IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAY BRAUSE and GENE DUGAN,

Plaintiffs,
vs.

BUREAU OF VITAL STATISTICS,
ALASKA DEPARTMENT OF HEALTH
& SOCIAL SERVICES, and the
ALASKA COURT SYSTEM,
Defendants.

Case No. 3AN-95-6562 CI

MEMORANDUM AND ORDER

Plaintiffs Jay Brause and Gene Dugan are men who sought and have been denied a license to marry each other by the State of Alaska. They subsequently filed a complaint against the Bureau of Vital Statistics, the Alaska Department of Health and Social Services, and the Alaska Court System. Plaintiffs' action seeks a declaration establishing that the relevant statutes prohibiting same-gender marriage violate Alaska's Constitution, and an injunction that prevents the state from applying or enforcing the statutes. The parties both move for summary judgment. The plaintiffs seek a ruling on the level of scrutiny to be applied in review of the Marriage Code; the defendants move for complete summary judgement. The parties agree that the decisions before the court are purely issues of law.

The plaintiffs' present motion for summary judgment seeks a decision that the Code's prohibition implicates the privacy and equal protection provisions of the Alaska Constitution, thus requiring a showing of a compelling state interest to withstand plaintiffs' claim that the Code's ban on same-sex marriage is unconstitutional.

The court finds that marriage, i.e., the recognition of one's choice of a life partner, is a fundamental right. The state must therefore have a compelling interest that supports its decision to refuse to recognize the exercise of this fundamental right by those who choose same-sex partners rather than opposite-sex partners.

STATEMENT OF FACTS

On August 4, 1994, Mr. Brause and Mr. Dugan completed and filed an application for a marriage license. The Office of Vital Statistics denied the application. Presiding Judge Karl Johnstone had previously issued a policy directive stating that "a marriage license shall not be issued for the purpose of marrying two persons of the same sex" since "marriage between two persons of the same sex is not contemplated by our statutory scheme." The parties agree that the directive correctly interpreted the Marriage Code as it existed at the time and that it is consistent with recent amendment of the Code.

Except for being of the same sex, plaintiffs have met all statutory requirements for obtaining a marriage license.

DISCUSSION

The current provision of the Alaska Marriage Code, A.S. 25.05.011 (a), states: "Marriage is a civil contract entered into by one man and one woman that requires both a license and a solemnization." A.S. 25.05.013 adds:

(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 this state.

(b) A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.

Brause and Dugan argue that the statutory ban on same-sex marriage violates the Alaska Constitution's guarantee of the right to privacy and equal protection.

The plaintiffs' motion challenges the very definition of marriage found in the Code. Though that definition contains notions with which many are familiar, for example, that marriage means the union of one man and one woman that is not the end of the inquiry. Indeed, it is the definition of marriage itself which the court must test as a result of plaintiffs' challenge. It is not enough to say that "marriage is marriage" and accept without any scrutiny the law before the court. It is the duty of the court to do more than merely assume that marriage is only, and must only be, whatmost are familiar with. In some parts of our nation mere acceptance of the familiar would have left segregation in place. In light of Brause and Dugan's challenge to the constitutionality of the relevant statutes, this court cannot defer to the legislature or familiar notions when addressing this issue.

Before addressing the privacy and equal protection claims presented, it is useful to first review the basic role of the state in marriage.

The state issues marriage licenses, solemnizes marriages and keeps a docket of applications for marriage licenses available for public review. The state also distributes basic information to applicants about the effects of alcohol, drugs and battering can have upon a fetus. Other than that, the state does not become involved, except to require that the applicants be at least 18 years of age or, if minor, have the proper consents or be on active duty with the armed services. The Marriage Code now specifically prohibits same-sex marriage, bigamy and marrying anyone closer than one's first cousin. Applicants for marriage are under a duty to swear that the contemplated marriage meets the requirements of the law, give their names, relationship, occupations, ages (and, where appropriate, guardians), and give descriptions of any prior marriages and their dissolutions. The issuing officer has a duty to issue the license if "all requirements are met and there is no legal objection to the contemplated marriage, and neither party is under the influence of intoxicating liquor or

otherwise incapable of understanding the seriousness of the proceeding . . ." A.S. 25.05.111. The license is to issue after a three day waiting period and is good for three months thereafter. A.S. 25.05.091; A.S.25.05.121.

