MARK LEWIS, et al., Plaintiffs-Appellants, v. GWENDOLYN L. HARRIS, et al., Defendants-Respondents.	SUPREME COURT OF NEW JERSEY DOCKET NO. 58, 389 Civil Action On Appeal from a Final Judgment of the Superior Court, Appellate Division Docket No. Below:A-2244-03T5 Sat Below: Hon. Stephen Skillman, P.J.A.D Hon. Donald Collester, J.A.D. Hon. Anthony Parrillo, J.A.D.

BRIEF OF THE NEW JERSEY STATE BAR ASSOCIATION AS AMICUS CURIAE

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INTRODUCTION

The present state of the law in New Jersey as it applies to same-sex couples and registered domestic partners is untenable and poses grave uncertainty to attorney representing same sex couples and, more importantly, to the same sex couples themselves. As the largest professional organization for attorneys in the State of New Jersey with over 16,000 members, the New Jersey State Bar Association (hereinafter "NJSBA"), respectfully submits this Brief *Amicus Curiae* in the instant matter to demonstrate that this uncertainty and unpredictability in the law is difficult, and in some cases, impossible to overcome even with the most diligent efforts of our membership using the most cutting edge legal knowledge and skills. Attorneys who represent registered domestic partners must now fashion agreements and other legal documents in an unpredictable, and in some cases, an unrealizable attempt to place our clients and our clients' children on a footing equal to that which is automatically available to lawfully wedded spouses and their children.

Although the New Jersey Domestic Partnership Act, N.J.S.A. 26:8A-1, (hereinafter referred to as the "Act" or the "DPA") permits the registered domestic partners to modify the obligations and rights to each other in a valid contract, N.J.S.A. 26:8A-6(e), as practicing attorneys representing these families, we have found that no amount of contractual underpinning can accomplish that

goal under the law as it presently exists. While the NJSBA does not suggest to this Honorable Court a choice of remedy in the instant matter, the Bar Association nonetheless wishes to express its continuing apprehension that the status of the law as it stands poses uncertainty to attorneys advising same sex couples and unpredictable consequences to our clients.

THE INTEREST OF THE NEW JERSEY STATE BAR ASSOCIATION AS AMICUS

The NJSBA mission is to serve, protect, foster and promote the personal and professional interests of its members; to serve as the voice of New Jersey attorneys with regard to the law, legal profession and legal system; to promote access to the justice system and fairness in its administration; to foster professionalism and pride in the practice of law; to provide educational opportunities to New Jersey attorneys to enhance the quality of legal services and the practice of law; and to provide education to the public to enhance awareness of the legal profession and the legal system.

The limitation on rights and obligations as set forth in the DPA is of particular concern to our member attorneys as the legal rights of registered domestic partners impact upon numerous areas of the law practiced by our members, including but not limited to family law and children issues, joint ownership of real estate, estate planning, New Jersey imposed Estate Tax, and labor and employment law.

Just prior to the adoption of Assembly Bill A-3743 (the DPA with its corresponding Senate Bill), the Board of Trustees of the NJSBA, as a method of memorializing its concern for the restricted and ineffective terms of the Act, adopted the following statement which was sent to the Governor and circulated:

> After much deliberation by members of the Board of Trustees, the following statement was adopted:
>
> "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." December 17, 2003 correspondence from then NJSBA President Karol Corbin Walker to the Governor.

Unfortunately, the Bar Association was not invited to assist in crafting an appropriate alternative, and the DPA and the piecemeal litigation and conflicting case law that has followed have failed to address many of the issues that impact upon our domestic partners and same sex couple clients.

With respect to the instant case, the NJSBA Board of Trustees voted to petition:

> the Supreme Court for *amicus curiae* participation in the case of *Lewis v. Harris*, in which six same-sex couples are seeking the right to marry in New Jersey. The Board approved NJSBA participation limited to providing the Court with an overview of the status of the law as it exists today with regard to same sex couples, and identifying problem areas and shortfalls in the current law, most notably the Domestic Partnership Act. The Board specifically voted that the NJSBA not take a position on the merits of the constitutional arguments -

> that it just illustrate for the Court the legal issues and sometimes problematic solutions that currently face same-sex couples. NJSBA Report of the Board of Trustees Minutes, December 16, 2005.

The NJSBA hereby joins as an amicus in this matter for the limited purpose of assisting the Court in understanding the status of the law as it relates to same sex couples and registered domestic partners through the Domestic Partnership Act, the piecemeal and tediously slow legislation attempting to correct some of the inequities, and the often conflicting case law that is evolving. It is the concern of the Bar Association that this body of law has created an untenable and inequitable area of law which makes it difficult at best to represent clients whose rights are dictated by the law as it exists today.

LEGAL ARGUMENT

POINT I

THE DOMESTIC PARTNERSHIP ACT

A. The New Jersey Legislature Has Affirmatively Acknowledged the Importance of Same-Sex Unions to the State On Personal, Legal and Public Policy Grounds.

The Legislative findings and declarations of the DPA, N.J.S.A. 26:8A-2(a), explicitly recognize: "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." The Legislature states: "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." Id. at 2(b). The Legislature proceeds to reference "these mutually supportive relationships" finding that they are deserving of formal recognition by statute, and "that certain rights and benefits should be made available to the individuals participating in them … that are accorded to married couples under the laws of New Jersey…." Id. at 2(c) & (d).

Ultimately, the Legislature stated:

> "The need for all persons who are in domestic partnerships, regardless of their sex, to have access to these 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…." Id. at (d) (Emphasis supplied).

However, the rights and obligations granted in the Act are significantly limited and fail to address vast areas of law as it relates to families, couples, and their children in these "familial relationships." N.J.S.A. 26:8-12.

The Defendants-Respondents, (hereinafter referred to as "the State"), characterize the Act as providing "a myriad of protections and benefits provided to married couples" which, according to the State has ameliorated "many of the harms" of the unequal treatment alleged by the plaintiffs in their suit. Db9. The State then proceeds to itemize the important rights granted to

domestic partners in the Act, which consist of, by the State's own accounting, merely ten rights granted under the Act, some of which are only available to State employees and their partners.

While the rights granted under the DPA are very important, the words "spouse," "wife," "husband," and "marriage" appear in 850 separate provisions of the New Jersey State statutes granting rights and bestowing obligations to and upon married couples in New Jersey which impact upon every level of their lives. www.Lambdalegal.org. The DPA grants merely a handful of the New Jersey spousal rights and privileges to domestic partners.

B. The Registration Procedural Requirements Place Undue Burdens Upon Couples Seeking To Register As Domestic Partners.

In order to register as domestic partners, the couple is required to sign an Affidavit of Domestic Partnership proving the integrity of their relationship and past indicia as a couple. The Affidavit mandates that the couple already have "a common residence," thereby requiring that the couple live together before entering into the state sanctioned domestic partnership. N.J.S.A. 26:8A-4. No such requirement exists to obtain a marriage license. In fact the marriage license application assumes separate addresses for the male and female applicant prior to marriage, and the expectation of many people would be that a couple should not live together prior to the entry into a State sanctioned legally recognized relationship. See NJ Vital Statistics REG-15 form,

"Application for a Marriage License" http://www.state.nj.us/health /vital/forms.shtml.

Domestic partner applicants must also provide documentation acceptable to the government to prove that they have already assumed joint responsibility "for each other's common welfare as evidenced by joint financial arrangements or joint ownership of real or personal property." N.J.S.A. 26:8A-4. Mandatory proofs consist of a joint deed, mortgage or lease, joint bank account or primary beneficiary status under will, life insurance policy or retirement plan or joint ownership of a motor vehicle. Id. Marriage licenses between heterosexual couples are readily available with no fiscal proofs whatsoever and no prior financial commitment to each other either before or after the wedding ceremony.

