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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT CIVIL NO. 91-1394
STATE OF HAWAII

FINDINGS OF FACT AND CONCLUSIONS OF LAW NINIA BAEHR, GENORA DANCEL,
TAMMY RODRIGUES, ANTOINETTE PREGIL, PAT LAGON, AND JOSEPH MELILLO,
Plaintiffs,

vs .

LAWRENCE H. MIIKE, in his official capacity as Director of the
Department of Health, State of Hawaii,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before the Honorable Kevin S.C. Chang on September 10, 1996. Plaintiffs Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melillo were represented by attorneys Daniel R. Foley, Evan Wolfson and Kirk H. Cashmere. Defendant Lawrence H. Miike was represented by Deputy Attorney Generals Rick J. Eichor and Lawrence Goya. The Court having reviewed all the evidence admitted at the trial and having considered the arguments and other written -1- submissions of counsel for the parties and the briefs filed by the amicus curiae, hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACTS

I. THE PARTIES

1. At all times relevant herein, Plaintiffs Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon and Joseph Melillo (hereinafter collectively referred to as "Plaintiffs") were or are residents of the City and County of Honolulu, State of Hawaii.

2. Defendant Lawrence H. Miike ("Defendant") is a resident of the City and County of Honolulu, State of Hawaii. Defendant Miike is sued in his official capacity as Director of Department of Health, State of Hawaii. [When this lawsuit was commenced, John Lewin was the Director of Department of Health, State of Hawaii. Thereafter, pursuant to Rule 43(c) of the Hawaii Rules of Appellate Procedure, Defendant Miike was automatically substituted for Defendant Lewin when he assumed the position of the Director of Department of Health, State of Hawaii. A Notice of Substitution of Parties was also filed by defense counsel on April 23, 1996.]

II. RELEVANT PROCEDURAL HISTORY

3. Plaintiffs filed their Complaint for Injunctive and Declaratory Relief ("Complaint") on May 1, 1991.

4. In pertinent part, Plaintiffs' Complaint alleges that on or about December 17, 1990, Defendant and his agent denied the applications for marriage licenses presented by Plaintiffs Baehr and Dancel, Plaintiffs Rodrigues and Pregil and Plaintiffs Lagon and Melillo, respectively, solely on the ground that the couples are of the same sex. Plaintiffs sought a judicial declaration that the construction and application of

Hawaii Revised Statutes ("HRS") 572-1 to deny an application for a license to marry because an applicant couple is of the same sex is unconstitutional.

5. Defendant filed an Amended Answer to Complaint on June 7, 1991. In pertinent part, Defendant admitted that Plaintiffs Baehr and Dancel, Plaintiffs Rodrigues and Pregil and Plaintiffs Lagon and Melillo applied for marriage licenses on December 17, 1990, and that the couples applications for marriage licenses were denied by Defendant through his agent on the ground that the couples are of the same sex.

6. On July 9, 1991, Defendant filed a Motion For Judgement on the Pleading which sought a dismissal of the lawsuit. Defendant asserted, in pertinent part, that Plaintiffs in their Complaint had failed to state a claim against Defendant upon which relief could be granted.

7. A hearing was held on Defendant's Motion for Judgment on the Pleadings on September 3, 1991.

8. An Order Granting Defendant's Motion for Judgment on the Pleading was filed on October 1, 1991. A Judgment in favor of Defendant and against Plaintiffs was also filed on October 1, 1991. 9. Plaintiffs filed their Notice of Appeal to the Supreme Court of the State of Hawaii on October 17, 1991.

10. In Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993), the Hawaii Supreme Court vacated the circuit courts order and judgment in favor of Defendant and remanded the case to the circuit court for further proceedings. In pertinent part, the Hawaii Supreme Court directed the following.

On remand, in accordance with the "strict scrutiny" standard, the burden will rest on [Defendant] to overcome the presumption that HRS 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.

Id., 74 Haw. at 583 (citations omitted).

11. On May 17, 1993, Defendant filed a motion for reconsideration or clarification to the Hawaii Supreme Court.

12. On May 27, 1993, the Hawaii Supreme Court granted Defendant's motion for reconsideration, or, in the alternative, for clarification in part, and clarified the mandate on remand as follows.

Because, for the reasons stated in the plurality opinion filed in the above-captioned matter on May 5, 1993, the circuit court erroneously granted Lewin's motion for judgment on the pleadings and dismissed the plaintiffs' complaint, the circuit court's order and judgment are vacated and the matter is remanded for further proceedings consistent with the pluralitv opinion. On remand, in accordance with the "strict scrutiny" standard, the burden will rest on [Defendant] to overcome the presumption that HRS 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.

Baehr v. Lewin 74 Haw. 530, 852 P.2d 44 (1993), reconsideration and

clarification granted in part, 74 Haw. 645, 852 P.2d 74 (1993) (citations omitted).

13. An Order of Early Assignment to Trial Judge was filed on May 5, 1995.

14. On July 13, 1995, Defendant Director of Health's Motion for Reservation of Questions to the Supreme Court of Hawaii and for Stay Pending Appeal, or, in the alternative for Stay Pending the Action of The Commission on Sexual Orientation and the Law and of The Eighteenth Legislature filed on July 5, 1995, was granted in part, and the trial in the above-captioned case was rescheduled from September 25, 1995 to July 15, 1996. See Order Denying Defendant Director of Health's Motion for Reservation of Questions to the Supreme Court of Hawaii and for Stay Pending Appeal, and Granting Alternative Motion for Stay of Trial Pending the Action of The Commission on Sexual Orientation and the Law and of The Eighteenth Legislature filed on September 7, 1995.

