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GORDON PARK-LI, Clerk
BY: Cindies Carney
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

COORDINATION PROCEEDING, SPECIAL TITLE [RULE 1550(c)], MARRIAGE CASES	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4365
	FINAL DECISION ON APPLICATIONS FOR WRIT OF MANDATE, MOTIONS FOR SUMMARY JUDGMENT, AND MOTIONS FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

This Judicial Council Coordination Proceeding consists of six coordinated cases.[1] While the cases differ from each other in several respects, all share a common issue: whether Family Code section 300, which provides that a marriage in this state is a union between a man and a woman, and Family Code section 308.5, which provides that only a marriage between a man and a woman is valid or recognized in California, violate California's Constitution.

[1] All of the cases except *Clinton v. State of California* were coordinated under the Order Assigning Coordination Trial Judge, filed June 14, 2004. On September 8, 2004, *Clinton* was coordinated as an add-on case under Rule 1544, California Rules of Court.

For the reasons set forth below, this court concludes that both sections are unconstitutional under the California Constitution.

PROCEDURAL MATTERS

Through various pretrial proceedings, the coordinated cases were organized so that their common issue could be resolved simultaneously. The idea was that such resolution be embodied in an appealable judgment in each case, and thus all cases could proceed together for appellate review. In order to accomplish this, on December 22 and 23, 2004, the following proceedings were held:

1. *Woo v. State of California* (San Francisco Superior Court No. 504038) - Hearing on Application for Writ of Mandate under Code of Civil Procedure section 1094.
2. *City and County of San Francisco v. State of California* (San Francisco Superior Court No. 429539) - Hearing on Application for Writ of Mandate under Code of Civil Procedure section 1094.
3. *Clinton v. State of California* (San Francisco Superior Court No. 429548) - Hearing on Application for Writ of Mandate under Code of Civil Procedure section 1094.
4. *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (San Francisco Superior Court No. 503943) - Hearing on Motion for Summary Judgment under Code of Civil Procedure section 437c and on Motion for Judgment on the Pleadings.
5. *Randy Thomasson v. Gavin Newsom* (San Francisco Superior Court No. 428794) - Hearing on Motion for Summary Judgment under Code of Civil Procedure section 437c and on Motion for Judgment on the Pleadings.

6. *Robin Tyler v. County of Los Angeles* (Los Angeles Superior Court No. 088506) - Hearing on Application for Writ of Mandate under Code of Civil Procedure section 1094.

This decision resolves the constitutional question for each case in its respective procedural context.

ANALYSIS

1. General Constitutional Concepts

The parties advocating same-sex marriage argue that Family Code sections 300 and 308.5 violate the due process, equal protection and privacy provisions of the California Constitution (Cal. Const., art. I § 7, subd. (a), and art. I, § 1). The cases can be resolved upon the equal protection argument.

In analyzing an equal protection challenge to a statute under our state Constitution, the courts have recognized that most legislation creates classifications for one purpose or another, and then differentiates upon the classifications. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913.) This inexorably leads to legislatively conferred advantages or disadvantages based on such classifications. (*Flynt v. California Gambling Control Commission* (2004) 104 Cal.App.4th 1125, 1140.) The power to classify in this manner emanates from the police power under the United States Constitution, which reserves to the states the power to promote the general welfare of their citizens, and from the inherent power of government to provide for the protection, security and benefit of the people. This general police power, however, must be reconciled with the equal protection clause, which provides that no person shall be denied equal

protection under the law. (*Romer v. Evans* (1996) 517 U.S. 620, 633-35; *Board of Supervisors v. Local Agency Formation Com., supra*, 3 Cal.4th at 913.)

The reconciliation of the police power to promote the general welfare with the right of citizens to equal protection under the law is manifested in two tests that depend on the nature of the classification created by the legislation. The first is the basic standard for reviewing economic and social welfare legislation, in which there is a differentiation between classes of individuals but such classifications are not "suspect" or do not implicate fundamental human rights. In such instances, the legislative classifications are presumptively valid and must be upheld so long as there exists a rational relationship between the disparity of treatment and some legitimate governmental purpose. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 17; *Flynt v. California Gambling Control Commission, supra*, 104 Cal.App.4th at 1140.) Under this test, the burden is on the party challenging the legislation to demonstrate the absence of any rational connection to a legitimate state interest. (*D'Amico v. Board of Medical Examiners, supra*, 11 Cal.3d at 17.) This first test is known as the "rational basis test."

The second test is more stringent and is applied in cases where "suspect" classifications or fundamental human rights are implicated in the legislation. Here, the courts adopt "an attitude of active and critical analysis, subjecting the classification to strict scrutiny [citations]. Under this standard, *the state* bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (*D'Amico v. Board of*

Medical Examiners, supra, 11 Cal.3d at 17, original italics.) This second test is known as the "strict scrutiny" test.

