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## **Falling to Pieces: New York State Civil Legal Remedies Available to Lesbian, Gay, Bisexual, and Transgender Survivors of Domestic Violence**

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Falling to Pieces: New York State Civil  
Legal Remedies Available to Lesbian,  
Gay, Bisexual, and Transgender  
Survivors of Domestic Violence

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## I. INTRODUCTION

Domestic violence in the lesbian, gay, bisexual, and transgender (“LGBT”) communities presents an important lens through which to view the issues of domestic and intimate partner violence<sup>1</sup> and the legal definition, and recognition, of LGBT relationships.<sup>2</sup> While domestic violence occurs at the same rate in LGBT intimate partnerships as in heterosexual partnerships,<sup>3</sup> this violence is not addressed by many civil legal remedies available to heterosexual partners who are married or who have children together. This is, in large part, due to the legal definition of an intimate partnership, which, in New York State, requires that the parties be members of the “same family or household.”<sup>4</sup> This phrase excludes many LGBT survivors of domestic violence from civil legal remedies. The remaining criminal legal remedies may be, for reasons discussed below, unappealing to LGBT survivors of domestic violence. The intersection of violence in the LGBT communities and the civil legal remedies available to LGBT survivors rests primarily on the legal recognition, or lack thereof, of LGBT relationships. This article explores that intersection.

New York State provides civil legal protections to victims of domestic violence primarily through the Family Court Act, which governs family court matters including family offenses (New York State’s definition of domestic violence),<sup>5</sup>

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1. Although many LGBT survivors of violence characterize the violence as “intimate partner” violence rather than “domestic” violence for many reasons, including the possible lack of a domestic or cohabiting relationship, for the ease of this article and because most laws refer to this violence as “domestic,” I will use the phrase “domestic violence” to mean violence between intimate partners regardless of the lawful recognition or personal definition of the relationship or the status of cohabitation.
  2. Lesbian, gay, bisexual, and transgender (also referred to as “trans”) communities can also be referred to as the “queer” community and include people who identify as queer, questioning, two-spirited, gender variant, genderqueer, bigendered, intergender, intersex, same gender loving, or by any other terms that indicate self-definition of gender identity or sexual orientation. *See* Eli Green & Eric N. Peterson, *LGBTTSQI Terminology* (2006), <http://www.trans-academics.org/lgbttsqiterminology.pdf>. The lesbian, gay, bisexual, and transgender communities are not interchangeable. For practitioners new to the issues of the LGBT communities, some of the language used to describe LGBT people and their partners or their identities can be confusing. Gender identity is often confused with sexual orientation. Sexual orientation is commonly defined as our preference for sexual partners—either same-sex or opposite-sex partners. Lesbians generally identify themselves as women who partner with other women. Gay men generally identify themselves as men who partner with other men. Bisexual people often identify themselves as people who partner with same-sex and opposite-sex partners. On the other hand, gender identity is commonly defined as a sense of ourselves as masculine, feminine, or at some other point along that spectrum. Transgender people may define themselves as male or female, or in a differently defined gender or lack of gender. While some transgender people do identify as queer (either because they are involved in same-sex relationships or because their sexual orientation is not “straight”), others define their sexual orientation as straight or heterosexual.
  3. DIANE R. DOLAN-SOTO & SARA KAPLAN, *A REPORT OF THE NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE PROJECT (AVP)* 3 (2003/2004 ed., The New York City Gay and Lesbian Anti-Violence Project 2005), *available at* <http://www.avp.org/> (follow “publications” hyperlink; then follow “AVP Reports” hyperlink; then follow “2003-2004 New York City Domestic Violence Report” hyperlink).
  4. N.Y. FAM. CT. ACT § 812(1) (McKinney 2007).
  5. *See generally id.* at art. 8.

custody and visitation,<sup>6</sup> and support,<sup>7</sup> and the Domestic Relations Law, which governs New York Supreme Court proceedings when the court is hearing matrimonial matters.<sup>8</sup> To invoke these protections, parties must meet the criteria of a statutorily defined legal relationship that is generally set forth in the Family Court Act or the Domestic Relations Law.<sup>9</sup> The Domestic Relations Law requires that parties be legally married.<sup>10</sup> The Family Court Act allows petitions to be made by “members of the same family or household,” defined as “(a) persons related by consanguinity or affinity; (b) persons legally married to one another; (c) persons formerly married to one another; and (d) persons who have a child in common regardless whether such persons have been married or have lived together at any time.”<sup>11</sup> For the most part, lesbians and gay men, bisexual people in same-sex relationships, and transgender people whose gender identity may vary from their legal identity, cannot meet these criteria.<sup>12</sup> While legal recognition of LGBT relationships is expanding,<sup>13</sup> domestic violence in the LGBT communities is not adequately addressed by current laws.<sup>14</sup> Many traditional legal remedies that address domestic violence assume that intimate partners are hetero-

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6. *See generally id.* at art. 6.

7. *See generally id.* at art. 4.

8. *See* N.Y. DOM. REL. LAW art. 13 (McKinney 2007).

9. *See* Hernandez v. Robles, 794 N.Y.S.2d 579, 588–89 (Sup. Ct. N.Y. County 2005), *rev'd* 805 N.Y.S.2d 354 (1st Dep’t 2005), *aff’d* 7 N.Y.3d 338 (2006) (citing an informal opinion of the attorney general of the state of New York stating that “although the DRL does not expressly bar marriage of same-sex couples, . . . both the inclusion of gender-specific terms in multiple sections of the DRL, and the historical context in which the DRL was enacted, indicate that the Legislature did not intend to authorize same-sex marriage”).

10. The question of what constitutes a legal marriage remains unanswered in New York State. It is unclear whether a marriage recognized as legal in another state or country will be recognized in New York State. *See* Gonzalez v. Green, 831 N.Y.S.2d 856 (Sup. Ct. N.Y. County 2006). This issue is beyond the scope of this article.

11. N.Y. FAM. CT. ACT § 812(1)(a)–(d).

12. The exception may be parents of a legally adopted child; however, to date, no published decision discusses this relationship in the context of domestic violence. *See id.* By the same token, opposite-sex couples who do not have children in common and who choose not to marry may be similarly barred. This article focuses on the effects of domestic and intimate partner violence on people in LGBT relationships as there are attendant and influential concerns related to homophobia or transphobia experienced by LGBT litigants invoking legal remedies.

13. *See generally* Tara R. Pfeifer, *Out of the Shadows: The Positive Impact of Lawrence v. Texas on Victims of Same-Sex Domestic Violence*, 109 PENN ST. L. REV. 1251 (2005) (discussing the legitimacy of relationships as recognized by United States courts).

14. *See* Sharon Cammack & Patrice Pujol, *Domestic Violence: A National Epidemic*, HOUS. LAW, Sept.–Oct. 2004, at 10 (“But all too often, gay or lesbian victims receive fewer legal and societal protections. In fact, several states reportedly define domestic violence to specifically exclude same-sex victims.”). New York is cited as one of these states. In New York, some heterosexual survivors of domestic violence are excluded from the same domestic violence protections unavailable to LGBT survivors. While this article focuses on issues specific to the LGBT communities, many of the same obstacles are faced by heterosexual survivors who are not married to, or who do not have children in common with, their partners.

sexual, omit reference to LGBT victims, and fail to account for the impact of sexual orientation or gender identity.<sup>15</sup>

This article explores intimate partner violence in the LGBT communities and the legal remedies that address it. Section II explores the legal recognition of LGBT relationships afforded by New York State, and domestic violence in the LGBT communities. Section III surveys remedies available to LGBT survivors, primarily in same-sex relationships, and concludes that the lack of legal recognition of LGBT relationships hinders LGBT survivors from protecting themselves from domestic violence and its effects. Section IV explores the impact of fragmented relief on LGBT survivors of domestic violence and examines legislation that may address this piecemeal approach. The article concludes with recommendations for holistic legislation that will better protect LGBT survivors.

## II. LEGAL RECOGNITION OF LGBT RELATIONSHIPS AND LGBT DOMESTIC VIOLENCE

### A. *Legal Recognition of Same-Sex Partnerships in New York State*

While same-sex battering in many ways mirrors heterosexual battering, both in type and in prevalence, victims of same-sex battering receive fewer protections. Despite some legislative advances, many laws fail to recognize a legal relationship between same-sex intimate partners. The recognition that a court or statute gives to a relationship largely defines the remedies available to the parties in that relationship. For bisexual and transgender people involved with someone of the opposite sex,<sup>16</sup> the relationship may be viewed as a traditional opposite-sex relationship for the purposes of marriage licenses, domestic partnerships, or other legal relationships as defined in the Family Court Act or the Domestic Relations Law.<sup>17</sup>

For lesbians, gay men, and bisexual and transgender people involved in same-sex relationships, the process of determining whether the relationships are legally recognized is more difficult. New York State law does not currently pro-

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15. This omission of identity from the statute, and the impact of identity on services provided to domestic violence survivors, has been explored in relation to race and ethnic identity. See Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving From White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061 (2006).

16. Although I have found no case law on point, from speaking to transgender activists and attorneys, it appears that for the purposes of the Family Court Act or the Domestic Relations Law, courts will likely define a relationship as heterosexual if the partner's sex is the opposite of the trans client's sex as recorded on official documents. For example, a male to female trans woman would identify as a woman, but if her driver's license still reflects "male" as her sex, courts will likely, for the purpose of granting a marriage license, define her as "male."

17. See *B v. B*, 355 N.Y.S.2d 712, 717 (Sup. Ct. Kings County 1974) ("While it is possible that defendant may function as a male in other situations and in other relationships, defendant cannot function as a husband by assuming male duties and obligations inherent in the marriage relationship. . . . Apparently, hormone treatments and surgery have not succeeded in supplying the necessary apparatus to enable defendant to function as a man for purposes of procreation.").

vide its citizens in same-sex relationships with access to legal marriage, civil unions, domestic partnerships, or other methods for recognizing and legitimizing their relationships.<sup>18</sup> Only a limited number of jurisdictions throughout the state offer formalized domestic partnership registries that are inclusive of same-sex relationships.<sup>19</sup> Without clear legislative direction, civil courts throughout the state have been left to dissect, categorize, and formalize the relationships of the litigants before them in a variety of civil contexts such as settlement of estates, access to employment-related benefits, access to marriage, dissolution of relationships, distribution of jointly held property, and tort actions. Not surprisingly, the body of New York civil law varies from court to court and county to county. The state has largely refused to accord legal recognition to same-sex relationships when asserted to be spouse-like relationships.

