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February 16, 2007

Joseph Komosinski
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P.O. Box 360
Trenton, New Jersey 08625-0360

Formal Opinion No. 3-2007

Re: Recognition in New Jersey of Same-Sex
Marriages, Civil Unions, Domestic Partnerships
and Other Government-Sanctioned, Same-Sex
Relationships Established Pursuant to the Laws
of Other States and Foreign Nations.

Dear Mr. Komosinski:

Questions have been raised whether, once L. 2006, c. 103, the statute authorizing civil unions in our State, becomes effective, New Jersey will recognize as valid same-sex relationships formed under the laws of other States and foreign nations. You are advised that government-sanctioned, same-sex relationships validly established under the laws of other States and foreign nations will be valid in New Jersey beginning on February 19, 2007, either as civil unions or domestic partnerships. The name of the relationship selected by other jurisdictions, however, will not control its treatment under New Jersey law. Rather, it is the nature of the rights conferred by another jurisdiction that will determine how a relationship will be treated under New Jersey law. This requires both a comparison of the rights granted by the other jurisdiction to those afforded under New Jersey's civil union statute and domestic partnership law, as well as fidelity to the intent of the New Jersey Legislature.



As a result, those same-sex relationships from other jurisdictions that most closely approximate a New Jersey civil union - that is, relationships that provide substantially all of the rights and benefits of marriage - will be treated as civil unions under our law. Those same-sex relationships from other jurisdictions that most closely approximate New Jersey domestic partnerships - that is, relationships that provide some, but not all of the rights and obligations of marriage - will be treated as domestic partnerships under our law. Treatment of government-sanctioned, same-sex relationships from other jurisdictions in this fashion is consistent with the Legislature's decision to provide all of the rights and obligations of marriage, to same-sex couples through civil unions rather than marriage and to maintain domestic partnerships as a distinct government-sanctioned relationship after civil unions become effective.

Under this analysis, same-sex civil unions established under the current laws of Vermont and Connecticut, as well as same-sex domestic partnerships established under the laws of California, which provide rights that closely approximate those of New Jersey civil unions, will be valid in New Jersey and treated as civil unions in our State. In addition, same-sex marriages established under the current laws of Massachusetts, Canada, the Netherlands, Belgium, South Africa and Spain will be valid in New Jersey and treated as civil unions in our State. Great Britain, New Zealand, Iceland, and Sweden provide government-sanctioned, same-sex relationships that provide rights and obligations that closely approximate those offered to married couples. These relationships, which have a variety of names, will also be valid in New Jersey and treated as civil unions in New Jersey.

Couples in these relationships need not secure a New Jersey civil union license or solemnize their relationships in this State in order to enjoy all of the rights and obligations of a New Jersey civil union. However, pursuant to N.J.S.A. 37:1-7, a same-sex couple in a civil union or comparable relationship as noted above established under the laws of another jurisdiction may reaffirm their relationship under New Jersey law. Couples who reaffirm their relationships under this provision will receive a New Jersey civil union license and certificate of reaffirmation of civil union and will be registered as being in a civil union in this State. Ibid.

Same-sex couples in other government-sanctioned, same-sex relationships, such as the domestic partnerships recognized by

Maine and the District of Columbia, the reciprocal beneficiary relationships authorized under the laws of Hawaii, and the various same-sex relationships recognized by foreign nations that provide a set of rights and obligations fewer in number and scope than those afforded to married couples will be valid in New Jersey and treated as domestic partnerships in our State.

Couples in these relationship also need not register as domestic partners in New Jersey to enjoy the rights and obligations of domestic partnership in our State. However, same-sex couples in government-sanctioned relationships from other jurisdictions that approximate domestic partnerships, and who otherwise meet the requirements of New Jersey law, may enter into a New Jersey civil union with each other and secure all of the rights and obligations of a civil union in this State.

1. Background: Government-Sanctioned, Same-Sex Relationships.

Massachusetts is the only State that permits same-sex couples to marry. Marriage is available to same-sex couples in that State on the same terms as it is available to mixed-gender couples. See Opinion of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004); Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003). In addition, marriage is available to same-sex couples on the same terms that it is available to mixed-gender couples in five countries: Canada, the Netherlands, Belgium, South Africa and Spain. See Netherlands Legal Code, Art. 1:30; Moniteur Belge, 28.02.2003 Ed. 3 9880-9883; S.C. 2005, c. 33, s.2 and s.4; Laws of South Africa 2006, No. 17; Boletin Ofical De Las Cortes Generales, No. 18-1, 21 June 2005, 121/000018.

