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ARTHUR S. LEONARD

New York Recognition of a Legal Status for Same-Sex Couples: A Rapidly Developing Story

ABOUT THE AUTHOR: Professor of Law, New York Law School. This essay derives from a presentation the author made during a continuing legal education program at New York Law School on November 21, 2008. The material has been expanded to include subsequent developments through the beginning of January 2010. The author acknowledges research assistance from Stephen Woods, NYLS 2010 J.D. candidate, in the preparation of this article.

NEW YORK RECOGNITION OF A LEGAL STATUS FOR SAME-SEX COUPLES

New York State officials are not legally authorized to issue marriage licenses to same-sex couples,¹ and those individuals who are authorized to perform marriage ceremonies in New York State are not allowed to perform such ceremonies for couples who have not obtained a validly issued license.² Yet same-sex couples who legally marry outside of New York State and then return to reside within the state are entitled to legal recognition of their marriages, according to various state executive officials and a growing number of New York State courts.³ New York State has adopted a handful of statutes of limited application recognizing domestic partnerships,⁴ but has not adopted a general statute providing for domestic partnerships or civil unions for same-sex partners.⁵ The result of these developments

1. *Hernandez v. Robles*, 7 N.Y.3d 338, 357 (2006) (holding New York Domestic Relations Law does not authorize issuance of licenses for marriages of same-sex partners, although statute does not, on its face, expressly forbid such marriages).
2. *See* N.Y. DOM. REL. LAW § 13 (McKinney 1999).
3. *See* *Lewis v. N.Y. Dep't of Civil Serv.*, 872 N.Y.S.2d 578 (3d Dep't 2009), *aff'd on other grounds sub nom*, *Godfrey v. Spano*, 13 N.Y.3d 358 (2009); *Godfrey v. Spano*, 871 N.Y.S.2d 296 (2d Dep't 2008), *aff'd on other grounds*, 13 N.Y.3d 358 (2009); *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dep't 2008), *appeal dismissed*, 10 N.Y.3d 856 (2008). In *Martinez*, the court held that established New York marriage-recognition principles dictate recognizing a same-sex marriage performed in Canada. *Lewis* and *Godfrey* were challenges to executive actions recognizing same-sex marriages performed outside the state. In both cases, the Appellate Division panels rejected the challenges based on New York marriage-recognition principles, and in both cases the Court of Appeals affirmed the rejection of the challenges on other grounds without deciding whether New York marriage-recognition principles would apply to these marriages. *Godfrey*, 13 N.Y.3d at 377; *see also* *Golden v. Paterson*, 877 N.Y.S.2d 822 (Sup. Ct. Bronx County 2008) (rejecting challenge to memorandum sent by governor's legal counsel to agency heads advising of the *Martinez* decision and requiring reports back on steps being taken to avoid liability for refusing to recognize same-sex marriages).
4. *See* N.Y. PUB. HEALTH LAW § 2805-q (McKinney 2007) (hospital visitation by domestic partners); N.Y. PUB. HEALTH LAW § 4201 (McKinney 2002) (rights of surviving domestic partners with respect to disposition of remains); N.Y. WORKERS' COMP. LAW § 4 (McKinney 2005) (authorizing benefits for surviving domestic partners of employees killed during the terrorist attacks of September 11, 2001).
5. "Domestic partnerships" and "civil unions" are legal structures enacted in various jurisdictions to provide a legal structure other than marriage for emotionally committed couples. "Domestic partnerships" originally emerged in the private sector, sometimes as the result of collective bargaining and sometimes through voluntary employer action, to recognize the family relationships of cohabiting same-sex couples (and sometimes also unmarried different-sex couples) for purposes of employee benefit programs. From the mid-1980s onward, many municipalities adopted domestic partnership ordinances, conferring various local law rights that are enjoyed by married couples on unmarried partners who registered their relationships with the municipality. In three states—California, Oregon, and Washington—domestic partnership statutes have been adopted that confer upon registered same-sex domestic partners almost all of the legal rights and responsibilities under state law that are conferred upon married couples. *See* CAL. FAM. CODE. § 297.5 (West 2004); Oregon Family Fairness Act, § 9, OR. REV. STAT. § 106.990, Anno. & Ref. (2009); WASH. REV. CODE ANN. § 26.60.015 cmt. 521, § 1 (West 2009). "Civil unions" are, by contrast, virtual state law marriages for same-sex couples. The first civil union statute was enacted in 2000 by Vermont in response to an order to the legislature from the state's supreme court to cure a violation of the state constitution's Equal Benefits Clause that arose from the denial of marriage to same-sex partners. *See* *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). Neighboring states of New Hampshire, Connecticut, and New Jersey have enacted similar statutes; New Hampshire entirely voluntarily, Connecticut in the face of a pending lawsuit seeking same-sex marriages that was ultimately successful, *see* *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008), and New Jersey in

is an oddly unsettled legal landscape for same-sex couples in New York State as of January 2010, in which same-sex marriage cannot be contracted within the state, but same-sex marriage is freely available to those willing to go outside the state or outside the country to obtain it.⁶

I. HISTORICAL BACKGROUND: THE *HERNANDEZ* DECISION AND AVAILABILITY OF MARRIAGES ELSEWHERE

Several lawsuits initiated during 2004 seeking marriage licenses for same-sex partners were consolidated for decision by the New York Court of Appeals, which issued its ruling in *Hernandez v. Robles* on July 6, 2006.⁷ The court held that the New York Domestic Relations Law⁸ did not authorize marriage licenses for same-sex couples, and that this feature of the law did not violate the New York State Constitution.⁹ At the same time, the plurality observed that the legislature could

response to a state supreme court decision similar to the Vermont ruling. *See Lewis v. Harris*, 908 A.2d 196 (N.J. 2006). The Connecticut Supreme Court explained in detail in *Kerrigan* that civil unions are distinct from, and inferior to, marriage because they impart only legal rights and responsibilities but lack the broader social meanings attached by society to the concept of marriage. *See Kerrigan*, 957 A.2d at 417–18. Additionally, of course, because of the federal Defense of Marriage Act, couples that have domestic partnerships or civil unions are denied the numerous rights and benefits available to married couples under federal law, and have been held to lack standing to sue the federal government for denial of those benefits. *See, e.g., Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006) (same-sex domestic partners lack standing to challenge denial of federal rights under Defense of Marriage Act).

