

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. DORIS LING-COHAN, Justice PART 62

**DANIEL HERNANDEZ and NEVIN COHEN,
LAUREN ABRAMS and DONNA FREEMAN-TWEED,
MICHAEL ELSASSER and DOUGLAS ROBINSON,
MARY JO KENNEDY and JO-ANN SHAIN, and
DANIEL REYES and CURTIS WOOLBRIGHT,**

INDEX NO.: 103434/2004

Plaintiffs,

-against-

MOTION SEQ. NO.: 003

**VICTOR L. ROBLES, in his official capacity as
CITY CLERK of the City of New York,**

Defendant.

DORIS LING-COHAN, J.:

From the literary references of Shakespeare's Romeo and Juliet, to the anti-miscegenation laws of this country's recent past barring interracial marriage, the freedom to choose whom to marry has consistently been the subject of public outcry and controversy. In fact, ironically, the parents of one of the named plaintiffs¹ were, themselves, barred from marrying each other by an anti-miscegenation law that made it illegal for interracial couples to marry. In 1966, in order to marry, plaintiff Curtis Woolbright's parents moved to California,² the only State at that time whose courts had declared

¹ Affidavit of Curtis Woolbright, ¶ 8; attached to Affirmation of Susan Sommer ("Sommer") Submitted in Support of Plaintiffs' Motion for Summary Judgment dated July 29, 2004.

² In a highly controversial decision, California's Supreme Court was the first State court to declare its State's anti-miscegenation statute, which barred whites from marrying

bans on interracial marriage unconstitutional.

Thirty-eight years later, their son (Curtis Woolbright), his partner, and four other couples, bring suit to secure the fundamental right to choose one's partner in marriage. Karen Woolbright, mother of plaintiff Curtis Woolbright, understands from her own experience a generation ago what this means for her son:

"My son . . . and his beloved partner, Daniel Reyes, should have the right to get married for the same reasons I should have had the right to marry my husband, Curtis Woolbright Sr., in the early 1960's. My husband's home state Texas, and many other states at the time, restricted us from getting married, because he was black and I am white. There was no reason to exclude us from marriage other than fear and prejudice. . . . I cannot express how important it was to get married. As a married couple, we received protections and respect for our family that

"Negroes, Mongolians, members of the Malay race, or mulattoes," unconstitutional. Perez v. Sharp, 32 Cal 2d 711, 712, 198 P2d 17 (1948). It was not until almost two decades later, in Loving v. Virginia (388 US 1 [1967]), that the United States Supreme Court struck down a similar anti-miscegenation law as unconstitutional. At that time, sixteen States still had laws prohibiting interracial marriage. www.encyclopedia.thefreedictionary.com/miscegenation (accessed Feb. 2, 2005). Such laws were not completely repealed in individual States until November 2000, when Alabama became the last State to repeal its law, by 60 percent in favor of repeal. Id.

were still withheld in many parts of the country to inter-racial couples...[G]etting married also affected my self-esteem. Looking back I can say that the first day I referred to Curt as my husband validated my relationship and my feelings for him."

(Affidavit of Karen Woolbright, ¶¶ 3, 9, attached to Affirmation of Susan L. Sommer ["Sommer"] in Support of Plaintiffs' Motion for Summary Judgment dated July 29, 2004 ["Plaintiffs' Motion"]).

An instructive lesson can be learned from the history of the anti-miscegenation laws and the court decisions which struck them down as unconstitutional. The challenges to laws banning whites and non-whites from marriage demonstrate that the fundamental right to marry the person of one's choice may not be denied based on longstanding and deeply held traditional beliefs about appropriate marital partners.

Although anti-miscegenation laws were first enacted in colonial days, such laws were still common into the 1960's and upheld in case after case based on tradition rooted in perceived "natural" law.³ For example, the Indiana Supreme Court relied on the "undeniable fact" that the "distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold." State v. Gibson, 36 Ind 389 (1871). According to the Indiana Supreme

³ See Kindregan, Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History, 38 Fam LQ 427, 434-435 (Summer 2004); Ross, The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage, 37 Harv CR-CL L Rev 255 (2002).

Court, the laws requiring separation of the races derive not from "'prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.'" Id. (quoting West Chester & P.R. Co. v. Miles, 55 Pa 209, 214 [1867]); see also Scott v. State, 39 Ga 321 (1869) ("moral or social equality between the different races . . . does not in fact exist, and never can").