C. The DPA By Its Own Terms Limits the Obligations of Domestic Partners to Each Other.

Having mandated that the couple live together and share financial support prior to being granted the right to the State sanctioned familial relationship of a domestic partnership, the DPA self limits their obligations towards each other as follows:

> The obligations that two people have to each other as a result of creating a domestic partnership shall be limited to the provisions of this 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)

Not only are the DPA rights severely restricted, but so are the obligations between the partners. N.J.S.A. 26:8A-4(b)(4)(Domestic partners are only "jointly responsible for each other's basic living expenses during the domestic partnership")(Emphasis added); N.J.S.A. 26:8A-6(g)(Domestic partners are not responsible for each other's debts during the partnership even if the debt arose as a joint debt); N.J.S.A. 26:8A-10(a)(3)("In all such [termination] proceedings, the court shall in no event be required to effect an equitable distribution of property, either real or personal, which was legally and beneficially acquired by both domestic partners or either domestic partner during the domestic partnership.")

The statutory limitations of the DPA impact upon the terminating partners in a manner which would never be allowed in a divorce.

POINT II

THE DOMESTIC PARTNERSHIP ACT SHORTFALLS IN THE AREA OF FAMILY LAW

The DPA simply fails to address some of the most important legal protections necessary for families and their children.

A. The Purpose of the DPA is to Recognise Familial Relationships.

The Appellate Court in Lewis v. Harris, 378 N.J. Super. 168 (App.Div. 2005), acknowledges the legislative findings and declarations of the Domestic Partnership Act, N.J.S.A. 26:8A-1 et. seq. (herein referred to as the "Act") to include the principle

that: "All persons in domestic partnerships should be entitled to certain rights and benefits that are afforded to married couples under the laws of New Jersey…." N.J.S.A. 26:8A-2(d).

The Court further noted that,

> The need for all persons who are in domestic partnerships, regardless of their sex, to have access to these 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. Lewis, supra, 378 N.J. Super. at 177, quoting N.J.S.A. 26:8A-2(d).

The Court in Lewis outlined many of the rights afforded to domestic partners resulting from the enactment of the Act. These rights were created in the context of domestic partners addressing financial and medical issues with third parties such as health care providers, state taxing authorities, pension administrators and insurance providers. Lewis, supra, 378 N.J. Super. at 177-78.

In reviewing the rights provided to domestic partners under the Act, it is clear that the Legislature did not confer upon domestic partners the same rights and benefits that are afforded to married couples.

B. The DPA Fails to Provide a Right to an Automatic Name Change for Registered Domestic Partners.

Even in circumstances where the DPA purports to afford certain rights and benefits to domestic partners, it falls short of providing these rights to the fullest extent possible. Even the most basic right to automatically change one's surname upon marriage is not distributed evenly between married partners and domestic partners, as the Act contains no provision affording this right to registered domestic partners. If domestic partners want to publicly demonstrate their unity in the same manner as married couples do, the couple must go through a costly and time consuming name change petition through the courts. Presently, a name change petition costs $200.00, and the $200.00 fee covers the cost for changing the names of multiple family members. However, the Hudson County Clerk's Office has recently determined that since domestic partners are not considered "family" for the purpose of the filing fee since they are not biologically or legally related, the registered domestic partners involved were required to pay $400.00 for the Name Changes.

C. The DPA Fails to Provide any Rights or Obligations to Children in these Domestic Partnership Familial Relationships.

Perhaps the most sensitive area in which the Domestic Partnership Act is entirely deficient concerns issues of custody,

parenting time and parenthood for its registrants.[1] Unlike custody disputes between spouses which are controlled by statutes, e.g. N.J.S.A. 9:2-4, the DPA provides no statutory guidelines concerning parentage, or custody, parenting time, or child support in the event of the death of the natural parent or termination of the domestic partnerships. These child related issues represent only some of the shortfall of rights and obligations not addressed by the Act. N.J.S.A. 26:8A-1 in general and §§ 4, 5, 6, 10 in particular.

For instance, as to presumed parentage of a child born to a married couple, N.J.S.A. 9:17-43 provides, in pertinent part:

> A man is presumed to be the biological father of a child if … he and the child's biological mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by dealt, annulment or divorce.

The DPA is silent with respect to presumed parentage. There is no such presumption of dual parentage to the non-biological domestic partner upon the birth of a child to the partner during the partnership. The issue arises frequently with lesbian couples in which one gives birth to a child through artificial insemination from an anonymous donor.

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[1] According to the 2001 U.S. Census, 16,604 couples living in New Jersey have identified themselves as same sex couples. www.gaydemographics.org, (last visited on January 24, 2006). Nationwide, the Census reported that approximately 30% of these couples are raising children and that 56% of these couples are raising two or more children. Id. Thus, conservatively estimated there are at least 7,770 children being raised by same sex couples in our state.

There has been one recent trial level court case that granted presumed parentage in that scenario. In an Essex County Superior Court case, In Re Parentage of the Child Robinson, Chancery Division, Family Part, Essex County, FD-07-6312-05-A, May 23, 2005, approved for publication December 28, 2005, released for publication January 12, 2006, 15 New Jersey Lawyer 157 (January 23, 2006), the Hon. Patricia Medina Talbert ruled that the Artificial Insemination Statute, N.J.S.A. 9:17-44(a), and the New Jersey Parentage Act, N.J.S.A. 9:17-38, apply to the lesbian partner of the birth mother in the same manner as these statutes would apply to a husband whose wife was impregnated during the marriage through artificial insemination. Thus, the child was presumed to have two parents at birth where the parents had married in Canada, had registered as domestic partners in New York, and jointly selected a donor with physical characteristics of the non-birth mother. Unfortunately, this case as a trial level decision is non-binding on any other court, and other counties have ruled otherwise under the same circumstances.

Instead, in lieu of the automatic legal parenthood for married couples or litigation in other counties to obtain parentage in accordance with the Robinson decision, most domestic partners must rely upon costly and time consuming second parent adoption procedures, an inadequate substitute to the automatic designation of parentage, if automatic parentage is what both

parties to the domestic partnership desire. In re Adoption of Child by J.M.G., 267 N.J. Super. 622 (Ch. Div. 1993).

Inherent in the adoption process are substantial filing fees, considerable counsel fees and costs, and meticulous scrutiny from adoptive agencies, a daunting and intrusive task that includes extensive documentation, home studies, and additional expenses. Further, there is not a universal process throughout the state regarding second parent adoptions. Rather, the procedure varies from county to county. The disparities in procedure are of both a substantive and administrative nature. For example, in Essex, Union, and Mercer counties, a home study is required in all second parent adoptions. In Bergen county, however, a home study is only required if the child has lived in the household for less than six months. In Mercer County, the petitioner is required to file a Notice of Hearing upon the biological mother (i.e., in the context of a domestic partnership, the petitioner's same sex partner), whereas in Essex and Union counties, no such notice is required.

This lack of uniformity adds an additional burden upon parties seeking adoption that does not exist in marriages, where the presumption of parentage exists.

D. The DPA Has Failed To Set Forth Adequately the Rights and Obligations of Terminating Partners.

In addition to the substantial lack of comparable rights afforded domestic partners in relation to those rights afforded

married partners during the domestic partnership, there are many rights that are not granted to domestic partners concerning the termination of the partnership, even though analogous rights are codified by statute for parties involved in the dissolution of marriage. See DPA, N.J.S.A. 26:8A-10(2) in which the Legislature recited the same causes of action for termination as exist for divorce.

1. Failure to Provide for Child Custody, Parenting Time or Child Support

Again, the children of these terminating couples are the casualties of this shortfall. Absent a formal adoption and in the event of a termination of the partnership, the DPA fails to provide custody or visitation rights for the non-biological parent. N.J.S.A. 2A:34-2, 23, & 23.1. However, the courts have recognized that psychological parent-child relationships are worthy of protection even if the child was not adopted. V.C. v. M.J.B., 163 N.J. 200 (2000). The standard of proof in the absence of formal adoption is high, and requires proof that 1) the legal parent has acted in a manner consenting to and fostering the parental relationship between the child and the partner, and 2) the partners have lived openly together as a couple with the child, and 3) that the non-biological partner has performed significant parental functions and obligations, and 4) that a parent child relationship was forged Id. at 224-27. Failure to

prove any of these elements will result in the denial of custody and visitation. See A.F. v. D.L.P., 339 N.J. Super. 312 (App.Div. 2001).

The right to petition for and receive child support, absent an adoption, is also not addressed by the Act. N.J.S.A. 2A:34-23 provides an avenue of support for parties involved in a "matrimonial action," which, of course, remains inapplicable to domestic partners. This holds true even in cases in which the domestic partnership has long preexisted the birth of a child, and where one domestic partner has continuously and substantially contributed to the support of that child.

