SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2244-03T5

Civil Action

On Appeal From:

MARK LEWIS, et. al.,	:	SUPERIOR COURT OF NEW JERSEY
	:	MERCER COUNTY, LAW DIVISION
Plaintiffs-Appellants,	:	DOCKET NO. MER-L-15-03
	:	
v.	:	
	:	Sat Below:
GWENDOLYN L. HARRIS, et. al.,	:	
	:	HON. LINDA R. FEINBERG, A.J.S.C.
Defendants-Respondents.	:	
	:	

BRIEF AND APPENDIX OF THE PROFESSORS OF THE HISTORY OF MARRIAGE, FAMILIES, AND THE LAW AS AMICI CURIAE

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

We adopt the Statement of the Case and Statement of Facts in the brief of the Plaintiffs-Appellants.

INTEREST OF AMICI CURIAE

We are history scholars specializing in the history of marriage, families, and the law at various universities throughout the United States. We have written leading books and articles uncovering and analyzing the history of marriage and marriage law in the United States. This brief is submitted to assist the Court's deliberations by offering an analysis of the history of marriage law and practice based on our scholarship. Our names, institutional affiliations, and brief biographies are set out in an Appendix to this brief.

SUMMARY OF ARGUMENT

The history of marriage in New Jersey is a history of change, with the definition of marriage undergoing continuous reexamination and revision. Indeed, marriage today – a partnership between two adults who are equal in the eyes of the law – is significantly different from marriage as it existed at the state's founding or even a few decades ago.

To claim, as do defendants, that history "compels" the continuation today of a sex-based eligibility rule in marriage is thus to misunderstand and misuse the history of marriage.

The relevant history demonstrates that all marriage rules remain subject to meaningful judicial review and that a rule's vintage is not, by itself, sufficient justification for its retention. More specifically, the historical record, which documents the transformation or invalidation of many other traditional features of marriage, does not validate the different-sex eligibility rule challenged in this case. Instead, the ongoing evolution of marriage throughout New Jersey's history renders implausible the suggestion that marriage, which has survived so many changes, is too frail to endure the constitutionally compelled revision of the anachronistic sex-based eligibility rule.

The bundle of rights and responsibilities by which the state constitutes marriage has been altered to the point that marriage today possesses few of the elements of marriage that existed earlier in our history. Yet, simultaneously, the state has continued to recognize a substantial set of rights and responsibilities of couples as "marriage." For more than two centuries, even with these major changes, couples have overwhelmingly embraced marriage as the mechanism for achieving state recognition of their relationships. The real lesson this history teaches is that even in the wake of almost-total evolution, marriage has survived. Simply stated, the more marriage has changed, the more it has remained true to its core

purpose of recognizing a committed, interdependent partnership between consenting adults.

LEGAL ARGUMENT

THE LEGAL DEFINITION AND SCOPE OF MARRIAGE IN NEW JERSEY HAS NEVER BEEN STATIC; FEATURES OF MARRIAGE ONCE THOUGHT ESSENTIAL HAVE BEEN REVISITED AND REJECTED CONSISTENTLY OVER TIME.

By suggesting that the plaintiff-appellants' action challenges the "very essence" of marriage, Lewis v. Harris, No. MER-L-19-03, 2003 WL 23191114, at *22 (Law Div. Nov. 5, 2003), the trial court assumed that marriage is a fixed status with certain foundational elements that cannot be changed except, perhaps, by the Legislature.[1] But a variety of legal developments belie this rigid understanding of marriage as unalterably static. Through a steady stream of decisions, New Jersey's courts and legislature have continuously adjusted or abandoned elements once thought to represent the foundations of marriage.

I. THE SHIFT AWAY FROM THE COMMON LAW COVERTURE REGIME TRANSFORMED THE DEFINITION OF MARRIAGE IN NEW JERSEY.

Until well into the 19th century, marriage was, for most people, unimaginable as anything other than a complete merger of

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[1] The State likewise treats marriage as having a fixed historical meaning and depends on that fixed history to defend the marriage rule challenged here. See, e.g., Defendants-Respondents Brief ("D-R Brief") at 2 (arguing that the "historic definition of marriage" justifies rejection of plaintiffs' legal challenge).

a woman's legal identity into that of her husband. Marriage in New Jersey *meant* the legal merger of two individuals into one.[2] As the Chancery Court put it in 1831, "the effects of the marriage are, that the husband and the wife are accounted one person, and he hath power over her person as well as estate, and he is bound to support and maintain her in a suitable manner, according to his circumstances." Miller v. Miller, 1 N.J. Eq. 386, 391 (Ch. 1831). See also Wyckoff v. Gardner, 20 N.J.L. 556, 559 (Sup. Ct. 1846) ("the husband and wife, being considered one person in law"). See also Nancy F. Cott, Public Vows: A History of Marriage and the Nation 11-12 (2000) (describing the sudden change in a woman's rights upon marriage under the coverture regime); Hendrik Hartog, Man & Wife in America: A History 106 (2000) (describing American marriage law at the turn of the 19th century).

