

NO. 20371

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

NINIA BAEHR, GENORA DANCEL,)	CIV. NO. 91-1394-05
TAMMY RODRIGUES, ANTOINETTE PREGIL,)	APPEAL FROM THE FINAL JUDGMENT
PAT LAGON, JOSEPH MELILLO,)	filed on December 11, 1996
)	
Plaintiffs-Appellees,)	FIRST CIRCUIT COURT
)	
vs.)	
)	
LAWRENCE MIIKE, in his official)	
capacity as Director of the)	
Department of Health, State of Hawaii,)	
)	
Defendant-Appellant.)	
)	
)	

SUMMARY DISPOSITION ORDER

Pursuant to Hawai'i 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 Hawai'i legislature passed, upon final reading, House Bill No. 117 proposing an amendment to the Hawai'i 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, "the plaintiffs") and against Miike, ruling (1) that the sex-based classification in Hawai'i 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 Hawai'i 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 Hawai'i 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.¹ In light of the marriage amendment, HRS § 572-1 must be given full force and effect.

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,

¹ 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, 74 Haw. 650, 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 "[r]udimentary 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 Hawai'i Constitution. This is so because the framers of the 1978 Hawai'i 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 Hawai'i 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 Hawai'i 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 "[u]ndoubtedly, the delegates [to the convention] meant what they said: Sexual orientation [is] already covered under Article I, Section 5 of the State Constitution."

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, Hawai'i, December 9, 1999.

On the briefs:

Charles J. Cooper (of Cooper, Carvin & Rosenthal, PLLC) and Margery S. Bronster (Attorney General of Hawai'i), 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 The Madison Society of Hawai'i

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

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

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

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

Paul Alston and Lea O. Hong (of Alston Hunt Floyd & Ing), for amicus curiae Na Mamo O Hawai'i

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 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

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.

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 (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 Hawai'i 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 Hawai'i 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