ACT 217 H.B. NO. 2312

A Bill for an Act Relating to Marriage.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. **Legislative findings and purpose.** The legislature finds that Hawaii's marriage licensing laws were originally and are presently intended to apply only to male-female couples, not same-sex couples. This determination is one of policy. Any change in these laws must come from either the legislature or a constitutional convention, not the judiciary. The Hawaii supreme court's recent plurality opinion in Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993), effaces the recognized tradition of marriage in this State and, in so doing, impermissibly negates the constitutionally mandated role of the legislature as a co-equal, coordinate branch of government.

In Baehr v. Lewin, the Hawaii supreme court was asked to review whether the refusal of the department of health to issue marriage licenses to same-sex couples violated the couples' constitutional rights, inter alia, the right to equal protection of the laws under Article I, section 5 of the Hawaii Constitution. The court, in analyzing section 572-1, declared that its plain language restricted the marital relation to a male and a female. The court held that section 572-1, on its face, discriminated on the basis of sex against the same-sex couples in the exercise of the civil right of marriage, thereby implicating the equal protection clause of the Hawaii Constitution.

The court in Baehr further held that sex was a suspect category for purposes of equal protection analysis, thereby subjecting section 572-1 to strict scrutiny. Under strict scrutiny analysis, a statute is presumed to be unconstitutional unless compelling state interests are shown which justify the statute's impermissible classification. The court therefore held that section 572-1 is presumed to be unconstitutional unless the State can show that: (1) the statute's sex-based classification is justified by compelling state interests; and (2) the statute is narrowly drawn to avoid unnecessary abridgments of the same-sex couples' constitutional rights.

Although the Hawaii supreme court has the right to pass on the constitutionality of section 572-1, Hawaii Revised Statutes, the question before the court in Baehr was and is essentially one of policy, thereby rendering it inappropriate for judicial response. Policy determinations of this nature are clearly for nonjudicial discretion, and are more properly left to the legislature or the people of the State through a constitutional convention. Contrary to the plurality's assertion

that it was not engaging in judicial legislation, the court's intervention in this matter encroaches on the functions of the legislature in its law-making function, thereby impinging on the separation of powers of the respective branches of government.

Separation of powers is necessary for the functional division of governmental power that is the foundation of our constitutional democracy. The Hawaii state legislature, as the elected representatives of the people of the State of Hawaii, is, along with the executive branch, the appropriate source of major policy initiatives. The Hawaii supreme court in Baehr has in effect substituted its own judgment for the will of the people of this State. Deferral of this matter to the legislature therefore would have expressed the respect due a coordinate branch of government.

In addition to the plurality's failure to defer to the policy judgment of the legislature, the court also failed to afford sufficient weight to the strong presumption that every statute is constitutional. In the view of the legislature, the parties in Baehr challenging the constitutionality of section 572-1, Hawaii Revised Statutes, failed to overcome this presumption.

The plurality in Baehr relied on the observation in Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), that any state's powers to regulate marriage are subject to the constraints imposed by the constitutional right to the equal protection of the laws. However, as the dissent in Baehr correctly points out, the plaintiff in Loving was not claiming a right to a same-sex marriage, but instead involved a marriage between a white male and a black female whose marriage was refused recognition under Virginia's miscegenation laws. The United States Supreme Court in Loving relied on the Fourteenth Amendment to the United States Constitution in holding that Virginia's statute containing a race-based classification violated the equal protection of the laws.

The Fourteenth Amendment, a post-Civil War amendment added to the Constitution in 1868, was designed to expand the Thirteenth Amendment as the basis for federal civil rights authority, and was also aimed at forcing southern compliance with newly established political rights for blacks. The language of the Fourteenth Amendment not only reversed the citizenship holding in Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857), but allowed federal authority to be used to protect and advance the civil rights of black citizens. The Supreme Court later held in Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 2d 873 (1954), that racial segregation in public schools imposed by law violated the Fourteenth Amendment's equal protection clause.