6. This presents an eerie counterpart to the situation of non-religious Jews in Israel who wish to marry without the involvement of the Orthodox Jewish rabbinate. As civil marriage is not available within the country, such couples customarily travel outside of the country to marry, and then return to live in Israel, where civil marriages contracted elsewhere—even among Israeli citizens—are freely recognized. Indeed, the High Court of Israel has even gone so far as to order the civil authorities to issue new identity documents identifying some same-sex couples who were wed in Canada as “married.” *See HCJ 3045/05 Ben-Ari v. Dir. of the Population Admin. in the Ministry of the Interior* [2006] (unpublished).

7. 7 N.Y.3d 338 (2006).

8. N.Y. DOM. REL. LAW §§ 2, 3, 5, 12, 15(1)(a) & 50 (McKinney 1999). The *Hernandez* court explained:

Articles 2 and 3 of the Domestic Relations Law, which govern marriage, nowhere say in so many words that only people of different sexes may marry each other, but that was the universal understanding when articles 2 and 3 were adopted in 1909, an understanding reflected in several statutes. Domestic Relations Law § 12 provides that “the parties must solemnly declare . . . that they take each other as husband and wife.” Domestic Relations Law § 15 (1) (a) requires town and city clerks to obtain specified information from “the groom” and “the bride.” Domestic Relations Law § 5 prohibits certain marriages as incestuous, specifying opposite-sex combinations (brother and sister, uncle and niece, aunt and nephew), but not same-sex combinations. Domestic Relations Law § 50 says that the property of “a married woman . . . shall not be subject to her husband’s control.”

Hernandez, 7 N.Y.3d at 357.

9. One member of the court recused himself from the case. *See Hernandez*, 7 N.Y.3d at 355. Three members signed a plurality opinion, one of which and one other signed a concurring opinion, and two dissented. *See id.* Thus, there is no single opinion for the court, although the combination of plurality and concurrence rejected the plaintiffs’ contention that same-sex couples enjoy a right guaranteed by the New York State Constitution to marry on the same basis as different-sex couples. *See id.* at 356, 379.

change the law to allow such marriages,¹⁰ but said nothing about whether same-sex marriages validly performed in other jurisdictions were entitled to recognition in New York.

At the time the Court of Appeals spoke, only one other state—Massachusetts—was issuing marriage licenses to same-sex couples, and the question whether same-sex couples whose primary residence was outside of Massachusetts were entitled to receive marriage licenses in that state was being litigated. Shortly after the Massachusetts Supreme Judicial Court ruled in *Goodridge v. Department of Public Health* in 2003 that same-sex couples in Massachusetts were entitled to marry pursuant to the Equal Benefits Provision of the Massachusetts Constitution,¹¹ state officials determined that a little-known statute dating from 1913, which prohibited the issuance of marriage licenses to non-residents whose home states would not allow the marriages, could be used to deny marriage licenses to non-resident same-sex couples who could not marry in their home states, even though there was no residency requirement to obtain a marriage license in Massachusetts.¹² The Massachusetts Supreme Judicial Court subsequently rejected a constitutional challenge to that old statute in *Cote-Whitacre v. Department of Public Health*, but concluded that the statute should be construed to bar issuance of licenses only to residents of states that affirmatively prohibited same-sex marriages as a matter of positive declaration through their constitutions, statutes, or judicial opinions.¹³ The *Cote-Whitacre* decision was announced on March 30, 2006.¹⁴ The *Hernandez* decision was issued on July 6, 2006, while a Massachusetts trial judge was contemplating on remand in *Cote-Whitacre* whether a same-sex couple from New York (who were among the plaintiffs in that case) could obtain a marriage license in Massachusetts.¹⁵ That court concluded, in a decision announced on September 29, 2006, that the *Hernandez* decision answered the question by providing an affirmative declaration that same-

10. *See id.* at 366.

11. 798 N.E.2d 941 (Mass. 2003).

12. MASS. GEN. LAWS ch. 207, § 11 (repealed 2008). The statute had been passed at a time when most states forbade mixed-race marriages, but Massachusetts allowed them. It was based on a model statute proposed by the Commissioners on Uniform State Laws, primarily intended to prevent the availability of marriages for mixed-race couples in states like Massachusetts from being used as a device to evade the prohibition on mixed-race marriages in other states. This aspect of the law became moot in 1967 with the U.S. Supreme Court's decision in *Loving v. Virginia*, which held laws against mixed-race marriages unconstitutional. 388 U.S. 1 (1967).

13. 844 N.E.2d 623, 638 (Mass. 2006). The court stated:

[T]he statute broadly precludes the issuance of a marriage license in Massachusetts where the proposed marriage would be in violation of the laws of the domicile [sic] State, either because it is expressly deemed "void," or because it is prohibited by constitutional amendment, by the common law, or by State statutory language to the effect that such marriage is not permitted, not recognized, not valid, or the like.

Id.

