SB 308

Alaska State Legislature

Sen. Lyda Green, Chairman
Sen. Loren Leman, Vice-Chairman
Sen. Mike Miller
Sen. Johnny Ellis
Sen. Judith Salo

State Capitol
Room 123
Juneau, Alaska 99801-1182
907-465-3762

Senate Committee on Health, Education and Social Services

Sponsor Statement -- SB 308

An Act clarifying a statute relating to persons who may legally marry; relating to same-sex marriages; and providing for an effective date.

Senate Bill 308 amends the existing statute governing marriage in Alaska, to clarify that marriage is a civil contract entered into between "one man and one woman". The current statute uses the gender-neutral term "person". In light of recent litigation on the subject of same-sex marriages, including the case *Brause and Dugan v. State of Alaska*, the existence of such ambiguous language in statute is problematic.

In a March 31, 1995, written opinion the Department of Law expressed that only marriages between persons of the opposite sex would likely be recognized by the courts as authorized under current law, despite the gender-neutral language in the statute. This opinion is based on the fact that the original Alaska Marriage Code of 1963 specified that marriage is a contract entered into by a "man" and a "woman". The change to "person" in 1974 was the result of a revisor of statutes bill. There was no intent by the legislature to change the definition or requirements for marriage in a substantive way.

Nevertheless, the Department of Law acknowledged in its opinion that the existing language is problematic: "Using hindsight, we would have to say that the 1974 revisor's bill should not have amended AS 25.05.011 in the way that it did. First, the change to sex-neutral language *can be viewed as making a major substantive change in the law*, inappropriate for a revisor's bill." [emphasis added] In order to eliminate ambiguity, SB 308 restores the traditional language in the marriage definition.

SB 308 also adds new language to the marriage statute stating that same-sex marriages recognized by other states or foreign countries are void in Alaska. This language is in response to the 1993 decision of the Supreme Court of Hawaii in *Baehr v. Lewin*, in which the court ruled that it may be unconstitutional for

Hawaii to disallow same-sex marriages, absent a compelling interest by the state. The case was remanded to the lower court which will rule on the case in July or August 1996.

The prospect of same-sex marriages being allowed in Hawaii or other states raises the possibility that Alaska would have to recognize such marriages if the "couples" moved to Alaska. Absent a strong legal policy in Alaska which excludes same-sex marriages, the courts could find that a marriage valid in one state is valid in all states. The people of Alaska have not chosen, either directly or through their elected representatives, to recognize same-sex marriages. The issue of same-sex marriages is one that should be decided by Alaskans, not by a court in Hawaii or any other state.

A third component of SB 308 states that a "same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage." This language precludes the state from recognizing same-sex "domestic partnerships" which are not legal marriages, but could be deemed to be entitled to the benefits of marriage, especially in the context of employee benefits.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. SB 308

Revision Date:
Title: "...clarifying a statute relating to persons who may legally marry; relating to same-sex marriages..."
Sponsor: Senate HES
Requester: Senate HES

Dept. Affected: Department of Law
BRU: Civil Division
Component: General Legal Services
COMPONENT SERIAL NO. 2087

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 25.05 to clarify that, in Alaska, marriage is a civil contract entered into by one man and one woman that requires both a license and solemnization. The bill also clarifies that a marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state. The bill further provides that a same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage. The bill therefore clarifies what the Department of Law believes is already the law in Alaska and, consequently, there should not be a fiscal impact for the department.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: 3/15/96

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 3/15/96

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STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

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March 31, 1995

Representative Norman Rokeberg
Alaska House of Representatives
Room 110 State Capitol
Juneau, AK 99811-1182

Re: Whether current Alaska law allows same-sex marriages

Dear Representative Rokeberg:

You have asked for our opinion on whether HB 227, a bill that you have introduced and that would amend the Alaska marriage code (AS 25.05) to specify that only a man and a woman can marry, would change the current law. It is our opinion that your bill would not change the law.

In our conversations with your staff we indicated that our opinion rested on our belief that the common law in Alaska would not allow same-sex marriages. On further research, however, our opinion now rests on our belief that a court would construe the Alaska Marriage Code (AS 25.05) as allowing only marriages between a man and a woman, notwithstanding the current, sex-neutral language of the code.

When first enacted in 1963, the Alaska Marriage Code (AS 25.05) did specifically restrict marriage to a man and a woman. Sec. 1, ch. 58, SLA 1963 (enacting AS 25.05.011). The references to "man" and "woman" were deleted, and replaced with sex-neutral language, in 1974. Sec. 92, ch. 127, SLA 1974. However, chapter 127 was the bill of the revisor of statutes, submitted under AS 01.05.036. That bill is generally limited to technical changes,

and is not supposed to make major substantive changes in the law[1]. Thus we believe that, if a court were confronted with the question, it would rule that AS 25.05.011 still implicitly contains the requirement that only members of different sexes may marry, because of the way in which the current sex-neutral language was adopted.[2]

Our conclusion is bolstered by the fact that the marriage code still uses the terms "husband" and "wife" in several places to refer to the parties to a marriage. See AS 25.05.041(b); 25.05.051. Had the legislature intended, either in 1974 or 1975, to authorize same-sex marriages, it would presumably have replaced these terms.

The Washington Court of Appeals reached a similar conclusion in Singer v. Hara, 522 P.2d 1187, 1189 (Wash. App.

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[1] Revisor's bills encompass many subjects, and, if they contain substantive changes in the law, they might well violate the single-subject requirement of article II, section 13 of the Alaska constitution. Instead, revisor's bills are exempted from the single-subject requirement by the portion of section 13 exempting bill "codifying, revising, or rearranging existing laws."

Using hindsight, we would have to say that the 1974 revisor's bill should not have amended AS 25.05.011 in the way that it did. First, the change to sex-neutral language can be viewed as making a major substantive change in the law, inappropriate for a revisor's bill. Second, the bill did make an unquestionably substantive change in the law (albeit not a major one), establishing an age of consent of 19 for both sexes, instead of the previous 19 for men and 18 for women (a change that presumably resulted from the 1972 amendment to article I, section 3 of the Alaska constitution to prohibit sex discrimination). Give the title of the bill - "An Act making corrective amendments in the Alaska Statutes as recommended by the revisor of statutes" - this change was not in our opinion appropriate.

[2] The sex-neutral language was retained when AS 25.05.011(a) was amended in 1975, to change the age set out in that statute. Sec. 1, ch. 28, SLA 1975. However, because the sex-neutral language was not changed, we do not believe that a court would view the 1975 amendment as making the substantive change that a revisor's bill cannot. The title of the 1975 bill amending AS 25.05.011(a), "An Act relating to the capacity of persons to consent to marriage," does not reflect an intent to change the law to allow same-sex marriages.

1974). Like AS 25.05.011(a), the Washington statute at issue in Singer, RCW 26.04.010, provided that "persons" may marry. The court, however, noted that, prior to 1970, the statute referred to males and females, and that these terms were eliminated when the age of consent was made the same for both sexes. The court also noted that 1972 amendments to Washington's community property laws retained references to "husband" and "wife." It concluded that, in light of these facts, the legislature had not intended to authorize same-sex marriage.

