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West Orange-Cove *trial set for July 26*

School Finance Litigation Update

Nearly 300 school districts have joined a lawsuit challenging the current Texas school finance system. A trial in the case, *West Orange-Cove Consolidated ISD v. Alanis, et. al.,* is scheduled for July 26, 2004, in Travis County District Court before State District Judge John Dietz. All parties are scheduled to file their findings of fact and conclusions of law by June 7, and discovery must be completed by June 25. The trial is expected to last about four weeks, and Judge Dietz has indicated that he will rule shortly after its conclusion.

School finance litigation background. Over the past three decades, the Texas public school finance system has evolved through a series of legislative responses to legal challenges by school districts and taxpayers. Three times in 20 years, courts declared the system inequitable and unconstitutional. A series of *Edgewood* lawsuits beginning in 1989 confronted the issue of equity, or how to resolve disparities in revenue-raising capacity and funding between property-wealthy and property-poor districts. In 1993, the 73rd Legislature enacted SB 7 and created the current recapture system, which essentially shifts money from richer districts to poorer districts to help equalize educational funding. In 1995, the Supreme Court upheld the constitutionality of this system. (For a detailed background, click here to see "Taking Stock of School Finance Litigation," HRO *Interim News* Number 77-8, May 29, 2002.)

In its 1995 decision (*Edgewood* IV), however, the Supreme Court acknowledged that "future legal challenges may be brought if a general diffusion of knowledge can no longer be provided within the equalized system because of changed legal or factual circumstances." In particular, the court warned that tax caps could be the basis for legal challenges: If the cost of providing for a general diffusion of knowledge continues to rise, as it surely will, the minimum rate at which a district must tax will also rise. Eventually, some districts may be forced to tax at the maximum allowable rate just to provide a general diffusion of knowledge. If a cap on tax rates were to become in effect a floor as well as a ceiling, the conclusion that the Legislature had set a [constitutionally prohibited] statewide ad valorem tax would

(See Litigation, page 2)

States Consider Constitutional Bans on Same-Sex Marriage

Prompted by new and increasing challenges to the traditional view that legal recognition of marriage should be confined to opposite-sex couples, Congress and state legislatures across the nation are debating whether to amend the U.S. and state constitutions to include a definition of marriage. Most state courts that have considered the issue have upheld limiting marriage to opposite-sex couples. However, recent legal interpretations by the highest courts in Vermont and Massachusetts that their state constitutions do not allow same-sex couples to be treated differently in availing themselves of the legal privileges and protections of matrimony have raised similar issues regarding equal protection and other rights guaranteed by the constitutions of other states.

(See Marriage, page 10)

(Litigation, from page 1)

appear to be unavoidable because the districts would then have lost all meaningful discretion in setting the tax rate.

When the *West Orange-Cove* lawsuit was filed in 2001, four property-wealthy districts asserted that because they were or soon would be levying local property taxes at $1.50 per $100 of taxable value, the maximum tax rate for maintenance and operations (M&O) of schools, they had lost local discretion in setting M&O rates. (Districts at the M&O tax cap may levy taxes beyond the M&O cap to finance debt for facilities and equipment.) They sought a declaration from the 250th District Court in Travis County that the system effectively creates a state property tax, prohibited under Texas Constitution, Art. 8, sec. 1-e. The problem, they contended, could not be cured simply by raising the statutory cap, because such a solution only would aggravate the state's over-reliance on local property taxes as a means of financing the school system. Rather, they requested that the state assume a greater responsibility for financing the school system and end its over-reliance on the local property tax.

If the cost of providing for a general diffusion of knowledge continues to rise ... the minimum rate at which a district must tax will also rise. Eventually, some districts may be forced to tax at the maximum allowable rate.

—Texas Supreme Court, *Edgewood* IV

In defending the current system, the state argued that the $1.50 rate did not constitute a state ad valorem tax because school districts are not required to tax at any rate, but instead choose the levels at which to tax and educate. School districts are required only to provide a basic minimum accredited education as defined by the Legislature.

State District Judge Scott McCown dismissed the case for "lack of ripeness," agreeing with the state that fewer than half of all school districts had reached the $1.50 cap, an insufficient number for the court to consider whether the state has established a prohibited state property tax by, in effect, compelling districts to tax at that level to meet the minimum standards required for accreditation. Judge McCown also agreed with another argument by the state that many districts taxing at the cap still had the discretion to reduce or eliminate their local-option homestead exemptions in order to free up additional revenue.

The Third Court of Appeals in Austin agreed with Judge McCown's decision to dismiss the suit *(West Orange-Cove Consolidated I.S.D., et. al. v. Alanis*, 78 S.W. 3d 529 (Tex. App.-Austin 2002)), but the decision was based on different reasoning. The appellate court said that the threshold for determining whether the $1.50 cap creates a state property tax is not the number of districts at or near the cap but whether any district has no choice but to tax at the cap to meet the state's minimum accreditation standard.

On May 29, 2003, the Supreme Court reversed the two lower court decisions and remanded the case to Travis County District Court for a trial, specifically reaffirming its previous *Edgewood* decisions. In its 8-1 decision *(West Orange-Cove Consolidated I.S.D., et. al. v. Alanis*, 107 S.W. 3d 558 (Tex. 2003)), the Supreme Court rejected the district court's reasoning that not enough districts had reached the $1.50 cap to consider the case. The determining factor is the extent of the state's control over the taxation process rather than the number of districts affected, the court said, and even a single district is entitled to a day in court if it alleges that it is constrained by the state to tax at a particular rate.

