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Benefits and Pitfalls of the Domestic Partnership Act

Act begins to address many, but not all, issues involved

In an effort to legally recognize that familial situations in New Jersey include both same sex and heterosexual individuals living together, the Legislature enacted the Domestic Partnership Act. N.J.S.A. 26:8A-1 et. seq.

Under the Act, which takes effect July 11, New Jersey will now recognize domestic partnerships, civil unions or reciprocal beneficiary relationships validly entered into outside the state. N.J.S.A. 26:8A-6(c).

The Act recognizes that many individuals choose to live in "important personal, emotional and economic committed relationships with another individual," and that these relationships assist the state in promoting the "financial, physical and emotional health of their participants." N.J.S.A. 26:8A-2. While the Act provides broad rights to same-sex couples and more limited rights to heterosexual couples over the age of sixty-two, the Legislature ignored unmarried heterosexual couples under the age of sixty-two. The distinction is predicated on the legislative determination that heterosexual couples obtain rights if they choose to marry.

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The act does not extend recognition to same-sex marriages. Legislation is pending, *S-1148*, which would prohibit same-sex marriage in New Jersey and prohibit the recognition of same-sex marriages recognized as valid in other jurisdictions.

To establish domestic partnership, parties must satisfy all nine of the requirements delineated in N.J.S.A. 26:8A-4. If the parties meet all the requirements, they then file an Affidavit of Domestic Partnership with the local Registrar and are issued a Certificate of Domestic Partnership. N.J.S.A. 26:8A-8a(2). The Certificate acknowledges that the partners are members of a registered domestic partnership recognized by the State of New Jersey and provides that they are entitled to all the rights, privileges and responsibilities accorded to domestic partners under the law. N.J.S.A. 26:8A-3.

Upon the formation of a domestic partnership, the obligations that the partners have to each other are limited to the provisions of the Act, and the provisions of the Act shall not diminish any right granted under any other provision of law. N.J.S.A. 26:8A-6. As set forth herein, the rights and obligations may be expanded by agreement of the partners.

When the Act becomes effective on July 11, 2004, a number of statutes will

be modified.¹ Examples of those changes are addressed in this article.

Domestic partners will now be permitted access to a partner who is hospitalized or in a nursing home. N.J.S.A. 26:2H-12.22 and N.J.S.A. 26:2H-32. As important, domestic partners may be designated as a health care representative and make medical decisions for their partner. N.J.S.A. 26:2H-58. Consent for disclosure of AIDS or HIV infection and the decision to donate organs may be made by domestic partners. N.J.S.A. 26:5C-12 and N.J.S.A. 26:6-58.1.

The Act also recognizes that occasions arise where domestic partners encounter an emergency medical situation but have not filed an Affidavit of Domestic Partnership. In those instances both partners, or one of the partners in the event that the other partner is legally or medically incapacitated, must inform the medical personnel that the two individuals have met the requirements for establishing a domestic partnership under the statute. N.J.S.A. 26:8A-6(f). The domestic partner will then be permitted to "accompany the other adult who is ill or injured while the latter is being transported to a hospital, or to visit the other adult who is a hospital patient, on the same basis as a member of the latter's immediate family ..." N.J.S.A. 26:8A-6(f). This provision may not be construed to permit two adults to be treated for any other purpose as domestic partners, nor

does it extend rights as to decision-making.

The Act does allow any health care or social service provider, employer, operator of a place of public accommodation, property owner or administrator or other individual or entity to treat a person as a member of a domestic partnership notwithstanding the absence of an affidavit filed under the law. N.J.S.A. 26:8A-6(d). Further, the Act allows domestic partners to modify the rights and obligations to each other in a valid contract, except for the nine requirements that must be met for a domestic partnership N.J.S.A. 26:8A-6(e). Contrast this with the very limited opportunities for a married couple to do the same, given the disfavored nature and questionable enforceability of mid-marriage agreements and the still limited rights of spouses to contract with each other under the Married Persons Act, N.J.S.A. 37:2-1 et. seq.

While commercial health and dental insurers must offer insurance to domestic partners just as they would for an employee's spouse, private employers who offer health insurance benefits to employees and employees' spouses do not have to provide insurance coverage to domestic partners. This decision is specifically protected from a discrimination claim by statute. In addition, a significant portion of the rights and benefits that will be made available to same-sex partners will not be afforded to heterosexual partners over the age of sixty-two. These include health benefits offered to partners of state employees, benefits offered under the Public Employees Retirement System, the Police & Fireman's Retirement System, the Judiciary, the Teacher's Pension and Annuity Fund, the State Police Retirement System and health and dental benefits offered to domestic partners.

A domestic partner is not liable for debts contracted by the other partner in their own name during the partnership. The partner who contracted for the debt shall be sued in his or her own name and any property belonging to that partner is subject to satisfy that debt. N.J.S.A. 26:8A-6(g).

The tax provisions in the Act will apply as of 2004 and amend the word

"dependent" to include a domestic partner. As a result, taxpayers may claim an additional \$1,000 personal exemption for a partner who does not file a separate income tax return. But note, the Act does not allow domestic partners to file a joint return. The Act also affects transfer inheritance taxes for decedents dying on or after July 10, 2004. The Act will exempt all transfers made by will, survivorship or contract to a surviving domestic partner.

