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CHAIR'S COLUMN

Bench-Bar Relations

by Lizanne J. Ceconi

During our Annual Meeting in Atlantic City, the Family Law Section hosted a bench/bar conference on the issue of alimony. It was an entertaining and thought-provoking experience to see how trial judges, appellate judges and a New Jersey Supreme Court justice view the issue. We were especially fortunate to hear Associate Justice Virginia A. Long share with us the history of alimony and the perspective from the New Jersey Supreme Court. I would also like to acknowledge and thank Judge Marie Lihotz of the Appellate Division, as well as Judges Richard Camp and Laura LeWinn for participating. Family Law Section Executive Committee members Patrick Judge and Bea Kandell did a great job of demonstrating how to effectively advocate for a client on the issue of alimony. Finally, the conference was coordinated and moderated by retired Judge Robert Fall and my partner, Brian Schwartz. Their insight and commentary kept the seminar lively and informative.

We all know that alimony conjures up more emotions in divorce than any other financial issue. It is safe to assume that anyone who willingly or gladly wants to pay alimony must have been in a miserable marriage for years! How often do we hear pure vitriol spew from a payor's mouth when told he or she will have to pay permanent alimony? Recently, I received a post-judgment motion where the payor claimed that paying alimony was psychiatrically detrimental to his health. The negative visceral reaction to paying alimony appears to be instinctual rather than learned.

It should come as no surprise that the issue of alimony probably holds up settlements in divorce cases more than any other issue. Often, it is not whether alimony will be awarded, but the amount and duration that cannot be resolved. We all know the statutory factors to be argued, but how your particular judge is going to address those factors remains to be seen. A judge's particular views impact alimony and college contribution cases more than any others.

During our bench/bar conference, a fact pattern was

presented to see how the individual judges would rule in awarding alimony. The moderators then changed one or two of the facts to determine whether the change(s) would affect, the alimony award. The results were varied, both as to amount and duration. The judges were able to articulate their reasons for the alimony awards. An appellate judge opined that all of the suggested alimony awards would most likely be affirmed on appeal. We also learned that less than 20 percent of cases appealed are reversed or remanded on the issue of alimony.

The divergent views gave us some food for thought. First, should there be alimony guidelines? The resounding answer was "no." Both judges and lawyers agreed that alimony is simply too fact sensitive to warrant the application of guidelines. Notwithstanding, there was discussion about the alleged "northern" view of awarding alimony; that is, awarding one-third of the differential in the parties' income. Truthfully, when we are faced with middle-income families, this rule of thumb may make sense. However, alimony should not be determined by a mathematical formula.

There also are some who argue for an equalization of the incomes of the spouses. For some reason, however, very few people are comfortable with an equalization of income. We tell ourselves that it's not fair to leave the person who has to go to work every day with the same level of income as the recipient. So at the end of the day, my guess is that most alimony cases settle between 25 to 40 percent of the differential in income, with the lower number attributable to shorter-term marriages and the larger to long-term marriages. It's also fair to say that permanent alimony is most likely to be awarded after a 15-year marriage, assuming a disparity in income.

Despite all of the rules of thumb, it is clear that how

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we advocate for our clients regarding alimony remains crucial. Since there are no guidelines for alimony, we, as attorneys, have a more important role in preparing our cases and arguing on behalf of our clients. We cannot simply argue disparity in income and length of marriage. The ages of the parties, the ages of the children, history of earnings, costs of child care, custodial obligations and earning capacity all play significant parts in the equation. We should be putting together a comprehensive plan with and for our client to address the alimony award.

But how do we get to communicate those plans? Is the early settlement panel (ESP) the first opportunity to put forth our position? If we are unsuccessful at the ESP, then do we save these arguments for a mediator? When, if ever, do the courts finally get to hear our proposals? When does it make the most sense to have those arguments raised?

We are all acutely aware of how hard our family part judges work. We know their calendars are full on a daily basis. We constantly hear about backlog and the one-year rule for resolving divorces. We know in most counties that peremptory trial dates may mean no more than a half hour of trial time, if that. "No further adjournments" is stamped on almost every scheduling notice generated from the courts; yet, the actual trial date is rarely as definitive as the notice might seem. My guess is that most of these unresolved cases are stuck on an alimony issue. Is there a better way to deal with the issue and get our positions heard earlier?

One solution is to have our judges involved in our cases earlier. Far too often, we get no face time with the judge to hear his or her perspective on the issues. It would go a long way for a litigant to know the judge's perspective early in the game. Telephonic case management conferences with attorneys and court staff may put a scheduling order in place, but it is of no benefit to the litigants. Bringing the litigants into court and introducing them to the judge hearing their case is often the first time a party realizes that divorce is a reality. A court appearance requires more attention to the file. While the parties may not be emotionally prepared to settle their case, it's a good time for them to hear the judge's initial impressions on alimony and other issues.

Initial impressions are just that; sometimes they are right and sometimes they are not. In the simpler cases, however, it is helpful for a litigant to hear that a short-term marriage is not going to provide a lot of alimony, if any. In the long-term marriages, it helps to have a judge pronounce that permanent alimony is almost a certainty. We all know that clients sometimes need a third party to confirm our advice and predictions, and in the more difficult cases of midterm marriages it is important to hear the judge's initial impressions. The client should have an opportunity to hear from the judge what factors will be important to the court in fashioning an alimony award. This allows the litigants,

as well as the attorneys, to focus on the factors the court expects to consider at the time of trial.

It is unlikely that the court's initial impressions will cause the case to settle at the first case management conference, but it forces everyone to pinpoint the issues. If, after the ESP, the alimony issue is still looming, these cases should go back to the judge for a settlement conference *before* sending them off to economic mediation. It is so easy to simply sign an order for economic mediation rather than hold a substantive settlement conference. In an effort to get cases off the court's docket, we are merely shuffling them aside, forced to revisit them again after failed mediation. Instead, I believe that if we were afforded a meaningful settlement conference immediately after the ESP, many of these cases would resolve more quickly—if not that day then, perhaps, soon thereafter.

There are some judges who are reluctant to share their impressions for settlement because they will be the trier of fact if the case does not resolve. I have yet to try a case to conclusion where the judge decided the case exactly how settlement was suggested. I think we all trust our judges enough (or should) to know that once trial starts, we begin with a clean slate. As a result, I encourage our judges to roll up their sleeves and try to help in the settlement of our cases. In the long run, it will move the calendars faster and more efficiently. Economic mediation can be saved for the cases that really need it.

Our best mediators are spending too much of their valuable time, with no compensation, scheduling conferences and reviewing files that could have been more easily disposed of by the court after ESP. Litigants are paying for mediation after two free hours that they didn't ask for or want. Lawyers are not always preparing their cases properly for ESP because they know that the matter won't be addressed by the court, but rather will be sent to mediation. Accountability and judicial participation early on in the process will bring more matters to settlement faster and more efficiently.

It is harder and harder for a litigant to get his or her day in court. At a minimum, involvement by our judges in settlement discussions will bring more satisfaction in the results and the process. ■

FROM THE EDITOR-IN-CHIEF

Child Support: The Good, the Bad and the Ugly

by Mark H. Sobel

Perhaps it was because I was traveling to Atlantic City to attend the Bar Convention that I began to think how provincial the *northern* practitioners in this state are and just how much there is to learn from our *southern* colleagues. While all of us profess the importance of enforcement of child support orders, it seems that our southern colleagues recently have put some teeth into that broad pronouncement.

In Burlington County, the Honorable Thomas S. Smith Jr., presiding judge of the criminal part, after a criminal trial, recently sentenced an individual to jail for willful non-support. Based upon my research, it was the first case I saw resulting in incarceration for non-support since 1975. That is an awfully long time ago.

For more than 30 years, while we professed intolerance for non-support, we collectively failed to utilize all of the mechanisms for enforcement that were, in fact, available. Pursuant to N.J.S.A. 2C:24-5, willful non-support occurs, and a person commits a crime in the fourth degree, if he "willfully fails to provide support which he can provide and which he knows he is legally obligated to provide to a spouse, child or other dependent." The penalty for such a violation of this New Jersey statute is in addition to the requirements under N.J.S.A. 2C:62-1 *et. seq.*

As important as the action taken in Burlington County was, it is equally important that it be publicized. All practitioners need to know that the *pay or stay hearings* are not the only vehicles to make certain that the paramount purpose to have support orders paid on a consistent basis is a firm policy of our state. It is sanctioned by our Legislature and carries with it real criminal exposure. We can all learn by the example in Burlington County, that child support is a serious business, and failure to meet such requirements can and should carry serious consequences. We should not have had to wait over 30 years to re-establish this firm commitment, and the actions in Burlington County are to be lauded as both necessary and appropriate, given the societal costs of willful non-support.

Now, as far as the bad is concerned, even a cursory review of the new Child Support Guidelines would cause one to pause. How is it possible that the new guidelines could in some instances actually lower the child support amounts? It seems inconceivable that things could actually be cheaper now then they were a few years ago.

While people are examining that phenomenon, one issue that rarely gets examined is not the amounts, but the statistical pool upon which they are predicated. It seems to be an extremely small sampling, especially at the upper ranges, which is utilized to form these guidelines. While statisticians can say that these may be statistically significant, I wonder if less than a few hundred examples of individuals earning collectively over $200,000 throughout the country can possibly fairly approximate the real child support costs of those families living in New Jersey.

No matter what takes place regarding a review of the child support guidelines, it is vital that the underpinnings of those guidelines be examined. We need to know, and the court should be advised in discussing these *rebuttable* presumptions, exactly how many individual sub-sets were utilized for the particular category currently before the court. I believe it would be instructive for us, as well as the court, to know that perhaps as few as 12 subsets were utilized for a particular category of the guidelines. That is vital information that we should have in order to understand just how rebuttable these rebuttable presumptions may, in fact, be.

As far as the ugly (this may just be in the eye of the beholder because it may generate additional litigation which, while economically productive for lawyers and experts, may not be so for the actual litigants), the recent promulgation of the guidelines may, in fact, result in applications for reduction based merely upon those guidelines. That flood of motion practice seems not to have occurred, and I would urge my colleagues to examine a recent Appellate Division decision before embarking upon that course of action.

In *Fortsch v. Fortsch,*[1] decided by the Appellate Division on April 20, 2007, the court reversed and remanded a trial court decision regarding interpretation of a

property settlement agreement. In accordance with that property settlement agreement, the father was required to pay child support in the amount of $525 per month for each of his four children. The agreement also provided that upon emancipation, child support for the remaining children would be adjusted. Upon the emancipation of the parties' eldest child, the father moved to reduce child support. The mother moved to increase the father's obligation, and the trial court concluded that the $525 per child would remain in place.

Importantly, the Appellate Division, in reversing and remanding the trial court's determination, urged that the initial determination was too narrow. It did not focus upon the maturation of the children during their period of non-emancipation nor "the time that has elapsed" until modification, suggesting inflation and other issues were appropriately to be considered at the time of the readjustment. As a result, the Appellate Division recognized that the amount per child may likely increase per child, even though the support would now only be for three children rather than four.

Given the above determination, it would appear that the Appellate Division has become somewhat sensitized to the Child Support Guidelines and the fact that these presumptions are actually rebuttable, a concept those of us at the trial level find somewhat as likely as actually winning at the casinos in Atlantic City. While everyone professes that it can actually happen, the casinos did not get built upon winnings. As we swear in our new slate of officers for the upcoming year, it would be helpful if we all address the importance of both enforcing child support and making sure that the child support amount is both fair and equitable. If we can do the latter, the former should be easier to accomplish. ■

ENDNOTE

1. A-4174-05T1, decided April 20, 2007.

SENIOR EDITOR'S COLUMN

Same-Sex Marriage

by Toby Solomon

The issue of same-sex marriage continues to be a topic of heated debate. The New Jersey Legislature enacted the Domestic Partnership Act, which took effect on July 10, 2004. This act formally recognized domestic partnerships and guaranteed certain rights and benefits to couples of the same sex who entered into such partnerships. On Oct. 25, 2006, the New Jersey Supreme Court decided *Lewis v. Harris*,[1] which held that same-sex couples have the same rights under the New Jersey Constitution as married heterosexual couples.

The Court declined, however, to place this entitlement to equal rights under the label of "marriage," and instead left that determination to the Legislature. The Legislature was given 180 days to draft legislation to conform to the Court's decision. The bill set forth by the New Jersey Legislature established civil unions. The resultant legislation gives same-sex couples all the rights and responsibilities of marriage allowed under state law, but still not the title. This was not the end of the heated debate, but rather raised new issues.

The articles in this issue provide an overview of the current status of civil unions with the attendant benefits, the inevitable problems and thorny issues, which have and will continue to arise. ■

ENDNOTE

1. *Lewis v. Harris*, 188 N.J. 415 (2006).

FROM THE EDITOR-IN-CHIEF *EMERITUS*

Congratulations Lynn Fontaine Newsome

by Lee M. Hymerling

It is the pleasure of the *New Jersey Family Lawyer's* Editorial Board to congratulate our colleague and friend, Lynn Fontaine Newsome, upon assuming the presidency of the New Jersey State Bar Association. Lynn's elevation represents the result of years of dedication, not only to the NJSBA, but also to our profession. As president, we have no doubt that Lynn will serve with honor and distinction, not only as the spokesperson for all lawyers in our state, but, most particularly, for family lawyers, for, indeed, Lynn has long practiced with us in this, our chosen field.

