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**STATE OF NEW YORK
COURT OF APPEALS**

_____X
DANIEL HERNANDEZ and NEVIN COHEN, LAUREN ABRAMS and DONNA FREEMAN-TWEED,
MICHAEL ELSASSER and DOUGLAS ROBINSON, MARY JO KENNEDY and JO-ANN SHAIN, and
DANIEL REYES and CURTIS WOOLBRIGHT,
Plaintiffs-Appellants,

-against-

New York County Clerk's Index # 103434/2004

VICTOR L. ROBLES, in his official capacity as City Clerk of the City of New York,
Respondent-Appellee. _____X

_____X
SYLVIA SAMUELS and DIANE GALLAGHER, HEATHER McDONNELL and
CAROL SNYDER, AMY TRIPI and JEANNE VITALE, WADE NICHOLS and
HARING SHEN, MICHAEL HAHN and PAUL MUHONEN, DANIEL J.
O'DONNELL and JOHN BANTA, CYNTHIA BINK and ANN PACHNER,
KATHLEEN TUGGLE and TONJA ALVIS, REGINA CICCHETTI and SUSAN
ZIMMER, ALICE J. MUNIZ and ONEIDA GARCIA, ELLEN DREHER and LAURA
COLLINS, JOHN WESSEL and WILLIAM O'CONNOR, and MICHELLE CHERRY-
SLACK and MONTEL CHERRY-SLACK,
Plaintiffs-Appellants,

-against-

Albany County Clerk's Index Number 1967/04

THE NEW YORK STATE DEPARTMENT OF HEALTH and THE STATE OF NEW
YORK,
Respondents-Appellees. _____X

BRIEF OF

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK,
AMERICAN ACADEMY OF MATRIMONIAL LAWYERS--NEW YORK CHAPTER,
THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK,
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/NEW YORK
AND
TOMPKINS COUNTY BAR ASSOCIATION**

AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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A. Issues Discussed

This brief demonstrates that same-sex couples, who are unable to legally marry in New York, are treated unequally with opposite-sex married couples under New York law. It also establishes that, in the absence of equal marriage rights in New York, same-sex couples are unable to fashion alternatives that make up for the unequal rights.

B. Interest of Amici

The Association of the Bar of the City of New York, also known as the New York City Bar (“NYCBAR”) is one of the oldest and largest professional associations in the United States. It was founded in 1870 to improve the administration of justice, promote rule of law, and elevate the legal profession’s standards of integrity, honor and courtesy. It was among the first bar associations to have a standing committee dealing with lesbian and gay issues, and has been an advocate for same-sex marriage for nearly a decade. *See NYCBAR, Report on Same-Sex Marriage in New York* (1997). NYCBAR has over 22,000 voluntary members who serve hundreds of thousands of clients, and who have a vital interest in ensuring that New York grant full marriage rights to same-sex couples. NYCBAR submits this brief to emphasize that because same-sex couples are

unable to marry, they face inequalities with profound implications for the clients of NYCBAR members and for many others.

The American Academy of Matrimonial Lawyers was founded in 1962 to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, with the goal of protecting the welfare of the family and society. Its members are recognized as expert practitioners in the field. The American Academy's New York Chapter ("AAML-NY") has been in existence more than 30 years and has approximately 177 members. As a leading New York matrimonial law organization, AAML-NY is deeply concerned that New York law recognize that American families have undergone major changes in structure and type, and that this evolving reality includes thousands of New York same-sex couples.¹

¹ This brief represents the views of the New York Chapter of the American Academy of Matrimonial Lawyers. It does not necessarily reflect the views of the American Academy of Matrimonial Lawyers. This brief does not necessarily reflect the views of any judge who is a member of the American Academy of Matrimonial Lawyers. No inference should be drawn that any judge who is a member of the Academy participated in the preparation of this brief or reviewed it before its submission. The New York Chapter of the American Academy of Matrimonial Lawyers does not represent a party in this matter, is receiving no compensation for acting as amicus, and has done so pro bono publico.

The Asian American Bar Association of New York ("AABANY"), founded in 1989, is an organization of Asian and Pacific American attorneys dedicated to the interests of Asian Pacific American communities.²

The Legal Aid Society of the City of New York (the "Society") is a private organization that has provided free legal assistance to indigent persons for nearly 130 years. The Society's Civil Practice routinely represents clients in matrimonial actions in Supreme Court and orders of protection, custody, visitation and support matters in Family Court. The Civil Practice's Domestic Violence Project works closely with the lesbian, gay, bisexual and transgender communities. The Society has seen the direct impact of the lack of marital status for its lesbian and gay clients, who often lack standing to obtain legal remedies for property distribution, custody and visitation issues and to protect themselves from domestic violence with civil orders of protection.

National Employment Lawyers Association/New York ("NELA/NY") is the New York affiliate of the National Employment Lawyers Association ("NELA"). NELA, founded in 1985, is the national membership organization for lawyers who

² The Amicus Brief represents the views of AABANY. It does not necessarily reflect the views of any member or of any judges who are members of AABANY.

represent employees in labor, employment and civil rights disputes. NELA/NY has approximately 350 members who work on behalf of those who have been illegally mistreated in the workplace. NELA regularly participates in precedent-setting litigation affecting individual rights in the workplace, while promoting the highest standards of professionalism, ethics and judicial integrity. As an advocate of workplace fairness, NELA/NY strongly supports equal access to spousal benefits under state law for all New York employees.

Tompkins County Bar Association ("TCBA") was incorporated in 1912 to promote "the science of jurisprudence, the administration of justice, and to maintain the integrity, honor, courtesy and dignity of the profession of law." Its approximately 250 members practice in a non-metropolitan upstate county where, according to the 2000 U.S. Census, 2.19% of all coupled households are gay or lesbian -- the second-highest percentage of any New York State county, and the second-highest of any non-metropolitan county in the United States.

gaydemographics.org, *2000 Census Information on Gay and Lesbian Couples, New York: By County* (undated) , available at

http://www.gaydemographics.org/USA/states/newyork/2000Census_state_ny_counties.htm <visited Mar. 31, 2006>; David M. Smith & Gary J. Gates, *Gay and*

Lesbian Families in the United States: Same-Sex Unmarried Partner Households;

A Preliminary Analysis of 2000 United States Census Data 11 (2001), available at <http://www.hrc.org/Content/ContentGroups/Publications1/census.pdf> <visited May 11, 2005>. Because the gay and lesbian clients of TCBA members suffer legal disabilities due to their inability to marry, and because justice demands it, TBCA supports equal marriage rights for same-sex couples.

C. Summary of Argument

In these two cases, the plaintiffs argue that unequal exclusion of same-sex couples from the rights and duties of marriage violates the New York State Constitution. Five years ago, NYCBAR observed: "The institution of marriage confers countless rights and benefits on its participants that same-sex couples in New York are excluded from enjoying." NYCBAR, *Report on Marriage Rights for Same-Sex Couples in New York* (2001), reprinted in 13 COLUM. J. GENDER & L. 70 (2004) This amicus brief shows that in countless areas -- including health care, estates, torts, divorce and custody --same-sex life partners in long-term, committed relationships lack the rights, benefits and duties that opposite-sex married couples automatically receive. By preventing same-sex partners from marrying, the state thrusts their families into legal limbo and excludes these couples and their children from full membership in society.

In its 389-page report on same-sex marriage issues, the New York State Bar Association

found . . . a vast array of areas in which the law provides specific rights and benefits – often with correlative obligations – or default mechanisms reserved to married couples (i.e., in New York, heterosexual couples who elect to marry), from which same-sex couples that would marry if they could, are excluded. In other words, we found that same-sex couples are excluded from the broad range of “governmental benefits . . . , property rights . . . , and other, less tangible benefits” that the Supreme Court has identified as attaching to marriage.