Three other courts have concluded that same-sex marriages are not authorized under sex-neutral statutes like AS 25.05.011(a) because of the use of the word "marriage." Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972); Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Adams v. Howerton, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982). These courts all looked at the dictionary definition of "marriage," which invariably refers to a relationship between a man and a woman, or between members of opposite sexes. They concluded that the use of the word indicated legislative intent to limit the ability to marry to a man and a woman.

To our knowledge, there are no published judicial decisions holding that a statute like AS 25.05.011(a) allows same-sex marriages. Therefore we believe it quite likely that the Alaska courts would follow the decisions discussed above and rule that the Alaska marriage code does not authorize same-sex marriages.[3]

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[3] The well-known, recent Hawaii case of Baehr v. Lewin, 852 P.2d 44 (Hawaii 1993), rests on constitutional grounds, not on statutory interpretation; the statute challenged explicitly limited marriage to a man and a woman. Whether or not AS 25.05 is interpreted to allow same-sex marriages is of course a totally different issue from whether a ban on same-sex marriages is constitutional.

Please feel free to contact us if you have further questions.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: John B. Gaguine
Assistant Attorney General

cc: Pat Pourchot
Legislative Liaison
Office of the Governor

Deborah Behr
Assistant Attorney General
Department of Law

Dist by Rep Robinson

Maureen Longworth, M.D.
3245 Hospital Drive
Juneau, AK 99801

March 26, 1996

Alaska State Legislature
Members of the Senate
Members of the House

Dear Legislators:

I am a family physician and have been practicing for twelve years. As a family doctor I have the privilege of interacting with people around the most intimate details of their lives. I take the psycho-social responsibility of my work very seriously. With this experience and perspective in mind I approach you regarding SB 308 to prohibit same sex marriage.

In my clinical practice, behind closed doors and under the safe umbrella of confidentiality gay and lesbian patients share with me their painful struggle of how discrimination effects their ability to lead a healthy life. Studies have shown that suicide rates are higher in gays than in the general population, particularly in our gay youth.

If we are a society in favor of family values, why do we look for ways to inhibit some Americans who want to marry and conform? Legalizing same gender marriage would add support to long term, committed, healthy relationships.

Politically speaking, adopting SB 308 seems like a costly move backwards. Eleven states have withdrawn their anti-gay marriage bills, probably because similar bills are being challenged in the courts in three states and resulting in costly legal fees that will likely end up in the supreme court. I do not want my state money caught up in this litiginous battle.

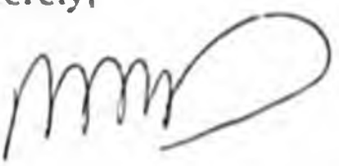
In 1967, a similar issue, regarding mixed race marriage was brought to the Supreme Court, and at that point the court mandated that mixed race marriages be recognized in all states. Currently gays are the last group in the United States not granted the right to marry. When this reaches the Supreme Court, as is likely to occur in the next year, it is likely that disallowing gay marriage will be considered a violation of the civil rights outlined in our constitution, and as in 1967, the Supreme Court will

pass a mandate making SB308 unconstitutional.

Rather than go backwards, and chose a costly legal battle, why not take advantage of an economic opportunity? It is obvious that this issue will be decided by the Supreme Court in the next year or two. Why not Alaska be the first state to grant same gender marriage? For an economy that depends on tourism, this would be a boon. People would travel here from all over the U.S with their families and friends. The tens of thousands of dollars spent on each wedding would be spent in Alaska. Eventually if the Supreme Court gives them the choice, gay people would likely marry in their home state, but it is likely that Alaska would be honored by gay Americans for years to come, and they would continue to spend money here.

In summary, I see no reason to support SB 308. As I have pointed out there are humanitarian, economic, and political reasons that support same gender marriage as the healthier and smarter choice. I am counting on you, as my representatives to represent my choice, and I will be watching you vote.

Sincerely,



Maureen P. Longworth, M.D

cc. *Juneau Empire*

RECEIVED
APR 8 1996
Ans'd.....

Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary committee name committee on Senate Bill # 308 bill/subject, dated March 25 1996

I Am opposed To Same Sex mArriAges And Support this bill # 308. I have no personal involvement with This issue other Than A moral conviction That it is wrong. Further, I do NOT Support ANY Form OF LegAlizATION or Minority StATUS OF Same Sex mArriAges AND/or Special Rights For homosexual, GAy/lesbiAn individuAls.

Signed: John C. Drashner (John C. DRASHNER)
Testifier

Representing (Optional)

P.O. Box 68, Palmer
Address

(907) 745-5076
Phone No.

March 25, 1996

Senator Lyda Green

With the decline of family values and crime reaching all-time highs, I believe its time to enact legislation that will protect family values. I therefore support SB-308.

In the matter of the budget, I support a reduction in State spending on matters which are not essential government services such as the Arts. State spending can be cut without cutting services. I know this because I work for DOT\PF in Anchorage. Everyday I see people sitting at their desks doing nothing. I estimate 25-30% of the time is wasted. Some employees do little or no work most of the time in my section.

An income tax should be enacted only after cuts are made.

In regards to PFD's, dividends should not be capped or limited until cuts and/or other taxes (income or sales) are imposed.

Sincerely,
Stephen Ranger

Stephen Ranger
2025 Grizzly Bear Dr.
Wasilla, AK 99654

Daytime Ph. 266-1759.

Alaska State Legislature

Please enter into the record my testimony to the SJUD
committee name

committee on SB 308, dated 3-25-96.
bill/subject

I STRONGLY SUPPORT PASSAGE OF SB 308. I BELIEVE THAT WE NEED TO SEND A STRONG & CLEAR MESSAGE THAT SAME-SEX RELATIONSHIPS WILL NOT BE RECOGNIZED AND NOT GIVEN OR ENTITLED TO BENEFITS OF MARRIAGE. I BELIEVE THIS BILL ACCOMPLISHES THAT. THIS IS A VERY IMPORTANT ISSUE TO ME AND I LOOK FORWARD TO YOUR POSITIVE RESPONSE.

Signed: Adria Myers
Testifier

self
Representing (Optional)

Box 4112 Soldotna, AK 99669
Address

262-3282
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary
committee name

committee on SB308
bill/subject
. dated 25 March 96 .

I ask your support of SB308. It is important to —
-- State's rights and soverenity.
— the preservation of the family.

This is not about fear, hate, or discrimination — it's about definition of the institution of marriage upon which our State's future defends - not only for propagation of human kind, but, also, the values that will hold communities and our nation together.

There is nothing new under the Sun — The disintegration and destruction of whole communities + civilizations are evidence and examples to us more than 1000 years B.C., ~~[illegible]~~ MWR and as early as the fall of the Roman Empire- where homosexual marriages were upheld and prominent. Let us learn from history (for once).

If you enlarge the union of marriage to include same sex — where will it stop - (3 men + 1 woman; 4 woman)? Pedophiles will be the next in line to get the right to marry an 8, 10, or 12 yr. old boy or girl. Please - support the moral standard - support SB308.

Signed: Mark N Moldenhauer MARK N. MOLDENHAUER
Testifier

Self
Representing (Optional)

Po Box 595 STERLING, AK 99672
Address

262-9319
Phone No.

fax # 1-907-465-3922

3-25-96

TO WHOM IT MAY CONCERN:

TO ALL SENATE, HOUSE, DELEGATES, AND COMMITTEE MEMBERS.
LET IT BE KNOWN THAT I WISH FOR YOU TO SUPPORT LANGUAGE THAT WILL DEFINE MARRIAGE AS A UNION BETWEEN A MAN AND A WOMAN..

