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SAME-SEX MARRIAGE IN NEW YORK

*Lewis A. Silverman**

The issue of same sex marriage connotes different meanings for varying segments of our society. Importantly for the legal profession, several issues should be addressed in discussing this topic. Three questions should be asked of all that are interested in the legalities of this revolutionary form of marriage. In this presentation I will attempt to address these three issues. It should be emphasized, however, that both the legal climate as well as the social climate are constantly changing and the information provided today may quickly become untimely.

The three questions to which I direct your attention are: 1) Is same sex marriage currently legal in New York? 2) Will same sex marriage become legal in New York? and 3) Will New York recognize same sex marriages and other types of legal relationships formed outside of New York?

The History of Same Sex Marriage in New York

In New York marriage is a civil contract to be entered into by two people with capacity and consent.¹ This specific definition in the Domestic Relations Law does not actually include any language to indicate that the civil contract must be created only by a male and a female. The only legal interpretation in New York prior to the current wave of law suits occurred several years ago and is based on a 1997 ruling from the New York Department of Health which runs the Bureau of Vital Statistics.² Based on that ruling, New York officials have consistently declined to grant marriage licenses to same sex couples.

Much has been made of the actions of New Paltz Mayor Jason West in celebrating marriages for same sex couples. Mayor West performed these weddings without the couples having official marriage licenses. As such he was charged with a misdemeanor in accordance with Domestic Relations Law §§13,

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¹ N.Y. DOM. REL. LAW § 10 (McKinney 2005).

² In the Matter of Storrs v. Holcomb, 666 N.Y.S.2d 835, 245 A.D.2d 943 (App. Div. 3d Dept. 1997).

17 (the misdemeanor charges were subsequently dropped).³ However, there is substantial doubt about the legality of these marriages. Although Domestic Relations Law §25 states that marriages performed without the formality of a marriage license may still be valid,⁴ the fact is that these omissions were not accidental; they were deliberate ceremonies in contravention of the requirements of the Domestic Relations Law.⁵

A petition for mandamus was brought to enjoin Mayor West from solemnizing any marriages where the couple did not have a duly issued license. In affirming the injunction, the Appellate Division, Third Department, specifically declined to discuss the constitutional issues regarding same-sex marriage in New York. Noting that several cases were then being litigated, the Court simply noted that Mayor West had violated the separation of powers doctrine by making a judicial determination which exceeded his executive role as mayor. While the Court noted the pending litigation, it declined to engage in a review of Mayor West's justifications for his actions.⁶

More importantly for our discussion, while the section defining marriage itself is not gender specific, Domestic Relations Law §15(1)(a), which describes the requirements for a marriage license, in two instances refers to bride and groom or husband and wife. These are gender specific terms and not gender neutral. Whether the courts will determine that they therefore render the entire marriage article gender specific is arguable, but at least they do indicate some intent on the part of the Legislature to create marriage in New York as between a man and a woman.

The Legal Challenge in New York

During the last several years challenges have been brought to gender specific or even gender neutral marriage statutes in many jurisdictions, including

³ *Charges Against Mayor Who Performed Same-Sex Marriages Are Dismissed as Unconstitutional: People v. Jason West*, 231 N.Y. L.J. 19 (2004) [hereinafter *Charges Against Mayor*].

⁴ See *Berenson v. Berenson*, 98 N.Y.S.2d 912 (Dom. Rel. Ct. 1950); *Heller v. Heller*, 68 N.Y.S.2d 545 (Sup. Ct. 1947).

⁵ N.Y. DOM. REL. LAW § 25 (McKinney 2005) states: "Nothing in this article contained shall be construed to render void by reason of a failure to procure a marriage license any marriage solemnized between persons of full age..." It appears from the statute that if the parties intend to celebrate a valid marriage, then the lack of a license does not void an otherwise valid marriage. See *Persad v. Balram*, 724 N.Y.S.2d 560 (Sup. Ct. 2001). The person performing the ceremony, however, may be guilty of a misdemeanor. See N.Y. DOM. REL. LAW § 17 (McKinney 2005). That is the statute used to charge Mayor West. See *Charges Against Mayor*, *supra* note 3.