15. A Notice of Change of Responsible Deputy was filed on April 18, 1996, which stated that responsibility for handling of the case on behalf of the Defendant had been changed to Deputy Attorney General Rick J. Eichor.

16. Following a status conference with counsel on April 19, 1996, a Stipulation to Continue Trial Date and Order was filed on May 9, 1996. As a result, the trial in the above-captioned case was continued from the week of August 1, 1996 to September 10, 1996.

III. DEFENDANT'S POSITION

17. The directive of the Hawaii Supreme Court is clear. Pursuant to the mandate of the Supreme Court, Defendant has the burden of proof in this case. *Id.*

18. Defendant's First Amended Pretrial Statement was filed on May 13, 1996. In pertinent part, Defendant stated the following.

[A]ll that remains is for the State to show that there is a compelling State interest to deny Plaintiff marriage licenses because they are of the same sex and that this compelling interest is narrowly drawn to avoid unnecessary abridgments of constitutional rights.

The following substantial and compelling state interests will be shown:

a. That the State has a compelling interest in protecting the health and welfare of children and other persons. . . .

b. That the State has a compelling interest in fostering procreation within a marital setting. . . .

c. That the State has a compelling interest in securing or assuring recognition of Hawaii marriages in other jurisdictions. . . .

d. That the State has a compelling interest in protecting the State's public fisc from the reasonably foreseeable effects of State approval of same-sex marriage in the laws of Hawaii. . . .

e. That the State has a compelling state interest in protecting civil liberties, including the reasonably foreseeable effects of State approval of same-sex marriages, on its citizens.

Defendant's First Amended Pretrial Statement at pages 2-4.

19. Defendant's Pre-Trial Memorandum was filed on September 6, 1996. In pertinent part, Defendant asserted the following.

The State of Hawaii has a compelling interest to promote the optimal development of children. . . . It is the State of Hawaii's position that, all things being equal, it is best for a child that it be raised in a single home by its parents, or at least by a married male and female. . . . The marriage law furthers the compelling state interest of securing or assuring recognition of Hawaii marriages in other jurisdictions. . . . The marriage law furthers the compelling state interest in protecting the public fisc from the reasonably foreseeable effects of approval of same-sex marriage.

Defendant's Pre-Trial Memorandum at pages 1, 2 and 4.

20. Defense counsel acknowledged Defendant's burden of proof and, in pertinent part, stated the following in his Opening Statement. "The State has a compelling interest in promoting the optimal development of children. . . . It is the State's policy to pursue the optimal development of children, to unite children with their mothers and fathers, and to have mothers and fathers take responsibility for their children." Trial Transcript ("Tr.") 9/10/96. pages 4-5.

IV. DEFENDANT'S WITNESSES

21. Defendant presented testimony from the following expert witnesses: (1) Kyle D. Pruett, M.D.; (2) David Eggebeen, Ph.D.; (3) Richard Williams, Ph.D.; and (4) Thomas S. Merrill, Ph D.

22. Dr. Kyle Pruett is an expert in the field of psychiatry, specializing in child development. Beginning in 1981 and continuing for a ten-year period, Dr. Pruett conducted a longitudinal study of fifteen families with young children with regard to the developmental competence of children raised primarily by their fathers in intact families. At the end of his study, Dr. Pruett found that children raised by families with primarily paternal care in the early months and years of life are competent and robust in their development, and are not sources of clinical concern.

23. In pertinent part, Dr. Pruett found that there were unique paternal contributions made by a father which had a positive effect on the following: (1) a child's self-esteem and feelings of being loved and important to the family; (2) a child's ability to cope with frustration and discouragement; (3) a child's interest in generative or creative matters; and (4) a child's gender

flexibility.

24. However, Dr. Pruett also stated that the unique or non-replicable contributions offered by a father (and the unique contributions offered by a mother) are "small", in comparison to the contributions that parents make together to their children.

Tr. 9/10/96, page 84. Dr. Pruett conceded that the beneficial results described above are not essential to being a happy, healthy and well-adjusted child. Tr. 9/10/96, pages 86-87.

25. Dr. Pruett testified that biological parents have a predisposition which helps them in parenting children. The predisposition is based upon the following factors: (1) chromosomal or genetic contributions; (2) the parents' choice and timing of conception or procreation; (3) the physical changes to the mother's body and the father's observations and interaction with those changes; (4) immediate bonding upon the child's birth; and (5) a predisposition to sacrifice and make one's self secondary to the needs of the child.

26. Dr. Pruett also expressed his belief that children which are adopted or are the result of assisted reproduction live in a "burden[ed] system." Tr. 9/10/96, pages 58, 62.

27. Dr. Pruett stated that same-sex relationships do not provide the same type of learning model or experience for children as does male-female parenting, because there is an overabundance of information about one gender and little information about the other gender. Tr. 9/10/96, page 63.

28. Nevertheless, Dr. Pruett also stated that same-sex parents can, and do, produce children-with a clear sense of gender identity. Tr. 9/10/96, pages 106.

