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EQUAL JUSTICE UNDER LAW

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Statement by Janson Wu, Esq.
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Before the Senate Judiciary Committee in Support of Senate Bill 394,
An act relative to the recognition of out of state marriages, uniform marriage recognition law, civil union recognition, civil union recognition, and gender neutral references
February 18, 2014

Honorable Chairperson Carson and Members of the Committee:

I am a staff attorney at Gay & Lesbian Advocates & Defenders (GLAD), a New England-wide public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. I submit this testimony in strong support of Senate Bill 394.

SB 394 completes the promise of full equality for same-sex married couples that New Hampshire made in 2009 when it enacted its marriage equality law. In the three year since the first same-sex couples married in New Hampshire, we have seen the happiness and joy that has come with those marriages. At the same, there have also been unintended gaps in the law. This legislation fills those gaps so that all families are treated equally. There are four provisions to this law, which I will address in turn.

Section 1

This section provides that any New Hampshire couple who had married in another state (such as Massachusetts) will have their marriages recognized from the date of solemnization. This clarification is necessary because prior to 2010, New Hampshire law prohibited recognition of marriages of same-sex couples who were married out of state. While the legislature has since repealed that law, it failed to state explicitly that such repeal should apply to couples who had married out of state before 2010.

We are aware of at least one New Hampshire family court judge who has ruled in a divorce case of a NH same-sex couple that it would only recognize the validity of their marriage beginning from 2010, despite the fact that the couple actually married in 2004 in Massachusetts and entered into a civil union in Vermont in 2002. The judge based her ruling on the fact that prior to 2010, New Hampshire had a statute prohibiting the recognition of out-of-state marriages by same-sex couples. That statute has since been repealed, but the judge refused to apply that repeal retroactively. As a result, the court effectively erased the first 8 years of their marriage. Especially in a divorce case, the length of a marriage profoundly impacts determinations of property division, alimony, and child custody. In this case, because the couple's child was born before 2010, the court held that the child was not a child of the marriage, and therefore the non-birth mother was not a legal parent under New Hampshire's marital presumption statute. As a result, that mother has been effectively cut off from ever seeing her 9-year-old son again.

Section 2

This section repeals New Hampshire's reverse evasion law, RSA 457:44. NH RSA 457:44, enacted in 1979, prohibits a non-resident couple from marrying in New Hampshire if their marriage would be "void" or "prohibited" in their home state. It states in whole: "No

marriage shall be contracted in this state by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this state in violation hereof shall be null and void."

This law was adopted almost verbatim from a uniform act called the Uniform Marriage Evasion Act.[i] This uniform act was adopted in 1912 in order to respect other states' prohibitions on marriage – specifically their anti-miscegenation laws. At the time the Uniform Marriage Evasion Act was adopted, thirty out of forty-eight states forbade or made void interracial marriage.[ii] The committee that drafted the uniform act acknowledged that it would give effect to other states' laws barring marriage between "a white person and a colored person."[iii] Historians have theorized that the uniform act was part of a wave of anti-miscegenation laws that swept the Nation beginning in 1912, following the high-profile marriage of Jack Johnson, the first black heavyweight prizefighter, with a white woman.[iv] Very few states actually adopted such reverse evasion laws, given their roots in racism and white supremacy. Only about half a dozen states ever adopted a law like this, and those states have either repealed those laws or allowed those laws to fall into disuse long ago.[v]

Accordingly, reverse evasion statutes have proved not only discriminatory, but worthless and unnecessary decades ago.

While we believe that this statute is unconstitutional and therefore unenforceable,[1] its continued existence threatens the validity of many marriages of out-of-state couples who come to New Hampshire to get married. Today, even though no state prohibits marriages of interracial couples, almost 30 states prohibit marriages of same-sex couples. For couples from one of those states who have already come to New Hampshire to marry, they should not have to worry about whether their marriage may be declared void. For example, we know of one couple from Ohio, which has a constitutional amendment prohibiting same-sex couples from marrying, who came to New Hampshire to marry, not realizing that New Hampshire had a reverse evasion statute. They are now worried that their marriage may not be valid and have had to "remarry" in New York in order to address the cloud hanging over their marriage. (A copy of a letter from their attorney is attached.)

