

IN THE SUPREME COURT OF THE STATE OF OREGON

MARY LI and REBECCA KENNEDY;
STEPHEN KNOX, M.D., and ERIC
WARSHAW, M.D.; KELLY BURKE and
DOLORES DOYLE; DONNA POTTER and
PAMELA MOEN; DOMINICK VETRI and
DOUGLAS DEWITT; SALLY SHEKLOW
and ENID LEFTON; IRENE FARRERA and
NINA KORICAN; WALTER FRANKEL and
CURTIS KEIFER; JULIE WILLIAMS and
COLEEN BELISLE; BASIC RIGHTS
OREGON; and AMERICAN CIVIL
LIBERTIES UNION OF OREGON,
Plaintiffs-Respondents, Cross-
Appellants,

and

MULTNOMAH COUNTY,

Intervenor-Plaintiff-Respondent,
Cross-Appellant,

vs.

STATE OF OREGON; THEODORE
KULONGOSKI, in his official capacity as
Governor of the State of Oregon; HARDY
MYERS, in his official capacity as Attorney
General of the State of Oregon; GARY
WEEKS, in his official capacity as Director of
the Department of Human Services of the State
of Oregon; and JENNIFER WOODWARD, in
her official capacity as State Registrar of the
State of Oregon,

Defendants-Appellants, Cross-
Respondents,

and

DEFENSE OF MARRIAGE COALITION,
CECIL MICHAEL THOMAS, NANCY JO
THOMAS, DAN MATES, and DICK JORDAN
OSBORNE,
Intervenors-Defendants-Appellants,
Cross-Respondents.

Multnomah County Circuit Court
Case No. 0403-03057

CA No. A124877

SC S51612

INTERVENOR-PLAINTIFF-
RESPONDENT, CROSS-APPELLANT
MULTNOMAH COUNTY'S REPLY
BRIEF

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I. Whether Marriage *Per Se* is a Privilege Under Article I, Section 20, is Before the Court as a Justiciable Controversy.

A. The Contentions of the State.

In its Response, the State argues that the trial court correctly declined to decide the question of whether marriage itself is a privilege under Article I, section 20, because the status of civil marriage is *inseparable from* the statutory benefits and obligations that flow from that status. The State then concludes that for this court to decide the issue of whether marriage itself is a privilege would constitute an advisory opinion, and that the court has no authority to issue advisory opinions.

B. Marriage *Per Se* is a Privilege Under Article I, Section 20.

The State argues that “the status of civil marriage is inseparable from the statutory benefits.” (Response at 7). This differs significantly from the State’s argument before the trial court. At oral argument before the trial court, the State argued that there are two tiers of marriage benefits: tangible (statutory) and intangible (social), and that marriage is the “gateway” allowing certain couples access to statutory benefits. (SER 495 to 500). The trial court agreed with the State, and ruled only that denying the statutory benefits of marriage to gay and lesbian couples violates Article I, Section 20. The trial court declined to determine whether denial of the status of marriage itself violated Article I, section 20, because it was unclear how the appellate courts would resolve the issue of intangible benefits. (ER 434).

Therefore, the State's position below, that marriage offers two tiers of benefits, was useful to the State at the trial level because it allowed the court to issue a ruling limited to the statutory benefits without reaching the more volatile question of admitting same-sex couples into the social institution of marriage. The State’s current

“inseparable” analysis, however, actually requires this court to determine that marriage *per se* is a privilege protected by Article I, section 20. If the tangible (statutory) benefits of marriage are truly “inseparable” from the intangible (social or public) benefits, it would be impossible to extend (or withdraw) access to one without extending access to the other. To the extent the status and benefits of marriage are inseparable, one cannot be a “privilege” unless the other also is a privilege.¹

The County fully briefed the issue of marriage *per se* as a privilege in its opening brief, and will not repeat that argument here. The County asserts that the issue of whether marriage *per se* is a privilege under Article I, section 20, is ripe for decision by this court in this case.

C. The Issue of Whether Marriage is a Privilege Under Article I, Section 20, is Before this Court as an Actual Controversy.

The State's argument that the statutory benefits of marriage are inseparable from the civil status of marriage highlights the logical inconsistency in the State's argument that ruling on the question of whether the status of marriage is a “privilege” violates the rule against advisory opinions.

An advisory opinion is one which decides an issue of law that is “abstract, hypothetical, or contingent” or decides a constitutional question “in advance of the necessity for its decision” such that a decision by the court will not effect the rights, obligations or liabilities of the parties before the court. *Gortmaker v. Seaton*, 252 Or 440,

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¹ The fact that the parties to the civil marriage contract may effect the statutory benefits granted as a result of marriage (i.e. prenuptial agreements, wills) mediates against considering marriage and the statutory benefits that flow from marriage as inseparable.

