SUPREME COURT OF THE STATE OF NEW JERSEY

MARK LEWIS and DENNIS WINSLOW; SAUNDRA HEATH and CLARITA ALICIA TOBY; CRAIG HUTCHINSON and CHRIS LODEWYKS; MAUREEN KILIAN and CINDY MENEGHIN; SARAH and SUYIN LAEL; MARILYN MANEELEY and DIANE MARINI; and KAREN and MARCYE NICHOLSON-MCFADDEN,	:	Docket No. 58,389
Plaintiffs/Appellants,	:	
v.	:	Appellate Division Docket No. A-2244-03T5
GWENDOLYN L. HARRIS, in her official capacity as Commissioner of the New Jersey Department of Human Services; CLIFTON R. LACY, in his official capacity as the Commissioner of the New Jersey Department of Health and Human Services; and JOSEPH KOMOSINSKI, in his official capacity as Acting State registrar of Vital Statistics of the New Jersey State Department of Health and Senior Services,	:	Sat Below: Hon. Skillman, P.J.A.D. Collester, J.A.D. and Parrillo, J.A.D.
Defendants/Respondents.	:	

BRIEF OF AMICUS CURIAE NEW JERSEY STATE BAR ASSOCIATION

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* Aa refers to "Amicus Appendix."

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PRELIMINARY STATEMENT

The state of the law in New Jersey as it applies to committed same-sex couples and their families continues to pose grave concern to attorneys representing these families and, more importantly, to these families themselves. As the largest professional organization for attorneys in the State of New Jersey with over 16,000 members, the New Jersey State Bar Association (hereinafter "NJSBA" or "Association"), respectfully submits this Brief Amicus Curiae in support of the plaintiff same-sex couples' Motion in Aid of Litigants' Rights recently filed with the Court. The uncertainty, unpredictability and inequality of the New Jersey Civil Union Act, P.L. 2006, c. 103, is simply untenable and impossible to overcome even with the most diligent efforts of our membership using all of our legal tools, knowledge and skills. The chasm between committed same-sex couples and similarly-situated heterosexual couples who choose to marry remains since this Court first ruled that "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution." Lewis v. Harris, 188 N.J. 415, 423 (2006).

The passage of time has shown that, regardless of attempts at "tweaking" or "fixing" and other ameliorative measures that have been or may be taken, equality has been elusive and can never be realized for these couples under the separate but

unequal statute created by the Civil Union Act. In view of the gravity of the significant, continued and longstanding harms to these couples and their families - harms shown to be irreparable and to intrude on the dignity of their homes and of their lives together - the NJSBA respectfully submits that it is not only appropriate and proper, but urgently necessary, that the Court evaluate the Legislature's compliance with the Lewis holding. The time-tested judicial procedure under R. 1:10-3, captioned by these plaintiffs and many before as a motion in aid of litigants' rights, is available to the Court to evaluate that compliance and, where same may be found lacking, to address any non-compliance in summary fashion.

With no practical alternative remaining, we respectfully submit that the motion in aid of litigants' rights is the most efficient, effective and proper method for addressing the longstanding inequity and continuing injury wrought by the Civil Union Act and that no other remedy will suffice except the immediate and full provision of marriage equality by this Court.

THE INTEREST OF THE NJSBA AS *AMICUS CURIAE*

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

Association members represent same-sex couples every day in every conceivable type of legal matter. Because of this unique perspective, the NJSBA has been involved with the issues presented in this case for many years, from seeking to craft legislative solutions to participating in the constitutional challenge brought in the Courts. As an Amicus Curiae party in the original Lewis case before the New Jersey Supreme Court, the Association did not take a position on the ultimate remedy to be established, but expressed to this Court the apprehension of the attorneys representing same-sex couples and the rampant inequality of the state of the law as it related to married couples and same-sex couples at that time.

Following the Court's ruling in Lewis, which mandated the enactment of legislation that would provide all of the rights, benefits, burdens and obligation of marriage to committed same-sex couples on an "equal" basis as provided to their similarly-situated heterosexual counterparts, the NJSBA reviewed the two pieces of legislation that were introduced in response to the Court's directive. One bill created civil unions; the other provided for civil marriage, while "protect[ing]" religious organizations from claims of discrimination in the event such marriages were against the tenets of their faith.

It became immediately apparent that the attempt to create a seemingly parallel, but obviously different, legal construct for families of same-sex couples would be unworkable, unequal and unfair, if not discriminatory. Thus, the NJSBA adopted the following statement, which was sent to the Governor and members of the Legislature:

> **New Jersey State Bar Association Position on Senate Bill 2407 Which Would Establish "Civil Unions"**
>
> The New Jersey State Bar Association Board of Trustees voted to oppose this legislation because we believe the 71 page bill creates a convoluted, burdensome and flawed statutory scheme that fails to create for same-sex couples the same rights and remedies provided to heterosexual married couples as required by the New Jersey Supreme Court in its recent landmark decision on October 25, 2006 of Lewis v. Harris, 188 N.J. 415 (2006) and the New

> Jersey constitution. This legislation will create a separate, unequal and unnecessarily complex legal scheme. We remain unconvinced that this legislation will satisfy the Supreme Court's determination that "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated." [emphasis added]. See New Jersey State Bar Association Position on Senate Bill 2407 attached hereto as Exhibit A.

On the other hand, the NJSBA recently renewed its previously stated "high priority" support for legislation that would enact full marriage equality as follows:

> **New Jersey State Bar Association Position on Senate Bill S-1967, "Freedom Of Religion And Equality In Civil Marriage Act"**
>
> The New Jersey State Bar Association respectfully urges you to support Senate Bill 1967 (Weinberg) which would enact the "Freedom of Religion and Equality in Civil Marriage Act." As the voice of the state's largest lawyers group, we have had ample feedback from lawyers and citizens the Domestic Partnership Act and Civil Union Law have not put the rights of same-sex clients and their children on equal footing as married heterosexual couples and families, despite the good intentions of these laws.
>
> [T}he Domestic Partnership Act and Civil Union Law have created a flawed statutory scheme, and it has become abundantly clear that these measures have resulted in a failed experiment in discrimination. The civil union law created a separate, inequitable and unnecessarily complex legal scheme and the New Jersey State Bar Association remains unconvinced that this law satisfies the Supreme Court's determination that "the unequal dispensation

> of rights and benefits to committed same-sex partners can no longer be tolerated." …
>
> From the Bar's perspective, civil unions are a failed experiment. Family law, estate planning, and labor and employment law are some of the areas replete with instances where same-sex couples are treated differently than married, heterosexual couples. … For these reasons, the New Jersey State Bar Association respectfully and strongly supports passage of S-1967, the "Civil Marriage and Religious Protection Act." (Emphasis added). See New Jersey State Bar Association Position on Senate Bill S-1967 attached hereto as Exhibit B.

The Legislature, unfortunately, failed to pass the bill.

The Association's members continue to have concerns about their ability to achieve for their same-sex clients what Lewis has promised: "the financial and social benefits and privileges given to their married heterosexual counterparts." Lewis, supra, 188 N.J. 415. The NJSBA therefore again petitions the Court to permit it to participate in this matter as an Amicus Curiae party. The Association believes its participation can provide valuable insight about the practical effects of the Civil Union Act. It is the position of the NJSBA that only "marriage" can be equal to marriage. We hereby urge the Court to grant the relief requested in the plaintiffs' Motion in Aid of Litigants' Rights.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The New Jersey State Bar Association adopts the Statement of Facts and Procedural History put forth by the plaintiffs in their Motion in Aid of Litigants' Rights.

LEGAL ARGUMENT

POINT I

ATTORNEYS REPRESENTING SAME-SEX COUPLE CLIENTS CANNOT OVERCOME THE INEQUALITIES WHICH EXIST UNDER THE CIVIL UNION ACT, WHICH HAS DEMONSTRATED ITSELF TO BE A "FAILED EXPERIMENT IN DISCRIMINATION"

In Lewis v. Harris, 188 N.J. 415 (2006), the New Jersey Supreme Court reinforced "this State's legislative and judicial commitment to eradicating sexual orientation discrimination." 188 N.J. at 424. In its attempt to implement that holding through the creation of the Civil Union Act, the Legislature reflected nearly identical public policy pronouncements to those it had recited two years prior in the Domestic Partnership Act:

> There are a certain number of individuals in this State who choose to live together in important personal, emotional and economic committed relationships with another individual…[and t]hese *familial relationships*, which are known as domestic partnerships, assist the State by their establishment of a private network of support for…their participants [emphasis added]. N.J.S.A. 26:8A-2.[1]

The State Legislature built on those findings, declaring in the preface of the Civil Union Act that, "[p]romoting such stable and durable relationships as well as eliminating obstacles and hardships these couples may face is necessary and proper and reaffirms this State's obligation to insure equality

1 P.L. 2003, c. 246, enacted January 12, 2004 and effective July 10, 2004. See also N.J.S.A. 26:8A-1 et. seq.; registration under the Act is now closed to couples under the age of sixty-two.

for all the citizens of New Jersey." P.L. 2006, c. 103; N.J.S.A. 37:1-28(b).

