

SENATOR REY GRAULTY QUESTIONS

AND ANSWERS 1996

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MEMORANDUM

BACKGROUND, QUESTIONS AND ANSWERS ON
S.B. NO. 3113, S.D. 1 (Proposed).
RELATING TO DOMESTIC PARTNERSHIPS

This memorandum is prepared to explain the proposed Domestic Partnership Act in S.B. No. 3113, S.D. 1, and to answer questions that have been raised with the difficult issues of same-sex marriage, and why a domestic partnership act may be recommended as the legislative response at this time.

I. **Background.**

Compelling testimony has been received by the members of the Senate Judiciary Committee which the majority of the committee believes encourages adoption of a comprehensive domestic partnership act as a response to the constitutional concerns expressed in Baehr v. Lewin.

II. **Summary of the Supreme Court's Ruling.**

In Baehr v. Lewin, the State Supreme Court stated that unless the State can show a compelling state interest in prohibiting same-sex marriages, the court may be forced to conclude that the State has violated the equal protection rights of same-sex couples who wish to marry, and to hold that same-sex couples are entitled to be married and to all of the benefits accorded married couples.

III. **The Legislature's Response to Date.**

The Legislature has so far refused to legalize same-sex marriage. In 1995, it established Commission on Sexual Orientation and the Law to review the issue of same-sex marriage and to report to the Legislature. In December 1995, the Commission reported and recommended legalization of same-sex marriage, or as an alternative a domestic partnership law to allow couples, without regard to gender, to enter into partnerships with all of the entitlements given to married couples. A minority report opposed the recommendation.

IV. **The Public's Response to Date.**

A majority of the public appears to be against same-sex marriage, and may not have a clear understanding of domestic partnership law, the reasons for its creation and its necessity.

V. **Summary of the Reasons for Adopting a Domestic Partnership Law.**

To protect the institution of marriage by establishing a parallel means of enjoying the benefits and obligations of a family unit without regard to sexual orientation.

A domestic partnership law would defuse the court's equal protection basis for finding that same-sex couples are constitutionally entitled to the same benefits and obligations as married couples.

VI. **Summary of the Bill Proposing a Domestic Partnership Act.**

The bill establishes a domestic partnership law to enable same sex couples to form and be treated as a family unit by contract. Like married couples, domestic partners have binding obligations to each other and to interested third parties. The partners cannot walk away from the partnership without a court order.

Although most of the benefits and obligations that are accorded married couples are also given to domestic partners, there are exceptions, one of which relates to the interest of children. Thus, custody and adoption requirements involving children emphasize that the interest of the child is paramount.

VII. **QUESTIONS AND ANSWERS.**

1. **Why should the Legislature enact a Domestic Partnership Law at this time?**

Answer: The major reason is that the Legislature must protect and preserve the institution of marriage to recognize our communities' strong opposition to same-sex marriage. The best alternative is the domestic partnership law.

2. **Do we have any other alternatives.**

Answer: Yes. The alternatives for the Legislature are to (1) do nothing; (2) enact a same-sex marriage law; (3) pass a constitutional amendment; or (4) to recognize and create an alternative family relationship which enables the family to enjoy virtually the same benefits as married couples. The domestic partnership law is this fourth alternative.

3. **What are the potential consequences if we choose to do nothing?**

Answer: If the Legislature does nothing this session, the Court may interpret the inaction as an indication to let the matter be decided by the Court in accordance with the Court's decision in Baehr v. Lewin, that is, to leave it to the State to prove a compelling state interest for refusing to grant marriage licenses to same-sex couples. The Circuit Court will be deciding the issue this summer. The trial is scheduled for July 1996 and should be completed in late November or early December, 1996.

4. **What happens if the State fails to prove a compelling state interest in refusing to issue marriage licenses to same-sex couples?**

Answer: The State may be required to issue marriage licenses to same-sex couples. A compelling state interest is difficult to prove. The prediction by many scholars is that the State will fail to prove a compelling state interest in refusing to issue marriage licenses to same sex couples.

