



**Commission on Sexual Orientation and the Law
Legislative Reference Bureau
State Capitol, Room 446
Honolulu, HI 96813**

Phone: (808) 587-0666 Facsimile: (808) 587-0681

*Thomas P. Gill, Chairperson
Lloyd James Hochberg, Jr.
Robert H. Stauffer*

*Morgan Britt
Nanci Kreidman*

*L. Ku'umeaaloha Gomes
Marie A. "Toni" Sheldon*

**MINUTES OF THE MEETING HELD
WEDNESDAY, OCTOBER 25, 1995
(Continued to October 26, November 1, 2, 5, 6, 7, 1995
as Adopted at January 4, 1996 Meeting)**

I. Call to Order

The fourth meeting of the Commission on Sexual Orientation and the Law was called to order by Chairperson Thomas P. Gill at 9:10 a.m., at the State Office Tower, Senate Majority Caucus Room, Sixth Floor, 235 South Beretania Street, Honolulu. Members present were:

Thomas P. Gill, Chairperson
Morgan Britt
L. Ku'umeaaloha Gomes
Lloyd James Hochberg, Jr.

Nanci Kreidman
Marie A. "Toni" Sheldon
Robert H. Stauffer

Ms. Pamela Martin of the Legislative Reference Bureau also attended the meeting.

A one-page document entitled "Suggested Amendments to the Minutes of October 11-12 As Drafted" was distributed to the Commissioners and is attached as Attachment 1.

It was suggested by Mr. Hochberg, and the members agreed, for purposes of time and to accommodate the guest speakers that the Commission forego the approval of the minutes until after the invited guests gave their testimonies.

Dr. Stauffer moved to have the suggested written amendments to the minutes as stated accepted, *because they were available*. Ms. Gomes seconded the motion.

The Commissioners were given a few minutes' opportunity to review the suggested amendments. Dr. Stauffer added that Sister Chatfield's title on page 11 was not capitalized.

Chair Gill suggested that further discussion of the minutes be postponed until the continuation of the meeting and any other suggested amendments be submitted in writing. Mr. Gill stated that Mr. Hochberg reserved his opportunity to return to the minutes of the October 11, 1995, meeting to amend them.

The motion passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Chair Gill summarized what the Commission would be attempting to do at the meeting. The topic for the guests would be item (3), section 2, of Act 5, Session Laws of Hawaii 1995 which states:

"(3) Recommend appropriate action which may be taken by the legislature to extend such benefits to same-sex couples."

He stated that after hearing testimonies, the Commission would discuss the various motions submitted or to be submitted relating to items (1) and (2) of Act 5.

Ms. Martin reviewed the list of invited guests and briefly summarized the materials handed out for the meeting. She informed the Commission that invited guests, Daniel P. McGivern and Mely McGivern, would also be speaking. She added that invited guest, Dr. Robert Bidwell, postponed and instead would be testifying on November 8, 1995.

Ms. Martin added that the handouts included written testimonies from Bruce Fernandes of Maui, a letter from Sandra Pelosi, also from Maui. She also circulated a postcard addressed to the Commission from Penelope Spiller of Molokai and additional petitions from Mary Woodard's group.

Jon Van Dyke, Esq. Professor of Constitutional Law, William S. Richardson School of Law addressed the Commission first. Mr. Van Dyke reviewed the holding of the Baehr decision that "sex" is a suspect class under Article 1, section 5, Hawaii Constitution. As such the marriage law is presumed to be unconstitutional that must have a compelling state interest that is narrowly drawn to justify this. This second part, "narrowly" drawn is also interpreted to mean the State has chosen the "least drastic alternative", or the "least onerous alternative." Mr. Van Dyke pointed out the dramatic confrontational factors between the Legislature and the Courts in this issue. He pointed to the Baehr decision where the court states in very strong language that it rejects the argument that marriage is innately between a man and a woman, saying the argument is "circular...and tortured." In contrast Act 217, Session Laws of Hawaii 1994, says also in strong language, that marriage is meant for only a man and a woman and its a matter of public policy. Act 217 looks to notions of separation of power and implicates the Legislature's power to determine the will of the people, specifically admonishing the court that it has incorrectly interpreted the Constitutional's framers intent.

Mr. Van Dyke discussed various race-oriented cases where compelling state interests were found. See Mr. Van Dyke's written testimony attached to these minutes in the testimony portion at page T-9, for a full explanation of these cases. He stated that it was unclear if the Hawaii case, Holdman, was still valid.

Mr. Van Dyke reviewed the alleged compelling state interests that have been presented by the State to justify section 572-1, Hawaii Revised Statutes are (1) to foster

procreation, (2) create disproportionate incentives to move or remain in Hawaii, costing the state money and distorting the job and housing markets as well as altering the desirability as a visitor destination; and (3) allowing same-sex couples to marry conveys approval of non-heterosexual behaviors (see pg. T-8). He did not believe that any of these would be successful arguments in court because (1), which invokes the traditional family and the idea that marriage is linked to procreation, is flawed because the State has moved away from this requirement and it has not been pursued. (2) and (3) are more subjective and controversial in terms of acceptability. Regarding (2), there is law that says you cannot exclude undesirable people from your state. There is the right of free movement in the State. Finally, addressing (3), Mr. Van Dyke agrees that the government may set moral standards, but thinks it is hard to defend punishing people who don't meet that standard. That is, to encourage one type of family structure is different than discriminating against others.

Mr. Van Dyke shared his belief that the procreation argument is a problem because the State has not consistently applied that interest. In fact, Mr. Van Dyke believes the State, generally discourages procreation. Mr. Van Dyke does not believe the State can successfully meet the "narrowly tailored" requirement.

Mr. Van Dyke presented some ideas as to the public policies that would push the Commission one way or the other. They appear in the testimony on pg. T-12. He commented that finding a solution that respects all these elements and is not overtly confrontational is probably good. He sees the Domestic Partnership option as possible. He looks at it as a win-win situation. You give the same-sex couples the benefits of marriage, but keep the name of "marriage" for opposite sex-couples. He believes this would "moot" the case because they would not have any tangible injury.

Mr. Hochberg asked if Mr. Van Dyke based his statement on his understanding that objections of the public were of the word "marriage" or the substance. Mr. Hochberg continued that he believes that people who have testified at earlier meetings objected to the substance of allowing marriage regardless of whether one calls it domestic partnership. Is that respect for the diversity of religious views? Mr. Van Dyke recognized that it is a partial-win/partial-win situation. The fact that Act 217 recognizes the solemnizations.

Mr. Britt asked about what benefits a domestic partnership could provide in the area of income taxes, adoption, or inheritance, there isn't equity with marriage. With regard to the sacred relationship left for opposite-sex couples, wouldn't that be more akin to setting up a second class citizenship? Mr. Van Dyke stated that the State could supply all the economic benefits within their jurisdiction, so there must necessarily be federal litigation to resolve those issues. Mr. Hochberg stated that based on that information nothing short of marriage would "moot" the case. Mr. Van Dyke agreed that could be a possible outcome, but not likely he predicted. He believes the state court would say this is the logical accommodation of competing forces and there is no injury that justifies further litigation. Standing has three components: injury, causation, and redressability. The redressability, would drop out and the Supreme Court would have only an advisory opinion. Dr. Stauffer asked Mr. Van Dyke to confirm that domestic partnership is a "separate but equal" category, *i.e. separate but unequal*. Mr. Van Dyke agreed that a new category is being created. Dr. Stauffer expressed

his concern with regard to the federal benefits conferred by the status of "married", *i.e. that a domestic partnership could never equal marriage*. Mr. Van Dyke segued this question into his discussion on the full faith and credit clause.

Mr. Van Dyke confirmed that there are questions as to whether other states would recognize domestic partnership or same-sex marriage, especially if fundamental public policy concerns are violated. Mr. Britt questioned if any state had ever used this argument to refuse. Mr. Van Dyke replied that many states resolve the issue in court because usually they are slow to come around to a new way of thinking. This is especially so with the federal government, to address Dr. Stauffer's previous question. Ms. Kreidman asked how domestic partnership applies to opposite-sex couples that are not married. Mr. Van Dyke responded with a discussion on common law marriage, affirming that Hawaii does not recognize common law marriage. Ms. Kreidman encouraged Mr. Van Dyke along this line where he replied that there would be no reason not to allow opposite-sex couples to participate in domestic partnership because we already allow them to marry.

Finally, Mr. Van Dyke talked about imposing a residency requirement. He believes there is precedent that would make a residency requirement constitutional. See page T-15. Could you impose a residency requirement for domestic partnership even if we did not require it for marriage? Mr. Van Dyke would argue that there could be separate rules to develop new solutions to problems that wouldn't invite everyone to their shores.

Ms. Sheldon said if setting up domestic partnership that allows opposite-sex and same-sex couples to enter into domestic partnership you are not solving any problems, you are just re-creating a situation with a new law. Dr. Stauffer added that surveys on the Mainland indicated that 80% of those requesting domestic partnership status at the private level are opposite-sex couples. Ms. Sheldon confirmed and Mr. Van Dyke agreed that this situation could be used for fraud as is marriage. Ms. Sheldon continued, asking isn't the health of the community a compelling state interest? Mr. Van Dyke agreed but the health concern has to be narrowly drawn. The Commissioners brought up other health issues that are not restricted, for example domestic violence, smoking, and even the testing for certain diseases, which does not prohibit the license to marry it only requires awareness of the parties.

Mr. Hochberg referred to the concept that the people have put the authority on the Constitution not the legislature and therefore the Supreme Court has to determine the constitutionality of the marriage law. It is interesting because the polls of Hawaii are at least 2/3 against the extension of marriage benefits to non-heterosexual couples, so how is the Court supposed to take care of this interest of the people? *Mr. Van Dyke replied that the Constitution is designed to protect minority interests. The concept is that the Supreme Court is isolated in an ivory tower and insulated from the polls of the moment in order to draw upon eternal values of protection of minorities.* For example, the racial discrimination of the past... Mr. Hochberg interrupted and asked if the court recognizes these unions are not rooted in the tradition collective conscience and 2/3 of the polls agree and the legislative action why would an attorney argue that not allowing marriage is consistent with the Baehr decision? Mr. Van Dyke said an attorney could make that argument, but he did not think Judge Levinson would accept. It appears as if the Supreme Court has committed themselves in the other direction.

Mr. Hochberg seemed surprised then how Mr. Van Dyke could suggest that domestic partnership would moot the case. Mr. Van Dyke replied that he believed the Supreme Court was committed to fairness, tolerance and the other values our community is based on. If they saw a serious debate and solution that would compromise the situation, he believes they would accept it.

Mr. Hochberg pointed out other holdings in the Baehr case that Mr. Van Dyke did not discuss. One is that there is not a fundamental right of same-sex couples to marry. He asked Mr. Van Dyke if he thought that holding was important. Mr. Van Dyke agreed and also stated that the holding is inconsistent with the rest of the opinion, and he found that surprising. His class spent time discussing if that makes sense in terms of the whole opinion. He believes that the Supreme Court is struggling with the right to privacy. One case with regard to marijuana has not been reported out now for two years, so it appears as if they are deeply divided with regard to this issue.

The Commission recessed at 10:25 and reconvened at 10:36.

Mr. Hochberg continued his questions of Mr. Van Dyke. My question concerns this fighting between the Supreme Court and the Legislature and maybe you could explain to us when subsequent legislation could change a Supreme Court opinion. If it involves a statute, it is clear that the Legislature could amend the statutes to resolve it. If it involves a constitutional issue then the Supreme Court is the ultimate purveyor. For example we saw this in the abortion issues. The only way the legislature could accomplish overruling the Supreme Court in this instance would be by submitting a constitutional amendment to the public. In Hawaii it is relatively easy to amend or clarify the Constitution.

Mr. Hochberg pointed out that Mr. Van Dyke also left out of his discussion on the State's primary arguments the comity issue. Mr. Van Dyke explained that this argument that is tied to the Full Faith and Credit clause of the U.S. Constitution and means that each state has to respect the other state's laws. The argument rightly assumes that there will be litigation in other forums regarding the validity of same-sex unions or the marriage law itself as recognized in the State, but the Court would not likely view that as substantive argument and would probably categorize the argument under administrative convenience. It is a financial burden and a hassle, but it will not lead to war. And although administrative convenience arguments are relevant at times, it is not when fundamental rights and strict scrutiny issues are at hand.

Mr. Hochberg affirmed that Mr. Van Dyke did say that the state may set moral standards but he also said that the people that don't meet those standards don't have to be punished. He compared the situation with the morality of requiring deadbeat dads to pay child support or else we punish them. Mr. Van Dyke clarified for Mr. Hochberg that the deadbeat dad is doing something illegal. The same-sex couple does not engage in illegal activity in Hawaii. Mr. Hochberg stated that there are 23 states that still criminalize sodomy. Mr. Van Dyke agreed but reiterated that Hawaii is not one of them. Mr. Hochberg restated Mr. Van Dyke's position to be as long as people are not committing a crime they should not be punished. Mr. Van Dyke agreed.

Mr. Hochberg addressed Mr. Van Dyke's discussion regarding how the procreation argument is weak because it has been inconsistently applied. Mr. Hochberg stated that because the State does not ask couples if they will procreate, they don't know. Mr. Van Dyke disagreed. The State knows that if two 75 year-olds married, they could not procreate. Mr. Hochberg stated that he believed that was an extreme example to invalidate the question and by and large the majority of the licenses issued the State does not know because nobody asks. So the State is not inconsistently applying it, they plain just don't ask. Mr. Van Dyke tried to clarify Mr. Hochberg's point by asking then, if the State should not ask same-sex couples if they are going to procreate? Mr. Hochberg said they don't need to because it's plain on the face. Mr. Van Dyke agreed that it was plain of the face of the 75 year olds as well. Mr. Hochberg disagreed and stated that Sarah was 90.

Mr. Hochberg also brought up that Mr. Van Dyke did not discuss the Hawaiian traditions. He stated that it is probably agreed that there are some Hawaiian traditions we would not want to adopt. Mr. Van Dyke agreed, that human sacrifice and that women could not eat bananas should not be revived. Mr. Hochberg tried to confirm with Mr. Van Dyke his position *by* returning to the Baehr decision and *the* belief that same-sex marriage is not part of the collective conscience of Hawaii as well as in light of the history. Mr. Hochberg cautioned that we don't want to throw out all this information to simply move this forward, and we need to sit down and think it through in greater detail. Mr. Van Dyke agreed that the Commission's job is to look at these issues and paying respect to people's views is an appropriate thing to do here, and in the Legislature, to avoid confrontation and to look for compromises.

Mr. Hochberg referred to the allowance of private solemnizations of same-sex unions as enacted in Act 217, Session Laws of Hawaii 1994. He questioned how the leap could be made that the State has already accepted these type of relationships? Mr. Van Dyke responded that when you look at the decriminalization of behaviors, and that particular statute in Act 217 specifically acknowledges the relationship. Upon further questioning by Mr. Hochberg, Mr. Van Dyke stated he did not participate in the Act 217 legislation.

Chair Gill asked Mr. Hochberg how much more time it would take for him to finish his questions for Mr. Van Dyke. Mr. Hochberg responded by stating the he deserved and expected fairness from the Chair. The Chair reminded Mr. Hochberg that there are other speakers and if needed we could invite Mr. Van Dyke to return. Mr. Hochberg said that he would finish in time for today. Mr. Gill confirmed another five or six minutes. Mr. Hochberg agreed.

Mr. Hochberg questioned Mr. Van Dyke that these same-sex unions will not be required to be performed by every religious organization, which is required by the First Amendment. Mr. Van Dyke agreed that it is a logical conclusion. Mr. Hochberg added that the marriage law already has restrictions in it. Mr. Van Dyke also agreed.

Mr. Hochberg wondered how the big pot of people gets stirred up in the different situations, married, living together, and now domestic partnership (but no common law). Does the opposite-sex, living together couple have an opportunity for domestic partnership?

Mr. Van Dyke said that the burden is small for any opposite-sex, living together couple. They need only come forth and register, regardless of whether it is domestic partnership or marriage so it is unlikely that a new equal protection class would be generated if domestic partnership included opposite-sex couples. Mr. Hochberg was concerned that the burdens of marriage are what keep the opposite-sex couples from marrying. Mr. Van Dyke agreed that those burdens should be applied to domestic partnership, including making it difficult to get out. Mr. Hochberg asked if Mr. Van Dyke would be surprised to hear the Commission is not looking at any burdens, just goodies. Mr. Van Dyke refused to comment on that. The Chair added that the statement was false.

The Chair reminded Mr. Hochberg of his five-minute promise, made ten minutes ago. Mr. Hochberg assured the Chair he would be done "real soon." The Chair gave Mr. Hochberg an additional five minutes.

Mr. Hochberg asked how we bridge the gap between the economic disproportion between those who can get married and those that can't? He continued that it was his opinion if we removed the benefits from the marriage tag, so that no benefits are associated with marriage or domestic partnership wouldn't that solve the problem? Mr. Van Dyke agreed that is an option worth looking at, eliminating the marriage law from the state statutes altogether. Mr. Van Dyke's guess is that more people would be uncomfortable with that action based on the experience of people and their importance of marriage. Mr. Hochberg interrupted Mr. Van Dyke to clarify his point that he was not suggesting repeal of the marriage law, but only looking at the list of statutes that purport to be benefits, burdens and things that are impacted by marriage. What if they were marriage neutral? Mr. Van Dyke said an examination of each statute would have to be made and it may be that some places it could be separated, but others, like inheritance and custody, are linked to marriage for good reasons.

Copies of the overhead presentations used by Mr. Van Dyke are attached as his testimony to these minutes at pages T-3 to T-15.

Frederick Rohlfing III, attorney in private practice and former Act 217 Commissioner, was the next speaker to address the Commission. He promised that he wouldn't be as long as Professor Van Dyke.

His testimony started with a review of parts of the Baehr case that was not covered by Mr. Van Dyke. Mr. Rohlfing focused on the holding that there is no private right to marry, and therefore Justice Levinson's reliance on Loving is misplaced. He believes the Baehr decision is faulty because of their reliance on the Loving case where the ban on interracial marriage was struck down because the couple had been deprived of their liberty and due process of law under the United States Constitution Fourteenth Amendment. The same privacy consideration that Justice Levinson failed to find. So, it's only after *that* point where the opinion finds that there is no fundamental right to same-sex marriage *that it errs*. He borrowed Professor Van Dyke's overheads regarding the Baehr case.