In its decision, written by Justice Nathan Hecht, the Supreme Court noted that it is the job of the Legislature, not the courts, to devise a school finance system that meets the standards established in the Constitution. The court will not second-guess the Legislature's policy choices on what constitutes a minimally adequate education, but it will decide whether those choices as a whole meet the constitutional standard in Art. 7, sec. 1, which establishes a duty for the Legislature to create an efficient system for providing a "general diffusion of knowledge." Referring to the existing system, the court pointed out that:

> In every session since 1993, the Legislature has amended the Education Code, but little change has been made in funding the maintenance and operation of schools ... the level of state funding has continued to fall, reliance on local property taxes has increased, and more school districts ... have reached maximum rates. Presciently, we observed in *Edgewood IV*: "Our judgment in this case should not be interpreted as a signal that the school finance crisis in Texas has ended."

In remanding the case to the district court for trial, the Supreme Court said that there is no factual record for determining the cost of an accredited education. It noted that the plaintiff districts want to discover at trial the state's evaluation of that cost and to present evidence that the cost is greater than the amount that they can raise by taxing at the M&O cap. To dismiss the case without a trial, the state would have to show as a matter of law that these districts are not forced to tax at the maximum to meet the minimum standards for accreditation or for a general diffusion of knowledge.

The court said that an accredited education and a general diffusion of knowledge both are minimum standards binding on the districts, so a district may allege that if it is forced to tax at the cap in order to satisfy either standard, then the state is imposing a prohibited state property tax. While the court presumed that the two minimum standards are the same, the trial court may determine if they are different in deciding whether the plaintiff districts have lost all meaningful discretion in setting their tax rates at or near the cap to meet either of the standards. It also said that districts need not tax at $1.50 to show they have lost all meaningful discretion: if a district cannot meet the minimum standards by taxing at either $1.47 or $1.50, it does not have to tax at the higher level just to make that point.

The Supreme Court also addressed the lower court's point that a district may be taxing at the cap but still have some meaningful discretion to raise additional revenue by reducing or eliminating the optional homestead exemptions. School districts have the option of exempting from taxation up to 20 percent of the market value of residence homesteads, plus an additional amount for persons age 65 and older and disabled persons. It said that to prevail on this point, the state would have to show that as a matter of law the mere existence of the local-option exemptions precludes as a matter of law the allegation that districts are forced to tax at the cap. It noted that districts may not be able to meet the minimum standards even without granting the exemptions and that local political circumstances may preclude any meaningful discretion by the districts in granting the exemptions.

Defining school district wealth

"Property-wealthy" districts. School districts with $305,000 or more in taxable property value per weighted student. Revenue earned above this level is subject to recapture under Education Code, Chapter 41. Approximately 13 percent of Texas school districts fall into this category.

"Property-poor" districts. School districts with $271,400 or less in taxable property value per weighted student. These districts receive Tier 2 aid from the state that allows them to raise the "guaranteed yield" of $27.14 per student per penny of tax effort. Approximately 85 percent of Texas school districts fall into this category.

"Gap" districts. School districts with less than $305,000 but more than $271,400 in taxable property value per weighted student. These districts receive no Tier 2 aid from the state, but their tax revenue is not subject to recapture. Approximately 2 percent of Texas school districts are gap districts.

In a related case, *Hopson vs. Dallas ISD*, also filed in 2001, individual taxpayers sued the district in which they live, alleging that the system imposes an unconstitutional state ad valorem tax and also that weighted average daily attendance (WADA) system of distributing state aid violates the state constitutional requirement of equal and uniform taxation. The case originally was filed in the 134th District Court in Dallas County, but was transferred to Travis County District Court. At a hearing on March 23, Judge Dietz rejected a request to merge this separate challenge into the *West Orange-Cove* lawsuit and instead scheduled the *Hopson* case for a trial on October 4. (For more on the *Hopson* suit and the weights and adjustments

in the school finance system, click here to see *Formula Adjustments and the School Finance System*, HRO Focus Report Number 78-15, March 31, 2004.)

More districts join lawsuit. Since the Supreme Court issued its decision, 42 more school districts have joined the original four districts as plaintiffs in the *West Orange-Cove* lawsuit. This plaintiff group now includes both property-wealthy and property-poor districts, as well as three of the largest districts in the state: Dallas, Houston, and Austin.

Some 500 school districts in Texas currently are taxing at the maximum allowable M&O rate of $1.50 per $100 valuation, and nearly 700 districts are at or within five cents of the cap.

In December 2003, a group of property-poor districts entered a separate challenge in the lawsuit. Known as the *Alvarado* plaintiffs, many of these districts have been involved in school finance litigation since 1984, intervening on behalf of the plaintiffs in the *Edgewood* lawsuits and on behalf of the state in the original *West Orange-Cove* lawsuit.

A third group of districts, led by the Edgewood ISD and including many of the districts involved in the *Edgewood* lawsuits, also had intervened in the original *West Orange-Cove* lawsuit on behalf of the state. This group, which now consists of 16 property-poor districts, is involved in the case as a "cross-petitioner" because it supports and opposes certain aspects of both sides. (For a list of districts in each group, see *Table 1: School districts in school finance lawsuits*, pages 6-7.)

In their responses to the original *West Orange-Cove* lawsuit, the *Alvarado* and the *Edgewood* groups both defended the equity in the current school finance system, but also claimed that the system does not provide sufficient funding to guarantee a general diffusion of knowledge, as required by the Constitution.

