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SAME-SEX MARRIAGES IN NEW YORK: THE LANGAN AND HERNANDEZ DECISIONS

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THE SUPREME COURT OF NEW YORK ON SAME-SEX MARRIAGE

Same-sex marriage is a heightened issue in the legislative and judicial system in New York. For a brief period, between 2003 and early 2005, the Supreme Court of New York held that same-sex marriages in New York were constitutional. However, the atmosphere in New York State's judicial system quickly changed near the end of 2005. In 2003, the Supreme Court of New York in Nassau County had held in *Langan v. St. Vincent's Hosp.*,[1] that a surviving spouse has standing to bring an action for the wrongful death and medical malpractice of the deceased spouse of the same-sex. John Langan and the decedent had entered into a civil union in Vermont in November 2000. The court recognized that "[w]ith respect to marriages entered into in sister states, New York adheres to the general rule that marriage contracts, valid where made, are valid everywhere, unless contrary to natural laws or statutes."[2] New York, adhering to the Full Faith and Credit Clause, recognizes a marriage commenced legally in another state so long as it is performed properly.[3] Therefore, the court in *Langan* recognized that the surviving spouse had standing because his marriage to the deceased was legally performed in Vermont.

Legality of same-sex marriages experienced further success in 2005 with *Hernandez v. Robles*,[4] when the Supreme Court of New York in New York County held that same-sex couples could not be denied from entering into a civil union in New York. The

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[1] *Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d 411 (Sup. Ct. 2003), rev'd, 802 N.Y.S.2d 476 (App. Div. 2005), appeal dismissed, 6 N.Y.3d 890 (2006).
[2] *Id.* at 443.
[3] *K. v. K.*, 393 N.Y.S.2d 534 (Fam. Ct. 1977).
[4] *Hernandez v. Robles*, 794 N.Y.S.2d 579 (Sup. Ct. 2005), rev'd, 805 N.Y.S.2d 354 (App. Div. 2005), aff'd 855 N.E.2d 1 (N.Y. 2006).

court explicitly stated "[t]he [New York Domestic Relations Law] does not expressly bar same-sex marriage."[5] This is support by the fact that 'jural marriage' is defined "without any reference to the sex of the parties to a marriage."[6] The State's law did not explicitly preclude same-sex marriages. As a result, the court extended the meaning of 'spouse,' 'husband,' 'wife,' 'bride,' and 'groom' to either male or female and all personal pronouns were construed to apply equally to either men or women.

In both the *Langan* and *Hernandez* opinions, the courts had justified their ruling that same-sex marriage was constitutional because the laws of New York State do not preclude such right. Same-sex marriage continues to be a controversial and political issue in America's society. However, when the issue enters the judicial court system, the parties have the right to expect that decisions are made free from any form of political motivation. The judges that decided *Langan* and the *Hernandez* reinforced this notion by analyzing a legal issue with the current laws. The greatest success in these cases was not so much the decisions themselves, but the reasoning supported in each decision.

LANGAN V. ST. VINCENT'S HOSPITAL: AT THE APPELLATE DIVISION

The success of *Langan* and *Hernandez* were short lived because the Supreme Court of New York, Appellate Division, Second Department reversed the decisions on appeal in both cases. In October 2005, the appellate court reversed *Langan*, holding that the surviving spouse could not bring a wrongful death action against the hospital. The appellate court in *Langan* held that the wrongful death statute in New York's Estate, Powers and Trusts Law (EPTL) that allowed "the personal representative, duly appointed in [New York] state or any other jurisdiction, of a decedent...[to] maintain an action to recover damages for wrongful

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[5] *Id.* at 588.

[6] *Id.*; See also N.Y. DOM. REL. LAW § 10 (1999).

act, neglect or default which caused the decedent's death,"[7] did not include same-sex surviving spouses.[8]

LACK OF LEGISLATIVE INTENT TO EXCLUDE SAME-SEX MARRIAGES

The court's holding, however, is based on feeble reasoning and lack of precedent. First, the court reasoning stated that "the thought that the surviving spouse would be of the same sex as the decedent was simply inconceivable and certainly there was no discriminatory intent to deny the benefits of the statute to a directed class."[9] However, the court does not provide any reference to any language in the statute or legislative comments on the statute that confirms such negative intent. The court's reasoning leaves open whether or not it was the legislative intent to exclude same-sex surviving spouses from New York's wrongful death statute. By providing vague references, it is questionable whether the "thought that a surviving spouse cannot be of the same-sex as the decedent"[10] is the thought of the judge's alone.