450 P2d 547 (1969), citing *Federation of Labor v. McAdory*, 325 US 450, 461, 65 S Ct 1384, 89 L Ed 1725 (1945); and *Thorpe v. Housing Authority*, 393 US 268, 89 S Ct 518, 21 L Ed2d 474 (1969).

The State's reliance on *Yancey v. Shatzer*, 337 Or 345, 97 P3d 1161 (2004) for the proposition that this court is being asked to issue an advisory opinion regarding whether marriage *per se* is a constitutionally protected privilege is misplaced. In *Yancey*, the plaintiff was cited for possession of marijuana and excluded from two Portland parks for thirty days. In the course of appealing the citation the exclusion period expired. The court allowed review expressly “to consider the question of whether Oregon courts have the power to consider disputes that, like the present one, are capable of repetition and yet evade review because they became moot at some point in the proceedings.” *Yancey*, 337 Or at 347.

More broadly, the court in *Yancey* sought to address the question of whether the “judicial power [includes] the authority to adjudicate cases in which there is not an existing controversy.” *Yancey*, 337 Or at 347. A controversy exists when “the court’s decision in the matter will have some practical effect on the rights of the parties to the controversy.” *Yancey*, 337 Or at 349, quoting *Brummett v. PSRB*, 315 Or 402, 858 P2d 1194 (1993). A decision by the court in this case will have a practical effect on the plaintiffs, and presents precisely the type of controversy the court in *Gortmaker* contemplated as justiciable. In *Gortmaker*, the DA requested a decision regarding whether a particular criminal statute was constitutional in advance of prosecuting under the statute. The court stated “The only purpose of this admittedly ‘friendly’ litigation is to obtain an advisory opinion, *in advance of executive action*.” *Gortmaker*, 252 Or at 442.

It is precisely because Multnomah County took executive action regarding the constitutionality of the marriage statutes that the parties are now before the court. As a result of the County's executive action the individual plaintiffs have something at stake, the validity of their status as married couples. A decision on the issue of whether marriage *per se* is a privilege will effect whether plaintiffs have access to the social institution of marriage.

Moreover, the question of whether marital status itself is a "privilege" under Article I, section 20, is before this court as an existing controversy between plaintiffs and defendant State. The County extended to same sex couples the right to apply for and receive marriage licenses in Multnomah County based upon an executive decision that to deny the marriage licenses would violate Article I, section 20. Several of the individual plaintiffs entered into a civil marriage by having their marriage solemnized, and returned those to the County. The County then presented them for filing with the State Registrar pursuant to ORS Chapter 432. The State refused to recognize the marriages, and refused to register them as vital records. Therefore, whether marriage *per se* is a privilege under Article I, section 20, is not an academic question in this case. The court's determination of that question will profoundly effect the rights of the parties.

II. The Court Must Provide a Substantial Remedy to a Party Whose Rights Have Been Violated

A. Contentions of the State.

If the Court determines that the plaintiffs have been denied the privileges of marriage in violation of Article I, section 20, the State argues that this court should defer any remedy to the legislature. Doing so however, would violate the court's obligations under Article I, section 10, and the judicial power vested in the court.

B. The Court is Required to Provide a Substantial Remedy to Plaintiffs.

If this Court determines that the plaintiffs have been denied the privileges of marriage in violation of Article I, section 20, the court is required to provide a substantial remedy to the injured party. “[E]very man shall have remedy by due course of law for injury done him in his person, property, or reputation.” Article I, section 10, Oregon Constitution.

In *Hewitt v. SAIF*, 294 Or 33, 653 P2d 970 (1982), this court adopted a two-step “analytical framework by which the appropriate remedy may be assessed.” The court first “examine[s] the legislative purpose in providing benefits under the challenged statute,” and then it “resolve[s] what the legislature would have done if faced with the invalid statute[.]” *Hewitt*, 294 Or at 51. The goal of this analysis is to arrive at a remedy that “most effectively fulfills the purpose of the legislation.” *Id.* at 54.

Importantly, in crafting a remedy that “most effectively fulfills the purpose of the legislation,” this court may not simply decline to grant a remedy or defer to another body the obligation to provide a remedy. The purpose of Article I, section 10, is to “make the common-law maxim that there is no wrong without a remedy a fixed and permanent rule of law in this state.” *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 115, 23 P2d 333, 352 (2001), quoting *Platt v. Newberg et al.*, 104 Or 148, 153, 205 P 296 (1922)(internal quotation marks omitted). Moreover, the remedy must be substantial. *Greist v. Phillips*, 322 Or 281, 906 P2d 789 (1995); *Neher v. Chartier*, 319 Or 417, 879 P2d 156 (1994).