It is Mr. Rohlring's view that if there is no fundamental right to same-sex marriage the Court ought to have given more respectful treatment to the role of gender in Hawaii's marriage law than they did. The discrimination analogy to Loving overlooks the specific unique type of discrimination that existed in the Loving case, that of a long tradition of White Supremacy. Virginia only prohibited marriages between Whites and other races and therefore, viewed in context, created a system of racial caste. Justice Levinson should have realized, as Justice Heen did, that the identical treatment of men and women under the Hawaii marriage law makes it consistent with the equal protection provisions of Hawaii's Constitution. Heterosexual marriage does not discriminate on the basis of sex because it does not draw a line between what men and women can do or what benefits will be received.

In overcoming the facial neutrality the Supreme Court should have focused on the intent of the drafters, which was not accomplished. Statutes prohibiting homosexual marriage don't convey any sexist message or inferiority of one gender over another.

Mr. Britt commented that it does contribute to a heterosexist bias. Mr. Rohlring agreed. Mr. Britt suggested that what if in Mr. Rohlring's written testimony, particularly on page four, the words Homophobia or Heterosexism were substituted for White Supremacy what kind of conclusions would you come up with? Mr. Hochberg replied that race is immutable and homosexuality is behavior. Mr. Britt disagreed and clarified that it is Mr. Hochberg's presumption that homosexuality is not immutable. Mr. Britt, apologized for interrupting and asked Mr. Rohlring to continue. Mr. Rohlring added that it was interesting that Justice Levinson avoids that whole argument. Mr. Britt agreed.

Mr. Rohlring suggested that the the Supreme Court's analogy to miscegenation laws is ironic and the Court should have recognized that what we are dealing with is the possibility of sexual apartheid that is implicit in homosexual marriage. If Justice Levinson had considered these arguments he would have come up with a more intermediate standard. The Supreme Court never investigated the intent of the framers and if they had they would have agreed as Mr. Britt does in his memo, that the framers probably never intended for the equal protection clause to allow same-sex marriage. Now the Baehr case operates as holding the legislature hostage to the Supreme Court. If the legislature tries to untangle marriage from certain benefits, he agrees with Mr. Van Dyke, that *it would be difficult*. Some of these laws are so bound up in marriage that perhaps they are inseparable. But some of the connections to marriage are irrational, for example the fishing license statutes.

The point is that marriage is not a creature of the State, regardless of the State's exclusive authority to certify it. The marriage laws go much farther back in time. As other people who have spoken before me these marriage powers can have both good and bad consequences. There are three legal responses to this. The three categories are (1) prohibited behavior; (2) permitted relationships; and (3) preferred relationships and conduct. Homosexual relationships have historically been placed in the prohibited behavior and have moved into the permitted relationships category along with adultery and fornication. But no state has escalated these relationships to the preferred category.

Mr. Britt asked if the words adultery and fornication are actually used in the Hawaii Revised Statutes. Mr. Rohlring replied, "Not any more." Mr. Britt clarified then they aren't part of the argument. Mr. Rohlring said *the discussion needs to be included to show how certain behaviors have been treated*. Mr. Britt further clarified Mr. Rohlring's *point to be that just* because a behavior is legal we don't have to make it preferred. *Mr. Rohlring agreed*.

Mr. Rohlring continued that marriage is one of the oldest preferred behaviors known, so extending marriage to same-sex couples is not a demand for tolerance, it is a demand for the special protected status of marriage.

Mr. Rohlring added that with regard to extending domestic partnership status to same-sex couples, some of the concerns from the perspective of legislators might be, "Why should domestic partnerships be limited to same-sex couples? Like business partnerships, why should these partnerships be limited to just one partner. If marriage appears to be an arbitrary category, why create a new category of domestic partnerships?"

The Chair asked Mr. Rohlring if he had a recommendation. Mr. Rohlring replied that his recommendation is very brief, it is that any means of extending the traditional benefits and obligations of marriage to homosexual couples is inappropriate.

The Chair clarified Mr. Rohlring's position as "do nothing". Mr. Rohlring agreed with the caveat that except for benefits that are tied to marriage that are irrational, for example hunting licenses.

Mr. Rohlring submitted written testimony *that is attached at pages T-16 to T-26*.

Mr. Thomas P. Coleman, Esq., Executive Director of the Spectrum Institute. Spectrum helps government agencies and corporations with changing social and family diversity to reflect present day realities. He has been an attorney for 22 years and for all of those years he has been fighting to end sexual orientation and marital status discrimination. He has promoted inclusiveness in the definition of family and promoted the right to privacy. He has worked with all levels of government, City, State and Federal. So he is here today to talk about reform.

Mr. Coleman and Spectrum Institute recommend a comprehensive domestic partnership. The language of the current domestic partnership bill in the Commissioner's hands is more for a limited domestic partnership but a comprehensive domestic partnership bill would be shorter because it makes general statements authorize the status of spouse on the partners in a domestic partnership. He stated that no State of Nation has ever taken this step. Even in the Scandinavian countries there are caveats and exceptions in their domestic partnership laws. Mr. Coleman believes Hawaii has shown a progressive attitude towards the acceptance.

Mr. Coleman presented his testimony from a series of charts that are reproduced in the written testimony portion of these minutes attached as T-40a through T-40e.

"During Mr. Coleman's explanation of the factual situation versus the legal situation of same-gender "families" in Hawaii, Mr. Hochberg offered that heterosexual unmarried couples with biological children are not recognized as families either because we don't have common law marriage. Mr. Coleman replied that factually, they are still families too, even if the law doesn't recognize them. Ms. Sheldon asked if domestic partners would be included in the domestic violence laws, where if police were called to the scene, one of them would go to jail? Mr. Coleman replied, "Naturally. It would be the same."

Mr. Coleman referred to the numerous statutes in the list produced by the Legislative Reference Bureau that indicate that benefits exist and Mr. Hochberg interrupted to say that the Commission has not reviewed the statute list. The Chair asked Mr. Hochberg to allow Mr. Coleman to continue.

Mr. Coleman responded to what he has heard today regarding just keeping the status quo. He pointed out that national statistics of opinion polls reveal that 30% are absolutely against it and would like to re-impose criminal penalties, and there's 30% of the public that support the legalization of same-sex marriage and 40% say that some kind of reform is necessary but they don't feel comfortable with the solution of same-sex marriage. Mr. Hochberg interpreted Mr. Coleman's 30-30-40 breakdown to make him appear in the middle, and stated that no one in Hawaii has suggested criminalizing sodomy. Mr. Coleman clarified that in national polls those people that are Christian conservatives support criminalization of homosexual relationships. Mr. Coleman quoted a Los Angeles Times poll where one of the questions asked was how do you label yourself? Mr. Coleman said that he would provide the exact poll when he returned to the mainland.

Mr. Coleman suggested that there are five possible actions available to Hawaii: (1) do nothing which he predicts will result in a court-ordered same-sex marriage; (2) pass a Limited Domestic Partnership Act which he believes will have the same result as (1); (3) pass a Comprehensive Domestic Partnership Act which he predicts the Court may accept as satisfying the equal protection clause; and (5) eliminate marriage as a civil institution which Mr. Coleman predicts will not happen. See Chart at page T-40e attached.

When Mr. Coleman had finished his presentation, Mr. Hochberg suggested that there could be another suggested action on the list that would make it very clear that Baehr v. Lewin is overturned and that would be a constitutional amendment that prohibited any marriage except between one man and one woman. Mr. Coleman agreed that would be a sixth option, but he commented that he did not believe the votes were there in the Legislature for that option. Mr. Britt offered that there could be a federal Constitutional amendment, but that isn't going to happen either.

Dr. Stauffer, referred to one of his articles where he stated there are one thousand statutes that are driven by state-issued marriage certificates and as the Commission does not have the time or money to investigate this, do you have an article where these are enumerated? Mr. Coleman clarified that there are 1499 hits under a WestLaw search of marriage and spouse and further clarified that most likely the figure is closer to hundreds because one statute may use the terms more than once.

The Chair asked Mr. Coleman if he had a format for the comprehensive domestic partnership law and Mr. Coleman volunteered to send his recommendations upon return to the mainland, and it would be less than about two pages.

He volunteered that his domestic partner and he will be moving to the Big Island in January, and that he actually has a stake in the outcome. Mr. Hochberg commented that brings to mind several questions, how long have you been working on this issue in Hawaii? Mr. Coleman replied that he has been following the issue from the summer of 1993, when Representative Tom held informational hearings on the neighbor islands. He attended the one on the Big Island while on vacation. Mr. Hochberg asked how come he couldn't find any information on Spectrum Institute or yourself as an author? He looked in Books in Print, Readers Guide, Periodical Literature, and computer databases on West Law and the Legal Infotrack CD-ROM. The only listing was an interview published in the Los Angeles Times in September of 1981. Is your organization a ghost and is this just a pet project of yours after 22 years of lawyering? Mr. Coleman responded, "No." He further stated that the Spectrum Institute has worked with the State of California on these and other similar issues. Mr. Hochberg said he could do the same thing in Hawaii, incorporate and have a pet project, just be honest. Mr. Coleman stated that he could not vouch for Mr. Hochberg's search, and continued to say that the Spectrum Institute has two primary projects. Ms. Kreidman interrupted, stating that she did not feel comfortable having Mr. Coleman substantiate his organization. Dr. Stauffer reminded the Commission that Mr. Coleman has travelled from the mainland at no cost to the Commission to provide his testimony and that we should respect that, even if the Spectrum Institute is not a big organization. Mr. Coleman confirmed that it is a small non-profit organization. Mr. Hochberg disagreed with Dr. Stauffer and stated that it is his right to know, and further stated he believed the Commission didn't care because Mr. Coleman's testimony fit into the majority's agenda.

Mr. Hochberg asked Mr. Coleman if he was familiar with Martine Rothwell, who wrote a book called the Apartheid of Sex? Mr. Coleman was not. Mr. Hochberg asked if Mr. Coleman's view of full equality was similar to hers? He stated her position to be: Martine Rothwell was born Martin Rothwell, after being married and having two kids and a career as a lawyer for twenty years and making a lot of money in satellite law, got a little bored. He and his wife thought it would be interesting to live the second half of their lives as a same-sex couple and he went and got a sex-change operation. Now the ABA parades them around as a lesbian couple. Is that the goal of full equality? Mr. Coleman responded that under current law if someone has a sex-change operation they are treated... Mr. Hochberg interrupted to say that was not his question, he clarified that his question was is your institute, your movement that is seeking the full equality, that is what we're talking about? Mr. Coleman replied he thought it sounds like that's what Mr. Hochberg was talking about. The Chair asked Mr. Hochberg to clarify his question.

Mr. Hochberg continued, if you have domestic partnership and two men are in prison, how do you deal with that problem, are they allowed to have domestic partnership marital relations together? They are allowed to have relations none of the other heterosexual prisoners

do. Mr. Coleman disagreed. As Professor Van Dyke said with regard to prison security, there are more strict guidelines that are allowed to keep order. Criminals are treated differently.

Mr. Hochberg confirmed that Mr. Coleman is suggesting a simple 2-page piece of legislation stating why this is a good idea and the domestic partnership status equals the "spouse" status wherever they appear in the statutes. Mr. Michaels, the First Deputy Attorney General said when he was here that that law would be unconstitutional, vague and would have to change every statute. Mr. Coleman replied that the legislature can do that. Simply reference those statutes, if you have to reference the specific statute you just do it.

Both Mr. McGivern and his wife agreed to testify in time for a break at noon. He read his testimony and stated that this is the first time he ever appeared before a body, knowing that what he and others have to say makes no difference. He stated that nothing would sway the opinions of the Commission or change the ultimate result that would lead to domestic partnership law. His written testimony is attached at page T-42.

Mely McGivern stated that she was a guest of Toni Sheldon and feared that her birthplace is close to becoming a Sodom and Gommorah of the World. She believes that the action of the Commission could lead to same-sex marriage or domestic partnership. Her written testimony is attached.

There were two comments from the public. The first speaker was Laurie McNamara. She stated that she didn't judge lesbians but believed that if these laws are passed, you'll have people doing it for financial benefit, for example, military housing and people with children from previous marriages will get together because it will be a lot cheaper and the government will pay for it. It will be very expensive.

The second speaker was Sherry Silva. She stated that she didn't have any specific reasons other than she was Christian and didn't think it was right. She quoted the State motto and added that it used to mean something. She did not want to impose the death penalty on people who entered into this kind of relationship but she did not approve and felt that being responsible for her children, she would find it difficult to have her children play with the children of same-sex couples. She commented that she wanted a moral environment for her kids.

The meeting recessed at noon to be reconvened on October 26, 1995.

October 26, 1995

The meeting reconvened at 9:15 a.m. on October 26, 1995. All members were present.

Mr. Hochberg called the Commission's attention to the imbalance of the minutes of October 11, 1995.

Mr. Gill stated: "We have to be polite and hear what everyone has to say."

Mr. Hochberg moved that the materials presented by Dr. Ghali and other speakers be listed in the minutes. Ms. Sheldon seconded the motion and Dr. Stauffer spoke in favor of it. The motion passed with four ayes and three abstentions. The Chairperson, Mr. Hochberg, Ms. Sheldon and Dr. Stauffer voted aye, with Ms. Gomes, Mr. Britt and Ms. Kreidman abstaining.

Mr. Hochberg moved to add the clinical psychologist credential to Dr. Kehoe's name in the October 11, 1995 minutes. The motion failed with Mr. Hochberg, Ms. Sheldon and Dr. Stauffer voting aye and Ms. Gomes, Mr. Britt and Ms. Kreidman abstaining. The Chair did not vote.

Mr. Hochberg then moved that the minutes reflect that Ms. Martin produced a written transcript of portions of the audio tape from the September 27, 1995, minutes and they were discussed. Dr. Stauffer, speaking against this motion, stated that he understood changes were to be presented in writing ahead of time. Whereupon Mr. Gill question Mr. Hochberg as to the amount of changes he had to present. Mr. Hochberg asked to be permitted to present those he had submitted in writing. After much discussion Mr. Gill asked Mr. Hochberg to restate his motion, and Dr. Stauffer described that motion as a lengthy one concerning Ms. Martin's transcript.

Mr. Hochberg moved to have his changes incorporated in the minutes, but Mr. Gill stated that what Mr. Hochberg wants is a transcript and he won't get it. Mr. Gill stated: "We have to move on and not spend time going over this."

Dr. Stauffer called for the question and summarized Mr. Hochberg's motion. The motion failed to carry with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, and Dr. Stauffer voting nay. Ms. Kreidman abstained.

Dr. Stauffer then moved to table discussion on the minutes and send out a new written transcript. Mr. Hochberg spoke against the motion stating that the majority has had an agenda to railroad this through. Mr. Hochberg pointed out that the policy of review is not established as requiring written proposed amendments and that these (the October 11, 1995) minutes connoting the most important testimony on economic matters. Mr. Hochberg noted that failing to review the contents of these minutes diminishes the value of the majority report and makes its contents intellectually dishonest.

Dr. Stauffer called for the question and a vote was taken. The motion passed with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voted aye and Mr. Hochberg and Ms. Sheldon voted nay.

Mr. Hochberg then moved to handle those amendments he had submitted in writing (attached as Attachment 2).

Mr. Gill ruled Mr. Hochberg out of order. Mr. Hochberg appealed the ruling, Ms. Sheldon joined in that appeal. Mr. Hochberg's appeal was defeated with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting nay, and Mr. Hochberg and Ms. Sheldon voting aye.

Mr. Hochberg moved to table all discussion on any substantive material until the Commission members reviewed and analyzed LRB's list of statutes and addressed whether there are major legal or economic benefits the Commission should be dealing with. Ms. Sheldon seconded the motion. The motion failed with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

Mr. Gill informed Mr. Hochberg that his right to bring the amendments to the October 11, 1995 Minutes was being reserved and he could bring up those amendments at a later time.

III. Discussion and Organization Relating to: (1) The Identification of Major Legal and Economic Benefits Extended to Married Opposite-sex Couples, But Not to Same-sex Couples; and (2) Substantial Public Policy Reasons to Extend or Not to Extend Such Benefits in Part or in Total to Same-sex Couples with Voting on Motions as Needed

Memorandum No. 1

Dr. Stauffer moved to adopt the two-page treatment of terminology, starting with the word "Terminology" on the bottom of page 3 and continuing to the second paragraph on page 5 as a guiding principle of the Commission, and reads as follows:

Terminology

The phrase "major legal and economic benefits" is not otherwise defined in the law, nor is it otherwise defined in the committee reports which accompanied the legislation.¹

Lacking direct guidance from the Legislature, the Commission has employed the applicable rule of interpretation,² concluding that the words in the phrase should carry their normal and customary meaning.

The First Deputy Attorney General of the State of Hawaii, in testifying to the Commission, expressed the view that the Hawaii Supreme Court, in sending the case back to circuit court, may have been intending the Legislature (and hence the Commission as established by the Legislature) to investigate the topic. It therefore appears reasonable to see if the Supreme Court has given any guidance on what might be considered as "major legal and economic benefits."

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1. Cite all committee reports.
 2. Give the citation.

The Supreme Court did not directly address the issue using that phrase, but it did list 14 separate provisions of State law that the court considered to be numbered amongst "the most salient marital rights and benefits."³

One of these "most salient" benefits is noteworthy: "the right to change of name pursuant to HRS §574-5(a)(3)."⁴ The change of name fee is currently \$50, but at the time of the court's decision was only \$10. Even with the added burden of a required newspaper public notice and the fee to an attorney to file the necessary papers, the purely economic value of the benefit is only about \$300 today,⁵ and \$250 or less at the time of the court's decision.

The Commission finds that the court appeared to rest its "most salient" reasoning on a combination of legal and economic factors and that even a benefit of name-change can be considered a "most salient" or "major" benefit. Importantly, the court appears to take into account factors (such as newspaper fees for legal advertisements, or private attorney fees) that are not the direct effect of a law but are only indirectly required by a law.

Mr. Hochberg moved to table all discussion on substantive material until the Commission looks at the statutes it received on September 13, 1995, analyzes the LRB attorney's report of the definitions of those statutes, and actually determines whether there are any major legal and economic benefits in those statutes which the Commission needs to address.

Ms. Sheldon inquired as to the fact the Dr. Stauffer's memos address things the Commission has not discussed. Mr. Gill stated that was not true, that the Commission had received a list of the statutes and had time to review them. Ms. Sheldon replied that reviewing the LRB's list is not the same as discussing the statutes.

Ms. Kreidman inquired as to whether Ms. Sheldon wanted to go through the statutes and determine whether it's a benefit or a burden. Ms. Sheldon replied that she does not think

3. Baehr v. Lewin, 74 Haw 560 (1995).

The operative terms here are "salient," used by the court, as opposed to "major," used by the Legislature.

The court did not otherwise define "salient," again leaving the Commission to employ its customary and common meaning.