Civil unions, which provide all of the legal rights and obligations of marriage, are distinct legal relationships available to same-sex couples in Vermont and Connecticut. See Vt. Stat. Ann. tit. 15, §1204(a); Conn. Gen. Stat. Ann. §46b-38nn. New Jersey's civil union statute, L. 2006, c. 103, which will offer all of the rights and obligations of marriage to same-sex couples, will become effective on February 19, 2007.

Domestic partnerships, which generally provide same-sex couples some, but not all, of the rights and obligations of marriage, are recognized in several States and foreign nations. An exception in this category is California, which provides domestic partners with a host of rights approximating those afforded to married couples. Cal. Fam. Code §297.5(a). The majority of

jurisdictions that recognize domestic partners, including Maine, the District of Columbia and Hawaii (where the unions are called "reciprocal beneficiary relationships") provide notably fewer rights to domestic partners than to married couples. See 2003 Me. Laws c. 672; D.C. Code §32-702; Haw. Rev. Stat. §572C-2, et seq.

New Jersey's domestic partnership statute, which provides some, but not all, of the rights and obligations of marriage, took effect on July 10, 2004, L. 2003, c. 246, and will remain in place when the law authorizing civil unions takes effect. The rights and responsibilities of domestic partnerships existing before the effective date of L. 2006, c. 103 will not be altered. N.J.S.A. 26:8A-4.1. However, all same-sex couples in domestic partnerships will be provided with notice and an opportunity to enter into a civil union with each other. Ibid. If they elect to do so, their domestic partnerships will be dissolved automatically when their civil union comes into being. Ibid. In addition, once the law authorizing civil unions becomes effective, the only new domestic partnerships that will be authorized are for couples, either same-sex or mixed-gender, both of whom are over 62 years of age. Ibid.

Government-sanctioned, same-sex relationships other than marriage exist in, among other nations, Andorra, Colombia, Croatia, Czech Republic, Denmark, Finland, France, Germany, Great Britain, Hungary, Iceland, Israel, Luxembourg, New Zealand, Norway, Portugal, Slovenia, Sweden, Switzerland, and parts of Argentina, Brazil, Italy, Mexico, and in all Australian States. The terminology for these unions is not standardized and the names given to these relationships translate into, among other things, life partnerships, stable unions, civil pacts, registered partnerships, domestic partnerships, civil partnerships, reciprocal beneficiary relationships, and significant relationships. The recognized relationships in Great Britain, New Zealand, Iceland, and Sweden offer rights that match those offered to married couples. See Laws of Great Britain 2004, c. 33; Laws of New Zealand 2004, No. 102; Laws of Iceland No. 87 12 June 1996; Laws of Sweden 1994.1117, c. 3, §1.

2. Recognition of Civil Unions, Domestic Partnerships, Reciprocal Beneficiary Relationships, and other Same-Sex Relationships Established Under the Laws of Other States and Foreign Nations.

New Jersey law expressly mandates recognition of same-sex relationships other than marriage validly established under the laws of other jurisdictions. The Domestic Partnership Act provides that a "domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the partnership was created, shall be valid in this State." N.J.S.A. 26:8A-6c. In addition, the law authorizing civil unions provides that a "civil union relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the civil union relationship was created, shall be valid in this State." N.J.S.A. 37:1-34; L. 2006, c. 103, §95.

Current Vermont and Connecticut civil unions, like their New Jersey counterpart, provide all of the rights and obligations of marriage to the civil union partners. See Vt. Stat. Ann. tit. 15 §1204(a); Conn. Gen. Stat. Ann. §46b-38nn. These unions, therefore, are valid in New Jersey and should be accorded all of the rights and obligations of a New Jersey civil union. The current California domestic partnership, despite its name, has been expanded to include rights and benefits indistinguishable from marriage. Cal. Fam. Code §297.5(a). Given the scope of California's domestic partnership, this relationship more closely approximates a New Jersey civil union than a New Jersey domestic partnership and should be treated as the equivalent of a New Jersey civil union. The same is true for the civil partnerships authorized by Great Britain, Sweden, New Zealand and Iceland, where same-sex couples are afforded rights and benefits identical to civil marriage. See Laws of Great Britain 2004, c. 33; Laws of New Zealand 2004, No. 102; Laws of Iceland No. 87 12 June 1996; Laws of Sweden 1994.1117, c. 3, §1.

