1976 WL 30521 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
August 12, 1976

***1** THE PRESENT STATE OF THE LAW IN SOUTH CAROLINA IS THAT A MARRIAGE BETWEEN MEMBERS OF THE SAME SEX IS PROHIBITED AT COMMON LAW AND BY STATUTORY LAW, AND IN THE EVENT THAT SUCH A MARRIAGE IS PERFORMED IN THIS STATE IT IS VOID.

Colonel Hugh R. Overholt
Staff Judge Advocate
Department of the Army
Fort Bragg, North Carolina 28307

QUESTION PRESENTED:

What is the legal status in South Carolina of a marriage between members of the same sex?

AUTHORITIES:

Keezer on the Law of Marriage and Divorce (3d ed) § 2 p.9, § 139, p. 202;

Webster's New International Dictionary 1384 (3d ed);

Century Dictionary and Encyclopedia;

Black's Law Dictionary 1123 (4th ed);

Sections 20-1, 20-5, 20-5.1, 20-5.2, 20-6.1, 20-24, 16-412, Code of Laws of South Carolina (1962), as amended;

2 South Carolina Law Review 284 (1950);

27 Arkansas Law Review 687 (1973);

52 Am.Jur.2d Marriage § 1 at 865;

Singer v. Hare, 11 Wash. App. 247, 522 P.2d 1187 (App. Ct. 1974);

B. v. B., 78 Misc.2d 112, 355 N.Y.S.(2d) 712 (1974);

Jones v. Hallahan, 501 S.W.(2d) 588 (Ky. Ct. App. 1973);

Anonymous v. Anonymous, 67 Misc.(2d) 982, 325 N.Y.S.(2d) 499 (1971);

Baker v. Nelson, 291 Minn. 310, 191 N.W.(2d) 185 (Sup. Ct. 1971), app. dismd. 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed. (2d) 65 (1972);

  

Johnson v. Johnson, 235 S.C. 542, 112 S.E.(2d) 647 (1960);

Grisby v. Reib, 153 S.W. 1124 (Sup. Ct. Texas 1913);

55 C.J.S. Marriage § 10.

DISCUSSION:

There are numerous definitions of marriage.

Keezer on the Law of Marriage and Divorce (3d ed) § 2, p.9 states:
'Marriage is a contract between the two competent persons of opposite sex to live together for life, subject to such laws as do and may govern the relation of husband and wife.'

'There can be no marriage between any two persons of the same sex, and no kind of an attempted solemnization of such a marriage can be legal or valid.' [1]

Webster's New International Dictionary 1384 (3d ed) defines marriage as:
'The state of being united to a person of the opposite sex as husband or wife; the institution whereby men and women are joined in a special kind of social and legal dependence, for the purpose of founding and maintaining a family.' (emphasis added)

Century Dictionary and Encyclopedia defines marriage as:
'The legal union of a man and a woman for life; the formal declaration or contrast by which a man and a woman join in wedlock.' (emphasis added)

Black's Law Dictionary 1123 (4th ed) defines marriage as:
'The civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex.' (emphasis added)

All of these definitions vary to some degree but they all contain one common element: the union of one man and one woman.

***2** Section 20-1, Code of Laws of South Carolina (1962), as amended, reads in part as follows:
'All persons, except mentally incompetent persons, and persons whose marriage is prohibited by this section, may lawfully contract matrimony.'

The prohibition of Section 20-1 forbids the union between direct members of the same family which would result in incestuous relationships, but there is no specific wording that prohibits the union of members of the same sex. In the absence of such a provision it becomes necessary to consider the legislative intent of the statute to determine whether our legislature meant for the statute to include homosexual marriages. The legislative intent can be extrapolated through a careful inspection of the structure and wording of the statute. The statute is replete with language of sexual distinction. For example, paragraph one of Section 20-1, states that all persons may contract matrimony unless prohibited by the

  

statute. Paragraph two lists the relationship prohibited to the male all in the female gender, while paragraph three delineates those relationships prohibited to the woman all in the male gender. There is a strong inference here that the intention was to include only marriages between the opposite sex.

The legislature permeated the marriage statutes with heterosexual terms such as 'husband and wife', 'marriage', and reference to 'female and male' knowing the definitions and usages of the words and with provisions exclusively limited to heterosexual relations. Sections 20-5, 20-5.1, 20-5.2, 20-6.1 all refer to the issue of a marriage, a condition that cannot possibly include a union between members of the same sex. Section 20-24 concerning required are for a marriage license to issue and consent to the marriage when the applicant is under specified ages refers to the 'male' and the 'female' applicants for the marriage license. The language and conditions of the statutes when viewed in toto clearly exclude the intention that a union between the same sex should be allowed.

