

THE LEGAL STATUS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILIES IN NEW YORK STATE⁸

Individual Rights, Family Rights

For the past three decades, most of the discussion in New York State around lesbian, gay, bisexual and transgender (LGBT) civil rights has focused primarily on how LGBT citizens are to be treated as individuals, with the consensus clearly becoming that at least gay, lesbian and bisexual citizens deserve the same civil rights as our neighbors.⁹ Poll after poll has shown that the solid majority of New Yorkers across racial, political, religious and geographic lines support laws that prohibit sexual orientation discrimination in employment, housing and access to public accommodations.¹⁰ Local governments responded to this public mandate, with twenty New York localities from places as large as New York City to as small as the Village of Alfred passing sexual orientation anti-discrimination ordinances.¹¹ New York State government also responded, at least in terms of public employees, beginning in 1980 with Attorney General Robert Abrahms' executive order prohibiting sexual orientation discrimination for his office, and continuing in 1983 with an executive order from Governor Mario Cuomo prohibiting sexual orientation discrimination throughout the executive branch in terms of employment by any state agency and in the provision of any service or benefit by the state.¹² The recognition of lesbian, gay and bisexual civil rights culminated in December of 2002 when New York became the thirteenth state in the nation and the second to last in the Northeast to pass a statewide law to outlaw discrimination for all its citizens on the basis of sexual orientation in areas such as employment, housing, credit and public accommodations.¹³

In focusing on LGBT people as individuals, however, the public discourse in New York, and certainly the debate in the New York State Legislature, during this time has far less frequently gone to the issue of LGBT families. New York seemed slow to recognize that, like other individuals across the state, LGBT people function most of the time in the context of a family. While the measures passed to protect lesbian and gay people as individuals clearly impacted families, they did little to address the family structure and functioning issues that confront LGBT people as they form couples, raise children or move into care providing situations.

Surprisingly, during the years that New York State was struggling to establish legal rights statewide for lesbian and gay people as individuals, the state in an ad hoc fashion was already taking quiet steps to cobble together a set of rights and responsibilities that would recognize and support families formed by lesbian and gay people. Through a jumble of court decisions, statutes, executive orders, policies, regulations and agency

interpretations, the state has taken at least some initial steps to fit the triangle peg of lesbian and gay families into the square hole of family support that government makes available to a husband, a wife and their children.

This piecemeal approach to creating a legal support structure for LGBT families unfortunately fails the state in a myriad of ways. The lack of a cohesive vision often leaves the entire state with more questions than answers in deciding how the public and private sectors should treat LGBT families in a variety of contexts. In many areas, LGBT families, their employers and government itself are left without any reliable guidance whatsoever, and in other cases they are forced to deal with contradictory information. The problem is compounded by the fact that even these piecemeal advances in government are often formulated by actors who lack a clear understanding of the wide variety of forms that LGBT families take.

The legal status of transgender families is even more difficult to capture. For a couple that presents itself as a male-female couple, and has had that gender presentation recognized in some legal capacity, the legal obstacles may be few in areas like inheritance or state benefits. This is particularly true if the couple is in a legally recognized marriage.* In some contexts, however, the discrimination against families with a transgender member can be even more severe than for lesbian and gay families. For example, in areas that involve children, like custody and adoption, a parent's transgender experience alone may determine whether the parent is able to have any custody of or even visitation with his or her own biological child.¹⁴

The Courts Lead the Legislature on Same-Sex Families

Predictably, the judicial branch of government began addressing lesbian and gay family issues long before the legislative branch. The legal system did not have the luxury enjoyed by the political system of simply ignoring issues that began to move to the forefront as lesbian and gay people began to become increasingly open not only about their own sexual orientation, but also about the couples they formed, the children they were raising and the families in which they lived.¹⁵

In 1984, the New York Court of Appeals first addressed a same-sex family issue when it barred same-sex couples from using adoption by a partner as a way of giving a legal status for their relationship.¹⁶ In doing so, the Court explicitly emphasized not the illegitimacy of the relationship, but the impropriety of using a mechanism that exists for the creation of a parent-child relationship to legally protect the relationship of two adults.¹⁷ The Court said, "Adoption is not ... a procedure by which to legitimize an emotional attachment, however sincere, but wholly devoid of the filial relationship that

* However, even a marriage between transgender people that may be legally recognized at one point in their relationship may become subject to legal challenge at another time. See Policy Institute of the National Gay and Lesbian Task Force, Family Policy 33-34 (2002) ("[T]ransgender people in marriages must live with the fear that in a time of crisis their relationship will not be recognized, an uncertainty that other married couples do not confront.")

is fundamental to the concept of adoption.”¹⁸ This may have also indicated the Court’s desire to recognize gay and lesbian relationships for what they are – adult relationships, not parent/child relationships.

