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Amendment raises concerns over domestic violence laws

Victims' advocates, proponents of same-sex marriage ban argue over whether it will hurt prosecutions

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Justin McKinney was sniffing gasoline out of a milk carton when the woman he lived with in the small town of Richwood, Ohio, came home.

For some reason, McKinney got angry, chased her down an alley and kneed her in the stomach. Police had to use a Taser to subdue him. Prosecutors charged McKinney with domestic violence.

His attorney never argued that he didn't hit the woman, and McKinney was convicted last year in the February 2006 attack. But last month, an Ohio appeals court reversed the conviction because McKinney and the woman were not married.

To blame: Ohio's constitutional amendment banning same-sex marriage, which is similar to the measure that Indiana's General Assembly has been debating this year.

Two of Ohio's 12 appeals courts have ruled that the amendment prevents unmarried couples from receiving the benefits of marriage, including protection under the state's domestic violence laws.

In those appellate districts, which cover 23 of Ohio's 88 counties, prosecutors faced with scenarios like McKinney's can only file charges of misdemeanor assault instead of domestic violence, which can be a felony.

Opponents of Indiana's proposed amendment worry the same could happen here.

"No attorney, no constitutional law expert, no academic in the world can tell you how every court in the state of Indiana is going to interpret this amendment," said Kerry Hyatt Blomquist, legal counsel for the Indiana Coalition Against Domestic Violence.

"As in Ohio, there may be judges that will see no conflict between the amendment and our existing domestic violence laws. But also as in Ohio, there may be judges that will."

Supporters of the proposed ban here argue that it is worded differently from Ohio's amendment and say no one would lose protection under Indiana's domestic violence laws.

"This is willful ignorance on the part of the domestic violence community. They are pushing more of a social agenda than they are a legitimate concern," said Sen. Brandt Hershman, R-Wheatfield, the amendment's author.

"There is little to no question that this amendment would have any impact on Indiana's current domestic violence law."

Immediate challenges

Ohio passed its constitutional amendment in 2004. Shortly after, its courts were flooded

with cases challenging the constitutionality of the state's domestic violence laws as they applied to unmarried couples.

More than 80 appeals have been filed by domestic violence defendants challenging their convictions, said Alexandria Ruden, an Ohio domestic violence law expert and attorney for the Legal Aid Society of Cleveland.

Eight cases are pending before the Ohio Supreme Court. That court heard arguments in one of those cases in December and is expected to rule this spring on whether unmarried couples there are protected under the state's domestic violence statute.

"Everyone is talking about and waiting for the Supreme Court decision, because we don't want our state's domestic violence laws overturned," said John Murphy, executive director of the Ohio Prosecutors' Association. "This is a serious issue with a lot of ramifications."

In the Ohio counties where the domestic violence law has been ruled unconstitutional, prosecutors have taken to filing assault charges in incidents involving unmarried couples.

The problem with that, Ruden said, is that abusers found guilty of assault are not prohibited from obtaining firearms. They would be if convicted of domestic battery.

Also, sentences often are not as severe for assault convictions, and it can be more difficult for victims in those cases to obtain protective orders, Ruden said.

Like Indiana's amendment, Ohio's has two sections. The first defines marriage as the union between a man and a woman, but the second prevents the courts and the legislature from bestowing benefits of marriage to unmarried couples.

Prior to the adoption of the constitutional amendment, unmarried couples in Ohio were protected by a provision in the state's domestic violence statute addressing people who are not married but are "living as a spouse" in the same household. The two appeals courts interpreted that language as a "benefit" of marriage.

"We had a poorly drafted, ambiguous amendment without having the forethought to realize what the potential ramifications might be," said Ruden, who also serves as legal counsel for two Ohio groups that advocate against domestic violence.

"I think most of the people in Ohio who voted for this thought they were voting against gays being able to marry, and had the amendment only been one sentence, they would have. Instead, we're stuck where we are now."

Some major differences

Supporters of Indiana's amendment say there is no need to worry that the same could happen here.

While the two states' domestic violence statutes are similar -- both use the "living as a spouse" phrase -- there are major differences between the second sentences in the Ohio and Indiana amendments, Hershman said.

Ohio's amendment, he said, prevents the courts *and* the legislature from giving unmarried couples the benefits of marriage. He said Indiana's amendment is not worded as strongly and only prevents the courts, not the legislature, from providing those "incidents of marriage."

Because the legislature already has given unmarried couples protection under domestic violence laws, Indiana's amendment doesn't jeopardize those rights, Hershman said.

James Bopp Jr., a constitutional law expert, agrees.

"The legislature, in the statute, has provided protection against domestic violence for people who are unmarried and have long-term relationships and live together," said Bopp, a Terre Haute attorney who supports the same-sex marriage ban.

"That is perfectly legal under this amendment."

Blomquist isn't so sure.

"That's a smokescreen," she said. "Until the language in the second sentence is made more definitive, it's always going to be up to a court's interpretation."

After reviewing Indiana's proposed amendment, Ruden, the Ohio attorney, agreed.

"The wording is not as strong as in Ohio, but then the question is, what do the 'legal incidents of marriage' mean?" Ruden said. "All you need is one savvy defense lawyer who challenges what the phrase means paired with the domestic violence statute including persons 'living as spouses,' and I think you're running a risk."

Bopp said there is no risk.

"These arguments are completely bogus and disingenuous," he said. "All they have to do is read the difference between the Ohio and Indiana amendments, but they choose not to."

Provision under scrutiny

Debate over whether the amendment's second sentence could impact Indiana's domestic violence law is key, because House Democrats are considering whether to remove that portion of the amendment.

Both House Speaker Rep. B. Patrick Bauer, D-South Bend, and House Rules and Legislative Procedures Committee Chairman Rep. Scott Pelath, D-Michigan City, have raised the possibility of placing just the amendment's first sentence on the ballot in 2008.

"This domestic violence issue is a very serious concern of mine that has to be alleviated if this amendment is going to move forward in its current form," said Pelath, whose committee is reviewing the amendment. "Maybe there is a compelling argument to alleviate those concerns, but I'm not fully convinced."

Same-sex marriages already are illegal in Indiana. But Hershman argues that if the amendment's second sentence is removed, courts could circumvent marriage with civil unions.

Removing that section to ease misplaced concerns from the domestic violence community would be uncalled for, he said.

Blomquist doesn't trust Hershman's and Bopp's opinions.

"I've heard their promises of what this amendment won't do," she said. "But I am not willing to bet the safety of domestic abuse victims on that."