COURT OF APPEALS - STATE OF NEW YORK

----------X

KENNETH J. LEWIS, DENISE A. LEWIS, ROBERT C. HOUCK, JR., AND ELAINE A. HOUCK,

Plaintiffs-Appellants,

-against-

THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE AND NANCY G. GROENWEGEN, *in her official capacity as President of the New York State Department of Civil Service*,

Defendants-Respondents,

-and-

PERI RAINBOW AND TAMELA SLOAN,

Defendants-Intervenors-Respondents.

----------X

NOTICE OF MOTION FOR AN ORDER GRANTING LEAVE TO APPEAL AND AFFIRMATION IN SUPPORT OF MOTION

Index No: 4078/07
Albany County
Supreme Court

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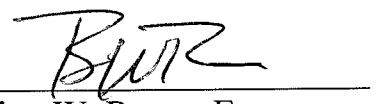
NOTICE OF MOTION FOR AN ORDER GRANTING LEAVE TO APPEAL

Index No: 4078/07
Albany County
Supreme Court

PLEASE TAKE NOTICE that upon the attached attorney affirmation of Brian W. Raum, dated February 10, 2009, and the papers included herewith, the undersigned will move this Court, pursuant to 22 NYCRR 500.22, at the courthouse thereof, located at 20 Eagle Street, Albany, New York 12207, on the 23rd day of February, 2009, at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order granting Plaintiffs-Appellants leave to appeal to the Court of Appeals in accordance with CPLR 5602(a)(1)(i), and for such other and further relief as this Court may deem just and proper.

Dated: February 10, 2009

Respectfully submitted,



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COURT OF APPEALS - STATE OF NEW YORK

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-against-

THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE AND NANCY G. GROENWEGEN, *in her official capacity as President of the New York State Department of Civil Service,*

Defendants-Respondents,

-and-

PERI RAINBOW AND TAMELA SLOAN,

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AFFIRMATION IN SUPPORT OF MOTION

Index No: 4078/07
Albany County
Supreme Court

I, Brian W. Raum, an attorney duly admitted to practice law in the State of New York, affirm the following under the penalties of perjury:

1) I am an attorney with the Alliance Defense Fund, counsel for Plaintiffs-Appellants ("Taxpayers"). As such, I am familiar with the facts and circumstances of this case as well as the papers and proceedings in this matter.

2) I submit this affirmation in support of Taxpayers' motion pursuant to CPLR 5602(a)(1)(i) for leave to appeal to the Court of Appeals from a final Opinion and Order of the Appellate Division, Third Department, which held that a

state executive-branch agency and official did not act unlawfully by recognizing same-sex "marriages" solemnized in other jurisdictions and treating partners to those unions as "spouses" under New York law.

3) This affidavit sets forth the information required by 22 NYCRR 500.22(b) and the grounds supporting the motion for an order granting leave to appeal. Copies of the appellate record and all briefs submitted to the Appellate Division have been provided together with this affirmation. The Appellate Division's decision is attached hereto as Exhibit A, and the Albany County Supreme Court's decision is attached hereto as Exhibit B.

Procedural History:

4) In Spring 2007, Defendants-Respondents New York State Department of Civil Service and its President Nancy G. Groenwegen (collectively referred to as "DCS") issued a Policy Memorandum, which stated in pertinent part: "[DCS] determine[s] that for purposes of benefits eligibility under NYSHIP [New York State Health Insurance Program] and all other benefit plans administered by its Employee Benefits Division, it [will] recognize as spouses partners in same sex marriages legally performed in other jurisdictions." R. 47.

5) Taxpayers commenced this action in the Albany County Supreme Court on May 23, 2007, and filed an Amended Verified Complaint on June 29, 2007. R. 35. Under their First Cause of Action (Violation of New York State

Finance Law § 123-b), Taxpayers assert that DCS, by implementing its Policy Memorandum, has caused and is continuing to cause "a wrongful expenditure, misappropriation, misapplication, or other illegal or unconstitutional disbursement of State funds or State property to same-sex 'spouses' purportedly 'married' outside the State of New York." R. 37. Taxpayers further contend that implementation of DCS's Policy Memorandum violates the separation-of-powers doctrine by "attempt[ing] to redefine the term[s] 'marriage' and 'spouse' as found in applicable State legislation and case law to include members of foreign same-sex 'marriages.'" R. 38.

6) In late September 2007, DCS and Defendants-Intervenors-Respondents filed motions to dismiss. The Albany County Supreme Court issued its Decision and Order on March 3, 2008, granting those motions and dismissing Taxpayers' claims. The Supreme Court based its holding exclusively on the Fourth Department's decision in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dept. 2008), which "concluded that a valid same-sex marriage performed in Canada was entitled to recognition in New York." R. 8. After acknowledging the *Martinez* ruling to be "binding" over it, the Supreme Court held that "[t]he [P]olicy [M]emorandum issued by the New York State Department of Civil Service Employee Benefits Division in which it recognized, as spouses, the parties to any

same sex marriage, performed in jurisdictions where such marriage is legal, is both lawful and within its authority." R. 9-10.

7) The Appellate Division affirmed the Supreme Court's order on January 22, 2009. Only three Justices joined the majority opinion, which began its analysis as follows:

> While [same-sex "marriage"] is relatively novel, there are longstanding rules of law that have guided our courts in determining whether persons validly married elsewhere will be considered married in New York. Rooted ultimately in principles of comity and choice of law that give controlling effect to the laws of other jurisdictions *unless they would do violence to some strong public policy of this [S]tate*, the well-settled marriage recognition rule recognizes as valid a marriage considered valid in the place where celebrated.

Exhibit A at 2-3 (quotations and citations omitted; emphasis added). Ultimately, the majority rejected Taxpayers' contention that DCS cannot recognize out-of-state same-sex "marriages" because it "would do violence to some strong public policy of this State" by altering the fundamental components—a man and a woman—of marriages recognized in New York. Exhibit A at 5-6.

8) The majority then rejected Taxpayers' claim that DCS violated separation-of-powers principles by interpreting the statutory term "spouse"—which has a well-settled legislative definition that includes only a husband or a wife in an opposite-sex marriage—to include same-sex partners who have obtained a "marriage" license from a foreign jurisdiction. At times, the majority recognized the merit in this argument by, for example, noting previous Appellate Division

decisions which "observed that, absent a legislative redefinition, the term 'legal spouse' [can]not reasonably be interpreted to include same-sex partners." Exhibit A at 7 n.1. But, in the end, the majority deviated from this precedent, concluding that "[o]nce an out-of-state same-sex marriage is recognized in New York . . . , each of its parties [is] 'a party to a marriage' and, thus, a 'legal spouse' who would be entitled to the benefits, rights and obligations of that status." Exhibit A at 7. In reaching this conclusion, the majority did not acknowledge (and perhaps did not appreciate) that its newfound application of comity principles judicially redefined the term "legal spouse."

9) Two Justices concurred in the result but were unwilling to join the majority's decision because it "chang[ed] longstanding law that affects all of the state's citizens." Exhibit A at 8. In critiquing the majority's decision, the concurring Justices noted the "potentially expansive implications of the majority's approach," Exhibit A at 9, citing as support a November 2008 Circular Letter from the New York State Insurance Department ordering all "insurance companies doing business in New York to recognize out of state same-sex marriages or face unfair practice and/or discrimination charges" Exhibit A at 9 n.2. Relying on this Court's decision in *Hernandez v. Robles*, 7 N.Y.3d 338, 361, 366 (2006), the concurrence reasoned that "[t]he Legislature is the governmental body best able to comprehensively and cogently address the issues in this emerging field." Exhibit

A at 9. For these important reasons, the concurring Justices disagreed with the majority's resolution of this case.

10) The concurring Justices' alternative analytical approach deferred to DCS's "discretion in defining . . . the terms spouse and dependent children," Exhibit A at 8, even though, as the majority aptly recognized, "the term 'legal spouse' [can]not reasonably be interpreted to include same-sex partners." Exhibit A at 7 n.1. Thus, as the majority also stated, the concurrence's approval of DCS's unreasonable statutory interpretation allowed that executive agency to "improperly intrude into the Legislature's domain," thereby violating separation-of-powers principles. Exhibit A at 7 n.1. In short, while the concurrence astutely recognized that the majority's change of "longstanding law" created "potentially expansive implications" best decided by the legislature, the concurring Justices endorsed a separation-of-powers violation and, like the majority, were unable to properly resolve the issues before them.

11) Taxpayers now seek an order from this Court granting permission to appeal pursuant to CPLR 5602(a)(1)(i).

Timeliness of this Motion:

12) A copy of the Appellate Division's Opinion and Order, entered on January 22, 2009, was served on Taxpayers, via overnight mail, with a notice of entry, on January 22, 2009. The notice of entry is attached hereto as Exhibit C.

Jurisdiction:

13) The Appellate Division's order, attached hereto as Exhibit A, is a final determination in this action and is not appealable as of right. This Court therefore has jurisdiction to review this matter pursuant to CPLR 5602(a)(1)(i).

Questions Presented for Review:

14) Do executive agencies and officials violate common-law comity principles and cause illegal disbursements of public funds by recognizing and granting benefits based upon out-of-state same-sex "marriages"?

15) Do executive agencies and officials exceed their constitutional authority, violate separation-of-powers principles, and cause unconstitutional disbursements of public funds by recognizing and granting benefits based upon out-of-state same-sex "marriages"?

Preservation of Questions Presented:

16) Taxpayers preserved the questions presented by raising them in their Amended Verified Complaint. Taxpayers argued the comity issue as part of their First Cause of Action, contending that DCS's acts were "illegal . . . , against public policy, [and] otherwise contrary to law." R. 37. This issue was addressed by the Supreme Court. R. 8. It was also addressed by the Appellate Division. Exhibit A at 2-6.

