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 domicile 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."
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An amendment to the U.S. Constitution banning same-sex marriage, backed by Pratt and others, will take too long, Boll said.
"We plan to slug it out state by state," he said.
As the number of same-sex weddings nationwide neared 4,000, the prospect arises that the happy couples will be thrust into legal limbo if judges freeze licenses invalid.
Or will they?
Even if courts issue the injunctions demanded by opponents and further appeals are halted, it may not be so easy to unstick wedlock after the voices have been heard.
Attorney General Bill Lockyer conceded as much in his own March 3 petition to the state Supreme Court opposing same-sex marriage. Lockyer v. City & County of San Francisco, S19292.
State officials can refuse to register marriages 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 that the SBO is collecting 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 damaged interests of holders of each certificate to establish marital rights and benefits that may not be valid under state and federal law.
Lockyer cited statistics for the joint income tax returns, efforts at name changes to reflect marital status and legal applications noting whether the borrower is married. All are areas where trouble 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 leaves ring-sponsors inherit the deceased's assets, Lockyer wrote.
Hertz, the Oakland attorney, endorsed Lockyer's concern, adding that same-sex couples who marry will lose the domestic partner benefits they already have and might gain the new ones that male-female married couples enjoy.
Indeed, San Francisco's revised marriage license application wording in a discussion, "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 a couple who were ready to buy a house and wanted to take out a loan," he said. Hertz is the author of NOW's "Legal Guide for Lesbian and Gay Couples." The bank wants to know whether they're married. "If they choose to put "No" with an asterisk, saying legal validity in question or something, they can't get a loan," he said.
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 on their chance in effect, they're settling whatever disputes are left by test cases.
"It forces the issues that will end up in court, and until the lawsuits are settled, there will be a lot of people asking what do we do," he said.
Ordeal is further complicated by a complex consortium agreement for two women, one of whom is wealthy. Then they called Boll and said they wanted to get married.
"I said, 'Sir,'" he said. "That will only make it worse.
Gay rights groups petitioned the state Supreme Court this

FREDERICK HERTZ — "If you're not married, you can't legally buy a house and mortgage it."

The Alliance Defense Fund, for example, may be out of luck negotiating 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 1951 in In re Brown (The Matter of Gregson), 160 Cal.2d.
Noted the high court: "The legislatures of a number of states have passed statutes designed to render marriages ... free from attack 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."
Hertz dead wrong," he said. "If we don't have standing, the laws won't come into play 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 the same is misleading."