STATE OF NEW HAMPSHIRE

SB 427 STUDY COMMISSION
TO STUDY ALL ASPECTS OF SAME SEX CIVIL MARRIAGE
AND THE LEGAL EQUIVALENTS THEREOF,
WHETHER REFERRED TO AS CIVIL UNIONS,
DOMESTIC PARTNERSHIPS, OR OTHERWISE

Testimony of Susan H. Hassan, Esq.
Getman, Stacey, Schulthess & Steere, PA
Three Executive Park Drive, Suite 9
Bedford, New Hampshire 03110
603-634-4300

September 19, 2005

My name is Susan H. Hassan. I am an attorney with the law firm of Getman, Stacey, Schulthess & Steere, PA in Bedford, New Hampshire. I practice in the area of Estate Planning, Estate Administration, Probate Court matters including guardianships, adoptions, and division of property or Petitions to Partition. I also do child and custody issues with gay and lesbian clients.

I serve a great number of gay and lesbian clients in both New Hampshire and Massachusetts. Through my practice, I have seen firsthand the myriad ways being denied marriage rights disadvantages gay and lesbian couples and the families they form.

There is generally a two-fold process for the application of laws in any State. One is the way in which a law is written, the "intent of the law" and the second is the real life application of the law. The laws in New Hampshire have been written under the traditional model of a family including a husband, wife and children. In our society today, however, the traditional family is quickly becoming more and more difficult to define. With divorced families, gay and lesbian families and unmarried families all living together, the composition of families continues to change. Despite these factual changes in the shape of families, the laws are not keeping up with

the changing times, forcing the Judicial branch to make hard determinations that relate to gay and lesbian families whose lives are largely not addressed under a traditional family model of laws. Because the laws are written to protect married families, same-sex couples often find themselves without legal protection at all, sometimes even when they have taken steps to create the countless legal documents that attempt to ensure that their family will be respected in times of great vulnerability.

The scope of the protections same-sex couples lack without marriage is vast, touching on areas from the most mundane (i.e. how to pay taxes, how to buy property) to the most crucial (i.e. the right to take leave to care for an ill spouse, access to family health insurance). The following sets forth examples of issues confronted by families in New Hampshire that have either been tried or are in current litigation.

1. **Protections Relating to Illness or Death.**

Without marriage, gay and lesbian couples are left without the safety net the law provides to families in times of tragedy. While same-sex couples can create documents in an attempt to protect themselves and their families when the laws fail to do so, this process is not a guarantee that their family will receive the respect it deserves, not to mention being burdensome and costly. On average, my clients spend approximately $1500 - $2000 trying to put these pieces in place. Despite this expense and effort, no documentation comes close to affording the automatic, comprehensive protections that only marriage provides, the vast majority of which cannot be obtained through contract.

- Right to obtain remains and make funeral arrangements

Without marriage, a surviving same-sex partner has no automatic authority to take care of the remains of his or her loved one. In New Hampshire, by statute, the person who has the

ability to obtain the remains of the deceased is the "next of kin" unless specifically declared in writing by the deceased. Because they are excluded from marriage, same-sex couples cannot be considered each other's next of kin. Thus, if a gay or lesbian couple in New Hampshire is in a long-term committed relationship but has not appropriately created a what I call a "Declaration of Intentions," stating that they wish their life partner to obtain their remains and make all arrangements, the next of kin -- usually the parents or siblings, but possibly a distant biological relative with no actual relationship with the decedent -- will have legal rights to do so, over the long-term partner, who is considered a legal stranger regardless of how long the couple has been together or the nature of the decedent's relationship with his or her biological family. If you are married and your spouse dies, by statute you are currently designated the next of kin and you have automatic rights over your spouse's remains and arrangements. Now imagine that these laws do not exist for married couples. Suddenly, your mother-in-law has rights over your spouse's body and has decided that your spouse will be buried in the family plot and does not view you as part of your spouse's immediate family. This is what gay and lesbians fear and realistically deal with on a daily basis.