14. *Id.* at 623.

15. *See* *Cote-Whitacre v. Dep't of Pub. Health*, No. 04-2656, 2006 WL 3208758 (Mass. Super. Sept. 29, 2006).

sex marriages were not authorized under New York law, and held that same-sex couples from New York could not obtain marriage licenses in Massachusetts.¹⁶

In addition to Massachusetts, there were a handful of foreign jurisdictions that allowed same-sex couples to marry at the time of the *Hernandez* decision, including Canada,¹⁷ (which shares a border with New York), the Netherlands,¹⁸ Spain,¹⁹ and Belgium;²⁰ subsequently, South Africa²¹ and Norway²² joined that list. The most significant of these for purposes of this article is Canada, due to its close geographical proximity to New York and its lack of a residency requirement for issuing licenses and performing marriage ceremonies. As some of the cases discussed below indicate, same-sex couples from New York did take advantage of these factors to marry in Canada. In addition, at the time of the *Hernandez* decision, some other states had already provided a legal status other than marriage for same sex couples. In Hawaii, reciprocal beneficiaries were afforded a short list of state law rights.²³ In Vermont,²⁴ California,²⁵ and New Jersey,²⁶ same-sex couples could enter into civil unions or domestic partnerships that provided almost all of the state law rights that married couples enjoyed in those jurisdictions.

II. NEW YORK TREATMENT OF SAME-SEX UNIONS CONTRACTED ELSEWHERE

In *Langan v. St. Vincent's Hospital*, a case that was making its way through the courts while *Hernandez* was pending, a surviving Vermont civil union partner who had resided with his partner in New York State was attempting to assert a wrongful death claim against the hospital where his partner had died after a surgical procedure, claiming that he should be entitled to sue as a spouse, as he would be able to do had

16. *See id.* at *2-3.

17. Civil Marriage Act, 2005 S.C., ch. 33, § 4 (Can.).

18. *See* Associated Press, *Dutch Legislators Approve Full Marriage Rights for Gays*, N.Y. TIMES, Sept. 13, 2000, at A4.

19. *See* Renwick McLean, *Spanish Parliament Gives Approval to Bill to Legalize Same-Sex Marriages*, N.Y. TIMES, Apr. 22, 2005, at A12.

20. Marlise Simons, *World Briefing Europe: Belgium: Parliament Approves Gay Marriages*, N.Y. TIMES, Jan. 31, 2003, at A6.

21. *See* Sharon LaFraniere, *South African Parliament Approves Same-Sex Marriages*, N.Y. TIMES, Nov. 15, 2006, at A12.

22. *See* Associated Press, *Norway: Same Sex Marriage Permitted*, N.Y. TIMES, June 18, 2008, at A11.

23. *See* HAW. REV. STAT. § 572C (2006). Reciprocal beneficiaries were same-sex couples or elderly unmarried different-sex couples who were accorded a small list of state law rights similar to those provided married couples. *See id.* §§ 572C-3, 572C-4.

24. *See* 15 VT. STAT. ANN. tit. 15, §§ 1201, 1204 (2002). Vermont civil union partners enjoy virtually all the state law rights and benefits that are accorded to married couples in that state.

25. CAL. FAM. CODE §§ 297, 297.5 (West 2004). California domestic partners enjoy virtually all the state law rights and benefits that are accorded to married couples in that state.

26. N.J. STAT. ANN. § 26:8A (West 2007). New Jersey civil union partners enjoy virtually all the state law rights and benefits that are accorded to married couples in that state.

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his partner died in a Vermont hospital.²⁷ Although the trial judge found that the plaintiff's Vermont civil union should be recognized in this circumstance as creating a spousal relationship for purposes of the New York Wrongful Death Act,²⁸ the Appellate Division, ruling after the *Hernandez* decision, rejected this conclusion, finding that comity principles did not require recognizing the civil union for purposes of New York law.²⁹ To date, no appellate court in New York has granted formal recognition to a Vermont civil union, or any other alternative legal status, such as a civil union or a domestic partnership, contracted in another state.³⁰

After the *Hernandez* ruling, the number of jurisdictions providing legal recognition in some form to same-sex partners increased, with Connecticut,³¹ New Hampshire,³² New Jersey,³³ Washington State,³⁴ and Oregon³⁵ joining the lists with an alternative status of civil unions or domestic partnerships, and with Connecticut proceeding to full marriage rights by order of its Supreme Court on October 28, 2008.³⁶ The California Supreme Court also opened up marriage to same-sex couples in a ruling issued on May 14, 2008,³⁷ but on November 4, 2008, California voters approved Proposition 8, overruling the court by adding an exclusively different-sex definition of marriage to the California Constitution.³⁸ During the summer of 2008,

27. 802 N.Y.S.2d 476 (2d Dep't 2005), *appeal dismissed*, 6 N.Y.3d 890 (2006).

28. *See Langan*, 765 N.Y.S.2d 411 (Sup. Ct. Nassau County 2003).

29. *See Langan*, 802 N.Y.S.2d 476.

30. While falling short of actual recognition of a Vermont civil union having legal effect in New York, a trial judge ruled in *Debra H. v. Janice R.*, No. 106569/08, 2008 N.Y. Misc. LEXIS 6367 (Sup. Ct. N.Y. County Oct. 2, 2008), that evidence that a lesbian couple had entered into a Vermont civil union would strengthen the case of one of the partners who was seeking joint custody and visitation rights with their child, borne by the other partner, after the break-up of their relationship. The court stated that "the parties' civil union at the time of [the child's] birth, is a significant, though not necessarily a determinative, factor in petitioner's estoppel argument," and found that "the civil union here is strong evidence of the parties' intention to create familial bonds for their and [the child's] benefit." *Id.* at *26-27. *Debra H.* was subsequently reversed, 877 N.Y.S.2d 259 (1st Dep't 2009), but the Court of Appeals has granted leave to appeal. 13 N.Y.3d 702 (2009).

