

Marriage Law Digest

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HERNANDEZ V. ROBLES

INDEX No. 103434/2004

**Supreme Court of the State of New York,
New York County
February 4, 2005**

Five same-sex couples sued the City Clerk of New York City alleging that the state definition of marriage violated various provisions of the New York Constitution.

The trial court opinion begins with a long rumination on anti-miscegenation laws making the analogy between those laws and New York's definition of marriage. After describing the plaintiffs in glowing terms, the judge says that the plaintiffs are being denied marriage benefits. She rejected, however, the statutory construction claim that since the marriage statute did not use gender specific terms, the marriage law already allowed licenses to be given to same-sex couples. As in other states, the opinion noted the fact that other marriage statutes used gender-specific terms.

The court then rejected the state's claim that precedent from New York (*Estate of Cooper*) and the U.S. Supreme Court (*Baker v. Nelson*). The former was distinguished as not raising constitutional claims and the latter as involving federal claims. Throughout the opinion, the court relies heavily on a New York attorney general opinion which had called the constitutionality of the marriage statute into question.

In response to the plaintiffs' due process claims, the court held that marriage is a fundamental right implicating liberty and privacy concerns. The exact nature of the

right was identified as a privacy right to choose whom one will marry. So, the court applied the compelling interest test. The state had proffered two interests: (1) fostering traditional marriage and (2) avoiding interstate conflict. The court rejected the first holding that under *Lawrence v. Texas*, moral disapproval is not a valid state interest. The court also noted that same-sex couples have children who might be benefitted if their parents could marry and argued that opposite-sex couples wouldn't be harmed if marriage were redefined. The second state interest was also rejected as the court held that the state could not justify its laws based on the discriminatory practices of other states.

The court similarly rejected the defendant's claim that plaintiffs should be required to establish a fundamental right to same-sex marriage. The court admitted that there is no such fundamental right but again characterized the relevant right as the freedom to choose one's partner. The court noted changes over time in the law related to marriage as yet another reason to reject the state's defense of the marriage law.

In regards to the equal protection claim, the court suggested that the definition of marriage might constitute sex discrimination but concluded that it was definitely sexual orientation discrimination. Thus, since the court had already concluded that the state had no legitimate state interest justifying the law, the marriage definition conflicted with the state constitution's equal protection clause.

In a final section, the court argued that New

York is increasingly giving recognition to same-sex couples and legal proscribing sexual orientation discrimination. The court even cites to a non-discrimination law despite its specific provision that it not be construed to mandate same-sex marriage.

In settling on a remedy, the court rejected any deference to the legislature, relying on the anti-miscegenation analogy and the court's jurisdiction to rule on constitutional claims. Thus, the court declared that the marriage laws must be read as if their language is gender neutral and enjoined the city clerk from denying licenses to same-sex couples. The order was stayed for 30 days.

In a sidenote, the court disclaimed any effect on the definitions of marriage of any churches or religious organizations.

BRONSON V. SWENSON
Case No. 2:04-CV-21 TS
U.S. District Court, District of Utah
February 15, 2005

Plaintiffs sought summary judgment in their action to have Utah's statute criminalizing bigamy and the state constitutional provision prohibiting plural marriage declared unconstitutional on federal grounds. Specifically, the plaintiffs claimed that these laws deprived them of free exercise, the right of association and the right to privacy. The court somewhat summarily noted that U.S. Supreme Court and Tenth Circuit precedent has consistently upheld prohibitions on polygamy and, while the court believed such statutes might eventually be treated as constitutionally suspect, that this precedent controlled. The court held distinguished *Lawrence v. Texas* as not involving public conduct, in contrast to this case which claims that the denial of public recognition somehow implicates privacy concerns.

SEYMOUR V. HOLCOMB

Index No. 2004-0458
N.Y. Supreme Court, Tompkins County
February 24, 2005

Twenty-five same-sex couples attempted to obtain marriage licenses from the Ithaca city clerk and were denied based on a directive from the state Department of Health. They sued alleging various state and federal constitutional claims. The court denied the city of Ithaca's attempt to intervene holding that licensing is a purely ministerial function and thus the city could not be exposed to liability for not issuing the license. The court also concluded that New York statutes cannot be construed to allow same-sex marriages.

In regards to the Equal Protection claim, the plaintiffs had alleged sex and sexual orientation discrimination. The court held that because the marriage laws treat men and women the same way and don't disadvantage either sex, there is no discrimination. The court further held that classifications based on sexual orientation merit only rational basis scrutiny. The standard was met because the state had a legitimate interest in "the preservation of the historic institution of marriage as a union of man and woman, which in turn, uniquely fosters procreation." The court ruled that the legislative decision to limit marriage licenses to opposite sex couples is not irrational and that the legislature had the duty to decide whether same-sex marriage would promote the same "societal benefit."

As to the equal protection claim, the court held that same-sex marriage is not a fundamental right under either the state or federal constitution since it is not rooted in the history and tradition of the nation. The *Loving* decision is inapposite because it relied on the current definition of marriage

and that holding was based on the racial discrimination in the law. The interest noted in the equal protection analysis satisfied the rational relationship test.

The court also rejected plaintiffs free expression claim noting that the marriage law "in no way prohibits, directly or incidentally, the plaintiff couples from expressing their commitment to each other, ceremonially or otherwise."

The court concluded that the legislature has to decide to give marriage benefits to same-sex couples.