



# Western PA Freedom to Marry Coalition

## *Marriage Announcements*

Fall, 1996

Volume 1 Issue 5

## We Won -- Big!

*Excerpts from Judge Kevin Chang's Decision in Baehr v Miike, decided December 3, 1996*

### VI. SPECIFIC FINDINGS

116. The following are specific findings of fact for this case based on the credible evidence presented at trial.

117. Defendant presented insufficient evidence and failed to establish or prove any adverse consequences to the public fisc resulting from same-sex marriage.

118. Defendant presented insufficient evidence and failed to establish or prove any adverse impacts to the State of Hawaii or its citizens resulting from the refusal of other jurisdictions to recognize Hawaii same-sex marriages or from application of the federal constitutional provision which requires other jurisdictions to give full faith and credit recognition to Hawaii same-sex marriages.

119. Defendant presented insufficient evidence and failed to establish or prove the legal significance of the institution of traditional marriage and the need to protect traditional marriage as a fundamental structure in society.

120. There is a public interest in the rights and well-being of children and families. See H.R.S. Chapters 571 and 577.

121. A father and a mother can, and do, provide his or her child with unique paternal and maternal contributions which are important, though not essential, to the development of a happy, healthy and well-adjusted child.

122. Further, an intact family environment consisting of a child and his or her mother and father presents a less burdened environment for the development of a happy, healthy and well-adjusted child.

There certainly is a benefit to children which comes from being raised by their mother and father in an intact and relatively stress free home.

123. However, there is diversity in the structure and configuration of families. In Hawaii, and elsewhere, children are being raised by their natural parents, single parents, step-parents, grandparents, adopted parents, hanai parents, foster parents, gay and lesbian parents, and same-sex couples.

124. There are also families in Hawaii, and elsewhere, which do not have children as family members.

125. The evidence presented by Plaintiffs and Defendant establishes that the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child.

More specifically, it is the quality of

### Historic court ruling after many setbacks

I apologize for the delay in getting this newsletter out. The past several months have been rough for marriage activists. The passage of DoMA, the state enacting anti-marriage legislation, and an election where marriage was used as a political football disheartened even the staunchest advocates for same-sex marriage rights. However, the old adage *It is always darkest before the dawn* can be true.

The December 3 decision by Judge Kevin Chang is historic. For the first time, a state was forced to show cause why gays and lesbians should be denied marriage rights. For the first time, a court has ruled that the state has no such

compelling interest. Although the judge delayed his opinion, as expected, until the appeal, it remains intact and on-the-books.

Evan Wolfson announced the decision on the internet with three words: **We won — big!** This is an understatement. On every point the judge found with the plaintiffs. The judge dismissed each of the state's claims and make strong findings of fact in support of gay and lesbian parents. The judge found two of our witnesses extremely credible, while dismissing one of the states witnesses because of bias. In the end, all the facts were on the side of marriage rights.

The fight is not over. A Hawaiian anti-marriage constitutional amendment could be drafted next year, but could not

be put before the voters until November 1998 — several months after the Hawaiian Supreme Court is expected to rule. Although the co-chair of Hawaii's Judiciary Committee calls an amendment "too little, too late", the fight to keep marriage rights promises to continue even after a final decision in this case.

In Pennsylvania, we need to continue engaging the public in discussion of this issue. When Hawaii does finally permit marriage for same-sex couples, we need to have laid the groundwork to overturn Pennsylvania's unjust anti-gay, anti-marriage law.

**The Marriage Coalition meets the second Tuesday** of every month at the **Gay and Lesbian Community Center** in Squirrel Hill at **7PM**.

# Your donation to the Western PA Freedom to Marry Coalition

helps us educate our community about the marriage for same-sex couples! **Please help by sending donations to WPaFtMC, PO Box 81253, Pittsburgh PA 15217-4253.** Donations are not tax deductible

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## Ruling Cont.

parenting or the “sensitive care-giving” described by David Brodzinsky, which is the most significant factor that affects the development of a child.

126. The sexual orientation of parents is not in and of itself an indicator of parental fitness.

127. The sexual orientation of parents does not automatically disqualify them from being good, fit, loving or successful parents.

128. The sexual orientation of parents is not in and of itself an indicator of the overall adjustment and development of children.

129. Gay and lesbian parents and same-sex couples have the potential to raise children that are happy, healthy and well-adjusted.

130. Gay and lesbian parents and same-sex couples are allowed to adopt children, provide foster care and to raise and care for children.

131. Gay and lesbian parents and same-sex couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children.

132. Gay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples.

133. While children of gay and lesbian parents and same-sex couples may experience symptoms of stress and other issues related to their non-traditional family structure, the available scientific data, studies and clinical experience presented at trial suggests that children of gay and lesbian parents and same-sex couples tend to adjust and do develop in a normal fashion.

134. Significantly, Defendant has failed to establish a causal link between allowing same-sex marriage and adverse effects upon the optimal development of children.

135. As noted herein, there is a benefit to children which comes from being raised by their mother and father in an intact and relatively stress-free home.

