OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

December 29, 2000

Jim Ryan
ATTORNEY GENERAL

FILE NO. 00-017

FAMILY LAW:
Recognition of Vermont Same-Sex
Civil Unions by Illinois

The Honorable Edward Petka
Majority Whip
State Senator, 42nd District
Post Office Box 188
Plainfield, Illinois 60544

Dear Senator Petka:

I have your letter wherein you inquire whether, under the Full Faith and Credit Clause of the United States Constitution (U.S. Const., art. IV, sec. 1), the State of Illinois is required to extend to persons who have entered into a "civil union" under the laws of Vermont the same benefits extended to married persons under the laws of Illinois. For the reasons hereinafter stated, it is my opinion that the State of Illinois is not required to recognize "civil unions" entered into under the laws of Vermont or to extend to persons who have entered into a "civil union" the benefits which may be extended to married persons.

As you are aware, the State of Vermont recently enacted legislation which allows same-sex partners to enter into a so-called "civil union", which confers upon them the benefits and protections of marriage. (2000 Vt. Laws 91.) The legislation was enacted in response to the Vermont Supreme Court's opinion in Baker v. State (Vt. 1999), 744 A.2d 864, wherein it was held that the Vermont marriage statutes were unconstitutional. In Baker v. State, three same-sex couples who had been denied marriage licenses sought a declaratory judgment declaring that the refusal to issue them licenses violated the Vermont marriage statutes and the Vermont Constitution. The trial court ruled that the marriage statutes could not be construed to permit the issuance of a license to same-sex couples and that such statutes were constitutional. (Baker v. State (Vt. 1999), 744 A.2d at 868.) The Vermont Supreme Court upheld the trial court's ruling regarding the construction of the marriage statutes, but held that those statutes were unconstitutional under the common benefits clause of the Vermont Constitution (Vt. Const., ch. I, art. 7) for failing to provide same-sex couples the same benefits as married persons. The court concluded that Vermont had "* * * a constitutional obligation to extend to same-sex couples the common benefit, protection, and security that Vermont law provides opposite-sex married couples". (Baker v. State (Vt. 1999), 744

A.2d at 886.) The determination of whether to provide such common benefits to same-sex partners by including them within the marriage statutes, or by creating a parallel domestic partnership system or some equivalent statutory alternative, was left to the Vermont legislature. Baker v. State (Vt. 1999), 744 A.2d at 886.

Thereafter, marital benefits were extended to same-sex partners through the enactment of the "civil union" statute. (2000 Vt. Laws 91.) The Vermont legislation authorizes two non-related persons of the same sex who are not currently a party to another civil union or to a marriage to enter into a civil union. The Vermont legislation requires parties to a civil union to be accorded the same benefits, protections and responsibilities as spouses in a traditional marriage. The procedures governing the creation and termination of a civil union are essentially identical to the procedures for entering into and dissolving a marriage. Persons seeking to enter into a civil union must first apply for and obtain a civil union license. Within 60 days after such license is issued, the civil union must be certified by a person authorized to certify a civil union, such as a judge, assistant judge, justice of the peace or member of the clergy. Within 10 days of the certification, the person who performed the certification must return the civil union certificate to the town clerk for registration. Parties to a civil union are allowed to

modify the terms, conditions or effects of their civil union in the same manner and to the same extent as married persons who execute an antenuptial agreement. The dissolution of civil unions follows the same procedures as are applicable to the dissolution of a marriage.

You have inquired whether, under the Full Faith and Credit Clause of the United States Constitution, Illinois is required to recognize civil unions entered into pursuant to Vermont law. Article IV, section 1 of the United States Constitution provides as follows:

> "Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The first sentence of article IV, section 1 of the United States Constitution requires each State to give full faith and credit to the public acts, records and judicial proceedings of every other State. The United States Supreme Court has, however, recognized a public policy exception that, in appropriate circumstances, permits a State to decline to give effect to another State's laws. (See H.R. Rep. No. 644, 104th Cong., 2d Sess. 9 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2913.) Thus, in Nevada v. Hall (1979), 440 U.S. 410, 99 S. Ct. 1182,

reh'g denied, 441 U.S. 917, 99 S. Ct. 2018 (1979), for example, the United States Supreme Court stated: "* * * the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." (Nevada v. Hall (1979), 440 U.S. at 422, 99 S. Ct. at 1189 citing Pacific Insurance Co. v. Industrial Accident Comm'n (1939), 306 U.S. 493, 59 S. Ct. 629.) Arguably, therefore, one State may refuse to give effect to a same-sex marriage entered into in another State if doing so would violate its own public policy.

Due to the uncertainty regarding whether the Full Faith and Credit Clause would require other States to recognize same-sex marriages should one State authorize them (H.R. Rep. No. 644, 104th Cong., 2d Sess. 9 (1996), reprinted in, 1996 U.S.C.C.A.N. 2905, 2913), Congress enacted the Federal Defense of Marriage Act (28 U.S.C. § 1738C), which provides, in pertinent part:

"

* * *

> 'No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.'

* * *

"

(Emphasis added.)

