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Legal Memorandum

Ref: DOA 08-0606

To: Director, Department of Administration
From: Attorney General *als*
Subject: Extent of Definition of "Common law"

You have asked: Is there anything that prevents the government of Guam from extending the definition of common law relationship, as recognized in the personnel policy of the government of Guam, to include same sex partners?

Does the term 'common law,' as used in Guam law establishing personnel policy for the government of Guam, and as defined in the Personnel Rules and Regulations Glossary, extend to same sex relationships? Based upon our legal research and analysis, the term does not extend to same sex couples.

1. Reference to Common Law Relationship in Personnel Statute.

The Personnel Policy and the Civil Service Commission Act (4 GCA §§ 4101, et seq.) recognizes a common law relationship for certain personnel matters. The use of sick leave is allowed, under certain conditions, for an employee to provide health care to an 'immediate family member' who has a serious illness or injury. Immediate family member is defined to mean the employee's spouse, **common law**, parents, parents-in-law, grandparents, brothers, sisters, children, grandchildren, any step or adoptive parents, adopted children or grandchildren of both the employee and the spouse, a guardian or person in loco parentis. 4 GCA §4108(c) (2) (emphasis added).

This is the sole reference in Guam statutes to common law, in the context of a family relationship. The term is not defined in the statute.

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2. Reference to Common Law Relationship in Personnel Regulations.

The Personnel Rules and Regulations contain a glossary of terms (hereafter, Rules Glossary). The Rules Glossary defines 'immediate family' as follows:

"With respect to leave, immediate family is defined as the employee's spouse, **common law**, mother, father, grandparents, guardian, children, in-loco parentis, sister, brother, mother-in-law and father-in-law. Step, adoptive, and spouse of adoptive parents/children/grandchildren would also be considered "immediate family" (emphasis added).

Further, the Rules Glossary defines common law as:

"persons who have co-habitated for at least two consecutive years and who are readily eligible to marry without emancipation under the laws of Guam."

This definition of common law is the only definition of the term found in Guam law.

3. 'Immediate Family' and 'Common Law' Relationship in Leave Policy.

The concept of immediate family, and by extension, common law relationship, is applicable in the personnel policies and procedures, in the following instances:

Sick Leave. By statute, sick leave may be used by an employee who is compelled to be away from work in order to care for an immediate family member due to serious illness or injury and the employee has exhausted all annual leave and compensatory time available. 4 GCA § 4108(c) (2).

Bereavement Leave. An employee shall be granted leave for two days upon the death of any member of the employee's immediate family. Rule 8.411.

Paternity Leave. Paternity leave shall be granted to a male employee upon the birth of a child by his wife, including common law. Rule 8.412.

Leave Without Pay. Extended leave without pay may be granted to an employee for good cause, and an example of good cause for granting leave without pay includes providing care to a spouse who is ill or disabled. Rule 8.605. This example does not refer to the common law relationship.

Family and Medical Leave Act. Leave of absence shall be approved for an employee under the Family and Medical Leave Act for the care of a spouse with a serious health condition. Rule 8.800 (A) (3) and (D) (2). The common law relationship is not specifically mentioned.

4. Leave Sharing.

By statute, a classified employee of the government can share accumulated leave with another employee who, because of personal reasons, is in need of extended annual or sick leave and does not have enough accumulated leave for the purpose. 4 GCA §§ 4109.1 to 4109.3. This provision of donating leave to a fellow employee is referred to as 'leave sharing.' Leave sharing procedures are found at Appendix G of the Rules.

Appendix G defines 'family member' as:

"Spouse, including a so-called "common law" spouse if such spouse is 18 years old or over, and has cohabited with the employee for at least the last two consecutive years immediately preceding the request for leave donation. Other recognized family members include..."

This definition of the common law relationship is not consistent with the definition found in the Rules Glossary, as it does not include the provision that the couple be readily eligible to marry. It is noteworthy that the statute authorizing the leave sharing procedures, at 4 GCA § 4109.3, does provide that the Director of Administration shall maintain the leave sharing program in the same manner as other personnel rules and regulations enacted pursuant to §4105 of Title 4.

5. Health Insurance and Life Insurance Benefits.

The use of the term 'common law' as a reference to common law marriage was likely introduced into the personnel practices of the government of Guam by health and life insurance providers. At the present time, both the health insurance provider, Calvo's Select Care, and the life insurance provider, Individual Assurance Company, recognize the common law relationship in insurance coverage available to government of Guam employees and retirees.

