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CHAIR'S COLUMN

New Jersey's Domestic Partnership Act

by Madeline Marzano-Lesnevich

The year 2004 could have been a momentous year for the citizens of New Jersey. It could have been a year in which New Jersey took a bold stance against discrimination among and against its citizens. It could have been the year in which same-sex couples were allowed to enjoy a civil marriage and all its attendant rights and responsibilities. It could have been the year in which we told those children of unmarried same-sex parents that their parents could marry.

But, thus far, it has not been. Instead, thus far, 2004 has been a year of compromise. And the result of that compromise is the Domestic Partnership Act, which went into effect in New Jersey on July 10, 2004.

While the Domestic Partnership Act grants New Jersey same-sex couples certain rights and benefits, it is more notable for what it fails to do. Read it carefully. We, as family law practitioners, need to be able to not only advise our clients or potential clients about what the Domestic Partnership Act offers or does not offer them, we also need to be able to advise our clients about whether they should indeed register as partners, or whether they instead should avail themselves of the benefits of other jurisdictions or enter into civil unions or beneficial relationships which are valid in the state in which entered, and are recognized in New Jersey. These are considerations we as family law practitioners will need to weigh carefully. The articles in this issue of *New Jersey Family Lawyer* will help you help your clients.

Of course 2004 has not yet ended, and we always have 2005. We have pending in the New Jersey Appellate Division our own version of *Hillary Goodridge and Others v. Department of Public Health and Another.*[1] In *Goodridge,* the Massachusetts Supreme Court held that the barring of an individual "from the protections, benefits and obligation of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[2] The pending New Jersey case, *Lewis v. Harris*, gives our New Jersey courts the opportunity to do that which our Legislature failed to do in enacting the Domestic Partnership Act.

In deciding *Goodridge*, the justices of the Massachusetts Supreme Court had the benefit of many *amici curiae* briefs. The most notable of the friends of the Court was the *amici curiae* brief of the child welfare experts, including the Massachusetts Psychiatric Society, the American Psychoanalytical Association, the National Association of Social Workers, the Massachusetts Chapter of the National Association of Social Workers, the Boston Psychoanalytical Society, the Gottman Institute, the Massachusetts Association for Psychoanalytical Psychology, and the heads of the Pediatric Departments of Harvard Medical School, Tufts University School of Medicine, and Boston Medical Center. The purpose of that *amici curiae* brief was to bring to the Court's attention "the substantial body of scientific literature that establishes beyond dispute that same sex relationships have the same qualities and longevity of opposite

The purpose of [the] *amici curiae* brief was to bring to the Court's attention "the substantial body of scientific literature that establishes beyond dispute that same sex relationships have the same qualities and longevity of opposite sex relationships, and that their children are not disadvantaged in any way…by the sexual orientation of their caregivers."

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sex relationships, and that their children are not disadvantaged in any way [by the sexual orientation of their caregivers]."[3]

Social science research, the brief asserts, also "demonstrates that ending the exclusion of same sex couples from marriage would benefit these couples, their children, and society as a whole."[4] In summary, the *amici curiae* argue, "there is no scientific basis for the state to exclude same sex couples from what the Superior Court characterized as the most important civil institution, the very basis of the whole fabric of civil society."[5]

At the time, the *amici curiae* in Massachusetts did not have the benefit of the position, adopted by way of resolution on July 28, 2004, of the American Psychological Association (APA), but our New Jersey courts do. The APA had been working toward developing policies that would guide psychologists in the current public debate over civil marriage for same-sex couples. The APA found "the benefits, rights, and privileges associated with domestic partnerships are not universally available, are not equal to those associated with marriage, and are not really portable…."[6] The APA resolved that it "believes that it is unfair and discriminatory to deny same sex couples legal access to civil marriage and to all its attendant benefits, rights and privileges;…that [the APA should] take a leadership role in opposing all discrimination in legal benefits, rights and privileges against same sex couples;" and that, most importantly, "the APA believes that children reared by a same sex couple benefit from legal ties to each parent."[7]

New Jersey courts, in deciding *Lewis v. Harris*, also should have the benefit of the research done by such prestigious institutions as those that entered the *Goodridge* case as *amici curiae*, in addition to the APA and the American Academy of Pediatrics (AAP). The AAP recently declared that "the unequal status of same sex couples communicates to children of lesbians or gays that their parents' relationship is less worthy than that of heterosexual parents."

The issue in the *Goodridge* case is the same as that in the *Lewis v. Harris* case: Are the plaintiffs being denied a constitutional right to marry? But the corollary issue in these two cases, and others like them, is whether the denial to same-sex couples of the right to marry is harmful to the children of those couples, harmful to the children of New Jersey whom the state has allowed to be adopted by same-sex couples, harmful to those children in "family type relationships" who are not afforded the legal recognition of their family.

The year 2004 need not be seen merely as the year when same-sex couples received a compromised status. The year 2004 or 2005 may yet be seen as the time when same-sex couples were elevated from the second-class status they endure in New Jersey. ■

ENDNOTES

1. 798 N.E. 2d 941 (2003).
2. *Id.* at 969.
3. Brief of *Amicus Curiae MPS, et al*, at 1.
4. *Id.* at 2.
5. *Id.* at 3.
6. American Psychological Association, Resolution on Sexual Orientation and Marriage, July 28, 2004.
7. *Id.*

FROM THE EDITOR-IN-CHIEF

Can We Change the Rules in the Middle of the Game? Yes!

by Mark H. Sobel

In past years, the big, tan book some of us might recognize has been produced in a rainbow of colors, from orange to blue to a very interesting shade of plum in 2003. I often wonder who makes that artistic decision; but in any event, the reason for the yearly variation in color is not aesthetics. It is to remind us that, in fact, *the rules do change*.

Unlike most competitive games, where the rules are predetermined and unalterable, in the ongoing competition of family law the rules actually change during the course of prolonged litigation (despite the efforts of Best Practices). Thus, through analysis, experience and concerted action, rules are meant to be modified to effectuate a more prompt, fair and reasonable resolution of disputes.

In keeping with the above, a group some of you may not know too much about meets on a continual basis over a two-year cycle. This group is the Family Division Practice Committee, operating under the Supreme Court of New Jersey, and ably chaired for more years than I can remember by the Honorable Eugene D. Serpentelli, A.J.S.C. Working under the guidance of Judge Serpentelli, the Family Division Practice Committee has formulated a sub-committee focusing on general procedures and rules. That sub-committee has been chaired for more years than I can remember by Lee Hymerling, Esq.

The importance of such work cannot be overstated. It is undertaken by the people who actually are in the trenches. It is a constant reminder that the rules are not some monolithic unchangeable set of standards but, rather, an evolving work in progress, constantly designed and redesigned to address the changes taking place in our community and court system. While in large part rule modifications and alterations are not based upon trial and error, it does sometimes happen. And it should happen. The family part must be both willing and able to test the waters in the hope of achieving our litigants' almost mythical goal: shortened litigation and decreased costs.

The willingness of all of us who practice in this part to provide experiences and comments regarding how the procedures can be improved is vital to this ongoing effort. It is only through this input that committees such as the Sub-Committee on General Procedures and Rules can properly evaluate existing rules. Often the information provided is anecdotal, but it provides a basis to test a rule, determine if the problem is systemic or isolated, and evaluate how to deal with it. Illustrative of how this works within our family part is the proposed amendment to Rule 1:6-3(b) regarding cross-motions on matters not covered by the original motion.

As we all know, the inevitable response to a simple, one issue, motion was often an omnibus cross-motion with 27 requests for relief unrelated to the original motion. The point was to force you to spend a *wonderful* weekend trying to respond under the time limitations imposed by the rules. To combat this apparent inequality, the rules were changed to provide, under Rule 1:6-3(b), that the cross-motion should relate "to the subject matter of the original motion..." It was thought that this would be an effective way to combat this type of sharp litigation practice.

Unfortunately, practitioners generally faced one of three scenarios under such circumstances: 1) the original motion return date was adjourned to accommodate a response to the cross-motion; 2) the cross-motion was heard on a separate date, requiring litigants and attorneys to make two court appearances; or 3) no adjournment was permitted, resulting in claims of "prejudice" and frequent filings of motions for reconsideration. Thus, the attempt to limit the cross-motion only begot more motions. While initially what was thought to be a wonderful idea to streamline the motion practice, deal with isolated subjects in a limited time parameter and allow both parties a fair amount of time to provide the court with essential information on the issues in dispute, transmuted (it is always nice to stick in some family law jargon) into an unworkable system that delayed ultimate resolution on the initial motion. Thus, during the evolutionary process of the rules, we learned through our collective experiences that the best-laid plans did not always work out

quite as expected. Herein lies the key to what can and should be done in the evolution of rules. They should be changed.

We recognized that simply because it appeared that limiting cross-motions would achieve greater effectiveness, the theory did not work out on paper. Still, the important thing is that we can and did constantly review how the rules really work within the system, and after examining this particular scenario, through the work of the aforementioned committee, presented the Supreme Court with the extremely insightful comment: "Let's go back to the way it was."

That is, in essence, what is going to happen under the amendment to Rule 1:6-3(b), which will now provide that family part motions will be exempted from the general rule that a cross-motion must relate to the subject matter of the original motion. There will, of course, be additional language added to Rule 5:5-4(b) that the court will not consider a non-related cross-motion if there will be prejudice to one of the parties. Absent that, however, the court will deal with all of the pending issues at one time, and thereby, hopefully, reduce the associated litigation costs.

This is a precise example of how the rulemaking and remaking procedure should work. Court rules should not be viewed as unchangeable. Rather, they should and must be viewed as constantly modifiable to adapt to our changing environment. Anyone practicing in this area can and should participate in this process. Submissions of letters, anecdotal or otherwise, provide the foundation for questions and inquiries constantly challenging the existing procedures. If anyone in this practice has been confronted with a situation where the rules seem less than effective, this is precisely the time to write a letter, make a comment, and get involved in a process that can and does change the rules while the game is being played.

Such changes can effectively tighten loopholes that invariably exist when rules are modified and extremely intelligent (perhaps crafty) litigators get their hands on them. A current example in the most recent rule changes is the alteration to Rule 5:5-4(b) regarding the page limitations for certifications. As we all know, some counsel, in order to evade the page limitation requirement, attach as exhibits to the page-limited certification anything and everything, including a series of additional certifications from other parties and/or experts, so as not to technically violate the rule. That loophole is about to be closed, providing that certified statements not previously filed with the court, even if included as exhibits to a certification, shall be included in the page limit calculation. While it is a small matter, I am sure it is one that confronted all of us at some point during our practice. It was something that perhaps was experienced by a limited number of attorneys, but fostered debate and discussion regarding how the system can be improved. The proposed amendment to Rule 5:5-4(b) is the result of that discussion.

There are numerous other rule changes that will be contained in the latest edition; perhaps most important is the fundamental change in the form of the case information statement. It is something all practicing attorneys in this area must devote substantial time to reacquaint themselves with. Hopefully, the changes in the case information statement, which took months to develop, will work to improve the system, but if they do not, let someone know. They, like everything else in the book, can be changed and should be changed to improve the service we provide to our clients.

Unlike other games, where landing on Free Parking may or may not entitle you to all the money in the middle of the board, here rules may be altered. It is vital that we not lose sight of that fact: Flexibility in this process provides for its longevity and appropriateness in dealing with the multi-faceted issues and their every-changing dynamics within the family part. Thus, fortunately, while the colors of the book change, it is not simply a decorator's decision. It is, rather, a reminder to each of us that, not only do we have to read the rules on a year-to-year basis, but we need to do so with a critical eye, for in doing that, we provide a service to the family part.

It is vital that such change take place. It is equally vital that we all participate in a review of such changes and critically comment upon such changes. We need to test the waters. We need to alter the way things have been done to see if they can be improved upon, and we also need to realize that sometimes we make mistakes in the process. Through the evolution of the rules, we constantly require ourselves to become reacquainted and recommitted to the particularities of the practice in which we operate. In so doing, we can provide the best insight because we are there doing it on a day-to-day basis. It is that insight which improves the rulemaking function.

While we may not be able to exchange all of our tiles for new letters in one fell swoop, we certainly can use those blank tiles as different letters throughout the game, and thereby, hopefully, improve the end product. It is the constant effort of the Supreme Court committee under the leadership of Judge Serpentelli that does this, and each of us not only should be grateful, but should assume an active rule in its ongoing evolution. ■

FROM THE EDITOR-IN-CHIEF EMERITUS

Enter the Newly Revised Case Information Statement

by Lee M. Hymerling

By order entered by the Supreme Court on July 28, 2004, the Court announced its rule changes to be effective on September 1, 2004. Among the most significant rule changes that will affect matrimonial practitioners are the revisions to the case information statement (CIS) form that appears in Appendix V of the Rules Governing the Courts of the State of New Jersey. It is noted that although the Supreme Court Family Practice Committee had recommended extending the deadline for the filing of CISs, from 20 to 30 days after issue is joined, that amendment was not approved by the Court. Many amendments to the CIS have, however, been approved. This article will describe some of the more notable amendments.