Over the last two decades, courts have struggled with how to define, and therefore what benefits to accord, same-sex relationships. In 1989, the New York Court of Appeals, the state's highest court, recognized that same-sex partners may qualify as "family members" under rent control law,<sup>20</sup> and then later, the First and Second Departments of the Appellate Division of the Supreme Court extended this protection to rent stabilization law.<sup>21</sup> In 1990, the Court of Appeals declined to review the surrogate court's refusal to recognize unmarried same-sex couples for the purposes of estates and trusts laws.<sup>22</sup> In 1999, there was some movement toward recognition when the First Department, although holding that same-sex partners living together in a spouse-like relationship did not enjoy a legally recognized relationship for the purposes of insurance law, suggested in dicta that a same-sex partner might qualify as a "spouse" in some contexts.<sup>23</sup> In 2005, the Third Department refused to recognize a same-sex partner as a "surviving spouse" for the purpose of seeking death benefits.<sup>24</sup> Just a few months later, the Supreme Court of New York in Westchester County held that registered domestic partnership status does not give rise to standing for a loss of consortium claim because lawful marriage is required.<sup>25</sup> In May of 2006, the Court of Ap-

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18. See *Hernandez*, 7 N.Y.3d 338.

19. See, e.g., N.Y. CITY ADMIN. CODE § 3-241 (2007); WESTCHESTER CITY CODE ch. 550 (2007); ITHACA CITY CODE pt. II, ch. 215, §§ 215.19-215.27 (2007); ALBANY CITY CODE ch. 215, §§ 12-14 (2007).

20. *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201 (1989).

21. *E. 10th St. Assocs. v. Estate of Goldstein*, 552 N.Y.S.2d 257 (1st Dep't 1990); *LaMarche v. Miles*, 234 N.Y.L.J. 19 (Civ. Ct. Kings County 2005).

22. *In re Cooper*, 564 N.Y.S.2d 684 (Sup. Ct. Kings County 1990), *aff'd*, 592 N.Y.S.2d 797 (2d Dep't 1993), *appeal dismissed*, 82 N.Y.2d 801 (1993) (finding that partners in unmarried same-sex relationships cannot be considered "surviving spouses" under the estates and trusts laws).

23. *Ortiz v. N.Y. City Transit Auth.*, 699 N.Y.S.2d 370 (1st Dep't 1999).

24. *Valentine v. Am. Airlines*, 791 N.Y.S.2d 217 (3d Dep't 2005).

25. *Lennon v. Charney*, 797 N.Y.S.2d 891 (Sup. Ct. Westchester County 2005) (holding that a derivative loss of consortium claim could not be maintained based on the claimant's status as a registered domestic partner in New York City because lawful marriage is required).

peals again declined to review a matter in which the Second Department held that a surviving partner of a same-sex Vermont civil union was not a “surviving spouse” for estates and trusts purposes.<sup>26</sup> Shortly thereafter, in August of 2006, the Supreme Court in Nassau County held that a same-sex partner has standing to bring a wrongful death action and a personal injury claim on behalf of the statutory distributees as the executor of the decedent’s estate.<sup>27</sup> The court reasoned that the partner in this action did not have to be defined as a spouse because she had standing as an executor.<sup>28</sup>

This case law suggests that the trial courts in at least some counties, and the appellate courts in others, are attempting to carve out ways to recognize the existence of same-sex relationships without affording these relationships the same benefits afforded to opposite-sex marriages. However, in July of 2006, this issue was directly addressed by the New York Court of Appeals in *Hernandez v. Robles*, when the court held that same-sex couples were not entitled to marry in New York under the current law, given the statutory language of the Domestic Relations Law.<sup>29</sup> The court reasoned that such an interpretation of the law was not an unconstitutional violation of equal protection, and called upon the legislature to determine whether to provide such access to legal marriage.<sup>30</sup> Within days, the New York Supreme Court in Nassau County, relying on *Hernandez*, declined to recognize a Canadian same-sex marriage for the purpose of health insurance coverage for a same-sex spouse.<sup>31</sup> Subsequently, in *Gonzalez v. Green*, the trial court refused to recognize a marriage performed in Massachusetts, and instead found it void under the laws of both New York (because the union was between two men and not one man and one woman) and Massachusetts (because residency, which the parties conceded they did not have, was required by Massachusetts law).<sup>32</sup> The court in *Gonzalez* did not reach the issue of whether New York will recognize an out-of-state same-sex marriage if it is valid under the laws of the marrying state.<sup>33</sup>

In 2001 and 2002, in response to the September 11, 2001 attacks on the World Trade Center, the governor and the New York State Legislature provided

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26. *Langan v. St. Vincent’s Hosp. of N.Y.*, 802 N.Y.S.2d 476 (2d Dep’t 2005), *appeal dismissed*, 6 N.Y.3d 890 (2006) (finding that a surviving partner of a same-sex Vermont civil union could not bring a wrongful death action arising from his partner’s death).

27. *Saegert v. Simonelli*, 824 N.Y.S.2d 758 (Sup. Ct. Nassau County 2006).

28. *Id.*

29. 7 N.Y.3d at 356.

30. *Id.* at 356–66.

31. *Funderburke v. N.Y. State Dep’t of Civil Serv.*, 822 N.Y.S.2d 393, 394 (Sup. Ct. Nassau County 2006) (finding that a retired teacher was not entitled to health insurance coverage for his spouse because the Canadian same-sex marriage was not between a man and a woman).

32. *Gonzalez v. Green*, 831 N.Y.S.2d 856 (Sup. Ct. N.Y. County 2006).

33. *Id.*

some direction to the courts in considering same-sex relationships. This legislation defined same-sex surviving partners as “surviving spouses” for the purposes of receiving benefits from the Crime Victims Board,<sup>34</sup> the September 11 Federal Fund awards,<sup>35</sup> workers’ compensation death benefits,<sup>36</sup> and the state’s World Trade Center Memorial Scholarship program.<sup>37</sup> In 2003, the state extended to same-sex partners of credit union members the right to become members and have full access to banking services.<sup>38</sup> In 2004, the governor and the New York State Legislature passed a bill that provides domestic partners with the right of visitation accorded to spouses and next-of-kin at any hospital, nursing home, or health care facility.<sup>39</sup>

When addressing relationships that fall short of spousal relationships, such as domestic partnerships, same-sex relationships fare slightly better in New York than in other states. Domestic partnerships, including same-sex domestic partnerships, are recognized by a few localities,<sup>40</sup> but they do not confer the state and federal protections or privileges of marriage, and they do not give partners direct access to traditional legal protection from domestic violence.<sup>41</sup> For example, the rights conferred by New York City upon a domestic partnership include (1) bereavement leave and childcare for New York City employees, (2) visitation in correctional and juvenile detention centers, (3) visitation in facilities operated by the New York City Health and Hospitals Corporation, (4) eligibility to qualify as a family member to be added by the New York City Housing Authority to an existing tenancy as a permanent resident, (5) eligibility to qualify as a family member entitled to succeed a tenant or cooperator in the tenancy or occupancy of a building supervised by the Department of Housing Preservation and Development, and (6) health benefits provided by New York City to its employees and retirees and eligible members of their families pursuant to stipulation or collective bargaining.<sup>42</sup> In February 2006, the governor signed the Control of Remains bill that extends control over a partner’s corpse to the domestic partner, both same- and opposite-sex.<sup>43</sup> However, as family courts are courts of limited juris-

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34. N.Y. COMP. CODES R. & REGS. tit. 9, § 5.113.30 (2001).

35. Workers’ Compensation, Estates, Powers and Trusts, Surrogate’s Court Procedure Act—“September 11th Victims and Families Relief Act,” 2002 N.Y. Sess. Laws 358 (McKinney).

36. Workers’ Comp.—Domestic Partners—Death Benefits, 2002 N.Y. Sess. Laws 1237 (McKinney).

37. Education—World Trade Center Membership Scholarships, 2002 N.Y. Sess. Laws 849 (McKinney).

38. Banks and Bank—Credit Unions—Requirements, 2003 N.Y. Sess. Laws 1393 (McKinney).

39. N.Y. PUB. HEALTH LAW § 2805-q (2007).

40. *See, e.g.*, N.Y. CITY ADMIN. CODE § 3-241 (2006); WESTCHESTER CITY CODE ch. 550 (2007); ITHACA CITY CODE pt. II, ch. 215, §§ 215.19–215.27 (2007); ALBANY CITY CODE ch. 215, §§ 12–14 (2007).

41. When recognized, domestic partnerships do confer some privileges and a legal status to same-sex couples who are so partnered.

42. N.Y. CITY ADMIN. CODE § 3-244 (2006).

43. Press Release, Empire State Pride Agenda, Governor Signs Control of Remains Bill (Feb. 3, 2006), available at <http://www.prideagenda.org/pressreleases/2006/pr-02-03-06.htm>. The bill provides for



diction in New York, only those specifically enumerated classes of individuals defined as family or household members may be granted access to the protections outlined in the Family Court Act.<sup>44</sup> A “domestic partner” does not qualify for family or household membership status under the Family Court Act and, to date, there have been no legal challenges or efforts in family courts to obtain such status for this class of persons. In addition, a domestic partner does not qualify as a “spouse” under the Domestic Relations Law.<sup>45</sup>

Over the past few years, the courts and the legislature have struggled to define same-sex partnerships with varying results. There are no statutes or case law that specifically address the intersection of domestic violence and the LGBT communities in New York. One concept that becomes clear when examining the conclusions of different judges and legislators throughout the state, however, is that the protections created for “victims of domestic violence” exclude LGBT survivors.