NOT ALL LAWS ARE CONSTITUTIONAL

Second, the court reasoned that "[l]ike all laws enacted by the people through their elected representatives, EPTL 5-4.1 is entitled to a strong presumption that it is constitutional."[11] The court was referring to past United States Supreme Court cases containing issues regarding laws passed by elected representatives or the voters themselves.[12] But is it really true that all laws passed by a group of elected representatives or voters are constitutional? History and precedent have proved that reasoning to the contrary. Majority vote does not always constitute constitutional judgment. The basis of the checks and balances system between the

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[7] N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (1999).
[8] See *Langan v. St. Vincent's Hosp.*, 802 N.Y.S.2d 476 (Sup. Ct. 2005).
[9] *Langan*, 802 N.Y.S.2d at 477.
[10] *Id.*
[11] *Id.*
[12] *Langan*, 802 N.Y.S.2d at 478.

legislature and the judicial courts is to ensure that the branch of government, the legislature, that passes the laws does not review the laws which it creates. To grant such a strong assumption that all laws passed by elected representatives are constitutional, without judicial review, goes against the whole purpose of the judicial system.

DENIAL OF EQUAL PROTECTION

Third, the court does not sufficiently base its holding on case precedent. The court selects part of the holding in *Romer v. Evans*[13] but ignores other holdings that are relevant to the issue in *Langan*. The court attempts to support the constitutionality of the statute by its reference to *Romer* that "[i]n order to survive constitutional scrutiny a law needs only to have a rational relationship to a legitimate state interest even if the law appears unwise or works to the detriment of one group or the other."[14] The court stated that since it did not meet the burden under *Romer*, the law was constitutional when applied to same-sex surviving spouses.[15]

The court, however, failed to cite a very significant holding in *Romer* that, if applied, would have been favorable in *Langan*. *Romer* held that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[16] If EPTL 5-4.1 was interpreted based on *Romer*'s reasoning in the context of same-sex marriages, clearly the law would make it more difficult for any same-sex surviving spouse to seek aids from the government by way of having standing to bring an action against a negligent party. EPTL 5-4.1 would result in a denial of equal protection by not only making it more difficult, but by completely barring the surviving spouse in *Langan* from bringing a wrongful death action against the hospital.

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[13] *Romer v. Evans*, 517 U.S. 620 (1996).
[14] *Langan*, 802 N.Y.S.2d at 478 (citing *Romer v. Evans*, 517 U.S. 620 (1996)).
[15] *Langan*, 802 N.Y.S.2d at 478.
[16] *Romer*, 517 U.S. at 633-634.

NO DISTINCTION BETWEEN MARRIAGE AND CIVIL UNION

Lastly, the *Langan* court leaves open whether same-sex couples married in Massachusetts, instead of having a civil union in Vermont, would have resulted in a different decision since "Massachusetts has judicially created such rights for its citizens"[17] to bring wrongful death suits. The court does not answer that question; instead, it attempts to make a distinction between 'marriage' and 'civil union' that leads to no real distinction other than in the name.[18]

"Same-sex couples who marry [in Massachusetts] are entitled to the benefits that Massachusetts extends to married couples."[19] The Massachusetts Supreme Judicial Court had held that "[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution."[20] Similarly, Vermont affords that all same-sex spouses shall "have all the same benefits, protection and responsibilities under [Vermont] law...as are granted to spouses in a marriage."[21] Although Vermont does not use the term 'civil union' interchangeably with 'marriage,' there is clearly no substantive distinction between the benefits and protections in a marriage and in a civil union. The only difference is in the name.

