

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF Section 53 of the *Supreme Court Act*, R.S.C. 1985, c. S-26;

AND IN THE MATTER OF a Reference by the Governor in Council concerning the *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes*, as set out in Order in Council P.C. 2003-1055, dated the 16th day of July 2003.

AFFIDAVIT OF NANCY G. MAXWELL

I, Nancy G. Maxwell, of the City of Topeka, County of Shawnee, State of Kansas, in the United States of America, MAKE OATH AND SAY AS FOLLOWS:

1. I, Nancy G. Maxwell, am Professor of Law at Washburn University School of Law in Topeka, Kansas, USA. I specialize in Family Law, and I also teach Comparative U.S.-European Family Law, Criminal Law and Alternative Dispute Resolution. In addition I am a faculty member of the Washburn University School of Law Children and Family Law Center and I am the Director of the Washburn University School of Law Summer Study Abroad Program located at the University of Utrecht, the Netherlands.

2. I have a Bachelor of Arts (Cum Laude) degree (1972) and a Juris Doctor (With Distinction) degree (1975) from the University of North Dakota and an LL.M. degree (1979) from Harvard University.

3. I practiced law in North Dakota from 1975 until 1978, and was a Visiting Professor at the University of North Dakota School of Law in 1977-78, prior to joining the faculty of law at Washburn University School of Law in August of 1979. I am licensed to practice law before state and federal courts in North Dakota and the United States Court of Appeals for the Eighth Circuit.

4. I have been a member of the Family Law Advisory Committee of the Kansas Judicial Council since 1982. This committee studies, drafts and introduces family law legislation to the Kansas Legislature. In that capacity I have been the principal drafter of various family law statutes.

5. For the last 6 years I have been involved, on an international level, researching, publishing and presenting scholarly papers, comparing the development of the United States and the Netherlands concerning the issue of opening marriage and co-parent adoption to same-gender couples. Some of the recent articles that I have published that are relevant to these issues involving same-gender couples are as follows:

Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison, 18 ARIZ. J. INT'L. & COMP L. 141 (2001). An earlier version of this article was published in 4:3 *Electronic J. Comp. L.* (November 2000), available at <http://law.kub.nl/ejcl/43/abs43-1.html>

Reflections on Frieda van Vliet's "Side Exit to No Man's Land?": Taking the Side Exit in the United States, NEMESIS, 2001, nr. 1, p. 14, available at <http://washburnlaw.edu/faculty/maxwell-n-pub.htm>

Legal Protection for All the Children: Dutch-American Comparison of Lesbian and Gay Parent Adoptions, 17 ARIZ. J. INT'L & COMP. L. 309 (2000), (with Astrid Mattijssen and Charlene Smith). An earlier version of this article was published in 3:1 ELECTRONIC J. COMP. L. (August 1999), available at <http://law.kub.nl/ejcl>

6. Some of my presentations concerning the issues of same-gender couples include the following:

Scholarly Presentations (2001-04)

- 6/02 “Legal Recognition of Children’s Relationships with Their Non-Biological Parents in Same-Gender Relationships: All-or-Nothing or Something in Between?” in the Adoption by Same-Sex Partners Program at Marriage, Partnerships and Parenting in the 21st Century, Turin, Italy (with Caroline Forder, Professor of European Family Law, Faculty of Law, University of Maastricht, The Netherlands)
- 10/01 “Opening Adoption to Same-Gender Couples: A Netherlands-United States Comparison” in the International Adoption Program of the International Bar Association Annual Meeting, Cancun, Mexico
- 10/01 “Opening Civil Marriage and Adoption to Same-Gender Couples: A Netherlands-United States Comparison” in the European Laws Update Workshop, National Lesbian and Gay Law Association Lavender Law Conference, Dallas, TX
- 4/01 “Opening Marriage to Same-Gender Couples: A Netherlands-United States Comparison” for the Faculty Scholarship Forum, Washburn University School of Law, Topeka, KS
- 3/01 “Same Gender Civil Unions/Marriages–A Comparative Analysis” and “Same-Gender Co-Parent Adoptions” for Representing the Invisible CLE, Washburn University School of Law, Topeka, KS

Other Presentations (1999-2004)

