

# Update: Annulment of Oregon Same-Sex Marriages?

By Mark Johnson

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In the December 2004 newsletter, we reported on the potential legal implications flowing from Multnomah County's issuance of 3,000 marriage licenses to same-sex couples in March and April of last year. On April 14, 2005, the Supreme Court decided *Li v. State of Oregon*, 338 Or 376, 110 P3d 91 (2005). (See, Casenotes, p. 6, this issue.) The *Li* court concluded that the Multnomah County marriages were void *ab initio*. 338 Or at 397. A question arises whether a same-sex couple married in Oregon can, should, or must get an annulment of their marriage.

An annulment clearly is not necessary, as the court has found that the marriages are void. The harder question is this: Is an annulment possible? If so, then all of the relief provided in ORS 107.105 is also available to the parties. See *Denis and Denis*, 153 Or App 655, 958 P2d 199 (1998). The grounds for annulment of a void marriage are stated in ORS 107.005(1): "A marriage may be declared void from the beginning for any of the causes specified in ORS 106.020 \* \* \* ." That statute, in turn, lists what are "prohibited" and "void" marriages in Oregon, namely, when either party has another spouse living at the time of the marriage, or when the parties are too closely related by blood.

In *Li*, the parties agreed, and the Supreme Court held, that same-sex marriages were also prohibited by statute, even though they were not specifically listed in ORS 106.020. 338 Or at 385-86. The court reached that conclusion by reading all of the marriage statutes together and noting that several of them referred to the parties as "husband and wife," which the court found to mean a man and a woman, in keeping with the ordinary meaning of those words. *Id.*

The court has construed the statutes to contain a third category of void marriages "same-sex marriages" not listed in ORS 106.020. The court's construction of the statutes, according to other case law, has become a part of them as though it was stated there explicitly by the legislature at the time of enactment. See *Stephens v. Bohlman*, 314 Or 344, 350 n 6, 838 P2d 600 (1992). Arguably, then, an annulment is available under ORS 107.005, together with all of the equitable relief that an annulment entails.

The only statutory alternative to the above holding is that Oregon law provides for two different kinds of void marriages and provides for annulment of one class of void marriages and not of the other. That outcome appears unlikely. A harder question is raised by the language of Article XV, section 5a, of the Oregon Constitution, which the voters adopted as Ballot Measure 36 in November 2004. That section provides: "It is the policy of Oregon, and its political subdivisions, that only a mar-

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The purpose of this Newsletter is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities. The opinions and recommendations expressed are the author's own and do not necessarily reflect the views of the Family Law Section or the Oregon State Bar.

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### Publication Deadlines

The following deadlines apply if a member wants an announcement or letter included in the newsletter.

Deadline	Issue
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July 1, 2005	August 2005
September 1, 2005	October 2005

Annual Conference  
October 20, 21 and 22, 2005

riage between one man and one woman shall be valid or legally recognized as a marriage." The Supreme Court has held that the section "signal[s] a presently enforceable tenet of Oregon constitutional law" that marriage is limited to opposite-sex couples. *Li*, 338 Or at 390.

Treating the Multnomah County marriages as void obviously does not violate the constitutional amendment. Arguably, however, granting the equitable relief of an annulment to a same-sex couple might accord some "legal recognition" to the marriage. The outcome may depend on whether the court gives retroactive effect to Measure 36, since all of the purported marriages took place before the measure's enactment. The *Li* court avoided the retroactivity question by deciding the validity of the marriages on statutory grounds. See 338 Or at 391. There is a presumption that constitutional amendments apply only prospectively, unless a contrary intent is shown. See *State v. Lanig*, 154 Or App 665, 675, 963 P2d 58 (1998). If a court finds that Measure 36 does operate retroactively, then a question arises as to the meaning of the phrase "legally recognized as a marriage" in the amendment (as distinct from "valid").

There are numerous unanswered questions regarding the status of these void marriages. In addition to the annulment statutes, other statutes also accord legal effect to void marriages. The parentage statutes are a prime example. See ORS 109.070(1)(a) & (b). Counsel providing advice to clients separating from same-sex relationships will need to ask whether the parties entered into a marriage when they were briefly available in 2004. If so, annulment options will need to be explored in addition to more traditional domestic partnership dissolution issues.

## Fun with Fees: An Explanation for the Apparently Inexplicable

It may have come to your attention that if your client is filing a petition for review under ORS 25.287(1)(e) to the circuit court on an administrative hearing on child support the fee for filing that appeal is more than if the client had filed a motion under ORS 107.135(1)(a) to show cause why child support should not be modified.

Why should this be the case? Shouldn't the fee in both instances be the same?

The answer is that the court system considers the petition for review under ORS 25.287(1)(e) to be a matter of first impression with the court under ORS Chapter 25 and is subject to the base fee provided for in ORS 21.110(1). A motion filed pursuant to ORS 107.135(1)(a) is considered to be a motion filed in a domestic relations case after entry of a judgment and is subject to the base fee provided for in ORS 21.111(3). The base fee provided for in ORS 21.110(1) is higher than the base fee provided for in ORS 21.111(3). Further, the applicable surcharges are different. On a ORS 107.135(1)(a) motion, the court system considers the surcharges for the law library, alternative dispute resolution services and other similar charges to have been paid in the original dissolution action. In contrast, since the petition for review under ORS 25.287(1)(e) is considered a matter of first impression, those surcharges are included in the fee paid to file the petition for review just as they are when a petition initiating a family law case is filed.

## 2005 Family Law Annual Conference

October 21, 2005 and October 22, 2005  
Salishan Lodge, Gleneden Beach, Oregon

This year the conference will include presentations on the following areas: family law tax issues, business valuation issues, estate planning for family law practitioner, third party practice, ethics, appellate review, collaborative custody evaluations, child abuse reporting, elimination of bias and more.

## Applicants for Editor

Section Chair Ronald Allen Johnston has announced that he has received notice from the newsletter Editor Conrad G. Hutterli that he is resigning from that position at the end of this year. The section's newsletter editor is responsible for putting out six newsletters each year and receives a per-newsletter stipend. Section members interested in serving as editor commencing in 2006 are encouraged to apply to Mr. Johnston at 1500 SW First, Portland, Oregon 97201; (503) 226-7986.