HERNANDEZ V. ROBLES: AT THE APPELLATE DIVISION

Two months after the Appellate Division's decision in *Langan*, the Supreme Court of New York, Appellate Division, First Department reversed *Hernandez*, holding that the Domestic Relations Law provisions do not permit same-sex marriages and do

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[17] *Langan*, 802 N.Y.S.2d at 479.

[18] See Derek B. Dorn, *Same-Sex Marriage Under New York Law - Advising Clients in a State of Uncertainty*, N.Y. ST. B.J., Jan. 2006, at 43, available at http://www.nysba.org/Content/NavigationMenu/Publications19/Bar_Journal/Bar_Journal_Archive/2006_Archive/journal_january_06_dorn.pdf.

[19] *Id.* at 41.

[20] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003); see also 78-Jan N.Y. St. B.J. 40 (Jan. 2006).

[21] See VT. STAT. ANN. TIT 15 § 1204(a) (2006).

not violate due process or equal protection by its exclusion.[22] The appellate court in *Hernandez* focused on the fact that it is not the judiciary's role to regulate marriage and that it is against public policy to allow same-sex marriages because the state has an interest in maintaining procreation, child welfare, and social stability.[23]

The court's rationalization is highly problematic. First, the court's judicial review avoids the primary issue, whether same-sex marriage in New York is constitutional. Second, the court based its reasoning on stereotypes and acts as a political commentator rather than a judge held with the duty of making impartial decisions.

JUDICIAL REVIEW

It is possible to conclude that any court decision may result in changes to the legislative position of the contested law. However, the intent was never to have the court regulate marriage. The court was to review a contested law passed by the legislature, in order to determine whether the law was constitutional. The court erred in concluding that a review of the law is equivalent to regulating the law. The law is for judicial review and only the legislature can adopt laws based on the court's opinion. If the court determines that the law is unconstitutional, it is up to the legislature to make amendments based on the court's opinion or to abolish the law. However, the court first has the duty to determine whether the current state statute and the state constitution, precludes same-sex marriage.

PUBLIC POLICY

The court in Hernandez based its decision on a number of 'public policy factors' for rejecting same-sex marriage: procreation, child welfare, and social stability. The court's assumption and biases of same-sex marriage was best contradicted in *Baker v. State*, decided by the Supreme Court of Vermont court

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[22] *Hernandez v. Robles*, 805 N.Y.S.2d 354 (App. Div. 2005).
[23] *Hernandez*, 805 N.Y.S.2d at 359.

holding civil unions between same-sex couples as constitutional.[24] Unlike Baker, that supported its decisions using facts regarding procreation, child welfare, and social stability, the court in Hernandez provides no factual support for its conclusions. Without providing facts to support its 'public policy factors,' the court is overstepping its duty by injecting, what may be concluded as, personal or political views of the issue. Such views are unfit in a judicial decision and its presence disintegrates the integrity of judicial decision-making.

PROCREATION, ADOPTION AND ARTIFICIAL INSEMINATION

The court does not provide factual support but that does not mean there are no facts to support a public policy rationale for or against same-sex marriage. The court's first factor was procreation; that procreation is between opposite-sex couples. Many couples, whether opposite or same-sex, have artificial insemination and/or adopt; neither of which is illegal, and the latter is desired and encouraged by the state because of the growing number of children that are not adopted.[25] The court also assumes that traditionally married couples want children. In addition, procreation is not always a result of marriage and in today's society, "children are being born to single-sex families on a biological basis, and that they are being so born in considerable numbers."[26]

NEGATIVE CHILD WELFARE RESULTING FROM TRADITIONAL MARRIAGES

The court's second factor is that a child's welfare is better maintained in traditional marriages than in same-sex marriage.

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[24] *Baker v. State*, 744 A.2d 864 (Vt. 1999).

[25] See generally *Adoption Frequently Asked Questions*, NYS Office of Children and Family Services, available at http://www.ocfs.state.ny.us/adopt/adopt_faq.asp (last visited Feb. 2, 2006).

[26] *Baker*, 744 A.2d at 881, citing E. Shapiro & L. Schultz, *Single-Sex Families: The Impact of Birth Innovations Upon Traditional Family Notions*, 24 J. FAM. L. 271, 281 (1985).

