STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#91070

DATE: September 18, 1991

SUBJECT: Constitutionality of Legislative Bill Which Amends Waiting Periods in Divorce Actions

REQUESTED BY: Senator Chris Beutler
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Jan E. Rempe, Assistant Attorney General

Section 1 of this Legislative Bill ("Bill") amends Neb. Rev. Stat. § 42-363 (Cum. Supp. 1990) by increasing the time period between perfection of service of process in a divorce action and the date the action may be heard or tried. Section 42-363 required a 60-day waiting period, whereas the Bill provides for a 150-day period. Section 2 of the Bill deletes from Neb. Rev. Stat. § 42-372 (Reissue 1988) language stating that a dissolution decree shall become final at the date of death of one of the parties to the divorce, or six months after the decree is rendered, whichever occurs first. Section 3 of the Bill states in part:

> (1) Except for purposes of appeal as prescribed in section 42-372 and purposes of remarriage as prescribed in subsection (2) of this section, a decree dissolving a marriage shall become final and operative thirty days after the decree is rendered or on the date of death of one of the parties to the dissolution, whichever occurs first.
>
> (2) For purposes of remarriage a decree dissolving a marriage shall become final and operative six months after the decree is rendered or on the date of death of one of the parties to the dissolution, whichever occurs first.

You have requested our opinion regarding the general constitutionality of the Bill with specific emphasis on a divorce decree's immediate finality for all purposes except remarriage.

A. Legislative Authority in Divorce Procedure.

"Nonexistent at common law, divorce is a matter within the exclusive and supreme province of the Legislature, subject to limitations imposed by the Constitutions, state and federal." Else v. Else, 219 Neb. 878, 880, 367 N.W.2d 701, 703 (1985). "'[T]he legislative authority of the state has full control over the mode, manner, time and place of the proceedings for divorce and generally of the procedure in actions for divorce.'" Id. (quoting O'Neill v. O'Neill, 164 Neb. 674, 83 N.W.2d 92 (1957)). See, also, Buchholz v. Buchholz, 197 Neb. 180, 248 N.W.2d 21 (1976) (marriage is subject to dissolution on terms fixed by state law). Further, public policy regarding divorce is within the Legislature's province. Id. See, also, Weber v. Weber, 200 Neb. 659, 265 N.W.2d 436 (1978); Detter v. Erpelding, 176 Neb. 600, 126 N.W.2d 827 (1964).

B. Initial Waiting Period.

As noted above, § 1 of the Bill requires that 150 days, roughly five months, elapse between perfection of service of process and the date a divorce action is heard or tried.

In Garrett v. State, 118 Neb. 373, 224 N.W. 860 (1929), the Nebraska Supreme Court upheld as constitutional a provision which stated that "no suit for divorce shall be heard or tried for a period of six (6) months after service has been had or perfected." Id. at 376, 224 N.W. at 862. Finding the provision neither arbitrary nor unreasonable, the court stated:

> The state has an interest in the marriage relation; it is a party in a divorce case. . . . [B]ecause of the interest of the state referred to, our Legislature has made various changes in the law for the purpose of conserving and maintaining that relation. It is common knowledge that the tendency among lawmakers has been to discourage divorce and to protect marriage.
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> . . . [The waiting period] was undoubtedly to give parties time to recover from anger, to recall affection, to remember benefits, to reflect on the well-being of offspring, and to consider from the standpoint of personal duty and responsibility. Immediate trial and preparation for trial are inherently such as to keep

> alive resentment and develop new animosity, hence the waiting time prescribed by the lawmaker in order that the relation in which the state is so vitally interested may not be terminated too easily and too speedily.

Id. at 379-80, 224 N.W. at 863.

Outside of Nebraska, "it now seems clear that there is no substantial constitutional objection to such statutes." 2 H. Clark, Jr., The Law of Domestic Relations in the United States, §15.4 at 87 (2d ed. 1987). Therefore, we do not believe this section of the Bill is constitutionally infirm.

C. Finality of Decree.

The Bill also provides that a divorce decree becomes "final and operative" 30 days after the decree is rendered, except for purposes of appeal and remarriage. The Bill goes on to state that "[f]or purposes of remarriage" a dissolution decree becomes "final and operative" six months after the decree is rendered. Death of a party to the divorce during these periods renders the decree final upon the date of death.

A "final" order is one that determines the "substantial rights of the parties to the action." In re 1983-84 County Tax Levy v. Box Butte Cty. Bd. of Equal., 220 Neb. 897, 900, 374 N.W.2d 235, 237 (1985). See, also, Neb. Rev. Stat. § 25-1902 (Reissue 1989) (final order affects "a substantial right in an action, when such order in effect determines the action"); Z & S Const. Co. v. Collister, 211 Neb. 348, 318 N.W.2d 728 (1982) (order not final when substantial rights of the parties remain undetermined).

Because the language of the Bill indicates that a divorce decree becomes "final" 30 days after the decree is rendered for all purposes except when remarriage may occur (and appeal or death), and because "final" denotes determination of all substantial rights of the parties (such as the right to a divorce and the incidents thereof, like custody, property, alimony, child support), we interpret the Bill to mean that 30 days after the decree is rendered, all substantial rights of the parties have been finally determined; however, the parties are prohibited from remarrying for six months after the decree.