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[2] Early models of marriage were influenced by both religious tradition and civil law. See Michael Grossberg, Governing the Hearth: Law and Family in Nineteenth-Century America 65-66 (1985) (observing that during the medieval period, the Catholic Church declared marriage a religious sacrament, and church-controlled governments oversaw the lives of their constituents through ecclesiastical laws) and id. at 66 (noting that in post-Reformation England, the Church of England rejected the Catholic doctrine that marriage was a sacrament). However, in New Jersey, since colonial times, the State's government has overseen the recognition and solemnization of marriages, with the colonial government holding the same power as English leaders to provide marriage licenses. See William Nelson, New Jersey Marriage Records, 1665-1800 lxxvi-lxxvii (1982).

For both men and women, negating a woman's status as an independent legal person was understood as one of marriage's indispensable elements. As the court explained in Miller, "[b]y marriage with a woman, the husband is entitled to an absolute or qualified right to all her estate, real and personal; . . . The wife, by marriage, has parted with her property, placed herself under the control of her husband, and looks to him for support." Miller, 1 N.J. Eq. at 391. See also Mulford v. Allen, 2 N.J. Eq. 415, 426 (Ch. 1841) ("Personal chattels, such as household goods and things moveable, vest in the husband absolutely at the marriage, without the intervention of any court or any act on his part to establish his claim to it."); Newman v. Chase, 70 N.J. 254, 260 n.4 (1976) (describing the "then prevailing rule," before the passage of the Married Women's Act of 1852, that "a husband was entitled to the possession and enjoyment of his wife's real estate during their joint lives").

This approach to marriage emerged from the view that the colonial family was a "little commonwealth" whose members were bound together by a well-defined set of reciprocal duties and the shared aims of domestic tranquility. Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 5 (1985) (quoting John Demos, A Little Commonwealth, Family Life in Plymouth Colony (1970)). The husband was, by legal entitlement and informal social code, the "governor" of

this colonial household. Id. The wife and children, in turn, were dependents within the husband's domain, responsible for maintaining the home and helping in the fields and workshop. See Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States 6-13 (1994) (discussing colonial fathers' rights and responsibilities); see also Hartog, supra at 99-101 (explaining the husband's duty to oversee the family as an economic unit). Coverture was understood as necessary "to preserve the harmony of the marriage relationship." See Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947, 996 (2002). Property ownership by women was feared because it "'would lead to perpetual discord,' . . . caus[ing] the 'breakdown of . . . the love of home, the purity of husband and wife, and the union of one family.'" See Margaret Valentine Turano, Jane Austen, Charlotte Bronte, and the Marital Property Law, 21 Harv. Women's L.J. 179, 185 (1988).

Consistent with this view of the marital household as a single unit headed by the husband, the collapse of women's legal identity upon marriage extended far beyond the loss of independent property ownership rights. Marriage meant that a woman's future labor belonged to her husband as well. In Skillman v. Skillman, the court declared that, "[a]t common law, the husband is entitled not only to all the personal property

which the wife owns at the time of her marriage, but to all that she acquires by her skill or labor during the coverture. His right to her services and to the proceeds of her skill and industry is absolute." Skillman v. Skillman, 13 N.J. Eq. 403, 406 (Ch. 1861).

Likewise, married women could not enter into contracts. "By the common law, the legal existence of a married woman is merged in that of her husband, so that, as a general rule, she can make no contract without his consent. A contract so made by her is absolutely void." Den ex dem. Rake v. Lawshee, 24 N.J.L. 613, 616 (Sup. Ct. 1854).

But, by the end of the 19th century, the institution of marriage had changed considerably. Marriage no longer meant the absolute legal subordination of women to their husbands. With the passage of the Married Women's Property Act, women were entitled to own property as independent individuals. The Act provided in part

> that the real and personal property, and the rents, issues, and profits thereof, of any female now married shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were a single female.

Act of March 25, 1852, ch. 171, 1852 N.J. Laws 407.[3] See also Buttlar v. Rosenblath, 42 N.J. Eq. 651 (E. & A. 1887) (holding that after the passage of the Act, the wife became entitled to the possession and enjoyment of her one-half interest in this joint estate). Not surprisingly, the opponents of these changes proclaimed that removing the husband from his role as the "ultimate locus of power within the home" would lead to domestic chaos and the destruction of the nation. Grossberg, supra, at 282; see also E.J. Graff, What is Marriage For? The Strange Social History of Our Most Intimate Institution 30-31 (1999) (quoting an 1844 New York legislative committee's observation "that allowing married women to control their own property would lead 'to infidelity in the marriage bed, a high rate of divorce, and increased female criminality,' while turning marriage from 'its high and holy purposes' into something arranged for 'convenience and sensuality.'").

