

A Look At How NYS Legislation Has Profoundly Impacted LGBT Family Law

by Jessica Cherry

When you think of what the word “family” means to you, it takes on a variety of meanings. It could mean your husband, wife, children, parents, grandparents, aunts, uncles or even your closest friends. The implications that come along with saying “family” are that you are related to that person by marriage or blood. However, this is a very traditional and somewhat close-minded way of approaching how one thinks of “family.” “Family” is not strictly defined by blood or marriage; it carries the meaning that you want it to have. In New York State, family is two women getting married and becoming wives; family is two men getting married and becoming husbands; family is a man and a women getting married to become husband and wife; and family is all LGBT families being able to legally adopt, including if it is their partner’s child. New York has done an excellent job in striving for LGBT equality, especially in Family Law, and it has become a role model for many states that have yet to legalize same-sex marriages or certain adoption rights.

Prior to 1989, New York State did not consider same-sex relationships to be included under the legal definition of “family.”¹ That changed when the New York Court of Appeals ruled on the case of *Braschi v. Stahl Associates Co.*² Braschi was living in an apartment with his life partner when his partner died of complications from AIDS.³ As a result of rent control and his partner’s name being on the rent, Braschi was going to be evicted from his apartment because housing law did not consider him a “family member.”⁴ Braschi took the case to court and argued

¹ "2015 David A. Garfinkel Essay Contest Resources: Background," Historical Society of the New York Courts, Accessed March 26, 2015, <http://www.courts.state.ny.us/history/academic-center/garfinkel-essay-scholarship-resources-general.html>.

² Grossman, Joanna, and Edward Stein, "The State of the Same-Sex Union: Part One in a Three-Part Series," FindLaw, July 7, 2009, Accessed March 26, 2015, <http://writ.news.findlaw.com/grossman/20090707.html>.

³ Ibid.

⁴ Ibid.

that the long-term relationship with his partner made him family.⁵ The court agreed with him, and from that point forward, long-term same-sex relationships were considered “family” under Rent Control Law.⁶ Small legal victories towards the end of the twentieth century started to help the marriage equality movement in New York State gain momentum.

After this significant win for the LGBT community, if you fast-forward fifteen years to 2004, public support for same-sex civil unions and marriages in New York was noticeably higher than in most states.⁷ Results from a poll of New York State residents, taken in 2004, showed that thirty-seven percent of New Yorkers supported same-sex marriage.⁸ Two years later, in 2006, the case of *Hernandez v. Robles* was brought before the New York Court of Appeals.⁹ It was the court’s ruling that the New York Constitution did not "compel recognition of marriages between members of the same sex" and that recognition of such marriages was a matter for the New York State Legislature."¹⁰ Despite the fact that Governors Spitzer and Paterson were Democrats who included marriage equality in their campaign platforms, measures to legalize it were failing. In 2009, a variation of the marriage equality bill was introduced as legislation to the New York State Senate.¹¹ Even though the Senate was controlled by the Democrats who largely support marriage equality, the bill was quickly defeated and it was a sizeable blow to supporters.¹²

During the time between when the first marriage equality bill was defeated and when the Marriage Equality Act was passed, New York had elected Andrew Cuomo as Governor in

⁵ Ibid.

⁶ "2015 David A. Garfinkel Essay Contest Resources: Background," Accessed March 26, 2015

⁷ Confessore, Nicholas, and Michael Barbaro, "New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law," The New York Times, June 24, 2011, Accessed March 28, 2015, http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?_r=2.

⁸ Ibid.

⁹ "2015 David A. Garfinkel Essay Contest Resources: Background," Accessed March 26, 2015

¹⁰ Ibid.

¹¹ Confessore and Barbaro, “New York Allows Same-Sex Marriage”

¹² Ibid.