In Part A, Issues in Dispute, the issue of "parenting time" has been added to the list of other issues. This amendment recognizes that, in addition to matters in which custody may not be in dispute, often traditional visitation issues remain.

In Part B, the name of employer line has been expanded to require the name and address of the business, if the litigant is self-employed. This amendment, among others, recognizes that often cases involve individuals employed in small businesses. To go along with this change, slightly revised language has been included in the form's reference to insurance obtained through employment or business.

In Part B(4), conforming with the Court's adoption of Rule 5:4-2(g), counsel are required to check whether the confidential litigant information sheet has been filed. With the adoption of Rule 5:4-2(g), all of us will have to contend with submitting a new sheet at the time our complaints are filed. Undoubtedly, local clerks will probably bounce complaints if not accompanied by a completed confidential litigant information sheet.

Part C(2) contains a CIS revision long sought by those who have advocated greater linkage between the CIS form and the child support guidelines worksheet. We all know that the child support calculations are based upon weekly rather than monthly figures. In revised Part C(2), weekly rather than monthly income and deduction information must be provided. Similarly, in Part C(2), a new line has been added to reflect net earned income per week in addition to net monthly earned income. These changes have been made despite the fact that the budget component of the CIS continues to be based on monthly rather than weekly figures.

Also in Part C(3), the title of the chart has been revised to read "your current year to date earned income" rather than its prior heading, "your year to date income." The chart has been amended to include union dues within its list of deductions.

Part C(4) contains detailed questions largely designed to require disclosure of information concerning non-wage forms of income. More clearly than ever, a listing of all year-to-date unearned income including, but not limited to, unemployment disability and/or Social Security payments, interest, dividends, rental income, and other miscellaneous unearned income is now required. If this portion of the form is fully completed, it will now become far more difficult to ignore even the prior version of the form's requirement to list unearned income.

Part C(5) calls for detailed additional income information that goes far beyond what was previously required. Included are such questions as: how often is the litigant paid; what is the litigant's annual salary; what raises have been received, if any; and what bonuses and other compensation has been received? For the business executive and others receiving stock options, restricted stock or non-cash compensation, an explanation of that compensation is required. Dependents must now be listed. Many will question whether this level of detail is required so early in litigation. Most likely, counsel for the non-employed spouse in heavy income, heavy asset cases will view the new requirements of the form as providing an overdue early glimpse of critical information. Without doubt, more so than ever before, the requirement that this information be provided in the CIS will be a treasure trove of data that will be explored further in the interrogatories and document demands that will be served.

On balance, the new C(5) requirements will have a salutary

effect hastening the exchange of meaningful data, both to opposing counsel and to the Court.

Undoubtedly, the most significant change in the form is a dramatic makeover of the CIS budget form. The titles on the two traditional budget columns have been modified. The title to the left-hand column now reads "Joint marital lifestyle family, including __ children," while the right-hand column reads "Current lifestyle, yours and __ children." The purpose for this revision is self-evident. The form itself, rather than additional pages some of us have added, makes it possible for counsel and the litigants represented to present a contrast between the way it was and the way it is. The left-hand column should reflect how the family lived while still intact. The right-hand column should reflect the litigant's current lifestyle following separation. Minor changes have been included within the budget form.

Minor changes have also been made to the balance sheet.

Finally, a significantly expanded checklist has been added to the end of the form. The checklist will be what it has always been intended to be—a firm reminder of what attachments are to be appended to the form.

The revised case information statement form will almost certainly engender gripes by some, and might even be controversial. Undoubtedly, diligently completing the form may take more time, and will probably prompt many questions from our clients.

For the basic wage earner, the form should not prove significantly more difficult to complete than its predecessor. For those with more complicated incomes, diligent completion of the form will become just that much more important. It is regrettable, although understandable, that the Court did not extend the deadline for the form's completion. Its failure to do so will probably give an advantage to the party who has filed the litigation, because the form may be able to be completed even before the complaint is filed. For the responding party, in many cases, 20 days is too short of a deadline for completing the revised CIS.

All in all, the newly revised CIS represents an understandable progression from the prior version. It makes sense for income information within the form to be stated in weekly, as well as monthly, terms. It makes sense for one part of the budget to address the historic family expenses, while the other part should reflect present living costs. For the more affluent, or those receiving non-traditional compensation, it is reasonable to require disclosure up front, rather than later.

As attorneys, we must accept that we are now required to practice in a system that has embraced the goal that most divorce actions are to be concluded within one year of filing. Although many challenge the wisdom of that rule, its application is no longer subject to debate. The reduction of backlogs prevalent in many counties has silenced most, but not all, of the debate. A legitimate challenge remains as to whether the system goes too far when it seems to attempt to make all fall within the general goal. One size does not fit all, whether relating to shoes or how long a divorce action should remain pending prior to judgment. That will be the subject of a later column.

What the amended CIS form does, however, is to make an already good form better. In a way, it goes further by requiring more upfront information so it fits all cases—both uncomplicated and complex matters.

The CIS represents our single most important pleading; and is the pleading most relied upon by the bench. Any attorney who permits his or her client to complete the form without the counselor's critical review is making a serious mistake. Filling out a CIS is important business for the matrimonial lawyer. Failure to thoughtfully complete the CIS is a serious matter to those clients whose matters must be tried, as any client who has found him or herself forced on cross-examination to justify the unjustifiable in a hurriedly prepared CIS will readily confirm.

Will the form make us work more carefully? It should. Will the form cause some level of frustration for all of us? It probably will. Does the new form get us closer to more complete early disclosure? How could it not? Will the new form force us to look at our cases sooner and with greater care? It should, and that is how it should be.

The Court is to be commended for its prompt review and approval of our new CIS. ■

Meet the 2004–05 Family Law Section Officers

CHAIR, MADELINE MARZANO-LESNEVICH

Madeline Marzano-Lesnevich is a partner in Lesnevich & Marzano-Lesnevich in River Edge, where she heads the firm's family law department. She is a matrimonial law attorney certified by the Supreme Court of New Jersey, and a fellow of the American Academy of Matrimonial Lawyers. She practices exclusively in family law. Ms. Marzano-Lesnevich is a member of the Supreme Court Family Practice Committee; a member of the board of directors of the Certified Trial Attorneys; a former member of the board of directors of the Women in the Profession Section of the NJSBA; a member of the Family Law Committee of the Bergen County Bar Association; a member of the American Bar Association's Litigation and Family Law sections, and a member of American Trial Lawyers Association's Family Law Section. Formerly, Ms. Marzano-Lesnevich served as a contributing editor to the *ABA Family Law Litigation Newsletter*. She is a former recipient of the New Jersey State Bar Association's Distinguished Legislative Award.

CHAIR-ELECT, BONNIE C. FROST

Bonnie C. Frost, certified as a matrimonial law attorney by the New Jersey Supreme Court, is a managing partner of Einhorn, Harris, Ascher, Barbarito, Frost & Ironson, P.C., in Denville, where she concentrates her practice in family law and matrimonial appeals. Ms. Frost is treasurer of the New Jersey Chapter of the American Academy of Matrimonial Lawyers; senior editor of the *New Jersey Family Lawyer;* secretary of the District X Ethics Committee for Morris and Sussex counties; and a member of the American Bar Association, the Morris County Bar Association Family Law Committee and the Morris County Bar Foundation. Ms. Frost has lectured for ICLE and the Morris County Bar Association.

FIRST VICE CHAIR, PATRICIA B. ROE

Patricia B. Roe, certified as a matrimonial law attorney by the Supreme Court of New Jersey, is a partner in the Toms River law firm of Louis, Roe & Wolf, P.C. The firm limits its practice to family law litigation. Ms. Roe is first vice-president of the Ocean County Bar Association and a former chair of the Ocean County Family Law Committee. She is co-chair of the Matrimonial Trial Lawyers Section of ATLA-NJ; a trustee of ATLA-NJ; and a former chair of both the District IIIA Fee Arbitration Committee and the District IIIA Ethics Committee. Ms. Roe currently serves as a trustee for the New Jersey Lawyers' Client Protection Fund. Named Ocean County Young Lawyer of the Year in 1998, she has lectured for ATLA and ICLE, and her articles have appeared in the *New Jersey Family Lawyer*. She was law clerk to the Honorable Robert A. Fall, J.A.D., while he was the presiding judge of the family part in Ocean County.

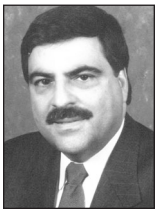
SECOND VICE CHAIR, IVETTE R. ALVAREZ

Ivette R. Alvarez is counsel at Einhorn, Harris, Ascher, Barbarito, Frost & Ironson. Ms. Alvarez is a member of the New Jersey State, Garden State and Essex County bar associations; the treasurer for the Hispanic Bar Association of New Jersey; trustee at-large for the New Jersey State Bar Association and treasurer of the association's Family Law Executive Committee. She is a past chair of the District V-C Fee Arbitration Committee, and served on several Supreme Court committees, including the Family Law Practice Committee; the Skills and Methods Ad Hoc Committee; the Family Division Practice Sub-Committee on Child Support and the Custody and Parenting Time Subcommittee. Ms. Alvarez serves on the executive committee and finance committee of Legal Services of New Jersey, and has also been a board member and community advisor for the Resource Center for Women.

SECRETARY, THOMAS J. HURLEY

Thomas J. Hurley is a solo practitioner in Burlington County. He is a certified matrimonial attorney and a member of the American Academy of Matrimonial Lawyers. Mr. Hurley is a frequent lecturer for the Institute of Continuing Legal Education, and an annual contributor to the *New Jersey Family Lawyer*. He served on the District IV Ethics Committee, and has served on the Family Law Executive Committee since 1993. Mr. Hurley presently serves on the board of the Cedar Run Wildlife Refuge and Unicorn Handicapped Riding Association.

IMMEDIATE PAST CHAIR, JOHN F. DEBARTOLO



John F. DeBartolo is a partner and co-founder in Atkinson & DeBartolo, PC, in Red Bank. He is first vice president of the Monmouth Bar Association, and has been an active 25-year member of both the county and the state associations. Mr. DeBartolo previously served as a co-chair of the Monmouth Bar Association/Family Law Committee and member of the District IX Ethics Committee. For more than 15 years he has served as an early settlement panelist and blue ribbon panelist. He has lectured at continuing legal education seminars for the New Jersey Institute of Continuing Legal Education, the Association of Trial Lawyers of America, the AAML (NJ Chapter), as well as for the Administrative Office of the Courts orientation seminar for new and rotated judges. He has served four terms on the New Jersey Supreme Court Family Division Practice Committee, and in November 2003 co-authored the brief and argued the case of *Weishaus v. Weishaus* on behalf of the New Jersey State Bar Association as *amicus curiae.* ■

Domestic Partnerships/ Pre-Partnership Agreements

The DOs And DON'Ts of Drafting

by Madeline Marzano-Lesnevich and Sarah J. Tremml

On July 15, 2004, the New Jersey Domestic Partnership Act went into effect, giving same-sex partners more rights. As family law practitioners, we must begin to employ the same strategies and protections for our domestic partnership clients as for our matrimonial clients. Below is a domestic partnership/pre-partnership agreement with practice pointers and tips for drafting an effective and substantive agreement. This form of agreement is a work-in-progress, as issues surrounding the act are continually evolving.

Family law practitioners should be cautioned in advising same-sex clients to enter into an agreement such as the one set forth below. An argument can clearly be made that since the act sets forth that the state of New Jersey must give full faith and credit to those civil unions, reciprocal beneficiary relationships or domestic partnerships entered into in other states (as noted in the act at C.26:8A-6(c)), clients might be better served entering into a civil union in Vermont or California, presuming they meet the statutory requirements of either, which affords each party even greater rights than the ones afforded under the New Jersey act.

Since, however, the act, at C.26:8A-6(c), specifically states that, "Domestic partners may modify the rights and obligations to each other that are granted by this act in any valid contract between themselves, except for the requirements for a domestic partnership as set forth in section 4 of P.L.2003, c.246," domestic partners can either expand or limit their rights and obligations to each other by entering into an agreement similar to the one set forth below. However, to best support the provisions set forth in their agreement, domestic partners should actively participate in other forms of estate planning, including but not limited to, devising healthcare proxies, last will and testaments, durable powers of attorney and any other pertinent agreements.

DOMESTIC PARTNERSHIP/PRE-PARTNERSHIP AGREEMENT

THIS AGREEMENT, made this _____ day of _____ , _____, by and between , residing at _____ (hereinafter referred to as _____), and _____, residing at _____ (hereinafter referred to as _____).