The Civil Union Act further states, "[c]ivil union couples shall have all the same benefits, protection and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage." N.J.S.A. 37:1-31(a). The "partner[s] in a civil union" are to be provided all the same rights and benefits as a married couple under New Jersey law. Unfortunately, time has shown that this simply has not occurred.

A. More than mere nomenclature, the term "civil union" has inflicted a governmental label of inferiority on New Jersey's committed same-sex couples

The Legislature chose to rely on a new and different name for same-sex couple relationships: "civil union." However, this naming distinction itself causes a constitutional injury.[2] The mere fact of providing two different names for committed relationships results in a sorting of couples and their families into same-sex and opposite-sex, over and over again, as the names are deployed in daily life. This sorting is understood by many simply as a proxy for sorting people as "gay" or

[2] For an in-depth analysis of this issue, see Poirier, Marc, "Name Calling: Identifying Stigma and the "Civil Union" / "Marriage" Distinction " 41 CONN. L. REV. 1425 (2009) (explaining social mechanism for constitutional injury delivered by state's use of civil unions to classify gay and lesbian couples separately from other committed couples). Marc Poirier is a Professor of Law and Martha Traylor Research Scholar at Seton Hall University.

"straight." The "civil union" / "marriage" distinction thus aids and abets social processes of stereotyping and discrimination around sexual orientation, just as in an earlier era the mere fact of a newspaper's publishing separate employment columns for men and women was found to aid and abet sex discrimination. Passaic Daily News v. Blair, 63 N.J. 474 (1973) (a newspaper violated the state's Law Against Discrimination by publishing separate male and female employment advertisements); see also Kerrigan v. Comm'r of Public Health, 289 Conn. 135, 957 A.2d 407 (Conn. 2008) (the "civil union/marriage" distinction created an injury of constitutional dimension, relying *inter alia* on Evening Sentinel v. National Organization for Women, 168 Conn. 26, 35, 357 A.2d 498 (Conn. 1975) (a newspaper violated the state antidiscrimination law by publishing separate male and female employment advertisements)).

As found initially before the Court, in the conclusions of the Civil Union Review Commission ("CURC"), the December 7, 2009 testimony before the State Senate Judiciary Committee on the proposed civil marriage legislation and in the pleading of petitioners now before the Court, civil union couples suffer constant constitutional injuries due to their segregated status. The "civil union" / "marriage" distinction enshrined in the Civil Union Act causes the following types of injuries:

(1) The "civil union" / "marriage" distinction perpetuates and legally requires continual sorting into same-sex and opposite-sex couples, which will be understood as sorting into gay and straight couples. This lends the imprimatur of the state to a distinction with a history of invidious discrimination, one which in so many other respects the state has sought to eradicate. See Lewis, 188 N.J. at 444-48 (exploring New Jersey's considerable commitment in decisional and statutory law to equality for gay and lesbian individuals and couples).

(2) Attorneys have a professional responsibility not to perpetuate the stigma of sorting their clients and others on the basis of sexual orientation, but are being compelled to do so by participation in the creation and advancement of a two-tiered system.

(3) Confusion over the new terminology blocks access to the rights and benefits supposedly required under this Court's earlier Lewis decision both because of sincere confusion over the nature of the rights afforded same-sex couples, and because of the opportunity to feign ignorance of the new terminology.

(4) Same-sex couples and their families must expend considerable effort and expense, over and over, attempting to explain that, despite the different name "civil union," they are entitled to equal rights as though married.

(5) In some situations the different name given to same-sex couples' relationships creates a tangible distinction that results in the deprivation of rights to which they would have been entitled in other jurisdictions had they been married, not to mention an intrusion on the dignity and value of the family unit in being labeled by a different name that is universally regarded to denote an inferior relationship status.

Members of the bar are in a special position to comment and, further, to object here. Our language, at least when we act in professional contexts, is not free to "find its place in [a] common vocabulary," as this Court wrote so hopefully in Lewis, supra, 188 N.J. at 461. Because we are obligated to use the legally precise names of these relationships, rather than the names our clients might choose, we become, against our own judgment and our clients' interests, agents of the injuries described herein. Ultimately, we must honor a state-imposed professional obligation to inflict these injuries upon our own clients.

In its earlier decision in this case, this Court left it to the Legislature to decide what name to use for the constitutionally-required recognition of same-sex couples. The Vermont Supreme Court did the same thing in its marriage equality decision, Baker v. State, 170 Vt. 194, 744 A.2d 864 (1999). Chief Justice Jeffrey Amestoy, the author of that

opinion, later explained that the Vermont Supreme Court's decision to defer on the nomenclature matter was motivated by a principle of state constitutional law. The Vermont Supreme Court was attempting to push the other branches of government into dialogue and action over an emerging and, indeed, controversial social and political issue. Jeffrey L. Amestoy, "State Constitutional Law Lecture: Pragmatic Constitutionalism - Reflections on State Constitutional Theory and Same-Sex Marriage Claims," Forward, 35 RUTGERS L.J. 1249 (2004). Understood in this light, the Vermont Supreme Court's deferral was not a permanent abdication of responsibility to enforce the state constitutional guarantee. Instead, it was an attempt to facilitate democratic dialogue by allowing the Legislature to decide what to do next. But the deference was provisional. In Vermont, a state commission found civil unions categorically unequal to marriage. Vermont Office of Legislative Council, "Report of the Vermont Commission on Family Recognition and Protection" (2008), available at http://www.leg.state.vt.us/WorkGroups/Family Commission/VCFRP_Report.pdf (last visited May 28, 2010). The Vermont Legislature responded with "An Act to Protect Religious Freedom and Promote Equality in Civil Marriage," 2009 Vt. Laws 3 (Apr. 7, 2009).

In New Jersey, however, the Legislature failed to follow through on the public conversation prompted by this Court in

2006 and carried forward, at the express direction of the Legislature and the Governor, by the CURC. Because the mandate of the Court has faltered, and the Legislature's choice of remedy has been shown to be flawed, this Court must step in, again, to right the Constitutional wrong.

The ultimate principle here is none other than the one articulated long ago in Brown v. Board of Education, that separate simply is not equal. Brown v. Board of Education of Topeka, Kan., 347 U.S. 483, 492-95 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896), and holding that, in the field of education, separate is never equal). See, Booker v. Board of Education of City of Plainfield, 45 N.J. 161, 212 (1965)(applying the principle of Brown where de facto educational segregation would perpetuate stigma). The Court must not be thrown off by the fact that, in many so-called "separate is not equal" decisions, tangible facilities such as schools or swimming pools are at stake. Brown rested squarely on the foundational understanding that, even if educational facilities were equal, the stigma of separateness would constitute a constitutional injury. Brown, 347 U.S. at 493-95. Stigmatic injury can be puzzling because it is intangible, but it is nonetheless real and often actionable. Beyond a doubt, the dual nomenclature for couples and families perpetuates a preexisting stigma and a practice of discrimination. See Kerrigan v. Comm'r

of Public Health, 289 Conn. 135, 148-55, 957 A.2d 407 (2008) (finding constitutionally cognizable injury in the legislature's provision of only civil unions); see Poirier, supra, 41 CONN. L. REV. at 1479 - 93 (explaining the social mechanism, based in daily microinteractions, of the constitutional injury found in Kerrigan). The problem is that having two names requires the sorting of people into groups; one name is unfamiliar but inherently creates a stigmatized group, thus reinforcing preexisting bias and prejudice. The dual naming structure contradicts the very principle of equality that the Civil Union Act was required to provide. See also, Loving v. Virginia, 388 U.S. 1 (1967). Loving, which has been invoked for various propositions in support of marriage equality, stands *inter alia* for the proposition that as a matter of equal protection a court can and must discern, when a statute sorts into categories, whether the law is implementing an underlying structure of discriminatory categories. In Loving, the Supreme Court saw race as the underlying and impermissible structure of the antimiscegenation statute. Id. at 11.

Here, it is the underlying and impermissible structure of the Civil Union Act creating discriminatory categories according to sexual orientation. The Legislature having abdicated its role to right a constitutional wrong, it is now incumbent upon the Court to enforce its own mandate of equality.

