



NEW YORK
CITY BAR

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Why Should New York Support Marriage Equality For Same-Sex Couples?

In over a decade's worth of reports and amicus briefs,¹ the New York City Bar Association has demonstrated that the right to a civil marriage – regardless of a spouse's sex – is essential for full equality for all New Yorkers. As the New York Court of Appeals concluded in *Hernandez v. Robles*² (2006), full marriage equality requires the Legislature to act.

New York's more than 50,000 same-sex couples, like their opposite-sex counterparts, confront life's challenges. Many have modest incomes. Approximately 20% are raising children under age 18, and more than 25% have one disabled partner. 32% of individuals in these couples are nonwhite.³ The inability of these long-term couples to marry has devastating real-world consequences. In death, without inheritance rights, the surviving partner can be thrown out of the family home. Upon relationship dissolution, without the right to maintenance, custody or visitation, the lives of a partner and the couple's children may be turned upside down.

Instead of its traditional leadership in the area of equality and civil rights, New York lags on marriage equality. Six states,⁴ Canada and six other countries⁵ have full marriage equality. More jurisdictions are proceeding rapidly toward it. Yet New York's domestic laws deny same-sex couples⁶ at least 1,324 legal rights and duties⁷ that married different-sex couples currently receive. Marriage provides the legal stability that many couples, lacking financial resources, knowledge or willingness to plan for the future, fail to create on their own. Half or more of the

1 See New York City Bar Committee Reports, <http://www.nycbar.org/Publications/reports/index.php?type=subject&alpha=S> (last visited June 5, 2009).

2 *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

3 See Williams Institute, "Census Snapshot New York" (Apr. 2004), available at <http://www.law.ucla.edu/williamsinstitute/publications/NewYorkCensusSnapshot.pdf>.

4 See Norma Love, "Gay Marriage: New Hampshire Makes Same-Sex Marriage Legal" (June 3, 2009), *The Huffington Post*, available at http://www.huffingtonpost.com/2009/06/03/gay-marriage-new-hampshir_0_n_211063.html.

5 See Wikipedia, http://en.wikipedia.org/wiki/Same-sex_marriage (last visited June 5, 2009).

6 See The Williams Institute, "Census Snapshot New York" (Apr. 2004), available at <http://www.law.ucla.edu/williamsinstitute/publications/NewYorkCensusSnapshot.pdf>.

7 See Empire State Pride Agenda Found. & New York City Bar, *1,324 Reasons for Marriage Equality in New York State* (June 12, 2007), available at http://www.nycbar.org/pdf/report/marriage_v7d21.pdf.

general public has failed to prepare many crucial documents: only 53% of New York State residents have a health care proxy;⁸ nationwide, only 40-50% of people have wills,⁹ 15-42% have living wills,¹⁰ and a mere 5% have prenuptial agreements.¹¹

The Association does not advocate for civil unions or California-style domestic partnerships that technically provide rights equivalent to marriage. In reality, as Vermont and other states have found, these marriage imitations are poorly understood, erratically recognized and viewed as second-class by government officials and the public.¹² Even if technically equivalent rights exist, if one same-sex partner is suddenly hospitalized and the other denied visitation and other next-of-kin rights, a later lawsuit is cold comfort, particularly when some courts simply refuse to give civil unions and domestic partnerships effect.¹³

While New York grants opposite-sex couples who marry, whether in this state or elsewhere, a full, clearly established set of rights and duties, same-sex couples face a confusing array of relationship recognition rules outside New York, and selective recognition within New York. Same-sex couples are not adequately protected by New York's piecemeal recognition of same-sex relationships over the last two decades by statutes,¹⁴ executive orders and

8 See Siena Research Institute, *Siena New York Poll*, Apr. 11, 2005, available at http://www.siena.edu/sri/results/2005/05_APR_NYPoll.htm and

http://www.siena.edu/sri/results/2005/Excel/SRI_NY_Poll_0405.xls (Question 3) <visited Mar. 3, 2006>.

9 See *Britain Low in League Table of Leaving Inheritance to 'Good Causes,'* (Apr. 11, 2005), available at <http://www.thepressdesk.com/axa/pressrelease.php?releaseid=3185> <visited Mar. 3, 2006>; Gary Langer, *You Know You Should But You Don't: Americans Say They Should Plan for The Future, But Don't*, ABC NEWS.COM, Aug. 26, 2002, available at http://abcnews.go.com/sections/us/DailyNews/planning_poll020826.html <visited Mar. 18, 2006>; *Most Americans Still Don't Have a Will, Says New Survey by FindLaw*, Aug. 19, 2002, available at <http://company.findlaw.com/pr/2002/081902.will.html> <visited Mar. 3, 2006>.