17) Taxpayers argued the separation-of-powers issue as part of their First and Second Causes of Action, stating that DCS, as an executive-branch agency, "violate[d] the separation of powers doctrine" by "attempt[ing] to redefine the term[s] 'marriage' and 'spouse' as found in applicable State legislation and case law to include members of foreign same-sex 'marriages.'" R. 38. This issue was briefly addressed by the Supreme Court. R. 8-9. It was also addressed by the Appellate Division. Exhibit A at 7-8.

The Questions Presented Merit Review by This Court:

18) In light of the criteria listed in 22 NYCRR 500.22(b)(4), this case warrants review by this Court. As will be explained fully herein, the issues presented in this appeal are novel and of public importance. In addition, the issues present a conflict with prior decisions of this Court. Consequently, this Court should grant Taxpayers leave to appeal.

Novel Issues:

19) This Court has never addressed whether comity principles mandate government recognition of an out-of-state same-sex "marriage" in New York. Neither does this Court's precedent provide definitive guidance on how to resolve that issue. This appeal will allow the Court to address this important issue for the first time and provide uniform guidance to the lower courts.

20) All prior decisions from this Court addressing comity and marriage recognition have involved out-of-state marriages between a man and a woman. *See, e.g.*, *Mott v. Duncan Petroleum Transp.*, 51 N.Y.2d 289, 292 (1980). Here, however, DCS has ordered the recognition of out-of-state unions between persons of the same sex. This Court has yet to address this wholly distinct issue: whether an out-of-state legal relationship that does not have the fundamental building blocks of a New York marriage—a man and a woman—can be recognized as a "marriage" in New York? This case provides an opportunity for this Court to resolve this emerging nuance of common-law comity principles.

21) Furthermore, this Court has never addressed whether, consistent with separation-of-power principles, executive-branch agencies and officials have authority to determine which out-of-state unions will be recognized as "marriages" in New York. Nevertheless, this Court has recognized that marriage issues are generally addressed by the legislative branch. *See Fearon v. Treanor*, 272 N.Y. 268, 271-72 (1936); *Hernandez*, 7 N.Y.3d at 361, 366. And this case provides an opportunity for this Court to clarify the role of executive-branch officials in addressing issues of marital recognition.

22) Thus, this Court should grant Taxpayers leave to appeal in order to address the novel issues presented in this case.

Issues of Public Importance:

23) The issues raised in this case threaten to (1) alter the fundamental components of the marital relationship in New York, (2) destroy New York's sovereignty to determine the fundamental components of the marital relationship, (3) affect the myriad legal rights and obligations flowing from the marital relationship, (4) allow executive-branch agencies and officials to invade the legislature's plenary power over marriage, and (5) nullify the legislature's policy decision to limit marital benefits to relationships between one man and one woman.

24) As recognized by the Appellate Division's concurring Justices, expanding comity principles to require government recognition of out-of-state same-sex "marriages" has already had, and will continue to have, far-reaching effects on New York society. This expansive application of comity principles effectively ushers same-sex "marriage" into New York through judicially created common law. Every same-sex couple wanting to be "married" in New York (even though New York does not allow such unions) can take a daytrip to Canada or Connecticut, get "married", and New York will be required to recognize it. As a result, this expansive application of comity has begun to transform the State of New York into a society with both opposite-sex marriages and same-sex "marriages," all of which must be recognized by the State; it has fundamentally

altered the structure of that most basic social institution—one man and one woman. Regardless of whether one thinks this is a positive or negative societal change, it is undeniable that through the expansive application of comity, the change has started to occur. And it is troubling, regardless of one's personal views on same-sex "marriage," to allow such a fundamental change to occur in the absence of legislative authority.[1]

25) Expanding comity principles to require recognition of out-of-state same-sex "marriages" effectively nullifies New York's sovereign decision to define marriage as the union of one man and one woman. It abdicates New York's sovereignty over marriage, favoring instead laws promulgated in jurisdictions that define marriage in a fundamentally different way than New Yorkers. In essence, it allows the "marriage" laws of foreign jurisdictions like Canada or Massachusetts—which have eradicated the basic man-woman construct—to govern here in the Empire State. Thus, this comity issue is far from an abstract legal concept; barring legislative action on this issue, it will determine the immediate future of marriage in New York.

---

[1] Lambda Legal Education and Defense Fund, attorneys for Defendants-Intervenors-Respondents, have unequivocally stated their plan to assist same-sex couples who receive "marriage" licenses from foreign jurisdictions "to win full recognition of their newly[]acquired status in their home [s]tate." H.R. Rep. No. 104-664, at 7 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2911 (Legislative Report discussing the Federal Defense of Marriage Act). They intend to use the extension of comity principles to import same-sex "marriage" into New York—a direct effort to reform the State's laws and public policy in the absence of legislative approval.

26) The judicial creation of same-sex "marriage" in New York will have countless ripple effects throughout everyday life; it is of momentous and far-reaching public importance. Whole aspects of New York society must change and respond. Government officials, employers, insurance companies, health-care providers, courts, attorneys, accountants—to name a few—must adapt their practices if same-sex "marriages" are to be recognized in New York. Divorces, inheritance rights, adoptions, pension benefits, property rights, taxation, and many other legal rights, benefits, and obligations will be changed by the recognition of out-of-state same-sex "marriages."

27) This newly imposed expansion of comity principles has already begun to have a widespread effect in many facets of state law. For the first time, New York Supreme Courts have exercised their jurisdiction to grant divorces for same-sex couples who obtained "marriage" licenses in other jurisdictions. *See Beth R. v. Donna M.*, 19 Misc.3d 724 (Sup. Ct. N.Y. Cty. 2008); *C.M. v. C.C.*, 21 Misc.3d 926 (Sup. Ct. N.Y. Cty. 2008). At least one New York Surrogate has broken with precedent and determined that the decedent's same-sex partner was the sole distributee because the couple had been "married" in Canada. *See Matter of the Estate of H. Kenneth Ranftle*, No. 4585-2008 (N.Y.L.J. Feb. 4, 2009). Attached hereto as Exhibit D. Furthermore, at least one New York Family Court has ruled that a partner of a same-sex couple did not need to be pre-certified as a qualified

adoptive parent (as she ordinarily would need to be under applicable law) because the couple had previously obtained a "marriage" license from another jurisdiction and thus were considered to be "married" under New York law. *See In re Donna S.*, 2009 WL 69341 (Fam. Ct. Monroe Cty. Jan. 6, 2009). Attached hereto as Exhibit E. These decisions show that the unprecedented application of comity principles has begun to create the legal reality of same-sex "marriage" in New York.

28) The vast overexpansion of comity has forced even private companies and corporations to recognize out-of-state same-sex "marriages." For example, as noted in the Appellate Division's concurring opinion, the New York Insurance Department has issued a directive mandating that all insurance companies doing business in New York must recognize out-of-state same-sex "marriages." *See* 2008 N.Y. St. Ins. Dept. Circular Letter No. 27 (Nov. 21, 2008). Attached hereto as Exhibit F. Given the widespread effect of this important issue, New Yorkers need the finality and consistency that only a decision from this Court can bring.

29) Permitting, as the Appellate Division has, executive agencies and officials to determine which out-of-state legal relationships will be recognized as "marriages" in New York transfers policy-making authority from the legislature to the executive branch. The legislature possesses "plenary power" to exert the "fullest control" over issues involving marriage. *Fearon*, 272 N.Y. at 271-72; *see*

also N.Y. Dom. Rel. Law §§ 1- 61. By ordering that out-of-state same-sex "marriages" must be recognized in New York, DCS has usurped the legislature's power over marriage and thus violated separation-of-powers principles. This violation of a fundamental constitutional principle is an important issue, calling for resolution by this Court. Thus, this Court should grant leave to appeal and declare that executive agencies and officials lack the authority to determine which out-of-state legal relationships will be recognized as "marriages" in New York.

30) Furthermore, forcing the government to recognize out-of-state same-sex "marriages" undermines the legislature's policy decision to limit marital benefits to relationships between one man and one woman. "The extension of [marital] benefits entails a consideration of social and fiscal policy more appropriately left to the Legislature." *Langan v. State Farm Fire & Casualty*, 48 A.D.3d 76, 79 (3rd Dept. 2007).[2] Yet, an expansive application of comity principles effectively abolishes the legislature's social and fiscal policy

[2] As this Court has recognized, many biological and social reasons support the legislature's decision to limit marital benefits to relationships between one man and one woman. That decision is neither arbitrary nor "merely a by-product of historical injustice." *Hernandez*, 7 N.Y.3d at 361. It is "based on innate, complementary, procreative roles, a function of biology." *Hernandez v. Robles*, 26 A.D.3d 98, 104 (1st Dept. 2005), *aff'd*, 7 N.Y.3d at 338. Only unions between a man and a woman result in the natural procreation of children. *See Hernandez*, 7 N.Y.3d at 359 (recognizing that one of the "important function[s] of marriage is to create more stability and permanence in the relationships that cause children to be born"); *Mirizio v. Mirizio*, 242 N.Y. 74, 81 (1926) (reasoning that marriage "relationship[s] . . . exist with the result and for the purpose of begetting offspring"). Moreover, relationships between a man and a woman produce certain child-rearing advantages. *See Hernandez*, 7 N.Y.3d at 359 ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like").

determinations by mandating that marital benefits be extended to same-sex couples. This result, as recognized by the Appellate Division's concurring opinion, inappropriately infringes on the realm of the legislature.

31) In sum, this Court should grant Taxpayers leave to appeal to address the issues of public importance presented in this case.

Conflict with Prior Decisions of this Court:

32) The Appellate Division's approval of DCS's Policy Memorandum conflicts with this Court's decision in *Hernandez*. To be sure, *Hernandez* did not address the precise questions at issue in this case: *Hernandez* held that the state legislature did not violate the New York Constitution by defining marriage as the union of one man and one woman; whereas, this case presents questions of common-law comity and executive-branch authority concerning marriage recognition. Nevertheless, this Court in *Hernandez* spoke extensively about changing the fundamental components of marriage in New York—one man and one woman—which is precisely the result of the Appellate Division's decision in this case.