This description of the state's role in marriage focuses on the establishment of the marriage itself and is not inclusive, nor is it intended to be, of the many rights and consequences established by the state on behalf of those who are married. Once married, the state provides benefits and imposed duties that are significant and valuable to society as well as to the individual members of the marriage. For a list of statutory benefits of marriage, see the appendix to plaintiffs' reply brief identified as "Revised Exhibit 4." Further evidence of the importance of marriage and the issuance of marriage licenses is found in A.S. 25.05.331 which makes it a misdemeanor to willfully and wrongfully refuse to issue a license.

Once the role of the state in creating and acknowledging marriage is recognized, the next step is to determine whether the state is infringing constitutionally protected rights in the way it exercises its power over marriage. The court must now test the legal definition of marriage to determine whether the definition itself, a definition that excludes persons of the same sex who want to marry, is constitutional. As further discussed below, the same principle that requires the state to have a compelling purpose before it can dictate choices related to personal appearance, requires the state to have a compelling purpose before it can define marriage to exclude partners of the same sex.

A. Right to Privacy

Alaska amended its Constitution in 1972 to explicitly guarantee the right to privacy. Article I, Section 22 reads in part: "The right of the people to privacy is recognized and shall not be infringed." Brause and Dugan contend that, insofar as the above cited statutes prevent same-sex marriage, they violate Alaska's guarantee of the right to privacy.

Brause and Dugan cite two primary cases for their argument that a prohibition of same-sex marriage implicates an Alaskan's constitutional right to privacy. In Breese v. Smith, 501 P.2d 159 (Alaska 1972), the Alaska Supreme Court invalidated a high school hair length limitation and stated that the core of the concept of liberty is the right to control one's personal appearance or, more broadly, the right to be let alone. 501 P.2d at 166-67. Because the hair length requirement implicated such an important right, the Supreme Court required the school to show a compelling interest for its existence. When the school was unable to do so, the limitation was struck down.
Secondly, Brause and Dugan cite Ravin v. State, 537 P.2d 494 (Alaska 1974). The court in Ravin recognized a fundamental right to privacy in one's home and declared unconstitutional a state statute that prohibited marijuana possession by an adult for personal use in the home.

The plaintiffs' contention that their privacy is violated by a refusal of the State of Alaska to recognize and allow their marriage may not

instinctively conform to common connotations of privacy, since, after all, they seek public recognition of a same-sex marriage. Privacy is commonly understood to mean seclusion, secrecy, or being left to one's personal affairs. These connotations of privacy may seem to make plaintiffs' claim of violation of privacy self-defeating, as the making public a relationship is not what one thinks of as the right to be let alone. Here Brause and Dugan claim a right to state recognition of their relationship. What they seek is clearly a public act and important for its public nature as much as for the other legal consequences which attend it.

Griswold v. Connecticut, 381 U.S. 479 (1965), demonstrates how government regulation can intrude improperly into the personal zone of intimacy protected by privacy. There the Supreme Court found that the state's prohibition of the distribution of information regarding contraceptives interfered with the right of marital partners to make intimate personal decisions about conceiving children and practicing birth control. The Court struck down the law for being an impermissible encroachment on the right to privacy. However, in Alaska, the history of the cases interpreting the right to privacy demonstrate that very public conduct may also be protected by the right to privacy, and that the right to privacy reaches beyond simple protection from government intrusion into one's intimate affairs.

Breese is an example of how government regulation improperly encroached on the exercise of the right to privacy and the public ramifications of that right. The Court held that hair length requirements of a public school interfered with the fundamental right of the student to determine his own personal appearance. According to the Court, the government could not interfere with the fundamental right to determine one's personal appearance - - a right protected by privacy - without demonstrating a compelling state interest. Though how one looks is a very public fact, the decision about one's personal appearance is personal, and therefore protected by the right to privacy.

At stake here is whether same-sex marriage can be denied by the state without violating fundamental rights, including the fundamental right to privacy. It is undisputed that marriage between persons of opposite gender is a fundamental right. See, e.g., Griswold; Loving v. Virginia, 388 U.S. 1 (1967). The question presented by this case is whether the personal decision by those who choose a mate of the same gender will be recognized as the same fundamental right. Clearly, the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important. Though the choice of a partner is not left to the individual in some cultures, in ours it is no one else's to make. Indeed, the marriage license and the marriage ceremony themselves make clear that this must be a choice freely made by the individual. Certainly the choice of a life partner is as important and personal as the choices involved in determining one's personal appearance.

When the Supreme Court of Hawaii in Baehr v. Lewin, 852 P.2d 44 (Hawaii 1993), addressed same-sex marriage, it noted that:

[W]e do not believe that a right to same sex marriage is so rooted in the
traditions and collective conscience of our people that failure to

recognize it would violate the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.
. .

