BAKER v. VERMONT

744 A.2D 864 (VT. 1999)

THE VERMONT SUPREME COURT TACKLES SAME-SEX MARRIAGE RIGHTS

> "[T]o acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity."
>
> CHIEF JUSTICE JEFFERY AMESTOY[1]

On December 20, 1999, the Vermont Supreme Court issued a groundbreaking ruling in the case of *Baker v. State*[2] granting same-sex couples the same benefits and privileges enjoyed by married opposite-sex couples under Vermont law.[3] The question presented in *Baker* was whether "the State of Vermont [could] exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married couples."[4] The court held that the State is "constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."[5]

Although the court held that same-sex couples are entitled to the same benefits as their opposite-sex counterparts, it left unanswered the specific form of relief they are due,[6] leaving the legislature with

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1. Baker v. State, 744 A.2d 864, 889 (Vt. 1999).

2. *Id.*

3. *See* VT. STAT. ANN. tit. 15, § 1 (1998) (defining the requirements and eligibility for marriage); *see also, e.g.*, VT. STAT. ANN. tit. 12, § 1605 (1998) (codifying the "marital privilege" rule); VT. STAT. ANN. tit. 14, § 10, 461, 465, 470 (providing for spouses' beneficial interests in each other's will).

4. *Baker*, 744 A.2d at 867.

5. *Id.*

6. *Id.* at 898 (Johnson, J., concurring in part and dissenting in part) (stating that the

the choice of amending the marriage statute or creating a parallel system of domestic partnerships.[7]

I. FACTS

The case began after three same-sex couples, all of whom enjoyed committed long-term relationships,[8] were denied marriage licenses after having applied at the offices of their respective town clerks.[9] In response, the plaintiffs brought suit for a declaratory judgment stating that the refusal to issue the marriage licenses violated Vermont's marriage statutes and the Vermont Constitution.[10] The trial court held "that the marriage statutes could not be construed to permit the issuance of a license to same-sex couples."[11] The trial court also ruled that the State had an interest in promoting "the link between procreation and child rearing."[12]

The plaintiffs challenged the denial of the marriage licenses on two grounds. First, plaintiffs argued that the denial violated the Vermont marriage statute.[13] Second, plaintiffs argued that the denial of the marriage licenses based on the applicants' sex violated the Common Benefits Clause of the Vermont Constitution.[14]

II. STATUTORY CLAIM

Although the plaintiffs conceded that the plain meaning of marriage under the relevant statutes is the union between a man and a woman,[15] they argued that "the underlying purpose of marriage is to protect and encourage the union of committed couples and that, absent an explicit legislative prohibition, the statutes should be interpreted broadly to include committed same-sex couples."[16] In

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court does not provide plaintiffs any relief, but instead "abdicates [its] constitutional duty to redress violations of constitutional rights" to the legislative branch).

7. *See id.* at 886 (stating that it is the prerogative of the legislature to create the means of addressing the constitutional mandate of the court).

8. *See id.* at 867 (stating that the couples had lived together for between four and twenty-five years). Two of the couples have raised children together. *Id.*

9. Baker v. State, 744 A.2d 864, 867 (Vt. 1999).

10. *See id.* at 868 (recounting the procedural history of the case).

11. *Id.*

12. *Id.*

13. *See id.* (discussing plaintiffs' statutory claim).

14. See VT. CONST. art. VII, § 1, which states: "That government is, or ought to be instituted for the common benefit, protection, and security of the people, nation or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community."

15. *See* Baker v. State, 744 A.2d 864, 868 (Vt. 1999).

16. *Id.*

making this argument, the plaintiffs relied on *In re B.L.V.B.*,[17] where the Vermont Supreme Court held that a woman could adopt her same-sex partner's children without terminating the natural mother's parental rights.[18]

B.L.V.B. involved an adoption statute which stated that an adoption deprived natural parents of their legal rights.[19] However, the statute contained a narrow exception for cases in which the adoption was by the "spouse" of the natural parent.[20] The court interpreted "spouse" to include the same-sex partner of the natural mother so as not to defeat the purpose of the statute, which was to safeguard the child.[21]

The court rejected plaintiffs' argument and distinguished *B.L.V.B.*, noting that the marriage statutes did not include a narrow exception that required a broad reading in order not to defeat the legislative purpose.[22] Instead, the court found clear evidence that "marriage under [Vermont's] statutory scheme consists of a union between a man and a woman."[23] The court thus rejected the plaintiffs' statutory claim.

III. CONSTITUTIONAL CLAIM

The plaintiffs also claimed that the law's refusal to allow them marriage licenses violated their "right to the common benefit and protection[24] of the law guaranteed by [the Common Benefits Clause] of the Vermont Constitution."[25] Justice Amestoy summarized Vermont common benefits jurisprudence, stating "case law has

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17. 628 A.2d 1271 (Vt. 1993).

18. *Id.* at 1272-73.

19. *See id.*

20. *See* VT. STAT. ANN. tit. 15, § 448 (1998).