Lynn's distinguished service as an attorney not only includes her past service as chair of the NJSBA Family Law Section; 10 years service on the New Jersey Supreme Court Family Practice Committee; service as a master of the Family Law Inns of Court; service as chair of the Morris County Family Law Committee and as president of the Morris County Bar Association and Foundation. Lynn also has frequently lectured for the New Jersey Institute for Continuing Legal Education. Her ascendancy to state bar president marks the culmination of her long climb through the ranks of the NJSBA's Board of Trustees, from the role of trustee through each executive committee post to the NJSBA presidency. That climb stands as evidence not only of Lynn's stamina, but also her dedication to our profession and the organization she now leads.

In 2006, before her elevation, Lynn received our section's highest honor, the Saul Tischler Award, in recognition of her career and the leadership she has provided to our section and to the bar as a whole. It was a well-deserved award to not only a consummate professional, but also a true leader.

One cannot underestimate the role of our state bar. It is the only lawyer organization that has the depth and wealth of human resources to represent the whole of our state's practicing bar. Through its sections and committees; its staff and its publications, the NJSBA has the ability to effect the professional lives of every lawyer in this state, whether a member or not. From its unique access to our Supreme Court to its skilled ability to appear before legislative committees to its contact with the Executive Branch, the state bar has made a difference.

That is why the state bar presidency is so important, and why only the most skilled and most wise should be entrusted with the privilege of leadership. We, as lawyers, are not the easiest of constituents to lead. As advocates, we frequently resist leadership and often are troubled by change. As those skilled in argument, we are not always the best listeners.

Lynn, by temperament and experience, is perfect for the job. She is not only a great listener, but also skilled at synthesizing what she hears into a plan of action. And there is so much for her to do.

The year ahead will present Lynn with many challenges. She will have to grapple with thorny issues, including the likely introduction of mandatory continuing legal education for all practicing New Jersey attorneys. This is not something that should be resisted, but something that should be embraced. Undoubtedly, she also will be called upon to advocate for judicial pay raises that are so long overdue. The canons of judicial conduct preclude our judges from actively involving themselves in the political process, but we, as lawyers, are not so barred. We are sure that the vast majority of the NJSBA's membership will join Lynn in doing all she can to assure our state and its citizens a continuation of a Judiciary second to none. That will only be possible if our judges are fairly paid. This is a perfect area in which our bar should lead the way.

The year ahead also will give Lynn the opportunity to work with a new chief justice, one who might serve for a generation to come. Our bar has long been honored to have a unique relationship with the bench—a relationship that our late, great Chief Justice Robert Wilentz often called a partnership. Such a partnership is just as important now as it was when, almost three decades ago, Chief Justice Wilentz assumed his role. The concept of such a partnership has withstood the test of time. It was respected by Chief Justice Deborah Poritz, just as it was respected during the all-too-short tenure of Chief Justice James Zazzali. Lynn is the perfect person to lead the bar as this partnership is renewed, and she is the perfect person to strengthen the respect that our Supreme Court has for the bar. A strong and enduring relationship between the bench and the bar is in the public's interest.

At the same time, Lynn will be charged with maintaining and

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Meet the Officers

LIZANNE J. CECONI (CHAIR)

Lizanne J. Ceconi is a principal and managing partner of Ceconi & Cheifetz, LLC, in Summit. A past president of the Union County Bar Association, she has served on the Judicial and Prosecutorial Appointments Committee and the Family Law Committee. Ms. Ceconi served as president of the Northern New Jersey Inns of Court and is presently a master and group leader. On behalf of the NJSBA Family Law Section Executive Committee, she has been instrumental in planning the last four Annual Family Law Retreats to Charleston, Santa Fe, Las Vegas and New Orleans. Ms. Ceconi received her undergraduate degree from Villanova University and her law degree from Seton Hall School of Law.

EDWARD J. O'DONNELL (CHAIR-ELECT)

Edward J. O'Donnell is certified as a matrimonial law attorney by the Supreme Court of New Jersey and a partner in Donahue, Hagan, Klein, Newsome & O'Donnell, P.C., concentrating in family law with an emphasis in divorce litigation. The president-elect of the Essex County Bar Association, he is a past chair of the association's Family Law Committee and was the 1998 recipient of the Essex County Bar Association Family Law Achievement Award. Mr. O'Donnell also is an officer of the Family Law Section of the Association of Trial Lawyers of America, as well as the president of the Northern New Jersey Family Law Inn of Court. He has lectured on family law issues for ICLE, the Association of Trial Lawyers of America, the New York State Bar Association, the Canadian Institute, the New Jersey Family Law Inns of Court, and the Essex and Bergen County Bar Foundations. A published author, he has contributed to *New Jersey Family Law Practice, 11th Ed.,* published by NJICLE, and the Essex County Bar Association publication *Traps for the Unwary.*

CHARLES F. VUOTTO JR. (FIRST VICE-CHAIR)

Charles F. Vuotto Jr. is a shareholder with Wilentz, Goldman & Spitzer in Woodbridge. He is certified by the New Jersey Supreme Court as a matrimonial attorney. He has lectured extensively to the public, bench, bar, accountants and paralegals on various family law-related issues, including: ICLE (including the 2004 Family Law Symposium); the New Jersey Bar Foundation; the American Institute of Certified Public Accountants; and the New Jersey Society of CPAs. Mr. Vuotto authored the brief in support of the NJSBA's motion for leave to appear as *amicus curiae* in the case of *Brown v. Brown,* and has authored or co-authored numerous articles on the topic of family law. Mr. Vuotto received his undergraduate degree from Seton Hall University and his law degree from Ohio Northern University, Claude W. Pettit College of Law.

THOMAS J. SNYDER (SECOND VICE-CHAIR)

Thomas J. Snyder is a partner with the law firm of Einhorn, Harris, Ascher, Barbarito, Frost & Ironson, and devotes his practice exclusively to family law matters. He has contributed to the NJSBA *amicus curie* brief submitted in the matter of *Lewis v. Harris,* and as a former legislative chair for the section testified on behalf of the NJSBA before state legislative subcommittees involving open adoption. For his lobbying efforts, he received the NJSBA Distinguished Legislation Award for 2006. Mr. Snyder has lectured on family law matters on behalf of the NJSBA, the New Jersey State Bar Foundation and ICLE. He is a member of the Association of Trial Lawyers of America and a graduate of the National Institute of Trial Advocacy. Mr. Snyder graduated from Seton Hall School of Law and served as judicial law clerk for the Honorable Peter B. Cooper.

ANDREA WHITE O'BRIEN (SECRETARY)

Andrea White O'Brien is a partner in the family law department of Lomurro, Davison, Eastman & Munoz in Freehold. Certified by the New Jersey Supreme Court as a matrimonial law attorney, she was a 2006 recipient of the Women of Achievement Award from the Women Lawyers of Monmouth and is an associate managing editor for the *New Jersey Family Lawyer.* Ms. O'Brien is a member of the Monmouth County Bar Association, co-chairing the Family Law Committee; the Association of Trial Lawyers of America, New Jersey Chapter; the Ocean County Bar Association; the Women Lawyers of Monmouth County; and the Jersey Shore Collaborative Law Group. She serves as a panelist in the Monmouth County Early Settlement Program and lectures on family law issues. Ms. O'Brien earned her undergraduate degree from Villanova University and her law degree from Brooklyn Law School, and served as a judicial law clerk for the Honorable Clarkson S. Fisher Jr.

IVETTE R. ALVAREZ (IMMEDIATE PAST CHAIR)

Ivette R. Alvarez is counsel at Einhorn, Harris, Ascher, Barbarito, Frost & Ironson. She is a member of the New Jersey State, Garden State and Essex County Bar Associations; the immediate past president of the Hispanic Bar Association of New Jersey; and a trustee at large for the New Jersey State Bar Association. 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 also has been a board member and community advisor for the Resource Center for Women. ■

Same-Sex Marriage and Civil Unions

The Passion, Protest and Progress

by Toby Solomon

The issue of gay marriages and same-sex civil unions has become a national debate engendering passionate arguments. This article is an overview addressing the history of marriage, same-sex marriages and the status and legal ramifications of same-sex civil unions in New Jersey.

THE HISTORY OF MARRIAGE

The concept of marriage has changed over the centuries. In Biblical times, polygamy was common, and it continues to be practiced by the Mormons in the United States and in some Islamic cultures. Likewise, polyandry, which is a form of polygamy in which one woman is married to several men, was also practiced in some countries. Marriage contracts between two men were permitted in ancient Rome, although historians tell us that such marriages were often ridiculed.

The Catholic Church was not formally involved in marriage ceremonies until the Middle Ages. Not until relatively recently, in 1753, did England pass the Marriage Act, which took control of marriage from individuals and the church. Marriages had to take place in the Church of England or a synagogue to be valid. In 1836, an act was again passed in England, this time eliminating the requirement that marriages include a religious ceremony.

American colonies had civil and religious marriage ceremonies. Common law marriages also were allowed. Slaves were not permitted to marry, and their children became the property of the slaves' owners. Interracial marriages were prohibited in many states until 1967, when the United States Supreme Court struck down such laws as a violation of due process and equal protection.[1]

SAME-SEX MARRIAGE AND CIVIL UNIONS

The law regarding sexual orientation has changed significantly over the past two decades. In 2003, the United States Supreme Court overruled a case that upheld the sodomy conviction of two gay men.[2] The Court held that making private sexual conduct a crime was a violation of due process.

A multitude of varying areas of law are affected by sexual orientation. The United States General Accounting Office has identified 1,138 federal rights, responsibilities and privileges automatically accorded to married couples in such areas as family law, which affect distribution of property upon divorce, the right to seek spousal support, custody, visitation and parenting time and adoption.[3] Further, other areas of law, such as taxation, healthcare, torts, real estate, and immigration are affected, affording significant rights to married spouses.[4]

Only one state—Massachusetts—has recognized same-sex marriages.[5] However, prior to the decision of the Massachusetts Supreme Judicial Court in 2003, the Supreme Court of Vermont held that same-sex couples do not have a right to marry, but have the right to the same benefits and protections as married couples.[6] Same-sex couples in Vermont were granted the right to have civil unions. In other states, the Legislature and courts have been at odds. For example, the Supreme Court of Hawaii held that a prohibition of marriage by same-sex couples constituted sex discrimination under its constitution.[7] However, the Hawaii Legislature later amended its constitution to reserve marriage to couples of the opposite sex.

In the mid-1990s states began enacting Defense of Marriage Acts[8] (DOMAs). The sole purpose of the DOMAs was to prohibit same-sex couples from marrying within the state, and to make sure the state would not recognize such marriages performed in other states. The United States government enacted a DOMA in 1996, which provides that for the purpose of federal laws and regulations, marriage means 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. Further, no state is required to recognize the same-sex marriage of another state.

Presently there are several countries that allow same-sex couples to marry. These countries include Canada, the Netherlands, Belgium, South Africa and Spain; others such as Great Britain, Sweden, New Zealand, France and Iceland allow same-sex couples to enter into legal relationships; still other countries, which provide for neither, do grant same-sex couples access to benefits and obligations similar or associated with marriage. Some states/jurisdictions—including the District of Columbia,

California, Maine and Hawaii—extend a narrow range of benefits.

CIVIL UNIONS IN NEW JERSEY

New Jersey has neither a law, nor a state constitutional amendment blocking same-sex marriage, and marriage is not defined in New Jersey statutes as a union between a man and a woman, yet the state's marriage laws have not permitted same-sex couples to marry.

On June 26, 2002, seven same-sex couples instituted an action in the superior court, Law Division, in Hudson County seeking to challenge this state's refusal to permit them to marry. The plaintiffs argued, *inter alia*, that they were being denied the rights and benefits of marriage. The plaintiffs were couples involved in committed relationships, and four of the seven couples had children. The thrust of the plaintiffs' argument centered on Article 1, paragraph 1 of the New Jersey Constitution, specifically alleging that the state's refusal to issue marriage licenses to same-sex couples offended their right to equal protection.[9] The defendants—the commissioner of the Department of Human Services, the commissioner of the Department of Health and Senior Services and the acting registrar of vital statistics—advanced the following arguments:

> (1) the plaintiffs cannot overcome the presumption that New Jersey Marriage laws are constitutional; (2) New Jersey Marriage laws do not permit same-sex couples to marry; (3) the Federal government and all 50 states do not recognize same-sex marriages; (4) plaintiffs' privacy rights are not violated by their inability to enter into a same-sex marriage; and (5) the plaintiffs' equal protection rights are not violated by an inability to enter into a same-sex marriage.[9]

On Nov. 5, 2003, the court found that "the marriage laws in this State, taken as a whole, did not support a conclusion that the legislature intended for same-sex couples to have the authority to marry."[10] The court acknowledged that the specific language "man and woman" is not used within N.J.S.A. 37:1-2 in relation to the issuance of a marriage license; however, the court reasoned that "the statutory scheme in New Jersey, since its inception, has defined a marriage and married persons as a relationship between members of the opposite sex."[11]

On the heels of the court's decision, New Jersey enacted the Domestic Partnership Act, which took effect on July 10, 2004, and constituted comprehensive legislation that prohibited discrimination based on sexual orientation, formally recognized domestic partnerships, and guaranteed certain rights and benefits to those individuals who enter into the domestic partnerships.[12] The act afforded limited rights with regard to family law. Instead, the act afforded rights *vis-a-vis* third parties—for example, the right for domestic partners to visit each other in the hospital and to make medical decisions for an incapacitated partner, and the opportunity for couples engaged in a domestic partnership to file joint state income tax returns. The act could not extend rights provided under federal law; therefore. joint federal income tax returns could not be filed.