The Act does not address certain rights and obligations. While the laws in New Jersey afford a divorcing couple rights as to child support, visitation, alimony, equitable distribution, and the continuation of insurance benefits, domestic partners are not afforded any of these benefits when the relationship ends. Domestic partnerships may be terminated for a number of reasons that parallel the provisions for divorce of N.J.S.A. 2A:34-2.² If the domestic partners are heterosexual and over the age of sixty-two, their partnership will be terminated by operation of law if they enter into a marriage that is legally recognized by the State of New Jersey. N.J.S.A. 26:8A-10 (4)(b).

Jurisdiction over all proceedings related to the termination of a domestic partnership, including the "division and distribution of jointly held property," is placed with the Superior Court. There is, however, a distinction between equitable distribution available to a married person and distribution of jointly owned property under the Act. Equitable distribution is specifically not available to a domestic partner. N.J.S.A. 26:8A-10. Domestic partners have no rights to an asset that is acquired by their partner unless this asset is placed in both partners' names. N.J.S.A. 26:8A-1. This is, however, subject to modification by the parties. See the discussion of N.J.S.A. 26:8A-6(e) below.

Similarly, while intestate succession applies to married couples, it does not apply to domestic partnerships. Nor does the Act provide a domestic partner the standing to sue for the injury or wrongful death of their partner. While domestic partners are afforded support during the partnership, the statute does not provide for any support once the relationship is terminated. The Act

requires that the partners agree to be jointly responsible for each other's basic living expenses during the domestic partnership. N.J.S.A. 26:8A-4(b)2. "Jointly responsible means that each domestic partner agrees to provide for the other partner's basic living expenses if the other partner is unable to provide for himself." Id. If you have a client who has not worked, and was supported by their partner during a 15-year domestic partnership, they are not entitled to any support after the partnership ends.

Even more serious is a situation where that same client advises you that the other partner has complete control over the finances, has forced your client out of the home and your client has no money and nowhere to go. This is a very common scenario in matrimonial law. Where you may present an order to show cause or, at the very least, a motion to the court for financial relief, in this case the Act provides no relief for your client. But consider the following. Domestic partners may modify the rights and obligations provided under the Act by entering into a valid contract. N.J.S.A. 26:8A-6(e).

The New Jersey courts have held that financial assistance may be awarded in palimony cases where the cohabitants have entered into either an express or implied contract or a quasi-contract implied by the parties' circumstances. *Kozlowski v. Kozlowski*, 80 N.J. 378, 383 (1979); *Crowe v. DeGioia*, 179 N.J. Super. 36, 40 (App. Div. 1981) rev'd on other grounds, 90 N.J. 126 (1982). If you can successfully tie N.J.S.A. 26:8A-6(e) in with the case law on palimony, your client may be financially assisted by their former partner.

Similarly, your client may seek advice as to visitation issues. Consider the following scenario. Your client explains that her partner gave birth to a baby girl known as Mary. Your client and her partner have raised Mary as their own for the past 10 years and both are bonded with the child. Under the Act your client is not afforded any visitation rights with a child that she has raised as her own.

Another common scenario is relocation of the child. Your client may ask you how she can prevent her ex-partner from taking their child that is hers in

every way, except biologically, from being moved out of state or even thousands of miles away. The Act does not provide any relief in this situation. It specifically indicates "the status of domestic partnership neither creates nor diminishes individual partners' rights and responsibilities toward children, unlike in a marriage where both spouses possess legal rights and obligations with respect to any children born during the marriage." N.J.S.A. 26:8A-1.

Current case law may provide avenues that will allow a domestic partner this very relief. For example, under *In re Adoption of Two Children by H.N.R.*, 285 N.J. Super. 1 (App. Div. 1995), a child may be adopted by its biological parent's partner. On the other hand, if your client is the nonbiological partner and has not adopted the child, relief may be afforded to them under *V.C. v. M.J.B.*, 163 N.J. 200 (2000). This

case applies where an individual is not related to the child by blood or adoption but has served as a psychological parent to that child. If you are able to meet the first threshold under *V.C.*, and establish that your client is a psychological parent to the child, your client then "stands in parity with the legal parent." *Id.* at 227-228.

The next step is a determination under N.J.S.A. 9:2-4 as to whether or not custody/visitation are in the child's best interests. *Id.* at 228. While visitation will be the "presumptive rule"³ under *V.C.*, custody will likely be granted to the legal parent in those cases where the best interests of the child will be served equally by both the legal parent and the psychological parent. *Id.*

The New Jersey Domestic Partnership Act begins to address a number of, but not all, issues involved. It offers certain benefits to partners dur-

ing the relationship but does not address many issues that accompany the termination of a relationship. The Act allows domestic partners to modify their rights and obligations by entering into a valid contract. This and some of the cases mentioned in this article may afford access, with some significant limitations, by consent to many of the rights and benefits afforded to married persons upon divorce. ■

Footnotes

1. A summary of the changes may be found in N.J.S.A. 26:8A-1. A complete list of the amended statutes may be found at 2003 NJ Sess. Law Serv. CH. 246.

2. See N.J.S.A. 26:8A-10(2)(a-g).

3. Visitation will be decided in accordance with the considerations delineated in N.J.S.A. 9:2-4.