The remedy the State advocates – deferring to the legislature – is so speculative that it provides no remedy at all. The State does not cite to any authority or mechanism for forcing the Legislature to act in the event it chooses not to. Moreover, there is no guarantee that the Legislature will provide a substantial remedy to *these* plaintiffs. At its

core, the remedy the State advocates is nothing more than a pat on the back to the plaintiffs for prevailing then sending them off to the Legislature to seek a remedy. Such a remedy fails the standards required under Article I, section 10.

The County agrees with the State that, as an academic matter, this court is not limited to only the two options described in *Hewitt* – either extending the statute to the disfavored class or withdrawing it from the favored class. This court has inherent authority in the first instance to provide any remedy the court finds is both substantial as to these plaintiffs and “most effectively fulfills the purpose of the legislation.” However, as applied in this case, it is difficult to foresee a third option. When faced with a similar violation of Article I, section 20, the Court in *Hewitt* concluded its only options were to extend the statute to the disfavored class or to withdraw it from the favored class. The County has consistently argued that the same analysis applies in this case and that the remedy that “most effectively fulfills the purpose of the legislation” is to extend the privilege of marriage to same-sex couples.

Furthermore, delegating to the Legislature the task of providing a remedy derogates the judicial power vested in the courts under Article III of the Oregon Constitution. It is inherently the duty of the courts to decide a justiciable controversy and to provide a substantial remedy to the injured party, if any. This duty may not be delegated to or assumed by the Legislature. *See, e.g., Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2002), *rev dismissed*, 335 Or 217 (2003)(“In short, regardless of what the legislature provides regarding the standing of litigants to obtain judicial relief, the courts *always* must determine that the constitutional requirements of justiciability are satisfied.” *Utsey*, 176 Or App at 548 (emphasis in the original)).

Ultimately, the State argues nothing more than deferring to the Legislature would be “appropriate.” This misses the nature of the respective roles of the legislature and the judiciary. The Legislature will likely weigh in, vigorously, on this issue regardless of what this court decides. As the court in *Hewitt* pointed out in response to the remedies advocated by Justice Peterson in dissent: “Those remedies are no less available to the legislature by the extension of the statute to the [disfavored class] should it decide to amend the law.” *Hewitt*, 294 Or at 54, n.18.

Regardless of what this court does, the Legislature retains full authority to amend the law. The obligation of this court is to decide the controversy presented to it and to provide a substantial remedy to the injured party. Based on this court’s decision in *Hewitt*, the court should remedy the violation of Article I, section 20, by extending the privilege of marriage to the plaintiffs in this case.

III. This Court Sua Sponte May Address the Question of Whether Oregon’s Marriage Laws Violate the Fourteenth Amendment to the United States Constitution

The State asserts that this court should not address the validity of Oregon’s marriage laws under the Fourteenth Amendment to the U.S. Constitution because the issue was not raised below. Citing *State v. Farmer*, 317 Or 220, 856 P2d 623 (1993), the State argues that an unpreserved claim of error cannot be reviewed on appeal. (State’s Answer at 58). The State’s argument misinterprets the record.

None of the parties have asserted a claim of error based on the Fourteenth Amendment. Therefore, this court is not being asked to review an unpreserved claim of error and *Farmer* does not apply. In asking the parties to address this issue, the court is simply exercising its inherent authority to raise an issue that may be relevant to its

inquiry. *See e.g. State v. Crenshaw*, 307 Or 160, 163, 764 P2d 1372, 1374 (1988)(“Although not raised by the parties, there are two preliminary procedural issues which should be addressed.”); *Tanner v. OHSU*, 157 Or App 502, 519, 971 P2d 435, 444 (1998)(“We begin with a matter that, although not raised by the parties, is necessary to the disposition of their constitutional contentions[.]”)

With respect to the merits of the constitutional questions under the Fourteenth Amendment, the County relies on the arguments presented in its Answering Brief.

Dated this 4th day of November, 2004.

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SUPPLEMENTAL EXCERPT OF RECORD

COURT RECORD	DESCRIPTION	SUPPLEMENTAL EXCERPT PAGE
50	Appeal Transcript of the hearing held in the matter of <i>Mary Li and Rebecca Kennedy, et al v. State of Oregon, et al</i> , MCCC Case No. 0403-03057	SER 495-500