WITNESSETH:

WHEREAS, each party named herein has had the opportunity to obtain independent legal advice prior to the execution of this Agreement and has been fully advised as to his or her rights hereunder and in the absence of such an Agreement, and with full knowledge of such rights, each is fully satisfied to enter into this Agreement; and

WHEREAS, the purpose of this Agreement is to reduce the potential for future controversy and, to that end, the parties have entered into this Agreement, and it is their mutual intent that this Agreement shall:

1. Resolve present living arrangements and provide a method or process to settle future disputes that may arise; and
2. Make full and adequate provisions for the support, maintenance, welfare and well-being of the entire family; and
3. Resolve all issues relating to property, whether jointly or separately owned and whether acquired before the registration of or during the domestic partnership; and
4. Resolve all obligations arising from the domestic partnership;

NOW, THEREFORE, in consideration of the forgoing and intending to be legally bound thereby, the parties attest to and agree as follows:

1. It is the intention of the parties to form a domestic partnership and register such domestic partnership with the State of New Jersey.
2. Both parties are at least eighteen (18) years of age and mentally competent to consent to a civil contract.
3. Both parties are entering into this Agreement freely and voluntary; neither party is acting under force or duress.

4. The parties are engaged in a committed, loving relationship of mutual caring and support and agree to be jointly responsible for their common welfare, including being jointly responsible for their assets and debts as provided by applicable law and as detailed below.
5. Neither party is married to or legally separated from any other person and neither party is engaged in another domestic partnership.
7. Neither party has terminated another domestic partnership within the last one hundred and eighty (180) days.
8. It is also the intention of the parties in entering into this Agreement that their rights shall be fixed in advance should the domestic partnership be terminated. It is their intention to avoid litigation and intrusion into their professional and personal lives that would perhaps otherwise occur if this Agreement had not been reached.

NOW THEREFORE, in consideration of the following mutual promises and covenants and for other good and valuable consideration, the parties hereto agree as follows:

ARTICLE I – PROPERTY

Separate Property

1. _____ and _____ agree that any and all property, real or personal, acquired by either party before the date of execution of this Agreement belongs solely to the person who earned or accumulated it and cannot be transferred to the other except in writing. Attached hereto as EXHIBIT A is a list of property owned by each party that is to be deemed separate property for the purposes of this Agreement.
2. Should either party receive real or personal property by gift or inheritance, the property belongs solely and absolutely to the party receiving such gift or inheritance and cannot be transferred to the other except in writing.
3. Each party acknowledges that they do not have a right to, or financial interest in, any separate property of the other, whether obtained prior to or after the date of this Agreement, unless such interest or right is in writing. Each party shall, during his or her lifetime, keep and retain sole ownership, enjoyment, control and power of disposal of all property of every kind and nature that has been defined in this Agreement as the separate property of the parties, including property that is now owned or hereafter acquired by such party and all increments thereto, free and clear of any interest, rights or claims of the other.
4. Each party acknowledges that under the terms of the Domestic Partnership Act, neither is liable for the debts of the other incurred before the execution of this Agreement or contracted for by the other during the pendency of the domestic partnership. Both parties acknowledge that should either contract for a debt in his or her name during the pendency of the domestic partnership, such party shall be solely liable to satisfy such debt and any property belonging to such party shall be liable to satisfy such debt in the same manner as if no domestic partnership existed.

Joint Property

5. It is the intention of the parties to create limited joint property during their domestic partnership. The joint property shall include any joint checking account maintained by the parties and any gifts given to them jointly. Also, as set forth in the Agreement, *infra,* the parties each shall have certain defined joint property rights in any future primary and secondary residences of the parties, together with the contents thereof, and shall also have defined joint property rights in certain retirement and deferred compensation plans (as distinguished from regular income which is merely deferred from one tax year into the next). There may also be other joint property acquired during the domestic partnership which is not specifically addressed herein.
6. Funds earned during the domestic partnership by either party through his or her primary, secondary or per diem employment shall constitute joint property. It is the intention of the parties that each will contribute his/her earnings to pay for the reasonable and necessary expenses for themselves and any children who may be born or adopted into the domestic partnership or who live with the parties and constitute a "family-like" relationship, or toward the creation of joint property. The income to be contributed by the parties as set forth in this section shall be referred to as Contributed Income.
7. The parties shall open a joint checking account into which they shall deposit their salary and wages earned during the domestic partnership. From this joint account, they shall pay the routine and ordinary expenses of the parties and any children who may be born or adopted into the domestic partnership or who live with the parties and constitute a "family-like" relationship. It is not presently practicable or desirable to quantify the allocation of Contributed Income as between the amounts to be applied toward expenses and the amounts to be applied toward the creation of Joint Property. It is understood and agreed between the parties that they will periodically consult with each other as to their expenses and financial plans and that all decisions shall be made in good faith.

PRACTICE POINTER #1: Family law practitioners handling domestic partnerships should be advised that the act provides that for New Jersey state taxes, the meaning of

dependent includes a qualified domestic partner. Consequently, taxpayers are able to claim an additional $1,000 personal exemption for a qualified domestic partner that does not file a separate income tax return. Therefore, when drafting pre-partnership agreements, practitioners should include a clause similar to the one drafted below, but should consult with their clients as to whether the partners intend to claim the other as a dependent, or whether they intend to file separate tax returns.

8. The parties agree that during the course of their domestic partnership, they shall withhold income taxes from their jointly earned income and shall file separate income tax returns, sharing equally any and all deductions generated by joint property. Each party shall be individually responsible for the payment of taxes generated by separate property but joint funds may be used to pay any taxes on joint income that exceed withholdings. The parties agree to consult with an accountant, as necessary, to assist with those annual calculations.
9. The contents of the parties' residences acquired during their domestic partnership shall be deemed joint property, and shall be divided equally between the parties upon a termination event.
10. It is contemplated that during the course of the domestic partnership each party will make contributions to pension or other retirement plans including but not limited to those sponsored by his/her employer(s). Such post-partnership contributions to any IRAs, KEOGHs, deferred compensation plans, or other pension and retirement benefits, employer contributions and the appreciation or depreciation in the value of said contributions shall constitute joint property.

PRACTICE POINTER #2: Practitioners should also be aware that for the purposes of the New Jersey inheritance transfer tax, the act applies to decedents dying on or after July 10, 2004. It exempts all transfers made by will, survivorship or contract to a surviving domestic partner. This includes a membership certificate or stock in a cooperative housing corporation and the value of any pension, annuity, retirement allowance or return of contributions.

11. Any and all real or personal property, other than that which is expressly excluded from joint property which is acquired by either or both of the parties on or after the date of their partnership (including gifts) shall constitute real property belonging to both of the parties and in which both parties shall have equal interests.
12. In the event that one of the parties shall die, with the other party surviving, Joint Property, including any appreciation in the value thereof, shall become the sole and exclusive property of the survivor. Each party agrees not to undertake any acts which would frustrate or impede the right of the other to obtain full ownership interest in the Joint Property, including appreciation, upon his or her death. Each party agrees that his or her Last Will and Testament shall be made in conformity with the provisions of this Agreement. Each party agrees, in order that compliance with this provision may be verified, that the other party may examine any and all records pertaining to Joint Property and may examine his or her current Last Will and Testament (including codicils).

PRACTICE POINTER #3: It is essential that domestic partners consider estate planning as a tool to be utilized concurrently with the establishment of a Domestic Partnership Agreement. Since the act does not specifically state that a judge is prohibited from equitably distributing property acquired during the domestic partnership, and since the family part of the superior court is a court of equity, an argument can be made that the court can uphold an agreement made between the partners with respect to equitable distribution of property. As such, the partners themselves must engage in long-range planning, including the distribution of property if one predeceases the other.

ARTICLE II – SUPPORT

13. Both parties acknowledge that the act requires that each party agrees to be financially responsible for each other during the pendency of their domestic partnership.
14. _____ and _____ agree that all income earned by either party during the pendency of the domestic partnership (except as defined in Paragraph 15 below) and all property accumulated from such income belongs in equal shares to both parties and that should the parties decide to separate and terminate their domestic partnership, all accumulated property should be divided equally, in accordance with Paragraph 16 below.
15. Any income earned by a party that is derived from his or her separate property as defined in Paragraph 1 above shall be deemed the separate property of that party.

PRACTICE POINTER #4: When drafting a domestic partnership agreement, a practitioner has to consider the needs and rights of their client when including a clause such as the one below. If you represent the monied partner, the clause set forth below could impose a burden on the party that is not otherwise required by law. If you represent the dependent partner, a clause similar to the one below would be advisable, to ensure the client has the ability to seek financial support in the same manner as a divorcing spouse. It is important that as a practitioner, the intentions

of the parties are fully understood before contracting for an expansion or limiting the rights of either party.

16. Both parties agree that it is their intention that should their domestic partnership terminate, they are to be financially responsible to one another in the same manner as married spouses, and that their respective financial obligations to each other shall be determine in accordance with factors set forth in the spousal support statute codified at N.J.S.A. 2A:34-23 and all relevant case law.

ARTICLE III – HEALTHCARE

Insurance

17. Both parties acknowledge that under the New Jersey Domestic Partnership Act, a domestic partner is to generally be treated as a dependent for purposes of certain health benefits. It is the intent of both parties to be treated as a dependent of the other so as to be eligible for all health insurance coverage possible.

PRACTICE POINTER #5: The act states that coverage for domestic partners of state of New Jersey employees is automatic. It further provides that employees who participate in certain retirement or health coverage plans and work or work-for entities other than the state may be eligible for coverage. Private employers, however, are not obligated to provide health insurance coverage for partners of employees.

Healthcare Directives

18. Both parties agree that each has been designated as the person with whom the power to make healthcare decisions for the other has been vested. Both parties also agree that they have executed both healthcare directives and living wills to ensure that each party's wishes with regard to medical decisions have been set forth clearly, and that each party has sworn to uphold the wishes of the other party.

PRACTICE POINTER #6: As with estate planning, it is essential that family law practitioners handling domestic partnerships advise their clients that the act grants limited rights to domestic partners with relation to healthcare and healthcare decisions. Although the act grants partners the right to visit each other in the hospital and grants the rights for a party to designate his or her partner as their healthcare representative or proxy, as with spouses or children, it is good practice to have healthcare proxies, living wills, and durable powers of attorney drafted separately to ensure that all the legal rights of each party are thoroughly protected.

ARTICLE IV – CUSTODY AND PARENTING TIME

19. Both _____ and _____ acknowledge that during their domestic partnership a child or children may either be born to one party, adopted by both parties, or live with the parties and constitute a "family-like" relationship with them. If such child or children is born to one party, it is the other party's intention to have a second parent adoption take place so that both parties are recognized as legal custodians of such child or children. If the child or children is (are) adopted by both partners, it is their intention for both parties to be treated as the child or children's biological parents.
20. It is the intent of both parties to be treated as equals with relation to custody and parenting time of any minor child or children born to or adopted by the parties during their domestic partnership. Should one party predecease the other, it is both parties' intent that the surviving partner have sole legal and physical custody of any minor child or children.
21. Both parties agree that should any child or children be born to or adopted by the parties during their domestic partnership, and the domestic partnership should then terminate, custody and parenting time of the minor child or children should be determined in accordance with the statutory factors set forth in N.J.S.A. 9:2-4 and all relevant case law.
22. Both parties agree that it is their intention to support any and all children born into or adopted during the parties' domestic partnership, or any children living with them and constituting a "family-like" relationship. Both parties further agree that should their domestic partnership terminate, their respective child support obligations shall be determined in accordance with N.J.S.A. 2A:34-23 (a) and all relevant case law. Additionally, the parties agree to be equally responsible for any additional expenses for the minor child or children, including but not limited to unreimbursed medical expenses, miscellaneous expenses and post-secondary or college expenses.

PRACTICE POINTER #7: The above paragraphs relate directly to the care, custody and control of a minor child or children born to or adopted by partners in a domestic partnership. The above paragraphs *do not* apply to children born to a partner before the domestic partnership was formed. Should two partners decide to form a domestic partnership and one partner is the biological mother or father of a child from another union, the care, custody and control of that child may already be determined by agreement or court order. Practitioners should keep those prior agreements or court orders in mind when drafting the custody and parenting time section of the domestic partnership agreement for their clients, so as not to create an inherent conflict.

ARTICLE V – TESTAMENTARY GIFTS

23. Except as otherwise expressly provided herein, _____ shall have the right to dispose of his

(or her) property by Last Will and Testament in such manner as he (or she), in his (or her) uncontrolled discretion deems proper, and with the same force and effect as if not in a partnership.

24. Except as otherwise expressly provided herein, _____ shall have the right to dispose of his (or her) property by Last Will and Testament in such manner as he (or she), in his (or her) uncontrolled discretion deems proper, and with the same force and effect as if not in a partnership.
25. Upon the termination of the partnership, any bequest made by one party to this Agreement to the other in a Last Will and Testament executed prior to the termination of the partnership, shall be deemed null and void and revoked and renounced. Upon the death of either party, the survivor, at the written request of the decedent's legal representative, shall promptly execute, deliver and file whatever documents are required to effectuate said renunciations.
26. Notwithstanding the provisions of this Agreement, neither party intends by this Agreement to limit or restrict in any way the right or power to receive by Last Will and Testament any such bequest from the other, but this provision shall not be construed as a promise or representation that any such additional gift, bequest or devise shall be made to either party. Nothing herein contained shall prevent either party from acting as executor under any Will in which he or she shall have been designated as such.

