DOMESTIC PARTNERSHIP PROPOSALS IN HAWAII: COMPARATIVE CHANCES OF PASSING CONSTITUTIONAL SCRUTINY

Commentary

As of January 29, 1997, only three domestic partnership bills are pending in the Hawaii Legislature: HB 118 (Souki), SB 795 (McCartney), and HB 1396 (Case/Thielen). The latter two bills actually use the term "domestic partnership" while the former uses the term "reciprocal beneficiaries."

The question is whether any of these bills will pass constitutional scrutiny, first when the Supreme Court decides *Baehr*, and then later in November 1998 if the voters adopt a constitutional amendment. The purpose of this commentary is to assist legislators in answering both questions.

Background: 1996 Legislative Session

Senator Norman Mizuguchi introduced SB 3113 last session. As it was originally written, that bill embodied the recommendation of the Commission on Sexual Orientation and the Law that the Legislature enact a comprehensive domestic partnership act which would be available to both same-sex and opposite-sex partners who live together as a family unit.

SB 3113 would have given registered domestic partners the same benefits and would have imposed the same burdens as state law confers on married couples. It was essentially identical to HB 4030, except that Representative Quentin Kawananakoa's bill was more inclusive because it was open to participation by blood relatives. Kawananakoa's bill died when it was not given a hearing by the House Judiciary Committee.

Mizuguchi's bill was substantially amended by the Senate Judiciary Committee. In the form it passed that committee and eventually passed the full Senate, SB 3113-SD1 contained several new restrictions:

(1) It basically became a "gay rights" bill because SB 3113-SD1 was limited to same-sex couples; (2) Even though visitors can get married in Hawaii on one day's notice, SB 3113-SD1 contained a one-year residency requirement for at least one of the domestic partners; (3) It included a longer waiting requirement for dissolution than the waiting period for a marital divorce; and (4) It also excluded any child custody rights for domestic partners.

Although SB 3113-SD1 was approved by the full Senate, it died when a conference committee of both houses was unable to reach an agreement. House members wanted a constitutional amendment prohibiting marriage, without giving domestic partners any rights or benefits. Senate members insisted that the issue of discrimination be addressed before they would consent to putting a constitutional amendment on the ballot. This standoff ended in a legislative stalemate last session.

Constitutional Proposals: 1997 Session

This session, the House has approved a proposed constitutional amendment (HB 117) which, if approved by voters in November 1998, would allow marriage to remain limited to opposite-sex couples. HB 117, however, does not address the issue of discrimination in benefits.

Senate leaders have introduced their own version (SB 1800) of a constitutional amendment. It differs essentially from the House proposal in only one respect – SB 1800 would require that civil rights (other than the ability to get married) may not be denied on the basis of sex. This proviso would basically require passage of a comprehensive domestic partnership bill to allow unmarried couples who are similarly situated to married couples to receive similar rights and benefits.

Short-Term Constitutional Scrutiny

It is likely that *Baehr v. Miike* will be decided by the Hawaii Supreme Court several months before any constitutional amendment is placed before the voters in November 1998. If the court grants an expedited appeal, a decision could come as early as December 1997. Under a normal schedule, a decision would be handed down in March or April of 1998.

The only evidence the Supreme Court may consider is that presented at the trial. No new evidence may be introduced on appeal. As the trial court's ruling demonstrates, the state failed miserably to meet the compelling interest test.

Therefore, the only variable now that could affect the outcome of the case is a change in statutory law. Constitutional law professor Jon Van Dyke has repeatedly predicted that unless a *comprehensive* domestic partnership act is passed, the Supreme Court

certainly will order the state to issue marriage licenses to same-sex couples.

On the other hand, Professor Van Dyke has said that he is 95% certain that the court would dismiss the *Baehr* case as moot if the Legislature grants equivalent rights and benefits to domestic partners as marriage provides to spouses. However, such a statute would have to be enacted this session -- before the Supreme Court hears oral argument in *Baehr*. In short, time is running out.

The Case/Thielen bill (HB 1396) has the best chance of satisfying the current equal protection clause under which the *Baehr* case will be decided. It grants identical rights and benefits to domestic partners as the state's marriage laws give to spouses, without exception. Also, from a political perspective, since it allows opposite-sex couples to register as domestic partners, it may be more palatable to moderate and conservative voters since it can not be labeled a "gay rights" bill.

The Souki bill (HB 118) has the least chance of being accepted by the Supreme Court as satisfying equal protection. In its first decision in *Baehr*, the court identified dozens of rights and benefits that marriage confers on spouses. Rather than curing this problem, the fact that HB 118 provides only four of these benefits actually serves to underscore the equal protection violation.

The McCartney bill (SB 795) has a fair chance of passing constitutional muster, but its deficiencies are glaring. A visiting couple can get married in Hawaii the day after they arrive. SB 795, however, has a one-year residency requirement before a couple can register as domestic partners. Also, there is a longer waiting period before domestic partners can dissolve their relationship than is required for a marital divorce. The omission of child custody rights for domestic partners -- while it may have been acceptable last year before the trial in *Baehr* occurred -- is now constitutionally suspect. The trial in *Baehr* focused heavily on child rearing by same-sex couples. The state failed to prove that such couples, as a class, are not good parents. Finally, the fact that SB 795 does not allow opposite-sex couples to register as domestic partners may concern the Supreme Court. Does the court really want to approve a new secular institution that on its face refuses to allow couples to participate solely on account of the gender of the partners?

The political stakes are high. Should the Legislature pass a comprehensive domestic partnership bill such as HB 1396 (or a more inclusive version of SB 795) and increase the chances of the state winning the *Baehr* case? Or should legislators remain unbending by giving only limited benefits to a small class of beneficiaries, thereby increasing the chances the Court will rule for the plaintiffs? The answer depends on how important it is to prevent a several month interval in 1998 during which time same-sex marriage will be legal through court order.

Constitutional Prospects After November 1998

If the Senate's version of a constitutional amendment (SB 1800) is passed by the Legislature and approved by the voters in November 1998, new court challenges will be filed by unmarried couples, especially if a domestic partnership bill is not passed that is *inclusive* in who may register and *comprehensive* in the benefits it confers. That is because SB 1800 requires that civil rights (other than marriage itself) may not be denied on the basis of sex.

If opposite-sex couples are excluded from domestic partnership -- as SB 795 currently does -- the argument will be made that such an exclusion constitutes sex discrimination. Although most opposite-sex couples will still want to get married -- because they want their married status to be transferrable to other states and because they want federal recognition of their marriage -- there are some opposite-sex couples who will feel otherwise. For example, some seniors, people with disabilities, and surviving spouses may want the benefit of registering as domestic partners under state law and not being considered married under federal law. Also, some feminists would prefer domestic partnership because marriage has had a history of oppressing women. Finally, there are couples who want legal recognition, without the religious connotations that "marriage" carries. Civil marriage in Hawaii has not been desacralized. Not only does it have its roots in religion, the civil marriage statute uses religious terms such as "rite," "ceremony," and "solemnization."

In the final analysis, either the Case/Thielen bill (HB 1396), or a more inclusive and comprehensive version of the McCartney bill (SB 795) has the best chance of passing constitutional scrutiny in the short-term as well as the long-run.

What the Legislature does now will have ramifications for years to come.

-- Thomas F. Coleman
January 29, 1997