### B. *Defining Domestic Violence*

For the LGBT communities fighting for equality and the legitimization of their relationships, it is difficult to admit that battering occurs (for fear of portraying LGBT relationships as violent), while simultaneously seeking legal and societal approval for these relationships. However, domestic, or intimate partner, violence occurs within the LGBT communities<sup>46</sup> with the same statistical frequency as in the heterosexual community.<sup>47</sup> The prevalence of domestic violence among gay and lesbian couples is approximately 25 to 33 percent.<sup>48</sup> Each year between fifty thousand and one hundred thousand lesbians and as many as five hundred thousand gay men are battered.<sup>49</sup> Although few studies have been

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equal standing for spouses and domestic partners above blood relationships like adult children, parents, and adult siblings. *Id.*

44. N.Y. FAM. CT. ACT § 812(1).
45. *See Funderburke v. N.Y. State Dep't of Civil Serv.*, 822 N.Y.S.2d 393 (Sup. Ct. Nassau County 2006) (holding that a Canadian same-sex marriage would not be recognized as a marriage in New York State because it was not between a man and a woman).
46. *See* Panelists of the Revolutions Within Communities: The Fifth Annual Domestic Violence Conference, *Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, 29 FORDHAM URB. L.J. 121 (2001).
47. DOLAN-SOTO & KAPLAN, *supra* note 3; *see also* Joanna Bunker Rohrbaugh, *Domestic Violence in Same-Gender Relationships*, 44 FAM. CT. REV. 287 (2006) (suggesting that while domestic violence may occur at the same statistical frequency in both same- and opposite-sex relationships, it may be milder in same-sex relationships than in opposite-sex relationships).
48. DOLAN-SOTO & KAPLAN, *supra* note 3.
49. Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 340 (1995).

done, preliminary data suggests that domestic violence may occur at a higher rate in transgender relationships.<sup>50</sup>

As in the heterosexual community, domestic violence in the LGBT communities is generally defined as a pattern of behavior in which one partner coerces, dominates, or isolates the other partner.<sup>51</sup> It is the exertion of any form of power that is used to maintain control in a relationship. The violence can be physical, emotional, sexual, psychological, or economic. Same-sex batterers use tactics of abuse similar to those of heterosexual batterers. However, some forms of battering are unique to the LGBT communities. Batterers in same-sex relationships have an additional social weapon in their arsenal. Same-sex batterers are able to successfully exploit their victims' internalized, or the community's externalized, homophobia, biphobia, or transphobia, simply by threatening to "out" their partners' sexual orientation or gender identity to family, friends, employers, landlords, or other community members.<sup>52</sup> As further explained by the New York City Gay and Lesbian Anti-Violence Project:

[LGBT] abusers have some additional tools at their disposal; heterosexism, homophobia, transphobia and biphobia. Heterosexism refers to the presumption that heterosexual relationships are the 'right,' only or preferred form of relationship. Homo/trans/bi-phobias refer to fear, ignorance and hatred of [LGBT] persons. Heterosexism, as well as the other phobias, can be exhibited or used by people of any sexual orientation or gender identity. [LGBT] abusers use these biases and stigmas to convince their victims that no one else will care about them, and that if victims seek assistance from others, they may be at risk for bias or even abuse, unfortunately not an unfounded concern.

[LGBT] abusers may also use these biases within relationships to control their victims' forms of self-expression or social contact with others.<sup>53</sup>

Same-sex survivors of domestic violence faced with custody battles worry that their sexual orientation will negatively impact their cases, and decide to stay with their abusers rather than risk losing custody or visitation rights. Batterers who abuse their transgender partners often tell their partners that no one will

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50. See Survivor Project, <http://www.survivorproject.org/survivor.html> (last visited Sept. 1, 2007). This may be due to societal transphobic responses to transgender people. Arlene Istar Lev & S. Sundance Lev, *Sexual Assault in the Transgender Communities*, F.O.R.G.E., Oct. 15, 1999, at 7, available at [http://my.execpc.com/~dmmunson/Nov99\\_7.htm](http://my.execpc.com/~dmmunson/Nov99_7.htm).

51. See Michelle Madden Dempsey, *What Counts As Domestic Violence? A Conceptual Analysis*, 12 WM. & MARY J. WOMEN & LAW 301 (2006).

52. Michelle Aulivola, *Outing Domestic Violence*, 42 FAM. CT. REV. 162, 164 (2004) ("Abusers in gay and lesbian relationships often threaten 'outing,' or divulging a partner's sexual orientation to family, friends, employers, or the community in general in an attempt to keep the victim from reporting the acts of violence and to force them to remain in the abusive relationship.")

53. DOLAN-SOTO & KAPLAN, *supra* note 3, at 3-4.

understand or love them because of their gender identity or transition process; or they may threaten to evict their transgender partners, leaving the survivors homeless and facing dangers on the streets, in homeless shelters, and in a discriminatory job market. Survivors face further isolation because they are reluctant to access services that are not perceived as LGBT-friendly. For LGBT survivors, their batterers are often the first or the only persons to accept their sexual orientation or gender identity, and batterers use this knowledge to keep survivors isolated.<sup>54</sup>

### III. LEGAL REMEDIES AVAILABLE TO LGBT SURVIVORS OF DOMESTIC VIOLENCE IN NEW YORK STATE

#### A. Addressing LGBT Domestic Violence

Legal, social, and academic responses to domestic violence in the LGBT communities are largely acknowledged to be inadequate. Theories for this inadequacy include homophobia within the legal system,<sup>55</sup> lack of knowledge of agencies and organizations that would otherwise respond to the violence,<sup>56</sup> the reluctance of LGBT community members to discuss domestic violence,<sup>57</sup> and the lack of attention the issue has received from LGBT rights and anti-domestic violence advocates.<sup>58</sup>

LGBT survivors cannot access the commonly used legal protection of civil orders of protection, however, because they lack standing under the Family Court Act.<sup>59</sup> Although bisexual and transgender individuals who marry opposite-sex partners and same-sex partners who adopt children in common may be able to use this remedy,<sup>60</sup> the definition of family prevents the majority of LGBT people

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54. See Aulivola, *supra* note 52; Leti Volpp, *On Culture, Difference, and Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 393 (2003).

55. See Krisana M. Hodges, *Trouble in Paradise: Barriers to Addressing Domestic Violence in Lesbian Relationships*, 9 L. & SEXUALITY 311, 331 (1999–2000) (“The obstacles lesbian battered women currently face—homophobia, discrimination, and statutory exclusion—are institutionally entrenched. Including the experiences of victims of same-sex domestic violence in the legal and political efforts to strengthen domestic violence laws is not enough to move mountains of legal oppression; however, statutory changes may combine with increased theoretical awareness to provide real and more complete legal protection for these victims.”).

56. See Sandra E. Lundy, *Abuse that Dare Not Speak its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273 (1993).

57. See Kathleen Finley Duthu, *Why Doesn't Anyone Talk About Gay and Lesbian Domestic Violence?*, 18 T. JEFFERSON L. REV. 23 (1996).

58. See Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325 (1999).

59. See N.Y. FAM. CT. ACT §§ 812(1), 821. Bills that would expand the definition of “family” for purposes of the Family Court Act to allow LGBT people (among other unrelated persons in intimate or dating relationships) access to the family courts have been proposed in the New York State Legislature since 1988.

60. It is well established that same-sex couples in New York may adopt children in common, and that applications for adoption may not be denied on the basis of the applicant’s sexual orientation. N.Y. COMP.

in long-term, committed relationships, most of whom are not married and do not have children in common,<sup>61</sup> from obtaining this relief in family courts.<sup>62</sup>

Advocates have asserted that domestic violence must be addressed by a holistic, multi-tiered approach.<sup>63</sup> First, domestic violence survivors and their children must be safe from imminent harm.<sup>64</sup> This is often accomplished through court orders that protect the survivor and his or her children, and provide for limited contact with the abuser when custody, visitation, or housing issues are implicated.<sup>65</sup> Second, survivors must be free to live autonomously from the abusers.<sup>66</sup> These needs are farther reaching and take more time to address, as they invoke long-term decisions about children as well as housing and economic issues.<sup>67</sup> New York laws address these issues through an overlapping system of family laws and matrimonial laws for heterosexual partners who are married or who have children.<sup>68</sup> These provisions, as discussed in detail below, at times protect LGBT survivors and at times do not. Much domestic-violence-related relief, such as the legal dissolution of a relationship, resolution of custody, visitation and support issues, and distribution of joint property, is available to married

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CODES R. & REGS. tit. 18, § 421.16(h) (2007); *In re Adoption of Anonymous*, 622 N.Y.S.2d 160 (4th Dep't 1994). A same-sex partner of a child's biological mother may adopt the child regardless of the partner's sexual orientation. *In re Jacob*, 86 N.Y.2d 651 (1995). The partners of a same-sex couple may adopt jointly by what is known as a two-parent adoption. *In re the Adoption of Carolyn B.*, 774 N.Y.S.2d 227 (4th Dep't 2004). This adoption of a child confers upon the two parents a legally recognized relationship. *See id.* New York also permits gay men and lesbians to become foster parents. *See In re the Adoption of Jessica N.*, 609 N.Y.S.2d 209 (1st Dep't 1994). Adoptions by same-sex couples, when challenged by one partner after a break up, will not lightly be set aside. *See Turner v. Hembrooke*, 785 N.Y.S.2d 772 (3d Dep't 2004).

61. Also excluded from this definition are opposite-sex couples who choose not to get married and do not have children in common, and teenagers who are too young to marry and do not have children in common, among other groups.
62. Although New York does not allow most LGBT people to use the family or supreme courts to obtain orders of protection, the New York City Criminal Court has held that New York courts must give full faith and credit to orders of protection from other states, even if they are issued to same-sex couples who would not be entitled to the same relief in New York. *People v. Hadley*, 658 N.Y.S.2d 814 (Crim. Ct. Richmond County 1997).
63. *See, e.g., Lowell D. Castleton et al., ADA County Family Violence Court: Shaping the Means to Better the Result*, 39 FAM. L.Q. 27, 51 (2005).
64. *See Donna Coker, Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 835 (2001).
65. *See Anne C. Johnson, From House to Home: Creating a Right to Early Lease Termination for Domestic Violence Victims*, 90 MINN. L. REV. 1859 (2006).
66. *See Peter Margulies, Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071 (1995).
67. *See Donna Coker, Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009 (2000).
68. *See generally* N.Y. DOM. REL. LAW § 240 (2007); N.Y. FAM. CT. ACT arts. 4, 6 & 8 (2007).

survivors under the Domestic Relations Law. However, most LGBT survivors do not have standing to invoke this relief.<sup>69</sup>

### *B. Domestic Violence Remedies for LGBT Survivors*

New York judicial and legislative efforts have created some specific legal rights for same-sex couples, but few of these rights are protections from domestic violence. For example, one significant remedy is compensation from the Crime Victims Board, which was recently extended to all domestic partners, including same-sex partners.<sup>70</sup>

Many groups have long recognized the insufficient response to domestic violence for LGBT citizens. In its periodic reports to the governor, the Office for the Prevention of Domestic Violence, which evaluates mandatory arrest laws and other practices in New York, has noted that an expansion of the definition of family and household member to include these families is necessary.<sup>71</sup> In its report to the Chief Judge in 2005, the New York State Matrimonial Commission recognized the difficulty of applying current domestic violence remedies to LGBT relationships, and recommended that remedies be expanded.<sup>72</sup> As discussed in detail in Section IV of this article, remedial legislation has been pending since 1988; however, for nearly twenty years, the New York Senate has refused to move the bill out of committee and onto the senate floor for a vote.