ARTICLE VI – TERMINATION

27. Both parties acknowledge that the act (Chapter 246, P.L. 2003) mandates that when two parties terminate a domestic partnership, the Superior Court of New Jersey shall have jurisdiction over all proceedings related to the termination of a domestic partnership, however the court can only preside over the division and distribution of jointly held property.

PRACTICE POINTER #8: Since the act does not prohibit the New Jersey Superior Court from equitably distributing property that is not held jointly, practitioners must be careful to set forth protections for their client. If you represent the monied partner, the clause set forth below could arguably impose a burden on the client, which is not otherwise required by law. If you represent the dependent partner, you would want to include a clause as drafted below to ensure that if property (such as pensions, real property, etc.) that is not held jointly can be equitably distributed by the court upon the termination of the domestic partnership.

28. Both parties agree that upon termination of the domestic partnership, the division of property should be decided equitably in accordance with the statutory factors set forth in N.J.S.A. 2A:34-23.1.
29. Both parties acknowledge that to terminate their domestic partnership, they must allege and prove grounds in accordance with Section C26:8A-10 of the act.

PRACTICE POINTER #9: With the trend in family law turning toward economic mediation and custody mediation, a family law practitioner drafting a domestic partnership agreement may want to incorporate clauses such as the ones below.

Either party may terminate the domestic partnership by giving the other a (enter time period here) written notice. If one partner is contemplating terminating the relationship, both parties agree that at least one joint counseling session will be scheduled if either party requests it.

Both parties agree that if children are involved, they agree to give more than a (enter the time period listed above) written notice of intent to terminate and agree to at least (enter a number) counseling sessions.

ARTICLE VI – ARBITRATION/MEDIATION

30. Both parties agree that any dispute arising out of this Agreement shall be arbitrated or mediated under the terms of this Agreement. Both parties agree to try and resolve the matter independently with the help of a mutually agreeable mediator before seeking court intervention. If the parties are unable to agree upon a mediator, each party will then name a second mediator, and both named mediators will choose an independent third party who shall arbitrate the Agreement.

ARTICLE VII – SEVERABILITY

31. In case any provision of this Agreement should be held contrary to, or invalid under, the law of any country, state or other jurisdiction, such illegality or invalidity shall not affect in any way any of the other provisions hereof, all of which shall continue in full force and effect. Any provision which is held to be invalid or illegal in any country, state or other jurisdiction shall, nevertheless, remain in full force and effect in any country, state or jurisdiction in which such provision is legal and valid.
32. It is further agreed and understood between the parties that they intend to be bound by whatever existing statute and case law is in effect in the State of New Jersey at the time of the signing of this Agreement and they do not wish to be bound by any retroactive application of future judicial decisions or amendment to any existing statute.

ARTICLE VIII –RIGHTS

33. Each of the respective rights and obligations of the parties under this Agreement shall be deemed independent and may be enforced independently irrespective of any of the other rights and obligations set forth hereunder.

ARTICLE IX – ENTIRE UNDERSTANDING

34. This Agreement contains the entire understanding

and agreement of the parties. All prior conversations, communications, representations, correspondence and other writings are merged into this instrument, which, alone, sets forth the understanding and agreement of the parties. No oral statement or prior written matter outside of this Agreement shall have any force or effect.

35. This Agreement cannot be changed or terminated orally. No waiver of any provision of this Agreement shall be valid unless in writing and signed by both parties. No waiver of a breach or default under any provision of this Agreement shall be deemed a waiver of such provision or of any subsequent breach or default of any kind. No delay or omission to exercise any right or power accruing upon any breach or default shall impair such right or power or be construed to be a waiver of any such breach or default or acquiescence therein. The failure of either party to insist upon strict performance of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature.

ARTICLE X – EFFECTIVE DATE

36. This Agreement shall take effect only upon the establishment of a registered domestic partnership of the parties. This Agreement shall be null and void in the event that the parties do not form such domestic partnership with each other.

ARTICLE XI
IMPLEMENTATION

37. Each party (or his or her legal representative) shall, upon the request of the other, execute, acknowledge and deliver any additional instruments that may be reasonably required to carry the intention of this Agreement into effect, including such instruments as may be required by the laws of any jurisdiction now or hereafter in effect which may affect the property rights of the parties as between themselves or with others. The intentions of this paragraph shall survive any termination of the domestic partnership between the parties, and the parties shall be required to execute any documents in that circumstance. The parties further agree that this paragraph should survive any incapacity of the other party so the full and complete intentions of this Agreement may be carried into effect.

ARTICLE XII –BINDING ON ESTATES

38. This Agreement shall become effective upon the formation of a registered domestic partnership of the parties and shall bind the parties and the respective heirs, executors and administrators, next of kin and other personal representatives.

ARTICLE XIII – EXECUTION

39. This agreement may be executed simultaneously in counterparts, each of which shall be deemed to be an original.

WITNESS:

_____

As to _____

Dated: July _____, 2004

WITNESS:

_____

As to _____

Dated: July _____, 2004

ACKNOWLEDGMENTS

STATE OF NEW JERSEY }
}ss.:
COUNTY OF }

On this _____ day of July, 2004, before me personally came _____, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he or she acknowledged to me that he or she executed the same.

_____
Notary Public or Attorney at Law

STATE OF NEW JERSEY }
}ss.:
COUNTY OF }

On this _____ day of July, 2004, before me personally came _____, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he/she acknowledged to me that he/she executed the same.

_____
Notary Public or Attorney at Law

Madeline Marzano-Lesnevich *is chair of the Family Law Section of the New Jersey State Bar Association, and is a partner at Lesnevich & Marzano-Lesnevich. She practices exclusively in the area of family law.* ***Sarah J. Tremml*** *is an associate at Lesnevich & Marzano-Lesnevich, and practices exclusively in the area of family law.*

The Domestic Partnership Act

A Primer for Elder Law Practitioners

by Stephen J. Hyland

Although much of the recent discussion on the Domestic Partnership Act of 2004[1] (DPA) has been exclusively focused on the extension of legal rights to same-sex couples, the limited protections of the act are also available to unmarried seniors. Thus, elder law practitioners must be prepared to discuss the ramifications of the act with their clients.

This article discusses the features of the act—and its omissions—in light of their applicability to New Jersey's seniors. In particular, the article reviews the effect of the act in several critical areas of elder law, including healthcare, estate planning, taxation, senior housing, and retirement benefits. In each of the areas discussed, the author has also pointed out some areas that, because they are not covered in the DPA, require special planning in order to ensure the couple is adequately protected.

ELIGIBILITY REQUIREMENTS

Assuming they meet all other requirements, that is, they are unmarried,[2] not in another domestic partnership,[3] unrelated,[4] share a common residence[5] and agree to joint responsibility for basic support,[6] two persons of the same or opposite sex who are at least 62 years of age may register as domestic partners.[7]

In general, common residence means the partners share a home in New Jersey but does not require that it be the partner's sole residence.[8] An important consideration for older partners is that one partner may reside temporarily elsewhere, on either a short-term or long-term basis, for reasons that include medical care, so long as there is intent to return to the shared residence.[9]

Non-residents of New Jersey may register if at least one partner is a participant in one of several state-administered retirement systems.[10] Thus, a retiree living in another state would be entitled to domestic partnership registration so long as he or she were participating in one of the eligible plans. The wisdom of this is discussed elsewhere in this article.

REGISTRATION AS A PREREQUISITE

Most of the rights and obligations under the Domestic Partnership Act are predicated on the couple becoming registered.[11] Registration is a simple process, entailing the filing of a sworn affidavit of domestic partnership with a local registrar at a cost of $28.[12] Upon filing, the partners receive a certificate of domestic partnership, to be used as proof of registration.[13]

Couples that have registered under another state's civil union, domestic partnership or reciprocal beneficiary relationship laws are recognized by the act.[14] These couples receive all of the rights and responsibilities of couples that have registered in New Jersey.[15]

Unregistered Partners

Couples who have not registered but who otherwise meet the requirements may be treated as registered in medical emergencies by one or both stating that they are unregistered but otherwise meet the registration requirements.[16] Emergency recognition provides only the right to accompany a partner during emergency transport, and visitation rights.[17]

Termination

In order to terminate a registered domestic partnership, one or both partners must file for termination in the family part of the superior court.[18] The reasons for termination parallel the reasons for divorce.[19] The court may, but is not required to, effectuate an equitable distribution.

A registered domestic partnership between opposite-sex partners is automatically terminated if the couple subsequently marries.[20]

RIGHTS AND OBLIGATIONS OF REGISTERED PARTNERS

A complete discussion of the rights and responsibilities of registered partners is beyond the scope of this article. However, the act provides several rights that are important to seniors. These are:

- Statutory protection from discrimination under the New Jersey Law Against Discrimination (LAD);[21]
- Visitation rights in hospitals and other healthcare settings;[22]
- Healthcare decision rights;[23]
- Limited taxation relief;[24] and
- Health and state pension benefits.[25]

The obligations under the act are few and somewhat murkily defined.[26] Registered partners are obliged to have a common residence[x27] and to be jointly responsible for each

other's basic living expenses,[28] including basic food and shelter,[29] should one partner become unable to do so.[30] Although the DPA strictly limits the obligations under the act to those enumerated in the law itself,[31] the partners may contractually add obligations or alter existing ones.[32]

Unfortunately, the act fails to address some critical elder law areas, such as guardianship and surrogate decision-making, or real estate or other property transfers.

On the other hand, some limitations in the DPA and/or federal law are actually beneficial to older domestic partners. For example, unlike married couples, partners are not jointly liable for each other's individual debts, contracted before or during the partnership.[33] In another example, since the partners' support obligations cease when the domestic partnership is terminated, couples are insulated from any court-ordered support.[34]

It will take some time before the courts and/or the Legislature correct the omissions and oversights in the DPA. In the meantime, elder law practitioners must be prepared to fill in the holes in New Jersey and federal law through the use of appropriate planning and document preparation.

Federal Rights Excluded

Domestic partnership is not recognized under federal law, which is currently limited by the Defense of Marriage Act.[35] Thus, the DPA has no effect on federal entitlements, such as Social Security, federal rights including immigration, federal taxes, or any other law or regulation that relies upon a federal definition of *marriage* or *spouse*.[36]

Jurisdictional Limits

With the exception of California,[37] New Jersey's DPA is not currently recognized in any other state. Opposite-sex couples in particular, accustomed as they are to the universal recognition of marriage in the United States, may not realize that the rights granted under the act stop at the New Jersey border.

The careful practitioner must remind domestic partners who own property outside of New Jersey, or who vacation or winter in another state or country, that they will still need to use various contractual means to protect their partnership outside the state.

DISCRIMINATION

The Domestic Partnership Act adds registered domestic partnership as a protected class in the New Jersey Law Against Discrimination (LAD).[38] With this addition, it is now illegal to discriminate against domestic partners in employment, public accommodation, housing, and the extension of credit.[39] Thus, it would be illegal discrimination for an age-restricted community to refuse to rent or sell to registered domestic partners on the basis that one partner does not meet the age requirement if there were not a similar restriction for married couples.[40] It would also be a violation of LAD if a nursing home treated domestic partners differently than married couples.[41]

The act carves out several exceptions to LAD in regard to domestic partner benefits. First, it is specifically not a violation of LAD for an employer other than the state to refuse to provide domestic partner benefits.[42] Second, it is not a violation of LAD to provide health and pension benefits to same-sex but not opposite-sex partners.[43]

ADVANCED DIRECTIVES AND SURROGATE DECISION MAKING

Although planning for incapacity and end-of-life matters should be routine for couples of all ages, it is particularly important for unmarried partners who have no more legal right to make decisions in these areas than any other interested stranger. There are numerous cases where domestic partners have been prevented from hospital visitation or making the same kind of life-and-death healthcare decisions married couples are routinely allowed, even when the partners have prepared appropriate advance directives.

With the enactment of the Domestic Partnership Act, several of the more important healthcare directives and visitation rights that domestic partners had to contractually provide are embodied in the law. Although no longer as necessary in New Jersey, many of these directives must still be prepared in order to protect couples when they are outside New Jersey.

Advance Directives

The DPA modified the Advance Directives for Health Care Act[44] to include a patient's domestic partner among those having a right to be designated as a healthcare representative.[45]

The practical effect of this change in the law may be negligible, since a patient could already declare any "person of the declarant's choosing" as their designated healthcare representative in a written directive.[46] Perhaps the only substantive change is that, previously, a patient's domestic partner could not be named in such a directive if he or she is an operator, administrator or employee of the healthcare facility in which the declarant is a patient or resident.[47] Now, a domestic partner is considered an exempt family member.[48]

Guardianship

In 1983, Minnesota resident Sharon Kowalski was hit by a drunk driver, leaving her severely disabled from a head injury. When her domestic partner of over four years, Karen Thompson, told Sharon's father, Donald, the nature of their relationship, he reacted first with disbelief, then with disgust. In July 1985, Donald obtained legal guardianship over his daughter without even a court hearing, moved Sharon to a nursing home some distance from the home she shared with her partner, and gave orders preventing Karen from visitation. After a long fight, guardianship was awarded to Karen in 1991.

