

ARGUMENT

I. APPLYING N.J.S.A. 9:17-44(a) TO PETITIONERS FULFILLS THE INTENT OF THE STATUTE IN QUESTION AND IS REQUIRED UNDER NEW JERSEY APPELLATE DIVISION PRECEDENT.

- A. The Purpose of the Uniform Parentage Act and, Specifically, N.J.S.A. 9:17-44 is to Protect the Rights of Children and Ensure Legal Recognition of the Parent-Child Relationship.

N.J.S.A. 9:17-44 was passed by the New Jersey Legislature in 1983 as part of the adoption of the Uniform Parentage Act. The Legislature's intent in adopting the Act was "to establish the principle that regardless of the marital status of the parents, all children and parents have equal rights with respect to each other and to provide a procedure to establish parentage in disputed cases." Fazilat v. Feldstein, 180 N.J. 74 (2004), citing Assembly Judiciary, Law, Public Safety and Defense Committee, *Statement to Senate Bill No. 888*, at 1 (Oct. 7, 1982).

The overall scheme adopted by the Legislature sought to protect the rights of children and to facilitate the flow of benefits from parent to child. In enacting the statute in question, the Legislature found that where a couple demonstrates the requisite commitment to each other, the use of artificial insemination should not prevent a child born into that relationship from receiving from the moment of birth the benefits that would flow from the non-genetic parent within that couple.

No one has enunciated or alleged any purpose that would be served by a

denial of those benefits to a child from the moment of birth, so long as the couple has demonstrated its commitment to each other and to raising a child. In fact, such a denial deprives the child of numerous protections and benefits, as outlined in the brief submitted earlier. To find the statute inapplicable in the current situation serves only to penalize a child because she or he is born to a same sex couple rather than a heterosexual couple.

- B. Prior New Jersey Court Decisions Establish that, When Parent-Child Relationships Are at Issue, Statutes Must Be Construed to Afford Same-Sex Couples and Their Children the Same Rights as Heterosexual Couples and Their Children.

The Appellate Division decision in In the Matter of the Adoption of Two Children by H.N. R., 285 N.J. Super. 1 (App. Div. 1995) is directly analogous to this case – and sets precedent that clearly requires a decision for Petitioners. In H.R.N., the Appellate Division stated that to read the stepparent portion of the adoption statute (N.J.S.A. 9:3-50) in a manner that precludes committed same-sex couples not only defeats the best interests of the child, but also produces “a wholly absurd and untenable result.” Id. at 9. The court held that, although the statute used the term “stepparent” (thus insinuating marriage), the statute should not be read to deny the same protections for a same-sex second parent adoption simply because the same-sex couple could not marry.¹ In upholding same-sex second parent adoptions, the Court wrote:

Although the precise circumstances of these adoptions may not have been contemplated during the initial drafting of the statute, the general intent and spirit of [the adoption statute] is entirely consistent with them. The intent of the legislature was to protect the security of family units by defining the legal rights and

¹ The statute there at issue ensured that a step-parent could adopt his or her spouse’s child without the spouse’s parental rights being terminated.

responsibilities of children who find themselves in circumstances that do not include two biological parents. Despite the narrow wording of the step-parent exception, we cannot conclude that the legislature ever meant to terminate the parental rights of a biological parent who intended to continue raising a child with the help of a [same-sex] partner. Such a narrow construction would produce the unreasonable and irrational result of defeating adoptions that are otherwise indisputably in the best interests of children. [Id.]

The Court further held: “When social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment. To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest.” Id. at 10.

See also In re Adoption by A.R., 152 N.J. Super. 541, 545 (Cty. Ct. 1977) (where Judge Dreier in interpreting that same statute stated that it “must be read against the peculiar factual setting of this case, and with an application of common sense.”); Matter of Adoption of Child by J.M.G., 267 N.J. Super. 622 (Ch. Div. 1993).