SINCERELY YOURS,
Marvin Haken
11441 CELESTIAL ST
EAGLE RIVER, AK 99577
(907) 694-2645

SENATE JUDICIARY COMMITTEE
JUNEAU , ALASKA
FAX # 1-907-465-3922

MARCH 25, 1996

TO WHOM IT MAY CONCERN:

TO ALL SENATE, HOUSE, DELEGATES, AND COMMITTEE MEMBERS,

LET IT BE KNOWN THAT I WISH FOR YOU TO SUPPORT [illegible]UAGE THE DEFINE MARRIAGE AS A UNION BETWEEN A MAN AND A WOMAN..

SINCERELY YOURS,

Irma J. Haker
11441 Celestial Street
Eagle River Alaska 99577
Phone # 694-2645

NEWS RELEASE **Not for Publication until Noon, August 4, 1995**

Contact: **Robert H. Wagstaff, lead counsel**
907 277-8611 office

Jay Brause or Gene Dugan, plaintiffs
907 568-1663 voice mail

Same-Sex Marriage Legal Action Filed in Alaska

(August 4, 1995) In Anchorage Superior Court today, two men filed legal action against the Bureau of Vital Statistics, Alaska Department of Health & Social Services, for denying their application for a marriage license one year ago on August 4, 1994.

The two men, Jay Brause and Gene Dugan, are 16-year life-partners, who, with their attorneys, Robert Wagstaff and Erik LeRoy, assert that prohibiting Dugan and Brause's marriage was unconstitutional under Alaska's constitutional equal protection and right to privacy provisions.

Today's action was taken to overturn an administrative memorandum issued by the Anchorage Superior Court presiding judge in 1993 which stated in part that, ". . . I have concluded that marriage between persons of the same sex is not contemplated by our statutory scheme. Therefore, a marriage license shall not be issued for the purpose of marrying two persons of the same sex."

The action by Dugan and Brause follows the 1993 decision by the Hawai'i Supreme Court that the State of Hawai'i must show a "compelling interest" in denying an application for marriage from persons of the same sex, as based on its interpretation of the Hawai'i Constitution's equal protection provisions. Alaska's Constitution contains an almost unique provision specifically guaranteeing its citizens privacy. Dugan and Brause's claim focuses on this provision of Alaska's Constitution.

\# \# \#

Some of the Rights that come with Marriage in Alaska

The State of Alaska attaches legal significance to the marriage relationship. State and federal laws award spouses numerous rights simply because of their status as a party to a marriage. The following is a list of some of those rights.

1. Right to file wrongful death action AS 9 55.580
2. Right to notice and consent in adoption proceeding AS 25 23.050
3. Spouse's right of intestate succession AS 13.11.010
4. Intestate succession to Alaska Native Corporation stock AS 13.16.705; 13.11.012
5. Right to authorize anatomical gifts AS 13 50.010
6. Right to revocation of will with marriage annulment AS 13.11.185
7. Surviving spouse's homestead allowance AS 13.11.125
8. Surviving spouse's elective share of estate AS 13.11.070
9. Surviving, omitted spouse's rights AS 13.11.110
10. Applicability of Uniform Disposition of Community Property rights at death AS 13.41.005
11. Surviving spouse's exemptions AS 13.11.130
12. Surviving spouse's family allowance AS 13 11.135
13. Right of notice of guardianship proceedings AS 13.26.135
14. Right to appointment as guardian AS 13.26.145
15. Child custody AS 25.24.150
16. Residency of spouse determining right to Permanent Fund Dividend AS 43.23.015
17. Actions between spouses respecting property AS 25.15.020
18. Authority to act as attorney in fact AS 25 15 040
19. Right to adopt AS 25.023.020
20. Violation of bigamy statute AS 11.51.140
21. Both spouses join in conveyance of family home AS 34.15.010
22. Spouse's services excluded from definition of employee AS 23.30.525
23. Right of first refusal under gasoline product leasing act AS 45.50.825
24. Right to effectuate insurance upon spouse AS 21.42.090
25. Criminal nonsupport rights AS 11.51.120
26. Worker Compensation rights upon spouse's death AS 23.30.215
27. Spouse's right to compensation for permanent partial disability AS 23.30.195
28. Spouse's interest in public employee retirement system AS 39.35.455
29. Spouse's interest in qualified domestic relation orders and retirement plans AS 39.35.455
30. Old age survivor insurance AS 39.30.20
31. Beneficiary public employee group health and life insurance AS 39.30.090
32. Public employee family leave AS 39.20.305; 23.10.500
33. Public employee leave of absence AS 39 20 310
34. Payments due to deceased public employees AS 39.20.360
35. Spouse's interest in supplemental employee benefits AS 39.30 160
36. Spouse's interest in public employee special hazard insurance AS 39.30.130
37. Spouse's interest in public employee's deferred compensation program AS 39.45 010
38. Federal income tax applications
39. Nondischargeability in bankruptcy of spousal support 11 U S C. §523 (a) (5)
40. Right to consent to adoption AS 25.23 040

Legislative Research Agency

Alaska State Legislature

130 Seward Street, Suite 218
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Phone: (907) 465-3991
Fax: (907) 463-3351

March 8, 1995

MEMORANDUM

TO: Representative Norman Rokeberg

FROM: Carol R. Vandor CRV
Legislative Analyst

RE: **Legislative History of AS 25.05.011 (Requirements for Marriage)**
Research Request 95.152

You asked for a legislative history of AS 25.05.011 which addresses marriage requirements. Alaska Statute 25.05.011 states that marriage is a civil contract requiring a license and solemnization which may be entered into by a person who is 18 years of age or older; those who qualify for a license under section 171[1]; or a member of the armed forces of the U.S. while on active duty.

This provision has been simplified over the years. Initially, it established a minimum age for a *male* as 21 years and for a *female* as 18 years. In 1970 the minimum age of a male was lowered to 19. In 1974 the legislature amended the law again to specify that a *person*, rather than a male or female, be at least 19 years of age. A year later the minimum age was lowered to 18, and members of the armed forces on active duty were included.

Alaska Statute 25.05.011 traces its origin to a territorial law (§ 21-1-1) which read

> Marriage is a civil contract, which may be entered into by males of the age of twenty-one years, and females of the age of eighteen years who are otherwise capable; provided, however, that no person shall be joined in marriage in this Territory until a license shall have been obtained for that purpose from a duly appointed and qualified United States Commissioner, or Marriage Commissioner as provided by Section 1211, Compiled Laws of Alaska, 1933 [§ 21-1-31 herein]. That nothing in Section 1189, Compiled Laws of Alaska, 1933, as amended [§ 21-1-11 herein], shall prevent a Marriage Commissioner from issuing a marriage license.

---

[1]AS 25.05.171 addresses persons capable of consenting to marriage, minimum ages, and consent of parents or guardian.

After statehood, the legislature began to adopt territorial laws as Alaska statutes. The territorial law was revised somewhat and formally adopted as a state law by Chapter 1 SLA 1963. It was renumbered as AS 25.05.010 which read

> Marriage is a civil contract, which may be entered into by males of the age of 21 years, and females of the age of 18 years who are otherwise capable. However, no person shall be joined in marriage in the state until he obtains a license from a person authorized by law to issue marriage licenses.