Although the case of Sharon

Kowalski occurred in Minnesota, it is illustrative of the obstacles same-sex couples encounter as a result of state laws that fail to equate their relationship with that of married couples. Unfortunately, the DPA failed to address this important area.

For same-sex couples in particular, guardianship can be especially problematic. First, because the current statute fails to equate the domestic partnership with that of a married couple in regard to guardianship and conservatorship, a domestic partner has no more right to commence a proceeding or to be named guardian over his or her partner's person or estate than any other "mere stranger."[49] Second, same-sex couples frequently conceal the nature of their relationship from their families. In some cases, the couples face hostility from one or both partners' family as a result of their sexual orientation, with family members viewing the relationship as involving undue influence. Third, New Jersey has no formal way for a person to name their preferred guardian and to disqualify others from being named.

Thus, a registered domestic partner, faced with a Sharon Kowalski-type situation, would have to undergo a potentially contentious contested guardianship proceeding with an uncertain outcome. Considering the Domestic Partnership Act was intended to prevent such emotionally wrenching battles, the act has failed in this regard.[50]

Until the laws are amended to fix this oversight, domestic partners should be counseled to make known their wishes in a form of advance directive called a designation of guardianship. This document, which should be witnessed, allows a person to make known their wishes in regard to the naming of guardians in the event of legal incapacity.

ESTATE PLANNING AND TAXATION

The Domestic Partnership Act effects estate and tax planning in several ways. First, it exempts inheritance transfers between domestic partners, in the same way as transfers between married spouses.[51] The exemption applies to any property that passes by will[52] or in contemplation of death,[53] and includes the transfer of jointly owned property pursuant to a right of survivorship.[54] Second, it provides that the payment of any pension, annuity, retirement allowance or return of contributions payable to a registered domestic partner under a qualified pension or retirement plan would be exempt from state taxation.[55] Finally, it provides for a $1,000 additional exemption for a domestic partner who does not file a separate income tax.[56]

The DPA clearly contemplates that domestic partners only hold joint interest in property they intend to acquire jointly; each partner retains individual ownership in any property he or she individually acquires during the partnership. First, it holds that if one partner is sued, his or her partner's property is not at risk.[57] Second, in termination proceedings, the court shall divide and distribute the jointly held property.[58] Third, the court is instructed it may, but is not required to equitably distribute property that was "legally and beneficially acquired by both domestic partners or either domestic partner during the domestic partnership."[59]

The act made no change to the rules of intestacy, nor did it equalize tax treatment of domestic partners in regard to gifts or other property transfers. Furthermore, it did not provide for joint tax filing by domestic partners, something that has been widely and erroneously reported.

There are several other areas of taxation that, because they are unmodified by the DPA, continue to result in unequal treatment of domestic partners as compared to married spouses. These include the estate tax, gift tax, real estate transfer fee (which applies to transfers between domestic partners but not between spouses), and a sales tax on the transfer of a vehicle title from a deceased partner to his or her domestic partner. On the other hand, the current property tax rebate program results in a slight benefit to domestic partners, because they are not required to aggregate their income.

PENSION AND HEALTHCARE BENEFITS

For opposite-sex couples, there is little relief in this area. First, no employer is required to extend domestic partnership benefits to an opposite sex partner and his or her dependents, even if provided to a same-sex couple of similar age.[60]

Second, the act has no effect on federal programs, such as Medicare, Medicaid and Social Security, even if the program is administered by the state.[61]

On the other hand, an employer may voluntarily offer domestic partnership benefits to its qualified opposite-sex employees and retirees, as well as to same-sex partners.[62] However, if it does so, it is entitled to require that the employee contribute a portion or even the full amount of the cost for dependent coverage, even if it does not require this for married couples or same-sex partners.[63] To the extent that the employer pays the dependent cost, the employer-paid portion is considered imputed income for federal tax purposes only, and is subject to federal withholding.[64]

Joint Liability for Medical Expenses

As one of the requirements for registration, domestic partners agree to provide for each other's "basic living expenses" during the duration of the partnership.[65] The act defines basic living expenses to include the "cost of health care, if some or all of the cost is paid as a benefit because a person is another person's domestic partner."[66] What isn't clear from this definition is whether this means a partner is responsible for medical care only if it is a benefit of employment.

Because of the uncertainty regarding whether couples can be held responsible for each other's medical expenses, domestic partners should be made aware that any jointly owned property may potentially be

subject to a lien for these expenses.

Partners should also be aware that some facilities might seek to have both partners contractually agree to be responsible for each other's medical expenses. If such an agreement was required prior to the provision of medical services, and it was not equally applied to married couples, the facility would be in violation of the New Jersey Law Against Discrimination.[67]

MISCELLANEOUS CONSIDERATIONS

The Domestic Partnership Act allows registered partners to give certain consents on behalf of their incompetent or deceased partner.

First, a domestic partner may consent to the disclosure of the health record of an incompetent or deceased partner who is known to or suspected of having HIV infection or AIDS.[68] Second, a registered partner may give written consent for a necropsy or autopsy.[69] Third, a registered partner may gift all or part of his or her partner's body[70] or may consent to organ and/or tissue donation.[71] This brings up another unfortunate oversight—possession and disposition of remains.

Under the laws regulating cemeteries and funeral directors, the next of kin, as that term is usually defined, are given the right to possess and dispose of a person's remains. This definition does not include domestic partners, who therefore have no rights to their loved one's remains.

Only in the limited circumstance that arises when a deceased partner has left no evidence of an anatomical gift or a contrary intent, thereby giving the choice to his or her partner, is the deceased partner entitled to receive the remains for disposition.[72]

In order to avoid this, domestic partners of all ages should be counseled to execute a separate disposition of remains document, giving their partner the right to possession and disposition of their remains. This document provides the written instructions on which a funeral director or morgue can release the remains and carry out funeral arrangements.

SUMMARY

The Domestic Partnership Act has changed the legal landscape when it comes to unmarried older couples, both heterosexual and homosexual.

Prior to the enactment of the DPA, there were no legal protections, other than contractual ones, for unmarried couples. For same-sex couples, these agreements had to be particularly well drafted in order to withstand legal challenges from family members who were often openly hostile to the relationship.

With the enactment of the Domestic Partnership Act, some protections are now embodied in the law. However, some vital protections that are taken for granted by married couples are missing, and couples will need to ensure they contractually provide for these missing areas.

As in marriage, domestic partnership registration creates a legal relationship that can only be terminated by order of a judge. Couples still need to consider their entire living situation when considering how best to protect their relationship. In particular, couples need to evaluate:

- Their expected medical needs;
- Their future housing requirements;
- Their estate-planning needs;
- Their future state residency plans;
- Their end-of-life wishes;
- Their particular tax situation; and
- The degree of commitment to each other.

Each of these areas should be carefully evaluated, with the advice of an elder law practitioner, before a couple legally commits to each other as registered domestic partners. ■

ENDNOTES

1. P.L. 2003, Chapter 246.
2. N.J.S. 26:8A-4b(3).
3. *Id.* If they were, the prior domestic partnership must have been terminated at least 180 days before or by the death of the former partner. N.J.S. 26:8A-4b(9).
4. N.J.S. 26:8A-4b(4).
5. N.J.S. 26:8A-4b(1).
6. N.J.S. 26:8A-4b(2).
7. N.J.S. 26:8A-4b(5).
8. N.J.S. 26:8A-3.
9. *Id.*
10. *Id.*
11. With the exception of the medical emergency provision, N.J.S. 26:8A-6f, all rights and obligations require registration as provided in N.J.S. 26:8A-4a.
12. N.J.S. 26:8A-4a. The fee is set by the Department of Health and Senior Services.
13. N.J.S. 26:8A-8b.
14. N.J.S. 26:8A-6c.
15. Until the extent of recognition is clarified by the courts, such couples should be considered to have *at least* the rights and obligations under the New Jersey DPA.
16. N.J.S. 26:8A-6f.
17. *Id.*
18. N.J.S. 26:8A-10a(1). Although not yet reflected in the rules of court, the family part has jurisdiction over "civil actions in which the principal claim is unique to and arises out a …family-type relationship." R. 4:3-1(a)(3).
19. N.J.S. 26:8A-10a(2).
20. N.J.S. 26:8A-10b.
21. N.J.S. 10:5-5 and 10:5-12.
22. N.J.S. 26:2H-12.22.
23. N.J.S. 26:2H-32, 26:2H-57 and 58, healthcare directives; 26:5C-12, disclosure of records; 26:6-50, consent to autopsy or necropsy; 26:6-57 to 58.1 and 63, consent for body, organ and tissue donation.
24. N.J.S. 54:34-1 to 34-4, inheritance transfer tax exemption; N.J.S. 54A:1-2 and 54A:3-1, income tax deduction.
25. N.J.S. 52:14-17.26, 43:15A-6, 43:16A-1, 43:6A-3, 18A:66-2, and 53:5A-3; N.J.S. 17:48-6bb, 17:48A-7aa, 17:48E-35.26, 16B:26-2.1x, 17B:27-46.1bb, 26:2J-4.27, 17B:27A-7.9, 17B:27A-19.12, 17:48C-8.2, 17:48D-9.5, require various forms of health and dental plans to make domestic partners benefits available.
26. N.J.S. 26:8A-6.
27. N.J.S. 26:8A-4b(1).
28. N.J.S. 26:8A-4b(2).
29. N.J.S. 26:8A-3.
30. *Id.*
31. N.J.S. 26:8A-6a.
32. N.J.S. 26:8A-6c.
33. N.J.S. 26:8A-6g.

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Roccamonte and the Need for Cohabitation Planning

by John P. Paone Jr.

For years, men and women have been entering into premarital agreements prior to embarking upon marriage. Marriage planning today has become a common part of our legal landscape. Conversely, very little attention has been paid to the need for planning prior to couples electing to live together. Indeed, many have falsely assumed that cohabitation was a do-it-yourself way to avoid the type of liability that arises from a lawful marriage. The recent New Jersey Supreme Court decision in *In Re Estate of Roccamonte*[1] has established that this thinking is wrong.

With the increasing number of heterosexual couples living together without the benefit of marriage—and with over 16,000 same-sex couples living together and presently prohibited from legally marrying in New Jersey—the need for cohabitation planning reaches many residents in our state. This article will review the *Roccamonte* decision and explore the rights and liabilities of unmarried couples who elect to live together without the benefit of written cohabitation contracts. It will demonstrate how the outcome in *Roccamonte* may be vastly different in other cohabitation cases. The article will assist practitioners in drafting cohabitation agreements and in cohabitation planning for their clients.

With the increasing number of heterosexual couples living together without the benefit of marriage—and with over 16,000 same-sex couples living together and presently prohibited from legally marrying in New Jersey—the need for cohabitation planning reaches many residents in our state.

THE *ROCCAMONTE* CASE

Arthur Roccamonte and Mary Sopko lived together for over 30 years without becoming lawfully married. Arthur met Mary in the 1950s, while she was employed in New York as a model. In the early 1960s, Mary moved to California because Arthur refused Mary's request that he divorce his wife. Arthur pursued Mary in California and convinced her to return to New Jersey. Mary did so, and the parties began living together.

During their relationship, Arthur paid $15,000 to purchase a co-op apartment and placed the title to that asset in Mary's name; he paid the $950 per month maintenance on the co-op; he paid for Mary's food, clothing and furniture; he gave Mary $600 per week for household expenses and paid for improvements and renovations to the co-op. Arthur paid for dinners out, jewelry, furs and vacations, and also assisted in the support of Mary's daughter from her previous marriage.

For her part, Mary provided what can best be described as domestic services for Arthur. This included cooking, sexual relations, housekeeping, shopping, escorting and accompanying Arthur, and caring for him during his illness.

Arthur never got divorced, but the parties continued to live together. In 1995, Arthur died without leaving a will. By operation of the law of intestate succession, Arthur's surviving spouse and his two emancipated children stood to inherit his entire estate. Upon Arthur's death, Mary owned the co-op and its furniture, a certificate of deposit valued at $10,000, and an $18,000 life insurance policy on Arthur's life. At the time of Arthur's death, Mary was 70 years old, living on only Social Security and food stamps.

Mary filed suit against Arthur's estate, seeking to enforce what she claimed was Arthur's promise of lifetime support. The matter had a long and tortuous *pendente lite* history, as the parties disputed which court and county would hear this matter. Ultimately, trial took place in Union County before Judge John Boyle, then sitting in the probate part.