Since it was filed in 2001, the lawsuit has evolved from challenging only the constitutionality of the $1.50 tax cap into a question of whether the current school finance system meets constitutional standards for providing an "adequate" education. While each of the groups involved in the lawsuit approaches this issue from a different perspective, all three contend that the state is not providing sufficient funding to meet these constitutional standards. The following section provides a summary of each group's arguments drawn from their most recent court pleadings.

West Orange-Cove plaintiffs

The *West Orange-Cove* plaintiffs do not directly challenge the recapture aspect of the current system, commonly referred to as "Robin Hood," in which the state collects money from property-wealthy districts and distributes it to property-poor districts (see *Defining school wealth*, page 3.) However, they ask the court to prohibit the state from enforcing chapters 41 and 42 of the Education Code, which include the recapture provisions, and from distributing any money under the current school finance system until the constitutional issues have been addressed.

Tax cap. In the nine years since the *Edgewood* IV decision, school districts have grappled with increasing education costs, burgeoning student populations, rising accountability standards, and many new state and federal mandates, these plaintiffs say. In order to provide a constitutionally adequate education to their students, many districts are required to tax at or near the maximum allowable M&O rate of $1.50 per $100 valuation. In fiscal 2004, roughly 48 percent of school districts in Texas are taxing at the $1.50 statutory cap. These 494 districts comprise 78 property-wealthy districts and 416 property-poor districts. Nearly 700 districts, or about two-thirds of the total, currently are at or within five cents of the cap, and many more are expected to reach this level in fiscal 2005.

The *West Orange-Cove* plaintiffs say that because they lack access to sufficient additional revenues to keep up with rising costs and rising standards, they have been forced to take measures detrimental to the education of their students. Districts that reach the $1.50 cap are unable to raise additional revenue to maintain valued programs, despite the demands of their constituents. They have no

means of dealing with rising salaries, increasing costs of utilities, insurance, supplies, and fuel, or an unexpected fiscal crisis.

Accountability. The financial pressure on school districts has been exacerbated by new state and federal accountability requirements that have not been adequately funded, say the plaintiffs. In recent years, Texas has adopted an expanded educational curriculum, established increasingly rigorous high school graduation requirements, and phased in a more difficult assessment test (TAKS). According to the plaintiffs, more than 60 unfunded or partially funded mandates have been placed on school districts since 1995. In addition, the state, by opting to comply with the federal No Child Left Behind Act, has obligated school districts to meet a wide range of new and expensive federal mandates. The plaintiffs point out that districts at the $1.50 cap will be hard pressed to meet the challenges associated with the more rigorous accountability regime in light of their inability to raise any additional revenue.

The West Orange-Cove *plaintiffs claim not only that the tax cap is unconstitutional, but also that the current system fails to provide an adequate educational system.*

Students with special needs. Because current state funding formulas do not reflect the true cost of educating students with special needs, the state's school finance system fails to provide an adequate educational system required by the state Constitution, the plaintiffs say. Many school districts must meet higher state and federal standards while educating a large and growing population of "special needs" students who generally cost more to educate, including those with limited English proficiency (LEP) or disabilities or from economically disadvantaged backgrounds. For districts with large numbers of special needs students, the gap between the amount of state or federal money provided to pay for new accountability and assessment standards and the actual costs to meet these mandates is even greater than for districts without these students, say the plaintiffs.

Cost of education. The plaintiffs point out that the Education Code requires districts to provide "all Texas children … access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic and educational opportunities of our state and nation." Districts satisfy their constitutional obligation, say the plaintiffs, when they provide all of their students with a meaningful opportunity to acquire the "knowledge and skills necessary to read, write, compute, problem solve, think critically, apply technology and communicate across all subject areas," such that upon graduation, students are prepared to "continue to learn in postsecondary educational, training, or employment settings," as required by the Education Code.

The Legislature has determined that the Recommended High School Program is the best means of achieving these goals, and other components of an adequate education are identified in other statutes. The cost of providing this education is not limited to instructional expenses, but also includes expenditures to provide: adequate and well-maintained facilities, remedial and literacy programs, sufficient numbers of qualified teachers, small class sizes, dropout prevention programs, extracurricular activities, school nurses, guidance counselors, discipline programs, and many other non-instructional costs. The plaintiffs say the local revenue raised at the M&O cap under the current system is inadequate to meet the goals and standards set by the state.

Alvarado plaintiffs

Two-hundred-forty property-poor school districts have joined the *Alvarado* plaintiffs as of March 2004. Many of these districts were involved in previous *Edgewood* school finance lawsuits as part of a group known as the *Alvarado* intervenors. These plaintiffs avow an intense interest in protecting the advances in equity that have occurred as a result of the *Edgewood* mandates and in enforcing those mandates that have not been met. However, they claim that the current school finance system is unconstitutional because the total amount of state and local funds available to public schools is inadequate to meet the constitutional requirements to provide "a general diffusion of knowledge."