The parties dispute both which test applies here and what the result of such application would be. For the reasons set forth below, the strict scrutiny test applies to this case. Further, this court concludes that under either the rational basis test or the strict scrutiny test, Family Code sections 300 and 308.5 fail to meet constitutional muster. Accordingly, in the interest of a full analysis of the issues, each test will be applied.

2. The Rational Basis Test

As is set forth above, the rational basis test places the burden of demonstrating the lack of a rational connection between the challenged legislation and a legitimate state purpose on those who challenge the law. While the courts defer to the legislature, the fact that legislation exists is not sufficient to conclude that the requisite rational basis likewise exists. Instead, under this test, the courts must conduct "a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals" as follows:

> The decisions clearly hold that a legislative classification, such as that involved here, violates the constitutional requirement of equal protection of the law unless it rationally relates to a legitimate state purpose. Neither our cases nor those of the United States Supreme Court have settled on a particular verbal formula to express this proposition. Some decisions require that the classification 'bear some rational relationship to a conceivable legitimate state purpose'[citation]; others, that the classification must rest upon 'some ground of difference having a fair and substantial relation to the object of the legislation.'[citations].

(*Newland v. Board of Governors* (1977) 19 Cal.3d 705, 711.)

Upon these standards, the challengers to Family Code sections 300 and 308.5 have met their burden of demonstrating that those sections do not

rationally relate to a legitimate state purpose. To be sure, the burden here is to demonstrate a negative. Nonetheless, it appears that no rational purpose exists for limiting marriage in this State to opposite-sex partners.

Looking for a rational legitimate state purpose, this court begins with the purposes advanced by the State in its oppositions filed herein. The State offers two purported purposes. The first is that the male/female marriage requirement embodies California's traditional understanding that a marriage is a union between a male and a female. This argument is that opposite-sex marriage is deeply rooted in our state's history, culture and tradition and that the courts should not redefine marriage to be what it has never been before.

In the appropriate contexts, the legislative embodiment of history, culture and tradition is constitutionally permissible. Indeed, examples abound. From such areas as the legislative recognition of traditional holidays (Government Code section 19853) to the requirement that everyone drive on the right side of the road (Vehicle Code section 21650) and the statutory adoption of common law maxims of jurisprudence (Civil Code sections 3509 through 3548), the legislature has often codified history, culture and tradition. In each such instance, however, an underlying rational basis beyond general acceptance by society justifies the law. Hence, legislative determinations of appropriate working conditions recognize generally accepted holidays, the Vehicle Code rules of the road which adopt how people had already been driving prevent highway chaos, and the enactment of well-established common law maxims of jurisprudence provides useful guideposts to fill gaps in codified law.

This is not to say that all legislative adoptions of how things have been are constitutional. The state's protracted denial of equal protection cannot be justified simply because such constitutional violation has become traditional. In *Perez v. Sharp* (1948) 32 Cal.2d 711, California's statutory ban on interracial marriages was challenged as violating the equal protection clause of the United States Constitution. Advocates of the racial ban asserted that because historically and culturally, blacks had not been permitted to marry whites, the statute was justified. This argument was rejected by the Court: "[c]ertainly, the fact alone that the discrimination has been sanctioned by the state for many years does not supply such [constitutional] justification." *Id.* at 727.

To be sure, the Court in *Perez* applied a "compelling state interest" analysis rather than the lesser rational basis test. This difference, however, is of no consequence. Even under the rational basis standard, a statute lacking a reasonable connection to a legitimate state interest cannot acquire such a connection simply by surviving unchallenged over time. As was stated in other contexts "no length of uncritical history or mindless tradition may sanction a procedure when the 'unconstitutionality of the course pursued...has been made clear.' *Erie R.R. Co. v. Tompkins* (1938) 304 U.S. 64, 77-78 [citations]." (*In Re Anderson* (1968) 69 Cal.2d 613, 641.)

Similarly, in *Lawrence v. Texas* (2003) 539 U.S. 558, 577-78, the Court said:

> [T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.

From these authorities, this court concludes that California's traditional limit of marriage to a union between a man and a woman is not a sufficient rational basis to justify Family Code sections 300 and 308.5. Simply put, same-sex marriage cannot be prohibited solely because California has always done so before.

The second argument advanced by the State is a combination of the tradition argument with the assertion that California has granted to same-sex couples virtually all of the rights that marriage entails. Thus, the State asserts, "it is not irrational for California to afford substantially all rights and benefits to same-sex couples while maintaining the common and traditional understanding of marriage."

If the maintenance of opposite-sex only marriage cannot be constitutionally justified due to tradition alone, the creation of a superstructure of marriage-like benefits for same-sex couples is no remedy. The issue is not whether such a system is "irrational." The rational basis test is not an abstract logic exercise whereby the court determines whether the challenged law makes sense. The issue under the rational basis test in this case is whether there is a legitimate governmental purpose for denying same-sex couples the last step in the equation: the right to marriage itself. If this State has decided not to allow same-sex couples to marry, it might be quite reasonable to ameliorate some of their practical concerns in such areas as taxation, health care, inheritance and the like. Such reasonableness does not substitute for the need to find a rational basis for denying same-sex marriage in the first place.