The H.R.N. holding applies directly to this case, and the same principles of statutory construction and application of common sense must be applied here. As in H.R.N., the statute being examined is meant to protect a child by clarifying the child’s relationships, thereby ensuring the child’s rights and a non-biological parent’s obligations. Also as in H.R.N., although the exact facts in this case may not have been envisaged by the Legislature in 1983, the Legislature does state that the parent and child relationship extends equally to every child and to every parent regardless of the marital status of the parents. N.J.S.A. 9:17-40. Indeed, the Legislature contemplated that its statutory framework should be used to advance and protect the parent-child relationship rather than be used to defeat that important status.

In heeding the Appellate Division’s demand that, “[w]hen social mores change, governing

statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment,” it must be noted that social mores have indeed changed. Most notably, same-sex couples are now treated on par with heterosexual couples in terms of their abilities, appropriateness, and rights in the areas of child-rearing and parental rights and responsibilities. See, e.g., H.R.N., supra. The concept that a family unit must have one father and one mother is “an anachronism that no longer fits contemporary society.” See Jersey Shore Medical Center – Fitkin Hospital v. Estate of Baum, 84 N.J. 137, 147-48 (1980) (a statute relying on the concept that a wife relies financially on her husband but that husbands do not rely financially on wives is based on “an anachronism that no longer fits contemporary society”). As such, N.J.S.A. 9:17-40 “must be interpreted to allow for those changes.” H.R.N., 285 N.J.Super. at 10. Such an interpretation mandates the recognition of the parent-child relationship in this case. Not only does that interpretation “not frustrate the purposes” behind the statute’s enactment, it furthers it.

Additionally, to give the statute the requested reading fulfills another compelling State interest --- to eliminate discrimination based on sexual orientation. That State interest has been repeatedly promoted by both the State Legislature and the State courts. See, e.g., the Law Against Discrimination (N.J.S.A. 10:5-1 et seq.) and Dale v. Boy Scouts of America, 160 N.J. 562 (1999) overturned on other grounds, 530 U.S. 640 (2000) (wherein the New Jersey Supreme Court found the need to end the “unique evils” of “the cancer of discrimination” against gays and lesbians to be a compelling interest).

In 2004, the Court of Appeals of Indiana came to the same conclusion advanced by the petitioners here. In re the Parentage of A.B., 818 N.E. 2d 126 (Ind. App. 2004). In that case, the

Court of Appeals held that “no [legitimate] reason exists to provide that children born to lesbian parents through the use of reproductive technology with less security and protection than to children born to heterosexual parents through artificial insemination.” Id. at 131. That Court stated, as have courts in New Jersey and other parts of the United States, that it “cannot close our eyes to the legal and societal needs of our society; the strength and genius of the common law lies in its ability to adapt to the changing needs of the society it governs.” Id.

C. Determining Whether New Jersey Officially Recognizes Jeanne and Kim’s Marriage Is Not Required in Order to Find that Jeanne’s and Vivian’s² Rights and Relationship Are Protected Under the Artificial Insemination Statute.

In their complaint and certifications, petitioners state that they were married in Ontario, Canada. Petitioners have supplied that information to this Court to demonstrate the level of their mutual commitment. However, whether New Jersey recognizes them as a married couple is not crucial to deciding the petition before this Court.

² Plaintiffs refer to the child expected to be born to Kim Robinson as Vivian LoCicero, the name to be given to the child upon birth. Plaintiffs do so because the child is expected to be born prior to the hearing on this matter. Plaintiffs recognize that, until birth, individual rights do not attach.

Regardless of whether their marriage is afforded legal recognition by the State, N.J.S.A. 9:17-44(a) should be found to apply to petitioners and similarly situated couples for the reasons stated above. A same sex couple which demonstrates their mutual commitment in a manner consistent with the statute should be allowed to benefit from that statute so that a child born to that union will have all of the parent-child benefits from the moment of birth.³ Those benefits should not be significantly delayed while Petitioners and their child await an adoption or other court proceeding. Indeed, whether or not their marriage is afforded legal status, to rule against the petitioners would produce an untenable and amorphous legal situation which denies Jeanne and the child rights without achieving any purpose – and, in fact, defeats the stated goals of the Parentage Act. The Appellate Division’s holding in H.R.N. not only requires that such a result not be allowed to occur, but affirmatively supports the position that addressing the question of marriage recognition is unnecessary and inappropriate.