21. *See B.L.V.B.*, 628 A.2d at 1273 (stating that "to apply the literal language of the statute in these circumstances would defeat the statutory purpose and reach an absurd result") (citations omitted).

22. *See* Baker v. State, 744 A.2d 864, 869 (Vt. 1999) ("We are not dealing in this case with a narrow statutory exception requiring a broader reading than its literal words would permit in order to avoid a result plainly at odds with the legislative purpose.").

23. *See id.*

24. Among the rights and protections that the plaintiffs were denied, the court mentioned access to spouse's medical, life and disability insurance; hospital visitation and medical decision-making privileges; spousal support, intestate succession, and homestead protections; marital evidentiary privilege; and division of property upon divorce. *See id.* at 883-84. In total, 300 Vermont statutes govern the burdens and benefits of marriage. *See Panel Shows Diverse Views on Same-Sex Issue*, BURLINGTON FREE PRESS (visited Mar. 23, 2000) <http://www.burlingtonfreepress.com/newstory36.htm> (describing some of the benefits denied same-sex couples under Vermont law).

25. *See Baker*, 774 A.2d at 869-70; *see also supra* note 14 (setting forth the text of the Common Benefits Clause).

consistently demanded in practice that statutory exclusions from publicly-conferred benefits and protections must be 'premised on an appropriate and overriding interest.'"[26] The test adopted by the majority in *Baker* is "whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose."[27] This is essentially a balancing test, whereby the state's interest in its stated goals is weighed against the excluded group's interest in the "common benefit, protection and security of the people."[28] Although the Common Benefits Clause is similar to the Federal Equal Protection Clause of the Fourteenth Amendment in its purpose, in that both prohibit unequal treatment by the government, analysis under the Common Benefits Clause of an exclusion from a publicly conferred benefit does not, according to the majority opinion of *Baker,* implicate multiple tiers of review.[29] In fact, the court instructed that instead of determining whether the excluded class is non-suspect, suspect or quasi-suspect, the court must merely delineate an excluded class, for purposes of review.[30]

The court outlined the analysis for determining whether a statutory exclusion violates the Common Benefits Clause. First, the court must delineate the class.[31] Second, the court must identify the state's "purpose in drawing the classification, and whether the nature of the classification is reasonably necessary to accomplish the state's claimed objectives."[32] Finally, the court must decide whether the "omission of

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26. *See Baker,* 774 A.2d at 873 (citing State v. Ludlow Supermarkets, Inc., 448 A.2d 791, 795 (Vt. 1982)).

27. *Id.* at 878-79.

28. *See id.* at 871 (citing *Ludlow Supermarkets, Inc.,* 448 A.2d at 795).

29. *See Baker,* 744 A.2d at 876 (Amestoy, J.) (stating that the text and history of the Common Benefits Clause yield "no rigid categories or formulas of analysis"). The court's historical analysis of the Common Benefits Clause illustrates that, unlike the drafters of the Fourteenth Amendment of the U.S. Constitution, the framers of the Clause were striving to secure "equal access to public benefits and protections for the community as a whole" and the prevention of governmental and political favoritism, not to prevent discrimination on account of racial or class distinctions. *Id.* at 876. *But see id.* at 890 (Dooley, J., concurring) (arguing that the analysis adopted by the majority opinion was a departure from the traditional two-tiered approach employed by the Vermont Supreme Court in past challenges to statutory schemes under the Common Benefits Clause, where classifications involving civil rights were given higher level scrutiny than mere economic classifications). This two-tiered scheme is illustrated in the test employed by the Court in the recent case *Brigham v. State:* "Where a statutory scheme affects fundamental constitutional rights or involves suspect classifications, both federal and state decisions have recognized that proper equal protection analysis necessitates a more searching scrutiny." *Id.* at 890 (Dooley, J., concurring) (quoting Brigham v. State, 692 A.2d 384, 396 (Vt. 1997)).

30. *See id.* at 878 (discussing the court's standard of review).

31. *Id.*

32. *Id.*

a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose."[33]

Applying the test set forth above, the court first identified the excluded class as "anyone who wishes to marry someone of the same sex."[34] The court next examined whether the government's main stated purpose—"furthering the link between procreation and child rearing"—represented a valid public interest reasonably furthered by the exclusion of same-sex couples from receiving the benefits flowing from the institution of marriage.[35] The court found that if this truly was the purpose of the exclusion, it was significantly under-inclusive as there are many opposite-sex couples who marry for reasons other than to have children, or indeed cannot have children.[36] Ultimately, the court dismissed the government's argument by pointing out that not only do same-sex couples raise children, but that the state explicitly allows same-sex couples to adopt children.[37] In light of these facts, the court determined that the statutory exclusion operated to treat similarly situated persons differently.[38] The court futher noted that most of the couples who use assisted-reproductive technology and other nontraditional methods of conception are infertile opposite-sex couples.[39] Therefore, the court dismissed the State's argument that the statutory exclusion of same-sex couples from the marriage laws because they cannot have children on their own furthers a "perception of the link between procreation and child rearing," and to discard such a notion would diminish mother's and father's status vis á vis procreation and child rearing.[40] Ultimately, the court found that excluding same-sex couples from the benefits of marriage furthered no valid public interest.[41]

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33. *Id.* at 878-79. The court explained that factors considered in making this determination include: "(1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community . . . [furthers] the government's goals; and (3) whether the classification is significantly under-inclusive or over-inclusive." *Id.* at 879.

