NINIA **BAEHR,** GENORA DANCEL, TAMMY RODRIGUES, ANTOINETTE PREGIL, PAT LAGON, JOSEPH MELILLO, Plaintiffs-Appellees, vs. LAWRENCE **MIIKE,** in his official capacity as Director of the Department of Health, State of Hawaii, Defendant-Appellant.

NO. 20371

SUPREME COURT OF HAWAI'I

1999 Haw. LEXIS 391

December 9, 1999, Decided

PRIOR HISTORY: [*1] APPEAL FROM THE FINAL JUDGMENT filed on December 11, 1996. FIRST CIRCUIT COURT. CIV. NO. 91-1394-05.

DISPOSITION: Ordered that the judgment of the circuit court be reversed and that the case be remanded for entry of judgment in favor of Miike and against the plaintiffs.

COUNSEL: On the briefs: Charles J. Cooper (of Cooper, Carvin & Rosenthal, PLLC) and Margery S. Bronster (Attorney General of Hawaii), for the defendant-appellant Lawrence Miike.

Daniel R. Foley (of Partington & Foley), Evan Wolfson (of Lambda Legal Defense Fund, Inc.), and Kirk H. Cashmere, for the plaintiffs-appellees Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melillo.

James E.T. Koshiba (of Koshiba Agena & Kubota), for amicus curiae Hawaii's Future Today.

Craig Furusho, for amicus curiae The National Legal Foundation.

Robert K. Matsumoto, Jay Alan Sekulow (of The American Center for Law & Justice), and Marie A. Sheldon, for amici curiae Representative Michael Kahikina, Representative Ezra Kanoho, Representative David Stegmaier, Representative Romy M. Cachola, Representative Felipe Abinsay, Jr., and Representative Gene Ward.

Karen A. Essene, for amicus curiae [*2] The Madison Society of Hawaii.

Berton T. Kato, for amicus curiae National Association for Research and Therapy of Homosexuality, Inc.

Paul Alston and Lea O. Hong (of Alston Hunt Floyd & Ing), for amicus curiae N Mamo O Hawaii.

Sandra Dunn, Steffen N. Johnson (of Mayer, Brown & Platt), and Kimberlee W. Colby, Steven T. McFarland, and Samuel B. Casey (of Christian Legal Society), for amici curiae The Christian Legal Society, Lutheran Church - Missouri Synod, National Association of Evangelicals, The Institute on Religion and Democracy, The Association for Church Renewal, Liberty Counsel, Biblical Witness Fellowship, Episcopalians United, Inc., The Presbyterian Lay Committee, Focus Renewal Ministries in the United Church of Christ, and Good News: A Forum for Scriptural Christianity Within the United Methodist Church.

Michael Livingston (of Davis, Levin, Livingston & Grande) and Mary L. Bonauto and Amelia A. Craig (of Gay & Lesbian Advocates & Defenders), for amici curiae Gay and Lesbian Advocates & Defenders, National Organization for Women, Inc., National Organization for Women Foundation, Inc., NOW Legal Defense and Education Fund, National Center for Lesbian [*3] Rights, Northwest Women's Law Center, People For The American Way, Asian American Legal Defense and Education Fund, and Mexican American Legal Defense and Educational Fund.

Steven H. Aden (of Dold LaBerge & Aden), for amicus curiae The Rutherford Institute.

Richard Kiefer (of Carlsmith Ball Wichman Case & Ichiki), for amici curiae Urie Brofenbrenner, Ph.D., Susan D. Cochran, Ph.D., Anthony R. D'Augelli, Ph.D., Susan E. Golombok, Ph.D., Richard Green, M.D., J.D., Martha Kirkpatrick, M.D., Lawrence A. Kurdek, Ph.D., Letitia Anne Peplau, Ph.D., Ritch C. Savin-Williams, Ph.D., Royce W. Scrivner, Ph.D., and Fiona Tasker, Ph.D.

Frederick W. Rohlfling III and J. Stevens Keali'iwahamana Hoag (of Frederick W. Rohlfling III & Associates), for amicus curiae The Church of Jesus Christ of Latter-Day Saints.

Mary Blaine Johnston, for amicus curiae American Friends Service Committee.

Robert Bruce Graham, Jr. (of Ashford & Wriston), for amicus curiae Hawaii Catholic Conference.

David S. Brustein, for amici curiae Andrew J. Cherlin, Ph.D., Frank F. Furstenberg, Jr., Ph.D., Sara S. McLanahan, Ph.D., Gary D. Sandefur, Ph.D., Lawrence L. Wu, Ph.D.

