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v.	*Sat Below:*
GWENDOLYN L. HARRIS, in her official capacity as Commissioner of the New Jersey Department of Human Services; CLIFTON R. LACY, in his official capacity as the Commissioner of the New Jersey Department of Health and Senor Services; and JOSEPH KOMOSINSKI, in his official capacity as Acting State Registrar of Vital Statistics of the New Jersey State Department of Health and Senior Services, *Defendant-Respondents.*	Hon. Stephen J. Skillman, P.J.A.D. Hon. Donald G. Collester, J.A.D. Hon. Anthony J. Parillo, J.A.D.

BRIEF AND APPENDIX OF AMICI CURIAE GARDEN STATE EQUALITY EDUCATIONAL FUND, INC., AND GARDEN STATE EQUALITY, LLC, A CONTINUING POLITICAL COMMITTEE

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INTEREST OF THE AMICI

Amici are New Jersey's largest and most prominent statewide organizations whose primary mission is to advance the civil rights of the lesbian, gay, bisexual, transgender, and intersex (hereafter "LGBTI") community. Garden State Equality has more than 7,500 members and represents the approximately 875,000 LGBTI residents of New Jersey, as well as our straight allies.

Garden State Equality, LLC, is a New Jersey Continuing Political Committee that supports pro-LGBTI issues and candidates in New Jersey at the state and local levels. The not-for-profit Garden State Equality Educational Fund, Inc., has an educational mission: to educate New Jersey citizens and their governmental leaders about the challenges faced by members of the New Jersey LGBTI community in their quest to obtain equality under the law. Central to the Garden State Equality Educational Fund's work is educating citizens and leaders on the need for marriage equality for same sex couples.

Though each organization is legally separate, they have joined together as "Garden State Equality" to advance their similar interests in this case.

Amici, separately and together, have been at the forefront of addressing many of the most visible and horrendous examples of discrimination seen in New Jersey in the last few years. For example, Garden State Equality has led the recent public fight to

have Ocean County Freeholders adopt pension benefits for Lieutenant Laurel Hester and other gay and lesbian law enforcement and other personnel, and to educate citizens about the basic issues of fundamental fairness and equality at issue.

Garden State Equality counts among it members both "straight" and LGBTI citizens. Straight New Jersey citizens, the backbone of our state's progressive tradition, are far more than a token presence in our organization. Garden State Equality's leaders and financial supporters are from the straight and LGBTI communities, and its aggressive grassroots outreach is to both communities equally. Garden State Equality passionately advocates for expanding the LGBTI rights movement beyond its base by demonstrating that the civil rights sought by our community are nothing more than the civil rights which should be extended to all citizens of our State pursuant to the New Jersey State Constitution.

The separate Garden State Equality Educational Fund, which does not engage in political activity, produces public-education programs like the renowned town meeting series supporting marriage for lesbian and gay couples: "New Jersey: A State That Doesn't Hate." Since January 2003, over 8,000 New Jersey citizens have attended Garden State Equality's events across New Jersey in support of marriage equality.

The primary goal of Garden State Equality at this moment is obtaining the right for same sex couples to marry just like others similarly situated in society. Many of these couples, single persons and their families are members of Garden State Equality.

Like the plaintiffs, many Garden State Equality members and supporters are in loving same-sex relationships and are committed to each other, with many are raising children together as happy families. Like the plaintiffs, the State of New Jersey continues to deny them the right to marry and, in doing so, continues to demean and degrade their families by keeping them in an inferior status.

SUMMARY OF ARGUMENT

These *amici* describe and argue in Point I the failings of the Domestic Partnership Act ("DPA"). In contrast to the State's arguments, and those of the majority in the Appellate Division, the DPA provides eligible couples with a minuscule portion of the rights available to married couples. The DPA neither ameliorates the discrimination suffered by same-sex couples nor gives them many of the rights available to different sex couples.

The DPA also has made it legally permissible to discriminate against New Jersey citizens based on their sexual orientation where they previously had rights to actionable claims for this discrimination. This has been accomplished by giving municipal entities immunity from liability under the Law Against Discrimination when they deny pension and health benefits to domestic partners of employees. Even in the private sector, hospitals in New Jersey have cited the exclusion of domestic partners from marriage as a reason to deprive them of the most basic human rights.

In their brief, these *amici* provide publically-documented, real life, tragic examples of this sort of discrimination. Yet these events would not have occurred and would not occur in the future if all New Jersey citizens could marry the person of their choice, without regard to their spouse's sex.

In other situations, we have seen various cases testing the reach or limitations of the Domestic Partnership Act that achieve different results. Cases involving presumed parentage of children born to a domestic partner as the result of alternative insemination techniques have reached opposite results. Other cases show an expansive view of the rights available under the Act involve real estate tax exemptions for disabled veterans and loss of consortium rights for partners of injury victims.

The problem is that litigation like this will continue for years to come, especially with all the uncertainties and holes in the DPA. The desire of gay and lesbian couples to secure as much security and protection as they can from the DPA will continue to result in conflicting decisions. This will most certainly cause an undue burden on the courts and the justice system. Any attempt to legislate away the discrimination and harms caused by the State's statutory prohibition against marriage for same sex couples will fall short of what the New Jersey Constitution demands and will burden the courts with more litigation.

The State argues in its brief that the decision of the Massachusetts Supreme Judicial Court rejecting that state's unconstitutional ban on marriage equality created a "firestorm of protest" and resulted in chaos in that state. See Db1-2, 9 35-38, 42-43. The State also suggests that Massachusetts is on the brink of overturning that decision. See Db1-2, 9 35-38, 42-43.

In fact, nothing could be further from the truth. Massachusetts has embraced marriage equality and, as the discussion in this Brief will show, New Jersey will embrace it as well.

LEGAL ARGUMENT

POINT I

THE DOMESTIC PARTNERSHIP ACT LACKS CLARITY AND HAS LEFT A TRAIL OF CONFUSION, DISCRIMINATION AND DISAPPOINTMENT FOR THOSE WHO HAVE JOINED TOGETHER TO ACCEPT ITS MINUTE LEGAL PROMISE.

A. New Jersey's Domestic Partnership Act now provides same sex couples approximately 10 of the 1,138[1] substantive rights accorded to married couples.

The Domestic Partnership Act (hereinafter "DPA" or the "Act"), N.J.S.A. 26:8A-1 et seq., hailed upon enactment as a great advance for gay and lesbian civil rights, is actually not. The Act made New Jersey the fifth state in the United States to provide recognition of, and give some legal rights to gay and lesbian couples. The Act was not marriage by any means, but was celebrated at the time as a giant step for humankind.

Through early December 2005, more than 3,680 couples have registered as New Jersey Domestic Partners. 365Gay news staff, New Jersey Moves To Expand Domestic Partner Law, Dec. 2, 2005, at http://365gay.com/Newscon05/12/120205njPartner.htm (last visited Jan. 17, 2006). This is done in a semblance of hope of best protecting their families and each other from the otherwise harsh forces of state law.

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[1] See Gov't. Accounting Office (GAO) Report to Senator Frist, available at http://www.gao.gov/new.items/d04353r.pdf (last visited Jan. 18, 2006)

New Jersey's Domestic Partnership Act has proven to be the national paradigm of how a half-step civil-rights law – one that still denies gay couples the freedom to marry – can fall flat on its face. Time and again in the past year, hospitals, county governments and other institutions in New Jersey have cited the exclusion of domestic partners from marriage as a reason to deprive them of the most basic human rights. See Certification of Steven Goldstein, dtd. January 26, 2006, at ¶¶ 23-36.

The Act is being amended at the pace of a glacier's creep.

In the majority Appellate Division opinion, Justices Skillman and Parrillo erroneously state that same-sex couples "may enter into domestic partnership unions under the Domestic Partnership Act that entitle them to many of the same legal benefits enjoyed by married opposite-sex couples." Lewis v. Harris, 378 N.J. Super. 168, 194 (App. Div. 2005) (emphasis added). The key word in that misstatement is "many," which should instead read "a minuscule portion." It clearly is a misinterpretation of law to characterize the provision of approximately ten (10) rights (actually eight (8) at the time the majority opinion was handed down) as anything akin to marriage like. It is not even marriage-lite.

Likewise, the State's opposition brief states that, in passing the Act, the Legislature "ameliorated" "many of the harms alleged in the Amended Complaint." (Db1, 2, 9.) The State also

asserts that the DPA provides "many of the protections and benefits accorded to married couples." Id. at 8. Thereafter, the State recites a complete list of the rights granted to Domestic Partners under the DPA, but accomplishes this listing in only two pages of its 60-page brief.

The feeling of Domestic Partners can be succinctly summed up by Eddie Bennett and Christopher Bellis, the twenty-second couple registered in the State on June 10, 2004. They stated to an Associated Press Reporter that life has not changed much since they registered, "I felt like I was getting a dog license," Bennett said. See Geoff Mulvihill, After year of domestic partnership, push grows for gay marriage, PHILADELPHIA INQUIRER, July 9, 2005, at http://www.miami.com/mld/philly/news/12097165.htm (last visited Jan. 22, 2006).[2] For many of those individuals who have chosen to register as domestic partners, it seemed to establish merely a "business arrangement." Janon Fisher, Gays In New Jersey Sign Up For Domestic Partner Law, N.Y. TIMES, July 11, 2004, Metro section at 33; see also Gay Couples Push For Right To Get Married, THE RECORD OF BERGEN COUNTY, July 10,

[2] This Associated Press article was also printed in *New York Newsday* at http://www.nynewsday.com/news/local/wire/newjersey/ny-bc-nj--domesticpartnersh0709jul09,0,1100509.story?coll=ny-region-apnewjersey (last visited as cached page at http://64.233.187.104/search?q=cache:jPaY4rhKeEMJ:www.nynewsday.com/news/local/wire/newjersey/ny-bc-nj--domesticpartnersh0709jul09,0,1100509.story%3Fcoll%3Dny-region-apnewjersey+%22geoff+mulvihill%22+rosalind+partner&hl=en)

2005, at A3 ("[Then]-Assemblywoman Loretta Weinberg (D-Teaneck), said that although she is often thanked for pushing through the domestic partnership law, she doesn't hear from gay people who think the law is enough.")

The feeling of obtaining a Domestic Partnership was also poignantly portrayed by former New Jersey resident Helen Zia in her Declaration to the California Superior Court in City and County of San Francisco v. State of California, Proceeding No. 4365.[3]

> Lia and I registered as Domestic Partners . . . . It was like getting a dog license. In fact, I think we may have been standing in the same line that you stand in to get a dog license. The form looked like something from an office supply store, and it cost about $10 or $15. . . . It was symbolic to us, but not to anyone else. We had no celebration at the time, and though we told our families, the act of registering as domestic partners had no real meaning to them. Whenever we told people we were partners, they would ask, 'Partners in what business?'. . . . Our families, colleagues and friends began to see us as a couple, but it was still far from what it would have been in our families' and friends' eyes if we could have married.[4]

Even the N.J. State Bar Association (NJSBA) weighed in on the inherent inefficiency of the DPA at the time it was enacted,

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[3] Declaration of Helen Zia, City and County of San Francisco v. State of California, Proceeding No. 4365, ¶ 5, at http://www.sfgov.org/site/uploadedfiles/cityattorney/pressreleases/HZ-DEC.PDF (last visited Jan. 14, 2006) (emphasis added).

