

The Hawaiian Marriage Case: What Does it Mean for Us?

Continued from page 1

"compelling state interests" that can only be achieved by denying marriage to two women or two men.

The Attorney General of Hawaii is now trying to decide whether or not to try to make such a demonstration. He doesn't relish the task, for he's highly likely to lose. He cannot win by attempting to show that the state has especially good reasons for permitting marriages between women and men. No, he must show that the state has powerfully strong reasons for denying gay and lesbian couples the opportunity to marry. And what could those reasons possibly be? The religious right argues that if gay couples are allowed to marry, it will lead to the collapse of traditional, heterosexual families—surely a preposterous claim. They also claim that permitting gay marriages will send out a public message that being gay is okay, which will in turn cause some children who would otherwise have become heterosexual to turn out gay instead. Apart from our response that being gay is just fine, this claim rests on utterly unproven and highly dubious assumptions about what causes people's sexual orientations.

So, it is now probable, though not certain, that within the next year, perhaps within the next few months, Hawaii will begin routinely issuing marriage licenses to gay and lesbian couples.

That will mark a huge step forward toward full recognition of lesbian and gay relationships in the United States. No state permits same-sex couples to marry today. In fact, no state has yet adopted legislation that permits couples to register as "domestic partners." Several cities—New York, San Francisco and Burlington, for example—permit partners to register but no state has. And these local registration ordinances are largely symbolic. They

provide an affirming acknowledgment of gay and lesbian couples but carry no rights, benefits or obligations.

The Significance of Hawaii's Decision

If gay and lesbian couples are permitted to marry in Hawaii, what difference will it make in their lives? First and, to many the most important, of course, will be the opportunity to participate in our culture's most important single ritual of belonging, our most socially significant voluntary act of bonding. To most Americans, people are considered "family" only if united by blood or marriage. Many of us who are gay create our own new families, and reject traditional family forms, but many others of us—as the litigation in Hawaii suggests—would like the state to endorse our relationships as well, welcoming us into the larger society of American families.

Whatever your views about the meaning of marriage, there is considerably more to Hawaii's action than symbolism. If Hawaii starts issuing licenses, it will be of great interest not just to lesbians and gay men who live there, but also to others of us in the rest of the country who might travel there and marry and return to our home states. Let's look at those who stay in Hawaii first and then at those who marry there but live elsewhere in the United States.

For Hawaiians, most clearly, whatever responsibilities and benefits currently apply to heterosexual married couples under Hawaiian law will apply to gay or lesbian couples who marry and live in Hawaii—the laws, for example, relating to state taxes, divorce, dying without a will, decision-making on behalf of an incompetent person, lots of others. Most of these laws provide rights or benefits and will be perceived as valuable protections for gay and lesbian couples. A few will

be experienced (at least by one of the partners) as a burden. Splitting up, for example, will be more cumbersome—you have to get a divorce from the state—and probably more expensive for one of the two. Eligibility for Medicaid may be affected, when the income of the spouse is considered available to the person applying. But all the benefits and burdens are simply what gay and lesbian couples will now have an opportunity to choose to assume, in the same manner that heterosexual couples now choose.

It is less clear where gay and lesbian couples who marry and live in Hawaii will stand under federal laws. Today, for example, only married couples may file a joint federal tax return (sometimes a benefit and sometimes not). Similarly, and more clearly a benefit, only a partner who is a "spouse," "wife" or "husband" can obtain Social Security benefits as the survivor of a longtime wage-earner. The federal government recognizes as a spouse a person whose marriage would have been recognized as valid in the state where the person lives. (There is no federal law of marriage.) Thus, a lesbian or gay male couple married in Hawaii who stayed in Hawaii should be entitled to federal benefits like any other married couple. The reason that gay and lesbian couples' future position under federal law is uncertain is that courts might decide that Congress had opposite-sex couples in mind when they used the word "spouse" or "wife." In addition, Congress itself, if hostile to Hawaii's decision, might simply change the tax and Social Security laws (and other laws) to limit their application solely to persons in opposite-sex marriages. Any such changes would, of course, be resisted in court, but it is quite uncertain whether the federal courts would force the federal government to accept Hawaii's definition of who counts as a spouse for benefits under federal law.

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