34. *See* Baker v. State, 744 A.2d 864, 880 (Vt. 1999).

35. *See id.* at 881.

36. *See id.* (noting that the state extends the benefits of marriage to opposite-sex couples without imposing the "governmental goal").

37. *See id.* at 882 (finding that the marital exclusion exposes same-sex couples' children to the risks the state is trying to protect).

38. *See id.*

39. *See* Baker v. State, 744 A.2d 864, 880 (Vt. 1999).

40. *Id.*

41. *See id.* at 884.

Finally, the court tackled step three, which addressed whether the "omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose."[42] In light of the significance of the rights and benefits flowing from marriage,[43] the determination that the exclusion of members of the community furthers the government's goals,[44] and the significant under-inclusiveness of the classification,[45] the court found that the exclusion did not bear reasonable and just relation to the stated governmental purpose.[46] The court, therefore, found the statutory exclusion to be a violation of the principles of the Common Benefits Clause of the Vermont Constitution.[47]

IV. THE VERMONT LEGISLATURE'S RESPONSE

The Vermont House and Senate have undertaken the challenge of complying with the court's holding in *Baker* with admirable energy and sincerity.[48] After taking into account the views of the public through hearings,[49] nonbinding votes held on Town Meeting Day,[50] discussions with constituents,[51] and their own personal beliefs,[52] the members of the House decided that out of the alternatives presented,[53] the best option for satisfying the Court's mandate was

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42. *Id.* at 878-79.

43. *Id.* at 884.

44. *See* Baker v. State, 744 A.2d 864, 884-86 (Vt. 1999).

45. *See supra* note 34 and accompanying discussion.

46. *See* Baker v. State, 744 A.2d 864, 884 (Vt. 2000).

47. *See id.* at 889.

48. *See* Ross Sneyd, *Committee to Consider Reciprocal Beneficiaries*, ASSOC. PRESS NEWSWIRE, Mar. 1, 2000 (noting how the legislature is taking pains to address legitimate good-faith concerns).

49. *See* Ross Sneyd, *Gay Marriage to Top Gay Agenda Again*, ASSOC. PRESS NEWSWIRE, Jan. 30, 2000 (reporting on the House and Senate Judiciary Committees' hearings).

50. *See* Mike Eckel, *Stockbridge Has Town Meeting*, ASSOC. PRESS NEWSWIRE, Mar. 7, 2000 (describing how the nonbinding votes will serve as guidance for state lawmakers trying to craft legislation on same-sex unions).

51. *See* Sneyd, *supra* note 48 (quoting members of the legislature on the opinions of their constituents).

52. *See generally* Elizabeth Mehren, *Vermont Offers Gay Couples Benefits but Not Marriage*, SALT LAKE TRIB., Feb. 14, 2000 at A6 (discussing the views of various members of the Vermont legislature).

53. *See* Sneyd, *supra* note 49 (noting that the alternative was to amend existing marriage statutes to allow same-sex couples to marry).

through a system of domestic partnerships.[54] The Civil Union Bill[55] passed after lengthy debate.[56]

Although media reports stated that the Senate would basically sign off on the bill as passed by the House,[57] the Senate Judiciary Committee plans to hold further hearings on the matter.[58] Ultimately, the Committee will revisit the option of a constitutional amendment that would define "marriage" as a union between a man and a woman.[59]

V. CONCLUSION

Regardless of the final outcome of the legislative action, the Vermont Supreme Court's holding in *Baker* is a truly fascinating development in the growing debate[60] concerning whether same-sex couples should be entitled to the same marital benefits that opposite-sex couples enjoy.

SAM CHARRON

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54. *See* Sneyd, *supra* note 48.

55. *See* 1999 Vermont House Bill No. 847, Adjourned Session (Vt. 1999-2000).

56. *See House Passes Same-Sex Rights Bill* (visited Mar. 21, 2000) <http://www.weax.com/now/story/0,1597,172637-390,00.shtml> (reporting that "[a] bill creating civil unions passed on a 79 to 68 vote after a full day of passionate debate on the House Floor").

57. *See, e.g.*, Steve Marshall, *News*, USA TODAY, Mar. 17, 2000, at 1A.

58. *See id.*

59. *See Historian Advises Caution When Considering Constitutional Amendment*, ASSOC. PRESS NEWSWIRE, Mar. 24, 2000.

60. *Compare* HAW. REV. STAT. § 323-2 (1999) (extending the rights of a spouse to reciprocal beneficiaries — as defined in HAW. REV. STAT. § 572C-4 — to include same-sex couples who meet certain requirements in matters of hospital visitation and health care decisions), *with* ALASKA STAT. § 25.05.013 (Michie 1999) (withholding marriage benefits from same-sex couples).