

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONAL PRIDE AT WORK, INC., a
non-profit organization on behalf of its
Michigan Members, et al.

Plaintiffs-Appellants,

-vs-

JENNIFER GRANHOLM, in her official
capacity, as Governor of the STATE OF
MICHIGAN, CITY OF KALAMAZOO,
a municipal corporation,

Defendants,

and

MICHAEL A. COX, in his official capacity as
Attorney General for the STATE OF MICHIGAN,

Intervening Defendant-Appellee.

Supreme Court No. 133554

Court of Appeals No. 265870

Ingham County Circuit Court
No. 05:368-CZ

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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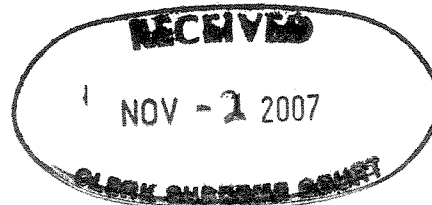


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A. The Only Agreement Recognized As A Marriage

In this case in which the Court is called upon to decide the meaning of the forty-two words contained in the 2004 Marriage Amendment to the Michigan Constitution, plaintiffs have argued at considerable length in their original brief that the Court of Appeals and the Attorney General completely failed to give effect to two critical words limiting the scope of that amendment. As plaintiffs pointed out, the text of the amendment provides that the union between one man and one woman will be the only relationship recognized *as a* marriage or *as a* union similar to a marriage. Plaintiffs further pointed out that the public employers involved in this case, in extending employment related benefits to their employees' same-sex partners, simply do not recognize that relationship *as a* marriage or *as a* union similar to a marriage.

Ironically, the brief which Mr. Cox has filed in this case serves to affirm the substance of the plaintiffs' contentions. Mr. Cox's brief acknowledges the potency of plaintiffs' argument by repeatedly advocating a reading of the amendment which completely omits the three critical words - "as a marriage" - which formed the basis for the plaintiffs' argument.

From the very first page of his brief, Mr. Cox struggles to reformulate the text of art 1, §25. Mr. Cox asserts on page 1 of his brief: "The Amendment , art 1, § 25, states that the union of one man and one woman in marriage will be the only agreement recognized for any purpose." Cox Brief, p. 1. This is an obvious misstatement; the amendment does *not* provide that the union of one man and one woman, "will be the only agreement recognized for any purpose."¹ Rather, the amendment states explicitly that such a union will be the only agreement recognized *as a marriage*.

¹One is certainly left to wonder as to the future of all of contract law if Mr. Cox's indefensibly broad reformulation of art 1, §25 were, in fact, accurate.

Again, on the very first page of his brief, Mr. Cox summarizes his position as to what the marriage amendment precludes. He states that the amendment prohibits: “(1) the recognition of (2) a union similar to marriage (3) for any purpose.” But again, the unequivocal text of the amendment does not prohibit the recognition of a union similar to a marriage for any purpose; it prevents the recognition of such a union *as a marriage* or as a union similar to a marriage.

On the first page of his brief, Mr. Cox further asserts that the public employers involved herein have violated art 1, §25 because, “they ‘recognize’ these unions by formally acknowledging their status for the purposes of establishing a legal right to health benefits.” Yet again, this assertion fundamentally misstates the amendment’s reach. The public employers involved in this case do not violate art 1, §25 by “acknowledging the status” of a same sex partnership. They violate the amendment only when they acknowledge that partnership *as a marriage* or by acknowledging that relationship as something similar to a marriage. But, the public employers who employ the individual plaintiffs named in this case are not called upon to recognize² the relationship that exists between employees and their same-sex partners as a marriage.

The three statements selected above from the first page of Mr. Cox’s brief are repeated throughout that document. Cox Brief, pp. 13-19³. Indeed, every formulation of art 1, §25 offered

²While plaintiffs have serious disagreements with much of what Mr. Cox argues in his brief before this Court, plaintiffs would accept the dictionary definition of “recognize” provided in Mr. Cox’s brief. According to Mr. Cox, that word means “to acknowledge the legal validity of something.” Cox Brief, p. 17. What Mr. Cox overlooks, however, is that the University of Michigan, Michigan State University and the other public employers who provide the contractual benefits at issue herein do not and cannot “acknowledge the legal validity” of such a relationship.