Five years later, the New York Court of Appeals in the watershed ruling *Braschi v. Stahl Assocs. Co.* expanded the definition of family to include same-sex partners in terms of who could continue to inhabit a rent-controlled apartment after the tenant dies.¹⁹ Though narrow in its decision, the Court employed expansive language in its first decision examining whether same-sex couples could be considered a “family” in the eyes of the law:

[W]e conclude that the term family ... should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society’s traditional concept of “family” and with the expectations of individuals who live in such nuclear units. In fact, Webster’s Dictionary defines “family” first as “a group of people united by certain convictions or common affiliation” [citation omitted] ... [I]t is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control.²⁰

In 1991, the Court of Appeals first looked at issues involving the children of LGBT parents in *In re Alison D. v. Virginia M.*²¹ There the Court found that although there was a close and loving relationship between a woman and the biological child of her ex-partner, she could not legally be considered a “parent” as the term was used in the state statute allowing for visitation.²² Under this decision, even though two lesbian parents decided to have and raise a child together, the non-biological parent had no legal rights to see the child against the biological mother’s wishes absent an adoption or some other legal documentation.²³

This decision when paired with the *Braschi* decision seemed to indicate that while the courts might be willing to expand the definition of “family” or interpret the concept of family broadly when faced with silence or ambiguity from the Legislature, it was not prepared to extend family rights by expanding terms like “parent” or “spouse” absent specificity from the Legislature, particularly on issues that involved children.²⁴

In 1995, the Court of Appeals first took a favorably expansive view toward gay parenting in *In re Jacob*.²⁵ In a closely decided 4-3 decision, the Court of Appeals appeared to be

willing to decide legislative ambiguity to allow a domestic partner to legally adopt the biological child of her lesbian partner in a practice known as “second-parent adoption.” In writing for the majority, Chief Judge Judith Kaye said:

To be sure, the Legislature that last codified [the adoption statute] in 1938 may never have envisioned families that “include two adult lifetime partners whose relationship is characterized by an emotional and financial commitment and interdependence.” Nonetheless, it is clear that [the law], designed as a shield to protect new adoptive families, was never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents.²⁶

After *Jacob*, lesbian and gay parents could legally adopt children both as individuals and as a couple.

Government Mostly Follows the Courts

Interestingly, almost three years before the Court of Appeals addressed same-sex family issues for the first time, the executive branch of government had already issued its first regulation dealing with same-sex families. In 1981, New York State affirmatively allowed for adoption by lesbian and gay people through a Department of Social Services²⁷ regulation that said adoption could not be denied to a parent based solely on his or her homosexuality.²⁸ This continues to distinguish New York from the four states that still prohibit lesbian and gay people from adopting a child.²⁹

This movement by government ahead of the courts on LGBT family issues, however, was an aberration. It would be another decade, for example, before state government followed up the Department of Social Service adoption regulation with any other formal recognition of same-sex families. For the most part, the executive branch seemed to use the political cover provided by the courts before moving ahead with a regulation or executive order.

For example, New York State government next acted on an LGBT family issue by codifying the Court of Appeals decision in *Braschi*. In 1992, the State Division of Housing and Community Renewal issued regulation 2520.6, which included in the definition of “family member” any person residing with the tenant as a primary or principal residence “who can prove emotional and financial commitment and interdependence...”³⁰ The court ruling appeared to ease the way in allowing the Division to issue the first New York State regulation recognizing same-sex domestic partners, even if the terms “gay,” “lesbian,” “sexual orientation” or even “domestic partner” were never used.

In 1993, state government also utilized the criteria articulated in *Braschi* to allow insurers to issue health insurance policies for domestic partners. Then-State Insurance

Superintendent Salvatore R. Curiale in a letter to then-Governor Mario Cuomo interpreted the terms “dependent” and “chiefly dependent” in state Insurance Law as including a domestic partner who could demonstrate a mutual economic dependence on a same-sex partner.³¹ The Insurance Department said such mutual dependence could be evidenced “by a nexus of factors, such as common ownership of property, common householding, shared budgeting, length of relationship, etc.”³² These criteria would later become standard in a number of contexts both public and private for “proving” domestic partnerships.³³

In 1994, New York State recognized the different families of its state workers by beginning to offer health benefits to the domestic partners of public employees. This initial agreement with the public employees union included only the employees of the executive branch. Other branches followed suit, though, with the New York State Senate becoming the final branch of government to offer domestic partner benefits in January 2001.³⁴

It is important to note that all these government changes prior to the new millennium happened through executive orders or agency actions. The Legislature would not recognize lesbian and gay families in even the most incremental way until it was prompted by tragedy to face the question of whether same-sex families should be treated differently than married spouses.