The United States Supreme Court in Loving made clear that the Fourteenth Amendment was intended to eliminate racial discrimination, and that restricting the freedom to marry solely because of racial classifications violated the central meaning of the equal protection clause. In contrast, the Hawaii supreme court in Baehr has interpreted Article I, section 5 in a manner not intended by the framers of Hawaii's Constitution, by analyzing the equal protection issue presented in that case in terms of sexual orientation or preference classifications in place of gender classifications. The plurality's reliance on the Loving decision in Baehr is therefore inapposite to its interpretation of Article I, section 5, of the Hawaii Constitution with respect to same-sex marriages. Although the State of Hawaii clearly has the power to regulate marriages in the State, which in turn is subject to the constraints imposed by the right to equal protection of the laws, the invalidation of the race-based classification in Loving is simply not parallel to the sex-based classification in Baehr.

The Hawaii Constitution's equal protection clause differs from that of the United States Constitution in part by the former's inclusion of the word "sex". Article I, section 5 provides in pertinent part that "[n]o person shall be ... denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of ... sex ...." The Baehr Court correctly points out that, by its plain language, this section "prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex". Id., slip op. at 29. However, the plurality's subsequent interpretation of the word "sex" in this context demonstrates that although the opinion purports to express the word "sex" in terms of "gender", in reality the court misinterprets the word "sex", in the context of Article I, section 5, in terms of "sexual orientation" or "sexual preference". This interpretation was not intended by the framers of Hawaii's Constitution.

The word "sex" was included in the equal protection clause in Hawaii's Constitution as adopted by the people of the State in 1950. No discussion was made regarding inclusion of this word in the testimony or other minutes of the first Constitutional Convention. The only other reference to "sex" in the Constitution is in Article I, section 3 of the Hawaii Constitution, Hawaii's version of the equal rights amendment adopted in 1972, which provides in relevant part that "[e]quality of rights under the law shall not be denied or abridged by the State on account of sex." The legislative history of this amendment analyzes this word in terms of gender rather than sexual orientation:

> Your Committee believes all persons are free by nature and are equal in their inherent and inalienable rights. ... These rights cannot endure unless women along with men recognize and possess their corresponding obligations, responsibilities, and privileges equally. It is the affirmative duty of the people through their elected representative to ensure that no person shall be discriminated for so long as the precept of our government, the equality of all people, outweighs the purpose of distinguishing that person by class.

Standing Committee Report No. 394-72 (Judiciary) on S.B. No. 1408-72. During the latest Constitutional Convention in 1978, there was no debate regarding the word "sex" in Article I, section 5. If the delegates to the respective conventions had intended "sex" to mean "sexual orientation", there most likely would have been a lively discussion on this issue. The fact that there is no debate at all on this issue lends strong credence to the implication that "sex" meant "gender".

In addition, in enacting legislation prohibiting discrimination on the basis of sex, the legislature distinguishes between sex (in the sense of "gender") and sexual orientation. For example, in section 368-1, Hawaii Revised Statutes, the legislature found that the practice of discrimination because of "race, color, religion, age, sex, sexual orientation, marital status, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy." See also sections 42D-3(2) and 378-2(1), Hawaii Revised Statutes.

Viewed from this context, it is apparent that section 572-1, Hawaii Revised Statutes, and all of Hawaii's marriage licensing statutes, do not deny equal protection of the laws under Article I, section 5 of the Hawaii Constitution. There simply is no class of individuals under that section that have been discriminated against in relation to another group of similarly situated individuals. Because all men and all women are treated alike by section 572-1, there is no sex- (i.e., gender-) based classification.