- 2/04 “Opening Marriage in the U.S. and the Netherlands: What are the Differences in Approaches?” Women’s Legal Forum, Washburn University School of Law, Topeka, KS
- 4/02 “Rainbow Families” for the Big 12 Gay Conference, University of Kansas, Lawrence, KS
- 11/00 “Working with Oppressed Minorities–the Gay, Lesbian, Bi-Sexual, Transgendered Client” for the Master’s of Social Work Human Behavior class, Washburn University, Topeka, KS
- 3/00 “Working with Clients Who are Sexual Minorities” for the Bachelor of Social Work Human Behavior class, Washburn University, Topeka, KS

- 2/00 “Gay and Lesbian-Headed Households–A Look at an American Family” for the Adult Sunday School Class, Our Savior’s Lutheran Church, Topeka, KS
- 10/99 “Recent Legal Developments Affecting Gay and Lesbian Relationships and Families” for P-FLAG (Parents and Friends of Lesbians and Gays) Lawrence-Topeka Chapter, Lawrence, KS
- 6/99 “Recent Developments in American Family Law” for the Association of Family Law Specialists (of the Netherlands), Utrecht, The Netherlands
- 4/99 “Adoption by Same-Sex Couples: Recent Developments in the US and the Netherlands” for the Molengraaff Institute for Private Law, University of Utrecht, The Netherlands
- 3/99 “Adoption and Marriage and Same-Sex Couples: An American and Dutch Comparison” for the Women’s Legal Studies Department Faculty of Law, University of Utrecht, The Netherlands

7. I make this affidavit and report based on the above background information and in particular on the basis of my research, scholarly presentations and publications in the area of comparing the United States and Dutch legal developments involving same-gender couples. Attached to this, my affidavit, is my current *curriculum vitae*, marked as Exhibit A.

Division of Powers and Judicial Review in the U.S. and the Netherlands

8. The Tenth Amendment to the United States Constitution reserves certain powers to the states; included in this reservation of power is the right to control family law legislation. Therefore, each state has the authority under this amendment to develop its own family law principles, including statutes regulating who can enter into a civil marriage. However, state legislation must not violate constitutional principles found in the state or the federal constitutions. Legislation that violates constitutional principles of equal protection, due process, liberty interests, rights of privacy or fundamental rights can be challenged by those citizens adversely affected by the

legislation, and the courts have competency to strike down the legislation as unconstitutional.

9. Because of this allocation of legislative authority, statutes that prohibited the issuance of a marriage license to couples who were of different races were struck down as violating the equal protection and due process clauses of the federal constitution by the California Supreme Court striking down a California statute in *Perez v. Sharp*, 32 Cal. 2d 71 (1948) and the United States Supreme Court, striking down a Virginia statute in *Loving v. Virginia*, 388 U.S. 1 (1967). In addition, the United States Supreme Court has struck down, as a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a Wisconsin statute that stated that any Wisconsin resident “having minor issue not in his custody and which he is under obligation to support by any court order or judgment” was prohibited from marrying without a court approval order, which approval could not be granted absent a showing that the support obligation had been met and that children covered by the support order “are not then and are not likely thereafter to become public charges.” *Zablocki v. Redhail*, 434 U.S. 374 (1978). In this case, the United States Supreme Court affirmed its prior position in the *Loving v. Virginia* case, that the right to marry is a fundamental right and when “a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”

10. In contrast to the United States situation, where the regulation of marriage is primarily controlled by the individual states, in the Netherlands national law controls the regulation of marriage. Also in contrast to the United States legal system, the Dutch courts cannot strike down statutes that violate constitutional provisions or provisions of international treaties. This was evident in a 1990 case before the Dutch High Court (Hoge Raad), HR 19 oktober 1990, in which the Dutch High Court stated that although the term “civil marriage” is “understood to be an enduring bond between a man and a woman,” that understanding “does not exclude the possibility that there is not adequate justification for the fact that a particular legal consequence flows from marriage but not from an enduring cohabitation of two persons of the same sex.” HR 19 oktober 1990, NJ 1992, 192, m.nt. EAAL en EAA (homohuwelijk; trans. of para. 3.6 by Caroline Forder). In other words, the High Court recognized that discrimination arguments may be relevant when examining the benefits opposite-gender couples acquire through marriage, but which are denied to same-sex couples because they cannot marry. The High Court, however, deferred to the separation of powers, stating that “[a] question of this kind – which anyway could only be addressed by the legislature – was not raised in these proceedings.” HR 19 oktober 1990, NJ 1992, 192, m.nt. EAAL en EAA (homohuwelijk; trans. of para. 3.6 by Caroline Forder).

