

FROM ARTHUR

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Honorable Joseph Souki
House of Representatives
Honolulu, HI 96813

Re: Analysis of HB 117/118 Package

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Dear Representative Souki:

As you know from my communications and testimony during the last legislative session, I have been studying the legal and political actions in Hawaii pertaining to same-sex marriage and domestic partnership, and have periodically shared my views with members of the Legislature.

The package introduced by Speaker Joe Souki (HB 117/118) is the most recent attempt by the majority party to respond to the Supreme Court's ruling and the subsequent decision of the trial court in the *Baehr* case.

If the HB 117/118 package is adopted by the Legislature, it will have the effect of insuring that same-sex marriages will be legal in Hawaii for several months during 1998.

In an article that appeared in the Honolulu Advertiser on January 18, 1997, Professor Jon Van Dyke predicted that the HB 117/118 package would not stop the Supreme Court from ordering the state to issue marriage licenses to same-sex couples when it decides the *Baehr* case in a few months. In his opinion, the only legislative action that would likely stop the legalization of same-sex marriage would be passage of a bill that gave domestic partners identical benefits to married couples. HB 118 falls far short of the mark because it only confers three token benefits and withholds dozens of others. I share Professor Van Dyke's view of the situation. Currently, the only legislation that could satisfy the Supreme Court is SB 795. I can not comment on the domestic partnership bill that is privately circulating among members of the House because it has not yet been introduced and is therefore not yet available for review.

If the HB 117/118 package is adopted by the Legislature as its only response to *Baehr*, the following scenario most likely will occur:

(1) The Supreme Court will not postpone the appeal in *Baehr* to await the outcome of a political decision by the voters in November 1998. It will hear and decide the case long before that election. To delay deciding the case until after November 1988 would be a political act by

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the Court -- and that will not happen. The Court will either hear the case under a normal schedule, or it will expedite the appeal since the trial court's ruling is so clear and the evidence provided by the state at trial was so weak. No new evidence may be presented on appeal.

(2) Although the Supreme Court might accept a *comprehensive* domestic partnership act (such as SB 795) as satisfying the demands of the equal protection clause of the state Constitution -- and Professor Van Dyke has consistently stated that he is 95% certain that the Court would accept such a comprehensive law in lieu of same-sex marriage -- it most certainly will not accept the few token benefits conferred by HB 118. In its first decision, the Court listed dozens of benefits that were conferred by marriage and that were being denied to the plaintiffs. Conferring only three of those benefits at this stage will only underscore the magnitude of the equal protection problem, rather than curing this constitutional defect.

(3) The Supreme Court probably will decide the *Baehr* case by the end of 1997 (if the appeal is expedited) or by April 1998 (under a normal schedule). Without passage of a *comprehensive* domestic partnership act, the Court most certainly will rule for the plaintiffs and therefore order the director of the Department of Health to issue marriage licenses to same-sex couples. Since the Legislature has had years to deal with this issue and will have failed to do so in a manner that satisfies the state constitution, the court most likely will deny any further stay. It is therefore reasonable to expect marriage licenses to issue by May 1998 at the latest.

(4) Same-sex couples in Hawaii, and throughout the nation, can anticipate that the constitutional amendment will be approved by the voters in November 1998. As a result, dozens of *Hawaiian* residents will take advantage of this "window of opportunity" and will secure marriage licenses between May 1998 and November 1998. In addition, thousands of same-sex couples from the mainland will fly to Hawaii during this lacuna for the same purpose.

(5) If public opinion polls are accurate, the voters of Hawaii probably will approve the constitutional amendment in November 1998.

(6) Approval of the amendment will not have addressed the fairness issue, nor will it halt the litigation. Three constitutional law experts -- a law professor, a litigator, and a retired Supreme Court justice -- unanimously testified to this effect at a Senate Judiciary Committee hearing last year. They predicted that while an amendment would prevent the Supreme Court from ordering the state to issue marriage licenses to same-sex couples, it would not stop the Court from declaring the existing statutory scheme of benefits to be unconstitutional in violation of the state constitution's equal protection clause. All of these experts stressed this reality to the Senators last year. They said that the Court could order the state to revise all of its statutes and

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regulations in a manner that would eliminate discrimination against domestic partners. This would eventually require the Legislature to pass a law similar to SB 795. Failure of the Legislature to do so will result in a court-ordered domestic partnership registration procedure with benefits for registered partners identical to those now granted by statute to spouses.

