Gay City NEWS

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Ct. Judges Engaged, Elusive

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The Connecticut Supreme Court this week heard a particularly strong argument in support of same-sex marriage equality in Kerrigan et al. v. Department of Public Health, in which eight same-sex couples have asserted a state constitutional right to marry.

Connecticut's current Constitution was adopted in 1965 and amended in the 1970s to incorporate an Equal Rights Amendment, prohibiting any abridgement of equality on the basis of sex-a factor that figured large in the plaintiffs' argument.

Their case, heard May 14, differed from all those that have gone before because Connecticut already has a civil union law that affords same-sex couples virtually all the legal rights and benefits of marriage. Because of this, the trial court that heard the case upheld the state's position, reasoning that depriving same-sex couples the status of marriage did not create an inequality that amounted to a violation of the state constitutional equality guarantee. (The argument that will soon go before the California Supreme Court presents a similar scenario, although in that state gay couples are protected not in civil unions but by a wide-reaching Domestic Partnership Law.)

As happened with one of the judges on New York's high court last year, Chief Justice Chase T. Rogers recused herself because of a family conflict - in this case, her husband's law firm prepared a friend-of-the-court brief for a group supporting marriage equality. A Court of Appeals judge, Lubbie Harper, Jr., filled the vacancy on the seven-member court.

The bench, as constituted for the argument, consisted of five men and two women, with Senior Associate Justice David Borden presiding. Two members of the panel-Harper and Flemming Norcott, Jr. - are African-American.

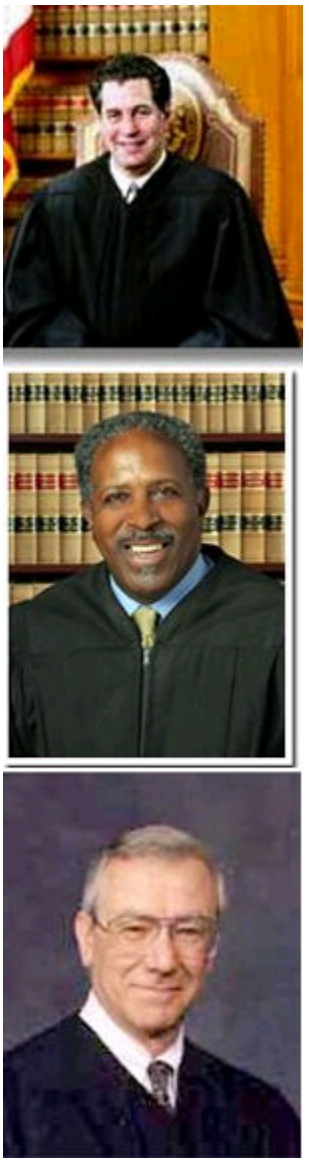
This analysis is based on viewing all but a few minutes of the argument, which was broadcast live on the Web.

During the time when this reporter was watching, the court's two women, Justices Joette Katz and Christine Vertefeuille, asked no questions and made no comments.

Most of the questions were posed by Borden and Richard L. Palmer, with Harper and Norcott also asking some questions and interjecting comments, and Peter Zarella speaking so briefly he didn't tip his hand at all.

That said, none of the judges gave any definitive signal of their views on the ultimate question before them. Palmer started out as a skeptic regarding several points in the plaintiffs' arguments, but during the state's case he seemed gradually to be modifying his views. Still, it's dangerous to make predictions based on observations of an unfamiliar bench. There may be one or more devil's advocates, for example.

Those judges who spoke seemed pretty neutral in their questioning; the four who participated the most appeared careful to avoid committing themselves on all but a few intermediate points in the argument.



Though no one on the Connecticut Supreme Court definitively signaled their conclusion, Richard L. Palmer, Lubbie Harper, Jr., and David Borden each at points challenged the state's defense of the marriage status quo.

Bennett Klein of Gay and Lesbian Advocates and Defenders, the Boston-based group that won the 1999 Vermont civil union and 2003 Massachusetts marriage rulings, argued for the plaintiffs, and Jane Rosenberg, an assistant attorney general, argued for the state.

Klein did an absolutely splendid job with the plaintiffs' argument and rebuttal. He was unflappable, had the authorities and cases at his fingertips, had good answers for all the questions, and kept steering the argument back to his strongest points, making small concessions when necessary but never losing sight of the main argument - that the Connecticut Constitution's guaranty of equality has never been satisfied by "separate but equal," and that, as

he said in opening his argument, the Legislature in the Civil Union Act had created "a separate institution for one minority group."

The legislative history of the Act showed that to the lawmakers "marriage means something," that is, they saw a distinction between civil unions and marriage, and if there is a distinction, then there is not complete equality, Klein argued. Despite the state's claims that the law is "neutral" on its face, the legislative history shows "a considered decision to deny to one class of citizens the same institution that is available to other citizens."

Klein focused strongly on the state Equal Rights Amendment, pointing out that as a matter of "plain language" it puts sex on the same plain as race in terms of any equality analysis. He invoked Loving v. Virginia, the 1967 U.S. Supreme Court ruling that struck down state bans on interracial marriage. Just as opponents of same-sex marriage argue that both heterosexuals and homosexuals and both men and women are equally barred from marrying members of their own sex, defenders of miscegenation laws claimed both whites and blacks were equally prevented from interracial marriage. The Supreme Court saw through that fake equality.