The View of Family Changes on September 11th

If any one event in the history of New York State challenged government to reexamine its view of lesbian and gay families, it was the attack on the World Trade Center on September 11, 2001. Just as those who died in the World Trade Center spanned all races, creeds and colors, the September 11th tragedy touched lesbian and gay families as much as heterosexual families. David O’Leary lost Michael Lepore, a project analyst at Marsh & McLennan and his partner of 17 years with whom he shared a Yonkers home. Catherine Anello lost her partner Pamela Boyce, an assistant vice president for accounting at Carr Futures on the 92nd floor of One World Trade. Michael Lyons became separated from his 18-year companion, John Keohane, as the two fled the falling debris side-by-side; Michael did not learn until two days later that John had been killed as the towers tumbled around them. Tragically, Michael committed suicide six months later.

Lesbian and gay partners who lost loved ones on that day, just like husbands and wives across the state, went to their government and private charitable organizations for support in their time of crisis. Unlike legally married husbands and wives, however, lesbian and gay domestic partners found additional complications, red tape, confusion and in some cases indifference or hostility. It took two and a half weeks of her partner not coming home before Elba Cedeno finally mustered enough courage to go to the

Family Assistance Center at Pier 94 in New York City, where emergency relief agencies gathered to process those seeking relief. She waited in long lines just like other family survivors, all clutching photos of their lost loved ones. Elba, however, was turned away because she was not registered as a domestic partner with the woman with whom she had owned two homes and shared a joint checking account. The couple lived in a municipality that did not have a domestic partnership registry.³⁵

When New York State government eventually implemented relief systems to assist 9/11 victims, it took a uniformly inclusive view of family. Governor George Pataki began with an executive order to make the surviving domestic partners of 9/11 victims eligible for governmental relief through the state’s Crime Victims Board.³⁶ This executive order also permanently changed the requirement that domestic partners prove that they were dependent upon a deceased partner for at least 75% of their income so that they only needed to prove 50% dependency.³⁷ This dependency requirement was changed again a year later to require only a mutual interdependency without any specific percentage, making the eligibility of unmarried domestic partners (either of the opposite or same sex) more equitable to married partners, who need show no economic interdependence whatsoever.³⁸

The executive order set the tone for all New York State relief to 9/11 victims, resulting in all 9/11-specific relief extended by New York State being inclusive of mutually interdependent domestic partners. For example, New York State’s World Trade Center Relief Fund explicitly treated domestic partners as the equivalent of surviving spouses, using those terms synonymously in the application materials for the fund.³⁹ Likewise, in creating the World Trade Center Memorial Scholarship, the Legislature included surviving domestic partners of 9/11 victims as eligible for college scholarships through the state, just like married spouses.⁴⁰

Similar to the Crime Victims Board change effectuated by executive order, the Legislature changed the procedures of the Workers’ Compensation Board to make surviving 9/11 partners eligible for death benefits on behalf of partners who died on the job in the World Trade Center.⁴¹ This marked the first time that a statute changed a New York State relief program to include domestic partners. So far, this change has been limited to 9/11 survivors only. An appeal to the Workers’ Compensation Board to extend death benefits to a non-9/11 surviving partner is still pending.⁴²

Unfortunately, the federal government was not initially as compassionate as New York State in its treatment of surviving 9/11 domestic partners. While not explicitly excluding domestic partners, the federal 9/11 relief fund was purposely vague about whether these partners would be entitled to relief, particularly if the deceased partner had no will or other legal documentation.

New York State government attempted to indicate its intent that New York’s domestic partners be included for federal relief. Not only did Governor Pataki, NYC Mayor Rudolf Giuliani and Attorney General Eliot Spitzer send an unprecedented bipartisan letter to President George W. Bush asking that domestic partners be included in the federal fund,⁴³ but the Legislature also unanimously passed an omnibus September 11th Victims and Families Relief Act that said in its legislative intent:

[T]he Legislature hereby finds and declares ... that domestic partners of victims of the terrorist attacks are eligible for distributions from the federal victim compensation fund, and the requirements for awards under the New York State World Trade Center Relief Fund and other existing state laws, regulations, and executive orders should guide the federal special master in determining awards and ensuring that the distribution plan compensates such domestic partners for the losses they sustained.⁴⁴

This law marked the first piece of legislation in the history of New York to include the term “domestic partner.”