Although same-sex couples without children in common are ineligible for civil orders of protection, criminal court orders are available.<sup>73</sup> The Criminal Procedure Law provides for protections for survivors of family offenses, similar to civil orders of protection, when the parties have a relationship of “family” as

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69. It is unlikely that LGBT partners will receive legal recognition of their relationships through marriage or a marriage-like union. The New York Court of Appeals, in 2006, determined that the lack of access to marriage did not violate the rights of same-sex couples in New York State. *Hernandez v. Robles*, 7 N.Y.3d 338 (2006).

70. This protection is not limited to victims of September 11th, but extends to all crime victims. N.Y. COMP. CODES R. & REGS. tit. 9 §§ 525.1, 525.2 (2007).

71. SUZANNE CECALA & MARY M. WALSH, N.Y. STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, *NEW YORK STATE’S RESPONSE TO DOMESTIC VIOLENCE: SYSTEMS AND SERVICES MAKING A DIFFERENCE* (2006), available at [http://www.opdv.state.ny.us/about\\_dv/nyresponse/nysdv.pdf](http://www.opdv.state.ny.us/about_dv/nyresponse/nysdv.pdf).

72. SONDR A MILLER, MATRIMONIAL COMM’N, *REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK* (2006), available at <http://www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf>. Although the New York State Assembly has proposed and passed legislation that would expand the Family Court Act to include unmarried couples without children in common, the measure has never passed the Senate. *Id.*

73. Under the expanded New York City Police Department definition, a family or household includes persons who are not legally married, but are currently living together in a family-type relationship; persons who are not legally married, but formerly lived together in a family-type relationship; and persons who are registered New York City domestic partners. The content of the order of protection obtained in criminal court will vary depending upon whether the parties meet the definition of “family” under the Family Court Act. See CECALA & WALSH, *supra* note 71 at 7.

defined by the Family Court Act.<sup>74</sup> These provisions include orders to stay away, orders to refrain from committing family offenses, visitation terms, protection for children and family and household members, permission to enter a residence to remove personal belongings, and any other terms the court finds necessary to protect the complainant.<sup>75</sup> In contrast, the Criminal Procedure Law section that applies to crimes other than family offenses grants criminal courts the power to issue only orders to stay away and refrain from harassment, intimidation, threats, or other interference with the proceeding.<sup>76</sup> New York has a mandatory arrest law<sup>77</sup> that requires that a police arrest be made under delineated circumstances,<sup>78</sup> and requires that a primary aggressor determination be made when there is a contemplation of mutual arrests for misdemeanors.<sup>79</sup> LGBT victims of domestic violence are protected by the mandatory arrest law only if the police respond to an abusive incident as a domestic incident committed by a family or household member.<sup>80</sup> An appellate court has ruled that a domestic incident report should be filled out even when the parties are not family or household members within the meaning of the Family Court Act.<sup>81</sup> This protection is often unpredictable as police department practices vary throughout the state.<sup>82</sup> Additionally, the police often do not perceive incidents of domestic, or intimate partner, violence as such between same-sex couples, and instead assume that the dispute is a discrete argument. Even if the police acknowledge and understand the intimate nature of the relationship between the parties, the officers often fall victims to stereotypes that interfere with the proper implementation of the mandatory arrest law. For example, an officer may assume that the primary aggressor is the more masculine-identified partner, or that an incident of domestic violence between gay male partners does not require police intervention because, as men, each partner can handle himself.

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74. N.Y. CRIM. PROC. LAW § 530.11(1) (McKinney 2007); N.Y. FAM. CT. ACT § 812(1)(a)–(d).

75. N.Y. CRIM. PROC. LAW § 530.12.

76. *Id.* § 530.13.

77. While a discussion of mandatory arrest laws is generally beyond the scope of this article, it is important to note that mandatory arrests are not uniformly viewed as an appropriate response to domestic or intimate partner violence. *See, e.g.*, Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994).

78. N.Y. CRIM. PROC. LAW § 140.10(4). New York State law requires that an arrest be made if the police have reasonable cause to believe that certain felonies have been committed by “family and household members,” or that the respondent or defendant has been duly served with an order of protection and has violated the order, or that specified misdemeanors have occurred and the complainant does not affirmatively, and without being questioned by the police, ask for the police not to arrest. *Id.*

79. *Id.* § 140.10(4)(c).

80. *Id.* § 140.10.

81. *Groves v. State Univ. of N.Y. at Albany*, 707 N.Y.S.2d 261 (3d Dep’t 2000).

82. *See* CECALA & WALSH, *supra* note 71.

Although the criminal justice system is available to LGBT survivors, LGBT survivors view this system with trepidation.<sup>83</sup> Many survivors of domestic violence have themselves had past homophobic or transphobic interactions with the police and do not view law enforcement as available to the LGBT communities. Survivors who would otherwise call the police are often afraid to do so because of a fear of what the police will do to their partners once the partners are in custody. LGBT community members have a sense of how the police have reacted, or failed to react, to LGBT hate and bias crimes, and wonder if the police department is a safe place to seek help. In addition, criminal court orders of protection require a higher burden of proof than family court orders, which makes proving lower level domestic violence allegations beyond a reasonable doubt more difficult, as these crimes are often verbal threats that were witnessed only by the victim. Criminal court orders, particularly those not recognizing the intimate nature of the relationship, also fail to provide the protection that a civil court order of protection would.<sup>84</sup> Although available, same-sex litigants are often fearful of invoking these judicial protections as they report a perceived bias in the New York court system and a fear that judges are not properly educated, and that district attorneys' offices do not comprehensively understand issues particular to LGBT survivors.<sup>85</sup>

### C. Custody and Visitation Protections

When there is a legal relationship between a child and both same-sex partners or opposite-sex bisexual or transgender partners, whether through adoption, marriage, or an order of filiation, courts look to the "best interests of the child," in determining custody and visitation matters.<sup>86</sup> The Domestic Relations Law requires a court to consider the effect of domestic violence on the child in determining custody or visitation, which applies to LGBT custody determinations.<sup>87</sup> If there is no legal relationship between the child and one of the partners, courts

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83. See Adele M. Morrison, *Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen when Queer Theory and Practice Meet Criminal Law's Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN'S STUD. 81, 94 (2003) ("As with those who identify as belonging to other subordinated communities, LGBT individuals, even those who have been victimized, are often reluctant to bring the law into their homes. One reason for this is that police often respond differently when called to a same-sex domestic violence incident than when called to a different-sex domestic violence incident.").

84. See Pamela M. Jablow, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1111 (2000) ("Opponents of protecting gays and lesbians under the domestic violence statutes reason that battered homosexuals are not being denied equal protection because they have the option of pressing criminal charges. This argument fails to consider the differences in civil and criminal system and the benefits associated with civil protection orders.").

85. See MILLER, *supra* note 72.

86. N.Y. DOM. REL. LAW § 240(1)(a).

87. *Id.* § 240(1).

treat the unrelated parent as a legal stranger, who must show extraordinary circumstances, such as unfitness of the parent, before the courts will consider the child's best interest.<sup>88</sup> Because the law affords few protections, survivors of domestic violence who are not the legal parents of children may stay with their abusive partners to maintain contact with the children.

New York courts have afforded no help to same-sex partners who have not adopted the children of their partners. In 1991, the Court of Appeals held that a long-term same-sex partner who planned with the biological mother to conceive children with the intent of raising the children together as a family did not have a right to visitation unless the child was adopted.<sup>89</sup> Another New York court has since held that the doctrine of equitable estoppel is also unavailable to a same-sex partner seeking custody of a non-adopted child, and that *parens patriae* did not provide a basis for granting standing to the former lesbian partner of the biological mother of two siblings, one of whom the partner had adopted and the other she had not yet adopted.<sup>90</sup>

Recently, the New York Supreme Court, Kings County, in *Cannisi v. Walsh*, addressed the lack of legal protection for same-sex couples with children in a separation agreement action.<sup>91</sup> The *Cannisi* court used the best interests of the child standard to determine how to distribute property in a dissolving partnership in which the partners were both parents of the child.<sup>92</sup> The court pointed

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88. *In re Doc*, 779 N.Y.S.2d 907 (Fam. Ct. Kings County 2004) (“[A legal] ‘stranger’ has standing [to seek custody of a child] only if it is shown that the birth parent is unfit, or has abandoned the child, or that similarly ‘extraordinary’ circumstances exist that permit the court to weigh custody in light of the child’s best interests.”).

89. *In re Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991).

90. *In re C.M. v. C.H.*, 789 N.Y.S.2d 393 (Sup. Ct. N.Y. County 2004); see also *In re Janis C. v. Christine T.*, 742 N.Y.S.2d 381 (2d Dep’t 2002) (holding that the doctrine of equitable estoppel is unavailable to a previous same-sex partner seeking visitation when the partner is neither the biological nor the adoptive parent of the child); *Multari v. Sorrell*, 731 N.Y.S.2d 238 (3d Dep’t 2001) (dismissing the claim for visitation of a former heterosexual partner of a child’s biological mother, because the former partner was neither the biological nor the adoptive parent of the child).

