

THE COURT OF APPEALS'S DECISION IN *GODFREY V.*
SPANO: A TROUBLING EXERCISE OF INDECISION

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The institution of marriage reaches into nearly every aspect of everyday life and, as a result, is of tremendous social, economic and legal importance. In addition to its role at the center of the way we structure our families, marriage also brings with it a great number of legal protections that reflect a married couple's public commitment to building a life together. These protections are memorialized in laws about property, taxes, medical decision-making, childrearing, and even death and dying.

In New York, there are over one thousand legal rights and responsibilities affected by one's marital status, including those most significantly that affect couples in a moment of crisis.¹ Although there have been efforts by the governor, the legislature, and various local governments to extend certain of those rights to same-sex couples in committed relationships, there remain many hundreds of rights that are still being denied.² Unfortunately,

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¹ THE EMPIRE STATE PRIDE AGENDA FOUNDATION & THE N.Y. CITY BAR ASS'N, 1,324 REASONS FOR MARRIAGE EQUALITY IN NEW YORK STATE 3 (2007), <http://www.prideagenda.org/tabid/73/Default.aspx>.

² For example, a child born to a married couple is deemed the legitimate child of the husband and wife for all purposes if the child was conceived in a physician's office through artificial insemination by a third party, N.Y. DOM REL. LAW § 73 (McKinney 2004), and a spouse can make decisions about donating the organs of her deceased spouse, N.Y. COMP. CODES R. & REGS. tit. 10, § 405.25 (2004). *Id.* For a full list of rights denied to unmarried same-sex couples in New York State see *supra* note *.

following the Court of Appeals' 2006 decision in *Hernandez v. Robles*³ which held that the New York State Constitution does not guarantee a right to civil marriage for same-sex couples as a matter of either due process or equal protection,⁴ and the recent defeat in the New York State Senate of a bill that would have legalized same-sex marriage,⁵ full civil marriage is still far from a reality for the many same-sex couples living in New York.

Of course, neighboring countries and states, like Massachusetts and Connecticut, have extended civil marriage to same-sex couples. Today, seven countries, five states, and the District of Columbia permit same-sex couples to enter into a valid civil marriage.⁶ Under well-settled principles of comity, and New York's longstanding common law "marriage recognition rule," same-sex couples married in those jurisdictions should be entitled to the absolute recognition

³ 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006).

⁴ *Id.* at 356, 855 N.E.2d at 1, 821 N.Y.S.2d at 774.

⁵ See A.40003, 232nd Gen. Assem., 20th Extraordinary Sess. (N.Y. Dec. 2, 2009), available at <http://open.nysenate.gov/openleg/bill/A40003>. The bill is entitled: "An act to amend the domestic relations law, in relation to the ability to marry."

⁶ Massachusetts, Iowa, Connecticut, Vermont, and New Hampshire all permit same-sex couples to marry. See An Act Relative to Civil Marriage & Civil Unions, N.H. REV. STAT. ANN. §§ 457:1–3 (2009) (recognizing marriage effective Jan. 1, 2010); An Act to Protect Religious Freedom & Recognize Equality in Civil Marriage, 2009 Vt. Acts & Resolves 33 (recognizing same-sex marriage effective September 1, 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009) (striking down same-sex marriage ban); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (striking down same-sex marriage ban); see also *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008) (striking down same-sex marriage ban), superseded by *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009) (upholding Proposition 8, which prohibits marriages by same-sex couples, but holding prior marriages remain valid). The city council and Mayor of Washington D.C. have approved a bill that would permit same-sex couples to marry in the nation's capitol. See Tim Craig, Nikita Stewart & Michelle Boorstein, *Washington Mayor Fenty Signs Same-Sex Marriage Bill*, WASH. POST, Dec. 19, 2009, at B1. Seven countries also permit same-sex marriage. See Article 143, 2003, B.S., book I, tit. V, ch. 1 (Belg.) (recognizing that two persons of different sexes or of the same sex may contract marriage); Civil Marriage Act, 2005, S.C., ch. 33, §§ 2, 4 (Can.) (extending marriage to same-sex couples); Act to Open Marriage, 2001, Stb., book I, tit. IV (Neth.) (recognizing that a marriage can be contracted by two people of different or the same sex); Civil Code on the Right to Marry, C.C., 2005, art. 44 (Spain) (recognizing that matrimony shall have the same requisites and effects regardless of whether the persons involved are of the same or different sex); *Minister of Home Affairs v. Fourie* 2005 (1) SA 1 (CC) at 102 (S. Afr.) (recognizing same-sex marriages); Norge, *Norway Introduces New Marriage Act*, June 25, 2008, http://www.norway.ie/News_and_events/Events/ekteskapslov (recognizing that "two persons of the opposite sex or the same sex may enter into marriage"); Christine Demstader, *Sweden Says "I Do" to Same-Sex Marriage*, SWEDEN.SE, May 1, 2009, <http://www.sweden.se/eng/Home/Lifestyle/Reading/Sweden-says-I-do-to-same-sex-marriage/> (describing new laws recognizing marriages). Israel also recognizes foreign marriages of same-sex couples, even though same-sex couples are not permitted to marry domestically. Yuval Yoaz, *In Precedent-Setting Ruling Court Says State Must Recognize Gay Marriage*, HAARETZ, Nov. 21, 2006, <http://www.haaretz.com/hasen/spages/790724.html>.