Early in the 20th century, the Court of Errors and Appeals reversed a Chancery Court ruling and held that a wife could maintain an action to recover wages owed to her by a partnership that included her husband. Turner v. Davenport, 63 N.J. Eq. 288, 292 (E. & A. 1901) ("We think that the wages due the wife for services to the co-

[3] The Act provided similar rights to retain independent ownership of property for women who married after the Act took effect. See id.

partnership became, by our statute, . . . her sole and separate property, and that she is entitled to enforce her claim in equity against the assets of the firm in which her husband is a member.").

Marriage was once again significantly transformed when women were granted the right to sue in tort in 1906, something quite inconceivable just a few decades earlier. See An Act for the protection and enforcement of the rights of married women, ch. 248, 1906 N.J. Laws 525. This led to the creation of tort remedies for injured wives that previously would have been thought of as nothing short of extraordinary. In Sims v. Sims, 79 N.J.L. 577 (E. & A. 1910), for example, the court recognized a woman's claim for alienation of affection even though a wife could not have brought such a claim under the common-law coverture regime. "Keeping in mind the old law and the existing mischief," the court found that allowing the wife to bring that claim was necessary to "remedy the inequality to which she was subjected by the common law." Id. at 582. Even further, in 1931, while formally retaining the common law doctrine of interspousal immunity, the Court of Errors and Appeals nonetheless found that a husband's employer could be liable to a wife in tort for injuries caused to the wife by her husband. Hudson v. Gas Consumers' Ass'n, 123 N.J.L. 252, 255 (E. & A. 1939) ("[T]he trespass by a husband against the person of his

wife does not lose its unlawful quality even though the husband is not answerable in damages for it, but this exemption or immunity, which the husband has, does not extend to his employer . . . .").

II. SINCE THE MID-TWENTIETH CENTURY, NEW JERSEY HAS CONTINUED TO MAKE IMPORTANT CHANGES TO ELEMENTS OF MARRIAGE ONCE CONSIDERED UNALTERABLE.

Having endured the transformations addressed above, marriage neither collapsed as a legal or social entity nor became so immutably fixed as to ward off further evolution. To the contrary, changes to what had been thought of at one time or another as "core" elements of marriage continued. These shifts are described below in connection with rules regarding interspousal immunity, liability for conspiracy, joint liability for individual expenses, loss of consortium, child custody, procreation, and sexual relations between spouses. They reinforce the conviction that marriage, as a legal status, has been and continues to be in a constant state of change, reflecting the imperatives of a changing social order.

The doctrine of interspousal immunity, for example, had long been understood as fundamental to marriage. That one spouse might be able to sue another struck many as contrary to the very essence of the marital bond. As Justice Proctor observed in Immer v. Risko, 56 N.J. 482 (1970), although the "metaphysical concept" of "legal identity of husband and wife . . . cannot be seriously defended today," the "disruptive effect upon the harmony of the family" was often relied on to justify the doctrine's retention. Id. at 488 (citations omitted).

Yet the Court did not find the interspousal immunity doctrine's longstanding roots in traditional conceptions of marriage, or the unquestionably important policy concerns with familial harmony, sufficient to warrant the rule's retention. Instead, the Court concluded that the doctrine, as applied to negligence suits arising from automobile accidents, "cannot be fairly sustained." Id. at 490. See also Small v. Rockfield, 66 N.J. 231, 238 (1974) ("The common law's interspousal immunity was largely grounded on concepts which admittedly have no place in current thinking."). In altering its position with respect to this once-essential feature of marriage, the Court emphasized that "[t]he nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice." Immer, 56 N.J. at 487 (citation and internal punctuation omitted).

In Merenoff v. Merenoff, 76 N.J. 535 (1978), the New Jersey Supreme Court further broadened the abrogation of the interspousal immunity doctrine to reach all suits in tort. With reasoning that would have been simply unthinkable to marriage law experts of an earlier era, the Court concluded that "the choice to sue, or not to sue, should be that of the parties to

the marriage, who as individuals are entitled to seek their personal happiness according to their own lights." Id. at 552.

The courts have similarly cast aside a longstanding presumption that marriage precluded spouses from being criminal co-conspirators. In State v. Pittman, 124 N.J. Super. 334, 336 (Law Div. 1973), the Superior Court observed that prior judicial decisions had sustained the view that spouses could not be co-conspirators because of the "oneness of the marital relationship." Indeed, in State v. Struck, 44 N.J. Super. 274, 279 (Cty. Ct. 1957), the court had earlier found that "the fiction of unity of spouses still is a very real part of our law in this State." But Pittman, 124 N.J. Super. at 337, reached "the obvious conclusion that as of 1973, by reason of events occurring in recent years, the common law concept of oneness has been vitiated in this State and other States in many instances." Id. at 337-38 (citing, inter alia, New Jersey's initial abolition of the interspousal immunity doctrine in Immer). It concluded, "New Jersey should wait no longer in conforming to the modern commonsense view." Id. at 340.