The court's assumptions are unsupported by any factual basis and its reasoning is highly stereotypical in that:

> "Marriage promotes sharing of resources between men, women and the children that they procreate; provides a basis for the legal and factual assumption that a man is the father of his wife's child via the legal presumption of paternity plus the marital expectations of monogamy and fidelity; and creates and develops a relationship between parents and child based on real, everyday ties. It is based on the presumption that the optimal situation for child rearing is having both biological parents present in a committed, socially esteemed relationship."[27]

There are many faults with the court's reasoning. First, as mentioned earlier, the court assumes that if a married couple has a child, it would be a child that they have procreated failing to take into consideration adoption or artificial insemination. Second, the court assumes that traditional marriages result in monogamy and fidelity, obviously implying that same-sex couples undoubtedly practice polygamy and infidelity. Like the appellate court in *Langan*, the appellate court in *Hernandez* fails to cite any facts to support of its conclusion. A statistic that the court does not cite include the divorce rate for opposite-sex couples, which in 2004, was 37% in America.[28] This rate clearly does not include separation rates for opposite-sex couples, which would increase the over-all rate of unsuccessful traditional marriages. These rates are significant because divorce and separation usually have a severely negative impact on a child's welfare, most significantly the feeling of rejection from the child's parents.[29] Considering these facts,

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[27] *Hernandez*, 805 N.Y.S.2d at 360.

[28] *Americans for Divorce Reform: Divorce Rates*, *available at* http://www.divorcereform.org/rates.html (last visited Feb. 2, 2006).

[29] Patrick F. Fagan, *The Social Scientific Data on the Impact of Marriage and Divorce on Children*, The Heritage Foundation, *available at* http://www.heritage.org/Research/Family/tst051304a.cfm (last visited Apr. 26, 2006).

there is no indication that traditional marriages are likely to result in an optimal situation for child rearing, as was implied by the court.

SOCIAL STABILITY IS NOT BASED ON TRADITIONAL MARRIAGES

The court's last factor is that traditional marriages would result in social stability. The court assumes that pulling together the procreation and child rearing factors would result in a stable society by reasoning that the Domestic Relations Law:

> "sets up heterosexual marriage as the cultural, social and legal ideal in an effort to discourage unmarried childbearing and to encourage sufficient marital childbearing to sustain the population and society; the entire society, even those who do not marry, depend on a healthy marriage culture for this latter, critical, but presently undervalued, benefit. Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children and society, and such preference constitutes a rational policy decision. Thus, society and government have reasonable, important interests in encouraging heterosexual couples to accept the recognition and regulation of marriage."[30]

The court assumes that the well-being of society is dependent on traditional marriages. In addition to the faulty reasoning mentioned earlier, the court does not have and does not cite any factual basis for its implication that same-sex marriages would lead to a broken society. Traditional marriages are not necessary for the well-being of a child nor is there any support that it is necessary for society. Many people get married for its official recognition and for its benefits, such as a lower taxable income by filing joint tax returns and the exclusion of gain from the sale of a

[30] *Hernandez*, 805 N.Y.S.2d at 360.

primary residence.[31] The benefits alone may be sufficient for some to get married since there is an estimate of "1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges."[32]

CONCLUSION

Progressive issues faced by the courts in both the *Langan* and *Hernandez* cases require careful consideration in decision-making. However, the appellate courts' decisions in both cases reflect the continuously changing nature of judicial decision-making. Their decisions reinforce a judge's ability to make decisions, to draw the line between what is, and is not, constitutional, and then to walk away without providing the parties or the public with substantive reasoning. Society has faith in the judicial system, not because a judge states what he believes is right or wrong, but because he believes it is right based on facts and an in-depth analysis of the law. It is reasoning which society looks upon and which creditability in the law is shaped.

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[31] See generally 26 U.S.C. § 121 (2000).

[32] Letter from Dayna K. Shah, Associate General Counsel, Government Accounting Office, to The Honorable Bill Frist, United States Senate (Jan. 23, 2004).