11. In the United States, it is the role of the state legislatures to regulate marriage, but that competence is limited by the protections guaranteed in the state and federal constitution—the rights of equal protection, due process, liberty, and privacy. In the Netherlands, national law controls the regulation of marriage but the Dutch courts cannot strike down this legislation as violating equality principles guaranteed under the constitution or international treaties.

Evolution of Marriage in U.S. Constitutional Law

12. In the United States, the definition of marriage has evolved through time. One such example involved the challenges in the courts to statutes that prohibited marriages of interracial couples. The earlier case of *Loving v. Virginia*, 388 U.S. 1 (1967), found that state laws prohibiting interracial marriages violated both the equal protection and due process clauses of the U.S. Constitution. The Supreme Court mandated a change in the definition of marriage even though, at the time of the decision, 16 states had statutes that prohibited and punished marriages on the basis of racial classifications. Only 15 years before the *Loving* decision, 30 of the then 48 states prohibited interracial marriages. Like some of the arguments in the later same-gender marriage cases, the lower state court in Virginia and the dissent in the *Perez* case in California cited religious beliefs and moral abhorrence as grounds for not opening marriage to mixed race couples.

13. The meaning of marriage also has evolved in the same-gender cases in the United States. An analysis of three state cases in the early 1970s shows that the courts could not look beyond the formalistic definition of marriage; in the courts' logic, "the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage," *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) and "[a]ppellants were not denied a marriage license because of their sex; they were denied a marriage license because of the nature of marriage itself." *Singer v. Hara*, 522 P.2d 1190 at 1196 (Wash. App. 1974). In addition, the courts narrowly defined the purpose of marriage in terms of procreation and survival of the species. *See generally* Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZONA J. INT'L. & COMP L. 141 (2001), attached to this my affidavit as Exhibit B.

14. In these earlier U.S. decisions, there was little or no mention of the cultural, societal, emotional, psychological, familial, or economical advantages of this state-sanctioned relationship. Consequently, the earlier court decisions were unable to “deconstruct” the marriage relationship and ask the deeper questions about the functional purposes of state regulation of marriage. In addition, religious references, which were repugnant to the courts as a justification for prohibitions against interracial marriages, were freely mentioned in these same-gender couple cases.

15. However, in the later cases in the United States starting in 1993, courts in Hawaii, Alaska and Massachusetts found that the prohibitions against allowing same-gender couples to marry violated provisions within their state constitutions. For example, the Hawaii court found that the marriage statute was a gender-based classification, falling under the state constitutional provision prohibiting sex discrimination. Using an equal protection analysis, the court applied a strict scrutiny level of review, requiring the state to show a compelling state interest to justify the discrimination. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). This the state could not do, resulting in the marriage statute being struck down as an unconstitutional violation of equal protection. *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct).

16. Although the Hawaii courts did not find a violation of a fundamental right or the right of privacy, the Alaska court disagreed with the way that the Hawaii Supreme Court analyzed the fundamental right claim. The Alaska judge stated that “[t]he relevant question is not whether same-sex marriage is so rooted in our traditions that it

is a fundamental right, but whether the freedom to choose one's life partner is so rooted in our traditions. Here the court finds that the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy” *Brause v. Bureau of Vital Statistics*, 1998 WL 88743, at *4 (Alaska Super. Ct.).

Because a fundamental right was involved, the Alaska judge applied the highest standard of review, strict scrutiny, in examining the marriage statutes. As in the Hawaii case, the state was unable to provide a compelling state interest to justify denying the fundamental right to marry to same-gender couples. The judge also stated that, even if the marriage statutes had not infringed on a fundamental right, restricting marriage to opposite-gender couples also implicated the Alaska constitution's equal protection provision, which specifically prohibited unequal treatment based on gender.