It is true that the marriage-like benefits legislation is relevant to the constitutional question here. In determining whether a rational basis for

a classification exists, the court must consider the nature of the class being singled out and must view the operation of the questioned legislation in the context of other legislation defining the rights of persons similarly situated. (*Brown v. Merlo* (1973) 8 Cal.3d 855, 861-62.)

In this context, the existence of marriage-like rights without marriage actually cuts against the existence of a rational government interest for denying marriage to same-sex couples. California's enactment of rights for same-sex couples belies any argument that the State would have a legitimate interest in denying marriage in order to preclude same-sex couples from acquiring some marital right that might somehow be inappropriate for them to have. No party has argued the existence of such an inappropriate right, and this court cannot think of one. Thus, the State's position that California has granted marriage-like rights to same-sex couples points to the conclusion that there is no rational state interest in denying them the rites of marriage as well.

The idea that marriage-like rights without marriage is adequate smacks of a concept long rejected by the courts: separate but equal. In *Brown v. Board of Education of Topeka, et al.* (1952) 347 U.S. 483, 494, the Court recognized that the provision of separate but equal educational opportunities to racial minorities "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Such logic is equally applicable to the State's structure granting substantial marriage rights but no marriage and is thus a further indication that there is no rational basis for denying marriage to same-sex couples.

As is set forth above, this court is not limited to the justifications offered by the State in determining whether there is a sufficient connection between Family Code sections 300 and 308.5 and some legitimate state interest. The task here is to determine whether such a connection exists. Therefore, this court will look beyond the governmental interests advanced by the State in these cases.

A second potential source for finding a rational basis is legislative history. Family Code Section 300 was enacted in 1992. It replaced former Civil Code section 4100, which prior to 1977 defined marriage as "a personal relation arising out of a civil contract, to which the consent of the parties capable of making it is necessary." A 1977 amendment to section 4100 changed this definition to add that marriage is the union between a man and a woman. Family Code section 308.5 resulted from a referendum called Proposition 22, the Limit on Marriages Initiative, passed by the electorate on March 7, 2000.

At the December 22, 2005 hearing in this matter, this court took judicial notice of legislative history of Family Code section 300 and of voter materials for Proposition 22. The substance of these materials is that the legislature and voters intended to clarify that under existing law, marriage in California was limited to opposite-sex couples. The parties advocating same-sex marriage argue that these materials demonstrate an impermissible discriminatory purpose to Family Code sections 300 and 308.5. The opponents of same-sex marriage assert that these materials demonstrate that the legislature and the voters intended that marriage only be between a man and a woman.

For the purposes of the rational basis test, this legislative history sheds no light on the existence of a legitimate governmental interest for

precluding same-sex marriage. As for Family Code section 300, the legislative materials indicate that a purpose of the 1977 amendment to then Civil Code section 4100 seems to have been to eliminate a perceived ambiguity in the law. Former Civil Code section 56, amended in 1969 as Civil Code section 4101 and more recently replaced as Family Code section 301, in substance provided that an unmarried male over the age of 18 and an unmarried female over the age of 18 could consent to marriage. The legislative history to what is now Family Code section 300 indicates an intention to clarify that each such party capable of consent had to consent to marry a member of the opposite sex rather than of the same sex. Notwithstanding any such perceived ambiguity, marriage in California before Family Code section 300 and the 1977 amendment to former Civil Code section 4100 was limited to opposite-sex couples, and no legislative history provided to this court indicates the existence of a legitimate governmental purpose for that previous limitation. Thus, the legislative history to section 300 is irrelevant to the search for a legitimate governmental purpose for limiting marriage to opposite-sex couples.

Similarly, the background materials to Proposition 22 indicate that its purpose as articulated to the voters was to preclude the recognition in California of same-sex marriages consummated outside of this state. Any such discriminatory purpose, however, does not determine whether there is nonetheless a legitimate governmental interest in limiting marriage in this state to opposite-sex couples.

Thus, the legislative history of Family Code sections 300 and 308.5 does not offer any authority for determining whether there is a legitimate

governmental interest under the rational basis test for precluding same-sex marriage.

Plaintiffs in the Proposition 22 and the Thomasson cases add another possible state purpose for the limitation of marriage to opposite-sex partners. These plaintiffs argue that California courts have long recognized that the purpose of marriage is procreation and that limiting the institution to members of the opposite sex rationally would further that purpose. The cases cited for this proposition, however, do not establish the judicial recognition advocated by plaintiffs.

In *Baker v. Baker* (1859) 13 Cal. 87, the Court held that a man who had married a woman who he did not know was then pregnant by another man could annul the marriage. This case is cited for the proposition that "the first purpose of matrimony, by the laws of nature and society, is procreation. A woman, to be marriageable, must, at the time, be able to bear children to her husband..." (*Id.* at 103.)