Indeed, Petitioners agree with the State’s position at oral argument that the Artificial Insemination Statute is not about protecting or recognizing the relationship between the two parents (here, Jeanne and Kim) and that this court therefore need not, and should not, address the question of whether New Jersey recognizes out-of-state marriages of same-sex partners. Rather, the statute pertains to - and seeks to protect - the relationship between the non-biological parent and the child. The issue of marriage therefore only arises under the statute in the context of establishing the

In granting recognition of the statute’s application to this case, the court need not read the statute any more broadly than is necessary to ensure its validity; rather, the statute need cover only those same-sex couples who have established the indicia of commitment to the family relationship and to the expectant child consistent with what is required under the statute. That has been established here.

necessary indicia of commitment to the family unit that is required for the statute to apply. As such, Jeanne and Kim's marriage provides an important piece of evidence (i.e., indicia) of their commitment to each other and to their child. But the question of whether or not that marriage is formally recognized and thereby establishes additional rights between *Jeanne and Kim* is not determinative and therefore should not be addressed.⁴

⁴ Should this court nevertheless address that question, it should be noted that, unlike many other states, New Jersey has declined to adopt a Defense of Marriage Act ("DOMA"). As such, while other states have determined that recognition of same-sex marriages is against their states' public policy, New Jersey has declined to place any official barrier to the recognition of out-of-state marriages of same-sex couples. The court can therefore only hold that the marriage should not be recognized if the court finds that it violates public policy. Bucca v. State, 43 N.J.Super. 315, 321 (Ch.Div.1957). The Appellate Division has, to some extent, spoken on that question. The Appellate Division held that same-sex partners "can exchange rings, proclaim devotion in a public or private ceremony, [and] call their relationship a marriage....None [of these actions] are offensive to the laws or stated policies of this state." In re Application for Change of Name by Bacharach, 344 N.J.Super. 126, 135 (App. Div. 2001). The court has also noted that, especially when it benefits the best interests of a child, recognition of same-sex relationships is not only *within* our public policy but *further*s public policy. Matter of the Adoption of Two Children by H.N.R., 285 N.J. Super. 1, 9 (App. Div. 1995) (granting the adoption of a child by the mother's lesbian partner and holding that authorizing statute's silence as to adoption by an parent's unmarried cohabitant, should not be read to "proscribe adoptions by certain combinations of individuals"); Matter of Adoption of Child by J.M.G., 267 N.J. Super. 622, 626 (Ch. Div. 1993) (granting the adoption of a child by her mother's lesbian partner and finding that the "importance of the emotional benefit of formal recognition of the relationship between [plaintiff] and the child must not be underestimated"). See also V.C. v. M.J.B., 163 N.J. 200, 230 (2000) (holding that the lesbian partner of the children's mother was a psychological parent to the children and that their best interests are served by visitation with her despite her separation from their mother).

The New Jersey Supreme Court has also recognized the meaning of marriage in terms that are wholly consistent with it being viewed without regard to sexual orientation:

"A marital-type relationship is...the undertaking of a way of life in which two people commit to each other, foregoing other liaisons and

opportunities, doing for each other whatever each is capable of doing, providing companionship, and fulfilling each other's needs, financial, emotional, physical, and social, as best as they are able. And each couple defines its way of life and each partner's expected contribution to it in its own way."

In re Estate of Roccamonte, 174 N.J. 381, 392 (2002).