However, in this case, Defendant has not proved that allowing same-sex marriage will probably result in significant differences in the development or outcomes of children raised by gay or lesbian parents and same-sex couples, as compared to children raised by different-sex couples or their biological parents.

In fact, Defendant’s expert, Kenneth Pruett, agreed, in pertinent part, that gay and lesbian parents “are doing a good job” raising chil-

dren and, most importantly, “the kids are turning out just fine.”

136. Contrary to Defendant’s assertions, if same-sex marriage is allowed, the children being raised by gay or lesbian parents and same-sex couples may be assisted, because they may obtain certain protections and benefits that come with or become available as a result of marriage. See *Baehr v. Lewin*, 74 Haw. 530, 560-561, 852 P.2d 44, 59 (1993), for a list of noteworthy marital rights and benefits.

137. In Hawaii, and elsewhere, same-sex couples can, and do, have successful, loving and committed relationships.

138. In Hawaii, and elsewhere, people marry for a variety of reasons including, but not limited to the following: (1) having or raising children; (2) stability and commitment; (3) Personal closeness (4) intimacy and monogamy; (5) the establishment of a framework for a long-term relationship; (6) personal significance; (7) recognition by society; and (8) certain legal and economic protections, benefits and obligations. See *Baehr v. Lewin*, 74 Haw. 530, 560-561, 852 P.2d 44, 59 (1993) for

## **Ruling Cont.**

a list of noteworthy marital rights and benefits.

In Hawaii, and elsewhere, gay men and lesbian women share this same mix of reasons for wanting to be able to marry.

139. Simply put, Defendant has failed to establish or prove that the public interest in the well-being of children and families, or the optimal development of children will be adversely affected by same-sex marriage.

140. If any of the above findings of fact shall be deemed conclusions of law, the Court intends that every such finding shall be construed as a conclusion of law.

### **CONCLUSIONS OF LAW**

1. This Court has jurisdiction over the subject matter and the parties to this action. Venue is proper in the First Circuit Court. 2. The trier of fact determines the credibility of a witness and the weight to be given to his or her testimony. In pertinent part, the trier of fact may consider the witness' demeanor and manner while on the stand, the character of his or her testimony as being probable or improbable, inconsistencies, patent omissions and discrepancies in his or her testimony or between the testimony of other witnesses, contradictory testimony or evidence, his or her interest in the outcome to the case and other factors bearing upon the truthfulness or untruthfulness of the witness' testimony. In a non-jury trial, the credibility of a witness is a matter for the trial court to determine and the court can accept or reject the testimony of a witness in whole or in part.

3. Defendant's burden in this case is to "overcome the presumption that HRS 572-1 is unconstitutional by demonstrating that it furthers a compelling state interest and is narrowly drawn to avoid unnecessary abridgements of constitutional rights."

4. There is no fundamental right to marriage for same sex couples under article I, section 6 of the Hawaii Constitution. Marriage is a state-conferred legal status which gives rise to certain rights and benefits.

5. The Department of Health, State of Hawaii, has the exclusive authority to issue licenses to marriage applicants.

6. There are certain rights and benefits which accompany the state-conferred legal status of marriage. See *Baehr v. Lewin*, 74 Haw. 530, 560-561, 852 P.2d 44, 59 (1993) for a list of noteworthy marital rights and benefits.

7. If Plaintiffs, and other same-sex couples, were allowed the state-conferred legal status of marriage, they would be conferred with these and other marital rights and benefits.

8. HRS 572-1, on its face and as applied, regulates access to the status of marriage and its concomitant rights and benefits on the basis of the applicants' sex. As such, HRS 572-1 establishes a sex-based classification.

9. Sex is a "suspect category" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution. Consequently, HRS 572-1 is subject to the "strict scrutiny" test.

10. Defendant, rather than Plaintiffs, carries a heavy burden of justification.

11. Specifically, HRS 572-1 is presumed to be unconstitutional and the burden is on Defendant to show that the statute's sex-based classification is justified by compelling state interests and the statute is narrowly drawn to avoid unnecessary abridgements of constitutional rights.

12. Article IV section 1 of the U.S. Constitution provides, in pertinent part, that all states must recognize the "public acts, records and judicial proceedings of every other state."

Whether other states will recognize or avoid recognizing same-sex marriages which take place in Hawaii and the consequences to Hawaii residents of other states' recognition or non-recognition of same-sex marriage (and all of the rights and benefits associated with marriage) is an important issue.

However, except for asking the court to take judicial notice of the Defense of Marriage Act, P.L. 1-4-199 ("DOMA"), Defendant introduced little or no other evidence with regard to this significant issue of comity and same-sex marriage,

conflict-of-laws, and/or the effects, if any, of the Full Faith and Credit Clause of the U.S. Constitution.

13. Except for the affidavit testimony of Kenneth K. M. Ling and Michael L. Meaney, which provided statistical, budgetary and operational information regarding the Family Court of the First Circuit Court and the Child Support Enforcement Agency, State of Hawaii, respectively Defendant presented little or no other evidence which addressed how same-sex marriage would adversely affect the public fisc. Defendant did not offer any testimony which explained the significance of the above and Defendant did not specifically explain or establish how same-sex marriage would adversely impact the Family Court or the Child Support Enforcement Agency.