The facts and language of the case, however, do not stand for the proposition that one must be capable of producing children in order to marry. The woman in *Baker* had defrauded her husband into the marriage by concealing her condition. The entire paragraph in which plaintiffs' quote appears is:

> It cannot be pretended that the condition of the defendant was not a most material circumstance to the consent required for the validity of the [marriage] contract. Its concealment operated as a fraud on the plaintiff of the gravest character. His contract was with and for her; it referred to no other person, much less included a child of bastard blood. A child imposes burdens and possesses rights. It would necessarily become a charge upon the defendant, and through her upon the plaintiff. It would become a presumptive heir of his estate, and entitled under our law, as against his testamentary disposition, to an interest in his property acquired after marriage, to the deprivation of any legitimate offspring. The assumption of such burdens, and the yielding of such rights, cannot be inferred in the absence of proof of actual knowledge of her condition on his part. Again, the

> first purpose of marriage, by the laws of nature and society, is procreation. A woman, to be marriageable, must, at the time, be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract. A woman who has been pregnant over four months by a stranger, is not at the time in a condition to bear children to her husband, and the representation in this instance was false and fraudulent. The second purpose of matrimony is the promotion of the happiness of the parties by the society of each other, and to its existence, with a man of honor, the purity of the wife is essential. Its absence under such circumstances as necessarily to attract attention must not only tend directly to the destruction of his happiness, but to entail humiliation and degradation upon himself and family. We can conceive no torture more terrible to a right-minded and upright man than a union with a woman whose person has been defiled by a stranger, and the living witness of whose defilement he is legally compelled to recognize as his own offspring, as the bearer of his name and the heir of his estate, and that, too, with the silent, if not expressed, contempt of the community. By no principle of law or justice can any man be held to this humiliating and degrading position, except upon clear proof that he has voluntarily and deliberately subjected himself to it.

(*Baker v. Baker, supra*, 13 Cal. at 103-04.)

From this quote, it is clear that *Baker* stands for the proposition that the concealment of pregnancy by another man is grounds for annulment because, due to the potential legal and emotional consequences of having another man's child born into one's marriage, such concealment precludes the requisite consent to the marriage by the husband. The point of the case is that the parties to the marriage have a right not to be defrauded as to material matters that might affect their decision to marry. Indeed, the last line from the quote that "[b]y no principle of law or justice can any man be held to this humiliating and degrading position, except upon clear proof that he has voluntarily and deliberately subjected himself to it" supports the position that a party can enter into a marriage with someone who cannot produce children so long as that party voluntarily and deliberately does so.

Accordingly, the line in *Baker* regarding the "first purpose of matrimony" no more supports a rational governmental purpose to preclude same-

sex marriage than would the line in the same paragraph that "with a man of honor, the purity of the wife is essential" support a notion that in California, only virgins can marry.

The other California cases cited on this point are to the same effect as *Baker*. In *Vileta v. Vileta* (1942) 53 Cal.App.2d 794, a woman represented to a man that she was capable of bearing children. He married her, then discovered she had lied about being fertile. The court annulled their marriage because "[h]er concealment of her sterility is a fraud that vitiates the marriage contract [citations] and justifies annulment, when the man acts promptly upon his discovery of the fraud." (*Id.* at 796.) Thus it was her fraud, not her sterility, that obviated the marriage. In fact, the court's statement that annulment is justified "when the man acts promptly" shows that an annulment might not be available if the husband's behavior upon discovery indicates that he had accepted the fact of his wife's sterility.

In *Schaub and Security First National Bank of Los Angeles v. Schaub* (1945) 71 Cal.App.2d 467, the court affirmed the annulment of a marriage that had been fraudulently induced. The trial court had found that the defendant had married Schaub solely to gain an interest in his property, and was never intimate with him. Instead, she continued a sexual relationship with her boyfriend in an "open, flagrant and continuous" manner. The case did not deal with the essence of marriage being procreation. Given that the husband was 60 years old at the time of the marriage and he had died during the pendancy of the appeal, the production of children may not have been an issue with him. The issue in the case was the fraudulent nature of the woman's representations before the marriage, which resulted in the annulment of both the marriage and a deed conveying real property to her in joint tenancy.

Sharon v. Sharon (1888) 75 Cal. 1 concerned whether a couple's union under a contract that provided that their relationship would be kept secret for a period of time was a marriage under California law. The union had not been solemnized in a ceremony, but the parties' agreement and their behavior indicated consent to many of the rights and obligations of marriage. The case had nothing to do with the concept of procreation as a purpose of marriage, although the Court did quote from a treatise called *Stewart on Marriage and Divorce* stating that "the procreation of children under the shield and sanction of the law" is a purpose of marriage.[2] (*Id.* at 33.) This quote, being both unrelated to the issues in the case and the words of an obscure treatise rather than those of the Court, is insufficient to establish procreation as a legitimate government purpose for marriage in California.

