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ENDORSED  
FILED  
San Francisco County Superior Court

MAR 14 2005

GORDON PARK-LI, Clerk  
BY: JOSE RIOS MERIDA  
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

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

INTRODUCTION

This Judicial Council Coordination Proceeding consists of six coordinated cases.<sup>1</sup> 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.

<sup>1</sup> 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.

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

3 PROCEDURAL MATTERS

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

- 10 1. *Woo/Martin v. State of California* (San Francisco Superior Court No.  
11 504038) - Hearing on Application for Writ of Mandate under Code of  
12 Civil Procedure section 1094.
- 13 2. *City and County of San Francisco v. State of California* (San  
14 Francisco Superior Court No. 429539) - Hearing on Application for  
15 Writ of Mandate under Code of Civil Procedure section 1094.
- 16 3. *Clinton v. State of California* (San Francisco Superior Court No.  
17 429548) - Hearing on Application for Writ of Mandate under Code of  
18 Civil Procedure section 1094.
- 19 4. *Proposition 22 Legal Defense and Education Fund v. City and County*  
20 *of San Francisco* (San Francisco Superior Court No. 503943) - Hearing  
21 on Motion for Summary Judgment under Code of Civil Procedure section  
22 437c.
- 23 5. *Randy Thomasson v. Gavin Newsom* (San Francisco Superior Court No.  
24 428794) - Hearing on Motion for Summary Judgment under Code of Civil  
25 Procedure section 437c.



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

17           The second test is more stringent and is applied in cases where  
18 "suspect" classifications or fundamental human rights are implicated in the  
19 legislation. Here, the courts adopt "an attitude of active and critical  
20 analysis, subjecting the classification to strict scrutiny [citations]. Under  
21 this standard, *the state* bears the burden of establishing not only that it  
22 has a *compelling* interest which justifies the law but that the distinctions  
23 drawn by the law are *necessary* to further its purpose." (*D'Amico v. Board of*  
24 *Medical Examiners, supra*, 11 Cal.3d at 17, original italics.) This second  
25 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. The Rational Basis Test

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  
18 equal protection of the law unless it rationally relates to a  
19 legitimate state purpose. Neither our cases nor those of the  
20 United States Supreme Court have settled on a particular verbal  
21 formula to express this proposition. Some decisions require that  
22 the classification 'bear some rational relationship to a  
23 conceivable legitimate state purpose' [citation]; others, that the  
24 classification must rest upon 'some ground of difference having a  
25 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

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  
22 viewed a particular practice as immoral is not a sufficient reason  
23 for upholding a law prohibiting the practice; neither history nor  
24 tradition could save a law prohibiting miscegenation from  
25 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

1 in the context of other legislation defining the rights of persons similarly  
2 situated. (*Brown v. Merlo* (1973) 8 Cal.3d 855, 861-62.)

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

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

24 As is set forth above, this court is not limited to the justifications  
25 offered by the State in determining whether there is a sufficient connection  
between Family Code sections 300 and 308.5 and some legitimate state

1 interest. The task here is to determine whether such a connection exists.  
2 Therefore, this court will look beyond the governmental interests advanced by  
3 the State in these cases.

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

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

22 For the purposes of the rational basis test, this legislative history  
23 sheds no light on the existence of a legitimate governmental interest for  
24 precluding same-sex marriage. As for Family Code section 300, the legislative  
25 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:

16 It cannot be pretended that the condition of the defendant was not  
17 a most material circumstance to the consent required for the  
18 validity of the [marriage] contract. Its concealment operated as a  
19 fraud on the plaintiff of the gravest character. His contract was  
20 with and for her; it referred to no other person, much less  
21 included a child of bastard blood. A child imposes burdens and  
22 possesses rights. It would necessarily become a charge upon the  
23 defendant, and through her upon the plaintiff. It would become a  
24 presumptive heir of his estate, and entitled under our law, as  
25 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,