[4] Id.

stating in a December 17, 2003, letter from then-NJSBA President Karol Corbin Walker to Governor McGreevey:

> The NJSBA supports a generic bill that brings justice to any segment of the population, both young and old, denied the legal benefits that people who are currently married enjoy. A-3743 is defective in many ways and requires further deliberative analysis. The New Jersey State Bar Association stands ready to assist the Governor and Legislature in crafting appropriate legislation.

See Dec. 17, 2003, correspondence from then-NJSBA President Karol Corbin Walker to the Governor, letter on file with Amici and the New Jersey State Bar Association.

We expect that the NJSBA will address other salient issues as amicus curiae in the instant matter and provide legal discussion of how the DPA poses grave consequences for attorneys and their gay and lesbian clients. These families must now expend considerable resources in an impossible effort to chase down the civil rights and protections that come with the word "marriage."

B. The Domestic Partnership Act inserted a Trojan Horse provision into the Law Against Discrimination that allows county and municipal governments and private employers to discriminate against same-sex couples and exempts each from liability.

Originally enacted in 1945, the New Jersey Law Against Discrimination (hereinafter "LAD") was defined by the New Jersey Legislature as "[a]n act to protect all persons in their civil rights; [and] to prevent and eliminate practices of discrimination against certain persons . . . ." and eventually was amended in 1991 to protect gays and lesbians by including "affectional or sexual orientation" as a prohibited basis for discrimination.

P.L. 1945, c. 169; P.L. 1991 (eff. Jan. 18, 1992), c. 519; currently codified at N.J.S.A. 10:5-1 et seq. The New Jersey Domestic Partnership Act[5] (hereinafter "DPA" or "Act") amended the Law Against Discrimination to include "Domestic Partner" status as a protected (and actionable) class. P.L. 2003, c. 246; N.J.S.A. 26:8A-1 et seq.

In drafting the Domestic Partnership Act, the Legislature carved a large hole in the Law Against Discrimination. The carve-out allows counties, municipalities and private employers to discriminate against gay and lesbian couples in the provision of healthcare, pension and other benefits with impunity. See N.J.S.A. 26:8A-11(b) ("Notwithstanding any other provisions of law to the contrary, the provisions of subsection a. of this section shall not be deemed to be an unlawful discrimination under the "Law Against Discrimination" . . .). The most recent example of this can be seen in the Ocean County Freeholders who denied domestic partner benefits to a long-serving law enforcement officer dying of cancer - just because they could. See Goldstein Certif. at ¶¶ 25-29.

The effect of this Trojan Horse cannot be stated more strongly. The New Jersey Legislature addresses the importance of same-sex families in the DPA legislative findings, but has with-

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[5] P.L. 2003, c. 246; N.J.S.A. 26:8A-1 et seq.

drawn important legal protections and remedies. The State Legislature has made it legally permissible to discriminate against New Jersey citizens based on their sexual orientation where they previously had rights to actionable claims for this discrimination. Such prima facie discriminatory provision invokes comparison to Colorado's Amendment 2, the ill-fated subject of the U.S. Supreme Court's landmark ruling in Romer v. Evans, 517 U.S. 620 (1996) (holding as unconstitutional a provision that barred gay men and lesbians from petitioning government for discrimination protections.)

Garden State Equality, as the State's highest profile civil rights organization advocating for the lesbian, gay, bisexual, transgender, and intersex community, respectfully submits two documented episodes of the failure of the Act, out of the many terrible stories in which it has been involved since the enactment of the DPA. See Goldstein Certif. at ¶¶ 3, 8-11, 20, 25-35, and infra.

C. Failure of the Domestic Partnership Act: Rosalind Heggs and Paula Long, New Jersey residents and partners in a Vermont Civil Union recognized as a domestic partnership in New Jersey, nonetheless are denied recognition as a couple by a New Jersey hospital during a medical emergency – demonstrating that neither the labels of "civil union" nor "domestic partnership" have consistent efficacy in the real world.

Rosalind Heggs and Paula Long of Camden, have been together fourteen (14) years and were joined together in a Vermont Civil

Union on September 8, 2001. New Jersey's Domestic Partnership Act provides that their out-of-state union is to be treated as if it were a Domestic Partnership.[6] N.J.S.A. 26:8A-1 et seq. See Associated Press, Push grows for gay marriage in N.J., PHILADELPHIA INQUIRER, at http://www.miami.com/mld/philly/news/12097165.htm (last visited Jan. 18, 2006).

Ms. Heggs, suffering from pneumonia, entered Our Lady of Lourdes Medical Center in Camden, New Jersey, in March 2005. The doctors diagnosed her with heart, lung and kidney failure and gave her three days to live. As her condition worsened, Ms. Heggs lost the capacity to consent to doctors' insertion of a tube that could prolong her life. Id.

Ms. Long provided to the hospital the paperwork that shows her and Ms. Heggs are domestic partners under New Jersey law. The hospital refused to recognize the papers or the law. Indeed, Ms. Long had brought with her a copy of the New Jersey domestic partnership statute and presented it on the spot, pointing to the relevant sections. The hospital, likely unfamiliar with the law (or perhaps worse, openly discriminating) told Paula that only Ms. Heggs' blood relatives in Maryland qualified as next of kin.

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[6] The DPA provides, at N.J.S.A. 26:8A-6(c), that "[a] domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction in which the partnership was created, shall be valid in this State."

They later apologized for denying Paula's right to make medical decisions.

Most poignantly, the hospital staff removed Ms. Heggs' civil-union ring and placed in the hospital safe, refusing to give it to Ms. Long despite her request. Id.

The glaring problem that Ms. Heggs' and Ms. Long's situation highlights is that legislative creations such as domestic partnerships place gay men and lesbians in a legal netherworld – a separate category that, unlike marriage, is either unknown or unfamiliar to most. Often these situations require that a domestic partner retain legal counsel to enforce their rights under the Act. Even where a medical facility does not discriminate intentionally, but is merely ignorant of the law, precious moments slip by, and possibly a life, when a domestic partner must educate or sue in order to make decisions for their incapacitated partner.

D. Failure of the Domestic Partnership Act: Police officer Lieutenant Laurel Hester, in the final months of her life, and her registered domestic partner Stacie Andree, endured admitted sexual-orientation discrimination by the Ocean County Freeholders, who relented only after intense public and political pressure.

The most glaring example of wholesale discrimination using the Legislature's hole in the Law Against Discrimination is the Ocean County Freeholders' repeated denial of domestic partner benefits to a long-serving law enforcement officer dying of

cancer. This horrendous injustice played out in local, national and international media outlets and made Lieutenant Laurel Hester of Ocean County, New Jersey, the most famous lesbian police officer in the United States.[7]

Lieutenant Hester has final-stage, metastasized lung cancer and has a few months to live. The cancer has spread rapidly and has deposited tumors in her brain. When Lieutenant Hester heard about her cancer last fall, she sought health and pension benefits for her same-sex partner, Stacie Andree, just as any dying person would seek for his or her surviving spouse. See Tristan Schweiger, Ocean Freeholders reject gay workers dying wish, County will not allow partner to receive benefits, THE PRESS OF ATLANTIC CITY, Dec. 8, 2005, at http://www.pressofatlantic city.com/news/local/ocean/story/5751976p-5769221c.html (last visited Jan. 16, 2006).

Ocean County Freeholder John Kelly maintained that granting Domestic Partnership benefits would "violate the sanctity of marriage." See Margaret F. Bonafide, Two counties back domestic partner benefits, ASBURY PARK PRESS, Dec. 4, 2005, at http://www.app.com/apps/pbcs.dll/article?AID=/20051204/NEWS03/512

[7] According to a January 16, 2006, search of Google Internet search engine at http://www.google.com the search term "Laurel Hester," returns more than 38,000 pages of results, demonstrating how widely Lieutenant Hester has appeared on the Internet, television, radio and in newspapers around the world.

040421 (last visited Jan. 16, 2006). On that same basis, the five-member Ocean County Board of Freeholders continued to deny pension and health benefits to Ms. Andree even though Lieutenant Hester spent twenty-four (24) years protecting the county, including the Freeholders: "I have been a police officer over 25 years and with Ocean County for 24 years," Hester said in December 2005. "That is a long time to be in the closet. I would not have to be here to announce my sexual orientation [if the county followed the same benefits package afforded to state employees]." See Margaret F. Bonafide, Tourism boycott threatened Gay rights group angry over refusal of partner benefits, ASBURY PARK PRESS, Dec. 8, 2005, at http://www.app.com/apps/pbcs.dll/article?AID=/ 20051208/NEWS/512080465 (last visited Jan. 16, 2006).

Lieutenant Hester made an appearance before the Freeholders by video on January 18, 2006, as she was too weak from chemotherapy treatments and illness to attend in person. Therefore, she made her plea to the Freeholders supported by her fellow officers and other county and state leaders. See Damien Cave, Dying Officer Again Turned Down on Benefits for Companion, N.Y. TIMES, Jan. 18, 2006, at http://www.nytimes.com/2006/01/19/nyregion/19benefits.html (last visited Jan. 23, 2006) ("Rejecting an emotional videotaped plea from a lesbian police lieutenant on the verge of death, Ocean County's Freeholders declined once

again on Wednesday to approve a resolution that would let county employees pass on their pension benefits to domestic partners. For more than a year, the Freeholders have repeatedly refused to consider the resolution, and their opposition has become increasingly controversial over the past few months.") Video of Lieutenant Hester's appearance before the Freeholders can be found at http://www.gardenstateequality.org/hester.htm (last visited Jan. 23, 2006).

The Freeholders' treatment enraged millions across New Jersey, particularly as the tragedy was occurring in a state that is one of most socially progressive places in the country. Religious, police professional and legislative leaders condemned the Freeholders for their heartlessness. Id.

The irony of this story is that the heartless and insensitive behavior of the Ocean County Freeholders proves the inefficacy of the Domestic Partnership Act and highlights the hole that the State legislature carved out of the Law Against Discrimination. This hole allows each county's leaders to pick and choose which citizens get equal rights and which do not, which relationships are worthy of protection and which are not. In fact, under the discrimination exemption, counties are now free to articulate that sexual orientation is the basis of their discrimination and they remain immune from a challenge under the Law Against Discrimination.

If New Jersey had marriage equality, this tragic saga would never have taken place. Lieutenant Hester's partner Stacie Andree would have gotten benefits automatically. Lieutenant Hester will very likely die before the Court comes down with its decision in this matter which makes the Freeholders' cruelty so much more grotesque. To watch a long-serving law enforcement officer forced to beg for equal rights from her deathbed, while denied again and again, struck a chord with many and provide literal black and white evidence of the pervasive tentacles of discrimination that still exist in our society.

