

Legal Advice Is Ambiguous For Same-Sex Couples

■ Views diverge on whether existing marriages will stand and whether the nuptials will affect other contracts.

By John Roemer

Daily Journal Staff Writer

Frederick Hertz, an Oakland attorney specializing in gay issues, last week told a lesbian colleague that current legal uncertainties make it unwise for same-sex couples to marry.

"She agreed," Hertz said Wednesday. "She said, 'It's great political theater, but I can't recommend it to clients.'"

Then Hertz saw the woman in line with her partner at San Francisco City Hall to get their own license.

The disconnect between professional convictions and private yearnings underscores fears over the validity of same-sex marriages — and the mounting pressure on courts to order the chaos.

The tumult reached more U.S. cities this week, with Portland, Ore., Nyack, N.Y., and New Paltz, N.Y., joining San Francisco in issuing marriage licenses to couples of the same gender.

As the movement spread, hard on its heels were opponents. The Alliance Defense Fund planned to ask the Oregon Supreme Court today for an immediate stay on license issuance.

U.S. Senate Majority Leader Bill Frist, R-Tenn., Wednesday accused the local officials who OK the licenses and the judges who have failed to issue injunctions of promoting a "legal domino effect" that could stampede the nation into accepting same-sex marriage as an irreversible fact.

Benjamin W. Bull, the chief counsel for the Alliance Defense Fund, echoed Frist and vowed Thursday to resist.

"Those in the gay rights movement hope to create a critical mass of facts that will make it a done deal, make it too late to squeeze the toothpaste back into the tube," said Bull, whose Arizona-based "traditional family values" group sped to the California Supreme Court last week demanding an immediate stay on the issuance of same-sex marriage licenses.

"We assert these licenses are void *ab initio* (from the beginning)," he said. "They're not worth the paper they're written on."

ADVICE: Asterisk Is Suggested

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An amendment to the U.S. Constitution banning same-sex marriage, backed by Frist and others, will take too long, Bull said.

"We plan to slug it out state by state," he said.

As the number of same-sex weddings nationwide nears 4,000, the prospect arises that the happy couples will be thrust into legal limbo if judges rule their licenses invalid.

Or will they?

Even if courts issue the injunctions demanded by opponents and further nuptials are halted, it may not be so easy to unlock wedlock after the vows have been said.

Attorney General Bill Lockyer conceded as much in his own March 1 petition to the state Supreme Court opposing same-sex marriage. *Lockyer v. City & County of San Francisco*, S122923.

State officials can refuse to register marriage licenses issued to same-sex couples, Lockyer wrote in his petition, "but the lack of state registration does not necessarily, by itself, invalidate a marriage," he added, citing a 1943 attorney general's opinion.

So Lockyer asked the high court to declare invalid the licenses and marriage certificates already issued and refund the \$82 fee collected from each couple.

Otherwise, he argued, ambiguity and conflict will create problems for the government.

"More importantly," Lockyer said, "the uncertainty surrounding the validity and effect of these marriage certificates will potentially result in harm to the holders of such certificates to establish marital rights and benefits that may not be valid under state and federal law."

Lockyer cited attempts to file joint income tax returns, efforts at name changes to reflect marital status and loan applications asking whether the borrower is married. All are areas where troubles could arise as long as uncertainties remain over the authenticity of same-sex marriages.

Even after death, difficulties could remain if a same-sex couple marries and makes no will, relying on state law that lets surviving spouses inherit the deceased's assets, Lockyer wrote.

Hertz, the Oakland attorney, endorsed Lockyer's concerns, adding that same-sex couples who marry will lose the domestic partner benefits they already have and might not gain the new ones that male-female married couples enjoy.

Indeed, San Francisco's revised marriage license application warns in a disclaimer, "By entering into marriage you may lose some or all of the rights, protections and benefits you enjoy as a domestic partner."

Hertz said he fields tricky questions constantly.

"I got a call yesterday from two men who were ready to buy a home and wanted to take out a loan," said Hertz, the author of Nolo's "Legal Guide for Lesbian and Gay Couples." The bank wants to know whether they're married: "I told them to put 'Yes' with an asterisk, saying 'legal validity in question' so the bank can't call them untruthful."

Hertz understands that emotional needs often trump cold logic.

"There's an enormous desire to claim for one's own what had been forbidden territory, even if the consequences might not be favorable," he said.

So, despite the ambiguities of the situation, Hertz is glad people are seizing their chance. In effect, they're setting themselves up to be test cases.

"It forces the issues that will end up in court, and until the issues are litigated I can't really tell people what to do," he said.

Hertz recently drafted a complex cohabitation agreement for two women, one of whom is wealthy. Then they called and said they wanted to get married.

"I said, 'Stop,'" he recounted. "That will only make it worse."

Gay rights groups petitioned the state Supreme Court this



S. TODD ROGERS/Daily Journal

FREDERICK HERTZ — "[Same-sex couples getting married] forces the issues that will end up in court, and until the issues are litigated, I can't really tell people what to do."

week to be allowed to intervene on the validation issue.

Jon W. Davidson, a Los Angeles-based staff attorney at the Lambda Legal Defense and Education Fund, said public policy has long favored maintaining marriages once they take place.

"There are very good reasons why we've had a long history of case law that says once people have gotten married, it should not be easy for others to set aside what they've done," he said Thursday.

That policy, ratified by California court decisions dating from 1911, strongly favors the validity of the matrimonial act once it's performed — and excludes third parties from butting in.

The Alliance Defense Fund, for example, may be out of luck regarding couples already wed, Davidson said. Third parties such as the ADF have no standing to challenge marriages.

He said the California Supreme Court laid down the fundamental rule in 1911 in *In re the Estate of Gregorson*, 160 Cal.21.

Noted the high court: "The legislatures of a number of states have passed statutes designed to render marriages ... free from attack except for proceedings for annulment brought by or on behalf of one of the parties. ... We think our own statutes should be construed in like manner."

Subsequent cases refined the question of third party intervention to exclude all but the state attorney general. So Lockyer may have the necessary standing to challenge the marriages that already have been performed, Davidson said.

Bull, the ADF's chief counsel, disagreed.

"He's dead wrong," he said. "If we don't have standing, the issue will never be raised in any substantive way. The attorney general of California is a liberal Democrat who supports same-sex marriage. To say he is the only one with authority to challenge is like asking the fox to guard the henhouse."

Lockyer's filing in the state Supreme Court, Bull said, is "adequate in terms of the irreparable consequences issue, but he never defends the state law banning gay marriage." Bull referred to Proposition 22, passed by voters in 2000, defining marriage as being between a man and a woman.

"His silence on the law was ringing," Bull said.

As the debate continues, San Francisco's license application explicitly cautions:

"If you are a same-gender couple, you are encouraged to seek legal advice regarding the effect of entering into marriage."

Good idea, except that as two San Francisco Superior Court judges and the California Supreme Court continue to wrestle with the issue, most lawyers have no idea what the effect might be.

Staff Writers Peter Blumberg and Tyler Cunningham contributed to this story, as did the Associated Press.