29. Dr. Pruett stated the following with respect to raising children in a same-sex marriage environment.

Q. And in comparing same sex parenting with opposite sex parenting, which is more likely to pose greater developmental difficulties for children?

A. In terms of probability, same-sex marriages are more likely to provide a more burdened nurturing domain.

Tr. 9/10/96, page 63.

30. It is Dr. Pruett's opinion that most children are more likely to reach their optimal development being raised in an intact family by their mother and father. According to Dr. Pruett, this family configuration presents the fewest burdens on child development. Tr. 9/10/96, page 63.

31. However, Dr. Pruett also stated that single parents, gay fathers, lesbian mothers and same-sex couples have the potential to, and often do, raise children that are happy, healthy and well-adjusted. Tr. 9/10/96, page 69.

32. Dr. Pruett testified that single parents, gay fathers, lesbian mothers, adoptive parents, foster parents and same-sex couples can be, and do become, good parents. Tr. 9/10/96, page 71. Significantly, Dr. Pruett knows the foregoing to be true based on his clinical experience. Tr. 9/10/96, page 72.

33. More specifically, Dr. Pruett stated that parents' sexual orientation does not disqualify them from being good, fit, loving or successful parents. Tr. 9/10/96, page 72.

34. Dr. Pruett agreed that, in general, gay and lesbian

parents are as fit and loving parents as non-gay persons and couples. Tr. 9/10/96, page 73.

35. Same-sex couples have the same capability as different-sex couples to manifest the qualities conducive to good parenting. Tr. 9/10/96, page 75.

Dr. Pruett testified as follows.

Q. And you've seen same-sex couples that have those qualities [to being good parents]?

A. Yes.

Q. And have made good parents?

A. And have made good parents, yes.

Q. And good parents as a couple?

A. Yes.

Tr. 9/10/96, page 75.

36. Dr. Pruett also agreed that same-sex couples should be allowed to adopt children, provide foster care and to take children in and raise and care for them. Tr. 9/10/96, page 73.

37. Importantly, Dr. Pruett testified that the quality of the nurturing relationship between parent and child could, and would, outweigh any limitation or burden imposed on the child as a result of having same-sex parents. Tr. 9/10/96, page 79.

38. Finally, when questioned regarding research performed by Charlotte Patterson regarding children raised by same-sex couples, Dr. Pruett expressed his agreement with the general conclusions reached by Dr. Patterson. Tr. 9/10/96, pages 132-133.

More specifically, Dr. Pruett agreed with the following conclusions, that gay and lesbian parents "are doing a good job" and that "the kids are turning out just fine." Tr. 9/10/96, pages 133-134.

Dr. Pruett was not surprised by Dr. Patterson's conclusions. In fact, they are what he expected to see, and although Dr. Pruett questions Dr. Patterson's research methodology, he is not aware of any data, research or literature which disputes Dr. Patterson's findings and conclusions. Tr. 9/10/96, pages 132-134.

39. Dr. David Eggebeen is an expert in the field of sociology with a special emphasis in demographics related to family and children.

40. In pertinent part, Dr. Eggebeen testified regarding changes or trends which have occurred in partnering, child bearing and labor force behavior in the United States. For example, Dr. Eggebeen testified regarding the following facts: (1) the marriage rate in the U.S. population has declined over the past twenty years; (2) the median age of marriage for women in the U.S. population has risen over the past twenty years; (3) the annual divorce rate in the U.S. population has increased over the past approximate thirty years; (4) the number of young adults currently cohabiting has increased over the past eight years; (5) the birth rate for women in the U.S. population has decreased over the past twenty years; (6) the number of proportionate births to non-married women in certain racial groups has increased over the past thirty years; and (7) the number of women in the labor force in the U.S. population and the number of working mothers with children under the age of six has increased dramatically over the past thirty years.

41. Based on his studies of the changes referred

above, Dr. Eggebeen testified as follows.

[C]hildren are going through fundamental changes in the structure of childhood and what we're seeing today is children today are living in very different circumstances than was evident or the case in the past. It's common today to find children in single parent families. It's common today to find children in single parent families. It's common today to find children living with a mother who never married. It's common today to find children in remarried families. It's common today to find children in dual earner families where both parents participate in the type of work. It is common or getting common to find children whose parents never married and they're cohabiting.

Tr. 9/11/96, pages 32-33.

42. However, Dr. Eggebeen also testified that, as of 1990, almost six out of ten children in the United States are living in families where their parents are married and both of the parents are biological parents of the child.

43. Dr. Eggebeen explained further that ". . . children have gone through substantial changes in their lives. . . [T]here is greater diversity in living arrangements and family --- in families that children live today in the '90s. However, a substantial percentage of children remain or will spend their childhood in . . . traditional kinds of family structures." Tr. 9/11/96, page 38.

44. Based on his research, Dr. Eggebeen concluded that marriage is a "gateway to becoming a parent," and marriage is synonymous with having children. Tr. 9/11/96, page 42.

45. However, Dr. Eggebeen also testified that individuals get married without intending to have children, or marry and are biologically unable to have children. Further, the absence of the intent or the ability to have children does not weaken the institution of marriage.

In fact, Dr. Eggebeen recognized that people marry and want to get married for reasons other than having children; that those reasons are valuable and important; and that regardless of children, it is beneficial to society for adults to marry. Dr. Eggebeen testified that individuals should not be prohibited from marriage simply because they cannot have children. Tr. 9/11/96, pages 55-57.