A comparison of the two words shows them to have very similar, and at times identical, meanings.

Salient means "standing out conspicuously; prominent, striking." Major means "notable or conspicuous in effect or scope; considerable."

The court added the modifier "most," as in "most salient," which if anything suggests the court's list includes a rarefied level of benefits. As such, the Commission's list should include the court's list, but add more items to it.

4. Baehr v. Lewin, 74 Haw. 561 (1993).

5. See the discussion about the current \$300 cost, on page <27> of this report.

we have determined what is a benefit and what is a burden because we do not have a definition.

Dr. Stauffer stated that the motions he intends to bring will address all statutes.

Dr. Stauffer stated that it is vital that we begin by defining our terms. He stated that major legal and economic benefits are not defined in the legislation or committee reports so we use normal and customary meaning.

Dr. Stauffer moved to accept his definition of major legal and economic benefit, which would include changing your name as a most salient benefit, as the Commission's guiding principle in determining major legal and economic benefits.

Mr. Hochberg spoke against the motion and requested a verbatim transcript of his discussion. It is as follows:

"Two reasons not to follow this definition. One of them is, what the Supreme Court was saying, when a Court says something is a salient aspect in a case, what they're saying is we haven't done exhaustive research, this is what stands out to us, at a minimum.

"Number 2, what we've been asked to do by the Legislature is not what the Supreme Court was doing when it made its list. And what's important under that is the change from one Commission's charge in 1994 to our charge in 1995, that language change is the critical language change because we're looking at legal and economic benefits and all the Supreme Court was doing, is looking at, are there things that stand out in the statutes that you can't have if you don't have a marriage license. So what the Supreme Court was looking at is different from what the two commissions were looking at and then in analyzing the use of the language to determine what it means because it wasn't defined by the legislature the change from precise to major is how you define what the legislature meant in 1995. What the legislature didn't want, I think, is what they had asked for the first time; which is a precise list, which is a list of every single thing to the minutest detail. What they want is what are the major benefits, and they want to know what the major economic benefits are. And Professor Ghali told us how you come up with what a major economic benefit is and Sumner La Croix agreed, he did not disagree that you don't just identify a value, for instance, on an in-state tuition for a nonresident spouse of a professor, you have to ask the question, what is the likelihood, the probability that the benefit is going to be taken advantage of. And then you reduce the dollar value by whatever that proportion is and a \$1,500 value becomes \$1.50, which is not what the legislature is worried about."

Chair Gill suggested that when the Commission, assuming it does, adopts a particular benefit, as being a benefit it is going to report that as the definition of major. If the legislature or Court agrees or disagrees is their business. *Mr. Gill stated that we don't want to get wrapped up in a convoluted definition of what we thought the legislature meant, if they thought about it at all, which is why Mr. Hochberg's motion failed twice early on.* The Commission will make its decision on each issue of what a major benefit is, based on how it is used. *Mr. Hochberg stated that major means significant and salient means stands out. Mr. Gill*

stated that "we (the majority members of the Commission) are just making sure that Mr. Hochberg doesn't gas the thing to death and try to kill the report."

Dr. Stauffer agreed with the comments of the Chair and did not want to second guess the legislature by using a precise definition, but tried to simply review the language and let it stand as it is. He said that the actual determination of whether an item is substantial or major will be made as the Commission reviews his memorandum. He then called for the question.

Ms. Martin then repeated the motion which was: "to adopt the two-page treatment of terminology, starting with the word 'Terminology' on the bottom of page 3 and continuing through the second paragraph on page 5 as a guiding principle of the Commission."

Mr. Hochberg asked for clarification for the effect of adopting this terminology. It was his understanding that because the Supreme Court listed as a most salient benefit the right to change one's name for free, which would otherwise cost \$10, that it would be considered a major benefit that the Commission would be testing other items against.

Dr. Stauffer said that the two-page treatment stands on its own and that the last paragraph which states: "The Commission finds that the court appeared to rest its 'most salient' reasoning on a combination of legal and economic factors and that even a benefit of name-change can be considered a 'most salient' or 'major' benefit....", gives a good summary. He continued that the language is amendable and could be included as a footnote or stand as is but it is included to be a guiding principle, as a foundation to work with. He again called for the question.

Mr. Hochberg asked Dr. Stauffer to respond to the statement and questioned whether the Commission was using ghost written material. Ms. Sheldon supported Mr. Hochberg's questioning.

Ms. Kreidman expressed her discomfort with the tone and degree of Mr. Hochberg's and Ms. Sheldon's personal attacks and Mr. Hochberg's questioning of intellectual honesty.

Dr. Stauffer again called for the question.

The motion passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Memorandum No. 3

Dr. Stauffer moved that the following non-Hawaii Revised Statutes (HRS) benefit treatment be adopted by the Commission, subject to later review and amendment as appropriate. This motion is from pages 1 through 5 of Memorandum No. 3 and refers to international, federal, and other states' implications *and reads as follows:*

"Major Legal and Economic Marriage Benefits Extended to Opposite-Gender Couples, But Not to Same-Gender Couples"

International Implications

It is understood that most nations of the world bestow special rights and benefits, or allow special benefits to be chosen, by persons that are recognized as having a government marriage certificate. It is likewise understood that these foreign countries generally recognize U.S. marriage certificates. Finally, it is understood that under the American federal system of governance, the actual issuance of U.S. marriage certificates is done by the individual States, including Hawaii.

As such, it can be persuasively argued that the conferring of a marriage certificate by the State of Hawaii carries with it certain major legal and economic benefits in these foreign countries, should a couple with such a marriage certificate visit or otherwise have dealings with such foreign countries. But these major legal and economic benefits are all subject to the applicable provisions of international law, any other applicable treaty provisions that each such country has with the United States, and subject further to any applicable internal laws or judicial decisions within each such country.

An investigation of such international scope has not, to the Commission's knowledge, ever been undertaken. The scale of such a study is also clearly outside of the resources made available to the Commission.

As such, the Commission finds that a persuasive argument exists that many major legal and economic benefits available in foreign countries are conferred on a couple through the State of Hawaii's conferring of a marriage certificate.

At the same time, the Commission finds that a precise listing or valuation of such major legal and economic benefits is outside the scope of its appropriated investigative resources, and therefore outside the scope of this report.

Federal Implications

Under the American federal system of governance, the conferring of marriage certificates has been reserved to the individual sovereign States, including the State of Hawaii.

The granting of major legal and economic marriage benefits have not been limited to the States, however, as the Federal government has provided a vast array of such benefits. In all these cases of Federal marriage benefits, however, the determination of whether such major benefits should be conferred is based on whether the couple, or an individual within a couple, possesses a marriage certificate issued by one of the States.

As noted by Dr. Randall W. Roth, professor at the William S. Richardson School of Law, these matters "relate to federal law, but are driven by a couple's marital status as determined by state law."⁶

6. Roth, Randall W. "Testimony to Commission on Sexual Orientation and the Law." Mss. September 27, 1995. Page 2 of written testimony.

The Commission finds that Federal law and administrative rules⁷ literally encompass tens of thousands of pages of material. The Commission further finds that within that mountain of paper there are known to be a substantial number of laws and rules that bestow major legal and economic marriage benefits. Further, that these in turn are bestowed on the basis of a couple, or a member of the couple,⁸ possessing a State marriage certificate. Hence the Commission further finds that the State of Hawaii, in conferring such certificates, is indirectly conferring these Federal major benefits. Further, that these conferred-benefits have substantial economic value.

Despite the presence of such laws, rules, conferred major benefits, and substantial values, the resources appropriated to this Commission are insufficient to carry out a complete review of these Federal benefits.

So important is examining individual Federal benefits, however, that the Commission could not entirely pass by carrying out such precise analysis as the Commission did with the question of international benefits. The Commission therefore has been able to concentrate on a very few well-known Federal benefits, and these are included within the Commission's more detailed analysis that is contained below.

Other States' Implications

Much like the analysis above regarding foreign countries, the other 49 sovereign States, the District of Columbia, and the territories and possessions of the U.S., grant large numbers of major legal and economic marriage benefits on the basis of a couple possessing a Hawaii marriage certificate. These benefits, in turn, carry substantial economic value.

Because of our country's federal system of governance, as epitomized in this instance by the "Full Faith and Credit" clause of the U.S. Constitution,⁹ these other jurisdictions are bound, except for certain exceptions, to recognize Hawaii's marriage certificates and to provide the same major legal and economic marriage benefits to couples with Hawaii certificates as those jurisdictions give those couples with marriage certificates from the "home" State. Therefore, because of this overriding Federal Constitutional provision, the chances of a Hawaii-certified couple receiving such benefits is higher within these jurisdictions than within foreign countries.

At the same time, the Commission does not have the resources to provide an exhaustive list of these other jurisdictions' benefits, nor to consider whether a same-

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7. i.e., Public Laws and Federal Regulations.
 8. Some benefits are conferred to one member of the certified couple, such as the right of the "economically weaker" member to sue the other for support.

In this report, the phrase to "benefits to a couple" shall be generally understood to include benefits to individual members of the couple, even if the text does not directly refer to the individual members.

9. Give citation.

gender couple with a valid Hawaii marriage certificate would be entirely protected under the Full Faith and Credit Clause.

The Commission therefore finds that the major marriage benefits granted by the State of Hawaii, and as reviewed in more detail later in this report, are similar to those granted by other U.S. jurisdictions. The Commission further finds that the right of a couple, legally married in Hawaii, to enjoy the substantial values of these benefits in these other jurisdictions is generally based on possessing a Hawaii marriage certificate.

Hawaii Administrative Rules; Hawaii Political Subdivision Ordinances and Administrative Rules

The Commission finds that there are thousands of pages making up the uncodified Hawaii Administrative Rules, that these rules have the force and effect of law, and that there are a multitude of major legal and financial marriage benefits granted under the provisions of these rules. The Commission further finds that these major marriage benefits constitute a significant economic value. Besides these findings, however, the Commission has chosen to concentrate on Hawaii law and not to investigate Hawaii's administrative rules.

Likewise, the Commission finds that there are major marriage benefits granted through the ordinances and administrative rules of the political subdivisions of the State of Hawaii. The Commission further finds, in these cases, that unlike the cases of international, Federal, or other-U.S.-jurisdictions, there is here no question that Hawaii law and Hawaii marriage certificates would control.¹⁰ The Commission further finds, for couples married in Hawaii, that all marriage benefits granted under an ordinance or rule of a political subdivision of the State of Hawaii are conferred only to those couples possessing Hawaii marriage certificates, and that these benefits have a substantial value.

The Commission will not otherwise investigate the matter of Hawaii political subdivision marriage benefits, on account of a lack of resources to carry out such a detailed task."

Mr. Hochberg moved to include the word "salient" before "major legal and economic..." in the title of the draft proposal as stated above. *It was pointed out by Mr. Hochberg that there was no second, at which point Ms. Sheldon seconded the motion.*

Dr. Stauffer spoke against the motion stating that the title was a direct quote from Act 5, Session Laws of Hawaii 1995.

The motion failed with Mr. Hochberg and Ms. Sheldon voting aye and Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting nay. Mr. Britt abstained.

Dr. Stauffer felt that the Commission needs to address international implications, federal implications, and other states' implications, and Hawaii Administrative Rules and Hawaii Political Subdivision (referring to the four major counties) Ordinances and

10. Give citation on supremacy of general Hawaii law over county ordinances.

Administrative Rules. He stated that the purpose of this particular draft proposal is to apprise the legislature that the Commission is aware that there are international, federal, etc. benefits and implications, but that it is beyond the Commission's scope to precisely list all of them. He added that the material can be used in an applicable format (a sentence, footnote, appendix, etc.).

Ms. Sheldon spoke against the motion. She questioned statements that inferred that the federal government would recognize same-sex marriages just because a marriage certificate was conferred by a state. She added that it has not been determined that the federal government would recognize such relationships for purposes of federal law and that the State of Hawaii has no power to directly or indirectly confer federal benefits. *Ms. Sheldon also stated that earlier expert testimony indicated a good chance that the same-sex relationships may fall within the exceptions to the full faith and credit clause and may not be recognized by other states.*

Dr. Stauffer responded that benefits under federal law are driven by a couple's marital status as determined by state law. He stated that the federal government does not issue marriage certificates but issues benefits based on marriage certificates from the states. He added that certain federal laws grant benefits to married couples, specifically heterosexual couples; and some laws that do not specify that the couple be heterosexual. He referred to Dr. Roth's statement *that* said that there may be some federal benefits, driven by the states' issuance of marriage certificates. He added that the law review article relating to the Full Faith and Credit clause ("*Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages,*" by Joseph W. Hovermill, *Maryland Law Review*, 1994, Vol. 53, p. 450-493), which had been distributed to the Commission on October 25, 1995, suggested that several states would have to adopt or recognize Hawaii's certificates unless specific legislation was passed against it. Dr. Stauffer emphasized that this was a rough draft and how staff incorporates it into the report can be settled later.

Mr. Hochberg spoke against adopting the motion. He recalled that, because of time constraints and lack of resources, the Commission would not focus on international or federal laws. It was his understanding that the Commission would concentrate on the HRS. He opined that it was beyond the scope of the Commission to address federal, international, or interstate laws and felt it would be best to be silent on those issues.

Chair Gill explained that the memorandum simply informed the legislature that the Commission is aware there are federal, international, and interstate implications.

In speaking against the motion, Mr. Hochberg called the Commission's attention to the fact that Professor Roth also said that in his opinion he didn't think the feds were going to buy domestic partnerships from Hawaii, particularly if they co-exist with marriage.

Mr. Hochberg stated that the "findings" keep coming up concerning major legal and economic benefits despite the fact the we don't have a definition. Further, as Mr. Van Dyke informed the Commission, pursuant to the Dred Scott decision, one state cannot legislate

another's reality. Finally, Mr. Hochberg pointed out that he understands that the Chair, at the outset, stated that we would not be addressing these issues.

Mr. Hochberg moved to amend the proposed draft to remove the phrase "the Commission finds..." everywhere it appears. His rationale for the amendment was that the Commission had not done that kind of research. Ms. Sheldon seconded the motion.

Dr. Stauffer called for the question and the motion failed to carry with Mr. Hochberg and Ms. Sheldon voting aye. Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voted nay.

Dr. Stauffer then called for the question on his original motion which was to adopt "the following non-HRS benefit treatment be adopted by the Commission, subject to later review and amendment as appropriate. The treatment is discussed in pages 1 through 5 of Memorandum No. 3 and refers to international, federal, and other states' implications.).

The motion passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Ms Kreidman asked how the minority would be drafting their report.

Ms. Sheldon expressed her opinions regarding the Sunshine Law. She felt that not being able to meet and discuss Commission matters outside the meetings makes it impossible to make any deadlines and to confer. She added that even federal courts allow you to confer before filing a motion to compel discovery and felt the Commission should challenge the Attorney General Opinion.

Mr. Gill agreed that the Opinion was troublesome but that the Commission had to abide by it.

The members discussed the basic format of the final report to the Legislature and Ms. Martin said that based on the information she has obtained so far, she has basically been trying to describe what the Commission has discussed but has left open in each issue, what the majority and minority opinions decide. She offered to draft both a majority and a minority report that could be examined and commented on by both sides of the Commission.

Dr. Stauffer suggested that Ms. Martin could possibly draft a report that integrates both majority and minority views, as Congress does, or use the judiciary's system that includes the majority's view and dissenting opinions.

Ms. Sheldon then said that it appears a minority report will be in order. She added that if the Commission fails to cooperate and tries to manipulate the language of the minority, she would file a separate minority report written to say "what I want it to say." She also stated that her First Amendment right allows her to do so.

Ms. Martin advised the Commission that all members have the privilege of reviewing and commenting on a minority position, statement, or opinion and added that the comments made should be shared as well.

Dr. Stauffer acknowledged Ms. Sheldon's concerns, that the Commission could possibly vote down her motions on what she wants included in the report. *One solution could be a "minority caucus" meeting.* It was his understanding that subcommittees could be formed, with as little as two persons. He said that these subcommittees could call meetings, with the concurrence of the Chairperson and *with the understanding* that the meetings would have to be noticed seven days in advance, be open to the public and media, and could be held anywhere. He suggested that this would *comply with* the Sunshine Law.

Ms. Kreidman wanted it recognized that there would not be seven reports.

The Commission recessed at 9:55 a.m. and reconvened at 10:02 a.m.

Mr. Hochberg moved to amend Proposed Draft No. 3, page 3, at the end of the section on federal implications by adding a paragraph that reads:

The Commission also finds that since 1977, Congress has voted twenty-six times against homosexual rights.

Chair Gill ruled Mr. Hochberg out of order because the motion had already been adopted but suggested that if he had a separate idea he would like to express, he could do so in a separate motion *when the Commission gets to Mr. Hochberg's section.* Mr. Hochberg maintained that since the proposals were open for changes, he wished to add that paragraph. Ms. Sheldon seconded the motion and Mr. Hochberg called for a vote.

Chair Gill stated that he had ruled Mr. Hochberg out of order and questioned whether he was appealing the ruling of the Chair. Mr. Hochberg stated that there was a second to the motion and that the Chair could handle it in whatever manner he pleased.

Chair Gill clarified that Mr. Hochberg was appealing the ruling of the Chair, that the Commission will not revisit a measure once it has been adopted.

Mr. Hochberg reiterated that his motion was to add a paragraph to Memorandum No. 3, page 3, at the end of the section on federal implications.

The Chairperson ruled that the draft had already been accepted under the conditions proposed and that members are given the right to make any changes or suggestions and will be given that opportunity and therefore the amendment was not appropriate.

Dr. Stauffer offered that Mr. Hochberg could ask the Commission to adopt two paragraphs as the expression of the Commission and that the suggestions could be included in the proper place in the draft report.

Ms. Kreidman requested that the process of amending the report be clarified since the members had been given that privilege.

Mr. Hochberg said his problem up to this point is that he has been told that it is not the time to make changes and felt that this was the appropriate time to make amendments.

Chair Gill told Mr. Hochberg that the Commission was reserving his rights to make those motions as part of his suggestion to be included in a particular section of the report. *Mr. Gill told Mr. Hochberg that "we don't go forward and then go back. It's a way of wasting time." Mr. Hochberg replied that "we could just deal with it here and you guys could vote it down.*

Mr. Gill stated: "You put it in good shape, let everybody take a look at it and then when your time comes to put your suggestions, and so forth."

Mr. Hochberg then appealed the ruling of the Chair with respect to adding a paragraph, at the end of the section on federal implications, which paragraph would have read: "The Commission finds that since 1977, twenty-six times the U.S. Congress has voted against extending various rights to homosexuals."

