



Nebraska Supreme Court Asked To Dissolve Couple's Same-Sex Marriage, Toss State Ban

by Bill Kelly, Senior Producer, NET News

March 27, 2014 - 6:30am

A divorce case sent to the Nebraska Supreme Court may provide the first direct challenge to the state's ban on same-sex marriage heard by the high court.

Bonnie Nichols, legally married in Iowa, challenged the ruling of a Lancaster County District Court judge denying her a divorce from her lesbian spouse because the relationship is not legally recognized in Nebraska. The brief, submitted to the Supreme Court in December, remained out of the public eye until it came to the attention of NET News. *Nichols v. Nichols* is the first challenge to the same-sex marriage law in a Nebraska court since voters approved it 14 years ago.

When turning down the request for a divorce District Court Judge Stephanie Stacy wrote "this case requires navigation through areas of Nebraska jurisprudence which presently are uncharted by Nebraska's appellate courts."

Nebraska State Constitution Article I, Section 29

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska. *(Approved by Nebraska voters in 2000)*

Nichols asked the state's high court to reverse Judge Stacy's August 2013 ruling which claimed current state law did not permit the judge to act. "Granting dissolution of marriage under Nebraska law necessarily involves recognizing the marriage," Stacy wrote. "Because Nebraska's Constitution prohibits recognizing same-sex marriages, this court does not have subject matter jurisdiction to dissolve the parties' same-sex marriage."

Nichols appeal argues Nebraska law does not specifically ban dissolving a same-sex marriage. The appeal also asks the marriage ban itself be nullified because it violates basic constitutional rights for same-sex couples.

“The state of Nebraska tried to make the relationship unavailable,” said Megan Mikolajczyk, attorney for Nichols in an interview with NET News. “Instead they’ve made a relationship they don’t want in this state permanent. I don’t think that was their intended end result.”

The Nebraska case arrives in the wake of a recent flurry of activity in the federal courts, where marriage bans in eight other states were overturned. Last June the U.S. Supreme Court required the federal government to recognize legal relationships of same-sex couples. The rulings language in *United States v. Windsor* gave support to those who felt limiting marriage was based on prejudice rather than a claimed community benefit. Similar cases before other federal judges will be heard in the coming months.

In 2000 Nebraska voters approved, with a 70-30 margin, a constitutional amendment defining marriage as permissible only between a man and a woman. A three-judge panel of the Eighth Circuit of the U.S. Circuit Court of Appeals later upheld the amendment as constitutional.

[\(Read the Eighth Circuit's ruling here\)](#)

This is a new issue for the Nebraska Supreme Court. These are referred to as “a case of first impression” in legal circles. The brief prepared by Mikolajczyk makes three legal arguments supporting her clients request for a divorce.

- Marriage licenses from one state must be honored by another state, whether they are held by heterosexual or homosexual couples.
- Obstacles to ending a marriage violate the couples constitutional right to associate, or in this case not associate, with whoever they choose to live.
- Limiting marriage to a man and woman in Nebraska law violates the U.S. Constitution's guarantee of equal protection for all citizens.

Supporting the case with “friend of the court” briefs are the American Civil Liberties Union of Nebraska [\(Read the brief\)](#) and another same-sex couple currently seeking a divorce in Lancaster County, Neb., represented by Nebraska Legal Aid. [\(Read the brief\)](#)

Half of that couple, Rebecca Yorkston, said “it’s an irony that a divorce could play a role in marriage equality.” She and her estranged partner were surprised they were unable to file for divorce in Iowa, where they were married, because they are not residents of the state. As their case awaits a hearing in district court, both parties realize they are in a kind of legal limbo.

“There is no start over and there is no finish,” Yorkston said. “It kind of puts you in a place where it is very hard to move forward.”

Minutes before the courts deadline for filing briefs in support and opposition Nebraska Attorney General Jon Bruning registered the State of Nebraska's opposition in an amicus brief (sometimes called a "friend of the court" brief). In it Bruning refers to the 2006 decision from the U.S. Court of Appeals of the Eighth District that upheld Nebraska's right to define marriage as the voters saw fit. The brief said challenges to Nebraska's Constitution "have no merit" because the federal courts had already determined the state's law did not violate any citizens rights.

Bruning's brief also took issue with claims made in the Nichols case that Nebraska had a constitutional obligation to recognize any marriage conducted legally in another state, in this case Iowa. "Extended to its logical result," the brief stated, "the State of Iowa can legislate its laws on marriage and divorce for the State of Nebraska."

There have been an unknown, but likely small number of same-sex divorce cases filed in district courts in Nebraska. None have advanced to the court of appeals until now.

Bonnie and Margie Nichols were married in November 2009 in Council Bluffs, Iowa. It was the same year Iowa's Supreme Court made same-sex marriage legal. Three years later the couple, as legal residents of Nebraska, filed for divorce.

"They just want to go on with their lives, just like any other person in the state of Nebraska who wants a divorce," Mikolajczyk said. "The only difference is it's two women." Her client declined a request for an interview but allowed the attorney to speak on her behalf. Court records indicate Bonnie Nichols' partner, Margie, opposed the divorce and is not part of the appeal.

Supporters of a state's right to make laws limiting the right to marry have historically expressed skepticism about the legal arguments raised in the Nichols case. "Each state does have its own sovereignty," said Patrick Borchers, law professor at Creighton University in Omaha. "It gets to make its own decisions on matters of social policy."

The legal principle raised in the Nichols' appeal comes from the section of the U.S. Constitution addressing "full faith and credit." That clause states court judgments and legal documents produced by one state must be recognized by another, including the license to marry. Borchers believes the argument is weak because, he said, "states differ on these kind of things" routinely. "They differ on income tax rates, they differ on Medicaid benefits and they differ on marriage laws," he said. The distinction, in his view, gives states the leeway to define who gets a license and which licenses to accept from other states.

Same-sex couples legally married in other states but currently living in Nebraska find their lives in a legal limbo. This is a dilemma for judges who, according to Borchers, must say "we don't consider you married in the first place so there is nothing for us to do." A request for a divorce in a state without recognition of a legal marriage is comparable with handing someone a length of rope without a knot in it. "If I said 'untie it' you would say 'I don't see the knot in the rope.' Nebraska is in the position of (saying) we don't see the knot in the rope, so there is nothing to untie."

Whether the state agrees to grant a same-sex divorce or not, the issues for couples unable to end their marriages in their state of residence are real and complex. As in any marriage there can be issues of jointly held property, alimony and custody, and/or visitation rights for children.

There is also the looming question of what happens when one part of a same-sex couple wishes to remarry. Pointing out that a bi-sexual may want to marry someone of the same sex, Mikolajczyk pointed out someone who wants to remarry someone of the opposite sex would be blocked from doing so. "Which marriage is recognized?" she asked. "Are you committing bigamy? There are so many problems this issue creates."

“My client has a new partner and they are happy. I don’t know if they want to get married or not, but that option is not available to them right now. I think, and a lot of other people think, that is unconstitutional.”

The Nebraska Supreme Court has not yet added the case to its schedule nor responded to the request that it take on the case directly rather than having judges from the Court of Appeals first pass judgment on its merits.