Likewise with respect to joint liability for individual expenses within a marriage, the New Jersey Supreme Court has refused to endorse the "rule imposing liability on husbands, but not wives," calling it "an anachronism that no longer fits contemporary society." Jersey Shore Med. Ctr-Fitkin Hosp. v.

Estate of Baum, 84 N.J. 137, 147 (1980). Explicitly acknowledging the changing essence of marriage, the Court reasoned that the "rule must yield to the evolving interdependence of married men and women and to the reality that a marriage is a partnership." Id. at 141. In a related vein, in Shanley v. Nuzzo, 160 N.J. Super. 436, 441 (J. & D.R.Ct. 1978), the court observed that the husband's traditional role as sole provider had given way to "the changing values and lifestyles in contemporary society" to the point that a woman "likely . . . may be the breadwinner for her family." As a result, financial support responsibilities may no longer be allocated according to sex. Id. at 442.

Changes in the meaning of marriage regarding loss of consortium claims were, perhaps, even more dramatic. "At common law, the right of a husband to the consortium of his wife was well established. . . . The common law recognized no corresponding cause of action for a wife." Susan Demidovich, Loss of Consortium: Should Marriage Be Retained as a Prerequisite?, 52 U. Cin. L. Rev. 842, 843 (1983). This refusal to recognize a wife's consortium claim fit neatly within historical views about the nature of marriage. As the New Jersey Supreme Court observed, the common law position "was understandable in the light of its medieval concept that, during the marriage, the legal existence of the wife was suspended or

incorporated into that of the husband." Ekalo v. Constructive Serv. Corp., 46 N.J. 82, 86 (1965) (citing 1 Blackstone, Commentaries §442). Yet in 1965, the New Jersey Supreme Court refused to embrace this longstanding view, concluding instead that a married woman could maintain a loss of consortium claim in her own right. Id. at 90.

Finally, and perhaps most significantly in terms of the elements commonly thought of as central to marriage, the role of sexual relations between spouses and procreation has also undergone an extraordinary shift.

With respect to sexual relations, the New Jersey Supreme Court has explained that "the nature of marriage at a particular time in history" supported "an implied matrimonial consent to intercourse which the wife could not retract." State v. Smith, 85 N.J. 193, 201 (1981). Indeed, that presumptive consent had long been considered fundamental to the marriage right. Nonetheless, in Smith, the Court recognized that such an understanding of marriage had become "outdated and doubtful." Id. at 211. As a result, the Court concluded, a defendant accused of raping his wife could not "avoid prosecution for rape simply because he was still legally married to his victim." Id.

Like sexual relations, procreation too has long been considered foundational to marriage. As the Chancery Court opined in 1909, "[t]he controlling purpose of marriage is to

enable the sexes to gratify lawfully the natural desire for procreation which has been implanted in them, that the race may be preserved upon the earth."[4] Raymond v. Raymond, 79 A. 430, 431 (Ch. 1909). See also Turney v. Avery, 92 N.J. Eq. 473, 474 (Ch. Div. 1921) ("I do not hesitate to say that [procreation] is the most important object of matrimony, for without it the human race itself would perish from the earth.").

In the last several decades, however, courts have rejected the claim that procreation is an essential marriage imperative. In T. v. M., 100 N.J. Super. 530 (Ch. Div. 1968), for example, the court observed that while procreation is an important end of marriage, it is not an essential element of the relationship. "If the begetting of children were the chief end of marriage" the court wrote, "it should follow that our public policy would favor annulling marriages in sterility cases where the fact of sterility is unknown to the parties at the time of the marriage. But no statute in this state permits annulment in such cases." Id. at 538.

Even further, where a spouse brought an action alleging fraud because her husband "*insist[ed]* on having children,

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[4] The court continued: "If either party may refuse to consummate the marriage, and still hold the other in the bond of matrimony, it is apparent that licentiousness would be encouraged and promoted, and we would become a race of bastards." Id.

contrary to the express agreement of the parties prior to marriage that they would *not* have children," the court annulled the marriage for fraud. V.J.S. v. M.J.B., 249 N.J. Super. 318, 319-20 (Ch. Div. 1991) (applying N.J.S.A. 2A:34-1(d)'s authorization of nullification for "fraud as to the essentials of marriage") (emphasis in the original). The authority to determine the role of procreation within the marriage rested, the court found, with the marital partners. Id.

As the foregoing discussion illustrates, the history of marriage in New Jersey is one of ongoing transformation. Elements long thought of as essential to marriage have undergone repeated, significant change. Yet, even with the extensive transformation of rules governing marriage, there can be no question that marriage, as the state's most comprehensive formal mechanism for recognizing adult partnerships, has remained both viable as a legal status and desirable to the state's residents, including the plaintiffs in this action.