46. Dr. Eggebeen testified that children raised in a single parent home are at a "heightened risk", as compared to children raised in a married couple family. Tr. 9/11/96, page 43.

According to Dr. Eggebeen, children in a single parent family are at greater risk for the following: (1) poverty or economic hardship; (2) poor academic performance; (3) behavior problems and conduct disorders; and (4) premarital or teenage birth for girls.

47. Dr. Eggebeen stated that remarriage or cohabiting with a step-parent does not lessen or eliminate the risks to children from single parent families. "[C]hildren in a remarriage

family. . . do not seem to perform any differently than children who remain in single parent families and therefore their performance or the risk of poor outcomes is about the same as is for children in single parent families." Tr. 9/11/96, page 46.

48. Dr. Eggebeen suggested that the lack of improvement in risk factors in remarriage or step-parent families may be attributable to "the role ambiguity of step parent relationships," characteristics which a step-parent brings to the family and which adversely affect the children or the absence of a biological relationship with the children. Tr. 9/11/96, pages 46-48. With respect to the latter, Dr. Eggebeen related the story of Cinderella and her evil stepmother. Tr. 9/11/96, page 48.

49. Dr. Eggebeen equates a same-sex couple with children to a step-parent situation with all of the above-described risk factors. Specifically, Dr. Eggebeen testified that "same-sex marriages where children [are] involved is by definition a step parent relationship," because there is one parent who is not the biological parent of the child. Tr. 9/11/96, pages 49.

50. However, Dr. Eggebeen conceded that there are some situations involving a same-sex couple which would not fit the classic step-parent scenario. For example, a situation involving a same-sex couple that sought and received reproductive assistance and in which the non-biological parent was fully involved from the beginning of the planning process, was present throughout the nine month period and at birth, and thereafter, raised the child as though they were the biological parents of the child. Tr. 9/11/96, pages 114-115.

51. Dr. Eggebeen also testified that single parents, adoptive parents, lesbian mothers, gay fathers and same-sex couples can create stable family environments and raise healthy and well-adjusted children. Tr. 9/11/96, page 82.

52. It is Dr. Eggebeen's opinion that gay and lesbian couples can, and do, make excellent parents and that they are capable of raising a healthy child. Tr. 9/11/96, page 83.

53. Dr. Eggebeen agrees that gay and lesbian parents should be allowed to adopt children and serve as foster parents. Tr. 9/11/96, page 85.

54. Dr. Eggebeen testified that cohabiting same-sex couples are less stable than married couples. However, the sole basis for Dr. Eggebeen's conclusion is a chart taken from the book entitled *American Couples*, co-authored by Pepper Schwartz, Ph.D. The chart which summarizes approximately twenty year old information is Defendant's Exhibit Q, and depicts a comparison of the percentages of married, gay and lesbian couples, respectively, which had stayed together or broken up over periods of time.

Dr. Eggebeen testified that Exhibit Q is the best data that he could find which proves that gay and lesbian couples have substantially higher break up rates over time than married different sex couples. Tr. 9/11/96, -pages 73-74. Dr. Eggebeen admitted that he has done limited research on the subject of same sex couples and gay and lesbian parenting, and agrees that Charlotte Patterson and Pepper Schwartz are experts in the fields. Tr. 9/11/96, pages 131-132.

55. Finally, and importantly, Dr. Eggebeen stated that children of same-sex couples would be helped if their families had access to or were able to receive the following benefits of marriage: (1) state income tax advantages; (2) public assistance;

(3) enforcement of child support, alimony or other support orders; (4) inheritance rights; and (5) the ability to prosecute wrongful death actions. Dr. Eggebeen also agreed that children of same-sex couples would be helped if their families received the social status derived from marriage. Tr. 9/11/96, pages 89-92.

56. Dr. Richard Williams is an expert in the field of psychology with special expertise in qualitative and quantitative research and research methods, statistical analysis and construction of research studies.

57. Dr. Williams was asked by defense counsel to review and analyze studies of children raised by gay and lesbian parents. He reviewed approximately twenty to thirty studies, and eventually selected nine studies to critique.

58. At trial, Dr. Williams presented commentary regarding nine research studies which defense counsel anticipated that Plaintiffs' expert witnesses would rely upon for their testimony and opinions in this case.

Dr. Williams' general criticism of the nine studies included the following: (1) there was non-representative sampling of heterosexual, gay and lesbian parents; (2) inadequate sample size was employed; and (3) comparison groups used in the studies were not comparable in terms of household make up. Dr Williams also presented specific criticism as to each of the nine referenced studies .

59. The testimony of Dr. Williams is not persuasive or believable because of his expressed bias against the social sciences, which include the fields of psychology and sociology.

For example, Dr. Williams believes that a majority of the studies in the social sciences have theoretical or methodological flaws. Tr. 9/12/96, pages 71-72. According to Dr. Williams, modern psychology is so flawed that no fix, reconciliation or overhaul can correct it. Tr. 9/12/96, page 70.

60. Further, even assuming that research studies are conducted properly, Dr. Williams still doubts the ultimate value of psychology and other social sciences. Tr. 9/12/96, page 73.

61. At times, Dr. Williams expressed severe views. For example, Dr. Williams believes that there is no scientific proof that evolution occurred. Tr. 9/12/96, page 80.