The Ocean County Freeholders, though they eventually gave into political pressure and granted benefits, robbed Lieutenant Hester of her dignity and the comfort of the peaceful passing that each human being hopes to have at the end of their days. See Damien Cave, Deal Would Let Dying Officer Leave Pension to Companion, N.Y. TIMES, Jan. 22, 2006, at http://www.nytimes.com/2006/01/22/nyregion/22partner.html (last visited Jan. 23, 2006); see also FOR DYING OFFICER, HEARTENING NEWS, Ocean officials are expected to grant partner benefits, STAR-LEDGER, Jan. 22, 2006, at A-1.

The publicly reported cases of Laurel Hester and Rosalind Heggs demonstrate how marriage is the only currency of commitment the real world universally understands and accepts. Anything less than marriage, including merely adding rights to the

existing law without calling it marriage, will always give someone in authority the legal pretext to say, "You are not married." As reports on Lieutenant Hester and Ms. Heggs document, in the real world only the label of marriage will make a gay civil rights law work.

E. The Domestic Partnership Act strains already limited resources of an overburdened New Jersey court system.

If this situation is allowed to remain as is, it will continue to diminish the effectiveness of the Law Against Discrimination, usurp the massive authority of that statute which this Court has held in the highest regard, and create years of litigation and ultimately waste tens of thousands of hours and millions of dollars of resources within the New Jersey court system.

Already we have seen various cases testing the reach or limits of the Domestic Partnership Act, sometimes with differing results. In Hennefeld v. Tp. of Montclair, 22 N.J. Tax 166 (2005), a successful claim was brought for a 100% disabled veteran's property tax exemption granted on property owned jointly by an honorably discharged disabled veteran and his same-sex registered domestic partner as joint tenants with right of survivorship. Such a right does not arise within a strict reading of the DPA, but the Honorable Vito Bianco, J.T.C., undertook a thoroughly researched discussion and opinion that is a credit to the judiciary. Facing little opposition from the

Township of Montclair and the State's Attorney General's Office, the plaintiff Domestic Partners' ownership interest in their home was held to be treated in the same fashion as was "accorded to married couples."

In the recently published opinion of the Honorable Patricia Talbert, In re Parentage of the Child of Robinson, __ N.J. Super. __, 15 N.J. Lawyer 159 (Ch. Div. Dec. 28, 2005), the trial court in Essex County held that under the artificial insemination section of New Jersey Parentage Act, parentage of child born to lesbian's domestic partner is presumed. But see In re Birth of a Child to Jean Elizabeth Moses, No. FD-12-226-06C (Middlesex County), Aug. 2, 2005 (Oral Decision) (trial court in Middlesex County refused to find presumed parentage for the domestic partner of the non-birth mother under same or similar circumstances as in Parentage of the Child of Robinson, supra [GSEa17[8]]; see also Buell and Moffett v. Clara Maass, No. ESX-L-5144-03, May 11, 2005 (Slip. Op.) (trial court extended standing for loss of consortium claim to domestic partner of injured party, but limited same only to the length of time of statutory recognition of the relationship and not to the years

[8] References to Appendix pages preceded by the designation "GSE" refer to the appendix annexed to the brief of amici Garden State Equality.

the couple had been together preceding the enactment of the DPA. [GSEa1]

Undoubtedly, litigation like this will continue for years to come, especially with all the uncertainties and holes in the DPA and the desire of gay and lesbian couples to obtain as much security and protection as they can from the DPA. Although the cases noted herein have not been appealed, others surely will come and result in conflicting decisions. As such, trial courts, the Appellate Division and this Court can expect to handle hundreds of cases arising out of the DPA as the court system is asked over and over again to review and discern the unclear and loosely written words of the DPA. Thus, any attempt at a legislative solution to ameliorate the discrimination and harms caused by the State's statutory prohibition against marriage for same sex couples will fall short of what the New Jersey Constitution demands and will burden the court with more litigation.

Accordingly, the Court should strike down the statutory prohibition which limits marriage to different sex couples.

POINT II

NEW JERSEY HAS A LONG RECORD OF LEADING THE NATION WITH PROTECTIONS AND RIGHTS FOR MINORITY GROUPS, INCLUDING GAYS AND LESBIANS, AND A COURT DECISION GRANTING MARRIAGE EQUALITY WILL BE WELL-RECEIVED JUST AS IT WAS IN MASSACHUSETTS.

The State argues and implies in its brief that the decision of the Massachusetts Supreme Judicial Court which overturned that State's unconstitutional ban on marriage equality created a "firestorm of protest" and chaos in that State, and that Massachusetts is on the brink of overturning that decision. See Db1-2, 9 35-38, 42-43. The inference the State wishes the Court to draw is that the same would happen in New Jersey if this Court were to make an analogous finding and decision.

Nothing could be further from the truth about Massachusetts or New Jersey.

A. New Jersey citizens strongly support marriage equality for same-sex couples, and even more strongly believe marriage equality is an issue for the Court, not the Legislature.

In April 2005, Zogby International[9] conducted an independent poll of likely New Jersey voters on issues of public opinion related to same-sex relationships and gay and lesbian civil rights (hereinafter "Zogby Poll").[10] Zogby conducted the poll on

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[9] Information about Zogby International is available at http://www.Zobgy.com.

[10] The full poll results are available at http://gardenstateequality.org/april05poll.pdf (last visited (continued...)

April 12-14, 2005, among a sample of 804 likely New Jersey voters, with a margin of error of ±3.5%.

A summary of results of four questions and responses pertinent to the instant discussion are reported below:

Q. *Do you agree or disagree that gay couples should have the same freedom as heterosexual couples to marry?*[11]

Agree	438	**54.5%**
Disagree	322	40.1
NS	43	5.4
Total	804	100.0%

Q. *As you may know, the New Jersey Supreme Court may rule that gay couples have the constitutional right to marry because they are entitled to equal protection under the law. If this happens, which of the following do you think the state legislature should do?*

Respect the Court's legal decision and let gay couples marry	487	**60.6%**
Begin the process of amending the state constitution to stop gay couples from marrying	262	32.6
NS	55	6.8
Total	804	100.0%

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[10] (...continued)
Jan. 15, 2006) and poll results with demographical features are available at http://gardenstateequality.org/april05rosstabs.pdf (last visited Jan. 15, 2006).

[11] NS indicates respondent declined to answer.

Q. *Compared to federal laws, New Jersey laws generally provide women, racial minorities, and gays stronger protections against discrimination. Do you think it is a good idea, or not a good idea, that New Jersey provides these stronger protections against discrimination?*

Good idea	610	**75.9%**
Not a good idea	139	17.3
NS	53	6.6
Total	802	99.8%

According to Zogby, the poll results shows that, by 61-33 percent, likely New Jersey voters opposed the idea of the Legislature's putting on the ballot a measure to ban gay marriage. And by 81-19 percent, New Jersey voters say the Legislature has more important priorities than to spend time trying to put a constitutional amendment on the ballot to ban gay marriage. Sixty-eight percent (68%) of New Jersey citizens say they hold that view strongly.

The Zogby Poll nearly mirrors the 55-41% result of another Zogby poll of New Jersey likely voters in July 2003, also with a margin of error of ±3.5%. <u>See</u> Recent Polls on Same-Sex Marriage and Civil Unions at http://www.thetaskforce.org/downloads/recentstatemay2005.pdf (last visited Jan. 15, 2006). These polls demonstrate that New Jersey residents have a consistent and multi-year history of understanding and accepting marriage rights for gay men and lesbians.

There is every reason to expect that New Jersey will follow a much less divisive route than that of Massachusetts (see infra) should this Court holds that our State Constitution provides for marriage equality rights for gay men and lesbians. Both candidates in the recent gubernatorial race, Republican Douglas Forrester and Democrat Jon Corzine, declared in a debate televised statewide that they would oppose any effort to enshrine a same-sex marriage ban in our State's constitution. Governor Corzine, as a candidate, emphatically stated, "I don't believe constitutions are about taking away rights. That's why I wouldn't have supported an amendment in the federal government, and I won't support one in New Jersey." Geoff Mulvihill, Candidates oppose gay marriage - and using constitution to ban it, PHILADELPHIA INQUIRER, Sept. 22, 2005, at http://www.philly.com/mld/inquirer/news/local/12709470.htm (last visited Jan. 15, 2006).

Thus, New Jersey citizens have shown they are ready and willing to embrace marriage equality and will accept a court decision granting gay men and lesbians this equal right under the law.

B. The New Jersey Legislature has affirmatively acknowledged the importance of same-sex relationships to the State on personal, legal and public policy grounds.

The Law Against Discrimination (hereinafter "LAD") was defined by the New Jersey Legislature as "[a]n act to protect all

persons in their civil rights; [and] to prevent and eliminate practices of discrimination against certain persons . . . ." including gays and lesbians. P.L. 1945, c. 169; N.J.S.A. 10:5-1 et seq. The New Jersey Domestic Partnership Act[12] amended the Law Against Discrimination to include "Domestic Partner" status as a protected (and actionable) class. P.L. 2003, c. 246; N.J.S.A. 26:8A-1 et seq.

The Legislature made profound statements of public policy within the DPA that directly address the instant matter and the validity of the plaintiffs' relationships. These findings were clearly intended to bring the families of gay men and lesbians under the canopy of equality and freedom that has long sheltered individual gay men and lesbians in New Jersey from discrimination in public accommodations.

The DPA legislative findings are excerpted below in pertinent part:

> a. There are a significant number of individuals in this State who choose to live together in important personal, emotional and economic committed relationships with another individual;
>
> b. These familial relationships, which are known as domestic partnerships, assist the State by their establishment of a private network of support for the financial, physical and emotional health of their participants.

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[12] P.L. 2003, c. 246, codified at N.J.S.A. 26:8A-1 et seq.

> c. [T]he Legislature believes that these <u>mutually supportive relationships should be formally recognized by Statute</u>, and that <u>certain rights and benefits should be made available</u> to the individuals participating in them including: [discrimination protection; healthcare visitation and decision making; tax-related benefits; and, in some cases, health and pension benefits equivalent to spouses];
>
> d. All persons in domestic partnerships should be <u>entitled to certain rights and benefits</u> that are <u>accorded to married couples</u> under the laws of New Jersey, including [those listed above]. . . . The need for all persons who are in domestic partnerships, regardless of their sex, to have access to these rights and benefits is <u>paramount</u> in view of their <u>essential relationship</u> to <u>any reasonable conception of basic human dignity and autonomy</u>, and the extent to which they will play an integral role in enabling these persons to enjoy their <u>familial</u> relationships as domestic partners and to cope with adversity . . . ;
>
> * * *
>
> f. [I]t is the public policy of this State to hereby establish and define the rights and responsibilities of domestic partners.

<u>N.J.S.A.</u> 26:8A-2 (emphasis added).

The New Jersey State Legislature has acknowledged and affirmed the value of the relationships between gay men and lesbians, especially in the context of child-rearing and support for the members of each "family" unit. These findings provide statutory acknowledgment of the critical value and "safety net" that these relationships provide in our society. On this basis, the Legislature granted benefits and rights to these relationships, but also required responsibilities of them as well.