10 See Langer, *supra* note 9; Pew Research Ctr., *Strong Public Support for Right to Die*, Jan. 5, 2006, available at <http://www.people-press.org/reports/display.php3?ReportID=266> <visited Mar. 3, 2006>; Caroline Wellbery, "Improving Advance Directive Completion Rates," *72 Am. Fam. Physician* 694 (2005).

11 See Arlene G. Dubin, *Prenups for Lovers* 15 (2001); Gary Belsky, "Living by the Rules," *Money*, May 1996, at 100, 102.

12 See Joanna L. Grossman, "The Vermont Legislature, Inventor of the 'Civil Union,' Grants Full Marriage Rights to Same-Sex Couples: Why It Decided Civil Unions Were Not Sufficient to Ensure Equality," *FindLaw for Legal Professionals*, Apr. 13, 2009, available at <http://writ.lp.findlaw.com/grossman/20090413.html> <visited June 12, 2009>; see also Tara Parker-Pope, "Well: How Hospitals Treat Same-Sex Couples," *New York Times*, May 12, 2009, available at <http://well.blogs.nytimes.com/2009/05/12/how-hospitals-treat-same-sex-couples/?apage=2> <visited June 12, 2009> (hospitals reportedly fail to recognize California and Oregon domestic partnerships); Tina Kelley, "Equality Elusive Under New Jersey Civil Union Law," *New York Times*, Apr. 13, 2007 (health insurance and tax confusion under civil unions); Tina Kelley, "Couples Not Rushing to Civil Unions in New Jersey," *New York Times*, Mar. 21, 2007 (hospitals fail to respect New Jersey domestic partnerships); Laura Mansnerus, "Doubts Persist As New Jersey Moves Toward Civil Unions," *New York Times*, Dec. 14, 2006 (hospitals fail to respect New Jersey domestic partnerships).

13 See, e.g., *Langan v. St. Vincent's Hosp.*, 25 A.D.3d 90, 802 N.Y.S.2d 476 (2d Dep't 2005).

14 See PUBLIC HEALTH LAW §4201(McKinney 2006) (recognizing registered domestic partnerships for purposes of disposition of partner remains); EXECUTIVE L. § 354-b.2(b) (McKinney 2004) (supplemental burial allowance for domestic partners of deceased military personnel killed in combat); WORKERS' COMP. L. § 4 (McKinney 2002) (workers' compensation benefits for surviving domestic partners of September 11, 2001 terrorist attacks); N.Y. Session Laws 2002, c. 73, §1(7) (legislative history stating that domestic partners are intended to be eligible for federal Victims Compensation Fund).

regulations,¹⁵ and court decisions.¹⁶ Despite the efforts of governors, state officials, local executives and legislators of both parties up to this point, the lack of equal marriage rights will generate decades of litigation, complex private domestic partnership agreements, and scattershot legislation and regulations meant to establish inheritance, divorce, child custody, pension and tort rights under a range of relationship recognition rules.¹⁷ Even as lower-income same-sex couples are priced out of the legal services that are needed to obtain recognition for their relationships,¹⁸ and talented workers grow to perceive our state as discriminatory and unwelcoming, New York will incur enormous expenses in determining these rights. In contrast, full marriage equality is projected to add \$210 million to New York's economy in the three years after enactment.¹⁹

15 See Memorandum from David Nocenti, Counsel to the Governor, New York State, to All Agency Counsel, New York State (May 14, 2008), available at http://data.lambdalegal.org/in-court/downloads/exec_ny_o_20080514_governor-directive-same-sex-marriage.pdf. See also Westchester Co. Executive Order No. 3 of 2006 (Spano, Co. Exec.) (County recognizes same-sex marriages for purposes of couple rights and benefits); Letter of Anthony W. Crowell, Special Counsel to Hon. Michael A. Bloomberg, to Alan Van Capelle, Executive Director, Empire State Pride Agenda, Apr. 6, 2005 (New York City recognizes civil unions and same-sex marriages for purposes of couple rights and benefits); Letter of Michael A. Cardozo, New York City Corporation Counsel, to Hon. Michael A. Bloomberg, Nov. 17, 2004 (New York City pension plans recognize same-sex marriages, civil unions and equivalents); Letter of Alan G. Hevesi, New York State Comptroller, to Mark E. Daigneault, Oct. 8, 2004 (recognizing civil unions and same-sex marriages for purposes of state pension benefits); Letter of Frederic P. Schaffer, General Counsel & Vice Chancellor for Legal Affairs, CUNY, to Anthony W. Crowell, Special Counsel to the Mayor, June 17, 2005 (recognizing civil unions and same-sex marriages for purposes of state agency CUNY's pension system); Exec. Order No. 113.30 (2001) (Pataki, Gov.) (compensation for surviving same-sex partners of World Trade Center victims); Ian Fisher, "Cuomo Decides to Extend Domestic-Partner Benefits" *New York Times*, June 29, 1994, p. B4; Kevin Sack, "Pataki Drops Threat to Close Down Government," *New York Times*, Mar. 29, 1995, p.A1 (gubernatorial extension of health insurance benefits to same-sex domestic partners of New York State executive branch employees).