The fact that both men and women are prevented from marrying someone of their own sex does not, Klein asserted, mean that Connecticut's statute does not create a sex classification. Because the state's Equal Rights Amendment bars discrimination based on sex, any such classification must be examined using strict scrutiny, the highest form of judicial review that imposes a heavy burden on the state.

Some members of the court seemed to have trouble accepting that argument, and Borden in particular was more interested pursuing analysis of whether sexual orientation discrimination also involved a "suspect classification" for which the state has a heavy burden in justifying. Through his questioning, he appeared to satisfy himself that if the differential treatment of gay couples were subjected to heightened scrutiny by the court, the state would lose, though he did not make clear whether he in fact views sexual orientation discrimination in these terms.
Arguing for the state, Jane Rosenberg built on the trial court's decision, asserting that only the legal rights and benefits of marriage were relevant to the court's decision, and that the Civil Union Law cured any previous inequality. For her, the issue was simply one of semantics, but Borden was unwilling to accept this. In fact, he went out of his way - even further than Klein in the plaintiffs' argument - to described marriage as a "status," not just a word.

Judge Harper, who seemed rather neutral in his questioning during the plaintiffs' argument, became more combative during the state's argument, and Judge Palmer, who had not seemed particularly supportive of the plaintiffs during their argument, emerged as more their champion during the state's argument, challenging the idea that this was just about semantics by asking about the "stigma" of a separate institution and later directly challenging Rosenberg on her analysis of whether sexual orientation was a "suspect classification," which would require the state to present compelling reasons for using it as a distinction in the marriage statute.

Rosenberg emphasized the progressive posture of the Connecticut Legislature on gay rights - a civil rights law, a hate crimes law, a civil union law, and an adoption law, often ahead of the curve nationwide - to argue that that gay people in Connecticut are not politically powerless and therefore not entitled to the extra protection accorded groups marked by a suspect classification.

But several judges, including Palmer, jumped on this, asking whether that meant that women and people of color, as they improve their political standing, are also no longer entitled to strict scrutiny of laws that discriminate against them. Klein seized on this point during his rebuttal, which in a number of respects impressed this reporter as particularly effective in pinning down misconceptions created by the state's argument.

Rosenberg performed very professionally, but she was outclassed in the argument by Klein, whose motivation - after all-was stronger. The incentives for each altered the playing field.

What the state never really did was articulate a good reason - not involving invidious discrimination - why it denies same-sex couples the right to marry at the same time that it bestows on them all the state law rights and benefits of marriage. The best Rosenberg could come up with was "tradition."

Clearly, after the 2003 Lawrence v. Texas U.S. Supreme Court ruling that threw out the remaining sodomy laws, she could not argue moral disapproval, and after the enactment of civil unions, she couldn't very well assert that the rights and benefits of marriage are aimed at "channeling procreation" by heterosexuals into stable families- an argument that carried the day in New York, Washington State, and Indiana. Indeed, Rosenberg specifically disavowed that argument as part of her case, though she did point out that some amicus briefs had made that point, which could be weighed in deciding whether the distinction in marriage law was rational - the lowest standard that a statute must meet.

It seemed clear that among the justices there was common agreement that if the best the state could come up as a rationale was tradition, it would lose if the law were subjected to heightened scrutiny, and indeed might even lose if it were subjected to the less demanding rational standard.

Handicapping the outcome? This is a difficult one. It is really hard to know how the fact of the civil union law will cut with this court - though Burden posed the strategic question to Klein whether a victory for his side would provide a disincentive for legislatures elsewhere to pass civil union laws since opponents might say this would only tee up a marriage case before the state supreme court.

Several possible outcomes come to mind.

One, the court could dodge the bullet by quibbling with the lower court's analysis and sending the case back there for reconsideration. The trial court failed to establish which level of judicial scrutiny was appropriate. The state Supreme Court could particularly instruct the lower court to examine the question of the "immutability" of sexual orientation as a factor.

Or the court could do what the intermediate-level Court of Appeals in California did -find that what is really at stake in the case are the rights and benefits of marriage, and that those have been adequately addressed with civil unions. The high court in Vermont back in 2000 accepted the civil union solution, and last year the New Jersey Supreme Court clearly indicated that it would too. And, the Washington high court last year pointedly noted that the marriage plaintiffs there had not put the civil union question on the table, suggesting a majority would have supported that.

Finally, of course, the court could follow the lead of Massachusetts and decree that marriage must be opened up to same-sex couples.

The first course - returning the case to the lower court for further litigation - may be the most likely outcome, but with two members of the court silent and no other member offering a clear indication, prediction is problematic. Palmer was particularly elusive - at times sounding like an ardent gay rights advocate, at others like a defender of traditional marriage, and at still others points genuinely puzzled by the specifics of Klein's argument.

What can be said is that the same-sex marriage advocates in this case gave it their best shot, that Klein lived up to his excellent reputation - earned when he won the first AIDS discrimination case decided by the U.S. Supreme Court - and that if the battle is lost in the short term in this case, it will not be for lack of the best possible representation.