DVPOs for Same-Sex Dating Relationships?

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Domestic violence protective orders (DVPOs) are available to "persons of the opposite sex who are . . . or have been in a dating relationship," and who are able to establish that the person that they are or were dating committed an act of domestic violence against them. Persons of the same sex who are or were in a dating relationship don't have the same opportunity. Is that constitutional? The Supreme Court of South Carolina just addressed a related question, and its opinion suggests that the answer is no.

Background. G.S. 50B-1 defines a "personal relationship" as a relationship where the parties involved:

(1) Are current or former spouses;

(2) Are persons of opposite sex who live together or have lived together;

(3) Are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16;

(4) Have a child in common;

(5) Are current or former household members;

(6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship. For purposes of this subdivision, a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship.

The statute defines "domestic violence" as the commission of certain acts by a party to a "personal relationship," so only individuals in a "personal relationship" are eligible for a DVPO. Same-sex couples who are dating but not living together aren't in a "personal relationship" as defined by the statute.

It has been clear at least since *Obergefell v. Hodges*, 576 U.S. __ (2015) (ruling that the Due Process Clause and the Equal Protection Clause of the Constitution require all states to permit and to recognize same-sex marriages), that distinctions between same-sex and opposite-sex relationships require legal scrutiny. In this prior post, I noted that Chapter 50B contained several questionable provisions.

South Carolina case. The recent South Carolina case that bears on this issue is *Doe v. State*, __ S.E.2d __, 2017 WL 3165132 (S.C. July 26, 2017). South Carolina's domestic violence statutes apply only to "household members," defined in part as a "male and female who are cohabiting or formerly have cohabited." A woman who suffered domestic violence at the hands of her female partner -- the two were engaged, but not married -- sought a DVPO but was denied based on the above definition. She challenged the law in court, arguing that the exclusion of same-sex couples violated equal protection principles.

The state supreme court agreed. It stated that it "cannot find a reasonable basis for providing protection to one set of domestic violence victims—unmarried, cohabiting or formerly cohabiting, opposite-sex couples—while denying it to others. Accordingly, we find no constitutionally valid rational basis for the statutory classifications created by the definitional subsections at issue."

Turning to the question of how to remedy the defect, the court decided to "sever the discriminatory provision," removing the reference to cohabiting couples from the statute. In other words, *the court made opposite-sex cohabiting couples ineligible for DVPOs* so that both same-sex and opposite-sex couples are treated in the same way. (The chief justice dissented as to the remedy. He would have held the statute unconstitutional as applied to the plaintiff and would have held "that the family court may not utilize these statutory provisions to prevent [the plaintiff] or those in similar same-sex relationships from seeking [a DVPO].")

Back to North Carolina. Obviously, South Carolina cases aren't binding on North Carolina courts. But that court was unanimous on the fundamental equal protection issue. Using the same lens to look at North Carolina's statute, there are two provisions that are worth considering:

- The phrase "[a]re persons of opposite sex who live together or have lived together." This is virtually indistinguishable from the language at issue in the South Carolina case. However, it may be difficult for a plaintiff to establish standing to contest this portion of the North Carolina statute because the statute also covers individuals who "[a]re current or former household members." Persons of the same sex who "live together or have lived together" appear to be covered by the latter provision -- though I have heard arguments that the "household members" provision should not be interpreted to include romantic partners -- and so arguably suffer no legally cognizable injury by their exclusion from the "live together" prong of the statute.
- The phrase "[a]re persons of the opposite sex who are in a dating relationship or have been in a dating relationship." This provision is the focus of today's post, and I must say, the argument that this provision violates equal protection strikes me as quite strong. Violence in same-sex relationships seems to be as common, or maybe even more common, than in opposite-sex ones, suggesting an equivalent need for DVPOs. Of course, legislative actions are presumptively constitutional; *Obergefell* was decided partly based on the fundamental right to marry, which is not implicated in the "dating relationship" provision; and it is not clear what degree of scrutiny would apply to a challenge to this

provision, so perhaps the issue is not a complete slam dunk.

What's the practice? I suspect that judges are receiving DVPO requests arising out of same-sex dating relationships, and I have heard that at least some judges will issue DVPOs in such circumstances. But as always, I welcome comments regarding how this issue is playing out in the real world.