On Oct. 25, 2006, the New Jersey Supreme Court decided *Lewis v. Harris*[13] and determined that committed same-sex couples have the same rights under the New Jersey Constitution as married heterosexual couples. The Court held that the equal protection guarantee of Article 1, paragraph 1 of the New Jersey Constitution was violated by denying rights and benefits to committed same-sex couples that were available to their heterosexual counterparts.

However, the Court did not find that a fundamental right to same-sex marriage exists in this state, declined to place this right under the label of "marriage," and instead left it up to the Legislature to determine, giving it 180 days to rewrite the state's laws to reflect the Court's decision. The Court held that the state could fulfill the constitutional requirement in one of two ways. It could either amend the marriage statutes to include same-sex couples, as in Massachusetts, or enact a parallel statutory structure by another name, similar to Vermont, in which same-sex couples would not only enjoy the rights and benefits, but also bear the burdens and obligations of civil marriage.[14]

In compliance with the constitutional mandates set forth by the Court in *Lewis v. Harris*, the Legislature opted to establish civil unions. The bill establishing civil unions in New Jersey was signed into law by Governor Jon Corzine on Dec. 19, 2006. The first civil unions took place on Feb. 19, 2007. This legislation made New Jersey the third state to offer civil unions. Jurisdictions in North America that offer either civil unions, registered or domestic partnerships include Hawaii (1996), California (1998), Maine (1999), Vermont (2000), Connecticut (2005), New Jersey (2006), as well as the District of Columbia (Washington, DC) (2001).

The bill specifically states that parties to a civil union will have "all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, which are granted to spouses in a marriage."[16] The bill further states that members of same-sex partnerships will have full rights to a partner's insurance, healthcare decisions, benefits and tax breaks. Among the expanded rights provided by the amended law is the eligibility for same-sex couples to hold title to real and personal property as tenants by the entirety. It is important to recognize, however, the limitations still facing individuals entering into civil unions, which include that civil unions are not recognized by the federal government and the expanded rights are only applicable to rights and benefits available under state law. Accordingly, their status

will not be recognized on the federal level, nor will disapproving states respect these rights, which currently provide some degree of relationship recognition.

The implication of the federal DOMA comes into play as the definition of spouse under federal law refers only to marriages between people of the opposite sex. For example, the Employee Retirement Income Security Act (ERISA) preempts state law with respect to benefit plans covered by ERISA, including many types of welfare benefits, as well as retirement plans. Since DOMA applies to ERISA, and ERISA preempts state law, the New Jersey law cannot create a binding obligation on plans governed by ERISA to recognize same-sex partners as spouses. However, the rules get even more complicated when the employer provides medical benefits through the purchase of insurance. ERISA does not preempt the state regulation of insurance. However, if the health insurance plan is governed by ERISA, New Jersey cannot regulate it. There is a question regarding whether state law is exempt from ERISA under certain conditions, for example, if a plan is 100 percent self-insured.

There are still other problems. For example, due to the impact of DOMA on federal tax laws, employer-paid costs of providing coverage for same-sex partners who are not "dependents" under the Internal Revenue Code would be considered regular compensation, and would be taxable as income. Moreover, that portion of the premium an employee pays attributable to the same-sex partner's coverage would not be eligible for pre-tax treatment under a cafeteria plan. Accordingly, employers who have employees who are parties to a civil union will have to assure that the employee's benefit is properly treated for federal tax purposes. The rights of surviving same-sex partners also are complicated because survivor rights may involve the application of federal law such as the case with Social Security benefits.

ADOPTIONS BY SAME-SEX PARTNERS

Prior to New Jersey's current legislation permitting civil unions, the state addressed an interrelated issue of heated debate, which was adoption by same-sex couples. Same-sex adoptions constitute an adoption of a minor child by a family comprised of the biological parent and the same-sex cohabiting partner of the biological parent. The fundamental question presented before the appellate court was whether the adoption statute permitted the adoption of children by the same-sex cohabiting partner of their natural mother without affecting the mother's parental rights.[17] The appellate court rejected a trial court's holding that since the plaintiff was not the legal spouse of the biological mother, she could not qualify as a stepparent, since it would have the effect of terminating the biological mother's rights. The appellate court chose a less restrictive interpretation of the adoption act, which is silent regarding joint adoption by unmarried persons and adoption by a same-sex partner or an unmarried cohabitant of the birth mother. The court reasoned that the statutory imperative is for the act to be liberally construed to the end that the best interests of the children be promoted.[18]

Other states, including New York, Connecticut and Vermont, also have considered the precise question in similar factual contexts involving almost identical statutes, and have similarly recognized the right of an unmarried partner of a child's biological mother, whether heterosexual or homosexual, who is raising the child together with the biological parent, to become the child's second parent by means of adoption.[19]

In view of these decisions, the child of an unmarried couple is entitled to an array of rights and privileges from both parents, including health insurance benefits, Social Security and inheritance rights. These decisions have further allowed both parents to make medical and educational decisions for a child. Granting a second-parent adoption has insured that two adults are legally responsible for the child.

A same-sex partner who does not formally adopt his or her partner's child(ren) runs the risk of his or her parental rights being challenged at the time of a dissolution of the civil union, and even greater challenges if the couple relocates to a state that neither recognizes civil unions, nor same-sex adoptions. Full faith and credit and comity principles simply will not apply in such situations. A recent case before the Virginia Court of Appeals addressed such an issue.[20] The question was whether a Virginia court should recognize and grant full faith and credit to the custody and visitation orders of a Vermont court. In that case, the Virginia Court of Appeals ruled that the Vermont court had acquired jurisdiction over a child custody and visitation dispute arising from the dissolution of a civil union, which was entered into in Vermont.

The parties, Janet and Lisa Miller-Jenkins, were a same-sex couple residing in Virginia. The couple traveled to Vermont on or about Dec. 19, 2000, at which time they entered into a civil union. The couple thereafter returned to Virginia and decided to have a child through artificial insemination. In April 2002, Lisa gave birth to the couple's daughter. In August 2002, the parties moved to Vermont with the child. The couple separated in or about Sept. 2003, and Lisa took the child and moved to Virginia. Shortly thereafter, Lisa filed a petition for dissolution of the civil union in the Vermont trial court. In her petition, Lisa acknowledged that the child was born after the couple entered into a civil union. She requested that the court award custody to her and visitation for Janet. Lisa further asked the court to award child support.

On June 14, 2004, the Vermont court issued a temporary order, which awarded Lisa primary custody

and awarded Janet visitation. Lisa thereafter initiated a separate action in a Virginia trial court. The Virginia court, as a result, issued a conflicting order designating Lisa as the sole parent and finding that Janet did not have a right to custody or visitation. That order was the subject of an appeal before the Virginia Court of Appeals.

The court held that the Virginia trial court did not have jurisdiction in this case on the ground that Lisa previously invoked the jurisdiction of the Vermont court by filing her petition in Vermont. Accordingly, federal law, more specifically the Parental Kidnapping Prevention Act (PKPA),[21] prevented the Virginia court from exercising jurisdiction, and required that the previously entered orders of the Vermont court pertaining to custody and visitation be given full faith and credit, because the PKPA is clear that once a state acquires jurisdiction over a child custody or visitation case, another state cannot assume jurisdiction. However, the court focused on the limited issue of jurisdiction in the context of the facts of this matter and did not address whether Virginia law recognizes or endorses same-sex unions entered into in another state or jurisdiction. The matter is now on appeal to the Virginia Supreme Court.

DISSOLUTION OF CIVIL UNIONS

The dissolution of civil unions would follow the same procedures as those required for individuals seeking a divorce. The dissolution of a civil union could be sought on the same grounds as presently available for divorce. The superior court has jurisdiction over such matters involving the dissolution of a civil union, including annulment, premarital agreements,[22] divorce, alimony, child custody, parenting time, child support and property division. The bill specifically amends N.J.S.A. 2A:34-23 to provide individuals in a pending action for dissolution of a civil union the same rights available to individuals in a pending divorce action, including alimony and maintenance, as well as the care, custody, education and maintenance of any children. The rights of the parties to a civil union with respect to a child of whom either becomes the parent during the term of the civil union, will be the same as those of a married couple with respect to a child of whom either spouse becomes the parent during the marriage. Accordingly, the parties to a civil union would be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons.

The court may further order one party in an action for dissolution of a civil union to pay a retainer fee on behalf of the other party, and/or pay for expert and legal services when the respective financial circumstances of the parties make the award reasonable and just.

With the expansion of property rights under the amended law, parties to a civil union dissolution action will be able to seek equitable distribution of property, both real and personal, which was legally and beneficially acquired during the civil union. Similarly, all property—real, personal or otherwise—legally or beneficially acquired during the civil union by either party by way of gift, devise, or intestate succession, will not be subject to equitable distribution, except that gifts between parties to a civil union will be subject to equitable distribution.

In making an equitable distribution of property in a matter involving the dissolution of a civil union, the court must consider the relevant factors as set forth within N.J.S.A. 2A:34-23.1. The current equitable distribution statute was specifically amended to include civil unions.

CONCLUSION

Although *Lewis v. Harris* mandated equal protection under the law, it did not mandate same-sex marriage.[23] Therefore, although the decision brought good news for same-sex couples in New Jersey, many inequities remain. Further, given the federal DOMA and individual state DOMAs, problems will arise when couples leave New Jersey or come to New Jersey. For example, if a same-sex couple married in Massachusetts relocates to New Jersey, the state will not recognize their marriage, but will treat it as a civil union. Is this equality? The question remains whether it is a disparity that could or will be addressed any time soon. ■

ENDNOTES

1. *Loving v. Virginia*, 388 U.S. 1 (1967).
2. *Lawrence v. Texas*, 539 U.S. 558 (2003).
3. U.S. General Accounting Office, Jan. 23, 2004.
4. *Id.*
5. *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003).
6. *Baker v. State*, 744 A. 2d 864 (Vt. 1999).
7. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).
8. 28 U.S.C. § 1738C.
9. *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 at *1 (N.J. Super. L. Nov. 5, 2003).
10. *Id.* at *2.
11. *Id.* at *3.
12. *Id.*
13. Domestic Partnership Act, P.L. 2003, c.246 (c:26:8A-1 *et seq.*).
14. *Lewis v. Harris*, 188 N.J. 415 (2006).
15. *Id.* at 463.
16. P.L. 2006, C103 C.37:4(a).
17. *In the Matter of the Adoption of Two Children by H.N.R.,* 285 N.J. Super. 1 (App. Div. 1995). *See also, In re Adoption of a Child by J.M.G.,* 267 N.J. Super. 622 (Ch. Div. 1993).
18. *See* Toby Solomon, Adoption by Same-Sex Partners, *New Jersey Lawyer* 175, March 1996.
19. *See In the Matter of Evan*, 583 N.Y.S. 2d 997 (Surrogate's Court of New York 1992) (First reported decision in New York permitting female life partner of biological mother to legally adopt child since New York recognizes that a child's best interests are not predicated by parental sexual orientation and discrimination based upon sexual orientation is specifically proscribed); *In Re the Adoption by Baby Z*, 45 Conn. Supp. 33 699 A.2d 1065

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COMMENTARY

A Comity of Errors: N.J. Attorney General Reinterprets Common Law to Reject Foreign Same-Sex Marriages

by Thomas Hoff Prol

On Feb. 16, 2007, the New Jersey Attorney General issued a seven-page Formal Opinion No. 3-2007,[1] declaring that "government-sanctioned, same-sex relationships validly established under the laws of other States and foreign nations will be valid in New Jersey…as civil unions or domestic partnerships."[2] The attorney general's opinion also specifically addressed the recognition of so-called same-sex marriages entered into in Massachusetts and foreign nations, by dissecting the common law principle of comity and the full faith and credit clause of the U.S. Constitution with an eight-sentence, single footnote analysis citing to a state tax court case.[3]

The conclusion of the attorney general's opinion seems benign, even palatable. It endeavors to provide full recognition as civil unions to the foreign marriages of gays and lesbians. However, between the lines of Opinion 03-2007 is a new holding in New Jersey legal analysis that now requires state policy officers and civil servants to subject all foreign marriages to a discriminatory test. Indeed, New Jersey requires all marriages entering its jurisdictional limits be evaluated based on the sex and sexual orientation of the spouses. If the spouses are gay or lesbian, their marriage—a so-called same-sex marriage in the attorney general's opinion—must necessarily be transformed into a civil union by operation of New Jersey law.

