WHAT DOES THE MARRIAGE EQUALITY DECISION OF THE SUPREME COURT MEAN FOR YOUR ORGANIZATION?

CMIC LEADERS WEBINAR SERIES

Featuring Richard Hammar

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Richard Hammar is an attorney and CPA specializing in legal and tax issues for churches and clergy. He is also the author of several books published by Christianity Today and serves as senior editor of several award-winning newsletters. Richard is a graduate of Harvard Law School.

Following the webinar: You can expect a one-page document highlighting the important topics that were discussed today in Richard’s presentation.

Key Dates for future webinars:
• Thursday, Oct. 8 featuring James Friedman
  • 1-2 p.m. CT (Registration opens 9/21/15)
• Friday, Nov. 6 featuring Mark Chopko
  • 1-2 p.m. CT (Registration opens 10/22/15)
SUPREME COURT'S MARRIAGE EQUALITY DECISION

• Landmark 5-4 decision on June 26, 2015
• Due Process and Equal Protection clauses
• Religious organizations may "advocate and teach"
• Dissenting justices: what about practice and the “exercise of religion”
“Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction, that by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure that they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or is indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the state to bar same-sex couples from marriage on the same terms as accorded couples of the opposite sex. Pp. 27.”
EXISTING STATE LAWS

- Prior to Supreme Court’s decision, 37 states and the District of Columbia had provisions making same-sex marriages lawful.
- Court’s decision invalidates laws and constitutional provisions in 13 states defining marriage solely as a union between a man and a woman.
2 KEY AREAS OF RISK

1. Will ministers be legally required to perform same-sex marriages?
2. Will churches be required to host same-sex marriages on church property?
Risk #1 Will ministers be legally required to perform same-sex marriages?

It is unlikely that ministers will be legally required to perform same-sex marriages.

- Previous SCOTUS rulings suggest clergy will be free to decline to marry same-sex couples without penalty or civil liability; First Amendment’s protection of religious freedom is robust with regard to clergy performance of sacerdotal functions.
- Prior to SCOTUS decision, clergy was able to refuse to perform marriages on religious grounds (e.g. marriages in which one or both members are not members of the faith, or have been previously married and divorced).
- **KEY POINT:** No minister has been sued, much less been found liable, for not performing such marriages.
- Every state that recognized same-sex marriage included accommodations for the right of clergy to refuse to perform marriage...
KEY DIFFERENCE – ACCOMMODATION FOR RELIGIOUS PRACTICE

• 37 states previously recognized same-sex marriages, and in most states there was an explicit and unequivocal recognition of the right of clergy to marry, or not marry, any couple on the basis of their religious beliefs.

• “Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice.” (Roberts’ dissenting opinion)
EXAMPLES OF RELIGIOUS FREEDOM PROVISIONS IN STATE LAWS

• **Maryland** – “… An official of a religious order…who fails or refuses to join individuals in marriage is not subject to any fine or other penalty…”

• **Minnesota** – “… A member of the clergy…is not subject to any fine, penalty, or civil liability for failing or refusing to solemnize a civil marriage for any reason.”

• **New York** – “A refusal by a clergyman or minister…to solemnize any marriage…shall not create a civil claim or result in any state or local government action to penalize, withhold benefits or discriminate against any such clergyman or minister.”
Risk #2 Will churches be required to host same-sex marriages on church property?

A church must determine:

1. if it is a place of "public accommodation" under applicable local, state, or federal laws;
2. if so, is an exemption available for churches;
3. if a church exemption exists, have all the conditions for the exemption been satisfied; and
4. the constitutional protections available to churches based on applicable judicial precedent.
1. Is there a state, county, or local law prohibiting discrimination by places of “public accommodation?” There currently is a patchwork quilt of hundreds if not thousands of such laws, which makes it impossible to answer specific questions without knowing the answers to the questions listed below.

2. If so, what forms of discrimination are prohibited? Do they include sexual orientation?

3. If the answer to #1 is yes, do churches satisfy the definition of a place of public accommodation?

4. If the answer to #1 is yes, does it matter if churches rent their property to nonmembers as a means of generating income? Does this make it more likely that they will be deemed places of public accommodation?

5. If the answer to #1 is yes, does it matter that the church allows outside groups to use its facilities at no charge, or at a fee designed to recoup expenses but not generate income? Does this make it more likely that they will be deemed places of public accommodation?

6. If the answer to #3 is yes, does the law in question provide any exemption for churches?

7. If the answer to #6 is yes, does your church meet any conditions that are necessary to qualify for the exemption?

8. Consider the application of the First Amendment guaranty of religious freedom.

9. Consider the application of federal and state “religious freedom restoration” laws, such as the federal Religious Freedom and Institutionalized Persons Act (RLUIPA).

10. Is it possible to amend the applicable public accommodations law to include a broad exemption for churches?
Risk #2  Will churches be required to host same-sex marriages on church property?

Likely conclusions:

1. Churches that do NOT rent their facilities to outsiders for marriages and other events face no civil liability for not allowing their facilities to be used to host a same-sex marriage, reception, etc., in violation of their religious beliefs.

2. Churches that DO rent their facilities to outsiders for marriages and other events MAY face civil liability for not allowing their facilities to be used to host a same-sex marriage, reception, etc., even if same-sex marriages violate their religious beliefs.
Risk #2 Will churches be required to host same-sex marriages on church property?

Many examples of churches being treated less favorably if engaged in commercial activity:

- property tax exemption
- income tax exemption (if more than insubstantial)
- UBIT
Q # 1 What actions can we take to reduce our church’s risk?

Do we need to amend our bylaws?
A #1 Do we need to amend our bylaws?

Probably unnecessary:

- Many church governing documents already contain sufficient language that provide a theological basis for the church’s definition of marriage.
- Bylaw documents are viewed by the courts as self-imposed rules relating to the governance and administration of an organization.
- Resolutions and policies may be more appropriate to amend to reflect practices and operations.
A #1 Do we need to amend our bylaws?

Most Importantly:

- An amendment adding a marriage policy to an organization’s bylaws is no guaranty of protection since it might be ignored by an activist court. (1983 BJU)

- The bottom line is that including a statement in the church’s governing documents defining marriage may be of some help, but it is no guaranty of protection.
LEARN MORE:

Read Richard Hammar’s comprehensive coverage of the Supreme Court ruling in the September/October issue of Church Law & Tax Report.

Visit ChurchLawandTax.com for more details.