

Honorable Bill Hardiman, 2004 Mich. OAG No. 7160 (2004)

2004 Mich. OAG No. 7160 (Mich.A.G.), 2004 WL 2096457

Office of the Attorney General

State of Michigan
Opinion No. 7160
September 14, 2004

MARRIAGE:

***1** Validity of out-of-state same-sex marriages in Michigan

ADOPTION:

FULL FAITH AND CREDIT:

[US Const, art IV, § 1](#)

A marriage contracted between persons of the same sex in a state that recognizes same-sex marriages is not valid in the State of Michigan.

Couples of the same sex who marry in a state that recognizes same-sex marriages as valid are not legally authorized to adopt children in Michigan as a couple; one member of a same-sex couple may adopt a child in Michigan as a single person.

Honorable Bill Hardiman
State Senator
The Capitol
Lansing, MI

You have asked two questions regarding the validity in Michigan of marriages performed between persons of the same sex in Massachusetts, a state that recognizes same-sex marriages, and the applicability of Michigan's adoption statutes in such instances.

You first ask whether, in light of Michigan law governing marriage, the State or local units of government may recognize as valid those marriages that are performed between persons of the same sex in Massachusetts.

The Legislature has declared the public policy of this State with respect to marriage in chapter 551 of the Michigan Compiled Laws:

Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. *A marriage contracted between individuals of the same sex is invalid in this state.* [[MCL 551.1](#); emphasis added.]

Chapter 551 further defines “marriage” as follows:

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So far as its validity in law is concerned, *marriage is a civil contract between a man and a woman*, to which the consent of parties capable in law of contracting is essential. Consent alone is not enough to effectuate a legal marriage on and after January 1, 1957. Consent shall be followed by obtaining a license as required by [section 1](#) of Act No. 128 of the Public Acts of 1887, being [section 551.101 of the Michigan Compiled Laws](#), or as provided for by [section 1](#) of Act No. 180 of the Public Acts of 1897, being [section 551.201 of the Michigan Compiled Laws](#), and solemnization as authorized by sections 7 to 18 of this chapter. [[MCL 551.2](#); emphasis added.]

In addition, sections 3 and 4 of chapter 551 specify:

*2 A man shall not marry... another man. [[MCL 551.3](#)]

A woman shall not marry... another woman. [[MCL 551.4](#)]

Your question, however, pertains to a marriage legally performed in the Commonwealth of Massachusetts. 1939 PA 168, [section 1](#), as amended by 1996 PA 334, recognizes as valid in Michigan those marriages validly performed in another state, with the exception of marriage contracted between individuals of the same sex. [MCL 551.271](#). Section 2 of 1939 PA 168 was added by 1996 PA 334, and states:

This state recognizes marriage as inherently a unique relationship between a man and a woman, as prescribed by section 1 of the chapter 83 of the Revised Statutes of 1846, being [section 551.1 of the Michigan Compiled Laws](#), and therefore *a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction*. [[MCL 551.272](#); emphasis added.]

The Supreme Judicial Court of Massachusetts has declared that, under Massachusetts law, citizens of that state of the same sex may not be excluded from the institution of civil marriage. *Opinions of the Justices to the Senate*, 440 Mass 1201, 1209; 802 NE2d 565, 571 (2004). Under [article IV, section 1 of the United States Constitution](#), the states must generally give full faith and credit to the public acts and records of other states:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

However, this provision does not require Michigan to recognize as valid, marriages between individuals of the same sex for two reasons.

First, the Full Faith and Credit Clause, by its terms, authorizes Congress to prescribe its applicability to the states. In 1996, in response to an attempt to recognize same-sex marriages in Hawaii, ¹ Congress passed the Defense of Marriage Act, which states:

No State... shall be required to give effect to any public act, record, or judicial proceeding of any other State... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State[s].... [[28 USC 1738C](#)]

*3 Thus, Congress has authorized the states to decline to give effect to same-sex marriages under the Full Faith and Credit Clause.