The legislature finds that the prohibition against discrimination on the basis of sex in Article I, section 5 of the Hawaii Constitution is for the purpose of protecting gender equality. In other words, "sex" means gender, not sexual orientation, for purposes of both the marriage licensing statutes and Article I of the Hawaii Constitution. The court in Baehr, in analyzing the equal protection issue presented in that case in terms of sexual orientation or preference classifications rather than gender classifications, impermissibly expanded the intention of that word as it appears both in the marriage statutes and the Constitution. This interpretation was not the intent of the framers of Hawaii's Constitution in 1950, nor has it ever been the intent of the Hawaii legislature. Any change in this purely policy determination lies wholly within the province of the legislature or a constitutional convention.

The legislature further finds that section 572-1, Hawaii Revised Statutes, and all of Hawaii's marriage licensing statutes, as originally enacted, were intended to foster and protect the propagation of the human race through male-female marriages. This original intent was acknowledged by the court in Baehr in its discussion of the fundamental right to marry:

> The United States Supreme Court first characterized the right of marriage as fundamental in Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). In Skinner, the right to marry was inextricably linked to the right of procreation. The dispute before the Court arose out of an Oklahoma statute that allowed the state to sterilize "habitual criminals" without their consent. In striking down the statute, the Skinner court indicated that it was dealing ... with legislation which involve[d] one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." Id. at 5441, 62 S. Ct. at 1113...

Baehr v. Lewin, slip op. at 18-19 (emphasis added). In addition, the Hawaii supreme court expressed the same sentiments by quoting with approval from the United States Supreme Court's opinion in Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978):

> Long ago, in Maynard v. Hill, 125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 654 (1888), the Court characterized marriage as "the most important relation in life," id., at 205, 8 S. Ct., at 726, and as "the foundation of the family and of society, without which there would be neither civilization nor progress," id., at 211, 8 S. Ct., at 729. In Meyer v. Nebraska, 262 U.S. 390, 434 S. Ct. 625, 67 L. Ed. 1042 (1923), the Court recognized that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause ...

Id., slip op. at 20 (citations omitted).

Although the Court in Baehr cited these United States Supreme Court opinions in the context of rejecting the contention that the right to marry, as protected by Article I, section 6 of the Hawaii Constitution, extends to same-sex couples, the United States Supreme Court's underlying rationale for the enactment of marriage licensing laws in general applies equally to Hawaii's marriage licensing statutes. As the plurality in Baehr stated, "the least that can be said is that [the Skinner Court] was obviously contemplating unions between men and women when it ruled that the right to marriage was fundamental." Id., slip op. at 19.

Consistent with the traditional definition of marriage — man and woman — as acknowledged in Baehr, at the present time neither this State, nor any of the other states, sanctions by statute any marriage configuration other than unions between men and women.

The legislature notes that section 572-1 was amended by Act 119, Session Laws of Hawaii 1984, by deleting the requirement that marriage applicants show that they are not impotent or not physically incapable of entering into a marriage. The intent of this amendment was to remove any impediment that may have prevented persons who were physically handicapped or elderly, or who had temporary physical limitations, from entering into a valid marriage. This amendment, however, does not detract from the original purpose of section 572-1. As such, the statute's sex-based classification is clearly designed to promote this legislative purpose and bears a reasonable relationship to that purpose.

The legislature finds that Hawaii's marriage licensing statutes, both as originally enacted and at present, are intended to apply only to male-female couples, not same-sex couples. The Court in Baehr has effectively usurped the role of the Hawaii state legislature on this issue by substituting its own policy judgment for that of the people of Hawaii. The legislature stresses that since the determination of the nature of the marital relationship, together with its rights and benefits, falls more appropriately within the province of the legislature as one of policy, this issue is more properly dealt with in the legislative rather than judicial forum. Under the principle of separation of powers, the Court therefore should have deferred to the legislature in its determination and interpretation of the marriage contract.