of their marriages in New York. Indeed, this conclusion has been reached by nearly every lower court in New York that has considered the issue, as well as by New York's governor and the past two attorneys general.

Recently, in *Godfrey v. Spano*,⁷ and its companion case, *Lewis v. Department of Civil Service*,⁸ the issue of marriage recognition for same-sex couples was presented to the Court of Appeals. The case provided the opportunity for the Court to extricate same-sex couples in New York married in other states from the "legal limbo" in which they have been living by clarifying that valid out-of-state marriages of same-sex couples are recognized under New York law.⁹ Disappointingly, rather than addressing the question head-on, the Court of Appeals "ducked" the issue, calling for the legislature to resolve the question instead of the courts.¹⁰ But the Court's ruling (or lack of ruling) flatly contradicted the centuries-old common law rule that has been held to apply precisely in the situation present here—namely, when the legislature has been silent on the question of whether a particular type of marriage (here, a marriage between a same-sex couple) that cannot be performed in New York should nevertheless be recognized as valid in New York.¹¹

This article discusses the effect of the Court of Appeals' decision and argues that the Court unnecessarily left ambiguity in the law regarding the recognition of marriages between same-sex couples where common law principles of comity compel recognition. Part I describes the long standing marriage recognition rule and its application to marriages of same-sex couples. Part II describes the factual and legal history of the *Lewis* and *Godfrey* cases. Part III discusses the Court of Appeals's decision and its effect on married same-sex couples. Although the majority decision in *Lewis* and *Godfrey* does not resolve definitively the issue of marriage recognition, this article concludes that it provides no basis for New York courts to depart from their consistent holdings, including the holdings of the Third and Fourth Departments—namely that the marriage recognition rule compels recognition of out-of-state marriages between same-sex couples.

⁷ 57 A.D.3d 941, 871 N.Y.S.2d 296 (App. Div. 2d Dep't 2008), *aff'd*, 13 N.Y.3d 358 (2009).

⁸ 60 A.D.3d 216, 872 N.Y.S.2d 578 (App. Div. 3d Dep't 2009), *aff'd sub nom.*, *Godfrey v. Spano*, 13 N.Y.3d 358 (2009).

⁹ *Godfrey*, 13 N.Y.3d at 367.

¹⁰ *Id.* at 377.

¹¹ *See id.* (Ciparick, J., concurring) (noting the applicability of the common law rule).

I. THE MARRIAGE RECOGNITION RULE

Going all the way back well into the nineteenth century, the black letter principle that New York “recognizes as valid a marriage considered valid in the place where celebrated” has been “so well settled . . . as to become a maxim in the law.”¹² This “marriage recognition rule,” as it came to be known, was developed under the common law to determine the legal effect in New York of a marriage that is validly performed outside of the state, but that could not be validly performed under the laws of New York. The common law rule provides that a marriage validly entered into outside of New York will be recognized unless it is subject to one of two rarely applied exceptions: (1) recognition of the out-of-state marriage is expressly prohibited by a New York statute; or (2) the marriage is otherwise “offensive,” “abhorrent,” or “obnoxious” to New York public policy.¹³ Applying this rule, New York courts have recognized the following types of marriages then or now not permitted in New York: marriages of divorced adulterers and new spouses,¹⁴ incestuous relationships,¹⁵ common law marriages,¹⁶ proxy marriages,¹⁷ and marriages where the wife was as young as fifteen.¹⁸

Over the past decade, since marriage between same-sex couples has become possible in other countries and states, the issue of New York’s recognition of valid out-of-state marriages of same-sex couples has come to the fore. Pursuant to the well-settled marriage recognition rule, there can be little doubt that out-of-state marriages of same-sex couples do not fall under either of the two established exceptions to the marriage recognition rule: there is no statute prohibiting the recognition in New York of marriages of same-sex couples and such marriages are certainly not “offensive”

¹² See *Van Voorhis v. Brintnall*, 86 N.Y. 18, 25, 26 (1881).