Table 1: School districts in school finance lawsuits

West Orange-Cove plaintiffs

West Orange-Cove
Alamo Heights
Allen
Argyle
Austin
Beckville
Carrollton-Farmers Branch
Carthage
College Station
Coppell
Dallas
Darrouzet
Deer Park
Fairfield
Graford
Grapevine-Colleyville
Hallsville
Highland Park
Houston
Humble
Katy
Kaufman
La Porte
Lake Travis
Lewisville
Lubbock
Marble Falls
McCamey
Miami
Northeast
Northside
Northwest
Palo Pinto
Pearland
Plano
Port Neches-Groves
Pringle-Morse
Richardson
Round Rock
Round Top-Carmine
Spring Branch
Spring
Stafford
Sweeny
Terrell
Texas City

Edgewood plaintiffs

Edgewood
Brownsville
Edcouch-Elsa
Harlandale
Kenedy
Laredo
La Vega
Los Fresnos
Monte Alto
Pharr-San Juan-Alamo
Raymondville
San Elizario
Sharyland
Socorro
South San Antonio
Ysleta

Alvarado plaintiffs

Alvarado
Abbott
Academy
Aldine
Amarillo
Anthony
Aspermont
Athens
Aubrey
Avery
Axtell
Balmorhea
Bangs
Beeville
Bells
Big Sandy
Blooming Grove
Boles
Boling
Bonham
Booker
Borger
Bowie
Brock
Brownfield
Bruceville-Eddy
Bryson
Buckholts
Burkburnett
Burkeville
Cameron
Campbell
Canton
Canutillo
Canyon
Central Heights
Central
Chapel Hill (Smith)
Childress
China Springs
Chireno
Cisco
City View
Cleburne
Clint
Collinsville
Commerce
Community
Como-Pickton
Connally
Cooper
Copperas Cove
Cotton Center
Covington
Crandall
Crawford
Crosby
Detroit
Diboll
Dickinson
Dilley
Dime Box
Dimmitt
Dodd
Douglass
Early
Ector
El Paso

***Alvarado* plaintiffs (cont'd.)**

Electra
Elkhart
Elysian Fields
Era
Etoile
Everman
Fannindel
Ferris
Forney
Fort Davis
Fort Worth
Frost
Gainsville
Ganado
Garrison
Gilmer
Godley
Gunter
Hale Center
Hamlin
Harleton
Hart
Haskell
Hawley
Hearne
Hemphill
Hereford
Hico
Hidalgo
High Island
Honey Grove
Hubbard
Hudson
Huffman
Huntington
Hutto
Itasca
Jacksboro
Jasper
Joaquin
Karnes City
Kirbyville
Knox City-O'Brien
Kountze
Kress
Krum
La Joya
La Pryor
Lake Worth
Lamesa
Lasara
Latexo
Leverett's Chapel
Linden-Kildare
Lingleville
Lockhart
Lorena
Louise
Lyford
Lytle
Mabank
Magnolia
Martinsville
Meadow
Megargel
Mercedes
Meridian
Merkel
Mesquite
Mildred
Millsap
Mission
Montague
Morton
Motley County
Muenster
Nederland
New Boston
New Castle
New Home
New Summerfield
Newton
Nocona
Nueces Canyon
Olfen
Olton
Orange Grove
Paint Creek
Pampa
Panhandle
Paradise
Paris
Perrin-Whitt
Petersburg
Pflugerville
Poteet
Pottsboro
Presidio
Princeton
Quanah
Redwater
Ricardo
Rice CISD
Rice ISD
Rio Vista
Rivercrest
Robinson
Roby
Rochester County Line
Rocksprings
Roosevelt
Rosebud-Lott
Rusk
Sam Rayburn
Samnorwood
San Augustine
San Perlita
Sands
Sanford
Santa Anna
Santa Fe
Seagraves
Seguin
Seymour
Shallowater
Shelbyville
Shepard
Sierra Blanca
Slaton
Smyer
Socorro
Southside
Springtown
Spur
Stamford
Sulphur Bluff
Sulphur Springs
Sunray
Tahoka
Taylor
Tenaha
Texline
Thorndale
Throckmorton
Timpson
Tolar
Tornillo
Trenton
Trinidad
Troup
Troy
Tulia
Uvalde
Valley View (Cooke)
Van Alstyne
Venus
Vernon
Warren
Weatherford
Wellman-Union
Wells
West Hardin County
White Oak
Whitesboro
Whitharral
Wildorado
Wills Point
Windthorst
Woden
Woodson
Yorktown
Zavalla

The *Alvarado* plaintiffs fault the state for repeatedly neglecting its responsibility to meet the constitutional "adequacy" requirement. Instead of providing the funding needed to meet its own standards for a basic accredited education, the state consistently lowers the bar to fit what it is willing to pay for or ignores information that points to a need for additional funding, these plaintiffs say. Given the state's long-standing and continuing practice of providing financial resources on an "as-funds-are-available" basis, school districts have been left with an insurmountable challenge, these plaintiffs say.

> *It would not be unconstitutional for the Legislature to eliminate the $1.50 cap on local property taxes and allow school districts to raise property taxes to supplement local funds, but this supplementation could not ... lead to the kinds of inequities in funding that were found unconstitutional in the* Edgewood *cases.*
>
> —Texas Supreme Court, *Edgewood* IV

Accreditation standards. The state's accreditation system was implemented in 1993 in an attempt to meet constitutional requirements to provide for a general diffusion of knowledge. The state has evaded its constitutional duty, however, by adopting a rigorous assessment and accountability system but failing to adequately fund its implementation, say the *Alvarado* plaintiffs. The state has chosen this path by simply "fitting" its educational system into whatever financial resources it has been willing to devote to education. When low test scores or high dropout rates indicated a need for additional resources, say the plaintiffs, the state responded by lowering passing requirements or allowing districts to underreport dropout rates rather than providing the resources needed to improve these problems. The *Alvarado* plaintiffs want these accreditation standards to be declared unconstitutional and to be suspended unless and until the necessary resources are provided to meet them.