New York State Bar Association, *Report and Recommendations of the Special Committee to Study Issues Affecting Same-Sex Couples 3* (2004) [hereinafter "*State Bar Report*"], available at

http://www.nysba.org/Content/ContentGroups/Reports3/Same-Sex_Marriage_Report/Same-SexIssuesReport2004.pdf <visited March 3, 2006>

(internal footnote omitted; quoting *Turner v. Safley*, 482 U.S. 78, 96, 107 S. Ct. 2254, 2265 (1987)). The *State Bar Report* has been formally adopted, see New York State Bar Association, *Resolution Adopted by House of Delegates* (Apr. 2, 2005), and much of this brief relies on its exhaustive research. (Because the *State Bar Report* has a fine-grained table of contents, we have not cited to it in detail.)

Similarly, in its recently issued Report to the Chief Judge of the State of New York, the New York State Matrimonial Commission recommended equal marriage rights for same-sex couples:

[I]nsofar as the issues raised herein involve equal protection under the law, the dissolution of marriages, the distribution of the marital estate and determination of custody and shared parenting time, it is the opinion of a majority of this Commission, based on substantial evidence submitted to it, that these important issues could be substantially addressed by the extension of civil marriage to same sex couples in New York State.

Matrimonial Commission Report to the Chief Judge of the State of New York, at 63 (2006), available at <http://www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf>. <visited Mar. 28, 2006> (emphasis added).

Marriage has symbolic meaning and is an important social institution. Also significant are the many concrete legal protections that marriage provides. The current marriage laws, as they have been interpreted by most courts, leave many families vulnerable and, as a result, are inherently unfair. While there is rarely decisive precedent, New York courts have often given narrow interpretations to same-sex couples' rights in the absence of marriage. Even where courts have granted legal recognition to same-sex couples, as in the areas of single-family zoning and succession rights to rent stabilized apartments, the courts burden same-

sex couples with detailed proof-of-relationship tests that require an unrealistic level of documentation.

While couples can eliminate some risks by cobbling together a patchwork of documentation, this is expensive and cumbersome. Many couples do not have the resources to document their relationships and wishes, or may not realize that they need to. And no amount of documentation could possibly replicate the complete bundle of rights and responsibilities that accompanies marriage.

The 2000 United States Census reported 46,490 same-sex couples in New York. Tavia Simmons & Martin O'Connell, *Census 2000 Special Reports: Married-Couple and Unmarried-Partner Households: 2000* 4 (2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf> <visited Apr. 9, 2006>. This figure is probably an undercount: some couples were likely reluctant to disclose their actual status due to confidentiality fears, or because they felt the Census categories did not adequately describe their relationship. A 25% undercount is realistic, based on comparing the Census results with other estimates of coupling rates among same-sex couples and with the best-respected estimate of the overall lesbian and gay population. Gary J. Gates & Jason Ost, *The Gay and Lesbian*

Atlas 13, 18-21 (Urban Inst. Press 2004). Assuming a 25% Census undercount, there would be 58,112 same-sex couples in New York.

Many of these couples are minorities: in New York, 13.7% are African-American, 14.3% are Hispanic and 3.86% are Asian and Pacific Islander.

gaydemographics.org, *Same-Sex Couples by Main Racial Groups by State*, available at

http://www.gaydemographics.org/USA/2000Census_Gay_SF2table.htm <visited

Apr. 8, 2006> (based on 2000 U.S. Census Information on Gay and Lesbian Couples, Summary File 2). As noted in Table 1, like their opposite-sex married U.S. African-American and Hispanic counterparts, same-sex U.S. African-American and Hispanic couples have estimated median incomes \$7,000-\$14,000 below those for all opposite-sex married U.S. couples. (The median income figures for all U.S. same-sex couples and for all U.S. Asian and Pacific same-sex couples are not available.)

<i>Table 1 -- Median annual income, U.S.-wide, for married and same-sex couples, 2000 Census (African-American and Hispanic couples are defined as couples with at least one member of group³)</i>	
	Median income
All opposite-sex married couples ⁴	\$57,345
African-American opposite-sex married couples ⁵	\$50,000
African-American male same-sex couples	\$50,000
African-American female same-sex couples	\$40,000
Hispanic opposite-sex married couples ⁶	\$44,000
Hispanic male same-sex couples	\$49,800
Hispanic female same-sex couples	\$43,000

³ 21% of same-sex African-American couples in the sample used to generate the data are interracial; 39% of the same-sex Hispanic couples in the sample used to generate the data are interethnic. The median incomes reported for same-sex couples in the sample where both partners are African-American or both are Hispanic are \$5,000-\$10,000 below those reported for same-sex couples with at least one African-American or Hispanic partner. Thus, the text of the brief uses more conservative figures with larger sample sizes. Alain Dang & Somjen Frazer, *Black Same-Sex Households in the United States: A Report from the 2000 Census* 14, 16 (Nat'l Gay & Lesbian Task Force Pol'y Inst. & Nat'l Black Just. Coalition, 2d ed. Dec. 2005), available at <http://www.thetaskforce.org/reslibrary/list.cfm?pubTypeID=2> <visited Mar. 28, 2006>; Jason Cianciotto, *Hispanic and Latino Same-Sex Couple Households in the United States: A Report from the 2000 Census* 24, 37 (Nat'l Gay & Lesbian Task Force Pol'y Inst. & Nat'l Latino/a Coalition for Just., 2005) available at <http://www.thetaskforce.org/downloads/HispanicStudy/HispanicLatinoSSHH.pdf> <visited Apr. 9, 2006>.

⁴ U.S. Census Bureau, American FactFinder, *Table QT-P32. Income Distribution in 1999 of Households and Families:2000*; Census 2000 Summary File 3 (SF 3)-Sample Data, available at http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=01000US&-qr_name=DEC_2000_SF3_U_QTP32&-ds_name=DEC_2000_SF3_U&-redoLog=false <visited Apr. 9, 2006>.

⁵ Figures on African-American couples are from Dang & Frazer, *Black Same-Sex Households in the United States A Report from the 2000 Census* 15, cited at note 3 above.

⁶ Figures on Hispanic couples are from Cianciotto, *Hispanic and Latino Same-Sex Couple Households in the United States: A Report from the 2000 Census* 36, cited at note 3 above.

A statistically rigorous analysis of the median incomes for African-American and Hispanic couples, including the statistical significance of their difference from the median for all married opposite-sex couples, is unavailable.⁷ Nonetheless, the differences from all opposite-sex married couples are substantial, and the reported median incomes indicate that many minority same-sex couples are struggling economically.

In both *Samuels v. New York State Dep't of Health*, __ N.Y.S.2d __, 2006 WL 346465, 2006 N.Y. Slip Op. 01213 (3d Dep't 2006), and *Hernandez v. Robles*, __ A.D.3d __, 805 N.Y.S.2d 354, 360 (1st Dep't 2005), the courts found a rational basis for excluding same-sex couples from marriage. However, neither decision considered – even tangentially – the effects of this exclusion on the thousands of

⁷ The median incomes reported for all types of African-American and Hispanic couples are estimates generated through a custom tabulation of the U.S. Census Bureau's 5% Public Use Microdata Samples ("PUMS"). PUMS provides more detailed socioeconomic information for its sample of Census respondents than is available through the Census's full-population datasets on same-sex couples. The tradeoff for making PUMS' richer dataset available is that, like any sample, it introduces the possibility of sampling error. Dang & Frazer, *Black Same-Sex Households in the United States: A Report from the 2000 Census* 32-35 (Technical Appendix), cited at note 3 above; Cianciotto, *Hispanic and Latino Same-Sex Couple Households in the United States: A Report from the 2000 Census* 68-70 (Technical Appendix), cited at note 3 above.

