DATE: December 30, 1996

SUBJECT: Same-sex Marriage - Impact of Baehr v. Lewin and the Defense of Marriage Act on Nebraska Law

REQUESTED BY: Senator Jim Jensen

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested an Attorney General’s Opinion concerning the impact of the recent court decision in Hawaii regarding same-sex marriage, as well as the new federal Defense of Marriage Act, on possible legislation in Nebraska to prohibit same-sex marriages.

In Op. Att’y Gen. No. 96025 (March 25, 1996), we addressed the issue of whether Nebraska would be required to recognize a same-sex marriage license obtained in the State of Hawaii. At that time, a lawsuit concerning same-sex marriage was still pending before a trial level court in Hawaii following remand by the Hawaii Supreme Court. See Baehr v. Lewin, 852 P.2d 44 (Hawaii 1993). On December 3, 1996, the trial court ruled that Hawaii could not refuse to grant licenses for same-sex marriages, thus creating the possibility that other states, including Nebraska, would have to

[The use of the phrase "same-sex 'marriage'" in this opinion is in no way intended to indicate that two persons of the same sex are capable of entering into a marriage relationship. See Op. Att’y Gen. No. 96025 (March 25, 1996) ("Marriage" can only occur between persons of the opposite sex); 1977-78 Rep. Att’y Gen. 170. (Op. No. 113, June 27, 1977).]
1. New legislation expressly prohibiting or excluding recognition of same-sex marriages under Nebraska law is the only certain way to avoid the possibility that Nebraska could be forced to recognize same-sex marriage licenses issued in Hawaii.

2. The Defense of Marriage Act protects any State, including Nebraska, from being forced to recognize same-sex marriages from other jurisdictions if such State does not wish to do so. However, DOMA does not alter existing State laws nor prohibit States from recognizing same-sex marriages. Given the existing uncertainty under Nebraska law, additional legislation would be required to ensure Nebraska would be protected under DOMA.

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved By:

Attorney General

3-2687-3