This article will discuss why the author believes the attorney general is wrong. The long history of the common law principle of comity, as well as New Jersey's rich jurisprudence in recognizing marriages that are valid in other jurisdictions, even where they are not able to be legally formed under New Jersey law, point directly to the recognition of foreign same-sex marriages in New Jersey *as marriages*, not civil unions. The attorney general's conclusion reflects a misevaluation of the body of law pertaining to full faith and credit analysis, comity and conflict of laws; runs afoul of the Law Against Discrimination; and violates the holding and promise of equality of the New Jersey Supreme Court in *Lewis v. Harris*.[4]

THE NEW JERSEY CIVIL UNION ACT

The New Jersey Civil Union Act, P.L. 2006, c. 103, was signed into law on Dec. 21, 2006, and was effective Feb. 19, 2007. The act emanated from the New Jersey Supreme Court's unanimous Oct. 25, 2006, decision in *Lewis v. Harris,* which mandated that "the unequal dispensation of rights and benefits to committed same-sex couples can no longer be tolerated under our State Constitution."[5] The Supreme Court continued in *Lewis*:

> [w]ith this State's legislative and judicial commitment to eradicating sexual orientation discrimination as our backdrop, *we now hold that denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, Paragraph I* [of the New Jersey Constitution] [emphasis added].[6]

The Court ordered the New Jersey Legislature to enact implementing legislation to provide for the formation of legal relationships for gay men and lesbians.[7] The decision was split 4-3, leaving to the Legislature the choice of whether to label such a union marriage or to construct a "civil union" statute through a "parallel" and "separate statutory scheme:"[8]

> [t]he Legislature must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples. We will not presume that a separate statutory scheme, which uses a title other than marriage, contravenes equal protection principles, so long as the rights and benefits of civil marriage are made equally available to same-sex couples.[9]

Chief Justice Deborah Poritz, writing for the dissent, stated that there is "no principled basis"[10] on which the majority can deny "marriage" to same-sex couples:

> [w]hat we 'name' things matters, language matters…By excluding same-

> sex couples from civil marriage, the state declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as 'real' marriage, that such lesser relationships cannot have the name of marriage.[11]

The Civil Unions Act states, "[c]ivil union couples shall have all the same benefits, protection and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage."[12]

The "partner[s] in a civil union"[13] have essentially all the same rights as a married couple under New Jersey state law, but they are denied all rights and benefits, as well as standing to claim them, as are provided for similarly situated married couples under federal law. The Defense of Marriage Act (DOMA), at 18 U.S.C. § 1738C, defines marriage as the union of one man to one woman for federal legal issues, and provides that a state is not required to give legal effect to a same-sex marriage solemnized in another state.

New Jersey law provides that a civil union is created under a separate statutory scheme, but has drafted them to be equal to marriages under New Jersey law. They are not a *per se* "marriage" with "spouses," which are the terms of art applicable in all federal laws providing benefits to married persons. Likewise, their status is not required to be recognized by other states, and they are not entitled to the rights, benefits and protections afforded married couples by federal law.[14] Indeed, these partners apparently lack fundamental legal standing to lay claim to interstate recognition or those federal rights, benefits and protections simply because of the words used to define them.

The Civil Unions Act failed to deliver on the *Lewis* holding's promise of full equality under the law, as it could not create rights, nor standing to claim rights provided to spouses or married couples under federal law and laws of other states. This unfulfilled promise now extends to the state's apparent alternate recognition of foreign marriages, including those from a sister state and a number of nations who grant full and equal marriage rights to committed same-sex couples.

A STRONG PUBLIC POLICY FAVORING RECOGNITION AND SUPPORT OF SAME-SEX RELATIONSHIPS

In the *Lewis* holding, the Supreme Court remarked on "this State's legislative and judicial commitment to eradicating sexual orientation discrimination."[15] In implementing the mandate of that holding by creation of the Civil Unions Act, the New Jersey State Legislature reflected public policy pronouncements it recited two years prior in the Domestic Partnership Act.[16] Those findings in 2003 were powerful and significant:

> [t]here are a certain number of individuals in this State who choose to live together in *important personal, emotional and economic committed relationships* with another individual…[and t]hese *familial relationships*, which are known as domestic partnerships, *assist the State* by their establishment of a private network of support for…their participants [emphasis added].[17]

The state Legislature built on those findings, declaring in the preface of the Civil Unions Act that, "[p]romoting such stable and durable relationships as well as eliminating obstacles and hardships these couples may face is necessary and proper and reaffirms this State's obligation to insure equality for all the citizens of New Jersey."[18] They summarized, "the Legislature is continuing its longstanding history of insuring equality under the laws for all New Jersey citizens by providing same-sex couples with the same rights and benefits as heterosexual couples who choose to marry."[19]

New Jersey is a long-standing leader in civil rights protections for gay men and lesbians around the nation by virtue of its expansive and far-reaching New Jersey Law Against Discrimination.[20] Since at least 1992, the Law Against Discrimination has made it unlawful to subject people in New Jersey to differential treatment in employment, housing, places of public accommodation, credit and business contracts based on various factors, including "affectional or sexual orientation."[21]

In enacting the Law Against Discrimination, the New Jersey Legislature sought to eliminate discrimination against protected people, finding:

> …that practices of discrimination against any of its inhabitants [in the enumerated classes]…are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State.[22]

A LONG HISTORY OF RECOGNIZING MARRIAGES FROM OTHER JURISDICTIONS

The New Jersey Supreme Court has repeatedly looked to the restatement as a baseline for interpretation of the validity of foreign marriages conducted outside the territorial limits of the state.[23] The Restatement (Second) of Conflict of Laws Section 283(2) (1971) provides:

> [a] marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid *unless it violates the strong public policy* of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage [emphasis added].[24]

In 1890, the New Jersey Court of

Errors and Appeals, the predecessor to our modern state Supreme Court, met with a legal scenario similar to the question presented to the attorney general by foreign same-sex marriages. In *Smith v. Smith*,[25] the former Eveline Verona English-cum-Mrs. Hezekiah B. Smith made claim of dower in the estate of the deceased Hezekiah B. Smith, with whom she understood she had a marriage in Massachusetts and, thereafter, four children, prior to his abandonment of the family. The Court inquired into the proper disposition of an estate related to a marriage found to have been validly conducted in Massachusetts, though one that may not have been legally formed had it been conducted within the borders of New Jersey.

The Court reiterated its previous holdings on the subject,

> [i]t was said by this court in *Harral v. Harral*, 39 N.J. Eq. 279-287 [(1884)], that "*the doctrine generally adopted, and supported by reason and public policy, is that a marriage celebrated according to the rites and ceremonies recognized by the laws of the country where the marriage takes place is valid everywhere.*" The law of marriage is said to be part of the les gentium, governed by the lex loci contractus, and recognized everywhere in civilized nations, with some exceptions involving polygamy, incest, and probably some other equally heinous crimes against the generally recognized law of marriage, and express prohibitory and invalidating words in a statute. *Certainly it is the law of comity between the different states of this country* [emphasis added].[26]

New Jersey has a long history of recognizing marriages that are valid in the jurisdiction in which they are performed, regardless of whether or not this state actually authorizes such formation within its own borders. Though there is a presumption that a marriage is valid when it comes before the court for scrutiny, the courts of New Jersey also have had moments to deny recognition of certain marriages where it found the parties incapable of forming the necessary intent to contract for the marriage,[27] it deemed the relationship to violate the state's public policy against incest by deviation within the bounds of consanguinity,[28] or it found the marriage was polygamous as a matter of law.[29]

CASES ON POINT: COMMON LAW MARRIAGES AND PROXY MARRIAGES

The Appellate Division clarified in the 1957 holding of *Winn v. Wiggins*[30] that New Jersey will recognize a common law marriage that is valid in the state where it was entered:

> [t]he two essentials of a common-law marriage are capacity in the parties and their mutual consent… *Simmons v. Simmons*, 35 N.J. Super. 575, 579 (App. Div. 1955). By reason of N.J.S.A. 37:1-10, which declares void any common-law marriage contracted [in N.J.] after December 1, 1939, the parties must also show that the common-law marriage was recognized under the laws of the state where it occurred.[31]

While the court in *Winn* specifically declined to determine whether New Jersey will recognize a common law marriage performed in another state for two New Jersey domiciliaries,[32] it did suggest it was inclined to disfavor such marriages as evasion of New Jersey law. However, New Jersey's courts have subsequently progressed toward recognition as the policy favoring recognition of out-of-state marriages has expanded over time.[34] *Winn* was decided at a time when the courts followed the Restatement (First) of Conflict of Laws Section 132 (1934), which instructed:

> A marriage which is against the law of the state of domicile of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases: (a) polygamous marriage, (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil, (c) marriage between person of different races where such marriages are at the domicil regarded as odious, (d) marriage of a domiciliary *which a statute at the domicil makes void* even though celebrated in another state [emphasis added].[35]

There could be an argument made that the 1939 statute prohibiting common law marriage to be contracted in New Jersey reflects the public policy in New Jersey, which could bar recognition of out-of-state common law marriages. However, the Court in *Torres v. Torres*, at 144 N.J. Super. 540 (Ch. Div. 1976), reviewed such a case and clarified the public policy behind N.J.S.A. 37:1-10.

> The purpose of the statute was to invalidate common-law marriages and any other marriage in which there was a lack of legal process and lack of commitment. (*citing Parkinson v. J & S Toll Co.,* 64 N.J. 159, 163 (1974)). The intent of the statute is to prevent illegitimate common-law unions which are marked by this lack of commitment and which union may dissolve at any moment. The uncertainty as to economic support and dependency are the primary concerns of the State.[36]

The Court in *Torres* found that a proxy marriage of the New Jersey domiciliary and the Cuba resident, who intended to move to New Jersey immediately after the proxy marriage ceremony, showed commitment because, the parties went to great lengths to be married by proxy, used the same surname, lived together as husband and wife for seven years, had one child, and to the public the parties constituted a family unit. The Court in *Torres* also invoked "collateral estoppel and unclean hands [to bar one spouse] from attacking the marriage of which he was the prime beneficiary and primarily responsible for its creation."[37]

New Jersey recognizes common law and proxy marriages that were contracted within a jurisdiction in

which they are valid, even where there is a statute that hems these relationships in with a heavy burden of proof upon presentment within the state. In juxtaposition, New Jersey has no express or implied prohibition against same-sex marriage, and no provision of law directly opposed to their formation. Indeed, through "this State's legislative and judicial commitment to eradicating sexual orientation discrimination as our backdrop,"[38] New Jersey actually has articulated a strong public policy *in favor of* recognition of same-sex relationships of all kinds. The attorney general's opinion implies that the Civil Unions Act operates as a bar to recognition of foreign same-sex marriages and, *sua sponte*, operates to create a public policy forbidding recognition of those as marriages, yet authorizing them as an equal sibling of civil unions.

On such logic, one must necessarily find that the Legislature's failure to formally authorize other marriage unions, such as common law, proxy, arranged and similar marriages must operate as an outright bar to recognition of those marriages when they are presented for recognition within the state boundaries. However, the mere fact that the New Jersey Legislature chose to create a separate civil unions law does not, in itself, give rise to a public policy *against* recognition of foreign same-sex marriages *as marriages*.

The New Jersey attorney general's legal analysis also represents the contraposition that many of our neighboring states' attorneys general (even those with no formal establishment of civil unions or same-sex marriages) have exercised. Instead, nearby sister states have adhered to a more traditional, established interpretation in accordance with the long history of comity analysis under the common law.

A CLEAR ROADMAP ON INTERPRETATION PROVIDED BY OTHER STATE AGS

Perhaps the most glaring shortcoming in the attorney general's opinion is the failure to recognize that other state attorneys general have already utilized the correct legal interpretation standard. This includes two states that do not provide for the creation of same-sex marriage or civil unions under their own laws. The common law principle of comity and the Full Faith and Credit Clause of the federal Constitution demand recognition of foreign marriages—even those where the spouses are of the same-sex—as marriages. New Jersey's attorney general has chosen to blaze a new trail in comity analysis, one that simultaneously places the state in opposition to longstanding common law and Constitutional jurisprudence, to reject foreign marriages simply on the basis of the sex and sexual orientation of the spouses.

In a March 3, 2004, advisory opinion, then-Attorney General Elliot Spitzer declared that there has never been a New York statute or constitutional provision "that expressly *prohibits* New York State from sanctioning the creation of same-sex marriages nor from recognizing such marriages created in other jurisdictions."[39] He noted that while the Domestic Relations Law does not authorize the creation of same-sex marriages, "the exclusion of same-sex couples from marriage 'presents serious constitutional concerns' under the New York Constitution."[40] Spitzer opined that, therefore, parties to foreign same-sex marriages "must be treated as spouses" under New York law.[41] This opinion and analysis has been embraced by current New York Attorney General Andrew Cuomo.[42]

On May 17, 2004, Attorney General Richard Blumenthal of Connecticut wrote to Massachusetts Governor Mitt Romney in a widely publicized letter that "same-sex marriages performed in Massachusetts are not 'automatically void' in his state 'because our state has no statute declaring same-sex marriage void.'"[43]

On Feb. 21, 2007, Rhode Island Attorney General Patrick C. Lynch reiterated his May 2004 pronouncement on the full legal effect to be accorded Massachusetts marriages in Rhode Island, advising the state's Board of Governors for Higher Education that it should treat *as married* those employees who go with their same-sex partners to Massachusetts and then return as married to their jobs at the state's public colleges and universities.[44] In 2004, Lynch "said his state would probably honor 'any marriage validly performed in another state,' and noted that 'the only marriages in Rhode Island deemed void involve bigamy, incest, or mental incompetence, or marriages in which one or both parties never intended to be married.'"[45]

What we are left with, then, is an over-anxious reach or, perhaps, a purposeful search to find a reason to deny foreign-wed gay men and lesbians their proper legal status. This prohibition is raised for no other reason except the mere fact that they are a gay or lesbian same-sex couple. The logic underlying this determination can only be the product of a discriminatory analysis against these couples, in violation of the Law Against Discrimination and opposite to the clear holding of *Lewis*.