33) In *Hernandez*, this Court stated its "conclusion" that "any expansion of the traditional definition of marriage should come from the Legislature." *Hernandez*, 7 N.Y.3d at 361. This Court similarly remarked that "the present generation should have a chance to decide [the same-sex 'marriage'] issue through

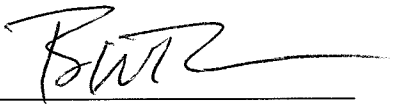
its elected representatives [*i.e.*, the legislature]." *Id.* at 366. Here, however, the Appellate Division's decision has effectively ushered same-sex "marriage" into New York, thus altering the fundamental components of marriage through judicial fiat, and robbing this "present generation" of New Yorkers of its opportunity to decide the same-sex "marriage" issue through its elected legislators. This judicial restructuring of marriage in New York directly violates part of this Court's decision in *Hernandez*. The lower courts of this State cannot accomplish indirectly what this Court has ruled they cannot do directly—namely, the redefinition of marriage. This Court must intervene to correct this conflict between the Appellate Division's decision and its own precedent.

34) This Court should therefore grant Taxpayers leave to appeal to address the conflict between the Appellate Division's decision in this case and this Court's decision in *Hernandez*.

WHEREFORE, for all the above reasons, I respectfully request that this Court issue an order granting Taxpayers leave to appeal to the Court of Appeals from the order of the Appellate Division, Third Department, entered on January 22, 2009.

Dated: February 10, 2009.

Respectfully submitted,



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*Not admitted in this jurisdiction

AFFIRMATION OF SERVICE

I, Brian W. Raum, an attorney duly licensed in the State of New York, affirm under the penalties of perjury that the following is true and correct:

That on the 10th day of February 2009, I served copies of the foregoing Notice of Motion, Attorney Affirmation in Support, and supporting papers by depositing true copies with the United Parcel Service, via *Next Day Air* overnight service, pre-paid, addressed as follows:

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those being the addresses designated on the latest papers served by them in this action.

Brian W. Raum, Esq.

EXHIBIT A

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 22, 2009 504900

KENNETH J. LEWIS et al.,
Appellants,
v OPINION AND ORDER

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE et al.,
Respondents.

Calendar Date: October 15, 2008

Before: Peters, J.P., Rose, Lahtinen, Kane and Malone Jr., JJ.

Brian W. Raum, Scottsdale, Arizona, and Cutler, Trainor & Cutler, L.L.P., Malta (James P. Trainor of counsel), for appellants.

Andrew M. Cuomo, Attorney General, Albany (Sasha Samber-Champion of counsel), for New York State Department of Civil Service and another, respondents.

Susan L. Sommer, Lambda Legal Defense and Education Fund, Inc., New York City, and Kramer, Levin, Naftalis & Frankel, L.L.P., New York City (Jeffrey S. Trachtman of counsel), for Peri Rainbow and another, respondents.

Frederick C. Veit, National Legal Foundation, Briarcliff Manor, for National Legal Foundation, amicus curiae.

Vincent P. McCarthy, American Center for Law and Justice, N.E., Litchfield, Connecticut, and Kriss, Kriss & Brignola, L.L.P., Albany (Charles Kriss of counsel), American Center for Law and Justice, N.E., and Benjamin P. Sisney, American Center for Law and Justice, Virginia Beach, Virginia, for American Center for Law and Justice, N.E., amicus curiae.

Michael A. Cardozo, Corporation Counsel, New York City (Susan Paulson of counsel), for City of New York, amicus curiae.

Matthew Faiella, New York Civil Liberties Union Foundation, New York City, for New York Civil Liberties Union Foundation, amicus curiae.

Rose, J.

Appeal from an order of the Supreme Court (McNamara, J.), entered March 13, 2008 in Albany County, which, among other things, granted summary judgment in favor of defendants and dismissed the complaint.

When defendant Department of Civil Service announced that it would recognize the parties to a same-sex marriage as spouses if their marriage were valid in the jurisdiction where it was solemnized, thereby allowing such spouses of state employees access to the benefits provided under the New York State Health Insurance Program (see Civil Service Law § 161 [1]; § 164 [1]), plaintiffs commenced this action as individual taxpayers seeking a declaration that the Department's recognition of such marriages is illegal, unconstitutional and results in the unlawful disbursement of public funds. Defendants then moved for dismissal of the complaint, and plaintiffs cross-moved for summary judgment on their claims. Bound by the holding that New York's marriage recognition rule requires the recognition of out-of-state same-sex marriages in Martinez v County of Monroe (50 AD3d 189 [4th Dept 2008]), Supreme Court denied plaintiffs' cross motion and, after searching the record, granted summary judgment to defendants. Plaintiffs now appeal, arguing that the marriage recognition rule does not apply or, if it does, such marriages fall within an exception to the rule. Unpersuaded, we affirm Supreme Court's order.

While the type of marriage involved here is relatively novel, there are longstanding rules of law that have guided our courts in determining whether persons validly married elsewhere

will be considered married in New York. Rooted ultimately in principles of comity and choice of law that give controlling effect to the laws of other jurisdictions unless they "would do violence to some strong public policy of this [s]tate" (Byblos Bank Europe, S.A. v Sekerbank Turk Anonym Syrketi, 10 NY3d 243, 247 [2008] [internal quotation marks and citations omitted]; see Zurich Ins. Co. v Shearson Lehman Hutton, 84 NY2d 309, 319 [1994]; Restatement [Second] of Conflict of Laws § 6), the well-settled marriage recognition rule "recognizes as valid a marriage considered valid in the place where celebrated" (Van Voorhis v Brintnall, 86 NY 18, 25 [1881]), and the courts of New York must follow that rule unless the out-of-state marriage falls within one of its two exceptions (see Matter of May, 305 NY 486, 490 [1953]; Moore v Hegeman, 92 NY 521, 524 [1883]; Thorp v Thorp, 90 NY 602, 605 [1882]; Van Voorhis v Brintnall, 86 NY at 26). The first exception occurs where there is a "New York statute expressing clearly the Legislature's intent to regulate within this [s]tate marriages of its domiciliaries solemnized abroad" (Matter of May, 305 NY at 493). Such a statute must convey, in express terms, a legislative intent to void a marriage legally entered into in another jurisdiction (see Van Voorhis v Brintnall, 86 NY at 34-35; Matter of Peart, 277 App Div 61, 70 [1950]). The second exception to the marriage recognition rule occurs in cases where an aspect of the out-of-state marriage is abhorrent to New York public policy, such as incest or polygamy (see Matter of May, 305 NY at 491; Van Voorhis v Brintnall, 86 NY at 26). This exception has been invoked to preclude recognition of an out-of-state polygamous marriage (see Earle v Earle, 141 App Div 611 [1910]; People v Ezeonu, 155 Misc 2d 344 [1992]), an out-of-state incestuous marriage (see Matter of Incuria v Incuria, 155 Misc 755 [1935]) and an out-of-state marriage where one party was under the age of consent (see Cunningham v Cunningham, 206 NY 341, 349 [1912]).

Our courts have narrowly construed these two exceptions, applying the marriage recognition rule to recognize a wide variety of out-of-state marriages that would not qualify as marriages if they had been solemnized in New York. These include the second marriage of a divorced spouse even though such remarriage was expressly precluded at the time in New York by the former Domestic Relations Law (see Fisher v Fisher, 250 NY 313

[1929]; Moore v Hegeman, 92 NY 521 [1883]; Thorp v Thorp, 90 NY 602 [1882], supra; Van Voorhis v Brintnall, 86 NY at 18), a marriage solemnized in Rhode Island that would be considered incestuous in New York, but was not found to be offensive "to a degree regarded generally with abhorrence" (Matter of May, 305 NY at 493), common-law marriages that are valid in other states but could not be entered into in New York (see Matter of Mott v Duncan Petroleum Trans., 51 NY2d 289 [1980]; Matter of Yao You-Xin, 246 AD2d 721 [1998]; Matter of Coney v R.S.R. Corp., 167 AD2d 582 [1990], lv denied 77 NY2d 805 [1991]), marriages of persons younger than the legal age of consent to marriage in New York (see Hilliard v Hilliard, 24 Misc 2d 861 [1960]; Donohue v Donohue, 63 Misc 111 [1909]) and marriages by proxy that could not occur in New York (see Fernandes v Fernandes, 275 App Div 777 [1949]; Matter of Valente, 18 Misc 2d 701, 705 [1959]; Ferraro v Ferraro, 192 Misc 484 [1948]).

Given our longstanding application of the marriage recognition rule to determine whether out-of-state marriages not meeting our own definition of a marriage will, nevertheless, be recognized in New York, we must reject plaintiffs' initial contention that the rule can have no application here. Specifically, plaintiffs argue that the rule does not apply because same-sex marriages valid in the jurisdiction where solemnized are not "marriages," as that term is defined in New York. In every case in which the rule has been applied, however, the out-of-state marriage failed to meet New York's definition of a marriage in some respect. Also, while the Court of Appeals has held that the Domestic Relations Law limits marriages solemnized in New York to persons of the opposite sex (see Hernandez v Robles, 7 NY3d 338, 357 [2006]) and stated that any revision of the statute specifying who can be validly married here "rests with our elected representatives" (id. at 379), it did not hold that same-sex marriages solemnized elsewhere would not be defined as marriages here, and it observed that the Legislature could rationally choose to permit same-sex couples to marry in New York (see id. at 358-359, 365). In addition, we note that the Supreme Courts of our neighboring states of Connecticut and Massachusetts have defined marriage in their states to include the marriage of same-sex couples (see Kerrigan v Commissioner of Pub. Health, 289 Conn 135, 957 A2d 407 [2008]; Goodridge v Department of Pub.