A vote was taken on the Chairperson ruling Mr. Hochberg out of order because Memorandum No. 3 had already been adopted. The ruling passed with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting aye. Mr. Hochberg and Ms. Sheldon voted nay.

Mr. Hochberg then moved that a paragraph be added at the end of page 5 of Memorandum No. 3 that states: "This Commission also finds that twenty-three states have laws which criminalize sodomy." Ms. Sheldon seconded the motion.

The Chairperson again ruled Mr. Hochberg out of order for the same reason (that the proposal had already been adopted). A vote was taken on the ruling of the Chair and passed with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting aye. Mr. Hochberg and Ms. Sheldon voted nay.

Memorandum No. 5

Dr. Stauffer then referred to Memorandum No. 5 dealing with intangible benefits. He moved that the treatment of intangible benefits be adopted subject to later review and amendment as appropriate. Mr. Britt seconded the motion.

"Major Legal and Economic Marriage Benefits Extended to Opposite-Gender Couples, But Not To Same-Gender Couples"

Intangible Benefits¹¹

The legal benefits that are often closest to the hearts of affected couples that are denied the right to a marriage certificate are what might be called "intangibles."¹² For example, there is the statutory right to visit a spouse in the hospital.¹³ Certainly, to be denied the right of access to a beloved spouse, with little time to live after some medical emergency, all because there is no government marriage certificate, can be heartrending.

If the hospital's decision in such an example was in error (and a valid marriage certificate was eventually produced), it is easy to envision a lawsuit over the pain and suffering caused to the surviving spouse. In such a case it is easy to envision a jury computing the economic value of such a denied marriage benefit, and making an award in the hundreds of thousands of dollars.

The Commission finds, however, that outside of such jury deliberations, it is very difficult if not impossible to place a monetary value on each of these intangible benefits that, in reality, probably are priceless pieces of our very humanity.

Two more examples include the right of a legal spouse to decide whether a deceased partner's physical remains should be donated to science or for transplants,¹⁴ and the legal spouse's right to decide the final disposition of the deceased's remains.¹⁵

Disposition of remains in a manner other than the form desired by a legal spouse or guardian resulted in one Hawaii jury award that placed the value of this spousal right at several hundred thousand dollars.¹⁶ The specific right to allow for (or deny) the donation of organs treads on the topic that some religious traditions view as mutilation of corpses; history teaches that so intrinsically valuable is this right that wars have broken out over its violation.

Yet another example is the Federal government's policy of waiving the normal decades' long waiting list for immigration for members of a citizen's family, including a legal spouse who is a foreign citizen. In this case, current Federal law would give preference to the immigration into the U.S. of a foreign citizen who is the spouse of a

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11. In general, see also La Croix, Sumner J.; and Badgett, Lee. "A Brief Analysis of Important Economic Benefits Accruing from Same-Sex Marriage[;] Revised Testimony Before [The] Commission on Sexual Orientation and the Law, State of Hawaii." September 27, 1995 as revised October 5, 1995. Mss, 9 pages.
 12. List the affected statutory sections from Appendix A.
 13. Give citation.
 14. Give citation(s).
 15. Give citation(s).
 16. Cite the court case; estimate the value if it is available (the award included the cost of having to place some newspaper advertisements, and so the value may not be known...).

U.S. citizen (provided the U.S. citizen economically "sponsors" the foreign citizen), but only if the couple has a certificate. What value can be given to being able to live together with your spouse, one of the most fundamental of marriage benefits?

The Commission finds that in purely economic terms, many of these "intangible" benefits have the desirable feature that they often do not impose economic costs on other people. The Commission further finds that these "intangible" legal/economic benefits have a substantial but intangible economic value.

The Commission further finds that beyond the specific intangible benefits listed above is one other than stands head and shoulders above all the other benefits combined. That is the intangible benefit of liberty and equality. What price, what cost is it to lose equality?

We cheapen the discussion by reducing legal marriage to only a matter of dollars and cents. Certainly the majority of those married couples who are allowed to receive governmental certificates do not view these documents as passports to economic prosperity. We should step back and look at the bigger picture.

What, for example, was the cost in human liberty to be forced to attend segregated schools before Brown v. Board of Education?¹⁷ What was the cost in terms of human equality for different-gender couples to go to jail for marrying the one they loved, before Loving v. Virginia?¹⁸

Add up the hundreds of special marriage-certificate benefits. Now subtract their purely economic value. What you have left is the greatest intangible benefit of all, simple recognition and equality. And the Commission finds that this value is priceless and is above and beyond the other values, intangible or otherwise, simply because the value of legal marriage is greater than the sum of its parts.

Indeed, the Commission finds that this intangible idea of "being really married" through governmental certification -- the intangible idea itself, removed from all the purely economic considerations -- is one of the primary "benefits" associated with legal marriage in the minds of most members of the general public. The Commission reiterates its finding: this benefit is of substantial but unquantifiable value."

Mr. Hochberg moved to amend the draft proposal in Memorandum No. 5 to add the word "salient" wherever the phrase "major, legal and economic marriage benefits" appears so that it would read "salient and major legal and economic marriage benefits." Ms. Sheldon seconded the motion.

Mr. Hochberg explained and Ms. Sheldon agreed, that the definition which was adopted in Memorandum No. 2 used the word "salient", it would be consistent to do so here.

A vote was taken on Mr. Hochberg's motion and failed to carry with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting nay.

17. Give the case's citation. (Also ensure the name is given correctly in the text.)

18. Give court citation. (Also ensure name is given correctly in the text.)

Dr. Stauffer explained Memorandum No. 5, relating to intangible benefits. He stated that there are certain legal benefits of marriage which are "closest to the heart" of affected couples but are intangible in the sense that it is difficult for an economist to put a "price tag" on it. His example was a situation of a couple married by a church that recognizes same-gender marriages but who does not have a legal marriage certificate. He explained that if one spouse were admitted to a hospital, the other spouse may not be allowed to visit the spouse because he or she may not be a certified spouse. He added that the law states that the hospital must allow legal spouses to visit. He further explained that a jury could possibly give it an economic value but for the Commission to attempt to do so would be "reducing something that is very human into dollars and cents." He concluded that these intangible benefits have value but that the Commission should not place a precise economic value on them. Dr. Stauffer said that same-gender couples repeatedly state that one important reason why they wish to be married is because of these types of intangible benefits. He suggested that these intangible benefits be listed first and that Ms. Martin cite them.

It was Mr. Hochberg's understanding that if you are conscious when entering a hospital you can allow anyone to visit you. He added that if you are unconscious before entering, many things could have been done beforehand, such as durable powers of attorney, living wills, etc., that would not permit the hospital to exclude certain visitors.

Ms. Kreidman stated that people do not expect to get into accidents and as a reflection of the general populous, many do not have durable powers of attorney, living wills, etc. She added that she is aware of situations where partners have not been able to have access to their "loved ones" because of family preferences or hospital interference.

Dr. Stauffer added that the benefit granted by state law is that an opposite-sex, married couple does not need to write a durable power of attorney, or does not need to contact every hospital in the State to give permission for a spouse to visit; it is just automatic.

Mr. Hochberg said that the Commission was not asked by the Legislature to find major legal or major economic benefits, but was asked to find major legal and major economic benefits. He continued that if the benefit does not have a major economic component to it, it is outside the scope of the Commission and should not be included in the report.

Dr. Stauffer stated that he did include both legal and economic benefits and referred to two other paragraphs of his memorandum that state in part: "...outside of such jury deliberations, it is very difficult if not impossible to place a monetary value on each of these intangible benefits that, in reality, probably are priceless pieces of our very humanity."

Ms. Sheldon addressed the issue and referred to the last paragraph on page 2 of the memorandum and stated that the content was incorrect and that the federal government specifically does not permit the immigration of same-sex couples, even from countries that recognize domestic partnerships, such as Denmark.

Dr. Stauffer stated that when he wrote the memorandum, he was relying on Dr. Roth's testimony which included this benefit. Since then, he has become aware that the Ninth

Circuit Court of Appeals, in a Colorado case, interpreted the federal law as saying it does not apply. He agreed that this paragraph may have to be amended but he would stand by what he wrote as of October 6 but would mention the Ninth Circuit case.

Mr. Hochberg said that his interpretation of the case was that what the Colorado court said was exactly what our Supreme Court rejected, which is that marriage may not exist between two people of the same sex because the definition of "marriage" is people of opposite sex. He added that it had nothing to do with any defect of issuing the license. He further added that the Ninth Circuit Court of Appeals ruled that for immigration purposes, the couple was not married. Mr. Hochberg suggested deleting the paragraph now but to possibly include it after clarification.

Ms. Kreidman said that since the procedure for amending the memorandum was not clear, she would support Mr. Hochberg's suggestion.

Dr. Stauffer then rephrased the motion to delete that one paragraph and any footnotes attached to it with the possibility of including it later.

Mr. Hochberg referred to the concept starting on page 3 and stated that our society does not grant "carte blanche" human liberty, but is defined by instances where human liberty is restricted. He added that if the Commission is inferring ultimate human liberty, then any type of marriage ceremony, or lack thereof, would not be required. He stated that heterosexual couples do not experience complete human liberty with their right to be married. They cannot marry persons of a certain age, persons related within a short bloodline distance, persons already married, etc. He urged that this is not an argument the majority should make because it totally lacks merit and a view of reality.

Dr. Stauffer begged to differ and referred to the last paragraph of the memorandum that states in part: "...the Commission finds that this intangible idea of 'being really married' through governmental certification -- the intangible idea itself-is one of the primary 'benefits' associated with legal marriage in the minds of most members of the general public." He added that many, all over the political spectrum and particularly the religious right people testified that there was "something" to marriage.

Ms. Sheldon asked Dr. Stauffer if he was inferring that the Commission was leaning toward something more than domestic partnerships. She stated that Memorandum No. 5 speaks to marriage rather than domestic partnerships.

Dr. Stauffer replied "yes", this particular section speaks to the idea and the status of being married as a major intangible benefit.

Mr. Hochberg then referred to the second full paragraph on page 3 and stated that it put into perspective what Memorandum No. 5 proposed to do. He questioned whether the majority of the Commission realized that it was going far beyond the scope of Act 5. He added that the only reason it was "hooked in" was because of a "liberty hook" and if this is the perspective that the majority is going to take he suggested that the members be honest

and recommend to the Legislature that chapter 572, HRS, be repealed and get the State out of the "marriage business."

Dr. Stauffer said that it was not his intent to abolish chapter 572. He then called for a vote on his original motion and added that he voluntarily removed the paragraph that begins on the bottom of page 2, relating to immigration of same-sex couples. The motion passed with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Dr. Stauffer stated that Memorandum Nos. 6, 7, 8, 9, 10, 11, and 12 flow together, are numbered internally, and attempt to cover fourteen areas of substantial major benefits that are all connected. He then moved that the text contained in Memorandum Nos. 6 through 12 be adopted, subject to editing and amendment later.

Chair Gill suggested that the Commission be given the chance to review and consider all fourteen different benefits individually.

Memorandum No. 6

Dr. Stauffer then withdrew his motion and referred to Memorandum No. 6, page 1.

Mr. Hochberg moved "to table voting on the memorandum because the Commission had not finalized the minutes of October 11, 1995, that included Dr. Ghali's response to Dr. La Croix's economic analyses on which the memorandum are based and consequently, the minutes do not reflect what occurred and since what occurred is ostensibly what these memorandum are based on, until the Commission resolved the question on the matters in the minutes." Ms. Sheldon seconded the motion and Mr. Hochberg called for the vote.

The motion failed to carry with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

Dr. Stauffer moved to adopt Substantial Benefit No. 1 as contained in Memorandum No. 6, subject to later review and amendment as appropriate. Mr. Britt seconded the motion. Specifically, the motion reads:

Substantial Benefit No. 1: Spousal/Dependent-Support Benefits

The Commission finds that if recognition and equality is the top benefit from governmental certification, and the one perhaps most commonly thought of by the general public, a close second is this package of benefits that are made available usually to one spouse (and any children) through the government's enforcement of the certificate's contract language.

That is to say, by the couple agreeing to the terms of the marriage partnership, as contained within the government certificate, they are each agreeing to support the other spouse (and any children).

The Commission also finds that for this package of benefits, including such things as spousal support, the government contributes little of the economic value of these benefits. Further, that government costs for this package consist largely of subsidizing the family court and other judicial avenues open to an economically weaker spouse (and children) to enforce the payment of benefits by the economically stronger spouse.

The Commission further finds that these benefits are not therefore made available directly by the government to a certified spouse (or the children). Instead, the direct benefits are paid by the economically stronger spouse. But these payments are indirectly made available by the government through its providing for enforcement of these support laws that come into effect by the couple getting their government certificate.

The Commission also finds that to many members of the general public, this package of benefits are also known as the central commitments that are at the heart of the social institution of marriage. When a person gets sick, instead of the government being the first caregiver consulted, we look to the person's spouse (and this applies whether the person getting sick is the economically weaker or stronger of the two). The same applies to both spouses if we see children getting sick or needing support.

The Commission also finds likewise, that if a couple separates but does not divorce, we look first to the economically stronger spouse to provide spousal support to the economically weaker spouse and any children. And if a couple does divorce, we look to the economically stronger spouse to provide for the economically weaker spouse and the children.

In addition, the Commission finds that while certified couples (and children's advocates) do not always have to appeal to the government to enforcement these support laws, just knowing that the laws are in place and capable of enforcement is a strong inducement to the one spouse to support the other and for the two spouses to support the children.

Therefore, the Commission finds that having these laws in place not only provides a first-line of individual support for society's most vulnerable citizens, but also provides an incentive that shows up in the extraordinary level of longevity, responsibility, and commitment seen in the certified marriage bond that are not seen in the bonds of many informal cohabiting couples. i.e., even with the high divorce rate, legal marriage enjoys a higher degree of longevity, responsibility, and commitment than non-legal marriage or unmarried couples' relationships.

The Commission also finds that the spousal-support laws and closely connected to the children-support laws. In short: the marriage certificate provides legally enforceable commitments between the spouses but also between them and their children. Hence, by supporting legal certification, the government and society as a whole are benefited by attempting to help ensure proper support of the weaker spouse, and we are also benefitted by attempting to ensure proper support for the procreation and raising of children.¹⁹

19. How child-support laws can benefit procreation is an indirect process. In short, by providing enforceable parent-support laws for children, the government creates an economically safer environment for an economically weaker spouse to agree to have a child.

Therefore, the Commission finds that government and society are harmed by denying married spouses and their children these benefits. The married spouses, their procreation of children, and their existing children are all likewise harmed.

The Commission also finds that the precise economic analysis of these benefits is difficult because of the number of variables involved. i.e., every couple, every child, every spousal-benefit case, and every divorce-decree is different. Still, we have the Hawaii Supreme Court's listing of benefits within this package.

The Commission takes note that of the 14 "most salient" government-certificate benefits, six were from this single category of spousal/dependent support:²⁰

- * The control, division, acquisition, and disposition of community property under Chapter 510, HRS.
- * The rights to notice, protection, benefits, and inheritance under the Uniform Probate Code, Chapter 560, HRS, (i.e., amongst other benefits, the fact that many people don't leave wills, and the law then provides for the distribution of the estate to the certified spouse and children).
- * The award of child custody and support payments in divorce proceedings under Chapter 571, HRS.
- * The right to spousal support pursuant to §572-24, HRS.
- * The right to file a nonsupport action under Chapter 575, HRS.
- * Post-divorce rights relating to support and property division under Chapter 580, HRS."

Dr. Stauffer summarized Substantial Benefit No. 1, Spousal/Dependent-Support Benefits. He gave an example of a married heterosexual couple and explained that if the stronger economic partner moved out, the weaker economic partner could sue for support. Dr. Stauffer said he presented this scenario to Dr. La Croix who replied that *technical economics perspective* there was no benefit, *because* as far as the marriage was concerned, *the benefit/burden* was all internal, between that couple, *and so* there was no *net* economic benefit *the couple as a whole*. Dr. Stauffer stated that he disagreed with Dr. La Croix and Dr. Ghali, who also believed there was no economic value, *insofar as he felt there was a benefit if not to the couple as a whole then to at least one member of the couple*. Dr. Stauffer agreed with the Supreme Court and added that six of the fourteen "most salient" *marriage benefits* listed by the Supreme Court *are these* divorce, dependent support, alimony, *etcbenefits*. He further added that many would consider divorce to be a burden *but also a benefit to the spouse receiving alimony, etc*. He requested that staff included the precise statutes in the final report.

Ms. Sheldon asked if members of the homosexual community were seeking either a domestic partnership and/or same-sex marriage so that they can be together and obtain the benefits that married heterosexual couples receive, have their love for one another

20. The following six benefits are from Baehr v. Lewin, 74 Haw 560-1 (1993).

recognized, have the status of being married and one of the benefits of marriage is the benefit of getting divorced.

Ms. Kreidman described marriage as being a commitment, obligation, and regard to one's intimate partnership. It was presumed that marriage bestows additional costs as well as benefits.

Ms. Sheldon concluded that adopting a law that would legalize these unrecognized relationships, such as common law and same-sex marriages, would be a great cost to society.

Mr. Hochberg found that this meeting had brought a shift in discussion on same-sex couples. He observed that up to this point the Commission has described same-sex couples in long-term relationships desiring the benefits of marriage. He commented that the Commission has suddenly shifted toward a discussion on a "fail safe" net for failed relationships.

Dr. Stauffer noted that Memorandum No. 6 was dated October 6, 1995, and there was not a major shift in discussion and the memorandum does not mention failed relationships.

Mr. Hochberg recommended that if the majority adopted Memorandum No. 6, the Legislature should be notified of the deviation of the description of what the Commission has been working on up to this point.

Chair Gill called for a vote and Mr. Hochberg moved to amend the motion to include the word "salient" wherever the phrase "major legal and economic benefits" occurred. Ms. Sheldon seconded the motion and Mr. Hochberg called for the question. *Mr. Gill stated: "We're going back to make another dance here. If I could have the Commission's attention, the motion is to insert the word "salient" in all the particular spots in Benefit No. 1."*

The vote was taken with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

The vote was then taken for the adoption of Substantial Benefit No. 1 in Memorandum No. 6. Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voted aye and Mr. Hochberg and Ms. Sheldon voted nay.