17. In the most recent U.S. case, *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), the Massachusetts Supreme Judicial Court held that limiting civil marriage to opposite-gender couples violated principles “of individual liberty and equality under the law protected by the Massachusetts Constitution.” 798 N.E.2d at 968. The court also stated that “[b]arred access to the protections, benefits, and obligations of a civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under the law.” 798 N.E.2d at 949. The court compared the inability of same-

gender couples to marry with the prohibition against interracial marriages, stating that this inability to marry “deprives individuals of access to an institution of fundamental legal, personal, and social significance.” 798 N.E.2d at 958. As for the argument that “broadening civil marriage to include same-sex couples will trivialize or destroy the institution of marriage as it has historically been fashioned[,]” the court responded, stating that “[c]ertainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries. But it does not disturb the fundamental value of marriage in our society.” 798 N.E.2d at 965. In his concurring opinion, Justice Greaney stated that preventing same-gender couples from marrying was an unconstitutional prohibition because it “constitutes a categorical restriction of a fundamental right.” 798 N.E.2d at 970. Shortly after the decision in the *Goodridge* case, the Massachusetts Senate asked for an advisory opinion from the court on whether the enactment of civil unions would be compatible with the Massachusetts Constitution. The court found that civil unions did not comply with the court’s decision in *Goodridge*, stating that legislation on civil unions “maintains an unconstitutional, inferior, and discriminatory status for same-sex couples.” *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004). The majority reaffirmed its position in *Goodridge* that only full marriage rights were compatible with the state constitution.

18. In summary, some of the judges in the Hawaii, Alaska and Massachusetts cases, who found violations of constitutional protections, stated that it is the very definition of marriage itself that was being challenged. By re-defining the marital relationship as a state-created and state-sanctioned status, contract, or legal institution, which confers benefits and rights to its parties, these judges found it reasonable to conclude that denying marriage to same-gender couples was discriminatory. In similar fashion, when the petitioners argued a violation of the right to privacy or a fundamental right under the due process analysis, the judges who defined that right narrowly, by asking the question whether there is a fundamental right to a “same-gender marriage,” found no due process violations. *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. Ct. 1995), *Storrs v. Holcomb*, 168 Misc. 2d 898, 645 N.Y.S.2d 286 (1996). However, if the judges defined the right to marry broadly, such as the right to choose one's life partner or the right to receive the state-conferred benefits that flow from state regulation of marriage, then these judges found a violation of this right. *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct.), *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

19. The case of *Baker v. State*, 744 A.2d 864 (Vt. 1999) stands apart from the Hawaii, Alaska and Massachusetts cases because it did not open marriage, but rather it allowed the Vermont legislature to determine whether to open marriage or create a separate institution that would grant same-gender couples the benefits of marriage. The Vermont legislature opted to create a separate institution of civil unions rather than open marriage to same-gender couples. This case has been criticized for following the legal analysis of “separate but equal,” which was rejected by the U.S.

Supreme Court when dealing with racial classifications in *Brown v. Board of Education*, 74 S. Ct. 686 (U.S. 1954). As mentioned in paragraph 17 above, the Massachusetts Supreme Judicial Court found civil unions were incompatible with notions of equal protection, stating that substituting civil unions for marriage “maintains an unconstitutional, inferior, and discriminatory status for same-sex couples.” *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004).

20. Within the last two years, other lawsuits have been filed by same-gender couples, seeking the right to marry. Currently lawsuits are pending in Arizona, Indiana, New Jersey, New York, Oregon and the state of Washington. Early in 2004, municipal and county officials in different parts of the United States began to issue marriage licenses to same-gender couples, justifying their actions by asserting that state law did not prohibit marriages of same-gender couples, or, if state law was restrictive, this restriction violated state constitutional principles. These licenses were first issued in the city of San Francisco, followed by New Paltz, New York; Asbury Park, New Jersey; Sandoval County, New Mexico as well as Multnomah County and Benton County in Oregon. The number of marriage licenses that have been issued are as follows: California: 4,037; New Jersey, Asbury Park: 17; New Mexico, Sandoval County: 26; New York, New Paltz: 38; Oregon: 3,022. The status of these marriage licenses has been challenged in all of these jurisdictions. However, on May 17, 2004, Massachusetts will begin issuing valid marriage licenses to same-gender couples pursuant to the ruling of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). Thus, at least one state in the United States will begin to open marriages, following the lead of the Netherlands (where 5843 same-gender marriages have been solemnized through February, 2004) and Belgium, which opened marriage in 2003. In addition, 1972 marriage licenses

have been issued in the Canadian province of British Columbia, Sweden currently is considering legislation to open marriage to same-gender couples, the incoming prime minister of Spain, Jose Luis Rodriguez Zapatero, has promised to open marriage to same-gender couples and King Norodom Sihanouk of Cambodia has called for a similar result in his country.