31. *See* CONN. GEN. STAT. ANN. § 46b-38bb (West 2009), *repealed by* 2009 Conn. Pub. Acts 13 (effective Oct. 1, 2010).

32. *See* N.H. REV. STAT. ANN. § 457-A:2 (LexisNexis 2009), *repealed by* 2009 N.H. Laws 59 (effective Jan. 1, 2011).

33. *See* N.J. STAT. ANN. § 37:1-30 (West Supp. 2009).

34. *See* WASH. REV. CODE ANN. § 26.60.030 (West Supp. 2009).

35. 2007 Or. Laws ch.99, § 3(1).

36. *See Kerrigan*, 957 A.2d 407.

37. *See In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

38. *See* CAL. CONST. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California.") Challenges were filed to the validity of the enactment of this Amendment. The California Supreme Court heard oral argument on March 5, 2009, with a decision constitutionally mandated to be issued within ninety days of the argument. The court agreed to consider not only constitutional challenges to Proposition 8, but also whether same-sex marriages performed prior to its enactment would remain valid, in the event that the court decided to reject the constitutional challenges. On May

Massachusetts repealed its old statute that had served to bar almost all non-resident same-sex couples from obtaining licenses there.³⁹ After the Massachusetts repeal, none of the other U.S. jurisdictions allowing same-sex marriages had residency requirements for those seeking licenses, so at various times during 2008, same-sex couples residing in New York could marry in California, Massachusetts, and Connecticut (and, of course, Canada) and return to live in New York as married couples if governmental and non-governmental actors in New York would recognize their marriages.

Some New York couples, impatient with the slow progress of the legislature in approving a law to open up marriage to same-sex couples, went out of state to marry. It was therefore inevitable that New York State government officials and courts would confront the question whether those marriages would be recognized in the state. Responding to requests for advice about same-sex marriage from various municipalities, the New York Attorney General's Office issued an informal letter opinion in March 2004, stating that although existing New York marriage statutes could not be construed to allow same-sex marriages, the established principles of the New York marriage-recognition doctrine would support recognizing such marriages lawfully performed elsewhere,⁴⁰ and various other officials—such as the Westchester County Executive, the State Comptroller, and the Civil Service Department—eventually came to the same conclusion.⁴¹ However, the first courts to confront the issue balked, citing *Hernandez* as establishing a state policy against recognizing same-sex marriages.⁴²

III. THE MARTINEZ DECISION AND ITS JUDICIAL AFTERMATH

Despite these earlier trial court decisions, on February 1, 2008, in the first appellate ruling on the subject, the Appellate Division, Fourth Department, found that nothing in *Hernandez* would preclude recognition of same-sex marriages, and that principles of comity, as developed by the New York courts in marriage-recognition

26, 2009, the California Supreme Court rejected the constitutional challenges to Proposition 8 and held that Proposition 8 “lawfully amend[ed] the California Constitution.” *Strauss v. Horton*, 207 P.3d 48, 63–64 (Cal. 2009). However, the California Supreme Court held, in the same decision, that any same-sex marriages performed before the effective date of Proposition 8 are valid and “must continue to be recognized in [California].” *Id.* at 64.

39. MASS. GEN. LAWS ch. 207, § 11 (2007), *repealed by* 2008 Mass. Acts ch. 216, § 1 (effective Aug. 1, 2008).

40. *See* Marc Santora, *Spitzer's Opinion Mixed on Status of Gay Marriage*, N.Y. TIMES, Mar. 4, 2004, at A1.

41. In each case, their decisions were challenged in taxpayer litigation backed by the Alliance Defense Fund, resulting in court decisions rejecting the challenges. *See* discussion *infra* Part IV.

42. *Funderburke v. N.Y. Dep't of Civil Serv.*, 822 N.Y.S.2d 393 (Sup. Ct. Nassau County 2006), *vacated as moot*, 854 N.Y.S.2d 466 (2d Dep't 2008); *Gonzalez v. Green*, 831 N.Y.S.2d 856 (Sup. Ct. N.Y. County 2006). Courts that cited *Hernandez* for this proposition did not provide any reasoned explanation or nuanced analysis of the *Hernandez* decision to reach their conclusions, but merely asserted that recognizing such marriages would be contrary to the public policy against same-sex marriage announced in *Hernandez*.

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cases, compelled recognition of a marriage contracted in Canada by a same-sex couple residing in New York.⁴³ In that case, *Martinez v. County of Monroe*, an employee of a community college and her same-sex partner who had married in Ontario, Canada in July 2004, asserted that the college must treat the employee's same-sex spouse the same as any other legal spouse for purposes of the college's healthcare plan.⁴⁴ The college's refusal was sustained by the Monroe County Supreme Court, but the Appellate Division reversed, rejecting the contention that *Hernandez* required denying recognition to the marriage.⁴⁵

The Appellate Division explained that New York marriage-recognition law, dating back “for well over a century . . . recognized marriages solemnized outside New York unless they f[ell] into two categories of exception: (1) marriage, the recognition of which is prohibited by the ‘positive law’ of New York and (2) marriages involving incest or polygamy, both of which fall within the prohibitions of ‘natural law.’”⁴⁶ Thus, New York followed the general rule of comity in marriage-recognition cases. The Appellate Division found that neither exception applied to this case.⁴⁷ Unlike most other states,⁴⁸ New York has never enacted a statute expressly forbidding

43. See *Martinez*, 850 N.Y.S.2d 740.

44. See *id.* at 741–42.

45. *Id.* at 741, 743.