Domestic partnerships, reciprocal beneficiary relationships and other government-sanctioned, same-sex relationships that afford rights and obligations less expansive than the rights and benefits of marriage are valid in New Jersey and will provide all of the rights and obligations of a New Jersey domestic partnership. The domestic partnerships authorized by the current laws of Maine and the District of Columbia fall into this category. See Me. Pub. L. 2003, c. 672; D.C. Pub. L. 9-114. These

relationships, like New Jersey's domestic partnerships, provide for limited health care, inheritance, property rights, and other rights and obligations, but do not approach the broad array of rights and obligations afforded to married couples. Government-sanctioned, same-sex relationships provided by other jurisdictions that approximate New Jersey domestic partnerships are valid in this State and should provide all of the rights and obligations of a New Jersey domestic partnership.

Government-sanctioned, same-sex relationships other than marriage authorized by foreign nations not addressed in this Formal Opinion should be examined under the analysis set forth herein. Those that approximate a New Jersey domestic partnerships are valid in New Jersey and provide all of the rights and obligations of a New Jersey domestic partnership. Any that more closely approximate a civil union also are valid in New Jersey and provide all of the rights and obligations of a New Jersey civil union.

3. Recognition of Same-Sex Marriages Established under the Laws of Massachusetts and Foreign Nations.

In Lewis v. Harris, 188 N.J. 415 (2006), our Supreme Court held that the State Constitution requires that same-sex couples be afforded access to a government-sanctioned relationship that provides all of the rights and obligations of marriage. The Court held that this mandate could be satisfied either by extending the ability to marry to same-sex couples or by providing a distinct, government-sanctioned relationship that would provide same-sex couples with all of the rights and obligations of marriage. The Legislature decided not to authorize same-sex marriages, but to create civil unions as the vehicle for providing the rights and obligations of marriage to same-sex couples.

This history is instructive in deciding how to treat same-sex marriages established in Massachusetts and foreign nations under New Jersey law. Consistent with Lewis v. Harris, such marriages could be called either marriages or civil unions, so long as all of the rights and obligations of marriage were provided. It is reasonable to conclude that the Legislature intended that these same-sex relationships be considered civil unions in view of the Legislature's response to the holding in Lewis v. Harris. The Legislature's lawful policy judgment should be respected and followed.

Accordingly, same-sex marriages established under the laws of Massachusetts and foreign nations are valid in New Jersey and should be treated as civil unions in our State.¹

4. Conclusion

In light of your authority to supervise local registrars of vital statistics who will have authority to issue marriage licenses and civil union licenses, see N.J.S.A. 26:8-24, and in the interest of uniform Statewide practices, it would be appropriate to inform local registrars of the advice provided in this letter.

Sincerely yours,



STUART RABNER

ATTORNEY GENERAL OF NEW JERSEY

¹ Although the Full Faith and Credit Clause of the United States Constitution mandates that States recognize the "public Acts, Records, and judicial Proceedings of every other State," U.S. Const. art. IV, §1, that requirement is not absolute. The Clause does not require "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." Baker v. General Motors Corp., 522 U.S. 222, 232 (1998) (quoting Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939)); see Franchise Tax Bd. v. Hyatt, 538 U.S. 488 (2003) (Full Faith and Credit Clause does not require a State to adopt another State's sovereign immunity statutes). Recognizing same-sex marriages established under Massachusetts law as civil unions in New Jersey both gives substantial effect to the Massachusetts relationships by providing all of the rights and obligations of marriage and comports with the intent of the New Jersey Legislature to provide those rights to same-sex couples through a civil union. Similarly, with respect to same-sex marriages formed under the laws of foreign nations, as "a general matter, the laws of one nation do not have force or effect beyond its borders." Hennefeld v. Township of Montclair, 22 N.J. Tax 166, 178 (Tax 2005) (quoting In re: Kandu, 315 B.R. 123, 133 (Bankr. W.D. Wash. 2004)). Comity, however, permits States to give effect to foreign laws. Recognizing same-sex marriages established in foreign nations respects foreign laws and comports with New Jersey's legislative decisions regarding the provision of rights and obligations to same-sex couples.