¹³ *In re Estate of May*, 305 N.Y. 486, 491–492, 114 N.E.2d 4, 6–7 (1953); see also *Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 7 N.Y.3d 624, 628–29, 859 N.E.2d 498, 500–501, 825 N.Y.S.2d 692, 694–95 (2006).

¹⁴ See *Moore v. Hegeman*, 92 N.Y. 521 (1883); *Thorp v. Thorp*, 90 N.Y. 602 (1882); *Van Voorhis*, 86 N.Y. 18.

¹⁵ See *In re May*, 305 N.Y. 486, 114 N.E.2d 4.

¹⁶ See *Mott v. Duncan Petroleum Transp.*, 51 N.Y.2d 289, 414 N.E.2d 657, 434 N.Y.S.2d 155 (1980); *Farber v. U.S. Trucking Corp.*, 26 N.Y.2d 44, 256 N.E.2d 521, 308 N.Y.S.2d 358 (1970).

¹⁷ See *Fernandes v. Fernandes*, 275 A.D. 777, 87 N.Y.S.2d 707 (App. Div. 2d Dep’t 1949); *In re Will of Valente*, 188 N.Y.S.2d 732, 18 Misc.2d 701 (Sur. Ct. Kings County 1959).

¹⁸ See *Hilliard v. Hilliard*, 209 N.Y.S.2d 132, 24 Misc.2d 861 (Sup. Ct. Greene County 1960); *Donohue v. Donohue*, 116 N.Y.S. 241, 63 Misc. 111 (Sup. Ct. Erie County 1909).

or “abhorrent” to New York’s public policy.

Indeed, when considering this precise issue in 2004, the New York Attorney General opined that “New York law presumptively requires that parties [to marriages between same-sex couples from other jurisdictions] must be treated as spouses for purposes of New York law.”¹⁹ And nearly every court in New York to consider the validity of an out-of-state marriage of a same-sex couple under common law principles has recognized such marriages as valid in New York.²⁰ For example, the issue first reached the appellate level in the case *Martinez v. County of Monroe*.²¹ There, the Fourth Department held that the marriage recognition rule applies to marriages between same-sex couples and dictates the recognition of such marriages.²² This is hardly surprising given the rule’s longevity and establishment as well-settled, in addition to the widespread legal, political, and cultural consensus in New York according rights and respect to same-sex couples and their families.²³

¹⁹ Informal Op. N.Y. Att’y Gen. 2004-1 (Mar. 3, 2004), *available at* http://www.ag.ny.gov/bureaus/appeals_opinions/opinions/2004/informal/2004_1.pdf.

²⁰ *Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (App. Div. 4th Dep’t 2008) (recognizing out-of-state marriages of same-sex couples for purposes of benefits); *In re Donna S.*, 871 N.Y.S.2d 883, 23 Misc.3d 338 (Fam. Ct. Monroe County 2009) (noting New York’s recognition of out-of-state marriages of same-sex couples in the context of an adoption proceeding); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 25 Misc.3d 567 (Sur. Ct. N.Y. County 2009) (noting New York’s recognition of same-sex couple’s marriage in the Netherlands); *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 19 Misc.3d 724 (Sup. Ct. N.Y. County 2008) (recognizing a Canadian marriage of two women for the purpose of granting divorce); *C.M. v. C.C.*, 867 N.Y.S.2d 884, 21 Misc.3d 926 (Sup. Ct. N.Y. County 2008) (recognizing a Massachusetts marriage of two women for the purpose of granting divorce); *Golden v. Paterson*, 877 N.Y.S.2d 822, 23 Misc.3d 641 (Sup. Ct. Bronx County 2008) (upholding governor’s directive to recognize out-of-state marriages of same-sex couples); *Godfrey v. DiNapoli*, 866 N.Y.S.2d 844, 22 Misc.3d 249 (Sup. Ct. Albany County 2008) (upholding state comptroller’s recognition of Canadian marriage of a same-sex couple).

²¹ 50 A.D.3d 189, 850 N.Y.S.2d 740.

²² *Id.* at 194, 850 N.Y.S.2d at 744.