46. *Id.* at 742 (citations omitted).

47. See *id.* at 742–43.

48. States that have adopted legislation and/or a constitutional amendment effectively prohibiting same-sex marriages include, as of January 2010:

Ala.: ALA. CONST. art. 1, § 36.03; ALA. CODE § 30-1-19 (Lexis Nexis 2009). Alaska: ALASKA CONST. art. I, § 25; ALASKA STAT. § 25.05.013 (2008). Ariz.: ARIZ. CONST. art. XXX, § 1; ARIZ. REV. STAT. ANN. §§ 25-101(c), 25-112 (2007). Ark.: ARK. CODE ANN. §§ 9-11-107, 9-11-208 (2008 & Supp. 2009). Cal.: CAL. CONST. art. I, § 7.5; CAL. FAM. CODE § 308.5 (West 2004). Colo.: COLO. CONST. art. II, § 31; COLO. REV. STAT. § 14-2-104 (2008). Fla.: FLA. CONST. art. I, § 27; FLA. STAT. ANN. §§ 741.04(1), 741.212 (West 2005). Ga.: GA. CONST. art. I, § IV; GA. CODE ANN. § 19-3-3.1 (2004). Haw.: HAW. CONST. art. I, § 23; HAW. REV. STAT. § 572-1 (2006). Idaho: IDAHO CONST. art. III, § 28; IDAHO CODE ANN. § 32-209 (2006). Ill.: 750 ILL. COMP. STAT. ANN. 5/201, 5/212(5), 5/213.1 (West 1999 & Supp. 2009). Ind.: IND. CODE ANN. § 31-11-1-1 (West 2003). Kan.: KAN. CONST. art. 15, § 16; KAN. STAT. ANN. §§ 23-101(a), 23-115 (2007). Ky.: KY. CONST. § 233a; KY. REV. STAT. ANN. §§ 402.005, 402.020(1)(d), 402.040(2), 402.045 (West 1999). La.: LA. CONST. art. XII, § 15; LA. CIV. CODE ANN. art. 89 (Supp. 2009); LA. CIV. CODE ANN. art. 3520 (Supp. 2009). Md.: MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2006). Mich.: MICH. CONST. art. I, § 25; MICH. COMP. LAWS SERV. §§ 551.1, 551.271(2) (Lexis Nexis 2007). Minn.: MINN. STAT. ANN. §§ 517.01, 517.03 (2006). Miss.: MISS. CONST. art. XIV, § 263A; MISS. CODE ANN. § 93-1-1(2), (West 2004). Mo.: MO. CONST. art. I, § 33; MO. ANN. STAT. § 451.022 (West 2003). Mont.: MONT. CONST. art. XIII, § 7; MONT. CODE ANN. § 40-1-401, (2009). Neb.: NEB. CONST. art. I, § 29. Nev.: NEV. CONST. art. I, § 21. N.C.: N.C. GEN. STAT. ANN. §51-1.2 (LexisNexis 2007). N.D.: N.D. CONST. art. XI, § 28; N.D. CENT. CODE §§ 14-03-01, 14-03-08, (2004). Ohio: OHIO CONST. art. XV, § 11; OHIO REV. CODE ANN. § 3101.01 (LexisNexis 2008). Okla.: OKLA. CONST. art. II, § 35; OKLA. STAT. tit. 43, § 3.1 (West 2001). Pa.: 23 PA. CONS. STAT. §§ 1102, 1704 (West 2001). S.C.: S.C. CONST. art. XVII, § 15; S.C. CODE ANN. § 20-1-15 (2008). S.D.: S.D. CONST. art. XXI, § 9; S.D. CODIFIED LAWS §§ 25-1-1, 25-1-38, (1999). Tenn.: TENN. CONST. art. XI, § 8; TENN. CODE ANN. § 36-3-113 (West 2005). Tex.: TEX. CONST. art. I, § 32; TEX. FAM. CODE ANN. §§ 2.001, 6.204 (Vernon 2006). Utah: UTAH CONST. art. I, § 29; UTAH CODE ANN. §§ 30-1-2, 30-1-4.1, (West 2007). Va.: VA. CONST.

the recognition of marriages of same-sex couples contracted in other states, and the Appellate Division did not consider a marriage between two persons of the same-sex to be a violation of natural law in the sense conveyed by the historic exception for incestuous or polygamous marriages.⁴⁹

Rejecting Monroe County's argument that the *Hernandez* case satisfied the first exception by construing the Domestic Relations Law to prohibit the issuance of marriage licenses to same-sex couples, the Appellate Division asserted that *Hernandez* "does not articulate the public policy for which it is cited by defendants, but instead holds merely that the New York State Constitution does not *compel* recognition of same-sex marriages solemnized in New York."⁵⁰ Furthermore, the *Hernandez* ruling had observed that the legislature was free to change this result, which, according to the Appellate Division, meant that the Court of Appeals would hold that recognition of a same-sex marriage would not violate the public policy of the state.⁵¹

Furthermore, the Appellate Division opined, under New York's Human Rights Law,⁵² the college was prohibited from discriminating against an employee "in compensation or in terms, conditions or privileges of employment" due to the employee's sexual orientation.⁵³ By distinguishing between legally valid same-sex and opposite-sex marriages in providing health benefits, the college was engaging in such discrimination.⁵⁴ The Appellate Division remanded the case to the trial court for determination of a remedy and entry of a final order.⁵⁵

art. I, § 15-A; VA. CODE ANN. §§ 20-45.2, 20-45.3, (West 2008). Wash.: WASH. REV. CODE § 26.04.020 (West 2005). W. Va.: W. VA. CODE ANN. §§ 48-2-104, 48-2-603 (West 2004). Wis.: WIS. CONST. art. XIII, § 13; WIS. STAT. §§ 765.001, 765.01, (2009). Wyo.: WYO. STAT. ANN. § 20-1-101 (2009).

