; and (3) same-sex couples who were already joined in civil union could do nothing, and their civil union would remain in full legal force and effect. See 2009 Vt. Acts & Resolves 3.

The above-mentioned choices were created by: (1) repealing the portions of the Civil Union Act dealing with issuance of civil union licenses (including 18 V.S.A. §§ 5160-5165); (2) amending the statutory definition of "marriage" from "the legally recognized union of one man and one woman" to "the legally recognized union of two people"; and (3) requiring that all "[t]erms relating to the marital relationship or familial relationships ... be construed consistently with [the revised definition of marriage] for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law, or any other source of civil law." See 2009 Vt. Acts & Resolves 3; see also 15 V.S.A. § 8 (2011).

The above-mentioned options were described in the Vermont General Assembly's official summary of the Same-sex Marriage Act:

When the act takes effect on September 1, 2009, same-sex couples will have access to the civil marriage laws but may no longer establish a civil union. Couples with existing civil unions will be permitted to marry one another. The civil marriage does not dissolve the civil union. Civil unions established before September 1, 2009 will continue to be recognized in Vermont, regardless of whether the couple chooses to marry.

<http://www.leg.state.vt.us/docs/2010/Acts/ACT003sum.htm> (official summary of 2009 Vt. Acts & Resolves 3 on Vermont General Assembly's official website).

Thus, civil unions entered into prior to September 1, 2009, are still valid and in effect, notwithstanding the enactment of same-sex marriage in Vermont. Consequently, the civil union entered into by Mr. Warnken and Mr. Baker in 2003 created a legal spousal relationship that is still valid and in effect under Vermont law.

C. Civil union spouses must refrain from marrying a person who is not his or her civil union spouse.

A civil union spouse who enters into a marriage with someone other than his or her civil union spouse

violates both civil and criminal law in Vermont. See 15 V.S.A. § 4 (2011) ("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."); see also 13 V.S.A. § 206 (2011) ("A person having a [spouse] living who marries another person ... shall be imprisoned not more than five years").

Mr. Warnken's marriage to Mr. Elia occurred two and one half years after Mr. Warnken's civil union to Mr. Baker, and before a civil union dissolution occurred. Consequently, under Vermont law, the marriage between Mr. Elia and Mr. Warnken is void as a matter of law.

II. LEGAL RECOGNITION OF MR. WARNKEN'S AND MR. ELIA'S MARRIAGE WOULD RESULT IN MR. WARNKEN HAVING TWO CONCURRENT SPOUSES, THEREBY: (1) ALLOWING EACH SPOUSE SIMULTANEOUSLY TO CLAIM THE NUMEROUS BENEFITS AND PROTECTIONS AFFORDED TO HIM VIA HIS MARITAL RELATIONSHIP WITH MR. WARNKEN; AND (2) ALLOWING MR. WARNKEN SIMULTANEOUSLY TO CLAIM THE NUMEROUS BENEFITS AND PROTECTIONS AFFORDED TO HIM VIA HIS MARITAL RELATIONSHIPS WITH BOTH SPOUSES.

In addition to the legal ramifications of allowing one person to have two or more legal spouses at once, there are many negative practical ramifications to such an allowance. Marriages and

civil unions are legal, binding contracts. Many rights and responsibilities flow from the spousal relationship that is created by a civil union or a marriage. Simultaneously recognizing both Mr. Warnken's first spouse (Mr. Baker) and his second spouse (Mr. Elia) would result in both Mr. Baker and Mr. Elia having all the same state-based rights and responsibilities that stem from being married to Mr. Warnken.

In other words, there would be two spouses (Mr. Baker and Mr. Elia) who could, among other things:

1. Inherit from Mr. Warnken under intestate succession (see 15 V.S.A. § 1204(e)(1));
2. Elect to override Mr. Warnken's will and instead claim a spousal share (see 15 V.S.A. § 1204(e)(1));
3. Make decisions regarding anatomical gifting of Mr. Warnken's bodily remains (see 15 V.S.A. § 1204(e)(19));
4. Elect homestead rights as Mr. Warnken's surviving spouse (see 15 V.S.A. § 1204(e)(16));
5. Apply for health coverage under Mr. Warnken's health plan (see 8 V.S.A. § 4063a (2011));