²³ More specifically, a statutory prohibition on the recognition of marriages of same-sex couples performed in other states has never been reported out of committee in New York. *See, e.g.*, A.4978/S.2800, 2007 Leg., 230th Reg. Sess. (N.Y. 2007). Moreover, the New York State Assembly has four times passed a bill allowing same-sex marriages in New York. *See, e.g.*, A.8590, 2007 Leg., 230th Reg. Sess. (N.Y. 2007). At least ten municipalities across the state recognize out-of-state same-sex marriages, including Albany, Buffalo, and New York City. *See* Statement by Mayor Gerald D. Jennings on Same Sex Marriage in the City of Albany (Oct. 1, 2005), <http://www.prideagenda.org/tabid/71/Default.aspx>; Statement of Anthony M. Masiello, Mayor of Buffalo, Mayoral Statement on Same Sex Marriage in the City of Buffalo, New York (Mar. 5, 2004), <http://www.prideagenda.org/tabid/71/Default.aspx>; Letter from Anthony W. Crowell, Special Counsel to the Mayor of the City of New York, to Alan Van Capelle, Executive Director, Empire State Pride Agenda (Apr. 6, 2005), <http://www.prideagenda.org/tabid/71/Default.aspx>; *see also* Brief of the New York Civil Liberties Union et al., *supra* note *, at 13–20, 27–32.

II. *LEWIS AND GODFREY CASES*

On March 31, 2009, the New York Court of Appeals granted leave to appeal in two companion cases that presented the question of the applicability of the marriage recognition rule to same-sex couples.²⁴

A. *Lower Court Proceedings*

Lewis involved a 2007 policy memorandum, issued by the President of the New York State Civil Service Commission and Commissioner of the New York State Department of Civil Services, directing that all New York State agencies that participate in the New York State Health Insurance Program must recognize valid out-of-state same-sex marriages for the purpose of providing health insurance and other benefits. Kenneth J. Lewis and other New York State taxpayers represented by the Alliance Defense Fund, an Arizona-based religious advocacy group, challenged the policy memorandum in Supreme Court, Albany County.²⁵ Plaintiffs alleged that the New York State Department of Civil Service violated State Finance Law section 123-b and separation of powers principles by issuing the policy memorandum, thereby illegally disbursing state funds and usurping the role of the legislature to define the institution of marriage.²⁶ Peri Rainbow and Tamela Sloan, a lesbian couple who lived in New York and were married in Canada in 2005 intervened and, with defendants, moved to dismiss the complaint.

The plaintiffs cross-moved for summary judgment. The trial court denied the cross-motion for summary judgment, and granted summary judgment to the defendants in March 2008.²⁷ The trial court's decision was affirmed by the Appellate Division, Third Department in January 2009.²⁸ A majority of the appellate division upheld the policy memorandum under the marriage recognition rule and further held that the memorandum was a reasonable

²⁴ *Godfrey v. Spano*, 12 N.Y.3d 705 (2009); *Lewis v. N.Y.S. Dep't of Civil Serv.*, 12 N.Y.3d 705, 906 N.E.2d 1086, 879 N.Y.S.2d 52 (2009).

²⁵ *See Lewis v. N.Y.S. Dep't of Civil Serv.*, 60 A.D.3d 216, 217–18, 872 N.Y.S.2d, 578, 581–82 (App. Div. 3d Dep't 2009).

²⁶ *Lewis* initially filed but later abandoned claims based on article VII, § 8 of the New York State Constitution, § 202 of the State Administrative Procedure Act, as well as article IV, § 8 of the New York State Constitution before they were considered by the Court of Appeals. *See id.* at 223–24, 872 N.Y.S.2d at 585.

²⁷ *Id.* at 217, 872 N.Y.S.2d at 578. The appeal was taken from Justice McNamara's order dismissing the complaint and granting summary judgment.

²⁸ *Id.*

interpretation of the word “spouse” under the statutory authority granted to the Department of Civil Services.²⁹

The *Godfrey* case similarly involved a 2006 executive order by Westchester County Executive Andrew J. Spano which directed that all Westchester County government agencies must recognize valid out-of-state marriages of same-sex couples in the same manner as all other marriages. This order was challenged in Supreme Court, Westchester County by Margaret Godfrey and other residents and taxpayers of Westchester County, who were also represented by the Alliance Defense Fund.³⁰ The plaintiffs claimed that Spano had illegally legislated in the area of marriage and domestic relations, in violation of General Municipal Law section 51.³¹ Michael Sabatino and Robert Voorheis, a same-sex couple living in Westchester who were married in Canada in 2003, and the state comptroller intervened and, with Spano, moved to dismiss the complaint. The supreme court granted the motion to dismiss on the grounds that no illegality had been shown because the marriage recognition rule required there to be recognition of the marriages.³² The Second Department unanimously affirmed, but on different grounds.³³ Specifically, the Second Department upheld the executive order on the ground that it did not constitute an unlawful expenditure,³⁴ but did not reach the question of whether the marriage recognition rule compelled recognition of the marriages at issue.³⁵