⁶ In the Matter of *Hebel v. West*, 803 N.Y.S.2d 242 (App. Div. 3d Dept. 2005).

Hawaii,⁷ Vermont⁸ and Massachusetts.⁹ The challenges to these statutes have not been based on the United States Constitution; rather, the challenges have been based on the specific provisions of the individual state constitutions. In Hawaii the challenge was upheld based on the Hawaii Constitution's Equal Rights Amendment, a provision which has no counterpart in the United States Constitution. In Vermont the challenge was upheld based on the state Constitution's Common Benefits Clause, which predates the Fourteenth Amendment by almost a century. And the most recent successful challenge, in Massachusetts, was based on the state Constitution's Equal Protection and Due Process clauses, although concededly the decision in *Goodridge v. Department of Public Health* used much federal Fourteenth Amendment analysis to arrive at its conclusion.

Goodridge is important because, unlike the situation in Vermont, in Massachusetts the legislature did not fashion an alternative remedy and same-sex marriages have been celebrated within the Commonwealth since May, 2004. *Goodridge* is also significant because the Supreme Judicial Court utilized a hybrid of federal and state jurisprudence. First, the court recognized that the United States Supreme Court has established the "right to marry" as a fundamental right and a component of the right to privacy implicit in the Fourteenth Amendment's due process clause.¹⁰ The court went on to find a "right to choose to marry" as a personal liberty interest under the Massachusetts Constitution and its own due process clause. The court did not thereafter identify a suspect class because it found the statute in question did not survive even a rational basis review and "[violated] the basic premises of individual liberty and equality under the law protected by the Massachusetts Constitution."¹¹

The importance of these cases from other states should not go unnoticed. When an issue is determined based on a state constitution and the state's jurisprudence there is no ground for a federal court to become involved in determining whether a state can grant or deny marriage to a same sex couple. After *Goodridge* was issued, the decision was challenged in federal court; the United States Supreme Court subsequently declined to review the dismissal of the challenge.¹²

⁷ Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

⁸ Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

⁹ Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

¹⁰ *Id.* at 957.

¹¹ MASS. CONST. pt. 1, art. I.

¹² Largess v. Supreme Judicial Court of Mass., 317 F. Supp. 2d 77 (D. Mass. 2004). Citizens, including several state legislators, sought "to enjoin enforcement of the *Goodridge* decision on the ground that the [Supreme Judicial Court] violated the Guarantee Clause of the federal Constitution

Challenges were then made to the New York statute based on New York State's own equal protection clause. Lawsuits were brought in several counties which challenge both the interpretation of the statute as gender specific and, in the alternative, the constitutionality of denying marriage licenses in New York to same sex couples as a violation of the New York State Constitution.¹³ The first court to rule on these issues held that "the [Domestic Relations Law] does not authorize same-sex marriage."¹⁴ The trial court found that there was a liberty interest in privacy and the fundamental right to choose whom to marry.¹⁵ This was subject to strict scrutiny analysis for due process purposes, which the court found that the state did not meet. The court went on to find that New York law established discrimination based on sexual orientation and could not even satisfy the rational basis test.¹⁶ The court concluded that the challenged statutes violated the New York State Constitution's due process and equal protections clauses.

The Appellate Division disagreed. In a decision issued on December 8, 2005, the First Department criticized the trial court for both its legal analysis as well as the relief ordered.¹⁷ Quoting extensively from the dissent in *Goodridge*, the Court found no violation of either the equal protection or due process clause of the New York State Constitution and found that "society and government have a strong interest in fostering heterosexual marriage as the social institution that best forges a linkage between sex, procreation and child rearing."¹⁸ Not only did the Appellate Division find that discrimination on the basis of sexual orientation involved no suspect class entitled to heightened scrutiny, but the court found no discrimination in any event. Regarding the due process claim, the court stated: "The US Supreme Court recognizes traditional, heterosexual marriage as a fundamental right pursuant to both equal protection and substantive due process

