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

MARK LEWIS and DENNIS WINSLOW; SAUNDRA HEATH and CLARITA ALICIA TOBY; CRAIG HUTCHISON and CHRIS LODEWYKS; MAUREEN KILIAN and CINDY MENEGHIN; SARAH and SUYIN LAEL; MARILYN MANEELY and DIANE MARINI; and KAREN and MARCYE NICHOLSON-MCFADDEN,

Plaintiffs-Appellants,

v.

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 Senior 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,

Defendants-Respondents.

COLLESTER, J.A.D., dissenting.

Although my colleagues and I arrive at a different conclusion, we are in agreement that any individual views we have on the morality or social implications of same-sex marriage must play no part in our analysis of the constitutional issues presented. In the ongoing public debate there are persons of

intelligence, sensitivity and good will on each side of the issue. Some believe that lawful marriage between persons of the same gender would undermine the essential nature of both marriage and family life. Others argue that it would give proper recognition to committed same-sex relationships and by doing so enhance marriage. Our function as judges is to interpret the Constitution, not rewrite it, and our interpretation must be principled rather than skewed to fit an individual philosophy or a desired result. N.J. Sports Authority v. McCrane, 61 N.J. 1, 8 (1972). Nonetheless, we must interpret our Constitution to uphold individual rights, liberties and guarantees for all citizens even though our conclusion may disappoint or offend some earnest and thoughtful citizens.

For all of its personal, familial and spiritual value, marriage is a creature of State laws governing its entrance, protecting its special status, and, when necessary, specifying the terms of its dissolution. Marriage is also a fundamental civil right protected by both the Federal and New Jersey Constitutions. Zablocki v. Redhail, 434 U.S. 374, 383, 90 S. Ct. 673, 680, 54 L. Ed. 2d 618 (1978); J.B. v. M.B., 170 N.J. 9, 23-24 (2001). Laws may not "interfere directly and

substantially with the right to marry." Zablocki, supra, 434 U.S. at 387, 90 S. Ct. at 681, 54 L. Ed. 2d at 631.

The right to marry is effectively meaningless unless it includes the freedom to marry a person of one's choice. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 958 (Mass. 2003); see also, Perez v. Lippold, 198 P.2d 17, 21 (Cal. 1948). In Loving v. Virginia, 388 U.S. 1, 18, 87 S. Ct. 1817, 1823-24, 18 L. Ed. 2d 1010, 1018 (1967), the United States Supreme Court struck down laws prohibiting interracial marriage under both the Due Process and Equal Protection Clauses of the Federal Constitution. Zablocki, supra, 434 U.S. at 392, 90 S. Ct. at 685, 54 L. Ed. 2d at 635, invalidated a Wisconsin law requiring a person under a child support order to meet financial requirements and seek court approval in order to marry. Prison inmates cannot be foreclosed from marrying a person of their choosing, who is either inside or outside the institution. Turner v. Safley, 482 U.S. 78, 94, 107 S. Ct. 2254, 2265, 96 L. Ed. 2d 64, 83 (1987); see also, Vasquez v. Dep't of Corrections, 348 N.J. Super. 70, 76 (App. Div. 2000) (holding the denial of a request by an inmate serving a life sentence violated her constitutional right to marry).

Statutory restrictions on the right to marry are few, and they are grounded in the State's proper regulatory authority,

commonly called its police power, to protect general health, safety and welfare. Marriage is prohibited to a child, a close relative, a mental incompetent or a person afflicted with a venereal disease in a communicable stage. See, N.J.S.A. 37:1-1 to -9. None of the plaintiffs in this case fall within these proscribed categories, and neither the State nor the majority opinion suggest a reason of health, safety or general welfare to justify a prohibition of their right to marry the person of their choosing.

While New Jersey statutes do not specifically limit marriage to a union of a man and a woman or expressly prevent a person from marrying someone of the same sex, it is clear that they do so. M.T. v. J.T., 140 N.J. Super. 77, 83-84 (App. Div.), certif. denied, 71 N.J. 345 (1976). Plaintiffs argue that this prohibition deprives them of their fundamental right to marry a person of their choosing in contravention of their rights of liberty, privacy and equal protection of laws, guaranteed by the New Jersey Constitution. See, Sojourner A. v. Dep't of Human Services, 177 N.J. 318, 332 (2003); Greenberg v. Kimmelman, 99 N.J. 522, 568 (1995); In re Quinlan, 70 N.J. 10, 39-40 (1976).