(7) The passage of a constitutional amendment allowing marriage to be limited to opposite-sex couples will only have prospective effect. This is because the ex post facto clause and the impairment of contracts clause of the federal constitution would preclude such an amendment from undermining the legality of same-sex marriages performed in Hawaii during the hiatus between the Supreme Court's ruling in *Baehr* and the passage of the amendment in November 1998. As a result, the HB 117/118 package will not prevent dozens of Hawaii same-sex couples from being legally married until such time as the partners secure a divorce or one partner dies. Thus, same-sex marriage will remain part of the social and political landscape in Hawaii for decades.

Therefore, voting in favor of the HB 117/118 package will have no effect on stopping same-sex marriages from being legalized in Hawaii during May-November 1998, and will not remove the constitutional need to pass a comprehensive domestic partnership act to cure the equal protection problem. This package appears to be designed to appease segments of the public rather than satisfying the demands of the state constitution.

Finally, I must comment on the legal effect of HB 118.

The reference to the widowed mother and her adult son cited in the preamble to HB 118 is a strange example to use to justify the inclusion of blood relatives in the bill. There are only three benefits conferred by HB 118: inheritance without a will, hospital visitation and medical decision making, and the right to sue a wrongdoer for wrongful death. A mother and son do not need any of these benefits because they already have them under current law. A son will inherit from his mother even if the mother has not executed a will. No hospital would ever deny visitation to a mother and child; such a relationship already has preferred visitation rights. Under the common law, if a person is unable to make medical decisions for herself, the right to make such decisions automatically is conferred on the next of kin. Finally, the wrongful death statute already allows a parent to sue for the wrongful death of a child and vice versa.

As for the benefits conferred on unmarried couples who are not related by blood, the benefits in HB 118 are mostly illusory. One partner can already bequeath property to his surviving partner by executing a will. The couple can execute a durable power of attorney for health care to take care of the medical decision-making problem. The time and money that it

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would take to register as reciprocal beneficiaries under HB 118 could be used instead to draft a short will and to execute a medical power of attorney. As a result, the so-called "benefits" conferred by HB 118 on unmarried couples are essentially imaginary.

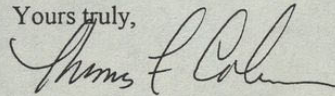
Furthermore, this bill might deprive unmarried couples of benefits which they already have under current law. There are dozens of Hawaii statutes that confer benefits on members of a "family." Since many of these statutes do not define "family," unmarried partners may already qualify for these family benefits. Also, under current law, unmarried partners have the right to make contracts for division of property upon dissolution of the relationship. This bill may take that right away from such couples if they were to register as reciprocal beneficiaries because HB 118 states that "the parties named in the certificate shall have only those rights and obligations provided expressly by the laws of the State of Hawaii to reciprocal beneficiaries."

Finally, the exclusion of unrelated opposite-sex partners from any reform package has the effect of harming many single adults who are economically precluded from marrying. This includes seniors and people with disabilities who live in opposite-sex unmarried relationships. While these couples may legally marry, if they do, they may lose important economic benefits such as pension survivor benefits from a previous marriage or federal benefits upon which they often rely for survival. That is why so many seniors and people with disabilities live together out of wedlock. That is also why they would support an unrestricted domestic partnership bill.

The HB 117/118 package also ignores the needs of opposite-sex couples who would like to form a legally recognized *secular* relationship that has no ties to religion. Civil marriage is not truly a secular institution. It has its roots in religion. The civil marriage statute also continues to use religious terminology such as "solemnized," "rite" and "ceremony." This is one of the reasons why Governor Cayetano has suggested that a new secular institution of domestic partnership should be created for any two adults and that it not be limited to same-sex couples.

In sum, the HB 117/118 package will not have the effect that is presumably intended, namely, to prevent the legalization of same-sex marriage in Hawaii.

Yours truly,



Thomas F. Coleman

cc: Governor Ben Cayetano
Senate President Norman Mizuguchi