³ See also pages 23, 25, 27 and 31 of Mr. Cox’s brief, where the arguments all flow from a reworded amendment, stripped it of its actual language, in an attempt to persuade this Court that “the amendment requires both that marriage be the only agreement recognized for any purpose and that similar unions not be recognized for any purpose.” Cox Brief p. 31. Mr. Cox

by Mr. Cox in his brief to this Court represents a reading of the amendment in which the words “recognize *as a marriage*” have been written out of the amendment’s text.

Mr. Cox’s need to consistently reformulate the text of art 1, §25 demonstrates one essential aspect of this case: art 1, §25 must be judicially rewritten if the Court of Appeals’ decision in this case is to be affirmed. This Court can come to the conclusion that the contractual benefits at issue here are prohibited by art 1, §25 only if that amendment can be judicially modified to prohibit *any* “recognition” of any same sex relationship. But, the amendment was not written in such a way as to prohibit the states’ recognition of a same sex relationship. It was written only to preclude the recognition of such a relationship *as a marriage*.

Having rewritten the amendment to remove the words “as a” marriage, the argument that flows from this rewording is seriously flawed. In his brief Mr. Cox places enormous emphasis on the fact that several of the public employers involved herein extend these contractual benefits only after an employee and his/her same-sex partner execute a statement attesting to the existence of their relationship. But, while these employers require a statement attesting to the existence of this relationship, these employers do not intrude on the prohibitions contained in the amendment because neither the attestation of the existence of the same sex *relationship*, nor the employers use of the attestation as a criteria for benefits constitutes recognition of that relationship as a marriage or as a union similar to a marriage.⁴

can only reach this expanded interpretation of the constitutional amendment by deleting the actual words “the only agreement *recognized as a marriage*. “

⁴Notably absent from Mr. Cox’s brief is any discussion of the fact that private employers offering same-sex benefits require similar documentation as to the existence of the *relationship* existing between their employees and their same-sex partners. App. pgs. 98c-101c. But, Mr. Cox cannot seriously suggest that, by extending contractual benefits in this way, General Motors,

Mr. Cox also anchors his argument that same-sex partnership benefits are treated as the “equivalent” of a marital benefits, on a flawed factual premise. Contrary to Mr. Cox’s assertion that the public employers have “expanded this right from one that was previously reserved to spouses” to cover only same sex domestic partners (Cox Brief, p. 18), these benefits extend to other designated beneficiaries. Mr. Cox’s entire argument that same sex partners are being treated as unions similar to marriage unions, is based on the factually inaccurate premise that only same sex partners receive this benefit and that “aged parents or invalid siblings” cannot. In fact, Wayne State University allows for just such designations by providing benefits for sponsored adult dependants and the University of Michigan’s program extends health benefits to the parents of faculty as well as the survivors of deceased eligible faculty and staff.⁵

Mr. Cox’s argument that same sex benefits represent an “extension” of a marital benefit is erroneous in another important respect. Healthcare benefits do not represent a benefit which flows

Ford or Chrysler is recognizing the same-sex relationship of one of its employees *as a* marriage or *as a* union similar to a marriage. Defendant attempts to make a public/private distinction by asserting that “only the government legally defines marriage; private organizations cannot do so.” p. 31, n 31. This point proves more than intended. The amendment defines and restricts marriage to a union between a man and a woman and prohibits the government from expanding the definition or recognition of marriage to same sex unions. The provision of employment benefits to domestic partners in no way contravenes this limitation on governments authority to “legally defin[e] marriage.”.

⁵The benefits provided by the University of Michigan to the surviving spouse of one of its employees deserve particular attention here. It cannot be suggested that these benefits are extended on the basis of a marital relationship since that marriage no longer exists. But, these benefits are offered on the basis of the *relationship* that existed between a former University of Michigan employee and his/her surviving spouse. This distinction applies as well to the same-sex benefits involved here. The University of Michigan, in extending contractual benefits to the same-sex partners of their employees, may recognize the existence of a same sex relationship, but in providing benefits the University of Michigan need not and does not recognize that relationship *as a* marriage or as something similar to a marriage.

from the status of being married. As the circuit court correctly observed in its opinion granting summary disposition to the plaintiffs, “[a]n individual does not receive healthcare benefits from his/her spouse as a matter of legal right upon being married.” Apx. pg. 76a.