Plaintiffs are diverse in background and occupation and have lived in committed relationships for decades. Cris

Lodewycks and Craig Hutchinson have been together for thirty-four years. Cris is an investment asset manager, president of the Summit Business Association and a trustee of his local YMCA. Mark Lewis and Dennis Winslow are Episcopal priests whose pastoral duties have included officiating at hundreds of weddings and assisting congregants with marriage counseling. Mark is the chaplain for the Secaucus fire and police departments and a trustee of Christ Hospital in Jersey City. Another ordained minister, Alice Troy, is midway through the second decade in her relationship with Sandra Heath.

The other plaintiffs are raising children. The relationship of Cindy Meneghin and Maureen Kilian spans thirty years and they each gave birth following artificial insemination and adopted the other's child. As parents of a twelve year old boy and an eleven year old girl, they attend PTA meetings, coach soccer and are very involved in the lives of their children. Cindy is Director of Web Services at Montclair State University, and Maureen is a church administrator.

Karen Nicholson-McFadden and Marcye Nicholson-McFadden also gave birth to their children, a boy now six and a girl now two, following artificial insemination and cross-adoption. Karen and Marcye have been partners for sixteen years and operate an

executive search firm. Karen is a member of the local zoning board of adjustment.

Sarah Lael and her partner, Suyin Lael, adopted their eight year old daughter and at last report were in the process of adopting two other children under the age of five. Marilyn Amneely gave birth to five children during an eighteen year marriage and retained their custody following her divorce. Marilyn's relationship with plaintiff Diane Marini began fourteen years ago, and since that time, Diane has participated in the lives of Marilyn's children as a step-parent. Diane owns two businesses and is a member of the Haddonfield planning board, while Marilyn is a registered nurse at Thomas Jefferson University Hospital in Philadelphia. Together they survived a health crisis after Diane was diagnosed with breast cancer in 1999.

My colleagues and I agree as to the fundamental nature of the right to marry, but they reject plaintiffs' constitutional claims by defining marriage strictly as heterosexual unions. By this definition, plaintiffs are not deprived of the right to marry as long as it is to a member of the opposite sex. But since they cannot marry the person of their choice, it is really no right at all. By so defining marriage, the majority views plaintiffs' assertion of a right to marry as a claim of a

different kind of right or to a different kind of marriage, which is beyond judicial authority to recognize as lawful. This analysis mirrors decisions in other jurisdictions which have summarily rejected similar constitutional claims based on other State constitutions. See, e.g., Standardt v. Supreme Court ex rel. County of Maricopa, 77 P.3d 451 (Ariz. Ct. App. 2003), review denied (Ariz. 2004); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972). But see, Goodridge v. Dep't of Pub. Health, supra, 798 N.E.2d at 949.

The argument is circular: plaintiffs cannot marry because by definition they cannot marry. But it has the advantage of simplicity. If marriage by definition excludes plaintiffs from marrying persons of their choosing, then, unlike all others, they have no fundamental or constitutionally protected right and must seek creation of that right through the political process and a legislative redefinition of marriage. Therefore, opposite-sex marriage is a tautology. Same-sex marriage, an oxymoron. We need go no further. Case closed.

I disagree with both the analysis and the result. To cabin the right to marry within a definition of marriage which prohibits plaintiffs from even asserting a constitutional claim for entitlement to marry the person of their choosing robs them

of constitutional protections and deprives them of the same rights of marriage enjoyed by the other individuals of this State, even those confined in State prisons.

After recasting the issue as to whether plaintiffs' claim fits within the restricted definition of marriage, not surprisingly the majority finds no support for marriage between same-sex persons that is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty," and thereby declares that plaintiffs have no fundamental right of marriage.

The analysis is reminiscent of arguments in support of anti-miscegenation laws before Loving. Those laws defined marriage as the union of a man and woman of the same race, and proponents presented a long history in support of the definition.[1] Indeed, in Loving the State of Virginia argued that there was no fundamental right to interracial marriage because "the historic tradition of marriage" did not contemplate such marriages. In rejecting the argument, the Supreme Court framed the issue not as a claim of right to interracial marriage but

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[1] In 1947 thirty-one of the forty-eight states had criminal statutes punishing those who entered into such marriages as well as those who performed them. Twenty years later when Loving was decided, sixteen states still had these laws. Robert J. Sickels, Race, Marriage, and the Law, 64 (1972); James Trosino, American Wedding: Same-Sex Marriage and the Miscegenation Analogy, 73 B.U. L. Rev. 93 (1993).

rather as an assertion of a fundamental right to marriage. Loving, supra, 388 U.S. at 12, 87 S. Ct. at 1823-24, 18 L. Ed. 2d at 1018 (1967). The Court declared that the right to marry was one of the "basic civil rights of man" and could not be restricted or prohibited by racial classification. Loving, supra, 388 U.S. at 12, 87 S. Ct. at 1824, 18 L. Ed. 2d at 1018, quoting Skinner v. State of Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1101, 1113, 86 L. Ed. 1655, 1660 (1942). Therefore, while Loving rejected a prohibition of marriage based on race, the analysis is relevant to the instant case because Loving also rejected a definition of marriage foreclosing an individual's right to marry a person of one's choosing and addressed the issue of the constitutional viability of the restriction in terms of the fundamental right to marriage itself rather than to a separate right or different form of marriage.

