STATE OF NEW YORK
INSURANCE DEPARTMENT
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The Office of General Counsel issued the following opinion on November 21, 2008, representing the position of the New York State Insurance Department.

Re: Health Insurance for Same-Sex Spouses in Legal Out-of-State Marriages

Question Presented:

Does the marriage of a same-sex couple legally performed in a jurisdiction outside New York confer the same rights to spousal health insurance coverage in New York as the marriage of an opposite-sex couple?

Conclusion:

Yes. Same-sex parties to marriages validly performed outside of New York must be treated as "spouses" for purposes of the New York Insurance Law, including all provisions governing health insurance.

Facts:

The inquirer reports that she and her same-sex partner, who have been together for 20 years, were recently married in Ontario, Canada, where the marriage of same-sex couples is legal. The inquirer further states that she is a teacher for a Board of Cooperative Educational Services (BOCES), and that, after her marriage, she applied for her spouse to be covered under her health insurance. The inquirer reports that her insurer rejected her application for spousal coverage on the ground that same-sex partners who are married to each other are not "spouses" within the meaning of the Insurance Law.[1]

The Department notes that, by memorandum dated May 14, 2008 ("Governor's Memorandum"), the Counsel to the Governor of this State directed counsel of all state agencies to review their policy statements, regulations, and statutes to ensure that terms such as "spouse," "husband," and

[1] On July 9, 2008, the New York Civil Liberties Union sued BlueCross BlueShield of Western New York ("BCBSWNY") in Supreme Court, Erie County for refusing to extend spousal health coverage to the same-sex spouse of a school-district employee whose marriage had been entered in Canada. See Kornowicz & Higgins v. Healthnow New York Inc. (Sup. Ct. Erie Cty., filed July 9, 2008). On July 28, 2008, BCBSWNY announced that it will begin providing spousal coverage for same-sex couples legally married outside the State. See, e.g., Gene Warner, Same-Sex Area Couple Wins Health Care Benefits Fight, Buffalo News, July 29, 2008, at B1; Fran Lysiak, Following Lawsuit, Blues of Western N.Y. Provides Benefits to Married Same-Sex Couples, Best's Insurance News, July 29, 2008.

"wife" are construed in a manner that encompasses marriages of same-sex couples legally performed out-of-state, unless barred by some other provision of law. The Governor's Memorandum observes that extending recognition to valid marriages of same-sex couples that are performed in jurisdictions outside of New York is consistent with State policy, and notes that in April 2007, the New York State Department of Civil Service extended recognition to same-sex spouses legally married in other jurisdictions for purposes of spousal benefits under the New York Health Insurance Program. In a decision dated September 2, 2008, the Supreme Court of the State of New York, Bronx County, upheld the legal validity of that memorandum. See Golden v. Paterson, Index No. 260148/2008 (Sup. Ct. N.Y. Cty. Sept. 2, 2008).

Analysis:

Insurers are authorized to issue group health insurance policies to employers for the coverage of their employees by N.Y. Insurance Law § 4235(c)(1)(A) (McKinney 2007) (governing commercial insurers) and Insurance Law § 4305(a) (governing not-for-profit insurers and health maintenance organizations). In addition, when group health insurance is sold to an employer to cover its employees, insurers are authorized to extend coverage to the employees' spouses, among others, by Insurance Law § 4235(f)(1) (governing commercial insurers) and Insurance Law § 4305(c)(1) (governing not-for-profit insurers and health maintenance organizations).[2] Insurance Law § 4235(f)(1) provides, in pertinent part:

> Any policy of group accident, group health or group accident and health insurance may include provisions for the payment by the insurer of benefits for expenses incurred on account of hospital, medical or surgical care or physical and occupational therapy by licensed physical and occupational therapists upon the prescription or referral of a physician for the employee or other member of the insured group, his spouse, his child or children, or other persons chiefly dependent upon him for support and maintenance[.]... (Emphasis added.)

Insurance Law § 4305(c)(1) provides:

> (c) (1) Any such contract may provide that benefits will be furnished to a member of a covered group, for himself, his spouse, his child or children, or other persons chiefly dependent upon him for support and maintenance[.]... (Emphasis added.)[3]

Although the Insurance Law authorizes employers to offer their employees group health insurance, and to extend such coverage to spouses and other family members or dependents, it does not require employers to offer such coverage. See Office of General Counsel ("OGC") Opinion 04-05-25 (May 19, 2004); OGC Opinion 07-11-10 (Nov. 29, 2007) (noting that Insurance Law permits, but does not require, insurers to provide domestic partner coverage).

