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**Folder Title:**  
Same Sex Marriage: [Memoranda] [loose]

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April 11, 1996

NOTE FOR KUMIKI GIBSON

FROM: CHRYSANTHE GUSSIS

RE: Same Sex Marriage

Attached are caselaw, newsclips (including excerpts from articles re. this Administration's position) and law review articles on same-sex marriage. Also attached are two memos I did for Marvin on this issue. My research was done in January and early February and at that point, to my knowledge DOJ hadn't written anything on the subject.

There are two major cases addressing same-sex marriage:

In Baehr v. Lewin, the Hawaii Supreme Court held that a state law prohibiting same-sex couples from obtaining marriage licenses violated the equal protection clause of the state constitution. Baehr v. Lewin, 74 Haw. 645 (1993). Finding that the discrimination was based on gender, a suspect category, the court ruled that the state law was subject to strict scrutiny. The state must show a compelling state interest for the law, and that the law is narrowly tailored to minimize any abridgement of the constitutional right. The Court rejected the claim that a fundamental right to same-sex marriage was protected under the privacy provision of the Hawaii constitution.

Shahar v. Bowers involved a claim of Constitutional violations brought by a prospective employee of the Georgia Law Department, Robin Shahar, whose offer of employment was rescinded after the Attorney General learned of her plans to marry another woman. Shahar v. Bowers, 70 F.3d 1218 (11th Cir. 1995). The action asserted violations of her 1st Amendment intimate and expressive associational rights, as well as equal protection and due process rights.

The 11th Circuit held that Shahar's intimate association rights were violated, finding that despite the fact the Shahar's religious-based marriage was not marriage "in a civil, legal sense," it constituted marriage "in the conventional sense" and was therefore subject to strict scrutiny. 70 F.3d at 1224-24. The court remanded the expressive association claim and rejected the equal protection and due process claims.

I'm also attaching a bankruptcy case denying a same-sex couple the benefits of a debtor/spouse relationship (In re Allen).

January 25, 1996

MEMORANDUM FOR MARVIN KRISLOV

FROM: Chrysanthe Gussis

RE: Same-Sex Marriage

This memo summarizes the December 1995 Report by the Commission on Sexual Orientation and the Law of the State of Hawaii. The memo also contains a brief summary of a recent 11th Circuit case involving same-sex marriage. No other new cases have been decided.

I. HAWAII - COMMISSION RECOMMENDATIONS FOLLOWING BAEHR v. LEWIN.

In Baehr v. Lewin, the Hawaii Supreme Court held that a state law prohibiting same-sex couples from obtaining marriage licenses violated the equal protection clause of the state constitution. Baehr v. Lewin, 74 Haw. 645 (1993). Finding that the discrimination was based on gender, a suspect category, the court ruled that the state law was subject to strict scrutiny. The state must show a compelling state interest for the law, and that the law is narrowly tailored to minimize any abridgement of the constitutional right. The Court rejected the claim that a fundamental right to same-sex marriage was protected under the privacy provision of the Hawaii constitution.

In response to Baehr, the state legislature convened the Commission to address some of the issues raised by the decision. The Commission's task was three fold:

- 1) Examine the major legal and economic benefits extended to opposite-sex marriage but not to same-sex couples.
- 2) Examine the public policy reasons to extend or not to extend all or some of such benefits to same sex couples.
- 3) Recommend legislative action in response to its findings.

The Commission found that significant public policy reasons exist to allow marriage between couples of the same gender. After considering a number of possible responses to the Baehr decision, the Commission concluded that the legislature must allow marriage and extend its full benefits to same-sex couples to ensure equal protection under the state constitution. While extension of marriage rights to same-sex couples may raise significant Full Faith and Credit issues beyond Hawaii borders, as well as have international implications, such effects were beyond the scope of the Commission's task. Two of the seven Commission members disagreed with the Commission Report and submitted a minority opinion, purporting to represent the majority of Hawaii residents. The minority recommended a constitutional amendment allowing marriage between a man and woman only, and proposed enlarging the definition of "family" in areas of state law determined by the legislature to address equal protection concerns of unmarried couples.

Major Legal and Economic Benefits. The Commission found that there are a substantial number of major benefits conferred as a result of the right to marry. Three types of benefits were analyzed:

- 1) Intangible benefits related to the status of marriage which do not necessarily have an economic value. Examples include the right to visit a spouse in the hospital, to make decisions regarding the medical use of a spouse's body, the right of spousal privilege and confidential marital communications, and more fundamental benefits of simple recognition, liberty and equality.
- 2) Quantifiable benefits which can be tied to monetary amounts such as health and retirement benefits, spousal and dependant support, income tax and estate benefits.
- 3) General benefits which may or may not have economic value. Such benefits are mostly conferred on the basis of the definition of "family" or "immediate family."