D. Prohibition on Remarriage.

We have identified two possible constitutional concerns with the prohibition on remarriage discussed above: equal protection and special legislation.

1. **Equal Protection.**

The Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Article III, § 18, of the Nebraska Constitution addresses disparate treatment by special legislation. State v. Kubik, 235 Neb. 612, 456 N.W.2d 487 (1990). "In Nebraska, both equal protection and the prohibition against special legislation emanate from [Neb. Const. Art. III, § 18]." Haman v. Marsh, 237 Neb. 699, 712, 467 N.W.2d 836, 846 (1991).

"Equal protection guarantees that similar persons will be dealt with similarly by the government. [Citations omitted]. When examining a claim of deprivation of equal protection, the first inquiry is whether the statute discriminates among those who are similarly situated." In re Interest of A.M.H., 233 Neb. 610, 613, 447 N.W.2d 40, 43 (1989). This Bill discriminates among similarly situated people: that is, persons who have been recently divorced by a decree declared final 30 days thereafter for all purposes except remarriage may not marry for a specific time period, while persons who have never been married have no such constraint.

While equal protection guarantees similar treatment for similarly situated individuals, the guarantee "does not foreclose the state from classifying persons or from differentiating one class from another when enacting legislation. State v. Kubik, supra at 615, 456 N.W.2d at 490.

> The standard of review used by courts when reviewing statutes challenged on equal protection grounds depends upon the nature of the classification and the rights affected. If the classification involves either a suspect class or fundamental rights, courts will analyze the statute with strict scrutiny. Under this test, the end the Legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists.

Id. at 615, 456 N.W.2d at 490-91. If a fundamental right or suspect class is not involved in the classification, "[a]ll that is required is that there be a rational relationship between a legitimate state interest and the statutory means selected by the Legislature to accomplish that purpose." Id. at 615, 456 N.W.2d at 491.

The U.S. Supreme Court has held that "liberty" under the fourteenth amendment includes a fundamental right of privacy, of which the right to marry is a part. Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978). See, also, Henne v. Wright, 904 F.2d 1208 (8th Cir. 1990). However, in Zablocki v. Redhail, supra at 386, 98 S. Ct. at 681, 54 L. Ed. 2d 618, which involved a statute prohibiting certain persons from marrying without a court's permission, the U.S. Supreme Court stated:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

Because the statute at issue in Zablocki could have permanently barred some persons from marrying, the Court characterized the statutory classification as interfering "directly and substantially with the right to marry." Id. at 387, 98 S. Ct. at 681, 54 L. Ed. 2d 618. In contrast, the Bill at issue only delays marriage for a short time period. Such a regulation does not significantly or substantially interfere with one's decision to marry and, therefore, would be subject to less rigorous constitutional scrutiny. Under this less stringent scrutiny, there seems to be a rational relationship between the state's legitimate interest in preserving marriages occurring soon after divorce and the statutory means selected to accomplish that purpose. Therefore, the Bill would probably survive a challenge on equal protection grounds.

2. Special Legislation.

Article III, § 18, of the Nebraska Constitution prohibits the Legislature from passing "local or special laws . . . [f]or granting divorces." A legislative act can violate the special laws provision by (1) creating a totally arbitrary and unreasonable method of classification, or (2) by creating a permanently closed class. Haman v. Marsh, supra; Mapco v. State Bd. of Equal., 238 Neb. 565, 471 N.W.2d 734 (1991).

To be valid under the first prong above, legislative "[c]lassifications must be based on some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified." Haman v. Marsh, supra at 713, 467 N.W.2d at 847

(emphasis in original). "'[T]he test for statutes challenged under the special-laws prohibitions . . . is that they must bear "a reasonable and substantial relation to the objects sought to be accomplished by the legislation."'" Haman v. Marsh, supra (quoting Benderson Devel. Co. v. Sciortino, 236 Va. 136, 372 S.E.2d 751 (1988)).

If the object of the legislation regarding the delay before remarriage is to protect the success of the second marriage, it seems the provision bears a reasonable and substantial relation to the object of the legislation. Barring recently divorced persons from remarrying for a certain time period, while single or long-time divorced persons have no such constraint, seems to be a classification based on a substantial difference of situation, in light of your stated purpose. Therefore, the Bill would probably be held not to violate the special-laws prohibition as creating a totally arbitrary classification.

With regard to the closed class concern, "a classification which limits the application of the law to a present condition, and leaves no room for opportunity for an increase in the numbers of the class by future growth or development, is special." Haman v. Marsh, supra at 716, 467 N.W.2d at 848. Clearly, the Bill allows an increase in the number of class members because more divorces will occur, and more people will be subject to the remarriage provision in the Bill.

Because the Bill's classification is not unreasonable and class membership will increase, the Bill does not violate Neb. Const. art. III, § 18, as special legislation.

E. Conclusion.

It is our opinion that all sections of the Bill are constitutional.

Sincerely,

DON STENBERG
Attorney General

Jan E. Rempe

Jan E. Rempe
Assistant Attorney General

Approved By:

Attorney General

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