

## ESSAY 5: The Marriage Canon: History and Critique

### 1. Overview

Resolution 2012-A050 directs the called-for Task Force to explore the biblical, theological, historical, liturgical, and canonical dimensions of marriage; and to consult with the Standing Commission on Constitution and Canons and the Standing Commission on Liturgy and Music to address the pastoral need for priests to officiate at the civil marriage of a same-sex couple in states that authorize such. Additionally, Resolution 2012-D091, calling for specific amendments to Canon 1.18 intended to allow same-sex marriage, was referred to the Task Force for study. These issues cross biblical and theological dimensions that are explored more thoroughly elsewhere in this report. This section of the report surveys the history of the Episcopal canons addressing marriage and then explores current issues presented to this Church in Canon 1.18, including the current description of marriage as applying only to couples comprising one man and one woman.

### 2. History

Canonical history in The Episcopal Church is consistent in one respect: canons follow practice. That is, the Church changes and evolves its practice and then amends the canons to reflect the current practice.<sup>33</sup> Sometimes this happens relatively quickly — for example, in the case of the ordination of women; sometimes this happens slowly — for example, in the case of the Church’s practices regarding divorce and remarriage. In either case, a review of the journals of General Convention and of *The Annotated Constitution and Canons* (White & Dykman, eds., 1979) shows that oftentimes the discussion has taken place over a number of years before the amendment passes General Convention. The marriage canon has followed this norm.

It should be noted that the term “Holy Matrimony” may appear to be used interchangeably with marriage. Holy Matrimony is not defined but in usage refers to the sacramental rite of the Church, and some prefer its use in the context of the Church’s relationship to weddings and marriage. The connotation of “Holy Matrimony” is something more than marriage as defined by civil law. That “something more” is expressed in covenant language: the exchange of vows in the presence of a priest and at least two witnesses and blessed in the Name of God. Yet the marriage rite in the Book of Common Prayer 1979 is entitled, “The Celebration and Blessing of a Marriage.” And both civil and church law talks of “solemnizing” marriage. Even if Holy Matrimony is understood as “something more,” that understanding is more aspirational than real, as marriage in the Church is no guarantee of success of the relationship.

The canons addressing marriage or Holy Matrimony first addressed not the making of the marriage but its dissolution. The first mention of marriage in the canons<sup>34</sup> of The Episcopal Church appears in the Convention of 1808. The House of Deputies referred a communication to the House of Bishops, then consisting of the two bishops in attendance, White and Claggett, making a request. The communication asked the bishops to consider adopting the English canon regarding marriage and inserting it into future editions of the prayer book.

The bishops responded by deferring the matter to consideration and action by a future convention, pointing to the absence of some of their members, as well as absences among the deputies. The 1808 convention instead passed a joint resolution stating “the sense of this Church” regarding the remarriage of the divorced, declaring, “it is inconsistent with the law of God, and the Ministers of this Church, therefore, shall not unite

<sup>33</sup> There are other instances when amending the canons was intended to change the practice. A recent example is the serial revisions of Title IV between 1994 and 2009.

<sup>34</sup> The Constitution of The Episcopal Church has not historically addressed marriage. The discussion here is confined to the canons.

in matrimony any person who is divorced, unless it be on account of the other party having been guilty of adultery” (White & Dykman, 398).

This joint resolution of 1808 remained the only statement of the General Convention on the subject of marriage until 1868 when the first canon was enacted as Canon II.13:

No minister of this Church shall solemnize Matrimony in any case where there is a divorced wife or husband of either party still living; but this Canon shall not be held to apply to the innocent party in a divorce for the cause of adultery, or to parties once divorced seeking to be united again.

The new canon restated what the joint resolution of 1808 had put forward: remarriage of a divorced person is allowed only when the divorce occurs because of the adultery of one of the partners and then only of the innocent partner. It also adds a clarifying statement that allows a divorced couple to reunite and remarry in the church. This statement regarding divorce and remarriage relied on what is commonly called “the Matthean exception,” referring to Matthew 5:32: “But I say to you that anyone who divorces his wife, except on the ground of unchastity, causes her to commit adultery; and whoever marries a divorced woman commits adultery.” Allowing this exception to the general prohibition of remarriage of a divorced person while the other partner lived was an Episcopal Church step away from the Church of England’s blanket ban on remarriage of divorced persons (White & Dykman, 398-99).

The 1877 convention repealed Canon II.13 as it was enacted in 1868 and enacted a new version entitled “Of Marriage and Divorce”:

- Section 1 declared unlawful any marriage “otherwise than as God’s Word doth allow”;
- Section 2 prohibited ministers from knowingly solemnizing, after due inquiry, the marriage of any divorced person whose spouse is alive, if divorced for cause arising after marriage, and retains the exception for the innocent spouse or divorced spouses seeking to reunite;
- Section 3 prevented reception of a person not married according to the Word of God and the discipline of this Church into Baptism, Confirmation, or Holy Communion without the “godly judgment” of the bishop. But no minister could refuse the sacraments to a penitent person in imminent danger of death;
- Section 4 required referral of the facts of any case arising under section 2 to the bishop of the diocese or missionary jurisdiction in which the case arose, or, in the absence of such a bishop, to a bishop designated by the Standing Committee. The bishop was empowered to make inquiry into the matter as he found expedient and then deliver a judgment. No guidelines are given to serve as the basis for entering judgment;
- Section 5 applies the new canon only prospectively as to any penalties that may attach. (White & Dykman, 400-1)

The House of Bishops had concurred with the amendments in 1874 but the House of Deputies deferred consideration until the next convention in 1877. The 1868 amendments applied only to clergy, while the 1877 revision added penalties for laity by excluding from the sacraments those who married outside the Church.