Health, 440 Mass 309, 798 NE2d 941 [2003]). Thus, regardless of how we define marriage in New York, we must apply the marriage recognition rule to determine whether we will recognize same-sex out-of-state marriages for the purpose of according their parties spousal benefits.

Plaintiffs argue in the alternative that such marriages fall within one of the rule's two exceptions. Clearly, however, the rule's first exception is inapplicable because no New York statute expressly precludes recognition of a same-sex marriage solemnized elsewhere. While the Court of Appeals has held that the provisions of the Domestic Relations Law limit marriages solemnized in New York to opposite-sex couples (see Hernandez v Robles, 7 NY3d at 357), the Court did not go further and read those statutes as invalidating such marriages solemnized in other jurisdictions.

As for the second exception precluding recognition of an incestuous or polygamous marriage, we note that an out-of-state same-sex marriage would not fall within that preclusion unless the same-sex spouses were closely related or were more than two in number, situations not under consideration here. Nonetheless, since this exception is rooted in the idea that some marriages are abhorrent to New York public policy (see Villafana v Villafana, 275 App Div 810, 811 [1949]; Godfrey v Spano, 15 Misc 3d 809, 812-813 [2007], affd ___ AD3d ___, 2008 NY Slip Op 10584 [2008]; Matter of Incuria v Incuria, 155 Misc at 759; People v Kay, 141 Misc 574, 578 [1931]; see also Cunningham v Cunningham, 206 NY at 349; Langan v St. Vincent's Hosp. of N.Y., 25 AD3d 90, 101 [2005] [Fisher, J., dissenting], appeal dismissed 6 NY2d 890 [2006]; Matter of Bronislawa K. v Tadeusz K., 90 Misc 2d 183, 185 [1977]), we must consider plaintiffs' argument that same-sex marriages should come within this exception because they are as abhorrent to public policy as incest and polygamy. New York's public policy, however, cannot be said to abhor the recognition of out-of-state same-sex marriages.

The Court of Appeals has defined New York's "public policy" as "'the law of the [s]tate, whether found in the Constitution, the statutes or judicial records'" (Mertz v Mertz, 271 NY 466, 472 [1936], quoting People v Hawkins, 157 NY 1, 12 [1898]; see

Matter of Rhinelander, 290 NY 31, 36 [1943]). Unlike a majority of the states, and despite having had the opportunity to do so (see e.g. 2007 NY Assembly Bill A4978), New York has not taken the controversial step of enacting legislation to deny full faith and credit to out-of-state same-sex marriages as permitted under the federal Defense of Marriage Act (see 28 USC § 1738C). In addition, although the NY Constitution does not compel recognition of same-sex marriages solemnized in New York (see Hernandez v Robles, 7 NY3d at 356), there is no New York court precedent holding that a New York statute or judicial decision precludes recognition of out-of-state same-sex marriages (compare Gonzalez v Green, 14 Misc 3d 641 [2006] [out-of-state same-sex marriage of New York residents in Massachusetts held to be invalid under the law of Massachusetts]; Funderburke v New York State Dept. of Civ. Serv., 13 Misc 3d 284 [2006], order vacated, appeal dismissed 49 AD3d 809 [2008]). To the contrary, several courts have recognized such marriages (see Martinez v County of Monroe, 50 AD3d 189 [2008], supra; C.M. v C.C., 21 Misc 3d 926 [2008]; Golden v Paterson, NYLJ, Sept. 8, 2008, at 19, col 3 [Sup Ct, Bronx County]; Beth R. v Donna M., 19 Misc 3d 724 [Sup Ct, New York County 2008]; Godfrey v Hevesi, NYLJ, Sept. 18, 2007, at 28, col 1 [Sup Ct, Albany County]; Godfrey v Spano, 15 Misc 3d 809 [2007], supra]). Furthermore, as the Court of Appeals has twice cautioned us, where the Domestic Relations Law does not expressly declare void a certain type of marriage validly solemnized outside of New York, the statute should not be extended by judicial construction (see Matter of May, 305 NY at 492; Van Voorhis v Brintnall, 86 NY at 33). Nor does our holding restrict the Legislature's ability to preclude recognition of out-of-state same-sex marriages in the future since the marriage recognition rule already admits of exceptions based upon statutory enactments. Accordingly, we conclude that the marriage recognition rule is applicable here and warrants dismissal of plaintiffs' first cause of action alleging an unlawful disbursement of public funds.[1]

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[1] While the concurrence suggests that we are "changing longstanding law," it fails to show why the marriage recognition rule should no longer be applied in New York and cites no contrary expression of public policy that would preclude

Plaintiffs also claim that health insurance benefits cannot be extended to the parties to a same-sex marriage because they are not "spouses" as normally defined under Civil Service Law article 11. Once an out-of-state same-sex marriage is recognized in New York, however, each of its parties would be "a party to a marriage" and, thus, a "legal spouse" who would be entitled to the benefits, rights and obligations of that status (Matter of Langan v State Farm Fire & Cas., 48 AD3d 76, 78 [2007]). The cases cited by plaintiffs in support of a contrary conclusion are readily distinguishable because they do not involve marriages and do not consider whether out-of-state same-sex marriages will be recognized in New York (see id.; Langan v St. Vincent's Hosp. of N.Y., 25 AD3d 90 [2005], supra; Matter of Valentine v American Airlines, 17 AD3d 38 [2005], supra; Matter of Cooper, 187 AD2d 128 [1993], lv dismissed 82 NY2d 801 [1993]).

To the extent that plaintiffs claim that the Department violated the separation of powers doctrine by usurping the Legislature's authority, we are satisfied that the Department did not "'go beyond stated legislative policy and prescribe a remedial device not embraced by the policy'" (Matter of Citizens For An Orderly Energy Policy v Cuomo, 78 NY2d 398, 410 [1991], quoting Matter of Broidrick v Lindsay, 39 NY2d 641, 645-646 [1976]). Rather, the Department's recognition of same-sex spouses falls squarely within the scope of the policy expressed in Civil Service Law §§ 161 and 164 to provide benefits to the spouses and dependent children of state employees. Moreover, in recognizing those marriages, the Department has not usurped the

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recognition of out-of-state same-sex marriages under that rule. We also have reservations about the breadth of discretion that the concurrence attributes to defendants in order to find an alternate basis to uphold their determination here. We have previously observed that, absent a legislative redefinition, the term "legal spouse" could not reasonably be interpreted to include same-sex partners (see Matter of Langan v State Farm Fire & Cas., 48 AD3d 76, 79 [2007]; Matter of Valentine v American Airlines, 17 AD3d 38, 40-41 [2005]). Thus, to do what the concurrence suggests would improperly intrude into the Legislature's domain.

Legislature's power to subsequently determine by positive legislation that out-of-state same-sex marriages cannot be recognized in New York. We further find no merit in plaintiffs' alternate claim that the Department violated NY Constitution, article VII, § 8 (1) by using public funds to aid a former Governor's personal goal of creating civil marriage equality in New York. Inasmuch as the Department's policy furthers a valid governmental purpose to benefit public employees, it cannot fairly be said that it is invalid as promoting a private undertaking (cf. Matter of Schulz v State of New York, 86 NY2d 225, 235 [1995]).

Finally, the determination to recognize same-sex marriages is not invalid for the Department's failure to comply with the formal rule-making procedures of the State Administrative Procedure Act because the determination is an interpretative statement that is merely explanatory (see State Administrative Procedure Act § 102 [2] [b] [iv]; Cubas v Martinez, 8 NY3d 611, 621 [2007]; Matter of Elcor Health Servs. v Novello, 100 NY2d 273, 279 [2003]; Matter of HMI Mech. Sys. v McGowan, 277 AD2d 657, 659 [2000], lv denied 96 NY2d 705 [2001]; Matter of Abreu v Coughlin, 161 AD2d 844, 845 [1990]). The Department's expansion of the definition of the term "spouse" is a reasonable interpretation of existing Department regulations that define the term "dependent" as "includ[ing] the spouse of an employee or retired employee" (4 NYCRR 73.1 [h]).

Peters and Kane, JJ., concur.

Lahtinen, J. (concurring).

We respectfully concur in the result, but upon a much narrower ground.

Action taken by the state pertaining to its own employees is different from changing longstanding law that affects all of the state's citizens. The Legislature has vested the President of the Civil Service Commission with broad discretion in defining, for purposes of health insurance coverage for state employees, the terms spouse and dependent children (see Civil

Service Law § 164; Slattery v City of New York, 179 Misc 2d 740, 754 [1999], mod 266 AD2d 24 [1999], appeal dismissed 94 NY2d 897 [2000], lv dismissed and denied 95 NY2d 823 [2000]; cf. Matter of Police Assn. of City of Mount Vernon v New York State Pub. Empl. Relations Bd., 126 AD2d 824, 825-826 [1987]). "[T]he Commission's interpretation of its regulations is entitled to deference" (Matter of Kirmayer v New York State Dept. of Civ. Serv., 24 AD3d 850, 851 [2005]). State employees have been entitled for more than a decade to include coverage for a same-sex partner under the state's health insurance plan as a domestic partner (see generally Fisher, Cuomo Decides to Extend Domestic-Partner Benefits, New York Times, June 29, 1994, section 3, col 5, at 4). The practical effect of the determination here is to give an out-of-state document formalizing a same-sex relationship the same weight as the affidavit required to receive such benefits as a domestic partner, which is a narrow accommodation to state employees in an area where the Legislature has specifically accorded the Commission broad discretion.

The Legislature is the governmental body best able to comprehensively and cogently address the issues in this emerging field (see generally Hernandez v Robles, 7 NY3d 338, 361, 366 [2006]).[1] In deference to such body and in light of the potentially expansive implications of the majority's approach,[2] we would decide this case narrowly, as this record permits (cf. Godfrey v Spano, ___ AD3d ___, 2008 NY Slip Op 10584 [2008]).