CONCLUSION

With the New Jersey Supreme Court's ruling in *Lewis v. Harris*, open discrimination against gay men and lesbians has now been largely relegated to the dustbin of history. However, soft forms of discrimination linger. These come in disparate treatment and legal analyses that appear harmless, even helpful. However, they serve to promote a malignant view—that separate, and ostensibly equal categories of legal relationships can and should be carved out for gay men and lesbians.[46]

The reader may ask what import there is to the form of recognition—be it marriage or civil union—that the state of New Jersey accords to same-sex couples who arrive from Massachusetts, Canada, South Africa, Belgium, Spain, the Netherlands, or any of the other jurisdictions that provide or may in the future provide

recognition of same-sex unions as marriages. Indeed, the attorney general's opinion does seek to accord to these marriage relationships the full recognition as civil unions, which are, on paper at least, crafted to be equal to marriages under state law in every respect and legal consequence.

The simple fact that the highest law enforcement officer of our state government has upended centuries of comity interpretation and analysis should shock legal scholars as well as serve as a call to arms for every civil rights lawyer in the state.This is especially so where that reinterpretation results in an inferior status for a marginalized segment of society. On the same day Attorney General Rabner announced Opinion 03-2007, his website's "Frequently Asked Questions" held out the following query:

> 11. Does New Jersey recognize a valid marriage license from another country?
> Yes. For additional information, please contact the Department of Health and Senior Services, Office of Vital Statistics at (609) 292-4087 ext. 505.

There was no indication on the website that the sex or sexual orientation of the spouses was determinative as to the degree of recognition those spouses receive in New Jersey, nor that being gay, lesbian or same-sexed was an impediment to full recognition of the marriage. This remains on the website to the date of this writing.[47]

To arrive at the conclusion outlined in Opinion 03-2007, the attorney general necessarily invites inquiry into the sex and sexual orientation of spouses in foreign marriages upon their arrival in New Jersey. This is an inquiry that is odious to the public policy of this state, and which represents a stark offense to the state Supreme Court's directive in *Lewis* that discriminatory treatment of gay man and lesbians must be vanquished. Attorney General Opinion 03-2007 must be exhibit one when the statutorily created Civil Unions Review Commission is seated and begins its deliberative process evaluating the effects of the act.[48]

If New Jersey's attorney general cannot understand and implement the "separate statutory scheme" of civil unions correctly and fairly, how can gay men and lesbians expect to be treated equally by this state's citizens, businesses and institutions?

As Chief Justice Poritz poignantly noted in her *Lewis* dissent,"[w]hat we 'name' things matters, language matters…Ultimately, the message is that what same-sex couples have is not as important or as significant as 'real' marriage, that such lesser relationships cannot have the name of marriage."[49] We already know from recent events in our state that civil unions are not working.[50] Prior to passage, the Civil Unions Act was assailed by the New Jersey State Bar Association because it "creates a convoluted, burdensome and flawed statutory scheme that fails to create for same-sex couples identical rights and remedies provided to heterosexual married couples as required by the Supreme Court as well as the Constitution…the civil union legislation would create a separate, unequal and unnecessarily complex legal scheme."[51]

The New Jersey Civil Unions Act has fundamentally failed to deliver the promise of equality from *Lewis*. It has fallen flat on its face as an embarrassing experiment in discrimination committed by the state Legislature, compounded by the state's businesses and private citizens, and now reinforced by the state attorney general. Indeed, the state's chief law enforcement officer, who argued against marriage equality before three levels of state courts, is now charged with enforcing the very law his office opposed.

We know from bygone eras that where government leads with an example of discrimination, society's institutions and society's citizens follow suit; this sad truth has been proven again by civil unions. The guarantee of hope that came to New Jersey's gay and lesbian community in the Supreme Court's decision in *Lewis* has been dashed in favor of what is most politically expedient and palatable.

With this article, the author issues a call to New Jersey Attorney General Stuart Rabner to reverse his finding that foreign marriages are to be evaluated upon arrival in New Jersey, and treated discriminately based on the sex and sexual orientation of the spouses.[52] In the same review, the attorney general should declare that the Domestic Partnership Act-based full faith and credit and comity analyses handed down by the Honorable Vito Bianco, J.T.C., in the published tax court case *Hennefield v. Montclair*,[53] are no longer persuasive and have been overruled by the unbounded, state Constitution-based holding of full equality provided in *Lewis v. Harris*.

Lewis proclaimed that discrimination has no place in the decisions of our government, nor in the provision of rights and benefits to committed same-sex couples. A marriage valid in another jurisdiction must be recognized in New Jersey as a marriage, just as it always has been, regardless of the sex and sexual orientation of the spouses. ■

ENDNOTES

1. Formal Opinion No. 3-2007 was issued on Feb. 16, 2007, by N.J. Attorney General Stuart Rabner to Joseph Kominski, the state Registrar of Vital Statistics.
2. *See* Press Release of the N.J. Attorney General at http://www.nj.gov/oag/newsreleases07/pr20070216d.html (last visited May 19, 2007).
3. The attorney general references *Hennefield v. Montclair*, 22 N.J. Tax 166 (2005). This author will argue below that the logic, analysis and part of the holding of that case were overruled by *Lewis v. Harris*.
4. *Lewis v. Harris*, 188 N.J. 415 (2006).
5. *Id.* at 423.
6. *Id.* at 424.
7. On Nov. 20, 2006, Assemblyman Reed Gusciora (D-15, Mercer) introduced A-3685, the four-page Civil Marriage and Religious Protection Act in order to, at Section (f), "end the pernicious practice of marriage discrimination in New Jersey." The Civil

Unions Act was introduced on Dec. 4, 2006, and substantially amended and changed during the ensuing two weeks until passage by both houses of the Legislature.

8. *Lewis*, 188 N.J. at 424.
9. *Id.* The reader is advised that the state Legislature actually merged the Court's directive by providing a statutory scheme of civil unions, but weaving the provisions for same throughout the marriage statute.
10. *Id.* at 464.
11. *Id.* at 467.
12. N.J.S.A. § 37:1-31(4)(a).
13. P.L. 2006, C103 C.37:1-29 "One partner in a civil union couple" means a person who has established a civil union pursuant to the provisions of this [Civil Unions] act.
14. According to a Jan. 23, 2004, analysis of the U.S. General Accounting Office, there are 1,138 federal statutory provisions classified by the U.S. Code in which marital status is a factor in the provision of benefits, rights and privileges. *See* http://www.gao.gov/new.items/d04353r.pdf (last visited May 14, 2007) for a complete recitation of the federal provisions organized by code subchapter.
15. *Lewis*, 188 N.J. at 424.
16. P.L. 2003, c. 246, enacted Jan. 12, 2004; the law took effect July 10, 2004. *See also* § N.J.S.A. 26:8A-1 *et. seq*. Registration under the act is now closed to same-sex couples.
17. N.J.S.A. § 26:8A-2.
18. P.L. 2006, c. 103 C.37:1-28(b).
19. *Id.* at C.37:1-28(f).
20. P.L. 1945, c. 169; *see also* N.J.S.A. § 10:5-1 *et. seq*. "New Jersey was one of the first states to adopt comprehensive legislation prohibiting discrimination based on affectional or sexual orientation and one of the first states to formally recognized domestic partnerships…" P.L. 2006, C103 C.37:1-28(c).
21. *See generally* N.J.S.A. § 10:5-1 *et. seq*.
22. N.J.S.A. § 10:5-3. The Legislature empowered the N.J.S.A. § 10:5-6.
23. *Heuer v. Heuer*, 152 N.J. 226, 233 (1998).
24. This logic and analysis were supported by U.S. Supreme Court opinion in *Loughran v. Loughran et. al,* 292 U.S. 216 (1934), *rehearing denied* 292 U.S. 615 (1934). The Court held, in an opinion authored by Justice Brandeis, at 686-87, "[m]arriages not polygamous or incestuous, or otherwise declared void by statute [citation to Restatement omitted] will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction." (*citing Meister v. Moore*, 96 U.S. 76 (1877), and *Travers v. Reinhardt*, 205 U.S. 423 (1907)).
25. *Smith v. Smith*, 52 N.J.L. 207 (1890).
26. *Id.* at 213-14.
27. *See Wilkins v. Zelichowski*, 26 N.J. 370 (1958) (holding that a 16-year-old girl would not form the requisite ability to contract until she reached the age of eighteen and, therefore, was entitled to an annulment as a matter of law).
28. *Bucca v. New Jersey*, 43 N.J. Super. 315 (1957) (holding that the marriage of an uncle and his niece was barred by New Jersey law, was not entitled to recognition in New Jersey, and if both were to cohabit in the state, a prosecution for incest could result).
29. *Metropolitan Life Insurance Co. v. Chase*, 189 F. Supp. 326 (D.C.N.J. 1960), *aff'd* 294 F. 2d. 500 (1961) (the court of appeals declared a polygamous marriage unenforceable and held, at 503-04, "where the domicile has a strong public policy against the type of marriage which the parties have gone to another state to contract, *which policy evidences by a statute declaring such marriages to be void*, the former state as the one most interested in the status and welfare of the parties will ordinarily look to its own laws to determine the validity of the alleged marriage (*emphasis added*)." (*citing Cunningham v. Cunningham* 206 N.Y. 341, 99 N.E. 845 (1912) and *Wilkins*, op. cit.).
30. *Winn v. Wiggins*, 47 N.J. Super. 215 (App. Div. 1957).
31. *Id.* at 220. N.J.S.A § 37:1-10 bars creation of a common law marriage in New Jersey after Dec. 1, 1939.
32. *Id.* at 224.
33. That is, New Jersey courts may bar recognition of New Jersey domiciliaries' purported common law marriage wherein the parties specifically seek to evade New Jersey's prohibition on common law marriages, at N.J.S.A. § 37:1-10, by fleeing temporarily to another jurisdiction to enter into a common law marriage and immediately thereafter return to New Jersey.
34. *See* Koppelman, Andrew, Same-Sex Marriage, Choice of Law, and Public Policy, 76 *Tex. L. Rev.* 921 (1998) and Hogue, Lynn, *State* Common Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?, 32 *Creighton L. Rev.* 29 (1998) (for more detailed discussion of the recognition of same-sex marriages in the face of state law in opposition to such recognition).
35. Evan Wolfson, executive director of Freedom to Marry, provides an excellent discussion on the impact of the First Restatement analysis in his note, *Fighting to Win and Keep the Freedom to Marry: The Legal, Political, and Cultural Challenges Ahead, Nat'l Journal of Sexual Orientation Law* Vol. 1, 258 at 279; *See* http://www.ibiblio.org/ gaylaw/issue2/wolfson.html (last visited May 14, 2007).
36. *Torres v. Torres*, 144 N.J. Super. 540, 542 (Ch. Div. 1976).
37. *Id.* at 544.
38. *Lewis*, 188 N.J. at 424.
39. *See* http://www.oag.state.ny.us/press/2004/mar/mar3a_04_attach2.pdf (last visited May 18, 2007). *See also* Dorn, Derek B., Same-Sex Marriage Under New York Law: Advising Clients in a State of Uncertainty. *NYSBA Journal* (Jan. 2006).
40. Dorn, *supra,*. at 42.
41. *See* Lewis, Raphael and Ebbert, Stephanie, R.I., Conn. May Grant Recognition, *Boston Globe* (May 18, 2004). http://www.boston.com/news/specials/gay_marriage/articles/2004/05/18/ri_conn_may_grant_recognition/ (last visited May 13, 2007).
42. "John Milgrim, a spokesman for New York Attorney General Andrew Cuomo, said that since 2004, the attorney general's office has taken the position that[,] 'New York law presumptively requires the recognition of marriages validly performed in other jurisdictions.'" LaVoie, Denise. Judge rules marriages valid for gay New York couples who wed in Massachusetts before July 2006, Associated Press Wire Service. http://news.findlaw.com/ap/o/51/05-16-2007/5e0c0006eeb9bb60.ht (last visited May 19, 2007).
43. *Id. See also* Medina, Jennifer. Lawyers Argue Legal Status of Gay Unions, *N.Y. Times*, p B1 (May 15, 2007). ("Connecticut's highest court became the first in the nation on Monday to hear arguments over whether the establishment of civil unions created a fundamentally inferior status for gays and lesbians.")
44. *See* press release on Attorney General Patrick C. Lynch, "AG Lynch issues opinion recognizing validity of same-sex marriages lawfully performed" http://www. riag. ri. gov/ public/pr.php?ID=844 (last visited May 14, 2007): "Specifically, Lynch advised

Commissioner Warner that the Rhode Island Board of Governors for Higher Education should comply with the requests made by several of its employees who were married in valid same-sex ceremonies in Massachusetts to alter their personnel files to reflect their status as married couples."