For example I had a recent case in which a couple of ten years was moving to Oregon. My client moved to Oregon first because of job commitments, while his partner was to remain here to sell the home and move the remaining personal property to Oregon. During this process the partner died and the parents and family member of the deceased partner did not contact my client. He was informed through a mutual friend that his partner had passed away. The family refused to allow him to go to the funereal, they will not tell him where he is buried, they confiscated all of their personal property and since the house was in the deceased's name, they refused to allow entry for my client to obtain his own personal property. Neither partner had

ever established any estate planning prior to the partner deceasing. My client had to expend approximately $4,000.00 just to obtain what minimal personal property they were willing to give him. He could have continued this matter to obtain more of his rights, but the cost and most of all the anxiety over continuing this matter was unbearable for my client. This was a family that had previously shared holiday dinners with each other. Yet at the time of death it was as if my client did not exist or their relationship even mattered any longer. Had this couple been married, my client's tragedy would have been lessened by at least being able to make final arrangements for the person with whom he had been in a committed relationship for a decade, being able to take care of their home, and having access to the property they had amassed over the years.

- Decision-making in times of illness

For married couples, the spouse is always allowed in to a hospital room or emergency room to visit their spouse, access to information about their spouse's condition, and to be a part of decision-making about their spouse's case. For a gay or lesbian family, without a Medical Authorization form, there is no guarantee that a partner will be allowed access to or information about the ill or injured partner, or be a part of decisions about medical care. I have had clients who have been admitted to the emergency room and have expressly stated that their partner would be in shortly, and requesting that hospital personnel please allow them to come back to be with them. When the partners arrived and asked to be taken to their loved ones, they have been denied access because they were not what the hospital considered "next of kin". It is shameful they need a form to prove to the hospital they are allowed access even when the patients, themselves, have requested their partner's presence. At a time of emergency, the trauma of a loved one's injury or illness is compounded by having to search for a piece of paper that will allow a gay man or lesbian to be by his or her partner's side.

Even when couples think they have protected themselves by executing a valid Health Care Power of Attorney, they have found those protections to be inadequate. The Health Care Power of Attorney is only valid at the time the individual can no longer speak on his or her own behalf. The Medical Authorization bridges that gap between the time a partner is admitted to a medical facility and can speak for themselves and that time the health care power of attorney becomes effective.

What this serves to illustrate are the ways that gay and lesbian families lack the automatic protections that come with a marriage license in times of vulnerability, and that even when a same-sex couple has taken the extra steps to try to obtain similar, more limited protections, those documents are not a guarantee that their family will be respected. More often than not, unless the couple has gone to an estate planning attorney who is aware of the laws or lack thereof for their gay and lesbian clients, while with good intentions to protect themselves, they may not be protected sufficiently. Only marriage can provide that protection automatically.

2. **Protections Upon Dissolution of the Relationship**

When a married couple ends their relationship, the law provides a comprehensive way to dissolve the union, addressing property and monetary issues, as well as issues relating to children of the relationship -- the system of divorce. Without marriage, a couple cannot be divorced, and thus gay and lesbian couples lack access to a system that will address all of these issues when they break up. This is a great source of contention not only for the couple themselves, but the attorneys on each side, who are trying to get the best deal for their clients, and for the courts, which have no statutory guidance for how to address the situation.

For a gay or lesbian couple dissolving their relationship, they must turn to piecemeal ways to untangle their lives. In order to merely split property that was purchased during the relationship, their method of dissolution is in the Probate Court through a Petition to Partition. In a Partition matter, equitable division is the relief -- meaning that the court has to examine each partner's contribution to everything. Therefore, every check that was paid for every expense, whether personal or for the household, is submitted. Every tax return for the length of the relationship; every receipt, witness, friend, and family member are all brought in to testify to who paid for what and how. The laws have reduced the relationship to a business transaction. The Court tries to provide what is most fair given the personal circumstances; however, the laws in reality reduce what was a loving, committed relationship to a business arrangement, not a familial issue. This process is often unfair to the parties and time consuming to both the parties and Court. If gay and lesbian couples were able to marry and become divorced under the laws of New Hampshire, the process for completion would be faster, more equitable, and healthier for the families and the Court.

For example, I just completed a 4-day trial regarding a Petition to Partition the property held by a couple. I came into the trial with 4 banker boxes full of information and evidence to present to the court regarding the equitable division of property. This was a two and a half year case that cost my client approximately $40,000.00 in the end. The issues in the case were over the equitable value of the home and some specific personal property. Yet if they were afforded the ability to divorce under the laws of New Hampshire this case would have settled and resolved in less then a year and the fees would have been approximately 5-10 thousand dollars instead, because under the laws in New Hampshire the house would have been equally divided between the parties without question and the personal property issue would have been equally divided.