Divorce rates remained low in the 1800s because secular law and social norms made divorce difficult. Spouses had to prove fault in some manner to obtain a divorce. Women, alone or with children, had few options for economic survival — a deterrent to seeking divorce. Divorce statistics were not even recorded prior to 1867. Less than 10 percent of marriages ended in divorce between 1867 and 1900. Nonetheless, the Church wrestled with how it should respond to its members who divorced. The idea of divorce ran counter to church values and ideas about marriage, but it played out in how the Church responded to its divorced members. The Church’s response came in the language of punishment: of clergy for knowingly officiating at the marriage a person who was divorced from a living spouse, and of laity who divorced and remarried.

The convention of 1883 appointed a joint committee of bishops and deputies “to consider the duty of the Church in relation to the whole subject of Marriage, including the impediments to the contract thereof, the manner of its solemnization, and the conditions of its dissolution, and to report to the next General Convention” (White & Dykman, 402). In their report to the 1886 convention, the committee contrasted the traditional view held by the Church with the prevailing secular sentiment seeking easier separation. The cause was identified as the ease with which first marriages were contracted, noting that children as young as 12 could marry without parental consent and without witnesses. The committee’s response was a proposed canon that featured:

- Setting 18 as the minimum age to marry without parental consent;
- Requiring solemnization to occur in the presence of at least two witnesses personally acquainted with both parties;
- Requiring clergy to keep a register of marriages recording certain facts, and signed by the parties, at least two witnesses, and the minister;
- Setting the law of the Church concerning divorce as that contained in Matthew 5:32 and 19:9, Mark 10:1, and Luke 16:18;
- Prohibiting divorce except for adultery or fornication, with the unfaithful spouse prohibited from marrying again during the lifetime of the innocent spouse;
- Subjecting clergy who violate the canon to ecclesiastical trial and admonition for a first offense and suspension or deposition for repeat offenses;
- Barring spouses from receiving Holy Communion for violating the canon except upon repentance and after separation from the new spouse.

The House of Deputies declined to concur in the adoption of the proposed canon which was referred to the next conventions of 1889, 1892, 1895, and 1901 with similar results. (White & Dykman, 402-3).

The convention of 1904 took up the proposal to revise the marriage canon and passed Canon 38, “Of Solemnization of Matrimony,” by a narrow majority after four days of debate in the House of Deputies meeting as a committee of the whole. Canon 38 set the following requirements:

- Section 1 required ministers to observe the law of the state governing the civil contract of marriage in the place where the marriage was performed.
- Section 2 required the presence of at least two witnesses to the solemnization and the recording in the proper register of the name, age, and residence of each party, signed by the parties, the minister, and at least two witnesses.
- Section 3 prohibited the minister, knowingly and after due inquiry, from officiating at the marriage any person who was divorced from a living spouse, except the innocent party to a divorce for adultery. It added the new requirements in the latter case of a one-year waiting period and presentation of the divorce decree and record with “satisfactory evidence touching on the facts of the case” to the ecclesiastical authority, along with evidence that the opposing spouse was personally served or appeared in court. The ecclesiastical authority, after taking legal advice on the evidence, declared in writing that in his judgment, the case of the applicant conformed to the requirements of the canon. It further allowed any minister as a matter of discretion to decline to solemnize any marriage.
- Section 4 authorized any minister to refuse the ordinances of Holy Baptism, Confirmation, or Holy Communion to anyone who has been married “otherwise than as the Word of God and discipline of this Church allow” until the case was presented to the ecclesiastical authority for his godly judgment. But no minister was to refuse the sacraments to a penitent person in danger of death.

As adopted, the canon represented a compromise — one that had eluded the General Convention for 15 years — between those who would prohibit remarriage of persons divorced from a still-living former spouse,

and those who advocated the limited adultery exception, previously enacted in 1868, for the so-called innocent spouse in a divorce for adultery (White & Dykman, 403-4).

Efforts to drop the adultery exception continued without success in the conventions of 1910 and 1913, when the question was referred to a joint committee on marriage. The committee's report to the 1916 convention argued for the exercise of discretion in excluding persons from the sacraments, recognizing that a subsequent marriage may have been entered into in good faith and in ignorance of the Church's law or while not subject to the Church's discipline, or may result in the break-up of a family. This discretion would lie with the minister of the congregation and the bishop of the diocese. The proposed canonical amendments failed in 1916 and 1919.

A number of changes in American social and economic structures from 1850 to 1920 kept the Church's discussions of the role of divorce and remarriage going. The Industrial Revolution drew men and women from rural community to the cities, from kinship community to a community of peers, and began to redefine the roles of men and women. Women organized to advocate for their civil rights in 1848 after the all-male Liberty Party added suffrage for women to its national platform. A month later, the Seneca Falls Convention met and adopted a "Declaration of Sentiments" demanding rights for women so that they could protect their homes and families.

Among the rights sought were equal treatment before the law; participation in the government of both State and Church; the right to own, inherit, and dispose of their property; and fair treatment in divorce. The Women's Christian Temperance Union (WCTU) organized in 1874, seeking to ban alcohol, and later tobacco and other drugs, in order to protect the home. Women protested their lack of civil rights and sought the rights that would treat them as adults in the eyes of the law, as opposed to the legal protections that kept them dependent on their fathers, husbands, and sons. Unable to vote, women — especially married women — lacked legal rights to retain custody of children and control of their own property in a divorce; legal protection against rape and other assaults, including domestic violence; and access to the economy to become self-supporting when they were widowed or divorced.