Judge Boyle concluded that the statements attributed to Arthur—"I'll take care of you" and "Don't worry, you'll be taken care of"—did not constitute an express palimony contract as had been recognized in *Kozlowski v. Kozlowski*[2] and *Crowe v. De Gioia*.[3] The trial court ruled that these statements were "not capable of any definite or calculable meaning," and therefore did not create an express contract for future support. Judge Boyle distinguished this case from prior palimony cases because in those cases the cohabitant was "tossed aside

unfairly" when the promisor went off with a younger woman. Here, the promisor died.[4]

Finally, Judge Boyle had before him an unreported Appellate Division opinion that was rendered only several months before his decision.[5] In the unreported case, the Appellate Division ruled that an agreement between unmarried cohabitants terminated upon death. Judge Boyle relied in part on this unreported opinion to conclude that any alleged contract that may have existed, terminated upon Arthur's death. Therefore, Mary's action against the estate was dismissed.

The Appellate Division reversed the trial court's decision in a 2–1 reported opinion, finding that it was improper to rely on an unpublished opinion; that the statements attributed to Arthur constituted an express palimony contract; and that Mary's contract rights survived the death of the promisor.[6] Thereafter, the estate took the matter to the New Jersey Supreme Court. In affirming the Appellate Division decision, the Supreme Court established the following guidelines in enforcing palimony contracts:

1. Palimony contracts need not be expressed (*i.e*. written or oral). Rather, "the existence of the contract and its terms are ordinarily determinable…primarily by the parties' acts and conduct in light of their subject matter and the surrounding circumstances."[7]

Although as far back as 1979 *Kozlowski* stated that there was no legal consequence between an expressed or implied palimony contract, no reported decision previously imputed a contract in a palimony case solely upon the "acts and conduct" of the cohabitants. Noting that in most cases there is likely to be no written contract; and further noting that the cohabitants are likely to dispute whatever oral statements are alleged in furtherance of an expressed contract; *Roccamonte* opens the door to courts imposing contract terms based upon the facts and circumstances of each case.

The *Roccamonte* estate argued that in deciding the terms of an implied contract, the test was whether a reasonable person standing in the shoes of the cohabitant would infer a promise in return for a promise or performance.[8] The argument was made that cohabitants do not want their relationship to have any legal consequences upon termination. If they did, they would enter into marriage or an express contractual relationship. Therefore, the estate contended that under this objective standard there could be no implied contract in cohabitation cases. The court rejected this argument, and has now made certain that a palimony contract can be implied based on the facts and circumstances of each case.

The *Roccamonte* estate argued that in deciding the terms of an implied contract, the test was whether a reasonable person standing in the shoes of the cohabitant would infer a promise in return for a promise or performance.

2. There is no need to attempt to quantify the consideration given in return for these contracts. The consideration for these contracts "need not be equal to the benefit received."[9]

The estate argued that Arthur took care of Mary during his lifetime, and that there was no expectation or entitlement for support to continue after his demise. It also attempted to minimize the contributions made by Mary in comparison to what Arthur had done for her during his lifetime. The court found that, unlike commercial contracts, consideration in these "marital-type relationships" is to be viewed differently. Here the consideration is

> 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 at they are able. And each couple defines its way of life and each partner's expected contributions to it in its own way. Whatever other consideration may be involved, the entry into such a relationship and then conducting oneself in accordance with its unique character is consideration in full measure.[10]

3. These contracts, which arise out of a marital type relationship, are to be treated differently than contracts that arise in the commercial setting. As a result "special considerations must be taken into account by a court obliged to determine whether such a contract has been entered into and what its terms are."[11]

The estate attempted to distinguish this case from *Crowe* and *Kozlowski* on the basis that Mary was not entirely economically dependent upon Arthur, as she was employed during most of the relationship. The court determined that the enforcement of these contracts is to remedy "economic inequality."[12]

> If one of the partners is not economically self-sufficient, albeit a wage earner, the promise of support by the other is no less legally significant than if she were entirely economically dependent. The difference is only in the amount of promised support that must be fixed in order to reach a reasonable lump sum payment.[13]

Therefore, the financial circum-

stances of the promisee will have bearing upon whether an implied contract exists and its terms.

4. These contracts do not expire upon the death of the promisor and are enforceable as an obligation against the promisor's estate.[14]

The court made clear that palimony contracts are enforceable against the promisor's estate, like any other obligation of the estate. The breach of contract was Arthur's failure to provide support for Mary's life upon his death. In this regard, although Arthur died intestate, had he drawn a will that did not provide for Mary's future support the outcome of the case would have been the same. This is because a testator cannot undo a contractual obligation by the terms of his or her will.[15]

Because such contracts are implied from the conduct and actions of the parties, Arthur's inability to testify does not raise concerns about fraud and undue prejudice. The decedent's actions will speak on his behalf. In *Roccamonte*, it was not disputed that Arthur lived with and supported Mary for 30 years.

THE EQUITABLE CONTRACT

Although the *Roccamonte* opinion is couched in traditional contract language, the court essentially set out the parameters for a new form of contract, which shall be referred to as an equitable contract in this article. This is because where the contract terms are not expressed, the *Roccamonte* decision gives future courts the ability to create these contracts based on what is a fair outcome under the facts of each case. It is not insignificant that in *Roccamonte* the court determined that all future palimony claims are to be decided in the family part. Previously, when palimony cases did not involve issues concerning the custody or support of children, these matters were decided in the Law Division along with other contract matters.[16]

The court stated that it was bringing these matters into the family part because family judges "have developed special expertise in dealing with family and family-type matters."[17] The family part is a court of equity with special sensitivities, and where the polestar is fairness.

In the Law Division, equity takes a back seat to law in enforcement of contract cases. Indeed, as far back as 1985, Justice Virginia Long (then sitting in the Appellate Division and authoring the opinion in *Crowe* that was adopted by *per curiam* decision of the Supreme Court) recognized these matters as "hybrid" actions.[18] Therefore, in many respects palimony cases represent the confluence of the doctrines of contract and equity.

Practitioners should be mindful that *Roccamonte*, *Kozlowski* and *Crowe* present remarkably similar fact patterns: promisees who were of relatively advanced age (70, 63, 58 years) and who had relatively little or no work history outside of the home; promisees with minimal assets and no significant ability to earn; financially well-off promisors; and long-term relationships (30+, 15, 20 years). After *Roccamonte*, it is clear that future cohabitation cases with different facts will likely face far different results. Under this equitable contract approach, the court has given itself great flexibility to determine the kind of relief (if any) due to less sympathetic litigants seeking to enforce oral or implied contracts for lifetime support.

For example, if these were simply contract cases, the length of the parties' relationship would be irrelevant for purposes of determining the existence of an enforceable contract. Under the equitable contract approach, a court could conclude that no implied contract for support had arisen from a short-term relationship (or perhaps that the support contracted was for a period far less than a lifetime). In this regard, Judge Conrad Kraft's opinion in *Zaragoza v. Capriola*[19] is instructive.

In *Zaragoza*, the court encountered a cohabitant who gave birth to a child in 1982 fathered by a man she claimed promised her support for her lifetime. There was no doubt that during their period of cohabitation the man supported this woman, she was not employed outside of the home, and she performed services beyond their sexual relationship. However, the parties cohabitated for only 14 months. In making its finding on the existence of a contract, the trial court was not guided by what the parties said but by their acts and conduct. The court stated that successful palimony claims are limited to cases demonstrating "a stable family relationship extending over a long period of time."[20] Based on this short-term relationship, the court found that "no agreement existed between the parties, either express or implied." Clearly, equity will intercede to reject claims of agreements for lifetime support in short-term relationships.

Additionally, equity has a place in these contracts because the court directs us to examine the economic circumstances of the promisee. If the court were merely enforcing a contract, this factor would be irrelevant. When the landscaper comes to collect his bill for services rendered, his financial status is not relevant to his entitlement under the contract. However, the court in *Roccamonte* held that this issue was relevant in the determination of whether a contract exists in a palimony case and what relief would be afforded the promisee. As it turned out, this factor did not affect the outcome in *Roccamonte,* as Mary was over 70 years of age and on Social Security. However, the case of a promisee who may have independent means or who may have the ability to earn, which would bring economic self-sufficiency, will likely result in no claim under an equitable contract analysis.

The age of the cohabitant is also likely to play a critical role in deter-

mining whether a contract exists and in constructing its terms. In *Carney v. Hansell*,[21] the promisee seeking lifetime support was only 43 years of age. Although the period of cohabitation was for more than 16 years, the court concluded that the contract for support was not for the promisee's lifetime but only for "as long as she lived with him." Accordingly, the court denied the claim for damages.

Future cases may feature cohabitants who are younger, in shorter-term relationships, and possessed with greater assets and with greater ability to earn than the promisees in *Roccamonte*, *Kozlowski* and *Crowe*.

When these litigants fail to obtain successful results, the perception may be that the pendulum is swinging toward limiting the rights of cohabitants. This observation would be superficial at best. A more accurate observation would be that the holding in *Roccamonte* now places the court in a position to distinguish between cohabitation cases based on varying fact patterns. Practitioners should understand that not every cohabitant will be entitled to lifetime support. Indeed, the right to support "does not derive from the relationship itself but rather is a right created by contract."[22] It is this equitable contract that will give courts the flexibility to do what is fair based on the unique circumstances of each case.

In the end, it may be (as so often has been the case) that Justice Morris Pashman was correct in his concurring opinion delivered in *Kozlowski*. There, the justice argued that the court should abandon contract principals altogether in palimony cases and

> presume that the parties intended to deal fairly with each other upon dissolution of the relationship…to insure that one party has not been unjustly enriched, and the other unjustly impoverished, on account of their dealings.[23]

The justice suggested that the factors to be weighed by the trial judge in this analysis would include:

A. the duration of the relationship;
B. the amount and types of services rendered by each party;
C. the opportunities foregone by either in entering the living arrangement;
D. the ability of each to earn a living after the relationship has been dissolved.

The author would add these factors:

E. the age of the parties;
F. the assets owned by the promisee;
G. the assets acquired by the promisor during the relationship; and
H. the promisor's obligation to children or a present or former spouse.

Importantly, Justice Pashman noted that "decisions concerning the complexities that might arise upon application of these principles must be determined on a case by case basis."[24] While *Roccamonte* has remained wedded to the concept of finding a contract, by also incorporating the equitable principles outlined above, the court has made palimony matters equitable contract cases that will be distinguishable based on the facts of each case.

SAME-SEX COHABITANTS

Palimony cases have been described as matters involving relationships "akin to a marriage" or a "marital-type relationship." When the law provides that marriage is defined as a relationship between one man and one woman, the question arises whether the law in palimony cases can be extended to same-sex cohabitants. The fact that same-sex couples cannot legally marry in New Jersey[25] makes the extension of these contract principles necessary to avoid the type of injustice that caused the court to act in *Roccamonte*, *Kozlowski* and *Crowe*.

The court faced a similar threshold when it extended the principles of contract and palimony to unmarried couples, notwithstanding the law of this state not to recognize common law marriages. In doing so, it relied on the following language from the California Supreme Court decision in *Marvin v. Marvin*:[26]

> The mores of society have indeed changed so radically…that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.[27]

For these same reasons, the author does not believe New Jersey's refusal to recognize same-sex marriage will act as a bar to enforcing palimony contracts between same-sex couples.

Recently, the Legislature enacted the Domestic Partnership Act, which enables same-sex couples (and heterosexual couples over the age of 62) to file an affidavit of domestic partnership, where the couples are "jointly responsible for each other's common welfare."[28] The act provides that each domestic partner agrees to provide for the other partner's basic living expenses (defined as food, shelter and any other costs, including but not limited to the cost of healthcare) if the other partner is unable to provide for him or herself. However, upon termination of the domestic partnership, the domestic partners from that time forward shall incur "none of the obligations to each other… as created by this Act."

The act also gives the superior court jurisdiction over "division and distribution of jointly held property" between domestic partners. However, "the court shall in no event be required to effect an equitable distribution of property… acquired by both domestic partners

or either domestic partner during the domestic partnership." Therefore, the act affords only limited property rights, and apparently no post-termination support rights to same-sex cohabitants. Nevertheless, the act makes clear that it does not diminish "any right granted under any other provision of law" for domestic partners. Furthermore, it provides that domestic partners "may modify the rights and obligations of each other that are granted by this Act in any valid contract between themselves…."As such, the act appears to encourage and endorse the enforcement of cohabitation agreements between same-sex couples, and would not appear to bar the extension of palimony contract principles as recognized in *Roccamonte* to these cases.

DO PALIMONY COHABITANTS FARE BETTER THAN MARRIED PERSONS?