Ronald V. Grant [*4] (of Dwyer Imanaka Schraff Kudo Meyer & Fujimoto), for amicus curiae Independent Women's Forum.

Paul Alston and William M. Kaneko (of Alston Hunt Floyd & Ing), for amicus curiae Japanese Americans Citizens League of Honolulu.

Robert Bruce Graham, Jr. (of Ashford & Wriston) and L. Steven Grasz (Deputy Attorney General, State of Nebraska), for amici curiae states of Nebraska, Alabama, Colorado, Georgia, Idaho, Michigan, Mississippi, Missouri, South Carolina, and South Dakota.

Chris R. Davis (of Phelps-Chartered) and Robert Bruce Graham (of Ashford & Wriston), for amicus curiae Westboro Baptist Church.

Edward C. Kemper, Sandy S. Ma (of American Civil Liberties Union of Hawaii Foundation), Matthew A. Coles and Jennifer Middleton (of American Civil Liberties Union Foundation), and Leslie G. Fagan and Tobias Barrington Wolff (of Paul, Weiss, Rifkind, Wharton, & Garrison), for amicus curiae American Civil Liberties Union of Hawaii Foundation.

Thomas J. Kuna-Jacob (pro se), amicus curiae.

Robert Bruce Graham, Jr. (of Ashford & Wriston) and David Zweibel (of Agudath Israel of America), for amicus curiae Agudath Israel of America.

OPINION: SUMMARY DISPOSITION [*5] ORDER

Pursuant to Hawaii Rules of Evidence (HRE) Rules 201 and 202 (1993), this court takes judicial notice of the following: On April 29, 1997, both houses of the Hawaii legislature passed, upon final reading, House Bill No. 117 proposing an amendment to the Hawaii Constitution (the marriage amendment). See 1997 House Journal at 922; 1997 Senate Journal at 766. The bill proposed the addition of the following language to article I of the Constitution: "**Section 23.** The legislature shall have the power to reserve marriage to opposite-sex couples." See 1997 Haw. Sess. L. H.B. 117 § 2, at 1247. The marriage amendment was ratified by the electorate in November 1998.

In light of the foregoing, and upon carefully reviewing the record and the briefs and supplemental briefs submitted by the parties and amicus curiae and having given due consideration to the arguments made and the issues raised by the parties, we resolve the defendant-appellant Lawrence Miike's appeal as follows:

On December 11, 1996, the first circuit court entered judgment in favor of plaintiffs-appellees Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melillo (collectively, [*6] "the plaintiffs") and against Miike, ruling (1) that the sex-based classification in Hawaii Revised Statutes (HRS) § 572-1 (1985) was "unconstitutional" by virtue of being "in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution," (2) that Miike, his agents, and any person acting in concert with or by or through Miike were enjoined from denying an application for a marriage license because applicants were of the same sex, and (3) that costs should be awarded against Miike and in favor of the plaintiffs. The circuit court subsequently stayed enforcement of the injunction against Miike.

The passage of the marriage amendment placed HRS § 572-1 on new footing. The marriage amendment validated HRS § 572-1 by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex

couples. Accordingly, whether or not in the past it was violative of the equal protection clause in the foregoing respect, HRS § 572-1 no longer is. n1 In light of the marriage amendment, HRS § 572-1 must be given [*7] full force and effect.

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n1 In this connection, we feel compelled to address two fundamental misapprehensions advanced by Justice Ramil in his concurrence in the result that we reach today. First, Justice Ramil appears to misread the plurality opinion in Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44, reconsideration and clarification granted in part, 76 Haw. 276, 875 P.2d 225 (1993) [hereinafter, "Baehr I"], to stand for the proposition that HRS § 572-1 (1985) defines the legal status of marriage "to include unions between persons of the same sex." Concurrence at 1. Actually, that opinion expressly acknowledged that "rudimentary principles of statutory construction renders manifest the fact that, by its plain language, HRS § 572-1 restricts the marital relation to a male and a female." Baehr I, 74 Haw. at 563, 852 P.2d at 60. Second, because, in his view, HRS § 572-1 limits access to a marriage license on the basis of "sexual orientation," rather than "sex," see concurrence at 1 n.1, Justice Ramil asserts that the plurality opinion in Baehr I mistakenly subjected the statute to strict scrutiny, see id. at 2-3. Notwithstanding the fact that HRS § 572-1 obviously does not forbid a homosexual person from marrying a person of the opposite sex, but assuming arguendo that Justice Ramil is correct that the touchstone of the statute is sexual orientation, rather than sex, it would still have been necessary, prior to the ratification of the marriage amendment, to subject HRS § 572-1 to strict scrutiny in order to assess its constitutionality for purposes of the equal protection clause of article I, section 5 of the Hawaii Constitution. This is so because the framers of the 1978 Hawaii Constitution, sitting as a committee of the whole, expressly declared their intention that a proscription against discrimination based on sexual orientation be subsumed within the clause's prohibition against discrimination based on sex. See Stand. Comm. Rep. No. 69, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 675 (1980). Indeed, citing the foregoing constitutional history, Lewin conceded that very point in his answering brief in Baehr I when he argued that article I, section 6 of the Hawaii Constitution (containing an express right "to privacy") did not protect sexual orientation because it was already protected under article I, section 5. Lewin could hardly have done otherwise, inasmuch as his proposed order granting his motion for judgment on the pleadings in Baehr I contained the statement that "undoubtedly, the delegates [to the convention] meant what they said: Sexual orientation is already covered under Article I, Section 5 of the State Constitution."