Section 1, Chapter 58 SLA 1963, repealed AS 25.05.010 and enacted AS 25.05.011 as follows:

> (a) Marriage is a civil contract requiring both a license and solemnization which may be entered into by
>
> (1) a male who is 21 years of age or older with a female who is 18 years of age or older, who are otherwise capable, or
>
> (2) those who qualify for a license under sec. 171 of this chapter.
>
> (b) No person may be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. No marriage performed in this state is valid without solemnization as provided in this chapter.

Section 9, Chapter 245 SLA 1970 amended AS 25.05.011(a)(1) to read (emphasis added):

> (a) Marriage is a civil contract requiring both a license and solemnization which may be entered into by
>
> **(1) a male who is 19 years of age or older with a female who is 18 years of age or older, who are otherwise capable, or**
>
> (2) those who qualify for a license under § 171 of this chapter.
>
> (b) No person may be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. No marriage performed in this state is valid without solemnization as provided in this chapter.

Section 92, Chapter 127 SLA 1974 amended AS 25.05.011(a)(1) to read (emphasis added):

> (a) Marriage is a civil contract requiring both a license and solemnization which may be entered into by
>
> **(1) a person who is 19 years of age or older, who is otherwise capable, or**
>
> (2) those who qualify for a license under § 171 of this chapter.
>
> (b) No person may be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. No marriage performed in this state is valid without solemnization as provided in this chapter.

Section 1, Chapter 28 SLA 1975 amended AS 25.05.011(a) to read (emphasis added):

> (a) Marriage is a civil contract requiring both a license and solemnization which may be entered into by
>
> **(1) a person who is 18 years of age or older, who is otherwise capable, or**
>
> (2) those who qualify for a license under § 171 of this chapter, or
>
> **(3) a member of the armed forces of the United States while on active duty.**
>
> (b) No person may be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. No marriage performed in this state is valid without solemnization as provided in this chapter.

Minor revisions were made in the law after 1977. Alaska Statute 25.05.011 currently reads (emphasis added):

> (a) Marriage is a civil contract requiring both a license and solemnization that may be entered into by
>
> (1) a person who is 18 years of age or older, who is otherwise capable,
>
> (2) those who qualify for a license under **AS 25.05.171**, or
>
> (3) a member of the armed forces of the United States while on active duty.
>
> **(b)** A person may not be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. A marriage performed in this state is not valid without solemnization as provided in this chapter.

Copies of the session laws and the replacement statutes are attached. We hope this information is useful to you. If we may be of further assistance, please contact this office.

Attachments

ALASKA
CIVIL LIBERTIES UNION

An Affiliate of the American Civil Liberties Union
P. O. Box 201844 Anchorage, AK 99520-1844
Phone: 1-907-258-0044 Fax: 1-907-258-0288

March 28, 1996

The Honoral le Robin Taylor
Alaska Senate
State Capital - Room 30
Juneau, Alaska 99801-1182

RE: **Constitutional Analysis of SB 308**

Dear Senator Taylor:

I am writing on behalf of the members of the Alaska Civil Liberties Union to express our opposition to Senate Bill 308 on the grounds that the bill is unconstitutional. Senate Bill 308 proposes legislation that will violate the Full Faith and Credit Clause of the United States and Alaska Constitutions. Under SB 308, Alaska judges will be unable to recognize, for any purpose, an entire category of a sister state's valid marriages. The legislation SB 308 proposes is highly unusual and unwise, and will leave Alaska hanging out in the fringes of American law begging for an expensive legal challenge.

I. Constitutional Arguments Against SB 308

A. The Full Faith and Credit Clause

The Alaska and United States Constitutions provide that judgments of one state shall be recognized as valid in other states. The federal Clause reads:

> Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.

U.S. Const. Art. IV, § 1.

Hawaii regards a marriage certificate issued pursuant to its marriage law to be prima facie evidence of a validly contracted marriage.[1] It is no secret that this bill is specifically aimed at Hawaii because Hawaii might, in the future, permit same-sex marriage. Thus, SB 30b is a direct affront to the state of Hawaii. The legislature proposes to place Alaska in a precarious position by declaring that Alaska will never honor a category of Hawaii's legal judgments. Will Hawaii respond by refusing to recognize Alaska judgments? For example, in response to Alaska's new law, a Hawaiian court could refuse to enforce the judgment of an Alaska court against a creditor residing in Hawaii.

The Supreme Court has not yet ruled on the issue of whether marriages must be accorded Full Faith and Credit. Several state and lower federal courts have ruled that marriages must be given full faith and credit even where the marriage would not be recognized under the laws of

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[1] Haw. Rev. Stat. §§ 527-1 and 527-13(c)(1985).

the forum state.[2] The Full Faith and Credit Clause establishes a general constitutional policy in favor of uniform recognition of marriages that are validly contracted under the laws of other states.

If SB 308 passes, a legal and practical nightmare will be created. Individuals will find themselves simultaneously married and unmarried in different parts of the country. Such a situation is untenable, both in terms of federalism and in terms of an American's reasonable expectation to exercise their fundamental right of marriage.

It does not take a great deal of imagination to see that passing SB 308 is the first step in creating a country where each state acts independently, leading to the breakdown of the rule of law. Each Alaska Senator should consider whether the risk of the break down of interstate relations is too high a price to pay for a piece of legislation which has been drafted in response to a decision that has not yet even been made by the Hawaii Supreme Court.

B. The Right to Interstate Travel

The right to interstate travel was first recognized by the Supreme Court in Crandall v. Nevada, 73 U.S. (6 Wall) 35 (1867). In 1969, the United States Supreme Court held that a state cannot discriminate against people entering its territory by imposing unconstitutional conditions on the right to enter. See Shapiro v. Thompson, 394 U.S. 618, 631 (1969). Cases decided under the right to travel provide strong, additional support for the argument that failure to recognize a marriage that is validly contracted under the law of another state is inconsistent with a person's fundamental right to travel freely throughout all fifty states of the nation.

Alaska's refusal to recognize a marriage validly contracted under the laws of Hawaii places a direct and tangible obstacle in the path of interstate migration. This refusal also implicates other constitutional provisions relating to due process, the right to travel and move freely throughout the nation, equal protection, interstate commerce, and privileges and immunities, as well as the fundamental right to marry itself. For example, a married couple residing in Hawaii who wished to move to another state to accept an employment opportunity or for medical treatment, would have to choose between their marriage and their right to travel.[3] Under the Analysis discussed in footnote 3, below, Alaska will need to demonstrate a compelling interest in banning same sex marriages, since Alaska's law impinges on at least two fundamental rights: the right to marry and the right to travel.

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[2] See, e.g., Thomas v. Sullivan, 922 F.2d 132, 134 (2d Cir. 1990)(New York does not recognize common-law marriages but must give full faith and credit to marriages that are valid under the laws of other states); Orsburn v. Graves, 210 S.W.2d 496 (Ak. 1948)(Arkansas must give full faith and credit to validly contracted Texas common-law marriage); Succession of Rodgers, 497 So.2d 429, 295 (Ct. App. La. 1986)(Louisiana does not recognize or permit common-law marriages, but must give effect to them when validly contracted in another state); Commonwealth ex rel. Alexander v. Alexander, 289 A.2d 83, 86 (Pa. 1971)(Pennsylvania must give full faith and credit to a Georgia marriage certificate).