Funding. One of the primary tools for determining state payments to school districts for educational costs, such as teacher salaries and housing costs, is the Cost of Education Index, or CEI. The CEI has not been updated since 1989, even though these costs have risen significantly since then, these plaintiffs say. A report by the Charles A. Dana Center, which was submitted to the Legislature in 2000 as required by law, showed that costs had risen significantly over the past decade. The Legislature ignored the results of this study, leaving the CEI unchanged as it has been for 14 years. This is another example of how the state ignores data when faced with the need to provide additional resources to meet its obligation to adequately fund education, these plaintiffs say.

Equity. Certain inequities that were barely acceptable to the Supreme Court when the current school finance system was approved have increased significantly since then, say the Alvarado plaintiffs.

M&O. The Supreme Court originally approved a system that had a gap of about $600 per student in M&O revenues between property-rich and property-poor districts. At that time, some of the wealthiest districts were allowed to spend even more money per student, further widening the gap. These "hold-harmless" provisions were supposed to be phased out after three years. Instead, the provisions were adopted permanently, allowing the wealthiest districts (about one-third of all property-wealthy districts) to spend significantly more per student than other districts. As a result, the gap in spending between these property-wealthy districts and property-poor districts now exceeds $1,000 per student, say the plaintiffs.

Facilities. Funding for facilities, such as new or renovated instructional buildings and equipment, is not subject to the same "share-the-wealth" recapture provisions as funding for maintenance and operations. Property-wealthy districts have almost unlimited access to facilities funding through their local property tax base, say the *Alvarado* plaintiffs, while the poorest districts have difficulty raising any funds for facilities through local taxes.

The Instructional Facilities Allotment (IFA), set up by the Legislature in 1997 to address this problem by supplementing local facilities funds with state funds, initially

distributed $200 million to some districts. But this funding has steadily declined, and in fiscal 2005, only $20 million in IFA funding will be available for new projects. The widening gap in facilities funding does not meet constitutional standards for equity, say the *Alvarado* plaintiffs.

Edgewood intervenors

In a pleading filed in February 2004, these 16 school districts (see page 6) intervened in the case to resist any changes to the current tax structure that would weaken or erode the gains in equity made as a result of previous *Edgewood* lawsuits. They agree, however, with the other two plaintiff groups about the need for additional funding to provide an adequate education as required by the Constitution.

Equity. Keeping property-wealthy districts within the limits available to property-poor districts (for Tier 2 financing), currently accomplished by the $1.50 cap, is essential to maintaining efficiency, the *Edgewood* intervenors say. They say the $1.50 tax cap has had the virtue of uniting Texans across district lines by making them more equal stakeholders in the system, enabling the system to more accurately reflect the cost of education across districts. Equity cannot be maintained if wealthy districts are given unlimited, unequalized access to taxable property located in their districts, they say.

Facilities funding. Nearly nine years after the Supreme Court, in *Edgewood IV*, issued a warning that districts must have substantially equal access to financing facilities as well as operations needs, facilities financing continues to suffer from wide disparities in tax revenue for similar tax effort, the *Edgewood* intervenors say. They point out that wealthy districts, on average, can raise upwards of 11 times more funding for facilities than comparably sized poor districts for similar tax effort. Even with guaranteed yield funds from the state, poor districts can raise only about half as much as the wealthy districts. Moreover, funding for the IFA and the Existing Debt Allotment, another state program designed to reduce disparities in facilities funding, depend on state appropriations that can change from one year to the next, making it difficult for property-poor districts to commit to long-term facilities funding, say the *Edgewood* intervenors.

— by Betsy Blair

(Marriage, from page 1)

In the wake of challenges to state marriage laws, Congress in 1996 enacted the federal Defense of Marriage Act, which seeks to ensure that states not be required to recognize same-sex marriages or civil unions from other states. The 78th Texas Legislature joined several other states in adding a state version of this law (SB 7 by Wentworth) during the 2003 regular legislative session. Some opponents of same-sex marriage say that these laws do not go far enough and have proposed a federal constitutional amendment banning same-sex marriage, which would supersede any state decisions, and amendments to state constitutions that would preclude interpretations by state courts similar to those in Vermont and Massachusetts. Meanwhile, other jurisdictions have considered enacting legislation affording same-sex couples certain protections and legal recognition of their family status short of marriage.

Status of same-sex marriage in other states

Hawaii bans same-sex marriage. One of the more notable constitutional challenges to a state's marriage law was *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999), in which the plaintiffs alleged that Hawaii's marriage laws were unconstitutional under the equal protection clause of the state constitution. Originally filed in 1996, the case sparked concerns that other states potentially would have to recognize Hawaiian same-sex marriages under the U.S. Constitution's full faith and credit clause. These concerns led to the enactment of the federal Defense of Marriage Act and similar efforts by individual states to restrict the recognition of same-sex marriage.

In 1997, before the case was decided, the Hawaii Legislature met and adopted a constitutional amendment that voters ratified in 1998. The amendment authorized the legislature to reserve marriage for opposite-sex couples, which it subsequently did by changing the state's marriage statute. When the Hawaii Supreme Court finally decided the case in 1999, it ruled in favor of the state, holding that the constitutional amendment had made the plaintiffs' complaint moot.

While reserving marriage for opposite-sex couples, the Hawaii Legislature also created reciprocal benefits rights. This extends some of the rights and privileges enjoyed by married couples under the state's insurance code, such as health insurance benefits, to any unmarried adult couple, including same-sex couples.