by depriving Plaintiffs of their right to a republican form of government." *Id.* at 81. The District Court found that it had subject matter jurisdiction but found that plaintiffs could not succeed on the merits and denied the injunctive relief. The Court of Appeals affirmed on the merits, holding that the "resolution of the same-sex marriage issue by the judicial branch of the Massachusetts government, subject to override by the voters through the state constitutional amendment process, does not plausibly constitute a threat to a republican form of government. Absent such a threat, our federal constitutional system simply does not permit a federal court to intervene in the arrangement of state government under the guise of a federal Guarantee Clause question." *Largess v. Supreme Judicial Court of Mass.*, 373 F.3d 219, 229 (1st Cir. 2004), *cert. den.* 543 U.S. 1002 (2004).

¹³ N.Y. CONST. art. 1, § 11.

¹⁴ *Hernandez v. Robles*, 794 N.Y.S.2d 579, 589 (Sup. Ct. N.Y. County 2005).

¹⁵ *Id.* at 595-96.

¹⁶ *Id.* at 600.

¹⁷ *Hernandez v. Robles*, 805 N.Y.S.2d 354 (App. Div. 1st Dept. 2005).

¹⁸ *Id.* at 360.

liberty and privacy doctrines...New York apparently recognizes a parallel right.”¹⁹ The Court further found that it is for the Legislature “to make policy decisions as to which type of family unit works best for society and therefore should be encouraged with benefits and other preferences.”²⁰

A strong dissent argued that there was both a violation of the liberty interest protected by the due process clause of the New York Constitution, and a violation of the equal protection clause under heightened scrutiny. More importantly, the dissent sharply challenged the majority’s linkage between marriage and family.²¹ This linkage was refuted both in *Baker* and *Goodridge*, which both found a constitutional violation where the right of a same-sex couple to marry had been denied.²² Justice Saxe argued: “As the institution of marriage has been redefined within modern American society, the law has adjusted accordingly. Indeed, the law and policy of this state has adopted a definition of “family” that includes same-sex couples (see e.g. *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201 (1989)). It is fair to say that both the law and the population generally now view marriage, at least in the abstract ideal, as a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support. In the face of such a widely held view, the gender of the two partners to a marriage is no longer critical to its definition.”²³

A second trial court in New York then considered these issues and issued a ruling.²⁴ Justice Joseph Teresi, in Albany County Supreme Court, found that the New York restriction was a classification based on sexual orientation and therefore, subject to rational basis review; he further found that the statute did not violate either the due process or equal protection clauses of the New York Constitution.²⁵

This ruling was affirmed on appeal.²⁶ The Appellate Division, Third Department found that the definition of marriage as a relationship between one

¹⁹ *Id.* at 361.

²⁰ *Id.* at 362.

²¹ *Id.* at 382.

²² See *Baker*, 744 A.2d at 864; see also *Goodridge*, 798 N.E.2d at 941.

²³ See *Hernandez*, 805 N.Y.S.2d at 381.

²⁴ See *Samuels v. N.Y. Dep’t of Health*, No. 1967-04 (Sup. Ct. Alb. County 2004), available at <http://marriagelawfoundation.org/mlf/cases/Samuels%20v.%20New%20York.pdf> (last visited May 24, 2006).

²⁵ For the pertinent New York constitutional sections, see N.Y. CONST. art. 1, §§ 6, 11.

²⁶ *Samuels v. N.Y. Dep’t of Health*, 811 N.Y.S.2d 136 (App. Div. 3d Dept. 2006).

woman and one man was precisely the “deep root”²⁷ which made marriage a fundamental right and found that precedent required the continuing use of the accepted standard on a rational basis review until and unless the Legislature decides otherwise.