Thus, marriage alone does not entitle a spouse to benefits. To obtain these benefits a person must be married to someone whose employer (1) maintains a benefit program (2) which extends such benefits to a spouse. While many employers who have developed such benefit programs, presumably for business reasons, have decided to offer these benefits to persons in a close relationship to the employee, *e.g.*, spouses and children, the simple fact is that they are not compelled to do so. While spouses represent an obvious close relationship to be included in most if not all of these benefit programs, this fact does not make the extension of benefits to spouses a “marital” benefit.

Mr. Cox, therefore, is also fundamentally wrong in suggesting that the same-sex benefits involved herein violate art 1, §25 because “they establish a legal right for same-sex domestic partners to receive health benefits *in the same way spouses receive them.*” Cox Brief, p. 17 (emphasis added). It would be just as logical to say that same-sex partners receive health benefits under the programs at issue in this case *in the same way as the employee’s children receive them.* But, recovering benefits in the same manner as an employee’s children does not somehow violate art 1, §25.⁶

By eliminating the two critical words from the amendment, Mr. Cox’s argument reduces to a truism. Mr. Cox announces that where a public employer provides benefits to a spouse, “the spouse gets this coverage only because of the marriage based on the legal contract or policy.” Cox Brief, p.

⁶Similarly, it would be just as logical to say that the parent of a member of the University of Michigan’s staff who can be covered by its benefit program, “receive[s] health care in the same way as spouses receive them.” Cox Brief, p. 17. No one would seriously suggest that the extension of health coverage to an employee’s parent would violate the terms of art 1, §25.

19. This is true. But it is also true that, in extending benefits to an employee's children, the children get this coverage on the basis of their status as children of the employee. Similarly, in extending benefits to a same-sex partner of one of its employees, an employer unquestionably extends this coverage on the basis of the same-sex relationship. But again, recognition of that relationship does not run afoul of art 1, §25. It is only the recognition of that relationship *as a marriage* which the amendment prohibits.

B. Mr. Cox's "Special Consideration" Argument

In his brief to this Court, Mr. Cox has introduced a new argument. He asserts that the extension of benefits to same-sex partners singles out these non-spouses for "special consideration." Cox Brief, pp. 19-21. Mr. Cox suggests that there is something improper with this "special treatment" inasmuch as the same treatment is not accorded to other non spouses, such as a friend of the opposite sex.

This argument represents an entirely irrelevant public policy argument as to which relationships an employer should choose to encompass in its fringe benefit coverage. Alternatively, Mr. Cox's "special treatment" argument represents an equal protection argument which he does not have standing to assert and one which he has not preserved by raising it in the lower courts. But, there is one illuminating aspect of Mr. Cox's argument.

In making his "special consideration" argument, Mr. Cox appears to promote the view that the employment benefits involved in this case can and perhaps should be extended to partners of the opposite sex. This aspect of Mr. Cox's position should be contrasted with the remainder of the arguments in his brief. If an employer were to do what Mr. Cox proposes and extend benefits to an opposite-sex partner, it would certainly be true that these opposite-sex parties would "receive health

benefits in the same way spouses receive them.” Cox Brief, p. 17. Yet, while obtaining benefits “in the same way spouses receive them”, in Mr. Cox’s view, renders these benefits unconstitutional where they are provided to same-sex partners, they are apparently constitutional for opposite-sex couples. Mr. Cox’s argument regarding the “special considerations” being given same-sex partners on pages 19 to 21 of his brief only serves to completely undermine the assertions that he makes on pages 17 to 19 of his brief in which he contends that the providing of benefits to a same-sex partner represents the “equivalent” of a marital benefit.

C. Union Similar To A Marriage

Mr. Cox contends that when a public employer offers contractual benefits to an employee’s same-sex partner, that employer is providing benefits to a relationship which is “similar to” a marriage. To reach that conclusion, he selects only a portion of the definition of “similar” contained in Miriam Webster’s online dictionary. Specifically, he asserts that Miriam Webster defines “similar” simply as “having characteristics in common.” Cox Brief, p. 21. This representation of Miriam Webster’s definition of “similar” is misleading. In fact, Miriam Webster’s complete definition of “similar” is “having characteristics in common: *strictly comparable*” and “alike in *substance or essentials*.” See Miriam-Webster Online Dictionary, www.m-w.com (emphasis added).

Therefore, contrary to Mr. Cox’s argument, the fact that there may be some overlapping characteristics between the eligibility requirements for domestic partnership benefits and marriage does not, by itself, mean that the marriage is “similar” to the same-sex relationships that form the basis of employment benefits. Rather, the two relationships must be “strictly comparable” and alike “in substance or essentials”.

