

Document 144: Hawai'i Same-Sex Marriage Court Case (1993)

In *Gay and Lesbian Rights in the United States: A Documentary History* edited by Walter L. Williams and Yolanda Retter. Greenwood Press, 2003.

In 1991, two lesbian couples and a gay male couple asked Daniel R. Foley, an attorney in Honolulu, to represent them in a lawsuit. One of the lesbian couples in the case, Ninia Baehr and Genora Dancel, explained that the denial of their right to marry left them without the legal and economic benefits provided to husbands and wives. The gay male couple had lived together in a committed relationship for fifteen years. Like other people who are in love, they wanted to be able to recognize their marriage formally. Yet when they applied for a marriage license, they were refused on the basis that state law specified a person can only marry someone of the other sex.

These couples appealed to several attorneys to challenge the state law that denied same-sex couples the right to marry, but none of them wanted to take a case that they seemed certain to lose. Foley was their last chance. He had previously focused on civil rights law relating to racial minorities and women, and he had served as legal director of the American Civil Liberties Union of Hawai'i, but he had never argued a gay rights case before a court. Nevertheless, Foley decided to take the case, and he took it all the way to the Hawai'i Supreme Court. In 1993 the Court decided that the Hawai'i State government must prove it has a "compelling interest" in refusing to allow same-sex couples the right to marry. After sending the case back to the State Circuit Court, Judge Kevin Chang ruled three years later that the State had failed to prove it had a compelling interest in preventing such marriages.

These court decisions made headlines across the nation, and same-sex marriage became a major issue in the struggle for gay and lesbian rights. It also highlighted the role of heterosexuals working for gay and lesbian rights. In this 1996 interview with

Walter L. Williams, Foley explained his three-part motivation for his involvement in the case: his Buddhist religion, his civil liberties ideology, and having a gay relative.

Did you consider taking a same-sex marriage case before this one?

I had never thought about marriage as anything other than between a man and a woman. But when these couples approached me, I could see that they had loving, committed relationships that reminded me of how my wife and I feel about each other. I knew it would be a case that would be practically impossible to win. But I'm a Buddhist, and in the Soka Gakkai Buddhist organization I belong to, a major teaching is that we must challenge and surmount those things that might seem to be impossible.

What does Buddhism say about gay rights?

Daisaku Ikeda, the president of the Soka Gakkai International (SGI) says that nothing is more important than respect for human dignity. The SGI's prime goal is to promote happiness among people. Ikeda repeatedly stresses the need to respect diversity, and the importance of human rights. The Charter of the SGI emphasizes the principle of not discriminating against any individual on any grounds. Diversity is a positive good, Buddhist teachings attest; it is the source of creative energy in life.

With this in mind, I began researching the issue of marriage law. I discovered there are hundreds of rights and benefits that accrue to people who are legally married, such as survivorship, property rights, employment benefits, health insurance, bereavement leave, inheritance rights, probate, public assistance, taxation, and other rights. Gay and lesbian couples can get none of those protections, simply because they cannot get legally married. I'm really committed to the ideals of the Declaration of Independence. When it declares that the fundamental goal of government is to protect

the right of all people to "life, liberty and the pursuit of happiness," what could be more basic than the right of someone to marry the person of their choice?

Still, what gave you a personal motivation to take on this case? You knew it would be an uphill battle, and that you would not make much money on it. You're a happily married heterosexual.

I thought of my deceased uncle. Our family realized he was gay, but we never talked about it with him. He was brilliant and talented, but he wasted a lot of his potential because he was forced to live in the closet. He never was able to overcome the intense prejudice against homosexuals, and he died without fulfilling his promise.

That certainly is a strong statement in favor of gay people coming out to their families.

Buddhism asks us to do everything we can to help others reach their highest potential. We did not do that in my family with my uncle, and I felt bad about that. After meditating about the issue, and talking with my wife, I decided to take the case as a memorial to my uncle.

I knew that if I didn't take the case, no other lawyer in Hawai'i would either. I decided that, from that day forward, I would do everything I could to make sure that younger gays and lesbians don't have to endure the pain of tortured silence that so sapped my uncle's spirit. That's what, in fact, finally killed him.

Denial of the right of same-sex couples to marry is not in accord with my Buddhist ideals of equal rights for everyone. My gut feeling was that the gay position needed to be heard by the courts. I thought to myself, who am I to deny these couples the right to have the same benefits and joys of marriage that I have? Why should I be entitled to have all these benefits, while they are not?

What happened when you took the case to court?

I filed a complaint in the Circuit Court of the State of Hawai'i in 1991, but the judge threw out my complaint. The couples were discouraged, but I wasn't surprised at the negative ruling. After all, this was a new area of law where little precedent existed. I determined to never give up, no matter how discouraging the circumstances. So, I filed an appeal of the case Baehr v. Lewin to the Hawai'i Supreme Court. In 1992, the Supreme Court agreed to hear arguments. The State Attorney General argued from precedent, that no federal or State court had ever granted marriage rights to lesbian or gay couples. Furthermore, he said, heterosexual marriage was the basis for morality in society, and was needed to continue the human race. I realized this reasoning was based on Judeo-Christian morality, rather than on the Constitution. Despite the fact that humanity's problem today is too many people, the Attorney General was appealing to old ideas from a time when humans were not overpopulated like today. I hoped the justices would realize this outdated reasoning for what it was.