On the flip side, NH's reverse evasion law is not necessary to protect the rights of other states to regulate marriage within their borders. With or without this law, every state is free to regulate marriage within its own borders, both in setting marriage eligibility and in determining whether to recognize marriages legally celebrated in other states. States have managed to deal with different states' marriage rules for over 200 years. No state has ever had a residency requirement for marriage. As a result, people have often traveled to other states to marry, often to their states where they grew up. When they return home, it is always up to each state to determine what legal effect it will give to an out-of-state marriage. As such, New Hampshire does not need to abort its own principles of providing equal marriage rights by deferring to the discriminatory marriages restrictions of other states.

No couple should have to worry about whether their marriage is valid or not. Particularly now that same-sex couples in 14 states and the District of Columbia can marry, New Hampshire has become an outlier in creating potential legal impediments to out-of-state same-sex couples'

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[1] New Hampshire's clerks are not currently enforcing this law and allowing out-of-state couples to marry in New Hampshire, regardless of their state of residence.

ability to come to New Hampshire to marry. This bill would repeal New Hampshire's reverse evasion law, so that any out-of-state couple can come to New Hampshire to marry, provided they meet New Hampshire's eligibility requirements. It also clarifies that those out-of-state, same-sex couples who have already married in New Hampshire will not have to worry that their marriages are void.

Section 3

This section makes clear that even though a couple may have entered into a civil union from another state, they can also get married in New Hampshire without having to first dissolve their civil union.

When the legislature passed its marriage equality law, it wanted to ensure that NH couples with out-of-state civil unions would be treated the same as married couples. In order to achieve that equality, it amended RSA 457:45 to provide that any out-of-state civil union shall be recognized as a marriage in New Hampshire. What the legislature had not realized is that New Hampshire also prohibits married couples from remarrying each other (i.e. renewing their marriage) except under limited circumstances. *See* RSA C-5:50, 51. The Attorney General has since ruled in an advisory letter to the Secretary of State. (A copy of that letter is attached.) That letter advised that these statutes, taken together, meant that a couple in an out-of-state civil union could not marry each other in New Hampshire, because they were already "married" under New Hampshire law and therefore could not get remarried. As a result, if the couple wanted to get married in New Hampshire, they first would have to dissolve their civil union. If they choose not to, then they would only have the status of their civil union and not marriage. Simply because New Hampshire may treat an out-of-state civil union as a marriage does not make it a marriage, and the second the couple travels to another state that does not afford that same treatment, that couple would lose all of the protections and benefits of marriage and would only be in a civil union.

This interpretation of the law undermines the intent of the statute – i.e. to provide equal protections to same-sex couples and their families. Instead, those families cannot enjoy the full security that only marriage provides unless they first dissolve their civil union – a process that not only costs time and money, but could also have harmful, unintended consequences for other marriage-related protections, such as health insurance.

Section 4

This section clarifies that all domestic relations-related statutes should apply equally to families, regardless of the gender of the two parties.

While the legislature, in passing its marriage equality law, intended that all families be treated the same, regardless of the gender of the two spouses or parents, litigants in family court have since tried to take advantage of archaic, gendered language in family law statutes to argue that those laws, such as NH's marital presumption law which refers to husbands, should not apply equally to families headed by same-sex parents. As a result, those families, and especially the children of those families, have been denied critical protections under New Hampshire's family and divorce laws. Quite literally, children have been torn apart from parents because family court judges have refused to apply New Hampshire's domestic relations laws equally to same-sex couples. This section clarifies that all families stand on equal footing regardless of the gender of the two parties/spouses/parents involved.