Vermont legalizes civil unions. In 1999, the Vermont Supreme Court ordered the state legislature to establish a system by which same-sex couples could obtain traditional marriage benefits and protections. The case, *Baker v. State*, 744 A.2d 864 (Vt. 1999) hinged on the common benefits clause of the Vermont Constitution, which states in part that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." The court decided that the plaintiffs — three same-sex couples who had been denied marriage licenses — could not be "deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry."

The Vermont ruling also recalled a significant federal opinion on the constitutionality of laws pertaining to marriage. In 1967, the U.S. Supreme Court decided *Loving v. Virginia,* 388 U.S. 1 (1967), holding that the right to marry is one of the "basic civil rights of man, fundamental to our very existence and survival." That ruling declared Virginia's anti-miscegenation laws barring inter-racial marriage unconstitutional under the equal protection and due process clauses of the 14th Amendment.

In *Baker v. State*, the Vermont Supreme Court gave its legislature an opportunity to choose a remedy — either through a change in the marriage laws or a parallel system of domestic partnership. In response, the Vermont Legislature created civil unions, which became effective in July 2000. Under Vermont law, civil union status is available to two people of the same sex who are not related to one another, are not a party to another civil union, and are over the age of 18. A couple may apply for a civil union license from the town clerk's office and, within 60 days, must have it certified by an authorized person. Parties to a civil union have all the same benefits, protections, and responsibilities

under Vermont law as opposite-sex couples who are married. A civil union in Vermont, however, does not entitle parties to any federal marriage benefits or protections.

Massachusetts ruling. The Massachusetts Legislature took up the issue of civil unions in 2003. In considering a bill that would have prohibited same-sex marriage and established civil unions, the state senate asked the Massachusetts Supreme Judicial Court to decide the constitutionality of the proposed law in light of the equal protection and due process clauses of the state constitution.

The court previously had ruled, in *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003), that the state could not use its regulatory authority to deny civil marriage to same-sex couples. As a remedy, the court changed the statutory definition of civil marriage to mean "the voluntary union of two persons as spouses, to the exclusion of all others." However, the court stayed its judgment for 180 days to afford the legislature an opportunity to conform existing statutes to the decision.

Thirty-nine states, including Texas, have enacted legislation that prohibits same-sex marriage or the recognition of same-sex marriages obtained in other states.

In an opinion issued February 3, 2004, *Opinion of the Justices*, 802 N.E. 2d 565 (Mass. 2004), the justices found that the proposed civil union law violated the Massachusetts Constitution in the same way as the statutes that were the subject of the *Goodridge* decision. They held that the entire proposed law would be unconstitutional and ruled that Massachusetts must allow same-sex marriages effective May 17.

A proposed constitutional amendment earlier had been placed on the agenda for the legislature to consider when it convened as the Constitutional Convention that began February 11, 2004. The legislature approved a constitutional amendment that would define marriage as a union between opposite-sex couples and establish a parallel system of civil unions for same-sex couples with the same benefits, protections, and rights as marriage. The legislature met again on March 29 and voted to take up the amendment again in the next constitutional convention in the 2005-06 session, when it could be approved for the ballot in November 2006.

In the absence of an action by the Massachusetts Supreme Court blocking the issuance of marriage licenses to same-sex couples, municipal clerks will begin issuing licenses on May 17, 2004; however, the licenses likely will be issued only to state residents. According to statements by Mass. Atty. Gen. Thomas Reilly, a 1913 law would prevent out-of-state couples from obtaining a license in Massachusetts. The law bans the issuance of a marriage license to couples who would not be eligible for marriage in their own state. As same-sex couples are not eligible to marry in any other state, only Massachusetts residents could receive marriage licenses.

California marriage licenses. One of the more visible battles over the issuance of marriage licenses occurred in San Francisco in February 2004. Mayor Gavin Newsom sent a letter to the county clerk and city attorney stating his belief that the state marriage licenses were discriminatory and unconstitutional under the equal protection clause of the California Constitution. He requested that they determine what changes would need to be made to the forms and documents used to apply for marriage to permit licenses without regard to gender. Two days later, on February 12, San Francisco (which is both a city and a county) became the first U.S. locality to issue marriage licenses to same-sex couples. Localities in New York, Oregon, and other states subsequently have made similar attempts to allow same-sex marriages, with varying results.

The next day, a group opposing same-sex marriage filed a lawsuit to prevent San Francisco from continuing to issue marriage licenses to same-sex couples. While lower courts did not issue an injunction, the California Supreme Court did on March 12. In the one month that San Francisco issued marriage licenses to same-sex couples, about 3,700 couples married. The Supreme Court did not invalidate the licenses that had been issued, nor did it rule on the constitutionality of the state's marriage statutes. A number of same-sex marriage cases are pending before the Supreme Court, and the injunction is in effect while those are heard.

Constitutional amendments to ban same-sex marriage

Introduced	Partially approved	On ballot	Failed to pass	Already in constitution
Alabama	Massachusetts* - approved by legislature 3/29/04.	Georgia - enrolled 3/29/04, on November 2004 ballot, requires majority vote to pass.	Idaho - passed by house, died in senate committee	Alaska
Illinois	Minnesota - passed by house 3/24/04	Utah - enrolled 3/10/04, on November 2004 ballot, requires majority vote to pass.	Indiana - passed by senate, died in house committee	Hawaii
Louisiana	Mississippi - passed by senate 3/15/04		Iowa - died in senate	Nebraska
Michigan	Wisconsin* - approved by legislature 3/11/04.		Kansas - passed by house, died in senate	Nevada
Missouri			Kentucky - passed by senate, died in house	
Oklahoma			Maine - died in committee	
Tennessee			Maryland - died in committee	
Vermont				
Washington				

* Amendment must be passed by two consecutive legislatures, then presented to voters.