B. The Civil Union Act has failed to provide equality in family law matters.

Attorneys representing clients in family law matters cannot overcome the inequalities which exist under the Civil Union Act. In electing to enact the Civil Union Act rather than extend marriage rights to gay and lesbian couples, the New Jersey Legislature created a construct that impedes the equitable treatment of gay and lesbian couples in family law matters. By sanctioning civil unions, rather than marriage, the Legislature created a status whose definition is indefinable in common language and, by its nature, eludes equitable treatment regardless of how skilled the family lawyer may be. The reason is simple: "marriage" is the common status understood by the citizens of this state and other jurisdictions to be a state-sanctioned status that carries with it certain rights and obligations. Being relegated to "civil union" status deprives a distinct group of citizens, i.e., gay and lesbian couples, of the benefit of both the familiar understanding of the rights and obligations of marriage and of the equitable principles derived from statutes, law and common experience that has allowed our Family Courts to weigh the rights and obligations of parties in judging family matters.

Couples entering into civil unions do not truly understand what the Legislature intended by creating a separate status

called "civil union." "Marriage" is a word that all citizens comprehend and from which they draw their understanding of the rights and obligations of persons joined in a state-sanctioned relationship. These rights and obligations during the relationship include, but, of course, are not limited to financial support for a spouse and the contribution to a spouse's reasonable medical care. Upon dissolution, these include obligations for alimony and equitable distribution of property. Although many of these rights and obligations apply to civil unions, those entering into these relationships do not necessarily understand that, and society at large often meets the term of "civil union" with a lack of comprehension. Education and time have not bridged this cultural chasm.

This confusion and misunderstanding is also pervasive throughout the court system itself. Respectfully, members of the Association have reported many instances in which Family Court clerks did not know how to properly handle the filing of civil union dissolution complaints or undertake other court functions related to such parties and matters. For example, while directed by the AOC to file these matters with an FM docket, many filing clerks persist in erroneously assuming they are FD matters. Attorneys report they are often referred to the non-dissolution office, rather than to the dissolution office, of the court's Family Part. This is not merely a shortcoming of training, as

some may suggest and, indeed, as has been undertaken by the court system, but speaks to the universal common understanding of citizens of what it means to be "married," as opposed to "civil unioned."

Another problem faced by family law practitioners is a lack of New Jersey recognition of legal foreign marriages between same sex couples discussed infra. This becomes a crucial problem for "divorce" complaints as same-sex couples married in jurisdictions with true "marriage" equality who then settle in New Jersey do not have their marriages recognized equally. They are deemed to be (merely) "civil unioned" and, thus, are prevented from filing for, or receiving, a divorce from their foreign "marriage" that would enable them to re-enter the status of "marriage" in the future if they return to jurisdictions which treat them with full equality.

One poignant example of this conundrum of whether a Canadian marriage between a same-sex couple was entitled to a New Jersey divorce came out in a Mercer County courtroom in late 2008 and early 2009, resulting in the unreported February 6, 2009, trial court decision in Hammond v. Hammond, Docket No. FM-11-905-08 (N.J.Super. 2009). See Pa Exhibit 34.[3]

[3] Pursuant to New Jersey Rule Governing Appellate Procedure 2:6-8, we reference the Plaintiffs' Appendix in accordance with the tab format they have designated. For example, Plaintiffs' Appendix Exhibit 1, the Affidavit of Mark Lewis, is labeled thus: "Pa Exhibit 1." Here, the transcript of the

In Hammond, La Kia Hammond, a New Jersey resident had been married in Canada to her same-sex spouse and, later, sought to end that Canadian marriage with a "divorce" in New Jersey, rather than a dissolution of a civil union. Id. at 6. Ms. Hammond indicated that she was living with a form of muscular dystrophy, Pa Exhibit 34 at 7, and sought to avoid any "uncertainty regarding her status if she is granted dissolution of a civil union rather than a divorce" as that might "complicate her plans to remarry in Canada and could complicate her intent to vest her new partner [sic] with authority to make medical decisions for her." Pa Exhibit 34 at 9. However, although the defendant defaulted and, thus, submitted no objection to a "divorce," the New Jersey Attorney General entered the case and opposed the divorce on the grounds that the Canadian "marriage" of a same-sex couple was necessarily and automatically converted into a New Jersey "civil union" by operation of law. Pa Exhibit 34 at 9-12. See also New Jersey Attorney General Opinion 03-2007, pp. 7-8, attached as Exhibit C. Therefore, the New Jersey Attorney General argued, the parties were only entitled to "dissolution of a civil union" and, indeed, were barred from receiving a "divorce" under New Jersey Law. Id. The significant concerns of the plaintiff included whether the Canadian government would recognize a New

February 6, 2009 decision of the Honorable Mary Jacobson, J.S.C. is at Pa Exhibit 34.

Jersey court's use of the "dissolution of a civil union" procedure to effect the "divorce" of two parties to a Canadian marriage. Pa Exhibit 34 at 9-10. If it did not, then she would be barred from entering into another marriage as she planned. Id.

The American Civil Liberties Union of New Jersey ("ACLU-NJ") entered the case on the side of the plaintiffs. Pa Exhibit 34 at 4. In an oral opinion issued on February 6, 2009, Pa Exhibit 34, the trial court granted Ms. Hammond a divorce in a ruling grounded in the common law principle of comity. Pa Exhibit 34 at 12-19, 25-26. Though the plaintiff obtained the relief she sought, to wit, a divorce, rather than dissolution, she was forced to expend significant effort to prove to that court that she should be "divorced" based on constitutional and equitable grounds.

The legal issues of comity are discussed infra, but in the family law context, should every married same-sex couple seeking to divorce in New Jersey be required to file briefs, notice the Attorney General and bring in sophisticated legal representation as provided in this matter by the ACLU-NJ and its highly-respected co-counsel? As an unpublished trial court opinion, the Hammond ruling has no precedential value. We ask rhetorically, would any couple married in another state accept without question the necessity to file briefs to get a divorce?

Would they accept having the State's Attorney General intervene in their divorce to argue that they were not entitled to the full stature of their relationship and were only entitled to an outcome that would interfere with their right to re-marry elsewhere in the future? By failing to authorize and recognize marriages for gay and lesbian couples, the State demonstrated without question that these citizens are clearly relegated to an inferior status.

On the flip side of this concern, what about New Jersey citizens who enter into civil unions and then move to another state? Persons entering into a civil union in New Jersey may not be able to have their civil union dissolved in other states that recognize same-sex marriage. Five other states (Connecticut, Vermont, New Hampshire, Massachusetts, Iowa) and the District of Columbia and a multitude of other nations authorize same-sex marriages. Other states, such as New York and Maryland, while not authorizing same-sex marriages themselves, affirmatively recognize marriages between same-sex couples performed in other states and provide various benefits and protections to those couples. However, to date there is no evidence that any state will fully recognize a New Jersey Civil Union for any purpose, including taxation, inheritance and divorce.

Not only do New Jersey gay and lesbian couples married in states with marriage equality not have their marriages fully

recognized, they cannot have their relationships reaffirmed as "marriages in New Jersey." The act of reaffirming a relationship after many years together or in recognition of a meaningful anniversary date is a right enjoyed by all heterosexual couples. However, gay or lesbian couples married elsewhere cannot enjoy that right, as the State relegates any such reaffirmation to the alternate status of Civil Union (which is widely perceived as inferior).

Family law practitioners face other problems. The records of many civil union matters are littered with inaccurate statements of the status of the parties as "married" or "spouses," when the parties' status is by law "civil union" or "civil union partners." There is a real fear among practicing attorneys and, indeed, experience has shown, that pleadings and court petitions are not handled accurately by the court system and clerks who, albeit sincerely, are simply not cognizant of these distinctions.

Again, as marriage is the commonly accepted term for persons in state-sanctioned relationships, in family law matters, civil union status has created doubt, uncertainty and as to some issues, prejudice and insult.

The "poster child" for the State's failure to treat same-sex couples equally in the family law arena is demonstrated by the early-2007 amendment to the New Jersey divorce statute,

P.L.2007, c.6. (2007), permitting a cause of action for divorce grounded on "irreconcilable differences." N.J.S.A. 2A:34-2(i). The amendment authorizes the filing of a Complaint for divorce before the New Jersey Courts predicated upon the existence of "irreconcilable differences which have caused the breakdown of the marriage for a period of six months and which make it appear that the marriage should be dissolved and that there is no reasonable prospect of reconciliation [emphasis added]." Id. This cause of action makes divorces in New Jersey significantly less litigious as it removes the necessity of clients to affirmatively allege bad faith and/or acts committed by the other party as a basis for termination of the marriage.

Against that backdrop, the New Jersey Civil Union Act, P.L. 2006, c. 103, was signed into law on December 21, 2006 and took effect on February 12, 2007. However, shortly after the passage of the Civil Union Act, the Legislature enacted the aforementioned "irreconcilable differences" amendment to New Jersey's "divorce" statute, which amendment became effective immediately upon enactment and was signed into law on January 20, 2007. Remarkably, the amendment did not include any similar cause of action applicable to Civil Unions, leaving the New Jersey Civil Union Act unequal to marriage on the very first day it took effect on February 19, 2007.