[3] In refusing to recognize a couples' valid marriage, Alaska may be found to be "unduly interfere(ing) with the right to 'migrate, resettle, find a new job, and start a new life.'" Shapiro v. Thompson, 394 U.S. 618, 629 (1969). In Shapiro, the Court found that the Equal Protection Clause incorporated the right to travel and employed a strict scrutiny analysis. The strict scrutiny analysis requires the State to demonstrate a compelling interest in the proposed regulation which cannot be served by a more narrowly tailored means. In Shapiro, the Court found that state and federal provisions denying welfare benefits to persons who had not resided within the jurisdiction for at least a year deterred and penalized travel. Subsequently, in Dunn v. Blumstein, 405 U.S. 330, 339-340 (1972) the Court held that Shapiro did not rest upon a finding that denial of welfare actually deterred travel. The Dunn Court clarified that the compelling state interest test is triggered by "any classification which serves to penalize the exercise of [the right to travel]."

C. Equal Protection

The Supreme Court of Hawaii based its decision on the rationale that banning same sex marriages is invidious sex discrimination which violates the Constitution of Hawaii. Of note, the Alaska Constitution expressly provides that "no person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin." Art. I, § 3. In 1996, those who oppose SB 308 have testified that since marriage is traditionally defined as a union between people of different sexes, same sex marriages do not require recognition.

It is important to remember that while marriage has traditionally been defined as a union between people of different sexes, it was also traditionally defined as between people of the same race. As recently as 1967, state governments denied interracial couples the right to marry. Subsequently, the United States Supreme Court clarified that since Americans have a fundamental right to marry, no State may not discriminate against protected classes of people by denying them a marriage license. Loving v. Virginia, 388 U.S. 1 (1967).

Just as the United States Constitution protects people from discrimination based on race, the Alaska Constitution protects all Alaskans from discrimination based on sex. Therefore, under Alaska law, arguably a marriage license may not be denied on the basis of the sex of either of the applicants. Clearly, under Alaska law, the State's purpose in denying equal protection of law to a citizen based on sex, must be balanced against the nature and extent of the infringement of individual rights. The state's justification that marriage is traditionally defined as a union between men and women, is unlikely to withstand the Alaska Supreme Court's Equal Protection analysis. In thinking about a future legal challenge to SB 308, the legislature should consider whether there is a stronger public policy against same-sex marriages in 1996, than there was against interracial marriages in 1967.

II. Conclusion

The United States and Alaska Constitutions embody a common sense expectation that basic freedoms do not expire when citizens cross state lines. If a person is married in one state, that person has a right to expect all other states to recognize a validly contracted marriage. The Alaska Civil Liberties Union urges you to vote no on SB 308 because the bill is unconstitutional and will tie Alaska up in needless, expensive and protracted litigation which the state will undoubtedly lose.

Respectfully yours,

Lynn Stimler
Executive Director

RECEIVED
MAR 28 1996
Ans'd.....

STATE of ALASKA

Delta Junction Legislative Information Office

P.O. Box 1189
Room 210, Jarvis Office Center
Delta Junction, AK 99737
(907) 895-4236
Fax (907) 895-5017

March 26, 1996

TO: Senate Judiciary Committee

Please accept the enclosed originals of written testimony for the Senate Judiciary hearing that was scheduled on 3/25/96.

Copies of this testimony were transmitted by fax on 3/25/96.

Thank you,

E A Sarver

Elizabeth A. Sarver
Information Officer

Enclosures: 1

Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary committee namo

committee on SB 308 bill/ subject, dated 3/25/96.

Senate
Jan. for Bill No 308

Homosexuals are presenting to this state a statements that they are quite normal and are motivated by love for changes in our state laws. Are we going to follow the leadings of this sick minority, even nature shows the absurdity of their perversion.

Signed: Charles E. Abbott
Testifier

P O Box 1434
Representing (Optional)

Delta Jct Alaska
Address

895-1098
Phone No.

Homosexuals

Senate Bill No.308

Dear Sen: Taylor

I would like to express my opinion about Senate Bill 308 that the Senate Health, Education and Social Services Committee passed. Senator Leman is one sponsor of this bill and I support this bill as they write it. Section 1. AS 25.05.001(a) is amended to read:

(a) Marriage is a civil contract entered into by one man and one woman ;hat requires [REQUIRING] both a license and solemnization. The man and the woman must each be at least one of the following: [THAT MAY BE ENTERED INTO BY]

(1) [A PERSON WHO IS] 18 years of age or older and [,WHO IS] otherwise capable:

(2) qualified [THOSE WHO QUALIFY] for a license under AS 25.05.171; or

(3) a member of the armed forces of the United States while on active duty.

Sec 2. AS 25.05 is amended by adding a new section to read:

Sec.25.05.013. SAME-SEX MARRIAGES. (a) A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in the state.

(b) A same-sex relationship may be recognized by the state as being entitled to the benefits of marriage.

Sec. 3. APPLICABILITY. AS 25.05.013, enacted by sec 2 of this Act, applies to all marriages entered into in other jurisdictions, whether entered into before, on, or after the effective date of this Act.

Sec. 4. This Act takes effect immediately under AS 01.10.070(c).

Senator Taylor it would please me greatly to know that you stand behind Senator Leman and his colleges in support of Senate Bill 308. Alaska needs to take a stand on Godly values for this State. I would like to leave you with a few scriptures for the Senator to read and meditate on. I will continue to support you as long as you keep looking down the road for long term goals for Alaska! Jobs for the future

generations to come! (Alaskan's for Alaskans').

HOMOSEXUAL

A person who is attracted sexually to members of his or her own sex. The apostle Paul listed homosexuals among "the unrighteous" who would not inherit the kingdom of God <1 Cor. 6:9>, and declared that God's wrath stands against such behavior, whether practiced by men or women <Rom. 1:26-27>.
(from Nelson's Illustrated Bible Dictionary)

1 Cor 6:9
9 Do you not know that the wicked will not inherit the kingdom of God? Do not be deceived: Neither the sexually immoral nor idolaters nor adulterers nor male prostitutes nor homosexual offenders
(NIV)

Rom 1:26-32
26 Because of this, God gave them over to shameful lusts. Even their women exchanged natural relations for unnatural ones.
27 In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed indecent acts with other men, and received in themselves the due penalty for their perversion.
28 Furthermore, since they did not think it worthwhile to retain the knowledge of God, he gave them over to a depraved mind, to do what ought not to be done.
29 They have become filled with every kind of wickedness, evil, greed and depravity. They are full of envy, murder, strife, deceit and malice. They are gossips,
30 slanderers, God-haters, insolent, arrogant and boastful; they invent ways of doing evil; they disobey their parents;
31 they are senseless, faithless, heartless, ruthless.
32 Although they know God's righteous decree that those who do such things deserve death, they not only continue to do these very things but also approve of those who practice them.
(NIV)

Michael D Sheldon
P.O. Box 1285
Petersburg, Alaska
99833
Ph. 907-772-3746
Fx. 907-772-2188

POSITION PAPER ~ Opposing SB-308 ~ March 25, 1996

Against Marriage Restrictions and the Voiding of Marriage Contracts of Other States

Organization: Committee for Equality – Statewide organization.
PO Box 34202, Juneau, AK 99803

Board Contacts: Anchorage: Jackie Buckley, 279-5001 (w); 279-5437 (fax); 562-0046 (h).
Fairbanks: Louise Barnes, 479-0618 (w/h).
Juneau: Sara Boesser, 586-5230 (w); 789-7450 (home fax); 789-9604 (h).