5. **What if we enact a same-sex marriage law?**

Answer: In light of what we believe to be the public's sentiment, this may not be an alternative. In a statewide poll on the issue of same-sex marriage conducted recently, 68% of Hawaii's residents who were polled opposed same-sex marriage.

6. **Will a constitutional amendment resolve the issue of same-sex marriage?**

Answer: This issue has not been resolved in other States, nor by federal courts.

7. **What will the domestic partnership law accomplish?**

Answer: S.B. No. 3113, S.D. 1 (Proposed) establishes an alternative response to Baehr v. Lewin. A domestic partnership act should defuse the equal protection claims of same-sex couples by providing them with virtually the same benefits and obligations as married couples, while protecting and preserving the institution of marriage.

8. **If we do nothing and the State fails to prove a compelling state interest, or if we legalize same-sex marriage, what would happen that is so bad for Hawaii?**

Answer: Other than the Legislature being held accountable for doing nothing or acting against the clear wishes of the public, legalizing same-sex marriage would have national and international implications.

a. **The Full Faith and Credit Requirement.**

Every state and country recognize opposite-sex marriages. States are required to give Full Faith and Credit to marriages made in Hawaii. However, there is nothing in the U.S. Constitution that requires these States to also recognize same-sex marriage. Thus, couples married in Hawaii may face difficulties with other States recognizing their marriages. As a consequence, opposite-sex marriages in Hawaii, which may be otherwise legitimate, may be questioned in other States and countries.

b. **InterState Compacts.**

Interstate compacts with other states which involve "spouses" may be affected in unanticipated ways. Since "marriage" and "spouse" have always been considered to involve only opposite-sex relationships, a change in Hawaii law may be treated as a violation of the compact with the other States. For example, under the Western Interstate Corrections Compact, Hawaii prisoners who are temporarily housed in California may be entitled to conjugal visits with a spouse. If California refuses to allow conjugal visits with a same-sex spouse, is the Compact being violated by California? This question would need to be resolved by litigation.

c. **Federal impacts.**

At the national level, a confrontation with the federal government may result, which may impact federal funds to Hawaii. Federal funds which include "spouse" as a criteria, such as public housing, public assistance, medicare, social security and FHA loans, may be impaired by legal issues relating to the definition of spouse.

9. **With respect to the foregoing anticipated problems, what is the difference between legalizing same-sex marriage and establishing a domestic partnership law?**

Answer: A domestic partnership would only be effective in Hawaii. Other states or countries need not recognize the partnership. Interstate compacts would not be impaired. There would be no impact on federal funds which involve "spouse" as defined in federal statutes. Domestic partners would not be covered as a spouse under federal law, unless Congress changes the law to include a domestic partner.

10. Are there any other benefits that may be realized by a domestic partnership law?

Answer: One of the benefits of a domestic partnership law is that it is intended to maintain the institution of marriage as we know it today. A domestic partnership does not require the sanction of a religious body, and should distance the State from a volatile religious dispute.

11. Baehr v. Lewin stands for the proposition that if the State does nothing, there is a substantial probability that the Court will find that the State does not have a compelling State interest to prohibit same-sex marriages. The State will be required to recognize same sex marriage on equal protection grounds.

What is the probability of the Courts ruling against the State?

Answer: Testimony from Professor Jon Van Dyke and Mr. Thomas Coleman, an attorney with vast experience in same-sex marriage and domestic partnership issues indicate that if the Legislature does nothing and the lawsuit is allowed to take its course, the State will lose. Professor Van Dyke states that the probability that the State will lose is 100%, while Thomas Coleman's belief is 99.9%. The reasons given so far by the State do not rise to the required level of "compelling state interest".

12. If the domestic partnership law is the best alternative that we know of today, will its enactment avoid the result of a court created law on same-sex marriage?

Answer: If the domestic partnership law confers all of the benefits and obligations the State confers of opposite-sex marriages, the parties in the lawsuit claiming discrimination would lose their basis for the lawsuit. There would be no damage to the couple resulting from the State's refusal to issue them a marriage license.

Thus, the court would have a very strong basis for dismissing the lawsuit, and deferring to the legislature on these issues.