In fact, the DPA may be read to reject post-termination child support. N.J.S.A. 26:8A-4(b)(2); 26:8A-6(b). This issue has not been addressed by the courts to date, but most certainly will have to be adjudicated. The issue arises in the following context. The DPA, at N.J.S.A. 26:8A-4(b)(2), provides: "Both persons agree to be jointly responsible for each other's basic living expenses during the domestic partnership." N.J.S.A. 26:8A-6(a)&(b) (emphasis added) provide:

> a. The obligations that two people have to each other as a result of creating a domestic partnership shall be limited to the provisions of this act, and those provisions shall not diminish any right granted under any other provision of law.
>
> b. Upon the termination of a domestic partnership, the domestic partners, from that time forward, shall

incur none of the obligations to each other as domestic partners that are created by this or any other act."

Under the savings clause that the DPA "shall not diminish any right granted under any other provision of law," id. at (a), child support claims between domestic partners may be addressed as comparable to child support claims of non-biological heterosexual couples. See Monmouth County Div. of Social Services v. R.K., 334 N.J. Super. 177 (Ch. Div. 2000) (Mother's former boyfriend who was child's psychological parent ordered to pay child support for his non-biological child.) Thus, a psychological parent may obtain visitation or potentially custody and be required to pay child support. But, what if a parent does not meet the elements required to prove psychological parenthood? What if the non-biological, non-psychological partner was the sole support of the biological parent and his or her child. The DPA is silent.

What if the non-biological parent was the stay-at-home parent, while the biological parent worked to support the family? Who is entitled to primary physical custody of the child upon termination of the partnership? The DPA is silent.

Such a severe distinction between the treatment of support for a child arising out of a marital dissolution setting and the support for a child arising out of the dissolution of a domestic partnership is arbitrary and unsettling. The factors set forth at N.J.S.A. 2A:34-23a govern the award of child support in a

matrimonial context, and the very first factor requires an assessment of the "needs of the child." A child's needs are not diminished merely because one of the parties that has been supporting that child is neither the child's adoptive or biological parent. Further, the "Philosophy of the Child Support Guidelines" as set forth in Appendix IX-A, ¶1 to R. 5:6A (the "New Jersey Child Support Guidelines") establishes that:

> The premise of these guidelines is that ... children should not be the economic victims of divorce or out-of-wedlock birth.

Are children of terminating domestic partners to be considered born "out-of-wedlock?" These children are just as much economic victims as those children whose parents are dissolving their marriage. However, absent the presence of a particular status i.e., adoptive parent, these children are afforded no protection.

Eventually, these and other child related issues will have to be resolved, either through the Court's decision in the Lewis v. Harris case, or future piecemeal legislation, or through costly and time consuming litigation, non-binding and potentially conflicting trial level decisions in varying counties, and eventual determinations by the Appellate Division or the Supreme Court.

2. The DPA Prohibits "Alimony" or Support Post Termination.

The DPA is silent on multiple other crucial issues when a domestic partnership is terminated. For instance, there is no provision in the Act for post relationship support to be paid by one party to another. Although this obligation exists during the duration of the partnership, the obligation ceases upon the termination of the partnership. N.J.S.A. 26:8A-4(2); 26:8A-6(b).

Again, this is in sharp contrast to the rights provided to married couples as set forth in N.J.S.A. 2A:34-23, which states: "Pending any matrimonial action brought in this State or elsewhere, or after Judgment of Divorce or maintenance, ... the Court may make such order as to the alimony or maintenance of the parties...."

The omission of any provision bestowing upon domestic partners the right to petition for support following the termination of the domestic partnership runs contrary to the principles underlying the Act itself. The Act includes the following three prerequisites for registration:

1. "Both persons have a common residence and are otherwise jointly responsible for each other's common welfare as evidenced by joint financial arrangements or joint ownership of real or personal property." [N.J.S.A. 26:8A-4(b)(1)]; and

2. "Both persons agree to be jointly responsible for each other's basic living expenses during the domestic partnership." [N.J.S.A. 26:8A-4(b)(2)]; and

3. "Both persons have chosen to share each other's lives in a committed relationship of mutual caring." [N.J.S.A. 26:8A-4(b)(6)]

Since it is acknowledged in the Act itself that a domestic partnership is based, at least in part, on joint financial responsibility for one another, it must logically follow that parties to a domestic partnership would have the right to rely on the joint financial responsibility established within the relationship. It would further follow that with the termination of such partnerships, a party who was once the recipient of the financial responsibility of another would have financial needs which do not simply cease to exist because the statute does not provide a basis for these needs to be addressed.

One theory often advanced by family practitioners and courts of this state, when addressing issues of support arising out of the dissolution of a marriage, is the Marital Partnership Principle. See Cox v. Cox, 335 N.J. Super. 465, 479-80 (App. Div. 2000); Glass v. Glass, 366 N.J. Super. 357, 369-79 (App. Div. 2005). This principle states that:

> the married couple forms an economic unit. The contributions of both husband and wife to this unit are valuable regardless of whether the contributions are financial or non-financial … the New Jersey Supreme Court has stated that "marriage is a shared enterprise, a joint undertaking, that in many ways is akin to a partnership…." [I]t is … directly relevant to the issue of alimony. Cox, supra, 335 N.J. Super. at 479-80, quoting "a noted scholar," Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 *J. Fam. L.* 351, 354-55 (1988-89)

In light of the legislative findings and declarations set forth within the DPA, and in light of the requirement of financial support during the partnership in order to be permitted to register, the above-cited Marital Partnership Principle should be applicable to domestic partners, who undoubtedly "form an economic unit," and whose partnership is a "shared enterprise" and "joint undertaking." In sum, the same principles that have been used to justify a support award in the marital setting are prevalent in the setting of a domestic partnership. Yet, domestic partners are deprived of this resource upon the termination of their partnership.

3. The DPA Fails to Provide Adequate Guidance for the Equitable Distribution of Assets and Debts Acquired During the Partnership.

There is no provision in the Act for the equitable division of "relationship debt" incurred in one party's name for the benefit of the partnership. To the contrary, such debts remain the sole obligation of the party who incurred them. N.J.S.A. 26:8A-6g. This provision of the Act is in stark contrast to the principles of equitable distribution afforded to married couples. Pursuant to N.J.S.A. 2A:34-23.1(n), a court may consider the debts and liabilities of the parties when effectuating equitable distribution of property.

In fact, it would appear that the Act contradicts itself with regard to "equitable distribution" of jointly held property. N.J.S.A. 26:8A-10(a)(1) provides only for "the division and distribution of jointly held property." Yet, N.J.S.A. 26:8A-10 (a)(3) specifically states:

> In all such proceedings, the Court shall in no event be required to effectuate an equitable distribution of property, either real or personal, which was legally and beneficially acquired by both domestic partners or either domestic partner during the domestic relationship.

Thus, there is no statutory authority for the equitable distribution of property acquired by either party in his or her sole name during the term of the partnership. Further, the statute rests wide discretion in the particular judge hearing the termination case, such that there is no predictability of how the property of the domestic partners will be adjudicated or even if it will be adjudicated. Again, this is in contrast to the rights afforded married couples who are provided an absolute right to equitable distribution of the property both real and personal, which was legally and beneficially acquired by either of them during the marriage. N.J.S.A. 2A:34-23(h).

E. The Right to Contract Between the Partners is Not an Adequate Substitute for Legal and Binding Rights and Obligations.

It is apparent that the Legislature has attempted to address the concerns as outlined above by providing domestic partners with the ability to modify rights and obligations to each other by way

of contract. N.J.S.A. 26:8A-6(e). However, this Court has, consistently recognized that contract principles have little place in the law of domestic relations. *Lepis v Lepis*, 83 N.J. 139, 148 (1980).