B. Proceedings at the Court of Appeals

At the Court of Appeals, the *Lewis* plaintiffs argued that if the marriage recognition rule were applied to same-sex couples, then the two established exceptions to the marriage recognition rule should apply and the marriages should not be recognized.³⁶ The plaintiffs argued that marriages of same-sex couples are somehow so “different” from other marriages that the long-standing marriage

²⁹ *Id.* at 223–24, 872 N.Y.S.2d at 585–86.

³⁰ *Godfrey v. Spano*, 836 N.Y.S.2d 813, 15 Misc.3d 809 (Sup. Ct. Westchester County 2007), *aff'd*, 57 A.D.3d 941, 871 N.Y.S.2d 296 (App. Div. 2d Dep’t 2008), *aff'd*, 13 N.Y.3d 358 (2009).

³¹ *Godfrey* also claimed that the order violated article IX, § 2(c) of the New York State Constitution and Municipal Home Rule Law § 10(1)(I), but abandoned this second cause of action before the case was heard by the Court of Appeals. *Id.* at 814, 15 Misc.3d at 811.

³² *Id.* at 818–19, 15 Misc.3d at 816–18.

³³ *Godfrey v. Spano*, 57 A.D.3d 941, 871 N.Y.S.2d 296 (App. Div. 2d Dep’t 2008).

³⁴ *Id.* at 943, 871 N.Y.S.2d at 298–99.

³⁵ *Id.* at 942–43, 871 N.Y.S.2d at 298.

³⁶ Brief of Plaintiffs-Appellants at 14–15, *Godfrey*, 13 N.Y.3d 358 (No. 16894/2006).

recognition rule should not apply.³⁷ Plaintiffs also argued, in other words, that the state's policy memorandum violated separation of powers principles because only the legislature, and not any executive body, can "change" the definition of marriage.³⁸ The plaintiffs in *Godfrey* likewise argued that comity principles do not apply because recognizing marriages between same-sex couples substantially conflicts with New York public policy.³⁹ The *Godfrey* plaintiffs also asserted that the recognition of such marriages would lead to an unlawful disbursement of public funds.⁴⁰

While the plaintiffs in *Lewis* and *Godfrey* did not contend that the *Hernandez* decision explicitly resolved the question of recognizing out-of-state same-sex marriages, they argued that *Hernandez* effectively controlled the Court's ruling by reflecting the strong public policy in New York against same-sex marriages and a determination that the legislature alone should make decisions regarding recognizing same-sex marriages.⁴¹

The state respondents—the Department of Civil Service in *Lewis* and the state comptroller in *Godfrey*—argued both that valid marriages of same-sex couples are entitled to recognition under the marriage recognition rule, and that the taxpayers failed to demonstrate that the challenged orders resulted in any unlawful disbursements of public funds.⁴² The married same-sex couples who were intervenors-respondents focused on the application of the marriage recognition rule, arguing that the rule clearly applied and neither of the two exceptions conceivably barred recognition of the marriages at issue.⁴³

C. Oral Argument

On October 13, 2009, the Court of Appeals heard oral argument.⁴⁴ Much of the argument was focused not on whether the marriage recognition rule compels recognition of otherwise valid marriages of same-sex couples, but on whether the Court of Appeals should even

³⁷ *E.g., id.* at 14 ("Comity does not extend to such an 'altogether different' foreign-created relation even if labeled 'marriage' by another jurisdiction.").

³⁸ *Id.* at 16.

³⁹ *Id.* at 4.

⁴⁰ *Id.* at 5.

⁴¹ *Id.* at 46–49.

⁴² Brief for State Respondents at 2–3, *Godfrey*, 13 N.Y.3d 358 (No. 16894/2006).

⁴³ Brief for Defendants-Intervenors-Respondents at 2, *Godfrey*, 13 N.Y.3d 358 (No. 16894/2006).