13. Could we create a domestic partnership law that allows for same-sex relationships but without all of the benefits accorded married couples, and still avert a court created same-sex marriage law?

Answer: The bill recognizes that not all benefits and obligations that are conferred on opposite sex marriages should automatically be conferred on domestic partners, especially when the State's interest in the welfare of third

parties have greater priority than the couples. For example, the State has very strong interest in the welfare of a child, and may require that the couple comply with a standard that will clearly satisfy the "best interest" of the child. This standard is applicable especially in adoption cases.

Otherwise, however, the bill seeks to establish a virtual equality between domestic partners and married couples.

14. Can we for example create a domestic partnership law that provides that domestic partners are entitled to all benefits of married couples except for certain ones and then list them?

Answer: The intent and integrity of the bill would be compromised by a domestic partnership law that attempts to create a lower class of family relationship than marriage for purposes of the benefits and obligations conferred by law. The court would not be convinced of the legislature's sincerity in complying with the constitution. Except in cases where the best interest of third parties have greater priority than the interest of the couple, the benefits and obligations conferred on married couples should be conferred equally on domestic partners.

15. Can we create a domestic partnership law that drops dead if the court in Baehr v. Miike (formerly Lewin) decides in favor of same-sex marriage?

Answer: Drop dead provisions are common, and should work in this case. The drop dead provision should be conditioned on a clear and definite event. The court's decision on the matter may be one such clear and definite event.

For example: A drop dead provision could read as follows:

"Section . This Act shall take effect upon its approval and if the Supreme Court of the State of Hawaii issues a decision in the case, entitled Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, Joseph Melilio, vs. Lawrence Miike in his official capacity as Director of the Department of Health, State of Hawaii, Civil No. 91-1394, or in any subsequent and related case requiring the State of Hawaii to apply its marriage laws to couples of the same sex in the same way that it is applied to heterosexual couples, this Act shall be repealed on the effective date of the court's decision.

A different drop dead provision may be appropriate and proper in this case.

16. Will a domestic partnership law cause employers, insurance or other companies that deal with spouses to incur higher costs?

Answer: There may be a slight increase initially. Municipalities and counties that have offered medical, health, and leaves of absences with or without pay, have experienced slight increases in medical and health insurance premiums. These costs, however, may have increased because of the lack of experience by insurance adjusters with domestic partners. Retirement, death, health insurance and other benefits enjoyed by spouses can and should be enjoyed by domestic partners in the same way without additional costs to employers, insurance companies, health maintenance, or other financial institutions that handle pensions, profit sharing, deferred compensation or other retirement and health insurance benefits.

17. Are there any facts to support the statement that there may be a slight increase initially?

Answer: Seattle, Washington has a domestic partnership ordinance that extends family leave to domestic partners. The City also extended medical and dental coverage, accidental death and dismemberment insurance to domestic partners. Based on the City's experience, and the experience of companies (Lotus Development Corp., and Levi Strauss & Co.) that offered employee benefits to domestic partners, costs either decreased or increased only by 1% to 3%.

18. What happens when the partners decide to breakup?

Answer: The bill requires that any breakup of the partners be approved by the family court. The court is authorized to make orders to compel a partner to make child support payments, support payments to the other partner, to divide their assets and debts in a just and equitable manner. The court is required to take into consideration the respective merits of the parties, the relative abilities of the parties, the condition in which one party will be left by the breakup, the burdens imposed by the breakup on either of the partners for the benefit of the children of one of them and all other circumstances of the case.

19. If Hawaii adopts a domestic partnership law, will Hawaii be the first State to do so?

Answer: Yes. Numerous municipalities, counties and businesses recognize domestic partnerships for specific and limited benefits that are given by them, however, Hawaii will be the first, if it enacts such a law this session.

A recent newspaper article indicated that in certain cases, the Internal Revenue Service may recognize a domestic partnership.

20. The bill includes a twelve-month residency requirement of one of the partners.

Is the residency requirement constitutional?

Answer: Professor Van Dyke believes that a residency requirement is both appropriate and constitutional and points to a U.S. Supreme Court decision upholding a twelve-month residency law in divorce cases.