45. *See* Lewis, Raphael and Ebbert, Stephanie, R.I., Conn. May Grant Recognition, *Boston Globe* (May 18, 2004). http://www.boston.com/news/specials/gay_marriage/articles/2004/05/18/ri_conn_may_grant_recognition/ (last visited May 13, 2007). *See also* Professor Arthur Leonard's Blog at http://newyorklawschool.typepad.com/leonardlink/2007/02/rhode_island_at.html (last visited May 14, 2007).
46. For an excellent discussion of the issue of the inferiority of civil union read, Buckel, David S., Government Affixes a Label of Inferiority on Same-Sex Couples When it Imposes Civil Unions & Denies Access to Marriage, *Stanford Law & Policy Rev.* Vol. 16, Issue 1; 2005 ("It is the different name itself that is the core of the harm to individuals and their families, because a separate status is a stamp of inferiority and an official invitation to bias and further discrimination.")
47. http://nj.gov/lps/faq.htm#a11 (last visited May 19, 2007).
48. P.L. 2006, c.103, C.37:1-36.
49. *Lewis*, 188 N.J. at 467.
50. The *New York Times* recently did an exposè on the short shrift many employers are giving to couples in civil unions who request benefits to which they are legally entitled. One example of a company appearing to not provide full recognition as required by New Jersey law was United Parcel Service (UPS), though this may have since changed since the *Times* educated their human resources department. *See* Kelley, Tina 2 Months After New Jersey's Civil Union Law, Problems Finding True Equality retitled Equality Elusive Under New Jersey Civil Union Law, *N.Y. Times,* April 13, 2007. http://www.nytimes.com/2007/04/13/nyregion/13civil. html?ex=1177473600&en=c1fbee82b43f1137&ei=5070 (Times Select article requires fee payment; last visited May 14, 2007).
51. *See* Dec. 8, 2006, press release of the New Jersey State Bar Association. *Se* http://www.njsba.com (last visited May 14, 2007).
52. The author is joined in this call by the American Civil Liberties Union-New Jersey Chapter, whose Legal Director Edward Barocas wrote on February 18, 2007, "the AG…through mere linguistic fiat, transformed those [same-sex] marriages into New Jersey civil unions. That action should have been condemned...and I do so now. The decision perpetuates a two-tiered system which is inherently discriminatory. As we know, separate is never equal…The New Jersey Legislature made clear when it passed the Law Against Discrimination that our state's goal is nothing less than the 'eradication of the cancer of discrimination.' Yet that august body—and our state attorney general—have now institutionalized discrimination by setting apart one group' rights from the rights of all others."
53. *Hennefield v. Montclair*, 22 N.J. Tax 166 (2005).

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(1996) (Permitting the adoption of a child by same-sex domestic partner of the biological mother); *Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d 1971 (Sup. Ct. Vt. 1993) (Construed adoption statute in effect at that time as permitting biological mother's same-sex domestic partner to adopt mother's child without mother having to terminate her parental rights).

20. *Miller-Jenkins v. Miller-Jenkins*, No. 2654-04-4, 2006 WL 3407834 *1 (Va. Ct. App. Nov. 28, 2006).
21. 28 U.S.C.A. § 1738A.
22. The bill amends the Uniform Premarital Agreement Act, N.J.S.A. 37:2-31 *et seq.* to include pre-civil union agreements.
23. 188 N.J. 415 (2006).

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enhancing the relevance of the state bar to all of its members. Lawyers do not have to belong to the NJSBA to practice in our state. Ours is not an immigrated bar. Lawyers should want to belong to the NJSBA for all that it provides. That is part of the message Lynn will convey in the year ahead.

We, in the Family Law Section, believe our section has, in its own way, given Lynn a model to project onto a larger stage. Our section's past successes should become the future successes of the full state bar. From our annual retreat to the enumerable Continuing Legal Education programs we sponsor; from our Young Lawyers Committee to the outreach we provide throughout the state; and through this publication, our section, as none other, provides service to its members. Our section has long been respected for the breadth of its programming; for the positions it has taken; and for the foresight it has shown over so many years.

Lynn, your years as a forceful and persuasive advocate; your years as an empathetic professional who understands her clients' problems as you counsel them through the difficult process of divorce; your persistence; and your energy and boundless talent to draw the best from each of us will serve you well in the year ahead.

That year will undoubtedly come with challenges, much success and probably some frustration. We have no doubt that you will make all of us proud. We have no doubt that the mark you will leave on the NJSBA and on our profession will have lasting effect. We have no doubt that you will never forget your roots in family law practice. We know that you will lead the state bar with distinction. We wish you Godspeed. We know your year will pass all too quickly. We also know that it will be a year of accomplishment. ■

Civil Unions: What You and Your Client Need to Know About Property Rights

by Alison C. Leslie

On Feb. 19, 2007, the Civil Union Act (CUA) became effective. The act was drafted by the Legislature in response to the majority decision in *Lewis v. Harris*,[1] where the New Jersey Supreme Court decided same-sex couples were not treated equally as heterosexual couples, and ordered legislation to be drafted and passed to rectify the matter. The CUA was passed in response to this decision.

While this historic and groundbreaking legislation falls short of creating equality between marriage and civil unions, or between heterosexual couples and same-sex couples, the legislation does expand the rights of same-sex couples in committed relationships. As family law practitioners, the creation of civil unions is as important as their dissolution, primarily in terms of alimony, child support, custody, and equitable distribution, all of which are now statutorily provided for in the dissolution of a civil union.

The uncharted territory of creating civil unions (note not marriage) and its dissolution (note not divorce) is a vast topic, and will certainly be explored and expanded as case law becomes available. This article focuses strictly upon the property rights of same-sex partners who are seeking to dissolve a civil union.

THE SHORTFALL OF THE DPA REGARDING PROPERTY RIGHTS

Many hailed the passage of the Domestic Partnership Act (DPA) in 2004 as the solution for same-sex relationships. Prior to the enactment of the DPA, same-sex couples were afforded minimal rights. The Legislature specifically stated that the DPA afforded committed same-sex couples "certain rights and benefits that are accorded to married couples under the laws of New Jersey."[2] Unfortunately, the DPA had numerous shortfalls, and failed to afford members in same-sex relationships numerous right that married couples take for granted. This was subsequently echoed by the New Jersey Supreme Court, and was one of the reasons for the decision in *Lewis v. Harris*. In fact, the Court could not discern "a public need that would justify the legal disability that now afflicts same-sex domestic partnerships."

The most troubling aspect of the DPA, as it related to property rights for separating partners, was that it stated "[a] court shall not be required to equitably distribute property"[3] acquired during the partnership. The DPA was, therefore, unclear regarding whether a partner was indeed entitled to share in the equity of property acquired during their partnership. There were no factors upon which the court could distribute property, which led to discretionary and arbitrary distribution, if any. Further, same-sex couples were specifically denied the ability to own real property as tenants by the entirety (N.J.S.A. 46:3-17.2), which would allow for the automatic transfer of ownership upon death (N.J.S.A. 46:3-17.5), and protection against severance and alienation (N.J.S.A. 46:3-17.4), as well as an exemption from the realty transfer fee for a transfer of real property between spouses (N.J.S.A. 46:15-10(j)).

Ironically, the DPA required domestic partners to prove they shared a "common residence," assumed joint responsibility "for each other's welfare as evidenced by joint financial arrangements or joint ownership of real or personal property" and agreed "to be jointly responsible for each other's basic living expenses during the domestic partnership." The DPA required proof of the factors of equitable distribution, but, in the event of dissolution, would not require the factors to be applied.

The New Jersey Supreme Court recognized these discrepancies in *Lewis v. Harris*, and ordered the New Jersey Legislature to amend the marriage statute or enact an appropriate statutory structure to afford same-sex couples equal protection under an amendment to the New Jersey Constitution.

HOW WILL A COURT DISTRIBUTE PROPERTY IN ACCORDANCE WITH THE STATUTE?

Courts are now required to consider, but not be limited to, the following factors in distributing property:

a. The duration of the marriage or civil union;
b. The age and physical and emotional health of the parties;
c. The income or property brought to the marriage or civil union by each party;
d. The standard of living established during the marriage or civil union;
e. Any written agreement made by the parties before or during the marriage or civil union concerning an arrangement of property distribution;
f. The economic circumstances of

each party at the time the division of property becomes effective;

g. The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage or civil union;
h. The contribution by each party to the education, training or earning power of the other;
i. The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, or the property acquired during the civil union as well as the contribution of a party as a homemaker;
j. The tax consequences of the proposed distribution to each party;
k. The present value of the property;
l. The need of a parent who has physical custody of a child to own or occupy the marital residence or residence share by the partners in a civil union couple and to use or own the household effects;
m. The debts and liabilities of the parties;
n. The need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse, partner in a civil union couple or children;
o. The extent to which a party deferred achieving their career goals; and
p. Any other factors which the court may deem relevant.

In every case, the court shall make specific findings of fact on the evidence relevant to all issues pertaining to asset eligibility or ineligibility, asset valuation, and equitable distribution, including specifically, but not limited to, the factors set forth in this section.

It shall be a rebuttable presumption that each party made a substantial financial or non-financial contribution to the acquisition of income and property while the party was married.

While some of these factors are non-subjective, such as the age and health of the parties, and debts and liabilities, there are certain factors that the court could apply inconsistently. For example, same-sex partners who have been together for the past 20 years could not have a civil union for this length of time. Will the court look at the relationship as a whole or as of the date of the civil union? Same-sex couples did not have the opportunity to enter in a civil union prior to Feb. 19, 2007, despite their entering into a relationship. There is an inequity in treating a 20-year relationship as a one-year civil union for the purpose of dividing property. If one partner sacrificed career goals and opportunities during the relationship, but is now re-entering the work force, how does this factor into the distribution of property? For the next several years, the application of this statute to same-sex couples involved in relationships that predate the statute has the potential to be inconsistently applied.

Under the DPA, the tax court held that despite the fact that a couple resided together since 1975, the date of entry of their domestic partnership on July 12, 2004, would govern the applicable date for the plaintiff's tax exemption.[4] Perhaps the solution is arguing that the length of the union should be considered under subsection p as a relevant factor.

The taxability of equitable distribution is another factor that must be scrutinized in distributing property. Partners in civil unions will receive the same tax status and benefits as married persons; however, due to the Defense of Marriage Act,[5] the federal government does not extend civil union couples the same rights as married couples. Therefore, in order to distribute Social Security benefits, a present value calculation may be required in order to divide the asset. Veterans benefits will not apply, and if a civil union is discovered the veteran could be discharged. Federal tax laws are not extended to civil unions, and same-sex couples are treated as single individuals. Therefore, the taxation subsection in the equitable distribution statute must be closely examined when reviewing and distributing property. An accountant should examine the taxability of any transfers prior to the distribution of property that may be subject to federal, but not New Jersey, taxes.

REAL ESTATE

The CUA now allows partners in civil unions to purchase property as tenants by the entirety.[6] A tenancy by the entirety was previously the tenancy held only by a husband and wife, by virtue of the joint acquisition of title by them after marriage. A tenancy by the entirety required a joint tenancy plus the unity of marriage. Joint tenancy exists when property is owned by two or more persons, and the interest of each person must be of the same duration, the time of vesting of title must be the same, title must raise from the same conveyance, and each person has equal and undivided possession. Upon death in a tenant by the entirety, however, the surviving spouse receives the remaining interest in fee.

The importance of permitting partners in civil union to hold property as tenants by the entirety is in the transfer upon death. When a married couple purchases real estate, the surviving spouse automatically becomes entitled to the property upon the death of his or her partner, even if the conveyance did not specifically identify the grantees as husband and wife. This occurs by operation of law as long as the parties were married when they took title and there was an absence of express language in the conveyance to indicate an intention to own the property as tenants in common or as joint tenants. This is especially important should the decedent die intestate, as the property would automatically transfer upon death.

The ability to deed property as

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The Future of Psychological Parentage in the Era of Civil Unions

by Debra E. Guston and Felice T. Londa

America's families in 2007 look vastly different than those of even 25 years ago. Families made up of same-sex couples raising children dot the landscape across the country. Commonsense and growing experience tell us that family courts throughout the nation need to take into consideration the ever-changing landscape of the American family. With the number of children being raised by same-sex couples, and with the inevitable break-up of some of those relationships, courts have been faced with a growing number of disputes over custody and parenting time. These suits frequently involve the biological or legal parent pitted against the other party, who has participated in raising the child but did not adopt the child, which would have cemented his or her parental relationship.

In New Jersey, the courts considered this very issue at a time when same-sex couples could not enter into any form of state-sanctioned or legally recognized relationship. By codifying the rights and standards to be applied in second-parent adoptions in the early 1990s,[1] the New Jersey's courts recognized a pathway to parenting not explicitly accessible by the statutory framework of the adoption laws.[2] These adoptions had been granted in many counties around the state under varying standards and procedures for several years before the reporting of the *J.M.G.* and *H.N.R.* cases.[3]

In families in which there had been no formal adoption but there was a claim by the non-biological/legal[4] parent to rights of custody or parenting time, the New Jersey Supreme Court recognized the rights of a psychological parent. In *V.C. v. M.J.B.*,[5] the New Jersey Supreme Court clearly enunciated the position of this state that a claim by a party with no biological or legal ties to a child, and more particularly, a biological parent's former same-sex partner, may meet the statutory definition of a "parent." If that party meets this standard, he or she is granted the right to seek the custody of or parenting time with children he or she assisted in raising.