Memorandum No. 7

Dr. Stauffer moved to adopt Substantial Benefit No. 2 in Memorandum No. 7. *Mr. Gill asked Dr. Stauffer to explain Substantial Benefit No. 2 which Dr. Stauffer agreed to explain, "if there was a second." Whereupon the motion was seconded by Ms. Kreidman. Specifically the motion reads:*

Substantial Benefit No. 2: Health Insurance Benefits

The Commission making the following findings, as contained in this section:

The Hawaii Prepaid Health Care Act²¹ mandates that private employers provide a minimum package of health insurance benefits to employees who work more than 20 hours per week. The law allows an employer to charge the employee up to 1.5% of the employee's wage or salary as payment towards the health insurance premium.²² For most workers, even if this amount is withheld from their salaries, the portion contributed by the employer is still substantial. By tradition, most employers in Hawaii pay all of the insurance premium, a substantial benefit.

A parallel law²³ mandates public employers to provide health insurance benefits. A minimum contribution from the public employers is mandated, with the precise contribution level set by collective bargaining.²⁴ Traditionally, employees do make a partial-contribution towards the insurance cost, but the employer's contribution is still substantial.

The law for private employers does not require that the health insurance coverage be provided to workers' legal spouses or dependents.²⁵ Still, almost all private firms provide this added coverage. Often the premium for this added coverage is not subsidized by the employer, but the payment amount is still substantially below getting the insurance privately because of reduced rates by going through the employer's plan; as such, this represents a substantial benefit. While private employers may voluntarily extend this benefit to non-legal spouses, this has generally not been the tradition in Hawaii. Therefore this substantial benefit is limited to legal spouses (and children), and constitutes a "marriage bonus." The precise amount of the bonus is set by various insurance plans, which are adjusted from time to time, and by the amount (if any) which the private employer contributes to the added insurance cost.

Most private employers provide the spousal benefit with the condition that if the spouse is already covered, that the only insurance benefit given would be for those medical expenses which are not already covered by the spouse's plan. If the spouse is not working, then full coverage would be given, with less coverage if the spouse is working or otherwise has some coverage. Assuming the spouse is not working and so gets coverage through the other spouse's employer, and assuming the employer contributes nothing to the cost of the spouse's policy, then one estimate of the savings to the married couple is \$1,251.48 in saved costs by going through the employer's plan.

Public employers, on the other hand, are mandated by law to provide certified spousal health benefits, and further to contribute a minimum amount towards these

21. Give citation.

22. Give citation.

23. Give citation.

24. Give citation.

25. Give citation.

costs (final agreement on the amount of subsidy is set by collective bargaining).²⁶ The "spousal benefit" is therefore at least \$1,251.48 if the spouse did not work (i.e., the savings of going through the employer), and more if the employer's contribution is factored in (the employer's contribution varies under the various collective bargaining agreements with the different unions and categories of public employees). In any case, the "marriage bonus" is a substantial amount.

A similar benefit is mandated for public employers to be provided to dependent children, another bonus.²⁷

Dr. Stauffer explained that Substantial Benefit No. 2 relates to spousal health insurance benefits primarily for public employees but also refers to private employees. He added that page 3 of the memorandum also mentions the possible value being \$1,251.48 but would vary case-by-case.

Mr. Hochberg moved to table the motion until the approval of the minutes of October 11, so that the members could review the comments of economists Dr. Ghali and Dr. La Croix. Ms. Sheldon seconded the motion and Mr. Hochberg called for the question.

The vote to table the motion was taken and failed to pass with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

A discussion ensued between Mr. Hochberg and Dr. Stauffer concerning the health insurance benefits.

Mr. Hochberg then referred to the second sentence of the second full paragraph of Substantial Benefit No. 2. He asked Dr. Stauffer where he obtained the information that "almost all private firms provided this health insurance for spousal added coverage."

Dr. Stauffer stated that it had been his private experience and his study of the market and believed the information was also contained in Dr. La Croix's testimony. *Dr. Stauffer said he would get the source of the information for us. Mr. Gill stated that perhaps Dr. Stauffer could give it to Mr. Hochberg for review. Mr. Hochberg voiced concern that in the meantime that information would be left in the report as truth, stating: "That's the trouble with the conduct of these proceedings." After further discussion, Dr. Stauffer agreed to have the sentence read: "Still, almost all private firms provide access to this added coverage (citation to be supplied)."*

Ms. Sheldon requested, whatever action is taken, that her right to discuss the matter further be preserved.

26. Give citations on these two or three things.

27. Give the citation.

Dr. Stauffer again reminded the Commission that the motion is subject to later review and amendment.

Mr. Hochberg then referred to the first full paragraph on page 3 of Substantial Benefit No. 2 of Memorandum No. 7 that reads: "...The 'spousal benefit' is therefore at least \$1,251.48 if the spouse did not work (i.e., the savings of going through the employer), and more if the employer's contribution is factored in (the employer's contribution varies under the various collective bargaining agreements with the different unions and categories of public employees)...." He then referred to Dr. Ghali's interpretation of Dr. La Croix's figures and said that it was an expected value, but not the real value. Mr. Hochberg opined that the real way to analyze any of these benefits is to say that the \$1,251.48 is an expected value that must be multiplied by the likelihood of the use of this benefit. He perceived, that without the benefit of Dr. Ghali's analysis, the economic evaluation in the paragraph was incorrect and would be misleading to the Legislature.

Dr. Stauffer contended that the statement in his motion was more factual than Mr. Hochberg's and if Mr. Hochberg disagrees, he could express his evaluation in the minority report.

Mr. Hochberg urged the Commission not to have misleading information in a report to the Legislature that must be corrected by a minority report. Ms. Sheldon agreed.

Dr. Stauffer said that his statement was not misleading but instead was the truth.

Chair Gill called for a vote on Substantial Benefit No. 2, Memorandum No. 7 and was adopted with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voted aye. Mr. Hochberg and Ms. Sheldon voted nay.

Dr. Stauffer then moved to adopt Substantial Benefit No. 3, Other Insurance Benefits, subject to later review and amendment as appropriate. Ms. Kreidman seconded the motion. The motion specifically reads:

Substantial Benefit No. 3: Other Insurance Benefits

The Commission finds that partially by tradition, and partially by legal mandate,²⁸ insurers in Hawaii have granted certified families discounts for various types of insurance.

This is thought to include premium discounts for life insurance, auto insurance, and private disability insurance. The matter is sufficiently complex that the Commission has been unable to further quantify the amount, but the Commission finds that the benefit is substantial.

Dr. Stauffer reviewed *these* two paragraphs which briefly state that insurers in Hawaii traditionally grant certified families premium discounts for various types of insurance,

28. Give citations.

including life, auto and private disability. He added that there are articles that discuss these types of insurance and how same-gender couples are penalized. He further added that staff has found certain mandates within the insurance chapters of the HRS which appear to have a connection with this and believes these citations should be listed in the report. Dr. Stauffer pointed out that *in his opinion* while the words used in the two paragraphs are somewhat *cautious*, it points out that *the matter* is an important benefit.

Ms. Kreidman suggested the sentence be clarified to read: "...insurers in Hawaii have granted certified families access to discounts for various types of insurance."

Mr. Hochberg referred to Ms. Martin's list of HRS sections, that confer marriage benefits. Ms. Martin clarified that although she takes full responsibility for the interpretation, some of them may not be hers but she would try to explain them.

Mr. Hochberg then specifically referred to section 431:10-203 which states: "...it declares a minor competent to contract for life or disability insurance on the minor's own life for the benefit of the minor or the minor's spouse." He questioned whether under this "new regime" the Commission was proposing that minors be allowed to marry without parental consent.

Dr. Stauffer replied, "obviously not", and reiterated that the subject is exceedingly complex but he has attempted to "boil it down" to two paragraphs.

Mr. Hochberg then referred to section 431:10-206, insurance contracts, which allows one spouse to contract for life or disability insurance without the consent of the insured spouse.

Ms. Sheldon stated that anyone could purchase a policy and insure whomever they pleased.

Dr. Stauffer gave the example of the premium for auto insurance for a married couple. He stated that although there are many other variables, insurance companies traditionally give a reduced premium to a spouse versus two individuals. He added that this appears in testimony from 1995 and literature that is included in the bibliography (under law review articles).

Mr. Hochberg again referred to the HRS list of benefits and stated that there are fourteen insurance sections that cover insurance contracts, health insurance, credit insurance, auto insurance, and life insurance. He said that none of the blurbs address a decrease in premiums for anyone.

Ms. Martin then pointed out that section 431:10D-212, and said that being able to participate in a "group life insurance" plan is an example of a benefit. She explained that the section allows the extension of discounted group life insurance policies to spouses and dependent children. She confirmed that the definition used when interpreting the list of HRS sections was "any improvement in condition or status that arises out of being married, or

being a spouse, or being a family." She added that a same sex partner would not be extended that group policy.

Mr. Hochberg disagreed and remarked that whether a same-sex partner were working or not, the the benefit would be free, under state law referring to the State Quest health program.

Dr. Stauffer then agreed to Ms. Kreidman's suggestion to reword the first paragraph of Substantial Benefit No. 3 to read: "...insurers in Hawaii have granted certified families access to discounts for various types of insurance."

Mr. Hochberg again expressed his concern about submitting a report to the Legislature that included misleading information.

Ms. Kreidman responded that because drastic cutbacks to access to entitlements is occurring, more people will be affected. She added that if the Commission has "an opportunity to provide insurance to someone who might not otherwise have it, they deserve it too."

After discussion on the procedure for making motions, *which included discussion by Ms. Sheldon, in her opinion, of Mr. Gill's continuing refusal to treat Mr. Hochberg with the same courtesy and privilege extended to other Commission members*, Mr. Hochberg moved to amend Substantial No. 3 by deleting the two paragraphs in its entirety and replacing it with Ms. Kreidman's comments which were: "Are you aware of the drastic cutbacks in access to entitlements that's taking place right now? Now that's going to affect more and more and more people. I don't think it is safe to say that everybody is either in this category or that category and if you are in this category you get insurance and if your in that category you also get insurance. It simply doesn't work that way. What we're trying to do is to say if we have an opportunity to provide insurance to someone who might not otherwise have it, the deserve it too."

The motion failed to pass with with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay. Mr. Hochberg and Ms. Sheldon voted yes.

Dr. Stauffer then agreed to Ms. Kreidman's suggestion to reword the first paragraph of Substantial Benefit No. 3 to read: "...insurers in Hawaii have granted certified families access to discounts for various types of insurance."

Dr. Stauffer clarified that Substantial Benefit No. 3 deals with life insurance, auto insurance, private disability insurance, not public disability, not HMSA disability, not workers' compensation, not TDI, but private, additional disability insurance that one can purchase aside from TDI, etc.

A vote was taken on Dr. Stauffer's original motion to adopt Substantial Benefit No. 3, as amended. The motion carried with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting aye. Mr. Hochberg and Ms. Sheldon voted nay.

Ms. Sheldon then formally requested a verbatim excerpt of the tape, in writing, of what Ms. Kreidman said: "Are you aware of the drastic cutbacks in access to entitlements that's taking place right now? Now that's going to affect more and more and more people. I don't think it is safe to say that everybody is either in this category or that category and if you are in this category you get insurance and if *you're* in that category you also get insurance. It simply doesn't work that way. What we're trying to do is to say if we have an opportunity to provide insurance to someone who might not otherwise have it, they deserve it too."

Mr. Hochberg moved that the complete written testimony by Daniel P. McGivern given at the previous meeting be put in its full context in the minutes of prior meeting and again in the current meeting by this motion. The motion was seconded by Ms. Sheldon.

Ms. Martin explained that, for administrative purposes and the reporting rule under the Public Information Act, all written testimonies have been attached to the minutes.

Dr. Stauffer *then* cited a section of chapter 92 which, *in his opinion*, states that commission members have the right to insert items into the minutes and *that he would* vote in favor of the motion.

In response to an inquiry from Ms. Kreidman, Mr. Hochberg reasoned that Mr. McGivern's testimony was very perceptive and wanted it included in the text of the minutes. He called for a vote but was assured by the Chairperson that it would be included.

The following is Daniel P. McGivern's testimony given on October 25, 1995.

When a person appears before a legislative body or a commission, it is expected that the members on the body are at least interested in what will be said. But this commission really isn't.

If 1,000 people testified against same-sex marriage and against domestic partnership laws, and only one person testified in favor, that person would have his or her view upheld by this commission.

This commission is not objective. It is a sham, a shibai, a fraud perpetrated on the public. The outcome of the commission's voting on whether marital benefits should be extended to homosexual and lesbian couples has been known since the commission was first appointed.

The real purpose of this commission is to hand a favorable report to the legislature, leading to a domestic partnership law in the next legislative session.

However, a domestic partnership law, which recognizes gays as a special class, will inevitably lead to same-sex marriage.

It is said that this commission does not truly represent the community. This is the first time I've ever appeared before a body, knowing that what I and others have to say makes no difference.

If anything is said that is contrary to furthering the homosexual-lesbian agenda, it will be disregarded by the majority of this commission.

Memorandum No. 8

Dr. Stauffer moved that Substantial Benefit No. 4, Retirement Benefits, report be adopted by the Commission, subject to later review and amendment as appropriate. Ms. Kreidman seconded the motion. Specifically, the motion reads:

Substantial Benefit No. 4: Retirement Benefits²⁹

The Commission makes the following findings, as contained in this section:

Retirement benefits are required by law for public workers of the four Counties and also for the State.³⁰ Retirement benefits for private workers are not required by law, but are fairly common in Hawaii.

A full examination of private-sector retirement benefits that include a "marriage bonus" is beyond the scope of this report, though it is understood that this bonus exists in private-sector plans and represents a substantial and common benefit.

Within the public-section (State and Counties) there are a number of retirement benefits, and this study will examine just two substantial benefits from this area. As private-sector retirement-benefit plans are often similar, an examination of these two public-sector retirement benefits can suggest what would be found of a separate examination of the private sector.

The two benefits are (1) retirement health insurance coverage; and (2) death-benefit payments as part of workers' pensions. The "marriage bonus" arises because these benefits are extended to surviving legal spouses in certain circumstances.

a. Retirement health insurance coverage.

If a public worker qualifies for retirement benefits and retires before the age where Federal Medicare benefits become available, that worker is allowed the option of retaining the very comprehensive medical-dental-vision-drug coverage that the worker enjoyed while in active service with the government. Further, the worker's right to extend these benefits to a legal spouse (a right that was enjoyed during active service) is retained: in retirement, the legal spouse is subsidized in his/her comprehensive coverage.³¹ One estimate of the value of this benefit is \$1,464 annually.

29. In general, see also La Croix, Sumner J.; and Badgett, Lee. "A Brief Analysis of Important Economic Benefits Accruing from Same-Sex Marriage; Revised Testimony Before the Commission on Sexual Orientation and the Law, State of Hawaii, September 27, 1995, revised October 5, 1995. Mss, 9 pages.

30. Give citations.

31. Give citation.

When the public retiree reaches the age of qualifying for Medicare, the retirement benefit shifts to paying for the "Premium for Part B" fee. This benefit is extended to legal spouses for the full lifetime of the spouse, whether or not the retiree pre-deceases the spouse.³² One estimate is that this benefit is worth \$553.20 annually. With plans currently occurring in Congress to raise the premium cost, and with the public employers committed to covering the cost at whatever level it rises to, this benefit amount is expected to rise over time.

Many private pension plans provide similar coverage for retirees' spouses below the effective age for Medicare, and for retirees's spouses eligible for Medicare coverage. Like the legal mandate for public employees, this traditional coverage is limited to certified spouses. As above, these benefits are substantial. If identical to the public coverage, one estimate places the benefits at \$1,464 annually for spouses not covered by Medicare, and \$553.20 annually for those covered by Medicare.

b. Retirement Death-Benefit Pension Coverage.³³

There are currently two public-sector pension plans, referred to as the "contributory" and "non-contributory" plans. Generally the former plan covered workers prior to the mid-1980s, and the latter plan covered most workers since that time. In general, a contributory plan means the worker contributes to the plan, whereas a noncontributory plan means the worker does not. In both cases the employer makes contributions.³⁴ The benefits are usually higher for a contributory plan as more payments have been made into it.

Over 90% of current public pensioners are on the contributory plan, whereas 72-74% of current workers are on the noncontributory plan.

If a worker dies prior to retirement, but the death was an "ordinary" one, in the sense that it was NOT caused by an accident on the job, and the worker was in the contributory plan, there is no "marriage benefit" because the death-benefits are paid to whoever the worker designated as their "beneficiary." The "beneficiary" need not be a spouse or a relative. So, whether legally married or not, a worker has the option of naming a partner or not.³⁵

If the same "ordinary" death occurs, but the worker was in the noncontributory plan, however, a "marriage benefit" clearly exists. In this case, the death benefits are paid to a legal spouse (and dependent children get an additional, smaller payment, up to the age of 18). If there was no legal spouse, then no payment is

32. Give citation.

33. Shimabukuro, David. "Testimony of David Shimabukuro, Assistant Administrator[,] Employees' Retirement System of the State of Hawaii to the Commission on Sexual Orientation and the Law[,] September 27, 1995." Mss. September 27, 1995.

While the statements and findings of this sub-section of the report are those of the Commission, the Commission thanks Assistant Administrator Shimabukuro for his assistance and testimony in helping the Commission deal with this issue.

34. Give citation.

35. Give citation.

made unless there are children (but payments to the children are much lower than to a legal spouse). If there are no children or legal spouse, then no payment is made. In other words, the worker has no right to name a "beneficiary," and instead is forced to have the primary payments go only to a legal spouse. Furthermore, the value of the death-benefits do not go to the workers' estate or other heirs if there is no legal spouse or any children.³⁶

The value of this "marriage bonus" is contained in various public documents and adjusted from time to time. It is a substantial amount of money.³⁷

There is one exception to the above discussion about contributory members (i.e., those who generally have no "marriage bonus").

When the public worker is hired, he or she must name a "beneficiary". But that beneficiary may die and the employer has no method currently of finding out and asking the worker to name a new beneficiary. Often the worker fails to remember to do so, and so an "ordinary" death as above may occur where the named beneficiary has already died. In that case the employer will automatically pay all the death benefits to the spouse (and/or dependent children), and if there are none, to the workers' estate.³⁸

This exception -- more common than might be supposed -- creates a "marriage bonus" for contributory members having "ordinary" deaths. Legal spouses would in these cases automatically get the death-benefits, as set by the employer from time to time, and which are substantial.³⁹

The next type of death is one caused by an accident on the job. In the case of non-contributory members, their benefit is the same as above: the death-benefits are paid to a legal spouse (and children) only. The value is the same as if the worker had died an "ordinary" death, and is substantial.⁴⁰

If the "accident-on-the-job" death was to a public worker on the contributory plan, however, things are treated differently than if it had been an "ordinary" death.⁴¹

For "ordinary" deaths, the death-payment is made to a designated beneficiary, which could be a legal spouse or not, therefore giving no special "marriage bonus". But for an "accident" death, the legal spouse gets a death-bonus whether or not the worker named the spouse as a beneficiary.⁴²

36. Give citations.

37. Give citation.

38. Give citation.

39. Give citation.

40. Give citation.

41. Give citation.

42. Give citation.

For example, if the worker named the legal spouse as beneficiary, then after an accidentally death, the spouse would get 100% of the benefits. But if the worker had named someone else, then that other person gets 50% of the benefit, and the legal spouse gets the other 50%.⁴³

This is the only time when "spousal rights" enter the picture for contributory members' death-benefits. Even at 50% of the total value, the amount is substantial.