When ascertaining legislative intent, it may be assumed that statutes relating to the same subject matter were enacted in accord with the legislative policy, and that together they constitute a uniform or harmonious system of law. Therefore, as a result, statutes in pari materia should not only be considered but also construed to be in harmony with each other. 2 South Carolina Law Review 284 (1950) citing Crawford, The Construction of Statutes, § 231 pp. 433-444.

Section 16-412, Code of Laws of South Carolina (1962), as amended, makes it a felony to commit 'the abominable crime of buggery'. Buggery is defined as 'a carnal copulation against nature; a man or a woman with a brute beast, a man with a man, or man unnaturally with a woman'. Black's Law Dictionary 243 (4th ed). Assuming arguendo that Section 20-1 permits the marriage between members of the same sex it would be in direct conflict with the criminal sanction of Section 16-412; the result being one statute allowing the union between members of the same sex and the other penalizing the consummation of such union. It is the opinion of this Office that the statutes are in pari materia and should be read in harmony with each other so as to be fully effective. Therefore Section 20-1 must be read to exclude the union between members of same sex.

***3** The sanction of Section 16-412 arises from our Anglo-American history which has been to regard homosexuality as an offense against society. The condemnation of homosexual conduct in American Law can be traced back as far as our Judeo-Christian heritage. During the Middle Ages, homosexual acts were defined as sodomy, deserving penalties so severe as torture, death or castration. By 1533, English courts assumed jurisdiction over 'buggery' as it became known, and provided for a penalty of death. It is from English common law that our American laws developed. 'The Homosexual's Legal Dilemma' 27 Arkansas Law Review 687 (1973).

For hundreds of years society has condemned homosexual conduct as illegal and immoral. It has been considered by most to be injurious to the public good because of the potential danger it holds to destroy the institution of marriage and the family. Accordingly, the fundamental premise in various cases on the subject of homosexuality, has been that a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female. Despite winds of change, this understanding of a valid marriage is almost universal. In the matrimonial field the heterosexual union is regarded as the only one entitled to legal recognition and public sanction at this time. 52 Am.Jur.2d Marriage § 1 at 865; Singer v. Hara, 11 Wash. App. 247, 522 P.(2d) 1187 (App. Ct. 1974); B. v. B., 78 Misc.(2d) 112, 355 N.Y.S.2d 712 (Sup. Ct. 1974); Jones v. Hallahan, 501 S.W.(2d) 588 (Ky. Ct. App. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.(2d) 185 (Sup. Ct. 1971), app. disd. 409 U.S. 810, 93 S. Ct. 37, 34 L.Ed.(2d) 65 (1972); Anonymous v. Anonymous, 67 Misc.(2d) 982, 325 N.Y.S.(2d) 499.

Marriage was a custom long before the State commenced to issue licenses and South Carolina still recognizes common law marriages. Thus, the question arises as to the validity of a marriage between members of the same sex at common law. Common law marriage has neither the benefit of license nor clergy; the essential requirement being mutual agreement between the parties to assume toward each other the relation of husband and wife. Johnson v. Johnson, 235 S.C. 542, 112 S.E.(2d) 647 (1960). By this definition it appears that a union between members of the same sex might be perfected

  

at common law. However, there is authority to the effect that a marriage at common law could exist only between a man and a woman. Grisby v. Reib, 153 S.W. 1124 (Sup. Ct. Texas 1913); Meezer on the Law of Marriage and Divorce (3d ed) § 139 p. 202. Therefore, at common law the terms 'husband and wife' and 'marriage' apply strictly to a relationship between a man and a woman. These definitions constitute the very rules by which the common law is enforced. As it is impossible for members of the same sex to bring themselves within these definitions, it is the opinion of this office that homosexuals cannot effect a valid common law marriage in South Carolina.

***4** Based on the accepted definitions of marriage, the apparent legislative intent of Section 20-1 and related sections of our marriage laws and the effect of section 16-412 it is the opinion of this office that the statutory law of South Carolina prohibits the union of members of the same sex. Furthermore it is the opinion of this office that such a union is prohibited at common law and any attempted solemnization of such marriage would be void.

Raymond G. Halford
Senior Assistant Attorney General

Footnotes

1 Marriage is the status founded on a contract to perform the duties legally incumbent on those whose association is founded on the distinction of sex. Id. § 139 at 202 (emphasis added).

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