Statistical significance is the probability that the relationship between two variables occurred by chance. (For example, whether the difference between the median income for all opposite-sex married couples and for Hispanic female same-sex couples reflected an actual difference, or instead could be attributable to sampling error for the Hispanic female same-sex couples drawn for PUMS.)

families affected. Whatever these courts' conjectures about the “cultural, social and legal ideal” (*Hernandez*, ___ A.D.3d ___ at ___, 805 N.Y.S.2d at 360), they have ignored reality: how same-sex couples create families, face the same day-to-day struggles as their opposite-sex married counterparts -- and suffer devastating consequences from the denial of equal marriage rights. The amici therefore urge this Court to reverse the decisions of the Supreme Court, Appellate Division, Third Department in *Samuels* and the Supreme Court, Appellate Division, First Department in *Hernandez*, and affirm the decision of the Supreme Court, New York County in *Hernandez v. Robles*, 7 Misc.3d 459, 794 N.Y.S.2d 579 (Sup. Ct. N.Y. County 2005).

D. Opposite-sex couples who marry have enforceable rights and obligations with regard to each other and to children, but same-sex couples who cannot marry do not

1. Parental rights and responsibilities

Reflecting a lesbian and gay baby boom accelerating over the past decade, 34% of female and 22% of male New York same-sex households have children.

See Tavia Simmons & Martin O’Connell, *Census 2000 Special Reports: Married-Couple and Unmarried-Partner Households: 2000* 4 (2003), available at

<http://www.census.gov/prod/2003pubs/censr-5.pdf> <visited Apr. 9, 2006>. In

2000, these same-sex couples were raising about 24,000 children in New York.⁸

⁸ To estimate the number of children, start with the Census figures for New York for the number of unmarried same-sex couples of each sex. Since male and female same-sex couples have children at different rates, multiply the number of New York same-sex couples of each gender by the percentage of same-sex couples of that gender with children. As noted in the text, the New York figures are at Tavia Simmons & Martin O’Connell, *Census 2000 Special Reports: Married-Couple and Unmarried-Partner Households: 2000* 4, 9 (2003). The 2000 Census says that the average family with its own children under 18 years of age has 1.87 children. U.S. Census Bureau, *Statistical Abstract of the United States: 2002*, Table 57 Families by Type, Race, and Hispanic Origin: 2000 at 52 available at <http://www.census.gov/prod/2003pubs/02statab/pop.pdf> <visited Apr. 9, 2006>. If, using a conservative estimate, the average same-sex family with children under 18 years of age has only 1.5 children, this would give us 19,290 in New York. If, following Gary J. Gates & Jason Ost, *The Gay and Lesbian Atlas* 13, 18-21 (Urban Inst. Press 2004), we further assume a 25 percent undercount of unmarried same-sex couples by the Census, that would mean 24,112 children being raised by same-sex couples in New York. Table 2 shows the calculations in detail:

<i>Table 2 -- Estimated number of children in New York same-sex households, 2000</i>			
Item	Male Same-Sex Couples	Female Same-Sex Couples	Total
NY # same-sex households	24,494	21,996	46,490
NY % same-sex households w/children under 18	21.7 %	34.3 %	
NY # same-sex households w/children under 18	5,315	7,545	
NY # children under 18; assumes U.S. Census # of couples & 1.50 children/same-sex couple	7,973	11,317	19,290
NY # children under 18; assumes 25% U.S. Census # couple undercount & 1.50 children/same-sex couple	9,966	14,146	24,112

As shown in Table 3, like their opposite-sex married African-American and Hispanic counterparts, a higher proportion of female same-sex African-American and Hispanic couples have children under age 18 in their households than do all opposite-sex married U.S. couples. In addition, a high proportion of male same-sex African-American and Hispanic couples have children under age 18 in their households. (The proportion of children under age 18 is not available for Asian and Pacific Islander couples.)

Table 3 -- Children under 18 in household, U.S.-wide, for married and same-sex couples, 2000 Census	
<i>(African-American and Hispanic couples are defined as couples with at least one member of group⁹)</i>	
	% w/ children under 18
All opposite-sex married couples ¹⁰	46%
All male same-sex couples	22%
All female same-sex couples	34%
African-American opposite-sex married couples ¹¹	58%
African-American male same-sex couples	36%
African-American female same-sex couples	52%
Hispanic opposite-sex married couples ¹²	70%
Hispanic male same-sex couples	41%
Hispanic female same-sex couples	54%

A statistically rigorous analysis of the reported percentages, including the statistical significance of the differences between each type of same-sex couple with children under 18 and all U.S. couples with children under 18, is unavailable.¹³ Nonetheless, the reported percentages indicate that a high

⁹ For a discussion of the prevalence of interracial same-sex African-American couples and interethnic same-sex Hispanic couples in the sample used to generate the data, see note 3 above.

¹⁰ Figures on all U.S. couples are from Tavia Simmons & Martin O’Connell, *Census 2000 Special Reports: Married-Couple and Unmarried-Partner Households: 2000* 9 (2003)

¹¹ Figures on African-American couples are from Dang & Frazer, *Black Same-Sex Households in the United States A Report from the 2000 Census* 22, cited at note 3 above.

¹² Figures on Hispanic couples are from Cianciotto, *Hispanic and Latino Same-Sex Couple Households in the United States: A Report from the 2000 Census* 51, cited at note 3 above.

¹³ For a discussion of the sampling and significance issues, see note 7 above.

proportion of minority same-sex couples -- in particular female ones -- are raising children.

In its opinion denying equal marriage rights to same-sex couples, the First Department stated: "Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children and society, and such preference constitutes a rational policy decision." *Hernandez v. Robles*, ___ A.D.3d ___, ___, 805 N.Y.S.2d 354, 360 (1st Dep't 2005). Based on the court's own reasoning, the denial of equal marriage rights to same-sex couples is irrational because it leaves tens of thousands of children of same-sex couples without the protections that children of opposite-sex married couples take for granted.

a. Adoption

One unmarried same-sex life partner may adopt the other partner's biological child (known as a "second-parent adoption") because this provides the child with additional parental support, *In re Jacob*, 86 N.Y.2d 651, 636 N.Y.S.2d 716 (1995). Domestic Relations Law §110 expressly permits adoptions by single, unmarried persons or by married couples. While the Fourth Department has extended this to hold that same-sex life partners may jointly adopt a non-biological child, *see In re Adoption of Carolyn B.*, 6 A.D.3d 67, 70, 774 N.Y.S.2d 227, 230 (4th Dep't 2004),

other New York courts have not yet considered the issue. Thus, in the absence of marriage, some children of same-sex couples may be deprived of the security provided by having two legally recognized parents. And even where same-sex partners pursue a second-parent adoption, they are faced with a complex, expensive process. When Donna Freeman-Tweed wanted to do a second-parent adoption of Elijah, the biological child of her six-year partner, Lauren Abrams:

[W]e had to have friends write letters on our behalf to the State indicating that she would make a good parent; we had to be fingerprinted; and we had to have a New York State probation officer come into our home to decide if it was a "suitable environment" in which to raise children. . . . I felt that this experience was very intrusive and extremely unjust, since married couples can obtain full parental rights automatically when they have a child.

