

WRITTEN TESTIMONY ON BEHALF OF
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

For

PUBLIC FORUM ON THE ISSUE OF CIVIL MARRIAGE

FOR SAME SEX COUPLES

Before the New York State Senate

Called by Sen. Thomas K. Duane

March 3, 2004

Prepared by Maureen F. Grady

Chair, Lesbian Gay Bisexual and Transgender Rights Committee

ABCNY

© 2004

Via E-Mail

Sen. Thomas K. Duane
New York State
Legislative Office Building, Room 415
Albany, NY 12247

Introduction- On behalf of the Association of the Bar of the City of New York, and its Committee on Lesbian Gay Bisexual and Transgender Rights, we call upon the New York State Legislature to take the next logical and legal step in promoting the public policy of the State of New York by promulgating and passing a bill which would permit same gender couples to legally marry in New York State. We thank you, Senator Duane, for your leadership on this issue.

The Current State of the Law in New York- As has been recently reported in the popular and legal media in this State, the clear language of section 10 of the Domestic Relations Law (“DRL”) contains no proscription on the issuance of marriage licenses to same gender couples. Although other sections of the DRL contain the words husband and wife and bride and groom for certain purposes, a same sex marriage is not a grounds for a void or voidable marriage. Further under the Estates Powers and Trusts Law (“EPTL”), both the First and Second Departments of the Appellate Division have interpreted the word “spouse” to include same gender partners. In addition, the adoption laws of this state have been broadened to permit same gender couples to cross-adopt each others’ children. A same gender marriage act would provide the full equal protection afforded to heterosexual couples under the State and Federal Constitutions.

New York State’s More Recent Policy Actions Point to the Recognition of Same Gender Couples as Marital Partners- Although the New York State Court of Appeals has not made any clear pronouncement concerning the DRL’s gender neutral language, the actions of the New York State Governor, Municipalities and the Legislature point to the recognition of same sex couples as contractual life partners. Since the City of New York’s and State of New York’s recognition of “domestic partnerships” for purposes of certain benefits, and more recently Governor Pataki’s Executive Order permitting survivor benefits for same gender couples after September 11, 2001, the State has taken a more liberal approach to the inclusion of same gender couples and their families as part of the lifeblood of New York.

Yet despite the Courts’ and the governments’ policy pronouncements, the lack of recognition of same gender couples prevents these life partners from availing themselves of the presumptions flowing from marital status and thereby bringing certainty to their domestic relations. Without such legislation same gender couples face continuing concerns from the ability to visit each other in the hospital to the ability to plan for the safety and economic stability of their families and their children after their death.

DOMA and the Proposed Federal Marriage Amendment-The Federal Defense of Marriage Act (“DOMA”) of 1996 and the newly proposed Federal Marriage Amendment (House Joint Resolution 56 of 2003) are discriminatory legislation that restrict the rights of both heterosexual and same-gender couples to freely contract for marriage. The 38 states that have so-called mini-DOMAs further restrict the ability of same-gender couples to enter into binding contractual relationships for the purpose of sharing life responsibilities. The proposed Federal Marriage Amendment is similarly restrictive and would be inconsistent with the constitutional principle of equal protection under the laws. The federalization of marriage is similarly not supported in the US Constitution. Most recently the Association of the Bar of the City of New York denounced the Federal Marriage Amendment as restrictive and “anti-family” because it would potentially endanger the rights of same-gender couples and children of those unions to enjoy the protection of state laws including adoption laws.

Domestic Partnership Legislation Does Not Go Far Enough- Several bills that have been introduced in the New York State Legislature (e.g. S. 3393 and A. 7304) which seek to recognize “domestic partnerships” for same gender couples do not adequately protect same gender couples. This type of legislation, offers only a definition of a “domestic partnership” not a full right to marry for same-gender couples. Such proposals raise serious questions with regard to the State Constitution’s equal protection clause as well as the 14th Amendment to the US Constitution and would not protect legally formed relationships under the penumbra of “domestic partnerships” in other states. Indeed, in States that have adopted mini-DOMAs, the status of same-gender “domestic partners” would be rendered meaningless. Only a fully equal right to marriage for same-sex couples would provide a minimum of protection for those couples, many with children, to move from New York State and expect the “domestic partnership” to survive legal scrutiny in a mini-DOMA state. A marriage, as that term is currently defined in the New York DRL is the legal recognition of a civil contract between two parties to share in the financial, familial and other responsibilities of a union. In sum, under the legal doctrine of comity, a sister state would be free to disregard a New York “domestic partnership.” *A marriage, however, is fully entitled to recognition by a sister state. Denying same-gender couples the right to enter into a legal union under the definition of marriage denies them the equal protection of the law.*

The definition of “domestic partnership” and the ancillary laws that are amended as a result, especially those concerning adoption, would become an interstitial web of difficult to understand legal definitions. A more simple amendment of the DRL definition of marriage and who may obtain a marriage license to include same-gender couples would result in an easier to apply set of laws for purposes of adoption, inheritance, and taxation among others.

Passage of a Same Gender Marriage Bill Must Protect Same Gender Couples Married in Other States and Countries- In order to provide the full protection of the laws of the State of New York, same gender marriage legislation must include a recognition of the legal civil marriage contracts that same gender couples have entered into in other states and other countries. Currently New York State law does not contain a

clear pronouncement, under the legal doctrine of comity, or under the recognition of sister state's contracts based upon full faith and credit, recognizing "civil unions" as that term is defined under State laws which recognize same gender civil unions (e.g. Vermont). Similarly, there are same gender couples who have taken the time, and expense, of traveling to Canada, Belgium and the Netherlands to become legally married in those countries. The law of the State of New York must clearly recognize these civil contracts under principles of comity—a same gender marriage bill would do just that. In turn, it would also afford the equal protection of the laws to the families of these couples.

The City Bar Has Repeatedly Supported the Right of Same Sex Couples to Marry-

The ABCNY has since at least 1997 supported the right of same sex couples to marry. The publication of the "Marriage Report" and its update in 2001 (attached and made part of this testimony) present a cogent legal analysis of New York State law-- which does not contain any proscription on marriage of same sex couples. In 2003, the ABCNY, as indicated, *supra*, denounced the introduction of the Federal Marriage Amendment in the US Senate Judiciary Committee (a copy of President Milonas' letter is attached and made a part of this testimony).

On behalf of the Association of the Bar of the City of New York, we appreciate once again the ability to voice our position. The State of New York's actions and public policy clearly support and underscore the need for, a same gender marriage bill in order to afford same sex partners and their families the full equal protection of the laws.

Respectfully submitted,

Maureen F. Grady
Chair-Lesbian Gay Bisexual and Transgender Rights Committee
Association of the Bar of the City of New York
42 West 44th Street
New York, NY 10036

/Attachments