

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
Our File No.:663-95-0451

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 law¹. Thus we believe that, if a court were

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

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. 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.

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.

²The 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.

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

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

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

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³The 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.