Although not specifically related to 9/11, it is probably not coincidental that the fourth lesbian and gay related bill passed during the regular 2002 legislative session dealt with family issues raised by 9/11. The Insurance Law was amended so that a person could take out a life insurance policy on a domestic partner, just as a wife can now do on a husband or vice versa.⁴⁵ This marked the first law passed by the New York State Legislature ever to recognize domestic partners outside of a 9/11 context.

Total Equality for Families

Despite these tentative yet important steps forward, New York has yet to comprehensively grant lesbian and gay families anything approaching the full set of rights and responsibilities available to opposite-sex couples through marriage. A bill has been introduced to open marriage to same-sex couples,⁴⁶ and another to explicitly prohibit same-sex unions or marriages either in New York or as recognized by other states.⁴⁷ However, unlike California which recently passed a wide-ranging domestic partnership law, or Vermont which created a marriage-like civil union mechanism in response to a court decision, neither chamber of the New York State Legislature has even moved out of committee any bill that addresses family recognition more than one step at a time.

Instead of state government leading in the area of same-sex family recognition, it is the municipalities that have begun to move where the state so far has feared to tread by creating some basic structures to recognize lesbian and gay families, just as was the case with recognition of the individual civil rights of LGBT people. New York City was the first municipality in the state to implement a domestic partnership system, where those who register with the city can have such rights as visitation in city jails and hospitals.⁴⁸

The cities of Albany, Ithaca and Rochester, and the towns of East Hampton and Southampton also have registries, though it is unclear whether any specific rights are attached to them.⁴⁹ Westchester County established a domestic partner registry in 2002, the first mechanism in the state, and perhaps the first in the nation, to grant domestic partner rights against private actors by requiring hospitals and nursing homes to treat domestic partners as spouses for visitation purposes.⁵⁰

Where Will the Legislature Head From Here?

Whether, or more importantly how soon, the New York State Legislature will expand upon the recognition of same-sex families outside of a 9/11 context is difficult to say. There are a number of active bills that have had at least a committee vote in either the Assembly or Senate which would provide the opportunity for the state to move ahead in recognizing LGBT families in at least an incremental fashion.

Each chamber of the Legislature, for example, has taken a step toward protecting students from bias-based harassment and discrimination in schools. This issue is of particular importance to LGBT youth, and the children, siblings and other relatives of LGBT people, who are vulnerable to harassment based on sexual orientation or gender identity and expression, whether their own or that of a family member. The Assembly in 2002 first passed the Dignity for All Students Act⁵¹ and the Senate the Schools as Safe Harbors Act,⁵² both of which explicitly prohibit bias bullying and harassment in schools based on a number of traits including sexual orientation.⁵³ The two chambers have yet to reach a compromise measure on this issue.⁵⁴ Both chambers have also moved bills to protect college students from bias incidents on campus, though the Senate has not yet brought such a measure for a vote.⁵⁵

In 2002, the Assembly passed and the Senate moved out of committee bills to open New York’s family courts to domestic partners.⁵⁶ These measures would expand the definition of family for the purposes of access to family court so that unmarried couples (including same-sex couples) who do not legally share a child can go to family court for orders of protection and other relief from domestic violence. As of now, only married spouses or couples sharing a child can utilize the family courts, while all others must rely on a criminal court system that is ill-suited for dealing with the sensitive nature of family problems. The two chambers have failed to agree whether this measure should be passed alone or as part of an overhaul of domestic violence protection laws that would include a so-called “lifetime” order of protection against abusive partners.⁵⁷

The Assembly has moved bills through a number of committees: to allow domestic partners to have control over a deceased partner’s bodily remains;⁵⁸ to require that employers extend bereavement leave to employees with domestic partners on the same basis that such benefits are offered to married employees;⁵⁹ and to prohibit discrimination

on the basis of sexual orientation in insurance underwriting⁶⁰ and to permanently grant Workers' Compensation death benefits to domestic partners just like surviving spouses.⁶¹ Though these measures have received votes in a number of various Assembly committees, none has received a full vote in that house. None of these bills have even moved out of committee in the Senate.