What is troubling about these decisions is the characterization of the question presented. The majority in both cases would have us believe that the relevant question is whether the state has the right to promote heterosexual marriage. Posed in that way, it is almost impossible for any challenge to succeed, no matter what choice the state makes. If the question is rephrased, however, it elicits a different analysis. The question should be whether every individual has a right, under the New York State Constitution, to a liberty interest in the fundamental right to marry and an equal protection right in those benefits that flow from that right.²⁸

The United States Constitution contains no suspect class for homosexuals. The level of scrutiny which the Supreme Court applied in the two most recent cases which ruled against discrimination was the rational basis standard and substantive due process. In neither case did the Supreme Court need to find a special right or protection for homosexuals in the Constitution.

In *Romer v. Evans*²⁹ the Supreme Court found that a Colorado Constitutional Amendment passed by referendum violated the equal protection clause under rational basis scrutiny, because the amendment took away from homosexuals’ access to their government. While the Court did not say that homosexuality deserves suspect class status, the Court made clear that one could not deny rights given to everyone else based on this category. “We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause.”³⁰ Because the statute failed under even a cursory review the Court had no need to delve further into the equal protection analysis.

²⁷ *Id* at 141.

²⁸ Reconsidering the question presented is nothing new. In *Lawrence v. Texas*, the United States Supreme Court, in reversing *Bowers v. Hardwick*, candidly criticized the narrow focus of the question presented in *Bowers* (is there a fundamental right to homosexual sodomy) and substituted a broader issue: is there a fundamental right to personal privacy? See *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁹ *Lawrence v. Texas*, 517 U.S. 620 (1996).

³⁰ *Id.* at 635.

In *Lawrence v. Texas*,³¹ which explicitly overruled *Bowers v. Hardwick*,³² the Supreme Court ruled that private, consensual sodomy could no longer be criminalized. The ruling was the last in a series of cases dating back to *Griswold v. Connecticut*³³ and the abortion cases, finding a constitutional right to personal bodily privacy. *Lawrence* was a logical extension of *Roe v. Wade*³⁴ and *Planned Parenthood of Pennsylvania v. Casey*.³⁵ Because of these cases the Supreme Court had no need to create an additional suspect class under Fourteenth Amendment analysis, and the majority opinion by Justice Kennedy and concurrence by Justice O'Connor were very careful to limit the ruling to state criminal laws relating to private consensual conduct. Justice Scalia did raise the possibility that the majority's opinion did create civil rights for homosexuals and, in fact, some of the current litigation is perhaps a reaction to his vitriolic dissent.³⁶ But one expects that when presented with the issue some years down the road, the Supreme Court and lower federal courts may not be quick to jump into the fray to create a new class of rights. What will be of more interest is whether they will honor privacy and marriage rights that may be created by the various states.

The Court of Appeals Decides

The New York litigation alleged that denying marriage licenses to same sex couples violated the due process and equal protection clauses of the New York State Constitution. We have seen over the years that the New York Court of Appeals has been reluctant to specifically create new classes and new categories of rights absent action by the legislature. For instance, in *Alison D. v. Virginia M.*, the Court of Appeals declined to grant standing to the former life partner of a lesbian mother so that the life partner, who was a biological and legal stranger to the child, could seek visitation with her former co-child.³⁷ On the other hand, the court has been much quicker to protect rights that it felt were already established by the constitution or statute. In *Matter of Jacob D.* the court specifically allowed same sex domestic partners, as well as a heterosexual non-married couple, the

³¹ *Lawrence*, 539 U.S. at 558.

³² *Bowers v. Hardwick*, 478 U.S. 186 (1986).

³³ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

³⁵ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

³⁶ "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are...called into question by today's decision." *Lawrence*, 539 U.S. at 558, 590. And further: "This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court." *Id.* at 605.