The institutions of that time were controlled by white men. Legislatures were all male. Women faced juries of men in civil and criminal cases. The Church reflected its times: only men could be ordained as clergy, and only men could serve on vestries and as deputies to General Convention. The WCTU obtained passage of Prohibition with the 18th Amendment to the federal constitution in 1920, subsequently repealed in 1933 in response to the uneven application of the law across economic class and in the face of widespread and open disregard for a law with a raft of unintended consequences. In short, Prohibition was unworkable. But women obtained the right to vote in 1920 with ratification of the 19th Amendment.

Women's roles in society continued to change with the Depression and World War II. Divorce rates increased in the early 20th century, doubling from 8 percent in 1900 to 16 percent in 1930. Divorce continued to be fault-based divorce codes, which required proof of abuse, adultery, or abandonment. Divorce rates dropped slightly during the Great Depression, in part because couples could not afford the economic consequences of divorce on top of unemployment. As the unemployment rate dropped, divorce rates began to rise gradually. By 1940, 20 percent of marriages ended in divorce. Fertility rates increased immediately following World War I, but then resumed a 50-year decline that was slowed only by the unreliability of available birth control (Coontz, 211).

The General Convention of 1922 amended section 3 of Canon 38, making it unlawful for any member of the Church to enter into a marriage when either of the parties was divorced from a living husband or wife. The convention of 1925 considered and rejected an amendment to section 3 of Canon 38 that restricted remarriage to cases where the bishop, acting with legal advice, found on the record that the divorce was granted for cause arising before marriage, essentially annulling the marriage, allowing remarriage of either

party. The House of Bishops considered a separate amendment that allowed remarriage of either party of any divorce, abolishing the Matthean exception. The proposal failed, and the Matthean exception survived.

The Joint Commission on Marriage and Divorce presented an extensive revision of the marriage canon that was adopted in 1931. Compared with the previous limited measures to regulate the solemnization of marriage by the Church, the new Canon 41, “Of the Solemnization of Holy Matrimony,” enacted far more detailed regulation of church marriage:

- Section 1 for the first time stated an affirmative duty that clergy instruct their congregations, both publicly and privately, on the nature and responsibilities of Holy Matrimony, and the mutual love and forbearance required.
- Section 2 retained the 1904 admonition that ministers conform to the laws of the state governing civil marriage, and added a parallel admonition to conform to the laws of the Church regarding the solemnization of Holy Matrimony.
- Section 3 expanded to five the list of conditions that the minister must discern before solemnizing a marriage. Among the new conditions were verifying that the parties had a right to contract a marriage under church law; instructing the parties on “the nature of Holy Matrimony, its responsibilities, and the means of grace which God has provided through His Church”; and requiring the parties to give the minister at least three days’ notice of their intent to marry. Requirements for at least two witnesses and entry into the parish register were retained.
- Section 4 added a new requirement that the parties to an imperiled marriage must present the matter to the minister who has “the duty ... to labor that the parties may be reconciled.”
- Section 5 retained the 1904 process and expectations for the remarriage of the divorced.
- Section 6 added new provisions and conditions for the annulment or dissolution of a marriage by reason of the presence of one of the listed impediments to the marriage: relationship by blood within the prohibited degree (consanguinity within first cousins); absence of free consent; mistake as to the identity of either party; mental deficiency affecting exercise of intelligent choice; insanity of either party; failure of a party to reach puberty; undisclosed impotence, venereal disease, or facts making the marriage bigamous. Section 6 added a role for the ecclesiastical court in the exercise of judgments on annulment or dissolution petitions as an alternative to presentation to the bishop. A further provision stated that no judgment was to be construed as addressing the legitimacy of children or the civil validity of the relationship.
- Section 7 retained the 1904 provision for excluding from the sacraments persons not married “according to the word of God and discipline of this Church” and the process for review by the bishop. Section 7 added an additional process for admitting persons married by civil authority or “otherwise than as this Church provides” to the sacraments. The process involved judgment by the bishop or ecclesiastical court.

Two of the 1931 proposals were subject to debate and amendment. The Joint Commission’s proposal did not include continuing recognition of the Matthean exception that was added back by the convention. The second major change, removing the right of determining nullity of a marriage from the local clergy to the bishop or ecclesiastical court, has an unclear basis, but a best guess is that clergy were thought to be too lenient with their congregants. Requiring the bishop to make the determination opened the door to more uniform results and more objective consideration. One additional significant change was the omission of the section 3 clause that permitted any minister in his own discretion to decline to solemnize any marriage (White & Dykman, 406-8).

The 1934 convention modified the three days’ notice requirement to allow the minister to waive “for weighty cause” when one of the parties was a member of the minister’s congregation or was well known to the minister — facts which had to be reported immediately to the ecclesiastical authority (White & Dykman, 408).

The report of the Joint Commission on Marriage and Divorce to the 1937 General Convention lamented that the Church's views on divorce and marriage were increasingly ignored by the Church as well as by the public at large. To remedy this concern, the commission made observations about the points of tension, noting that "[a]lmost everyone agrees that the present Canon is inadequate, but there is a wide difference of opinion as to the course that should be followed" (Joint Commission on Marriage and Divorce, quoted in White & Dykman, 409). The report went on to identify three issues:

- Some are slow to make changes, foreseeing difficulties and dangers and hence voting for the status quo.
- Others want to prohibit remarriage or the blessing of a remarriage of divorced persons, a strategy that has failed.
- Still others want to adopt annulment as done in the Eastern Orthodox and Roman churches, observing that "[t]o most Anglicans and Protestants this seems nothing but divorce under another name. In either case it 'puts asunder' those whom, to all appearances and understanding 'God hath joined together.'"

