STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SYLVIA SAMUELS and DIANE GALLAGHER, HEATHER McDONNELL and CAROL SNYDER, AMY TRIPI and JEANNE VITALE, WADE NICHOLS and HARING SHEN, MICHAEL HAHN and PAUL MUHONEN, DANIEL J. O'DONNELL and JOHN BANTA, CYNTHIA BINK and ANN PACHNER, KATHLEEN TUGGLE and TONJA ALVIS, REGINA CICCHETTI and SUSAN ZIMMER, ALICE J. MUNIZ and ONEIDA GARCIA, ELLEN DREHER and LAURA COLLINS, JOHN WESSEL and WILLIAM O'CONNOR, and MICHELLE CHERRY-SLACK and MONTEL CHERRY-SLACK,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 1967-04
RJI NO. 0104077742

THE NEW YORK STATE DEPARTMENT OF HEALTH and the STATE OF NEW YORK

Defendants.

Supreme Court Albany County All Purpose Term, September 21, 2004
Assigned to Justice Joseph C. Teresi

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TERESI, J.:

Plaintiffs, thirteen gay and lesbian couples seek an order pursuant to CPLR §§3212 and the New York Constitution, Article 1, §§6, 8 and II, for summary judgment in plaintiffs' favor on all claims and causes of action in the complaint. Defendants cross-move for an order pursuant to CPLR §2215 and §3212 for summary judgment dismissing the complaint in its entirety and a declaratory judgment stating that the Domestic Relations Law as applied to same-sex marriages is constitutional.

Plaintiffs' complaint alleges four separate claims in support of their position that prohibiting same sex marriages under the Domestic Relations Law violates the Constitution of this State. They allege that denying same-sex couples the ability to marry deprives them of the equal protection of the laws based upon their sexual orientation. Next, they allege that denying same-sex couples the ability to marry deprives them of the equal protection of the laws based on their gender. They also allege that this denial violates the due process clause of the New York State Constitution, Article I §6. Lastly, plaintiffs allege that the denial of the ability to marry based on their gender and sexual orientation violates freedom of speech protection under Article 1, §8 of the New York Constitution.

Initially, the Court finds that the Domestic Relations Law does not contain a gender-based classification; both men and women may obtain a license to marry someone of the other gender, and neither a man nor a woman may obtain a license to marry a person of the same gender. Neither of these scenarios discriminates on the basis of gender as both genders are equally free to marry and equally restricted. Therefore, this Court finds that the classification at issue is not one

of gender per se, but rather of sexual orientation..

First, the Court will address the plaintiffs' equal protection claims. The guarantee of equal protection in the 14th Amendment is limited by the practical reality that "most legislation classifies for one purpose or another, with resulting disadvantage to various groups or person." Romer v. Evans, 517 U.S. 620, 632 (1996) A challenged classification will be upheld as long as it does not burden a fundamental right or a suspect class, and provided "it bears a rational relationship to some legitimate end." *Id.* This is so "even if the law seems unwise or works to the disadvantage of a particular group, or if the rational for it seems tenuous." *Id.*

The equal protection clause of the New York State Constitution provides:

> "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." (N.Y. Const., art. 1 §11).

The Court of Appeals has "equat[ed]" the Federal and State equal protection clauses and has held repeatedly that the State provision "is no broader in coverage than the Federal provision." Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y. 2d 344, 360 n.6 (1985) (citing authorities).

Neither the Court of Appeals nor this State's Third Department has yet addressed what level of scrutiny should be applied to a sexual orientation classification. The Second Department has held that the standard of review is the rational basis test (see, Matter of Cooper, 187 AD2d 128, 133 [2nd Dept.], Appeal dismissed, 82 NY2d 801 [1993]).

In Cooper, the court was presented with two issues, one of which has not been brought

forth by Petitioners in the instant case and will not be addressed here[1]. The pertinent issue before the Court in Cooper was the claim that the provisions of the Domestic Relations Law that prohibited "members of the same sex from obtaining marriage licenses" was a violation of the Equal Protection Clause of the State Constitution. The Second Department, affirming the Surrogate Court's decision, held that rational basis is the appropriate standard for review for classifications based on sexual orientation.

Sound judicial practice dictates that this Court follow the well-established New York legal precedent that it is "the duty of a judge at special term to follow a decision made by the Appellate Division of another department until his own Appellate Division or the Court of Appeals pronounces a contrary rule." Hamlin v. Bender, 92 Misc 16 (Sup. Ct. Oneida County (1915) (citations omitted).

Other case law from New York, while not binding, is consistent with this. In Langan v. St. Vincent's Hospital of New York, 196 Misc 2d 440 (2003), the court held that "a heightened level of scrutiny for classifications based on 'sexual orientation' has not been applied" in New York. It applied a rational basis standard to the question of whether a Vermont civil union would be recognized in New York for purposes of the wrongful death statute. In further support of that decision, the Supreme Court cited Romer v. Evans, 517 U.S. 620 (1996), a U.S. Supreme Court case that addressed the constitutionality of an Amendment to the Colorado Constitution that expressly discriminated against homosexuals. The Romer majority found the amendment unconstitutional when it failed to satisfy "even this [rational basis] conventional inquiry." Romer

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[1]The first issue addressed by the Second Department was whether the term "surviving spouse" in NY EPTL §5-1.1 could be interpreted to include homosexual partners.

v. Evans, 517 U.S./ 620, 632 (1996).