³⁷ In the Matter of Alison v. Virginia, 77 N.Y.2d 651 (1991).

right to adopt in a rather tortuous interpretation of the step-parent provisions of Domestic Law Section §115.³⁸

The Court of Appeals resolved the issue, at least for the moment, with a ruling on July 6, 2006. Deciding *Hernandez v. Robles* and three other consolidated cases, three judges of the Court held that there is no present requirement under the New York Constitution for same-sex marriages to be judicially imposed.³⁹ First, the Court held that “New York’s statutory law clearly limits marriage to opposite-sex couples.” The Court made reference to specific gender terms within the text of the Domestic Relations Law and the “universal understanding” when the statute was adopted in 1909.⁴⁰

The Court phrased the critical question as whether “the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships.”⁴¹ The Court found marriage and its benefits to be an inducement for the creation of “stability and permanence in the relationships that cause children to be born.”⁴² The Court further held that the Legislature could decide that it was better for children to grow up with both a mother and a father. In justifying this position the plurality seemed to belittle the social science data offered by amici that there was no difference between same-sex and opposite-sex households. Finally, the Court noted that it was resolving only the constitutional issue and the ultimate decision was deferred to the Legislature.

In a concurrence, Judge Graffeo discussed at length the standard of review to be applied, concluding rational basis was the appropriate level of scrutiny.⁴³ Judge Graffeo stated that the fundamental right to marry, was expressed in several Supreme Court cases.⁴⁴ In which the fundamental right was tied to human procreation and therefore specifically implicating a man and a woman.⁴⁵ Because

³⁸ In the Matter of Jacob, 86 N.Y.2d 651 (1995).

³⁹ *Hernandez v. Robles*, No. 05239, slip op. (N.Y. July 6, 2006), available at 2006 WL 1835429. A three judge plurality issued the opinion of the Court. There was a one-judge concurrence and a two-judge dissent.

⁴⁰ *Id.* at 4.

⁴¹ *Id.* at 5.

⁴² *Id.* at 6.

⁴³ The plurality opinion glossed over the standard of review and assumed, without discussing, that rational basis was appropriate. It is interesting to note that while Judge Graffeo does not appear to disagree with the plurality, she did not join in that opinion, nor did any of the three judges in the plurality join her concurrence.

⁴⁴ *Loving v. Virginia*, 388 US 1(1967); *Zablocki v. Redhail*, 434 US 374 (1978).

⁴⁵ *Hernandez*, No. 05329, slip op. at 13 (N.Y. July 6, 2006), available at 2006 WL 1835429, at *13.

the fundamental right to marry was, therefore, not implicated, the issue could be reviewed under a rational basis standard of review. She further stated that there was no apparent gender or sexual orientation bias, thereby not establishing any intermediate level of scrutiny for review of the equal protections claims. [slip opinion of Graffeo, J. at 18].

In a dissent, Chief Judge Judith Kaye challenged the jurisprudential basis for the plurality opinion, as well as its conclusion. Critiquing the plurality's framing of the question presented, she stated: "An asserted liberty interest is not to be characterized so narrowly as to make inevitable the conclusion that the claimed right could not be fundamental because historically it has been denied to those who now seek to exercise it..."⁴⁶ She went on to say: "Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them."⁴⁷ She also disputed as a "distortion" the plurality's historical support for the meaning of marriage.

Chief Judge Kaye reframed the appropriate question to address regarding the equal protection analysis: "[The] question before us is not whether the marriage statutes properly benefit those they are intended to benefit – any discriminatory classification does that – but whether there exists any legitimate basis for excluding those who are not covered by the law."⁴⁸ She went on to argue that the classification was discrimination based on both sexual orientation and sex, requiring heightened scrutiny. She further opined that the classification did not survive even rational basis scrutiny because the interests proffered by the classification were not furthered by the exclusion of same-sex couples from marriage.⁴⁹ She concluded that it was the Court's duty to safeguard individual liberties and deference to the Legislature was not required under the separation of powers doctrine.⁵⁰

The conclusion reached in the plurality opinion was not surprising, but the flawed logic used to reach that opinion was disconcerting. By tying together sexual activity, marriage, and the procreation and rearing of children, the Court appears to have grouped together activities which have become legally and socially separate and independent from each other. The Court completely ignored the legions of children being raised in New York in single-parent households. The fact that so much of society finds marriage, per se, barely relevant to the

⁴⁶ *Id.* at 18.