Hultin v. Taylor (1970) 6 Cal.App.3d 802 was an action to recover money spent by the plaintiff on his former wife's house. The marriage had been annulled in a separate earlier case on the basis that the husband had defrauded his wife before the marriage by falsely telling her he wanted to have children. *Hultin* does not deal with the legal issues of the couple's marriage and only mentions the annulment in passing as one of the facts of the case. *Hultin* cannot support the argument for which plaintiffs cite it.

Finally, the plaintiffs opposing same-sex marriage cite *In Re Marriage of Liu* (1987) 197 Cal.App.3d 143. In this case, the court found that the wife's sole purpose for marrying was to get a "green card" in order to remain

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[2] The correct full title of the Stewart work is *The Law of Marriage and Divorce as Established in England and the United States*. It was published in 1884 and does not appear to have been updated since. The author is David Stewart, who was a lawyer in Baltimore, Maryland. This court found no indication that this treatise has ever been sufficiently accepted as an authority on California law to be relied upon here.

in the United States and that she had no intention of having sexual relations with her husband. The marriage was annulled because the husband's consent had been obtained through fraud. *Id.* at 156. There was no discussion of procreation in the case.

Thus, the cases cited do not establish that California courts have recognized that the purpose of marriage in this state is procreation. Instead, these cases establish that annulment is a remedy for the fraudulent inducement to marry. The facts in these cases also confirm the obvious natural and social reality that one does not have to be married in order to procreate, nor does one have to procreate in order to be married. Thus, no legitimate state interest to justify the preclusion of same-sex marriage can be found in these authorities.

This court is not aware of any other source of a legitimate state interest in precluding same-sex marriage. Since neither the parties' arguments nor any other matter properly available to this court demonstrate such a legitimate state interest, this court concludes that under the rational basis test, Family Code sections 300 and 308.5 violate the equal protection clause of the California Constitution.

3. Strict Scrutiny Test

The second analysis of constitutionality of legislation under the equal protection clause is the strict scrutiny test. It applies where a legislative classification creates a "suspect" class or impinges on a fundamental human right. Both circumstances exist here.

The parties in favor of same-sex marriage assert that the statutory classification created by Family Code sections 300 and 308.5 are based on gender. They argue that the sole reason that a person in California cannot

marry another of the same sex or have an out-of-state same-sex marriage recognized is that each member of the couple is of the same gender. The parties against same-sex marriage assert that the Family Code sections do not discriminate upon gender because the prohibition against same-sex marriage applies equally to both genders, and thus neither gender is segregated for discriminatory treatment.

The idea that California's marriage law does not discriminate upon gender is incorrect. If a person, male or female, wishes to marry, then he or she may do so as long as the intended spouse is of a different gender. It is the gender of the intended spouse that is the sole determining factor. To say that all men and all women are treated the same in that each may not marry someone of the same gender misses the point. The marriage laws establish classifications (same gender vs. opposite gender) and discriminate based on those gender-based classifications. As such, for the purpose of an equal protection analysis, the legislative scheme creates a gender-based classification.

The argument that the marriage limitations are not discriminatory because they are gender neutral is similar to arguments in cases dealing with anti-miscegenation laws. In *Perez v. Sharp, supra,* 32 Cal.2d 711, the Court rejected the argument that anti-miscegenation laws were not invidiously discriminatory because they applied equally to white people and black people in that neither could marry a member of the opposite race. The Court stated "[t]he right to marry is the right of individuals, not of racial groups." (*Id.* at 716.) An identical argument was rejected in *Loving v. Virginia* (1967) 388 U.S. 1, 8: "we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the

classifications from the Fourteenth Amendment's proscription of all individual racial discriminations..."

The State seeks to distinguish *Perez* and *Loving* on this point by arguing that racial neutrality under the anti-miscegenation statutes was superficial at best and that the real purpose of such laws was to maintain white supremacy over black people. In contrast, the State argues, no such patent discrimination exists relative to the marriage laws because California has granted to same-sex couples substantially the same rights as are given in marriage to opposite-sex couples. Thus, the State concludes that the holdings in *Perez* and *Loving* relative to rights being those of the individual and not a group are inapplicable here. The State's argument is to no avail.

Neither *Perez* nor *Loving* uses language to indicate that the protection of equal protection under the law depends on the number of the areas in which it has been denied. Neither case states that the right to marriage is to be determined by considering how many other rights have also been granted or denied. To the contrary, *Perez* makes it crystal clear that equal protection of the law applies to individuals and not to the groups into which such individuals might be classified and that the question to be answered is whether such individual is being denied equal protection because of his/her characteristics. Also, *Loving* expressly states that its holdings apply to any race-based statutory scheme, not just one purportedly seeking to achieve racial supremacy. (*Loving v. Virginia, supra,* 388 U.S. at 11, fn. 11.)