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[1] Nearly every other state has addressed this issue by legislative enactment or public referendum (see National Conference of State Legislatures, Same Sex Marriage, Civil Unions and Domestic Partnerships, http://www.ncsl.org/programs/cyf/samesex.htm [accessed Dec. 2, 2008]).

[2] See e.g. 2008 NY St Ins Dept Circular Letter No. 27 (Nov. 21, 2008 [relying on the similar analysis employed in the Fourth Department's decision in Martinez v County of Monroe (50 AD3d 189 [2008], lv dismissed 10 NY3d 856 [2008])] to direct insurance companies doing business in New York to recognize out of state same-sex marriages or face unfair practice and/or discrimination charges).

Malone Jr., J., concurs.

ORDERED that the order is affirmed, without costs.

ENTER:

Michael J. Novack
Clerk of the Court

EXHIBIT B

PRESENT: HON. THOMAS J. McNAMARA
Acting Justice
STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

KENNETH J. LEWIS, DENISE A. LEWIS, ROBERT C. HOUCK, JR., and ELAINE A. HOUCK,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF DIVIL SERVICES and NANCY G. GROWENWEGEN, in her Official Capacity as President of the New York State Department of Civil Service,

Defendants.

-and-

PERI RAINBOW and TAMELA SLOAN,

Proposed Defendants-Intervenors,

DECISION & ORDER
Index No.: 4078-07
RJI No.: 01-07-090751

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Culter, Trainor & Cutler, LLP
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McNamara, J.

In May 2007, the New York State Department of Civil Service Employee Benefits Division issued a revised policy memorandum in which it announced that it would recognize, as spouses, the parties to any same sex marriage performed in jurisdictions where such marriage is legal. The memorandum had the effect of extending all health benefit plans provided under New York State Health Insurance Program (NYSHIP) to such spouses of NYSHIP enrollees. Thereafter, plaintiffs brought this action for a declaratory judgment finding that the recognition of foreign same sex marriages as expressed in the policy memorandum is illegal, unconstitutional, *ultra vires*, void and constitutes an illegal expenditure of State funds.

Peri Rainbow and Tamela Sloan have moved to intervene, and if such leave is granted, to dismiss the amended verified complaint. Defendants New York State Department of Civil Service and Nancy G. Groenwegen have also moved to dismiss and plaintiffs have moved for summary judgment.

Civil Service Law §161 authorizes the President of the Civil Service Commission to establish a health insurance plan for state officers and employees. All persons in the service of the state who elect to participate in the health insurance plan are eligible to participate therein (Civil Service Law §163) and are entitled to have his or her spouse and dependent children included in the coverage

(Civil Service Law §164). Plaintiffs contend in the amended verified complaint that the policy memorandum which recognizes as spouses the parties to certain same sex marriages violates the constitutional principal of separation of powers, violates State Finance Law §123-b, violates New York Constitution article VII, §8 by using public funds to aid Governor Spitzer's political objectives and violates New York Constitution article IV, §8 and State Administrative Procedures Act §202 by promulgating a rule without first satisfying the procedural rulemaking requirements. Plaintiffs also argue that under the doctrine of judicial estoppel defendants should be prohibited from arguing that the term "spouse", as used in Civil Service Law §164, includes partners of same-sex couples who were married outside New York.

Judicial estoppel generally is applied where a party to an action has secured a judgment in its favor by adopting a certain position and then seeks to take a contrary position in the same action or in another action arising from the judgment (*Moore v County of Clinton*, 219 AD2d 131 [1996], lv denied 89 NY2d 851 [1996]). In *Funderburke v New York State Department of Civil Service,* 13 Misc.3d 284 (1996) plaintiff sought spousal health and dental insurance coverage for the man he had recently married in Canada. The court granted summary judgment to the defendants, New York State Department of Civil Service and Uniondale Union Free School District, on the ground that plaintiff's union was not a marriage as that term was defined by the Court of Appeals in *Hernandez v Robles*, 7 NY3d 338 (2006). Plaintiffs, here, contend that the position taken by the Department of Civil Service in this action is inconsistent with the position it took in Funderburke and that under the doctrine of judicial estoppel, the Department is prohibited from asserting a contrary position in this action. However, this action is neither the same action as Funderburke nor does it arise from the

judgment in Funderburke. Consequently, the doctrine of judicial estoppel does not apply.

The other arguments offered by plaintiffs to invalidate the determination are without merit. The contention that defendants violated the constitutional principal of separation of powers is not based on a belief that defendants do not have the authority to interpret "spouse" as that word is used in Civil Service Law §164. Plaintiffs argument is that the interpretation must be, but is not, consistent with legislative pronouncements and may not, but does, go beyond stated legislative policy (see e.g. *Matter of Campagna v Shaffer*, 73 NY2d 237 [1989]).

In *Martinez v County of Monroe*, 2008 NY Slip Op 909, the Appellate Division, Fourth Department, concluded that a valid same-sex marriage performed in Canada was entitled to recognition in New York. That result was reached by employing the marriage recognition rule which provides that "if a marriage is valid in the place where it was entered, it is to be recognized as such in the courts of this State, unless contrary to the prohibitions of natural law or the express prohibitions of a statute" (id at 3-4, citations omitted). Moreover, the court found that defendants' decision to deny plaintiff's application for spousal health care benefits, based on its refusal to recognize the Canadian marriage, violated Executive Law § 296 (1) (a), which forbids an employer from discriminating against an employee "in compensation or in terms, conditions or privileges of employment" because of the employee's sexual orientation. In the absence of a contrary holding in this Department, the ruling in Martinez is binding on this court (*Mountain View Coach Lines v Storms*, 102 AD2d 663, 664 [1984]; see *In re Patrick BB*, 284 AD2d 636 [2002]).

The determination in Martinez that recognition of legally performed Canadian same-sex marriages is appropriate under the marriage recognition rule forecloses the arguments that the policy

memorandum is not consistent with legislative pronouncements or goes beyond stated legislative policy.

The assertion that the policy memorandum violates State Finance Law §123-b is based on arguments that the marriage recognition rule and the principal of comity do not apply. Those arguments are also undermined by the holding in Martinez.

The ruling in Martinez also invalidates the claim that the policy memorandum violates New York Constitution article VII, §8 by using public funds to aid Governor Spitzer's political objective of recognizing same-sex marriages. To the extent that the policy memorandum is consistent with a political objective of the governor, that objective, according to the court in Martinez, is consistent with the New York policy regarding recognition of foreign marriages.

The argument that the policy memorandum established a new "rule" without complying with the rule-making procedures in the State Administrative Procedure Act also fails. State Administrative Procedure Act § 102 (2) (b) (iv) excludes from the definition of a rule "forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory." The policy memorandum provides an interpretative statement of the term "spouse" as it relates to eligibility for health plan benefits. As such, it does not constitute an improper unfiled rule.

The motion by Peri Rainbow and Tamela Sloan to intervene is granted.

The motion for summary judgment by plaintiffs is denied and upon searching the record summary judgment is granted to defendants and defendant-intervenors.

The policy memorandum issued by the New York State Department of Civil Service

Employee Benefits Division in which it recognized, as spouses, the parties to any same sex marriage, performed in jurisdictions where such marriage is legal, is both lawful and within its authority.

All papers including this Decision and Order are returned to defendant's attorneys. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

This memorandum shall constitute both the Decision and Order of this Court.

SO ORDERED.

ENTER.

Dated: Saratoga Springs, New York
March 3, 2008

Thomas J. McNamara
Acting Supreme Court Justice

Papers Considered:

1) Notice of Motion to Intervene dated September 12, 2007;
2) Affirmation of Susan L. Sommer, Esq., dated September 12, 2007 with exhibits annexed;
3) Notice of Motion dated September 19, 2007;
4) Defendant's Memorandum of Law dated September 19, 2007;
5) Notice of Motion to Dismiss dated September 26, 2007;
6) Affirmation of Susan L. Sommer, Esq., dated September 25, 2007 with exhibits annexed;
7) Defendant-Intervenor's Memorandum of Law dated September 25, 2007;
8) Notice of Cross-Motion dated November 9, 2007;
9) Bryon J. Babione, Esq., dated November 9, 2007 with exhibits annexed;
10) Memorandum of Law dated November 9, 2007;
11) Defendant-Intervenor's Memorandum of Law dated December20, 2007;
12) Defendant's Memorandum of Law dated December 21, 2007;
13) Plaintiff's Memorandum of Law dated January 3, 2008;
14) Defendant's Correspondence to the Court dated January 8, 2008.

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

KENNETH J. LEWIS, DENISE A. LEWIS, ROBERT C. HOUCK, JR., AND ELAINE A. HOUCK, Plaintiffs, – against – THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE AND NANCY G. GROENWEGEN, in her official capacity as the PRESIDENT OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, Defendants, – and – PERI RAINBOW AND TAMELA SLOAN, Defendant-Intervenors.	Index No. 4078-07 Justice Thomas J. McNamara **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the within decision and order of the Supreme Court, Appellate Division, Third Department was entered by the Clerk of the Court on January 22, 2009.

Dated: New York, New York
January 22, 2009

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State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 22, 2009 504900

KENNETH J. LEWIS et al.,
Appellants,
v OPINION AND ORDER

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE et al.,
Respondents.

Calendar Date: October 15, 2008

Before: Peters, J.P., Rose, Lahtinen, Kane and Malone Jr., JJ.

Brian W. Raum, Scottsdale, Arizona, and Cutler, Trainor & Cutler, L.L.P., Malta (James P. Trainor of counsel), for appellants.

Andrew M. Cuomo, Attorney General, Albany (Sasha Samber-Champion of counsel), for New York State Department of Civil Service and another, respondents.