⁴⁷ *Id.* at 18.

⁴⁸ *Id.* at 20 (emphasis in original).

⁴⁹ *Id.* at 23.

⁵⁰ *Id.* at 26.

rearing (and even the conception) of children seemed completely lost on the Court but presented a gaping hole in the logic which the Court exercised. In fact, the Court belied its own logic when it stated: “A person’s preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State’s interest in fostering relationships that will serve children best.”⁵¹ This is erroneous because it ties sexual activity to the birth of children, and the birth of children to marriage. Chief Judge Kaye noted that “the ability or desire to procreate is not a prerequisite for marriage.”⁵² The state’s interest in the private sexual activity has been discounted by a line of United States Supreme Court cases, culminating in *Lawrence v. Texas*,⁵³ and the relationship between children and marriage by the substantial numbers of children who are born and raised every year outside of marriage.

Does New York Recognize Out-of-State Same Sex Marriages and Civil Unions?

The next issue which we must address is whether New York will accept the validity of a same sex marriage contracted elsewhere. These marriages are presently being conducted in Massachusetts and Canada, and civil unions are being entered into in Vermont and Connecticut. It is complicated by federal law and by untested provisions of the United States Constitution’s Full Faith and Credit Clause.⁵⁴

At the present time, the only state actually allowing same sex marriages to be performed is Massachusetts. By gubernatorial interpretation of a statute, it is limiting same sex marriage to Massachusetts residents. This does not, however, preclude the possibility of a Massachusetts couple becoming married and then moving to New York. Same sex marriages are also legal at present in at least four Canadian provinces and several Western European countries, including the Netherlands and Belgium. Except for Canada, these jurisdictions seem to be restricting same sex marriages to their own nationals.⁵⁵

In addition, Vermont has created the civil union, a different type of relationship which entitles the civilly united couple only to such benefits as are granted under Vermont law.⁵⁶ The civil union, however, is not restricted to

⁵¹ *Id.* at 9.

⁵² *Id.* at 23.

⁵³ *Lawrence*, 539 U.S. at 558.

⁵⁴ U.S. CONST. art. IV, §1.

⁵⁵ See, e.g., Kees Waaldijk, *Dutch Gays Win Marriage Rights*, LESBIAN/GAY LAW NOTES, Jan. 2001, at 2, available at <http://qrd.org/qrd/www/legal/lglg/01.01.pdf> (last visited May 24, 2006).

⁵⁶ An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91, § 2(a); VT. STAT. ANN. tit. 15, § 1204 (Supp. 2000).

Vermont residents. Connecticut has now also created the civil union and has become the first state to establish special family rights for same-sex couples without judicial prompting.⁵⁷ Other states, including Hawaii and California have also created lesser types of domestic partnerships.⁵⁸ Furthermore, many municipalities have provided for domestic partnership registration, including several in New York,⁵⁹ and many private companies now extend benefits to same sex couples on a voluntary or contractual basis.⁶⁰

All states are required to give full faith and credit to the “public acts, records, and judicial proceedings of every other State.”⁶¹ There is no exception for same sex marriages performed in other states. The Full Faith and Credit Clause has, in fact, been tested with regard to the validity of marriages performed outside of a particular state’s jurisdiction. In the case of *Loughran v. Loughran*, the Supreme Court stated that if the marriage was legal in the jurisdiction where it was celebrated other states must grant recognition and validity, even if it was contrary to a particular restriction placed on one or both of the parties.⁶² This is the *lex loci* rule of marital recognition.⁶³ The Court did, however, include certain qualifying language which leaves open the possibility that one state may not have to accept a same sex marriage as contrary to its moral laws.⁶⁴

Matters are complicated by the adoption in 1996 of the Defense of Marriage Act (DOMA).⁶⁵ Congress passed this legislation specifically to define marital benefits under federal statutes and restrict them to heterosexual married

⁵⁷ The Connecticut statute states in pertinent part: “Parties to a civil union shall have all the benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman.” CONN. GEN. STAT. ANN. §46b-38nn (West 2005).