⁴⁴ Web Cast of Oral Argument, *Godfrey*, 13 N.Y.3d 358 (No. 16894/2006), available at <http://www.nycourts.gov/ctapps/Godfrey-Lewis.aspx>.

reach that question. Judge Graffeo, for example, expressed her concern that a broad marriage recognition ruling without any exception would affect private businesses and religious institutions.⁴⁵ Judge Smith also suggested that the Court of Appeals has a general preference for finding a narrow basis to rule rather than issuing a broad ruling with unforeseeable ramifications.⁴⁶ Chief Judge Lippman, on the other hand, was persistent in raising the question of whether the most “workable” resolution would be to settle the recognition issue broadly rather than let it play out on an agency-by-agency, county-by-county, case-by-case basis.⁴⁷

D. The Opinion

Ultimately, all of the judges agreed that the policy memorandum and county executive order were lawfully issued and uniformly rejected plaintiffs’ argument that the Court of Appeals’ prior decision in *Hernandez* controlled and compelled a finding that the marriages at issue were invalid in New York.⁴⁸ The Court split 4-3 in its analysis, however.⁴⁹

The majority opinion, authored by Judge Pigott,⁵⁰ held that the two executive orders at issue were lawful actions pursuant to statutory authority, and that the plaintiffs had failed to allege circumstances in which taxpayer funds were unlawfully expended.⁵¹ The majority found it “unnecessary to reach defendants’ argument that New York’s common-law marriage recognition rule is a proper basis for the challenged recognition of out-of-state same-sex marriages.”⁵² In a concurring opinion joined by Chief Judge Lippman and Judge Jones, Judge Ciparick agreed with the result reached by the majority, but stated that the orders “should be affirmed on the ground that same-sex marriages, valid where performed, are entitled to full legal recognition in New York under our State’s longstanding marriage recognition rule,” and found that the marriage recognition rule was “squarely presented” in the cases

⁴⁵ *Id.* at 0:56:35.

⁴⁶ *Id.* at 0:40:22.

⁴⁷ *Id.* 0:29:47, 0:35:42, 0:51:48, 0:59:20.

⁴⁸ *Godfrey v. Spano*, 13 N.Y.3d 358, 367–68, 368 n.2 (2009); *id.* at 377 (Ciparick, J., concurring).

⁴⁹ *Id.* at 381.

⁵⁰ *Id.* The majority opinion was joined by Judges Graffeo, Read, and Smith.

⁵¹ *Id.* at 373–77.

⁵² *Id.* at 377.

before the Court.⁵³

III. THE EFFECT OF THE COURT OF APPEALS'S OPINION

Although the *Godfrey* and *Lewis* decision produced a positive result for the specific same-sex couples who were parties in these cases, the majority opinion leaves unnecessary uncertainty in the law as to the rights and responsibilities of married same-sex couples. Such ambiguity is not only unnecessary as a legal matter, but has the troubling practical consequence of leaving the thousands of same-sex couples in New York who were married out of state in a kind of legal limbo, where they are unable to effectively plan their financial and other affairs for their families.⁵⁴

A. *The Majority Unnecessarily Avoided the Marriage Recognition Rule*

Although the issue of the marriage recognition rule was squarely presented, the majority strained to avoid any discussion of it in its ruling. The Court's decision to do so was improvident. There is no express doctrine in New York compelling the Court of Appeals to decide an issue only on the narrowest statutory grounds when possible. This is particularly so where, as here, the practical effect of such an artificial limitation is that the Court's ruling will provide little practical guidance to litigants in future cases.⁵⁵ Indeed, the Court of Appeals has issued far more expansive rulings than those sought here, even when there were narrower grounds for its decision.⁵⁶ Given that the language and substance of similar executive orders to be issued or litigated in the future are not likely to vary significantly across the state, the question that the Court chose to decide—whether the specific governmental authorities improperly exceeded their authority with respect to the specific

⁵³ *Id.* at 377 (Ciparick, J., concurring).

⁵⁴ According to a 2008 study by the Williams Institute, there are approximately forty-six thousand same-sex couples in New York State and approximately nine thousand who designate themselves as spouses. Gary J. Gates, SAME-SEX SPOUSES AND UNMARRIED PARTNERS IN THE AMERICAN COMMUNITY SURVEY, 2008 (2009), [http://www.law.ucla.edu/williamsinstitute/pdf/ACS2008_Final\(2\).pdf](http://www.law.ucla.edu/williamsinstitute/pdf/ACS2008_Final(2).pdf).

⁵⁵ *See, e.g.*, *Brothers v. Florence*, 95 N.Y.2d 290, 302, 739 N.E.2d 733, 739, 716 N.Y.S.2d 367, 373 (2000) (“[T]he shortcomings of a case-by-case approach are that it fails to provide adequate and clear notice and guidance to potential litigants, as well as to lower courts . . . and all but inevitably results in uneven application.” (citation omitted)).