In the *V.C.* case, the Court determined that even in the absence of parental neglect or unfitness, the Court may exercise its *parens patriae* power to protect a child's interests.[6] Further, and most importantly, the Court determined specifically that "at the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them."[7]

In *V.C.*, the Supreme Court established a four-prong test for psychological parenthood of a non-biological child who has been an involved and fit parent.[8] First, the legal parent must have acted in such a manner as to have consented to and fostered the parental relationship between the child and the third party by granting "a measure of parental authority and autonomy and…rights and duties vis-a-vis the child that the third party's status would not otherwise warrant." The Court differentiated between a psychological parent and a paid babysitter or nanny. Once created by consent, the legal parent loses the right to terminate the relationship that has been formed, and the relationship is entitled to protection by the courts. Subsequent animosity between the parties cannot be the rationale for termination of that bond.[9]

Failure to pursue a formal adoption was not deemed by the Court to be "preclusive of a finding of psychological parenthood where all the other indicia of that status are present."[10]

Second, the person claiming parentage must have lived with the child, and third, must have performed significant parental functions indicative of accepting the obligations of parenthood, which may or may not include financial support. The Court indicated that the keys to these determinations were the "nature, quality, and extent of the functions undertaken by the third party and the response of the child to that nurturance."[11]

The fourth, and the "most important," prong was that a parent-child relationship must have been forged.[12]

With that as the history of the growth of recognition of non-biological parental ties, what can we anticipate to be the future of these claims in an era in which the state has now recognized the full rights and benefits and obligations of marriage through civil unions?[13]

It would appear that partners who enter into a civil union are each entitled to be treated under law as if they are stepparents to the children of their civil union part-

ners who were born prior to the entry into the civil union. This recognition has arisen by custom, not by law. In a traditional heterosexual marriage, where one spouse is a parent, the new spouse is traditionally called a stepparent. If there is no other legal parent (either by death of the other parent, adjudicated abandonment or adoption or conception of the child by use of a donor whose rights have been waived) then the stepparent has a route to parentage via the adoption process. Under New Jersey's adoption laws, stepparents have some significant privileges, such as the right of the court to waive a home study[14] and to accelerate the entry of a final judgment.[15] Lesbian and gay couples similarly situated to such heterosexual couples have had access to the same process.

Following in this analysis is the question of the status of children born to one partner in a civil union relationship. New Jersey law recognizes the presumptive parentage of a husband when a child is born to his wife.[16] Whether the civil union laws mandating the extension of all laws pertaining to marriage to civil union couples works in this context is especially challenging, as the statutory presumption is based on our knowledge of biology and nothing more. The presumption of parentage is rebuttable if the biological tie to the husband cannot be proven. Further, civil union couples will be faced with out-of-state prejudices in the form of statutes and constitutional amendments forbidding the recognition of their relationship as marital or marriage-like, and this presumed parentage will not be protected by the public policy exceptions to constitutional full faith and credit and comity principles.

Ultimately, in the case of children born to a partner in a civil union, the completion of a second-parent adoption is essential to secure the second parent's parental rights beyond New Jersey's borders. The adoption also will secure the second parent's parental rights if challenged during dissolution of the civil union.

But what of couples who do not seek state recognition of their relationship through civil unions and do not formally adopt the children of their partners? Are those non-biological, live-in partners entitled to the protection of the court in recognizing a parental right in the event of a break-up of the relationship?

The answers to these questions require a crystal ball, and will be fact sensitive, of course. Since the first prong of the *V.C.* test to recognize a psychological parent is that there must be consent of the natural parent, is the refusal to enter into a legally binding relationship with a live-in partner consistent with a refusal to grant consent to establish a parenting relationship? For a child born prior to the live-in relationship, the authors believe this could be considered dispositive. If the relationship is not anticipated to be a permanent, lifelong commitment, and not given the respect of the now available legal binds, it can be concluded that the natural parent is not intending to consent to a lifelong relationship with the boyfriend or girlfriend (for want of better terms), much less intending to consent to a parental relationship between the child and the individual.

What of a child born during the live-in relationship? The answer to that question would be extremely fact sensitive, and may well be measured by the *V.C.* standards of involvement by both parties in the conception and birth of the child, in major decision-making relating to the child, in the caretaking of the child, and perhaps most importantly, in the manner in which the parties have held themselves out to their families and friends *vis a vis* the child. If they present themselves to the community as co-parents, and there is an establishment of parental functions performed by the claimant, then it is likely the party claiming parentage will succeed in establishing the first, *i.e.* the consent, prong of the *V.C.* requirements.

However, the failure of the non-biological/legal parent to adopt runs parallel with the foregoing analysis of the importance of a civil union in proving the first prong of the *V.C.* test. Such a failure to adopt, coupled with a failure to enter into a civil union, may be dispositive against the sharing of some parental duties. The consent of the legal parent is likewise required for an adoption to proceed, and, therefore, absent some significant and compelling reasons why an adoption was not completed, the party claiming psychological parent rights will have a difficult time establishing the required consent of the legal parent to parent his or her child.

The authors would propose that some compelling reasons for the failure to adopt could be the significant poverty of the couple because they cannot afford the legal process, nor proceed *pro se*; issues concerning the background of the second parent (*e.g.*, a criminal background that might not make the legal parent concerned for the child's safety, but might well make the court concerned); and perhaps a long established relationship outside of New Jersey in an unfriendly climate that would make it not unreasonable for a couple to doubt their rights to proceed to adoption even though there is clearly consent to co-parent and action on that consent. The authors do not believe that in the absence of clear evidence of the consent to parent that long-term New Jersey residents will have the ability to claim ignorance of the laws concerning civil union or adoption as a defense to their failure to provide: 1) objective evidence of the commitment of the couple to the relationship, and 2) action in an appropriate time frame seeking the adoption of the child in order to legally cement the parental bond of the non-biological/legal parent.

The authors conclusions on this issue lead them to surmise that parties claiming psychological parent status who have not entered into a

civil union with the child's biological or legal parent and later have custody and/or parenting time disputes over a child raised in their shared household will have a more difficult time in this new era of civil union in asserting and proving the first prong of the *V.C.* test, namely the consent of the biological/legal parent to parent. ■

ENDNOTES

1. *In re Adoption of Child by J.M.G.,* 267 N.J. Super. 622,666 A.2d 535 (Ch. Div. 1993) and *In re Adoption of Two Children by H.N.R.,* 285 N.J. Super. 1, 632 A.2d 550 (App. Div. 1995).
2. N.J.S.A. 9:3-37, *et. seq.*
3. The authors can report this anecdotally and by experience, Ms. Guston's first successful second-parent adoptions occurring in 1990 and 1991 in Ocean, Morris and Passaic counties.
4. By non-legal parent, the authors mean the partner of a parent by adoption of a child, as distinguished from a non-biological parent being the partner of a parent of a child by birth.
5. 163 N.J. 200 (2000), *cert denied M. J. B. v. V. C.,* 531 U.S. 926, 121 S. Ct. 302, 148 L. Ed. 2d 243 (2000).
6. *Id.* at 219.
7. *Id.* at 221.
8. *Id.* at 223.
9. *Id.* at 224-25.
10. *Id.* at 225-26.
11. *Id.* at 226.
12. *Id.*
13. The issue of whether, in fact, civil unions in New Jersey actually provide all of the constitutionally mandated protections of same-sex couples as per *Lewis v. Harris*, 188 N.J. 415 (2006), remains in controversy, but is better served by its own study, which is beyond the scope of this article.
14. N.J.S.A. 9:3-48(a)(4). But note the Supreme Court's recent Directive #17-06 mandating background checks and finger printing for all step-parent adoptions statewide.
15. N.J.S.A. 9:3-48(c)(4).
16. N.J.S.A. 9:17-43.

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Property Rights

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tenants by the entirety further creates the presumption that, as in married couples, partners in civil unions hold joint property whenever they hold real or personal property together, unless the document of title expresses otherwise. In this manner, automatic transference would provide protection against severance and alienation.

Attorneys must advise clients of the opportunity to purchase property as tenants by the entirety if they are in a civil union. Further, domestic partners who own property as tenants in common or joint tenants are not automatically transferred to tenants by the entirety by virtue of entering into a civil union.

PENSION AND RETIREMENT ACCOUNTS

A New Jersey employer is prohibited from discriminating against a civil union partner regarding receiving pension benefits. However, the question remains, how do we as practitioners distribute a pension in the event of a dissolution of a civil union? In distributing a pension in a divorce, we draft a qualified domestic relation order (QDRO), as permitted under the Employee Retirement Income Security Act (ERISA).[7] ERISA preempts any state law relating to employee benefits that are covered by ERISA. The interpretation of ERISA must be in accordance with DOMA.

Once again, the supremacy clause rears its head as we attempt to afford same-sex couples the same rights afforded to married couples. QDROs may not be enforced. An employer or pension plan may seek to avoid complying with an order to distribute a pension plan. An employer is not required to comply with a QDRO entered by a state court if a same-sex partner is named as an alternate payee of a pension plan. While QDROs are frequently the bane of the family law practitioner's existence, this potential minefield may not be recognized until years after the QDRO is to be enforced. Therefore, the author suggests the retirement plan be present-valued and purchased by the employee spouse to protect the non-employee spouse.

CONCLUSION

There is no doubt the boundaries of the CUA will be tested as more people enter into and dissolve civil unions. In interpreting the CUA, the author suggests first reviewing the rights afforded married couples and then applying the same rules to civil union partners. This is an exciting time in the development of the law. As the law progresses with additional case law, the rights of same-sex couples will likely continue to expand. ■

ENDNOTES

1. 199 N.J. 415, 448-449 (2006).
2. N.J.S.A. 26:8A-2(d).
3. N.J.S.A. 26:8A-10(a)(3).
4. *Louis Paul Hennenfeld and Blair William O'Dell v. Township of Montclair*, 22 N.J. Tax. 166 (2005). Judge Bianco determined the couple was eligible for a 100 percent disabled veteran's property tax exemption upon registration as domestic partners. It should be noted the parties registered two days after the DPA. The parties owned the property in question since 1985, and received only a partial exemption based upon Mr. Hennenfeld's proportionate ownership. The court declined to extend the date of the exemption to the date of acquisition of property because prior to July 12, 2004, "their ownership interest in the subject property could not have been treated in the same fashion as is 'accorded to married couples' before that date." *Id.* 204.
5. 18 U.S.C. § 1738C.
6. *Lewis v. Harris*, 188 N.J. at 449.
7. 29 U.S.C. 1144.

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And You Thought Marriage Was Taxing…

Tax Implications of New Jersey's New Civil Unions

by Gary R. Botwinick

On Dec. 21, 2006, the New Jersey Civil Union Act was signed into law, and became effective on Feb. 19, 2007. The act was the Legislature's response to the Supreme Court's decision in *Lewis v. Harris*,[1] which held that "committed same-sex couples must be afforded, on equal terms, the same rights and benefits enjoyed by married opposite-sex couples." The intent of the act was to place same-sex couples on exactly the same footing as opposite-sex couples. And, in fact, the act does an excellent job in that regard with respect to New Jersey taxation. However, with respect to federal taxation, the act runs headfirst into the Federal Defense of Marriage Act (DOMA).[2]

DOMA provides that "[i]n determining the meaning of any 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 a wife."[3] Consequently, those certain tax benefits (and burdens) afforded to married couples under the Internal Revenue Code, will not apply to civil unions.

In advising parties prior to entering into a New Jersey civil union, or representing an individual terminating a civil union, it is incumbent upon the attorney to understand the tax impact of both events. Family law attorneys are quite familiar with the tax aspects of a traditional divorce (*e.g.* alimony, child support, equitable distribution). Now they must become familiar with the effect transactions will have before, during *and after* the termination of a civil union. While space will not permit a thorough discussion of all of the tax implications of civil unions in comparison to marriages, this article is intended to focus on those issues that are most important to family law attorneys.

FEDERAL AND STATE INCOME TAX ISSUES: ENTERING INTO AND TERMINATING A CIVIL UNION

The refusal to recognize a civil union as a marriage under federal law creates significant problems with respect to income taxation.

Filing Status

Because DOMA specifically excludes same-sex partners (even if joined in a civil union) from the definition of "married" under the Internal Revenue Code, civil union couples are prohibited from claiming married filing status on a federal income tax return. Thus, they will be required to file using the single status.

Though the act specifically provides that, with respect to any New Jersey state tax laws, members of a civil union are treated in the same manner as married spouses,[4] New Jersey law generally provides that a taxpayer's filing status for New Jersey income tax purposes will follow the filing status of the taxpayer for federal income taxes.[5] So, are members of a civil union required to file New Jersey income tax returns claiming a single filing status, or are they permitted to deviate from the requirement of consistency?

The New Jersey Division of Taxation has recently indicated that civil union couples will be able to file using a joint filing status for New Jersey income tax purposes. Incidentally, this may be beneficial for federal tax purposes. Through a quirk of the federal income tax system, married couples with approximately equal income are subject to a "marriage penalty," which results in a higher tax than if the spouses were each entitled to file singly and the tax obligations were aggregated. DOMA, in effect, gives civil union couples a *bonus* for federal tax purposes.

Gain on Sale of Principal Residence

Section 121(b) of the Internal Revenue Code provides an exclusion for certain sales of a principal residence. Individuals owning and using a residence for two out of the five years preceding a sale, are able to exclude $250,000 of the gain on the sale from taxation. Married taxpayers filing a joint return can exclude up to $500,000 of gain from taxation, even if only one spouse meets the ownership test.

At first blush, this does not appear to be a problem for civil union couples, because they would each be able to exclude $250,000 on their single returns, thus getting the benefit of the full $500,000 exemption (2 x $250,000). But what if only one of the civil union spouses meets the ownership test? If they were permitted to file a joint return, this issue would be irrelevant. Additionally, the Internal Revenue Code provides that the ownership and use rules are relaxed if a sale occurs as a result of "unforeseen circumstances."[6]

The IRS has issued regulations

that provide certain "safe harbors," which are presumed to be "unforeseen circumstances," including "a divorce or legal separation under a decree of divorce or separate maintenance."[7] Would a dissolution of a civil union qualify under the safe harbor? Though DOMA does not define divorce or legal separation, it is likely that an interpretation of DOMA would lead to the conclusion that such a dissolution would not satisfy the safe harbor. This could result in the recognition of significant taxable gain to a spouse in a civil union that would not have been imposed in a marriage, as defined in DOMA.