Source: National Conference of State Legislatures, April 1, 2004, and other sources.

The California Legislature had enacted a new domestic partnership law, which took effect in January 2000, that gives broad rights and responsibilities to domestic partners registered with the state. California expanded the protections offered to same-sex couples through domestic partnerships registered with the state in 2001 by conveying certain rights and benefits, including: medical, legal, and financial decision-making authority; hospital visitation rights; state disability benefits; standing in wrongful death suits; use of form wills; and appointment as administrator of an estate.

The legislature expanded those rights in 2003 and added certain responsibilities including: rights and duties of support during and after the termination of the partnership; joint ownership of property and survivorship; joint obligation for debts; presumption of parenthood of a child born during the partnership; and death-related matters such as right to control disposition of remains. The new law also secures the right to act on behalf of and receive information about a partner, such as obtaining an absentee ballot or representation in small claims court. Other rights and obligations include tax matters, employment rights, other financial matters, and certain provisions relating to public employees and their families. The new law will take effect January 1, 2005.

Groups opposed to the new law have filed a lawsuit, *Knight v. Schwarzenegger,* to prevent its implementation. They say it violates Proposition 22, a ballot initiative that defines marriage as a union between a man and a woman, which was approved by voters in 2000. They say that the new domestic partnership law creates a parallel system that undermines the voter-approved definition of marriage. According to representatives of the groups that brought the suit, the case should be heard in early summer.

New Jersey establishes domestic partnerships. In January 2004, New Jersey Gov. James McGreevey signed into law a new domestic partnership statute that offers same-sex couples many of the financial rights that married couples enjoy. The new law, which will take effect in July 2004, will permit same-sex domestic partners to claim joint status for state tax purposes, claim mandatory insurance coverage, make certain health-care decisions, and establish a process by which the partnership can be terminated. It does not authorize same-sex marriage and does not include all of the privileges enjoyed by married couples, such as standing to sue in wrongful death cases and automatic rights and obligations related to a child born during the relationship.

Federal initiatives

While states have their own marriage statutes, the U.S. Constitution requires that the laws and proceedings in one state must be recognized as valid in all other states. The full faith and credit clause of the Constitution, says:

> 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. (Art. 4, sec. 1)

In the case of marriage statutes, the clause means that a marriage in New York also would be valid in Texas. In September 1996, President Clinton signed into law the federal Defense of Marriage Act (DOMA), which establishes that a state need not give full faith and credit to a same-sex relationship treated as marriage by another state. It also specifies that federal references to marriage mean only a legal union between one man and one woman as husband and wife and that the word "spouse" refers only to a husband or wife of the opposite sex.

Since 1996, thirty-nine states, including Texas in 2003, have enacted legislation that prohibits same-sex marriage or the recognition of same-sex marriages obtained in other states. Four of those states — Alaska, Hawaii, Nebraska, and Nevada — called "super DOMA" states, have incorporated DOMA language into their state constitutions.

Several proposals now before Congress would amend the U.S. Constitution to define marriage as a union between a man and a woman. On February 24, President Bush stated that he would support such an amendment because of recent events in California and Massachusetts, although he did not endorse a specific proposal. Amending the U.S. Constitution requires approval by a two-thirds majority of the members present in the U.S. House of Representatives and in the Senate. It then must be ratified by three-quarters, or 38, of the 50 states, according to Article 5.

One of the proposals, sponsored by Sen. Wayne Allard (R-Col.) and Rep. Marilyn Musgrave (R-Col.), would amend the Constitution to include a definition of marriage, saying that it "shall consist only of the union of a man and a woman." The proposed amendment also would require that neither the federal nor a state constitution could "be construed to require that marriage or the legal incidents thereof be conferred on any union other than the union of a man and a woman."

Supporters of a federal constitutional amendment say that it would preserve the institution of marriage at all levels by ensuring that states do not create an array of various types of marriages. They say it would preserve states' rights by allowing each state to consider the issue during the process of ratifying the constitutional amendment. It would prevent activist judges in states from overturning the commonly accepted definition of marriage despite public sentiment to the contrary. Supporters also say that the proposed amendment would not prohibit state legislatures from creating other types of legal unions, such as civil unions and domestic partnerships.

Opponents of a federal constitutional amendment say that it would trample states' rights by removing their authority to define marriage, traditionally a local matter. They also argue that this amendment inappropriately would write discrimination into the U.S. Constitution and use the amendment process to limit, rather than expand or protect, individual rights and liberty. Opponents also question how an amendment might affect state legislatures' authority to create other types of legal unions because they could be similar enough to marriage that their constitutionality could be challenged in court.

Status of same-sex marriage in Texas

Equal protection clause. Many of the legal challenges involving same-sex marriage and civil unions are based on states' equal protection clauses. Texas also has an equal protection clause and an equal rights amendment in Sec. 3 and 3a, respectively, Art. 1 of the Texas Constitution, which state:

> Sec. 3. *Equal Rights.* All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.
>
> Sec. 3a. *Equality Under the Law.* Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.

While Texas' equal protection clause is similar to that of other states, the way that the clause is interpreted can vary widely. Activists in support of same-sex marriage thus far have chosen not to challenge the Texas marriage statute, in part because the judiciary in Texas is viewed as being less receptive to such arguments than their counterparts in other states such as Vermont and Massachusetts.