III. THE ESSENCE OF MARRIAGE TODAY FOR THE STATE LIES IN THE INTERDEPENDENCE OF SPOUSES; THE SEX OF THE MARRIAGE PARTNERS HAS NO LEGITIMATE RELATIONSHIP TO THE STATE'S INTERESTS.

Reflecting the significant historical shift in the nature of marriage, recent judicial commentary on the nature of marital relationships reinforces that no acceptable connection exists between the different-sex marriage rule and the state's legitimate interests in the marriage relationship

In describing a relationship that would approximate a formal marriage, the New Jersey Supreme Court identified mutual support and commitment as the essential element of the relationship.

> A marital-type relationship is . . . the undertaking of a way of life in which two people commit to each other, foregoing other liaisons and opportunities, doing for each other whatever each is capable of doing, providing companionship, and fulfilling each other's needs, financial, emotional, physical, and social, as best as they are able. And each couple defines its way of life and each partner's expected contribution to it in its own way.

In re Estate of Roccamonte, 174 N.J. 381, 392-93 (2002). Indeed, the State appears to embrace this focus on interdependency, describing "economic support and dependency" as "primary concerns of the State." D-R Brief at 35, quoting Torres v. Torres, 144 N.J. Super. 540, 543 (Ch. Div. 1976). See also Opinions of the Justices to the Senate, 802 N.E. 2d 565, 569 (Mass. 2004) (describing civil marriage as "a wholly secular

and dynamic legal institution, the governmental aim of which is to encourage stable adult relationships for the good of the individual and of the community, especially its children" and concluding that "[t]he very nature and purpose of civil marriage . . . renders unconstitutional any attempt to ban all same-sex couples, as same-sex couples, from entering into civil marriage").

Roccamonte's recognition that the vital element of marriage is the mutual caring of the spouses dates long antedates the last few years. For example, in granting a petition to annul a marriage in which the spouses were capable of procreation but not sexual intercourse, the Chancery Court explained that "[h]ealth and happiness appear to be the touchstone" of marriage. T. v. M., 100 N.J. Super. 530, 538 (Ch. Div. 1968). Likewise, in addressing itself directly to the "essentials" of marriage, the court in V.J.S. v. M.S.B., 249 N.J. Super. 318, 320 (Ch. Div. 1991), recognized that "a determination of whether a fraud goes to the essentials of the marriage must be decided on a case-by-case basis." As the court explained, "[w]hat is essential to the relationship of the parties in one marriage may be of considerably less significance in another." Id. See also Patel v. Navitlal, 265 N.J. Super. 402, 409-10 (Ch. Div. 1992) (same).

This concern with mutual care is reflected in the statutory focus on insuring the consent of the parties to the marriage and on promoting the partners' commitment to each other. See, e.g., N.J.S.A. 2A:34-1(d)-(e) (providing that a marriage can be nullified in the event of lack of capacity due to mental condition, influence of intoxicants, lack of consent or duress, or lack of sufficient maturity as reflected by age); N.J.S.A. 2A: 34-23.1(h) and (o) (including as conditions for determining alimony and maintenance awards the "contribution by each party to the education, training or earning power of the other," and the "extent to which a party deferred achieving their career goals").

That marriage has come a long way from its gendered origins in coverture is substantiated further by the evolution of standards regarding parental rights in child custody disputes. The changes in this area - from a preference for fathers to a preference for mothers to a sex-neutral position - reinforce that the sex-based marriage eligibility rule, an outgrowth of an earlier era, can no longer reasonably be defended today.

Early on in custody disputes, as was true at common law generally, New Jersey embraced the "general rule . . . that the claim of father to the persons of his infant children, is paramount to those of the mother." Baird v. Baird, 21 N.J. Eq. 384, 388 (E. & A. 1869). Indeed, "[t]his rule is so entirely

axiomatic that it would be idle to cite authorities in its support." Id. See also In the Matter of Van Houten, 3 N.J. Eq. 220, 226 (Ch. 1835) ("[T]he natural right of the mother must yield to the will of the father. It is paramount and is considered a continuation of the father's authority."); Grossberg, supra, at 235 ("Prerepublican Anglo-American law granted fathers an almost unlimited right to the custody of their minor legitimate children. Moored in the medieval equation of legal rights with property ownership, it assumed that the interests of children were best protected by making the father the natural guardian and by using a property-based standard of parental fitness.").

This absolute, seemingly "natural" rule favoring fathers, however, gave way to a maternal presumption in child custody disputes elaborated by statute and case law. See, e.g., Bennet v. Bennet, 13 N.J. Eq. 114, 116 (Ch. 1860) (referencing an 1860 act mandating that children under seven remain in the custody of their mother upon parental separation); Rossell v. Rossell, 64 N.J. Eq. 21, 23 (Ch. 1903) ("[I]in dealing with the custody of an infant of tender years, especially if the infant be a daughter, under the general jurisdiction of the court, the chancellor would, in general, award the custody to the mother (if not restrained by proofs of unfitness) . . . ."