3. **Protections for children of gay and lesbian parents.**

Children of gay and lesbian families are the ones who suffer the most because of the inability of their parents to marry and the near impossibility of establishing a legal relationship between the children and both of their parents. Gay and lesbian couples all around the state have children, either via adoption or through assisted reproductive technologies. Regardless of how they come into the family, the children grow up knowing both parents as mom and mommy or dad and daddy respectively. Gay and lesbian couples raise their families with the intent to be together forever, just like married couples, and then, like a lot of relationships, the couple breaks up. Unlike married couples, however, these families lack a clear system for addressing issues of support, custody and visitation, which is compounded by the fact that, often, one of the partners lacks a legal relationship with the children.

While some courts have granted second-parent adoptions, allowing both members of a same-sex couple to be the legal parents of their children, there is no clear, state-wide precedent. Thus, for most families, only one parent is the legal parent, despite the couple's intention to parent jointly. In the past, some courts allowed a non-biological or non-adoptive parent to file a petition for custody or visitation and/or a biological or adoptive parent to seek child support from his or her ex-partner based on the non-legal parent's standing as a de facto parent. It was dependent on the interpretation of the judge of the current law as to whether he or she would have that ability or not, largely basing the decision on whether the judge believed the court had jurisdiction to even consider the claim. These cases had been heard in the Superior Court in front of the Marital Masters, although the new Family Court division is where these petition will be

brought going forward. If the Court determines they do not have jurisdiction in these matters, then what is in the best interest of the child can not be heard or even investigated in the case.

To illustrate, I had a client that was with her partner for six years when the decision to have a child was made. The couple made the decision to have the child together, to raise the child. Yet their relationship, like so many, deteriorated and the child was caught in the middle between the two parties. The child was four-years-old at the time of the break up, and my client, the non-biological mother continued to see the child on a regular basis for a year after the break up with the permission of the biological mother. Then the biological mother just stopped allowing my client to see the child. For a year, the biological mother kept indicating to my client "she would think about it". Finally, my client came to see me. Knowing the chance was minimal we still filed for visitation, but her petition was denied based on lack of jurisdiction.

The New Hampshire Supreme Court seemingly has closed the door to these kinds of petitions, however, in its ruling in In the Matter of Nelson, 149 N.H. 545, 825 A.2d 501 (2003), although it was not addressing gay families in its ruling. Attorneys are left trying to twist the law into a pretzel to make gay parents fit into a legal system that stymies their attempts to obtain custody of and/or visitation with their children at every turn. For example, I currently have a case where the opposing attorney has filed a petition for sole guardianship in the Probate Court on behalf of the non-biological mother, to replace the biological mother's interest, in an attempt to obtain visitation rights to the child.

Because the overwhelming weight of the law provides no avenue for non-legal parents to maintain a relationship with their children, the children are left to wonder why one of their parents that they grew up calling mommy is gone and may not be able to see them anymore if the biological parent wishes to cut off all ties. What becomes of siblings, grandparents and other

extended family members the children have come to rely on as family? This cannot possibly be what New Hampshire residents would consider "the best interest of the child."

By contrast, when a married couple breaks up, regardless of how complicated the legal relationships may be between the adults and the children of the parties, the divorce system provides an automatic forum to address issues of custody, visitation and child support. The divorce system recognizes that these adults and children were a family, and provides a way to protect the relationships between the adults and children in a way that respects the proper roles of parents and preserves the children's best interests. Without access to this system, the children of same-sex couples are left without proper respect for their families and their important parental relationships.

If all of this sounds ludicrous and confusing, that is because it is ludicrous and confusing, and it results from the fact that our laws in the State of New Hampshire exclude gay and lesbian families from the comprehensive web of protections that only flow from marriage. What I share with you today is an every day reality in the New Hampshire courts and in the lives of gay and lesbian families and their extended families. Today, tomorrow and every day after gay and lesbian families and their children will be faced with these inequities in justice. The courts will forever have these issues brought up in front of them every day doing the best they can under antiquated laws that do not provide what is in the best interest of a family or most importantly the best interest of the children. The current laws in the State of New Hampshire do not treat all of its citizens in a fair, dignified and equitable manner.