Public Policy Reasons to Extend or Not Extend Benefits. The Commission concluded that substantial public policy reasons exist to extend all legal and economic benefits of marriage to same-gender couples. Such reasons include:

- 1) Equal Protection. The denial of marriage rights purely on the basis of gender is a violation of equal protection. Same-gender marriages do not infringe on others' individual rights.
- 2) Past Precedent. Reasons for denying same gender marriages (e.g. religious, moral, public health and safety grounds) do not constitute a "compelling state interest." In Loving v. Virginia, the U.S. Supreme Court rejected such reasons in a like challenge to a state statute prohibiting marriage between persons of different races. Possible disruptions state economy are similarly not compelling. Statistics indicating that more Hawaii residents currently oppose same-sex marriage than support are not persuasive. At the time of Brown v. Board of Education, school integration was tremendously unpopular. When Denmark passed a national domestic partnership law, the majority of citizens were against it, but it is now generally accepted. In addition, two-thirds of state voters support equal rights for gays and lesbians.
- 3) Procreation and compelling state interest. The Commission rejected the argument that same-gender marriage should be barred because it does not lead to procreation. This position has been advanced by the State Attorney General. However, state law does not require opposite sex couples to prove fertility before issuance of a marriage license. The Commission also rejected the AG's assertion that benefits should be denied in the interest of protecting children who are best raised by their biological parents. The AG position did not deal with gender or sexual orientation per se.
- 4) Separation of church and state. This is not an issue because religious groups remain free to exclude those who do not share their beliefs.

Recommended Legislative Action. After considering a number of possible legislative responses to the Baehr decision, the Commission concluded that the legislature must allow marriage and extend full benefits to same-sex couples in order to afford equal protection under the law. While such an extension raised potentially far reaching Full Faith and Credit issues, such issues were beyond the legislative mandate of the Commission. Options considered and rejected by the Commission were:

- 1) No action by the state. This response would not demonstrate a compelling state interest, and thus might result in court-ordered marriage licenses.
- 2) Domestic Partnership law. While the Commission regarded this as the next best option to allowing marriage and suggested it currently might be more viable in the legislature, it noted that either a limited or comprehensive Domestic Partnership law would constitute nothing more than a separate-but-equal solution.
- 3) Separate religious and civil marriage. Full marriage rights and benefits would be extended through the civil ceremony with an optional religious component. The state would no longer need to license individuals to perform ceremonies.
- 4) Repeal current marriage law and provide for civil registration or other alternative. This would incorporate the separation issues of #3.
- 5) Repeal all marriage law. Elimination of all benefits for everyone would afford equal protection.
- 6) Amend state constitution to allow marriage between a man and woman only. The minority of the Commission supports this option.
- 7) Redefine "family" and "immediate family" and allow the legislature to select the benefits it wishes to extend. This option is supported by the minority of members on the Commission.

## II. GEORGIA - SHAHAR v. BOWERS.

Shahar involved a claim of Constitutional violations brought by a prospective employee of the Georgia Law Department, Robin Shahar, whose offer of employment was rescinded after the Attorney General learned of her plans to marry another woman. Shahar v. Bowers, 70 F.3d 1218 (11th Cir. 1995). The action asserted violations of her 1st Amendment intimate and expressive associational rights, as well as equal protection and due process rights.

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February 1, 1996

MEMORANDUM FOR MARVIN KRISLOV

FROM: Chrysanthé Gussis

RE: Same-Sex Marriage Statement

The following is a possible draft statement regarding same-sex marriage:

Same-sex marriage has increasingly become the subject of public discussion. Tens of thousands of gay and lesbian couples have expressed their desire to marry. State and local legislation has begun to acknowledge that gay and lesbian Americans can and do form family units. Courts have also begun to legalize same-sex marriage on Constitutional grounds.

The Administration is supportive of the life-long commitments formed by many gay and lesbian couples. We also acknowledge that the power to regulate marriage and domestic relations is a traditionally sovereign function reserved exclusively to the states. The Administration believes that the legal status of same-sex unions, and the accompanying rights and benefits, should continue to be determined on the state and local level. Such state and local action remains subject to the limits of the Constitution.

*optional* [The lack of legally recognized alternatives to marriage and the exclusion of gay and lesbian relationships from marriage have left many couples unable to define their relationships as they choose, and often has led to disparate and unfair treatment of similarly situated couples. These men and women are left without state protection of their relationship and are left to protect their relationships by using creative, but often inadequate, legal devices. For these reasons, we believe states should give serious consideration to the issue of same-sex unions and the role of marriage in defining the relationship and rights between parties.]

C - Draft a tentative statement --  
Think we shd. say that  
this matter should be left up  
the stz.

Morun - ~~2580~~ ← Marlene McDonald

I'm not sure who the  
audience is for this, so I wrote  
it in more of a legal tone.

- C

filed by ~~date~~ <sup>me</sup>

The third paragraph is optional

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[The Administration believes states should give serious consideration to the issue of same-sex unions and the role of marriage in defining the relationship and rights between parties. The lack of legally recognized alternatives to marriage and the exclusion of gay and lesbian relationships from marriage have left many Americans unable to define their relationships as they choose, and often has led to disparate and unfair treatment of similarly situated couples. These men and women are left without state protection of their relationship and are left to protect their relationships by using creative, but often inadequate, legal devices.]

I could also add more information on the types of benefits and rights that are denied same-sex couples, ranging from health care, to hospital visitation rights, to tax and property benefits.