It was not until 1948 that the first state Supreme Court rejected the reigning doctrine that laws limiting marriage to partners of the same race reflected natural law impervious to constitutional challenge. Perez v. Sharp, 32 Cal 2d 711, 198 P2d 17 (1948). The California anti-miscegenation law prohibited marriages of "white persons" to "Negroes, Mongolians, members of the Malay race, or mulattoes." 32 Cal 2d at 712, 198 P2d at 17.

Almost two decades after the groundbreaking and controversial California Supreme Court decision in Perez, the United States Supreme Court in Loving v. Virginia (388 US 1 [1967]), declared that Virginia's anti-miscegenation statute violated the fundamental right to marry and the guarantee of equal protection. At the time, about one third of all States still had laws prohibiting interracial marriage.⁴ In fact, the trial court in Loving, even as late as the 1960's, had rejected the rights of adults to choose their marital partners based on out-moded prejudices that are now recognized as illegitimate grounds for governmental action:

⁴ See supra, note 2.

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

Loving, 388 US at 2 (quoting trial judge's opinion).

As with the Perez court, the United States Supreme Court was not deterred by the deep historical roots of anti-miscegenation laws (Loving, 388 US at 7, 10); their continued prevalence (Id. at 6, n 5); nor any continued popular opposition to interracial marriage. Id. at 7. Instead, the Court held that "[u]nder our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State," declaring that "marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." Id. at 12 (quoting Skinner v. Oklahoma, 316 US 535, 541 [1942]).

I. BACKGROUND

Here, plaintiffs, members of five same-sex couples living in New York City, move for summary judgment declaring that, under the New York State Constitution, they are entitled to treatment equal to that of opposite-sex couples with regard to the issuance of marriage licenses and access to civil marriage. They contend that, insofar as New York State's Domestic Relations Law (DRL) denies marriage licenses and access to civil marriage to same-sex couples, it violates the Due

Process and Equal Protection Clauses of the New York State Constitution. In addition to declaratory relief, plaintiffs seek an injunction requiring defendant to grant each of the couples a marriage license.

Defendant Victor Robles ("Defendant Clerk"), who is sued in his official capacity as City Clerk of the City of New York, cross-moves for summary judgment dismissing the complaint. Defendant is the administrator of the New York City Marriage License Bureau and has responsibility for the issuance of marriage licenses and the solemnization of civil marriages in New York City.

The partners in each couple have been devoted to one another for periods ranging from three (3) to twenty-two (22) years and represent the rich diversity of New York. Several of the couples are raising children conceived during the relationship or adopted into their homes. The individual plaintiffs come from an array of racial, ethnic, and religious backgrounds and include health care professionals, a computer specialist, a textile stylist, a waiter, city planners, and a director of an emergency food assistance program. Each couple wishes to enter into a civil marriage, but was denied a marriage license by Defendant Clerk. Plaintiffs allege that they have suffered serious hardship because of their exclusion from civil marriage. Plaintiffs claim that without this State's recognition of same-sex marriage, they are denied the protections, benefits, and mutual responsibilities automatically afforded to married couples by New York State law.

Illustrative of the hardships caused by the exclusion of same-sex

marriage is the relationship of Mary Jo Kennedy and Jo-Ann Shain.⁵ Mary Jo Kennedy is a medical director of a family health center and Jo-Ann Shain is an editor of medical publications for lawyers. Having met at a public health conference, they moved in together and have been committed to each other in their loving relationship for twenty-two (22) years.

After discussing and understanding the momentous responsibility of bringing a child into the world, they decided to have a family. Jo-Ann's parents were happy that the couple was starting a family, as they have always treated Mary Jo as their daughter. Jo-Ann conceived a child through anonymous sperm donation and Mary Jo was with her at every step. In order to become the child's second legal parent, however, Mary Jo was required to go through an extensive legal process and waited years before she could adopt the child. In 1996, immediately after second-parent adoptions became legal in New York, Mary Jo was able to formally adopt the child. Mary Jo and Jo-Ann had to endure considerable expense, including hiring lawyers, and had their privacy invaded in the process. If they had been a married couple, Mary Jo would automatically have been the child's legal parent. While they had registered as domestic partners in New York City in 1993, such registration did not serve as an adequate substitute for marriage, since it provided the family with fewer privileges and protections.

Mary Jo Kennedy and Jo-Ann Shain's child is now 15 years old.