With legislative affirmation of these relationships memorialized in this State's public policy, it is respectfully submitted that the Court is presented with grounds to extend these legislative findings and affirmations to the Equal Protection and Due Process arguments advanced by the plaintiffs. This is not only supported by New Jersey citizens and the Legislature, but also by the Court's significant and expansive holdings in the last twenty (20) years on the rights of gay men and lesbians.[13]

C. One state's wedding reception: The marriage equality decision of the Massachusetts Supreme Judicial Court was embraced by state residents.[14]

Like New Jersey, Massachusetts, a state of comparable geographic and population size, has a record demonstrating and increasing acceptance of acceptance of marriage equality.[15]

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[13] We respectfully refer the Court to the discussion of *amici curiae* Professors of the History of Marriage, Families and Law, and Madeline Marzano-Lesnevich, Esq., for a thorough discussion of this issue.

[14] *Amici* acknowledge and appreciate the substantial assistance of Children of Lesbians and Gays Everywhere, MassEquality, the National Gay and Lesbian Task Force, and Freedom to Marry in Support of Respondents, as well as their counsel Jeffrey F. Webb, Esq., at Gibson, Dunn & Crutcher LLP, of California.

[15] On November 18, 2003, the Massachusetts Supreme Judicial Court held that the state's denial of gay and lesbian couples' right to marry was unconstitutional and provided the legislature with 180 days to cure the defect in the existing laws. Goodridge
(continued...)

Polling in Massachusetts just prior to the high court's decision indicated fifty-nine percent (59%) support for full marriage rights for same-sex couples. See Mary Bonauto, Goodridge in Context, 40 HARV. C.R.-C.L. REV. 1 (2005) (citing Memorandum from Bob Meadow and Steven Van Tassel, Decision Research, to Freedom to Marry Coalition of Massachusetts (Oct. 30, 2004)).[16]

After the opinion was issued, opponents of equality for gays and lesbians "predicted the demise of modern civilization." See Brief of *Amici Curiae* Children of Lesbians and Gays Everywhere, MassEquality, the National Gay and Lesbian Task Force, and Freedom to Marry in Support of Respondents, in Woo v. California, et al. (Cal. Ct. App., filed Jan. 9, 2006) at 20 (citing Steven Waldman, Trumping the religion card: Religious conservatives are beginning to realize that the fight to save marriage won't be won using biblical arguments that say homosexuality is morally wrong, OTTOWA CITIZEN, Nov. 21, 2003, at A-19) ("Gary Bauer's email newsletter about this week's Massachusetts Supreme [Judicial] Court ruling declared, 'Culture Wars Go Nuclear.' Brian Fahling of the

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[15] (...continued)
v. Dep't of Public Health, 440 Mass. 309 (2003).

[16] Ms. Bonauto was lead counsel plaintiffs in Goodridge, supra. The full text of her article is available at http://www.law.harvard.edu/students/orgs/crcl/vol40_1/bonauto.php (last visited January 14, 2006). Cf. Frank Phillips, Support for Gay Marriage Mass Poll Finds Half in Favor, Boston Globe, Apr. 8, 2003 (citing 50% support for marriage of same-sex couples).

American Family Association said it was "on an order of magnitude that is beyond the capacity of words. The Court has tampered with society's DNA, and the consequent mutation will reap unimaginable consequences for Massachusetts and our nation."); Thomas Caywood, Right wing revs up for 'last stand' in Bay State, BOSTON HERALD, Nov. 21, 2003, at 22 ("'Massachusetts is our Iwo Jima. For us it's our last stand. We're going to raise the flag,' said Rev. Louis Sheldon, chairman of the Traditional Values Coalition, based in Washington, D.C."); State of the union, ECONOMIST, Nov. 22, 2003 ("'We must amend the [federal] constitution,' announced Tony Perkins, head of the Family Research Council, "if we are to stop a tyrannical judiciary from redefining marriage to the point of extinction.")

With all the negative national press, a Boston Globe opinion poll showed a significant, though temporary, drop in support for marriage equality—to 35% of Massachusetts citizens favoring—shortly after the Goodridge decision was announced. Thereafter, in March 2004, the Massachusetts legislature opened up debate and narrowly passed the first step required toward enacting a state constitutional amendment. See Rick Klein, Vote ties civil unions to gay-marriage ban Romney to seek stay of SJC order, BOSTON GLOBE, Mar. 30, 2004, at http://www.boston.com/news/specials/gay_marriage/articles/2004/03/30/vote_ties_civil_unions_to_gay_marriage_ban (last visited Jan. 15, 2006). The amendment was

hours of debate, compared to four *days* before the first vote in 2004." Brief of *Amici Curiae* Children of Lesbians and Gays Everywhere, et al., supra, at 23.

Fifty-five (55) members of the Massachusetts Legislature switched from their previous votes in support of an amendment including two Senate leaders, Frederick E. Berry and Joan M. Menard, who pulled their previous support from the amendment because the sky did not fall: "Berry and Menard, both Democrats, said they were abandoning their previous support for the Travaglini amendment because they believe the negative consequences predicted by opponents of gay marriage never came to pass. 'There were no earthquakes,' Berry said." Raphael Lewis, BOSTON GLOBE, Sept. 7, 2005, at http://www.boston.com/news/local/massachusetts/articles/2005/09/07/key_senators_break_from_travaglini_amendment (last visited as cached page Jan. 15, 2006).[17]

Similarly, as reported in the *New York Times*, "Senator James E. Timilty, a Democrat who last year supported the amendment, also changed his mind. 'When I looked in the eyes of the children living with these couples,' Mr. Timilty said, 'I decided that I don't feel at this time that same-sex marriage has hurt

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[17] See also Google cached page at http://64.233.161.104/search?q=cache:KnVL6zBeRHMJ:www.boston.com/news/local/massachusetts/articles/2005/09/07/key_senators_break_from_travaglini_amendment/+%22There+were+no+earthquakes%22+Berry&hl=en (last visited Jan. 15, 2005).

the Commonwealth in any way. In fact I would say that in my view it has had a good effect for the children in these families." Pam Belluck, MA Legislators Vote Down Bill That Would Ban Gay Marriage, NEW YORK TIMES, Section A, page 14 (Sept. 15, 2005). The article begins, "[i]n a sign that the legalization of same-sex marriage has changed the political landscape in Massachusetts, the legislature soundly defeated a proposed constitutional amendment on Wednesday to ban gay marriage and create civil unions, an amendment that lawmakers gave preliminary approval to in a raucous constitutional convention last year.") See also MA Legislators Vote Down Bill That Would Ban Gay Marriage at http://www-tech.mit.edu/V125/N39/gaymarriage.html (last visited Jan. 15, 2006).[18]

Even Senator Brian Less, a Republican lead co-sponsor of the amendment in 2004, withdrew his support prior to the second vote saying, "Gay marriage [sic] has begun, and life has not changed for the citizens of the [C]ommonwealth, with the exception of

[18] Although a renewed effort is underway to attempt to enact a new constitutional amendment in Massachusetts, the new effort is already under court challenge and its success seems unlikely (see http://www.glad.org/ for case details). As noted in the Brief of *Amici Curiae* Children, supra, at 24: "[t]he earliest that it could reach the public for a vote is 2008." As one editorial in the SPRINGFIELD REPUBLICAN stated recently: "By then, supporters won't sound very convincing if they still attempt to argue that gay marriage is a threat to the sanctity of marriage, family values and religious beliefs. Gay marriage has been such a non-event in Massachusetts since it was legalized . . . ." at http://www.massequality.org/news/oped_story.php?id=42

those who can now marry. This amendment which was an appropriate measure or compromise a year ago, is no longer, I feel, a compromise today." LeBlanc, BOSTON GLOBE, supra.

The now everyday existence of same-sex marriages in Massachusetts has resulted in a significant shift in public perception of the relationships and, indeed, the lives of gay men and lesbians. The beneficial effect of granting full and equal citizenship under state law for the first time has been the only significant effect on the lives of most Massachusetts citizens. Just one year later, a super-majority (82%) of those citizens believe that marriage equality has either had a positive or no impact on heterosexual marriages. See MassEquality Education Fund/Decision Research Poll at http://www.thetaskforce.org/downloads/recentstatemay2005.pdf (last visited Jan. 15, 2006).

Thus, as we can see, the Bay State has embraced marriage equality which has not harmed different sex marriage in any way.

Both citizens and the Legislature of New Jersey acknowledge the importance of both same sex and different sex familial relationships. This Court has the authority to take the next step and grant all rights and benefits to these families under - the New Jersey Constitution, the specifics of which are covered plaintiffs' brief in support of this appeal. Accordingly, the Court should reverse the decisions of the Appellate Division and

the trial court, and grant the relief prayed for in plaintiffs' Complaint.

CONCLUSION

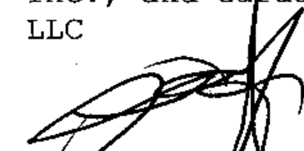
The Domestic Partnership Act is a trickle from a spigot on a hot summer's day, tempting those who put their thirsty lips near the faucet with the promise of a soothing cool drink, but never delivering more than a few drops. The State argues that the handful of rights provided under the Domestic Partnership Act should satisfy the constitutional inquiry in this matter as well as the plaintiffs' claims. This is the legal equivalent of a pat on a child's head. The rights provided under the Domestic Partnership Act are no panacea and no solution for the gay and lesbian community. In some ways, the law sets gay and lesbian civil rights in New Jersey back many years. For the first time in New Jersey history, the Legislature effectively has withdrawn civil rights and discrimination protections from a minority group. Few doubt the Legislature's noble intentions in creating the Domestic Partnership Act, but now the State says to the Court that this same Legislature should be left to determine our State's constitutional principles of equality and fairness as they apply to same-sex couples.

As the Court is well aware, various professional organizations have submitted briefs and motions as *amici curiae* in this case addressing the psychological and other benefits to be gained from marriage equality. During the pendency of this action the prestigious American Academy of Matrimonial Lawyers, an organiza-

tion of the nation's top 1,600 divorce and matrimonial law attorneys, approved a resolution supporting the legalization of marriage between same-sex couples: "BE IT RESOLVED that the American Academy of Matrimonial Lawyers supports the legalization of marriage between same-sex couples and the extension to same-sex couples who marry and their children of all of the legal rights and obligations of spouses and children of spouses." See Press Release, American Academy of Matrimonial Lawyers, American Academy of Matrimonial Lawyers Approves Resolutions Supporting Same-sex Marriages, Nov. 10, 2005, on file at offices of *Amici* Garden State Equality.

Viewing these factors together, along with the arguments contained in the foregoing brief and that of the plaintiffs, the Court should reverse the decisions of the Appellate Division and trial court and grant the relief requested in plaintiffs' Complaint.

Respectfully submitted,
LESLIE A. FARBER, LLC
Attorneys for Amici Curiae Garden State Equality Educational Fund, Inc., and Garden State Equality LLC



By: ______________________
Leslie A. Farber

Dated: January 26, 2006

By: ______________________
Thomas H. Prol

Dated: January 26, 2006

SUPERIOR COURT OF NEW JERSEY

CIVIL LAW DIVISION
ESSEX VICINAGE

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Re: Buell and Moffett v. Clara Maass et al
Docket No. L – 5144-03

Dear Counsel:

This is a motion for summary judgment and/or dismissal of the loss of consortium claims in plaintiffs' Modified First Amended Complaint ("Amended Complaint"). The court will not restate the factual allegations of the case since the majority of them are irrelevant to this motion. Rather, the court will only address those facts relevant to the loss of consortium claims.