The majority grounds its definition of marriage excluding persons of the same sex upon historic or religious tradition as well as the societal value attached to procreation. In my view, the first reason is unpersuasive, the second, irrelevant.

With respect to religious beliefs and traditions, it is clear that no matter how marriage is defined, the marriage ceremony has spiritual significance to most, and many consider it a sacrament or exercise of religious faith. Turner v.

Safley, 482 U.S. 78, 96, 107 S. Ct. 2254, 2265, 96 L. Ed. 2d 64, 83 (1987). To a great number of people, same-sex marriage is contrary to religious faith and teachings. Their objections must be respected, not demeaned. But it is slippery constitutional footing to base a definition of marriage on religious tradition, and, more to the point, plaintiffs seek access only to civil marriage. None of them, not even the three ordained clergy, maintain that same-sex marriage is supported by religious doctrine or tradition, and in this action they do not seek acceptance or recognition within a particular religious community. What they do say is that the spiritual dimension of marriage is unjustly denied to them by civil laws prohibiting them from marrying the person of their choice.

History should be considered a guide, not a harness, to recognition of constitutional rights, and patterns of the past cannot justify contemporary violations of constitutional guarantees. As Justice Holmes famously declared over a century ago,

> [i]t is revolting to have no better reason for a rule of law then that so it was laid down in the name of Henry IV. It is more revolting if [its foundation has] vanished long since, and the rule simply persists from blind imitation of the past.
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> [Justice Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).]

That said, it would be folly to challenge that the common historic and legal conception of marriage is as a heterosexual institution.[2] Moreover, I fully agree with the majority that the idea of marriage between persons of the same sex would have been alien both to those who drafted and those who ratified the New Jersey Constitution of 1947. But so were spaceships, computers and reproductive technology. A constitutional right of privacy was not recognized by the United States Supreme Court until 1965 in Griswold v. Connecticut, 381 U.S. 479, 484-85, 85 S. Ct. 1678, 1681, 14 L. Ed. 2d 510, 514-15 (1965), and it was almost a decade later when our Supreme Court discerned that right in Article I, paragraph 1 of our Constitution. In re Quinlan, supra, 70 N.J. at 39-40. It is also farfetched to assume that the framers of the Constitution envisioned a constitutional right for a woman to choose to have an abortion since at that time abortion was a crime which was vigorously prosecuted. State v. Moretti, 52 N.J. 182 (1968), cert. denied, 393 U.S. 952, 89 S. Ct. 376, 21 L. Ed. 2d 363 (1968); State v. Raymond, 113 N.J. Super. 222, 227 (App. Div. 1972).

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[2] A somewhat contrary view of history is set forth in William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 Va. L. Rev. 1419, 1435-84 (1993). Compare, George W. Dent, Jr., The Defense of Traditional Marriage, 15 J. L. Pol. 581, 593-601 (1999).

Certainly, marriage was not perceived as a partnership to the extent that it is today. The common law concept of marriage as a unity was still prevalent. Interspousal immunity from civil suit, then considered fundamental to marriage, was not rejected until decades later. Immer v. Risko, 56 N.J. 482, 488 (1970); Merenoff v. Merenoff, 76 N.J. 535, 557 (1978). The unity of marriage precluded spouses from being co-conspirators until the 1970s. See, State v. Pittman, 124 N.J. Super. 334, 336 (Law Div. 1973). A more egregious example was the marriage defense to rape, whereby a husband could avoid prosecution because marriage was a unity and consent by the wife to sexual intercourse was implied. See, State v. Smith, 85 N.J. 193 (1981).

By far the greatest changes in marriage as it has evolved from its common law unity to a partnership were in terms of its dissolution. Equitable distribution of property acquired during marriage, rehabilitative alimony, child support guidelines and joint custody are just some of the issues which judges routinely consider, but they were outside the scope of divorce litigation law a generation past. Indeed, divorce was relatively uncommon when our State Constitution was adopted. Current estimates are that up to fifty percent of marriages end in divorce, most of which are granted on no-fault grounds, which did not exist in

1947. The dynamics within marriage have also undergone great changes. Married couples, with or without children, are commonly both employed. Single parent households have multiplied as divorce rates have climbed, and adoptions are now more readily available to unmarried persons, including same-sex couples. Rather than a static concept, marriage has been described as an "evolving paradigm," Goodridge, supra, 798 N.E.2d at 966-67, and another paradigm, that of the nuclear family, has also undergone vast changes. See, V.C. v. M.J.B., 163 N.J. 200, 232-34 (2000) (Long, J., concurring).