The commission proposed only two minor changes to the impediments section of the canon which were adopted, adding "[I]ack of free and legal consent of either party" and "[i]mpotence or sexual perversion of either party undisclosed to the other" (White & Dykman, 410 [emphasis added]). Sexual perversion would include homosexuality.

The commission proposed more extensive revisions of the marriage canon in 1940 and 1943 without success, receiving unfavorable action in the House of Deputies in a vote by orders. The 1943 convention passed successfully a reorganization of canons related to marriage by transferring section 7 (1931), governing the access of divorced persons to the sacraments, to Canon 15, "Of Regulations Respecting the Laity." Section 4, the duty to seek counseling; section 5, the Matthean exception to the prohibition of remarriage after divorce; and section 6, annulment, dissolution, and the impediments to marriage, became a new Canon 17, "Of Regulations Respecting Holy Matrimony and the Impediments Thereto." And sections 1-3, telling ministers their duties and obligations in solemnizing marriage, became the new Canon 16, "Of the Solemnization of Holy Matrimony."

After almost 80 years of struggle, the 1946 convention eliminated the prohibition of the remarriage of divorced persons, including the Matthean exception. Applying solely to active members in good standing, the revised and renumbered Canon 18, "Of the Regulations Respecting Holy Matrimony," allowed a person whose marriage was annulled or dissolved by a civil court to petition the bishop or ecclesiastical authority of the diocese of canonical residence for a judgment of status or permission to be married by a minister of this Church. A one-year waiting period after issuance of the civil judgment was required, and petition had to be made at least 30 days before the planned date of marriage.

In considering such a petition, the bishop was required to be "satisfied that the parties intend a true Christian marriage," and, if so finding, refer the petition to his council of advisers or the court if the diocese has established one. The bishop or ecclesiastical authority was to base the judgment on, and conform with, the doctrine of the Church, "that marriage is a physical, spiritual, and mystical union of a man and a woman created by their mutual consent of heart, mind and will thereto and is a Holy Estate instituted of God and is in intention lifelong."

Canon 18 references the list of conditions in Canon 17 as forming the basis for the judgment of the ecclesiastical authority. The result of the judgment is that no marriage bond recognized by the Church was established and may be so declared by the proper authority. However, the judgment was held not to say anything about the legitimacy of children or the civil viability of the former relationship. Judgments were to be rendered in writing and kept as a permanent record of the diocese. Any person granted such a judgment could then be married by a minister of the Church (White & Dykman, 416-18). Essentially, the convention accepted remarriage of divorced members as determined by civil law.

Controversy lingered over a perceived ambiguity in Canon 18, Section 2(b), whether the impediments listed in Canon 17, section 2(b), “are shown to exist or to have existed which manifestly establish that no marriage bond [existed].” Some bishops were only willing to consider granting petitions to remarry if the marriage impediment arose before the marriage, a concept of contract law known as nullity *ab initio*, meaning that some defect occurred in the formation of the marriage contract.

Others were willing to recognize that for causes arising after marriage, the marriage bond dissolved. A special committee of the House of Bishops reported to the 1949 convention on this split of opinion by taking the middle way opposing further clarification, stating: “But as a matter of fact there is no ambiguity here. The Canon recognized two points of view as legitimate; one, that if one or more impediments existed before the marriage, no marital bond was created; the other, that if one of the impediments arises after marriage, the marital bond is broken.” The bishops could have it both ways (White & Dykman, 419, quoting the 1949 journal, 439).

The 1946 revision changed the requirement that both parties have received Holy Baptism to requiring that only one party be baptized. The change addressed a disagreement in interpretation that had arisen. Some clergy felt that the nature of Holy Matrimony implied its availability only to baptized persons. This interpretation pushed unbaptized parties to seek instruction and Holy Baptism before being married in the Church, as some clergy refused to solemnize the marriage otherwise. This view is rejected by requiring at least one party to have been baptized (White & Dykman, 414).

The 1949 convention nonetheless made two changes:

- Removed the referral by the bishop to his council of advisers or to a court formed for that purpose;
- Added the requirement that, if the remarriage was to be solemnized in a different jurisdiction than where the judgment is granted, the bishop or ecclesiastical authority of the second jurisdiction had to give approval as well.

These changes left the granting of permission to remarry to the bishop or ecclesiastical authority, without requiring consultation with attorneys, psychologists, a council of advice, or an ecclesiastical court, as had been required in prior times.

Proposals to return to the principle of nullity *ab initio* (1958) and to shorten the one-year waiting period (1970) were defeated.

From 1945 to 1947, a distinct spike in divorce rates was evident in the aftermath of World War II, reaching 43 percent when compared to the number of marriages in 1946. There may have been many reasons for this rise: hasty marriages immediately before deployment to the war, newfound independence among wives on the home front, and inability to undertake the burden of sustaining marriages to returning war veterans who were injured physically or psychologically as a result of their service. Divorce rates leveled off in the 1950s and 1960s averaging about 24 percent over the two decades.