The Court may take note that, when voting on the amendment to the causes of action for "divorce," the Legislature was aware that it had just passed the Civil Union Act and that within that Act, causes of action for dissolution of those relationships had been set forth explicitly. By not including reference to irreconcilable differences in the Civil Union Act, the legislators appeared to make it obvious that they were not providing equal treatment for civil unions compared to marriage. This unleashed a period of great confusion for attorneys and their clients as both the Bar and the Bench were unable to determine whether to apply the new cause of action for divorces to civil union dissolutions - whether on constitutional grounds of equal protection or using the "catch-all" phrase in the Civil Union Act, at N.J.S.A. 37:1-31(a), to justify proceeding on irreconcilable differences. There was further confusion as to whether the new cause of action might apply to the termination of domestic partnerships. The only fact clear was that the Legislature had failed to comply with the mandate of the Lewis decision at the very moment it claimed to be fulfilling it.

Recognizing the Legislature's failure, the Administrative Office of the Courts ("AOC") issued an internal "letter" of instruction to the State's Assignment Judges indicating that the Governor's signing statement attached to the irreconcilable differences bill reflected a constructive legislative intent to

apply the new cause of action to civil union dissolutions as well. Pa Exhibit 18 at 13. See January 22, 2007 AOC Directive from David P. Anderson, Jr., Director, Office of Professional and Governmental Services to Assignment Judges attached as Exhibit D. This letter was never published to the Bar, was never codified in an Administrative Directive and did not come to public light until it was produced as part of the work of the CURC. Director Anderson offered to "re-send" the letter to the Presiding Family Part judges. Pa Exhibit 18 at 13-14. No matter what the Bench's and Bar's understanding of the issue, there remains the prospect that a Complaint for the Dissolution of a Civil Union grounded in irreconcilable differences may be subject to attack for failure to state a claim, or a Judgment entered in respect to such a Complaint may be subject to appeal.

The sobering lesson of the irreconcilable differences debacle is that, at no time since the enactment of the Civil Union Act - indeed, to this very day - has the law ever been equal to marriage.

The Legislature persists in drafting legislation that fails to include civil union partners as protected or covered people. The Court may take judicial notice of pending legislation, for example, A2517 and the identical bill S1301, both introduced into this year's Legislative Session, as examples of the routine reference solely to "spouses," excluding civil union partners

both expressly and in common meaning. See copy of A2517 attached hereto as Exhibit E. This bill authorizes unemployment benefits for shared work programs and defines immediate family member as including "spouse," but not civil union partners.

Since the Legislature created civil unions, it must be charged with understanding its own legislative creation. What is clear from its subsequent actions is that, either by failure of memory, oversight, or neglect, the Legislature has repeatedly failed to put civil union partners on equal footing with married spouses as they have drafted new legislation since the enactment of the Civil Union Act that has often left out same-sex couples and their families.

In related matters, civil union couples have been repeatedly denied access to administrative name changes - the adoption of a spouse's surname or the creation of a hyphenated name - whereas married people have no difficulty in transacting such routine matters. This is particularly evident when civil union partners try to change their driver's licenses at the Motor Vehicle Commission.

Again, respectfully, even the courts fail to recognize these families equally. The Family Part Case Information Statement (Family Part Appendix V), amended several times since the enactment of the Civil Union Act, even now references only "marital lifestyle," "H" for "husband" and "W" for "wife," and

leaves no appropriate designations for civil union couples. How can attorneys effectively represent clients in family matters when in addition to the legal gymnastics in which they must engage to bring their client before the Court, the routine forms associated with these matters are not compliant and create obstacles to equal treatment for their clients?

Instead of being able to exercise equal status in the community and before the courts, attorneys must fight for each client's recognition at every turn and must seek "creative" means of asserting each client's rights while constructively arguing, indeed begging, the State, its citizens and the courts to analogize same-sex couples' relationships to married couples' relationships.

Therein lies the crux of the problem: civil unions are not and never will be equal to marriages as, despite the best of intentions, these relationships are not understood nor treated equally by the Legislature, the Courts, or the public. As a result, the Legislature has necessarily failed to properly and fully implement the promise of equality required in Lewis. However, the Court has the power to fix this shortcoming by granting same-sex couples the right to full equality through marriage.

C. The Civil Union Act has failed to provide equality in estate matters.

Attorneys representing clients in estate matters cannot overcome the inequalities which exist under the Civil Union Act. The serious illness or death of one's spouse or partner is a time of anxiety and confusion. When confronting these painful, life-changing moments, no one should have to use crucial time to explain or justify one's status and rights. Yet, it is just during these crises that the Civil Union Act repeatedly fails to provide the protections promised by Lewis.

For married people, there is immediate acceptance of that status due to the proficiency of citizens with that term. For civil union partners, the inadequacies of the civil union law come as roadblocks that manifest during these emergency and emotionally-charged situations. The report of the CURC is replete with incidents of non-recognition or misunderstandings by uninformed emergency workers and hospital and medical staff. Gay and lesbian couples came forward to CURC to share the intimate details of their health stories, sharing personal stories of how they experienced discrimination as a result of the confusion that occurred when moments counted and when there existed the greatest need for immediate access, understanding and attention to the medical crisis at hand.

In the proceedings before the CURC, one woman testified about her emergency room experience, stating, "[a]nd rather than

being able to focus on getting myself the treatment, we had to sit there and explain what our relationship was to each other. And so it took time away from medical care [emphasis added]." Pa Exhibit 17 at 28-29, lines 1-5. Another witness spoke of a nurse at a prominent New Jersey hospital who questioned her relationship and asked to see her civil union certificate:

> She knew nothing about domestic partnerships. She knew nothing about civil unions. There had been no training in that hospital. This is a critical care nurse, somebody that deals with life and death every day. People don't have time to run home and get papers to say I have the right to be in this room, to say I have a right to make decisions. Pa Exhibit 16 at 36, lines 15-23.

The nurse's demand to see the witness' civil union certificate ceased, unsatisfied and with silence, when the witness noted the nurse's wedding ring and asked, "are you married...do you have your marriage license with you?" Pa Exhibit 16 at 35, lines 23-25 and Pa Exhibit 16 at 36, line 1. Still, the witness stated, "I wasn't convinced she would go out and grab my partner should something have happened to me." Pa Exhibit 16 at 36, lines 4-6.

Another witness testified about a resulting fear of going to an emergency room because of the anticipated failure of staff to understand and respect her relationship. Pa Exhibit 17 at 23-25. Another complained of the failure of a medical office to have a place on its forms to list a civil union partner although

it had a place for married individuals. Pa Exhibit 16 at 12-13. This lack of understanding made her feel that she had a "second class marriage." Id.

Matters do not improve when a civil union partner dies. Although the state's laws as to inheritance and estate taxes were modified to treat civil union couples the same as married couples, Title 3B of the New Jersey Statutes concerning administration of estates totally fails to recognize the existence of civil union couples. The definition sections, N.J.S.A. 3B:1-1 and 3B:30-2, both include the terms spouse and domestic partner, but civil union partners are not considered. Nor is there any definition of spouse which might include a civil union partner. Under Title 3B, a civil union partner does not exist.

No wonder a surviving civil union partner confronts ignorance or discrimination when applying for assets without administration since the statute, N.J.S.A. 3B:10-3, clearly addresses spouses and domestic partners, but fails to grant such rights to surviving civil union partners.

Similarly, Title 3B statutes fail to reference civil union couples in statutes relating to:

1. elective shares, N.J.S.A. 3B:8-2 et seq.;
2. the right to an intestate share, N.J.S.A. 3B:5-15;
3. the appointment of a guardian, N.J.S.A. 3B:12-25 et seq.;
4. the right to administration without bonding,

N.J.S.A. 3B:15-1; and,

5. the right to letters of administration, N.J.S.A. 3B:10-2.

All of these statutes specifically mention spouses and domestic partners, but fail to consider or address civil union partners. By the Legislature giving civil union partners a separate status and then failing to recognize that status in subsequent proposed and enacted legislation, it has caused uncertainty, complications and unnecessary discrimination when administrating the estate of a deceased civil union partner.

New Jersey attorneys advising lesbian and gay clients confront these issues on a daily basis. Attorneys only have limited means to combat discrimination caused by the Civil Union Act. No number of documents can overcome public perception of civil unions as some strange, unfamiliar status which too often needs to be questioned and explained before acceptance.

These issues multiply when a member of a civil union couple leaves New Jersey. When the New Jersey Legislature adopted a second tier of a marriage-like status, it put its lesbian and gay citizens at a heightened risk of not receiving proper medical attention and being vulnerable to discrimination. Even if the couple is prepared by carrying a proxy directive for health care and a living will naming the civil union partner as the health care representative, often there are questions of its acceptance in a foreign state where there is total ignorance of,

if not outright hostility to, such a status. See Courtney G. Joslin, "Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines," 4 HARV. LAW & POL'Y REV. 31 (2010).