As noted by the Court in *Konzelman v Konzelman*, 158 N.J. 185, 194 (1999):

> The adoption of a property settlement into a divorce decree does not render it immutable. Courts have continuing power to oversee divorce agreements, *Corbin v. Mathews*, 129 *N.J.Eq.* 549,552,19 A.2d 633 (E. & A. 1941) and the discretion to modify them on a showing of "changed circumstances," and *Berkowitz v Berkowitz*, 55 N.J. 564, 569, 264 A.2d 49 (1970) that render their continued enforcement unfair, unjust, and inequitable.

Similarly, our Courts have noted the practical implications associated with negotiating and enforcing pre-nuptial and mid-marriage agreements with respect to the necessity of fairness, and the implications of coercion, duress and full disclosure. Pacelli v Pacelli, 319 N.J. Super. 185, 195 (App. Div. 1999); D'Onofrio v D'Onofrio, 200 N.J. Super. 361, 366-67 (App. Div. 1985).

F. Miscellaneous Other Familial Shortfalls in the DPA

1. No Spousal Immunity To Prohibit Forced Testimony Against a Domestic Partner

There are a variety of other miscellaneous spousal rights not granted to domestic partners. One right that is afforded to married partners, for which no comparable right exists for domestic partners involves the right to "spousal immunity" in a criminal proceeding, i.e., the right to refuse to testify against

a domestic partner when that partner is charged with a criminal offense. Such immunity exists for married spouses, and is codified in both the New Jersey Rules of Evidence (N.J.R.E. 501) and in N.J.S.A. 2A:84A-17(2), which provide:

> The spouse of the accused in a criminal action shall not testify in such action except to prove the fact of marriage unless (a) such spouse and the accused shall both consent, or (b) the accused is charged with an offense against the spouse, a child of the accused or of the spouse, or a child to whom the accused or the spouse stands in the place of a parent, or (c) such spouse is the complainant.

Absent this immunity, a domestic partner can be forced to testify against the financial interests of the partnership even if the accused domestic partner is responsible for the support of the "witness." While a married partner has the right to protect the marital partnership and be spared the indignity or discomfort of being compelled to give testimony against his or her spouse, a domestic partner has no comparable right.

2. No Free Public Education for Surviving Domestic Partners of New Jersey National Guardsmen, Firefighters, or Volunteer First Aid Responders

By law, the surviving spouse of a member of the New Jersey National Guard killed in the performance of his or her duties is entitled to free tuition at public universities. N.J.S.A. 18A:62-25 provides that:

> Any child or surviving spouse of a member of the New Jersey National Guard who … and was killed in the performance of his duties while on active duty with the New Jersey National Guard, or … is killed in the

> performance of his duties while a member of the New Jersey National Guard, shall be permitted to attend regularly-scheduled courses at any public institution of higher education in this State….

Similar benefits are afforded to the spouses of active firemen and firewomen and active volunteer first aid responders (N.J.S.A. 18A:71-78.1). As with many of the other statutory benefits afforded to married couples set forth herein, no such benefits are afforded to domestic partners who would otherwise meet the criteria and qualify for free public education.

3. No Compensation for Surviving Domestic Partners of Homicide Victims.

Domestic partners are not entitled to compensation which is available for spouses of homicide victims. N.J.S.A. 52:4B-2, 10.

4. No Tax Deduction for Payment of a Domestic Partner's Medical Expenses

Domestic partners are not entitled to tax deductions for payment of their domestic partner's medical expenses, although spouses enjoy this deduction. N.J.S.A. 54A:1-2, 54A:3-3; N.J.S.A. 54:34-1, N.J.A.C. 18:26-5.11.

In summary, despite the legislative findings and the acknowledged purpose of the Act, the DPA fails to provide domestic partners with the same or even similar rights and obligations as married couples both during the partnership or upon the termination of a relationship. This imbalance creates a minefield for attorneys attempting to advise domestic partners and runs

contrary to the Findings and Declarations of the Act, which state that the purpose of the Act is to preserve rights that are "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." N.J.S.A. 26:8A-2(d).

POINT III

THE DOMESTIC PARTNERSHIP ACT FAILS TO ADEQUATELY ADDRESS REAL PROPERTY ISSUES AFFECTING THE MANNER IN WHICH DOMESTIC PARTNERS HOLD REAL PROPERTY, THE RIGHTS OF DOMESTIC PARTNERS VIS A VIS PROPERTY USED AS THEIR RESIDENCE AND THE REQUIREMENT TO PAY REALTY TRANSFER FEES PURSUANT TO N.J.S.A. 46:15-7.

In the area of real estate the Domestic Partnership Act fails to address important rights which are available to spouses and which are necessary to protect the rights of domestic partners, in order to fulfill the purposes set forth by the Legislature in the Act. The Legislative findings and declarations state that domestic partners form important familial relationships with financial support deserving of legal recognition. N.J.S.A. 26:8A-2. Yet, the Act fails to provide the legal mechanisms required to do so as the Act does not allow real property held by domestic partners to be held as a tenancy by the entirety, even if that real property is their "marital home." N.J.S.A. 46:3-17.2. Thus, the failings of

the DPA deny domestic partners the protections of a tenancy by the entirety including creditor protection and a prohibition against partition. Further, the Act does not provide the protections afforded to spouses to jointly occupy their principal residence as per N.J.S.A. 3B:28-3. And, the Act does not allow for an exemption to the requirement that a realty transfer fee be paid upon the transfer of real property which exemption is afforded to spouses pursuant to N.J.S.A. 46:15-10. Each of these shortcomings is discussed in greater detail below.

Only married couples can own real estate as a tenancy by the entirety. N.J.S.A. 46:3-17.2. This ownership is created by simply stating in the conveying instrument that the parties are taking title as husband and wife. N.J.S.A. 46:3-17.2a. Neither spouse may sever, alienate or otherwise affect their interest in the tenancy by the entirety during the marriage or upon separation without the written consent or both spouses. N.J.S.A. 46:3-17.4. Upon the death of either spouse, the surviving spouse shall be deemed to have owned the whole of all rights under the original instrument of purchase, conveyance or transfer from its inception. N.J.S.A. 46:3-17.5.

All other people, including domestic partners must hold joint real property as either tenants in common, or joint tenants with right of survivorship. Pursuant to N.J.S.A. 46:3-17, unless expressly set forth in the conveying instrument, title shall be

held as a tenancy in common. Parties however can direct in the conveying instrument that title be held as a joint tenancy, thereby creating a right of survivorship upon the death of upon the death of either joint tenant. N.J.S.A. 46:3-17.1. In this way, domestic partners can insure survivorship rights in their real properties by use of the appropriate language in their conveying instrument.[2] The domestic partners however must be proactive to insure such survivorship rights. If the conveying instrument is silent then a tenancy in common will be created.

For married couples, in order to create a tenancy in common or a joint tenancy, an instrument conveying title to a husband and wife must specifically say so, or they will automatically enjoy the benefits of joint tenants by the entirety. N.J.S.A. 46:3-17.3.

The above referenced statutes as well as common law afford a number of advantages to those persons who hold real property as a tenancy by the entirety. First, as set forth above, a tenancy by the entirety is created simply by designating the grantees on conveying instrument as husband and wife. N.J.S.A. 46:3-17.2a. Thus, nothing further need be done in order to insure that upon the death of one spouse the real property will pass to the surviving spouse. On the other hand, domestic partners must take the proactive step of specifying on the conveying instrument that

[2] Transfers by right of survivorship entail substantial estate tax consequences to domestic partners, whereas ownership by a surviving spouse is entirely tax free. See Estate Section Point IV infra.

the real property is to be held as joint tenants. N.J.S.A. 46:3-17.1. In the absence of taking this step the real property will not pass to the surviving domestic partner absent a provision in the deceased domestic partner's last will and testament which devises the real property to the surviving domestic partner. This is an increased burden which domestic partners must bear but which married couples do not. If a mistake is made the consequences can be devastating as the surviving domestic partner will not inherit the deceased domestic partner's share of the real estate.

Another advantage of a tenancy by the entirety is that neither spouse may sever, alienate, or otherwise affect their interest in the tenancy by the entirety during the marriage or upon separation without the written consent of both spouses. N.J.S.A. 46:3-17.4. Therefore, a tenancy by the entirety cannot be partitioned during the marriage. Freda v. Commercial Trust Co., 118 N.J. 36, 45 (1990). See also Newman v. Chase, 70 N.J. 254, 260-61 (1976). This provides crucial protection against creditors seeking to access marital property to satisfy the debts of one spouse. Freda, supra, 118 N.J. at 46; Newman, supra, 70 N.J. at 264-65. While a creditor of one spouse may levy on that spouse's right of survivorship, the levy remains subject to the survivorship interest of the non-debtor spouse. Freda, supra, 118 N.J. at 45. Thus, the non-debtor spouse's interest is protected.