⁵ Affidavits from each plaintiff couple and family members are attached to Sommer Affirmation.

The family travels together, takes vacations with extended family and friends, and volunteers at a local homeless shelter and a soup kitchen. Nonetheless, as detailed in her affidavit, the child feels that it is unfair that her parents cannot be married to each other and that it is wrong that she can have a legal relationship with each of her parents, but they cannot have the legal relationship of marriage to each other.

Four other couples detail, in their affidavits, similar committed and loving relationships. In all respects, but the ability to marry, the relationships are typical of countless couples within the City and throughout the State; jobs are held, children are raised, day-to-day family concerns are addressed.

Plaintiffs Michael Elsasser, 49, and Douglas Robinson, 52, have lived together for 18 years. They live with their two sons, ages 18 and 15. Douglas adopted both boys from the New York City foster care program, when they were infants. He is an Assistant Vice President and Technical Project Manager at Citibank. His partner is a woven textile stylist and technician at a Manhattan-based company and vice-president of the co-op board in the building where the couple lives.

Plaintiffs Daniel Reyes, 30, and Curtis Woolbright, 37, have lived together for three years, contributing equally to all of their expenses including, rent for their apartment, utilities, groceries, credit card payments, car insurance and care for their two dogs. Daniel is the director of an Acute Emergency Food Assistance Program for Yorkville Common Pantry in Harlem. Curtis is an aspiring voice-over artist, and pays the bills by working as a waiter.

Plaintiffs Lauren Abrams, 39, and Donna Freeman-Tweed, 43, have lived together for six years. They live with their four year old son and their newborn son. Lauren is the biological mother of both boys, who were conceived through anonymous donor insemination. Donna's second-parent adoption of the older son was finalized in 2002, and the couple has begun the process of petitioning the State for second-parent adoption of their second child. Lauren is a midwife at Mt. Sinai Hospital in Manhattan. Her partner is a physician's assistant at the Brooklyn College Health Clinic.

Plaintiffs Daniel Hernandez, 46, and Nevin Cohen, 41, have lived together for five years. Daniel manages urban redevelopment projects at Jonathan Rose Companies. Nevin, an environmental planner, played an instrumental role in writing New York City's recycling law, when he worked as a policy analyst for the New York City Council. Recently, he founded his own environmental planning firm.

Each of the plaintiff couples appeared at Defendant Clerk's offices in March 2004, and sought a marriage license. All were informed that the DRL does not authorize the issuance of marriage licenses to same-sex couples. They were given a form letter⁶ explaining that defendant had recently received an advisory opinion from the Law Department of the City of New York⁷ advising his office to continue to decline requests for marriage licenses from same-sex

⁶ Form letter; attached to Affirmation of Jeffrey S. Trachtman ("Trachtman") Submitted in Support of Plaintiffs' Motion for Summary Judgment, dated July 29, 2004, ("Plaintiffs' Motion") as Exhibit 3.

⁷ Corporation Counsel Opinion ("Corporation Counsel Op."); attached to Trachtman Affirmation, as Exhibit 3.

couples, and that the Attorney General of the State of New York had issued an informal opinion⁸ concluding that New York law does not currently authorize same-sex marriages. A copy of each of those opinions was attached to the form letter. Also attached was an informational handout explaining New York City's Domestic Partnership registration program. The letter noted that Domestic Partnership registration offers some, although not all, of the legal protections of marriage, within New York City.

Defendant does not dispute that plaintiffs are serious, committed couples, devoted to building lives together as families, whose relationships are no different from those of married couples. In fact, defendant acknowledges that same-sex couples can establish committed, loving relationships and can be fine parents. [Defendant's Amended Memorandum of Law in Support of Cross Motion for Summary Judgment, dated September 4, 2004, at 2 ("Def. Br.")].⁹

⁸ 2004 NY Op. (Inf.) Att'y Gen'l (March 2004), at 7-11; attached to Trachtman Affirmation Submitted in Support of Plaintiffs' Motion as Exhibit 4 ("Attorney General Op."). The Opinion concluded that "the Legislature did not intend to authorize same-sex marriage. This interpretation of the statute, however, raises constitutional concerns, which are best resolved by the courts of this State." Id. at 27.