Alimony

In a divorce, the tax implications of alimony payments are clear. The Internal Revenue Code provides that "gross income includes amounts received as alimony or separate maintenance payments," and "there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individuals tax years.[8] In other words, the payee-spouse must include the alimony in taxable income, and the payor-spouse gets a corresponding deduction. But would this be the result if the payments are made as a result of a termination of a civil union?

Because DOMA limits the definition of a "spouse" to someone of the opposite sex, and only payments from a spouse can be considered "alimony or separate maintenance payments" under the Internal Revenue Code, such payments would not meet the requirements of 26 U.S.C. 71, and would not qualify as "alimony." Thus, the payor-spouse would be denied a deduction. But what about the payee-spouse?

It is unclear how the payee-spouse would be treated. There is no provision in the Internal Revenue Code to exclude these payments from the general definition of "gross income," as there is with respect to alimony payments.[9] Because the payment is unlikely to be viewed as having been given with "detached and disinterested generosity,"[10] it will not qualify as a gift exempt from income taxation.[11] So if it is not specifically exempted from the definition of "income," and it is not a "gift," then the likely result is that the IRS would take the position that the payment is includable in the payee-spouse's income. Thus, there is no deduction to the payor and inclusion in the payee's income—*double taxation*.

Property Transfers Between Civil Union Couples

Transfers of property between spouses or former spouses, if incident to a divorce, are exempt from federal income tax consequences to both the transferor and transferee-spouse.[12] The transferee takes a carryover basis from the transferor—in other words, the transferee assumes the transferor's basis. Consequently, neither spouse recognizes any gain or loss on the division of assets in a divorce, regardless of who may be the transferor or transferee.

DOMA, however, prohibits the application of Section 1041 with respect to transfers between civil union couples. Generally, this should not result in taxable income to the recipient-spouse in a civil union that is not being dissolved, because the transaction will typically qualify as a gift, and, therefore, be exempt from income taxation and gain recognition (but see below for gift tax treatment). However, if the transfer is incident to a dissolution of a civil union, the result is likely quite different, since such a transfer would not be considered a gift (*i.e.*, no detached and disinterested generosity).

In the case of a dissolution (since 26 U.S.C. 1041 does not apply), the tax consequences are likely to be governed by the holding of *United States v. Davis,*[13] which was decided before the enactment of 26 U.S.C. 1041. In *Davis*, the Court found that a transfer of appreciated property to an ex-spouse resulted in the recognition of taxable gain to the transferor-spouse. The transferee-spouse would take a stepped-up basis, as the built-in gain already would have been taxed. Interestingly, the Court also held that the receipt of property by the transferee-spouse did not result in income, as the property was received in exchange for a surrender of marital rights.

Thus, in a civil union dissolution, the transferor-spouse may have gain recognition if appreciated property is transferred. But would the transferee-spouse have income, or would the surrender of civil union partner rights be sufficient to avoid such an imposition? It is unlikely that the logic in *Davis* is any different when a civil union partner is, under state law, surrendering certain civil union rights. It is possible that the IRS could take the position that DOMA prevents such a result, though it is unlikely that such a position would be successful. Similarly, the IRS could take a position that there should be a capital gain on the exchange of the surrendered civil union rights for the transferred property. The Court, in *Davis*, however, did not make that determination.[14] Consequently, the transferor-spouse will likely have a taxable event, but the transferee-spouse probably will not.

Retirement Plans

In a divorce, qualified retirement benefits and individual retirement accounts (IRAs) are customarily divided between the spouses. Through the use of a qualified domestic relations order (QDRO), the division of the accounts does not result in a taxable event to either the transferor-spouse or the transferee-spouse. DOMA, however, prohibits the use of a QDRO with respect to civil union partners, as a QDRO must relate to child support, alimony or marital property rights of a spouse, former spouse, child or other dependent of the participant in the plan.[15] Thus, an actual division of a qualified retirement plan may be a practical impossibility, and if not impossible, then, at a minimum, extremely expensive from a tax perspective (*e.g.*, imposition of income taxes on distributions and a potential 10 percent penalty).

Gift and Estate Tax Issues

Contrary to popular belief, the federal estate tax is not dead, and

the federal gift tax is even livelier. The current federal estate tax exemption is $2,000,000 (and is scheduled to increase to $3,500,000 in 2009) and the lifetime gift tax exemption is $1,000,000 (and is not scheduled to increase). The gift tax annual exclusion amount is currently $12,000. Of course, the federal estate and gift tax regime still provides for an unlimited marital deduction for transfers between U.S. citizen spouses (as defined in DOMA). That means that transfers between U.S. citizen spouses, no matter how large, and regardless of whether they occur during or after death, will not be subject to either federal estate or gift taxes.

New Jersey, with the adoption of the act, now treats civil union couples the same as married couples for New Jersey estate taxes and inheritance taxes. This means that testamentary transfers between civil union partners will be exempt from the imposition of New Jersey estate and inheritance taxes. Likewise, transfers prior to dissolution of a civil union will not be subject to New Jersey taxes.

Unfortunately, as in the area of federal income taxes, DOMA rears its ugly head in the area of gratuitous transfers between civil union partners.

Support Paid by One Partner to the Other

As in most traditional marriages, members of a civil union will typically pool their resources, and use them for the support of the family. Married couples usually do not worry about gift tax consequences from such an arrangement because of the unlimited marital deduction. But how will these arrangements be treated for federal gift tax purposes?

Clearly, DOMA prevents such transfers from qualifying for the marital deduction. Thus, it would appear that these transfers will be subject to federal gift taxation to the extent that the transfer exceeds the $12,000 annual exclusion. But if the transfer is in satisfaction of a statutory obligation of support, the transfer would be neither income to the recipient nor a gift from the payor. This is akin to the support a parent provides to a child. For example, if a parent pays $30,000 per year in aggregate expenses to support a child, is the amount in excess of $12,000 considered a taxable gift? Generally, these expenses are not considered taxable gifts.[16] If the amount paid or transferred exceeds the reasonable requirements for support, the excess may be a gift.[17]

Civil union spouses are required to support each other in the same manner a husband and wife are required to support each other.[18] So it is arguable that payments to or for the benefit of a civil union partner are not considered gifts. But what if the payment is beyond the level of support required to be given? There are no reported cases on this issue yet, but it is an interesting question.

Joint Property

Spouses in a traditional marriage typically own their marital residence in joint names. The source of the downpayment and the future mortgage payments are generally ignored for gift tax purposes because of the unlimited marital gift tax deduction. Consider the following hypothetical examples:

1. The husband (who is a starving artist) and the wife (who is a successful surgeon) buy a $1,000,000 home in joint names. The wife provides the downpayment of $200,000 from her own premarital assets, and all of the mortgage payments and other expenses related to the residence are paid by her from her earnings. *There are no gift tax consequences either during or upon the termination of the marriage as a result of the unlimited marital deduction.*
2. Assume the same facts as in hypothetical 1, except that the parties are John (artist) and Mark (surgeon), and they are partners in a New Jersey civil union. Upon taking title to the home in joint names, because there is no marital deduction, the IRS is likely to take the position that a gift of half the equity has been made from Mark to John. Moreover, every time Mark makes a payment toward the mortgage, he is enhancing the value of John's interest in the property, thus it is a taxable gift.[19]

This same logic would apply to joint bank accounts. However, the gift would occur only as the money is withdrawn by or for the benefit of the non-contributing partner.[20]

Are there gift tax consequences upon the dissolution of the civil union? In a divorce in a marriage, the division of marital assets does not typically result in the imposition of gift taxes because of the exemption set forth in 26 U.S.C. 2523 (the "marital deduction" if the transfers occur while the spouses are still married to each other) and the provisions of 26 U.S.C. 2516 (pursuant to a written separation agreement, where there is a final divorce within three years thereafter). But in the case of a dissolution of a civil union, there is no marital deduction and, because of DOMA, the treatment under Section 2516 is not available.

All is not lost. Prior to 1981, the marital deduction for gifts between spouses was limited. Prior to 1954, Section 2516 of the Internal Revenue Code did not exist. Section 2516 was, in fact, enacted in response to the U.S. Supreme Court's decision in *Harris v. Comm.*,[21] which held that a transfer of property, pursuant to a decree of divorce, was a transfer for adequate and full consideration in money or money's worth and was not subject to the gift tax. After the *Harris* decision, there was significant confusion regarding whether or not any certain division was pursuant to a decree, and whether the fact that a division may not have been pursuant to a decree was enough to result in the imposition of a gift tax. Most courts held that a gift had occurred unless the terms of the

property settlement agreement had been incorporated into the Court's decree. In some cases, however, it was sufficient if the agreement itself provided that it would become effective upon entry of the decree. When Section 2516 was enacted in 1954, the issue was put to rest.

Since DOMA precludes the application of Sections 2516 and 2523 to civil union dissolutions, it is likely that the Supreme Court's holding in *Harris* would apply. Thus, if the transfer is pursuant to a decree of divorce (including where a property settlement agreement is incorporated into a divorce decree), then it is unlikely that the IRS would be successful in asserting that the transfer is a taxable gift. Of course, we will not know until such a case is ultimately litigated.

Federal Estate Taxation

As stated above, there is no federal marital deduction for testamentary transfers to a surviving civil union partner. For federal estate tax purposes, it would appear that such transfers are taxable. In many cases where the estates are rather large, this may be an important issue to consider before entering into a civil union, despite the fact that the federal estate tax is scheduled to be repealed in full in 2010[22] and currently has a high[23] exemption that is increasing.[24] Can a claim made by the surviving civil union spouse against the estate of the deceased spouse result in a substitute deduction in lieu of the marital deduction?

Upon the enactment of the act, the provisions of N.J.S.A. 3B:8-1 *et seq.,* specifically, the "elective share," applied equally to civil union and married couples. In other words, civil union spouses have the same elective share rights as married spouses. Pursuant to 26 U.S.C. 2053(a)(3), "claims" against a decedent's estate are deductible to the extent the claim is allowable under the applicable law of the jurisdiction under which the estate is being administered.

If a deceased civil union spouse leaves nothing to his or her surviving spouse, and the surviving spouse makes a claim for the elective share, is that a claim that the estate would be able to deduct for federal estate taxes under Section 2053(a)(3)? In order to be deductible, the claim must represent a personal obligation of the decedent, *existing at the time of his or her death,* whether or not then matured.[25] Is a claim for an elective share a claim that was existing at the time of the decedent's death?

In *Essex v. U.S.,*[26] the Court held that a claim for a widow's allowance, authorized as a claim against the estate under Nebraska law, was not deductible under Section 2053(a)(3). The IRS also may contest the surviving civil union spouse's claim on the grounds that the claim is not for an interest *in* the estate as opposed to a claim *against* the estate.[27]

Prior to entering into a civil union, would it make a difference if the parties entered into a prenuptial agreement providing that the parties will provide certain benefits to each other in the event of a death of one of the parties or a divorce? New Jersey law provides that civil union couples could enter into enforceable prenuptial agreements in the same manner as spouses in a so-called traditional marriage. Is that sufficient to make a deductible claim under Section 2053(a)(3)? The author has been unable to find any cases addressing this interesting question, but in counseling a party entering into a civil union, it may be worth considering.

CONCLUSION

The enactment of New Jersey's Civil Union Act creates an interesting playing field for various issues. Obviously, tax issues are among the most important considerations for family law attorneys counseling clients. This article could not possibly address all of the issues certain to arise. Many of the issues raised here will only be developed over the course of many years of litigation. It the meantime, it should be a very interesting ride. ■

ENDNOTES

1. 188 N.J. 415 (2006).
2. Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996).
3. 1 U.S.C. 7 (2007).
4. N.J.S.A. 37:1-32(n), 37:1-33.
5. *See* N.J.S.A. 54A:2-1.
6. 26 U.S.C. 121(c)(2).
7. Treas. Reg. 1.121-3(e)(2)(iii)(D).
8. 26 U.S.C. 71(a) and 215(a).
9. *See* 26 U.S.C. 61(a) (which defined "gross income" for tax purposes) and 26 U.S.C. 71 (excluding alimony from the definition of gross income).
10. The general test for determining when a transfer is a gift for tax purpose.
11. *See Commissioner v. Duberstein*, 363 U.S. 278 (1960).
12. 26 U.S.C. 1041.
13. 370 U.S. 65 (1962).
14. *See also* Rev. Rul. 67-221, 1967-2 C.B. 63 (Under the terms of a divorce decree, the husband transferred his interest in an apartment building to his former wife in consideration for and in discharge of her dower rights. The marital rights the former wife relinquished are equal in value to the value of the property she agreed to accept in exchange for those rights. *Held:* there is no gain or loss to the wife on the transfer and the basis of the property to the wife is its fair market value on the date of the transfer).
15. 26 U.S.C. 414(p).
16. *See Hooker v. Comm.,* 10 T.C. 388 (1948), *aff'd,* 174 F. 2d 863 (5th Cir., 1949).
17. *See* N.J.S.A. 37:1-31.
18. *See Rosenthal v. Comm.,* 205 F.2d 505 (2nd Cir. 1953).
19. *See* Treas. Reg. 25.2511-1(h)(5).
20. *See* Treas. Reg. 25.2511-1(h)(4).
21. 340 U.S. 106 (1950).
22. A likelihood that the author sees as extremely remote.
23. $2,000,000.
24. $3,500,000 in 2009.
25. *See* Treas. Reg. 20.2053-4.
26. 33 AFTR2d 74-1478 (D. Neb.).
27. *See Lindsey v. U.S.,* 167 F. Supp. 136 (D. Mary. 1958).

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