The Legislature has consistently failed to affect the Lewis mandate of equality. The inequality between civil unions and marriage as it relates to estate planning should not be permitted to continue. It can be easily resolved by simply permitting same sex couples the equal right of heterosexual couples to marry.

D. The Civil Union Act Has Failed To Provide Equality In Employment Fringe Benefits.

Attorneys representing clients in employment fringe benefits matters cannot overcome the inequalities which exist under the Civil Union Act. It goes without saying that tangible fringe benefits, such as healthcare coverage, are an important component of the overall compensation package of many employees. These benefits packages are not only essential to employees' well-being and happiness, but also provide an important safety net that protects them in the event of sickness and upon retirement. This is a safety net that keeps them from turning to the government and relying on benefits programs instead. Indeed, jobs with "good benefits" are sought after, and never more so than in today's economy. See "2009 Employee Job Satisfaction Report: A Survey Report by the Society for Human

Resource Management," http://www.shrm.org/Research/SurveyFindings/Articles/Documents/09-0282_Emp_Job_Sat_Survey_FINAL.pdf at pp. 8-10, 30 (last visited May 28, 2010).

The failure of the Civil Union Act to deliver on its promise of benefits equality to civil union partners is a failure that resonates every day in the lives of same-sex couples and their families throughout this state. See, Civil Union Review Commission, Final Report of the Civil Union Review Commission: Consequences of New Jersey's Civil Union Law (2008) (hereinafter "CURC Final Report") Pa Exhibit 14 at 11-14. This failure exacts both an economic and psychological toll on these New Jersey citizens. Id. Because same-sex couples still are not afforded benefits equality, they must shoulder a significant economic burden to purchase needed benefits. Id. Moreover, it is "demoralizing" and divisive for civil union partners to work side-by-side with married co-workers who receive greater benefits, and thus greater compensation, for the same work. Pa Exhibit 20 at 38, lines 15-25.

The Civil Union Act unequivocally directs that benefits be provided on an equal basis to civil union partners and to married couples. See N.J.S.A. 37:1-31(a), N.J.S.A. 37:1-32 and N.J.S.A. 37:1-33. Nevertheless, the vivid and unrefuted testimony before the CURC proves that this has not occurred. The term "civil union," even years after passage of the Act, is

simply not understood by many employers. As one witness put it, "[e]verybody knows [ ] what marriage is. It's portable. You say I'm married. People say I'm civil unioned . . . [y]ou'll run into, well, what in the world is that?" Pa Exhibit 15 at 86, lines 6-10. As one employment law practitioner testified, "the fact [ ] that employers are still questioning whether they have to provide benefits because the [benefits] plan says spouse or marriage is mind boggling to me." Pa Exhibit 17 at 81, lines 11-14.

It must be acknowledged that permitting New Jersey same-sex couples to marry, strictly as a legal matter, will not compel complete benefits equality. That is because, where federal law preempts state law, employers are not required to provide equal benefits to same-sex married couples. Perhaps the most prominent example of this involves health and welfare benefit plans (providing benefits such as medical, dental and vision coverage). Some employers fund these plans through insurance, while other employers self-fund their plans.

The Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, et seq., governs most health and welfare plans of New Jersey's private employers, and "supersede[s] any and all state laws insofar as they relate to any employee benefit plan" subject to ERISA, 29 U.S.C. §1144(a), except that the federal law does not preempt state laws which govern the business of

insurance. 29 U.S.C. §1144(b)(2)(A); see also, Kentucky Ass'n. of Health Plans, Inc. v. Noah, 538 U.S. 329 (2003).

Thus, because New Jersey requires that insurance carriers provide equal benefits to civil union partners and spouses, N.J.S.A. 37:1-32(e), health and welfare plans which are funded through the purchase of insurance must comply with the Act. Plans funded directly by employers are not subject to New Jersey insurance law. Therefore, ERISA's broad preemption provision takes those plans out of the reach of the Civil Union Act and the Law Against Discrimination, N.J.S.A. 10:5-12(a), the latter of which forbids employment discrimination based on both sexual orientation and civil union status. See also CURC Final Report Pa Exhibit 14 at 11-12 and, at 29, "the Commission finds that a marriage law in New Jersey would help to alleviate the disparate treatment of same-sex couples, including denial of benefits…"; see also, FMC Corp. v. Holliday, 498 U.S. 52 (1990).

But, while ERISA may not necessarily require the provision of benefits to same-sex couples, it does not affirmatively forbid employers from providing equal benefits to those same-sex couples. However, the mere classification of a relationship as a "civil union" does, in effect, operate as a bar to equality. The experience of Massachusetts, which permits same-sex couples to marry, teaches that employers will extend these fringe benefits to same-sex couples regardless of federal law if those

couples can marry. Accord CURC Final Report, Pa Exhibit 14 at 29; New Jersey Civil Union Review Commission; CURC First Interim Report (Feb. 19, 2008) Pa Exhibit 13 at 7-9 ("CURC Interim Report"); Hearing on S. 1967 Before the S. Judiciary Comm. ("Senate Hearing"): Testimony of Louise Walpin, Pa Exhibit 27 at 62 and Testimony of Professor Thomas Hoff Prol, Esq., Pa Exhibit 27 at 168; Hearings Before the CURC: Testimony of Tom Barbera, Pa Exhibit 15 at 36-39; Testimony of David Smith, Pa Exhibit 17 at 68, lines 13-22.

As one CURC witness stated, "from the day [Massachusetts'] marriage equality law took effect through today, civil rights organizations in Massachusetts as well as our state government have received virtually no complaints about companies providing health care benefits to same-sex married couples." Pa Exhibit 15 at 38, line 25 and 39, lines 1-5. Another witness testified: "Massachusetts employers by the persuasive weight of the word marriage are not using the Federal ERISA loophole to avoid recognizing same sex marriages." Pa Exhibit 17 at 68, lines 17-20. A third noted that, "[e]ven though technically a corporation might not have to, practically they do provide the same benefits [to same-sex couples in Massachusetts], because a marriage, is a marriage, is a marriage. What fair minded company would want to treat one marriage different from another marriage?" Pa Exhibit 18 at 107, lines 12-18.

On the other hand, the experience of New Jersey Civil Union partners is very different. The CURC heard and found that private employers across New Jersey have leaned heavily on ERISA in refusing to provide equal benefits to civil union partners, as the language of the Civil Union Act does not match the language of their plans, which reference "spouses" and "marriage." However, the record strongly suggests that New Jersey employers would follow the lead of their Massachusetts counterparts, Pa Exhibit 15 at 38, lines 2-25 and 39, lines 1-16; Pa Exhibit 17 at 68, lines 13-25 and 69, lines 1-4; Pa Exhibit 18 at 107, lines 7-18, and extend the benefits of marriage to all married couples, opposite-sex or same-sex, so long as the couple is "married" under state law. Remarkably, this is true whether or not ERISA would authorize the employer to exclude same-sex married couples from the benefits in question.

Thus, one witness testified that her attempts to obtain employment benefits were repeatedly denied until she advised the benefits administration company that, although in New Jersey she was in a civil union, she and her partner had gone to Massachusetts and married and, thus, had a Massachusetts marriage certificate. Upon learning that the employee was married, albeit in a same-sex marriage, the company granted the employee benefits, because the "marriage" fit within the

language of the applicable benefits plan, Pa Exhibit 15 at 42, lines 8-25 and 43, lines 1-25 and 44, lines 1-25 and 45, lines 1-18, and "the word marriage is a world of difference. Pa Exhibit 15 at 45, lines 17-18.

The state-sanctioned distinction between "marriages" and "civil unions" permits and facilitates discrimination among the two groups with respect to ERISA-governed benefit plans because, where same-sex couples are excluded from marriage, they are by definition also excluded from the existing language of benefit plans, which speak in terms of "marriage" or "spouses." Perversely, the Civil Union Act itself invites discrimination, and encourages employers to rely upon ERISA preemption.

Indeed, many plans cannot cover civil union partners unless they are amended to include language permitting the extension of benefits to a new classification. Pa Exhibit 15 at 35, lines 1-15 and 36, lines 1-19. Where marriage equality exists, employers do not have to take this extra step, and so fall back on a common sense interpretation of their plans' terms: they grant benefits to all married couples. Id.; see also Pa Exhibit 18 at 129, lines 3-21. They are unwilling to "draw a new line of discrimination in order to deny benefits to some married employees but not to others." Letter from Lee Swislow and Gary Buseck to CURC (September 26, 2007). Pa Exhibit 26.

