

THE LAW OFFICES OF JEFFREY G. MARSOCCI, PLLC

6200 FALLS OF THE NEUSE ROAD, SUITE 200

RALEIGH, NORTH CAROLINA 27609

PHONE: (919) 871-6993

FAX: (919) 871-6983

E-MAIL: NCLAWYER@MAIL.ICOMNET.COM

MEMORANDUM

To: All interested parties
From: Jeffrey G. Marsocci, Esq.
Re: Vermont Law
Date: May 16, 2000

We have recently received numerous inquiries about recently enacted legislation in Vermont regarding same-sex civil unions. Specifically, our clients, residents of North Carolina, have been asking if it is worth the time and expense to travel to Vermont to be joined in a Civil Union once the law becomes effective on July 1, 2000. At this time, it is our opinion that the costs far outweigh the benefits in taking such action for nearly all of our existing clients.

Vermont's law provides, among other things, the following rights and privileges to Civil Union partnerships:

- The right to inherit property
- The right to act on the other partner's behalf in certain transactions
- The right of a competent partner to make medical decisions regarding an incapacitated partner
- The right not to be compelled to testify against the other partner in trials
- The right to register real property as, in North Carolina terms, "property by the entirety," (joint property with right of survivorship for married couples).
- State income and estate tax benefits
- Public assistance programs to the same extent as if married
- Prohibitions against discrimination based upon martial/civil union status
- The right to a partner's health insurance benefits to the same extent as married couples

There are other minor benefits that are too numerous to mention, but the preceding are the rights most discussed. In addition to Vermont Civil Union rights, there are also numerous civil union responsibilities that accompany registering. Among these are:

- A duty to support the partner in times of sickness
- Financial responsibility for the partner to the same extent as married couples
- Child support responsibilities for children jointly adopted if there is a break-up of the Civil Union

If all of the rights listed above were unavailable to our clients in North Carolina in any manner and

the clients wished to move to Vermont, we would advise such a move as being in their best interests. However, many of the same rights listed above have already been achieved or can be achieved through proper estate planning and contracts. The following rights are achieved through proper estate, financial and contract planning, and many of our clients have already done so:

- The right to inherit property (through wills or revocable living trusts)
- The right to act on the other partner's behalf in certain transactions (through durable power of attorney documents)
- The right of a competent partner to make medical decisions regarding an incapacitated partner (through healthcare power of attorney documents)
- The right to register real property as, in North Carolina terms, "property by the entirety," (many of our clients have done so through use of a revocable living trust).

The other benefits under Vermont's law are only effectively available to those that are residents of Vermont, such as non-discrimination, public assistance and tax benefits. *Please note that these benefits have nothing to do with federal law.* Vermont has given extensive estate tax benefits to Civil Union partnerships, but the vast majority of estate taxes are federal in nature. In addition, it is not likely that many Civil Union partners would benefit much, if at all, from these Vermont estate tax savings because the deduction on the federal estate tax forms would most likely "make up the difference" in what is saved on state death taxes.

For example, a deceased Civil Union partner may owe \$100,000 in federal estate taxes, and there may be a deduction available on the estate tax form for up to \$20,000 in state death taxes. If there were no Civil Union partnership, the deceased partner may have owed Vermont \$15,000. This would mean that the federal government would get \$85,000 (\$100,000 minus the \$15,000 deducted), and the State of Vermont would get \$15,000. If a Civil Union partnership exempted the State Death taxes because the property went to the surviving partner, then the federal government would get \$100,000. The end result is the same: a tax bill of \$100,000.

It is also very unlikely that the State of North Carolina would recognize the Civil Union partnership in any manner whatsoever. North Carolina marriage law is much different from Vermont's Civil Union partnership, and the so-called federal Defense of Marriage Act allows states not to recognize same-sex unions from other states. It is a great concern to our firm that same-sex couples will fly to Vermont, obtain a Civil Union partnership, fly back to North Carolina and assume that they are protected.

There are some Constitutional grounds to contest such non-recognition, but it is unlikely that such challenges will be decided upon in the near future. I personally suspect that such challenges will reach the U.S. Supreme Court and will fail largely on the grounds that a civil union is not the same as a marriage as defined under state law, and the court case that demanded the law be enacted was decided by Vermont's Supreme Court interpreting the Vermont Constitution only. The Vermont case, *Baker v. State*, was about a same-sex couple opposing the fact that they were not afforded the same benefits as married couples. The Court struck down all laws that denied the *benefits* of marriage to same-sex couples because of Vermont's constitution. The Civil Union laws only afforded these same *benefits* to same-sex partners that registered in a Civil Union. They did not allow same-sex *marriages*. If Vermont had taken that next step and actually allowed same-sex

partners to *marry* under their laws, it would have given same-sex partners in other states better legal footing to marry in Vermont and then oppose their state's non-recognition of the marriage under the "Full Faith and Credit Clause" of the U.S. Constitution. However, they did not.

There are also added detriments to a Civil Union that are just as bad for heterosexual marriages, such as divorce. Under North Carolina law and for most of our estate planning clients, same-sex couples have combined their property in a revocable living trust. Dissolution of the trust can be done without court involvement, a required year's separation, or with a risk of alimony on either partner. If a dispute arose in revoking the trust and the partners going their separate ways, the court would hear the matter as a contract/trust dispute rather than the more expensive and involved divorce.

In summary, most of our clients will not benefit at all from registering as Civil Union partners in Vermont and then residing in North Carolina. In addition, it is most likely that a move to Vermont will not be much more beneficial to same-sex partners unless there are other sound financial reasons to move to Vermont, such as better job offers. Of course, everyone's situation is different, and we ask that if you have specific questions to please call us or another experienced estate planning attorney in your jurisdiction.

We are also specifically not putting this memorandum forth as legal advice on whether or not to enter a Civil Union in Vermont, and ask that you not rely on it as legal advice. We are only providing this memorandum as information on the potential benefits and detriments of a Vermont Civil Union without making a recommendation either way. If you have specific questions that require legal advice on Vermont law, then we ask that you contact a Vermont attorney; and if you have questions regarding North Carolina law, then please contact us.

Sincerely,

Jeffrey G. Marsocci
Attorney at Law