While public debate on same-sex marriage is polarized, there should be agreement as to the greater acceptance of gay and lesbian relationships in popular culture and as individuals living in the communities of our State. The 2000 census reported that at least 16,000 same-sex couples reside in New Jersey, a figure considered markedly conservative. Ruth Padawer, Census 2000: Gay Couples, At Long Last, Feel Acknowledged, The Record, August 15, 2001. In its amicus curiae brief, the city of Asbury Park contends in support of plaintiffs' position that the right of same-sex marriage would assist in building stronger communities in the State.

There have been significant alterations to the legal landscape in the past decades since the 1947 Constitution

respecting claims of right by gays and lesbians in both constitutional adjudications and domestic relations cases. Most notably is Lawrence v. Texas, 539 U.S. 538, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) in which the United States Supreme Court specifically overruled Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), its precedent of less than twenty years earlier, and held that the criminalization of intimate sexual contact between adult homosexuals in private impinged upon their liberty interests protected by the Due Process Clause of the Fourteenth Amendment. Lawrence, supra, 539 U.S. at 578, 106 S. Ct. at 2484, 156 L. Ed. 2d at 525. In disclaiming the historical rationale of Bowers, the Lawrence majority opinion by Justice Kennedy quoted language applicable to the case at bar from Justice Stevens' Bowers dissent:

> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."

[Lawrence, supra, 539 U.S. at 577-78, 123 S. Ct. at 2483, 156 L. Ed. 2d at 525 (quoting Bowers v. Hardwick, supra, 478 U.S. at 216, 106 S. Ct. at 2858, 92 L. Ed. 2d at 162). (Stevens, J., dissenting.)]

Judicial decisions of this State have enhanced the rights of gays and lesbians in matters of family law. As witnessed by the Lael family, sexual orientation is not a bar to adoption. Adoption of Two Children by H.N.R., 285 N.J. Super. 1, 11 (App. Div. 1993); Matter of Adoption of Child by J.M.G., 267 N.J. Super. 622, 631-32 (Ch. Div. 1993); see also, In re Application for Change of Name by Bachrach, 344 N.J. Super. 126, 134 (App. Div. 2001). Similarly, the custody and visitation rights of natural or psychological parents cannot be denied or abridged based on sexual orientation. V.C., supra, 163 N.J. at 230; M.P. v. S.P., 169 N.J. Super. 425, 439 (App. Div. 1979); In re J.S. & C., 129 N.J. Super. 486, 489 (Ch. Div. 1974), aff'd, 142 N.J. Super. 499 (App. Div. 1976). Moreover, a same-sex partner may lawfully change a surname to match that of his or her partner. Bachrach, supra, 344 N.J. Super. at 134.

The enhancement of rights in family law for gays and lesbians is representative of a more functional view of family than when our Constitution was adopted. See, e.g., Braschi v. Stahl Assoc., 543 N.E.2d 49, 54 (N.Y. 1989) (holding that for purposes of the New York rent control laws, a surviving

homosexual could not be evicted after his long-term partner died because in "the reality of family life" he qualified as a spouse or member of the immediate family). See generally, Martha Minow, The Free Exercise of Families, 1991 U. Ill. L. Rev. 925, 931-32 (1991); Note, Looking For a Family Resemblance, 104 Harv. L. Rev. 1640 (1991); Barbara J. Cox, Love Makes a Family — Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families, 8 J.L. & Pol., 5 (1991).

Our Supreme Court explored the dimensions and functional reality of "family" in V.C., supra, 163 N.J. at 227-28, in which it held that a former same-sex partner had standing as a psychological parent to seek legal custody and visitation of twins born to her former partner following artificial insemination. In her separate concurring opinion, Justice Long gave substance to the functional view of family, stating:

> [W]e should not be misled into thinking that any particular model of family life is the only one that embodies "family values." Those qualities of family life on which society places a premium — its stability, the love and affection shared by its members, their focus on each other, the emotional and physical care and nurturance that parents provide their offspring, the creation of a safe harbor for all involved, the wellspring of support family life provides its members, the ideal of absolute fealty in good and bad times that infuses the familial relationship (all of which

> justify isolation from outside intrusion) – are merely characteristics of family life that, except for its communal aspect, are unrelated to the particular form a family takes.
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> [Id. at 232.]