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The plaintiffs seek a limited scope of relief in the present lawsuit, i.e., access to applications for marriage licenses and the consequent legally recognized marital status. Inasmuch as HRS § 572-1 is now a valid statute, the relief sought by the plaintiffs is unavailable. The marriage amendment has rendered the plaintiffs' complaint moot.

Therefore,

IT IS HEREBY ORDERED that the judgment of the circuit court be reversed and that the case be remanded for entry of judgment in favor of Miike and against the plaintiffs.

IT IS FURTHER ORDERED that the circuit court shall not enter costs or attorneys' fees against the plaintiffs.

DATED: Honolulu, Hawaii, December 9, 1999.

CONCURBY: RAMIL

CONCUR: CONCURRING OPINION BY RAMIL, J.

I emphatically believe that this court's opinion in Baehr I should be overruled. Given the plain language of HRS § 572-1 n1 and the long-standing definition of marriage, n2 I disagree with the plurality's approach in Baehr I of availing itself of the plain meaning rule of statutory construction to transform the definition of marriage to include unions between persons of the same sex. In so doing, Baehr I placed this court at the center of the heated debate over the very definition of marriage.

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n1 I disagree with the plurality's perfunctory use of the plain meaning rule of statutory construction in Baehr I to construe HRS § 572-1 as classifying on the basis of gender. In my view, the trait on which HRS § 572-1 distinguishes applicants for marriage licenses is not gender, but rather sexual orientation. For example, if a male plaintiff in this case somehow changed his gender to become a woman, but remained homosexual (i.e., lesbian), she would still be disadvantaged by the prohibition on same-sex marriage inasmuch as she would not be permitted to marry another woman. However, if that same male plaintiff somehow changed his homosexual orientation, he would not be disadvantaged by HRS § 572-1 inasmuch as he would be able to marry a female. In short, HRS § 572-1 disadvantages homosexuals, whether male or female, on account of their desire to enter into a marriage relationship with a person of the same sex. [*9]

n2 From time immemorial, "marriage" has been defined as the:

legal union of one man and one woman as husband and wife. . . . Marriage. . . is the legal status, condition or relation of one man and one woman united in law for life, or until divorced, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex.

Black's Law Dictionary 972 (6th ed. 1990) (emphases added). The concept of marriage as a union between a man and a woman remained largely undisturbed and embedded in the collective consciousness of our society until Baehr I.

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In my view, the debate over whether marriage should include unions between persons of the same sex involves a question of pure public policy that should have been left tot he people of this state or their elected representatives. same-sex marriage may or may not, be a worthy idea. I do not, and indeed this court should not, express an opinion in this regard. See Konno v. County of Hawaii, 85 Haw. 61, 77, 937 P.2d 397, 413 (1997). [*10] If same-sex marriage is to be sanctioned by this state, it must be done in accordance with the laws of this state. The effort by the plaintiffs n3 and the plurality in Baehr I to subject to strict scrutiny the restriction of marriage to a man and a woman simply does not find support in our constitution. Indeed, the plurality's departure from the long-held definition of marriage constituted a fundamental paradigm shift of the concept of marriage and amounted to a public policy judgment ordinarily consigned to the people through their elected representatives. n4

See Konno, 85 Haw. at 74, 937 P.2d at 410.

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n3 I note that the plaintiffs, in Baehr I, did not fully brief the issue of gender discrimination in the context of the equal protection clause of the Hawaii Constitution.

n4 Article I, section 5 of the Hawaii Constitution provides in relevant part that "no person shall . . . be denied the equal protection of the laws . . . because of race, religion, sex or ancestry." [Emphasis added.] Based upon this language, the framers contemplated the denial of a person's civil rights as a result of his or her sex (i.e.) gender).

