

Hawaii Materials:

Legislative Actions in Sessions 1994 to 1999

In 1993, the Supreme Court of Hawaii issued an opinion in *Baehr v. Lewin* declaring that the refusal of the state to issue marriage licenses to same-sex couples constituted sex discrimination in violation of the state Constitution and therefore created a presumption of unconstitutionality. However, the court did not issue an injunction against the state. Rather, it remanded the case to the trial court with directions to conduct a trial at which the state would have the burden of proving that it had compelling interests to limit marriage to opposite-sex couples.

The trial court postponed the trial to give the Legislature an opportunity to address the issue in the 1994 legislative session. The Legislature responded that year by passing a two-part bill. Part one reaffirmed that marriage is limited to a relationship between one man and one woman. Part two created a Commission on Sexual Orientation and the Law to study and recommend what actions, if any, the Legislature should take to eliminate discrimination against same-sex couples.

The trial court again postponed the trial to give the Commission an opportunity to conduct its study. The Commission began its work in 1994 but has to disband after a federal judge ruled that the structure of the group violated the constitutional requirement of separation of church and state. The Legislature had specified that particular religious denominations would have representation on the Commission. The court found such a designation to be a violation of the First Amendment.

In 1995, the Legislature passed a bill to create a new Commission on Sexual Orientation and the Law. With staff assistance from Pamela Martin in the Legislative Reference Bureau, the Commission conducted a three-part study. First, it analyzed the benefits and protections afforded to opposite-sex married couples under Hawaii law. Second, it analyzed arguments as to whether or not such protections should be given to same-sex couples. Finally, it studied options the Legislature might consider to remove any unjust discrimination from the law. The Commission issued its final report to the Legislature in December 1995. It recommended that the Legislature either legalize same-sex marriage or enact a comprehensive domestic partnership law open to same-sex and opposite-sex unmarried couples.

In 1996, the Legislature received communications from various sources recommending the passage of a domestic partnership act. For example, the American Association for Personal Privacy sent a memo to each member of the Legislature entitled "Ten Reasons for Creating an Institution of Domestic Partnership as a Coordinate to Marriage." Attorney James Baird, an openly gay man and long-time Republican also wrote to legislators, urging them to enact a domestic partnership law. At the invitation of the Senate Judiciary Committee, attorney Thomas F. Coleman testified as an expert witness at an informational briefing for senators on the subject of domestic partnership.

A bill was introduced into the 1996 Legislature (SB 3113) proposing a comprehensive domestic partnership act. An amended version of the bill passed the Senate. Leaders in the House of Representatives refused to bring SB 3113 up for a vote on the House floor. They insisted that the appropriate move for the Legislature was to place a proposed constitutional amendment on the ballot limiting marriage to opposite-sex couples. Senate leaders refused to bring the proposed constitutional amendment up for a vote on the Senate floor. As a result, the 1996 session ended in a stalemate.

An interesting proposal was introduced in the 1996 session but was not voted on due to opposition by House leaders. Representative Quentin Kawananakoa (R-Honolulu) introduced HB 4030, a bill relating to "family partnerships." The measure was virtually identical to the comprehensive domestic partnership act (SB 3113) with the following exceptions. First, the label was changed to make it appear more inclusive. Second, the blood-relative exclusion common to many domestic partnership laws and programs was removed. By allowing any two unmarried adults, including blood relatives to register and participate, HB 4030 removed any presumption that "family partnerships" involved sexual conduct. Third, additional legislative findings were included in the bill to enhance the chances of it passing constitutional scrutiny by the court. The inclusion of blood relatives would presage future events, such as the passage of a reciprocal beneficiary bill the next year, and subsequent adoption of domestic partnership legislation in Los Angeles and Seattle which does not exclude unmarried blood relatives from their provisions.

A trial was then conducted in the *Baehr* case after the legislative session ended in 1996. The trial court issued a ruling in December 1996 concluding that the state had failed to rebut the presumption of unconstitutionality found by the Supreme Court in its 1993 ruling. The court ordered the state to issue marriage licenses to same-sex couples who might seek them. The state appealed the decision to the Supreme Court. The trial court then postponed the effect of its ruling until after the appeal was final.