⁵⁸ See, e.g., HAW. REV. STAT. § 572C (Supp. 1997); CAL. FAM. CODE § 297(b)(5)(B) (West 2005).

⁵⁹ See, e.g., Alfonso A. Castillo, *DOMESTIC PARTNERS: Couples get their cards; On program’s first day in Huntington, couples celebrate right to sign town’s registry but point out its limits*, NEWSDAY, Jun. 15, 2004, at A18.

⁶⁰ See, e.g., Michael S. Markowitz, *Gay Rights: Shareholders’ power is the new weapon in fight for workplace equality*, NEWSDAY, Jan. 4, 2004, at F10.

⁶¹ U.S. CONST. art. IV, § 1.

⁶² *Loughran v. Loughran*, 292 U.S. 216 (1933).

⁶³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §283 (1971).

⁶⁴ “It is true that, under rules of law generally applicable, these courts may refuse to enforce a mere right of contract if it provides for doing within the District things prohibited by its laws...It may, in the exercise of the police power, prohibit the enjoyment by persons within its borders of many rights acquired elsewhere and refuse to lend the aid of its courts to enforce them.” *Loughran*, 292 U.S. at 227.

⁶⁵ Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. §7 (Supp. V 1999) and 28 U.S.C. §1738C (Supp. IV 1998)).

couples and to allow states to do the same. Prior to this law it did not appear that federal statutes had a specific definition of marriage, leaving the issue to each state. Under the first clause of the Defense of Marriage Act, Congress allows the states to deny full faith and credit to same sex marriages contracted in other states. In answer to this federal challenge at least thirty-eight states have already adopted mini-DOMA's, specifically defining marriage within the state as male-female and declining to recognize same sex marriages performed elsewhere. (New York is not one of these states.) None of these mini-DOMA's have yet been challenged.

Will New York grant full faith and credit to a same sex marriage contracted in Massachusetts or even extend comity to same sex marriages celebrated in Canada? I believe the answer to this question is yes. New York explicitly recognizes the *lex loci* rule and the Court of Appeals has stated that even if a couple goes to another state to evade a restriction on marriage contained in the New York statute, New York will be required to grant full faith and credit to the marriage if it was valid in the state where it was performed. In *In re Estate of May*,⁶⁶ the couple, an uncle and niece who were prohibited by statute from marrying in New York, traveled to Providence, Rhode Island where the marriage was legal for adherents of the Jewish faith. They then returned to New York where they lived for 33 years. Upon the wife's death a challenge arose to the husband's application for letters of administration from three of his six children, who argued that the marriage was null and void and that he was not the surviving spouse and therefore not entitled to said letters. The Court of Appeals affirmatively ruled that, if the marriage was legal in Rhode Island, New York had to recognize it and granted the letters. Therefore, it appears that if any same sex couple validly marries in Massachusetts and subsequently seeks New York recognition of the marriage, it should be granted.

The rules of comity are somewhat different. Comity allows New York to recognize judicial and statutory actions of a foreign country. Thus a foreign judgment will be recognized by New York unless it was procured by fraud or recognition would violate a strong public policy of the state, or the original court lacked jurisdiction.⁶⁷ The cases interpreting this rule have generally been concerned with whether the person challenging international recognition has been accorded due process, not necessarily as we understand it but at least as to the fundamental right to appear and to be heard, and whether the challenge would upset any great moral opposition. For instance, even though many countries recognize plural marriages, New York declines to grant recognition to any but the

⁶⁶ *In re Estate of May*, 305 N.Y. 486 (1953).

⁶⁷ *Greschler v. Greschler*, 51 N.Y.2d 368 (1980).

first legally married spouse, even if the subsequent relationship would be considered a legal marriage in the country of celebration.⁶⁸

A recent legal challenge sought New York recognition of a Vermont civil union.⁶⁹ While as indicated earlier, the Vermont statute limits the effect of civil unions to Vermont's state laws and benefits, nevertheless an effort was made for New York recognition. In *Langan v. St. Vincent's Hospital*,⁷⁰ the surviving civilly united partner of a victim of alleged medical malpractice sought recognition as surviving spouse in New York to maintain the malpractice action. A Nassau County Supreme Court justice, on a motion to dismiss, granted recognition to the Vermont civil union, but the Appellate Division, Second Department, reversed.