This advantage however is not available to domestic partners. Therefore, a non-debtor domestic partner is at a serious disadvantage as compared to the non-debtor spouse. If the Legislature meant to protect these familial relationships, N.J.S.A. 26:8A-2c, then this is an area which should be addressed.

Another advantage which married couples enjoy over domestic partners is the right to joint occupancy of the marital home. N.J.S.A. 3B:28-3. This statute provides that:

> During life every married individual shall be entitled to joint possession with his spouse of any real property which they occupy jointly as their principal matrimonial residence and to which neither dower or curtesy applies. One who acquires an estate or interest in real property from an individual whose spouse is entitled to joint possession thereof does so subject to such right of possession, unless such right of possession has been released, extinguished or subordinated by such spouse or has been terminated by order or judgement of a court of competent jurisdiction or otherwise. N.J.S.A. 3B:28-3a.

As a practical matter one spouse cannot sell the marital residence without the other spouse's consent. This protects each spouse's interest in the marital home even if they do not own a fee interest in the real property. So long as the parties are married and are not separated each spouse has a right of possession to the marital residence unless there is a court order to the contrary. N.J.S.A. 3B:28-3c. This is an advantage which is not afforded to domestic partners. Again if the intent of the Legislature was to protect these familial relationships then this is an area which also needs to be addressed.

Lastly, the Domestic Partnership Act does not address a further advantage which married couples have with respect to the

payment of realty transfer fees. N.J.S.A. 46:15-7 sets forth a schedule of fees which must be paid upon the transfer of property. These fees have been raised twice in recent years and can be a significant cost depending on the value of the real property being transferred. The Legislature has set forth certain exemptions to the payment of these fees. N.J.S.A. 46:15-10. One exemption is for transfers between a husband and a wife. N.J.S.A. 46:15-10(j). This allows spouses to transfer properties between each other without having to pay a realty transfer fee. Spouses often transfer real property between each other for any number of reasons including but not limited to estate planning, and this exemption relieves them of a significant burden, thus helping married couples to keep their marital assets intact. Domestic partners do not have a similar advantage. And while it is true that transfers for less than $100.00 are also exempt, N.J.S.A. 46:15-10(a), it is important to keep in mind that property subject to a mortgage for more than $100.00 does not qualify for the exemption and is therefore subject to a realty transfer fee. N.J.S.A. 46:15-5(c). By not providing an exemption for domestic partners from the requirement of the imposition of a realty transfer fee on the transfer of real property, the DPA fails to fulfill the purpose of the Act which is to support the familial relationships known as domestic partnerships.

For the reasons set forth above each of the above referenced deficiencies conflict with the purposes of the Domestic Partnership Act and should be addressed.

POINT IV

THE DOMESTIC PARTNERSHIP ACT SHORTFALLS IN THE AREA OF WILLS AND ESTATE PLANNING

There are significant differences between the rights of heterosexual spouses and registered domestic partners in the areas of wills, estates and the related taxes. Many of those discrepancies have been resolved in a January, 2006 amendment to the DPA, L. 2005, c. 331 (hereinafter, "Chapter 331") in which domestic partners were granted many of the same rights as spouses.

For instance, as a result of the Chapter 331, domestic partners were granted spousal rights for purposes of the elective share law. N.J.S.A. 3B:8-1 et seq. A domestic partner, like a spouse, has the right to elect to take a portion of the estate if the amount left to the domestic partner by will or other transfer at death is less than the amount of the elective share provided by law. Domestic partners also have the same rights as spouses to control the decedent's funeral arrangements and the disposition of the decedent's remains. N.J.S.A. 45:27-22.

Chapter 331 also amended N.J.S.A. 3B:5-15, so that domestic partners are treated in the same manner as omitted spouses if a person executes a will while unmarried and subsequently marries

without providing for the surviving spouse. The omitted spouse's share is the amount that the spouse would have received under the law of intestacy as if the decedent had no will, unless it appears from the will or other circumstances that the decedent intended to exclude the spouse from sharing in the estate. Chapter 331 §5.

Under the initial DPA, domestic partners are classified as Class A beneficiaries under the New Jersey inheritance law, N.J.S.A. 54:34-2a, so that no inheritance tax is imposed upon the transfer to a domestic partner of the decedent. And, they are afforded comparable rights to spouses under the New Jersey Advance Directives for Health Care Act, N.J.S.A. 26:2H-53.

However, in many other important areas, domestic partners have not been granted comparable rights to spouses.

A. The Right to Make a Will

As a general matter, the law allows any person to make a will leaving his or her estate to the person or persons of his or her choice. Thus, same-sex couples, including those who have entered into a domestic partnership, may use a will to transmit assets on death to each other. A transfer by will to an unrelated person or to a domestic partner is treated differently for some tax purposes than a transfer to a spouse. The estate tax issue is discussed later in this section of the Brief.

The right of a domestic partner to appoint a guardian by will is more limited than the right of a spouse. Under New Jersey law,

the spouse of an incapacitated individual may appoint a testamentary guardian of the person and/or property of the incapacitated individual and may waive the requirement that the guardian post a bond. N.J.S.A. 3B:12-30. The right to name a guardian, however, is not given to a domestic partner of the incapacitated individual.

B. Construction of Wills and Other Governing Instruments

N.J.S.A. 3B: 7-1.1, sometimes referred to as the "Slayer Statute", prevents a person who is responsible for the intentional killing of a decedent from sharing in the decedent's estate. The statute has been amended to add a domestic partner's share of an estate as one of the benefits that is denied to the killer of a decedent. The statute may treat a spouse differently than a domestic partner in another respect, however. It prevents not only the killer but also any "relative of the killer" from receiving assets under the will or other governing instrument, or from serving in a fiduciary capacity. The term "relative of the killer" is defined as an individual who is "related to the killer by blood, adoption or affinity and who is not related to the decedent by blood or adoption or affinity." N.J.S.A. 3B:7-1.1c. A spouse of the killer is clearly related by affinity. It is not clear whether a domestic partner of the killer would be treated as a relative of the killer.

Under N.J.S.A. 3B:3-14, the dissolution of a marriage revokes any property disposition to the former spouse and any appointment of the former spouse as fiduciary in a will or other governing instrument. This provision, even after the enactment of Chapter 331, does not include dissolution of a domestic partnership. Thus a former domestic partner of a decedent may receive assets pursuant to a will or other governing instrument even after the partnership has ended.

Under New Jersey law, devises to certain persons related to the decedent do not lapse if the beneficiary predeceases the decedent. Instead, the devise passes to the descendants of the predeceased beneficiary. N.J.S.A. 3B:3-35. This anti-lapse law applies to a devise to a stepchild of the decedent. A stepchild is defined as "a child of the surviving, deceased or former spouse who is not a child of the decedent." The child of a domestic partner does not qualify as a stepchild under the statute.

C. Intestacy

Chapter 331 made extensive revisions to the law of intestacy. A domestic partner is now treated the same as a spouse for purposes of the New Jersey intestacy law, with one exception. Stepchildren of a decedent are entitled to share in the intestate estate if there are no other relatives of the decedent who are intestate heirs. N.J.S.A. 3B:5-4f. N.J.S.A. 3B:1-2 defines the term "stepchild." It provides in part: "'Stepchild' means a child

of the surviving, deceased, or former spouse who is not a child of the decedent." A child of a domestic partner is not included within the definition of stepchild.

D. Allowance Pending Disposition of Will Contest

When a will contest is pending, N.J.S.A. 3B:3-30 permits the Superior Court to order the fiduciary of the estate to pay an allowance to the "widow or widower of the decedent". No such allowance is authorized to a domestic partner.

