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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
	TENTATIVE DECISION ON APPLICATIONS FOR WRIT OF MANDATE AND MOTIONS FOR SUMMARY JUDGMENT

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/Martin 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.
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.

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 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.

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

7 2. <u>The Rational Basis Test</u>

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

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

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

23 Upon these standards, the challengers to Family Code sections 300 and
24 308.5 have met their burden of demonstrating that those sections do not
25 rationally relate to a legitimate state purpose. To be sure, the burden here

1 is to demonstrate a negative. Nonetheless, it appears that no rational
2 purpose exists for limiting marriage in this State to opposite-sex partners.
3 Looking for a rational legitimate state purpose, this court begins with
4 the purposes advanced by the State in its oppositions filed herein. The State
5 offers two purported purposes. The first is that the male/female marriage
6 requirement embodies California's traditional understanding that a marriage
7 is a union between a male and a female. This argument is that opposite-sex
8 marriage is deeply rooted in our state's history, culture and tradition and
9 that the courts should not redefine marriage to be what it has never been
10 before.
11 In the appropriate contexts, the legislative embodiment of history,
12 culture and tradition is constitutionally permissible. Indeed, examples
13 abound. From such areas as the legislative recognition of traditional
14 holidays (Government Code section 19853) to the requirement that everyone
15 drive on the right side of the road (Vehicle Code section 21650) and the
16 statutory adoption of common law maxims of jurisprudence (Civil Code sections
17 3509 through 3548), the legislature has often codified history, culture and
18 tradition. In each such instance, however, an underlying rational basis
19 beyond general acceptance by society justifies the law. Hence, legislative
20 determinations of appropriate working conditions recognize generally accepted
21 holidays, the Vehicle Code rules of the road which adopt how people had
22 already been driving prevent highway chaos, and the enactment of well-
23 established common law maxims of jurisprudence provides useful guideposts to
24 fill gaps in codified law.
25 This is not to say that all legislative adoptions of how things have
been are constitutional. The state's protracted denial of equal protection

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

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

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

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

24 From these authorities, this court concludes that California's
25 traditional limit of marriage to a union between a man and a woman is not a

1 sufficient rational basis to justify Family Code sections 303 and 308.5.
2 Simply put, same-sex marriage cannot be prohibited solely because California
3 has always done so before.

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

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

23 It is true that the marriage-like benefits legislation is relevant to
24 the constitutional question here. In determining whether a rational basis for
25 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

1 law. Former Civil Code section 56, amended in 1969 as Civil Code section 4101
2 and more recently replaced as Family Code section 301, in substance provided
3 that an unmarried male over the age of 18 and an unmarried female over the
4 age of 18 could consent to marriage. The legislative history to what is now
5 Family Code section 300 indicates an intention to clarify that each such
6 party capable of consent had to consent to marry a member of the opposite sex
7 rather than of the same sex. Notwithstanding any such perceived ambiguity,
8 marriage in California before Family Code section 300 and the 1977 amendment
9 to former Civil Code section 4100 was limited to opposite-sex couples, and no
10 legislative history provided to this court indicates the existence of a
11 legitimate governmental purpose for that previous limitation. Thus, the
12 legislative history to section 300 is irrelevant to the search for a
13 legitimate governmental purpose for limiting marriage to opposite-sex
14 couples.

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

21 Thus, the legislative history of Family Code sections 300 and 308.5
22 does not offer any authority for determining whether there is a legitimate
23 governmental interest under the rational basis test for precluding same-sex
24 marriage.

25 Plaintiffs in the Proposition 22 and the Thomasson cases add another
possible state purpose for the limitation of marriage to opposite-sex

1 partners. These plaintiffs argue that California courts have long recognized
2 that the purpose of marriage is procreation and that limiting the institution
3 to members of the opposite sex rationally would further that purpose. The
4 cases cited for this proposition, however, do not establish the judicial
5 recognition advocated by plaintiffs.

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

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

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> 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 by plaintiffs 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, plaintiffs 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 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.