49. *Martinez*, 850 N.Y.S.2d at 742-43. Unfortunately, the court states its conclusion as to this point without any detailed discussion, which would have been useful in light of the religious objections that have been articulated against same-sex marriages. In the eyes of some religious adherents, marriage is a sacred institution designed by the Deity for purposes of biological reproduction of humanity, and thus a proposal that two persons of the same sex, who cannot procreate through sexual intercourse, can be married is "unnatural." Perhaps the court did not mention that argument because it was implicitly deemed irrelevant in the civil marriage context, and giving it any weight would seem contrary to the separation of church and state that is deemed an essential element of our governmental plan.
50. *Id.* at 743.
51. *See id.*
52. N.Y. EXEC. LAW § 296 (McKinney 2005).
53. *Martinez*, 850 N.Y.S.2d at 743 (citation omitted).
54. *See id.* Were the college a private-sector entity, its employee benefits plan would not be subject to the State Human Rights Law due to preemption under the federal Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a) (2006). However, the state may regulate employee benefit plans offered by non-federal public sector employers in the state. *Id.* § 1003(b)(1) (providing that ERISA does not apply to "governmental" plans).
55. The remedy would be purely monetary. By the time the case came to decision by the Appellate Division, the college had altered its policy to extend benefits to domestic partners and the appellant's spouse was receiving coverage under the college's health benefits plan. *See Martinez*, 850 N.Y.S.2d at 743-44. The court rejected the defendant's suggestion that this mooted the case, since a claim remained for the costs of providing insurance coverage between the time the appellant requested the benefit and the time the college changed its policy. *See id.*

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Under New York practice, a ruling by a panel of the Appellate Division in any department becomes a precedent binding on all trial courts of the state unless or until another panel of the Appellate Division contradicts it.⁵⁶ Therefore, the *Martinez* ruling immediately established a statewide precedent for the recognition of same-sex marriages contracted in other jurisdictions. The county attempted an immediate appeal to the Court of Appeals, but was rebuffed on grounds that a final order had not been issued in the case.⁵⁷ Subsequently, the county abandoned its appeal.⁵⁸

Trial courts in other parts of the state, with one minor exception,⁵⁹ accepted *Martinez* as a binding precedent and soon applied it in other cases involving couples who had married in Canada or Massachusetts. For example, in *Beth R. v. Donna M.*⁶⁰ and *C.M. v. C.C.*,⁶¹ supreme court justices in New York County ruled that the court had jurisdiction to entertain petitions for divorce filed by same-sex spouses who were married in Canada and Massachusetts, respectively. Consistently, in *In re Estate of Ranftle*, a New York County Surrogate Court judge ruled that the surviving husband from a same-sex Canadian marriage was the decedent's legal spouse and sole distributee for purposes of probating a will.⁶² And, in *In re Donna S.*, a Monroe County Family Court judge found that there was no need for the same-sex legal spouse of a woman who was about to give birth through donor insemination to seek certification as a qualified adoptive parent, because she could be treated in the same way as the legal husband of a woman about to give birth under similar circumstances;

56. See *People v. Turner*, 5 N.Y.3d 476, 482 (2005) (citing *Mountain View Coach Lines, Inc. v. Storms*, 476 N.Y.S.2d 918, 919–20 (2d Dep't 1984)).

57. See *Martinez v. County of Monroe*, 10 N.Y.3d 856 (2008).

58. Gary Craig, *County Ends Same-Sex Marriage Challenge*, ROCHESTER DEMOCRAT & CHRONICLE, Nov. 22, 2008, at A1.

59. See *Will of Zwerling*, 2008 N.Y. Misc. LEXIS 5651 (Sur. Ct. Queens County Sept. 9, 2008). In *Will of Zwerling*, the court incorrectly stated that the lack of a ruling on the merits by the Appellate Division, Second Department, left doubt about whether a same-sex marriage performed in Canada was valid in Queens County. The court ruled that surviving parents of a decedent who had married his same-sex partner in Canada had to be joined as parties to the probate of a last will and testament. See *id.* The court erred, since controlling Second Department precedent provides that trial courts within the Second Department are bound by uncontradicted rulings of other departments of the Appellate Division. See *Storms*, 476 N.Y.S.2d at 919–20.

60. 853 N.Y.S.2d 501 (Sup. Ct. N.Y. County 2008).

61. 867 N.Y.S.2d 884 (Sup. Ct. N.Y. County 2008).