The Amended Complaint is filed on behalf of the four original plaintiffs - - Steven Moffett, Linda Henry, Scott Buell and JoAnn Buell, - - as well as two additional plaintiffs, Judith Peterson , the "domestic partner" of Linda Henry and Arlene Moffett, Steven Moffett's wife. The original plaintiffs, all present are former employees of defendant, Clara Maass Medical Center, an arm of St. Barnabas Medical Center, allege violations the New Jersey Conscientious Employee Protection Act ("CEPA"), New Jersey Law Against Discrimination ("LAD"), and the

common law. The two plaintiffs who have just been added sue for loss of consortium. Mr. and Mrs. Buell claim loss of consortium, in addition to their individual claims.

Linda Henry and Judith Peterson

Henry and Peterson have been life partners for nine years. On August 17, 2004 they filed an Affidavit of Domestic Partnership with the State of New Jersey. For the past nine years they have lived together. Their lease describes their house as a "private residence for [Judith] and Linda Henry." They have a joint bank account at Commerce Bank and a joint American Express account. In 2003, Henry signed an advance medical directive giving Peterson the right to make all decisions concerning her health care, as well as termination of same. Henry has named Peterson as her primary beneficiary on her savings and pension plans and the beneficiary of her life insurance policy. Henry's prescription drug plan lists a two person family, Ms. Henry and Ms. Peterson. Henry claims that the beneficiaries of her Will are her father, sister and Peterson.

According to the plaintiffs:

> Due to the misconduct of defendants ... oftentimes, Henry is very exhausted and many times complains of headaches to her partner. Additionally, the defendants' conduct has prevented her from performing various household services, not to mention providing affection and support to Peterson. Henry suffered a myocardial infarction (a.k.a. heart attack) as a result of stress principally attributed to her employment at [Clara Maass]. This unfortunate event has caused extreme anguish not only to Henry, but also to Peterson.

Henry and Peterson have both submitted lengthy Certifications attesting to the harm allegedly visited upon them by defendants' conduct. Henry's Certification is summed up in her final sentence, "Simply stated, for an extensive period of time since defendants began misbehaving, our life together (Judith and mine) has been turned into a nightmare". (¶11). Peterson's Certification is, in many respects, summed up by the following sentence: "Since

defendant's misconduct began, Linda has suffered a heart attack, ongoing visible stress, and inability to contribute to the household in any way as she had before; has neglected me through no fault of her own; and has created exceptional demands upon me." (¶5).

The Married Couples

Steven and Arleen Moffett has been married for 35 years. According to plaintiff "throughout this period of time they have experienced a healthy sexual relationship. Subsequent to the filing of the Complaint, Mr. Moffett has had sexual difficulties and has been diagnosed with erectile dysfunction for which he was prescribed medication. Ms. Moffett's loss of consortium claim is based on Mr. Moffett's sexual dysfunction." It is alleged that Viagra has been prescribed for Mr. Moffett.

Both Buells claim that their spouse has been emotionally distraught since the incidents which gave rise to this lawsuit, and that the spouse has been accordingly incapable of providing affection and support.

Analysis

I. The LAD, CEPA and Breach of Contract Counts

In enacting the LAD, "the Legislature did not intend to establish a cause of action for any person other than the individual against whom the discrimination was directed." Catalane v. Gilian Instruments, 271 N.J. Super. 476, 500 (App. Div. 1994) certif. den. 136 N.J. 298 (1994), and Herman v. Coastal Corp., 384 N.J. Super. 1 (App. Div. 2002) certif. den., 174 N.J. 363. The rule under CEPA is similar. Jones v. Jersey City Medical Center, 20 F. Supp. 2d 770 (D.N.J. 1998). And see Catalane, supra. While plaintiffs argue that the Supreme Court would not follow these cases, a trial court is bound by appellate authority, which in this case is quite clear. Further, defendants are correct that loss of consortium damages are not allowed in breach of

contract actions. Noye v. Hoffman-LaRoche, Inc. 238 N.J. Super. 430, 437 (App. Div. 1990). Therefore, the loss of consortium claims can be upheld, if at all, only under plaintiffs' common law tort causes of action.

II. Linda Henry and Judith Peterson

The common law in New Jersey has long prohibited loss of consortium claims for any but married partners. Thus, as early as 1908 loss of consortium claims based on injuries which occurred prior to marriage were not allowed. See Mead v. Baum, 76 N.J.L. 337 (Sup. 1908). Loss of consortium claims for premarital injuries were prohibited even when the two parties were engaged to be married at the time of the injury. See Childers v. Shannon, 183 N.J. Super. 591 (Law Div. 1982). Similarly, a "purported wife" could not recover damages for loss of consortium. See Sykes v. Zook Enterprises, Inc.,215 N.J. Super. 461 (Law Div. 1987). In Leonardis v. Morton Chemical Co., 184 N.J. Super. 10 (App. Div. 1982) the Appellate Division affirmed the rule forbidding loss of consortium recovery absent marriage, rejecting the prediction of Judge Ackerman in Bulloch vs. U.S., 487 F.Supp. 107 (DNJ 1980), that New Jersey would allow recovery. A Law Division judge in Stahl v. Nugent, 312 N.J. Super. 340 (Law Div. 1986) did allow a husband to recover for the premarital injuries to his wife when the injury occurred during the engagement, but that decision did not cite Leonardis and presumably did not accurately reflect the law of New Jersey at the time. Indeed, Judge Cohen in Schroeder v. Boeing Commercial Airplane Co., 712 F. Supp. 39, 40 (D.N.J. 1989) characterized Stahl as an "aberration".

The most authoritative discussion of the subject was made by Judge Cohen in Schroeder, supra, when he concluded:

> Having conducted an exhaustive discussion of state cases and New Jersey State law, we believe that the New Jersey Supreme Court will reassert the generally accepted principle

> that a valid marriage is a prerequisite to establish a claim for loss of consortium. We therefore grant defendant's motion in the form of a Fed.R.Civ.P. 12(b)(6) request to dismiss for failure to state a claim. Id. at 40

While Judge Cohen was clearly correct as to the status of the law of New Jersey in 1989, there have been two subsequent developments which cast serious doubts on the current correctness of that position. First, in Dunphy v. Gregor, 136 N.J. 99 (1994), the Supreme Court held that a woman who had witnessed the death of her fiancé could recover on a Portee claim. A Portee claim is a claim by one who has suffered emotional distress on account of witnessing a death or horrific injury of a loved one. See Portee v. Jaffee, 84 N.J. 88 (1980).[1] After discussing the policy reasons involving broadening the universe of plaintiffs who can sue under Portee, the Court developed a standard to determine which plaintiffs could sue:

> "That standard must take into account the duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and, as expressed by the Appellate Division, "whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements." Id. at 123, 617 A.2d. 1248." 136 N.J. at 112

Presumably, the Court would analyze the Henry/ Peterson relationship, like any other relationship in New Jersey, by the Dunphy standard. Using that standard, the duration of the life partnership has been nine years. The two appear to be mutually independent. The two contribute to each other's life. Indeed, the finances of the two seem to be totally intermingled. The two live together in the same household, and apparently rely on each other emotionally. It

[1] The Portee Court recognized the similarity between the cause of action for negligent infliction of emotional distress and the cause of action for loss of consortium, Portee, supra at 89, n.6. See similarly Dunphy at 136 N.J. 121 (Garabaldi, J. dissent), and Lozoya v. Sanchez, 133 N.M. 579, 586 (N.M. 2003) ("NIGD [negligent infliction of emotional distress] is a clam that is often considered by courts at the same time as a claim for loss of consortium, and the same policies are implicated by broadening the field of potential claimants for each.") The only case this court is aware of which distinguishes between a Portee claim and a loss of consortium claim in this regard is Smith v. Belle Sports, Inc., 934 F. Supp. 70, 77-79 (W.D.N.Y. 1996) which, applying New Jersey law, upheld a Portee claim by a cohabitant but rejected a loss of consortium claim. The Smith court offers no rationale as to why it treated the two causes of action differently.

seems clear to this court that the relationship between Henry and Peterson, like those of others in a longstanding domestic partnership, is a type of relationship that would meet the Supreme Court's Dunphy standard.

See similarly, In re Estate of Roccamonte, 174 N.J. 321, 392 (2002), a palimony case where the Court found a "marital-type relationship" to exist between an unmarried woman and a married man, holding that "[A marital-type relationship] is … the undertaking of a way of life in which two people commit to each other, foregoing other liaisons and opportunities, doing for each other whatever each is capable of doing, providing companionship, and fulfilling each other's needs, financial, emotional, physical and social, as best they are able." And see V.C. v. M.J.B., 163 N.J. 200, 229 cert. den. 531 U.S. 926, 121 S. Ct. 302, 148 L. Ed 2d 243 (2000) where the Court held that a lesbian could be a "psychological parent" to her former domestic partner's biological children, and thereby eligible for custody and visitation rights, if she lived with the mother and children for a significant length of time and assumed the normal obligations of parenthood.[2]

The second reason the Schroeder line of cases may no longer be good law is that all of those cases (other than Mead vs. Baum, decided in 1908) were written at a time when the Legislature had prohibited granting any special status to common law marriages. As Justice Garabaldi explained in Dunphy, supra "The New Jersey Legislature had abolished common law marriage in 1937. See N.J.S.A. 37:1-10 … Thus, the **legal distinction** between the duties and responsibilities of married and unmarried cohabitants remains." Id. at 120 (Garabaldi, J. dissenting, emphasis added.) See, similarly, Childers, supra, where the court said that "Marriage

[2] The V.C. Court stated at the outset that, "Although the case arises in the context of a lesbian couple …" the Court's standards would apply to all couples. Id. at 205-206. Any standard in the area must likewise be applied neutrally in regards to gender and/or sexual preference. The only possible differentiating factor would be the existence or not of a marriage license.

rights and benefits is paramount in view of their essential relationship to any reasonable conception of basic human dignity and autonomy, and the extent to which they will play an integral role in enabling these persons to enjoy their familial relationships as domestic partners and to cope with adversity when a medical emergency arises that affects a domestic partnership, as was painfully but graphically illustrated on a large scale in the aftermath of the tragic events that befell the people of our State and region on September 11, 2001; (emphasis added)

The Act contains an omnibus clause that is restrict a to obligations, but no necessarily as to rights:

> "The **obligations** that two people have to each other as a result of creating a domestic partnership **shall be limited** to the provisions of the act, and those provisions shall **not diminish any right granted** under any other provision of law." N.J.S.A. 26:8A-6 (emphasis added) [3]

The Act can be read in one of two ways as it relates to the right to sue for loss of consortium. It could be asserted that the Act provides only the four specific rights enumerated: (1) freedom from discrimination prohibited by the LAD; (2) "visitation rights for a hospitalized domestic partner"; (3) the "right to make medical or legal decisions for an incapacitated partner"; and (4) the right to be treated equally to a married person for tax purposes. This reading is buttressed by the Committee Statement that the Act confers "certain rights and benefits". This reading of the Statute would be consistent with the principle "**expressio unius est exclusio alterius**", or, in English, "the expression of one is the exclusion of others". See State v. Henderson, 375 N.J. Super. 265, 270 (Law Div. 2004) and the cases cited therein.