Hernandez v. Robles Record on Appeal ("HR") at 468. (All references to individuals that are cited to the *Hernandez v. Robles* Record on Appeal are to affidavits by plaintiffs in that case. Respondent-Appellee The City of New York concedes the truth of the material facts set forth in the plaintiffs' affidavits. HR at 575.)

b. Alternative Insemination

Lesbian life partners who have children through alternative insemination, unlike opposite-sex married couples who use the same procedure, face potential challenges to their parental rights. For opposite-sex married couples, when a doctor performs alternative insemination and the patient and her spouse give written consent, any child thus conceived is considered the legitimate child of the biological mother and her spouse for all purposes. DOM. REL. LAW §73. When a couple is unmarried, however, in order to become the legal parent of the child, the unmarried lesbian partner of an inseminated woman must pursue a second-parent adoption. Before approving a second parent adoption, a court can require the consent of the sperm donor, who is the other biological parent, if his identity is known. DOM. REL. LAW §§111; 111-a. Because the sperm donor's parental status is not automatically terminated, the same-sex couple who have raised the child may find themselves in litigation over his relationship with the child, as in *Thomas S. v. Robin Y.*, 209 A.D.2d 298, 618 N.Y.S.2d 356 (1st Dep't 1994). There, when relations between the biological father and the lesbian couple broke down after nine years, the First Department granted the father an order of filiation.

c. Custody and visitation of children

While a husband enjoys a presumption that he is the natural parent of any child born to his wife during their marriage, *see, e.g., Barbara S. v. Michael I.*,

24 A.D.3d 451, 805 N.Y.S.2d 425 (2d Dep't 2005) – whether or not this presumption is warranted – the non-biological, non-adoptive parent of a child born during a same-sex relationship gets no such presumption. Thus, when a same-sex couple with children separates, a partner who is not a biological parent and has not completed a second-parent adoption has virtually no custody or visitation rights. The biological parent can exclude the non-biological parent, with devastating psychological effects for the child and the non-biological former partner -- which happens repeatedly in New York cases. In *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586 (1991), the Court of Appeals upheld a biological mother's decision to deny visitation and cut off all contact between the non-biological mother and the child they had raised for two years, since birth. The Court explained that the non-biological mother was not a "parent" within the meaning of Domestic Relations Law §70. 77 N.Y.2d at 655-656, 569 N.Y.S.2d at 587-88.

Since *Alison D.*, courts have rejected equitable estoppel as an alternative theory for granting visitation to unmarried partners who are not biological parents, or -- unless there is a showing of unfitness or extraordinary circumstances -- as a theory for granting custody. *See, e.g., C.M. v. C.H.*, 6 Misc.3d 361, 789 N.Y.S.2d 393 (Sup. Ct. N.Y. County 2004); *Janis C. v.*

Christine T., 294 A.D.2d 496, 742 N.Y.S.2d 381 (2d Dep't 2002) (visitation only); *Multari v. Sorrell*, 287 A.D.2d 764, 731 N.Y.S.2d 238 (3d Dep't 2001) (visitation only).

In contrast to the harsh experience of non-biological lesbian and gay parents, married non-biological parents have been permitted to invoke equitable estoppel upon divorce to seek visitation and custody of a spouse's child born prior to the marriage, even in the absence of a second-parent adoption. *See Gilbert A. v. Laura A.*, 261 A.D.2d 886, 689 N.Y.S.2d 810 (4th Dep't 1999) (granting husband standing to petition for visitation under equitable estoppel and extraordinary circumstances theories); *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 676 N.Y.S.2d 677 (2d Dep't 1998) (granting husband standing to petition for custody and visitation under equitable estoppel theory); *but see Anonymous v. Anonymous*, 20 A.D.3d 333, 797 N.Y.S.2d 754 (1st Dep't 2005) (husband held out as father during two-year marriage, including using name on school records; denied interim visitation as "non-parent").

When a same-sex relationship dissolves and a biological or adoptive parent cuts off the ex-partner's contact with the child they have jointly raised, the non-biological parent suddenly loses a relationship with that child, and the child

suddenly loses someone who has functioned in every respect as a parent. In *Denise B. v. Beatrice R.*, N.Y.L.J., Sept. 19, 2005, p.1, col. 6 (Fam. Ct. Suffolk County), the court reluctantly denied visitation to a lesbian non-biological parent who had co-parented a child for five years -- since infancy. The court lamented that the “harsh result” required by *Alison* might harm the child, noting “the frequency with which children today are being raised by and bonding with long-term . . . nonmarital homosexual partners.” The abrupt loss of a key relationship is profoundly destructive -- and in the absence of marriage for same-sex couples, is often mandated. Second-parent adoption is not a full solution, since it is often too complex or expensive to pursue. *See* Part D.1.a above and Part J below.

d. Child Support

(1) Equitable estoppel

Given *Alison D.*, it is not clear whether a partner in a same-sex relationship without legal or biological ties to children the couple have raised together can be required to pay child support under a theory of equitable estoppel. *Cf. Karin T. v. Michael T.*, 127 Misc.2d 14, 484 N.Y.S.2d 780 (Fam Ct. Monroe County 1985) (transgendered partner with marriage license liable for child support based on equitable estoppel and written agreement).

(2) Stepparents' duty to provide support

When biological parents cannot provide the necessary financial support, stepparents, to the extent financially able, must support stepchildren who are or are in danger of becoming recipients of public assistance. *See* FAM. CT. ACT §415; *In re Monroe County Dep't of Soc. Servs. [Palermo] v. Palermo*, 192 A.D.2d 1114, 1114, 596 N.Y.S.2d 252, 253 (4th Dep't 1993). A legally recognized “step-relationship” does not exist outside of marriage, so this important financial safety net is unavailable if the child’s parent is living in a same-sex relationship.

2. Domestic violence

In 2004, the New York City Gay and Lesbian Anti-Violence Project opened 486 new domestic violence cases and reported a 21% increase in domestic violence incidents from the previous year. National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual and Transgender Domestic Violence in 2003/4*, at 1, available at www.avp.org, <visited February 7, 2006>. The estimated rate of domestic violence in same-sex relationships is about the same as in opposite-sex relationships. *Id.* at 3. Yet unmarried same-sex partners have far fewer protections.

The Family Court may issue orders of protection in domestic violence cases between spouses, parent and child, and “members of the same family or

household.” Because “members of the same family or household” are defined as blood relatives, persons legally married, persons formerly married, or persons who have a child in common, FAM. CT. ACT §812(1), the Family Court may not issue an order of protection in same-sex relationships unless the victim has a “child in common” with the abuser. This requirement is unlikely to be met unless there is a two-parent adoption.

A same-sex domestic violence victim instead must pursue an order of protection in the criminal justice system. CRIM. PROC. LAW §530.11. This requires the same-sex domestic violence victim to satisfy a more stringent evidentiary standard than in Family Court, and to obtain the abuser’s arrest. As a result, same-sex domestic violence victims “have to jump the hurdles of calling the police, asking for help, making sure they are taken seriously, filing a complaint, [and] choosing to have their perpetrator arrested.” Yet having an abuser arrested can trigger even more abuse. *State Bar Report* at 130 (quoting Conference, *Revolutions Within Communities: The Fifth Annual Domestic Violence, Conference: Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, 29 FORDHAM URB. L.J. 121, 140 (2001)).

3. Property distribution on dissolution

Under what is known as the “Equitable Distribution Law,” DOM. REL. LAW §236B, New York courts recognize marriage as an “economic partnership.” *O'Brien v. O'Brien*, 66 N.Y.2d 576, 585, 498 N.Y.S.2d 743, 747 (1985). When distributing assets in a divorce action, regardless of how title to marital property is held, courts look to factors including the presence of children and each party’s economic and non-economic contributions. For example, the court may award occupancy of the marital residence to the primary caretaker of the parties’ children. DOM. REL. LAW §236B(5)(d)(3). A spouse who helped the other spouse obtain a professional license or degree, whether by supporting the couple financially, or by caring for children, managing the household, and giving emotional support and encouragement, is entitled to distribution of a portion of its economic value. DOM. REL. LAW §236B(5) . Unmarried same-sex life partners lack these rights.

