

It is too soon to say whether a case pending before the Oregon Supreme Court will decide the fate of same-sex marriages conducted in Multnomah County.

The lawsuit, brought by the American Civil Liberties Union on behalf of Basic Rights Oregon and nine same-sex couples against the state of Oregon, seeks to end the state's exclusion of gay and lesbian couples from marriage rights. Opening oral arguments were originally scheduled for Nov. 17 and have been postponed by the court until Dec. 15. The court asked attorneys on all sides to submit additional statements on how the passage of Ballot Measure 36, which amends the Oregon Constitution to ban same-sex marriage, affects the case.

"There are at least a thousand different paths the court could go down with this case," says David Fidanque, executive director of ACLU Oregon.

Prior to Election Day, the ACLU had argued in written briefs that state statutes were in violation of the Oregon Constitution and must be remedied. Attorneys said the most obvious way the court could remedy the inequality is to extend the right to marry to same-sex couples.

In light of the passage of Measure 36, Fidanque says the ACLU's argument will change—but not much.

"Assuming marriage is no longer an option," he says, "we will argue there are only two choices: The court could order the Legislature to grant the same rights—call them what you will—to same-sex citizens. Or the court could take away the benefits, rights and responsibilities granted through marriage to opposite-sex couples."

HANGING IN LIMBO

Court case may decide the fate of existing same-sex marriages

by Meg Daly



Becky Kennedy and Mary Li at their wedding in March 2004

As for the 3,000-plus same-sex marriages that already took place in the state, Fidanque says the ACLU will argue that Measure 36 is not retroactive and that the marriages remain valid.

Willamette University law professor Steven Green thinks this outcome is unlikely.

"Unfortunately, I think [the court] is going to make them null and void," he says.

At the same time, he cautions against asserting what a new constitutional provision does or does not provide. He echoes Fidanque's opinion that the court has myriad ways it could go with the ACLU case and that Measure 36 only adds a new layer of complexity.

Green, who served as an adviser to the No on 36 campaign, says that one of the things the court could find is that an April ruling from the Multnomah County Circuit Court "recognizes that there is a greater issue of equal rights [at stake], and Measure 36 doesn't address that." Judge Frank Bearden's decision said, in part, that there is no justifiable reason for the state to discriminate against same-sex couples on the basis of gender or sexual orientation.

The court "could argue that Article 1 may still require equality," says Green.

Article 1, Section 20 of the Oregon Constitution states: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

"We are arguing that means what it says," says Fidanque.

The Defense of Marriage Coalition, which intervened on the side of the state, says otherwise.

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