The only court decision finding recognition of out-of-state same-sex marriages to be against public policy was in municipal tax court (which is not binding here) and was clearly *dicta*. Indeed, the reason why the issue of recognition of the out-of-state marriage was *dicta* in that case is because the judge held that, regardless of whether the marriage was recognized, the same-sex couple was due the statutory right in issue – the same holding plaintiffs seek here. Hennefeld v. Township of Montclair, --- N.J.Tax ----, 2005 WL 646650, (N.J.Tax, Mar 15, 2005).

D. Statutes Should Be Interpreted, Whenever Possible, to Avoid Constitutional Questions.

As explained herein in Point II, an interpretation of the Artificial Insemination Statute that precludes recognition of Jeanne's parentage of Vivian would deny to Jeanne and Vivian, on the basis of Jeanne's sex and sexual orientation, rights that would be granted to a similarly-situated male heterosexual and similarly-situated non-biological child. The State has advanced no legitimate interest that would be served by so doing and, as explained, the Legislature's interest in protecting children would actually be undermined. As noted, the Appellate Division has already held that "[t]o deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest." H.R.N. at 10. Thus, a cramped reading of the statute would fail to survive the New Jersey Constitution's equal protection analysis.

However, as stated by the Appellate Division: "If possible without frustrating the Legislature's basic design, we are obliged to construe statutory provisions...in a manner that saves them from invalidity on constitutional grounds." State v. May, 362 N.J.Super. 572 (App. Div. 2003), citing Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 280, *cert. denied*, 527 U.S. 1021 (1999). See also Holster v. Bd. of Trs. of the Passaic County College, 59 N.J. 60, 66 (1971) ("It is accepted principle of statutory interpretation that, if possible, legislation will be so read as to sustain its constitutionality"); Camden City Bd. of Educ. v. McGreevey, 369 N.J.Super. 592 (App. Div. 2004) (same). A challenged statute should therefore be construed in a manner "to avoid a statutory interpretation that might give rise to serious constitutional questions." Silverman v. Berkson, 141 N.J. 412, 417, 661 A.2d 1266, 1268 (1995), citing New Jersey Bd. of Higher Educ. v. Shelton College, 90 N.J. 470, 478, 448 A.2d 988 (1982). Indeed, when a statute's constitutionality is in doubt, a saving reading of

the statute is appropriate because of "the assumption that the Legislature intended to act in a constitutional manner." Right to Choose v. Byrne, 91 N.J. 287, 311 (1982).

Here, the court must likewise "assume that the Legislature intended to act in a constitutional manner" and must therefore construe the challenged statute to avoid "serious constitutional questions." Id. In the current case, it is easy to do so. Granting recognition of Jeanne and Vivian's relationship and thereby protecting the legal rights and financial security of Vivian not only ensures the statute's constitutionality, but in fact furthers the statute's spirit, intent, and purpose. Far from "frustrating the Legislature's basic design," it ensures the interests of children that the Parentage Act was intended to protect.

II. DIFFERENTIAL TREATMENT UNDER THE ARTIFICIAL INSEMINATION STATUTE WOULD VIOLATE EQUAL PROTECTION UNDER THE NEW JERSEY CONSTITUTION.

As explained in Petitioners' initial brief, Article I, paragraph 1, of the New Jersey Constitution guarantees equal protection, Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 79 (1978), thus ensuring that persons will not be subject to unjustified discrimination. See also Greenberg v. Kimmelman, 99 N.J. 552, 567-68 (1985). Should the statute at issue be read to only protect children in relationship to a male heterosexual applicant as opposed to a female lesbian applicant, differential treatment based on sex and sexual orientation exists, necessitating equal protection review.

In analyzing an equal protection claim under the New Jersey Constitution, the court must apply a balancing test, weighing the "nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg,

supra, 99 N.J. at 567. See also Caviglia v. Royal Tours of America, 178 N.J. 460, 472-473 (2004). The stronger the individual interest that is burdened, the greater the public need for the restriction must be to justify it. In the present case, those factors easily weigh in favor of a finding that the differential treatment and, accordingly, the denial of legal protections for Vivian LoCicero, violates the New Jersey Constitution's guarantee of equal protection.