91. No. 52075, slip op. at 1 (Sup. Ct. Kings County 2006).

92. *Id.* at 5 (“The Legislature has failed to create a mechanism to ensure the welfare of dependent children of separating same sex couples. Although the Legislature has yet to act, it is antithetical to public policy and inconsistent with existing legislation to believe the Legislature intends that the interests of the minor children of a same sex relationship should not be considered in dividing the assets of the couple. Notwithstanding the absence of a clear directive from the Legislature, the Court must fashion a remedy to deal with the dispute before it. In determining, what would be equitable in dividing the proceeds of the sale, the respective roles the parties assumed in the relationship, as well as any understandings by the parties regarding support of the children of the relationship must be considered. It is appropriate and necessary in determining how to divide the proceeds of the sale equitably, to take into consideration the intentions of the parties in deciding to raise a family, in addition to the contributions made to this particular property. The question at present, however, is not how the proceeds shall be divided; rather it is to decide whether information regarding Plaintiff’s retirement account is relevant to determining how the proceeds should be divided. Broad discovery will provide the parties an opportunity to fully develop their arguments, ensuring thorough consideration of all of the facts relevant to equitably distributing the proceeds. This is espe-



out the lack of a mechanism to protect children when dissolving the relationships of their same-sex parents, and incorporated an analysis of the children's needs to determine how to distribute property equitably.<sup>93</sup>

*D. Basic Economic Protections Available to LGBT Survivors of Domestic Violence*

Given the problems associated with obtaining civil orders of protection for LGBT survivors and the attendant problems associated with using the criminal system, safety planning often takes the form of increased financial assistance for LGBT survivors of domestic violence. In staying safe from domestic violence, it is imperative that survivors have a means by which to develop economic self-sufficiency.<sup>94</sup> Survivors who are unable to meet basic economic needs, such as housing and food, are often trapped in abusive relationships. Survivors wishing to safeguard joint assets may stay in abusive relationships rather than risk losing assets that they have contributed to, but do not share title in. Survivors may fear losing their jobs if they take action to prevent the domestic violence either because the abuser will “out” them at work or because engaging in the criminal justice system is time-consuming and means time away from work. New York State’s Sexual Orientation Non-Discrimination Act (“SONDA”)<sup>95</sup> prohibits discrimination on the basis of sexual orientation in employment, education, and housing accommodation.<sup>96</sup> While SONDA is useful for individuals who can demonstrate that their discrimination was based upon their sexual orientation, it does not

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cially indicated where, the interests of two minor children are impacted and there is no undue prejudice to either party.”).

93. *Id.*

94. See Wendy R. Weiser & Deborah A. Widiss, *Representing Domestic Violence Victims in the Workplace*, in *LAWYER’S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM* 237 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 5th ed. 2006), available at <http://www.courts.state.ny.us/ip/womeninthecourts/DV-Lawyers-Manual-Book.pdf>; Pami Vyas, *Reconceptualizing Domestic Violence in India: Economic Abuse and the Need for Broad Statutory Interpretations to Promote Women’s Fundamental Rights*, 13 *MICH. J. GENDER & L.* 177 (2006); Margaret Graham Tebo, *When Home Comes to Work*, 91 *A.B.A.* 42 (2005).

95. Executive, Civil Rights, Education—Discrimination Based on Sexual Orientation, 2002 N.Y. Sess. Laws 48 (McKinney).

96. Notably, SONDA does not protect transgender people from discrimination based on gender identity; however, if a trans person identifies as gay, lesbian, or bisexual, and is discriminated against because of sexual orientation, and not because of gender identity, the discrimination would be prohibited under SONDA. Many people argue that the “gender” and “sex” clauses in the New York State Human Rights Law protect trans people from gender identity discrimination. The New York City Administrative Code was recently amended to more clearly and accurately reflect this intention in New York City. *NEW YORK CITY COMM’N ON HUMAN RIGHTS, GUIDELINES REGARDING “GENDER IDENTITY” DISCRIMINATION, A FORM OF GENDER DISCRIMINATION PROHIBITED BY THE NEW YORK CITY HUMAN RIGHTS LAW*, available at [http://www.srlp.org/documents/trans\\_guidelines\\_final.pdf](http://www.srlp.org/documents/trans_guidelines_final.pdf) (last visited Sept. 4, 2007) (providing guidelines interpreting the Human Rights Law that was passed in 2002 to protect the people of New York City from discrimination on the basis of gender identity or expression).

protect them from discrimination based upon their status as “victims of domestic violence.”<sup>97</sup> Many of the laws that are designed to offer economic protection to survivors of domestic violence include LGBT survivors; however, some, like equitable distribution of the assets of the partners, do not.

For survivors, meeting basic economic needs often means relying on public assistance. Under the New York City and New York State anti-discrimination laws, LGBT public assistance recipients should be treated like any other public recipient is treated. Sexual orientation and gender identity have no effect on eligibility for public assistance, and the Family Violence Option (also known as the “domestic violence waiver”) is available to LGBT survivors.<sup>98</sup> However, prejudice and confusion about sexual orientation or gender identity issues make getting public assistance and domestic violence protections difficult for LGBT survivors. Additionally, public assistance workers may not be educated about the cultural differences in the LGBT communities, or about the dynamics unique to domestic violence in these communities. These workers may therefore make incorrect assumptions about the abuse and the risks faced by survivors when determining waivers under the Family Violence Option.

For working survivors, maintaining job security is of paramount concern.<sup>99</sup> New York does not provide its citizens who are experiencing domestic violence with a large amount of employment-based protections. New York State has a penal provision that criminalizes retaliatory action taken against an employee who must attend court proceedings in order to obtain an order of protection in criminal or family court or who must participate in criminal proceedings.<sup>100</sup> This law does not contain any limitations based upon family or matrimonial status that would determine the entitlement to protection. The New York City Administrative Code also protects resident domestic violence survivors from discrimination by employers.<sup>101</sup> New York City resident survivors may also be eligible for protections such as workplace accommodations,<sup>102</sup> time off for court

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97. See generally Weiser & Widiss, *supra* note 94; Vyas, *supra* note 94; Tebo *supra* note 94.

98. See Amy E. Schwartz & Sharon Stapel, *Public Assistance and Housing: Helping Survivors Navigate Difficult Systems*, in *LAWYER'S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM* 255 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 5th ed. 2006), available at <http://www.courts.state.ny.us/ip/womeninthecourts/DV-Lawyers-Manual-Book.pdf> (providing a detailed discussion on the Family Violence Option, and other public assistance considerations for domestic violence survivors).

99. See Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution when Domestic Violence Comes to Work?*, 12 *MICH. J. GENDER & L.* 275 (2006) (providing an in-depth survey of remedies used to assist survivors of domestic violence in the employment setting); see also Janet Mickish, *Domestic Violence: "Make it your Business" A Huge Success*, 33 *COLO. LAW.* 49 (2004); Sandra S. Park, *Working Towards Freedom from Abuse: Recognizing a "Public Policy" Exception to Employment-at-Will for Domestic Violence Victims*, 59 *N.Y.U. ANN. SURV. AM. L.* 121 (2003).

100. N.Y. PENAL LAW § 215.14 (McKinney 2007).

101. N.Y. CITY ADMIN. CODE § 8-107.1(2) (McKinney 2007).

102. *Id.* § 8-107.1(3)(a).

proceedings,<sup>103</sup> short-term disability benefits, and unemployment insurance benefits.<sup>104</sup>

*E. Housing and Domestic Violence*<sup>105</sup>

Many LGBT survivors of domestic violence, like other survivors, face homelessness; however, homeless shelters, even domestic violence shelters, often do not provide appropriate services for LGBT survivors. Under the New York City and New York State anti-discrimination laws, LGBT homeless people and subsidized housing tenants should be treated in a non-discriminatory manner. However, it is not considered discriminatory to refuse to shelter gay men in a shelter if it is a single-sex unit for women because anti-discrimination laws specifically allow for single-sex shelters.<sup>106</sup> There are also specific problems for transgender survivors who may be identified by shelter providers by their gender assigned at birth, and therefore assigned to the single-sex shelters that do not correspond with the survivors' gender identity. In New York City, the Department of Homeless Services ("DHS") has released a very helpful policy directive about sheltering transgender clients in homeless shelters.<sup>107</sup> The DHS policy states that "a client's gender is determined by his or her gender identity," and gender identity shall be determined by asking "the client how he or she identifies, irrespective of legal documents or physical appearance."<sup>108</sup>

All domestic violence survivors who are in imminent danger and have no safe place to live are eligible for shelter regardless of sex, gender, immigration status, family size, income, state, community, origin, or any other factor. However, because of space restrictions or staffing limitations, some shelters limit the number of beds available for large families, single people, men, residents with older male children, or residents with disabilities. Many domestic violence shelters have sheltered lesbians for years, although not all shelters have a residential service program that is geared toward same-sex domestic violence.<sup>109</sup> Some do-

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103. See N.Y. PENAL LAW § 215.14.

104. See Weiser & Widiss, *supra* note 94 at 244–45.

105. For a discussion of other domestic violence related housing options, see Schwartz & Stapel, *supra* note 98.

106. See N.Y. CITY ADMIN. CODE § 8-107(5)(k) ("The provisions of this subdivision which prohibit distinctions on the basis of gender and whether children are, may be or would be residing with a person shall not apply to dormitory-type housing accommodations including, but not limited to, shelters for the homeless where such distinctions are intended to recognize generally accepted values of personal modesty and privacy or to protect the health, safety or welfare of families with children.").

107. N.Y. City Dep't of Homeless Serv., Procedure No. 06-1-31 (Jan. 31, 2006), *available at* <http://www.transgenderlaw.org/resources/DHStransgenderpolicyfinal020206.pdf>.

108. *Id.* at 2.

