



STEVEN SENNE/Associated Press

Amy Zimmerman, left, and Tanya Wexler, both of New York and a couple for more than 12 years, talk to reporters outside a Suffolk Superior Court courtroom yesterday.

Judge hears P'town suit on 1913 law

By CONOR BERRY
STAFF WRITER

BOSTON — A 91-year-old state law the attorney general says prohibits out-of-state gay couples from marrying in Massachusetts will continue to be enforced while a judge considers whether it is discriminatory.

At a hearing yesterday in Suffolk Superior Court, Judge Carol Ball gave lawyers for the plaintiffs in two separate lawsuits against the state until later this month to file reply briefs and forward all material to her by Aug. 2. Ball did not indicate when she would rule on the case.

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Entertainer Pat Boone, joined by U.S. Sen. Rick Santorum, R-Pa., spoke in favor of the proposed constitutional amendment to ban gay marriage at a Washington press conference yesterday.

being of children and a desire to prevent unelected judges from amending the constitution from the bench.

"There is a master plan out there from those who want to destroy the institution of marriage to, first of all, begin to take this issue in a few select courts throughout this country at the state level," said Sen. Wayne Allard, R-Colo. Pointing to rulings in Vermont and Massachusetts, he said that "once they get their favorable rulings from activist judges ... they want to take it to the federal courts and they'll eventually move it to the Supreme Court."

Sen. Rick Santorum, R-Pa., said some criticism runs along these lines: "Marriage is hate. Marriage is a stain. Marriage is an evil thing. That's what we hear. People who stand for traditional marriage are haters, they're bashers, they're mean-spirited, they're intolerant. ... Well, we're not."

Several Republican senators have argued in private meetings in recent days that their leaders are making a political mistake by trying to

force the amendment to a vote. One lawmaker said there were fresh expressions of concern at a weekly closed-door meeting during the day.

At the same time, several aides said Santorum and Sen. Gordon Smith of Oregon both urged fellow Republicans to support the measure on the test vote, depicting it as an issue of loyalty to the GOP leaders.

Smith has been among Republicans expressing concern about the amendment as drafted, saying he prefers a simpler one-sentence version.

The officials spoke on condition of anonymity, citing the confidentiality of the discussions.

Under the Constitution, it takes a two-thirds vote by both houses of Congress to submit an amendment to the states. Approval by three-fourths of the state Legislatures is required to complete ratification.

Material from the Chicago Tribune was used in this report.

Law: Judge hears clerks' challenge

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A lawsuit on behalf of clerks from Provincetown and 12 other municipalities and a second suit by nonresident gay couples seeking the right to marry here are requesting injunctions to stop state officials from interfering with the issuance of marriage licenses to out-of-state gay couples.

The defendants in the suits are State Attorney General Thomas F. Reilly and the state Department of Public Health.

The plaintiffs' attorneys argued yesterday that a 1913 law barring nonresidents from marrying here if the union is illegal in their home state is now being enforced after years of lying dormant.

The lawyers — including Gretchen Van Ness, Provincetown's special town counsel, and attorneys from Boston firm Palmer & Dodge — contend that the law is discriminatory and had never been enforced before the May 17 legalization of gay marriage in Massachusetts.

Nonresident "opposite-sex" couples, they argued, are not subjected to the same stringent questions when they apply to marry in the Bay State, yet gay couples from out of state are now being turned away.

State's position

Attorneys for the state, however, claim the 1913 law protects the rights of other states to define marriage as they see fit, a principle repeatedly cited by the state Supreme Judicial Court in its landmark November ruling on gay marriage. That decision led to legalization of gay marriage this spring.

No other state in the nation allows same-sex couples to legally marry.

Assistant Attorney General Peter Sacks argued on behalf of the state yesterday that the SJC ruling defined marriage as "two willing spouses and an approving state." Since no other state allows gay marriages, that standard is not met anywhere but Massachusetts, he said.

"This is not a law that discriminates against nonresidents," Sacks said of the 1913 statute, adding that its enforcement had increased because "there's much more reason than there

was before to expect violations."

Gays can legally marry here if they are coming from a "jurisdiction where it's recognized," he said. However, he noted, gay marriage is only permitted in a few places worldwide, including the Netherlands, Belgium and a few Canadian provinces.

Judge Ball requested the plaintiffs' lawyers to file their briefs by July 23 and gave the state's legal team until July 30 to respond. Another hearing will likely be scheduled for next month after the judge receives the briefs, which she limited to 15 pages apiece.

The lawsuits — Johnstone v. Reilly and Cote-Whitacre v. Dept. of Public Health — maintain that the statute is being selectively enforced.

Provincetown case

The first case was named after Provincetown Town Clerk Doug Johnstone, who initially defied a state edict to stop issuing licenses to out-of-state gay couples. Van Ness is representing the Cape-tip town; the other 12 municipalities are being represented by attorneys from Palmer & Dodge on behalf of the ACLU of Massachusetts.