A. The Rights Being Burdened Are of the Highest Order.

The right of parentage is not only an important right, it is a fundamental right. New Jersey Div. of Youth and Family Services v. A.R.G., 179 N.J. 264, 285-86 (2004) ("We have repeatedly affirmed that parental rights are fundamental and constitutionally protected"). As explained by the New Jersey Supreme Court:

The freedom to maintain personal relationships or to engage in intimate associations is... "a fundamental element of liberty protected by the Bill of Rights." Rotary Club, supra, 481 U.S. at 545, 107 S.Ct. at 1945, 95 L.Ed.2d at 484. Although the Supreme Court has never set the "precise boundaries" of this freedom, "[t]he intimate relationships to which [it] has accorded constitutional protection include marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives." Id. at 545, 107 S.Ct. at 1945-46, 95 L.Ed.2d at 484 (citations omitted).

Dale, supra, at 605.

B. The Denial of the Right to Parentage Under the Statute Is a Significant Burden.

The government is placing a significant burden on Jeanne and Vivian's ability to form the parent-child relationship, by denying Vivian the right to have Jeanne deemed her parent at birth. Without that right, Jeanne's relationship with Vivian will be in legal limbo in numerous respects for a significant period of time and can result in serious hardships financially, legally, and emotionally. See Petitioners' initial brief at 8-9.

C. No Interest Is Served By the Denial of Rights and Differential Treatment.

Jeanne and her child's right to their familial relationship is being burdened solely because of her gender and sexual orientation -- If she were a male heterosexual who engaged in the exact same actions, recognition of the parent-child relationship would be granted. Because of the nature of the right at stake (parental rights) and the burden placed upon it (outright denial of that right at the time of birth, resulting in the loss of legal rights of the child for a significant period of time), the interest in that disparate treatment must be great.

Not only is there no *heightened* interest served by the denial of parental rights to a committed same-sex parent, the Appellate Division has held in no uncertain terms that there is no interest *whatsoever* in such a denial: "To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent *serves no legitimate state interest.*" H.R.N., 285 N.J.Super. at 10 (emphasis added). The State has not come forward with any reason to find to the contrary.⁵

Petitioners have met every indicia of commitment contemplated under the statute and there is no purpose served in denying Jeanne and Vivian the same rights to which a male

⁵ At oral argument, the only "interest" proffered by the State was that the statute served to establish "paternity." Yet that is merely a statement void of substance – as it fails to express the reason behind that restrictive definition. That there is an interest in establishing paternity does not explain why there is not also an equal interest in establishing maternity (or, to use the gender-neutral term, parentage) when to do so would protect the parent-child relationship. Indeed, constitutional analysis cannot blindly accept a particular definition or exclusion when it is that very definition or exclusion that is under review. Further, if the interest being put forth is merely to continue "archaic" gender norms or the outdated concept that a child must have one mother and one father, those interests have been outright rejected by the New Jersey courts on numerous occasions. See, e.g., H.R.N., supra.; Jersey Shore Medical Center – Fitkin Hospital v. Estate of Baum, supra.; Tomarchio v. Township of Greenwich, 75 N.J. 62, 75 (1977).

heterosexual and his non-biological child would be entitled. Since the interest in establishing the parent-child relationship exceeds the (non-existent) interest in the denial of that relationship, should the statute be read to preclude recognition of Jeanne's parentage of Vivian at the time of birth, the statute must be deemed unconstitutional.

CONCLUSION

For the reasons set forth above, Petitioners request that their motion for an order of parentage be granted.

Date: _____

By: _____
William Singer, Esq

Singer & Fedun, L.L.C.
2230 Route 206
P.O. Box 134
Belle Mead, NJ 08502
On behalf of the
American Civil Liberties
Union of New Jersey Foundation
Attorneys for Plaintiff