Susan L. Sommer, Lambda Legal Defense and Education Fund, Inc., New York City, and Kramer, Levin, Naftalis & Frankel, L.L.P., New York City (Jeffrey S. Trachtman of counsel), for Peri Rainbow and another, respondents.

Frederick C. Veit, National Legal Foundation, Briarcliff Manor, for National Legal Foundation, amicus curiae.

Vincent P. McCarthy, American Center for Law and Justice, N.E., Litchfield, Connecticut, and Kriss, Kriss & Brignola, L.L.P., Albany (Charles Kriss of counsel), American Center for Law and Justice, N.E., and Benjamin P. Sisney, American Center for Law and Justice, Virginia Beach, Virginia, for American Center for Law and Justice, N.E., amicus curiae.

Michael A. Cardozo, Corporation Counsel, New York City (Susan Paulson of counsel), for City of New York, amicus curiae.

Matthew Faiella, New York Civil Liberties Union Foundation, New York City, for New York Civil Liberties Union Foundation, amicus curiae.

Rose, J.

Appeal from an order of the Supreme Court (McNamara, J.), entered March 13, 2008 in Albany County, which, among other things, granted summary judgment in favor of defendants and dismissed the complaint.

When defendant Department of Civil Service announced that it would recognize the parties to a same-sex marriage as spouses if their marriage were valid in the jurisdiction where it was solemnized, thereby allowing such spouses of state employees access to the benefits provided under the New York State Health Insurance Program (see Civil Service Law § 161 [1]; § 164 [1]), plaintiffs commenced this action as individual taxpayers seeking a declaration that the Department's recognition of such marriages is illegal, unconstitutional and results in the unlawful disbursement of public funds. Defendants then moved for dismissal of the complaint, and plaintiffs cross-moved for summary judgment on their claims. Bound by the holding that New York's marriage recognition rule requires the recognition of out-of-state same-sex marriages in Martinez v County of Monroe (50 AD3d 189 [4th Dept 2008]), Supreme Court denied plaintiffs' cross motion and, after searching the record, granted summary judgment to defendants. Plaintiffs now appeal, arguing that the marriage recognition rule does not apply or, if it does, such marriages fall within an exception to the rule. Unpersuaded, we affirm Supreme Court's order.

While the type of marriage involved here is relatively novel, there are longstanding rules of law that have guided our courts in determining whether persons validly married elsewhere

will be considered married in New York. Rooted ultimately in principles of comity and choice of law that give controlling effect to the laws of other jurisdictions unless they "would do violence to some strong public policy of this [s]tate" (Byblos Bank Europe, S.A. v Sekerbank Turk Anonym Syrketi, 10 NY3d 243, 247 [2008] [internal quotation marks and citations omitted]; see Zurich Ins. Co. v Shearson Lehman Hutton, 84 NY2d 309, 319 [1994]; Restatement [Second] of Conflict of Laws § 6), the well-settled marriage recognition rule "recognizes as valid a marriage considered valid in the place where celebrated" (Van Voorhis v Brintnall, 86 NY 18, 25 [1881]), and the courts of New York must follow that rule unless the out-of-state marriage falls within one of its two exceptions (see Matter of May, 305 NY 486, 490 [1953]; Moore v Hegeman, 92 NY 521, 524 [1883]; Thorp v Thorp, 90 NY 602, 605 [1882]; Van Voorhis v Brintnall, 86 NY at 26). The first exception occurs where there is a "New York statute expressing clearly the Legislature's intent to regulate within this [s]tate marriages of its domiciliaries solemnized abroad" (Matter of May, 305 NY at 493). Such a statute must convey, in express terms, a legislative intent to void a marriage legally entered into in another jurisdiction (see Van Voorhis v Brintnall, 86 NY at 34-35; Matter of Peart, 277 App Div 61, 70 [1950]). The second exception to the marriage recognition rule occurs in cases where an aspect of the out-of-state marriage is abhorrent to New York public policy, such as incest or polygamy (see Matter of May, 305 NY at 491; Van Voorhis v Brintnall, 86 NY at 26). This exception has been invoked to preclude recognition of an out-of-state polygamous marriage (see Earle v Earle, 141 App Div 611 [1910]; People v Ezeonu, 155 Misc 2d 344 [1992]), an out-of-state incestuous marriage (see Matter of Incuria v Incuria, 155 Misc 755 [1935]) and an out-of-state marriage where one party was under the age of consent (see Cunningham v Cunningham, 206 NY 341, 349 [1912]).

Our courts have narrowly construed these two exceptions, applying the marriage recognition rule to recognize a wide variety of out-of-state marriages that would not qualify as marriages if they had been solemnized in New York. These include the second marriage of a divorced spouse even though such remarriage was expressly precluded at the time in New York by the former Domestic Relations Law (see Fisher v Fisher, 250 NY 313

[1929]; Moore v Hegeman, 92 NY 521 [1883]; Thorp v Thorp, 90 NY 602 [1882], supra; Van Voorhis v Brintnall, 86 NY at 18), a marriage solemnized in Rhode Island that would be considered incestuous in New York, but was not found to be offensive "to a degree regarded generally with abhorrence" (Matter of May, 305 NY at 493), common-law marriages that are valid in other states but could not be entered into in New York (see Matter of Mott v Duncan Petroleum Trans., 51 NY2d 289 [1980]; Matter of Yao You-Xin, 246 AD2d 721 [1998]; Matter of Coney v R.S.R. Corp., 167 AD2d 582 [1990], lv denied 77 NY2d 805 [1991]), marriages of persons younger than the legal age of consent to marriage in New York (see Hilliard v Hilliard, 24 Misc 2d 861 [1960]; Donohue v Donohue, 63 Misc 111 [1909]) and marriages by proxy that could not occur in New York (see Fernandes v Fernandes, 275 App Div 777 [1949]; Matter of Valente, 18 Misc 2d 701, 705 [1959]; Ferraro v Ferraro, 192 Misc 484 [1948]).

Given our longstanding application of the marriage recognition rule to determine whether out-of-state marriages not meeting our own definition of a marriage will, nevertheless, be recognized in New York, we must reject plaintiffs' initial contention that the rule can have no application here. Specifically, plaintiffs argue that the rule does not apply because same-sex marriages valid in the jurisdiction where solemnized are not "marriages," as that term is defined in New York. In every case in which the rule has been applied, however, the out-of-state marriage failed to meet New York's definition of a marriage in some respect. Also, while the Court of Appeals has held that the Domestic Relations Law limits marriages solemnized in New York to persons of the opposite sex (see Hernandez v Robles, 7 NY3d 338, 357 [2006]) and stated that any revision of the statute specifying who can be validly married here "rests with our elected representatives" (id. at 379), it did not hold that same-sex marriages solemnized elsewhere would not be defined as marriages here, and it observed that the Legislature could rationally choose to permit same-sex couples to marry in New York (see id. at 358-359, 365). In addition, we note that the Supreme Courts of our neighboring states of Connecticut and Massachusetts have defined marriage in their states to include the marriage of same-sex couples (see Kerrigan v Commissioner of Pub. Health, 289 Conn 135, 957 A2d 407 [2008]; Goodridge v Department of Pub.

Health, 440 Mass 309, 798 NE2d 941 [2003]). Thus, regardless of how we define marriage in New York, we must apply the marriage recognition rule to determine whether we will recognize same-sex out-of-state marriages for the purpose of according their parties spousal benefits.

Plaintiffs argue in the alternative that such marriages fall within one of the rule's two exceptions. Clearly, however, the rule's first exception is inapplicable because no New York statute expressly precludes recognition of a same-sex marriage solemnized elsewhere. While the Court of Appeals has held that the provisions of the Domestic Relations Law limit marriages solemnized in New York to opposite-sex couples (see Hernandez v Robles, 7 NY3d at 357), the Court did not go further and read those statutes as invalidating such marriages solemnized in other jurisdictions.

As for the second exception precluding recognition of an incestuous or polygamous marriage, we note that an out-of-state same-sex marriage would not fall within that preclusion unless the same-sex spouses were closely related or were more than two in number, situations not under consideration here. Nonetheless, since this exception is rooted in the idea that some marriages are abhorrent to New York public policy (see Villafana v Villafana, 275 App Div 810, 811 [1949]; Godfrey v Spano, 15 Misc 3d 809, 812-813 [2007], affd ___ AD3d ___, 2008 NY Slip Op 10584 [2008]; Matter of Incuria v Incuria, 155 Misc at 759; People v Kay, 141 Misc 574, 578 [1931]; see also Cunningham v Cunningham, 206 NY at 349; Langan v St. Vincent's Hosp. of N.Y., 25 AD3d 90, 101 [2005] [Fisher, J., dissenting], appeal dismissed 6 NY2d 890 [2006]; Matter of Bronislawa K. v Tadeusz K., 90 Misc 2d 183, 185 [1977]), we must consider plaintiffs' argument that same-sex marriages should come within this exception because they are as abhorrent to public policy as incest and polygamy. New York's public policy, however, cannot be said to abhor the recognition of out-of-state same-sex marriages.