This preference for mothers remained in force even after both the judiciary and legislature replaced the tender years rule with the "best interests of the child" standard in the 1940s. See Mayer v. Mayer, 150 N.J. Super. 556, 562 (Ch. Div. 1977) ("The 'best interests' standard was authoritatively announced in New Jersey in 1944 by the Armour decision [Armour v. Armour, 135 N.J. Eq. 47, 51 (1944)] and has since been followed by our courts."). In Mayer, the court explained that "[t]his statutory grant of equal rights in both parents to custody effectively reversed the holding of the common law wherein the father had the preferred right to custody of his minor . . . ." Id. at 564. It was not aimed, in other words, to eradicate the tender years doctrine. In Esposito v. Esposito, 41 N.J. 143, 145 (1963), decided well after the overt shift to the "best interests" standard, the New Jersey Supreme Court reiterated that "[c]ustody of a child of tender years is normally placed with the mother, if fit."

More recently, though, the state's courts have revisited this once-"normal" preference for maternal care and have concluded that this preference is not essential after all. In Beck v. Beck, 86 N.J. 480, 485 (1981), the Court reexamined the background presumptions in place to guide conflicting rights of parents and embraced a sex-neutral approach, concluding that both mothers and fathers are entitled to "full and genuine

involvement in the lives of their children following a divorce." The Chancery Division addressed the maternal preference even more directly, recognizing that neither parent should be presumed best solely on the basis of sex. See Mayer, 150 N.J. Super. at 563-64. As the court explained,

> Where both parents are suitable persons to have the custody of their children and are devoted to them, they should be given as nearly equal rights to the custody of the children as is practical and compatible with the convenience, education and welfare of the children, since it is against public policy to destroy or limit the relation of parent and child and the child is entitled to the love and training of both parents.

Id. at 564 (quoting 2 *Nelson, Divorce and Annulment* (2 ed. 1961) §§ 15, 17, at 256-57). See also Alan M. Grossman, New Jersey Family Law § 13-1 (LEXIS 2004) ("The law of child custody has undergone significant changes in recent years. The dramatic social changes of the past half century have resulted in an upsurge in custody disputes, in an increasing number of which fathers have been awarded physical custody and increased time-sharing. Whereas in earlier years it was generally a foregone conclusion that the mother would be awarded custody of the children and that the father would be granted reasonable rights of visitation, that is no longer true in cases in which the father seriously pursues custody.").[5]

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[5] In contexts further afield from marriage, the United States Supreme Court has illustrated repeatedly this same inclination

These shifts in custody rules and in the doctrine and law that constitute marriage underscore that conventional understandings, while not to be denigrated, cannot alone justify the continued enforcement of an otherwise discriminatory law or doctrine. As Justice Holmes remarked, dissenting in Lochner v. New York, 198 U.S. 45 (1905), "the accident of our finding certain opinions natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." Id. at 76 (Holmes, J., dissenting).[6] That is certainly

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to revisit gendered rules and values once thought unquestionable. For example, in the jury service context, in 1961, the Court sustained Florida's law exempting women from jury service against an equal protection challenge on the grounds of women's "special responsibilities." Hoyt v. Florida, 368 U.S. 57, 62 (1961) (describing women as "the center of home and family life"). Id. at 61-62. Yet not quite fifteen years later, the Court reversed itself in Taylor v. Louisiana, 419 U.S. 522 (1975), maintaining that "[i]f it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed." Id. at 537.

[6] The U.S. Supreme Court has taken this point to heart, affirming in numerous cases that while history is a useful starting point for analysis, the past alone cannot justify retention of a discriminatory, exclusionary rule into the future. See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) ("'[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . .'" (alteration in original) (quoting Williams v. Illinois, 399 U.S. 235, 239 (1970)); Marsh v. Chambers, 463 U.S. 783, 790 (1983) ("Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . . ."); Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) ("It is obviously

the case here, where the different-sex eligibility requirement reflects the view of marriage as a gendered status that has been long rejected by both the courts and legislature. The present focus of both the courts and the legislature is now trained instead on the spouses' commitment to each other, a factor that has no conceivable legitimate connection to the sex of the marital partners.