E. In a medical crisis, married couples, but not same-sex couples, have clear rights that support their relationships

When a partner in a couple is in a medical crisis, time is crucial and the consequences of decisions can be life-altering. Married couples have a clear set of rights and duties that are universally respected, whether or not they have documented their relationships. In the absence of marriage, a same-sex partner bringing a loved one to an emergency room can be refused the right to visit, or

even to be told about his loved one's condition or treatment. Nevin Cohen, in discussing the terminal illness of his late partner of more than ten years, Kenneth Skurdna, observed:

The situation was made worse by the fact that I did not have the recognition of being Ken's spouse. When Ken was ill and in the hospital, I was not always given the same information or asked the same decision-making questions in a way that a spouse would be. Although some doctors respected my relationship with Ken, others did not.

HR at 456. Similarly, when Curtis Woolbright's partner of three years, Daniel Reyes, underwent laser surgery to remove malignant colon polyps, Woolbright "worried that I had no legal right to visit Daniel, or to make emergency medical decisions. I prayed that there would be no complications. . . . But the fear is a constant reminder that we are not considered equal under the law." HR at 562-63.

1. Access to partners' medical information

New York law permits a health care provider to disclose a patient's confidential medical information only with the patient's consent. *See* PUB. HEALTH LAW §17. New York's law is more stringent than federal health privacy

law, and prevails over it where the two conflict. *National Abortion Fed'n v. Ashcroft*, 03 Civ. 8695, 2004 U.S. Dist. LEXIS 4530, at 9 (S.D.N.Y. Mar. 19, 2004). Because same-sex relationships do not have the same legal status as marriage, and detailed documentation may be unavailable in a medical emergency, a same-sex partner may be unable to prove that his or her interest in a patient's care is equal to that of a spouse. If health care providers insist on unavailable documentation, they may withhold important medical information from the same-sex partner based on "professional judgment" -- and may even feel compelled to withhold the information under New York law. *See* Thomas Crampton, *What Marriage Means to Gays: All That Law Allows Others*, NEW YORK TIMES, Mar. 30, 2004, p. B1 (same-sex partner denied access to ill partner's medical information despite documentation).

2. Decisionmaking powers upon a partner's incapacity

New York State law permits a person to designate another individual to make health care decisions in the event of physical incapacity by executing a health care proxy. *See* PUB. HEALTH LAW §§2960-2979. If no health care proxy is in place and the Surrogate's Court has not appointed a guardian, a spouse has priority, followed by other legally recognized family members. PUB. HEALTH LAW

§2965(ii)-(v). A close friend -- which is all that a same-sex life partner is in the absence of marriage -- comes after family members. PUB. HEALTH LAW §2965(vi).

When an adult is declared mentally incapacitated, the authority to make decisions on behalf of the incapacitated individual does not vest automatically in any individual. *See* MENTAL HYG. LAW §81.19 (listing eligibility requirements for guardian appointment). Instead, a court appoints a guardian after a hearing. *See* MENTAL HYG. LAW §81.11(a). Although the most important factor is the “the best interests and welfare of the incompetent,” if the incapacitated person has not executed a document or otherwise identified a preference, a court generally appoints one of the incapacitated person's legally recognized family members as guardian. *See In re Application of Eichner*, 102 Misc.2d 184, 195, 423 N.Y.S.2d 580, 588 (Sup. Ct. Nassau County 1979) (preference for family members). Moreover, when legally recognized family members are not appropriate appointments, the court must explain its reasons for choosing someone else. *See* MENTAL HYG. LAW §81.19; *Matter of Pasner*, 215 A.D.2d 763, 627 N.Y.S.2d 966 (2d Dep’t 1995).

Thus, absent the disabled same-sex partner's properly executed health care proxy or document identifying a preferred guardian, if legally recognized family

members object to the relationship, they may attempt to exclude the other same-sex partner from critical decisions. When Minnesotan Karen Thompson's same-sex partner of four years, Sharon Kowalski, was permanently disabled in a 1983 automobile accident, Kowalski's parents barred Thompson from visiting her. It took nine years of litigation for Thompson to win guardianship and pursue a program of aggressive rehabilitation for Kowalski. Eleanor J. Bader, *The Lawyer's Bookshelf: "The Sharon Kowalski Case: Lesbian and Gay Rights on Trial"* (book review), N.Y.L.J., Sept. 5, 2003.

Even if the legally recognized family members do not object to the relationship, the partner and parent may disagree on care decisions. When a member of a married couple is incapacitated, they have the comfort of knowing that their spouse -- the life partner whom they have chosen -- will usually be the one making crucial decisions, rather than a parent or other family member. A same-sex partner rolls the dice.

F. When a member of a couple dies, married spouses, but not same-sex partners, are protected from destitution by rights to the assets and benefits of the deceased

1. Intestate distribution

Under the Estates, Powers and Trusts Law, the surviving spouse of a decedent has vested rights in any intestate distribution. ESTATES, POWERS & TRUSTS LAW ("EPTL") §4-1.1(a). If the deceased person has no issue, then the surviving spouse receives the entire estate. *Id.* §4-1.1(a)(2). If the deceased person has issue, then the surviving spouse receives fifty thousand dollars plus one half of the remaining intestate estate. *Id.* §4-1.1(a)(1). Because same-sex couples are not permitted to marry, the New York County Surrogate's Court has held that the surviving partner in a same-sex relationship receives nothing if his or her partner dies intestate: *In re Petri*, N.Y.L.J., Apr. 4, 1994, p. 29, excluded from inheritance a surviving same-sex partner who claimed an eleven-year relationship in which the partners "conducted [themselves] as a couple in every sense of the word." This can leave a life partner destitute, while the decedent's estate goes to distant or estranged blood relatives.

2. Spousal right of election

If a deceased spouse had a will, a surviving opposite-sex spouse who is excluded from its distribution generally has a statutory right of election to take the greater of \$50,000 or one-third of the net estate. EPTL §5-1.1-A(a)(2). However, inheritance law provides no such protection for a surviving same-sex partner. In *In re Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993), the Second

Department held that the surviving partner in a four-year same-sex relationship was not permitted to exercise the right of election against the deceased partner's will, with the result that the lion's share of the estate went to a former same-sex partner of the decedent. Thus, absent a written, properly drafted, executed and witnessed legal instrument, a same-sex life partner is excluded from inheritance rights.

3. Workers' Compensation Law

Under the New York Worker's Compensation Law, if a worker dies from a covered on-the-job injury, the surviving spouse and/or minor children are entitled to weekly cash benefits equal to two-thirds of the deceased worker's average weekly wage. WORKERS COMP. LAW §16. Same-sex life partners do not have this right, according to *In re Valentine*, 17 A.D.3d 38, 791 N.Y.S.2d 217 (3d Dep't 2005), in which the Third Department held that a same-sex domestic partner was not a "surviving spouse" and, therefore, was not eligible to receive death benefits. Bill Valentine was an airline employee killed in a November 2001 American Airlines plane crash shortly after taking off from John F. Kennedy Airport. Valentine and his surviving partner, Joe Lopes, had been together 21 years, owned an apartment together, jointly held bank accounts and investments, and had registered as New York City domestic partners. *Id.*; *see also* Beth Shapiro, *NY*

Court Rejects Workers' Comp Claim By Same-sex Partner, 365GAY.COM, Mar. 23, 2005, available at <http://www.365gay.com/newscon05/03/032305nyBens.htm>

<visited May 11, 2005>. But because he was unable to marry, Lopes was deprived of the statutory death benefit, leaving him in a far more precarious financial situation than a married spouse has when a husband or wife dies in a work-related accident.