Legislative Competence to Open Marriage to Same-gender Couples

21. Based on the analysis of the U.S. state court decisions that have broadly defined marriage to include same-gender couples, there is no question that every state legislature has the competence to open marriage to same-gender couples even though the original drafters of that state's marriage statutes in the 18th and 19th Centuries thought of marriage as an opposite-gender institution. There is nothing in the court decisions that questions legislative competence to do so.

22. This legislative competency is clearly seen by the fact that the Hawaii and Alaska court decisions did not take effect because the state legislatures passed proposed constitutional amendments, which the states' citizens adopted, defining marriage as involving one man and one woman. The President of the United States recognizes the competency of legislatures to change the definition of marriage when he announced his support for a proposed amendment to the United States Constitution which states that "[m]arriage in the United States shall consist only of a union of a man and a woman. Neither this constitution or the constitution of any state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." (H. J. Res. 56, introduced in the House of Representatives on May 21, 2003; S. J. Res. 26, introduced in the Senate on Nov. 25, 2003. Another similar constitutional amendment, S. J. Res. 30,

was introduced in the Senate Mar. 22, 2004). President Bush stated that “[i]f necessary, I will support a constitutional amendment which would honor marriage between a man and a woman Let me tell you, the [Massachusetts Supreme Judicial Court] I thought overreached its bounds as a court [when it decided to open marriage to same-gender couples]. It did the job of the legislature.” Interview with Diane Sawyer on Dec. 16, 2003, *available at* http://abcnews.go.com/sections/primetime/US/bush_sawyer_excerpts_3_31216.html. *See also* <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>. If marriage had a definition set at the time of the early enactment of the marriage statutes, then constitutional amendments would not be needed to define marriage as between a man and a woman. As was the case in Hawaii and in Alaska, in Massachusetts the only way that its decision opening marriage to same-gender couples will not take effect is if there is a constitutional amendment limiting marriage to one man and one woman. And in the state of California, where the opposite legislative action is occurring though the introduction of a bill to open marriage to same-gender couples, again there is no doubt of the legislature’s competency to change the current definition of marriage. See California panel OKs bill to legalize same-sex marriage *available at* <http://www.cnm.com/2004/ALLPOLITICS/04/20.gay.marriage.reut/>

23. It is also inarguable that this legislative competence extends to jurisdiction over defining capacity to marry as one element of regulation of marriage. During the anti-miscegenation era, in which interracial couples were prohibited from marrying in over 30 U.S. states, the legislation often specifically nullified the *capacity* to marry on the basis of race. When these statutes were declared to be constitutionally invalid, the pre-existing capacity of such individuals and couples was restored.

24. State legislative authority over the capacity of same-gender couples to marry is currently demonstrated by the dozens of anti-marriage statutes enacted by states that expressly nullify the *capacity* to marry on the basis of the sex of the intending spouses. These statutes are often almost identical to the anti-miscegenation statutes referred to in paragraph 23 above. See Maxwell, Exhibit B, footnote 223 for examples.

Evolution of Marriage in Dutch Law

25. The impetus for opening marriage in the Netherlands through legislation came about after the Dutch High Court made it obvious that prohibiting same-gender couples from marrying was a violation of equality principles because denying the benefits of marriage to same-gender couples could have discriminatory impact. However, because of the role of the courts in the Netherlands, it was obvious that change would have to come from the legislature. HR 19 oktober 1990, NJ 1992, 192, m.nt. EAAL en EAA (homohuwelijk; trans. Caroline Forder), Rb Amsterdam 13 februari 1990, NJCM-Bulletin 1990, p. 456-460, m.ny. K. Boele-Woelki en P.C. Tange.

26. The evolution of the law through the judicial process is not a feature of the Dutch civil law system; therefore the only other avenue for change was the legislative process. This stands in stark contrast with the evolution of the law through court decisions in the United States, under the common law system. Although an argument can be made that changes in public attitude towards homosexuals follow a certain predictable legislative process, Kees Waaldijk, *Standard Sequences in the Legal Recognition of Homosexuality: Europe's Past, Present and Future*, 4 AUSTRALIAN GAY AND LESBIAN LAW JOURNAL 50 (1994), this process is not evident in the U.S. case law. See also Ian Sumner, *Going Dutch? A Comparative Analysis and Assessment of the Gradual Recognition of Homosexuality with respect to the Netherlands and England*, 9 MAASTRICHT J. 2002-1 pp. 29-56.

