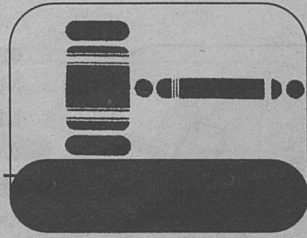


## feature

## LEGAL BRIEFS

by susan murray &amp; beth robinson



## The Hawaii Effect

On December 9, the Hawaii Supreme Court dismissed Hawaii's same-sex marriage case, *Baehr v. Anderson*, concluding that a constitutional amendment ratified by Hawaii's voters in November, 1998, made Hawaii's ban on same-sex marriage constitutional. In a short written order, the Hawaii Supreme Court reaffirmed that Hawaii's refusal to allow same-sex couples to marry ran afoul of the equal protection principles in the Hawaii constitution, but concluded that the constitutional amendment removed Hawaii's discrimination from the protection of Hawaii's equal protection clause.

## A Brief Review

The Hawaii high court's decision marks the last chapter in a nearly decade-long saga. In the early 1990s, three same-sex couples sued Hawaii seeking the legal status, protections, supports and obligations of civil marriage. Although the trial court dismissed their case, in 1993 the Hawaii Supreme Court ruled in the case of *Baehr v. Lewin* that Hawaii's refusal to allow the couples to marry constituted sex discrimination. (The only reason Ninia Baehr was not allowed to marry Genora Dancel is because Ninia Baehr was a woman, not a man). The Hawaii constitution only allows the state to discriminate on the basis of sex if its discrimination is "narrowly tailored" to serve a "compelling state interest." Accordingly, the Hawaii Supreme Court sent the case back to the trial court for a trial to determine whether Hawaii had a good enough reason to discriminate against the plaintiffs by denying them marriage licenses.

After a several-week trial, with a great deal of expert evidence, the trial court concluded in December, 1996, that the state had failed to demonstrate a compelling state interest to justify its discrimination. Although the state had argued that the marriage laws were designed to protect children, the court found that the state had failed to show that its discrimination served that interest.

The state and the trial court's decision was put on hold until the state's highest court could review the decision.

tional amendment, the Hawaii Supreme Court has concluded that its hands are tied in terms of protecting gay and lesbian

Significantly, the Hawaii Supreme Court reaffirmed that, in the absence of the recent constitutional amendment, Hawaii's refusal to allow same-sex couples to marry would violate the Hawaii Constitution's prohibition of state discrimination on the basis of sex.

While the case was on appeal, the legislature and voters of Hawaii took the highly unusual step of amending the Hawaii Constitution to limit the marriage rights of a portion of the Hawaii population — namely, same-sex couples. In particular, the constitutional amendment stated, "The legislature shall have the power to reserve marriage to opposite-sex couples." The amendment vote, in November, 1998, followed months of intense campaigning by both sides (and all-out fear-mongering by those opposed to equal rights and protections for the families formed by same-sex couples).

As a result of the constitu-

tional amendment, the Hawaii Supreme Court has concluded that its hands are tied in terms of protecting gay and lesbian

## What does it mean for Vermont?

The first question most Vermonters are asking is, "What does this mean for us?" The short answer: absolutely nothing. Comparing the Hawaii case and the Vermont case is like comparing apples and oranges, because Hawaii has a specific constitutional provision essentially authorizing the legislature to discriminate against an unpopular minority in this case. Vermont has no such provision, and any attempt to amend Vermont's constitution in the same way would fly

in the face of Vermont's longstanding commitment to freedom, tolerance and equality.

What Vermont does have, like Hawaii, is a constitutional provision designed to protect citizens from discrimination on the basis of sex. Significantly, the Hawaii Supreme Court reaffirmed that, in the absence of the recent constitutional amendment, Hawaii's refusal to allow same-sex couples to marry would violate the Hawaii Constitution's prohibition of state discrimination on the basis of sex.

If the Hawaii court's decision had had any influence at all on the Vermont Supreme

more opportunities to see the love and commitment that characterizes many of our families, and to consider the patent unfairness of denying us rights that most Americans take for granted.

According to an NBC News/Wall Street Journal poll reported on September 16, two-thirds of Americans now believe that gay and lesbian people will win the freedom to marry. Meanwhile, the political center has shifted toward recognition of our need for and entitlement to broader protections and supports for our families.

Throughout the nation, proponents of equal civil rights for gay and lesbian people and their families will continue to carry the torch lit by our brave and committed brothers and sisters in Hawaii.

*Susan Murray and Beth Robinson are attorneys at Langrock Sperry & Wool in Middlebury, Vermont, whose practices include employment issues, family matters, estate planning, personal injury and worker's compensation cases, and general commercial and civil litigation. This column features timely information about legal issues of interest to our community. We hope to provide information about important laws and court cases that may affect our rights, as well as practical nuts and bolts advice for protecting ourselves and our families. If you'd like to see us cover a particular topic, please feel free to write OITM or call us at 388-6356. ▼*

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Court's thinking, then, it would have been to support the plaintiffs' position in the Vermont case.

## What does it mean nationally?

No one court decision and no one vote in any state is going to determine the fate of marriage and family rights for same-sex couples.

The Hawaii case opened a whole new chapter in our movement for equality and inclusion, and launched an important social and political conversation about gay and lesbian people and our families. To a degree many of us could not have imagined a decade ago, the broader public has had

## Good legal advice can make all the difference.

Langrock Sperry & Wool offers the services of 22 lawyers with over 300 years combined experience in all areas of the law — including two lesbian attorneys with special expertise serving the legal needs of the g/l/b/t/q community.

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