The significance of the word "marriage" has also been evident in the collective bargaining context. Many collective bargaining agreements reflect benefits language unchanged over the course of many years and do not use the term "civil union partners." Pa Exhibit 20 at 94-95. Testimony before the CURC demonstrated the uphill battle faced by unions attempting to negotiate, in these difficult economic times, an extension of benefits to a new class of individuals. Pa Exhibit 20, lines 93-94. Were marriage equality a reality in New Jersey, the language already existing in most collective bargaining agreements would be sufficient to extend those benefits to same-sex spouses, without additional bargaining required. Senate Hearing, Testimony of Rosemarie Cipparulo, Esq., Pa Exhibit 27 at 73; Pa Exhibit 15 at 42-44.

It is clear that the Civil Union Act has failed to provide equal employment benefits to civil union partners. It is just as clear that marriage equality would largely remedy this problem. The current distinction in terminology between married couples and civil union partners invites confusion and discrimination in the provision of employment benefits to same sex couples, making it all the more difficult for employers, employees and the attorneys advising them to navigate this area of the law.

Given the significant monetary value and importance that many fringe benefits have for employees, their spouses and their

children, and the importance of the benefits as a safety net for families who would otherwise turn to the government, the impact of this failure cannot be overstated and should not be overlooked. Only by granting true marriage equality in New Jersey will our State create an atmosphere that enhances employment benefits equality to all families.

E. The New Jersey Civil Union is not recognized nor understood by other states or countries and, therefore, is not met with equal treatment in those jurisdictions

New Jersey has a long history of recognizing marriages that are valid in the jurisdiction in which they are performed, regardless of whether or not this State actually authorizes such formation within its own borders. While there exists a presumption that a marriage is valid when it comes before the court for scrutiny, the New Jersey Supreme Court has repeatedly looked to the Restatement as a baseline for interpretation of the validity of foreign marriages conducted outside the territorial limits of the State. Heuer v. Heuer, 152 N.J. 226, 233 (1998). The Restatement (Second) of Conflict of Laws §283(2) (1971) provides:

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

> and the marriage at the time of the marriage [emphasis added].[4]

However, will another state recognize the relationship status created by the New Jersey Legislature which is denominated a civil union? Unfortunately, the answer is a resounding "no." A New Jersey Civil Union appears to be of little or no value in a foreign state as New Jersey's same-sex couples who have entered into a civil union are not given full and equal relationship recognition therein as was sought by the Court in its Lewis holding. Thus, New Jersey couples may find that their civil union is of little use beyond this State's borders whereas, if they were "married," the results would be remarkably different.

Looking to New York, where thousands of New Jersey citizens go every day for work or personal reasons, that state has made it clear that it will recognize a same-sex "marriage" validly entered into in a sister state. See Martinez v. County of Monroe, 850 N.Y. S. 2d 740 (2008). See also Jeremy W. Peters, "New York to Back Same-Sex Unions From Elsewhere," N.Y. TIMES, MAY 29, 2008, http://www.nytimes.com/2008/05/29/nyregion/29marriage.

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4 This logic and analysis were supported by U.S. Supreme Court opinion in Loughran v. Loughran et. al, 292 U.S. 216 (1934), reh. den. 292 U.S. 615 (1934). The Court held, in an opinion authored by Justice Brandeis, at 686-687, "[m]arriages not polygamous or incestuous, or otherwise declared void by statute…will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction" (citation omitted) (citing, Meister v. Moore, 96 U.S. 76 (1877), and Travers v. Reinhardt, 205 U.S. 423 (1907)).

html?_r=2&hp&oref=slogin (last visited May 28, 2010). As a result, a same-sex "married" couple from the three other states neighboring New York that allow same (Massachusetts, Connecticut and Vermont) is automatically provided the full panoply of rights in New York state that are otherwise accorded to married couples.

A poignant example of the unequal treatment that might be realized by New Jersey civil union partners can be found in the 2000 case of New York residents John Langan and Neil Spicehandler who had previously entered in a Vermont civil union and then returned to New York. Subsequently, Mr. Spicehandler died as a result of medical malpractice after being struck by a motorist in midtown Manhattan. His partner, Mr. Langan sought damages under the New York wrongful death statute; however, under that law, only a "spouse" can bring such an action.

In the ensuing medical malpractice litigation, the trial judge held that the couple's Vermont civil union afforded Mr. Langan the constructive right to sue as a spouse. However, on appeal, the New York Supreme Court, Appellate Division overturned the lower court ruling. Langan v. St. Vincent's Hospital, 802 N.Y.S. 2d 476 (N.Y. App. Div. 2005), rev. denied 850 N.E. 2d 672 (NY 2006).[5] The appellate panel concluded that

[5] While the N.Y. Court of Appeals has granted some limited parental rights to civil union partners, that court has thus far declined to provide anything akin to full equality to such partners as compared to the full and equal

the Legislature had never contemplated extending the wrongful death statute to same-sex couples in a civil union.

Similarly, as Langan tried to claim death benefits under New York states' workers compensation law, his case was dismissed for the same reason: a civil union partner is not considered a spouse under New York law. Matter of Langan v. State Farm Fire & Casualty, 849 N.Y.S.2d 105 (N.Y. App. Div. 3d Dep't 2007).

These cases demonstrate in clear and certain terms that New Jersey couples in a civil union are unprotected and vulnerable when they cross the Hudson River to go to work, to visit relatives or friends, or for a day or evening of fun and pleasure. In contrast, same-sex couples married in three other states bordering New York - Vermont, Connecticut and Massachusetts - enjoy all of the rights of marriage when they are in New York.

It would be short-sighted to simply dismiss this as a problem of New York's making. The New Jersey Legislature, and, indeed, this Court, have the tool to fix the problem, notwithstanding New York's failure to follow the lead of

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rights its allots for "married" couples pursuant to the common law principle of comity. See Debra H. v. Janice R., 2010 N.Y. LEXIS 620, 2010 NY Slip Op 3755 (N.Y. May 4, 2010). It is noted that the N.Y. Supreme Court, Appellate Division, Third Department recently ruled that civil union partners are now able to dissolve their relationships before the courts within that Department. Dickerson v. Thompson 2010 NY Slip Op 2052; 897 N.Y.S.2d 298 (N.Y. March 18, 2010).

surrounding states in providing equality in the relationships of same-sex couples. It is difficult to imagine that the New Jersey Supreme Court intended that committed same-sex couples from New Jersey would suffer such unequal treatment when it issued its opinion in Lewis, but that is just what has happened and will continue to happen simply because same-sex couples are denied the use of the portable word "marriage" for their relationships.

POINT II

THE CIVIL UNION REVIEW COMMISSION'S RECORD AND REPORT AND THE LEGISLATIVE HEARINGS OF DECEMBER 7, 2009, CONFIRM THAT THE CIVIL UNION ACT FAILED TO MEET THE PROMISE OF EQUALITY THAT THE NEW JERSEY SUPREME COURT MANDATED IN ITS LANDMARK *LEWIS V. HARRIS* DECISION

A. The findings of the Civil Union Review Commission are clear and unequivocal that Civil Unions are simply not equal and those findings have achieved widespread judicial and public recognition and acceptance in documenting the failure of civil unions to provide full equality

The Civil Union Review Commission ("CURC") was created by the State Legislature within the Civil Union Act, P.L. 2006, c. 103, to evaluate whether civil unions provide rights equivalent to marriage, as required under Lewis v. Harris, 188 N.J. 415 (2006). Specifically, the Legislature charged the CURC with evaluating "the effectiveness of the act" and with "determin[ing] whether additional protections are needed" in order to comply with the constitutional mandate of Lewis. N.J.S.A. 37:1-36(c)(1) & (3).

In directing the Commission to evaluate "the effect" of providing same-sex couples "civil unions rather than marriage," N.J.S.A. 37:1-36(c)(5) & (6), and to report its findings to the Legislature and Governor, N.J.S.A. 37:1-36(g), the State inherently acknowledged that passage of the Civil Union Act may not necessarily satisfy the Court's holding in Lewis. Indeed,

this Court appears to have also recognized this same possibility in its original Lewis holding, 188 N.J. at 459, implicitly acknowledging that a separate statutory scheme such as civil unions is novel and, indeed, experimental. Therefore, the Legislature created a mechanism by which that body would undertake an independent analysis of the law and its effectiveness, far removed from the political process. See N.J.S.A. 37:1-36.

The Legislature and the Governor established the CURC with thirteen representatives of the leadership of the democratically-elected legislative and executive branches including the state government departmental heads. N.J.S.A. 37:1-36. The Act provides that

> "[t]he commission shall be composed of 13 members to be appointed as follows: the Attorney General or his designee, the Commissioner of the Department of Banking and Insurance or his designee, the Commissioner of Health and Senior Services or his designee, the Commissioner of Human Services or his designee, the Commissioner of the Department of Children and Families or his designee, the Director of the Division on Civil Rights in the Department of Law and Public Safety or his designee, one public member appointed by the President of the Senate, one public member appointed by the Speaker of the General Assembly, and five public members appointed by the Governor, with the advice and consent of the Senate, no more than three who shall be of the same political party." Id.

