

# P E N N S Y L V A N I A LAW WEEKLY

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## **SEPARATE, BUT NOT EQUAL**

*Voters reject same-sex marriage, partnerships as N.J. moves toward recognizing unions*

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Same-sex marriage and domestic partnerships did not fare well at the polls on Nov. 7. Same-sex marriage was on the ballot in eight states seeking to ban same-sex marriage and/or domestic partnerships. Seven states approved a ban on same-sex marriage: Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin. The only state that defeated a proposed ban was Arizona.

The recent elections came merely two weeks after the Supreme Court of New Jersey ruled on same-sex marriages in *Lewis v. Harris*, 2006 N.J. LEXIS 1521 (2006).

The plaintiffs in *Lewis* were seven same-sex couples, all of whom had been in permanent committed relationships for a period in excess of ten years. Not only did these couples wish to marry, but they also wanted the legal, financial, estate, and social benefits that heterosexual married people enjoy. The plaintiffs sued to challenge the constitutionality of New Jersey's marriage statutes.

The trial court had entered summary judgment in the favor of the state and dismissed plaintiffs' complaint. The plaintiffs appealed to the Appellate Division which affirmed the trial court. However, one appellate judge dissented and the matter came before the Supreme Court.

The New Jersey Supreme Court defined two components of the plaintiffs' equal protection challenge.

The first issue was whether committed same-sex partners had a constitutional right to the privileges and benefits afforded to married heterosexual couples and, if so, whether they had a constitutional right to have their relationship recognized by the name of marriage.

New Jersey's marriage laws were first enacted in 1912 and identified marriage as available only to a male and a female.

However, while the appeal was pending before the Appellate Division, the Domestic Partnership Act (DPA) was passed in 2003, which afforded certain rights and benefits to same-sex couples who entered into "domestic partnerships."

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That act pertains to two classes of people: persons of the same-sex and persons who are each 62 years of age or older and not of the same-sex. The DPA gave certain rights to domestic partners including decision-making regarding healthcare, tax related benefits, health and pension benefits, the right to make funeral arrangements, inheritance privileges and guardianship rights in the event of a person's incapacitation.

Also in effect was legislation known as the Law Against Discrimination (LAD) whereby New Jersey prohibits discrimination on the basis of "affectional or sexual orientation." Those terms are defined as meaning: "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation."

The intent of the Law Against Discrimination is to guarantee that gay people are not subject to employment discrimination, discrimination regarding access to public accommodations, obtaining housing and real property, seeking credit and loans from financial institutions, and engaging in business transactions. The LAD states that access to those opportunities and basic needs of modern life is a civil right.

One would assume after reviewing New Jersey's Law Against Discrimination and Domestic Partnership Act that gay couples had all the rights and benefits of married heterosexual couples. However, the Supreme Court of New Jersey took pains to list the rights afforded to heterosexual married couples which are not available to committed same-sex couples:

A surname change without petitioning the court;

Ownership of property as tenants-by-the-entireties;

Survivor benefits under New Jersey Worker's Compensation Act; Back wages owed to a deceased spouse;

Compensation available to spouses, children, and other relatives of homicide victims;

Free tuition at any public institution of higher education for surviving spouses and children of certain members of the New Jersey National Guard;

Tuition assistance for higher education for spouses and children of Volunteer Firefighters and First Aid Responders;

Tax deductions for spousal medical expenses;

Exemption from the Realty Transfer Fee for transfers between spouses;

The testimonial privilege given to the spouse of an accused in a criminal action.

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Further, same-sex couples do not receive the same workplace protection as married couples, and employers do not have to provide health insurance coverage for an employee's domestic partner.

Additionally, certain estate and inheritance rights are not available under the DPA and there are rights afforded to male-female marriage partners upon divorce that are not available to same-sex partners.

The New Jersey Supreme Court conducted a two-part equal protection analysis. The first inquiry made by the court was whether committed same-sex couples have the right to the same statutory benefits and privileges as married couples do. The second issue analyzed was, assuming same-sex partners do have a constitutional right to have the same benefits and privileges as heterosexual married partners, do same-sex partners have a constitutional right to define their relationship by the name of marriage, the word which historically has been characterized by the union of a man and woman.

Finding that the Domestic Partnership Act and the Law Against Discrimination legislation did not remedy the disparate treatment of committed same-sex couples and finding no legitimate public interest to refuse to confer those benefits on same-sex couples, the New Jersey Supreme Court determined that same-sex committed partners and their children should enjoy the same benefits and privileges as married heterosexual couples.

Having decided that, the second inquiry was whether to permit committed same-sex couples to be able to "marry."

The court conducted a thorough analysis of whether the right of same-sex couples to marry is a fundamental right under the Constitution of the United States and the Constitution of the State of New Jersey. The court said:

"Under Article I, Paragraph 1, as under the Fourteenth Amendment's substantive due process analysis, determining whether a fundamental right exists involved a two-step inquiry. First, the asserted fundamental liberty interest must be clearly identified. Second, that liberty interest must be objectively and deeply rooted in the traditions, history and conscience of the people of this State."

Finding that same-sex marriage is not deeply rooted in the state's history and the people's collective conscience, the court found that the ability for same-sex people to marry was not a fundamental right.

The New Jersey Supreme Court, in deciding that marriage is not a fundamental right, looked to Vermont and Connecticut, two states having civil unions and to Massachusetts, the only state in the United States that give same-sex couples the ability to marry, to discern what the high courts of those states had determined.

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The first determination, after reviewing the law of those three states was that the remedy, if any, must come from the legislature. The court therefore ruled that the legislature must remedy the equal protection disparities which presently exist in New Jersey. The court stated:

"We do not know how the Legislature will proceed to remedy the equal protection disparities that currently exist in our statutory scheme. The Legislature is free to break from the historical traditions that have limited the definition of marriage to heterosexual couples or to frame a civil union style structure, as Vermont and Connecticut have done."

The court then mandated that the legislature must provide within 180 days to committed same-sex couples the same rights and benefits enjoyed by heterosexual married couples.

However, the court stopped short of finding that marriage for same-sex committed couples is a fundamental right.

The holding of the Supreme Court of New Jersey did not have a positive impact on the elections which took place two weeks later. The fact is that there are still states that prohibit adoption by same-sex couples and have enacted legislation to restrict adoption by same-sex couples.

The fact is also that with the exception of Massachusetts, every state of the United States defines marriage as the union between a man and a woman.

Although progress has been made in this country regarding same-sex unions, the law is still "separate, but not equal." •