[2] Insurance Law § 4305(c)(1) applies to group contracts issued by health maintenance organizations pursuant to N.Y. Pub. Health Law § 4406(1) (McKinney Supp. 2008).

[3] While Insurance Law § 4235(f)(1) speaks of the employee, "his spouse, [and] his child or children" (emphasis added), and Insurance Law § 4305(c)(1) permits an employee to obtain group coverage "for himself, his spouse, [and] his child or children" (emphasis added), there is no question that the group health insurance provisions of the Insurance Law apply to both male and female employees, and to both male and female spouses. The New York General Construction Law mandates that "[w]henever words of the masculine or feminine gender appear in any law, rule or regulation, unless the sense of the sentence indicates otherwise, they shall be deemed to refer to both male or female persons." N.Y. Gen. Constr. Law § 22 (McKinney 2003).

However, when an employer chooses to extend its employees' health coverage to spouses, other family members, or dependents, the employer may not distinguish between types of spouses or other such persons in a manner that is unlawfully discriminatory. OGC Opinion 04-05-25; OGC Opinion 07-11-10 (citing Insurance Law § 4224(b)(1), N.Y. Exec. Law § 296(1)(a)).

Same-sex couples legally marrying outside of New York and residing in the State give rise to the question of whether a same-sex spouse is considered a "spouse" for purposes of group insurance offered in accordance with the Insurance Law. The remainder of this opinion addresses that question.

Nothing in the Insurance Law – and indeed, nothing in any New York statute – either expressly authorizes or expressly prohibits this agency from interpreting the term "spouse" in the Insurance Law to include same-sex parties to marriages legally performed out of state. Moreover, while the Court of Appeals – the State's highest court – held in Hernandez v. Robles, 7 N.Y.3d 338, 357, 366 (2006), that New York's statutory law limits marriage to opposite-sex couples, and that this limitation is consistent with the New York Constitution, Hernandez did not address the question of whether New York should, as a matter of comity, recognize marriages of same-sex couples validly solemnized outside the State. Indeed, "the question of whether same-sex marriages valid in the jurisdiction where performed should be recognized in New York is an outgrowth of [Hernandez's] determination that the law in New York does not compel the State to sanction same-sex marriage." Godfrey v. Hevesi, 2007 N.Y. Misc. LEXIS 6589, at *5 (Sup. Ct. Albany Cty. Sept. 5, 2007).

While the Court of Appeals has yet to consider how marriages of same-sex couples performed outside this State should be treated in New York, see Beth R. v. Donna M., 19 Misc.3d 724, 853 N.Y.S.2d 501, 504 (Sup. Ct. N.Y. Cty. Feb. 25, 2008) (holding that "Hernandez did not address what effect New York should give to a validly entered out-of-state same-sex marriage") (emphasis added), the Appellate Division, Fourth Department recently addressed the issue in Martinez v. Monroe Community College, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't), lv. to appeal denied, 10 N.Y.3d 856 (2008).

In Martinez, plaintiff Patricia Martinez's employer denied her application to obtain health care benefits for her same-sex spouse, whom she had married in Canada, even though the employer provided such benefits to the opposite-sex spouses of its employees. The Fourth Department held that Ms. Martinez's marriage to her same-sex partner was entitled to recognition in New York State as a matter of comity.

The Martinez court observed that, "[f]or well over a century, New York has recognized marriages solemnized outside of New York unless they fall into two categories of exception." One exception category is for "marriages involving incest or polygamy, both of which fall within the prohibitions of 'natural law.'" Martinez, 850 N.Y.S.2d at 742 (citing Matter of May, 305 N.Y. 486, 491 (1953); Moore v. Hegeman, 92 N.Y. 521, 524 (1883); Thorp v. Thorp, 90 N.Y. 602, 605 (1882); Van Voorhis v. Brintnall, 86 N.Y. 18, 24-26 (1881)). The other category of exception is for marriages "the recognition of which is prohibited by the 'positive law' of New York[.]" Id. In other words, comity requires that a marriage valid in the place where it was entered "be recognized as such in the courts of this State, unless contrary to the prohibitions of natural law or the express prohibitions of a statute[.]" Id. (quoting Moore, 92 N.Y. at 524, and citing Thorp, 90 N.Y. at 606 and Van Voorhis, 86 N.Y. at 25-26) (internal quotation marks omitted).