The "winds of change" in the traditional understanding of family and marriage which we noted almost thirty years ago in M.T. v. J.T., 140 N.J. Super. 77, 83-84 (App. Div.), certif. denied, 71 N.J. 345 (1976), have been felt by the Legislature, which enacted the Domestic Partnership Act, L.2003, c.246, while this appeal was pending. The Act confers some but not all state legal rights afforded married persons to those who qualify and register as domestic partners. N.J.S.A. 26:8A-1 to -12.[3]

Therefore, while conclusions drawn from the past admittedly depend to a degree on where one focuses the telescope, history since 1947 points to changes in the reality of marriage and family life as well as greater acceptance of committed same-sex relationships. I see no basis in the history of marriage to

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[3] Two important legal distinctions between domestic partners and married persons are that (1) property acquired by a partner during a domestic partnership is treated as individual unlike in a marriage where joint ownership may arise as a matter of law; and (2) 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.

justify a definition which denies plaintiffs the right to enter into lawful marriage in this State with the person of their choice.

Although the Attorney General disclaims the promotion of procreation as a rationale for prohibiting same-sex marriage, the majority does give it weight, stating that "our society considers marriage between a man and woman to play a vital role in propagating the species and in providing the ideal environment for raising children." I agree with the Attorney General. Procreation is irrelevant to the issue before us.

Promotion of procreation as a factor defining marriage to exclude same-sex applicants is relied upon in the those cases cited by the majority which recognize that history or tradition cannot alone justify its restrictive definition of marriage or distinguish it from the argument based on history which was rejected by the Supreme Court in Loving. See, e.g., Baker v. Nelson, 191 N.W.2d 185, 186-87 (Minn. 1971) ("procreation and the rearing of children within a family" provides "a clear distinction between a marital distinction based merely on race and one based on the fundamental difference in sex."). See generally, William H. Hohengarten, Same-Sex Marriage and the Right of Privacy, 103 Yale L. J. 1495, 1513-23 (1994).

However, there is not, nor could there be, a threshold requirement to marriage of the intention or ability to procreate. See, M.T., supra, 140 N.J. Super. at 83-84. Of course many heterosexuals marry for reasons unrelated to having children. Some never intend to do so. Some are unable to do so by reason of physical inability, age or health. Moreover, tying the essence of marriage to procreation runs into cases upholding as a right of privacy the election not to procreate. See, Griswold, supra, 381 U.S. at 485, 85 S. Ct. at 1682, 14 L. Ed. 2d at 515 (protecting the right of married persons to use contraceptives); Eisenstadt v. Baird, 405 U.S. 438, 454-55, 92 S. Ct. 1029, 1039, 31 L. Ed. 2d 349, 363 (1972) (extending the same rights to persons who are not married), Roe v. Wade, 410 U.S. 113, 153, 93 S. Ct. 705, 727, 35 L. Ed. 2d 147, 177 (1972) (upholding a woman's right to choose an abortion). See also, Right to Choose v. Byrne, 91 N.J. 287, 305-06 (1982).

Also if procreation or the ability to procreate is central to marriage, logic dictates that the inability to procreate would constitute grounds for its termination. However, as opposed to the inability or unwillingness to engage in sexual intercourse, the inability or refusal to procreate is not a legal basis for divorce or annulment. See, e.g., T. v. M., 100 N.J. Super. 530, 538 (Ch. Div. 1968). Finally, the claim that

the promotion of procreation is a vital element of marriage and justifies exclusion of persons of the same gender falls on its face when confronted with reproductive science and technology. The fact is some persons in committed same-sex relationships can and do legally and functionally procreate. Cindy Meneghin, Maureen Kilian, Karen Nicholson-McFadden and Marcye Nicholson-McFadden, all plaintiffs in this case, each gave birth to their children following artificial insemination.

Moreover, the majority mentions the conventional wisdom of "the role that marriage plays in procreation and providing the optimal environment for child rearing," but no authority is given to justify this "optimal" status. This presents simply as an article of faith and one which ignores the reality of present family life parenting, which includes adoption, step-parenting and the myriad of other relationships of parenting noted by our Supreme Court in V.C. Further, the argument that opposite-sex persons provide a more suitable environment for raising children because they are married simply underscores that plaintiffs and their children are unjustly treated by denying them a right to marry their committed partners. Finally, there is nothing in the record to indicate that the eight plaintiffs in this case currently raising or having raised children as natural parents, adoptive parents or step-parents, are providing an environment

for growth and happiness of the children that is anything less than optimal.

Two New Jersey cases are cited by the majority in support of its position. The first, Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J. Super. 442 (App. Div. 1997), certif. denied, 153 N.J. 48 (1998), bears only indirectly. There we declined to interpret the term "dependents" to include domestic partners for purposes of coverage in the State Health Benefits Plan, id. at 452, a result which spawned two separate concurring opinions terming it "distasteful." Id. at 463, 464 (Baime, J.A.D., and Levy, J.A.D., dissenting.).[4] I submit that the comments in the Rutgers majority opinion relating to a same-sex marriage were simply dicta and not authoritative or persuasive in this case.