As General Convention prepared to convene in 1973, bishops and deputies submitted from 30 to 40 resolutions calling for amending or repealing the canons on Holy Matrimony. Both houses appointed special committees that met jointly during the first week of the convention, came to agreement on major issues, and drew up proposed amendments to the canons which were adopted by considerable majorities without significant floor changes.

Canon I.16, *Of Regulations Respecting the Laity*, was amended to repeal Section 7 addressing a minister’s withholding of the sacraments from a person “married otherwise than as the word of God and discipline of this Church allow.”

Canon I.17, “Of the Solemnization of Holy Matrimony,” was repealed, and a new canon was adopted in its place.

- Section 1 was retained, requiring clergy to conform to state law governing civil marriage and the laws of this Church governing Holy Matrimony.
- Sections 2 and 3 required clergy to meet the conditions and follow the procedures in solemnizing any marriage. The list of impediments to marriage was eliminated in an effort to move clergy from a legalistic evaluation of the marriage to a more pastoral approach emphasizing the nature of Christian marriage. The clergy were required to instruct and ascertain the understanding of the parties that marriage is a physical and spiritual union entered into in the community of faith by mutual consent of heart, mind, and will intending to be a lifelong commitment. Further, the parties must satisfy the minister that they are entering into marriage without fraud, coercion, mistaken identity, or mental reservation. Section 3 procedures requiring 30 days’ notice to the minister, presence of at least two witnesses, and recording the marriage in the proper register were retained, as was the requirement that the couple sign the “Declaration of Intent” contained in section 3(d), which was first introduced into the canon in 1949. The Declaration of Intent was connected to the required instruction, but it sounded, in fact, more like a confessional statement expressed as the couple’s “understanding” of Christian marriage.
- Section 4 retained the clergy’s discretion to decline to perform any marriage.

Canon I.18, “Of Regulations Respecting Holy Matrimony: Concerning Preservation of Marriage, Dissolution of Marriage, and Remarriage,” was repealed and a new canon adopted:

- Section 1 addressed the duty of the parties and the minister to attempt reconciliation in the face of imperiled marriage unity before filing legal action.
- Section 2 allowed a party who wished to remarry after receiving a civil decree of annulment or dissolution to petition the bishop or ecclesiastical authority for a judgment of nullity or termination. The requirements for this permission were streamlined from earlier versions. Reliance on a civil decree of annulment or dissolution continued.
- Section 3 set out procedures for the minister to follow in preparation for solemnizing the marriage of a party who was previously married to a living spouse. As revised, section 3 made clear that divorced persons could remarry in the Church, and set out the simplified procedures for ministers to follow and obtain the bishop’s consent.
- Section 4 makes Canon I.17 applicable to all remarriages (White & Dykman, 413-15).

No-fault divorce arrived in the 1970s as states changed their laws to move away from the necessity of proving a grievous wrong to the marriage, and toward recognition that marital relationships simply do not work out or meet the expectations of both parties. In the 1980s, equitable distribution of marital property became the law, reducing the battles between divorcing spouses over property as a means of punishing the other or reducing an offending spouse to abject poverty. Divorce rates jumped from 33 percent in 1970 to 50 percent in 1985 as these two legal trends took hold nationwide. Divorce rates continue to run to about 50 percent of marriages in 2014.

The 1973 rewrites of Canons I.16, I.17 and I.18, renumbered as Canons I.17, I.18 and I.19 in 1985, settled the canons on marriage and remarriage for the next 30 years. There have been a few relatively minor changes adopted subsequently:

- In 1979, Canon I.18.3 (now I.19.3) was amended to clarify which bishop would be consulted when a member of the clergy canonically resident in one diocese was licensed to perform a remarriage in another diocese. The canon required consulting with, and reporting to, the minister’s bishop.
- In 2000, Canon I.19.1 was amended to clarify the duty of clergy when consulted by the parties to an imperiled marriage. The prior canon emphasized reconciliation as the purpose of the consultation. Some



clergy apparently took this charge literally, encouraging women in abusive relationships to work matters out without regard to the physical safety of the woman and/or children. Societal, legal, and law enforcement norms regarding domestic violence, spousal abuse, and child abuse changed significantly during the 1980s and 1990s. The amendment changed the charge to reconcile if possible, and imposed an additional duty on the clergy to “act first to protect and promote the physical and emotional safety of those involved and only then, if possible, to labor that the parties be reconciled.”

- In 2000, General Convention further amended Canon I.19.3 to add reporting to the bishop of the diocese where the member of the clergy is canonically resident or the bishop where the member of the clergy is licensed to officiate, and to report to that bishop on the remarriage.

Even though the marriage canons did not change dramatically, discussion of issues related to marriage continued in General Convention in parallel with secular society. These discussions occurred under the umbrella of human sexuality and across interim bodies of the General Convention, debating what the Church should say and do about premarital sex and adultery; infertility and emerging technologies to allow infertile couples to conceive and bear children and surrogacy; abortion and birth control; couples cohabiting without marriage; marriage across religious denominations; interracial marriage; and full inclusion of gay and lesbian, later widened to include bisexual and transgender persons (LGBT), in community.

Calls continue for revision of the canons to permit same-sex marriage or some form of recognition for same-sex relationships; to remove clergy from acting as agents of the state in solemnizing marriage; to allow blessings for same-sex couples, for heterosexual couples who choose not to marry for financial reasons, and for immigrants living illegally in the United States. These issues will be considered further in the critique of the present canons.