In *McLaughlin v. Florida* (1964) 379 U.S. 184, the Court similarly rejected the argument that a ban on interracial cohabitation which treated all interracial couples the same was not racially discriminatory. The Court held that even though the statute applied equally to whites and blacks, a

court must inquire "whether the classifications drawn in a statute are reasonable in light of its purpose...[or] whether there is an arbitrary or invidious discrimination between those classes covered by...[the statute] and those excluded." (*Id.* at 191.)

Accordingly, this court concludes that Family Code sections 300 and 308.5 create classifications based upon gender.

It is well established that a gender-based classification is a "suspect" classification and thus subject to the strict scrutiny of analysis under the equal protection clause of the California Constitution. (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 564; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17-20.) Since Family Code sections 300 and 308.5 create a gender-based classification, the strict scrutiny test applies here.

In addition to the gender-based classification, the Family Code sections implicate a fundamental human right: the right to marry. The United States Supreme Court and California courts have repeatedly recognized the existence of the right to marry. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." (*Loving v. Virginia, supra,* 388 U.S. at 12.) "Marriage is...something more than a civil contract subject to regulation by the state; it is a fundamental right of free men." *Perez v. Sharp, supra;* 32 Cal.2d at 714. "The right to marry is a fundamental constitutional right." (*In Re Carrafa* (1978) 77 Cal.App.3d 788, 791.)

The opponents of same-sex marriage argue that the fundamental right to marry as recognized in California should be viewed as a right to marry a person of the opposite sex. They assert that a fundamental right to same-sex

marriage has never been recognized in California, hence cannot form a basis for an equal protection analysis. In other words, these opponents advocate that the right to marry must be defined in terms of who one can marry. They suggest that to do otherwise will open a door to such improprieties as brothers marrying their sisters or the marriage of an adult to a child.

This argument misses the manner in which the identification of a fundamental human right relates to a strict scrutiny equal protection analysis. The point is not to define a right so as to make it inexorably inviolate from governmental intrusion. Instead, the exercise is to determine whether a fundamental human right exists and then to determine to what extent, if at all, the government can limit that right. This process is clearly explained in *Perez*. *Perez* identifies the fundamental human right to marriage, then states "[t]here can be no prohibition of marriage except for an important social objective and by reasonable means." (*Perez v. Sharp, supra,* 32 Cal.2d at 714.) Thus, when *Perez* recognizes that "...the essence of the right to marry is freedom to join in marriage with the person of one's choice..." (*id.* at 717), it is not saying that therefore anyone can marry anyone else (e.g. siblings to each other or adults to children), but rather that the starting point is that one can choose who to marry, and that choice cannot be limited by the state unless there is a legitimate governmental reason for doing so:

> In determining whether the public interest requires the prohibition of a marriage between two persons, the state may take into consideration matters of legitimate concern to the state. Thus, disease that might become a peril to the perspective spouse or to the offspring of the marriage could be made a disqualification for marriage...[statutory citation]. Such legislation, however, must be based on tests of the individual, not on arbitrary classifications of groups or races...

Id. at 718.

Likewise, the state can preclude incestuous marriages (Family Code section 2200) as well as establish a minimum age for effective consent to marriage (Family Code section 301) because such limitations on the fundamental right to marry would further an important social objective by reasonable means and do not discriminate based on arbitrary classifications. Thus, the parade of horrible social ills envisioned by the opponents of same-sex marriage is not a necessary result from recognizing that there is a fundamental right to choose who one wants to marry.

Accordingly, this court finds that the strict scrutiny test applies to this case because Family Code sections 300 and 308.5 implicate the basic human right to marry a person of one's choice.

As is set forth above, the strict scrutiny test places on the State the burden of establishing a compelling interest which justifies the limitation of marriage in California to opposite-sex couples and that the distinctions drawn by the law are necessary to further such purpose.

In its rational basis analysis, this court has determined that the State's two rationales (tradition and tradition plus marriage rights without marriage) do not constitute a legitimate governmental interest for the limitation of marriage to opposite-sex couples. It is axiomatic that such rationales could not therefore constitute a compelling state interest. The same must be said for the various other potential interests analyzed by this court under the rational basis test, although it is noted that under the strict scrutiny test, the burden is on the State to demonstrate the compelling governmental interest. Be that as it may, for the reasons set forth above, the other arguments do not constitute legitimate governmental interests, let alone compelling governmental interests.

This court is aware that several states have interpreted the constitutionality of their opposite-sex only marriage laws under due process standards. Some courts have concluded that their state's marriage laws can be

seen as rationally related to a legitimate governmental interest in procreation. In addition, the plaintiffs in the Proposition 22 and Thomasson cases here have argued that California's preclusion of same-sex marriage is related to a state interest in procreation.

While this court has concluded that there is no sufficient basis for finding that any governmental purpose of fostering procreation underlies Family Code sections 300 and 308.5, the possibility that others in this State might conclude otherwise renders it appropriate to analyze such a potential interest under the strict scrutiny test.