14. Defendant presented meager evidence with regard to the importance of the institution of traditional marriage, the benefits which that relationship provides to the community and, most importantly, the adverse effects, if any, which same-sex marriage would have on the institution of traditional marriage and how those adverse effects would impact on the community and society. The evidentiary record in this case is inadequate to thoughtfully examine and decide these significant issues.

15. Finally, Defendant's argument that legalized prostitution, incest and polygamy will occur if same-sex marriage is allowed disregards existing statutes and established precedent [for example, *State v. Mueller*, 66 Haw. 616, 671 P.2d 1351 (1983) (upholding ban on prostitution)] and the Supreme Court's acknowledgment of compelling reasons to prevent and prohibit marriage under circumstances such as incest.

16. In *Dean v. District of Columbia*, 653 A.2d 307 (D.C.App. 1995), two homosexual males filed a complaint against the District of Columbia which sought an injunction to require the Clerk of the Superior Court to issue them a marriage license. The trial court granted summary judgment in favor of the District of Columbia. On appeal, the District of Columbia Court of Appeals affirmed the

## **Ruling Cont.**

trial court's order granting summary judgment.

In the Dean case, Judge Ferren wrote a lengthy opinion concurring in part and dissenting in part, and in which the majority joined in part.

Judge Ferren would have reversed summary judgment and remanded the case for trial to decide (1) the level of scrutiny constitutionally required, and (2) whether the District of Columbia has demonstrated a compelling or substantial enough governmental interest to justify refusing plaintiffs a marriage license. The portion of Judge Ferren's opinion which deals with the question of whether the District of Columbia could demonstrate at trial a substantial or compelling state interest is useful and informative. In pertinent part, Judge Ferren wrote the following.

[I]f the government cannot cite actual prejudice to the public majority from a change in the law to allow same-sex marriages . . . then the public majority will not have a sound basis for claiming a compelling, or even a substantial, state interest in withholding the marriage statute from same-sex couples; a mere feeling of distaste or even revulsion at what someone else is or does, simply because it offends majority values without causing concrete harm, cannot justify inherently discriminatory legislation against members of a constitutionally protected class - as the history of constitutional rulings against racially discriminatory legislation makes clear.

Suppose, on the other hand, that scientifically credible "deterrence" evidence were forthcoming at trial, so that either the heterosexual majority or the homosexual minority would be prejudiced in some concrete way, depending on whether the marriage statute was, or was not, available to homosexual couples. In that case, the ultimate question of whose values should be enforced, framed in terms of what a substantial or compelling state interest really is, would pose the

hardest possible question for the court as majority and minority interests resoundingly clash. Dean at 653 A.2d at 355-356 (1995) (footnotes omitted).

17. In this case, the evidence presented by Defendant does not establish or prove that same-sex marriage will result in prejudice or harm to an important public or governmental interest.

18. Defendant has not demonstrated a basis for his claim of the existence of compelling state interests sufficient to justify withholding the legal status of marriage from Plaintiffs.

As discussed hereinabove, Defendant has failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children and families, or the optimal development of children would be adversely affected by same-sex marriage. Nor has Defendant demonstrated how same-sex marriage would adversely affect the public fisc, the state interest in assuring recognition of Hawaii marriages in other states, the institution of traditional marriage, or any other important public or governmental interest.

The evidentiary record presented in this case does not justify the sex-based classification of HRS 572-1.

Therefore, the court specifically finds and concludes, as a matter of law, that Defendant has failed to sustain his burden to overcome the presumption that HRS 572-1 is unconstitutional by demonstrating or proving that the statute furthers a compelling state interest.

19. Further, even assuming arguendo that Defendant was able to demonstrate that the sex-based classification of HRS 572-1 is justified because it furthers a compelling state interest, Defendant has failed to establish that HRS 572-1 is narrowly tailored to avoid unnecessary abridgments of constitutional rights.

20. If any of the above conclusions of law shall be deemed findings of fact, the court intends that each such conclusion be construed as a finding of fact.

21. Based on the foregoing, in accordance with the mandate of the Hawaii Supreme Court, and applying the law to

the evidence presented at trial, judgment shall be entered in favor of Plaintiffs Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon and Joseph Melillo as follows:

### **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:**

1. The sex-based classification in HRS 572-1, on its face and as applied, is unconstitutional and in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution.

2. Defendant Lawrence H. Miike, as Director of Department of Health, State of Hawaii, and his agents, and any person in acting in concert with Defendant or claiming by or through him, is enjoined from denying an application for a marriage license solely because the applicants are of the same sex.

3. To the extent permitted by law, costs shall be imposed against Defendant and awarded in favor of Plaintiffs.

DATED: Honolulu, Hawaii, December 3, 1996.

KEVIN S. C. CHANG

Judge of the Above-Entitled

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