In declining to recognize Langan's standing as a surviving spouse, the appellate court engaged in a cursory analysis of the judicial precedents regarding same-sex marriage but narrowed its holding to two more basic points to find EPTL §5-4.1 constitutional. First, the Court noted that the same court had already spoken on this very issue⁷¹ and precedent justified the same conclusion in *Langan*. Secondly, the court found that the state of Vermont, in enacting the Civil Union law, did not intend to identically equate civil unions with marriage, and neither plaintiff nor decedent claimed a valid marriage entitled to full faith and credit or comity. The court's dictum regarding the constitutional issue was limited and of little import, although it is curious that the court cited extensively a Minnesota decision which was not reviewed by the United States Supreme Court, seeming to draw some constitutional principle from the denial of certiorari.⁷²

A spirited two-judge dissent would have found a constitutional violation. Justice Steven Fisher could not "identify any reasonably conceivable rational basis for classifying similarly-situated wrongful death plaintiffs on the basis of their sexual orientation." Going further (and perhaps hinting at future decisions by New York courts), he challenged the concept that denying the right to file a

⁶⁸ See, e.g., *In re Application of Sood*, 142 N.Y.S.2d 591 (Spec. Term 1955); *People v. Ezeonu*, 588 N.Y.S.2d 116 (Sup. Ct. Bronx County 1992).

⁶⁹ *Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d 411 (Sup. Ct. Nassau County 2003).

⁷⁰ *Id.* at 412.

⁷¹ *In re Cooper*, 187 A.D.2d 128 (N.Y. App. Div. 2d Dept. 1993), *appeal dismissed*, 82 N.Y.2d 801 (1993). There the court found that "the term 'surviving spouse' cannot be interpreted to include homosexual life partners" for the purpose of a statutory elective share. *Id.* at 132. The *Langan* court found this conclusive on whether a same sex partner could qualify as a spouse for purposes of the E.P.T.L..

⁷² See *Baker v. Nelson*, 409 U.S. 810 (1972), *cert. denied*, 291 Minn. 310 (1971).

wrongful death claim in any way promoted the state's interest in fostering marriage as an institution.⁷³

Conclusion

It is important to note that the decision of the Court of Appeals in *Hernandez v. Robles* was a plurality opinion. Although it is extremely rare for a court to reverse itself, one has only to look at the change of heart by the United States Supreme Court from *Bowers v. Hardwick*⁷⁴ to *Lawrence v. Texas*⁷⁵ over a span of less than two decades. The Court of Appeals will have more than one change in personnel over the next few years which may bring a review should a new majority form. It is also possible that the New York Legislature may decide to approve legislation favoring marriage or some form of civil union for same-sex couples. The same occurred in Connecticut without any judicial requirement or mandate. A new governor will sit in Albany in January, 2007, and it will be interesting to see if the issue of same-sex marriage rights will play out in the upcoming gubernatorial campaign.

The same sex marriage jungle is thick with political and social intrigue and litigation. It is ironic that, at this time, so many heterosexual couples are seeking to get out of marriage while same sex couples are seeking to avail themselves of the institution. Of course, same sex couples are seeking the same rights, benefits and recognitions that heterosexual married couples have always enjoyed. The landscape is changing quickly, and it is possible that what is said today will need revision next year, in five years and, perhaps in a generation, when the issue may have been resolved once and for all and the controversy may have ended.

⁷³ *Langan v. St. Vincent's Hosp.*, 802 N.Y.S.2d 476, 490 (App. Div. 2d Dept. 2005).

⁷⁴ *Bowers*, 478 U.S. at 186.

⁷⁵ *Lawrence*, 539 U.S. at 558.