The CURC held eight public hearings, at which individuals of all political perspectives and opinions testified.[6] The CURC also reviewed countless written materials in carrying out its charge. The CURC's work received widespread recognition, including a favorable reference to its Interim Report by the California Supreme Court. In re Marriage Cases, 183 P.3d 384 (2008).[7]

The unanimous conclusion of the CURC was that the Civil Union Act failed to comply with Lewis's mandate of full equality for committed same-sex couples and their families. As a result, the CURC's Final Report unanimously called for the State to repeal the Civil Union Act and provide marriage equality to committed same-sex couples. Pa Exhibit 14:

B. The December 7, 2009, hearing before the New Jersey State Senate Judiciary Committee, subsequent statements of State legislators and the lessons of other states confirm the irreparable shortcomings of the Civil Union Act and the continuing harm it inflicts on committed same-sex couples and their families

The CURC Final Report is clear, but it is not the only source of proof that the Civil Union Act is not working. On December 7, 2009, as discussed infra, the New Jersey Senate

[6] See 1T6-11 Pa Exhibit 15 (especially noting, at 1T10, then-NJSBA President Lynn Fontaine-Newsome stating that "civil unions are a failed experiment"); See also 8T10-15 Pa Exhibit 22 (with then-NJSBA President Peggy Sheahan-Knee stating, at 8T11, "the New Jersey Civil Unions Law has shown itself to be what the New Jersey State Bar association predicted it would be, a failed experiment in discrimination.")

[7] We note that the California Supreme Court ruling was supplanted by Proposition 8, a constitutional amendment that is a result of a process somewhat unique to California. Further Court treatment was provided for at Strauss v. Horton 46 Cal.4th 364, 93 C.R.3d 591, 207 P.3d 48 (2009).

Judiciary Committee held a hearing on a marriage equality bill that, if enacted, would have allowed same-sex couples the right to enter into civil (i.e., non-religious) marriages. The nine-hour Committee hearing saw approximately 100 witnesses come forward, including representatives of this Association,[8] together with hundreds of pages of reports, data and exhibits submitted. Opponents of marriage equality even acknowledged the flaws in the Civil Union Act and the systemic failure in the public's understanding, acceptance and recognition of civil unions. Even various senators on that Committee who ultimately voted against marriage equality admitted the endemic inequality in the Civil Union Act and the public's unequal reception of those relationships which it attributed to either a lack of understanding or outright discrimination). The hearing concluded with a 7-6 vote that saw the marriage equality bill advance to a vote by the full Senate that later failed 14-20. See Pa Exhibit 27.

While some claim the Act could be revised, the experience of the States of Vermont, Connecticut and California teach us that no amount of "fixing" will ever be sufficient in remedying the shortcomings of the Civil Union Act.

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[8] See, e.g., Pa Exhibit 25 (pages 64-65, with NJSBA President Allen Etish stating, at 65, "Mr. Chairman, members of the Committee, this tragic experiment in discrimination must end.")

Vermont is, indeed, instructive on how civil unions can never provide equality for same-sex couples and their families. Senator Diane Snelling, a Vermont Republican state senator, testified before the New Jersey Senate Judiciary Committee how she and her fellow legislators, after considering Vermont's civil union experience, arrived at the unavoidable conclusion that the law there could never be fixed - and did so in sufficient numbers (a bi-cameral legislative supermajority) to override the Vermont Governor's veto. Senator Snelling testified:

> Like New Jersey, Vermont passed civil unions in response to a court decision. Although it was groundbreaking at the time, it was also a compromise. The law didn't provide full equality, and left many Vermont same-sex couples and their children as second class citizens. We did experience a period of intense division then, but in 2009 it's a different world and most Vermonters have accepted the fact that same-sex couples are neighbors and friends and family and deserve equal legal rights in their commitment to each other [emphasis added]. Pa Exhibit 27, pages 47-52.

Similarly, testimony before the CURC from benefits representatives from Massachusetts, a state that has allowed same-sex couples to marry since 2004, illustrated how the provision of health and pension benefits to same-sex couples is a non-issue in that state, as contrasted to same-sex couples being ineligible for many such benefits in New Jersey. As

noted, supra, employers in Massachusetts who are presented with a same-sex couple's "marriage" certificate simply accept that certificate as a "marriage" of "spouses" and provide them health and pension benefits, just as it would to an opposite-sex couple. See Pa Exhibit 15 at 36-45; see also Pa Exhibit 13 at 7-9. "Marriage" and "spouse" matters because those are the precise words found in the plain reading of ERISA and its provision of health and pension benefits. Id.; see also 29 U.S.C. §§ 1001, et seq. Importantly, Massachusetts employers governed by ERISA could invoke the federal preemption loophole to deny the same-sex couples employment benefits, but they do not because of the commonality of labels applied to the relationship. In New Jersey, where the labels are different, the treatment is different. Id.

In Connecticut, the state's Supreme Court recognized that labels matter when it threw out that state's civil union law in its landmark ruling in Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 957 A.2d 407 (Conn. 2008), finding that same-sex couples are entitled to heightened scrutiny under Connecticut equal protection analysis. That court rejected civil unions based, in part, on the finding that because of the

> long history of discrimination that gay persons have faced, there is a high likelihood that the creation of a second, separate legal entity for same sex couples will be viewed as reflecting an official

> state policy that that entity is inferior to marriage, and that the committed relationships of same sex couples are of a lesser stature than comparable relationships of opposite sex couples." Kerrigan, supra, at 475.

Those words from the Connecticut Supreme Court reflect the reality that, by confining committed same-sex couples to a class of relationship other than full and equal marriage, the state inflicts upon those couples a label of inferiority and invites open discrimination against same-sex couples and their families. See David S. Buckel, "Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage," 16 STAN. L. & POL'Y REV. 73, 77-79 (2005) (showing, through testimony of same-sex couples, that people look down on those in civil unions but hold those in marriages in higher regard.)

Similarly, the California Supreme Court found that the connection between the right to marry (rooted in substantive due process) and equal protection is inextricably interwoven and one element of that right is "a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families." In re Marriage Cases, 183 P.3d. 384, 400 (2008). Such dignity and respect, moreover, are placed at "serious risk" when the state assigns "a different

designation for the family relationship of same-sex couples…" Id.

What is clear from the above is that the "unintended consequences" of naming some couples as "civil union partners" and others as "married spouses" is, by itself, a deprivation of equal protection under law. In enacting the Civil Union Act, the State has not only failed to eliminate the inequality that previously existed between same-sex couples and their similarly-situated heterosexual counterparts, but, in fact, has cemented the invidious notion that same-sex couples are different and inferior. As a result, what members of this Association and their same-sex couple clients have learned over the past three years is that only marriage is equal to marriage.

POINT III

WHERE A VIOLATION OF CONSTITUTIONAL MAGNITUDE PERSISTS, THE MOTION IN AID OF LITIGANTS' RIGHTS IS AN APPROPRIATE AND EFFICIENT MECHANISM FOR THE COURT TO EVALUATE LEGISLATIVE COMPLIANCE AND, IF LACKING, FASHION AN APPROPRIATE REMEDY

A. The Court previously found a constitutional violation in the Legislature's failure to dispense rights and benefits to committed same-sex couples equal to those provided to similarly-situated heterosexual couples who choose to marry

On October 25, 2006, the Court issued its unanimous decision in Lewis v. Harris which held that "the unequal dispensation of rights and benefits to committed same-sex couples can no longer be tolerated under our State Constitution." 188 N.J. 415, 423. The Court stated in Lewis:

> "[w]ith this State's legislative and judicial commitment to eradicating sexual orientation discrimination as our backdrop, we now hold that denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, Paragraph I [of the New Jersey Constitution] [emphasis added]." Lewis, supra, 188 N.J. at 424.

With clear judicial restraint and legislative deference, the Court directed the New Jersey State Legislature to create and enact legislation to provide for the formation of legal relationships for gay men and lesbians "which will provide for, on equal terms, the rights and benefits enjoyed and the burdens and obligations borne by married couples." 188 N.J. 415, 423.

By a 4-3 split decision, the fashioning of the ultimate remedy and, indeed, even the name of such relationships was left to the Legislature and "the democratic process." Id. The majority authorized either marriage equality or the formation of "parallel statutory structure," provided the latter provided full equality to committed same-sex couples:

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

The New Jersey Civil Union Act was signed into law on December 21, 2006, effective on February 19, 2007. As illustrated throughout this brief, the Civil Union Act has proven itself to be a failed experiment, which the Legislature is unwilling to end. It is therefore appropriate for the Supreme Court to step back into this matter and fashion a further appropriate remedy, namely, to find a constitutional right to marriage for same-sex couples in New Jersey.