As plaintiffs have discussed at some length in their original brief, Mr. Cox’s suggestion that

marriage and the same-sex relationships necessary for employment benefits are similar ignores the fact that none of the myriad substantive benefits and legal responsibilities that flow from marriage apply to same-sex partners. Plaintiffs' Brief, pp. 36-47. Thus to call this relationship, which possesses *none* of the legal attributes of marriage, as one that is similar to a marriage manages to trivialize, rather than elevate, the institution of marriage. Mr. Cox responds to none of these arguments.

Instead, he claims that the same-sex relationships which form the basis for the employment benefits at issue here are "similar" to marriage by reference to what he refers to as "the seven provisions of law that provide the definition of marriage in Michigan, MCL 551.1 through MCL 551.9." Cox Brief, p. 22. Mr. Cox's fixation of these seven statutes is far too narrow in determining whether a same-sex relationship may be deemed "similar to" marriage because it ignores the hundreds of other statutes that describe the substantive attributes, legal rights and responsibilities of marriage.

Yet, even if one were to confine the analysis to the seven statutes which, according to Mr. Cox, provide the "definition" of marriage in Michigan, it is obvious that a same-sex relationship cannot be characterized as a union similar to marriage. In fact, four of the seven statutes on which Mr. Cox relies state without equivocation that there can be no legal similarity between a same-sex relationship and a marriage. MCL 551.1, the first of the statutes that Mr. Cox points to in support of his assertion that a same-sex partnership is similar to a marriage, specifies that, "marriage is inherently a unique relationship between a man and a woman." The next section, MCL 551.2, describes marriage as "a civil contract between a man and a woman." MCL 551.3 further emphasizes that a man cannot marry another man and MCL 551.4 provides a similar prohibition against the marriage of two women.

Moreover, Mr. Cox, like the Court of Appeals, offers only five examples as to how same-sex partnerships are comparable to the statutes. Cox Brief, p. 22. These five examples, which are limited to comparing eligibility criteria for entering into a marriage and domestic partnerships, do not address the scope and breadth of marriages' benefits, rights and responsibilities and simply cannot justify a conclusion that they are similar marital unions. The fact that there are some overlapping eligibility criteria for the two relationships does not mean that they are "strictly comparable" or "alike in substance or essentials." Miriam-Webster Online Dictionary, www.m-w.com.

When enacting the Marriage Amendment, the "similar unions" that Michigan voters did not want the state to recognize were the civil unions that existed in Vermont and Canada. These legally sanctioned unions are strictly comparable and alike in substance to marriage because they provided the benefits, rights and responsibilities of marriage conferred by the state.⁷ As the plain language of the Marriage Amendment reflects, the electorate intended to preserve the institution of marriages and similar unions to heterosexual relationships. It did not intend to strip individuals of health insurance employment benefits.

D. For Any Purpose

Mr. Cox mistakenly contends that if this Court reads "similar unions" to refer to relationships such as Vermont's civil unions, it would somehow nullify the significance of the phrase "for any purpose." Cox Brief, p. 26. Under the plain language of the Marriage Amendment, same-sex agreements "recognized as a marriage or similar union" cannot be granted legal status as a marriage

⁷See <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html#6> ("Parties to a civil union are given all the same benefits, protections and responsibilities under Vermont law, whether they derive from statute, administrative, court rule, policy, common law or any other source of civil law, as are granted spouses in a marriage.").

or similar union “for any purpose.” Therefore, if the Michigan Legislature, for example, enacted a law recognizing same- sex civil unions, similar to the law in Vermont, it would violate the Marriage Amendment because a such a union would be a similar union to a marriage and could not be recognized for any purpose – whether the purpose be for inheritance, tax exemptions or any of the multitude of statutory rights and responsibilities accorded those who are married. However, as the trial court properly recognized, the phrase “for any purpose” has no application unless there first exists state action *recognizing the legal validity of a same-sex relationship as a marriage or similar union*. Apx pg 81a. Since public employers are not recognizing a same sex relationship “as a marriage or similar union” by conferring health insurance as an employment benefit, the phrase “for any purpose” simply does not apply.


RELIEF REQUESTED

Based on the foregoing, plaintiffs-appellants, National Pride At Work, Inc. *et al*, respectfully request that this Court reverse the Court of Appeals’ February 1, 2007 opinion and reinstate the circuit court’s order granting summary disposition to the plaintiffs.

Respectfully submitted,



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