Position: **CFE Opposes SB-308 because it attacks Alaska state statute guaranteeing nondiscrimination on the basis of gender, and it is unconstituional at the federal level by breaking federal constituion fair faith and credit law. This kind of law is being defeated in other states — you can keep Alaska out of federal legal challenges by siding with the states that are rejecting this very same bill.**

The Committee for Equality opposes SB-308, and urges you to stop it in committee, because 1) it illegally discriminates on the basis of gender; and 2) it illegally calls for Alaska to not recognize or uphold contracts legal in other states of the Union; 3) this kind of law is being defeated in other states — you can keep Alaska out of federal legal challenges by siding with the states that are rejecting this very same bill.

To attempt to void other states' contracts is an unconstitutional act. As such it is extremely unfortunate that such a bill as this has been brought forward. The legislature does not need unnecessary contentious bills before it when matters of genuine concern need its time and attention. Refocus your energies. Hold hearings on bills that would protect people – such as the Governor's Domestic Violence Bill – instead of spending precious time on a bill like SB-308 **that will eventually be found illegal at the federal level via court action.**

1) Unlawful gender discrimination:

Why does this bill discriminate illegally on the basis of gender? It's true that both men and women are allowed to marry, so it obviously doesn't discriminate in that aspect. However, if a person does choose to seek a legal marriage license from the state, she or he would be forced to choose only a person of the opposite gender for that contract, or be denied the state's license. **Limiting the marriage license applicant's choice to only one gender is obvious gender discrimination.**

2) It breaks federal law to disregard other states' contracts:

This is the most blatantly anti-gay/lesbian bill to date in the legislature, and we ask you to consider the negative impact this will have on public discourse. Press reports nationwide show that hate crimes increase against lesbian and gay citizens when anti-gay bills are being debated. But aside from that, and equally important, is that bills such as this are doomed in the end, if history is any teacher.

Not to very long ago, legislative bodies prevented slaves from marrying one another; fortunately time and reason caused laws to change and that practice ended. But much more recently, and **a clearer example of why this bill is bad law — "mixed race" marriages were also made illegal by legislative bodies.** Finally some states crossed against the "norm," and declared the marriages legal. Around the country laws just like SB-308 sprung up, to disallow recognition of mixed race marriage contracts. However, the Federal Constitution's full faith and credit clause, which requires states to uphold one another's judicial proceedings, overturned those unconstitutional laws because legal comity is required across state lines for state contracts. And marriage is, among other things, a contract. Would the Alaska legislature want other states to disregard contacts made in Alaska?

[continued]

For example, Alaska allows marriages between younger persons than is allowed in some states—do we wish those states to not honor our state's marriage contracts? Like former anti-mixed-race laws, SB-308 will in the end prove unconstitutional at the Federal level, so why pass a bad law and become part of a legal battle Alaskans need not spend their money on?

Also, to those who might say "marriage" is ordained to be only man-woman, think long and hard about their arguments. They raise many red herrings:

One red herring is that "marriage is only for pro-creation." If that were true, then why don't people have to sign "procreation pledges" to get a marriage license? Why wouldn't the license be withheld until if/when a couple had children? Wouldn't sterile people be denied marriage? Wouldn't people too old to procreate be denied a marriage license?

Another red herring people like to intone is that "God made Adam and Eve, not Adam and Steve." Actually, I think most religious people would agree that God made every Adam and Steve and Joshua and Jose and Abdul on the planet. Also, "marriages" between same sex persons actually were blessed by the Christian church up through the Middle ages — it is only later that it was restricted to man-woman blessings only. In other words, marriage is a concept that has changed through time, and is changing as we speak with regard to same-sex persons who love and wish to support one another.

Another historical reminder — a friend pointed out that as recently as the 1960's, it was a crime in some New England states to "cohabitate" — in other words, unmarried persons could be arrested for living together if they were not married. Time and legal challenges overturned that law too, as this law will be overturned eventually if allowed to pass in Alaska.

To the red herring that "same-sex marriage destroys the family," I can only wonder why the same old phrase must resurrect so often against so many people. It took women in this country over 60 years to receive the right to vote, and a major battle cry against women's vote was that "if women could vote, it would be the end of the family." Mixed-race marriages too were considered to doom 'family.' To the women of Alaska, I propose that it's fortunate that such beliefs did not prevent women's advancement forever. But we of all people should recognize a scapegoat when we see it. And blaming the small minority of lesbian and gay people in the country who might wish to marry for the difficult times already facing families today is too far a stretch for reason.

The red herrings are endless, and each would fail in the light of full and reasoned discussion.

3) Join other states who are rejecting this federally unconstitutional law.

There is no rush to pass this bill. Supporters of this bill would claim otherwise, stating incorrectly that in Hawaii same-gender marriages will become legal right away and couples will want Alaska to honor those contracts very soon. The fact is that the Hawaiian case won't be reheard in lower court until mid-summer, with a decision at the end of 1996. Since either side promises a Supreme Court appeal, Hawaii's case won't have Supreme Court resolution until late '97 or early '98.

This bill is not Alaskan-born. It has been posed almost verbatim to over 20 states, and you should know that in the majority of states where this bill has been resolved, it has been resolved by defeating the bill. You can put Alaska on the side of the majority that is defeating this unconstitutional bill, instead of aligning us with the minority of states that would choose to fail in their federal contract-recognition responsibilities. To do that would add Alaska to the list of states that would be sued to overturn just such bad law. Save Alaska from that expense. Kill this bill, and allow reasonable time to study the legal implications of the Hawaii case. A knee-jerk rush to pass a bad law won't do anyone any good.

In conclusion, this bill should be stopped here. The issue needs legal research, and there is plenty of time to follow the Hawaii case without embroiling Alaska in the legal battles ahead. To the churches that disapprove of same-gender marriage — a reminder that they don't have to religiously bless these relationships, but for them to pressure the state to break gender non-discrimination laws and break contracts that are legal across state lines in a Union such as the US, is unconscionable. The decisions about who can receive a state marriage license, with all the benefits it provides, should be left to the courts.

SENATE COMMITTEE REPORT

DATE: 3/20/96 FURTHER: has no fiscal

DATE TURNED INTO OFFICE: 3-25-96

The Judiciary Committee considered SENATE BILL NO. 308

Clarifying a statute relating to persons who may legally marry; relating to same-sex marriages.

and recommends:

| | be replaced with _____ CS _____(_____)
| | adopt previous _____ CS _____(_____)
| | attached amendment(s)
| | adopt Letter of Intent by _____ Committee
| | further referral to the _____ Committee

Senate Bill:
| | same title
| | new title

House Bill:
| | same title
| | technical change
| | new: SCR*_____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
Lynda Green	✓	Ty Ellis		X	
Mike Miller	✓				
		Eve Evans	X		
CHAIR Lisa Taylor	✓				

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
Dept. of Law			
Civil Div	4/15/96	✓	

| | APPROPRIATION -- no fiscal note

*Include fiscal notes accompanying Governor's bill

Alaska State Legislature

Please enter into the record my testimony to the SENATE JUDICIARY committee name

committee on SB 308 - SAME SEX MARRIAGE bill/subject dated MARCH 25 1996.