February 18, 2013

Submitted by:

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[i] *See* St. 1913, c. 360, §§ 1-3 and *Proceedings of the Twenty-Second Annual Conference of the Commissioners on Uniform State Laws*, Report of the Committee on Marriage and Divorce, p. 125 and text of Act at pp. 129-30.

[ii] See Peter Wallenstein, Tell the Court I Love My Wife: Race, Marriage, and Law – An American History, (2002), Figure 8, App. 40.

[iii] *See Proceedings of the Twenty-Second Annual Conference of Commissioners on Uniform State Laws* held at Milwaukee, Wisconsin, August 21, 22, 23, 24, and 26, 1912, Report of the Committee of Marriage and Divorce, Comment 4, pp. 127-28.

[iv] *See* Byron Curti Martyn, *Racism in the United States: A History of Anti-Miscegenation Legislation and Litigation*, (Ph.D. Diss., Univ. of S. CA., 1979), 909, 1387-93, App. 37; *see also* Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity and Adoption* 232, 256 (2003).

[v] In addition to New Hampshire, the only states that have this law or some version of it on its books are Illinois, Vermont, Wisconsin, and Wyoming. Massachusetts repealed its law in 2008. Louisiana repealed its version of the 1913 law in the wake of the U.S. Supreme Court's decision in Loving v. Virginia. The other 44 states regularly allow non-residents to marry without regard to the home states' laws, leaving it up to the home states to police their own laws. In fact, so few states adopted the uniform law that its proponents abandoned the effort by withdrawing it in 1943, explaining that the uniform law "merely tend[ed] to confuse the law."

State of New Hampshire
Inter-Department Communication

DATE: December 30, 2009

FROM: Rosemary Wiant
Assistant Attorney General

AT (OFFICE) Attorney General's Office

SUBJECT: Out-of-State Civil Unions: Ability to Marry in New Hampshire

TO: William Gardner
Secretary of State

CC: Michael A. Delaney, Attorney General; Orville B. Fitch, Deputy Attorney General; Michael K. Brown, Senior Assistant Attorney General; Steve Wurtz, Vital Records

Attorney-Client Privileged/Confidential

Question

Whether two same-sex New Hampshire residents, already joined in a civil union obtained in Vermont, may marry in New Hampshire as of January 1, 2010.

The short answer to your question is no, unless the couple first dissolves their civil union. Effective January 1, 2010, New Hampshire recognizes a civil union obtained outside of this state as a marriage in this state and treats it accordingly. New Hampshire does not allow two people, who are already married, to remarry each other.

Background/Relevant Facts

Two women who are residents of Portsmouth, New Hampshire desire to marry and have filed an Intention to Marry Worksheet with the city clerk in Manchester, New Hampshire. The women are currently parties to a civil union obtained in Vermont on July 11, 2005. The Manchester clerk has not yet issued a marriage license, pending this analysis of the law concerning civil unions obtained outside of the State of New Hampshire.

Relevant Statutes

> **457:1 Purpose and Intent**
> The purpose of this chapter is to affirm the right of 2 individuals desiring to marry and who otherwise meet the eligibility requirements of this chapter to have their marriage solemnized in a religious or civil ceremony in accordance with the provisions of this chapter.

457:1-a Equal Access to Marriage
Marriage is the legally recognized union of 2 people. Any person who otherwise meets the eligibility requirements of this chapter may marry any other eligible person regardless of gender. Each party to a marriage shall be designated "bride," "groom," or ""spouse."

457:2 Marriages Prohibited
. . . . No person shall be allowed to be married to more than one person at any given time.

RSA 457:45 Civil Union Recognition
A civil union legally contracted outside of New Hampshire shall be recognized as a marriage in this state, provided that the relationship does not violate the prohibitions of this chapter.