Pursuant to this "marriage-recognition" rule, the Fourth Department observed, New York commonly recognizes marriages that are legal in the place where they were entered but could not have been legally solemnized in New York. Id. (citations omitted). Marriages accorded such recognition include a Rhode Island marriage between an uncle and his half-niece, see, e.g., Matter of May, 305 N.Y. at 493; a common-law marriage contracted in the state of Georgia, see, e.g., Matter of Mott, 51 N.Y.2d 289, 292-94 (1980); the marriage of two opposite-sex minors in Ontario, Canada, see, e.g., Donahue v. Donahue, 63 Misc. 111, 116 N.Y.S. 241, 242 (Sup. Ct. Erie Cty. 1909); and a marriage by proxy in the District of Columbia, i.e. a marriage where one spouse was physically absent from the wedding ceremony, Fernandes v. Fernandes, 275 A.D. 777, 777 (2d Dep't 1949). See also Martinez, 850 N.Y.S.2d at 742.

Ms. Martinez's marriage, the court found, is not barred from recognition as a matter of "natural law," because "[t]hat exception has generally been limited to marriages involving polygamy or incest or marriages 'offensive to the public sense of morality to a degree regarded generally with abhorrence' … and that cannot be said here." Id. at 743 (citation omitted); see also Godfrey v. Hevesi, 2007 N.Y. Misc. LEXIS 6589, at *4 (describing "natural law" exception to marriage recognition rule as applicable only in cases of marriage involving polygamy or incest); 2004 N.Y. Op. Atty. Gen. No. 1, 2004 WL 551537, at *11 (N.Y.A.G. March 3, 2004) (opining that "[t]he abhorrence exception is so narrow that only marriages involving 'polygamy or incest in a degree regarded generally as within the prohibition of natural law' have been deemed abhorrent by the courts") (citation omitted).

Nor did the Fourth Department find that the "positive law" exception bars New York from recognizing Ms. Martinez's marriage:

> [A]bsent any New York statute expressing clearly the Legislature's intent to regulate within this State marriages of its domiciliaries solemnized abroad, there is no positive law in this jurisdiction to prohibit recognition of a marriage that would have been invalid if solemnized in New York (May, 305 N.Y. at 493, 114 N.E.2d 4 [internal quotation marks omitted]; see also Van Voorhis, 86 N.Y. at 37). The Legislature has not enacted legislation to prohibit the recognition of same-sex marriages validly entered into outside of New York, and we thus conclude that the positive law exception to the general rule of foreign marriage recognition is not applicable in this case.

Martinez, 850 N.Y.S.2d at 742 (internal quotation marks omitted).

Notably, the Martinez court expressly rejected the notion that the Court of Appeals' conclusion in Hernandez reflects a New York State public policy against the marriage of same-sex couples so as to bar the recognition in New York of marriages validly performed outside the State. The Fourth Department noted:

> Hernandez holds merely that the New York State Constitution does not *compel* recognition of same-sex marriages solemnized in New York (see id. at 356, 821 N.Y.S.2d 770, 855 N.E.2d 1). The Court of Appeals noted that the Legislature may enact legislation recognizing same-sex marriages (see id. at 358-359, 821 N.Y.S.2d 770, 855 N.E.2d 1) and, in our view, the Court of Appeals thereby indicated that the recognition of plaintiff's marriage is not against the public policy of New York.

Id. at 743.