Cases relevant to the issue of same-sex marriage. A recent case, which resulted in the U.S. Supreme Court striking down the Texas law that criminalized sodomy, could serve as a precedent for future litigation about same-sex marriage. In *Lawrence v. Texas*, two men were charged with sodomy under sec. 21.06 of the Texas Penal Code, which is a Class C misdemeanor (maximum fine of $500). They pleaded no contest, were fined, and brought an appeal arguing that Penal Code, sec. 21.06 was unconstitutional. The 14th Court of Appeals by 7-2 rejected arguments that the law violated the Texas equal protection or equal rights clause or was within a constitutionally protected zone of privacy implicit under the due process clause. The dissenters would have invalidated the law under the equal protection and equal rights clauses on the basis of unjustified discrimination on the basis of gender and sexual orientation (*Lawrence v. Texas*, 41 S.W. 3d 349 (Tex. App.-Hous. (14 Dist.) 2001)).

The U.S. Supreme Court in June 2003 decided in *Lawrence v. Texas,* 539 U.S. _, that the Texas law violates individual liberty and privacy rights under the due process clause of the U.S. Constitution, overruling an opposite finding in an earlier case, *Bowers v. Hardwick*, 478 U.S. 186 (1986). The five-member majority cited as controlling the conclusion reached by Justice John Paul Stevens in his dissent in the *Bowers* case:

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

In his dissent, Justice Antonin Scalia questioned whether laws prohibiting same-sex marriage could be upheld under the reasoning of the court majority or that of Justice Sandra Day O'Connor, who in her concurring opinion would have struck down the Texas statute on equal protection grounds.

Another recent Texas case with relevance to the issue of same-sex marriage is a divorce proceeding that took place in Beaumont in early 2003. Two men had been granted a civil union in Vermont and sought a divorce in Texas. The state district court judge granted the divorce to the couple, but upon a petition by the Texas attorney general, the judge vacated the divorce in March 2003. In the petition, Atty. Gen. Greg Abbott noted that "because these two men were never married under either Vermont or Texas law, they cannot legally petition for divorce under the Texas Family Code. The court's final decree of divorce is void as a matter of law." Following the lower court's action, the plaintiff withdrew his petition.

Another recent related case is *Littleton v. Prange*, 9 S.W. 3d 223 (Tex. App.-San Antonio 1999). It was brought by a transsexual who was born male, became female through a sex-change operation, married a man, and brought a wrongful death action following the man's death. The San Antonio Court of Appeals denied the transsexual widow legal status as the man's spouse in bringing the action, and said that any change in policy interpreting the marriage law should be made by the Legislature, not the courts.

Defense of Marriage Act. The Texas DOMA, SB 7 by Wentworth (Family Code, sec. 6.204), which took effect September 1, 2003, declares that same-sex marriages or civil unions are contrary to Texas' public policy and are void. It prohibits the state and any agency or political subdivision from recognizing a same-sex marriage or civil union granted in Texas or in any other jurisdiction or any legal rights asserted as a result of such a marriage or union. It defines a civil union as any relationship status other than marriage intended as an alternative to marriage or applying primarily to cohabitants and that grants the parties legal protections, benefits, or responsibilities granted to spouses in a marriage.

SB 7 also includes a legislative finding that through designation of guardians, appointment of agents, and use of private contracts, individuals may arrange for rights relating to hospital visitation, property, and entitlement to life insurance proceeds without any legally recognized familial relationship between such persons. During the decade preceding the Texas DOMA, two municipalities formed their own policies on domestic partnership benefits. In 1993 the City of Austin approved domestic partnership medical leave and health insurance benefits for city employees of either sex. The health insurance benefits portion was overturned by the voters the following year, but the medical leave for employees to care for a domestic partner was retained. In 2001, Houston voters approved a proposition that prevents the city from offering medical benefits to same-sex partners.

Since 1993, the Travis County Clerk's Office voluntarily has accepted filings of a "declaration of domestic partnership" for both same-sex and opposite-sex couples. While having no legal authority, the declarations may be used for purposes such as authorizing emergency medical care. In Opinion JC-0156, issued December 16, 1999, Atty. Gen. John Cornyn determined that the Bexar County Clerk's Office was not required to record such declarations; nor does recording such instruments alter state law concerning marriage.

Amending the Texas Constitution. Like opponents of same-sex marriage in other states (see *Constitutional amendments to ban same-sex marriage*, page 12), some opponents of same-sex marriage in Texas support amending the Texas Constitution to prevent a possible challenge of the state's marriage statutes. Supporters of a constitutional amendment say that Texas' equal protection clause is not so different from that of other states and that it could be interpreted to permit same-sex marriage. Even though Texas courts may be unlikely to interpret the Constitution to allow same-sex marriage today, it could happen in the future. Preserving marriage for unions between a man and a woman should be defined beyond doubt, not left to the whims of future judges, say amendment supporters.

Opponents of amending the Texas Constitution say that it is entirely unnecessary because, in practical terms, no case would get far enough to challenge it. The courts in Texas are considered so unlikely to be sympathetic to arguments favoring same-sex marriage that no one has even filed a suit to start the process. Recent examples of how the courts likely will rule prevent challengers from wasting time and resources filing in Texas. Other challenges have been a part of a national campaign, with national funding and resources, to seek same-sex marriage status in certain states. Texas is not one of them, so the state should not change the Constitution unnecessarily, say amendment opponents.

— by Kelli Soika

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