The most persuasive argument in favor of a broader reading of the Act is that the list of the four above described rights could be considered non-exhaustive since the list is preceded by

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[3] That language may refer to the fact that the Act creates neither the type of joint ownership of property nor the type of responsibilities towards children created by marriage. See the Committee Statement, which explains that "the bill recognizes that while individuals in domestic partnerships share some of the same emotional and financial bonds and other indicia of interdependence as married couples, **domestic partnership is a status distance from marriage.** The bill draws **two chief legal distinctions** to reflect the continuing difference between each status: (1) property acquired by one partner during a domestic partnership is treated as the property of that individual, unlike in a marriage… and (2) the status of domestic partnership neither creates nor diminishes individual partners' rights and responsibilities towards children, unlike in a marriage…" (emphasis added)

the word "**including**". Hennefeld v. Township of Montclair, 2005 WL 646650 (N.J. Tax) concerned a claim by a same sex couple for a 100% disabled veteran's property tax exemption, a status normally reserved for married couples. Since the Act does not mention the 100% disabled veteran's property tax exemption, the court engaged in the following statutory analysis:

> The use and meaning of the word "**including**" in legislation was addressed in Boardwalk Regency Corp. v. New Jersey Casino Commission, 352 N.J.Super. 285, 800 *A.*2d 157 (App.Div.2002). In that case, the court "view[ed] the word 'including' as merely illustrative, not limiting." See Jackson v. Concord Co., 54 *N.J.* 113, 126-27, 253 *A.*2d 793 (1969) (holding that the word "include" is a word of enlargement, not limitation, and that the examples specified were merely illustrative);
>
> . . . . . .
>
> Accordingly this court finds that the lists of "certain rights and benefits," contained in N.J.S.A. 26:8A-2(c) and--2(d) are **not exclusive**. Rather, they merely demonstrate, by way of example, **the kinds of rights and benefits the Legislature intended to be extended** to domestic partners under the DPA.
>
> Furthermore, the Legislature intended to make "certain tax-related benefits" available to domestic partners. N.J.S.A. 26:8A-2(c). The court recognizes, however, that the disabled veteran's exemption is not specifically listed among those "tax-related benefits." Ibid. What the DPA does provide to domestic partners is "an additional exemption from the personal income tax and the transfer inheritance tax on the same basis as a spouse." N.J.S.A. 26:8A-2(d) (emphasis added). These "tax-related benefits" are specifically listed among the "certain rights and benefits ... accorded to married couples" Ibid. Since the list is **not exclusive**, the court concludes that the DPA contemplated domestic partners would be entitled to other tax exemptions "accorded to married couples," N.J.S.A. 26:8A-2(d), but were not specifically listed. This is particularly true for same-sex domestic partners in those instances where they are denied "certain rights and benefits ... accorded to married couples", N.J.S.A. 26:8A-2(d), specifically because "[they] ... are ... unable to enter into a marriage with each other that is recognized by New Jersey law, unlike persons of the opposite sex ...," N.J.S.A. 26:8A-2(e), and therefore "do not have access to the protections and benefits offered by law to married couples." Assemb. Appropriations Comm., Assemb. No. 3743, *L.* 2003, *c.* 246, following N.J.S.A. 26:8A-1. (emphasis added)

An expansive reading is also supported by the fact that the principal rights granted by the Act - - freedom from discrimination, the right to make life and death decisions for one's partner, and the right to recover the same tax benefits as married couples - - are generally considered

more important than the right to make a loss of consortium claim when one's partner is injured. Measured **quantitatively**, most people file tax returns annually, but no person brings a loss of consortium claim unless his or her loved one files a tort action, which for many people, never occurs. Measured **qualitatively**, a life or death decision is obviously more important than the right to file a loss of consortium claim. The United States Court of Appeals for the First Circuit has discussed the principle that the Legislative grant of a greater power generally includes the grant of a lesser power:

> The Greater Includes the Lesser. The principle that the grant of a greater power includes the grant of a lesser power is a bit of common sense that has been recognized in virtually every legal code from time immemorial. It has found modern expression primarily in the realm of constitutional law. See, e.g., City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763, 108 S.Ct. 2138, 2147, 100 L.Ed.2d 771 (1988) (commenting that the power to prohibit speech entirely includes the lesser power to license it at the government's discretion); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 345, 106 S.Ct. 2968, 2979, 92 L.Ed.2d 266 (1986) (holding that the power to ban casino gambling includes the lesser power to prohibit advertising of casino gambling). United States v. O'Neil, 11 F.3d 292, 296 (1st Cir. 1993)

In determining how to read the Act, it is useful to examine the Statutes of the other States which have passed laws in this area. See **California** Code Section 1714.01(a) which states that domestic partners shall be entitled to **recover damages for neglect infliction of emotional distress** to the **same extent that spouses are entitled to** under California law. (emphasis added) The California Code goes on to state that "A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons . . . The decedent's surviving spouse, **domestic partner. . .**" California Code Section 1714.02(a) (emphasis added) The California Legislature Counsel's Digest explains that "Existing law establishes a cause of action for negligence, including the negligent infliction of emotional distress and a cause of action for wrongful death. This bill would make those provisions **applicable to a domestic partner** as well as a surviving spouse." (emphasis added)

Vermont's Civil Union law is written in a similarly expansive fashion:

The following is a **nonexclusive** list of legal benefits, protections and responsibilities of spouses, which shall apply in a like manner to parties in a civil union:
15 V.S.A. §1204(e)

. . . .

(2) . . . **loss of consortium** § 1204 (e), (emphasis added)[4]

Connecticut's Statute is also expansive:

Wherever in the general statutes the terms "spouse", "family", "immediate family", "dependent", "next of kin" or any other term that denotes the spousal relationship are used or defined, a party to a civil union shall be included in such use or definition and wherever in the general statutes, ... the term "marriage" is used or defined, a civil union shall be included in such use or definition. State of Connecticut, General Assembly, File No. 379, Section 15.

The Summary of the Connecticut Statute (which is prepared "solely for the purpose of information, summarization, and explanation") states that "The bill authorizes same sex civil unions and extends to participants in them **legal rights and obligations equal to those of married couples**. (emphasis added) State of Connecticut, General Assembly, File No. 379, Senate Summary.

Hawaii's "Reciprocal Beneficiaries" law states that "In any action under this section [Wrongful Death], such damages as may be given under the circumstances shall be deemed fair and just compensation . . . including . . . **consortium**" Section 613.3 (emphasis added). Hawaii's Reciprocal Benefits law, on the other hand, contains two narrowing provisions not found in the Act:

Unless otherwise provided by law, reciprocal beneficiaries shall not have the same rights and obligations under the law that are conferred through marriage under Chapter S72 . (emphasis added) HI St § 572-6

[4] Hennefeld v. Township of Montclair, supra. recently addressed the effect of a Vermont civil union in New Jersey. It found that "Vermont's Civil Union Statute is clearly more expansive than New Jersey's DPA" and therefore could not be give it full Faith and Credit since the Defense of Marriage Act provides that states not recognize laws of other states giving same sex relationships greater rights than do the laws of the forum. (p.10).

. . . .

> Notwithstanding any other law to the contrary **the rights and benefits extended by the Act shall be narrowly interpreted and nothing in this Act shall be construed nor implied to create or extend rights or benefits not specifically provided herein** (emphasis added) 1997 Haw. Sess. Laws Act 383 § 74

In the absence of either the broad language in the California, Vermont and Connecticut Statutes or the narrow language in the quoted last two provisions of the Hawaii Statute, the court concludes that a Legislative which gave certain **greater** rights to "the many adult individuals in the State who share an important personal, emotional and committed relationship with another adult" (Committee Statement) would give lesser rights to those individuals as well. While the Legislature stated that it did not want to give domestic partners the right to sue for alimony and/or child support - - which would be changes of major consequence - - there is nothing in the Act or Committee Statement to suggest that the Legislature did not support the recent liberalization of tort law which would extend to those people who are not married the right, in limited circumstances, to sue for loss of consortium, providing they can meet the other requirements for bringing such a suit. See V.C. supra where the Court, dealing with the parental rights of an unmarried cohabitant, noted a possibly expansive phrase in N.J.S.A. 9:2-13(f) modifying the definition of "natural and adoptive parents" and said of that phrase - - "when otherwise described by the context": **"That language evinces a legislative intent to leave open the possibility** that individuals other than natural or adoptive parents may qualify as 'parents', depending on the circumstances." Id. at 216. (emphasis added) Similarly, the word "including" in the Act may "evince Legislative intent to leave open the possibility that individuals other than [spouses]" may obtain recovery when their life partners can no longer provide them consortium.

See Judge Feinberg's thoughtful decision in Lewis v. Harris, 2003 WL23191114 (Law Div. 2003). While the Act had not passed at the time of her decision, Judge Feinberg did comment on the Act in draft form, stating that if passed, it "would extend to same sex partners the **same benefits and protections as a spouse** under the laws of this State". (p. 23, emphasis added). The decision herein is consistent with, albeit slightly narrower than, Judge Feinberg's comment.[5]

If one analyzes Dunphy, which broadens the class of people able to sue in the closely related infliction of emotional distress context, and the Legislative intent demonstrated by the Act, the most logical conclusion is that domestic partners who file under the Act and who meet the other Dunphy requirements can sue for loss of consortium.

The final hurdle for Peterson on this motion is defendants' argument that the claim should be barred since their alleged wrongful acts occurred from the Summer of 2002 to February 2003, which was **prior** to the July 10, 2004 effective date of the Act (N.J.S.A. 26:8A-1, Historical and Statutory Notes) and prior to the August 17, 2004 date when Peterson and Henry filed an Affidavit of Domestic Partnership. There are three possible judicial responses to this argument: (a) Peterson could be allowed to sue for all consortium injuries she suffered; (b) Peterson could be barred from filing any claims; or (c) Peterson could be barred from asserting any damages she suffered prior to August 17, 2004.

Allowing Peterson to sue for all consortium damages she has suffered would violate the rule that Legislation is generally not to be given a retroactive effect, Nobrega v. Edison Glen Associates, 167 N.J. 520, 536 (2001); Gibbons v. Gibbons, 86 N.J. 515, 521 (1989) and Rothman

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[5] This court's reasoning does not apply to rights as important or more important than the four enumerated in the Act, nor would it apply to rights emanating from Statutes which explicitly refer to husbands or wives. See, for example, N.J.S.A. 44:140 which requires "husbands" and "wives", to support their "spouse[s]"), and N.J.S.A. 3B:5-3 which provides for intestate inheritance by the surviving "spouse".

v. Rothman, 65 N.J. 219, 224-225 (1974). Further, allowing recovery prior to August 17, 2004 would violate this court's ruling that consortium claims can only be brought by domestic partners who meet the Dunphy standards **and** file a Certificate. The counter-argument that only the Legislature's decision not recognize same gender relationships prevented Peterson and Henry from legalizing their relationship prior to 2002 and that a ruling not giving Peterson the same rights as a married person is unconstitutional, is answered by Lewis v. Harris which holds that the Legislative decision did not violate the Constitutional rights of same gender couples.