4. Disposition of partner's remains

On February 3, 2006, Public Health Law §4201 was added, providing that, in controlling the disposition of the decedent's remains, a decedent's domestic partner takes priority over anybody except a designee in a will, a specially designated agent, or a surviving legal spouse. Thus, surviving domestic partners take priority over surviving adult children, parents, adult siblings, guardians or estate fiduciaries. The law provides three ways to establish domestic partner status: (i) registering in jurisdictions with domestic partner registration systems; (ii) being a person's designated partner for employment benefits or health insurance; or (iii) documenting financial or other dependence or mutual interdependence.

While this law gives domestic partners with foresight and legal wherewithal priority in the disposal of their loved ones' remains, it does not make domestic

partners equal with opposite-sex spouses. Instead, it forces the surviving partner to prove status with great speed – as little as the one day required for burial in Judaism – at a time of great grief. A surviving opposite-sex spouse, on the other hand, ordinarily can decide on the disposition of the deceased spouse's remains without providing any additional documentation -- or even a marriage license.

If domestic partnership status is not satisfactorily demonstrated, the legal spouse of the decedent is given priority, followed by other legally recognized family members and then "any other person authorized" to dispose of the body. PUB. HEALTH LAW §4201(2) In this case, same-sex domestic partners will face the traumatic issues in *In re Stewart*, 159 Misc.2d 884, 887, 606 N.Y.S.2d 965, 967 (Sup. Ct. Queens County 1993). There, Drew Stanton and Michael Stewart had been same-sex partners for five years when Stanton died of AIDS. Although Stanton had been alienated from his mother and brother, they seized his remains in order to hold an elaborate Orthodox Jewish funeral, including having the cantor who had presided over Stanton's bar mitzvah fly in from Florida. Because Stanton had often told his life partner of his desire to be cremated, the court gave Stewart standing to sue to change the burial arrangements. 159 Misc.2d at 888-89, 606 N.Y.S.2d at 968-69.

While the parties ultimately settled, *Stewart* raises a specter: unless same-sex couples can incontestably prove domestic partnership status immediately after a loved one's tragic and sometimes sudden death, the surviving same-sex partner and the biological family may literally be fighting over a decaying body, at great expense and emotional trauma to all involved. Notwithstanding Public Health Law §4201, a surviving same-sex partner will still be in a far worse position than a surviving opposite-sex spouse.

G. Property and occupancy rights clearly protect a married spouse, but not a same-sex partner, in such events as the other partner's death or insolvency

The inability of same-sex couples to marry dramatically impacts upon one of the hallmarks of a loving, life partnership -- the family home. Unable to benefit from New York's tenancy in the entirety -- which can only be enjoyed by married persons -- a same-sex life partner is at greater risk of being forced out of the couple's home upon the death of one partner, and encounters greater burdens in determining rights of occupancy.

1. Tenancy by the entirety

Tenancy by the entirety, a “unique form of co[-]ownership” reflecting the special status of spouses jointly holding property" is the default way that spouses take title to real property in New York. *See* WARREN’S WEED ON THE NEW YORK LAW OF REAL PROPERTY §27.04 (2004). It creates a right of survivorship: when one partner dies, the surviving partner automatically receives the deceased partner's share of the property, even if the deceased spouse left no will. Each tenant may sell, mortgage or otherwise encumber his or her rights in the property, but if that tenant dies before the other spouse, the buyer or mortgagee is left with no interest in the property. *V.R.W., Inc. v. Klein*, 68 N.Y.2d 560, 565, 510 N.Y.S.2d 848, 851 (1986). There is no equivalent means for unmarried same-sex life partners to protect the family home. Because of this, Daniel Hernandez and Nevin Cohen "face additional challenges in sharing property and building for a future together," complicating their joint purchase of a property in Greene County. HR at 447.

Under New York law, a couple who are not legally married cannot create a tenancy by the entirety; instead, the couple is limited to tenancy in common or joint tenancy, which are inadequate. Tenancy in common is the default form of joint ownership for unmarried persons. EPTL §6-2.2. A tenant in common can sell or encumber his or her interest in the property. *Cary v. Fisher*, 149 A.D.2d 890, 892, 541 N.Y.S.2d 138, 140 (3d Dep’t 1989). And a tenant in common --

whether a same-sex life partner, the buyer of that partner's tenancy in common interest, an intestate successor, or a foreclosing creditor -- is entitled to partition of the property, which can result in the ouster of the other same-sex life partner from the family home. Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 462 (2001).

A joint tenancy, like a tenancy by the entirety, creates a right of survivorship in the surviving partner. This offers unmarried same-sex life partners more protection than a tenancy in common, but it, too, is inferior. In contrast to tenancy by the entirety, which is the default form of tenure for married couples, same-sex life partners must expressly create a joint tenancy. EPTL § 6-2.2(a); *see also* Joseph Rasch, *NEW YORK LAW AND PRACTICE OF REAL PROPERTY* §14.38 (1991). If they do not engage a lawyer, they are unlikely to know about this alternative. The joint tenancy is far easier to destroy than the tenancy by the entirety, since either joint tenant may demand partition. REAL PROP. LAW § 240-c(1). On sale or foreclosure of a joint tenant's interest, the joint tenancy becomes a tenancy in common, and the transferee can request a partition. This can result in the sale of the family home and the ouster of the same-sex partner.

2. Occupancy rights

In *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 213, 544 N.Y.S. 784, 790 (1989), this court held that Miguel Braschi, who had lived with Leslie Blanchard in a rent-controlled apartment for eleven years as same-sex couple, could not be evicted from the apartment by the landlord on Blanchard's death. However, in order to establish these rights, Braschi had to provide documentation of the relationship, including joint checking accounts, a health care proxy, a will, and proof of occupancy of the apartment. Similarly, in *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 730 N.Y.S.2d 15 (2001), because medical student Sara Levin was unable to legally marry her five-year same-sex partner, the Albert Einstein College of Medicine denied her campus housing; as a result, the couple took a Brooklyn apartment, from which Levin commuted all the way to the Bronx. 96 N.Y.2d at 489-90. While this court permitted Levin's discrimination claim to proceed under the New York City Human Rights Law, Levin was required to prove that the policy had a disparate impact on gay and lesbian unmarried couples compared to married students. 96 N.Y.2d at 496.

Whole areas of municipalities may be effectively closed to same-sex couples. Under zoning laws, municipalities can restrict housing to single-family dwellings. WARREN'S WEED ON THE NEW YORK LAW OF REAL PROPERTY §2.02

(2004); *Village of Freeport v. Association for the Help of Retarded Children*, 94 Misc.2d 1048, 1049, 406 N.Y.S.2d 221, 222-23 (Sup. Ct. Nassau County 1977), *aff'd*, 62 A.D.2d 644, 400 N.Y.S.2d 724 (2d Dep't 1977). While municipalities may not define "family" to exclude unmarried couples, *see Baer v. Town of Brookhaven*, 73 N.Y.2d 942, 540 N.Y.S.2d 234 (1989) (zoning ordinance excluding "functional" families from definition of "family" unconstitutional under New York Due Process Clause), same-sex couples may not be able to afford the legal fees needed to show zoning boards that they belong.

In the rent-controlled apartment, campus housing and single-family zoning situations, the proof of the same-sex relationship is subject to challenges. It took Daniel Hernandez a year to get Nevin Cohen added to Hernandez's apartment lease. Daniel Reyes added:

[M]y prior landlord refused to issue a rider for me to add [Curtis Woolbright] to a lease for my apartment, because Curtis is not my legal spouse. Without the rider, Curtis had no secure legal right to possess or occupy the apartment as an authorized lessee. Curtis was concerned that he would be kicked out of the apartment if something happened to me.