1 with a man of honor, the purity of the wife is essential. Its  
2 absence under such circumstances as necessarily to attract  
3 attention must not only tend directly to the destruction of his  
4 happiness, but to entail humiliation and degradation upon himself  
5 and family. We can conceive no torture more terrible to a right-  
6 minded and upright man than a union with a woman whose person has  
7 been defiled by a stranger, and the living witness of whose  
8 defilement he is legally compelled to recognize as his own  
9 offspring, as the bearer of his name and the heir of his estate,  
10 and that, too, with the silent, if not expressed, contempt of the  
11 community. By no principle of law or justice can any man be held  
12 to this humiliating and degrading position, except upon clear  
13 proof that he has voluntarily and deliberately subjected himself  
14 to it.

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

16 From this quote, it is clear that *Baker* stands for the proposition that  
17 the concealment of pregnancy by another man is grounds for annulment because,  
18 due to the potential legal and emotional consequences of having another man's  
19 child born into one's marriage, such concealment precludes the requisite  
20 consent to the marriage by the husband. The point of the case is that the  
21 parties to the marriage have a right not to be defrauded as to material  
22 matters that might affect their decision to marry. Indeed, the last line from  
23 the quote that "[b]y no principle of law or justice can any man be held to  
24 this humiliating and degrading position, except upon clear proof that he has  
25 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.

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

12           In *Schaub and Security First National Bank of Los Angeles v. Schaub*  
13 (1945) 71 Cal.App.2d 467, the court affirmed the annulment of a marriage that  
14 had been fraudulently induced. The trial court had found that the defendant  
15 had married Schaub solely to gain an interest in his property, and was never  
16 intimate with him. Instead, she continued a sexual relationship with her  
17 boyfriend in an "open, flagrant and continuous" manner. The case did not deal  
18 with the essence of marriage being procreation. Given that the husband was 60  
19 years old at the time of the marriage and he had died during the pendency of  
20 the appeal, the production of children may not have been an issue with him.  
21 The issue in the case was the fraudulent nature of the woman's  
22 representations before the marriage, which resulted in the annulment of both  
23 the marriage and a deed conveying real property to her in joint tenancy.

24           *Sharon v. Sharon* (1888) 75 Cal. 1 concerned whether a couple's union  
25 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

1 been solemnized in a ceremony, but the parties' agreement and their behavior  
2 indicated consent to many of the rights and obligations of marriage. The case  
3 had nothing to do with the concept of procreation as a purpose of marriage,  
4 although the Court did quote from a treatise called *Stewart on Marriage and*  
5 *Divorce* stating that "the procreation of children under the shield and  
6 sanction of the law" is a purpose of marriage.<sup>2</sup> (*Id.* at 33.) This quote, being  
7 both unrelated to the issues in the case and the words of an obscure treatise  
8 rather than those of the Court, is insufficient to establish procreation as a  
9 legitimate government purpose for marriage in California.

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

17 Finally, plaintiffs cite *In Re Marriage of Liu* (1987) 197 Cal.App.3d  
18 143. In this case, the court found that the wife's sole purpose for marrying  
19 was to get a "green card" in order to remain in the United States and that  
20 she had no intention of having sexual relations with her husband. The  
21 marriage was annulled because the husband's consent had been obtained through  
22 fraud. *Id.* at 156. There was no discussion of procreation in the case.

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23  
24 <sup>2</sup> The correct full title of the Stewart work is *The Law of Marriage and*  
25 *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.

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

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

### 15   3. Strict Scrutiny Test

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

20           The parties in favor of same-sex marriage assert that the statutory  
21 classification created by Family Code sections 300 and 308.5 are based on  
22 gender. They argue that the sole reason that a person in California cannot  
23 marry another of the same sex or have an out-of-state same-sex marriage  
24 recognized is that each member of the couple is of the same gender. The  
25 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

1 superficial at best and that the real purpose of such laws was to maintain  
2 white supremacy over black people. In contrast, the State argues, no such  
3 patent discrimination exists relative to the marriage laws because California  
4 has granted to same-sex couples substantially the same rights as are given in  
5 marriage to opposite-sex couples. Thus, the State concludes that the holdings  
6 in *Perez* and *Loving* relative to rights being those of the individual and not  
7 a group are inapplicable here. The State's argument is to no avail.