In addition, the Fourth Department in Martinez observed that, "unlike the overwhelming majority of states, New York has not chosen, pursuant to the federal Defense of Marriage Act (28 U.S.C. § 1738C), to enact legislation denying full faith and credit to same-sex marriages validly solemnized in another state." Id. [4]

Having found no "natural law" or "positive law" prohibition against the recognition by New York courts of a marriage between same-sex partners validly performed outside the State, the Fourth Department concluded that "[t]he Legislature may decide to prohibit the recognition of same-sex marriages solemnized abroad. Until it does so, however, such marriages are entitled to recognition in New York." Id.; see also 2004 N.Y. Op. Atty. Gen. No. 1, 2004 WL 551537, at *12 (observing that "New York law presumptively requires that parties to [same-sex unions from other jurisdictions] must be treated as spouses for purposes of New York law."); Legal Opinion of Office of the New York State Comptroller, dated October 8, 2004 (concluding that the New York Retirement System will recognize a Canadian marriage between same-sex partners in the same manner as a New York marriage between opposite-sex partners under the principle of comity).

Apart from finding that Ms. Martinez's marriage deserves recognition under New York law, the Fourth Department also held that the failure of Ms. Martinez's employer, Monroe Community College, to recognize her marriage violates N.Y. Executive Law § 296(1)(a) (McKinney Supp. 2007). That provision states:

> 1. It shall be an unlawful discriminatory practice:
>
> (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. (Emphasis added.)

The court ruled that the sole reason for the employer's refusal to recognize Ms. Martinez's marital status was her sexual orientation – a plain violation of Executive Law § 296(1)(a). See Martinez, 850 N.Y.S.2d at 743.

To date, Martinez is the only Appellate Division decision to address the question of whether New York should recognize valid marriages of same-sex couples performed in jurisdictions outside of New York. The only other Appellate Division decision to consider recognition of out-of-state marriages between same-sex partners defers to Martinez. See Funderburke v. New York State Dep't of Civil Servs., 49 A.D.3d 809 (2d Dep't 2008) (vacating Supreme Court decision declining to order recognition of a marriage entered into in Canada between same-sex partners, citing Martinez, and dismissing appeal as moot).

[4] The Defense of Marriage Act, 28 U.S.C. § 1738C, relieves states from being required to give effect to same-sex marriages authorized by another state pursuant to the Full Faith and Credit Clause of the United States Constitution, U.S. Constit. Art. IV, Sec. I. The statute does not, however, bar a state from recognizing valid foreign marriages.

In the absence of guidance from the Court of Appeals or the other Departments of the Appellate Division, Martinez is controlling precedent for all trial courts in the State. See, e.g., Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 664 (2d Dep't 1984) (holding that "[t]he Appellate Division is a single statewide court divided into departments for administrative convenience . . . and, therefore, the doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule.") (citations omitted); see also People v. Turner, 5 N.Y.3d 476, 482 (2005) (following Mountain View); Tzolis v. Wolff, 39 A.D.3d 138, 142 (1st Dep't 2007) (holding that, "[a]bsent any authority from this Court, the motion court was bound to follow the applicable ruling of another department") (citation omitted).

The Fourth Department's decision in Martinez also is consistent with the holdings of several lower courts in New York. See, e.g., Golden, Index No. 260148/2008, slip op. at 26 (holding that Governor's Memorandum implementing marriage recognition rule enunciated in Martinez is "consistent with New York's common law, statutory law, and constitutional separation of powers"); Lewis v. New York State Department of Civil Service, 2008 N. Y. Misc. LEXIS 1623 (Sup. Ct. Albany Cty. March 3, 2008), appeal pending (3d Dep't) (finding that policy memorandum issued by New York State Department of Civil Service Employee Benefits Division, which recognized as spouses the same-sex partners in any marriage performed in jurisdictions where such marriage is legal, was both lawful and within the agency's authority); Beth R. v. Donna M., 853 N.Y.S.2d 501 (holding that out-of-state marriages between same-sex partners were properly recognized under New York law); Godfrey v. Spano, 836 N.Y.S.2d 813 (Sup. Ct. Westchester Cty. 2007), appeal pending (2d Dep't) (finding that Westchester County Executive's order requiring county agencies to recognize the marriages of same-sex couples validly contracted out of state for the purposes of extending and administering all rights and benefits belonging to these couples constituted a lawful exercise of the County Executive's power); Godfrey v. Hevesi, 2007 N.Y. Misc. LEXIS 6589 (finding that New York Comptroller's policy of recognizing Canadian marriage of same-sex couple in the same manner as New York marriage of opposite-sex couple was legal and not contrary to law).