HR at 447, 555. In contrast, the members of a married opposite-sex couple have clear rights to stay in their home. Without marriage and its clearly defined property rights, same-sex life partners and their families risk losing the roofs over their heads.

H. If a member of a couple is injured, married couples, but not same-sex couples, have clear rights to recover in tort

A family is a cooperative, interdependent economic unit. In recognition of this, New York authorizes tort claims to compensate a victim's spouse and family, in the event of wrongful death or other harm. Unmarried same-sex life partners pool their savings and labor just like their married opposite-sex counterparts; yet without the right to marry, their families are without recourse if a tragedy occurs -- and tortfeasors go unpunished.

1. Wrongful death

A married spouse may sue to recover the pecuniary loss caused by the wrongful death of his or her partner. Pursuant to the Estates, Powers and Trusts Law, the personal representative of an estate may sue for damages on behalf of the

decedent's distributees who suffered pecuniary loss as a result of the decedent's wrongful death. "Distributees" include the surviving spouse and other blood relatives. EPTL §§5-4.1(1), 1-2.5. The First Department has held that unmarried same-sex partners are not "spouses" under the wrongful death statute, *Raum v. Restaurant Assocs., Inc.*, 252 A.D.2d 369, 370, 675 N.Y.S.2d 343, 343 (1st Dep't 1998), appeal dismissed, 92 N.Y.2d 946, 681 N.Y.S.2d 476 (1998), meaning that a same-sex partner is potentially exposed to severe, uncompensated financial loss if there is a wrongful death. Likewise, in *Langan v. St. Vincent's Hosp.*, the Second Department reversed the Supreme Court's holding that a same-sex life partner in a Vermont civil union had standing to sue as a spouse for wrongful death. *Langan v. St. Vincent's Hosp.*, 196 Misc.2d 440, 455, 765 N.Y.S.2d 411, 422, (Sup. Ct. Nassau County 2003), *rev'd*, ___ A.D.3d ___, 802 N.Y.S.2d 476 (2d Dep't 2005) (appeal pending). The right to marry would secure for same-sex couples this important protection for the cooperative economic effort inherent in any family.

2. Loss of consortium

Married opposite-sex couples may sue for the loss of the right of consortium, which recognizes that sexual intimacy is an integral part of spousal relationships. *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 502, 293 N.Y.S.2d 305,

308 (1968). As the U.S. Supreme Court noted in *Lawrence v. Texas*, which held that same-sex couples have a liberty interest in private sexual activity, "These matters [involve] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy. . . ." 539 U.S. 558, 574, 123 S. Ct. 2472, 2481 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992)). Although there are few reported cases in New York, marriage may be a prerequisite to a loss of consortium claim. *Anderson v. Eli Lilly Co.*, 79 N.Y.2d 797, 798, 580 N.Y.S.2d 168, 169 (1991); *Lennon v. Charney*, 8 Misc.3d 846, 797 N.Y.S.2d 891 (Sup. Ct. Westchester County 2005). Marriage would give a clear right to compensation to same-sex unmarried life partners who have experienced a loss of consortium due to a tortfeasor's wrongdoing.

3. Victims' Compensation Board financial awards

The surviving opposite-sex spouse of a crime victim is entitled to financial assistance from the New York State Crime Victims' Compensation Board for out-of-pocket expenses incurred as a direct result of the crime. EXEC. LAW §§620-623. In *Secord v. Fischetti*, however, the First Department held that the term "surviving spouse" did not extend to "homosexual life partners" for this purpose. 236 A.D.2d 206, 206, 653 N.Y.S.2d 551, 552 (1st Dep't 1997). Under the law, a surviving

same-sex life partner is eligible to receive victim's compensation only if he or she was principally dependent on the decedent. EXEC. LAW §624. The right to marry would eliminate the need for a detailed, fact-specific inquiry at a time when a surviving same-sex partner has already suffered significant trauma from crime.

I. Recognition of same-sex relationships legally created in other jurisdictions is no substitute for domestic New York same-sex marriages

Although New York same-sex life partners can obtain legal recognition of their relationships in nearby jurisdictions, such as marriage in Ontario and Quebec, and civil union in Vermont and Connecticut, these are not substitutes for domestic New York marriage. New York is deferential to marriages validly celebrated in other jurisdictions, recognizing them unless this would grossly violate New York's strong public policy by being "offensive to the public sense of morality to a degree regarded generally with abhorrence." *In re May's Estate*, 305 N.Y. 486, 493, 114 N.E.2d 4, 7 (1953).

Despite this strong precedent, if New York same-sex life partners are forced to legally establish their relationships elsewhere and then return to New York to live, they will lack certainty about how New York will treat the many rights that come with marriage or civil union. A surviving same-sex partner in a Vermont

civil union, who alleged that medical malpractice caused the wrongful death of his partner, had to litigate whether New York would recognize a Vermont civil union for wrongful death purposes. While the Nassau County Supreme Court granted recognition, the Second Department reversed the decision and denied it, *Langan v. St. Vincent's Hospital*, 196 Misc.2d 440, 765 N.Y.S.2d 411 (Sup. Ct. Nassau County 2003), *rev'd*, ___ A.D.3d ___, 802 N.Y.S.2d. 476 (2d Dep't 2005) (appeal pending). And same-sex couples still face case-by-case adjudication of other legal rights. In contrast, opposite-sex couples who marry in New York are fully recognized.

J. Same-sex couples cannot fully document their relationships in the absence of marriage

Same-sex partners can protect themselves against some of the discrimination caused by unequal marriage rights. They can create wills, health care proxies, joint tenancies, domestic partnership agreements and child custody and visitation agreements. See, e.g., ADVISING LESBIAN, GAY, BISEXUAL & TRANSGENDER (LGBT) CLIENTS ON HOW TO PROTECT THEIR RELATIONSHIPS & FAMILIES (CityBar Center for Continuing Legal Education, ed., 2005).

Documentation costs money. Lauren Abrams and Donna Freeman-Tweed paid \$800 to prepare wills, health care proxies and guardianship papers, and \$1200 for the legal work for Ms. Freeman-Tweed's second-parent adoption of their son, Elijah; Douglas Robinson and Michael Elsasser, in an 18-year relationship, paid \$1500 for their basic document package. HR at 468, 501, 508. Not everyone can afford to pay for these legal services. Elsasser has not pursued a second-parent adoption of Robinson's adopted children, Justin and Zachary, because of the cost. Reyes and Woolbright have been unable to afford the cost of a basic document package, even though, as Reyes states, "Without these documents, we know that the law in many ways treats us as strangers and that we are at risk in times of crisis." HR at 496, 556.