62. Finally, Dr. Williams admitted that his critique of studies regarding gay and lesbian parenting is a minority position. Tr. 9/12/96, pages 74-75.

63. Defendant's last witness was Thomas Merrill, Ph.D. Dr. Merrill is an expert in the field of psychology, including the areas of human development, gender development and relationships relative to children and their development.

64. Dr. Merrill is a psychologist in private practice in Honolulu, Hawaii. His clinical experience with families involving one or two gay or lesbian parents is limited. Dr. Merrill has not testified as an expert in Family Court cases which involved the sexual orientation of a parent or a same-sex couple and the custody of a child. He has not participated in or conducted any study which focused on the children of gay and lesbian parents. Tr. 9/13/96, page 36.

65. Dr. Merrill examined the issue of same-sex versus opposite sex parent and child development for the first time as a result of his retention in this case. Tr. 9/13/96, page 35.

66. In pertinent part, Dr. Merrill testified that the

parental relationship is an important learning model for children and that it is significant to have opposite sex parents for a child's learning. Tr. 9/13/96, pages 12-13.

67. Dr. Merrill stated that different-sex parents are important because both parents serve as models and as objects for a child's learning and development. Dr. Merrill explained as follows:

We interact with -- and when I say identify, we measure and develop ourself in relationship to our same gender parent. We also identify our relationship with our opposite sex parents and there are different developmental stages where that relationship with the opposite sex parent is equal to or more important than our development -- our relationship at the moment with the same gender parent.

Tr. 9/13/96, page 13.

68. According to Dr. Merrill, although replacement of a biological parent is certainly possible, as in the case of remarriage and adoption, it would result in the presence of a different influence on the child and the child's developmental outcome may be different. Tr. 9/13/96, pages 20-21.

69. Dr. Merrill testified that same-sex parents do provide a learning experience for a child. However, Dr. Merrill stated that there is insufficient information regarding the effects of being raised by gay or lesbian parents on the development of a child. Tr. 9/13/96, page 22.

As a result, Dr. Merrill has no opinion regarding the development of children in a family with same-sex parents. Specifically, he cannot say whether or not children raised in a same-sex family environment will develop to be healthy, well-adjusted adults. Tr. 9/13/96, page 38.

70. At the close of his direct examination, Dr. Merrill presented the following opinions.

Q. In your opinion, to a reasonable degree of psychological probability, in what family structure are children most likely to reach their optimal development?

A. Children are most apt to reach their optimal level of development as exhibited in terms of their adjustment as adults in a family in which there is a limited amount of strife, a maximum amount of nurturing, a maximum amount of support, a maximum amount of guidance, a maximum amount of leadership, and a very strong and intimate bond between parents and child.

Q. And does the presence of the mother and father improve the likelihood that there will be a strong bond?

A. That would be a significant part of the maximum optimum environment in which to raise a child, yes.

Tr. 9/13/96, pages 32-33.

71. Dr. Merrill testified that the sexual orientation of a parent is not an indication of parental fitness. Tr. 9/13/96, page 46.

72. Dr. Merrill also agreed that gay and lesbian couples with children do have successful relationships. Tr. 9/13/96, page 46.

73. On one occasion, Dr. Merrill was retained by two attorneys to do a custody evaluation in a case involving a same-sex relationship on the mother's side. In part, he was asked to address children's development issues. Dr. Merrill testified that the fact that there was a same-sex relationship on the mother's side was not an issue and did not affect his evaluation in the case. Tr. 9/13/96, page 34.

74. Finally, and in pertinent part, Dr. Merrill testified as follows.

Q. Now, doctor, do you think the children, regardless of whether they have a mother and a father, male-female parents, single parents, adoptive parents, gay and lesbian parents, same gender parents, should have the same opportunity in society to reach their optimum development, each child?

A. Yes, I do.

Tr. 9/13/96, page 45.

Dr. Merrill further stated that children should not be denied benefits, such as health care, education and housing based on the status of their parents. Opposite-sex, same-sex, single and adoptive parent status should not be a basis to deny benefits to children. Tr. 9/13/96, page 46.

V. PLAINTIFFS' WITNESSES

75. Although Plaintiffs do not have the burden of proof in this case, they nevertheless presented testimony from the following expert witnesses: (1) Pepper Schwartz, Ph.D.; (2) Charlotte Patterson, Ph.D.; (3) David Brodzinsky, Ph.D.; and (4) Robert Bidwell, M.D.

76. The court found the testimony of Dr. Schwartz and Dr. Brodzinsky to be especially credible.

Dr. Schwartz and Dr. Brodzinsky are well-qualified individuals. See Plaintiffs' Exhibits 1 and 2, respectively.

At trial, each of them testified in a knowledgeable, informative and straightforward manner worthy of belief. In general, the expert opinions of Dr. Schwartz and Dr. Brodzinsky appear to be well-founded based on their significant research and analysis, and their clinical and professional experience, respectively.

77. Dr. Schwartz is an expert in sociology and interdisciplinary studies of sexuality with a special expertise in gender and human sexuality, marriage and the family, and same-sex relations in parenting and research. She testified, in pertinent part, to the following.