Also, as with the point above, a contributory member's death-benefit in an "accident" case will 100% go to the legal spouse (with additional payment to the children) if the named beneficiary has passed away and no new beneficiary was named by the worker.⁴⁴ This benefit, as described above, is substantial.

State law does not mandate death-benefit payments for private employees. Some private firms extend such benefits, sometimes to the surviving certified spouse (and children) and other times to a designated beneficiary. To the degree that the benefit is made available, and to the degree that it is limited to the certified spouse (and children), these private-sector benefits are substantial.

In the case of all certified spouses receiving a death-benefit payment, they have the further benefit of rolling the payment amount over into an IRA, while an unrelated recipient of the death-benefit cannot do so and so must pay a sizeable tax penalty. Deferring and reducing the ultimate the tax penalty (through use of the IRA option) is an additional substantial benefit for legal spouses.⁴⁵

Dr. Stauffer explained that Substantial Benefit No. 4 describes the retirement health insurance and death-benefit pension coverage for certified spouses of public employees. The memorandum was based on *the written testimony of David Shimabukuro, Assistant Administrator, Employees' Retirement System*. He further explained that the memorandum described the ramifications of ordinary death, accident on the job, etc. *for contributory versus noncontributory plan members*.

Mr. Hochberg moved to table discussion on Substantial Benefit No. 4 because the minutes of the October 11 meeting had not been reviewed or approved, that persons, other than Mr. Shimabukuro, had testified, and that Dr. Ghali's testimony had not be included or agreed upon for those minutes. He added that because there had been ex parte, subsequent communication with Mr. Shimabukuro for Memorandum No. 8, he should probably come back and readdress the topic, rather than having the Commission disregard what was heard. Ms. Sheldon seconded the motion.

The motion failed to pass with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

43. Give citation.

44. Give citation.

45. Give citations.

Mr. Hochberg's recollection, without the benefit of corrected minutes reflecting what the consensus of the Commission recalled the testimony on the Employees' Retirement Systems (ERS) to be is as follows:

- (1) There was no benefit to being married because you can select your beneficiary (not addressed by Dr. La Croix).
- (2) Except in certain cases where a spouse can obtain additional pension if a contributory employee dies accidentally while in service. Dr. Ghali stated that because this situation happens infrequently, it may be considered insignificant and not a major economic benefit.

Mr. Hochberg's overall recollection was that the ERS yields little benefit to married couples that everyone else does not have.

Ms. Kreidman *inquired why oppose the principal* if the cost is so minimal?

Mr. Hochberg responded that because the Commission has not yet discussed whether it is appropriate to recommend to the legislature that they extend the same benefits to those who engage in homosexual sex as they do to those heterosexuals who choose to marry.

Dr. Stauffer commented that the memorandum reflects the three firm benefits (included in Mr. Shimabukuro's written testimony) based on having a marriage certificate and also includes benefits where beneficiaries can be designated. Dr. Stauffer clarified *some of the monetary figures* in his memorandum and referred for a citation to footnote 29 in these minutes which is the first footnote of Substantial Benefit No. 4.

Mr. Hochberg stated that in his opinion Dr. La Croix backed away from his written paper when confronted with Dr. Ghali in the room and he recalls that Dr. La Croix admitted that he didn't do an economic analysis. Dr. Stauffer stated that was not his recollection. Mr. Hochberg believed that if the minutes of the October 11, meeting were finalized this issue could be resolved. Dr. Stauffer confirmed that we have Dr. La Croix's written nine-page testimony that has not been withdrawn.

Ms. Sheldon requested that figures in the memorandum be cited. Dr. Stauffer agreed to footnote the figures.

Mr. Hochberg and Dr. Stauffer discussed and disagreed on the evaluation of lump sum distributions, and ordinary and accidental death benefits. Dr. Stauffer said he stood by his interpretation.

A vote was then taken on Dr. Stauffer's motion. The motion passed with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Mr. Hochberg moved to adjourn and the motion was seconded by Ms. Sheldon.

The Chairperson stated that the motion to adjourn was out of order and questioned whether Mr. Hochberg wished to appeal. He added that there were more items on the agenda that needed to be addressed and suggested that the members agree on a date and time to reconvene. The members decided to meet on Wednesday, November 1, 10:00 a.m.

November 1, 1995

Chair Gill reconvened the meeting at 10:07 a.m., November 1, 1995. All members were present.

Substantial Benefit No. 5/Memo No. 9

The Chair handed out a "Proposed Statement on the Economic Effect of Legalizing Same-Sex Marriage on Tourism in Hawaii" attached as Attachment 3.

Mr. Hochberg moved to amend the agenda to include public testimony at this continued meeting. The motion was seconded by Ms. Sheldon. The Chair stated that November 8, 1995 has a place for public testimony. Mr. Hochberg spoke in favor of his motion under the the sunshine law. Dr. Stauffer spoke against the motion stating that HRS does not allow amending of the agenda. Ms. Sheldon spoke in favor that we should consider the schedule of the person. Mr. Hochberg said the express language allows the public to speak at every meeting.

The motion to amend the agenda did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

Ms. Sheldon moved to amend the agenda to introduce four short motions that are relevant to Mr. Stauffer's and Mr. Britt's information. Mr. Hochberg seconded. Mr. Britt spoke against the motion asking that the motions be in writing so the members could consider them. Ms. Sheldon said that there is no requirement that the motion be in writing. Mr. Hochberg clarified that Ms. Sheldon's motions may be procedural and acceptable to Mr. Britt. Mr. Britt suggested that the motions be taken in order as presented to the Commission.

The motion to amend the agenda did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

Dr. Stauffer moved to include Substantial Benefit No. 5, Workers Compensation/ Memo No. 9, pg. 1. Ms. Gomes seconded the motion. Specifically it states:

Substantial Benefit No. 5: Workers Compensation Benefits

The Commission finds that Hawaii's workers compensation law allows death benefits to be paid, due to employment-related death, to a dependent certified spouse

(or other family members: dependent parent, children, grandchildren). However, these benefits are not paid to an uncertified spouse.⁴⁶

The Commission further finds that these benefits are significant and equal 62% of the worker's weekly wage (with a mandated minimum benefit though also with a mandated maximum). This monthly payment to the certified spouse does not end until that spouse's death or remarriage.⁴⁷

Mr. Hochberg moved to amend the title to read "salient and major legal...." Ms. Martin clarified the motion started after the title. Mr. Hochberg withdrew the motion.

Ms. Sheldon moved to table the motion because we the Commission had not reviewed the statute *and no statute was identified*. Mr. Hochberg seconded the motion. He spoke in favor of the motion to table because we have not talked about it or looked at the statute.

Mr. Gill asked Dr. Stauffer when *his lists (referring to the memos) were* submitted. Dr. Stauffer spoke against the motion based on the fact he has made these available to Commission members since October 6.

The motion to table the discussion on Substantial Benefit No. 5 did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

Ms. Sheldon asked why we are voting at all, because everyone has made up their minds.

The Chair confirmed that there has been three weeks to review the material. Ms. Sheldon replied that her personal review of the statute is not the Commission's review of the statute. Ms. Kreidman agreed and suggested discussing it now.

Mr. Hochberg asked Dr. Stauffer for a definition of certified spouse. Dr. Stauffer replied *a spouse whose marriage has been recognized* by the State. Mr. Hochberg asked where Dr. Stauffer got the definition. Dr. Stauffer replied the statute. Ms. Martin pointed out that section 386-42, Hawaii Revised Statutes, defines dependents.

Mr. Hochberg moved to strike the second paragraph. Ms. Sheldon seconded the motion. Mr. Hochberg, pointing to the second paragraph spoke in favor of his motion with regard to the major benefit *because we have to decide on* what the economists said. Refreshing the Commission's memory of the economists testimony he stated in order to value a benefit you need to take mathematical steps that have not been taken here because we don't have the necessary data, including how many people would take advantage of the benefit.

46. Give citation.

47. Give citation.

Ms. Kreidman questioned whether we are examining the benefit's value to the individual or to the community? To the community it may not be a major benefit, but to the individual it may.

Mr. Hochberg said, *in his opinion*, the economists were not speaking to the benefits to society. Except maybe Dr. La Croix. *Mr. Hochberg said the economists were telling us the difference between the individual and the community is the "economic value".*

The motion to strike the second paragraph did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

A call for the question on Substantial Benefit No. 5 was made. The motion to accept Substantial Benefit No. 5 as stated passed with Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting aye and Mr Hochberg and Ms. Sheldon voting nay.

Dr. Stauffer moved to accept Substantial Benefit No. 6, wrongful death benefits, as stated in Memorandum No. 8. Ms. Gomes seconded the motion. Specifically it states:

Substantial Benefit No. 6: Wrongful Death Benefits

The Commission makes the following findings for this section:

In a wrongful-death complaint, a legal spouse is allowed to sue for loss of support to the surviving spouse and the loss to the estate. The suit may also attempt to recover damages, including loss of companionship, consortium,⁴⁸ and marital care, as well as the expenses of any illness and burial. In most cases, an uncertified spouse cannot sue for support. If the legal spouse is the only dependent of the deceased, the loss of support can be up to 40% of the deceased' lost earnings.⁴⁹

For example, if someone murders or is otherwise responsible for causing the wrongful death of a spouse, the government may or may not bring criminal charges or other actions against the person causing the wrongful death. But aside from workers compensation (if the death was caused on the job), and except for any private insurance the couple may have carried, and except for the extremely limited payments under the Victims' Compensation Act,⁵⁰ the surviving spouse will get no monetary payment other than charity.

Society has addressed this injustice by allowing legal spouses to bring "wrongful death complaints," which are forms of civil lawsuits, against those responsible for the wrongful death. If the perpetrators are capable of making a payment, and if the

48. Give meaning of this term.

49. Give citations. (Probably: HRS sections 663-3, 663-18.)

50. Get correct name of act (for the text above), and also give the precise statute citation here.

lawsuit is successful, the surviving spouse may collect support payments (i.e., payments over time), a lump-sum award for the loss to the person's estate of his or her earning power caused by the death, together with other payments. The precise sum collected would, of course, depend on the cost of support to the surviving spouse, the lost value to the estate (including the earning power of the deceased), the circumstances of the wrongful death, the level of success of the lawsuit, and the amount spent on legal costs for the case.

This nevertheless is a substantial benefit, and possessing it gives a couple (and their children) a certain peace of mind during their lifetime together. While wrongful deaths are rare, worrying about them (and worrying about how the surviving spouse and children will be supported) is a much more common occurrence. These laws provide this comprehensive form of benefit, at no real cost to the government, and the benefit is a significant one.

Dr. Stauffer clarified that this benefit is defined in the wrongful death statute, which is section 663-3, Hawaii Revised Statutes.

Ms. Sheldon stated that just because you have a marriage and a death you don't have the right to bring a wrongful death suit. The statute is limited in what it allows you to claim, it does not allow a windfall benefit.

Dr. Stauffer agreed that *the benefit* is only opened *under certain circumstances* of wrongful death and still speaks in favor of accepting this as a benefit.

Mr. Hochberg moved to table the vote because we don't have the statute, or the exact language. Ms. Sheldon seconded the motion.

Ms. Kreidman reminded Mr. Hochberg that this is a first run and we have an opportunity to adjust. And now we're throwing out the benefits for initial review.

The motion to table the discussion on wrongful death did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

Mr. Hochberg addressed the substance of the alleged benefit. He stated that before this Commission could determine whether this was a major legal and economic benefit the economic calculations needed to be addressed because of the change in the tort law that is eminent. He said there are expected changes relating to hedonics, and loss of consortium, although he couldn't say exactly. Mr. Hochberg sees a problem with declaring something that probably will not exist much longer as a major legal and economic benefit. His second point is the validity of statement that reads "40% of the deceased's lost earnings..."

Dr. Stauffer replied it came from the testimony of Dr. La Croix and Dr. Badgett. Mr. Britt added that it is not in the Commission's duty to predict what the Legislature will do regarding benefits that currently exist on the books, or to determine how many people will partake in the benefit only that the fact that it will happen to some one at some time.

Mr. Hochberg says our economists view is that they don't look at that way. And without that economic evaluation he believes we're not doing what the legislature asked us to do.

Ms. Sheldon added that while recognizing these are drafts we are looking at today but what is the point of voting on something that's wrong? We're drafting wrong things, and this particular paragraph (first full paragraph) is wrong.

Mr. Britt disagreed with the statement that they are wrong. That is an interpretation. He reminded Ms. Sheldon that there will be an opportunity to present the objections in a minority report, but we need to proceed. Mr. Britt stated that many of these discussions appear to be to delay and obstruct so that there would be no report.

Ms. Sheldon clarified that she did not say everything is wrong. She just refers to the first full paragraph. Mr. Britt agreed that if Ms. Sheldon disagrees with anything then it is her obligation to state that.

Mr. Hochberg said that there are things that are currently tied to marital status that should be removed from their dependency on marital status. Assuming wrongful death meets the definition of major legal and economic benefit the elimination of marital status requirement from wrongful death rights would make it marriage neutral.

The motion to accept Substantial Benefit No. 6 -- wrongful death benefits passed with Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

The Commission recessed at 10:50 a.m. and reconvened at 11:00.

Mr. Hochberg asked Ms. Martin to have a copy of the tapes or written refusal from her Director. Ms. Martin said she would ask the Director.

Dr. Stauffer moved to accept Substantial Benefit No. 7, Hawaiian Home Lands surviving spouse benefit. Mr. Britt seconded the motion. Specifically it states.

Substantial Benefit No. 7: Hawaiian Home Lands Surviving Spouse Benefit

The Commission finds that upon the death of a Hawaiian Home Lands lessee, a certified spouse can assume the lease if the spouse is qualified by blood-quantum,⁵¹ while a spouse without a marriage certificate cannot.⁵²

The Commission further finds that the "marriage benefit" here depends on having the lessee spouse die while the legal spouse is still living. The value of the

51. An inheriting legal spouse need be only 25% blood-quantum.

52. Give citation.

benefit would depend on how many years the surviving spouse lives. One estimate puts the benefit at \$4,812 annually. In any case, it is a substantial benefit.

Dr. Stauffer spoke in favor of the motion explaining the law provides that only a *legal* spouse can take over the lease.

Mr. Hochberg moved to table the motion until we could approve the minutes. Ms. Sheldon seconded the motion.

The motion to table the discussion on Substantial Benefit No. 7 did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

The question whether two people can be on the lease was asked. Dr. Stauffer *referred to the law, which states* if you are not *Hawaiian* you can't be on the lease. The only time two spouses can be on the lease is if both are *Hawaiian* and qualify. Ms. Sheldon asked Dr. Stauffer to footnote the \$4812 figure. Dr. Stauffer agreed and added that the information is from testimony of Dr. La Croix and Dr. Lee Badgett. *The testimony from Dr. Ghali could not be considered an option.*

Mr. Hochberg spoke in favor of Dr. Ghali's analysis. Dr. Ghali *did* not advocate throwing the surviving spouse out on the street. He said you have to figure out what's going to happen to the *Hawaiian* family that loses the lease, and who's going to pay and what the cost is for that family is to live somewhere else.

The motion to accept Substantial Benefit No. 7, *Hawaiian Home Lands* surviving spouse benefit passed with Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Mr. Hochberg moved to add Dr. Ghali's analysis in Substantial Benefit No. 7. There was no second to the motion. The Chair reminded Mr. Hochberg that he could submit that information in the minority report or at a meeting where additions and deletions will be reviewed.

Dr. Stauffer moved to accept Substantial Benefit No. 8, "Savings in Creating the Relationship". Mr. Britt seconded the motion. Specifically it states:

Substantial Benefit No. 8: Savings in Creating the Relationship⁵³

The Commission makes the findings below, covering this section:

Besides the intangible benefit of equality; besides the central core benefits that come from the internal commitments of a certified family; and besides the benefits

53. In general, see also La Croix, Sumner J.; and Badgett, Lee. "A Brief Analysis of Important Economic Benefits Accruing from Same-Sex Marriage; Revised Testimony Before the Commission on Sexual Orientation and the Law, State of Hawaii, September 27, 1995, revised October 5, 1995. Mss, 9 pages.

cited above in insurance, retirement, and death benefits; there is another commonly understood package of benefits that are associated with being certifiably married.

This package can be called "creating the relationship." The benefits in this package start with the right to change your name without paying the normal costs of a name-change.⁵⁴ The package continues in automatically-created legal relationships with your spouse and your children.

Some of these benefits are repeated under other categories,⁵⁵ but they can also be lumped together here because many of them can be partially "replicated" without having a government certificate. For example, to change names, the spouse(s) can use the normal (payment) route provided by law.

There are three costs associated with "replicating" a certified marriage. First, some of the steps involve paying a government fee (as with the name-change). Second, nearly all the steps require costly legal (or other) services. Third, the "replication" is not always guaranteed.

As just one example amongst many, under normal law, a certified spouse generally has the right to "inherit" the sole custody of any dependent children at the time of death of the other spouse.⁵⁶ Non-certified spouses can attempt to "replicate" this right by each having careful wills and trusts set up by their lawyer(s) at substantial cost.

But these legal documents are not necessarily binding. Other family members can -- and have -- challenged the wills and trusts and have sometimes succeeded in taking the children, despite the clear wishes of the deceased.

We can therefore place a known financial value on this specific marriage-certificate benefit through finding out what it would cost to "replicate" the benefits by drawing up documents.⁵⁷ But there must always be an additional, unknown value in this example, namely the degree of worry to the spouses (and to the children) that their family will be torn apart at the time of death of one of the spouses. Similar findings exist for several of the other benefits in this package.

Having made these points, it remains that the government certificate is a single relatively simple and inexpensive step to create this package of relationships without having to go through the bother of lawyers. Hawaii law provide for at least the following benefits covered by this package:

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- 54. Give citation; also cite earlier discussion in the report.
 - 55. For example, the claiming of a deceased' body is included as an intangible benefit, above, while the benefits of probate and certain divorce rights are also referred to under the first substantial-quantitative benefit above.
 - 56. Give citation.
 - 57. The estimates given in the text are from a local attorney who specializes in this work, and as reviewed by two other attorneys. Actual costs to a couple may vary and could greatly exceed the figures given in the text, depending on the complexity of the couples' estates and other factors.