Calvo's Select Care defines Spouse to include:

"a "common law" spouse, provided that such common law spouse is readily eligible to marry the Subscriber without emancipation under Guam law and has cohabited with the subscriber for the last two consecutive years immediately preceding the proposed Enrollment of such common law spouse."

Individual Assurance Company defines dependant to include, as a family member, the Individual's common-law spouse. Common-Law Spouse requirements include:

- a. must be over the age of 18 years of age and have the legal capacity to marry; and
- b. must have cohabited continuously for a period of at least two years and together have borne a child; or
- c. if no child was borne together, then the period of continuous cohabitation must be at least four years.

6. Readily Eligible to Marry Under the Laws of Guam.

The term 'common law,' found in the Personnel Rules and Regulations, by its own definition, applies to those couples who have co-habitated for at least two consecutive years and who are readily eligible to marry without emancipation under the laws of Guam. Therefore, whether common law extends to same sex relationships is determined by who is eligible to marry under the laws of Guam? Are same sex couples eligible to marry under the laws of Guam? The answer is no.

Marriage is "a personal relation arising out of a civil contract, to which the consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization authorized by this Title." 19 GCA § 3101. Marriage must be licensed, solemnized, authenticated, and recorded. 19 GCA § 3201.

Marriage is licensed on Guam at the Department of Public Health and Social Services (hereafter, Public Health). 19 GCA § 3202. All persons about to be married must first obtain a license from Public Health to do so.

A marriage is also recorded at Public Health. Section 3202 requires that each marriage performed on Guam shall be filed with the Territorial Registrar of Vital Statistics and specific formalities and requirements are set out for this to be done. For this purpose marriage is defined.

"Marriage means the legal union of persons of the opposite sex. The legality of the union may be established by civil or religious regulations, as recognized by the laws of Guam." 10 GCA § 3207 (8).

In addition to the unequivocal definition found at § 3202, there are numerous references in the laws of Guam that would indicate that a marriage is understood to be between a man and a woman. What follows is a compilation of references to marriage that imply or assume that a marriage on Guam is between a man and a woman.

19 GCA § 3108,

Upon entering a contract of marriage a woman may elect to retain her maiden name as her surname. Upon entering into a contract of marriage, either spouse may elect to hyphenate his or her name with the surname of the other spouse.

19 GCA § 3202

(a) All persons about to be joined in marriage must first obtain a license therefore, from the Department of Public Health and Social Services, which license shall state:

- (1) ...
- (7) Whether the female elects to retain her maiden name as her surname upon marriage as provided for by § 3108.
- (8) Whether either party elects to hyphenate his or her surname with the surname of the other party as provided for by § 3108.
- (9) ...

19 GCA § 8402

When an action for dissolution of marriage is pending, the court may...require the husband or wife, as the case may be, to pay as alimony any money necessary to enable the wife, or the husband, to support herself and her children, or to support himself and his children... When the husband or wife willfully deserts the wife or husband, or when the husband or wife has any cause of action for dissolution of marriage... he or she may, without applying for dissolution of marriage, maintain in the Superior Court of Guam an action against her or him for permanent support and maintenance of himself or herself or of himself and the children or of herself and the children. When the husband willfully fails to provide for the wife, she may, without applying for dissolution of marriage, maintain in the Superior Court an action against him for permanent support and maintenance of herself or of herself and children.

19 GCA § 6105(b)

Property or any interest therein acquired during marriage by a woman by an instrument in writing, in her name alone, or in her name and the name of another person not her husband, is presumed to be the separate property of the married woman ...

22 GCA § 9103(s) and (t)

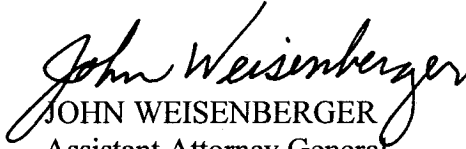
(s) Widow. The term includes only the decedent's wife who, at the time of his death, lived with him or was dependent for support upon him; or who was living apart from him for ...

(t) Widower. This term includes only the decedent's husband who, at the time of death, lived with her husband and was dependant for support upon her.

7. Conclusion.

The common law relationship, a relationship that is akin to marriage, is established and recognized in government of Guam personnel law, policy and benefits. The definition of what establishes a common law relationship is clear. This definition is consistent with the definition utilized by the providers of both health insurance and life insurance benefits to government of Guam employees.

In order for the relationship to be considered common law, as that term is used, the common law couple is required to be readily eligible to marry. On Guam, only a man and a woman are legally readily eligible to marry.


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