78. Initially, Dr. Schwartz discussed her book, *American Couples*. Dr. Schwartz specifically addressed a chart taken from the book and relied upon by Defendant. According to Dr. Schwartz, the data contained in Defendant's Exhibit Q represents the following: (1) that there is a substantially higher break up rate for all three kinds of couples (gay men, lesbian and cohabitators) than there is for married couples; and (2) married couples have an advantage that keeps them together longer than other kinds of

couples. Tr. 9/16/96, pages 47-48.

79. Dr. Schwartz noted that the data presented in American Couples was collected in the late '70s and up until 1980 or 1981. Since that time, there have been significant changes in society. For example, the entry of AIDS into gay male life and society, has made people more cautious and less likely to have multiple partners and more desirous of settling down. Gay men, in particular, have been hardest hit by the disease and it has made monogomy and couplehood more attractive.

Additionally, there is now a trend in which people contemplate and want to be more serious, to make families and to engage in long-term committed relationships. This is a large change from the attitudes of the late '70s and early '80s. Tr. 9/16/96, page 54-56.

80. Dr. Schwartz testified that heterosexual and homosexual people want to get married. Tr. 9/16/96, pages 58-59, 65. The doctor stated specifically:

[T]hey want companionship, they want love, they want trust, they want someone who will be with them through thick and thin. They're looking for a live and a love partner. . . . [I]n our own [culture] it's an aspiration for --- for intimacy and security. And that is the definition of marriage as people first and primarily think of it."

Tr. 9/16/96, page 59.

81. Dr. Schwartz stated that same-sex couples can, and do, have successful, loving and committed relationships. Tr. 9/16/96, page 129.

82. Dr. Schwartz also identified practical, economic, legal, social and psychological benefits of marriage and reasons for people to marry. Tr. 9/16/96, pages 59-65.

83. Dr. Schwartz testified that the sexual orientation of parents is not an indicator of parental fitness. Tr. 9/16/96, page 128.

84. Dr. Schwartz also testified that gay and lesbian parents and same-sex couples are as fit and loving parents, as non-gay persons and different-sex couples. Tr. 9/16/96, page 127.

85. Dr. Schwartz believes that the primary quality of parenting is not the parenting structure, or biology, but is the nurturing relationship between parent and child. Tr. 9/16/96, page 129.

86. Dr. Schwartz also believes that children should not be denied benefits and protections because of the status of their parents. Tr. 9/16/96, pages 129-130.

87. Dr. Schwartz has the following opinions.

First, there is no reason related to the promotion of the optimal development of children why same-sex couples should not be permitted to marry. Tr. 9/16/96, page 130.

Second, allowing same-sex couples to marry would not have a negative impact on society or the institution of marriage. Dr. Schwartz testified, "[T]here would be no dishonor and no ultimate fragility to the institution [of marriage] by including gays and lesbians." Tr. 9/16/96, pages 130-131. Third, allowing same-sex couples to marry would have a positive impact on society and the institution of marriage. Dr. Schwartz stated the following.

I think that marriage is really a high state of hope and effort for people. I think when we deny it to people we say that --- that there's some other location for love and raising children and that we're not as concerned about these kids' welfare or in some ways we don't think it would be good for them to be in a married home. It's not that those children don't exist, it's not that those families don't exist, they do.

To me, I think that most Americans believe in marriage strongly. I believe by taking other people into the fold and asking that they behave as responsible to their children to give them support to have both rituals to enter into their relationships and legal complications by exiting them, that we shore up how important we think marriage is. I think it --- I think it in no way undermines it and I think it strengthens it by our insistence about how important it is and why we hope this will be available for all families.

Tr. 9/16/96, pages 131-132.

88. Dr. Charlotte Patterson is an expert in the field of psychology of child development with a special expertise in lesbian and gay parenting and the development of children of lesbian and gay parents. She testified, in pertinent part, to the following.

89. Dr. Patterson is a professor at the University of Virginia. She has completed two studies regarding the children of lesbian and gay parents.

90. The first study is known as the Bay Area Family Study. The study involved thirty-seven families, all of which had at least one child between the ages of four and nine. In every case, the children had either been born to women who identified themselves as lesbian at the time of the study, or who adopted children early in life. Data in the Bay Area Family Study was collected in 1990 and 1991.

91. According to Dr. Patterson, the main result of the Bay Area Family Study was a conclusion that the particular group of children, when compared to available norms, appeared to be developing in a normal fashion. Tr. 9/17/96, pages 23-24.

However, Dr. Patterson also noted a finding that the children of the lesbian mothers sample were more likely to express that they felt (within a normal range) symptoms of stress in their lives, as compared to children in the normal sample. The children who described symptoms of stress also said that they felt an overall sense of well-being about themselves in their lives.

Although she has two plausible explanations, Dr. Patterson does not have a definitive interpretation or explanation for the above finding. Tr. 9/17/96, page 25.

Dr. Patterson agreed that the sample group of lesbian mothers in the Bay Area Family Study, when considering ethnic background, education, income, and other socioeconomic factors is not representative of women and all mothers in America. Tr. 9/17/96, pages 81-84.

92. Dr. Patterson's second study is known as the Contemporary Family Study. The study involved eighty families who conceived a child using the resources of the Sperm Bank of California. and all of which had at least one child that was at least five years old at the time of the study. Fifty-five of the families were headed by lesbian mothers. The remaining twenty-five families were headed by heterosexual parents. Most of the data for this study was collected in 1994 and 1995.