While the Act should not be read to allow Peterson to sue for all loss of consortium she has suffered, it would be equally incorrect to read the Act as forbidding Peterson from suing for **any** loss of consortium. The committed live-in relationship between Peterson and Henry began **six years before** the alleged wrongdoing. The Legislature declared that the inability of committed partners to obtain various rights was an "oversight" the Legislature wished to "redress" [Committee Statement]. It is doubtful the Legislature wished to "redress" this "oversight", yet immunize tort defendants from paying any compensation to committed partners merely because the partners were **not able** to gain legal sanction for their relationships until after the injuries occurred. An additional reason the Act should not be read to bar Peterson from all recovery is that if defendants' actions were wrongful, they were wrongful whether committed before or after the effective date of the Act. Compare Hennefeld v. Township of Montclair, supra, where the action in question, a decision by the County Board of Taxation denying the application of a same sex couple for a 100% disabled veteran's property tax exemption, was apparently legal before the Act and illegal after.

This court adopts what could be called an intermediate reading of the Legislative intent. The court believes that the Legislature did not wish bar recovery **for damages incurred after**

registration to those who (a) were in a committed long term relationship when the Act passed and (b) legalized that relationship after the Legislature gave than the opportunity to do so. That Peterson and Henry would have legally committed to each other if the law allowed them to do so distinguishes this case from the Mead, and Schroeder, supra, line of cases, supra, prohibiting fiancés from recovery, since those individuals **could have** married sooner but chose, for whatever reason, not to do so. A Legislature so clearly committed to expanding the rights domestic partners would have wished to allow recovery in these circumstances. It could be argued that allowing Peterson to recover even for post Act damages is to give partial retroactive effect to the Act, but see Rothman v. Rothman, supra, which held that:

> ...in construing a statute its terms will not be given retroactive effect 'unless they are so clear, strong and imperative that no other meaning can b annexed to them, or unless the intent of the legislature cannot otherwise be satisfied.' . . . **it is no more than a rule of statutory interpretation and all such rules have a single purpose—to aid the court in its quest for legislative intent. Where, as we find here to be the case, supervening considerations clearly compel a contrary determination, this, like all other rules of statutory construction must give way.** (emphasis added) Rothman, 65 N.J. at 219

This court's analysis on retroactivity under the Act is consistent with Hennefeld v. Township of Montclair, supra, where the Tax Court held that a same sex couple was entitled to a 100% disabled veteran's property tax exemption only after July 12, 2004, the date they registered as domestic partners under the Act. Hennefeld's retroactivity analysis arose in a more difficult context for plaintiffs (it is a rule that "exemptions from local property taxation must be strictly construed" supra, at 7), but the line drawn at the date of registration makes sense in both cases. Indeed, while this court believes Stahl v. Nugent, supra, was wrongly decided in 1988, it contained a timing aspect - - the court allowed a claim for loss of consortium for a January 1, accident to an engaged woman to be brought only from the February 29 marriage date - - which is consistent with the decision herein.

Thus, this motion to dismiss the Peterson claim is granted only insofar as it concerns her claim for damages prior to August 17, 2004.[6]

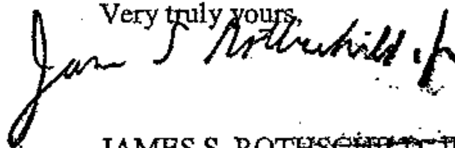
III. The Married Couples

Married couples have long been able to bring loss of consortium claims; thus it would normally not be necessary to address that aspect of the motion. See Schuttler v. Reinhardt, 17 N.J. Super. 480, (App. Div. 1952); Giardelli v. Public Service Ry. Co., 8 N.J. Misc. 104 (Sup. Ct. 1930); Clark v. Chaisson, 7 N.J. Misc. 269 (Sup. Ct. 1929). Nevertheless, the court does note that Mr. Moffett's wife has alleged that Mr. Moffett has suffered sexual dysfunction as a result of the incidents which give rise to this motion. Such a claim can no longer be asserted in New Jersey without medical proof. In Knowles v. Mantua Township Soccer Association, 176 N.J. 324 (2003), the Court stated:

> Plaintiff alleged in his petition for certification and at oral argument that he is unable to engage in sexual relations with his wife as a result of the injuries. Although such a permanent loss presumable would satisfy the second prong of the Brooks/Gilhooley test, we are unable to find medical evidence in the record connecting that claim to the injuries. Consequently, that claim has not been considered in our determination. Id. at 334.

Since a claim for sexual dysfunction cannot be brought by a tort plaintiff in absence of proof, a similar claim in a loss of consortium context must also be dismissed.

Very truly yours,



JSR:afc

JAMES S. ROTHSCHILD, JR., JSC

[6] It could be argued that the court is drawing a relatively fine line on the retroactivity issue in this case. But as Justice Pollock stated in Frame v. Kothaio, 115 N.J. 638, 649 (1989), "Drawing lines… is the business of the courts and lines must be drawn to provide remedies for wrongs without exposing wrongdoers to unlimited liability."

SUPERIOR COURT OF NEW JERSEY
MIDDLESEX COUNTY, FAMILY PART
DOCKET NO. FD-12-226-06C
A.D.# ______________

1
2 IN THE MATTER OF) TRANSCRIPT
3 THE BIRTH OF A CHILD) OF
TO JEAN ELIZABETH MOSES) RULING
4
5 Place: Middlesex County Courthouse
6 One JFK Square
New Brunswick, New Jersey
7 Date: August 2, 2005
8
9 BEFORE:
10 THE HON. FRANK M. CIUFFANI, J.S.C.
11 TRANSCRIPT ORDERED BY:
12 WILLIAM S. SINGER, ESQ. (Singer & Fedun)
13
14
15
16 Transcriber, Karen Cohen
17 G&L TRANSCRIPTION OF NJ
40 Evans Place
18 Pompton Plains, New Jersey 07444
Sound Recorded
19 Recording Operator, Wilcox
20
21
22
23
24
25

I N D E X

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THE COURT: Ruling	3

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1 THE COURT: This is in the matter of -- in
2 the matter of the birth of a child to Jean E. Moses.
3 This is FD-12-226-06C. I'm supplementing the decision
4 that I put on the record earlier today -- this morning,
5 in fact, in the presence of counsel for the plaintiffs
6 and counsel for the State of New Jersey. Specifically,
7 William Singer for the plaintiffs and Patrick
8 DeAlmeida, Assistant Attorney General for the State.
9 The Court makes the following factual findings.
10 Jean Elizabeth Moses was born on August 1st,
11 1969 in Princeton, New Jersey. She is a resident of
12 New Jersey and a citizen of the United States.
13 Beth Rappaport was born on May 1st, 1968 in
14 Jersey City, New Jersey and is a resident of New Jersey
15 and a citizen of the United States.
16 Jean and Beth are a lesbian couple who are
17 deeply committed to each other as set forth in the
18 certifications which they filed along with their
19 verified complaint. They entered into a civil union in
20 Vermont on August 24, 2002 and became domestic partners
21 in July, 2004 under New Jersey Law NJSA 26:8A-1. They
22 reside together in a home that they own in South
23 Brunswick, New Jersey. Jean and Beth decided to have a
24 child together, after much consideration and
25 discussion, and they had determined to pursue having a

1 child with whom they will jointly raise with love and
2 affection. I should restate that. They determined to
3 pursue having a child, whom they will jointly raise
4 with love and affection.
5 Jean and Beth investigated various options to
6 -- then to have a child and they chose to proceed with
7 alternate insemination. They purchased sperm from an
8 anonymous donor from the Fairbanks Cryobank and
9 arranged to have the sperm shipped directly to their
10 physician's office. With the assistance of Dr. Seth
11 Derman (phonetic) of the Delaware Valley OB/GYN
12 Infertility Group in Lawrenceville, New Jersey Jean was
13 inseminated on November 6, 2004 with the sperm of the
14 anonymous donor. Beth was present for the procedure.
15 At the time of the filing of their verified
16 complaint, which was July 1st, 2005, Jean was pregnant
17 and due to give birth to a child at the end of July,
18 2005. As of the appearance before this Court, Jean in
19 fact gave birth to a beautiful baby girl, who is
20 Elizabeth (phonetic).
21 Jean and Beth assert that the best interests
22 and happiness and welfare of Melissa requires that both
23 of them be determined to be the child's legal parents
24 at birth. And they seek an order from this Court that
25 they are both the parents of the child.

1 The Court has reviewed thoroughly the
2 excellent briefs submitted by Mr. Singer, on behalf of
3 his clients, the decision by Judge Talbert, which was
4 attached to the verified complaint, which was in the
5 matter of Child of Kimberly Robinson, FD-07-6312-05A,
6 the brief submitted by Mr. DeAlmeida on behalf of the
7 State, and renders the following decision.
8 First, the Court observes as -- or the State
9 Registrar did that the parties to this suit, the
10 plaintiffs specifically, are sincere in their
11 commitment and sincere in their dedication to young
12 Melissa, to raise Melissa together.
13 The sole issue before this Court is the
14 appropriate legal mechanism for the recognition of the
15 non-birth mother as the parent of the child, Melissa.
16 The net effect of an order which would
17 determine that the non-birth mother is a parent of the
18 child would be to have the birth certificate, which has
19 already been issued with respect to Melissa, amended to
20 include Beth Rappaport as a parent, along with the
21 natural mother in this case, Jean Moses.
22 Now the State Registrar of Vital Statistics
23 registers all, "vital statistics", and records the,
24 "facts relative to any birth." NJSA 26:8-1. The State
25 Registrar is required to procure on a birth certificate

1 44(a) creating a legal relationship between a man and a
2 child where the child is born to a married couple as a
3 result of the mother's artificial insemination by a
4 man, not her husband. The Statute provides, in
5 relevant part, that:
6 "If under the supervision of a licensed
7 physician and with the consent of her husband a wife is
8 inseminated artificially with semen donated by a man
9 not her husband, the husband is treated in law as if he
10 were the natural father of the child thereby conceived.
11 The donor of the semen shall be "treated in law as if
12 he were not the father of the child thereby conceived
13 and shall have no rights or duties stemming from the
14 conception of the child." NJSA 9:17-44(b).
15 By operation of this statute the rights of
16 the natural father are terminated and the presumption
17 of paternity exists due to marriage, which could be
18 rebutted by the husband's knowledge that his wife was
19 impregnated by another man's semen is preserved. The
20 Statute is unambiguous and by its plain terms does not
21 apply to domestic partners, whether of the same gender
22 or not.
23 The plaintiffs in this case argue that the
24 Court should construe NJSA 9:17-44 to apply to their
25 domestic partnership situation. In connection with