### **3. Critique of the Current Marriage Canon (Canon I.18)**

This section will review current marriage-canon-related issues that have come under discussion in the Church in recent years; discuss whether and how the canon might address those issues; and suggest how the canon might be revised to resolve the issues.

Canon I.18, “Of the Solemnization of Holy Matrimony,” commonly known as the Marriage Canon, outlines the current regulations of this Church regarding marriage. Its companion Canons I.17, “Of Regulations Respecting the Laity,” and Canon I.19, “Of Regulations Respecting Holy Matrimony: Concerning Preservation of Marriage, Dissolution of Marriage and Remarriage,” also address regulations related to Holy Matrimony and marriage.

As the historical review shows, the marriage canons are regulatory in nature. The marriage canons reflect the current thinking about how marriage occurs in the Church and, with the exception of Canon I.17, apply to clergy only, describing the duties and responsibilities of clergy who officiate at the solemnization of marriage. To the extent that the rules require the clergy to assure that the couple seeking to marry complies with certain duties, the laity is also regulated. But it is clergy who are subject to Title IV discipline, should the member of the clergy fail to conform to the marriage canons.

Canon I.18.1: should the Church move away from clergy acting as agents of the state in solemnizing marriage?

Sec. 1. Every Member of the Clergy of this Church shall conform to the laws of the State governing the creation of the civil status of marriage, and also to the laws of this Church governing the solemnization of Holy Matrimony.

Canon I.18.1 sets out the requirement that the clergy conform to both civil law and church law when solemnizing Holy Matrimony. Generally, state law requires a license issued to the couple, signed by the

officiant, and returned to the recording agency for registration, subject to penalties for the officiant who fails to file the license; consent of the couple, freely, seriously, and plainly expressed in the presence of the other; in the presence of a designated officiant; and with a declaration or pronouncement by the officiant that the couple are married according to state law.

Officiants are designated government officials such as magistrates, justices of the peace, and judges; and ordained ministers of any religious denomination or ministers authorized by a church. This provision sets up a dual role for the clergy officiating at Holy Matrimony, reflected in the pronouncement in the BCP Marriage Rite, “I pronounce that they are husband and wife, in the Name of the Father, and of the Son, and of the Holy Spirit.” In that dual role, the clergy sign and file the civil marriage license, record the marriage in the church register, and pronounce and bless the marriage. While the state-law qualifications to obtain a marriage license may overlap with the canon-law qualifications to marry, each also has its separate requirements that will be addressed in the discussion of Canon 1.18.2 and 1.18.3.

Some clergy have expressed increasing discomfort with that dual role on behalf of both state and church. Some express reluctance to act as agents of the state, reflecting the culture of separation of church and state in the United States. Some recognize that Episcopal clergy in some European and Latin-American dioceses function within the model where a separate civil ceremony is later blessed in a church setting, such as in some European and Latin-American dioceses.

Indeed, the Book of Common Prayer contains a separate rite, “The Blessing of a Civil Marriage,” for this purpose. A few have taken a stand on the prohibition of same-sex marriage, declaring that they would not officiate at any marriage until they could marry every couple who desired to commit themselves in marriage. Some clergy, and a greater number of laity, recognize the symbolism and emotional attachment to signing the civil marriage license within the marriage liturgy and, in some places, on the altar itself.

Remarkably, despite the raising of this concern, no legislative proposals to change the model in this Church have come before General Convention since 1994. Resolution 1994-D102 proposed to strike the phrase, “to the laws of the State governing the creation of the civil status of marriage and also” and was referred to the Standing Committee on Constitution and Canons for further study. The 1997 Blue Book Report from Constitution and Canons made no mention of their consideration of this change and made no recommendation to amend the canons to eliminate conformity with state law.

The Task Force on the Study of Marriage recommends the following amendment of Canon 1.18.1, retaining the dual conformity to state law and church canons, along with three additional changes:

**CANON 18: Of the Solemnization of Holy Matrimony**

*Canon 18: Of the Celebration and Blessing of Marriage*

Sec. 1. Every Member of the Clergy of this Church shall conform to the laws of the State governing the creation of the civil status of marriage, and also to ~~the laws of this Church governing these canons concerning the solemnization of marriage Holy Matrimony.~~ *Members of the Clergy may solemnize a marriage using any of the liturgical forms authorized by this Church.*

First, the canon is renamed to reflect and connect to the title of the marriage liturgy in the Book of Common Prayer, and “Holy Matrimony” is changed to “Marriage” accordingly. Second, the wording, “the laws of this Church governing” marriage is clarified by making specific reference to the canons. And, third, the last sentence is returned to section 1, having been moved in 1973 from section 1 to section 3 setting out the Declaration of Intent. This sentence gives recognition to the current situation in which General Convention has authorized a number of liturgical forms that are not yet incorporated into the Book of Common Prayer.

Amending the Book of Common Prayer remains the third rail in The Episcopal Church, reflecting the residual bitterness of the battles over adoption and reception of the 1979 version.

Canon I.18.2: What criteria should the clergy evaluate before solemnizing a marriage? Should the canon restrict marriage to one man and one woman? Should the canon recognize same-sex marriage marriages, and under what conditions (for example, where authorized by state law)?

Sec. 2. Before solemnizing a marriage the Member of the Clergy shall have ascertained:

- (a) That both parties have the right to contract a marriage according to the laws of the State.
- (b) That both parties understand that Holy Matrimony is a physical and spiritual union of a man and a woman, entered into within the community of faith, by mutual consent of heart, mind, and will, and with intent that it be lifelong.
- (c) That both parties freely and knowingly consent to such marriage, without fraud, coercion, mistake as to identity of a partner, or mental reservation.
- (d) That at least one of the parties has received Holy Baptism.
- (e) That both parties have been instructed as to the nature, meaning, and purpose of Holy Matrimony by the Member of the Clergy, or that they have both received such instruction from persons known by the Member of the Clergy to be competent and responsible.