January 2011. Governor Cuomo became a staunch supporter of marriage equality, and he included it among his top priorities during his first year in office.¹³ The efforts of Governor Cuomo, his staff, and multiple LBGT equality support groups resulted in the creation of the Marriage Equality Act, which went before the Senate on June 24, 2011.¹⁴ After much persuasion by the same people who created the bill, both Democrats and Republicans in the Senate voted their conscience, not in a way that would politically benefit them.¹⁵ This is the mark of true bipartisanship; both Democrats and Republicans voting based on their individual beliefs, not based on what their party platform is on such a vital issue. After long debate, the Republican-controlled Senate voted to pass the Marriage Equality Act of 2011 – and subsequently made history.¹⁶ Governor Cuomo was present immediately after the Senate vote to sign the bill into law that night, to show his appreciation for bipartisanship and to stand in solidarity with the LGBT community.¹⁷

Governor Cuomo signing the Marriage Equality Act of 2011, combined with it subsequently coming into effect thirty days later, was an absolute victory for the LGBT community and its supporters. The biggest fight of the marriage equality movement in New York State was finally over. Passing this law has changed the lives of a countless number of LGBT individuals, and they now have the freedom to marry whomever they want, regardless of gender or what other people may think. Knowing that you have the freedom to legally marry the person you love, just the same as a straight couple, has brightened and brought joy into so many lives. The LGBT community tried for so many years to get a marriage equality bill passed, even

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

under two Democratic Governors, and Governor Cuomo managed to do it within his first year. The LGBT community will be forever grateful for the actions of Governor Cuomo and the New York State Senate.

For LGBT individuals, being able to marry their partner was the first big hurdle for the New York State gay rights movement. Another issue for most couples, that was second only to being able to marry their partner, was where they stood as a legal parent to their partner's child or children that they adopted together. In 1995, the case of *Matter of Jacob* was brought before the New York Court of Appeals.¹⁸ The court ruled that a partner in a same-sex relationship can adopt their partner's child, as long as their partner is the legal parent of that child.¹⁹ This case was the gateway to second-parent adoptions. In New York State, there is now considered to be a "presumption of parenthood" for all married couples.²⁰ For lesbian couples, this means that if they want to have a child together, one partner gets pregnant with donor sperm and she gives birth to the child, and then her wife is considered to be that child's other legal parent at the time of birth.²¹ This also means that gay and lesbian married couples are both considered legal parents at the time of adoption, if they adopt children together.²²

Despite the fact that there is a "presumption of parenthood," lawyers for same-sex couples in New York State are still urging the couples to petition for second-parent adoption rights, as a safety net.²³ However, this process should not be necessary. One issue that has yet to be officially resolved is that same-sex couples still aren't treated exactly the same as straight couples when it comes to having children. If straight couples don't have to petition for second-

¹⁸ "2015 David A. Garfinkel Essay Contest Resources: Background," Accessed March 26, 2015

¹⁹ Ibid.

²⁰ Dodge, David, "At the Cutting Edge of Gay Family Law," *The New York Times*, June 17, 2014, Accessed March 26, 2015, <http://parenting.blogs.nytimes.com/2014/06/17/at-the-cutting-edge-of-gay-family-law/>.

²¹ Ibid.

²² Ibid.

²³ Ibid.

parent adoption rights when their children are born to them, same-sex couples shouldn't have to either. The situation is almost hypocritical; a lesbian couple who has a child born to them are both considered legal parents of that child, but the one who didn't bear that child naturally should still petition for second-parent adoption, despite already being considered a legal parent.²⁴ This is an unnecessary double standard that is costing, on average, one year's worth of time, thousands of dollars in legal fees, contact with a social worker, and family court dates all at the recommendation of a lawyer.²⁵ At the moment, there is a precedent set by Brooklyn Surrogate Court Judge Margarita López Torres, which says that second-parent adoption in the case of same-sex couples "was neither necessary nor available" because of the "presumption of parenthood."²⁶ It is possible that another judge in the state could hand down a different ruling on a similar case, but this seems to be the precedent that is standing for New York State courts at the moment.²⁷ This is an issue that needs to be taken care of once and for all, so that same-sex couples can have children or adopt children and be treated the exact same as a straight couple. There is still progress that needs to be made in this area of LGBT Family Law. The way things are now can be very discouraging for same-sex couples looking to have children, since they have to jump through all of these hoops just to be sure that they are in fact the legal parents.

It is very evident that in New York State there are many different kinds of family. Family is not defined by the gender of two people in a relationship; it is defined by the love that they share. There is no "traditional family," as some people might have you think, regarding a man and a woman. The only way that we can define what a "traditional family" is in 2015 is a family where two people love each other immensely, and if they choose to have kids, they love

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

those kids just as much and treat them well. We can only hope that the states that have yet to legalize gay marriage and certain adoption rights follow in the footsteps of New York State and all of the other states that have gotten on the right side of history, and they come to learn that love is love.

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