One component of the strict scrutiny test inexorably leads to the conclusion that even if the encouragement of procreation were to be seen to be a rational basis for our marriage laws and even if it appeared that such interest is compelling, this rationale still fails to satisfy constitutional equal protection standards. Even where a compelling state interest exists, the State must also demonstrate that the distinctions drawn by the law are not arbitrary but instead are *necessary* to further its purpose. Under this element, California's opposite-sex only marriage law fails to satisfy the strict scrutiny test.

Under our present opposite-sex only law, marriage is available to heterosexual couples regardless of whether they can or want to procreate. As long as they choose an opposite-sex mate, persons beyond child-bearing age, infertile persons, and those who choose not to have children may marry in California. Persons in each category are allowed to marry even though they do not satisfy any perceived legitimate compelling governmental interest in procreation. Another classification of persons, same-sex couples, also do not satisfy any such perceived interest, yet unlike the other similarly situated classifications of non-child bearers, same-sex couples are singled out to be

denied marriage.[3]

Given this situation, one cannot conclude that singling out the same-sex couple classification of non-child bearers from other classifications of non-child bearers is necessary to any perceived governmental interest in allowing marriage in order to further procreation. On this point, the advocates of opposite-sex only marriage have failed to offer any explanation whatsoever for such disparate treatment of similarly situated classifications, let alone satisfy their burden of proof thereon under the strict scrutiny test. Thus, the denial of marriage to same-sex couples appears impermissibly arbitrary.

Accordingly, this court concludes that under the strict scrutiny test, Family Code sections 300 and 308.5 violate the equal protection clause of the California Constitution.

Upon this conclusion and upon the result reached applying the rational basis test, this court need not resolve any of the other constitutional questions raised by the parties.

CONCLUSION

Upon the foregoing, the following dispositions will be made in the various cases:

1. Woo v. State of California - Judgment declaring Family Code sections 300 and 308.5 unconstitutional under the California Constitution shall be entered and an appropriate Writ of Mandate shall be issued. Counsel for the Petitioners shall meet and confer with opposing counsel and prepare and submit appropriate papers.

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[3] To be precise, same-sex couples can cause procreation. A female capable of producing children can be married to another female and become pregnant through various methods, then produce and raise the child in her same-sex union. Similarly, a same-sex male couple could cause a female to become pregnant, directly or otherwise, and later adopt and raise the child.

2. *City and County of San Francisco v. State of California* - Judgment declaring Family Code sections 300 and 308.5 unconstitutional under the California Constitution shall be entered and an appropriate Writ of Mandate shall be issued. Counsel for the Petitioners shall meet and confer with opposing counsel and prepare and submit appropriate papers.

3. *Clinton v. State of California* - Judgment declaring Family Code sections 300 and 308.5 unconstitutional under the California Constitution shall be entered and an appropriate Writ of Mandate shall be issued. Counsel for the Petitioners shall meet and confer with opposing counsel and prepare and submit appropriate papers.

Further, Petitioner Clinton has requested that this court make five findings of fact, which this court believes are neither findings of fact nor appropriate in light of this decision. Accordingly, the request for such findings is denied.

4. *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* - The plaintiff's Motion for Summary Judgment requested that this court determine whether as a matter of law the subject Family Code sections violate the California Constitution. The position taken by the moving party was that such statutes do not violate California's Constitution. This Final Decision makes the constitutional determination requested by the motion but does not reach the conclusion advocated by the moving party. No counter-motion for summary judgment was filed. Therefore, procedurally this court has granted the plaintiff's request that the legal determination regarding the Family Code sections be made but reached the opposite result from that argued by the plaintiffs, thus making it inexorable that judgment in favor of the defendants be entered. Accordingly, judgment shall enter in

favor of the defendants and against the plaintiffs and declaring that Family Code sections 300 and 308.5 violate the California Constitution.

In the alternative, the City and County of San Francisco moved for Judgment on the Pleadings upon the argument that in the event that this court finds that Family Code sections 300 and 308.5 violate the California Constitution, then as a matter of law judgment should be entered against the plaintiff in this case declaring that Family Code sections 300 and 308.5 are unconstitutional. Said motion is granted.

Further, this court can on its own motion grant a judgment on the pleadings. Code of Civil Procedure section 438(b)(2). The determinations of this Final Decision justify this court ordering that Judgment on the Pleadings against the plaintiff and in favor of defendants declaring that Family Code sections 300 and 308.5 violate the California Constitution be entered. It is so ordered.

5. *Randy Thomasson v. Gavin Newsom* - The plaintiffs' Motion for Summary Judgment requested that this court determine whether as a matter of law the subject Family Code sections violate the California Constitution. The position taken by the moving parties was that such statutes do not violate the California Constitution. This Final Decision makes the constitutional determination requested by the motion but does not reach the conclusion advocated by the moving parties. No counter-motion for summary judgment was filed. Therefore, procedurally this court has granted the plaintiffs' request that the legal determination regarding the Family Code sections be made but reached the opposite result from that argued by the plaintiffs, thus making it inexorable that judgment in favor of the defendants be entered. Accordingly, judgment shall enter in favor of the defendants and against the

plaintiffs and declaring that Family Code sections 300 and 308.5 violate the California Constitution.