16 *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008) (requiring recognition of valid out-of-state same-sex marriages). See also *Godfrey v Spano*, 57 A.D.3d 941, 871 N.Y.S.2d 296 (Sup Ct. App. Div 3d Dept. 2008) (upholding Westchester County executive order recognizing same-sex marriages); *Lewis v. N.Y.S. Dep't of Civ. Svcs.*, 60 A.D.3d 216, 872 N.Y.S.2d 578 (Sup Ct. App. Div 3d Dept. 2009) (upholding Civil Service Dept. recognition of same-sex marriages); *Godfrey v. DiNapoli*, 22 Misc.3d 249, 866 N.Y.S.2d 844 (Sup. Ct. Alb. Co. 2008) (upholding New York State comptroller recognition of same-sex marriages); *Beth R. v. Donna M.*, #350284/07, 2008 NY Slip Op 28091; 2008 N.Y. Misc. LEXIS 1271; 239 N.Y.L.J. 40 (Sup.Ct. N.Y. Co. Feb. 25, 2008) (recognizing marriage for purpose of awarding divorce and child custody). See also *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 212-13, 543 N.E.2d 49, 55, 544 N.Y.S.2d 784, 790 (N.Y. 1989) (state administrative code grants rent stabilization successor rights for unmarried life partners).

17 *Compare Matter of the Estate of H. Kenneth Ranftle*, 4585-2008 (Surr. Ct. N.Y. Co. 2009) (recognizing same-sex marriage for notice purposes in probate proceeding) with *Will of Alan Zwerling* (NYLJ, Sept. 9, 2008) (Surr. Ct. Queens Co.) (notice to parents required because validity of same-sex marriages not determined).

18 Amicus Brief of Association of the Bar of the City of New York, *et.al, Hernandez v. Robles*, Court of Appeals, p.48 (filed Apr. 2006), available at http://www.nycbar.org/pdf/report/Hernandez_Marriage.pdf <visited June 23, 2009>.

19 See Office of the New York City Comptroller, *Thompson: NYS Economy Would Gain \$210 Million after Legalization of Marriage for Same-Sex Couples*, May 26, 2009, available at http://www.comptroller.nyc.gov/press/2009_releases/pr09-05-131.shtm <visited June 23, 2009>; Office of the New York City Comptroller, *Love Counts: The Economic Benefits of Marriage Equality for New York* (June 2007), available at <http://www.comptroller.nyc.gov/bureaus/bud/07reports/Jun07LoveCountBudgetnotes.pdf> <visited June 23, 2009>; see also, Williams Institute, *The Effect of Marriage Equality and Domestic Partnership on Business and the Economy* (Oct. 2006) (increased benefits to businesses, including a \$2 billion gain in wedding and tourism-related revenues, and to federal and state budgets as a result of allowing same-sex marriage), available at

The Marriage Equality Act applies only to government-granted civil marriages. It will *not* affect opposite-sex couples and their personal marriage choices, and will *not* affect religious beliefs or worship. No church, synagogue, mosque or temple will be required to marry same-sex couples or endorse their relationships.

There is no legitimate basis for subjecting same-sex couples to second-class status by denying them the right to marry. The Senate, in passing the Marriage Equality Act, will clearly determine who is married under New York law and their rights and duties. When the Act becomes law, it will benefit all New Yorkers.

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Committee on Lesbian, Gay, Bisexual and Transgender Rights

By: Carmelyn Malalis, Chair

Committee on Sex and Law

By: Rachel Braunstein, Chair

<http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1035&context=uclalaw/williams>; Douglas Holtz-Eakin, Director, Congressional Budget Office, "The Potential Budgetary Impact of Recognizing Same-Sex Marriages. Letter to Chairman of the House Subcommittee on the Constitution" (June 2004) (\$1 billion net federal budget gain in each of first ten years following 50-state adoption of same-sex marriage) *available at* <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>.