One of the arguments raised by the dissenter in the Appellate Division opinion in *Roccamonte* is that a palimony promisee should not be in a better position than a divorced spouse.[29] Specifically, the argument made was that while alimony terminates upon death of the payor under N.J.S.A. 2A:34-25, in *Roccamonte* the contract right (to a "one time lump sum…in an amount predicated upon the present value of the reasonable future support defendant promised to provide to be computed based upon the promisee's life expectancy") survives the death of the promisor.[30] In responding to this criticism, the court noted that while alimony terminates upon death, provisions are regularly made for life insurance to secure the obligation for the lifetime of the alimony recipient. Moreover, in cases where life insurance is not practical, the court may direct the establishment of an *inter vivos* trust to secure future support.[31]

Commentators who bemoan the *Roccamonte* line of cases as placing palimony promisees in a better position than divorced spouses fail to see the big picture. These critics focus primarily on the victorious promisee receiving a onetime lump sum payment, immune from changes in circumstances (such as the payor's reasonable retirement) and other terminating events (such as the subsequent marriage of the recipient). While a one-time lump sum payment has its benefits, it does not take into account changes in circumstances that would warrant an increase in the award, such as future disability or increased needs of the promisee. Indeed, in *Crowe* the court affirmed the trial court's calculations regarding the lump sum award, which gave no consideration to inflation and future cost of living increases.[32] Collection of these awards may also be problematical. For example, as contract judgments, palimony awards would appear to be dischargeable in bankruptcy, whereas alimony claims are protected.[33]

Moreover, a more generous standard applies in the calculation of alimony as compared with the standard for support in a palimony case. Married persons are entitled to alimony in an amount that will afford them a lifestyle reasonably comparable to the standard of living established during the marriage.[34] *Roccamonte* did not adopt the *Crews* standard for determining support in the calculation of a lump sum palimony award. Instead, the standard for support of an unmarried cohabitant is an amount that will provide a "reasonable degree of economic comfort appropriate in the circumstances."[35] This standard gives the court latitude to deviate from the actual lifestyle enjoyed during the period of cohabitation.

It is easy to see how this standard may diminish the entitlement of a cohabitant in the case of a palimony promisor with limited means, or where the palimony promisor may have obligations to a spouse entitled to alimony and unemancipated children entitled to child support. The reasonable support for a palimony promisee will vary greatly from case to case, based upon the underlying circumstances, even though the promise for lifetime support may be identical.

Commentators have also ignored the limitations on a cohabitant's ability to share in property acquired during the relationship. There is no right to equitable distribution for unmarried cohabitants.[36] In most cases, property titled solely in the name of the promisor, and acquired during the period of cohabitation, will be beyond the reach of the promisee. The promisee is at best limited to claims under theories of joint venture, partnership and partition claims under principals of owelty.[37] Claims dealing with real property are likely to be met with statute of fraud defenses. In short, property claims by cohabitants based on oral or implied agreements are not likely to be met with open arms.[38]

In California, the courts have declined to use the doctrine of implied contract to enable a promisee to share in the cohabitant's business success during the relationship. In *Maglica v. Maglica*[39] the court required direct testimony of an agreement and other proofs before it would entertain the plaintiff's claim for a share of the cohabitant's multimillion-dollar business, which "boomed" during their relationship.

Some have pointed out that a subsequent marriage of the parties eviscerates the substantial contract rights created through cohabitation. It has been held that cohabitation contracts merge and are subsumed by the greater contract of marriage, and are therefore unenforceable.[40] However, the equitable remedies available in divorce actions give the court great ability to provide relief to address the premarital contributions of the parties.[41]

Also keep in mind that palimony litigants may not be entitled to counsel fees, whereas married persons may seek counsel fees in their actions.[42] Palimony litigants are not entitled to *pendente lite* relief unless they establish "the need is

urgent and the probability of success high" with reference to their claims.[43] The state of California refuses to grant *pendente lite* relief in palimony cases, stressing the paradox of awarding damages in a contract case before a hearing and establishment of a claim.[44] If any *pendente lite* relief is granted, the amount is to be deducted from the eventual lump sum awarded to the palimony claimant.[45]

The public policy of this state in favor of marriage has not changed. Indeed, it is difficult to foresee many instances where a palimony promisee would be better off than a similarly situated married partner. Notwithstanding an attempt to treat unmarried cohabitants fairly, the rights of unmarried cohabitants are limited, and these parties often face a long and hard road when seeking to enforce those rights.

COHABITATION PLANNING

As prudent individuals come to recognize cohabitation planning as a necessity, practitioners will have to address these requests and be prepared to draft cohabitation agreements. There is currently no case law in New Jersey involving the enforcement of a written agreement drafted in contemplation of cohabitation. However, there is little doubt that these written contracts will be important to limiting potential exposure and in fixing the rights of the parties upon termination of a cohabitation relationship.

For guidance in drafting cohabitation agreements, practitioners should look first to the Uniform Premarital Agreement Act and the requirements for an enforceable premarital agreement.[46] That having been said, there are differences between the potential claims of cohabitants and married persons. Therefore, it would be wrong to suggest that the act is the *sine qua non* for enforcement of cohabitation agreements. It is important to keep in mind that in premarital agreements, statutory rights to alimony and equitable distribution are being waived and modified. Cohabitation agreements merely express the contract between the cohabitants and their rights under that contract upon the termination of the relationship. Thus, for example, as there is no right to equitable distribution between unmarried cohabitants, it would not appear that the same level of financial disclosure is needed to enforce these agreements as issues concerning property rights.

Clearly, the motivation for these agreements will be for financially successful cohabitants to have financially dependent cohabitants waive any claim to support, including any lump sum payment upon the termination of the relationship. Before drafting agreements providing for blanket waivers, the practitioner should consider whether the family part will enforce a cohabitation agreement that becomes unconscionable at the time enforcement is sought.[47]

The family part does not enforce property settlement agreements between married partners that are not fair and equitable.[48] In *Roccamonte*, had Mary signed such an agreement at the request of Arthur, would a court of equity enforce such a contract, thereby leaving the dependent promisee destitute at the end of a long-term relationship? From an equity standpoint, the answer is *no*. From a contract standpoint, the answer is that Mary is only entitled to the rights under her express contract.

Rather than seeking an absolute waiver of liability, cohabitation agreements may be most effective (and most enforceable) by defining and limiting exposure in such cases. Thus, an agreement that provides a cohabitant nothing if the relationship lasted only five years, and then X amount of support for Y years if the relationship exceeded five years, and so on, will have a far better chance of surviving the scrutiny of a court of equity, and will accomplish the goal of allowing cohabitants to limit their future liability. If there is to be a blanket waiver of liability, the agreement should address the promisor's contributions to the promisee as consideration for the waiver.

In *Roccamonte*, Arthur purchased a co-op for Mary and made her the beneficiary of a life insurance policy on his life, but these acts did not factor into the court's decision. A cohabitation agreement should recite as consideration from the promisor what otherwise may be misconstrued as a gift. Conversely, premarital agreements are enforceable without consideration.[49]

In the aftermath of *Roccamonte*, cohabitation agreements must address the rights of the parties in the event of death. The author does not believe the court would prohibit parties from entering into agreements where all contractual obligations arising during the period of cohabitation expire and are deemed satisfied upon the death of a cohabitant. However, the question again arises, will a court of equity leave a financially dependent cohabitant, such as Mary, destitute after a long-term relationship that ends by the death of the financially successful cohabitant? To ensure the promisor's obligations will terminate, these agreements should contemplate a provision for life insurance, or a specific bequest in the will of the promisor making clear that this is intended to discharge any contractual obligation that may exist.

Because such contracts are not negotiated at arm's length, it would be prudent to insist upon independent counsel for each party, or to expressly waive in writing the opportunity to consult with independent legal counsel.[50] Although no party apparently had counsel in *Roccamonte*, *Kozlowski* and *Crowe* prior to entering into those oral or implied contracts, the failure to have independent counsel (or clear evidence that the right to counsel has been waived) is likely to be fatal to the enforceability of written agreements that severely limit the

contract rights of financially dependent cohabitants.

A question also arises regarding whether cohabitation agreements must be executed before the commencement of cohabitation. Due to the nature of such relationships, it is not likely they will come with the type of lead time that normally precedes a marriage (*i.e.*, no engagement period). Furthermore, premarital agreements must be executed before the marriage ceremony, because certain statutory rights arise contemporaneously with a lawful marriage that cannot be modified afterward, except in limited circumstances.[51] While it should not be fatal for cohabitation agreements to be executed after the commencement of cohabitation, agreements executed long after the cohabitation has commenced, and after parties have changed their positions in reliance upon a promise, express or implied, are likely to be subject to greater scrutiny.

CONCLUSION

Practitioners should understand that, to date, we have only scratched the surface regarding potential cohabitation cases. From the vast array of cohabitants likely to come before the court, many different outcomes will be realized. Practitioners should be prepared to advance the case law as different factual scenarios present themselves, and to counsel their clients on the merits of cohabitation planning. ■

ENDNOTES

1. 174 N.J. 381 (2002).
2. 80 N.J. 378 (1979).
3. 102 N.J. 50 (1986).
4. This article does not address the question of whether an action exists if the financially dependent cohabitant elects to end the relationship against the will of the financially dominant cohabitant.
5. *Hendricks v. Richie,* Docket # A-1903-98T2.
6. *In Re Estate of Roccamonte*, 346 N.J. Super. 107 (App. Div. 2001).
7. *Roccamonte* at 174 N.J. 389.
8. *Farnsworth on Contracts*, Section 3.10, at 210 (1990).
9. *Roccamonte* at 174 N.J. 392.
10. *Id.* at 392-93.
11. *Id.* at 389.
12. *Id.* at 393.
13. *Id.*
14. *Id.* at 496-97.
15. Had Arthur made *inter vivos* provision for Mary, an issue could still be raised as to whether this was sufficient to satisfy his obligation under the implied contract. Furthermore, had Arthur made a bequest to Mary in his will, an issue would exist as to whether this would offset his contractual obligation or whether it would be deemed a gratuitous bequest not unlike his purchase of the co-op for Mary.
16. *Crowe v. De Gioia*, 90 N.J. 126, 136-137 (1982).
17. *Roccamonte* at 174 N.J. 399.
18. *Crowe v. De Gioia*, 203 N.J. Super. 22, 37 (App. Div. 1986).
19. 201 N.J. Super. 55 (Ch. Div. 1985).
20. *Id.* at 64 (*citing Hewitt v. Hewitt*, 62 Ill. App. 3d 861, 380 N.E. 2d 454 (App. Ct. 1978)).
21. 363 N.J. Super. 111 (Ch. Div. 2003).
22. *Roccamonte* at 174 N.J. 381.
23. *Kozlowski* at 390-91.
24. *Id.* at 391.
25. *Lewis v. Harris*, Mer-L-15-03.
26. 18 *Cal.* 3d 660, 557 P.2d 106 (1976).
27. *Kozlowski* at 386.
28. *See* A.3743 (passed January 8, 2003).
29. *Roccamonte* at 346 N.J. Super. 122-25.
30. *Roccamonte* at 174 N.J. 390.
31. *Jacobitti v. Jacobitti*, 135 N.J. 571 (1994).
32. *Crowe* at 203 N.J. Super. 35.
33. While alimony is taxable (unless designated non-taxable alimony), the tax consequences of a palimony lump sum award remains unclear at this time. While the recipient can argue that it represents non-taxable money damages, presumably the estate in *Roccamonte* will declare the payment as a tax-deductible charge against the estate.
34. *Crews v. Crews*, 164 N.J. 11 (2000).
35. *Roccamonte* at 174 N.J. 393.
36. *Kozlowski* at 383.
37. *See Baker v. Drabik*, 224 N.J. Super. 603 (App. Div. 1988); *Asante v. Abban*, 237 N.J. Super. 495 (Law. Div. 1989).
38. *Wajda v. Wajda*, 239 N.J. Super. 248 (Ch. Div. 1989); *Carney v. Hansell*, 363 N.J. Super. 111 (Ch. Div. 2003).
39. 66 Cal. App. 4th 442, 78 Cal. Rptr. 2nd 101 (1998).
40. *Mangone v. Mangone*, 202 N.J. Super. 505 (Ch. Div. 1985).
41. *Id.* at 510. *Weiss v. Weiss,* 226 N.J. Super. 281 (App. Div.) *cert. den.* 114 N.J. 287 (1988); *Berrie v. Berrie*, 252 N.J. Super. 635 (App. Div. 1991); *Coney v. Coney*, 207 N.J. Super. 63 (Ch. Div. 1985).
42. *Crowe* at 203 N.J. Super. 39-40; *Carney v. Hansell*, 363 N.J. Super. 111 (Ch. Div. 2003); *but see* R. 5:3-5(c) (permitting the court to assess fees in "claims relating to family type matters in actions between unmarried persons" and Judge Pressler's comment that the construction by *Crowe* is "superseded" by this rule change).
43. *Roccamonte* at 174 *N.J.* 399-400.
44. *Friedman v. Friedman*, 20 Cal. App.4th 876, 24 Cal. Rptr.2nd 892 (Ct. App. 1993).
45. *Roccamonte* at 174 N.J. 399-400. Unmarried cohabitants in a domestic violence proceeding can obtain interim support without establishing a palimony contract. *Maksuta v. Higson*, 242 N.J. Super. 452 (App. Div. 1990).
46. N.J.S.A. 37:2-31.
47. *See* N.J.S.A. 37:2-38b.
48. *Peterson v. Peterson*, 85 N.J. 638 (1981); *Edgerton v. Edgerton*, 203 N.J. Super. 160 (App. Div. 1985).
49. N.J.S.A. 37:2-33.
50. *See* N.J.S.A. 37:2-38(4).
51. *Pacelli v. Pacelli*, 319 N.J. Super. 185 (App. Div. 1999); *Nicholson v. Nicholson*, 199 N.J. Super. 525 (App. Div. 1985).