Finally, even having undergone enormous transformation, marriage unquestionably has survived, and the historical evidence suggests that marriage will continue well into the future. Changes to discriminatory, albeit familiar, marriage rules have occurred repeatedly during the last two centuries yet both the State and its residents continue to embrace marriage as an invaluable legal status for interdependent couples. Accompanying each set of changes to marriage have been cries of danger to the institution of marriage, as illustrated above in the objections raised to the Married Women's Property Act and by

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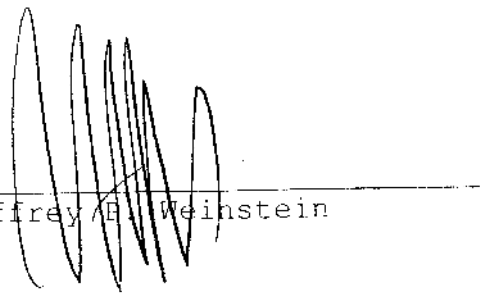
correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."). Perhaps Oliver Wendell Holmes put the point best, writing in 1897 that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if [its foundation has] vanished long since, and the rule simply persists from blind imitation of the past." Justice Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

the arguments of defendants' amici. See, e.g., Brief Amici Curiae of The New Jersey Coalition to Preserve and Protect Marriage, et al. at 61 (arguing that the sex-based marriage restriction is needed "for the benefit of society and its children"). As the Massachusetts Supreme Judicial Court observed, "[a]larms about the imminent erosion of the 'natural' order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of no-fault divorce." Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 340, 798 N.E.2d 941, 967 (Mass. 2003) (footnote omitted). But, that court added, "[m]arriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution." Id. Likewise, in New Jersey, the sex-based eligibility rule is now an artifact of a long-discarded gendered ordering of marriage; history demonstrates for us that marriage will survive the invalidation of this rule just as it has survived changes to so many anachronistic rules in the past.

CONCLUSION

As illustrated above, the history of marriage has been one of evolution, not of static immutability, with marriage surviving innumerable changes to its core rules over the last two centuries. These changes to the institution of marriage over time have left the current different-sex marriage rule without any legitimate relationship to the concerns of fairness, equality and interdependence that are marriage's contemporary underpinnings. As a result, amici respectfully urge this Court, in keeping with the tradition of courts rejecting marriage rules that no longer have a plausible basis, to reverse the decision below and reject the sex-based restriction in New Jersey's marriage law.

Respectfully submitted,
WEINSTEIN SNYDER LINDEMANN SARNO
A Professional Corporation



Jeffrey R. Weinstein

Date: November 5, 2004

APPENDIX:
BIOGRAPHIES OF PROFESSORS OF THE HISTORY OF MARRIAGE, FAMILIES, AND THE LAW

Peter W. Bardaglio, Ph.D., is a professor of history at Ithaca College. He is the author of Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South (University of North Carolina Press, 1995), which won the 1996 James Rawley Prize from the Organization of American Historians for best book published on the history of race relations in the United States. Bardaglio has also published numerous articles and essays on race and gender in the nineteenth-century South as well as on families and public policy in the United States.

Norma Basch is a professor of history at Rutgers University. She has written extensively on marriage and domestic relations in nineteenth-century American law, including a recent book on the history of divorce published by the University of California Press. She teaches courses on gender history, women's history, and American legal history in both the undergraduate and doctoral programs at Rutgers.

Nancy F. Cott is the Jonathan Trumbull Professor of American History at Harvard University and the Pforzheimer Foundation Director of the Schlesinger Library on the History of Women in America at the Radcliffe Institute for Advanced Study. Her research and teaching concentrate on the history of women and of

gender relations in the United States. Her interests have ranged from family structures, women's rights, and feminism, to the role of gender in political institutions and citizenship. She is the author or editor of seven books, the most recent of which is Public Vows: A History of Marriage and the Nation (Harvard University Press, 2000).

Peggy Cooper Davis is the John S.R. Shad Professor of Lawyering and Ethics at New York University School of Law. She is a former family court judge and has published widely on family and child welfare issues. Her book, Neglected Stories: The Constitution and Family Values (New York: Hill and Wang, 1997), was a pathbreaking analysis of the constitutional position of the family.

Nancy E. Dowd is Chesterfield Smith Professor of Law at the University of Florida Levin College of Law, where she teaches in the areas of family law, constitutional law, and gender and the law. She is the author of many articles in the area of family law and two books, Redefining Fatherhood (New York University Press, 2001) and In Defense of Single Parent Families (New York University Press, 1997).

Ariela Dubler is an associate professor at Columbia Law School, where she teaches legal history and family law. Her

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research and writing focus on the history of marriage and nonmarital relations.

Linda Gordon is Professor of History at New York University and Vilas Distinguished Research Professor Emeritus at the University of Wisconsin. She is the author of three books and the editor of two books on the history of social policies regarding work, family, and gender. Her most recent book, The Great Arizona Orphan Abduction (Harvard University Press, 1999), won the Bancroft prize for best book in US history and the Beveridge prize for best book on the history of the Americas.

Robert W. Gordon is Chancellor Kent Professor of Law and Professor of History at Yale University. He teaches courses on American Legal History and has written extensively on the history of law regulating relationships in the household and workplace.