E. Durable Power of Attorney

The powers conferred by the Revised Durable Power of Attorney Act, N.J.S.A. 46:2B-8.1 et seq. and the banking power of attorney law, N.J.S.A. 46:2B-10 et seq. do not depend on the marital relationship. Thus, a person may name a domestic partner as his or her agent under a power of attorney to the same extent that a spouse may be named.

However, a section of the banking power of attorney law, N.J.S.A. 46:2B-13b, provides that a bank "may refuse to act or rely upon a power of attorney first presented to it more than 10 years after its date or on which it has not acted for a 10-year period unless the agent is either the spouse, parent or a descendant of a parent of the principal." A domestic partner is not entitled to the benefit of that provision.

F. New Jersey Estate Tax

In 2002, New Jersey "decoupled" its estate tax from the federal estate tax. L. 2002, c. 31. Prior to the enactment of that legislation, the New Jersey estate tax was imposed only on estates that were large enough to require the payment of federal estate tax. Under current law, the New Jersey estate tax exemption is $675,000, much lower than the federal threshold of $2 million. Thus, nearly all couples are well advised to plan to avoid the New Jersey estate tax. That planning is particularly difficult for domestic partners.

The New Jersey estate tax is calculated on the basis of the provisions of the federal estate tax law that were in effect on December 31, 2001. As a result, the New Jersey estate tax law treats registered domestic partners very differently than heterosexual couples.

For instance, both the federal and New Jersey estate tax law allows an unlimited deduction for assets passing to a surviving spouse outright or in certain types of trust. 26 U.S.C.A. § 2056. Therefore, it is very common for married couples to plan their estates to take maximum advantage of the allowable estate tax exemption ($2 million in 2006 through 2008 under current federal law) and to leave the balance of the estate to the surviving spouse, avoiding estate tax on the first spouse's death.

The federal Defense of Marriage Act, P.L. 104-99, 110 Stat. 2419, codified at 1 U.S.C.A. § 7 and 28 U.S.C. § 1738C, prohibits any federal-level recognition of same-sex marriages or any other state recognized unions. Thus, domestic partners are not entitled to the federal estate tax marital deduction. Since New Jersey follows the federal estate law, registered domestic partners are not entitled to the marital deduction either, and may not transfer assets to each other as a means of eliminating or deferring the New Jersey estate tax. The denial of the marital deduction prevents domestic partners from engaging in the type of estate planning so frequently and effectively used by married couples.

Further, the New Jersey estate tax law adopts the federal estate tax law which provides that an asset held by a husband and wife as tenants by the entirety or as joint tenants with right of survivorship is treated for estate tax purposes as owned 50% by each spouse. Upon the death of one spouse, the 50% that passes by survivorship is included in the deceased spouse's estate. 26 U.S.C.A. § 2040(b). This rule provides certainty and predictability concerning the estate tax treatment of jointly held marital assets.

Assets held jointly by unmarried persons, including registered domestic partners, are treated very differently under both the federal and New Jersey estate tax law. Upon the death of the first owner to die, the tax law presumes that the deceased

domestic partner contributed all of the funds used to purchase and maintain the asset. Thus, the entire asset is included in the estate of the first to die, except to the extent the survivor can prove that he or she contributed to acquire and maintain the asset. Very often, the survivor does not have records to prove the extent of his or her contributions. Because the marital deduction is not available to shelter the transfer between domestic partners, the result is taxation of the entire asset in the estate of the first to die. Moreover upon the death of the surviving joint owner, the entire asset is again includable in that person's estate and may be subject to additional tax.

Consequently, a surviving domestic partner is faced with the prospect of proving the extent to which he or she contributed to the acquisition of jointly owned assets. Because of the lower exemption applicable to the New Jersey estate tax, $675,000 as opposed to the federal estate tax exemption of $2 million in 2006 through 2008 under current law, the issue affects many more couples than does the federal estate tax.

As a result, any domestic partnership couple with a combined estate valued in excess of $675,000 faces the imposition of estate tax on the first partner's death at rates as high as 16%. The payment of that tax depletes the pool of assets that are available to support and maintain the survivor.

POINT V

THE DOMESTIC PARTNERSHIP ACT FAILS TO REMEDY THE EMPLOYEE BENEFITS INEQUITIES FACED BY DOMESTIC PARTNERS IN NEW JERSEY AND ACTUALLY PERMITS DISCRIMINATION AGAINST DOMESTIC PARTNERS WHEN SAME WOULD OTHERWISE BE PRECLUDED BY THE LAW AGAINST DISCRIMINATION (LAD)

Although the DPA seeks to remedy certain inequities between employment benefits provided to legally married couples and to those employees living in domestic partnership relationships, the Act fails to equalize marital relationships and domestic partnerships with respect to many employment benefits and entitlements. In fact, the legislation actually creates a minefield for labor and employment practitioners attempting to navigate through the quagmire of required benefits, permissive benefits and denied benefits.

While the statute appears on its face to address some aspects of health insurance and pension benefits inequities, the actual impact of the statute indicates that domestic partners are foreclosed from receiving most dependent coverage and survivor benefit opportunities available to spouses. In addition, employees currently often receive many other types of employment benefits such as Family Medical Leave rights and New Jersey Family Leave rights which are not available to domestic partners. Most significantly, the statute itself admits it is not a panacea as its legislative findings and declarations state that it attempts

to provide health and pension benefits spouses would receive to domestic partners only "in some cases." N.J.S.A. 26:8A-2.

The Act further indicates that health insurers must offer coverage benefits to domestic partners on the same basis as they would offer coverage to spouses. Although the Act itself does not specifically impose this burden upon health insurers, other sections of the New Jersey Statutes specifically mandate that health insurers doing business in New Jersey must offer health insurance benefits to domestic partners on the same basis as is offered to other dependents. See N.J.S.A. 17B:27-19.2 (requiring coverage under small employer health insurance benefit plans), N.J.S.A. 17B:27A-7.9 (requiring domestic partnership coverage for HMOs providing coverage in New Jersey), N.J.S.A. 17B:27-46.1bb (requiring domestic partner coverage by group health insurers), N.J.S.A. 17:48D-9.5 (requiring dental plan coverage for domestic partners).

Although insurers are required to offer domestic partnership coverage, employers themselves are not required to maintain domestic partnership coverage for employees. N.J.S.A. 34:11A-20. In fact, N.J.S.A. 26:8a-11 specifically excepts an employer from a discrimination lawsuit for failure to provide domestic partnership coverage. Thus, availability of dependent coverage from private employers for domestic partners is purely at the option of the employer.

Under the rules governing the New Jersey State Health Benefits Plan (SHBP), a health insurance fund operated for the benefit of employees of the state and its political subdivisions, state employees are entitled to receive benefits for their domestic partners. The State Health Benefits' rules specifically define "dependents" to include domestic partners. N.J.S.A. 52:14-17.26. However, although municipal employers are granted the option of participating in the SHBP, municipal employers are not required to provide dependent coverage to domestic partners. Rather, municipal employers may elect to do so. Thus, some employees participating in the SHBP will receive domestic partner benefits, while other employees participating in the very same state operated health plan will not. Id. For example, as of January 26, 2006, eight (8) of twenty-one (21) counties have now voluntarily granted domestic partnership benefits to their employees, i.e. Camden, Bergen, Hudson, Mercer, Monmouth, Ocean, Passaic, and Union and several municipalities.

The Act does not and could not address federal Family Medical Leave time nor does it address equality under the New Jersey Family Leave Act. The federal FMLA allows employees 12 weeks of leave time to recover from the employee's own illness, to care for an ill "family member" or after the birth or adoption of a child. The New Jersey Family Leave Act provides similar leave time, but does not include time off for the employee's own illness. Although

both Acts permit an employee leave time to care for an ill "family member", the federal law does not define "family" at all. 29 C.F.R. 780.308, implementing the FMLA, defines family to include a parent, child, spouse or step-parent or step-child. The regulation indicates that any other individual who may live with the employee who is requesting leave time, is not included in the definition of family. Consequently, the employee would not be entitled to leave in order to care for a domestic partner under the Family Medical Leave Act. Similarly, the New Jersey Family Leave Act defines family member as a parent, child or spouse. N.J.S.A. 34:11B-3. Thus, leave time to care for a domestic partner is unavailable while leave time to care for a spouse is indeed required under the state law as well.