109. Although lesbians and bisexual women generally do not have trouble finding shelter space designated for women, often the shelter is not equipped to address issues of sexual orientation or same-sex violence. Gay men, as all men do, have a more difficult time finding domestic violence shelters because many shelters have dormitory style housing and therefore may be designated as single sex. Transgender clients whose birth certificates reflect their gender assigned at birth and not their gender identity, and transgender

mestic violence shelters have specifically addressed sheltering gay men and lesbian survivors of domestic violence.<sup>110</sup> Notably, the New York State shelter regulations do not require that shelter space go only to those who are born biologically female; however, the vast majority of those in need of services have been female survivors of heterosexual domestic violence. As a result, most domestic violence shelters do not have the physical space to serve individuals of different genders within their existing structures. Some domestic violence programs that have more flexible space arrangements, or safe home networks, have the ability to house gay male or transgender male residents. However, most domestic violence survivors, regardless of gender identity or sexual orientation, do not need residential domestic violence services, rather they need support and assistance from a program's non-residential services, such as advocacy, support, and counseling. LGBT survivors of domestic violence report feeling re-victimized by the shelter system, the shelter staff, and the other residents' homophobic or transphobic behavior.<sup>111</sup> This may be changing as the New York State Senate recently appropriated \$400,000 to create the "lesbian, gay, bisexual and transgender domestic violence fund," which will make "the moneys of the fund available to support the development of community lesbian, gay, bisexual and transgender domestic violence education and services."<sup>112</sup>

#### F. Name Changes

Some survivors of domestic violence choose to change their names to evade their partners' attempts to find them.<sup>113</sup> While there are provisions that are well-established for name changes on behalf of victims of domestic violence and stalking,<sup>114</sup> transgender people have experienced, for some time, difficulty in changing their names for any reason. Initially, some courts, although not all, prohibited name changes of transgender applicants absent proof of gender reas-

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clients who do not "pass" as easily in their gender identity presentation (e.g., a "masculine" looking transgender woman) are often denied shelter or are sheltered in an inappropriate single-sex shelter. The most commonly heard reason for turning trans women away from women-only DV shelters is that the other shelter residents will not feel comfortable with a trans woman. This is transphobia and must be addressed through education and information to shelter staff and residents.

110. In New York City, Safe Horizon has a dedicated apartment for LGBT clients and, so far, has used it to house gay, lesbian, and trans women. Safe Horizon attorneys work closely with the New York City Anti-Violence Project ("AVP") and receive both LGBT referrals and on-going training from AVP. As well, shelters such as the Safe Homes Project and Help USA have worked to include LGBT populations in their shelter systems.

111. DOLAN-SOTO & KAPLAN, *supra* note 3.

112. N.Y. State Assemb., A03378, 2007–2008 Reg. Sess., *available at* <http://assembly.state.ny.us/leg/?bn=A03378>.

113. Name changes based on same-sex relationship status are acceptable absent an intent to defraud or misrepresent. *In re Daniels*, 773 N.Y.S.2d 220 (N.Y. Civ. Ct. N.Y. County 2003).

114. N.Y. CIV. RIGHTS LAW § 64-a (McKinney 2007).

signment surgery.<sup>115</sup> This requirement was, for obvious reasons, omitted from the analysis in non-transgender name changes. This additional hurdle was irrelevant in name change applications and advocates suspected that the court was suffering from a lack of understanding of, and bias against, transgender applicants. After vigorous advocacy, and education of the bench, the court reversed that decision. The court's thoughtful decision found that the original decision was based on ideas that were "misplaced, as they anticipate questions that simply are not raised by this application."<sup>116</sup> Subsequent decisions have made explicit the limitations of the court's analysis in deciding name changes, and have specifically held that public policy concerns should not be the focus of the decision making.<sup>117</sup> Instead, absent an intent to defraud or to misrepresent, a transgender name change should not be denied.<sup>118</sup>

### G. *Protection of Assets*

Because the legal system does not provide many of the safety protections to LGBT survivors that advocates generally rely upon when working with domestic violence survivors, such as orders of protection and the myriad forms of relief that accompany these orders, it is important to consider other legal remedies that might be available to LGBT intimate partner violence survivors. Contract and transactional law can be of assistance in determining the rights and responsibilities of each partner when dissolving a relationship. An LGBT survivor of intimate partner violence may be able to bring a breach of contract action. The Supreme Court in New York County held that even when a marriage would not be recognized in New York, any express agreements made therein are to be recognized.<sup>119</sup> The court in this case did not focus on the legally defined relationships between the parties, but instead considered the action of contracting, including whether there was sufficient consideration, a meeting of the minds as to the essential terms, and mutual promises, in addition to the "love and affection" expected in an intimate partnership.<sup>120</sup> Generally, New York does not recognize an

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115. *In re Guido*, 771 N.Y.S.2d 789, 789 (N.Y. Civ. Ct. N.Y. County 2003) ("The court denied the application 'without prejudice to renew with statement regarding marital status/children and proof, *i.e.*, physician's affirmation, of the completion of the sex change operation.'").

116. *Id.* at 791.

117. *In re Daniels*, 773 N.Y.S.2d 220, 223–24 (N.Y. Civ. Ct. N.Y. County 2003) ("An application to change a name is not to be decided based on public policy grounds, but on a much narrower basis.").

118. *Guido*, 771 N.Y.S.2d 789.

119. *Anonymous v. Anonymous*, No. 50080, slip op. at 11 (Sup. Ct. N.Y. County 2004).

120. *Id.* at 6 ("The sole issue before this Court at this juncture . . . is whether the Agreement between plaintiff and defendant is a valid and enforceable contract. The relevant inquiry . . . thus becomes whether there was sufficient consideration to support the Agreement, for this remains the pertinent test even though the parties' contemplation of cohabitation may have been the reason for their entering into such an agreement at the outset. Provided there is sufficient consideration, the issue next becomes whether there was a meeting of the minds as to the essential terms. . . . Consideration is defined as some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or

implied contract for the rendition of services by unmarried couples living together because courts assume that the relationships between the parties make the rendering of such services naturally gratuitous.<sup>121</sup> However, in *Moors v. Hall*, the Second Department suggested that an individual may be entitled to *quantum meruit* recovery for the reasonable value of the domestic services rendered while in an unmarried relationship.<sup>122</sup> Generally, a major obstacle to recovery in *quantum meruit* is the presumption that services rendered between members of the same household have been performed gratuitously.<sup>123</sup> Presumably, LGBT partners could similarly sue for services rendered and face the same obstacles. As well, additional obstacles exist in enforcing contracts generally. Oral contracts of this type are unenforceable under the statute of frauds.<sup>124</sup> Former domestic partners in both straight and same-sex relationships have had much less success bringing breach of contract claims against their former partners based on oral promises of care and support.<sup>125</sup>

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undertaken by the other. It is not essential to the validity of a contract that the consideration be recited therein since it may be implied, or proved by parol evidence. Mutual promises in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void, are sufficient consideration for one another in a bilateral contract. However, 'love and affection,' does not suffice as a predicate for enforcement of an executory agreement." (citations omitted).

121. *Morone v. Morone*, 50 N.Y.2d 481, 486 (1980) ("New York courts have long accepted the concept that an express agreement between unmarried persons living together is as enforceable as though they were not living together provided only that illicit sexual relations were not 'part of the consideration of the contract.' The theory . . . is that while cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation, neither does cohabitation disable the parties from making an agreement within the normal rules of contract law.") (citations omitted).
122. 532 N.Y.S.2d 412 (2d Dep't 1988). It is important to note that in *Moors*, the couple maintained separate residences and the male partner acknowledged on several occasions that he would pay his female partner for the services rendered. *Id.*
123. 95 AM. JUR. 3D *Proof of Facts* 1 § 13 (2007).
124. *Robin v. Cook*, 204 N.Y.L.J. 22 (Sup. Ct. N.Y. County 1990); see also *Plaza v. Wisser*, 626 N.Y.S.2d 446 (1st Dep't 1995) (holding that the evidence of the plaintiff, the former partner to a same-sex domestic partnership, was insufficient to support the plaintiff's claim because any oral agreement is barred by the statute of frauds).
125. In some cases, the outcome has been rather severe. See, e.g., *O'Reilly v. O'Reilly*, No. 51297 (Sup. Ct. Rockland County 2005). In *O'Reilly*, the plaintiff was married for a number of years and produced two children with her husband, a mentally disabled man. *Id.* at 1. During the marriage, the husband's mother provided the family with a home and financial support. *Id.* The plaintiff claimed that her mother-in-law promised that she would continue to provide housing and financial support to the family if the plaintiff would be a stay-at-home wife and mother. *Id.* The plaintiff alleged that she gave up educational and employment opportunities in detrimental reliance on this promise. *Id.* Upon the death of her son, however, the mother-in-law ceased providing support to the plaintiff and began eviction proceedings against her and her children. *Id.* at 2. The plaintiff sued her mother-in-law for breach of contract, and argued that the oral promises should be exempt from the statute of frauds based on the equitable theories of promissory estoppel and partial performance. *Id.* at 2-3. The *O'Reilly* court, while sympathetic to the plaintiff's position, found that her claims failed as a matter of law under the statute of frauds and that she did not satisfy the equitable theories of partial performance. *Id.* at 5.

Same-sex partners may also be able to invoke the laws of partnership.<sup>126</sup> The law of partnership and joint ventures has been used as an avenue for legal and equitable relief by and among non-marital cohabitants, and thus, appears to be immediately applicable to a party who was formerly in a gay or lesbian relationship.<sup>127</sup> In determining whether the laws of partnership are appropriate, courts look at whether the parties had so joined their property, interests, skills, and risks so that contributions have become one, and the interests of the parties have been made subject to each of the parties.<sup>128</sup> Such a partnership need not have been agreed to in writing.<sup>129</sup> The fact that there is no written agreement is merely one element to consider in determining whether a partnership existed.<sup>130</sup> A court will look at the relevant testimony, conduct, and documentary evidence.<sup>131</sup> Even though a partnership or joint venture theory of recovery is one avenue for recovery that should be explored, it has several built-in evidentiary obstacles, tying the victim-plaintiff's recovery to his or her ability to establish that an economic relationship existed between the plaintiff and the former partner.<sup>132</sup> LGBT survivors of abuse may have problems overcoming these evidentiary hur-

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126. *See, e.g.*, *Cytron v. Malinowitz*, No. 51555 (Sup. Ct. Kings County 2003) (determining that a domestic partner seeking a portion of the proceeds from the sale of a jointly-owned property in a partition action could be determined by the laws of partnership).

127. The leading case governing unmarried, cohabiting parties in New York is *Morone v. Morone*, in which the New York Court of Appeals held that express contracts between unmarried cohabitants will generally be enforced, particularly when the contract involves the distribution of assets and income between the parties. 50 N.Y.2d 481 (1980). The court in *Morone* relied, in part, upon a decision by the California Supreme Court. *Id.* The California Supreme Court held, in *Marvin v. Marvin*, that even in the absence of an express contract, relief by and among unmarried cohabitants may be fashioned through the finding of an implied contract, or even through such assorted doctrines as constructive trust, partnership, and joint venture. 557 P.2d 106 (Cal. 1976). However, the New York Court of Appeals did not find *Marvin* to be altogether persuasive, and refused to imply a partnership agreement between two unmarried cohabitants when the relationship of the parties was such that the services rendered between them would be considered gratuitous. *Morone*, 50 N.Y.2d at 488.