B. The Motion in Aid of Litigants' Rights, a storied tool of New Jersey jurisprudence, is the most appropriate procedure by which the Court can evaluate Legislative compliance with Constitutional requirements and the Court's previous holding

The New Jersey Supreme Court has utilized the R. 1:10-3 procedure in aid of litigants' relief on many occasions when, upon a "default in a legislative obligation," it has "come face to face with a constitutional exigency involving, on a level of plain, stark and unmistakable reality, the constitutional obligation of the Court to act…to enforce the constitutional right involved." Robinson v. Cahill, 69 N.J. 133, 139-40 (1975) ("Robinson IV"). This obligation stands against the backdrop also articulated by the Robinson IV Court, quoting the Court's holding in American Trial Lawyers Assoc. v. N.J. Supreme Court, 66 N.J. 258 (1974):

> The people's constitutional reposition of power always carries with it a mandate for the full and responsible use of that power. When the organic law reposes legislative power in that branch, for instance, it is expected that such power will be used, lest it wither and leave the vacuum of a constitutional exigency, requiring another branch (however reluctantly) to exercise or project the exercise of, that unused power for the necessary vindication of the constitutional rights of the people [emphasis added]. See Robinson IV, 69 N.J. 133, 140 (1975).

A bare review of New Jersey decisional jurisprudence provides a number of instances in which the Supreme Court has

retained to itself the indisputable authority to evaluate legislative compliance with its prior rulings and, where compliance is found lacking, to order immediate remedial action or other relief. Accord Robinson, supra; Abbott by Abbott v. Burke, 153 N.J. 480 (1998) (where the Court adopted numerous recommendations regarding necessary supplemental judicial relief); State ex rel. S.S., 183 N.J. 20 (2005) (recognizing that, under R. 1:10-3, the State's courts have the authority to secure compliance with court orders and, at 22, the Court has recognized the "power (and need) to enforce its own orders.")

As the plaintiffs have correctly noted in their petition to this Court, in granting relief in aid of litigants' rights in cases involving a violation of Constitutional magnitude, the Court has clearly recognized that, with such rights at issue, the State's enactment of legislation purporting to be responsive to directives of the Court does not end the need for further judicial review and/or intervention. For example, as recently as 2005, the Court granted a motion in aid of litigants' rights in the context of the Abbott case lineage after concluding that the Legislature's response to the Court's decisions in previous Abbott holdings had failed to remedy the Constitutional violation articulated in those decisions. Abbott v. Burke, 185 N.J. 612, 613 (2005) ("Abbott XIV").

In Robinson and its progeny, the Court declared the State's education financing system unconstitutional, but, in doing so, the Court showed deference to the Legislature by providing the democratically-elected branch an opportunity to remedy the Court-declared deprivation of constitutional rights. See Robinson v. Cahill, 118 N.J. Super. 223 (N.J. Super. Ct. 1972); ("Robinson I"); Robinson v. Cahill, 62 N.J. 473, 513-521 (1973) ("Robinson II"); Robinson v. Cahill, 67 N.J. 35 (1973) ("Robinson III"); Robinson v. Cahill, supra, 69 N.J. 133 (1975) ("Robinson IV") and Robinson v. Cahill, 70 N.J. 155 (1976) ("Robinson V") modf'd by 70 N.J. 464 (1976), injnct'n dissolved at 70 N.J. 465 (1976). Indeed, Robinson and its progeny are also instructive of the precedent of the Supreme Court in fashioning a remedy in face of the Legislature's inability or failure to fully comply with the Court's prior holdings.

There, as in Lewis, the Supreme Court first allowed the Legislature an opportunity to devise a remedy and simply established a deadline by which time such satisfactory remedial legislation had to be enacted. However, when the Legislature failed to act, the Court was compelled to step in and right a Constitutional wrong. Robinson IV, 69 N.J. 133 (1975). Later, when the Legislature failed to adopt an appropriate and satisfactory legislative remedy that met the constitutional requirements articulated by the Court, the Court stepped in with

further review and analysis in Robinson III, supra, and, holding in Robinson IV, supra:

> The Court has now come face to face with a constitutional exigency involving, on a level of plain, stark and unmistakable reality, the constitutional obligation of the Court to act. Having previously identified a profound violation of constitutional right, based upon default in a legislative obligation imposed by the organic law in the plainest of terms, we have more than once stayed our hand, with appropriate respect for the province of other Branches of government. In final alternative, we must now proceed to enforce the constitutional right involved [emphasis added]. 69 N.J. 133, 139-40 (1975).

In Lewis, as in the Abbott and Robinson cases, the Court found a clear violation of the New Jersey State Constitution. In Lewis, the Court held unanimously that the state's marriage laws failed to provide for the equal dispensation of rights and benefits to committed same-sex couples and their families. Lewis, supra, 188 N.J. at 423. As such, it is appropriate that the Court evaluate legislative compliance with its directive, especially in the face of the plaintiffs' motion to enforce their rights with a concomitant claim of abject failure to effect the Court-ordered remedy.

C. The continuing harm to Plaintiffs and those similarly-situated demands a swift remedy where irreparable damage is inflicted on each person's rights, dignity and worth

As Chief Justice Poritz poignantly noted in her dissent from the Lewis majority, "[w]hat we 'name' things matters, language matters… Ultimately, the message is that what same-sex couples have is not as important or as significant as 'real' marriage, that such lesser relationships cannot have the name of marriage." Lewis, supra, 188 N.J. at 467.

The record before the Court is unequivocal and clear that New Jersey's Civil Union Act is not working, has not been working for some time and cannot be fixed.[9] Prior to passage, the NJSBA assailed the new Civil Union Act legislation because,

> "the 71-page bill creates a convoluted, burdensome and flawed statutory scheme that fails to create for same-sex couples identical rights and remedies provided to heterosexual married couples as required by the Supreme Court as well as the Constitution …. [T]he civil union legislation would create a separate, unequal and unnecessarily complex legal scheme." See December 8, 2006 Press Release of the NJSBA at http://www.njsba.com/press/press_title_link.cfm?pressid=668 (last visited May 28, 2010).[10]

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9 For a discussion of this failure in the time period immediately following enactment of the N.J. Civil Union Act, see Tina Kelley, "2 Months After New Jersey's Civil Union Law, Problems Finding True Equality," N.Y. TIMES, April 13, 2007, http://www.nytimes.com/2007/04/13/nyregion/13civil.html?scp=1&sq=Elusive%20Under%20New%20Jersey%20Civil%20Union%20Law&st=cse (last visited May 28, 2010).

10 As NJSBA President Wayne J. Positan noted therein, "The board further questioned why the Legislature is rushing to pass this bill even though so much time remains left for them to deliberate prior to reaching the 180-day deadline for action set by the Supreme Court in *Lewis v. Harris*. There has

The experience of NJSBA members in representing same-sex couple clients has borne out the NJSBA's predictions. As detailed earlier in this brief, the rights, dignity and worth of same-sex couples remain in jeopardy, despite the best efforts of NJSBA members to fashion appropriate legal "fixes" for those areas where the current law is lacking. It is for this reason - the continuing need of our members to fashion creative solutions to achieve equal treatment for their same-sex couple clients despite the passage of the Civil Union Law - that the NJSBA has concluded that the only way that such equal protection can be obtained is through full marriage equality including the language of "marriage," "spouse," "husband," "wife," and all rights and obligations relating thereto.

The NJSBA respectfully urges the New Jersey Supreme Court to hear the plaintiffs' petition and, after careful consideration, grant them the remedy of marriage equality, as requested.

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not been enough time devoted by the Legislature to deal with the significant issues that need be addressed by the bill." Id.

CONCLUSION

As demonstrated above, what has resulted in the wake of the enactment of the Civil Union Act is a piecemeal and tediously slow series of evolving - and often conflicting - attempts to address inequities inherent in the separate status of "marriage" and "civil unions." The collective experience of practicing attorneys among the NJSBA membership, the experiences of sister states who have discarded their own experiments with civil unions and the testimony presented before the Civil Union Review Commission and the Senate Judiciary Committee collectively bring us to a sobering, simple truth that is crystal clear and intractable: civil unions are not marriage and civil unions will never be equal to marriage.

The passage of time only makes curing these profound inequities and deeply personal harms more urgent.

For the above-stated reasons, the New Jersey State Bar Association respectfully requests that the Supreme Court grant the plaintiff's request for relief and order the Legislature to provide "marriage" fully and equally to same-sex couples.

Respectfully submitted,
New Jersey State Bar Association

Richard H. Steen/Sab
Richard H. Steen, President

6/14/10