I strongly urge you to do whatever you can to advance the passage of this bill as written before the end of the legislature session. For Alaska's legislature to take the lead in this very important matter would send a clear signal to other states. We must uphold traditional families! They are the very foundation of our society. Throughout recorded history there has been no institution as important as the traditional family. Redefining the family as accepting same sex Marriages is not only morally wrong, but would have devastating effects upon our society in every way. This issue is not about discrimination it is about erosion. Passing SB 308 would deter that erosion. Thank you.

Signed: Phil Reamtsma
Testifier

CALVARY BAPTIST CHURCH
Representing (Optional)

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Address

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Phone No.

LEG Legislative Information Office

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Juneau, Alaska 99801-2105

MEMORANDUM March 17, 1995

SUBJECT: HB 227, An Act clarifying a statute relating to persons who may legally marry (Work Order No. 9-LS0711\C)

TO: Representative Norman Rokeberg
Attn: Mia Costello

FROM: Terri Lauterbach
Legislative Counsel

You have asked for a legal discussion of how passage of HB 227 might affect the validity of marriages contracted outside Alaska by persons of the same sex, considering the existence of the full faith and credit clause (art. IV, sec. 1) of the federal constitution.[1]

Actually, in addition to the full faith and credit clause, there are two other legal principles to consider in order to answer your question about the treatment of marriages performed outside Alaska if HB 227 were to be enacted. Those principles concern comity and conflict of laws.

After reviewing general legal literature about these principles, it is my opinion that passage of HB 227 in its current form probably would not invalidate the marriages of persons of the same sex who legally married outside Alaska and then lived in Alaska.[2]

If the legislature's only intent is to prohibit same-sex marriages in Alaska while allowing same-sex marriages from other states to be valid here, then HB 227 achieves that goal, although the intent could be strengthened by the addition of a comity clause.

If the legislature's intent is to not only prohibit same-sex marriages in Alaska, but also to invalidate same-sex marriages legally obtained outside the state, then HB 227 would be more likely to achieve that goal if it were amended by the addition of some or all of the following

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[1]Art. IV, sec. 1, of the United States Constitution reads as follows: **Full faith and credit among states.** Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

[2]While I know of no state where a same-sex marriage has been held to be valid as of this date, this memo must assume, in order to answer your question, that same-sex marriages may some day be validly contracted in another state.

SECTIONAL ANALYSIS

provisions: (1) a strong policy statement explaining why there is a compelling state interest in prohibiting same-sex marriages, (2) an amendment of AS 25.05.021 prohibiting same-sex marriages, (3) a statute specifying that marriages contracted in other states are invalid in Alaska if they could not have been contracted validly here, and (4) criminal sanctions generally considered applicable primarily to same-sex relationships, such as an anti-sodomy statute. Bear in mind, however, that none of these statutory changes would matter if the prohibition of same-sex marriages were found by an Alaska court to be unconstitutional.

DISCUSSION

HB 227 amends the requirements for the performance of a marriage contract in Alaska, clarifying that, in Alaska, marriage is a contract between one man and one woman. Assuming for the purposes of this memo that a same-sex marriage may be (now or some time in the future) validly contracted outside Alaska, you have asked whether HB 227 could affect the validity of those marriages if the married couple became residents of Alaska after the marriage. You have asked particularly about the full faith and credit clause of the federal constitution. (Please see the text of this clause in footnote 1 of this memo.)

The purpose of the full faith and credit clause rights acquired or confirmed under public acts and judicial proceedings of one state by requiring recognition of their validity in others. Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201 (1941), reh. den., 314 U.S. 712. This clause is most often applied with respect to court proceedings so that litigation once pursued to judgment is as conclusive of the rights of the parties in every other court as in that in which the judgment was rendered. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943), reh. den. 321 U.S. 801, (ovrld on other grds., Thomas v. Washington Gas Light Co., 448 U.S. 261).

I have not found any case law that construes the full faith and credit clause with respect to the type of situation you have posed in your question. Your question primarily concerns two other legal principles: conflict of laws and comity. If there is a conflict of laws between two states whose laws both have a bearing on a particular case, then a court will use conflict of laws principles to decide which state's law should apply in the case. The choice of governing law may also be influenced by application of the comity principle under which a court in one jurisdiction may, out of deference and respect, not obligation, apply the law of another jurisdiction. A state court may by comity give a remedy which the full faith and credit clause does not compel. 16 Am. Jur. 2d, Conflict of Laws, sec. 10, page 28. The tendency of modern decisions is toward a broader comity in the enforcement of rights created by the legislature of sister states. 16 Am. Jur. 2d, Conflict of Laws, supra.

Application of these general principles of law has yielded the following general rule with respect to marriages: a marriage valid where contracted is valid everywhere. 71 A.L.R.2d 687, at 694; 3 A.L.R.2d 240, at 241; Restatement of the Law 2d, Conflict of Laws 2d, sec. 283; and Homer Clark, Jr., The Law of Domestic Relations in the United States (2nd ed. 1987), p. 96. This rule is particularly true where the parties or at least one of the parties, at the time of the marriage, were domiciliaries of the state where the marriage was performed.

71 A.L.R.2d 687, at 695 and 701; 3 A.L.R.2d 240, at 245. However, courts are divided on the validity of a marriage contracted outside a state where the marriage would not have been valid by persons who were domiciliaries of the state where the marriage would have been invalid, who left the state to get married, and who returned to the domiciliary state after the marriage. Some courts have upheld the validity of these marriages and some have not. 71 A.L.R.2d 687, at 700.

There is a notable exception to the general rule that initially valid marriages are valid everywhere. The exception concerns the public policy of the state where the validity is being questioned. If recognition of the marriage contracted elsewhere would violate a strong public policy of the state where the marriage is being questioned, a court may not recognize the marriage, but there is authority on both sides of this question. 71 A.L.R.2d 687, at 702. As to how strong the public policy of the state needs to be on the question, it has been stated that "it is everywhere accepted that marriages should be invalidated only for the most compelling reasons." Clark, supra; Restatement of the Law 2d, Conflict of Laws 2d, sec. 283.

How a court will determine what a state's "public policy" is and how strong it is becomes the issue at this point. Some courts have found that a marriage validly performed outside the state is not necessarily against public policy just because it would be invalid or even "absolutely void" under the laws of the state where the marriage is being questioned. State v. Graves, 228 Ark. 378, 307 S.W.2d 545 (1957); Keith v. Pack, 182 Tenn 420, 187 S.W.2d 618 (1945). Even in the face of noncompliance with substantive standards like age or parental consent requirements and affinity (remote incest) prohibitions, courts may, and according to some commentators, usually will recognize the validity of the marriage if it was valid where contracted. Krause, Family Law, (Nutshell Series, 2d ed.); Restatement of the Law 2d, supra. Under contract law, a contract is not necessarily contrary to the public policy of a state merely because it could not validly have been made there. Enforcement of a contract valid by the law governing the contract ordinarily will not be denied on the grounds of public policy unless a "strong case" for such action is presented. 16 Am.Jur.2d Conflict of Laws 2d, sec. 20.