The Court of Appeals has defined New York's "public policy" as "'the law of the [s]tate, whether found in the Constitution, the statutes or judicial records'" (Mertz v Mertz, 271 NY 466, 472 [1936], quoting People v Hawkins, 157 NY 1, 12 [1898]; see

Matter of Rhinelander, 290 NY 31, 36 [1943]). Unlike a majority of the states, and despite having had the opportunity to do so (see e.g. 2007 NY Assembly Bill A4978), New York has not taken the controversial step of enacting legislation to deny full faith and credit to out-of-state same-sex marriages as permitted under the federal Defense of Marriage Act (see 28 USC § 1738C). In addition, although the NY Constitution does not compel recognition of same-sex marriages solemnized in New York (see Hernandez v Robles, 7 NY3d at 356), there is no New York court precedent holding that a New York statute or judicial decision precludes recognition of out-of-state same-sex marriages (compare Gonzalez v Green, 14 Misc 3d 641 [2006] [out-of-state same-sex marriage of New York residents in Massachusetts held to be invalid under the law of Massachusetts]; Funderburke v New York State Dept. of Civ. Serv., 13 Misc 3d 284 [2006], order vacated, appeal dismissed 49 AD3d 809 [2008]). To the contrary, several courts have recognized such marriages (see Martinez v County of Monroe, 50 AD3d 189 [2008], supra; C.M. v C.C., 21 Misc 3d 926 [2008]; Golden v Paterson, NYLJ, Sept. 8, 2008, at 19, col 3 [Sup Ct, Bronx County]; Beth R. v Donna M., 19 Misc 3d 724 [Sup Ct, New York County 2008]; Godfrey v Hevesi, NYLJ, Sept. 18, 2007, at 28, col 1 [Sup Ct, Albany County]; Godfrey v Spano, 15 Misc 3d 809 [2007], supra]). Furthermore, as the Court of Appeals has twice cautioned us, where the Domestic Relations Law does not expressly declare void a certain type of marriage validly solemnized outside of New York, the statute should not be extended by judicial construction (see Matter of May, 305 NY at 492; Van Voorhis v Brintnall, 86 NY at 33). Nor does our holding restrict the Legislature's ability to preclude recognition of out-of-state same-sex marriages in the future since the marriage recognition rule already admits of exceptions based upon statutory enactments. Accordingly, we conclude that the marriage recognition rule is applicable here and warrants dismissal of plaintiffs' first cause of action alleging an unlawful disbursement of public funds.[1]

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[1] While the concurrence suggests that we are "changing longstanding law," it fails to show why the marriage recognition rule should no longer be applied in New York and cites no contrary expression of public policy that would preclude

Plaintiffs also claim that health insurance benefits cannot be extended to the parties to a same-sex marriage because they are not "spouses" as normally defined under Civil Service Law article 11. Once an out-of-state same-sex marriage is recognized in New York, however, each of its parties would be "a party to a marriage" and, thus, a "legal spouse" who would be entitled to the benefits, rights and obligations of that status (Matter of Langan v State Farm Fire & Cas., 48 AD3d 76, 78 [2007]). The cases cited by plaintiffs in support of a contrary conclusion are readily distinguishable because they do not involve marriages and do not consider whether out-of-state same-sex marriages will be recognized in New York (see id.; Langan v St. Vincent's Hosp. of N.Y., 25 AD3d 90 [2005], supra; Matter of Valentine v American Airlines, 17 AD3d 38 [2005], supra; Matter of Cooper, 187 AD2d 128 [1993], lv dismissed 82 NY2d 801 [1993]).

To the extent that plaintiffs claim that the Department violated the separation of powers doctrine by usurping the Legislature's authority, we are satisfied that the Department did not "'go beyond stated legislative policy and prescribe a remedial device not embraced by the policy'" (Matter of Citizens For An Orderly Energy Policy v Cuomo, 78 NY2d 398, 410 [1991], quoting Matter of Broidrick v Lindsay, 39 NY2d 641, 645-646 [1976]). Rather, the Department's recognition of same-sex spouses falls squarely within the scope of the policy expressed in Civil Service Law §§ 161 and 164 to provide benefits to the spouses and dependent children of state employees. Moreover, in recognizing those marriages, the Department has not usurped the

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recognition of out-of-state same-sex marriages under that rule. We also have reservations about the breadth of discretion that the concurrence attributes to defendants in order to find an alternate basis to uphold their determination here. We have previously observed that, absent a legislative redefinition, the term "legal spouse" could not reasonably be interpreted to include same-sex partners (see Matter of Langan v State Farm Fire & Cas., 48 AD3d 76, 79 [2007]; Matter of Valentine v American Airlines, 17 AD3d 38, 40-41 [2005]). Thus, to do what the concurrence suggests would improperly intrude into the Legislature's domain.

Legislature's power to subsequently determine by positive legislation that out-of-state same-sex marriages cannot be recognized in New York. We further find no merit in plaintiffs' alternate claim that the Department violated NY Constitution, article VII, § 8 (1) by using public funds to aid a former Governor's personal goal of creating civil marriage equality in New York. Inasmuch as the Department's policy furthers a valid governmental purpose to benefit public employees, it cannot fairly be said that it is invalid as promoting a private undertaking (cf. Matter of Schulz v State of New York, 86 NY2d 225, 235 [1995]).

Finally, the determination to recognize same-sex marriages is not invalid for the Department's failure to comply with the formal rule-making procedures of the State Administrative Procedure Act because the determination is an interpretative statement that is merely explanatory (see State Administrative Procedure Act § 102 [2] [b] [iv]; Cubas v Martinez, 8 NY3d 611, 621 [2007]; Matter of Elcor Health Servs. v Novello, 100 NY2d 273, 279 [2003]; Matter of HMI Mech. Sys. v McGowan, 277 AD2d 657, 659 [2000], lv denied 96 NY2d 705 [2001]; Matter of Abreu v Coughlin, 161 AD2d 844, 845 [1990]). The Department's expansion of the definition of the term "spouse" is a reasonable interpretation of existing Department regulations that define the term "dependent" as "includ[ing] the spouse of an employee or retired employee" (4 NYCRR 73.1 [h]).

Peters and Kane, JJ., concur.

Lahtinen, J. (concurring).

We respectfully concur in the result, but upon a much narrower ground.

Action taken by the state pertaining to its own employees is different from changing longstanding law that affects all of the state's citizens. The Legislature has vested the President of the Civil Service Commission with broad discretion in defining, for purposes of health insurance coverage for state employees, the terms spouse and dependent children (see Civil

Service Law § 164; Slattery v City of New York, 179 Misc 2d 740, 754 [1999], mod 266 AD2d 24 [1999], appeal dismissed 94 NY2d 897 [2000], lv dismissed and denied 95 NY2d 823 [2000]; cf. Matter of Police Assn. of City of Mount Vernon v New York State Pub. Empl. Relations Bd., 126 AD2d 824, 825-826 [1987]). "[T]he Commission's interpretation of its regulations is entitled to deference" (Matter of Kirmayer v New York State Dept. of Civ. Serv., 24 AD3d 850, 851 [2005]). State employees have been entitled for more than a decade to include coverage for a same-sex partner under the state's health insurance plan as a domestic partner (see generally Fisher, Cuomo Decides to Extend Domestic-Partner Benefits, New York Times, June 29, 1994, section 3, col 5, at 4). The practical effect of the determination here is to give an out-of-state document formalizing a same-sex relationship the same weight as the affidavit required to receive such benefits as a domestic partner, which is a narrow accommodation to state employees in an area where the Legislature has specifically accorded the Commission broad discretion.

The Legislature is the governmental body best able to comprehensively and cogently address the issues in this emerging field (see generally Hernandez v Robles, 7 NY3d 338, 361, 366 [2006]).[1] In deference to such body and in light of the potentially expansive implications of the majority's approach,[2] we would decide this case narrowly, as this record permits (cf. Godfrey v Spano, ___ AD3d ___, 2008 NY Slip Op 10584 [2008]).

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[1] Nearly every other state has addressed this issue by legislative enactment or public referendum (see National Conference of State Legislatures, Same Sex Marriage, Civil Unions and Domestic Partnerships, http://www.ncsl.org/programs/cyf/samesex.htm [accessed Dec. 2, 2008]).

[2] See e.g. 2008 NY St Ins Dept Circular Letter No. 27 (Nov. 21, 2008 [relying on the similar analysis employed in the Fourth Department's decision in Martinez v County of Monroe (50 AD3d 189 [2008], lv dismissed 10 NY3d 856 [2008])] to direct insurance companies doing business in New York to recognize out of state same-sex marriages or face unfair practice and/or discrimination charges).

Malone Jr., J., concurs.

ORDERED that the order is affirmed, without costs.

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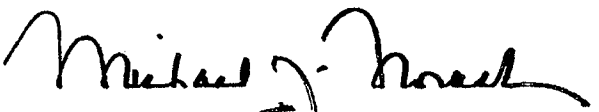

Michael J. Novack
Clerk of the Court

EXHIBIT D

2/4/2009 N.Y.L.J. 34, (col. 2)

New York Law Journal
Volume 241

Wednesday, February 4, 2009

Court Decisions
Decisions
First Judicial Department
New York County
Surrogate's Court

ESTATE OF H. KENNETH **RANFTLE,** DECEASED (4585/08)

Surrogate Glen

ESTATE OF H. KENNETH RANFTLE, Deceased (4585/08)--In this proceeding for the probate of the will of H. Kenneth Ranftle, the court must determine the identity of decedent's distributees entitled to receive process under SCPA 1403 (1)(a), in the following circumstances.
The decedent married his same-sex partner, J. Craig Leiby, in Montreal, Province of Quebec, Canada on June 7, 2008. He died on November 1, 2008 survived by Mr. Leiby and by three siblings. The decedent had no children. His parents predeceased him, as did another sibling, who also left no children.
Marriages valid where solemnized have long been recognized in New York; exceptions exist only for marriages affirmatively prohibited by New York law, or proscribed by 'natural law' (Matter of May, 305 NY 486 [1953]). [FN1] As decedent's marriage was valid under the laws of Canada, where performed, and falls into neither exception to the general rule, the marriage is entitled to recognition in New York (Martinez v. County of Monroe, 50 AD3d 189 [4th Dept 2008]) (recognizing Canadian same-sex marriage for purposes of entitlement to spousal health care benefits).
Accordingly, Mr. Leiby is decedent's surviving spouse and sole distributee (EPTL 4-1.1). Citation in this probate proceeding need not issue under SCPA 1403 (1)(a) or any other provision of law to any other person as distributee.
Probate decree signed.