Provincetown officials directed Johnstone to "temporarily" follow a cease-and-desist order issued by Reilly, after the attorney general and Gov. Mitt Romney cautioned that defiant clerks could face legal action.

The second case, named after Sandi and Bobbi Cote-Whitacre of Essex Junction, Vt., was brought against the state health department by Gay & Lesbian Advocates & Defenders of Boston.

Five of the eight nonresident couples named in the suit were married in Massachusetts by clerks who ignored the 1913 law, and three couples were turned away when they attempted to apply for marriage licenses.

The couple, who were married in Provincetown days after the legalization of gay marriage, were in Boston yesterday for the hearing. They said they would make as many trips down as necessary.

Material from The Associated Press was used in this report.

Gays: Senate support wanes for amendment

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Democrats, many of whom oppose the measure, took delight in the internal Republican woes, and Sen. Dick Durbin of Illinois read aloud from a recent statement on the issue by Lynne Cheney, wife of the vice president. "When it comes to conferring legal status on relationships, that is a matter that should be left to the states," he quoted her as saying.

The emotionally charged proposal, backed by the president and many conservatives, provides that marriage within the United States "shall consist only of a man and a woman."

A second sentence says that neither the federal nor any state constitution "shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." Some critics argue that the effect of that provision would be to ban civil unions, and its inclusion in the amendment has complicated efforts by GOP leaders to gain support from wavering Republicans.

While there was no disagreement that the measure would fall short of the 60 votes needed to advance, Republicans held out hope they could gain a majority. Even that seemed in doubt, although their chances improved when an aide to Sen. John Kerry said he and vice presidential running mate John Edwards did not intend to return to the Capitol for what amounted to a procedural vote. Both men oppose the amendment.

Legislation possible

The Senate moved toward a showdown as House Republicans pursued a different plan — seeking to pass legislation rather than an amendment.

The House Judiciary Committee scheduled a meeting today on a measure to strip federal courts of jurisdiction over a 1996 federal law that defined marriage as the union between a man and a woman.

Bush urged the Republican-controlled Congress last February to approve a constitutional amendment, saying it was needed to stop judges from changing the definition of the "most enduring human institution."

The odds have never favored passage in the current Congress, in part because many conservatives are hesitant to overrule state prerogatives in the area of issues such as marriage.

But Republican strategists hope to force Democrats to choose between voting the wishes of their liberal constituents, some of whom favor gay marriage, or in favor of an amendment that polls show is favored by a heavy majority of the country.

"They want to put senators on the spot. Ads will be running. Trust me," said Durbin, who added that the Republicans were trying to "change the subject" of the election away from the war in Iraq and the economy.

"Activist judges" criticized

In a string of speeches during the day, Republicans said their motivation was the defense of marriage, the well-

Reilly: Law on gay marriage for residents

Attorney general says case protects other states' rights

THE ASSOCIATED PRESS

BOSTON — Massachusetts' landmark gay marriage case applies only to Bay State residents and explicitly protects other states' rights to define marriage in their own way, according to a brief filed yesterday by Attorney General Thomas Reilly.

A Suffolk Superior Court judge will hear arguments this afternoon on a suit filed by eight out-of-state gay couples, who are seeking a preliminary injunction against a 1913 law that prohibits marriages that would be unlawful in a couple's home state.

The couples argue that the law perpetuates the same discrimination that was ruled unconstitutional by the state high court.

The state attorney general argues, however, that the couples' reliance on the high-court decision in the case of Goodridge vs. Department of Public Health ignores the ruling's specific references to the autonomy of other states.

"Language used throughout the Goodridge majority decision recognizes that other states are entitled to reach their own conclusions about same-sex marriage and that nothing in Goodridge is intended to force the issue in, or on, other states," Reilly writes.

The brief quotes a part of the majority decision that states:

"We would not presume to dictate how another state should respond to today's decision.."

GOP moves to save face

■ Lack of support for changing the
Constitution prompts new strategy.

By DAVID ESPO

THE ASSOCIATED PRESS

WASHINGTON — Short on votes and beset by internal divisions, Senate Republicans struggled yesterday to salvage a respectable defeat for a constitutional amendment banning gay marriage, an issue that President Bush pushed toward the top of the election-year agenda.

"This issue is not going away," Majority Leader Bill Frist of Tennessee said in a virtual concession that the measure would fall short of the 60 votes needed to advance past a test vote today. "Will it be back? Absolutely, yes," he added.

Fearing that the amendment might fail to get even 50 votes — much less the 67 needed to approve a constitutional amendment — Frist now plans a simple procedural vote today on whether to shut off debate and hold a vote.

Republicans are likely to lose that effort, which requires 60 votes, and the issue would die, but they may get enough votes to declare a face-saving victory.