

Spouse ruling allows first gay divorce

Court strikes down definition Women separated days after wedding Court ruling allows first gay divorce [ONT Edition]

Toronto Star - Toronto, Ont.

Author: Tracey Tyler
Date: Sep 14, 2004
Section: News
Text Word Count: 899

Document Text

(Copyright (c) 2004 Toronto Star, All Rights Reserved.)

The honeymoon's over and the era of same-sex divorce in Canada has begun.

Two lesbians who married last year soon after the Ontario Court of Appeal legalized their right to wed have become the first same-sex couple in the country - and possibly the world - to get divorced.

In granting the women a divorce yesterday, Madam Justice Ruth Mesbur of the Superior Court of Justice declared the definition of "spouse" in the federal Divorce Act to be "unconstitutional, inoperative and of no force and effect."

The legislation defined "spouse" as "either of a man or a woman who are married to each other."

And that presented a problem for the women, known only as M.M. and J.H., who separated after just five days of marriage and, like some 3,000 other same-sex couples in Canada to tie the knot, had no legal mechanism for ending their union.

M.M., who filed for the divorce, sat quietly to one side of the courtroom yesterday, dressed in grey pants and vest and wearing a grey and pink tie. At times she held the hand of a female companion for support.

J.H. didn't attend the hearing.

Outside court, M.M. said she wasn't comfortable discussing the case yesterday.

But in an affidavit filed last week, M.M. said she knew "as early as the day after the ceremony that the marriage was not going to survive.

"J.H. and I had experienced long-standing difficulties, both in our physical relationship and on several emotional levels," she said.

"Prior to our marriage, we both knew there were problems. I had naively hoped that the marriage would help to resolve some of the issues in our relationship, but unfortunately it was not a solution.

"I was aware almost immediately after the ceremony it was a mistake."

In the opinion of Martha McCarthy, M.M.'s lawyer, yesterday's decision applies across the country.

"It's a matter of federal law. It has national application," she said.

Mesbur was told yesterday the case might, in fact, be the first same-sex divorce in the world.

Her decision is also not likely to be appealed.

Within a day of the Star reporting on M.M.'s divorce petition in July, the federal government conceded the definition of spouse in the Divorce Act violated the equality provisions of the Charter of Rights and Freedoms.

The only thing left for Mesbur to decide was how to remedy the constitutional violation. She was effectively given two options.

Gail Sinclair, a lawyer representing the federal attorney-general, argued that while the definition of spouse in the Divorce Act should be struck down, Mesbur should not go further, instead leaving it up to Parliament to rewrite the legislation.

Until then, courts faced with applications from same-sex couples wanting a divorce can define spouse by turning to the common-law definition of marriage, reformulated by the Ontario Court of Appeal last year, Sinclair suggested.

It defines marriage as "the voluntary union for life of two persons to the exclusion of all others."

But lawyers McCarthy and Julie Hannaford, representing M.M. and J.H. respectively, argued the law should not be left ambiguous and urged Mesbur to "read in" a new definition of spouse.

The words "two persons" or "two individuals" could be substituted for "man" and "woman," they told the court.

Superficially, much of yesterday seemed to be taken up with tinkering over language. But below the surface, more fundamental power struggles were at play.

From the federal government's perspective, it was about ensuring Parliament, not the courts, writes legislation.

But from the perspective of gays and lesbians, it was about protecting hard-won rights.

Same-sex couples and some supporters of their right to equality are quick to point out that nearly every gain they've made has come from the courts, not Parliament, which has left many gays and lesbians distrustful that politicians will protect their interests.

"It's very consistent with gay and lesbian equality claims in this country that the courts do all the heavy lifting," McCarthy said outside court.

"Every step along the way for gays and lesbians in this country has been hard fought," Hannaford added, and ambiguity in the law raises concerns the government has a way to backtrack.

The Supreme Court of Canada has told judges they need to be "precise" when crafting remedies in cases where equality rights are infringed, McCarthy told the court. In this case, that requirement will be met if the court comes up with a new definition of "spouse," she told Mesbur.

But the Supreme Court also said judges must pay heed to two guiding principles - respect for the Charter and respect for Parliament - when remedying equality rights violations, Sinclair said.

When it came to same-sex marriage, it was the Ontario Court of Appeal's "prerogative" to reformulate the common-law definition of marriage, because that was judge-made law, but the court shouldn't be doing it when the law in question is

a statute created by Parliament, such as the Divorce Act, she said.

Another reason it makes sense to let MPs do the work is because there are a range of options at their disposal - spouses could be defined as two "individuals," for example, or two "persons" - and it's hard to know which Parliament would pick, she said.

But McCarthy begged to differ. There are no "options," she said. "Gays and lesbians are either in, or they're out," she said.

Credit: Toronto Star

Reproduced with permission of the copyright owner. Further reproduction or distribution is prohibited without permission.