The other case, M.T. v. J.T., 140 N.J. Super. 77 (App. Div.) certif. denied, 71 N.J. 345 (1976), is cited and quoted for its support of the historic understanding of marriage as the lawful union of a man and a woman. Interestingly, M.T. was both. Born a man, he cohabited with J.T. in a homosexual relationship for five years and then underwent transsexual surgery which involved removal of his male sex organs and the

[4] The Legislature subsequently remedied the matter through the Domestic Partnership Act. N.J.S.A. 26:8A-1 to -12. See also, N.J.S.A. 18A:66-2; N.J.S.A. 43:6A-3; N.J.S.A. 43:15A-6; N.J.S.A. 43:16A-1; N.J.S.A. 52:14-17.26.

construction and placement of "a vagina and labia adequate for traditional penile/vaginal intercourse." Id. at 80. M.T. and J.T. later married in New York and continued their cohabitation, this time as husband and wife, for two years in New Jersey during which time they regularly engaged in sexual intercourse. Id. at 79. After they separated, M.T. filed a support complaint as a non-working wife. J.T. countered that he had no obligation to pay support because M.T. was in reality a man and that therefore their marriage was void. We held that M.T. was a woman, that the marriage was valid and that she was entitled to support for the following reason:

> Plaintiff has become physically and psychologically unified and fully capable of sexual activity with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did so here.
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> [Id. at 89-90.]

I gather from M.T. that a relationship qualifies as a lawful marriage if the genitalia of the partners are different so that they can engage in sexual intercourse. Accordingly, history and procreation are irrelevant provided surgery is successful, and the new woman and her partner are then entitled to a constitutional right to marry that neither he nor she had

in the pre-op room. Constitutional rights should not be limited by genitalia or the ability to engage in a particular form of sexual intimacy. See, Lawrence, supra, 539 U.S. at 575, 123 S. Ct. at 2482, 156 L. Ed. 2d at 523.

The arguments based on tradition, history, promotion of procreation or existing case law do not justify a definition of marriage which proscribes plaintiffs from asserting their right to marry the person of their choosing under Article I, paragraph 1 of the Constitution. That provision reads as follows:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

The expansive language of this paragraph has been interpreted by our Supreme Court to guarantee all substantive rights of due process to all persons as well as equal protection of the laws of this State. Sojourner A., supra, 177 N.J. at 332; Doe v. Poritz, 142 N.J. 1, 8 (1995); Greenburg, supra, 99 N.J. at 568. While the Federal Constitution remains the primary source of individual rights, the New Jersey Constitution is a separate source of individual freedoms and may provide more expansive protection of individual liberties. See, e.g., State v. Novembrino, 105 N.J. 95, 146 (1987) (exclusionary rule

unaffected by federal good faith exception); Right to Choose v. Byrne, 91 N.J. 287, 300 (1982) (statute restricting Medicaid funding abortion to circumstances where necessary to saving life of mother held to be a denial of equal protection contrary to Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980)); State v. Schmid, 84 N.J. 535, 559 (1980) (broader concept of individual rights of speech). See also, Justice Stewart G. Pollock, Adequate and Independent Grounds as a Means of Balancing the Relationship Between State and Federal Courts, 63 Tex. L. Rev. 977 (1986); Justice William J. Brennan, State Constitutions and The Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

Plaintiffs base their due process challenges on the constitutional right of privacy recognized in Article I, paragraph 1 of the New Jersey Constitution. At first blush, plaintiffs' claim of a right of privacy in support of a right to marry may seem anomalous, for privacy is commonly understood with a right to be left alone as famously discussed in legal parlance by Justice Brandeis in The Right to Privacy, 4 Harv. L. Rev. 5 (1890). But the constitutional right of privacy also means the right of an individual to make his or her fundamental life choices rather than the State making those decisions. See generally, Hoehengarten, supra, 103 Yale L. J. at 1524-30; see

also, Jeb Rubenfeld, The Right to Privacy, 102 Harv. L. Rev. 737, 754-56 (1989). So a married couple may choose not to procreate by using contraception. Griswold, supra, 381 U.S. at 484-85, 85 S. Ct. at 1681-82, 14 L. Ed. 2d at 514-15. A woman may make her own decision whether to bear or beget a child. Roe, supra, 410 U.S. at 153, 93 S. Ct. at 727, 31 L. Ed. 2d at 363 (1973); Right to Choose, supra, 91 N.J. at 305-06; Planned Parenthood v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Two consenting adults, heterosexual or homosexual, may elect to engage in sexual relations. Lawrence, supra, 539 U.S. at 578, 123 S. Ct. at 2484, 156 L. Ed. 2d at 525; State v. Saunders, 75 N.J. 200 (1977). And a person may elect to discontinue life support knowing that death will result. Quinlan, supra, 70 N.J. at 10. In all these and other cases the law has recognized rights of individuals to make fundamental life decisions in the conduct of their lives despite State opposition. We should do so here.