In contrast, with respect to the specific right to marry, the framers of the 1950 Hawaii Constitution did not contemplate the denial of the right to marry on the basis of sex. During the constitutional convention of 1950, the framers of the bill of rights considered a specific provision, section 22, that would have expressly guaranteed the right to marry. See Committee of the Whole Report No. 5 in 1 Proceedings of the Constitutional Convention of Hawaii of 1950, at 304 (1960) (hereafter "Committee of the Whole Report No. 5"). Ironically, the word "sex" was not included in the proposed section 22. Specifically, the proposed draft section provided that "the right to marry shall not be denied or abridged because of race, nationality, creed or religion." See Committee of the Whole Report NO. 5 at 304. In contrast to what eventually became the equal protection

clause, which refers expressly to "sex," the language drafted by the framers with respect to the specific right to marry did not mention "sex." Id. In my view, the fact that the framers refrained specifically from the use of the work "sex" in the context of the specific right to marry indicated that the framers did not even conceive the possibility of same-sex marriage. See Hawaii State AFL-CIO v. Yoshina, 84 Haw. 374, 381, 935 P.2d 89, 96 (1997) ("where [the framers] included)] particular language in the one section of a [constitution provision], but omit[] it in another . . . it is generally presumed that [the framers] act[ed] intentionally and purposefully in the disparate inclusion or exclusion."].

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Surely, the meanings of words undergo continuous evolvement, and we should be mindful that " customs change with an evolving social order." Baehr I, 74 Haw. 530 at 570, 852 P.2d 44 at 63. I am also mindful, however, that our primary task as the final arbiter of the Hawaii Constitution is to determine the intent of the framers and to effectuate that intent. State v. Mallan, 86 Haw. 440, 448 950 P.2d 178, 186 (1998); cf. State v. Dudoit, 90 Haw. 262, 276, 978 P.2d 700, 714 (1999) Ramil, J., dissenting); Robert's Hawaii School Bus v. Laupahoehoe, 91 Haw. 224, 239, 982 P.2d 853, 868 (1999). Because the only unequivocal support in the history of our constitution and society is in favor of restricting marriage to a man and woman, I believe that Bahr I erroneously subjected HRS § 572-1 to strict scrutiny.

The plurality's analysis in Baehr I veered recklessly down the perilous path of interpreting the plain words of our constitution without any consideration to the intent of its framers, thereby establishing misguided precedent for future cases that call for the interpretation of our constitution. Cf. [*12] State v. Richie, 88 Haw. 19, 31, 960 P.2d 1227, 1239 (1998) (statutory provision should be construed in light of precedent, legislative history, and common sense), By invoking the equal protection clause of our constitution to justify a departure from the long-held paradigm of marriage as a union exclusively between a man and a woman, the plurality ignored our foremost obligation to construe our constitution in accordance with the intent of its framers. In the absence of clear support for such a drastic step, it was improper for this court to usurp the people's role by making our own policy decision in favor of same-sex marriage. "The determination of what the law could be or should be is one that is properly left to the people, [who are sovereign,] through their elected legislative representatives." Konno, 85 Haw. at 79, 937 P.2d at 415 (brackets added). As Thomas Jefferson observed long ago: Some men [and women] look at constitutions with sanctimonious reverence, and deem them like the are of the covenant, too sacred to be touched. They ascribe to the men [and woman] of the preceding age a wisdom more than human, and suppose what [*13] they did to be beyond amanded. . . . I am certainly not an advocated for frequent and untried changes laws and constitutions. I think moderate imperfections had better be borne with. . . . But I know also, that laws and institutions must go hand in hand with the progress of the human mind. . . . As new discoveries are made, new truths disclosed, and manners and opinion change with the change of circumstances, institutions must advance also, and keep pace with times. . . . Each generation is as independent of the one preceding, as that

was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believe most promotive of its own happiness.

Thomas Jefferson, Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1816 in Complete Jefferson 291-92 (Padover ed. 1943). Like Thomas Jefferson, "I know of no safe depository of the ultimate powers of the society but people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education." Thomas Jefferson, Letter from Thomas Jefferson to William Charles [*14] Jarvis, Sept. 28, 1820 in 10 Writings of Thomas Jefferson 160 (Ford ed. 1899).

IV. CONCLUSION

For the reasons discussed above, I concur with the result of the majority but disagree that HRS § 572-1 stands on "new footing." Notwithstanding the marriage amendment passed by the electorate, I believe that this court should overrule Baehr I to avoid setting precedent that is inconsistent with the fundamental principles of constitutional interpretation

MARION R. RAMIL, Associate Justice