Many couples, due to lack of financial resources, lack of knowledge or unwillingness to plan for the future, never create the documentation. Half or more of the general public (including unmarried people) has failed to prepare many crucial documents, based on estimates of varying statistical rigor. Only 53% of New York State residents have a health care proxy;¹⁴ nationwide, only 40-50% of

¹⁴ See Siena Research Institute, *Siena New York Poll*, Apr. 11, 2005, available at http://www.siena.edu/sri/results/2005/05_APR_NYPoll.htm and http://www.siena.edu/sri/results/2005/Excel/SRI_NY_Poll_0405.xls (Question 3) <visited Mar. 3, 2006>.

people have wills,¹⁵ 15-42% have living wills,¹⁶ and a mere 5% have prenuptial agreements.¹⁷ While lesbian, gay, bisexual and transgender ("LGBT") couples who responded to a recent survey have created documents at a higher rate than the general population (69% have wills, 66% have health care proxies, and 65% have living wills),¹⁸ the researchers acknowledged significant sample bias. Potential respondents were contacted by e-mail through listservs for gay community organizations. Respondents to other online surveys of the LGBT population have been whiter, better educated and older than the general population -- characteristics that in the general public increase the likelihood of persons executing wills or health care proxies. In addition, couples may have more of an incentive to document than single people do. Finally, respondents who are on gay community listservs are likely to identify closely with the gay community, and are more likely

¹⁵ See Britain Low in League Table of Leaving Inheritance to 'Good Causes,' (Apr. 11, 2005), available at <http://www.thepressdesk.com/axa/pressrelease.php?releaseid=3185> <visited Mar. 3, 2006>; Gary Langer, *You Know You Should But You Don't: Americans Say They Should Plan for The Future, But Don't*, ABC NEWS.COM, Aug. 26, 2002, available at http://abcnews.go.com/sections/us/DailyNews/planning_poll020826.html <visited Mar. 18, 2006>; *Most Americans Still Don't Have a Will, Says New Survey by FindLaw*, Aug. 19, 2002, available at <http://company.findlaw.com/pr/2002/081902.will.html> <visited Mar. 3, 2006>.

¹⁶ See Langer, *supra* note 15; Pew Research Ctr., *Strong Public Support for Right to Die*, Jan. 5, 2006, available at <http://www.people-press.org/reports/display.php3?ReportID=266> <visited Mar. 3, 2006>; Caroline Wellbery, *Improving Advance Directive Completion Rates*, 72 AM. FAM. PHYSICIAN 694 (2005).

¹⁷ See Arlene G. Dubin, *PRENUPS FOR LOVERS* 15 (2001); Gary Belsky, *Living by the Rules*, MONEY, May 1996, at 100, 102.

¹⁸ See Ellen D. B. Riggle et al., *The Execution of Legal Documents by Sexual Minority Individuals*, 11 PSYCHOL. PUB. POL'Y & LAW 138, 156 (2005).

to receive information from other gay community sources on the need for relationship documentation.¹⁹ Even if there were no sample bias, however, the study shows that over 30% of LGBT couples have not created desperately needed documentation.

For opposite-sex married couples, marriage provides an essential bundle of rights and duties when life's inevitable tragedies occur. Same-sex life partners who have failed to document their relationships may face catastrophe. In *Robin v. Cook*, N.Y.L.J., Oct. 30, 1990, p.21 (Sup. Ct. N.Y. County), Judy Robin claimed an oral contract to provide Dora Cook with lifetime household services and, in exchange, receive an apartment and \$600 a month for the rest of Cook's life. When the same-sex couple broke up after five years, Cook ceased payments and demanded that Robin leave the apartment. The court held the alleged oral contract unenforceable under the statute of frauds. If Robin and Cook had been a married opposite-sex couple, Robin could have claimed maintenance and a property distribution.

¹⁹ *See id.* at 159-60.

Even when same-sex partners enter into contracts that attempt to mimic marital rights with pre-nuptial, post-nuptial or separation agreements, they fall short because the vast majority of rights arising from marriage are statutory. “There is a strict surveillance of all transactions between married persons, especially separation agreements.” *Christian v. Christian*, 42 N.Y.2d 63, 72, 396 N.Y.S.2d 817, 823 (1975). Pre- and post-nuptial agreements are upheld only if the support terms were “fair and reasonable at the time of the making of the agreement,” DOM. REL. LAW §236B(3)(3), and cannot relieve a spouse of the duty of support if the other spouse is in danger of becoming a “public charge.” *See* GEN. OBLIG. LAW §5-311; FAM. CT. ACT §463. They may be modified, with respect to spousal support terms, if there is a substantial, unexpected change of circumstances and extreme financial hardship would result from enforcing the original terms. DOM. REL. LAW §236B(9).

While married couples begin the negotiation of their agreements with the backdrop of the Equitable Distribution Law and its tacit presumption of an equitable split of marital assets, same-sex agreements rest awkwardly on common law contract principles designed for business dealings. As *Silver v. Starrett*, 176 Misc. 2d 511, 674 N.Y.S.2d 915 (Sup. Ct. N.Y. County 1998) demonstrates, these

agreements are much less protective of the rights of poorer, non-titled partners than the agreements struck by married couples with similar assets.

Ann Silver was an unskilled deaf woman, and her former partner of 14 years, Dr. Barbara Starrett, was a successful physician. Dr. Starrett owned her own practice, three New York real properties, and a beach home timeshare. Silver had worked in Dr. Starrett's office and made substantial emotional and financial contributions to the 14-year relationship. Upon the couple's separation, Silver, lacking the Equitable Distribution Law as a negotiating baseline, obtained an agreement that provided her with only about \$200,000 over five years and no recurring support payments, 176 Misc. 2d at 514, 674 N.Y.S.2d at 917. Had the couple been married, Silver would likely have been able to negotiate for a separation agreement providing approximately half of the assets acquired during the marriage, as well as long-term (perhaps permanent) spousal maintenance. *See, e.g., Sumner v. Sumner*, 85 N.Y.2d 104, 630 N.Y.S.2d 970 (1995) (lifetime maintenance) ; *DiCaprio v. DiCaprio*, 219 A.D.2d 819, 631 N.Y.S.2d 975 (4th Dep't 1996) (lifetime maintenance); *Traut v. Traut*, 181 A.D.2d 671, 580 N.Y.S.2d 792 (2d Dep't 1992) (50/50 distribution of spouses' main assets in light of wife's contributions to husband's business success). Because contract law governed, the *Silver* court refused to rule on fairness. 176 Misc. 2d at 515, 674 N.Y.S.2d at 918.

As *Silver* shows, even carefully drafted arrangements can be subject to contest, in contrast to the clarity and decades of precedent that marriage provides: Dr. Starrett litigated to try to eliminate even the modest compensation that she had agreed to pay Silver. 176 Misc. 2d at 514, 674 N.Y.S.2d at 917. Another same-sex couple, James Krause and Brendan Daly, had a 12-year relationship. Despite health care proxies, powers of attorney and living wills, when Daly suffered creeping paralysis, the doctors in a Westchester hospital refused to let Krause see Daly or to inform him of Daly's medical condition for nine days. Thomas Crampton, *What Marriage Means to Gays: All That Law Allows Others*, N.Y. TIMES, Mar. 30, 2004, p. B1.

While Mary Jo Kennedy and Jo-Ann Shain, who have a 22-year relationship, had prepared health care documentation, it was out of date when an emergency hospitalized Shain. Kennedy recalled, "As [Shain] lay in the hospital awaiting surgery, we rushed to fill out revised forms to make sure that I could consent to treatment for her if necessary. Needless to say, that situation was very stressful and would not have occurred if we had been married." HR at 528. While Robinson and Elsasser, have documented their relationship, Robinson nonetheless

stated: "Even when we carry these documents around with us, I am concerned that they may not be respected." HR at 508.

In its comprehensive report, the New York State Bar Association echoed Kennedy's and Robinson's concerns about the limits of documentation:

For some . . . exclusions [of same-sex couples from the rights of opposite-sex married couples], we found that same-sex couples with sufficient means and foresight could hire attorneys to develop private work-arounds, some relatively certain and easy, others more difficult, more problematic and more expensive. In yet other instances, no private work-arounds are possible.

State Bar Report at 3.

K. Conclusion

Marriage is a vast legal and social safety net, and this brief's list of legal rights and obligations affected by marriage does not purport to be complete. Excluding same-sex couples from marriage harms the couples and their children in their daily lives, especially at times of crisis. We urge the court to remedy this devastating inequality by holding that the law requires equal marriage rights for same-sex couples.

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Respectfully submitted,

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