Of course there are proper limits in an individual's rights of choice, just as there are proper government limits on privacy and liberty. But when the limitation amounts to a prohibition of a central life choice to some and not others based on sexual orientation, it constitutes State deprivation of an individual's

fundamental right of substantive due process as well as equal protection of the laws.

Which leads me to polygamy. My colleagues view of the nature of the right to marry asserted by plaintiffs as equally applicable to polygamy. The spectre of polygamy was raised by Justice Scalia in his Lawrence dissent in which he expanded a slippery slope analysis into a loop-de-loop by arguing that decriminalizing acts of homosexual intimacy would lead to the downfall of moral legislation of society by implicitly authorizing same-sex marriage and polygamy as well as "adult incest, prostitution, masturbation, adultery, fornication, bestiality and obscenity." Lawrence, supra, 539 U.S. at 590, 123 S. Ct. at 2490, 156 L. Ed. 2d at 533 (Scalia, J., dissenting).[5]

It is just as unnecessary for us to consider here the question of the constitutional rights of polygamists to marry persons of their choosing as it would be to join Justice Scalia's wild ride. Plaintiffs do not question the binary aspect of marriage; they embrace it. Moreover, despite the

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[5] Justice Scalia's tirade spawned many scholarly articles on privacy and polygamy. See, e.g., Joseph Buzzuti, The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?, 43 Cath. Law. 409 (2004); Cassiah M. Ward, Note, I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America, 11 Wm. & Mary J. Women & Law, 131 (2004).

number of amicus curiae briefs filed in this appeal and the myriad of views presented, no polygamists have applied. One issue of fundamental constitutional rights is enough for now.[6]

Challenges to state laws on grounds of a right of privacy impact both substantive due process and equal protection. While analytically distinct, these concepts are linked and tend to overlap constitutional adjudication involving marriage, family life and sexual intimacy. Lawrence, supra, 559 U.S. at 575, 123 S. Ct. at 2482, 156 L. Ed. 2d at 523; Goodridge, supra, 798 N.E.2d at 953. Early decisions considered the right to marry as a matter of liberty within due process protection, Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042, 1045 (1923). In Griswold, supra, 381 U.S. at 484-85, 85 S. Ct. at 1681-82, 14 L. Ed. 2d at 514-15, the majority found a right of privacy inclusive of marriage in the "penumbra" of the First, Third, Fourth, and Ninth Amendments of the Federal Constitution. A right of marriage was held to be inherent in substantive due process, Zablocki, supra, 434 U.S. at 383-86, 98 S. Ct. at 679-81, 54 L. Ed. 2d at 628-30, and as a protectable interest for

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[6] The curious may consider the following authorities in distinguishing polygamy. Richard A. Posner, Sex and Reason, 253-60 (1992); Alyssa Rower, The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment, 38 Fam. L. Q. 711 (2004). For a popular, albeit controversial, history of polygamy and Morman religious fundamentalism, see Jon Krakauer, Under the Banner of Heaven: A Story of Violent Faith (2004).

equal protection of laws in Skinner, supra, 316 U.S. at 541-42 S. Ct. at 1113-14, 86 L. Ed. at 1660. In all instances the right to marry was heralded as a fundamental right subject only to reasonable State regulations such as the banning of incestuous marriages, N.J.S.A. 37:1-1, bigamous marriages, N.J.S.A. 2C:24-1, and marriages to those persons mentally incompetent, N.J.S.A. 37:1-9.

In adjudicating claims of constitutional right of substantive due process or equal protection, our Supreme Court has eschewed the multi-tiered analysis employed by the United States Supreme Court in cases such as City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985) and Carey v. Population Services Intl, 431 U.S. 678, 686, 97 S. Ct. 2010, 2016, 52 L. Ed. 2d 675, 677 (1977). Aptly described in dissent by Justice Clifford as a "veil of tiers," Matthews v. City of Atlantic City, 84 N.J. 153, 174 (1980) (Clifford, J., dissenting), the federal framework tends to be inflexible and shroud the "full understanding of the clash between individual and governmental interests." Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 630 (2000). See also, Robinson v. Cahill, 62 N.J. 473, 491-92, cert. denied sub. nom., Dickey v. Robinson, 414 U.S. 976, 94 S. Ct. 292, 38 L. Ed. 2d 219 (1973). In its place our Supreme Court has

adopted a test to evaluate claims of due process or equal protection under the State Constitution by examining each claim of right on a continuum and weighing the extent of the right asserted, the governmental restriction challenge and the public need for the restriction. Greenberg, supra, 99 N.J. at 567-69. See also, Planned Parenthood, supra, 165 N.J. at 629-31; Right to Choose, supra, 91 N.J. at 299-301. This balancing test is especially appropriate where, as in this case, state law infringes on a fundamental right such as the right to marry. Greenberg, supra, 99 N.J. at 571; see also, Right to Choose, supra, 91 N.J. at 308-09; United States Chamber of Commerce v. State, 89 N.J. 131, 157-58 (1982).