In light of the controlling authority of Martinez and the several opinions from lower New York courts consistent with that holding, the Insurance Department is of the view that marriages between same-sex partners legally entered outside of New York must be recognized in the State for purposes of interpreting the Insurance Law. Indeed, the Insurance Department would consider an insurer's refusal to extend health insurance coverage to same-sex and opposite-sex spouses on an equal basis to be an unfair practice under Insurance Law §§ 2402 and 2403, and to be unfair discrimination under Insurance Law § 4224.[5] Insurance Law § 2403 prohibits any

[5] Larger employers and employee organizations (such as labor unions) typically offer employee benefit plans that enable employees to obtain health and/or life insurance on a group basis. An employer or employee organization may offer such benefits either by purchasing a group insurance policy that names the employees as beneficiaries or by itself paying directly for the benefits in an arrangement known as a "self-funded" plan. See, e.g., Office of General Counsel ("OGC") Opinion 07-09-22 (September 20, 2007). A program by which an employer or employee organization provides such benefits to employees constitutes an "employee welfare benefit plan" within the meaning of the federal Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. See 29 U.S.C. § 1002(1); OGC Opinion 07-09-22. Pursuant to ERISA, an employee welfare benefit plan cannot be considered an insurer for purposes of state regulation, see 29 U.S.C. § 1144(b)(2)(B), and state laws relating to such plans are generally preempted by ERISA, see 29 U.S.C. § 1144(a). However, pursuant to an ERISA provision commonly known as the "insurance savings clause," 29 U.S.C. § 1144(b)(2)(A), the states retain jurisdiction over the provisions of any insurance policy issued to an ERISA benefit plan by an insurance company. See, e.g., OGC Opinion 04-01-10 (January 7, 2004). Therefore, notwithstanding ERISA, Martinez protects New Yorkers who obtain their health or life insurance benefits directly from an insurer via an employer-sponsored group policy.

person from engaging in this State in any unfair or deceptive act or practice constituting a "determined violation," and Insurance Law § 2402(c) defines a determined violation as:

> any unfair method of competition or any unfair or deceptive act or practice, which is not a defined violation but is determined by the superintendent pursuant to section two thousand four hundred five of this article to be such method, act or practice.

Insurance Law § 4224(b)(1), in turn, provides:

> (b) No insurer doing in this state the business of accident and health insurance … shall:
>
> (1) make or permit any unfair discrimination between individuals of the same class in the amount of premiums, policy fees, or rates charged for any policy of accident and health insurance, or in the benefits payable thereon, or in any of the terms or conditions of such policies, or in any manner whatsoever.

In the Insurance Department's view, same-sex and opposite-sex legal spouses are similarly situated for purposes of construing the Insurance Law, a principal aim of which is to ensure that all consumers have a fair opportunity to purchase appropriate protection against risk. Although the Court of Appeals concluded in Hernandez that the Legislature could rationally distinguish between same-sex and opposite-sex couples for purposes of determining which couples may marry pursuant to the Domestic Relations Law, see 7 N.Y.3d at 358-60, the bases for the distinction deemed rational in Hernandez – that it could be considered more important to promote stability for children in opposite-sex than in same-sex relationships, and that it could be considered better for children to grow up with both a mother and a father than with two same-sex parents, see id. – are not probative to the construction of the Insurance Law.

In sum, where an employer offers group health insurance to employees and their spouses, the same-sex spouse of a New York employee who legally married his or her spouse out-of-state is entitled to health insurance coverage to the same extent as any opposite-sex spouse.

Moreover, please be advised that, while the query that gives rise to this opinion and the analysis set forth herein addresses accident and health insurance, the Department's analyses and conclusions are applicable to all other kinds of insurance as well.

For further information, you may contact Deputy General Counsel Martha A. Lees at the New York City office.

Nor does ERISA apply to certain plans such as governmental or church plans. See 29 U.S.C. § 1003(b). Moreover, where an employer provides employee benefits through a self-funded plan but also purchases stop-loss insurance to indemnify itself against excessive losses, the provision of stop-loss insurance to an employer that fails to extend benefits on an equal basis to same-sex and opposite-sex spouses may itself violate the Insurance Law. See, e.g., OGC Opinion 07-09-22. And, an employer's failure to treat same-sex and opposite-sex spouses equally for purposes of health insurance or otherwise may violate Executive Law § 296(1)(a). See Martinez, 850 N.Y.S.2d at 743.