457:46 Obtaining Legal Status of Marriage
I. Notwithstanding the provisions of RSA 457-A, no new civil unions shall be established on or after January 1, 2010. Two consenting persons who are parties to a valid civil union entered into prior to January 1, 2010 pursuant to this chapter may apply and receive a marriage license and have such marriage solemnized pursuant to RSA 457, provided that the parties are otherwise eligible to marry under RSA 457 and the parties to the marriage are the same as the parties to the civil union. Such parties may also apply by January 1, 2011 to the clerk of the town or city in which their civil union is recorded to have their civil union legally designated and recorded as a marriage, without any additional requirements of payment of marriage licensing fees or solemnization contained in RSA 457, provided that such parties' civil union was not previously dissolved or annulled. Upon application, the parties shall be issued a marriage certificate, and such marriage certificate shall be recorded with the division of vital records administration. Any civil union shall be dissolved by operation of law by any marriage of the same parties to each other, as of the date of the marriage stated in the certificate.

II. Two persons who are parties to a civil union established pursuant to RSA 457-A that has not been dissolved or annulled by the parties or merged into a marriage in accordance with paragraph I by January 1, 2011 shall be deemed to be married under this chapter on January 1, 2011 and such civil union shall be merged into such marriage by operation of law on January 1, 2011.

Discussion

The New Hampshire marriage law, RSA chapter 457, effective January 1, 2010, intends to treat all persons equally who desire to marry. So long as a couple, regardless of gender composition, desires to marry and meets the requirements of RSA 457, they may marry. RSA 457:1. RSA 457:1-a affirms that any two persons may marry provided that they are each eligible to marry under New Hampshire law, RSA 457. Each of these provisions establishes the State's

interest in affording equal access to marriage. Under these provisions, *all* persons must meet the eligibility requirements to enter into a marriage in New Hampshire.

Because New Hampshire recognizes parties to an out-of-state civil union as being lawfully married, couples that already have a legally contracted civil union are not eligible to marry unless the civil union is first dissolved. RSA 457:45; RSA 5-C:50-51. The plain language of the statute necessitates this interpretation. According to RSA 457:2, "[n]o person shall be allowed to be married to more than one person at any given time." Similarly, RSA 457:45 provides, "A civil union legally contracted outside of New Hampshire shall be recognized as a marriage in this state, provided that the relationship does not violate the prohibitions of this chapter." This interpretation is also consistent with New Hampshire's policy that parties to a civil union are entitled to the same rights, obligations and responsibilities as parties to a marriage. RSA 457-A:6 (repealed, effective Jan. 1, 2010). Therefore, the statutory language as well as the public policy to treat all persons equally, compels the conclusion that persons who already possess a civil union and, therefore already have the legal status of married in New Hampshire may not enter into a new marriage contract unless they first dissolve the civil union.

The same is true for couples that have a civil union obtained in New Hampshire. Such persons may not marry without first dissolving their civil union. For New Hampshire civil unions, however, the law incorporates a mechanism for automatically dissolving the civil union upon conversion of the civil union into a marriage. RSA 457:46. "Any civil union shall be dissolved by operation of law by any marriage of the same parties to each other, as of the date of the marriage stated in the certificate." Id. Because in the context of conversion, the statute provides that the original civil union will be dissolved by operation of law, it can only pertain to New Hampshire couples.[1] The New Hampshire statute does not affect, by operation of New Hampshire law, the legal status of parties to civil unions in other states. What is important to this analysis, however, is that New Hampshire law requires that a civil union be dissolved before entering into a marriage regardless of whether the civil union was obtained within or outside of New Hampshire.

Moreover, being able to obtain a marriage in New Hampshire while already a party to a civil union could call into question the legal status of the parties. Which legal status prevails? Is it that which was most recently obtained? If so, then the parties could face unintended consequences. The Gay & Lesbian Advocates & Defenders ("GLAD") organization has opined, for instance, that getting married in Massachusetts when a couple is already married "could be used as evidence that you believed your original marriage was not valid, and thus could affect how a court or other entity would apply the protections of marriage to your relationship during the time period between the two marriages." GLAD, Family Law in Massachusetts, *How to Get Married in Massachusetts*, p. 16, <http://www.glad.org/uploads/docs/publications/how-to-get-married-ma.pdf> (accessed Dec. 15, 2009). This could be relevant to establishing property division rights in the event of divorce or dissolution, and perhaps in the event of the death of a party. Therefore, there are also practical reasons for strictly interpreting the statutes limiting the availability of marriage to persons not already married or parties to a civil union.