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Statutes Amended and/or Referenced by the Domestic Partnership Act

N.J.S. 26:8a-1 *et seq*.

by Joan McSherry

In addition to the provisions of the act itself, the Domestic Partnership Act, N.J.S. 26:8A-1 *et seq*., specifically amends eight New Jersey statutes:

1. Title 10 Law Against Discrimination (LAD)
2. Title 26 Health and Vital Statistics
3. Title 54 New Jersey Transfers Taxation
4. Title 54A New Jersey Gross Income Tax Act
5. Title 52 State Government, Departments & Officers
6. Title 43 Pensions & Retirement & Unemployment Compensation
7. Title 18A Education
8. Title 53 State Police

As a sort of road map through the Domestic Partnership Act, the amending citations of the above statutes, (*emphases added),* are given below. All references are to the sections of the act as passed in November 2003.

TITLE 10 LAW AGAINST DISCRIMINATION (LAD)

Sec. 2. d. Legisl. Findings Sec. 11 — 10:5-1 *et seq*. (status, housing, credit, employment, labor practices, public accommodations, *et al*)
Sec. 11 — 10:5-5 ((f) refers to 33:1-12 & 33:1-21 alcoholic beverage license for private clubs)
Sec. 12 — 10:5-12 (refers to 10:5-5)
Sec. 57 c. — not unlawful discrimination under LAD
Sec. 58 — Sections 41-56 of Domestic Partnership Act apply to same-sex couples in established domestic partnership, which shall not be deemed unlawful discrimination.

TITLE 26 HEALTH AND VITAL STATISTICS

Sec. 13 26:2H-1 *et seq.* — Healthcare facility visitation
Sec. 14 26:8-1 — Vital statistics and vital records
Sec. 15 26:8-4 — State registrar information
Sec. 16 26:8-17 — Local registrar information
Sec. 17 26:8-23 — Department of Health & Senior Services in charge of registration
Sec. 18 26:8-24 — State registrar information
Sec. 19 26:8-25 — Local registrar information
Sec. 20 26:8-48 — No alterations/changes to certificates without proper amendments
Sec. 21 26:8-51 — Corrections to certificate require signature
Sec. 22 26:8-55 — Penalty for knowingly submitting certificate with incorrect information
Sec. 23 26:8-60 — Fee due local registrar from municipality/city
Sec. 24 26:8-62 — State registrar (refers to 26:8-1 *et. seq*. [except 26:8-63] and 26:8-64)
Sec. 25 26:8-63 — State registrar
Sec. 26 26:8-64 — State registrar search fees (refers to 26:8-63)
Sec. 27 26:2H-32 — Healthcare facility definitions "immediate family"
Sec. 28 26:2H-57 — Healthcare representative revoked upon termination
Sec. 29 26:2H-58 — Proxy for healthcare representative
Sec. 30 26:5C-12 — Consent required for disclosure of record of decedent with AIDS/HIV
Sec. 31 26:6-50 — Post-mortem, necroscopic examination consent
Sec. 32 26:6-57 — Definitions regarding organ donation
Sec. 33 26:6-58 — Donation of body/parts
Sec. 34 26:6-58.1 — Organ procurement organization consent/opposition
Sec. 35 26:6-63 — Custody of body after donation of body part

TITLE 54 NEW JERSEY TRANSFERS TAXATION

Sec. 36 54:34-1 — Re-transfer tax rate real/personal property $500 or more ([except 54:34-4] and refers to 54:34-2)

f. Right of *surviving joint tenant domestic partner* to immediate ownership/possession/enjoyment of real/personal property, or joint bank deposits or immediate ownership/possession/enjoyment of membership/stock in coop entitling owner to

occupy as dwelling is deemed a transfer taxable *as though belonged absolutely to the deceased* and had been *devised or bequeathed by will* to surviving joint tenant except that part of property survivor may prove to Dir. of Div. of Taxation originally belonged to survivor and never to the decedent. Where nonresident decedent, (f) applies only to real/tangible personal property in N.J.

Sec. 37 54:34-2 — Tax rate tables for transfer to domestic partner—*no tax* for transfers on/after Jan. 1, 1985

Sec. 38 54:34-4 — Transfers of property exempt from taxation

j. value of pension, annuity, retirement allowance or return of contributions, regardless of source, which is direct result of decedent's employment under a qualified plan as defined by section 401(a), (b) and (c) or 2039(c) of the Internal Revenue Code, payable to a domestic partner and not otherwise exempt per this section or other N.J. law.

TITLE 54A NEW JERSEY GROSS INCOME TAX ACT

Sec. 39 54A:1-2 — Defines domestic partner as "dependent"

Sec. 40 54A:3-1 — Domestic partner is additional personal exemption for taxpayer ($1,000 deduction) if dependant partner does not file separately

TITLE 52 STATE GOVERNMENT, DEPARTMENTS & OFFICERS

Sec. 41 52:14-17.26, 2. (b) — State Health Benefits Commission

Sec. 41 52:14-17.26, 2. (c) — "Employee" is appointive or elective officer or full-time employee of the state of New Jersey. Also includes Rutgers employees. Also includes employees of the New Jersey Institute of Technology while the employees of the institute are party to an educational services contract with the state. Also includes former employee of the South Jersey Port Corporation employed by a subsidiary corporation or other corporation established by the Delaware River Port Authority, and who is eligible for continued membership in the Public Employees' Retirement System. Not an "employee" if: retired employee not covered by the complete federal program; short-term; seasonal; on intermittent or emergency or fee basis; less than two months service; compensation limited to reimbursement of necessary job expenses actually incurred in discharge of duties. A 10-month employee on annual contract is deemed to have met two-month waiting period if he or she begins employment at beginning of contract year.

52:14-17.26 2. (d) (1) — Domestic partner is "employee's" *dependent* except when domestic partner is in military service or the retired employee is not covered by the complete federal program.

52:14-17.26 2. (d) (3) — An *employer other than the state* that is participating in the State Health Benefits Program, per Section 3 of N.J.S. 52:14-17.34, *may adopt a resolution* providing that "dependents" shall include domestic partners.

TITLE 43 PENSIONS & RETIREMENT & UNEMPLOYMENT COMPENSATION

Sec. 42 43:15A-6, 6. g. (1) — "Widower" *for employees of the state* includes domestic partner of a member who was a domestic partner for at least five years before and until date of member's death, who was receiving at least half of support from member in 12-month period immediately preceding member's death or accident which was direct cause of death. Dependency of widower terminated by subsequent marriage/domestic partnership. Re: accidental death benefit, five-year qualification is waived.

Sec. 42 43:15A-6, 6. g. (3) — A *public employer other than the state may adopt a resolution* providing that "widower" shall include domestic partners.

Sec. 43:15A-6, 6. q. (1) (2) (3) — "Widow" ….

Police & Firemen's Retirement System of New Jersey

Sec. 43:16A-1, (23)(a) — "Widower" *for employees of the state* includes domestic partner of a member or retiree, on the date of death, who has not since remarried or established a domestic partnership. Re: accidental death benefits, (43:16A-10) restriction of remarriage/new domestic partnership waived.

Sec. 43:16A-1, (23)(c) — A *public employer other than the state may adopt a resolution* providing that "widower" includes domestic partners.

Sec. 43:16A-1, (24)(a), (c) — "Widow" ….

Sec. 43:16A-1, (31)(a) — "Spouse" includes domestic partner of a member.

Sec. 43:16A-1, (31)(c) — A *public employer other than the state may adopt a resolution* providing that "spouse" shall include domestic partners.

Sec. 44 43:6A-3, 3. t. — (Definitions) "Widow" includes domestic partner of a member or retiree, for at least four years before and up to date of death. Eligibility terminated by subsequent marriage/domestic partnership who has not since remarried or established a domestic partnership. Re: accidental death four-year qualification is waived.

Sec. 44 43:6A-3, 3. u. — "Widower"…

Sec. 44 43:6A-3, 3. v. — "Spouse" includes domestic partner of a member or retiree.

TITLE 18A EDUCATION

Sec. 45 18A:66-2, 2. t. (1) — (Definitions) "Widower" *for employees of the state* includes domestic partner of a member for at least five years. before and until date of member's death, who was receiving at least half of support from member in 12-month period immediately preceding member's death, or accident which was direct cause of death. Dependency of widower terminated by subsequent marriage/domestic partnership. Re: accidental death benefit, five-year qualification is waived.

Sec. 45 18A:-66-2, 2. t. (3) — A *public employer other*

than the state may adopt a resolution providing that "widower" shall include domestic partners.
Sec. 45 18A:-66-2, 2. u. (1)., 2. u.(3) — "Widow"…
Sec. 45 18A:-66-2, 2. x. (1) — "Spouse" includes domestic partner
Sec. 45 18A:-66-2, 2. x. (3) — …public employer…may adopt resolution…"spouse"

TITLE 53 STATE POLICE
Sec. 46 53:5A-3, 3. t. — (Definitions) "Surviving spouse" includes domestic partner on date of death of member or retiree. Dependency terminated by subsequent marriage/domestic partnership except for *accidental* death benefits (53:5A-14)

In addition to the amended statutes, the act addresses the provider issues of health and dental benefits dependent coverage for same-sex couples. Again, all section references are to the act as passed.

Sec. 47. — hospital service corporation
Sec. 48. — medical service corporation
Sec. 49. — health service corporation
Sec. 50. — individual health insurer
Sec. 51. — group health insurer
Sec. 52. — health maintenance corporation
Sec. 53. — individual health benefits plan
Sec. 54. — small employer health benefits plan
Sec. 55. — dental service corporation
Sec. 56. — dental plan organization
Sec. 57. — employer who provides health benefits plan

Provisions of Sections 47 through 56 shall apply to policies or contracts issued or renewed on or after the effective date.

Provisions of Sections 41 through 56 apply to same-sex domestic partners, and do not violate LAD.

Certain state commissioners and boards of banking are charged by the Domestic Partnership Act to adopt rules and regulations to effectuate the purposes of the act.

SEC. 59.
a. Commissioner of Health and Senior Services re: sections 1 through 10 and 13 through 35
b. Commissioner of Banking and Insurance re: Sections 47 through 52, 55 and 56
c. New Jersey Individual Health Coverage Program Board re: Section 53
d. New Jersey Small Employer Health Benefits Program re: Section 54

The Domestic Partnership Act took effect on July 10, 2004. ■

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A Primer for Elder Law Practitioners

Continued from Page 69

34. N.J.S. 26:8A-6b.
35. P.L.104-199 (1996).
36. "In determining the meaning of an Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." 1 U.S.C. 7.
37. California Domestic Partner Rights and Responsibilities Act of 2003, AB 205, effective January 1, 2005.
38. N.J.S. 10:5-5qq.
39. N.J.S. 10:5-12.
40. *Id.*
41. *Id.*
42. N.J.S. 34:11A-20.
43. N.J.S. 26:8A-11.
44. N.J.S. 26:2H-53 *et seq.*
45. N.J.S. 26:2H-57 to 58.
46. N.J.S. 26:2H-58a (1).
47. N.J.S. 26:2H-58a (2).
48. *Id.*
49. *In re Tierney*, 175 N.J. Super. 614 (Law Div. 1980); *In re Schiller*, 148 N.J. Super. 168 (Ch. Div. 1977).
50. "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: … the right to make medical or legal decisions for an incapacitated partner." N.J.S. 26:8A-2d.
51. N.J.S. 54:34-2.a (1).
52. N.J.S. 54:34-1a and b.
53. N.J.S. 54:34-1c.
54. N.J.S. 54:34-1f.
55. N.J.S. 54:34-4j.
56. N.J.S. 54A:3-1 (b)1.
57. N.J.S. 26:8A-6g.
58. N.J.S. 26:8A-10a (1).
59. N.J.S. 26:8A-a (3).
60. N.J.S. 26:8A-11.
61. Such programs are currently limited by the Defense of Marriage Act, with the definition of "spouse" to "a person of the opposite sex who is a husband or wife." 1 U.S.C. 7.
62. N.J.S. 26:8A-6d.
63. N.J.S. 34:11A-20a.
64. The New Jersey Division of Revenue does not consider this taxable income for state purposes.
65. N.J.S. 26:8A-4b (2).
66. N.J.S. 26:8A-3.
67. N.J.S. 10:5-12f (1) and possibly 12i.
68. N.J.S. 26:5C-12.
69. N.J.S. 26:6-50.
70. N.J.S. 26:6-58.
71. N.J.S. 26:6-58.1.
72. N.J.S. 26:6-63.

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