Congress enacted section 2 of the Defense of Marriage Act (28 U.S.C. § 1738C) pursuant to the second sentence of article IV, section 1 of the United States Constitution, which states: "* * * the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Although the "Effects Clause" has not been invoked frequently (see H.R. Rep. No. 644, 104th Cong., 2d Sess. 9 (1996), reprinted in, 1996 U.S.C.C.A.N. 2905, 2930), it nonetheless authorizes Congress to enact legislation to prescribe the effect that public acts, records and proceedings of one State must be given in sister States.

Pursuant to the language of section 2 of the Defense of Marriage Act, Congress has decreed that no State is required to give effect to any public act, record or judicial proceeding of any other State respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State. Regardless of the terminology used, a "civil union" entered into pursuant to Vermont law is clearly a relationship between persons of the same sex that is treated as a marriage under the laws of that State. Consequently, it is my opinion that, pursuant to the Defense of Marriage Act, the State of Illinois is not required to recognize or give effect to a civil union entered into under Vermont law.

A State confronted with the question of whether to recognize a same-sex marriage entered into in another State must determine whether its own laws or the laws of the other State should apply. The purpose of the Defense of Marriage Act is to allow each State to apply its own laws, expressing its own public policy, on this issue, notwithstanding the general requirement that each State give effect to the acts, records and proceedings of every other State. (See H.R. Rep. No. 644, 104th Cong., 2d Sess. 9 (1996), reprinted in, 1996 U.S.C.C.A.N. 2905, 2931.) Therefore, although Illinois is not required to recognize a Vermont civil union under the Full Faith and Credit Clause of the United States Constitution, it must also be determined whether Illinois law requires same-sex civil unions entered into under the laws of another State to be recognized.

In this regard, section 213 of the Illinois Marriage and Dissolution of Marriage Act (hereinafter referred to as "IMDMA") (750 ILCS 5/213 (West 1998)) provides as follows:

> "Validity. All marriages contracted within this State, prior to the effective date of this Act, or outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties, are valid in this State, except where contrary to the public policy of this State." (Emphasis added.)

Concomitantly, section 216 of IMDMA (750 ILCS 5/216 (West 1998)) provides:

> "Prohibited marriages void if contracted in another state. That if any person residing and intending to continue to reside in this state and who is disabled or prohibited from contracting marriage under the laws of this state, shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state." (Emphasis added.)

Section 212 of IMDMA (750 ILCS 5/212 (West 1998)) flatly prohibits same-sex marriages in Illinois:

> "Prohibited Marriages. (a) the following marriages are prohibited:
>
> * * *
>
> (5) a marriage between 2 individuals of the same sex.
>
> * * * "

The public policy of the State is set out in section 213.1 of IMDMA (750 ILCS 5/213.1 (West 1998)), which provides:

> "Same-sex marriages; public policy. A marriage between 2 individuals of the same sex is contrary to the public policy of this State."

Under section 213 of IMDMA, Illinois does not recognize same-sex marriages contracted outside of Illinois because they

are violative of the public policy of this State. Pursuant to section 216 of the IMDMA, therefore, a same-sex marriage contracted outside of Illinois by an Illinois resident who intends to continue to reside in Illinois would be null and void for all purposes in this State.

The Vermont legislature, however, opted to provide marital benefits to same-sex partners through a system of civil unions rather than by permitting same-sex marriages. The difference between a civil union in Vermont and a same-sex marriage, however, is merely a matter of nomenclature. Pursuant to the Vermont civil union legislation, parties to a same-sex civil union are entitled to all benefits, protections and responsibilities under Vermont law as are spouses in a marriage. Moreover, Vermont same-sex couples must meet all of the formalities of marriage. Same-sex couples must obtain a civil union license, the civil union must be certified and the certificate of civil union must be registered in the same way as a marriage license. It is my opinion, therefore, that Vermont same-sex civil unions are equivalent to same-sex marriages, for purposes of Illinois law. Consequently, under both State and Federal law, same-sex civil unions entered into pursuant to Vermont law are not recognized under Illinois law.

I note that the Illinois Appellate Court recently concluded that a Chicago ordinance permitting same-sex domestic partners of city employees to qualify for health benefits did not impermissibly create a new marital status. (Crawford v. City of Chicago (1999), 304 Ill. App. 3d 818, appeal denied, 185 Ill. 2d 621 (1999).) Under the Chicago ordinance, domestic partners of city employees were only granted eligibility to receive health benefits similar to those afforded to employees' spouses. Parties to a Vermont civil union, on the other hand, are entitled to all marital benefits. Additionally, pursuant to the Chicago ordinance, city employees and their domestic partners merely had to register their partnership with the city personnel department in order to qualify for benefits. Parties to a Vermont civil union, however, must meet the same formal requirements as parties to a marriage. The relationship recognized by the Chicago domestic partnership ordinance, therefore, is clearly distinguishable from the quasi-marital relationship created by the Vermont civil union legislation.

For the reasons set out above, it is my opinion that the State of Illinois is not required to recognize same-sex civil unions entered into under the laws of Vermont under either the

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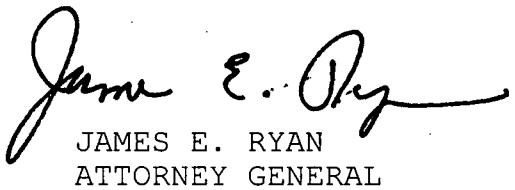
Full Faith and Credit Clause of the United States Constitution or Illinois law.

Sincerely,



JAMES E. RYAN
ATTORNEY GENERAL