Ironically, a domestic partner may be able to obtain through his employment health insurance coverage for his ill partner, as described above, but would not be able to take time off to care for the ill partner. The inability of the domestic partner to acquire family leave time may actually result in higher medical costs in the form of necessary home health care services to care for the ill domestic partner when same might not be necessary if the domestic partner could obtain family medical leave benefits.

With regard to pension benefits, New Jersey state employees participating in state operated pension funds, such as the judicial retirement system, would receive benefits under these

pension plans for domestic partners because these acts have been amended to include domestic partners as potential beneficiaries, not because the DPA requires it. See N.J.S.A. 53:5A-3 (state retirement system defining "surviving spouse" to include domestic partner), N.J.S.A. 43:6A-3(v) (judicial retirement system defines "spouse" to include domestic partner).

While state employees would receive these benefits, municipalities participating in many of these plans, such as the Public Employee Retirement System, "may" adopt a definition of "widow" or "widower" to include domestic partners. N.J.S.A. 43:15A-6(g) and (q). Thus, the domestic partner of a state employee participating in the same pension plan as the domestic partner of a municipal employee will have superior benefits under the plan. Similarly, for school employees participating in the teacher's pension and annuity fund, the law leaves the issue of domestic partner survivor benefits to the local employer or school board. N.J.S.A. 18A:66-2(x)(3). Thus, while provision of survivor benefits for domestic partners of state employees is required, survivor benefits are optional at the behest of the employer for municipal employees.

Even when employment benefits are granted to domestic partners, the recipient is taxed at ordinary income tax levels for the value of the benefits received. Thus, even with the New Jersey state and municipal employees, and the private employees which

grant such health and pension benefits, the impact is different depending upon the marital status of the employee.

Under 29 U.S.C.A. §1003, the Employee Retirement Income Security Act applies to any employee benefit plan including a pension plan if the employer is "engaged in commerce" or "any industry affecting commerce." ERISA also regulates pension plans established by labor unions or jointly trusteed union and employer plans Id. Moreover, ERISA provides that it shall supersede "any and all" state laws "insofar as they may now or hereafter relate" to employee benefit plans. 29 U.S.C.A. §1144.

Although the issue of preemption of state or local domestic partnership law has not been decided in New Jersey, in two recent federal cases, courts consistently held that the state or local domestic partnership law was preempted by ERISA and benefits must be denied in domestic partnership relationships when the plan does not specifically provide for such benefits. Air Transport Ass'n of Am. V. City and County of San Francisco, 992 F.Supp. 1149 (N.D. Cal. 1998); Catholic Charities of Maine, Inc. v. City of Portland, 304 F.Supp. 2nd 77 (D. Me. 2004). Thus, it is likely that the New Jersey Domestic Partnership Act will have limited if any effect on ERISA governed plans, which generally are the plans provided by private employers.

In addition to the various inconsistencies in health, pension and leave entitlements for domestic partners, domestic partners

are denied other statutory benefits to which spouses would be entitled. Under New Jersey's workers compensation law, domestic partners are not entitled to receive survivor benefits to which spouses and other dependents are entitled. N.J.S.A. 34:15-13(f) defines dependents to include spouses, children, step children, posthumous children, grandchildren, grandparents and others, but falls short of providing benefits to a surviving domestic partner.

Similarly, under New Jersey's wage and hour enforcement laws, a domestic partner is not entitled to collect back wages owed to the employee domestic partner if the employee domestic partner is deceased before the wages are paid. N.J.S.A. 34:11-4.5.

The Law Against Discrimination (the 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, as the LAD prohibits discrimination based on sexual orientation. N.J.S.A. 10:5-1 et. seq. The New Jersey Domestic Partnership Act, N.J.S.A. 26:8-1 et. seq., amended the LAD to include "Domestic Partner" status as a protected class. N.J.S.A. 26:8A-1 et. seq. and in particular Sections 11 and 12 of the Act.

The inclusion of domestic partners within the protection of the LAD is consistent with the Legislative findings and declarations set forth in the DPA itself, N.J.S.A. 26:8A-2, in which the Legislature made significant statements of public policy

that directly address the instant matter and the validity of the plaintiffs' relationships in the eyes of the state and under the umbrella of fairness and equality. The Legislature refers to these couples as "important personal, emotional and economic committed relationships with another individual" and as "familial relationships." In particular, the Legislature stated:

> The need for all persons who are in domestic partnerships, regardless of their sex, to have access to these 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…. Id. (Emphasis added.)

Yet, despite this clear acknowledgment of these relationships between gay men and lesbian couples, the DPA itself contains restrictive and limiting language as follows:

> 26:8A-11. Applicability of act
> * * * * * * * *
> 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," P.L.1945, c. 169 (C.10:5-1 et seq.). (Emphasis supplied.)

That is, it is not unlawful discrimination if an employer provides dependent insurance coverage to spouses but not to domestic partners. Consequently, the DPA has carved out a curious and unprecedented exception to LAD's important remedial statute which courts have always liberally construed to protect a minority class. It is the first statute in New Jersey State history to

actually create an exemption in the LAD to allow counties, municipalities and private employers to affirmatively discriminate against an otherwise protected class with regard to certain employment benefits without penalty.

It is noteworthy that such an exception to the LAD now exists given that for years, courts have indicated that the purpose of the statute has been said to be, "nothing less than the eradication of the cancer of discrimination". Fuchilla v. Layman, 109 N.J. 319, 334, cert. denied University of Medicine & Dentistry of New Jersey v. Fuchilla, 488 U.S. 826 (1988).

Even though domestic partnership status has limited the LAD protection against discrimination, there are still problems raised that we cannot avoid. As to marital status, the LAD prohibits discrimination based on whether or not someone is married, in other words marital status is a non-issue. However, as to domestic partners, one needs to self-identify as a member of a domestic partnership in order to gain LAD protection.[3] Going further, most employers do not require proof from employees that they are married in order to provide spousal benefits. Yet, the DPA appears to require domestic partners to prove their domestic partnership

[3] The requirement of "self-identification" is not unique to domestic partners, as there are other protected classes that also must "self-identify" in order to gain LAD protection. For example, a person with a disability often must self-identify in order to gain an accommodation for that disability. Similarly, certain protected characteristics may not be apparent from examining the appearance of an employee, i.e., HIV, sickle-cell anemia, sexual orientation. Even ethnicity may require self-identification.

status in order to receive the benefit of the limited protections the Act has to offer. In effect, classifying the same sex union as a domestic partnership, while classifying an opposite sex union as a marriage serves to stigmatize same sex relationships and acts as an "outing" statute, which many same sex couples may chose not to expose.

Attorneys advising same sex couples or registered domestic partners face a daunting task when attempting to navigate through all of these disparities and exclusions in the statutory provisions, and have little certainty about the best method to use, if any, to try to place their clients in an equivalent position to married couples.

POINT VI

THE DOMESTIC PARTNERSHIP ACT SHORTFALLS IN MISCELLANEOUS OTHER AREAS OF LAW

There are over 800 New Jersey State civil rights granted to married couples in New Jersey, and merely up to 10 granted to registered domestic partners under the original DPA. The shortfalls set forth above and those that follow are just a sampling of other rights not granted to domestic partners which have caused and will continue to cause problems in the representation of these couples by attorneys in New Jersey.