How did you argue your case?

I conceded right away that I would lose if I were in a federal court. But, I pointed out, the Constitution of the State of Hawai'i is more explicit than the United States Constitution in its protections for individual rights. It states that no person in Hawai'i can be denied "the equal protection of the laws" or be discriminated against on the basis of "race, religion, sex, or ancestry." I made the case that gay and lesbian Hawai'ians deserve the right to privacy in deciding their own private intimate decisions about who they wish to marry, and they should have the equal protection of the law in their marriage desires, just as other people do.

I also pointed out that the law which prohibits a person from marrying someone of the same sex, is a direct violation of the Hawai'i Constitution, which specifies that discrimination could not be made on the basis of sex. If the plaintiff Ms. Baehr could

marry a man, but could not marry Ms. Dancel just because she was a woman, then this was a clear example of sex discrimination.

Didn't you also use the analogy of state laws in the South prohibiting persons of different races from marrying?

Yes. In Virginia in the 1960s, an African-American woman and a white man challenged that state's miscegenation law. The Virginia courts ruled against this interracial couple, claiming that God did not intend for the races to mix. It was precisely the same argument, based on religion, as is now being used, to say God does not intend for people of the same sex to marry. We don't have such a belief in Buddhism, in fact we don't even believe there is some all-powerful god laying down rules of "don't do this or that." So it wasn't hard for me to argue against that idea.

The U.S. Supreme Court overturned miscegenation laws in 1967, ruling that a state's laws must be based on the Constitution, with its guarantees of equal protection of the laws for everyone, rather than on Christian ideas of some people being "saved" and above others. The Supreme Court in that case ruled that the right to marry who one wishes is a fundamental right, guaranteed by the Constitution's equal protection clause. From this decision as precedent, I argued Hawai'i should fulfill its own constitution, and guarantee lesbian and gay couples the equal protection of the laws.

Were you surprised at the judges' decision in your case?

Not really. I had gotten the impression that they carefully considered my arguments. What I was surprised about was that the majority opinion held that the sexual orientation of my clients was irrelevant to the case. The real issue, they said, was over the issue of whether a person could be denied the right to marry another person, simply because that other person was of the same sex. Using the 1967 miscegenation decision as precedent,

the Court suggested that a law prohibiting someone from marrying another person of the same sex was indeed sex discrimination.

The fundamental issue, they said, is equality. And a person's freedom to choose whom they wish to marry. They ruled that the only way the State can limit that right is to prove that it has a "compelling State interest" in doing so.

This decision is also an advance for the rights of women, isn't it?

Absolutely. The Court stated that discrimination on the basis of sex should receive the strictest scrutiny by the courts, meaning that in the future any case on sex discrimination will be accorded special attention. This decision grants far greater legal protections for women in Hawai'i, than previous cases had done. This case in behalf of gay and lesbian couples gained an additional major benefit in the area of women's rights. This case demonstrates that a victory for one group suffering discrimination is, in a larger sense, a victory for others as well.

What is the current status of the case?

The Hawai'i Supreme Court's decision returned the case to the lower court for a final decision, and given the firmness of the justices' words, it was unlikely the Attorney General could prove that the State had a compelling interest in prohibiting same-sex marriages. Now that the Circuit judge has decided in our favor, it is only a matter of time before the State Supreme Court will make its final ruling. The Lambda Legal Defense and Education Fund, and the Hawai'i Equal Marriage Rights Project, have been very supportive. My clients are already making plans for their wedding ceremonies. Genora Dancel and her partner Ninia Baehr have asked me to be their "Best Man...." The Hawai'i lesbian and gay community went wild with joy. Honolulu newspapers endorsed the decision. The President of the Hawai'i Bar Association congratulated the justices for showing "moral courage."

This case has certainly put you in the spotlight. It's being hailed as the greatest legal victory for lesbians and gays ever.

Yes, all major national newspapers gave front page coverage to the decisions. I've been swamped with requests for interviews by journalists and television news shows on all the major networks. Law Review journals are publishing articles on the case. With Hawai'i's law as precedent, this decision will make it easier for same-sex couples in other States to argue similar cases.... We really rocked the nation! No one in the legal community thought we could accomplish so much so soon.

How does this tie in with your Buddhist viewpoint?

This decision will help improve society because it will encourage more people to be happy in their life. It stands to reason that the more people you have who are happy, because they can marry who they want, the more of a contribution they will make to society. This is also a case promoting women's equality. Everybody concerned with women's rights and women's equality ought to be backing this effort....

In 1993 the American Civil Liberties Union presented you with its annual award for outstanding attorney.

Yes, that was nice. But there's little doubt in my mind that unless I was a Buddhist I could not have achieved this victory. My chanting gave me the strength to keep fighting against all odds and to never give up. The advocacy I did in this case is consistent with SGI Buddhist practice. Buddhism stands for diversity and the sacredness of each individual life. The Soka Gakkai stands for compassion and public service. These are not just ideas; they are embodied and applied in our daily practice.

Source: Interview of Daniel R. Foley by Walter L. Williams, Los Angeles, December 20, 1996. Bibliography: See also Daniel Woog, Friends and Family: The True Stories of Gay America's Straight Allies. Los Angeles: Alyson, 1999.