As to how a "strong case" could be made, some commentators have suggested that the public policy may need to be expressed clearly in a statute. 3 A.L.R.2d 240, at 241; Restatement of the Law 2d, supra. Such a statute could be a policy statement, a criminal sanction against the type of conduct that would violate the public policy, a statute expressly invalidating marriages that would be invalid if attempted in the state, or a combination of these provisions.[v] Statutes of this type would guide a court on it choice of laws governing a marriage that is questioned in this state but validly performed in another state.

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[v] As of 1987, statutes in four states (Illinois, Vermont, Massachusetts, and Wisconsin) provided that a marriage of domiciliaries contracted in another state that is void by the law of the domicile will not be recognized in the domicile. Clark, Jr., The Law of Domestic Relations in the United States (2nd ed. 1987), page 96.

Absent a statutory directive on the choice of law, a court will apply other choice-of-law principles, such as the needs of the interstate and international systems, the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue, the protection of justified expectations, the basic policies underlying the particular field of law, predictability and uniformity of results, and ease in the determination and application of the law to be applied. Restatement of the Law 2d, Conflict of Laws 2d, sec. 6. It is in the context of applying these principles that the strength of the public policy opposing same-sex marriages becomes important. In order to outweigh the factors concerning the expectations of the parties, the interests of the other states in having their marriages recognized, and the goal of uniformity of results, there would probably have to be a very compelling Alaska interest in invalidating a same-sex marriage validly contracted elsewhere.

In applying the foregoing discussion of general legal principles to HB 227, it is my conclusion that the bill as currently written would only clarify that marriage licenses would not be granted to same-sex couples in Alaska. HB 227 does not clarify how same-sex marriages validly contracted in other states would be treated here. In the absence of clarifying language, it is my opinion that HB 227 would not stand in the way of an Alaska court upholding a same-sex marriage contracted elsewhere. Using the full faith and credit clause, choice of laws principles, and comity, an Alaska court would probably follow the general rule that a marriage valid where contracted is valid in Alaska.

If this is not the desired result of HB 227, the bill should be amended in one or more of the following ways: (1) amendment of AS 25.05.021 to prohibit same-sex marriages; (2) inclusion of a strongly-worded policy statement explaining why the state has a compelling state interest in prohibiting same-sex marriages; (3) addition of a criminal statute generally indicating disapproval of same-sex unions, such as an anti-sodomy statute; and (4) a law specifying that a marriage contracted elsewhere that would not have been validly contracted in Alaska is invalid in Alaska.

Conversely, if the intended result of HB 227 is to prohibit same-sex marriages from being licensed in Alaska, but to recognize same-sex marriages validly licensed elsewhere, then HB 227 would be clarified by the addition of a section specifically providing that marriages contracted outside the state that are valid by the law of the state in which they were contracted are valid in Alaska.[4]

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[4]As of 1987, four states had such a law: Arkansas, California, Colorado, and New Mexico. Clark, Jr. The Law of Domestic Relations in the United States (2nd Ed. 1987).

It should be noted, however, that even with changes in HB 227 such as those described in this memorandum, if an Alaska court were to find that prohibition of same-sex marriages violates the state constitution, HB 227 could not overturn that result.[v]

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I realize that this memorandum does not give you a definitive answer to your question. A definitive answer is not possible, considering all of the different factors that a court will consider. However, I believe I have given you enough information so that you can decide whether and how to amend HB 227 to give further guidance to any potential court decision. Please let me know if I can be of further assistance.

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[v]The constitutionality of prohibiting same-sex marriages in Hawaii is currently being litigated in Baehr, et al. v. Lewin. (Civ. No. 91-1394), after remand from Hawaii's Supreme Court in 1993.

News clipping in The Anchorage Daily News Date: 1/26/95

UAF asks for new ruling on health benefits for unmarried couples

The Associated Press

FAIRBANKS — The University of Alaska has asked a judge to reconsider her recent ruling that unmarried couples living together should receive the same health benefits as married couples.

The university asked Superior Court Judge Mary Greene on Monday to reconsider her Jan. 11 order. She has 30 days to decide on the motion.

Greene's order said the university's definition of dependent in its employee health-care plan discriminated against two university employees, Mark Tumeo and Kate Wattum. Tumeo and Wattum had applied for health-care benefits for their same-sex partners and were denied by the university. The two sued the university a year ago.

Bob Miller, director of public affairs for the University of Alaska, said state law allows employers to limit health-care coverage to legally married couples.

According to the motion filed by the university, the state of Alaska has the right to discriminate in health-care benefits on the basis of marital status.

"The legislature mandated that dependent health care benefits shall be available to the state employee's spouse, the person who is in a state-created and state enforceable marital relationship with the employee," the motion says.

Currently, Alaska does not consider same-sex marriages legal. Tumeo and Wattum claimed they were discriminated against because the university provides health-care coverage to its employees' spouses but not to their domestic partners.

Greene agreed, saying discrimination against unmarried couples, even when they are of the same sex, constitutes discrimination based on marital status. But she stopped short of defining "domestic partner."

The attorney for Tumeo and Wattum, Will Schendel, said his clients will respond to the motion only if the judge asks for a response.

Sunday, Sept. 3, 1995

The Anchorage Times

Publisher: BILL J. ALLEN

"Believing in Alaskans, putting Alaska first"

Editors: DENNIS FRADLEY, PAUL JENKINS, WILLIAM J. TOBIN

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Social engineering

AS THE University of Alaska begins a new term, employees are being introduced to a new wrinkle in their health care benefits. It's called "financially interdependent partners."

As mandated in a ruling earlier this year by Fairbanks Superior Court Judge Mary Greene, the university is offering the same health care benefits to unmarried couples as it does to married ones. The UA is appealing Greene's ruling to the Alaska Supreme Court but is implementing the program while it awaits a final resolution.

Unmarried couples qualifying under the interim program are not necessarily heterosexual. Man-man or woman-woman partners are OK, as long as they are living together and sign an affidavit of financial interdependency — meaning each claims to be responsible for the common welfare of the other and for the children either may have.

Up until now, a legal marriage contract was required as the basis for extending employee health care benefits to a spouse and children. Now, apparently, anything goes.

Setting aside the moral and social implications, consider the economic costs involved.

If the decision is allowed to stand, it is a given that it will automatically extend to every state and local government employee, and before too long to the private sector.

Employees would find themselves in a position of almost unlimited possibilities for interdependent partnerships. Just sign an affidavit and bring a friend, relative, neighbor or whoever — and their kids — under the umbrella of state health care insurance.

Sexual intimacy is not one of the conditions needed for partners to qualify under the interim health benefit program. All that is necessary is an informal promise between two people that they intend to live together and support one another.

The potential costs of extending health coverage to many thousands of additional people are substantial. Judge Greene apparently didn't consider those costs. Let's hope the Supreme Court does.

The sanctity of marriage, the legal commitment in the vows of husband and wife, the obligations of raising a family, and the contributions of families to the community are far too important to simply downgrade and dismiss as being on a par with "financially interdependent partners."

It is one thing for consenting adults to choose their own lifestyles and relationships. It's quite another for government to legitimize — or finance — those choices. Government should not be doing that.

Whether or not the high court overturns Judge Greene's ruling, the Legislature next session should take action to clarify state law regarding public employee benefits.

State policy must recognize and uphold, not erode, the legitimacy of the marriage contract.