



SEVEN FREQUENTLY ASKED QUESTIONS REGARDING MARRIAGE IN CALIFORNIA AFTER THE *IN RE* MARRIAGE CASES DECISION AND THE QUALIFICATION OF PROPOSITION 8 FOR THE NOVEMBER 2008 BALLOT

QUESTION 1: DO PASTORS HAVE TO PERFORM SAME-SEX UNIONS?

No, pastors are not required by law to perform ceremonies for same-sex couples.

A. State Law Protections

In the California Supreme Court decision *In re Marriage Cases*, the court said that no religion will be required to change its policies or practices pertaining to same-sex couples, and no clergy or pastor will be required to solemnize a same-sex marriage if it contradicts his or her beliefs. The decision itself essentially exempts clergy from being required to perform the ceremonies for the time being.

To support this proposition, the court looked to the California Constitution, which protects the free exercise and enjoyment of religion as well as liberty of conscience.

B. Federal Constitutional Law Protections

Under the First Amendment to the U.S. Constitution, the following well established legal principles permit pastors to decline to perform same sex unions:

- (1) *the Free Exercise of Religion*
- (2) *the Freedom of Conscience*
- (3) *the Freedom of Speech*

QUESTION 2: CAN OTHER STATES BE FORCED TO RECOGNIZE SAME-SEX UNIONS PERFORMED IN CALIFORNIA?

No, other states cannot be *forced* to recognize same-sex unions performed in California. Federal law, specifically the Defense of Marriage Act (DOMA), clearly indicates that states are *not required* to recognize same-sex unions performed in other jurisdictions. However, states may chose to recognize same-sex unions performed in other jurisdictions, which California and other states have elected to do. This choice is a matter of state law.

For example, at present California has elected to recognize same-sex unions and marriages formed in other states. There are two requirements for recognition under current California law: (1) the rights and responsibilities of the partners must be similar to those of California's domestic partnership law, and (2) the union must also be valid under the laws of the jurisdiction where the legal agreement was formed. However, if Proposition 8 passes in November, only marriage between a man and a woman will be valid or recognized in California.

For individual state laws and constitutional amendments see the DOMA watch website run by the Alliance Defense Fund at <http://www.domawatch.org/index.php>.

QUESTION 3: IF PASSED, WHEN WOULD PROPOSITION 8, THE CALIFORNIA MARRIAGE PROTECTION ACT, GO INTO EFFECT?

Pursuant to the California State Constitution article II section 10(a), if passed, Prop. 8 will go into effect the day after the election.

However, it is possible that a lawsuit could be filed that would delay the proposition's implementation. For example, the recent lawsuit filed by the ACLU, Equality California, Lambda Legal, and the National Center for Lesbian Rights, *Bennett v. Bowen*, tried to prevent Proposition 8 from even being put on the ballot by claiming the proposition was a constitutional revision instead of an amendment. A similar suit *could* be filed after the proposition passes. If, in the future, the court deems the amendment a revision, the court could declare the amendment invalid and require the proposition to go through the process required to pass a constitutional revision. In that situation, the proposition would have to be approved by both houses of the legislature and then be voted on by the people.

QUESTION 4: IF PROPOSITION 8, THE CALIFORNIA MARRIAGE PROTECTION ACT, PASSES, WHAT HAPPENS TO THE PEOPLE WHO "MARRY" WHILE IT IS LEGAL?

If the proposition passes, the validity of the unions is uncertain and open to debate because there is no clear historical model to follow. The general consensus is that the marriages would not be void *automatically*. A lawsuit *could* be brought to have the

marriages performed from June 16th through November 4th nullified. Essentially the constitutional amendment makes the marriages voidable, but not automatically void.

An example of when the state *has* taken away a person's married status is when the California Supreme Court voided all of the same-sex marriage licenses issued by San Francisco in 2004. Those unions never had a solid legal foundation or clear judicial support in contrast to the unions being entered into at present.

Since California recognizes marriages performed in other states if they are valid in the state where the couple was married, it is likely California would continue to recognize the same-sex unions even if the constitutional amendment passed. A court could adapt California's general rule and apply it to the unions performed between June and November. The analysis would essentially be: "We recognize marriages if valid where contracted." As a result, the Court could determine that the marriages will remain valid because they were valid when performed, even if they can no longer be performed after the Amendment passes.

QUESTION 5: CAN SAME-SEX COUPLES GET "MARRIED" AFTER PROPOSITION 8, THE CALIFORNIA MARRIAGE PROTECTION ACT, PASSES?

The language of Proposition 8 is: "Only marriage between a man and a woman is valid or recognized in California." If the proposition passed, the California state constitution and the case law of the California Supreme Court would conflict. Even though the ceremonies could theoretically be performed, they would have no legal effect and the state government would not recognize them as legitimate. This results from the fact that the state constitution is higher law than a statute and the California Supreme Court must follow the constitution. The Court has confirmed this when they ruled in a 1984 case that:

"It has long been acknowledged that our state Constitution is the highest expression of the will of the people acting in their sovereign capacity as to matters of state law. When the Constitution speaks plainly on a particular matter, it must be given effect as the paramount law of the state."

However, homosexual legal activists will almost certainly continue to attempt to obtain the right to same-sex marriage through other means, such as arguing that homosexual individuals can self identify their sex (for example one of the male partners may declare himself the woman in the relationship in spite of genetics) as is already occurring via SB 777 in the public schools.

**QUESTION 6: THE ACLU FILED A SUIT TO TRY TO STOP
PROPOSITION 8, THE CALIFORNIA MARRIAGE PROTECTION
ACT, FROM BEING PUT ON THE BALLOT IN NOVEMBER. WHAT
IS THE STATUS OF THAT SUIT?**

The California Supreme Court rejected the suit without an opinion, and Proposition 8 will be put on the ballot absent any other last minute attempts to prevent the voters from deciding the issue.

The case name is *Bennett v. Bowen*, docket number S164520. The denial has yet to be posted on the court's website.

For an Associated Press article visit:

http://www.pe.com/ap_news/California/CA_Gay_Marriage_350056C.shtml

For the ADF update visit:

<http://www.alliancealert.org/2008/07/16/calif-supreme-court-rejects-lawsuit-against-calif-marriage-amendment/>

**QUESTION 7: CAN THE CALIFORNIA SUPREME COURT
DECLARE PROPOSITION 8, THE CALIFORNIA MARRIAGE
PROTECTION ACT UNCONSTITUTIONAL?**

No. The California Supreme Court must follow the state constitution. The state constitution is second in authority to only the U.S. Constitution. Once the California Constitution is amended, the California Supreme Court must follow it. The California Supreme Court has held that the state Constitution is the highest expression of the will of the people acting in their sovereign capacity as to matters of state law. When the Constitution speaks plainly on a particular matter, it must be given effect as the paramount law of the state. As a result, the California voters will be given the opportunity to have the final say on the definition of marriage in California by voting to amend the state constitution by way of Proposition 8.