As recently as the 2012 General Convention, a proposed amendment to Canon I.18.2 (b) changed “a man and a woman” to “two persons” (Resolution 2012-D091); the amendment was referred to the Task Force for consideration. Reflecting the theological views presented elsewhere in this report, the Task Force has come to the position of recommending recognition of same-sex marriage in this Church.

Appearing initially in 1946 in what was then Canon 18 (now Canon I.19) regulating remarriage after divorce, the Bishop or Ecclesiastical Authority was directed to apply the following standard to decisions to grant an application for remarriage:

The Bishop or Ecclesiastical Authority shall take care that his or its judgment is based upon and conforms to the doctrine of this Church, that marriage is a physical, spiritual, and mystical union of a man and a woman created by their mutual consent of heart, mind and will thereto, and is a Holy Estate instituted of God and is in intention lifelong; ...

The phrase, “a physical and spiritual union of a man and a woman” was moved to then Canon 17 (now Canon I.18) in 1973, at a time when the concept of same-sex marriage arose for the first time. Baker v. Nelson,<sup>35</sup> decided in the Minnesota Supreme Court in 1971 and turned down for review by the Supreme Court of the United States in 1972, was the first known attempt to establish a constitutional right to marriage for a same-sex couple.

It may be better understood as a description of the then-current understanding of marriage — one which has undergone considerable revision in subsequent years. Indeed, General Convention began three years later to affirm the pastoral needs and concerns of homosexual persons. (Resolution 1976-A069). General Convention 1997 called for continued study of the theological aspects of committed same-sex relationships (Resolution 1997-C003).

In 2000, General Convention recognized the presence of “other life-long committed relationships, characterized by fidelity, monogamy, mutual affection and respect, careful, honest communication, and the holy love which enables those in such relationships to see in each other the image of God” (Resolution 2000-D039). In 2012, after much study and call for a new liturgy to bless same-sex relationships, General Convention authorized the liturgy, “The Witnessing and Blessing of a Lifelong Covenant,” for provisional use

<sup>35</sup> Baker v. Nelson 291 Minn. 310, 191 N. W. 2d 385 (1971), appeal denied 409 U.S. 810 (1972)

under the direction of diocesan bishops. This Church has reached a point, as has civil society, where same-sex relationships are no longer “other” and have become “equal” and should be recognized as such.

The proposed revision retains the requirement of subsection (a) that clergy ascertain that the couple may contract the marriage under state law. Although state law is rapidly changing, it is not yet uniform regarding the legalization of same-sex marriage. That recognition is expected to accelerate in the face of the Supreme Court of the United States’ decision to deny review to the Court of Appeals decisions in three circuits, letting stand decisions ruling state bans on same-sex marriage unconstitutional. The legal landscape will remain in flux as the various lawsuits currently on file in the remaining states that have not yet recognized same-sex civil marriage are addressed and resolved.

While the apparent trend is toward striking down state bans, opportunities to uphold the ban remain viable as the grounds on which the bans are challenged are varied and not yet clearly resolved. Consequently, opportunities for this Church to recognize same-sex marriage will continue to depend on state law, which continues to vary from state to state. That should not deter General Convention from addressing how the Church extends a generous pastoral response to its LGBT members who wish to have their loving, committed relationships recognized and blessed by this Church where same-sex marriage is legal.

Subsection (b) is deleted in the proposed revision. The current wording does not reflect the understandings of marriage expressed in the marriage liturgy, which makes no mention of “a physical and spiritual union of a man and a woman” but instead speaks of “[t]he union of husband and wife in heart, body and mind” but not in spirit. Like the Declaration of Intent, it sounds like a creedal statement that the couple is asked to affirm rather than the aspirational statement it is. Deleting subsection (b) also removes the temptation to read “a man and a woman” as a definition of marriage rather than a description.

Subsections (c), (d) and (e) are relocated to section 3 with minor rewording.

Canon 1.18.3: What procedures should be required? Should the Declaration of Intent be retained? How should the Declaration of Intent be modified to recognize same-sex marriage?

Sec. 3. No Member of the Clergy of this Church shall solemnize any marriage unless the following procedures are complied with:

- (a) The intention of the parties to contract marriage shall have been signified to the Member of the Clergy at least thirty days before the service of solemnization; Provided, that for weighty cause, this requirement may be dispensed with if one of the parties is a member of the Congregation of the Member of the Clergy, or can furnish satisfactory evidence of responsibility. In case the thirty days' notice is waived, the Member of the Clergy shall report such action in writing to the Bishop immediately.
- (b) There shall be present at least two witnesses to the solemnization of marriage.
- (c) The Member of the Clergy shall record in the proper register the date and place of the marriage, the names of the parties and their parents, the age of the parties, their residences, and their Church status; the witnesses and the Member of the Clergy shall sign the record.
- (d) The Member of the Clergy shall have required that the parties sign the following declaration:
- (e) "We, A. B. and C. D., desiring to receive the blessing of Holy Matrimony in the Church, do solemnly declare that we hold marriage to be a lifelong union of husband and wife as it is set forth in the Book of Common Prayer.
- (f) "We believe that the union of husband and wife, in heart, body, and mind, is intended by God for their mutual joy; for the help and comfort given one another in prosperity and adversity; and, when it is God's will, for the procreation of children and their nurture in the knowledge and love of the Lord.
- (g) "And we do engage ourselves, so far as in us lies, to make our utmost effort to establish this relationship and to seek God's help thereto."