- * Access to Family Court for the award of child custody and support-payment proceedings.⁵⁸
- * The right to enter into premarital agreements.⁵⁹
- * The probate code which provides protection rights, notice rights, and other inheritance rights to the spouse and other related parties.⁶⁰
- * Defined principles for the control, division, acquisition, and disposition of community property in divorce.⁶¹
- * The right to spousal support and the right to file a nonsupport action.⁶²
- * The award of child custody and child-support payments in divorce proceedings.⁶³
- * Post-divorce rights relating to support and property division.⁶⁴
- * Full parenting rights to children born or adopted within the marriage.⁶⁵
- * The right to claim a deceased spouse's body.⁶⁶
- * The right to name change.⁶⁷

The estimates below of the value of these "replicated" rights are undervalued, not only because the rights being replicated are incomplete, but also because the documents often have to be drawn up more than once, as they will often have to be changed as conditions in the marriage change.

The government certificate therefore allows a married couple to save both the money and the time associated with drawing up these documents and then having to

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- 58. Give citation.
 - 59. Give citation.
 - 60. Give citation.
 - 61. Give citation.
 - 62. Give citation.
 - 63. Give citation.
 - 64. Give citation.
 - 65. Give citation.
 - 66. Give citation.
 - 67. Give citation.

worry if they will stand up in court. These benefits are significant, amounting to several thousand dollars.

- a. Change of name: \$300 each. If both persons wanted to change their names (e.g., hyphenate them): \$600 total.
- b. Parenting agreement, including what happens if the marriage is dissolved; this agreement includes the care for children and about custody and visitation rights if the marriage is dissolved: \$500.
- c. Durable power of attorney for finances, which allows one spouse to make financial decisions should the other spouse become incapacitated: \$100 each, or \$200 total.
- d. Living will, if not additionally billed as part of drawing up a will; these allow each spouse to give instructions about medicare care, including instructions on terminating life-support systems: \$75 each, or \$150 total.
- e. Will, not including billing for a living will, described above, but including instructions about burial and body disposition: \$150 each, or \$300 total.
- f. Living-together contract, including an agreement about any sharing of finances in the marriage, an agreement about property owned before and during the marriage, and an agreement about disposition of property at (non-legal) divorce: \$2500.
- g. Contract for buying or owning homes together: \$500.
- h. Trusts for each partner, facilitating successorship rights; since in Hawaii only the single biological or adoptive parent is has legal custody of the children in a non-certified family,⁶⁸ additional security for the children is possibly by each spouse preparing a trust; both spouses put all of their assets into their individual trusts and name themselves as sole trustee; the other spouse is, in each case, then named as the designated replacement trustee in the event of their incapacitation or death, and provisions are made for any children: \$1,500 each, or \$3,000 total.
- i. Second-parent adoption; the couple could attempt to convince the State Legislature to legalize second-parent adoption; such a law would allow the biological or adoptive parent to agree to have a second adoptive parent for the children without the first parent giving up parental rights; passage of such a law would remove the need for a parenting agreement (#b above) and possibly for the trusts (#h above). The cost of convincing the Legislature is difficult to assess but is, in any event, substantial.
- j. The cost of the uncertainty of not having legal rights but only "replicated" rights.

Basic value of a government certificate, assuming second-parent adoption has not yet been approved: \$7,750 with each spouse taking a new (e.g., hyphenated) name, or \$7,450 with one spouse changing their name. These basic figures should be increased by the "cost of uncertainty."

68. Give citation.

An additional point concerning wealth should be made. Many marriage-certificate benefits are available only to couples that are wealthy enough, for example, to fly around the world and attempt to make use of their marriage status in foreign countries.

By speaking of lawyers in this section, a reader could conclude that such benefits only apply to a couple with the money to hire the attorneys needed to draw up the documents.

But the point here is just the opposite: all these rights are available to the poorest couple, for the small \$25 fee of getting a marriage certificate. The \$7,450 or \$7,750 cost of the attorneys is therefore only a way of estimating the economic value of this group of benefits that are free to a certified couple.

It is also important to stress that all the above prices are given with the understanding that the rights and benefits being created here by these legal papers are not created by law but only by the contracts or other legal instruments being created by the lawyers. In other words, the poor but certified couple actually have stronger rights (with added value) to those gained at great expense by the non-certified couples paying for the "replicated" rights.

That is because the rights and benefits are not being conferred by statute, and the affected couple --no matter how many lawyers are hired at whatever price -- has weaker protection than the poorest, most vulnerable couple that is protected by a legal marriage certificate. The couple without the marriage certificate is more exposed to liability, challenge and litigation, not to mention an added exposure to stress and a lack of peace of mind.

Furthermore, the additional exposure to liability, challenge, and litigation becomes an additional economic matter as there would be further costs in defending against any challenge to these contracts and legal documents. And even with these defense-attorney costs, there are no guarantees that the defense, at whatever cost, would be successful.

In theory an insurance company could estimate the risks of legal challenge, the costs of defense, and provision for a financial payment if the defense lost. The cost of that insurance policy -- which would be extremely expensive, could be computed and added to the number above.

Dr. Stauffer spoke in favor of the motion and reviewed some of the highlights of the material. He pointed out there are two values for the change of name which takes into consideration if *one or both* parties wanted to change names. He explained with regard to the parenting agreement, that without a marriage certificate you need to draw up a parenting agreement *with* an attorney which costs approximately \$500. This is also the case with a durable power of attorney in the event one has to make decisions for an incapacitated spouse. The fee for this is \$100.

It was pointed out that these may replicate the powers of a marriage certificate, but even if these items are drawn up they are not as strong as the spousal assumption under the law.

The cost figures are from Dr. Stauffer's research, of three local attorneys who handle this type of law.

Mr. Hochberg moved to table motion because it is a complicated issue that we haven't dealt with at any of our meetings. Ms. Sheldon seconded the motion.

The motion to table the discussion on Substantial Benefit No. 8 did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

Ms. Sheldon addressed the costs attached to some of these issues. Specifically, item a, and stated that usually only one party changes their name when they get married. To say the benefit is \$600 is not real figure.

Dr. Stauffer replied that sometimes people hyphenate so he has considered the fees if both or only one change their name in the tally of the costs.

Ms. Sheldon then addressed the parenting agreement. She wanted clarification because it is her understanding that in same-sex relationships, generally kids come from a previous heterosexual relationship. Normally, one will be the biological parent. If the biological parent dies then the parenting agreement is to allow the children to stay with the non-biological parent, *where usually the children will go to the other biological parent or family.*

Ms. Kreidman added that those of us who are granted certain privileges tend not to notice, and she thinks it is important to notice and recognize the privileges we take for granted.

Ms. Sheldon said that she is only interested in what happens to the children. What about the other biological parent.

Ms. Kreidman responded with the scenario that what if there is no other biological parent. If the children, who have lived in the household for their 12 years and have developed relationships based on family status and the biological parent dies, what about the relationship between the former lover's parents and the children's relationships with all those people?

Mr. Hochberg reminded the Commission that Dr. Kehoe's testimony addressed concerns about children raised in homosexual households. He said the courts never allow the homosexual parents to have custody of the child and *it* would be decided the same as regular marriage couples, whatever is best for the kids.

Dr. Stauffer stated that it is his belief that where there is a disagreement over the custody of the children, the wishes of the custodian are relevant to be known. If the grandparents fight over kids then the custodian's input is valuable. If *they* were married it would be automatic .

Mr. Hochberg disagreed. He believes *in custody issues it's always what is best for the child.*

Dr. Stauffer agreed there are scenarios where the the court does not take into consideration the desires of the parents.

Ms. Sheldon believes the only time they would need a parenting agreement is if there were same-sex couples, *and the parenting agreement would be irrelevant because the child would normally go to the biological parent. If it should be determined that the best interest of the child would be to remain with the non-biological parent, that would happen without a parenting agreement.*

Dr. Stauffer stated that he is thinking of other situations. Ms. Sheldon replied that it would be impossible to consider every example. Dr. Stauffer agreed that we don't want to pick up every manini example in the world. The list of costs for replicating the relationship comes from Lee Badgett who got *it, in part*, from a lawyer's book. Dr. Stauffer attached figures *based on what* a Honolulu attorney would charge.

The Chair pointed out that all benefits do not apply to everyone.

Ms. Sheldon, then pointed out if you don't draw up a living will, its the same treatment as for married people. Dr. Stauffer agreed with Ms. Sheldon and withdrew paragraph "d".

Ms. Sheldon moved to strike paragraph "e" because when you draw up a will any couple can draw up those situations. Mr. Hochberg seconded.

Dr. Stauffer spoke against the motion.

Mr. Hochberg spoke about two people dying simultaneously. This should be one of the marital status dependent issues that is removed.

The motion to strike paragraph "e" did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer, and Ms. Kreidman voting nay.

Ms. Sheldon addressed paragraph "g". She stated that one doesn't have to be married to purchase a house together and there is no benefit to married couples described in paragraph "g" that is different for same-sex couples.

Dr. Stauffer agreed that two strangers can buy a house, but this benefit addresses the ideas of how the home is to be managed. Mr. Hochberg stated in his personal experience and owning a house with his wife, there has never been a discussion as to how to run the home.

Dr. Stauffer voluntarily withdrew paragraph "g".

Ms. Sheldon moved to strike paragraph "h" because it is unnecessarily characterized as a benefit because opposite sex-couples have to take the same action for trusts as same-sex couples do. Mr. Hochberg seconded the motion.

Dr. Stauffer spoke against the motion to strike because, while it *is true that* anyone can draw up a trust, if a trust isn't drawn up, only a *legally* married couple would have the rights enumerated in paragraph "h".

Mr. Hochberg said that the second argument regarding spouses drawing up a trust should not be tied to children's custody which is not reliant on marital status.

Ms. Kreidman wondered how paragraph "h" differs from paragraph "c". Dr. Stauffer says it relates to money, and financial matters.

Dr. Stauffer spoke to child custody issues by stating that parents would like to have the partner be the trustee to support the children, although he recognized that there may be other ways to address this.

Mr. Hochberg stated that at a bank you only need to have the account in both names. Ms. Sheldon stated that in her experience, this is not exclusive to married couples.

Dr. Stauffer also *said* that in paragraph "h" he had personal *knowledge that* there are things that could happen and this is the way to protect yourself out of *legal* wedlock.

Mr. Hochberg confirmed that even though Dr. Stauffer did not know specifically why it should stay in you would like to see it stay in. Dr. Stauffer agreed.

The motion to strike paragraph "h" did not pass with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, and Dr. Stauffer, voting nay. Ms. Kreidman abstained.

Everyone agreed to recess and reconvene 9:00 a.m., November 2, 1995 in the same room.

Ms. Sheldon submitted motions to staff to distribute to Commission members for the next meeting.

The members briefly discussed future meeting dates and times.

The minority members agreed to meet on Thursday, November 9, 1:00 p.m. in State Capitol Room 325 or State Office Tower, Room 1008.

Regular meeting scheduled for November 8, 1995, Wednesday, 9:00 a.m., Room 329, possibly continuing to November 9, 9:00 a.m.

The meeting recessed at 11:45 a.m.

Mr. Hochberg requested a press release for recessed meetings and requested a carbon copy.

November 2, 1995

The Chair reconvened the meeting on November 2, 1995, 9:13 a.m. in Room 1008, State Office Tower. He confirmed the continuation of the October 25, 1995, meeting agenda to first continue with Dr. Stauffer's motions, then Mr. Britt's motions.

The schedule of meeting dates was reconfirmed. The meetings were set as follows:

Monday, November 6, 1:30 p.m., Room 1008, State Office Tower; Wednesday, November 8, 9:00 a.m. to noon, State Capitol, Room 329, to be continued on November 9, State Capitol, Room 329, 9:00 a.m. to noon. The alternate site for the meetings on the 8th and 9th would be Room 1008, State Office Tower. The Minority Subcommittee meeting was set for Thursday, November 9, 1995, 1:00 p.m., to be continued on Tuesday, November 14, 1995 at 5:00 p.m.

Mr. Hochberg asked the LRB to set up a press release for continued meetings. Ms. Martin said she would do that.

Ms. Sheldon moved to that the Commission allow members of the public who appear at the Commission's day-to-day, unnoticed meetings be allowed to testify if they so desire. Mr. Hochberg seconded the motion.

The Chair expressed how the work of the Commission would be delayed if the public were allowed to speak at every meeting. He expressed the need for an opportunity to complete the agenda. *He reiterated how each agenda allowed for public testimony.*

The motion failed with Mr. Hochberg and Ms. Sheldon voting aye; Ms. Britt, Ms. Gomes, and Ms. Kreidman, voting nay; Dr. Stauffer abstained.

Ms. Sheldon wanted clarification that the Commission voted against allowing the public to speak. Ms. Kreidman clarified that the public has an opportunity to testify as stated on the agenda. Ms. Gomes further explained the continuances should be looked at as a continuum and the public has had a chance to speak on this agenda.

The Commission then continued discussion on Dr. Stauffer's memorandum.

Ms. Sheldon moved again to strike paragraph "h". Mr. Hochberg seconded the motion.

Dr. Stauffer spoke against the motion by restating that the process that unmarried same-sex couples have to go through, is not a *necessity*, but sometimes *things happen which make it necessary*. Some of the benefits of marriage are automatic but can be *partially*

replicated in a trust. His personal experience was that the trusts set up *some of* what the marriage certificate grants automatically.

Mr. Hochberg said that Justice Levinson in the Baehr case said that the state has guarded the definition of family for 75 years and we should not change this.

Mr. Britt asked how do you justify that if there is an adoption in a same-sex relationship where neither parent is the biological parent of the child. Who gets the child if the person who officially adopts the child dies?

Ms. Sheldon stated that the child goes to the family of the adopted person. Mr. Britt replied that often the "family" does not include the unrecognized spouse in a same-sex relationship.

The motion to strike paragraph "h" did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and the Chair voting nay. Ms. Kreidman abstained.

Ms. Sheldon moved to strike paragraph "i" because it creates a law that creates a benefit.

Dr. Stauffer explained that unless you have a marriage certificate only one person can adopt a child, and therefore, you are not allowed to have joint custody of the child. Hence, if the official adopted-parent dies the other parent does not have any authority. This would necessarily not require paragraph "b" or "h". This would be a substitute. Dr. Stauffer agreed that Ms. Sheldon was correct in terms of the need to lobby, and perhaps items listed in paragraph "i" *should be transferred* to paragraph "b" or "h".

The Chair suggested that perhaps what you are proposing is an alternative. Amending the marriage law, or amend the adoption law to allow this to happen.

Dr. Stauffer withdrew paragraph "i" pending further analysis and can take it up under recommendations.

The Chair suggested that when the Commission comes up with recommendations that there are some alternatives that should be considered.

Ms. Sheldon moved to strike paragraph "j" because everybody has legal rights but there is no right to not have to deal with the stress of legal uncertainty.

Dr. Stauffer responded by explaining if he had a relationship where his partner was a man and becomes incapacitated, and regardless of any parenting agreement, then the family of his partner could intrude and take the child because the presumption is to the biological family of the adopted parent.

Ms. Sheldon said the court always looks at the best interests of the child, which is not a benefit of a marriage. Dr. Stauffer agrees there is no absolute right, but if there is a marriage certificate there is a better chance of obtaining custody. Mr. Hochberg says the decisions are based on the best interests of the child. The courts will look at who has been taking care of the child for the longest period of time. Mr. Britt believes that there is a certain set of assumptions when there is a certificate and believes there is a legal certainty to that relationship. Dr. Stauffer agreed that there is weight given to marriage.

Mr. Hochberg proposed that if the Legislature gets a recommendation that if you have a marriage certificate you should get rights to a child that would be an erroneous benefit.

The motion to strike paragraph "i" did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Ms. Sheldon asked what "an additional point" is about? *Referring to the second paragraph after paragraph "j" in the motion for Substantial Benefit No. 8).*

Dr. Stauffer explained that it is part of the narrative for the argument of the benefit. It is based on the fact that the Commission adopted *the fact that* there may be benefits in an international arena, which could be obtained only if you have the money to travel to those jurisdictions. Ms. Sheldon asked how does it fit in? Dr. Stauffer responded that it fits in with regard to the fact that some benefits are connected to wealth. *Roughly* the same benefits would be available to a couple who has to pay only \$25 for a marriage license, as to a same-sex couple for the *much larger* amount that it costs to pay a lawyer. Mr. Hochberg believed it should not be included in today's report if it's policy. The Chair clarified that it's an argument. Dr. Stauffer confirmed that yes, it's an argument, not a policy.

Ms. Sheldon asked about the paragraph that starts "*That is because the rights...*" and ends "*..not to mention an added exposure to stress and a lack of peace of mind.*" She reaffirmed that stress knows no gender; being exposed to litigation is a part of life.

Ms. Sheldon moved to strike that paragraph. Mr. Hochberg seconded the motion. Ms. Sheldon spoke in favor of the motion stating that a married couple could have more liability than the same-sex couple. Mr. Hochberg agreed. Dr. Stauffer agreed that under the marriage law *that in some cases* the liability of the married couple may be greater *than for an unmarried couple. Still, on balance, the benefits and rights are greater for the married couple..*

Mr. Hochberg stated that this is the major problem with the adoption of the terminology; *he felt* it does not include burdens. Here we are not going to acknowledge there is a larger burden on married couples in the area of the stress and liability. This points out why the terminology is wrong.

Dr. Stauffer agrees that this a good point. He pointed out that the Commission has already approved many commitments that couples make to each other in Substantial Benefit No. 1. The economists believe those to be burdens, so in essence the Commission has

approved some burdens. We are just dealing with *the issue* at different times. Mr. Hochberg disagreed. He stated that he believes it is not a major benefit when you consider the burden.

Ms. Sheldon called for the question.

The motion to strike the paragraph did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Ms. Sheldon moved to strike the paragraph on pg. 7 starting "In theory..." Ms. Gomes seconded the motion. Ms. Sheldon said same-sex couples don't pay any more insurance than married couples. Mr. Hochberg clarified except if it's life insurance based on health issues.

Dr. Stauffer spoke in opposition of the motion to strike. He stated that it is based on paragraph "j" that says you can't replicate the relationship totally. Dr. Stauffer's research said that anyone can insure anything at a cost, so this paragraph is an attempt to quantify it. Mr. Hochberg stated that legal right replication insurance, would never be written. Someone should ask Lloyds, and if they will not insure it, we know its *not* a major benefit.