Outside of these active bills, there are a number of other areas that can begin to be addressed to help support lesbian and gay families short of the more comprehensive measures such as domestic partnership, civil unions and same-sex marriage. Governmental relief structures, such as state pensions, can be changed to treat same-sex couples like married couples. Insurance regulations can be clarified so insurance companies are encouraged to offer domestic partner coverage, even to smaller employers. Legislation can help ensure that senior citizens in care providing situations including nursing homes are not denied the companionship of their partners. Authority should be given to domestic partners to make medical decisions for their partners, just as spouses are so empowered. Intestacy laws should be changed so that surviving partners do not lose the property the couple acquired during their life together. Domestic partners should have the same right to sue for the wrongful death of a partner as do married spouses. The second-parent adoption rights established in *In re Jacob* could also be codified to clarify and secure those rights. The Legislature should explicitly clarify that all New Yorkers have the legal right to be free from discrimination based on gender identity and expression. Finally, measures can be taken to encourage private employers to treat domestic partners like married couples in areas like medical leave and health benefits. For example, New York State could adopt a requirement that businesses having contracts with the state provide domestic partner benefits to employees that are equal to benefits for married couples.⁶²

Where Will the Courts Head From Here?

With the passage of the Sexual Orientation Non-Discrimination Act, the courts are likely to work out exactly how discrimination against gay and lesbian individuals intersects with discrimination against lesbian and gay families. A decision of the Court of Appeals from last year, *Levin v. Yeshiva University*, may indicate, for example, that discriminating against same-sex domestic partners who cannot be legally married may be sexual orientation discrimination.⁶³ The court found that the Albert Einstein School of Medicine's policy of giving priority housing to married medical students was a violation of the New York City ordinance prohibiting sexual orientation discrimination because it disparately impacted gay and lesbian people who could not get married.⁶⁴ It remains to be seen whether the courts interpret the state's non-discrimination law similarly, for example to require that Workers' Compensation death benefits be given to surviving domestic partners just like surviving spouses.⁶⁵

Just as it has been the case in other states, the courts (rather than the Legislature) are likely to be the first forum where the question of same-sex marriage is addressed. While it is possible that a couple might seek an interpretation of New York State's gender-neutral marriage laws,⁶⁶ it is far more likely that a couple will take advantage of a same-sex marriage once it is legalized in another state and attempt to assert that legal marriage here in New York. The courts will then have to decide if either federal or state law requires full faith and credit be given to the legalized marriage.⁶⁷

The courts are also likely to be a venue where the issue of protection from transgender discrimination plays out. This protection from discrimination is the foundation for building stable homes and families. Some lower New York courts have found that the current state prohibition on sex discrimination prohibits discrimination against transgender people on the basis of gender identity and expression.⁶⁸ The scope of this protection, however, is largely unclear. The courts are likely to settle this question more conclusively when a case is brought by a transgender person who attempts to sue an employer or landlord under the state sex discrimination law.

Isn't There Something Better Than a Piecemeal Approach?

The ad hoc way in which New York law has addressed some aspects of LGBT family life is not only incomplete, but occasionally results in inconsistent treatment depending on which area of rights or responsibilities are being invoked. For example, a woman would be entitled to receive health insurance through her lesbian domestic partner who is a state employee, but she cannot receive the Workers' Compensation death benefit given to help support surviving spouses if her partner dies on the job. A lesbian who happens to be a state senator might have her partner accompany her to her swearing in ceremony, but she would not be required to report the income and business dealings of her partner the way legislators are required to do for their spouses. This same couple can adopt a child together in New York State, but are blocked from access to New York's family courts if issues of domestic violence should arise. The domestic partner can automatically inherit the rent-controlled apartment that she and her partner lived in together for a year, but not the house they bought together, lived in and improved upon for thirty years.

The logical step to curing these kinds of inconsistencies would be to open up the traditional infrastructure used by government for supporting and structuring families, namely marriage. It would also be far more efficient than trying to create a "separate but equal" mechanism such as the civil union structure implemented by Vermont, which tried to duplicate the legal rights and responsibilities of marriage.

However, because of political trepidation, fast movement on opening marriage to same-sex couples is unlikely. Ironically, marriage may not necessarily be the model that would fit all the various family structures in the LGBT community.⁶⁹ This should not be surprising since traditional marriage increasingly is failing to meet the needs of most modern families.⁷⁰ The question of how government may best support LGBT families, therefore, may be linked to how government can update the way it supports all families, which may turn out to be something very different than marriage.⁷¹