27. Under an incremental theory of change, one might expect that it would be necessary to decriminalize homosexual conduct before allowing same-gender co-parents the right to adopt children together. Yet, that is exactly the opposite of what has happened in the United States; courts in Massachusetts and Texas granted same-gender co-parent adoptions even though there were criminal sodomy statutes in effect in those jurisdictions at the time. In fact it was not until 2003 that the U.S. Supreme Court struck down state sodomy statutes as violations of the U.S. constitution's core concepts of common human dignity, *Lawrence v. Texas*, 123 S. Ct. 2472 (U.S. 2003), ten years after the first state court found discrimination in prohibiting same-gender couples from marrying under their state constitution, and well after over 21 jurisdictions had been granting same gender co-parent adoptions. For a list of these jurisdictions as of 2000, see Nancy G. Maxwell, *et al.*, *Legal Protection for All the Children: Dutch-American Comparison of Lesbian and Gay Parent Adoptions*, 17 ARIZONA J. INT'L & COMP. L. 309 (2000), footnotes 26 and 27, attached to this my

affidavit as Exhibit C.

28. In contrast with the U.S. and Canada, the Netherlands has been slow to recognize parenting rights of co-parents in same-gender relationships, even after opening marriage to same-gender couples. Unlike civil unions partners in Vermont, automatic legal parentage is not granted to a same-gender married Dutch couple when children are born during the relationship. The Netherlands lags behind in this respect because of its history of filiation laws, which are governed by its civil code. In addition, in the Netherlands foreign children are unavailable to same-gender couples to co-adopt, whereas no such prohibition exists in any state in the United States. Therefore, the supposed “last step” in recognition of homosexual equality—homosexual parenthood—under any assumed sequence of legislative steps, was in fact the first step in many of the state courts in the United States.

29. Unlike legal developments in the Netherlands, it has been the courts in the United States that have expanded the definition of marriage through the process of judicial review, with some state legislatures responding by limiting the definition of marriage. In the Netherlands, it was the legislature in the Netherlands that expanded the definition of marriage to include same-gender couples after the Dutch courts were not able to do so. In addition, in the U.S., almost half of the state courts have granted same-gender co-parent adoptions at the same time these state legislatures are enacting statutes limiting marriage to one man and one woman.

30. The history of legislated discrimination in the U.S. has resulted in the courts, not the legislatures, protecting the rights of the minorities. Even in the face of the reality that interracial marriages were not accepted by the majority of U.S. citizens, the

Court struck down anti-miscegenation statutes. See Molly McDonough, Gay Marriage Decision Harks Back 55 Years, ABAJ e-Report, November 21, 2003, <http://www.abanet.org/journal/ereport/nov21marry.html>. Therefore, unlike the United States, it is the legislature that has expanded marriage in the Netherlands, not the courts.

31. When the U.S. state courts were faced with requests by a same-gender co-parents to adopt the children they had been raising since birth as co-equal parents, the courts granted the adoption by interpreting the term “stepparent” to include these parents, who were functioning in ways that were similar to another non-biological parent, the stepparent. It is this “functional” analysis that also has been used in the marriage cases where the courts have recognized the evolving nature of marriage. These courts are able to do what the legislatures have refused to do, to look at marriage as a state-sanctioned relationship with enormous cultural, societal, emotional, psychological, familial, and economical advantages and responsibilities.

32. One of the common arguments opposing same-gender marriage is that marriage is the preferred institution for raising children. However, experts testified, and studies confirmed, that the children of gay or lesbian parents would be better protected if those of their parents who wished to marry were permitted to do so. *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct), *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). This evidence was similar to the adoption cases, in which the evidence showed that it was far better for the children to be protected with two legal parents, than to ignore the realities of these children’s lives and deny them equal treatment.

Same-gender Marriage and Religious Freedom

33. Because marriage is a civil contract and because of the separation of church and state in the First Amendment of the United States Constitution, there has been no suggestion in any of the U.S. cases that same-gender marriage would interfere with freedom of religion or conscience of any person or group.

Sworn before me at the City of)
Topeka, County of Shawnee,)
State of Kansas, United States)
of America, this _____ day of May,)
2004.)
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Nancy G. Maxwell

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Notary Public)
(Commissioner for Taking Affidavits))