FN1. The 'natural law' exception is generally limited to cases of incest and polygamy or where the marriage violates the state's public policy (Martinez v. County of Monroe, 50 AD3d at 191). It is noted that Governor David Paterson has instructed New York state agencies to recognize same-sex marriages that were valid where performed, through an Executive Directive dated May 14, 2008 (see Stashenko, Paterson Defends Recognition of Gay Marriages Elsewhere, NYLJ, May 30, 2008 at 1, col 4).
2/4/2009 NYLJ 34, (col. 2)
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EXHIBIT E

Family Court, Monroe County, New York.
In the Matter of the Petition for Certification as a Qualified Adoptive Parent DONNA S., Petitioner.
Jan. 6, 2009.

Background: Same-sex spouse filed petition requesting that she be certified as a qualified adoptive parent for the purpose of accepting placement of a child for a private placement adoption.

Holding: The Family Court, Monroe County, Joan S. Kohout, J., held that spouse would not be required to be pre-certified as qualified adoptive parent.
Petition granted.

West Headnotes

Adoption 17 ⚿4

17 Adoption
17k4 k. Persons Who May Adopt Others. Most Cited Cases
Same-sex spouse, as legally recognized spouse of biological mother, would be considered step-parent to biological mother's artificially inseminated child after child's birth, and therefore would not be required to be pre-certified as a qualified adoptive parent for the purpose of adoption. McKinney's DRL § 115-d(8).

Gregory A. Franklin, Esq., Daniel M. DeLaus, Jr., County Attorney, Rochester, Attorney for Petitioner.

JOAN S. KOHOUT, J.
***1** A petition was filed on December 3, 2008 by Donna R.S. requesting that she be certified as a qualified adoptive parent pursuant to Domestic Relations Law § 115-d for the purpose of accepting placement of a child for a private placement adoption. The petition does not identify a particular adoptive child.

Attached to Ms. S.'s petition is a copy of a marriage certificate showing that on July 4, 2007 Ms. S. was married to Lisa P. in Niagara-on-the-Lake, Ontario, Canada. The court has also received a favorable pre-adoption homestudy prepared by Karen Rabish, LCSW-R. In the homestudy, Ms. Rabish states: "Donna's motivation for this [pre-certification] is to legally adopt her partner Lisa's baby who is due to be born in March 2009."Ms. Rabish reports that the baby was conceived through intrauterine insemination.

While the court finds that the petition, attachments and the homestudy support a determination that Ms. S. is well qualified to be pre-certified to receive an adoptive child, it is the court's view that pre-certification is not required when the petitioner is married to the mother of a child conceived by artificial insemination.

Although New York State does not currently permit same sex couples to marry, recently developing case law has held that the marriage of same sex couples legally married in other jurisdictions must be recognized by New York (*seeMartinez v. County of Monroe,* 50 A.D.3d 189, 850 N.Y.S.2d 740 [4th Dept. 2008]*leave to appeal dismissed*10 N.Y.3d 856, 859 N.Y.S.2d 617, 889 N.E.2d 496 [2008];*see alsoC.M. v. C.C.,* 21 Misc.3d 926, 867 N.Y.S.2d 884 [Sup. Ct. N.Y. County 2008]). Additionally, New York State agencies have been directed by Governor David Paterson in a memorandum dated May 14, 2008 to apply statutes and regulations in a gender neutral manner to same sex parties validly married in another jurisdiction (see e.g. 2008 Ops. Gen. Counsel N.Y.S. Insur. Dept. 11-21-2008 stating that "[s]ame-sex parties to marriages validly performed outside of New York must be treated as spouses' for purposes of the New York Insurance Law, including all provisions governing health insurance").

Since Ms. S. is the spouse of Ms. P., she will at the very least be considered a step-parent to Ms. P.'s child after the child's birth. Step-parents are not required to be pre-certified as qualified adoptive parents for the purpose of adopting their spouse's child. Domestic Relations Law § 115-d[8] eliminates the pre-certification requirement as long as the proposed adoptive child has lived with the step-parent and the birth parent for at least one year prior to the granting of an adoption. The waiting period presumably may be waived upon a proper application to the court. Moreover, pursuant to Domestic Relations Law § 73 a child born to a married woman by artificial insemination is deemed the legal child of the husband if both spouses execute a consent to that effect. Given the holding in *Martinez,* it would seem that by the simple

execution of a consent, Ms. S. could become the baby's legal parent without the necessity of an adoption.

***2** Nonetheless, the petition for pre-certification and attachments are legally sufficient and the homestudy describes in detail the excellent qualifications of Ms. S. to be a parent. Therefore, the petition is granted and Ms. S. is approved as a qualified parent pursuant to Domestic Relations Law § 115-d. This order is effective until May 6, 2010.

This shall constitute the order and decision of the court.

N.Y.Fam.Ct.,2009.
In re Donna S.
--- N.Y.S.2d ----, 2009 WL 69341 (N.Y.Fam.Ct.), 2009 N.Y. Slip Op. 29009

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EXHIBIT F

STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
NEW YORK, NEW YORK 10004

David A. Paterson
Governor

Eric R. Dinallo
Superintendent

Circular Letter No. 27 (2008)
November 21, 2008

TO: All Persons, Firms, Associations, or Other Entities Licensed, Authorized, Registered, Certified, or Approved Pursuant to the New York Insurance Law, and all Health Maintenance Organizations Holding a Certificate of Authority Pursuant to Article 44 of the Public Health Law (collectively, "Licensees")

RE: Recognition in New York of Marriages Between Same-Sex Partners Legally Performed in Other Jurisdictions

STATUTORY REFERENCES: N.Y. Ins. Law Article 23 and §§ 2402, 2403, and 4224

On February 1, 2008, the Supreme Court of the State of New York, Appellate Division, Fourth Department held in Martinez v. Monroe Community College, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't), lv. to appeal denied, 10 N.Y.3d 856 (2008), that plaintiff Patricia Martinez's marriage to her same-sex partner was entitled to recognition in New York State as a matter of comity. The case arose after Ms. Martinez's employer denied Ms. Martinez's application to obtain health care benefits for her same-sex spouse, whom she had married in Canada, even though the employer provided such benefits to the opposite-sex spouses of its employees.

Shortly thereafter, the Insurance Department received inquiries from both consumers and industry seeking guidance as to how insurance companies, in the wake of Martinez, should treat same-sex couples in marriages legally performed outside the State of New York.

On May 6, 2008, the New York Court of Appeals – the State's highest court – dismissed Monroe County's application for leave to appeal. In the absence of guidance from the Court of Appeals or the other Departments of the Appellate Division, Martinez therefore is controlling precedent for all trial courts in the State. See, e.g., Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 664 (2d Dep't 1984); see also People v. Turner, 5 N.Y.3d 476, 482 (2005) (following Mountain View); Tzolis v. Wolff, 39 A.D.3d 138, 142 (1st Dep't 2007).

In a legal opinion issued on November 21, 2008 in response to an inquiry (the "Opinion"), the Department's Office of General Counsel ("OGC") concluded that same-sex spouses to marriages legally performed outside of New York must be treated as spouses for purposes of the New York Insurance Law, including all provisions governing health insurance. The Opinion finds that in light of the controlling authority of Martinez and several opinions from lower New York courts consistent with that holding, marriages between same-sex couples that

are valid when entered into outside of New York must be recognized in this State for purposes of interpreting the Insurance Law. Thus, where an employer offers group health insurance to employees and their spouses, the same-sex spouse of a New York employee who enters into a marriage legally performed outside the State is entitled to health insurance coverage to the same extent as any opposite-sex spouse. Moreover, the Opinion notes that its analyses and conclusions are applicable to all other kinds of insurance, too.

Accordingly, the Department expects all licensees to comply with Martinez and the Opinion by recognizing the marriages of same-sex couples legally performed in other jurisdictions, which includes providing all legally married couples with the same rights and benefits, regardless of the sex of the spouses. Further, an insurer's refusal to extend health insurance or other coverage on an equal basis to same-sex and opposite-sex spouses may constitute an unfair act or practice under Insurance Law §§ 2402 and 2403, and/or unfair discrimination under Insurance Law Article 23 and § 4224. In addition, an employer's failure to treat same-sex and opposite-sex spouses equally for purposes of health insurance coverage or otherwise may violate New York Executive Law § 296(1)(a), which also targets unlawful discrimination. See Martinez, 850 N.Y.S.2d at 743. The Department fully expects that, to the extent necessary, licensees will file new policy forms or policy form amendments with the Department to ensure compliance with the law, as expressed in this Circular Letter, controlling judicial precedent, and the Opinion.

The Department's construction of the Insurance Law also is consistent with a memorandum dated May 14, 2008 from the Counsel to the Governor, which asked all State agencies to review their policy statements, regulations, and statutes to ensure that terms such as "spouse," "husband," and "wife" are construed in a manner, consonant with Martinez, that encompasses marriages of same-sex couples legally performed outside the State, unless barred by some other provision of law. In a decision dated September 2, 2008, the Supreme Court of the State of New York, Bronx County, upheld the legal validity of that memorandum. See Golden v. Paterson, Index No. 260148/2008 (Sup. Ct. N.Y. Cty. Sept. 2, 2008).

Any general questions regarding the content of this Circular Letter may be directed to Deputy Superintendent and General Counsel Robert H. Easton at (212) 480-5282 or Deputy General Counsel Martha A. Lees at (212) 480-2290. For specific questions about policy form submissions, please contact the following Insurance Department personnel:

Health Bureau:	Thomas Fusco at (716) 847-7618 or tfusco@ins.state.ny.us
	Tobias Len at (518) 486-7815 or tlen@ins.state.ny.us
Life Bureau:	Peter Dumar at (518) 474-4552 or pdumar@ins.state.ny.us
Property Bureau:	Gerald Scattaglia at (212) 480-5583 or gscattag@ins.state.ny.us

Sincerely,

Robert H. Easton
Deputy Superintendent and General Counsel