The right to marry is to my view a fundamental right of substantive due process protected by the New Jersey Constitution and, for the reasons stated earlier, the exclusion of plaintiffs from the right cannot be justified by tradition or procreation. The balancing test then considers the extent to which the governmental restriction impinges upon that right. Greenberg, supra, 99 N.J. at 567. Here there is not only a restriction but a prohibition which excludes a sizeable number of persons and their children from the personal, familial and spiritual aspects of marriage. Finally, the balancing test inquires as to the public need for the restriction, or as in this case, the

prohibition of the right. Ibid. Here the majority and concurring opinions again rely on history, tradition and procreation. It is not necessary to repeat all the arguments set forth earlier in this dissent. Tradition in itself is not a compelling state interest. If it were, many societal institutions as well as individual rights would be compromised. After all, slavery was a traditional institution for over 200 years. See, People v. Greenleaf, 780 N.Y.S.2d 899, 901 (Just. Ct. 2004). To deprive plaintiffs of marrying the person of their choice, a right enjoyed by all others, on the basis of a tradition of exclusion serves only to unjustifiably and unconstitutionally discriminate against them. Moreover, procreation is even less persuasive as a public need. Can there be serious thought that legal recognition of same-sex marriage will significantly reduce heterosexual marriages or the birth rate? While some cases do link defining of marriage solely to members of the opposite sex to "the survival of the [human] race," see, e.g., Baker, supra, 191 N.W.2d at 186, I cannot fathom that a list of threats to our survival would include same-sex marriage. Also if there is an under-population crisis, somehow it has escaped my attention.

Even if plaintiffs' claim of a right to marry is not considered a fundamental right, their constitutional challenge

meets the "rational basis test," which is the third tier of the Federal tiers test. Briefly, the first tier requires "strict scrutiny" for legislative acts directly affecting fundamental rights; a lesser standard of "important government objections" is the intermediate tier test where a substantial right is indirectly affected or a semi-suspect class, like gender, is involved; and the bottom rung is occupied by other governmental acts for which the State must show only that the law rationally relates to a legitimate interest. Greenberg, supra, 99 N.J. at 564-65.

While the balancing test stated in Greenberg still sets the standard, I believe that plaintiffs prevail on their constitutional challenge even if the least restrictive or "rational basis" standard of review is employed since there is no showing of a basis of other than tradition or procreation to exclude plaintiffs from the significant (if not fundamental) state of marriage. See, Goodridge, supra, 798 N.E.2d at 961 ("[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection.").

As to equal protection, my conclusion is the same. Our Constitution and the Federal Constitution require that all similarly situated people be treated alike. Cleburne, supra, 473 U.S. at 439, 105 S. Ct. at 3254, 87 L. Ed. 2d at 330; Brown

v. State, 356 N.J. Super. 71, 79 (App. Div. 2002). It is disingenuous to say that plaintiffs are treated alike because they can marry but not the person they choose. By prohibiting them from a real right to marry, plaintiffs as well as their children suffer the real consequences of being "different." While the Domestic Partnership Act gives, at some cost, many, but not all, of the benefits and protections automatically granted to married persons, we have learned after much pain that "separate but equal" does not substitute for equal rights. Plaintiff Sarah Lael describes the difference in this way:

> For me, being denied marriage, despite how hard we work and support each other and our children, it is demeaning and humiliating. These feelings are part of my daily life ... because of constant reminders that we are second class.

What Sarah Lael and her partner lack and seek may be summed up in the word dignity. But there is more they will gain from lawful marriage. That something else goes to the essence of marriage and is probably best left to poets rather than judges. It is the reason that people do get married. For marriage changes who you are. It gives stability, legal protection and recognition by fellow citizens. It provides a unique meaning to everyday life, for legally, personally and spiritually a married person is never really alone. Few would choose life differently.

With great admiration for the wisdom, logic and eloquence of my colleagues, I must dissent.

I hereby certify that the foregoing is a true copy of the original on file in my office.

ACTING CLERK OF THE APPELLATE DIVISION