62. No. 4585-2008, 2009 N.Y. Misc. LEXIS 2488 (Sup. Ct. N.Y. County Jan. 26, 2009). Under section 1403(1)(a) of the Surrogate's Court Procedure Act, when a will is offered for probate, the distributees of the decedent must be served with process. N.Y. SURR. CT. PROC. ACT § 1403(1)(a) (McKinney 1995). When the decedent was married at the time of death, his or her sole distributee is his or her legal spouse. See *In re Ranftle*, 2009 N.Y. Misc. LEXIS 2488 (Sup. Ct. N.Y. County 2009). Surrogate Glen ruled that the decedent's same-sex spouse from a Canadian marriage was his sole distributee. See *id.* Thus, if the decedent had died intestate, his surviving same-sex spouse would inherit the entire estate. See *id.* If, as in this case, the decedent died leaving a will, other family members who would have been considered distributees in the absence of a surviving spouse would have been entitled to notice of the probate proceeding so they could protect their interests. Because Surrogate Glen recognized the same-sex marriage, no notice was required in this case to the surviving siblings of the decedent.

execution of consent by both parties would be sufficient to establish the spouse's legal rights as a parent.⁶³

IV. THE EXECUTIVE BRANCH RESPONSE TO THE *MARTINEZ* DECISION

The *Martinez* ruling set in motion executive branch action as well. Some elected officials with executive authority had previously announced that governmental bodies under their authority would recognize same-sex marriages contracted out of state,⁶⁴ but the new state-wide appellate judicial precedent spurred Governor David Paterson to action at the instance of his legal counsel, David Nocenti. Nocenti had drafted a memorandum that was sent to all executive agencies of the state during May 2008, alerting them to the *Martinez* ruling and observing that failure to recognize same-sex marriages lawfully contracted elsewhere could subject the government to liability.⁶⁵ The memorandum instructed the agencies to review their policies in light of the legal obligation to accord recognition to such marriages, and to report back to the governor's office by the end of June on what steps they were taking to revise their procedures in conformance with the law.

Shortly after the California Supreme Court put the same-sex marriage issue back in the headlines with its controversial ruling of May 15, 2008 by holding that denial of marriage rights to same-sex couples violated the constitution of the most populous state in the nation,⁶⁶ news of the Nocenti memorandum leaked to the press, sparking outraged protest from some opponents of same-sex marriage and a lawsuit claiming that the governor had exceeded his authority by authorizing the letter to be sent. The lawsuit quickly provided vindication for Governor Paterson, as a trial court ruled that he had not exceeded his authority when he ordered executive branch agencies to comply with a state-wide legal precedent of the Appellate Division.⁶⁷ This conclusion was consistent with rulings issued both earlier and subsequently, rejecting similar challenges that had been mounted to decisions by the State Comptroller, the Civil Service Department, and the Westchester County Executive: That government

63. 871 N.Y.S.2d 883 (Fam. Ct. Monroe County 2009).

64. Former New York City Comptroller Alan Hevesi had announced this position, as had Westchester County Executive Andrew Spano, and the Civil Service Department had changed its position and settled the *Funderburke* lawsuit, which was brought by a retired public school teacher who had married his same-sex partner in Canada and sought coverage for his partner under the health insurance program for state government retirees administered by the Civil Service Department. See *Godfrey*, 871 N.Y.S.2d 296; *Funderburke v. State Dep't of Civil Serv.*, 854 N.Y.S.2d 466 (2d Dep't 2008); Michael Cooper, *Hevesi Extends Pension Rights to Gay Spouses*, N.Y. TIMES, Oct. 14, 2004, at B1.

65. The memorandum, which was subsequently leaked to the press, was reproduced in full on various websites. This author located a copy on the website of a weekly newspaper, the *New York Observer*. See Azi Paybarah, *Paterson's Message on Same-Sex Marriage*, N.Y. OBSERVER, May 29, 2008, available at <http://www.observer.com/2008/patersons-message-same-sex-marriage>.

66. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

67. See *Golden*, 877 N.Y.S.2d 822. Taxpayer plaintiffs in this and the other lawsuits, see cases cited *infra* note 68, were represented by attorneys affiliated with the Alliance Defense Fund, a legal advocacy organization opposed to same-sex marriage that vowed to appeal all of its cases to the Court of Appeals. See Joel Stashenko, *Conservative Christian Group Targets New York*, N.Y. L.J., Feb. 3, 2009, at 1.

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entities and programs under their direction would recognize same-sex marriages lawfully contracted out of state.⁶⁸ All of the trial judges in these cases agreed that government executives in New York State could, consistent with their authority and established principles of New York marriage-recognition law, decide to recognize same-sex marriages lawfully performed in other jurisdictions.

The appellate seal of approval was put on this conclusion when a panel of the Appellate Division, Third Department rejected the challenge to the Civil Service Department's decision to recognize foreign same-sex marriages for purposes of administering employee benefits programs for public employees in the state. The January 22, 2009 ruling in *Lewis v. State Department of Civil Service* decisively rejected the argument that the Civil Service Department had violated separation of powers or otherwise exceeded its discretionary authority by recognizing foreign same-sex marriages for these purposes.⁶⁹ A majority of the five-judge panel relied broadly on the Fourth Department's *Martinez* decision to declare that such marriages would be recognized under New York law, while two concurring judges rested their agreement more narrowly on the discretion of the Civil Service Department to construe its enabling statute consistently with the existing practice of extending benefits to domestic partners of public employees, under policies adopted administratively or negotiated with the public sector labor unions.⁷⁰

Meanwhile, as the litigation was progressing, various agencies of the state government responded to the Nocenti memorandum by reviewing and revising their policies. The first truly tangible example of this came with publication by the State Insurance Department of a "Circular Letter" to the insurance industry, providing that companies licensed to sell insurance in New York State should treat same-sex couples legally married in other jurisdictions as married for the purposes of New York insurance law.⁷¹ As of the beginning of 2009, other departments had not been heard from as formally, although the State Tax Department had sent informal

68. *Lewis v. N.Y. Dep't of Civil Servs.*, No. 4078-07, 2008 N.Y. Misc. LEXIS 1623 (Sup. Ct. Albany County, Mar. 3, 2008), *aff'd*, 872 N.Y.S.2d 578 (3d Dep't 2009), *aff'd on other grounds sub nom.*, *Godfrey v. Spano*, 13 N.Y.3d 358 (2009) (holding Civil Service Department's decision to recognize foreign same-sex marriages for purposes of administration of state employee benefit programs is not subject to constitutional challenge); *Godfrey*, 871 N.Y.S.2d 296 (holding Westchester County Executive's order that county agencies afford recognition to same-sex marriages to the extent consistent with the law is not subject to constitutional challenge); *Godfrey v. Hevesi*, No. 5896-06, 2007 N.Y. Misc. LEXIS 6589 (Sup. Ct. Albany County Sept. 5, 2007) (holding State Comptroller's decision to recognize foreign same-sex marriages for purposes of administering state employee retirement program is not subject to constitutional challenge).