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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.

Thus, the cases cited by the plaintiffs 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 plaintiffs' 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 plaintiffs' cases.

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

1 applies equally to both genders, and thus neither gender is segregated for
2 discriminatory treatment.
3 The idea that California's marriage law does not discriminate upon
4 gender is incorrect. If a person, male or female, wishes to marry, then he or
5 she may do so as long as the intended spouse is of a different gender. It is
6 the gender of the intended spouse that is the sole determining factor. To say
7 that all men and all women are treated the same in that each may not marry
8 someone of the same gender misses the point. The marriage laws establish
9 classifications (same gender vs. opposite gender) and discriminate based on
10 those gender-based classifications. As such, for the purpose of an equal
11 protection analysis, the legislative scheme creates a gender-based
12 classification.
13 The argument that the marriage limitations are not discriminatory
14 because they are gender neutral is similar to arguments in cases dealing with
15 anti-miscegenation laws. In *Perez v. Sharp, supra,* 32 Cal.2d 711, the Court
16 rejected the argument that anti-miscegenation laws were not invidiously
17 discriminatory because they applied equally to white people and black people
18 in that neither could marry a member of the opposite race. The Court stated
19 "[t]he right to marry is the right of individuals, not of racial groups."
20 (*Id.* at 716.) An identical argument was rejected in *Loving v. Virginia* (1967)
21 388 U.S. 1, 8: "we reject the notion that the mere 'equal application' of a
22 statute containing racial classifications is enough to remove the
23 classifications from the Fourteenth Amendment's proscription of all
24 individual racial discriminations..."
25 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

1 cases here have argued that California's preclusion of same-sex marriage is
2 related to a state interest in procreation.

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

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

17 Under our present opposite-sex only law, marriage is available to
18 heterosexual couples regardless of whether they can or want to procreate. As
19 long as they choose an opposite-sex mate, persons beyond child-bearing age,
20 infertile persons, and those who choose not to have children may marry in
21 California. Persons in each category are allowed to marry even though they do
22 not satisfy any perceived legitimate compelling governmental interest in
23 procreation. Another classification of persons, same-sex couples, also do not
24 satisfy any such perceived interest, yet unlike the other similarly situated
25 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 based upon the rational basis test, it need not resolve any of the other constitutional questions raised by the parties.

FURTHER PROCEEDINGS

A. <u>Case Specific</u>

The following sets forth the status of the individual consolidated cases in light of this decision and the further proceedings for each:

1. *Woo/Martin v. State of California* - The parties have agreed that this ruling obviates any other claims or causes of action set forth in their petition/complaint and that no factual findings need to be made. Thus, all that remains to be done in this case is to prepare an appropriate Writ of Mandate and judgment of dismissal or other disposition of the remaining

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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.

matters. Counsel for the Petitioners shall meet and confer with opposing counsel and prepare and submit appropriate papers as set forth below.

2. *City and County of San Francisco v. State of California* - The Respondent State of California has agreed that this ruling obviates any other claims or causes of action set forth in the petition/complaint. The Petitioner City and County of San Francisco has stated that "if the Court considers and decides the four constitutional challenges the City has raised to the sex restriction in the California marriage statutes when it rules on the writ, then the declaratory relief claim will be moot. If on the other hand, the Court does not reach some or all of the constitutional issues (perhaps for procedural reason), then the declaratory relief claim may remain to be resolved through additional proceedings."

As in the Woo/Martin case, it is necessary to prepare an appropriate Writ of Mandate. Counsel for the City shall meet and confer with opposing counsel and prepare and submit appropriate papers as set forth below.

As for any remaining issues that the City believes must still be resolved in light of this decision, counsel for the City shall submit a memorandum as set forth below specifying the precise remaining issue or issues and provide authorities as to why the City is entitled to a resolution thereof in light of this decision.