Section 3 sets out specific procedures for clergy to follow when requested to officiate at a marriage. Subsection (a) sets a notice requirement: the couple must make the request known at least 30 days in advance, but it allows for waiver at the discretion of the member of the clergy. Waiver is permitted for a member of the congregation. Waiver may also be considered when a party can provide satisfactory evidence of a good reason to waive the waiting time. Deployment in the military and pregnancy are two such situations to have received waivers, at least in the past. Marriage after childbirth is more common today. Issuance of a waiver may lie within the member of the clergy's discretion but must be reported to the bishop immediately.

The proposed revision retains Section 3(a) renumbered Section 2. Both parties must be involved in the presentation of a case for waiving the 30 days' notice requirement, and the additional language, "shortening the time," is inserted, suggesting that marriage upon demand is not sanctioned.

Subsection (b) requires that the ceremony occur in the presence of at least two witnesses. State law frequently requires the presence of at least two witnesses who sign the civil marriage license.

Subsection (c) spells out the information to be entered into the church registry. Subsections (b) and (c) are combined as Section 4 in the proposed revision.

Subsections (d)-(f) spell out the Declaration of Intent, which the member of the clergy must have the couple sign before proceeding with the marriage. The prescribed declaration is a series of statements to which the couple must assent: marriage is lifelong; a union of heart, body, and mind, intended by God for mutual joy, for help and comfort in prosperity and adversity, and for the procreation and nurture of children when God so will; and pledges the couple's utmost efforts to establish the relationship with God's help. Traditionally, the prescribed declaration is signed as part of the required pre-marriage counseling.

The proposed revision of Canon I.18 deletes the declaration from the canon. The language of the declaration rings as a creedal statement, a statement of belief that may not be accurate. The couple is required to declare their belief in a set of statements about marriage; but the intentions of marriage are properly about performance, not belief. Since baptism is required for only one partner to the marriage, the declaration may force a false compliance on a nonbeliever or a person who holds to a tradition with a different theology of marriage or no theology at all.

An unbaptized nonbeliever or an atheist may marry in church for the sake of a spouse, but that person ought not to be placed in the situation of affirming a belief about whether marriage is "intended by God." Again it is the performance of the content of the vows that is the proper focus of the couple's intention. The marriage liturgy itself includes the Declaration of Consent, as well as the vows, and the wording in the proposed canonical revision points to these as the operative texts.

In lieu of the declaration, the proposed revision expands the essentials of the required pre-marriage counseling, basing the counseling upon the vows the couple will pledge to each other and on an assessment by the member of the clergy that the couple understands the duties and responsibilities of marriage. Also added is recognition that the community plays a role in supporting the marriage, a recognition that is also reinforced in the liturgy.

The proposed revision adds a new section 5, giving recognition that in the civil jurisdictions of some dioceses of The Episcopal Church, the civil ceremony and the church blessing are undertaken separately. While the requirement that clergy conform to the civil law of their jurisdictions may already encompass this situation, especially since there is a liturgy for the blessing of a civil marriage, explicit recognition of the different context is desirable.

Canon I.18.4: Shall clergy continue to have sole discretion to decline to solemnize any marriage?

Finally, the proposed revision retains section 4:

Sec. 4. It shall be within the discretion of any Member of the Clergy of this Church to decline to solemnize any marriage.

Bishops and clergy alike have called for retaining this discretionary authority. The clause in the context of heterosexual marriage allows the clergy to make a subjective decision regarding the particular couple seeking marriage. Clergy have expressed a desire to retain the ability to refuse marriage without repercussions in appropriate cases.

Some support for retention is the belief that in this transition time there should be a “conscience clause” to accommodate those for whom same-sex marriage violates their personal beliefs. The clause in the context of same-sex marriage would permit continued discrimination against a class of church members. Such discrimination appears to be prohibited by Canon I.17.5:

Sec. 5. No one shall be denied rights, status or access to an equal place in the life, worship, and governance of this Church because of race, color, ethnic origin, national origin, marital status, sex, sexual orientation, gender identity and expression, disabilities or age, except as otherwise specified by Canons.

A similar conscience clause was enacted in conjunction with the ordination of women with unsatisfactory results. The unrealized intent that gradually all bishops would come on board and ordain women did not occur. Rather it contributed to a division in this Church that caused some clergy and laity to feel devalued, and eventually they left. In the context of the decision to allow women clergy to serve as bishops in the Church of England, accommodation of those who, for reasons of theological belief and conscience would not accept or recognize women bishops, has been a central point of contention.

Similar results might occur in the context of same-sex marriage over the long term. Assuming that the conscience can change or can be changed through legislation is misplaced. Similar battles continue in the civil context as well, where legislators are introducing exceptions to permit government officials to refuse to perform same-sex marriages without losing their jobs. So far, the civil judiciary has rejected such exceptions to a fundamental right to marry.

While recognizing the potentially discriminatory aspects of the call for retaining section 4, the Task Force on the Study of Marriage nonetheless supports retaining the discretion of clergy in deciding whether to marry a particular couple. A better approach is to amend Canon I.17.5 to delete the last phrase, “except as otherwise specified by Canons,” thus banning discrimination against the enumerated classes altogether.

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