1 statutory construction it begins with consideration of
2 the statute's plain language. See Merin v. Maglaki
3 126 N.J. 430, 434 (1992). "A Statute -- strike that.
4 Absent an explicit indication of special meaning words
5 of a statute are to be given their ordinary and well
6 understood meaning. Renz v. Penn Central, 87 N.J. 437,
7 440 (1981).
8 Given that standard, the Court observes that
9 NJSA 9:17-44(a) applies only to married couples because
10 the Statute plainly indicates that the trigorous
11 provisions a "husband" must have consented to the
12 artificial insemination of his "wife". Husband and
13 wife refer to individuals who are parties to a
14 marriage. Period. See NJSA 37:1-1 et sec.
15 In New Jersey the ability to enter into a
16 marriage does not extend to same sex couples. Lewis v.
17 Harris 378 New Jersey Super 168, Appellate Division
18 205, appeal pending. While same sex couples, such as
19 the plaintiffs here, may enter into a domestic
20 partnership, that statutory union does not equate with
21 marriage and does not render the same sex couple
22 "husbands" or "wives" in the statutory sense.
23 The Domestic Partnership Act amended numerous
24 statutes to extend statutory benefits and protections
25 to domestic partners in many areas. However, nowhere

1 in the Domestic Partnership Act did the Legislature
2 amend the State's marriage statutes, the statutory
3 provisions concerning paternity or birth certificates
4 in general or NJSA 9:17-44(a) in particular.
5 The plaintiffs in this case in effect are
6 asking this Court to create a legally cognizable
7 parental relationship between the non-birth domestic
8 partner and the child from the moment of the child's
9 birth, despite the lack of any statutory basis for
10 doing so.
11 A parental relationship is established
12 through a biological relationship between adult and
13 child, the presumptions attendant to legal marriage or
14 by adoption. No statutory provision creates a
15 presumption of parentage for members of domestic
16 partnerships.
17 Furthermore, the plaintiffs cannot fit into
18 the presumption created by NJSA 9:17-44(a) as that
19 statute is based on the existence of a marriage, not
20 merely on the consent of two parties to a relationship
21 to create a child through artificial insemination.
22 The reason that the statute extends to
23 married couples is because of the statutory
24 presumptions concerning paternity and the existence in
25 every instance in which NJSA 9:17-44(a) is applicable

1 of definitive evidence that the presumption has been
2 overcome. That is that the husband is not the natural
3 father of the child.
4 To expand the statute by judicial fiat to
5 domestic partners in the manner requested by the
6 plaintiffs this Court finds would amount to a
7 usurpation of the role of the Legislature in shaping
8 social policy.
9 The Appellate Division in Lewis v. Harris
10 instructed that regardless of changing views that
11 society or members of the judiciary have of same sex
12 relationships, the legislature remains in control of
13 social legislation affecting the rights of same sex
14 couples. Regardless of the apparent wisdom of granting
15 parental status to the non-birth partner in -- in the
16 case, this Court is powerless to create a legal
17 relationship between the non-birth partner and the
18 child, pursuant to NJSA 9:17-44(a).
19 Other avenues of relief exist for the
20 plaintiffs in this case.
21 There is a mechanism under the adoption
22 statute for the plaintiffs to establish a parent child
23 relationship between the non-birth partner and the
24 child. During oral argument the Court engaged counsel
25 in a colloquy regarding that process and whether that

1 process could be expedited in order to deal with some
2 of the concerns that the plaintiff had -- or the
3 plaintiffs have.
4 The Court finds that a procedure exists under
5 the adoption statute for the rapid recognition of the
6 non-birth partner in this case as the parent of the
7 child at issue and that that procedure can be expedited
8 to minimize any of the concerns that the plaintiffs
9 expressed about what could happen between the time that
10 a final judgment of adoption is entered and the date of
11 birth of the child.
12 The Court observes that in anticipation of
13 the birth of a child a same sex couple is free to enter
14 into written agreements to address potential emergent
15 medical decisions regarding the child and custody in
16 the event that the birth mother is incapacitated.
17 Furthermore, where a child is not received from an
18 adoption agency, as in this case, an actual adoption
19 may be promptly and immediately filed after the birth
20 of a child. NJSA 9:3-44.
21 The adoption matter can proceed immediately
22 to a preliminary hearing and the Court may take
23 evidence as to the facts and circumstances surrounding
24 the adoption and a judgment of adoption could be
25 entered immediately upon the completion of the

1 preliminary hearing under the circumstances under NJSA
2 9:3-48(C-1). Under the protocol many of the concerns
3 raised by the plaintiffs would be addressed and the
4 long term relationship of the parties to the child
5 could be clearly established and legally recognized.
6 So the Court finds that the plain reading of
7 the statutory provisions which the plaintiffs rely upon
8 and argue that the Court should construe to grant them
9 the relief that they seek is inconsistent with the
10 relief that they seek. And for the Court to construe
11 the statute otherwise would be, in effect, legislating
12 and not acting in an appropriate manner as a trial
13 court.
14 With respect to the argument that such a
15 construction of that statute would violate the equal
16 protection clause of Article One of the State
17 Constitution, the Court finds that the statutory
18 construction which it has given to the statute is not
19 unconstitutional and does not violate the equal
20 protection clause of the State Constitution. Our
21 Supreme Court has cautioned Courts to remain "mindful
22 of the strong presumption in favor of constitutionality
23 and the traditional reluctance to declare a statute
24 void, a power to be delicately exercised." <u>Paul</u>
25 <u>Kimball Hospital v. Brick Township Hospital</u> 86 New

1 Jersey 429, 447 (1981).
2 Every possible presumption in favor of the
3 constitutionality of legislative action must be
4 extended by the Court. See Holster versus Board of
5 Trustees 59 N.J. 60, 66 (1971). Accordingly, any
6 litigant who attacks the statute must demonstrate that
7 there is no reasonable basis for sustaining it." And
8 where a statute's constitutionality is fairly debatable
9 Courts will uphold the law. See Newark Superior
10 Officers 98 New Jersey at page 227.
11 In Robinson versus Cahill 62 New Jersey 443,
12 Chief Justice Weinberger stated that a Court in
13 analyzing whether a statute violates the equal
14 protection of the clause -- equal protection clause
15 "must weigh the nature of the restraint on the denial
16 against -- I'm sorry. The Court must weigh the nature
17 of the restraint or the denial against the apparent
18 public justification and decide whether the State
19 action is arbitrary. In that process if the
20 circumstances sensibly so require the Court may call
21 upon the State to demonstrate the existence of a
22 sufficient public need for the restraint or the denial.
23 Overall, the instances in which the Court has
24 struck down a statute on equal protection grounds are
25 few. On the rare occasions on which a statute failed

1 to survive the equal protection scrutiny it cannot be
2 seriously disputed that the right asserted qualifies as
3 a fundamental right under the State Constitution; that
4 is the right vindicated has been so rooted in the
5 traditions and collective conscience of our people as
6 to be ranked as fundamental. King v. South Jersey
7 National Bank 66 New Jersey 161 (1974).
8 The crucial issue under New Jersey law is
9 whether there is an appropriate governmental interest
10 suitably furthered by the differential treatment. See
11 Borough of Collingswood v. Ringgold, 66 New Jersey 350
12 (1975). A "real and substantial relationship between
13 the classification of the governmental purpose which it
14 purportedly serves" must be shown to sustain the
15 classification.
16 The State Registrar, in its briefs, stated
17 that it did not dispute that parentage is a fundamental
18 right. The Court finds, however, that Beth Rappaport
19 does not have parental rights to the child born to Jean
20 Moses. Nothing in the State Constitution provides that
21 an adult with no biological connection to a child has a
22 fundamental right to create parental rights to that
23 child by the most convenient or expeditious method
24 possible.
25 There is a method under the adoption statute

1 for Beth Rappaport to obtain parental rights. That
2 procedure is not burdensome, onerous or cumbersome. It
3 can be expedited. At oral argument Mr. Singer
4 indicated that in his experience at the most rapid end
5 of the spectrum, so to speak, within four to five
6 months an adoption could be accomplished. I suspect
7 that that procedure could be even expedited further if
8 need be.
9 The plaintiffs did not provide the Court with
10 any precedent supporting the proposition that the State
11 Constitution establishes a right to immediate
12 recognition of parentage at the moment a child is born
13 when the person seeking that recognition has no
14 biological relationship with the child.
15 The fact that the Legislature has created a
16 different procedure for married men to be recognized at
17 the -- as the natural father of a child born to his
18 wife after her artificial insemination with his consent
19 does not equate to a constitutional violation. As the
20 Appellate Division firmly established last month in
21 Lewis v. Harris nothing in the Constitution requires
22 that same sex couples be accorded rights identical --
23 underline identical -- to married couples. Because our
24 Constitution does not enshrine a right to enter into a
25 same sex marriage the Legislature has the prerogative

1 to establish the legal rights to be accorded to same
2 sex domestic partners and those rights can differ from
3 those accorded to married individuals. Given the fact
4 that plaintiffs are afforded an efficient method for
5 the establishment of parental rights for both partners
6 to the child, the fact that married men enjoy a
7 different mechanism for establishing similar rights
8 this Court finds is of no constitutional significance.
9 Our Supreme Court, in the Baby M case, opined
10 that in light of the fact that the Legislature had
11 explicitly recognized the parent child relationship
12 between a child and its natural parents, married and
13 non-married, NJSA 9:17-38 to 59, between adoptive
14 parents and their adopted child or adopted child, NJSA
15 9:3-37 to 56 and between a husband and a wife's child
16 pursuant to artificial insemination, NJSA 9:17-44, but
17 in no other circumstances "it can be contended with
18 some force that the legislature's statutory coverage of
19 the creation of the parent child relationship evidences
20 an intent to reserve to itself the power to define what
21 is and what is not a parent child relationship." Baby
22 M at page 104. And the Court so holds that the
23 legislature has evidenced its intent to reserve to
24 itself the power to define what is and what is not a
25 parent child relationship.

1 that time amended to provide protections with respect
2 to parentage accorded to domestic partners in the
3 context of artificial insemination, in particular, or
4 parentage for domestic partners in general. Indeed the
5 Legislature quite plainly declined to extend any
6 statutory rights to domestic partners with respect to
7 parentage, as the Domestic Partnership Act is silent on
8 that subject. Clearly, having not included statutory
9 parental rights in the more specific Domestic
10 Partnership Act, the Legislature could not have
11 intended to secure such rights through the more general
12 Law Against Discrimination, which was examined and
13 amended by the Legislature simultaneously with Domestic
14 Partnership Stat -- Statute.
15 Accordingly, this Court finds that the
16 Court's construction, as previously set forth, of NJSA
17 17:44A does not constitute a violation of New Jersey's
18 Law Against Discrimination.
19 The parties at oral argument agreed that this
20 matter was ripe for summary disposition, that there are
21 no factual issues which would preclude the Court from
22 entering a final judgment, and so a final judgment will
23 be entered dismissing the plaintiff's complaint,
24 denying the relief entered. Mr. DeAlmeida has been
25 asked to prepare an appropriate form of judgment. This

1 concludes the Court's decision in this matter.

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5 CERTIFICATION

6 I, KAREN COHEN, the assigned transcriber, do hereby

7 certify the foregoing transcript of proceedings digitally

8 recorded on August 2, 2005, from 12:51:04 to 1:26:09, is

9 prepared in full compliance with the current Transcript

10 Format for Judicial Proceedings and is a true and

11 accurate non-compressed transcript of the proceedings as

12 recorded.

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16 Karen Cohen

17 KAREN COHEN AD/T #371

18 G&L TRANSCRIPTION OF NJ Date: September 2 , 2005

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