[1] There is also no indication from the legislative history that this section was intended to apply to out-of-state civil unions.

Finally, the New Hampshire statutes differ from the laws governing marriage in other states. For instance, according to GLAD, a couple may get married in Massachusetts even though the couple has a civil union from another state. GLAD, *How to Get Married in Massachusetts*, p.17. Significantly, however, Massachusetts's law contains no provision indicating that it recognizes civil unions as marriages. See M.G.L. chapter 207.

Vermont allows the same parties to a marriage or a civil union to marry. Vt. Stat. title 15 § 4 (providing, "Civil marriages contracted while either party is legally married or joined in civil union to a living person *other than* the party to that marriage shall be void") (emphasis added).[2] Similarly, Connecticut law specifically provides that a person is eligible to marry even though that person is already joined in a civil union *so long as* that person marries his or her civil union partner. Connecticut Office of Vital Records, <http://www.ct.gov/dph/cwp/view.asp?A=3294&Q=427720> (accessed Dec. 15, 2009); see generally C.G.S.§§ 46b-21 through 46b-35. New Hampshire, in contrast, has no similar provision. Instead, New Hampshire law affirmatively prohibits such remarriages. RSA 5-C:50 (allowing marriage when the parties are currently married only when the validity of that marriage is in question); RSA 5-C:51, I (providing, "A marriage certificate shall not be issued to parties who are already lawfully married to each other except as provided in RSA 5-C:50"). Therefore, because New Hampshire law recognizes parties to a civil union as being "lawfully married," those persons may not remarry each other.

In sum, all persons who are already parties to a marriage or civil union may not marry in New Hampshire. Such persons would have to dissolve their marriage or civil union and provide proof of such dissolution. See RSA 457:2; RSA 457:23; RSA 4-C:51, I. This requirement applies to *all* persons, whether a party to a same-sex or opposite sex marriage or civil union and, as such, is consistent with state policy affording all persons equal access to marriage under RSA 457:1-a.

[2] Vermont does, however, restrict civil union to persons who are not a party to another civil union or marriage.

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February 14, 2014

Senator Sharon Carson, Chairperson
Senate Judiciary Committee
New Hampshire State House 100
Concord, New Hampshire

Dear Senator Carson,

I am writing to support Senate Bill 394, which would repeal New Hampshire's reverse evasion law.

NH RSA 457:44, enacted in 1979, prohibits a non-resident couple from marrying in New Hampshire if their marriage would be "void" or "prohibited" in their home state. The statute states in whole: "No marriage shall be contracted in this state by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this state in violation hereof shall be null and void."

Senate Bill 394 would repeal 457:44 and restore the validity of those marriages of out-of-state couples who came to New Hampshire to marry, reasonably believing that such marriages would be valid.

This law has negatively impacted two clients of mine who married in New Hampshire in 2010. My clients applied for and were granted a marriage license from a New Hampshire clerk. Apparently, none of the New Hampshire clerks knew of the law.

My clients became aware of the problem in September 2013. The United States Supreme Court in its decision, *United States v. Windsor*, requires the federal government to recognize all same-sex marriages if they were valid where celebrated. My client's marriage was not valid under New Hampshire law because of NH RSA 457:44.

If New Hampshire intends to keep this law it must advise any same-sex nonresident couple seeking to marry that they cannot. Ohio could use this law to deny my clients specific rights. Further, the federal government can refuse to recognize the marriage because it was not valid where celebrated. Then my clients will be denied specific federal benefits. Only New Hampshire can rectify this situation. I encourage you to pass Senate Bill 394.

Thank you.

Sincerely,

Joan M. Burda
Attorney at Law