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Supreme Court of Hawai'i.

Ninia BAEHR, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, Joseph Melillo, Plaintiffs–Appellees,
v.
Lawrence MIIKE, in his official capacity as Director of the Department of Health, State of Hawaii, Defendant–Appellant.

No. 20371.
|
Dec. 9, 1999.

Civ. No. 91–1394–05, Appeal from the Final Judgment.

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SUMMARY DISPOSITION ORDER

***1** 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 1 of the Constitution: "**Section 23.** The legislature shall have the power to reserve marriage to opposite-sex couples." *See* 1997 flaw. 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 § 512–1 no longer is.[1] In light of the marriage amendment, HRS § 572–1 must be given full force and effect.

The plaintiffs seeks 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.

Concurring Opinion by RAMIL, J.

***2** I emphatically believe that this court's opinion in Baehr I should be overruled. Given the plain language of HRS § 572–1[1] and the long-standing definition of marriage,[2] 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.

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 to the 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 Hawai'i,* 85 Hawai'i 61, 77, 937 P.2d 397, 413 (1997). 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[3] 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.[4]

See Konno, 35 Hawai'i at 74, 937 P.2d at 410.

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. at 570, 852 P.2d at 63. I am also mindful, however, that our primary task as the final arbiter, of the Hawai'i Constitution is to determine the intent of the framers and to effectuate that intent. *State v. Mallan,* 36 Haw. 440, 448, 950 P.2d 176, 186 (1998); *of State v. Dudoit,* 90 Hawai'i 252, 276, 973 P.2d 700, 714 (1999) (Ramil, J., dissenting); *Robert's Hawaii School Bus v. Laupahoehoe,* 91 Hawai'i 224, 239, 932 P.2d 853, 863 (1999). Because the only unequivocal support in the history of our constitution and society is in favor of restricting marriage to a man and a woman, I believe that Baehr I erroneously subjected HRS § 572–1 to strict scrutiny.

The plurality's analysis in Baehr I veered recklessly down the perilous path o£ 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. State v. Richie,* 83 Hawai'i 19, 31, 960 P.2d 1227, 1239 (1998) (statutory provisions 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 Hawai'i at 79, 937 P.2d at 415 (brackets added). As Thomas Jefferson, observed long ago:

> ***3** Some men [and women] look at constitutions with sanctimonious reverence, and deem them like they are of the covenant, too sacred to be touched. They ascribe Id the men [and women] of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment.... I am certainly not an advocate for frequent and untried changes in

> laws and constitution. 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.... [A]s new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the 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 (Padovor ed.1943). Like Thomas Jefferson, "I know of no safe depository of the ultimate powers of the society but the 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 Jarvis, Sept. 29, 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 fooling." 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.

All Citations

Not Reported in P.3d, 1999 WL 35643448

Footnotes

[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, B52 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 3–3, 852 P.2d 44. 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. 59, 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 [i]s already covered under Article I, Section 5 of the State Constitution."

[1] 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 became 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.

[2] From time immemorial, "marriage" has been defined as the:

> [l]egal 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.

[3] 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 Hawai'i Constitution.

[4] Article I, section 5 of the Hawai'i Constitution provides in relevant part that "[n]o 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 1350 Hawai'i Constitution did not contemplate the denial of the light 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 Hawai'i of 1350, 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 "[t]he 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 word "sex" in the context of the specific right to marry indicates that the framers did not even conceive the possibility of same-sex marriage. *See Hawai'i State*

AFL–CIO v. Yoshina, 84 Hawai'i 374, 301, 935 P.2d 89, 96 [1997] ("where [the framers include]) particular language in one section of a (constitutional provision), but omit[ ] it in another ... it is generally presumed that [the framers] act[ed] intentionally and purposefully in the disparate inclusion or exclusion."].