1. No comprehensive survivorship rights, N.J.S.A. 3B:5-4;
2. No standing to file a wrongful death suit (to the exclusion of others) when one's domestic partner is killed, N.J.S.A. 2A:31-4;

3. No compensation for "spouses" of homicide victims, N.J.S.A. 52:4B-2, 10;

4. No right to sue under LAD for employment benefits withheld, even if the alleged rational basis is unwarranted, and the actual reason is a bias against domestic partners per se;[4]

5. No tax deductions for medical expenses paid by one domestic partner for the other. N.J.S.A. 54A:1-2, 54A:3-3, 54:43-1, and N.J.A.C. 18:26-5.11;

6. Double health insurance premiums and double deductibles;

7. No unlimited right to file a joint New Jersey income tax return.

How important are these withheld rights? If domestic partners were granted the unrestricted right to file a joint income tax return, the result would make employer health coverage of an employee's domestic partner and other types of employer-provided benefits free of New Jersey income tax. These domestic partnership employee benefits are now taxable as income for New Jersey tax purposes, but are entirely tax-free to married couples. See

[4] The request for domestic partner benefits, made by Lt. Laurel Hester, an Ocean County Prosecutor's Office investigator of 24 years, was repeatedly denied, until finally on January 25, 2006 as a result of extraordinary public and political pressure, the Ocean County Freeholders reversed their refusal to extend these benefits. Lt. Hester is in the final stages of cancer, and with the support of the Ocean County Prosecutor's Office and strong community support sought the protection of her benefits for her registered domestic partner. The Ocean County Freeholders repeatedly denied granting her request, citing that to do so would be a violation of the "sanctity of marriage" and that their domestic partner relationship was not "moral." They then claimed that they are not authorized to grant such benefits, which they claimed could only be granted by the State Legislature, insisted it should be a matter negotiated with the unions in the next contract, and finally, without any proof or analysis, claimed that it would be too costly to grant such benefits. The multiple rejections of her pleas for fairness and equality are a prime example of the devastating impact of the LAD carve out explicitly set forth in the DPA.

"Connecticut New Withholding Program Recognizes Civil Unions Benefits Similar to Spouses'", Daily Tax Report, No. 248, published December 29, 2005.

The above is not intended to be an exhaustive itemization of rights withheld from domestic partners, but merely a sampling of those failings which have caused or are expected to cause significant problems for attorneys attempting to represent same sex couples and registered domestic partners.

Since the passage of the DPA, amendments to legislation directed at the advance of civil laws to protect same sex couples have been few and far between. For instance, in the two (2) years since the date of passage of the DPA, January 10, 2004, only two amendment statutes have been passed:

1. Amendment September, 2005: Mental Health Advanced Directive rights granted to domestic partners.

2. Amendment January 12, 2006 (S2083) which granted to a surviving domestic partner "the same rights as a surviving spouse with respect to the decedent's funeral and the disposition of the decedent's remains if the decedent has not left a will."

   The law also amended various sections of the Probate Code, Title 3B, adding "domestic partner" into the definition of heir" and granting to surviving domestic partners intestate inheritance rights, the right to be named as administrator of the estate, and entitlement to assets without administration in the absence of a will. It also granted surviving domestic partners the right to an elective share of the decedent's augmented estate in the same manner as a spouse. Chapter 331 (See Point IV supra).

N.J.S.A. 26:8A-11(b). Eventually, the freeholders, faced with mounting national publicity and local objections to their refusal, reversed their position.

In two years, there have been three publicized court cases potentially expanding civil rights to domestic partners:

1. Hennefeld v. Township of Montclair, 22 N.J. Tax 166 (2005) which granted the 100% disabled veteran's property tax exemption to property owned jointly by an honorably discharged disabled veteran and his same-sex registered domestic partner as joint tenants with right of survivorship. The Tax Court determined that the partners' ownership interest in their home was to be treated in the same fashion as was "accorded to married couples" under DPA.

2. In the Matter of Robinson and LoCicero, supra, in which the Honorable Patricia Talbert ruled that under the Artificial Insemination Statute, parentage of a child born to a lesbian partner was presumed. As a Superior Court trial level decision, this ruling is non-binding on any other court. NB: Unreported decisions from other counties have refused to grant presumed parentage under the same or similar circumstances.

3. Buell and Moffett v. Clara Maass, Docket No. L-5144-03, an unreported Superior Court Essex County trial level decision which granted the right to sue for loss of consortium. This ruling is non-binding on any other court. (Copy attached.)

The Supreme Court has clarified the Rules of Court by Order dated July 22, 2004, to apply the rules of dissolution matters to cases involving terminations of domestic partnerships.

And, finally, as previously stated, as of January 26, 2006, domestic partnership benefits have been granted pursuant to the permissive language of N.J.S.A. 26:8A-11 in only eight (8) of the twenty-one (21) counties in the state. Benefits have also been granted in several municipalities, but most public employees who are not directly employed by the state do not have these benefits.

The failure to provide equal rights and benefits to families made of same sex couples has created a ripple effect of inequality in the manner in which these couples are viewed and treated by the law, even if they are legally registered as domestic partners.

Lawyers representing these clients currently utilize various creative lawyering methods to attempt to minimize the impact of these inequalities; however, many of these methods are utilized without any certainty of their long lasting effect or reliability because of the current unpredictability of the law in this area.

While the NJSBA does not propose a remedy to correct this problem, we do formally state that such a situation is nearly impossible to control or accommodate under the law. A practicing attorney, even one schooled in the most current understanding of the law, can sometimes be unable to protect his or her clients due to this disparity and ever-changing legal environment. The DPA has been described "as largely symbolic, full of gaps and ambiguities that render domestic partnerships a minefield to be navigated with creative lawyering." See Mary Jane Gallagher, As Same-Sex Couples Go Legal, Questions Swirl, Ambiguities May Leave Open Ground For 'Creative Lawyering.' http://www.law.com/jsp/article.jsp?id=10893 15013548 quoting Thomas Prol, Esq., last visited January 18, 2006. If this situation is allowed to remain, it will diminish the effectiveness of LAD, create years of litigation and ultimately waste countless hours and millions of dollars of resources within

the New Jersey court system. Further, our clients will be required to retain attorneys in an often unrealizable attempt, under the law as it presently exists, to craft rights, duties and obligations between them to protect their domestic partnership familial relationships.

CONCLUSION

The NJSBA does not advocate a position on the merits of the constitutional arguments put forth by the parties. However, the NJSBA has taken this opportunity as an *Amicus Curiae* to provide to this esteemed Court an overview of New Jersey law as it relates to same sex couples, and in particular the shortfalls of the Domestic Partnership Act which have caused significant issues of concern for attorneys representing these couples.

The NJSBA respectfully requests that the Court take what actions it deems best to resolve the problems, pitfalls, lost opportunities, ambiguities, and shortfalls of the Domestic Partnership Act and the existing law as it impacts upon our same sex couple clients.

Respectfully submitted,

Stuart A. Hoberman/sab

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President
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1/30/06

APPENDIX

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.

is **the only legal touchstone**", and Schroeder, supra, which states that "the **formal marriage relations** forms the **necessary touchstone** of the claim". And see Stahl, supra where the court said the distincton was based on **"a legal catch phrase"**. "Since these decisions, however, the Legislature has chosen to give legal status to adult individuals of the same gender who wish to establish a formal legal relationship with each other. This mechanism is N.J.S.A. 26:8A-1, the Domestic Partnership Act ("the Act").

According to the Assembly Appropriations Committee ("Committee Statement"):

> Assembly Bill No. 3743 (1R), as amended, is designated the "Domestic Partnership Act." The bill creates a mechanism, through the establishment of domestic partnerships, for New Jersey to recognize and support the many adult individuals in this State who share an important personal, emotional and committed relationship with another adult. These familial relationships assist the State by establishing a private support network for the financial, physical, and emotional health of their participants. **This bill provides the State with the opportunity to recognize the important material and non-economic contributions that individuals in these relationships make to each other, and to the State, by conferring certain rights and benefits, as well as obligations and responsibilities, upon domestic partners.**
>
> Currently, a significant number of New Jersey residents live in families in which the heads of household are unmarried. **Despite their interdependence and mutual commitment, these families do not have access to the protections and benefits offered by the law to married couples;** nor do they bear legal obligations to each other, no matter how interdependent their relationship. **This bill seeks to redress this oversight and provide certain benefits to, and enforce certain obligations within, these families.** (emphasis added)

The Act states in relevant part that:

> d. **All persons in domestic partnerships should be entitled to certain rights and benefits that are accorded to married couples under the laws of New Jersey, including:** statutory protection through the "Law Against Discrimination," P.L.1945, c. 169 (C.10:5-1 et seq.) against various forms of discrimination based on domestic partnership status, such as employment, housing and credit discrimination; visitation rights for a hospitalized domestic partner and the right to make medical or legal decisions for an incapacitated partner; and an additional exemption from the personal income tax and the transfer inheritance tax on the same basis as a spouse. **The need for all persons who are in domestic partnerships, regardless of their sex, to have access to these**

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

[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

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[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

[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."