3. *Clinton v. State of California* - The parties have agreed that this ruling obviates any other claims or causes of action set forth in their petition/complaint, except Petitioner Clinton has asserted that this court must also determine whether "regardless of the constitutionality of the California Marriage Laws, plaintiffs should be considered putative spouses under Family Code Section 2251." The transcript of the hearing on December

22, 2004, however, indicates that counsel for Petitioner Clinton may believe that such determination is not necessary in light of this decision. Counsel for Petitioner Clinton shall file a statement as to whether he believes such determination is necessary and, if so, a proposal for how and when such question be resolved.

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 Motion for summary judgment requested that this court determine whether as a matter of law the subject Family Code sections violate California's Constitution. This decision in its final form shall constitute both the order granting such motion for summary judgment and the legal determination requested. It will thus resolve all remaining issues in this case. Counsel for the defendant shall prepare a proposed form of Judgment as set forth below.

The City has filed substantial objections to evidence originally submitted in support of the motion for summary judgment. The moving party, however, agreed that the motion presented a pure question of law and that the submitted evidence should not be considered by this court. The court did not consider any such evidence. Hence the City's request that the court rule on its objections thereto is denied as moot.

5. *Randy Thomasson v. Gavin Newsom* – The Motion for Summary Judgment requested that this court determine whether as a matter of law the subject Family Code sections violate California's Constitution. This decision in its

final form shall constitute both the order granting such motion for summary judgment and the legal determination requested. It will thus resolve all remaining issues in this case. Counsel for the defendant shall prepare a proposed form of Judgment as set forth below.

The City has filed substantial objections to evidence originally submitted in support of the motion for summary judgment. The moving party, however, agreed that the motion presented a pure question of law and that the submitted evidence should not be considered by this court. The court did not consider any such evidence. Hence the City's request that the court rule on its objections thereto is denied as moot.

6. *Robin Tyler v. County of Los Angeles* - This court believes that the parties have agreed that this ruling obviates any other claims or causes of action set forth in the petition/complaint. Thus, all that remains to be done in this case is to prepare an appropriate Writ of Mandate and dismissal or other disposition of the remaining matters in this case. Counsel for the Petitioners shall meet and confer with opposing counsel and prepare and submit appropriate papers as set forth below.

2. Consolidated Further Proceedings

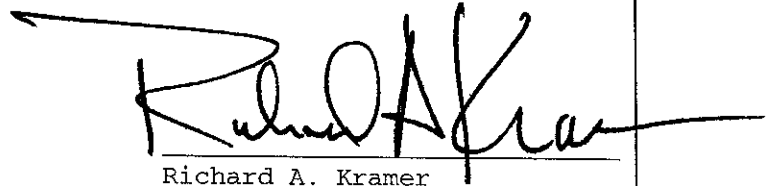
On or before March 25, 2005, parties shall file proposed revisions to this Tentative Decision. Such proposed revisions shall not reargue the substance of the matters decided but rather shall be limited to drafting and other similar matters.

All other filings ordered above shall be filed on or before March 28, 2005.

All papers to be filed under this decision shall be served on all counsel for parties in each of the coordinated actions and conformed courtesy

copies thereof shall be delivered on the date of filing to Department 304 of this court.

The coordinated actions are set for a further case management conference at 1:30 p.m. on March 30, 2005. All items set forth above as further proceedings shall be taken up at that conference.



Dated: March 14, 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, Jose Rios Merida, 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 March 14, 2005 I served the attached TENTATIVE DECISION ON APPLICATIONS FOR WRIT OF MANDATE AND MOTIONS FOR SUMMARY JUDGMENT by placing a copy thereof in a sealed envelope, addressed as follows:

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Yvonne R. Mere, Deputy
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Sacramento, CA 95814
By mail and by fax to (916) 324-5567

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Appellate & Trial Court Judicial
Services (Civil Case Coordination0
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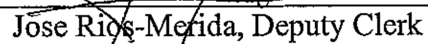
San Francisco, CA 94103

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: March 14, 2004

GORDON PARK LI, Clerk

By: 
Jose Rios-Merida, Deputy Clerk