STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

In the Matter of ELISSA KANE,
LYNNE LEKAKIS, ROBERT BARNES AND
GEORGE JURGSATIS,

Petitioners,

-against-

Decision, Order & Judgment
Index No.: 3473-04

JOHN MARSOLAIS, Albany City Clerk,
and the NEW YORK STATE DEPARTMENT
OF HEALTH,

Respondents.

Supreme Court, Albany County
RJI#01-04-ST4671

Present: E. Michael Kavanagh, JSC

Appearances:

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Kavanagh, J

Petitioners are same sex couples who have been denied a license to marry by the respondent Albany City Clerk. They have initiated this Article 78 proceeding to contest

that decision on the grounds that: 1) The Domestics Relations Law of the State of New York does not require persons to be of the opposite sex to marry; and 2) denial of a marriage license because of one's gender or sexual orientation violates that individual's constitutional right to equal protection of the law and due process.

Petitioners request that orders be issued 1) directing respondent New York State Department of Health to notify the Albany City Clerk that it may legally issue a marriage license to a same sex couple; 2) directing the Albany City Clerk to issue such a license; and 3) declaring that petitioners are legally married pursuant to DRL § 25 as a result of their participation in a ceremony designed to solemnize their relationship.

Respondent Department of Health opposes the petition on all of the grounds raised therein and at the same time moves to dismiss petitioners cause of action regarding the solemnization of the marriage as not justiciable.[1]

Background

Petitioners, as previously noted, are two same sex couples who have been intimately involved with their partner for many years and now seek to enter into a legally recognized marital relationship. They cite numerous reasons for wanting to become contractually committed to each other, including the ability to enjoy certain benefits now accorded to opposite sex couples who are in a legally recognized marital relationship.

Each couple applied for - and was later denied - a license to marry by the Albany City

[1]Respondent Albany City Clerk has indicated that it will rely on the position taken by respondent Department of Health in regard to the issues raised in the petition and will not participate in these proceedings. Accordingly, its failure to respond to petition is not an impediment to this Court rendering decisions on the issues raised in the petition by petitioners.

Clerk when they announced to him that it was their intention to marry someone of the same sex. The Clerk, in denying their application, referred to a letter that he had received from the Department of Health dated February 27, 2004 which stated in part:

> New York's Law does not authorize the issuance of marriage licenses to persons of the same sex * * *.
>
> A municipal clerk who issues a marriage license outside these guidelines, or any person who solemnizes such a marriage, would be violating state law and subject to penalties in law. Furthermore, the Department of Health is prohibited under state law from recognizing such invalid marriage license".

The Domestic Relations Law of the State of New York does not authorize marriages between individuals of the same sex.

The Domestic Relations Law does not by its express terms bar the issuance of a marriage license to a couple because they are of the same sex. In fact, it only expressly requires for two people to enter into a valid marital relationship that they be of a certain age and be competent to enter into a binding contract (DRL § 15[a] and DRL § 10). Petitioners claim that as a result of this ambiguity the statute should be interpreted as gender neutral and read to authorize marriage of people of the same sex. They argue that any interpretation of the Domestic Relations Law must be made in the context of a modern day trend to expand the traditional understanding of a marital relationship. In support of that position they point to recent judicial decisions which have approved of the adoption of children by couples of the same sex (see, In re Jacob, 86 NY2d 651); barred any discrimination against individuals who seek public housing because they are of the same sex (Levin v Yeshiva, 96 NY2d 484)[2] ; and recognized the surviving partner of a civil union

[2]It should be noted that in this decision Chief Judge Kaye stated "State law permits only heterosexual marriages (Levin v Yeshiva, supra, at p 503).

entered into in Vermont as a spouse with status to bring a wrongful death action (Langan v St. Vincent's Hosp., 196 Misc 2d 440).