69. *See Lewis*, 872 N.Y.S.2d at 585.

70. *See id.* at 584, 586. The Court of Appeals unanimously affirmed, but a majority of the court rested the affirmation on the reasoning of the concurrence in the Appellate Division and expressly refrained from opining as to the rationale used by the majority of the Appellate Division panel. *See Godfrey*, 13 N.Y.3d at 377. The concurring judges in the Court of Appeals stated that they would have decided the marriage-recognition issue in favor of the defendants based on New York marriage-recognition principles. *Id.* (Ciparick, J., concurring).

71. State of N.Y. Ins. Dep't, Circular Letter No. 27 (Nov. 21, 2008), available at http://www.ins.state.ny.us/circltr/2008/cl08_27.htm.

responses to inquiries, indicating that it was still studying how to reconcile the requirements of state and federal tax law with the new marriage-recognition regime.

V. INTO THE FUTURE

Although neither the Court of Appeals—the state’s highest court—nor the legislature had yet spoken directly on the issue at the beginning of 2010, the accumulating body of case law and executive action had created a momentum for the legal recognition of foreign same-sex marriages in New York that appeared to be well-grounded in existing precedent. The established principles of marriage recognition under New York law had long facilitated the easy movement of residents across state lines without having to worry about whether their marital status would be recognized in other jurisdictions—although the recent marriage-recognition cases appeared to create a startling anomaly between the kind of marriages that could be contracted within the state and those that might be obtained only outside it.

The decision by the Court of Appeals on November 19, 2009 to affirm two Appellate Division marriage-recognition rulings on other grounds, while expressly refraining from opining on marriage recognition, did not necessarily place this trend in question. For one thing, the court did not question the recognition analysis that the lower courts had articulated.⁷² For another, New York courts have followed the practice of continuing to treat the rationale of Appellate Division decisions as precedential even when they are affirmed by the Court of Appeals on other grounds.⁷³ Thus, as 2010 began, those of the Appellate Divisions that had expressed a view agreed that established New York marriage-recognition principles require recognition of same-sex marriages lawfully contracted out of state.

The Court of Appeals majority in *Godfrey v. Spano* expressed its “hope that the Legislature will address this controversy.”⁷⁴ Passage of pending marriage equality legislation would have done so, but the measure approved earlier in 2009 by the Assembly⁷⁵ was rejected by the State Senate on December 2, 2009 by a vote of twenty-eight to thirty-four,⁷⁶ a margin sufficiently decisive to suggest that the legislature would not take up this issue until after the next round of elections.

72. The court stated: “Because we can decide the cases before us on narrower grounds, we find it unnecessary to reach defendants’ argument that New York’s common law marriage-recognition rule is a proper basis for the challenged recognition of out-of-state same-sex marriages.” *Godfrey*, 13 N.Y.3d at 377.

73. See, e.g., *People v. Serrano*, 7 N.Y.3d 730 (2006) (citing *People v. Camacho*, 646 N.Y.S.2d 6 (1st Dep’t 1996), *aff’d on other grounds*, 90 N.Y.2d 558 (1997), as authority on the point the court had avoided determining in its prior affirmance).

74. 13 N.Y.3d at 377.

75. See Nicholas Confessore, *Personal Victory for Assemblyman on Gay Marriage*, N.Y. TIMES, June 25, 2007, at B5; Jeremy W. Peters, *Paterson Vows Personal Support to Pass Same-Sex Marriage Bill*, N.Y. TIMES, Apr. 17, 2009, at A1; Jeremy W. Peters, *Assembly Passes Gay Marriage Bill; Senate Fight Awaits*, N.Y. TIMES, May 13, 2009, at A24.

76. See Jeremy W. Peters, *New York Senate Turns Back Bill on Gay Marriage*, N.Y. TIMES, Dec. 3, 2009, at A1.

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New York legislators' failure to address the issue of marriage recognition in the face of judicial and executive developments recounted above says more about the continual dysfunction of the state legislative process in New York than it does about the substantive issue. The controlling Democratic majority in the Assembly—which passed same-sex marriage bills in 2007 and 2009—apparently assures that New York will not enact a statutory or constitutional ban on same-sex marriages, and Democratic control of the Senate, however tenuously maintained during 2009, seems to assure that no such measure would be brought to a vote in that chamber, either.

Regardless of what the Court of Appeals or the legislature might do, the reality is that with marriage being available in neighboring jurisdictions, same-sex couples residing in New York have married elsewhere and more such couples will continue to marry elsewhere and return to New York to live as marital partners. The right to recognition of those marriages is rapidly becoming established at law, if perhaps not yet fully in public opinion. This stalemate in the movement toward same-sex marriage in New York exposes the state government to legitimate criticism for hypocrisy, and to ridicule for a feckless inability to meet the actual situation on the ground with suitable legislation. But any long-time observer of New York State politics is likely to react to this situation with a resigned shrug of the shoulders accompanied by the question, "So what else is new?"

Of course, if the legislature were to resolve its stalemate and pass the marriage bill, this essay would attain the welcome status of quaint history.

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