Michael Grossberg is Professor of History and Law at Indiana University, Bloomington and Editor of the American Historical Review. His research focuses on the relationship between law and social change, particularly the intersection of law and the family. He has written a number of books and articles on legal and social history. His 1985 book, Governing the Hearth: Law and the Family in Nineteenth-Century America (University of North Carolina Press, 1983) won the Littleton-Griswold Prize in the

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History of Law and Society in America given by the American Historical Association. He also served as a consultant on Studies in Scarlet: Marriage and Sexuality in the United States and the United Kingdom, 1815-1914, a digital collection of legal materials produced by the Research Libraries Group.

Hendrik Hartog is the Class of 1921 Bicentennial Professor of the History of American Law and Liberty at Princeton University. He is the author of Man and Wife in America: A History (Harvard University Press, 2000) and other works on the legal history of marriage and the family.

Martha Hodes, Ph.D., is Associate Professor of History at New York University. She is the author of White Women, Black Men: Illicit Sex in the Nineteenth-Century South (Yale University Press, 1997) and the editor of Sex, Love, Race: Crossing Boundaries in North American History (New York University Press, 1999). She has served several terms as the Director of the Program in the History of Women and Gender at New York University.

Nancy Isenberg, Ph.D., is Associate Professor of History and Co-holder of the Mary Frances Barnard Chair in Nineteenth-Century American History at the University of Tulsa. She has written and edited books and published many articles on legal and gender

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issues. Her book Sex and Citizenship in Antebellum America (University of North Carolina, 1998) was awarded the 1999 book prize from the Society for Historians of the Early Republic.

Linda K. Kerber is May Brodbeck Professor in the Liberal Arts and Professor of History at the University of Iowa. She also holds an appointment as Lecturer in Law at the University of Iowa College of Law. Her most recent book, No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship (Hill and Wang, 1998), won the Littleton-Griswold Prize of the American Historical Association for the best book in U.S. Legal History. She is a past president of the American Studies Association and the Organization of American Historians and a Fellow of the American Academy of Arts and Sciences.

Elaine Tyler May is Professor of American Studies and History at the University of Minnesota. She has served recently as President of the American Studies Association and as the Distinguished Fulbright Chair in American History at University College, Dublin, Ireland. She has published several books and articles on marriage and divorce, the Cold War era, women and the family in the United States, the history of sexuality and reproduction, and the relationship between private life, politics and public policy.

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Linda McClain is Rivkin Radler Distinguished Professor of Law at Hofstra University School of Law. She is a former Faculty Fellow in Ethics at the Harvard University Center for Ethics and the Professions. She teaches and writes in the areas of family law, jurisprudence, property, and welfare law.

Martha Minow is Professor of Law at Harvard University, where she teaches family law and other courses. She is the co-editor of a casebook on women and the law, the author of numerous articles and book chapters on the history of family law, and a supervisor of numerous doctoral and masters degree students working on family law and its history in the United States and elsewhere.

Steven Mintz is John and Rebecca Moores Professor of History at the University of Houston and a member of the board of directors of the Council on Contemporary Families. His books include Domestic Revolutions: A Social History of American Family Life (Free Press, 1989).

Peggy Pascoe is Associate Professor and Beekman Chair of Northwest and Pacific History at the University of Oregon, where she is completing a book on the history of miscegenation law in the United States from 1860 to 1967. Among the articles she has written on the topic of marriage law is Miscegenation Law, Court

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Cases, and Ideologies of 'Race' In Twentieth-Century America (Journal of American History, June 1996).

Elizabeth H. Pleck, Ph.D., is Professor of History and Human Development and Family Studies at the University of Illinois, Urbana/Champaign. She teaches undergraduate and gradate courses in U.S. family history. She is the author of four scholarly monographs on American family history.

Carole Shammas is the John R. Hubbard Chair of History at the University of Southern California. She has published numerous articles in history and legal history journals concerning family law, and her new book, A History of Household Government in America (University of Virginia Press, 2002), discusses the changes in marriage law in the United States.

Mary Lyndon (Molly) Shanley is Professor of Political Science and the Margaret Stiles Halleck Chair at Vassar College, Poughkeepsie, New York. She is the author of Feminism, Marriage and the Law in Victorian England; Making Babies, Making Families, concerning ethical issues in contemporary family law; and two anthologies on political theory. She teaches courses in the history of political philosophy and contemporary political and feminist theory. She served as Chair of the American Political

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Science Association's Committee on the Status of Women and as President of the Women's Caucus for Political Science.

Reva Siegel is Nicholas deB. Katzenbach Professor of Law at the Yale Law School. Professor Siegel writes in the fields of constitutional law, antidiscrimination law, and legal history, with special focus on questions of gender and the institution of marriage.

Amy Dru Stanley, Ph.D., is Associate Professor of History at the University of Chicago. A historian of nineteenth-century American history, she has written extensively on law, marriage, gender, and the household. She is the author of From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation (Cambridge University Press, 1998), which won several academic awards, including the Frederick Jackson Turner Award for the best first book in American History.

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