⁹ Defendant expressly affirms that he "does not dispute the material facts set out by plaintiffs in their motion for summary judgment" (Def. Br. at 1-2), thereby conceding the truth of all the operative facts set forth in plaintiffs' opening brief and accompanying affidavits. In addition, defendant admits that "same-sex couples can establish committed, caring relationships and can be fine parents." (Def. Br. at 2.) By not contesting plaintiffs' contentions, defendant also concedes that plaintiffs' exclusion from marriage deprives them of a vast range of statutory protections, benefits, and mutual responsibilities automatically afforded to married couples by New York law. (See Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, dated July 29, 2004 ("Pl. Br."), at 14-23.)

Since both sides agree that there are no material facts in dispute, summary judgment is appropriate. See CPLR § 3212(b); Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957).

II. DISCUSSION

A. Disadvantages Suffered by Plaintiff Couples and Their Children

Defendant does not dispute that plaintiffs and their children suffer serious burdens by being excluded from civil marriage.¹⁰ Marriage provides an extensive legal structure that protects the couple and any children. It is not disputed, for example, that among many other disadvantages, plaintiff couples may not own property by the entirety; file joint state income tax returns; obtain health insurance through a partner's coverage; obtain joint liability or homeowner's insurance; collect from a partner's pension benefits; have one partner of the two-women couples be the legal parent of the other partner's artificially inseminated child, without the expense of an adoption proceeding; invoke the spousal evidentiary privilege; recover damages for an injury to, or the wrongful death of, a partner; have the right to make important medical decisions for a partner in emergencies; inherit from a deceased partner's intestate estate; or determine a partner's funeral and burial arrangements.¹¹ "Marriage laws provide many

¹⁰ See supra, note 9.

¹¹ See supra, note 9.

financial and legal protections to married couples. The U.S. General Accounting Office has identified 1049 federal laws in which benefits, rights and privileges are contingent on marital status." People v. Greenleaf, 5 Misc 3d 337 (Just Ct Ulster County 2004).

The concern that, without the legal recognition of marriage, a committed relationship may not be recognized if one of the couples is faced with a health crisis was experienced by a number of plaintiffs, including plaintiff Nevin Cohen (Cohen Affidavit, ¶12; attached to Sommer Affirmation, Plaintiffs' Motion): "When [my partner] was ill and in the hospital, I was not always given the same information or asked the same decision-making questions in a way a spouse would be." Mary Jo Kennedy recounted: "In 1992, an emergency sent Jo-Ann to the hospital. As she lay in the hospital awaiting surgery, we rushed to fill out revised forms to make sure that I could consent to treatment for her if necessary. Needless to say, that situation was very stressful and would not have occurred if we had been married." (Kennedy, ¶ 18, Plaintiffs' Motion).

Although, in New York City, same-sex couples may register as "domestic partners" (Administrative Code of the City of New York ["NYC Admin Code"] § 3-240), the benefits are relatively minimal compared to those of civil marriage. The benefits of domestic partnership are essentially limited to visitation rights with domestic partners in city facilities, health benefits, bereavement and child care leave for City employees, and eligibility to qualify as a family member for purposes of New York City-owned or operated

housing. See NYC Admin Code § 3-244(a)-(f).

One of the most important benefits of marriage is the securing of the bonds between parents and children and the protection of children raised in the family. For example, the children of parents in same-sex relationships are not necessarily covered by the statutory duty of support. See Family Court Act, Art IV § 413. Under State law, when a couple elects to conceive a child through donor insemination, only the married couple can ensure that at birth the child has an automatic legal parent-child relationship with each, upon their written consent. Domestic Relations Law ("DRL") § 73.

Marriage also imposes reciprocal responsibilities on spouses, which serve to protect the family, including the legal requirement that spouses provide each other with financial support or face legal redress in certain circumstances, such as if one spouse is a recipient of public assistance. Social Services Law § 101. Spouses, but not unmarried couples, are permitted to take out insurance policies on each other. DRL § 52; Insurance Law § 3205.

In addition to legal rights and obligations embodied in New York statutes, many private entities, such as employers, rely on the State's conferral of marriage and the resulting status of spouse in providing benefits.¹² These include health insurance benefits, health club benefits and car insurance.¹³

¹² See Pl. Br. at 18-19; Affidavits of Plaintiffs Reyes ¶ 14, Cohen ¶ 10, Shain ¶ 14, Abrams ¶ 22, and Robinson ¶¶ 21,23, attached to Sommer Affirmation.

¹³ See supra, note 12.