93. The three main conclusions of the Contemporary Family Study are as follows: (1) as a group, the children born as a result of donor insemination were developing normally; (2) sexual orientation of the parents was not a good predictor of how well children do in terms of a child's well-being and adjustment; and (3) irrespective of their parents' sexual orientation, children who live in a harmonious family environment had better reports from parents and teachers. Tr. 9/17/96, pages 36-37.

94. Based on her studies and review of other research, Dr. Patterson testified as follows. A biological relationship between parent and child is not essential to raising a healthy child. The quality of parenting which a child receives is more important than a biological connection or the gender of a parent. Tr. 9/17/96, pages 42-43.

95. According to Dr. Patterson, there is no data or research which establishes that gay fathers and lesbian mothers are less capable of being good parents than non-gay people and which supports denying gay people the ability to adopt and raise children. Tr. 9/17/96, page 52.

96. Dr. Patterson believes that gay and lesbian people and same-sex couples are as fit and loving parents as non-gay people and different-sex couples. Further, sexual orientation is not an indicator of parental fitness. Tr. 9/17/96, pages 53-54.

97. Dr. Patterson testified that same-sex couples can, and do, have successful, loving and committed relationships. Tr. 9/17/96, pages 54.

98. Dr. Patterson presented the following opinion. There is no reason related to the promotion of the development of children why same-sex couples should not be permitted to marry. Tr. 9/17/96, page 55.

99. Dr. David Brodzinsky is an expert in the fields of psychology and child development with a special expertise in adoption and other forms of nonbiological parenting and the development of children raised by nonbiological parents.

100. Dr. Brodzinsky counsels children and families in a clinical setting and also has an academic appointment at Rutgers University. In the academic setting, Dr. Brodzinsky does research, teaches, directs a program on counseling foster children and does clinical supervision. He has been at Rutgers University since 1974.

Dr. Brodzinsky serves as a consultant to several adoption

agencies in New Jersey and New York and is a founding director of the Adoption Institute, a newly formed nonprofit organization, whose mission is to provide information and education and promote research regarding adoption and adoption practices. In the past ten to fifteen years, he has conducted research and written extensively on the psychology of adoption, foster care, stress and coping in children.

101. In his clinical practice, Dr. Brodzinsky has worked with gay and lesbian parents. He has provided counseling over the years to approximately forty families headed by same-sex parents and same-sex couples. In pertinent part, Dr. Brodzinsky testified as follows.

102. Dr. Brodzinsky stated the following with respect to the following question: "Are there advantages to being raised by one's biological parents?"

The issue is not the structural variable, biological versus nonbiological, one parent versus two parent. Those are kind of --- they hide, I think, really what is going on. The issue is really the process variables, how children are cared for, is the child provided warmth, is the child provided consistency of care, is the child provided a stimulated environment, is the child given support. Those are the factors we can call, for lack of a better way of saying it, sensitive care-giving which transcend whether you're a single parent, two parent, biological, nonbiological. The research shows that --- that those are the factors that carry the biggest weight. And when you take a look at structural variables, there's not all that much support that structural variable in and of themselves are all that important.

Tr. 9/18/96, page 42.

103. Dr. Brodzinsky noted that same-sex parent adoptions occur and it is his opinion that same-sex parent adoptions should be allowed. Tr. 9/18/96, page 49. Dr. Brodzinsky explained as follows.

Q. As an expert in adoption and as a psychologist, do you believe that gay men and lesbians, same-sex couples, should be continue to be allowed to adopt children?

A. Absolutely.

Q. Why?

A. Because they are able to provide, like heterosexual couples or single parents, warm and loving environments. They're --- they're adopting children now. They're doing a good job of it. Obviously, you know, when we --- when a person seeks to adopt, there is an evaluation. It would be the same kind of an evaluation. We would exclude a gay or lesbian individual for the same reason that we

would exclude a heterosexual individual. That is, if they had a significant emotional problems or some other kind of factor that we felt, as -- as, you know, agency consultants, you know, would not -- would not predict well to a child's well-being.

Tr. 9/18/96, pages 56-57.

104. Dr. Brodzinsky testified that the research shows that same-sex couples and different-sex couples can be highly competent care-givers. The sexual orientation of parents is not an indicator of parental fitness. Tr. 9/18/96, page 50.

105. According to Dr. Brodzinsky, the primary quality of good parenting is not the particular structure of the family or biology, but is the nurturing relationship between parent and child. Tr. 9/18/96, page 63.

106. Dr. Brodzinsky believes that children adopted by same-sex couples are not at any increased risk for behavioral or psychological problems. Tr. 9/18/96, page 50.

107. Dr. Brodzinsky expressed his strong view regarding the issue of whether there is a best family environment to raise children.

Q. Now, the State's arguments seem to suggest that we somehow need to identify a best family for children, or as between mothers and fathers, we have to pick a best parent. What's your position on that?

A. I find that offensive truthfully. I find it offensive because it tends to suggest that there's only one way of being a parent. It excludes all nonbiological parenting which would be adoptive parenting, stepparenting, foster parenting, parenting by gay and lesbians. It suggests that if there are some additional issues that come with some of these nontraditional families that should be reason for excluding rather than taking that information and using it not in a punitive way but in a proactive, kind of supportive way to help families deal with the inevitable issues that come up in life. And there are going to be some unique issues in varying forms of family. But to talk about one form of family that is best, I find that, you know, truthfully offensive and a distortion of the research literature. And that's really why I'm here, you know, to make sure that message comes across.