128. *Hanlon v. Melfi*, 423 N.Y.S.2d 132 (Sup. Ct. Suffolk County 1979). However, an essential element to forming a partnership is a mutual understanding or promise between the parties to combine their money, labor, efforts, and skills so that they can share in the profits of a business purpose or goal. *Id.* at 134. Joint ventures are similar to partnerships, except that a contract or a voluntary agreement between the parties is required in the latter. *Id.* In addition, unlike partnerships, joint ventures are limited in time and purpose. *Id.*

129. *See Trombley v. Sorrelle*, 786 N.Y.S.2d 296 (City Ct. City of Watertown 2004) (dismissing the claim on procedural grounds, but recognizing that unmarried cohabitants may seek relief by first establishing that a partnership existed between the parties).

130. *See id.*; *Cytron*, No. 51555, slip op. at 2.

131. *Hanlon*, 423 N.Y.S.2d 132.

132. *See, e.g.*, *Dombrowski v. Somers*, 41 N.Y.2d 858 (1977) (determining that an oral agreement between two unmarried cohabitants, whereby one party agreed to "take care of" the plaintiff if the plaintiff performed certain domestic services, was too ambiguous to support any recovery under a partnership theory); *Cytron*, No. 51555, slip op. at 1 (noting that evidence of a "loving and committed" domestic relationship between the men constituted an insufficient evidentiary ground to establish whether a partnership or a joint venture could exist).

dles, particularly in instances where swift and expedient relief is sought, and the party seeking relief has limited amounts of evidence available to establish an economic measure of recovery.<sup>133</sup>

The theory of constructive trust may also protect same-sex relationships. A court may impose a constructive trust as to property to prevent one party from being unjustly enriched.<sup>134</sup> Generally, such a trust may be imposed upon a showing of four elements: (1) a confidential or fiduciary relationship, (2) a promise or agreement, express or implied, (3) a transfer in reliance on such promise or agreement, and (4) unjust enrichment. It is important to note that a constructive trust may be imposed based on a confidential relationship, which can grow out of a marital or other family relationship, such as an LGBT domestic partnership. Thus, the Supreme Court in New York County, in *Minieri v. Knittel*, indicated that a constructive trust might be appropriate because one party to a lesbian couple transferred nominal and joint title to her real and personal assets to her partner in reliance on an oral agreement between them that it was being held for the transferor and would be conveyed to the transferor upon request.<sup>135</sup> Importantly, in *Minieri*, the court also noted that the above enumerated factors are not necessarily determinative of the imposition of a constructive trust.<sup>136</sup> The Third Department, in *Lester v. Zimmer*,<sup>137</sup> held that the third element of a constructive trust, a transfer in reliance on a promise, may be demonstrated by such things as contributions of money, time, and effort by a domestic partner in reliance on a promise to share the results of their joint efforts. This remedy is particularly important to survivors of domestic violence who have experienced economic abuse which is often characterized by a lack of ownership of money or property in the relationship.

Same-sex survivors may also invoke protection under a conversion theory. Conversion is defined as an act or series of acts of willful interference, without

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133. Although non-existence of a formal partnership agreement has not thwarted the success of partnership arguments by cohabiting parties per se, the existence of a written agreement has resulted in the granting of summary judgment relief to former gay and lesbian partners who sought to enforce the remedial equities of the partnership. See *Carnuccio v. Upton*, 790 N.Y.S.2d 15 (1st Dep't 2005) (holding that a written domestic partnership agreement was supported by sufficient consideration when one agreed to provide financial consideration and the other to renovate and maintain the property which had been purchased jointly).

134. *Artache v. Goldin*, 519 N.Y.S.2d 702 (2d Dep't 1987).

135. 727 N.Y.S.2d 872 (Sup. Ct. N.Y. County 2001) (deciding a case in which former lesbian partners sued one another for a variety of claims relating to property and other economic items that they shared during their three-year relationship, including joint checking, money market, and investment accounts to which they both contributed).

136. Specifically, when deciding summary judgment on the plaintiff's constructive trust claim, the *Minieri* court found that satisfaction of the confidential or fiduciary relationship factor was "undisputed." *Id.* at 874. As to the other factors, the *Minieri* court held that there were questions of fact relating to the promises and transfers made, and to whether the defendant had been unjustly enriched. *Id.* at 875.

137. 542 N.Y.S.2d 855 (3d Dep't 1989).



lawful justification, with an item of property in a manner inconsistent with another's right, whereby such person is deprived of the use and possession of the property.<sup>138</sup> Thus, it would include such acts as taking possession of a partner's property, refusing to relinquish a partner's property, disposing of the goods of a partner to a third person, or destroying a partner's property.<sup>139</sup> This could be an important remedy for LGBT survivors who cannot access family or county supreme courts to obtain orders directing the abusers to return the property.

Survivors may also wish to bring an action under a replevin theory. Replevin constitutes an action for the repossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it.<sup>140</sup> Generally, replevin is applicable only when the property or thing is capable of specific identification or certain designation.<sup>141</sup> Replevin may be employed to permit the recovery of a wide variety of tangible goods. Although rarely used, replevin may be a powerful weapon when an abuser wrongly holds property belonging to the victim.

Because intimate partner violence in many LGBT relationships may not be remedied in family court or in county supreme courts, LGBT survivors may consider civil tort remedies. These torts could include assault, battery, intentional infliction of emotional distress, false imprisonment, defamation, or public disclosure of private facts.<sup>142</sup> Survivors may also consider using small claims courts to recover certain assets.<sup>143</sup> Although LGBT survivors will likely be unsuccessful in invoking legal protection because of the lack of a legally recognized definition of their relationships, using incident-based legal actions for similar remedies may provide necessary relief. Courts have recognized a right to use these theories of law despite *Hernandez* and the lack of access to marriage by same-sex couples.<sup>144</sup>

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138. BLACK'S LAW DICTIONARY 356–57 (8th ed. 2004).

139. *See, e.g.*, Tucker v. Evanczik, 435 N.Y.S.2d 552 (4th Dep't 1980) (determining that by the act of fraudulently signing a partner's name on a vehicle registration and then selling the vehicle to a third party constituted conversion).

140. BLACK'S LAW DICTIONARY, *supra* note 138, at 1325–26.

141. Salatino v. Salatino, 786 N.Y.S.2d 570 (2d Dep't 2004); N.Y. C.P.L.R. 7102 (2007).

142. For a discussion of the utilization, or lack thereof, of tort law to address domestic violence claims, *see* Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945 (2004); and Betty Levinson, *Domestic Violence and Tort Remedies*, in *LAWYER'S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM* 297 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 5th ed. 2006), *available at* <http://www.courts.state.ny.us/ip/womeninthecourts/DV-Lawyers-Manual-Book.pdf>.

143. A person may go to small claims court to recover money for damages or property taken by an abusive partner up to a value of five thousand dollars. The small claims court is a simple, inexpensive, and informal court where people can sue pro se.

144. *See, e.g.*, Cannisi v. Walsh, 831 N.Y.S.2d 352 (Sup. Ct. Kings County 2006) (“[T]he holding [in *Hernandez v. Robles*] does not negate the existence of same sex relationships, nor the reality that some same sex relationships dissolve, and the courts are called upon [to] resolve disputes regarding the distribution of assets of such relationships.”).

#### IV. THE EFFECT OF USING MULTIPLE LAWS AND FORUMS TO PROTECT LGBT SURVIVORS

For domestic violence survivors with legally recognized relationships with their partners, such as marriage or children in common, there are laws that allow the use of a single forum for multiple remedies. In the matrimonial proceedings of divorce, separation, and annulment, survivors may incorporate actions that include relief such as orders of protection, custody, child support, maintenance, equitable distribution of assets, and exclusive possession of the marital home.<sup>145</sup> For survivors with children in common with non-spouse partners, family courts can address, in one forum, issues such as orders of protection, custody, child support, and exclusive possession of the home.<sup>146</sup> The Integrated Domestic Violence Courts (“IDVC”), a new initiative working under a “one family, one judge” model, allows New York courts to address issues in criminal, supreme, and family courts in one forum.<sup>147</sup> These courts are an initiative of the chief judge to address the lack of a coordinated response to domestic violence in New York State.<sup>148</sup> The IDVC staff is trained on issues specific to domestic violence and has access to a richer resource base for referrals than other court staff, including specialized court staff. The IDVC has become a model response to domestic violence in New York. The IDVC was created specifically to address the often conflicting and confusing array of court dates in different forums and before different judges that survivors of domestic violence face in New York.<sup>149</sup> This model was specifically introduced to avoid a fractured approach to addressing domestic violence. The IDVC allows all actions typically heard in the family, supreme, and criminal courts to be heard in one forum before one judge. Because most LGBT survivors cannot obtain relief in county supreme courts or family courts, the intervention of the IDVC court structure is wholly denied to this population.

As is clear from the discussion above, traditional legal remedies, including single forum remedies, are largely unavailable to LGBT survivors in theory and in practice. To protect LGBT survivors, it is often necessary to take a piecemeal approach to civil legal remedies.<sup>150</sup> This approach is not ideal as survivors are already dealing with the emotional, physical, and economic effects of having abusive intimate partners, and may not have the wherewithal to develop the myriad strategies necessary to fully protect their rights.

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145. See generally N.Y. DOM. REL. LAW §§ 236 pt. B, 240 (2007).

146. See generally N.Y. FAM. CT. ACT arts. 4, 6 & 8 (2007).

147. Integrated Domestic Violence Courts are an initiative by Chief Judge Judith Kaye.

148. See Judith S. Kaye, *Albany Law Review Symposium: Refinement or Reinvention, the State of Reform in New York: The Courts*, 69 ALB. L. REV. 831 (2006).

149. See JUDITH S. KAYE, THE STATE OF THE JUDICIARY (2001), available at <http://www.nycourts.gov/admin/stateofjudiciary/soj2001.pdf>.

150. RYIAH LILITH, *Reconsidering the Abuse that Dare not Speak its Name: A Criticism of Recent Legal Scholarship Regarding Same-Gender Domestic Violence*, 7 MICH. J. GENDER & L. 181 (2001).