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

19         In *McLaughlin v. Florida* (1964) 379 U.S. 184, the Court similarly  
20 rejected the argument that a ban on interracial cohabitation which treated  
21 all interracial couples the same was not racially discriminatory. The Court  
22 held that even though the statute applied equally to whites and blacks, a  
23 court must inquire "whether the classifications drawn in a statute are  
24 reasonable in light of its purpose...[or] whether there is an arbitrary or  
25 invidious discrimination between those classes covered by...[the statute] and  
those excluded." (*Id.* at 191.)

1           Accordingly, this court concludes that Family Code sections 300 and  
2 308.5 create classifications based upon gender.

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

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

20           The opponents of same-sex marriage argue that the fundamental right to  
21 marry as recognized in California should be viewed as a right to marry a  
22 person of the opposite sex. They assert that a fundamental right to same-sex  
23 marriage has never been recognized in California, hence cannot form a basis  
24 for an equal protection analysis. In other words, these opponents advocate  
25 that the right to marry must be defined in terms of who one can marry. They

1 suggest that to do otherwise will open a door to such improprieties as  
2 brothers marrying their sisters or the marriage of an adult to a child.

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

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

*Id.* at 718.

24 Likewise, the state can preclude incestuous marriages (Family Code  
25 section 2200) as well as establish a minimum age for effective consent to  
marriage (Family Code section 301) because such limitations on the

1 fundamental right to marry would further an important social objective by  
2 reasonable means and do not discriminate based on arbitrary classifications.  
3 Thus, the parade of horrible social ills envisioned by the opponents of same-  
4 sex marriage is not a necessary result from recognizing that there is a  
5 fundamental right to choose who one wants to marry.

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

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

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

24 This court is aware that several states have interpreted the  
25 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



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

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

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

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

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

1 22, 2004, however, indicates that counsel for Petitioner Clinton may believe  
2 that such determination is not necessary in light of this decision. Counsel  
3 for Petitioner Clinton shall file a statement as to whether he believes such  
4 determination is necessary and, if so, a proposal for how and when such  
5 question be resolved.

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

10 4. *Proposition 22 Legal Defense and Education Fund v. City and County*  
11 *of San Francisco* - The Motion for summary judgment requested that this court  
12 determine whether as a matter of law the subject Family Code sections violate  
13 California's Constitution. This decision in its final form shall constitute  
14 both the order granting such motion for summary judgment and the legal  
15 determination requested. It will thus resolve all remaining issues in this  
16 case. Counsel for the defendant shall prepare a proposed form of Judgment as  
17 set forth below.

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

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

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

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

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

18 2. Consolidated Further Proceedings

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

23 All other filings ordered above shall be filed on or before March 28,  
24 2005.

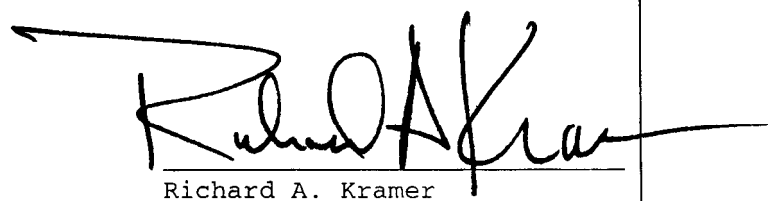
25 All papers to be filed under this decision shall be served on all  
counsel for parties in each of the coordinated actions and conformed courtesy

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

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

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Dated: March 14, 2005



Richard A. Kramer  
Judge of the Superior Court