In light of the above, this Court finds that an equal protection challenge based on a sexual orientation classification is subject to a rational basis standard of review.

The rational basis standard, as stated in Romer v. Evans, 517 U.S. 620, 632 (1996) is that a challenged classification will be upheld as long as it does not burden a fundamental right or a suspect class, and provided "it bears a rational relationship to some legitimate end" *Id.* "This is so even if the law seems unwise or works to the disadvantage of a particular group, or if the rational for it seems tenuous". *Id.*

This Court finds that, there is a legitimate State interest in granting marriage licenses only to opposite sex couples. The record here fails to convince this Court that the plaintiffs have met their burden on that issue. As stated in Affronti v. Crossin, 95 NY2d 718, 719 (2001), the Court of Appeals established the rule for rational basis standard of review.

> "Where a governmental classification is not based on an inherently suspect characteristic and does not impermissibly interfere with the exercise of a fundamental right, it need only rationally further a legitimate state interest to be upheld as constitutional (see, Nordlinger v. Hahn, 505 U.S. 1, 10). Undisputably, the disparate judicial salary schedules in Judiciary Law §§221-d and 221-e do not involve suspect classes or fundamental rights and are therefore subject to rational basis review (see, e.g., D'Amico v. Crosson, 93 NY2d, at 32, *supra*; Henry v. Milonas, 91 NY2d, at 268, *supra*).
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> The Rational basis standard of review is "'a paradigm of judicial restraint'" (Port Jefferson Health Care Facility v. Wing, 94 NY2d 284, 290 [quoting Federal Communications Commn. v. Beach Communications, 508 U.S. 307, 314, *cert denied* 530 U.S. 1276). On rational basis review, a statute will be upheld unless the disparate treatment is "so unrelated to the achievement of any combination of legitimate purposes that * * * [it is] irrational" (Kimel v. Florida Bd. of Regents, 528 U.S. 62, 84 [quoted case and

> internal quotation marks omitted]). Since the challenged statute is presumed to be valid, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it * * * *whether or not the basis has a foundation in the record"* (Heller v. Doe, 509 U.S. 312, 320-321 [quoted case and internal quotation marks omitted] [emphasis supplied]). Thus, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker '" (Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 [quoting] Vance v. Bradley, 440 U.S. 93, 111).
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> Indeed, courts may even hypothesize the Legislature's motivation or possible legitimate purpose (see, Port Jefferson Health Care Facility v. Wing, 94 NY2d, at 291, *supra*). Thus, "the State has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to *courtroom factfinding* and may be based on *rational speculation* unsupported by evidence or empirical data" *(id. [*quoted case and internal quotation marks omitted])."

The reasons advanced by defendants: ensuring consistency among Federal law and the laws of other States; and preserving the historic, legal, and cultural understanding of marriage - are sufficient to satisfy a rational basis review. The Court also notes that in the concurring opinion in Lawrence v. Texas, 539 US 558 at 584 (2003), Justice O'Connor states that preserving the traditional institution of marriage is a legitimate State interest.

Next, the Court will address the due process claims.

With regard to the question of whether there is a fundamental right to marriage for same-sex couples, this Court is bound by the Second Department's ruling in the Cooper decision until the Third Department finds contrary. In Cooper, the Second Department has held that same-sex couples do not have a fundamental right to marry, relying on the dismissal by United States

Supreme Court of a Minnesota Supreme Court case concerning whether same-sex couples had a fundamental right to marry. See, Baker v. Nelson, 409 U.S. 810 (1972). That dismissal was based upon the lack of a federal question after the Supreme Court found that the constitutional challenge had been considered and rejected. Cooper, at 134 (citation omitted). Therefore, this Court rules that same-sex couples do not have a fundamental Constitutional right to marry under both the United States and New York State Constitutions.

Therefore, as the appropriate standard as established by the Court of Appeals is to determine if the statutory scheme has a rational relationship to the governmental interest to be obtained. See, Hope v. Perales, 83 NY2d at 577 (1995). As this court has already found a rational basis, the due process claim must also fail.

Lastly, the Court finds on this record no merit to the plaintiff's claim that issuing marriage licenses only to opposite sex couples offends the State Constitution's Free Speech Clause. (See, Article I, §8, New York Constitution) Assuming, while not finding, that marriage is somehow expressive conduct, the governmental interest in this case is unrelated to the suppression of free expression and any incidental restriction on plaintiffs' free speech rights is no greater then is essential to the furtherance of that interest. People v. Hoffman, 68 NY2d 202, 207 (1986).

Therefore, the plaintiffs' motion for summary judgment is denied and the defendants' cross-motion for summary judgment dismissing the complaint is granted. The Domestic Relations Law as applied to deny marriage licenses to same sex couples, is declared constitutional.

All papers, including this Decision and Order are being returned to the attorneys for the

defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 7, 2004
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated June 30, 2004 with Affirmation of Roberta A. Kaplan, Esq. dated June 29, 2004 with Attached Exhibits A and B.
2. Affidavits in Support of Plaintiffs' Motion for Summary Judgment.
3. Notice of Cross Motion dated July 23, 2004 with Affirmation of James B. McGowan, Esq. dated July 15, 2004 with Attached Exhibits A and B.
4. Affirmation of Roberta A. Kaplan, Esq. dated August 16, 2004 with Attached Exhibits A - C and Affirmation of Audra J. Soloway, Esq. dated September 3, 2004.