The purpose of this Act is to:

(1) Emphasize that expanding the definitions of "sex" in Article I, section 5, of the Hawaii Constitution and "marriage" in chapter 572, Hawaii Revised Statutes, is a policy question within the exclusive purview of legislative bodies, to wit, the legislature or the constitutional convention and not the courts;

(2) Expressly reiterate the original intent of the legislature in enacting section 572-1, Hawaii Revised Statutes, that that section, and all of Hawaii's marriage licensing statutes, both originally and presently are intended to apply only to male-female, not same-sex couples, and that this application of the statute is consistent with Article I, section 5, of the Hawaii Constitution; and

(3) Understanding that same-sex relationships do exist:

   (A) Provide assurances consistent with Article I, section 4, of the Hawaii Constitution that the laws of the State do not prohibit religious organizations from solemnizing same-sex relationships; and

   (B) Provide for the establishment of a commission on sexual orientation and the law to conduct a study and present a report of its findings to the legislature prior to the convening of the regular session of 1995.

In reviewing or interpreting section 572-1, or any of Hawaii's marriage licensing statutes, the judiciary is directed to review and interpret those statutes in light of these legislative findings.

SECTION 2. Chapter 572, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§572- **Definition of marriage.** Whenever used in the statutes or other laws of Hawaii, "marriage" means the union licensed under section 572-1."

SECTION 3. Section 572-1, Hawaii Revised Statutes, is amended to read as follows:

"**§572-1 Requisites of valid marriage contract.** In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that:

(1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew, whether the relationship is legitimate or illegitimate;
(2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2;
(3) The man does not at the time have any lawful wife living and that the woman does not at the time have any lawful husband living;
(4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;
(5) Neither of the parties is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;
(6) [It shall in no case be lawful for any person to marry in the State without] The man and woman to be married in the State shall have duly obtained a license for that purpose [duly obtained] from the agent appointed to grant marriage licenses; and
(7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the man and the woman to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony."

SECTION 4. Section 572-3, Hawaii Revised Statutes, is amended to read as follows:

"**§572-3 Contracted without the State.** Marriages between a man and a woman legal in the country where contracted shall be held legal in the courts of [the] this State."

SECTION 5. Chapter 572, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§572- **Private solemnization not unlawful.** Nothing in this chapter shall be construed to render unlawful, or otherwise affirmatively punishable at law, the solemnization of same-sex relationships by religious organizations; provided that nothing in this section shall be construed to confer any of the benefits, burdens, or obligations of marriage under the laws of Hawaii."

SECTION 6. There is created, effective upon approval of this Act, a commission on sexual orientation and the law. The commission shall consist of

eleven members, ten appointed by the governor of the State of Hawaii, of which two shall be representatives from the Hawaii Civil Rights Commission; two shall be representatives from the American Friends Service Committee; two shall be representatives from the Catholic Church diocese; two shall be representatives from the Church of Latter-Day Saints; two shall be representatives from the Hawaii Equal Rights Marriage Project; and an eleventh member, who shall be the chairperson of the family law section of the Hawaii State Bar Association as of January 1, 1994, who shall serve as chairperson of the commission. Should the chairperson of the family law section of the Hawaii State Bar Association decline to serve, the president of the senate and the speaker of the house of representatives shall choose, at their joint discretion, a person with expertise in the law of domestic relations to serve as chairperson of the commission. The members of the commission shall serve without compensation and the commission shall be attached for administrative purposes to the legislative reference bureau, which shall provide staff support to the commission. The purpose of the commission shall be to:

(1) Examine the precise legal and economic benefits extended to opposite-sex couples, but not to same-sex couples;
(2) Examine whether substantial public policy reasons exist to extend such benefits to same-sex couples and the reasons therefor; and
(3) Recommend appropriate action which may be taken by the legislature to extend such benefits to same-sex couples.

The commission shall submit a report on its findings to the legislature no later than twenty days prior to the convening of the 1995 regular session.

SECTION 7. Statutory material to be repealed is bracketed. New statutory material is underscored.[1]

SECTION 8. This Act shall apply retroactively to any marriage license application pending on the effective date of this Act, or which has been rejected by the department of health before the effective date of this Act.

SECTION 9. This Act shall take effect upon its approval.

(Approved June 22, 1994.)

Note

1. Edited pursuant to HRS §23G-16.5.