Even petitioners concede that the State Legislature, when it enacted the DRL "* * * may not have contemplated same sex marriage * * * and may have intended marriage to be between a man and a woman * * * " (Petitioners' memorandum of law, June 16, 2004, p. 9). However, petitioners also argue that times have changed - and since the Legislature recently refused to adopt the Defense of Marriage Act, it cannot be said, with any conviction, that it is of the same mind today as it was in 1909 when it enacted the Domestic Relations Law.[3]

While the Domestic Relations Law may not expressly bar marriage between same sex couples, the statute is replete with other references in which it makes clear that this was in fact the Legislature's intent that marriage be reserved for couples of the opposite sex. For example, the Domestic Relations Law specifically provides that for a marriage to be valid, each party must "* * * solemnly declare * * * that they take each other as husband and wife" (DRL § 12). It also states that a clerk, before issuing a marriage license, must obtain certain personal data from the "bride" and the "groom" (DRL § 15 [1] [a]). Similar references are present throughout the statute (see; DRL § 140 [a]; DRL § 140 [e)]; DRL § 170; DRL § 175; DRL § 221 and DRL § 248). When the language employed throughout the DRL is " * * * construed according to its natural and most obvious sense * * * in accordance with its ordinary and accepted meaning * * * "(McKinney's Const Laws of New

[3]Proposals seeking to amend the DRL to either validate same sex marriages, or absolutely prohibit them have been considered but have not been enacted by the State Legislature (S-2220; A-2998; and A-07392).

York § 94 at 191-194) it is clear that those who drafted the statute assumed that a marriage to be legal would be between a man and a woman.

Frankly, it is doubtful that in 1909 the Legislature even considered the concept of same sex marriage when it enacted the DRL. And with the impasse that now exists within the Legislature on this contentious and very public issue, one cannot really be certain as to what its present state of mind is on same sex marriage. Given this reality, it would be highly presumptuous of this court to conclude that the Legislature, either in 1909 or today, has ever intended to authorize same sex marriage in New York. It is true, as petitioners assert, that to date New York has refused to adopt the Defense of Marriage Act, but the failure to muster a majority in the Legislature to adopt this law does not in turn mean that a consensus has emerged within the legislature which favors same sex marriage. In short, until the Legislature speaks more clearly on this issue, the only reasonable interpretation of the DRL, given both its history and its content, is that it does not authorize or permit marriage by individuals of the same sex.

DRL's ban on marriages of couples of the same sex does not violate an individual's rights under the Equal Protection clause or due process.

By only permitting a marriage between individuals of the opposite sex, petitioners claim that the DRL establishes a classification which unfairly discriminates against them, and as drawn, violates their right to equal protection of the law and due process.

The Equal Protection Clause does not bar all discrimination - it does require as a general rule that any classification established by a statute be rationally related to a legitimate State interest (Schweiker v Wilson, 450 US 221, 230; United States Railroad

Retirement Board v Fritz, 449 US 166, 174-175)[4] The nature of the classification will determine the scrutiny the statute is to receive in terms of its impact on an individual's right to equal protection of the law. If it is one that is based upon race, alienage or national origin, the statute will be subjected to the strictest scrutiny with the government having the burden of establishing that as written the statute is narrowly tailored to serve a compelling State interest (McLaughlin v Florida, 379 US 184, 192; Graham v Richardson, 403 US 365). Racial criteria is so rarely relevant to the achievement of a legitimate State interest that any law which creates a classification based on it is inherently suspect and almost presumptively unconstitutional.

If a statutory classification is based on gender, it will be examined with a heightened scrutiny because a person's sex rarely provides any sensible ground for differential treatment (Frontiero v Richardson, 411 US 677, 686). Again, it will be for the government to establish that the gender classification contained in the statute is substantially related to a relevant and important State interest (Mississippi University for Women v Hogan, 458 US 718).

All other statutory classifications will be reviewed by a less rigorous standard, the presumption being that the statute as enacted is valid - and the burden rests with the party challenging the statute to show that the provision is not in any way rationally related to any legitimate State purpose (City of Cleburne v Cleburne Living Center, 473 US 432).

Petitioners would equate one's sexual preference or orientation with their race or

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[4]The Court of Appeals has held that the State Constitutional provisions guaranteeing equal protection provides no greater coverage than that contained in the United States Constitution (Under 21, Catholic Home Bureau for Dependent Children v City of New York, 65 NY 2d, 360, Note 6).

national origin. They are obviously not the same - and a standard of strict scrutiny will not be applied to any classification based on an individuals sexual preference (In the Matter of Cooper v Kelly, 187 AD2d 128). Petitioner's also argue that a law denying an individual a license to marry because they want to marry someone of the same sex is a form of gender discrimination and should be subject to the heightened scrutiny standard. However, the ban on same sex marriages contained in the DRL does not give more rights to either a man or a woman. The genders are subject to the same prohibition - one that speaks not to an individual's gender, but instead to their sexual preference or orientation (In the Matter of Cooper v Kelly, 187 AD2d 128, supra). As such, the burden is on petitioners to show that the DRL prohibition against same sex marriage is not reasonably related to any legitimate State interest or purpose.