⁵⁶ *See also* *People v. Greene*, 9 N.Y.3d 277, 279–80, 879 N.E.2d 1280, 1281, 849 N.Y.S.2d 461, 462 (2007) (affirming the appellate division's decision on expansive grounds, when the issue could have been resolved on narrower grounds).

orders or memoranda issued—is of little moment and even less practical significance for the many same-sex couples married in other jurisdictions who are justifiably concerned about what may happen to themselves and their families.

Based on the questioning at oral argument, it appears that the Court’s motivation for avoiding the broader recognition question in its decision may have been to steer clear of the potentially wide-reaching impact of the marriage recognition rule itself, which, some judges feared, would potentially affect private and religious institutions. In fact, four of the current judges (Ciparick, Graffeo, Read, and Smith) were on the Court when *Hernandez v. Robles* was decided; and, of those four, Judges Smith and Read in the plurality and Judge Graffeo in her concurrence determined that same-sex marriage was not required under the New York Constitution.⁵⁷ Moreover, Judge Pigott, who authored the majority decision in *Godfrey* and *Lewis*, had previously written a dissenting opinion while at the Fourth Department in which he argued that “there is a fundamental difference between a married couple and an unmarried couple that ought not to be ignored,” and that same-sex couples should be denied the ability to file a joint petition to adopt a child not biologically related to either party because “adoption issues . . . are best left to the Legislature.”⁵⁸ Accordingly, it is not surprising that the four-judge majority was disinclined to apply a longstanding common law rule that would have the practical effect of endorsing an expansive view of marriage recognition for same-sex couples.

B. Call to the Legislature

The Court of Appeals’ decision results in further confusion, and a departure from precedent, because the final paragraph of the majority opinion, written less than two weeks before the vote that ultimately took place on December 2, 2009 in the New York Senate, contains the following statement: “We . . . express[] our hope that the Legislature will address this controversy; that it ‘will listen and decide as wisely as it can; and that those unhappy with the result—as many undoubtedly will be—will respect it as people in a

⁵⁷ *Hernandez v. Robles*, 7 N.Y.3d 338, 356, 379, 855 N.E.2d 1, 5, 22, 821 N.Y.S.2d 770, 774, 791 (2006) (Smith, J., plurality opinion; Graffeo, J., concurring).

⁵⁸ *In re Adoption of Carolyn B.*, 6 A.D.3d 67, 70, 71, 774 N.Y.S.2d 227, 230, 231 (App. Div. 4th Dep’t 2004) (holding that same-sex couples in a domestic partnership are entitled to jointly adopt a child not biologically related to either party).

democratic state should respect choices democratically made.”⁵⁹ What makes this statement so incongruous is the fact that it flies in the face of the marriage recognition rule itself, which dictates that valid out-of-state marriages should be recognized precisely in situations where there is an *absence* of legislative action. Indeed, as previously discussed, the paucity of support in the New York Legislature for a bill that would prohibit the recognition of valid out-of-state marriages of same-sex couples weighs, if at all, in favor of marriage recognition.⁶⁰ Thus, the majority’s statement serves as a misplaced call to legislative action precisely when there is a long-established common law rule for recognizing marriages in the absence of such legislative action in the first place.

C. *The Status of Married Same-Sex Couples*

Nothing in the *Lewis* and *Godfrey* decision, however, should cast doubt on the continued applicability of the marriage recognition rule to out-of-state marriages of same-sex couples living in New York. Notwithstanding suggestions by Judge Smith at oral argument that the entire rule is somehow “out of step” with current contract law (which does not recognize the place of contract as the law governing the validity of that contract),⁶¹ the Court’s holding did not, in any way, alter the long-standing common law rule regarding marriage recognition. Nor did the Court adopt the plaintiffs-appellants’ argument that the marriage recognition rule does not apply to same-sex marriages because they are somehow “structurally different” from other marriages.⁶²

Likewise, there should be no doubt that the recent rejection by the legislature of a bill allowing same-sex couples to marry in New York on December 2, 2009 does not affect the applicability of the marriage recognition rule.⁶³ If anything, it further emphasizes the

⁵⁹ See *Godfrey v. Spano*, 13 N.Y.3d 358, 377 (2009) (quoting *Hernandez*, 7 N.Y.3d at 366).

⁶⁰ See *supra* notes 5–11 and accompanying text.