The motion to strike the paragraph did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, and Dr. Stauffer voting nay. Ms. Kreidman abstained.

Ms. Sheldon moved to obtain Dr. Badgett's credentials and information to the Commission to determine if the Commission should accept the information in Dr. Badgett's testimony. Mr. Hochberg seconded the motion. He believes that Dr. Badgett should be held to the same scrutiny that any testifier is held to.

The Commission recessed at 10:25 and reconvened at 10:30.

Dr. Stauffer spoke against the motion. He stated that the information is on the record and is available for Commissioner's review already, and there is no reason to have to qualify testifiers to this Commission. Mr. Hochberg disagreed.

The motion to request credentials of Dr. Badgett did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Mr. Hochberg clarified that the footnote *in the title of the motion* is not part of the motion. Dr. Stauffer *disagreed saying* that he wanted to include the note as a *citation*. He *agreed with Mr. Hochberg that part of the title was dropped, so he would move the footnote to the end of the current title* of Substantial Benefit No. 8.

Mr. Hochberg moved to amend footnote 1 to include "See also the written testimony of Dr. Ghali..." Ms. Sheldon seconded, she stated it would provide a balance to this portion of the report. The Chair agreed. Dr. Stauffer, *as movant* agreed also, so *there was* no need for the motion. Mr. Hochberg withdrew the motion.

Mr. Hochberg asked what is meant by benefits of internal commitments? Dr. Stauffer replied that it is based on Substantial Benefit No. 1: having a marriage certificate operates as internal commitments. Previously, and here, it is used as a summary of points made *on this topic*.

Mr. Hochberg expressed that he feels that there was not the level of opportunity to investigate and wants to go back to the previous mention of this and Substantial Benefit No. 1 to discuss it. Dr. Stauffer reminded Mr. Hochberg that the Commission agreed not to back track. The Chair confirmed that Mr. Hochberg would have an opportunity to oppose it at a later meeting.

Mr. Hochberg clarified that it is the right of the government to come in and manipulate the relationship? Dr. Stauffer stated that he believed the words are clear and he was not sure where the *communication* breakdown was *coming from*. Mr. Hochberg stated that Substantial Benefit No. 1 comes into play when there is lack of internal commitment. Ms. Kreidman added that even when married spouses make commitments the government bolsters the commitment.

Mr. Hochberg said one only needs the central core benefits come from the internal commitments but they only arise when there are no internal commitments. Dr. Stauffer replied *by referring to* the discussion about the internal commitments *of a certified marriage* that the Commission has already approved. *Of course, he said, someone could always argue the benefits come from somewhere other than the law*. Mr. Hochberg continued and accused Dr. Stauffer of changing from the original Substantial Benefit No. 1 from being the internal commitment, to now say the benefit is the government enforcement that the commitment is kept. Dr. Stauffer *replied that he* believed the dispute revolves around language. Mr. Hochberg *replied that he* believes it is meaningless. He believes Substantial Benefit No. 1 is not stated in the paragraph. Dr. Stauffer disagreed *saying that if there are two ways to say things that mean the same thing, then it's a matter of language, and a layperson understands that*.

The Chair asked if there was a motion on this issue. Mr. Hochberg moved that *the section at the beginning of Substantial Benefit No. 8 which begins "besides the central core benefits.." be changed to read "besides the core benefits that come from the power of to enforce failed internal commitments..."* Ms. Sheldon seconded.

Dr. Stauffer spoke against the motion stating that it is inappropriate at this time and the words being asked to adopt are not accurate. Mr. Hochberg thought the Commission should adopt language that it likes.

Ms. Sheldon spoke in favor of the motion for consistency, to the extent it is inconsistent.

The motion to add the stated language did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Mr. Hochberg addressed the line that reads, "Some of these benefits..." One of these *benefits* is *the free* name change, and he would like a list of the other benefits. Dr. Stauffer agreed a list needs to be made and will add the requisite citations. Mr. Hochberg *restated* his position with regard to the next paragraph. Dr. Stauffer agreed.

Mr. Hochberg expressed his concern about the word "many" representing less than "many". In addition he wonders what is the "known financial value"? Dr. Stauffer agreed to add "estimated" in front of "known financial value". Mr. Hochberg stated that footnote no. 5 (*no. 57 in these minutes*) needs to name the local attorneys. Dr. Stauffer agreed to get the names.

Mr. Hochberg addressed the issue of premarital agreements. What is the right of enforcement to enter into a premarital agreements? He expressed that it is his understanding that they are not given weight in court. Dr. Stauffer replied that the state Supreme court cited this particular benefit referring specifically to the statute on premarital agreements. Mr. Hochberg reiterated his disagreement.

Mr. Hochberg asked if the known undervalued estimate is stated? Dr. Stauffer said yes, because these benefits are individual and things change so there necessarily has to be a range. Mr. Hochberg wondered if this differs for married couples? Dr. Stauffer reminded Mr. Hochberg that the Commission is talking about replicating the benefits of marriage. Ms. Kreidman tried to explain by giving this example. If she is married, and I have another child I don't need to do anything because I have marriage certificate, a same-sex couple would have to take further action to ensure the same protections for that child. Mr. Hochberg stated that married people who draw up trusts and then things change, still have to pay to the costs involved in changing. The time and cost of what you want to rely on is an expected value if the benefit is major. We need to consider the testimony of the expected value of both economists.

Dr. Stauffer disagreed *with Mr. Hochberg's statement "both economists"* and stated that Mr. Hochberg is entitled to his opinion, but Dr. Stauffer believes that the economists disagreed *in their testimony* and *he* believes Mr. Hochberg is putting words in the mouth of Dr. La Croix because Dr. Ghali was speaking about the value to the community and Dr. La Croix was referring to the individual. Mr. Hochberg reiterated the problem with not approving the minutes. Ms. Sheldon questioned how Mr. Hochberg was putting words in the mouths of the economists.

Dr. Stauffer recalled that it was under public policy where the economists' testimonies were similar. Ms. Sheldon asked if *the policy relating to domestic partnership* included opposite-sex couples. Dr. Stauffer *noted* that the Commission has not yet *decided the issue as it relates to "public policies," which will be taken up later*. Mr. Hochberg stated that is incorrect. You have to know the market you are in because it is not honest to tell the legislature otherwise. Dr. Stauffer took offense at the accusation that the Commission is not being honest. *He pointed out the Commission is still investigating benefits to an individual, which is Part I of its task and public policies is Part II.*

Ms. Kreidman made a comment regarding her discussions with legislators and agreed to ask if she could identify those legislators.

The Chair asked how much more discussion could be expected in order to judge for time. Mr. Hochberg responded by saying "enough time."

Mr. Hochberg continued to address the Substantial Benefit No. 8 by focussing on the word "many". Dr. Stauffer reminded Mr. Hochberg that the Commission already discussed that and a motion to strike failed. The Chair also reminded Mr. Hochberg that he is returning to issues that have been decided and therefore the Chair ruled Mr. Hochberg out of order.

Mr. Hochberg moved that the chair is not well taken. Ms. Sheldon seconded the motion.

The motion that the chair is not well taken did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Mr. Hochberg brought up the Life Foundation, which *he said* is the homosexual community center where you can get free wills, etc., so there is not a need to *include* any of these kinds of *legal* benefits because they already exist *for free*. Mr. Britt clarified that *the Life Foundation is not a gay/lesbian center but exists to help those who are HIV-positive. Further, the services of the Life Foundation are limited to those persons who have depleted their resources.* Mr. Hochberg believes *the Foundation* needs to be included simply *because it is a resource.* Mr. Hochberg asked if the Commission has a problem adding the Life Foundation to footnote 5. Dr. Stauffer replied yes, because then we would have to include legal aid, your brother, *and anyone else who could help, etc.*

Mr. Hochberg moved to add to footnote 5, in addition to other examples, where qualified people can obtain these legal services free of charge from the Life Foundation. Ms. Sheldon seconded the motion.

The motion to add material to footnote 5 did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Ms. Gomes took offense at Mr. Hochberg's statement regarding the Life Foundation. She stated that an intelligent person like *Mr. Hochberg, who had once* volunteered to provide services at the Life Foundation, has to know that those services are not available to the entire community.

The vote to accept Substantial Benefit No. 8 passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye, and Mr. Hochberg and Ms. Sheldon voting nay.

Ms. Sheldon requested the Commission to consider her motions, that were *then* passed out. Dr. Stauffer agreed *and suggested* that the Commission could make an exception and allow his motions to be interrupted to hear Ms. Sheldon's four motions

Ms. Sheldon moved that Chairperson Gill address the inquiries contained in Commissioner Sheldon's October 17, 1995 letter to Mr. Gill which was faxed to all Commissioners before we proceed with any further consideration of proposed sections of this Commission's report because responses to those inquiries are crucial to this Commission's consideration of any alleged findings contained in either Dr. Stauffer's or Mr. Britt's proposed report sections.

The Chair responded that he would address the issues at the end of the agenda. Ms. Sheldon withdrew the motion, pending opportunity to respond. Ms. Sheldon also stated that she takes serious exception to the Chair's implication that she his delaying the action. She reminded *the* Chair that she was appointed to do a job and she's going to do it.

The Chair agreed that he was also appointed to a job and he was going to do it.

Ms. Sheldon moved that in light of the fact that the Contents of the Minutes of October 11, 1995 Meeting are directly relevant to and cited in the Memoranda concerning various "salient" and/or legal and economic benefits which Commissioner Stauffer is in the process of presenting to the Commission in the form of motions to adopt said Memoranda as draft portions of the Commission's report to the Legislature, the Commission address the proposed amendments to the October 11, 1995 Minutes and vote concerning the approval of those minutes prior to proceeding with consideration of Commissioner Stauffer's motions regarding the contents of this Commission's report. Mr. Hochberg s seconded the motion.

The Chair reminded Ms. Sheldon that this motion has already been made to put the approval of the minutes at the end of the agenda. Ms. Sheldon interpreted the Chair's comment as asking us to approve items that are dependent on the approval minutes.

The motion to approve the minutes of October 11, before proceeding did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Ms. Sheldon moved that in keeping with the spirit and intent of Hawaii's Sunshine Law, Hawaii Revised Statutes Chapter 92, this Commission schedule meetings on the neighbor islands in order to provide all of Hawaii's citizens an opportunity to attend and address the Commission with their concerns regarding their questions of whether Hawaii should recognize and legitimize same sex marriage and/or domestic partnership. Mr. Hochberg seconded the motion.

Dr. Stauffer agreed *that going to* the neighbor islands would be good, but if LRB denies funds for that, the Commission could include a statement saying the effort was made. Ms. Sheldon felt it could be a basis to nullify the report. Mr. Britt suggested using a studio and broadcast with interactive television. Ms. Martin cautioned that the Sunshine Law requires official rules for video conferencing. Adopting those type of rules is not effective for a short-term commission.

After clarifying the issue with Ms. Sheldon, Dr. Stauffer withdrew his support of the motion on the basis of Ms. Sheldon's position that if the motion passed and funding was unavailable, it would be used to nullify the report.

The motion to schedule meetings on the neighbor islands did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

Dr. Stauffer asked the chair to make a formal request to the Director of LRB for funds to go to the Neighbor Islands. The Chair agreed.

Ms. Sheldon moved that this Commission adopt Robert's Rules of Order for the conduct of this and all remaining meetings of the Commission in order to establish and promote balance and consistency in the handling of matters before this Commission. Mr. Hochberg seconded the motion.

The Chair noted this motion had been made previously. Ms. Sheldon spoke in favor of the motion as brought up in her letter to Mr. Gill. The reason for Robert's Rules of Order was to be sure that Mr. Gill *did not change the rules as the Commission goes along.*

The motion to adopt Robert's Rules of Order did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, and Ms. Kreidman voting nay. Dr. Stauffer abstained.

Dr. Stauffer moved to accept Substantial Benefit No. 9 as amended above. Mr. Britt seconded the motion. *Specifically, the motion reads:*

Substantial Benefit No. 9: Income-Tax Benefits From Tax Tables

The Commission makes the following findings, for the information contained in this section:

The impact on income tax payments is complex, partly because both State and Federal tax laws are involved, but also because the effect of having a government certificate depends on such factors as the number of earners in the family and the level of each spouse's earnings.

This section presents two general scenarios: one in which legal marriage reduces a couple's income taxes and a second in which legal marriage increases a couple's income taxes.

These two scenarios are based on the well-known "Arnie Aloha family," described in the latest (1994) edition of the Tax Foundation of Hawaii's brochure describing the taxes of such a family. One spouse earns \$38,357 and the other earns \$29,232, and they have two young children. After adding in other sources of income, their total family gross income is \$84,760.

After subtracting their itemized deductions of \$15,476, the couple's taxable income is \$59,484 and their tax bill is \$16,943. If they had no children, their

taxable income would have been \$64,384, and they would have paid \$18,523 in taxes.

Now, let's suppose the same couple did not have a government certificate. They therefore have no choice of filing joint income-tax returns, and so let us suppose (for simplicity) that their family "other income" is split between the two spouses and that their family deductions are likewise split. Let us also assume that the higher-earning spouse takes the two children as dependents and files as "head of household." In this case, their income taxes would be \$14,730, a savings of \$2,213! This shows the "marriage penalty" -- the same couple pays \$2,213 more by getting legally married.

The "marriage penalty" is even seen if they had no kids: they would pay \$806 more by getting legally married. In both examples of having kids or not, the problem is that both had sizeable earnings from working.

Now, let's look at a second scenario. All the numbers are the same, except now all the wages are made by just one of the spouses. With the two kids, their tax bill would be \$16,943. Without kids it would be \$18,523.

In this case, the married couple without a government certificate get penalized: their taxes (with kids) would be \$1,226 more, and without kids the taxes would be \$2,897 more! This shows the "marriage bonus" for having a government certificate: \$1,226 or \$2,897.

All these numbers are reproduced in Table 1.

These examples reproduce the familiar result that the current income-tax tables favor families with one primary wage-earning, and penalize families with two earners; these findings are available in the economics literature.

Testimony was also received by the Commission that the average of the tax effects on all legally married couples in the U.S. is a "marriage penalty" of \$4,500.⁶⁹ That is to say, some couples with certificates will get a bonus, while others will not only not get a bonus but will get a penalty, and the average of all couples is estimated to be a penalty.

On the other hand, for some families, having the marriage certificate can produce a substantial benefit. Where the income of the spouses is unequal, or where one spouse stays home with the children (or is in school or a full-time training program, or already retired), we would expect to see a "marriage bonus" in their income taxes. Hence substantial benefit for at least some couples exists.

Still, the fact is compelling that the over-all effect of the income-tax system is a penalty for couples wishing to get a marriage certificate.

Testimony was received, however, that perhaps sheds the greatest light on this matter.⁷⁰ The fact is that a couple deciding whether to apply for a marriage license or not, generally have a CHOICE concerning what they wish to do.

69. Roth, Randall W. Verbal testimony before The Commission on Sexual Orientation and the Law. September 27, 1995.

70. Roth, Randall W. Verbal testimony before The Commission on Sexual Orientation and the Law. September 27, 1995.

Two individuals with jobs might decide, for example, to get their marriage certificate and then have one of them stay home (or only work part-time), thereby qualifying them for the substantial "marriage bonus."⁷¹

A couple denied the right to get a marriage certificate loses this "choice-benefit," which is a substantial value to lose.

Table: Federal and State Income Tax Payments for Married and Unmarried Couples

	Married, Filing Jointly	Unmarried	Gain or Loss w/ Marriage
Dual Earner, w/ children			
Federal	\$11,713	9,724 ^a	1,989
Hawaii	5,230	5,006	224
Total	16,943	14,730	2,213
Dual Earner, w/o children			
Federal	13,085	12,104	981
Hawaii	5,438	5,613	-175
Total	18,523	17,717	806
Single Earner, w/ children			
Federal	11,713	12,688 ^b	-975
Hawaii	5,230	5,481	-251
Total	16,943	18,169	-1,226
Single Earner, w/o children			
Federal	13,085	15,346	-2,261
Hawaii	5,438	6,074	-636
Total	18,523	21,420	-2,897

Notes: a: Higher earner files as head of household; lower earner files as single.

b: Single earner files as head of household and claims partner as dependent.

c: Single earner files as single and claims partner as dependent.

71. This is another example of how government policies can promote procreation and the at-home raising of children. To deny such policies to a group of parents and children hurts society, the spouses, the children, and the odds of their having further children.

Mr. Hochberg moved to table the motion because he does not feel well and we don't have time to finish anyway. Ms. Sheldon seconded and spoke in support of the motion to table because the Commission needs to complete the minutes.

Ms. Kreidman asked to discuss this point. She stated that the fact that Mr. Hochberg does not feel well is legitimate. She *asked to first consider* a motion to say we would recess until Monday. Mr. Hochberg seconded the *new* motion. The motion to recess until Monday, November 6, 1995 at 1:30 p.m., Room 1008, State Office Tower passed unanimously.

November 6, 1995

The Chair reconvened the meeting at 1:37 p.m. to *continue* the agenda of October 25, 1995. Mr. Britt, Ms. Gomes, Mr. Hochberg, Ms. Sheldon and Dr. Stauffer were present. Ms. Kreidman was excused.

The following materials were distributed: revised schedule; letter from Legislative Reference Bureau Director Wendell Kimura dated November 6, 1995; state library map; Tom Coleman's response to request from Commission; excerpt from Encyclopedia of Financial and Estate Planning.

The Chair reviewed the schedule stating the he recognized it was tight but it has to be met to be able to complete the report. It will be put to a vote on November 8, 1995.

Resuming where we left off on Thursday, November 2, 1995, there is motion to table Substantial Benefit No. 9 by Mr. Hochberg.

Dr. Stauffer noted that the Commission is 26 days behind schedule *and* he would like each discussion to take only 20 minutes. *In speaking against the motion to table, he* directed the Commission to the *chart at the end of Substantial Benefit No. 9*. The *chart* looks at income tax for different kinds of couples and *for* different income situations. Couples of different gender have the choice to have their tax consequences go down or up, *or to otherwise influence their taxes by using their marriage certificates, which same-gender couples are denied*.

The motion to table Substantial Benefit No. 9, income tax table benefits, did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Dr. Stauffer and Ms. Kreidman voting nay.

There was a call for the underlying motion to accept Substantial Benefit No. 9.

Ms. Sheldon asked for clarification that Substantial Benefit No. 9 presumes the federal government will recognize same-sex marriage. Dr. Stauffer says the benefits are based *partially on the* testimony of Mr. Roth that the *Federal benefit* status is driven by state law. Ms. Sheldon stated that the Commission does not have the authority to say the federal government will recognize same-sex certificates and therefore should not accept it.