The Supreme Court has held that a rational basis review in an equal protection analysis "is not a license for Courts to judge the wisdom, fairness or logic of legislative choices" (FCC v Beach Communications, Inc., 508 US 307, 313). Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines" (Heller v Doe, 509 US 312, 319; New Orleans v Dukes, 427 US 297, 303). Accordingly, a classification in this proceeding is accorded a strong presumption of validity (Heller v Doe, 509 US 312, supra).

"The burden is on [petitioners] to negate every conceivable basis which might support it (Lehnhausen v Lake Shore Auto Parts Co., 410 US 356, 364) whether or not the basis has a foundation in the record" (Heller v Doe, 509 US 312, 320-321; supra; Affronti v Crosson, 95 NY2d 713).

Without question, the State has a legitimate interest in protecting and preserving its historic institutions - and marriage is surely such an institution (Lawrence v Texas, 539 US 5). Given the historic understanding of marriage - and its place in our culture as the foundation of the family unit - it cannot be said that the objective of this law - limiting marriages to individuals of the opposite sex - is not reasonably related to a legitimate State interest.

Due Process

Petitioners argue that the right to marry is a fundamental right, the denial of which because of ones sexual orientation is a violation of their right to due process under New York's State Constitution. In making such an argument, petitioners must establish that the right to marry one of the same sex is something "* * * deeply rooted in this nation's history and tradition * * * " and one that goes to the very core of our traditional sense of liberty (Washington v Glucksberg, 521 US 702, 720, 721). Given the historical context within which this claim is made, it is simply not possible to view petitioner's desire to marry someone of the same sex as a fundamental right entitled to due process protection (see, In re Cooper, 187 AD2d 128, supra; see also, Matter of Samuels v NYS DOH, Supreme Court, Albany County, Index No.: 1947-04, Decision dated December 7, 2004). Therefore, the appropriate level of scrutiny is a rational basis test. As already discussed, the classification has a rational relationship to the governmental interest and therefore the due process claim must fail.

Recognizing marriages as Valid

On March 27, 2004, both couples participated in a marriage ceremony, solemnized by Reverend Trumore. Despite the fact that the ceremonies were performed without

licenses, petitioners want this Court to recognize the marriages as being valid under Domestic Relations Law § 25. DOH argues that his claim is not yet justiciable as there is no evidence that DOH has denied the couples any rights to which they would otherwise be entitled.

The Court does not agree that these claims are not justiciable. Petitioners have clearly been denied rights that they would otherwise be entitled and the argument that petitioners must actually wait to request these rights, and then be denied them before bringing this claim is meritless.

DRL § 25 was enacted to provide a measure of protection for individuals who satisfy the legal requirements needed to be married but failed to obtain a license (Davidson v Ream, 97 Misc 89, aff'd 178 AD 362). It was not intended to be a loophole through which individuals who did not qualify could be legally married in New York. To hold otherwise would in effect allow petitioners to substitute their judgment for that of the Legislature as to what are the basic requirements that must be met to marry in this State.

This constitutes the Decision, Order and Judgment of the Court. All papers are being returned to the Attorney General. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provisions of that rule regarding entry or filing.

SO ORDERED & ADJUDGED

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E. Michael Kavanagh, JSC

Dated: January ___, 2005
Albany, New York

Papers Considered:
Verified petition with exhibit
Verified Answer
Notice of motion; affirmation of James McGowan Esq. With exhibits
Notice of motion to dismiss; affirmation of Gary Stiglmeier Esq.
Affirmation in opposition of Terence Kindlon Esq.
Affidavit of John Marsolais

Memorandums of law read but not filed and returned to counsel:
Petitioner's Memorandum of law
Memorandum of Law in support of the answer and motion to dismiss of the New York State Department of Health with appendix
Memorandum of Law of respondents John Marsolais, City of Albany