Tr. 9/18/96, pages 58-59.

108. Finally, it is Dr. Brodzinsky's opinion that there is no reason related to the promotion of the development of children why same-sex couples should not be permitted to marry. Tr. 9/18/96, page 63.

109. Dr. Robert Bidwell is an expert in pediatrics with a subspecialty in adolescent medicine. Dr. Bidwell is the Director of Adolescent Medicine at Kapiolani Medical Center and is also employed at the University of Hawaii Department of Pediatrics with the John A. Burns School of Medicine. Dr. Bidwell teaches medical

students and pediatric residents in training, provides patient care, and practices adolescent medicine and general pediatrics at Kapiolani Medical Center.

110. In his clinical practice, Dr. Bidwell has treated children of same-sex parents. He has provided medical services to hundreds of children with families which included a single gay or lesbian parent or same-sex parents. In pertinent part, Dr. Bidwell testified as follows.

111. Dr. Bidwell described the best environment to raise a healthy, well-adjusted child or adolescent as being one in which "there's all those things that we associate with family, which is love and nurturance and guidance, protection, safety." Tr. 9/19/96, pages 27-28.

112. According to Dr. Bidwell, gay and lesbian parents and same-sex couples can, and do, provide an environment for their children. Tr. 9/19/96, page 29.

113. Dr. Bidwell testified that gay and lesbian parents and same-sex couples raise children that are just as healthy and well-adjusted as those raised by different-sex couples. Tr. 9/19/96, page 38.

114. Dr. Bidwell conceded- that he has worked with adolescents and teen-aged children living in a same-sex family environment that have experienced embarrassment, distress or a "difficult time" because their family "is not the same as the majority of families that surround them." However, the doctor also described the situation as a phase in the child's development. He said the following.

What's been reassuring to me is that -- that this has been a phase in their development, that I do not know of any teenager who has not gotten through this phase intact as a healthy adolescent. And, yes, I think there was pain. I think that there may have been tears from time to time, wishing that things were different. But I think it's -- I mean it's what we call growing up. I mean there are many different kinds of families. And all of our parents are different in some way from what we would like to see. . . .

So I think my experience has been for the same -- has been the same for the children of gay and lesbian parents, is that they may go through a rough time. And not all of them do. Remarkably, most of them, they make their accommodations. They find ways to deal with it. But they get through these periods. And if anything, I think they grow stronger through that experience. They learn about life. They learn about diversity. And the research -- and although I'm not a heavy-duty research person, I do look at the research. The research confirms that --that teenagers get through this period.

But I guess to get back to your question, yes, there is a special experience for these young people, and sometimes it's painful. But

it doesn't do developmental damage to these kids. If anything, it creates strength and promotes growth.

Tr. 9/19/96, pages 30-32.

115. Finally, Dr. Bidwell believes that children of same-sex parents would benefit, with respect to their health, development and adjustment, if their parents were married. Tr. 9/19/96, page 38.

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. See Article IV, Section 1 of the U.S. Constitution (The Full Faith and Credit Clause).

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 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 children 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 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. HRS 603-21.5 and 603-36.

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. *Young Ah Chor v. Dulles*, 270 F.2d 338, 341 (9th Cir., 1959); and *Nani Koolau Co. v. Komo Construction, Inc.*, 5 Haw. App. 137, 139-140, 681 P.2d 580, 584 (1984). 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. *Lee v. Kimura*, 2 Haw. App. 538, 544, 634 P.2d 1043, 1047-1048 (1981).

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." *Baehr*, 74 Haw. 530, 583, 852 P.2d 44, 74 (1993) citing *Naqle v. Board of Education*, 63 Haw. 389, 392, 629 P.2d 109, 111 (1987) and *Holdman v. Olim*, 59 Haw. 346, 349, 581 P.2d 1164, 1167 (1978).

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. *Baehr v. Lewin*, 74 Haw. 530, 557 and 560-561, 852 P.2d 44, 57 (1993).

5. The Department of Health, State of Hawaii, has the exclusive authority to issue licenses to marriage applicants. *Baehr v. Lewin*, 74 Haw. 530, 560, 852 P.2d 44, 59 (1993).

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. *Baehr v. Lewin*, 74 Haw.

530, 572, 852 P.2d 44, 64 (1993).

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. *Baehr v. Lewin*, 74 Haw. 530, 580, 852 P.2d 44, 67 (1993).

10. Defendant, rather than Plaintiffs, carries a heavy burden of justification. *Nachtwey v. Doi*, 59 Haw. 430, 435, 583 P.2d 955, 959 (1978) citing *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16-17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16, 33 (1973).

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 abridgments of constitutional rights. *Baehr v. Lewin*, 74 Haw. 530, 583, 852 P.2d 44, 67 (1993), reconsideration and clarification granted in part, 74 Haw. 645, 646, 852 P.2d 74 (1993).

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. *Baehr v. Lewin*, 74 Haw. 530, 562 n.19, 852 P.2d 44, 59 n.19 (1993).

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 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. *Nachtwey v. Doi*, 59 Haw. 430, 435, 583 P.2d 955, 958 (1978) (citations omitted) (quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16-17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16, 33 (1973)).

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