852 P.2d at 57.

The Hawaii court could reach such a conclusion because of the question it chose to ask. It is self-evident that same-sex marriage is not "accepted" or "rooted in the traditions and collective conscience" of the people. Were this not the case, Brause and Dugan and the plaintiffs in Baehr would not have had to file complaints seeking precisely this right. The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions.

Here the court finds that the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy. Failure of the state to provide public recognition of that private choice, whether it is the choice of a life partner of the opposite sex or of the same sex, is analogous to the unwillingness of the school in Breese to allow the presence of a student who made a personal choice to wear long hair.

Government intrusion into the choice of a life partner encroaches on the intimate personal decisions of the individual. This the Constitution does not allow unless the state can show a compelling interest "necessitating the abridgement of the. . . constitutionally protected right." Breese at 501 P.2d at 170.

B. Equal Protection

Brause and Dugan also assert that the relevant statutes deny them their rights as Alaskans to equal protection under the laws. Article I, Section 1 of the Alaska Constitution provides:

Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all personsare equal and entitled to equal right, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Article I, Section 3 goes on to prohibit the denial of civil rights on the basis of certain classifications: Civil Rights. No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin.

Whether a law violates the equal protection guarantees of the Alaska Constitution is determined by using the "sliding scale" test explained in State Dep't of Revenue v. Cosio, 858 P.2d 621, 629 (Alaska 1993):

[W]e apply a sliding scale under which the applicable standard of review for a given case is to be determined by the importance of the individual right asserted and by the degree of suspicion with which we

view the resultant classification scheme. As the right asserted becomes more fundamental or the classification scheme employed becomes more constitutionally suspect, the challenged law is subjected to more rigorous scrutiny at a more elevated position on our sliding scale.

Brause and Dugan argue that the statutes prohibiting same-sex marriage should be at the highest end of the sliding scale, and therefore require the most rigorous scrutiny, because they implicate the fundamental right to marry and because the classification scheme is based on sex.

1. The Fundamental Right to Choose One's Life Partner

There is no dispute that the right to marry is recognized as fundamental. Today the court has recognized that the personal choice of a life partner is fundamental and that such a choice may include persons of the same sex.
When the United States Supreme Court first characterized the right to marry as fundamental in Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), it linked the right to marry to the right to procreate, being faced, as it was, with a case involving the sterilization of prisoners. Similarly, in Zablocki v. Redhail, 434 U.S. 374 (1977), the court was faced with a law that required a marriage applicant to prove he was up to date on his child support for children of his previous marriage before he could obtain a marriage license. The court focused on the decision to marry and have children as deserving of at least the protection allowed a woman in deciding whether to seek an abortion or to raise a child in illegitimacy:

Surely, a decision to marry and raise a child in a traditional family setting must receive equivalent protection.

434 U.S. at 385.

The court thus recognized that procreation has been an important part of the U.S. Supreme Court's decisions that have found the right to marry fundamental. However, just as the "decision to marry and raise a child in a traditional family setting" is constitutionally protected as a fundamental right, so too should the decision to choose one's life partner and have a recognized nontraditional family be constitutionally protected. It is the decision itself that is fundamental, whether the decision results in a traditional choice or the nontraditional choice Brause and Dugan seek to have recognized. The same constitution protects both.

Thus, today's decision finds a person's choice of life partner to be a fundamental right. The consequence of this decision is that any limitations on this right are subject to the strict scrutiny standard established by the Alaska Supreme Court.

2. Classification Based on Sex

The court, having found the decision to choose one's life partner to be a fundamental right, has concluded that the strict scrutiny test

applicable to fundamental rights applies to its review of the State's prohibition of same-sex marriages.

Were the right to choose one's life partner not fundamental, the court would need to determine whether the Code raised classification issues. Were this issue not moot, the court would find that the specific prohibition of same-sex marriage does implicate the Constitution's prohibition of classifications based on sex or gender, and the state would then be required to meet the intermediate level of scrutiny generally applied to such classifications. That this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.

CONCLUSION

Having found that the Marriage Code implicates constitutional provisions, the court grants the plaintiffs' motion for summary judgment. The state's motion for summary judgment is denied.

The parties are directed to set necessary further hearings to determine whether a compelling state interest can be shown for the ban on same-sex marriage found in the Alaska Marriage Code.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 27th day of February, 1998.

PETER A. MICHALSKI
Superior Court Judge