In the alternative, the defendants moved for Judgment on the Pleadings upon the argument that in the event that this court finds that Family Code sections 300 and 308.5 violate the California Constitution, then as a matter of law judgment should be entered against the plaintiffs in this case declaring that Family Code sections 300 and 308.5 are unconstitutional. Said motion is granted.

Further, this court can on its own motion grant a judgment on the pleadings. Code of Civil Procedure section 438(b)(2). The determinations of this Final Decision justify this court ordering that Judgment on the Pleadings against the plaintiffs and in favor of defendants declaring that Family Code sections 300 and 308.5 violate the California Constitution be entered. It is so ordered.

6. *Robin Tyler v. County of Los Angeles* - Judgment declaring Family Code sections 300 and 308.5 unconstitutional under the California Constitution shall be entered and an appropriate Writ of Mandate shall be issued. Counsel for the Petitioners shall meet and confer with opposing counsel and prepare and submit appropriate papers.

Dated: April 13, 2005

Richard A. Kramer
Judge of the Superior Court

Superior Court of California
County of San Francisco

Coordination Proceeding
Special Title (Rule 1550(b))

MARRIAGE CASES

Judicial Council Coordination
Proceeding No. 4365

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, Andrea Carney, a Deputy Clerk of the Superior Court of the City and County of San Francisco, certify that I am not a party to the within action.

On April 13, 2005 I served the attached FINAL DECISION ON APPLICATIONS FOR WRIT OF MANDATE, MOTIONS FOR SUMMARY JUDGMENT, AND MOTIONS FOR JUDGMENT ON THE PLEADINGS by placing a copy thereof in a sealed envelope, addressed as follows:

Philip A. Leider, Deputy
Kathleen S. Morris, Deputy
Yvonne R. Mere, Deputy
OFFICE OF THE CITY ATTORNEY
1390 Market Street, Sixth Floor
San Francisco, CA 94102

Robert Wilson, Deputy Attorney General
Department of Justice
Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013

Christopher E. Krueger,
Deputy Attorney General
Office of the Attorney General
1300 I Street, Suite 125
Sacramento, CA 95814

[redacted]

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Appellate & Trial Court Judicial
Services (Civil Case Coordination0
455 Golden Gate Avenue
San Francisco, CA 94102-3688

Louis Maro, Deputy
Christopher E. Krueger, Deputy
STATE OF CALIFORNIA
ATTORNEY GENERAL'S OFFICE
1300 I Street
P.O. Box 944255
Sacramento, CA 94244

Terry L. Thompson
ATTORNEY AT LAW
P.O. Box 1346
Alamo, CA 94507

Bobbie J. Wilson
HOWARD RICE NEMEROVSKI CANADY, et al.
Three Embarcadero Center, Seventh Floor
San Francisco, CA 94111-4065

Dennis J. Herrera, City Attorney
OFFICE OF THE CITY ATTORNEY
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682

Therese M. Stewart, Chief Deputy
Sherri Sokeland Kaiser, Deputy
OFFICE OF THE CITY ATTORNEY
1 Dr. Carlton B. Goodlett Place, Room 234
San Francisco, CA 94102

Robert H. Tyler
ALLIANCE DEFENSE FUND
38760 Sky Canyon Drive, Suite B
Murrieta CA 92563

Rena M. Lindevaldsen
LIBERTY COUNSEL
P.O. Box 540074
Orlando, FL 32854

Courtney Joslin
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 570
San Francisco, CA 94102

John Steven West
Gloria Allred
ALLRED, MAROKO & GOLDBERG
6300 Wilshire Boulevard, Suite 1500
Los Angeles, CA 90048

Waukeen Q. McCoy
THE LAW OFFICES OF WAUKEEN Q. MCCOY
703 Market Street, Suite 1407
San Francisco, CA 94103

Glen E. Lavy
Byron . Babione
Benjamin W. Bull
Dale Schowengerdt
ALLIANCE DEFENSE FUND
15333 N. Pima Road, Suite 165
Scottsdale, Arizona 85260

Judy W. Whitehurst, Senior Deputy
OFFICE OF THE COUNTY COUNSEL
County of Los Angeles
500 West Temple Street
Los Angeles, CA 90012-2932

Courtney Joslin
Shannon Minter
Lena Ayoub
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 570
San Francisco, CA 94102

Jon W. Davidson
Jennifer C. Pizer
LAMBDA LEGAL
3325 Wilshire Boulevard, Suite 1300
Los Angeles, CA 90010-1729

David C. Codell
ATTORNEY AT LAW
9200 Sunset Boulevard
Penthouse Two
Los Angeles, CA 90069

Christine P. Sun
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
1663 Mission Street, Suite 460
San Francisco, CA 94103

I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: April 13, 2005

GORDON PARK LI, Clerk

By: Andrea Carney
Andrea Carney, Deputy Clerk