6. Assert parental rights regarding any children born during his marriage or civil union to Mr. Warnken (see 15 V.S.A. § 1204(f) and 15 V.S.A. § 308 (2011); see also *Miller-Jenkins*, 180 Vt. at 465, 912 A.2d at 970 (indicating that civil union status at the time of child's birth was the "foremost" indicator that the civil union spouse who had no biological ties to the child was the child's parent);
7. Participate in divorce or dissolution proceedings against Mr. Warnken and receive protections such as equitable property division, spousal maintenance, and child support judgments (see 15 V.S.A. §§ 1204(d) & 1206 (2011); see also *DeLeonardis v. Page*, 2010 VT 52, ¶12 n.1, ¶ 18, n. 1, 998 A.2d 1072, 1076 n. 1, 1078 (2011) (applying spousal maintenance divorce provisions to civilly unified same-sex spouses and referring to property divided in a civil union dissolution as a "marital estate");
8. Bring causes of action related to or dependent on their spousal relationship with Mr. Warnken, including an action for wrongful death, emotional distress, loss of consortium,

discrimination based on marital status, as well as actions under contracts reciting, related to, or dependent on spousal status (see 15 V.S.A. § 1204(e)(2));

9. Participate in emergency and non-emergency medical treatment decision-making for Mr. Warnken (see 15 V.S.A. § 1204(e)(10));
10. Be eligible for family leave benefits for Mr. Warnken's care (see 15 V.S.A. § 1204(e)(12)); and
11. Assert spousal privilege and testimonial immunity relating to Mr. Warnken (see 15 V.S.A. § 1204(e)(15)).

Conversely, Mr. Warnken will derive legal benefits and protections simultaneously from both his civil union with Mr. Baker and his marriage to Mr. Elia. In other words, Mr. Warnken could, among other things: 1) inherit from both Mr. Baker and Mr. Elia under intestate succession; (2) elect to override both Mr. Baker's and Mr. Elia's will and instead claim a spousal share; (3) make decisions regarding anatomical gifting of both Mr. Baker's and Mr. Elia's bodily remains; (4) elect homestead rights as both Mr. Baker's and Mr. Elia's surviving spouse; (5) apply for

health coverage under both Mr. Baker and Mr. Elia's health plan; (6) assert parental rights regarding any children born during his marriage or civil union to both Mr. Baker and Mr. Elia; (7) participate in divorce or dissolution proceedings against both Mr. Baker and Mr. Elia and receive protections such as equitable property division, spousal maintenance, and child support judgments in both proceedings; (8) bring causes of action related to or dependent on his spousal relationship with both Mr. Baker and Mr. Elia, including an action for wrongful death, emotional distress, loss of consortium, discrimination based on marital status, as well as actions under contracts reciting, related to, or dependent on spousal status; (9) participate in emergency and non-emergency medical treatment decision-making for both Mr. Baker and Mr. Elia; (10) be eligible for family leave benefits for both Mr. Baker's and Mr. Elia's care; and (11) assert spousal privilege and testimonial immunity relating to both Mr. Baker and Mr. Elia.

Administration of these benefits, protections, and responsibilities for multiple spouses of one person would be administratively confusing, unmanageable, and a tremendous waste of resources.

Furthermore, it would violate Vermont's public policy of recognizing a union between two people to the exclusion of all others, which was highlighted by the Vermont Supreme Court in *Baker* when it stated:

The State's interest in extending official recognition and legal protection to the professed commitment of **two** individuals to a lasting relationship of mutual affection is predicated on the belief that legal support of a **couple's** commitment provides stability for the individuals, their family, and the broader community.

Baker, 170 Vt. at 228-29, 744 A.2d at 889 (emphasis provided).

A legal recognition of Mr. Warnken's marriage to Mr. Elia, while Mr. Warnken's civil union with Mr. Baker is still in effect, would fly in the face of the above-mentioned Vermont public policy.


CONCLUSION

For the foregoing reasons the *Amici* urge the Court to find that Mr. Warnken's marriage to Mr. Elia is void as a matter of law, and order the lower court to grant Mr. Elia's Motion to Dismiss the divorce action.

Respectfully submitted,

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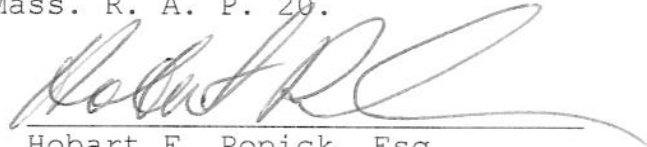


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BRIEF CERTIFICATION

I, Hobart F. Popick, pursuant to Mass. R. A. P. 16(k), hereby certify that this brief complies with all court rules governing appellate briefs including, but not limited to: Mass. R. A. P. 16(a)(6), Mass. R. A. P. 16(e); Mass. R. A. P. 16(f); Mass. R. A. P. 16(h); Mass. R. A. P. 18; and Mass. R. A. P. 20.



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ADDENDUM A

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