Pressure mounted for the Legislature to take some action during its 1997 session. Another comprehensive domestic partnership act was introduced in the Senate but leaders in the House indicated that they would not support it. Instead, they insisted that a constitutional amendment be placed on the ballot to be voted on in the November 1998 election. Senate leaders began to indicate some willingness to consider placing the issue on the ballot, but refused to do so unless companion legislation was enacted to give many of the benefits and protections of marriage to same-sex couples.

Five separate bills were introduced in 1997, each being supported by a different faction in the Legislature. Some were comprehensive in scope, others were more limited. Some were limited to same-sex couples, while others included opposite-sex couples as well. One was limited to same-sex couples and blood relatives, excluding unmarried heterosexual partners. The Legislature was split.

A compromise was finally reached by both houses of the Hawaii Legislature before the 1997 session ended. A constitutional amendment was authorized to be placed on the ballot. It did not prohibit same-sex marriage but instead merely reaffirmed the authority of the Legislature to limit marriage to opposite-sex couples if it so desired. A partial-benefits bill was also passed. However, House leaders insisted on several limitations and eventually got their way. They refused to call the measure "domestic partnership." Instead, a new term of "reciprocal beneficiaries" was created. They

demanded that the law not consider RB's as "family members" or in any way confer legitimacy on these relationships. The new law reflected these wishes. They also insisted that blood relatives be included along with same-sex couples. That also occurred. Finally, they insisted that only a limited number of benefits and protections be granted to RB's. Out of the 300 or so protections identified by the Commission in its report, only about 50 were extended to RB's in this new legislation.

Under this new statute, any two unmarried adults could register as reciprocal beneficiaries with the state so long as they were blood relatives or same-sex couples. Unrelated opposite-sex partners were excluded. The two parties did not have to live together. They did not have to assume any obligations to each other. After they registered, they received a few dozen benefits. However, the law did not deem them to be "family members" or "domestic partners." Neither did the law impose any obligations on the parties as a result of registering as reciprocal beneficiaries. In effect, the new law threw a few benefits at registered beneficiaries, no strings attached. This strange law has not been replicated by any other state or any municipality in the nation.

No action was taken by the Legislature in 1998. However, voters approved a constitutional amendment in November 1998. The amendment affirmed that the Legislature had authority to define marriage as a relationship between one man and one woman.

In 1999, the House Majority Leader introduced a bill (HB 884) to establish a comprehensive domestic partnership act. The bill would have applied equally to same-sex and unmarried heterosexual couples, giving them all benefits and obligations normally given to "spouses," "family members," and "dependents." The President of the Senate introduced a bill (SB 1315) to amend the reciprocal beneficiary law to limit it to same-sex couples and to make blood relatives ineligible to participate. Know that the constitutional amendment would prevent the Supreme Court from legalizing same-sex marriage, legislators had no incentive for any legislation action this session and therefore neither of these bills made any headway.

Having had the case under submission for over two years, the Hawaii Supreme Court issued its decision in *Baehr v. Miike* in November 1999. In view of the passage of the constitutional amendment, the court dismissed the case as moot. Same-sex marriage would not be legalized in Hawaii by the judiciary.

The eyes of the nation and world then turned to Vermont where a same-sex marriage case was pending. That court issued its decision in *Baker v. State* on December 20, 1999. The court ruled that it was unconstitutional to deny same-sex couples the benefits and protections of marriage. It gave the Legislature a reasonable amount of time to devise a remedy to cure the constitutional defect. The court suggested that a comprehensive domestic partnership act, such as that originally proposed by the Hawaii Commission on Sexual Orientation and the Law, might be an adequate remedy.

Some of the materials presented to the Hawaii Legislature, particularly those dealing with domestic partnership, are contained in this booklet. The Vermont Legislature may find them useful as it considers various legislative options in response to the decision in *Baker*.