⁶¹ Web cast of Oral Argument, *supra* note 44, at 0:43:38. This analogy between the common law governing commercial contracts and civil marriage is strained in any event since obviously, a “marriage contract” necessarily implicates a host of public policy concerns that commercial contracts do not. See *Fearon v. Treanor*, 272 N.Y. 268, 272, 5 N.E.2d 815, 816 (1936) (“[Marriage] constitutes an institution involving the highest interests of society. It is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the state.”); *Wade v. Kalbfleisch*, 58 N.Y. 282, 284 (1874) (“[Marriage] is more than a contract. . . . It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community.”).

⁶² Web Cast of Oral Argument, *supra* note 44, at 0:19:14.

⁶³ Jeremy W. Peters, *New York State Senate Votes Down Gay Marriage Bill*, N.Y. TIMES,

need for the marriage recognition rule to provide certainty for same-sex couples who have already been married elsewhere. While the passage of the bill would have obviated the need for the application of the marriage recognition rule—because same-sex couples married elsewhere could take the additional step of marrying in New York—its defeat in the senate simply does not change the dispositive facts that there is no statute prohibiting recognition of marriages of same-sex couples and that, in light of the political, social, and cultural climate in New York, recognition cannot be said to be “abhorrent” to New York’s public policy.

Thus, the holdings of the Third and Fourth Departments, and the concurrence in *Lewis* and *Godfrey*, that the marriage recognition rule compels recognition of valid out-of-state marriage of same-sex couples, remain intact. Nevertheless, as Judge Ciparick warned in the concurrence:

The effect of the majority’s rationale in affirming these orders will be to permit an unworkable pattern of conflicting executive and administrative directives promulgated pursuant to the individual discretion of each agency head. [The Court of Appeals] ought to avoid the confusion that would arise from a same-sex couple being considered legally married by one agency for one purpose but not married by another agency for a different purpose.⁶⁴

Although there is unlikely to be much variation in how state agencies and municipalities apply the law given the consistent rulings by the lower courts, lack of certainty and confusion resulting from the Court of Appeals’ decision is undeniable. Married same-sex couples in New York are left to guess as to which of the many rights granted to married couples they will be afforded. Because the issue was not resolved at a statewide level, a married same-sex couple living in Westchester County, for example, might receive health benefits, while a married couple in Herkimer County might not. Similarly, a couple that lives in one New York county and works in another might fear losing the protections and benefits of marriage every weekday as they drive across the county border from home to work (or vice versa). And a couple that builds a family in New York County and relies on the presumption of parentage would be left to fear that the parental relationship would not be honored should they move further upstate. Such an uneven

Dec. 2, 2009, at A1.

⁶⁴ *Godfrey*, 13 N.Y.3d at 377 (Ciparick, J., concurring).

patchwork of protections obviously makes little sense as a matter of public policy and surely cannot be justified on either economic or legal grounds. While a plurality of the Court of Appeals has indicated in *Hernandez* that the New York equal protection clause does not guarantee same-sex couples the right to marry in New York, surely, there is no principle of equal protection that would justify same-sex families being treated so differently from county to county within New York State.

Even more troubling is the fact that same-sex families must endure such uncertainty in the area of civil marriage, the whole point of which is to create certainty for families in an area that implicates so many issues of fundamental importance, is untenable. Indeed, same-sex spouses living in New York today are left wondering whether a hospital will let them see their dying spouse, whether they will have custody rights over their children, and whether they can make medical decisions for a dying spouse. They have to make predictions and “cross their fingers” about what steps they need to take to care for their families and whether those steps, in the end, will prove to be effective. This, of course, is precisely what the common law marriage recognition rule was designed to prevent.⁶⁵

IV. CONCLUSION

The Court of Appeals in *Lewis* and *Godfrey* unnecessarily left open an ambiguity in the law as to the legal status of same-sex couples in New York who were married in jurisdictions that authorize and recognize such marriages. Given the significance of this issue on both the national level and in New York, there can be little doubt that a case will soon present itself where resolution of this issue can no longer be deferred. In the meantime, the decision provides no basis for lower courts to depart from the holdings of the Third and Fourth Departments and nearly every other lower court to address the issue that valid out-of-state marriages of same-sex couples are recognized in New York.

⁶⁵ See *Van Voorhis v. Brintnall*, 86 N.Y. 18, 25, 26 (1881) (stating that the marriage recognition rule is “founded on principles of policy to prevent the great inconvenience and cruelty” of not recognizing out-of-state marriages, and “to avoid the public mischief which would result from the loose state in which people so situated would live” (quoting *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157, 159, 161 (Mass. 1819))).