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Second, the Full Faith and Credit Clause is not inflexible. An exception exists for those instances, such as same-sex marriage, where one state's law would contradict the public policy of another state. The United States Supreme Court has examined the Full Faith and Credit Clause on numerous occasions. In a case involving a state court's order of a money judgment, *Baker v General Motors Corp*, 522 US 222; 118 S Ct 657; 139 L Ed 2d 580 (1998), the Supreme Court reviewed prior decisions and noted a distinction between court judgments and a state's laws for purposes of applying the Full Faith and Credit Clause:

Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.... The Full Faith and Credit Clause does not compel “a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.” *Pacific Employers Ins Co v Industrial Accident Comm'n*, 306 US 493, 501, 83 L Ed 940, 59 S Ct 629 (1939); see *Phillips Petroleum Co v Shutts*, 472 US 797, 818-819, 86 L Ed 2d 628, 105 S Ct 2965 (1985). Regarding judgments, however, the full faith and credit obligation is exacting. [522 US at 232-233.]

While Massachusetts now allows marriage contracts between its citizens of the same sex as a result of a state court order, the court's decision is an interpretation of Massachusetts law and not a judgment that must be given full faith and credit in other states. The United States Supreme Court offered an even clearer statement regarding the proper application of US Const, art IV, § 1, in *Nevada v Hall*, 440 US 410, 422; 99 S Ct 1182; 59 L Ed 2d 416 (1979), quoting *Pacific Employers Ins Co v Industrial Accident Comm'n*, 306 US at 502-503:

“It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy.... And in the case of statutes, the extrastate effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.”

*4 According to the Court in *Nevada v Hall*, the Full Faith and Credit Clause ““does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it.”” 440 US at 423-424, quoting *Pacific Employers Ins Co*, 306 US at 504-505.

Michigan case law also recognizes the public policy exception to the Full Faith and Credit Clause. The Michigan Supreme Court in *In re Miller's Estate*, 239 Mich 455, 457; 214 NW 428 (1927), held that, were the Michigan Legislature to declare a type of out-of-state marriage to be invalid as a matter of public policy, it would be invalid in Michigan, even if valid in the state where contracted. The Legislature's declaration in MCL 551.1 that “[a] marriage contracted between individuals of the same sex is invalid in this state” falls squarely within this public policy exception.

It is my opinion, therefore, in answer to your first question, that a marriage contracted between persons of the same sex in a state that recognizes same-sex marriages is not valid in the State of Michigan.

Your second question asks whether couples of the same sex who marry in a state that recognizes same-sex marriages are legally authorized to adopt children in Michigan as a couple.

The Michigan Adoption Code, 1998 PA 474, MCL 710.21 *et seq*, provides in section 24 that adoption shall be by a person or a married couple. MCL 710.24. The Michigan Court of Appeals confirmed that “it has been held inconsistent

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with the general scope and purpose of adoption statutes to allow two unmarried persons to make a joint adoption.” *In re Adams*, 189 Mich App 540, 544; 473 NW2d 712 (1991).

The answer to your first question is determinative in answering your second question. Since a marriage contract entered into by two people of the same sex in a state that recognizes same-sex marriages is invalid in Michigan, such individuals are not recognized to be a married couple in Michigan. Therefore, they cannot adopt a child together in Michigan. Under [MCL 710.24](#), however, one of them may adopt a child as a single person.

It is my opinion, therefore, in answer to your second question, that couples of the same sex who marry in a state that recognizes same-sex marriages as valid are not legally authorized to adopt children in Michigan as a couple; one member of a same-sex couple may adopt a child in Michigan as a single person.

*5 Mike Cox
Attorney General

Footnotes

- 1 [H.R. Rep. No. 104-664, at 1 \(1996\)](#), reprinted in 1996 U.S.C.C.A.N. 2905, 2906.
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