This piecemeal approach is neither efficient nor effective for LGBT survivors. The use of judicial resources in multiple forums for multiple claims resulting from the same incident and factual circumstances is also inefficient for the judiciary. The need to appeal to multiple courts for various remedies is inconvenient at best, and is often prohibitively time consuming and expensive for any litigant. For survivors of domestic violence, this multiple forum structure may exact an emotional or financial toll that further limits survivors' abilities to litigate. Having multiple cases in various forums and before different judges makes it more likely that a survivor will abandon a particular action or present a partial, and therefore weakened, case.

To address the failures of a piecemeal approach, some legal theorists encourage legal recognition of LGBT relationships through marriage, civil unions, or domestic partnerships as a way to coordinate the legal response to domestic violence in LGBT partnerships.<sup>151</sup> It is unlikely that New York State, after the recent Court of Appeals decision in *Hernandez*,<sup>152</sup> will recognize the right to marriage or civil unions for same-sex couples in the immediate future. Although the majority in *Hernandez* suggested that the New York State Legislature could address this problem through new legislation, it also provided several reasons why the legislature might choose not to do so.<sup>153</sup> With this explicit direction from the New York Court of Appeals, it is unlikely that the New York State Legislature will provide for statewide legal recognition of LGBT relationships in the near future.<sup>154</sup>

It is also unlikely that New York State will expand the class of litigants who have standing in family court. Although such a bill has been proposed in the

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151. Carla M. da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Responses*, 4 S. CAL. REV. L. & WOMEN'S STUD. 251 (1994).

152. 7 N.Y.3d 338 (2006).

153. *Hernandez*, 7 N.Y.3d at 358–59 (“The question is not, we emphasize, whether the Legislature must or should continue to limit marriage in this way; of course the Legislature may (subject to the effect of the federal Defense of Marriage Act) extend marriage or some or all of its benefits to same-sex couples. We conclude, however, that there are at least two grounds that rationally support the limitation on marriage that the Legislature has enacted. First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. . . . There is a second reason: The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.”) (citations omitted).

154. Some scholars have discussed an equal protection challenge as a route to legalizing LGBT relationships. There may be a de facto discrimination challenge to the current Family Court Act and Domestic Relations Law regarding relationships conferring standing upon litigants. It is unclear from published cases invoking the Family Court Act, whether the statute does not apply to LGBT couples who meet the statutory definition or whether the cases are simply not reported. Any potential challenge in New York is weakened by the idea that many heterosexual couples are also precluded from invoking relief under the Family Court Act or the Domestic Relations Law. See Murphy, *supra* note 49; Mac D. Hunter, *Homosexuals as a New Class of Domestic Violence Subjects Under the New Jersey Prevention of Domestic Violence Act of 1991*, 31 U. LOUISVILLE J. FAM. L. 557 (1992–1993).

New York State Assembly and Senate for nineteen years, it has yet to be passed by the Senate.<sup>155</sup> The bill would expand the definition of family and household members from those married, formerly married, related by blood, or who have children in common<sup>156</sup> to include “unrelated persons who continually or at regular intervals reside in the same household or have done so in the past, and persons who are or have been in a dating or intimate relationship whether or not they have ever lived together.”<sup>157</sup> This new law would provide civil remedies to an expanded class of intimate partners.<sup>158</sup> Given that in the past nearly two decades, this bill and other versions of it, did not pass in the Senate, it is unlikely that this relationship-defined protection will expand to include LGBT survivors.

Without the right to marriage or a marriage-like relationship status, LGBT survivors and anti-violence advocates may use the myriad remedies discussed in this article. However, a more efficient, long-term solution may be to develop a different analysis of legislation that will protect LGBT survivors. Such legislation would make explicit that LGBT survivors are protected and would move from a relationship-focused provision of remedies to an incident-focused provision of remedies. The law would address the incidence of domestic violence and provide civil remedies that would protect survivors physically and economically regardless of any legally recognized relationship between the parties. Such a law would not require a legally recognized relationship between the parties, and it would provide for various civil remedies in one forum, such as a trial court.<sup>159</sup>

It is important that legislation that is aimed at protecting survivors of domestic violence specifically include LGBT survivors. Without explicit inclusion, it is likely that the obstacles to enforcing LGBT survivors’ rights, such as homophobia within the legal system and reluctance of LGBT survivors to iden-

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155. See A. 6060, 2007 Gen. Assemb., Reg. Sess. (N.Y. 2007); S. 1835, 2007 Gen. Assemb., Reg. Sess. (N.Y. 2007). These bills propose to expand the definition of “members of the same family or household,” for purposes of issuance of orders of protection and temporary orders of protection and the concurrent jurisdiction of family courts and criminal courts, to include: a former spouse whether or not living together, unrelated persons who continually or at regular intervals reside in the same household or have done so in the past, and persons who are or have been in a dating or intimate relationship whether or not they have ever lived together. In the 2007 Legislative Session, the New York State Assembly has also introduced a bill that would expand access to family court to a “third party acting with malice on behalf of a defendant” to be included under the temporary order of protection conditions and by adding unrelated persons who have been intimate or in a dating relationship with the victim under the definition of “members of the same family or household.” A. 4555, 2007 Gen. Assemb., Reg. Sess. (N.Y. 2007).

156. N.Y. FAM. CT. ACT § 812(1).

157. See A. 6060, 2007 Gen. Assemb., Reg. Sess. (N.Y. 2007); S. 1835, 2007 Gen. Assemb., Reg. Sess. (N.Y. 2007).

158. See generally Sarah E. Warne, Note, *Rocks, Hard Places, and Unconventional Domestic Violence Victims: Expanding Availability of Civil Orders of Protection in New York*, 52 N.Y.L. SCH. L. REV. 279 (2007/08) (discussing the need to expand the availability of civil orders of protection to LGBT survivors of domestic violence).

159. Such legislation may be proposed by the New York City Council; however, at the time of this article, no such legislation had been introduced.

tify domestic violence in their relationships will remain.<sup>160</sup> New York City has proposed legislation that would allow registered domestic partners, both same-sex and opposite-sex, to invoke protections related to bereavement leave, visitation in correctional facilities, visitation in hospitals, eligibility for housing as family members, which confers more protection than non-family members, and health benefits.<sup>161</sup> This bill focuses on the legal recognition of the partnerships and confers rights to New York City residents who enter into domestic partnerships. Although these protections do not focus specifically on domestic violence, it is conceivable that survivors could use this legal status to obtain protections from domestic violence by their partners, such as housing stability. However, this law falls short of the economic protections that are often most pivotal to survivors in leaving violent relationships. As well, a relationship-focused standing requirement omits LGBT survivors who have not entered into formal relationships with their partners.

Focusing on the legally recognized relationship definition may well serve many LGBT couples who have traditionally been underserved and underrepresented in the legal and political process due to the inaccurate perceptions of their relationships as transitory.<sup>162</sup> There is no doubt that conferring legal status upon a relationship brings with it attendant benefits and legitimizations, both socially and legally. However, it is ill-advised to conceive of domestic violence protections as derivative of marriage or a marriage-like relationship, even if such status existed in New York State for LGBT partners. To encourage survivors of domestic violence to formalize their relationships so as to avail themselves of relief from the domestic violence further mires those survivors in relationships from which they wish to escape. While the formalization of relationships can provide structure and certain remedies upon the dissolution of the relationship, the dissolution itself may create more difficulties emotionally, financially, and legally in escaping domestic violence.

If formalizing relationships will not adequately protect LGBT survivors, the shift in analysis must focus on incident- and remedies-based legislation. Any law that confers protection based on a legally defined relationship, by definition, omits classes of people. Legislation that focuses on the legally recognized status of the relationship between the parties does not effectively address violence experienced by those in LGBT relationships in New York. Instead, we should consider laws that address the underlying acts, as the Penal Code does, but that also allow civil remedies. As discussed above, civil remedies may be invoked more readily by survivors of domestic violence who want to escape the violence, but may not

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160. Mary Beth D. Collins, *Same-Sex Domestic Violence: Addressing the Issues for the Proper Protection of Victims*, 4 J.L. SOC'Y 99 (2002).

161. See N.Y. CITY ADMIN. CODE § 3-244 (2006).

162. See Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1880 (2006).

want to engage the criminal justice system. The argument that criminal proceedings protect LGBT survivors fails on two counts. First, the criminal justice system, which penalties include incarceration, may deter LGBT survivors from invoking this protection because they are worried about the safety of their partners in entering a homophobic criminal justice system,<sup>163</sup> and their own safety when prosecution results in little or no jail time. Second, the criminal justice system cannot provide, as a long-term solution, the economic relief that is so necessary to survivors' continued safety. Instead, using the Penal Code's incident-focused model, wherein the parties' relationship status is not determinative of the relief granted, we should develop civil legislation that addresses the incident of domestic violence with attendant civil relief.

An incident-focused model of legislation would allow courts to disentangle the relationship of the parties from the relief requested. Disentanglement theory seeks to separate the legal status of a relationship from the privileges that a law confers, and uses a "functional approach" to identify litigants who can invoke legal protections.<sup>164</sup> Using a disentanglement theory, legislation in New York would focus on the acts of domestic violence and incorporate remedies that address safety and economic issues. For example, a civil law that recognizes the act of domestic violence as conferring jurisdiction to the court over the parties, regardless of their relationship to each other, could provide for orders of protection, distribution of assets, and settlement of housing issues all in one forum. The shift in analysis would allow litigants, who can prove that an act of domestic violence occurred, to invoke protections that recognize the intimate nature of their relationship without explicitly defining this relationship.

Such a law would incorporate the family offenses that are recognized by the Family Court Act<sup>165</sup> without the attendant definition of family or household member.<sup>166</sup> Like transactional law, the civil remedies would be based on the interactions between the parties, which would therefore define their relationship to each other. The law would allow for civil remedies such as orders of protection, exclusive possession of a shared home, and distribution of shared financial assets.<sup>167</sup> This incident-based concept of law is not foreign to our legal system; it is in large part the basis of contract law, law in equity, small claims court procedures, and other transactional theories. It is anticipated that the intimate nature

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163. *Id.* at 1880 ("There is reason to believe that fear of a homophobic reaction may cause some individuals in same-sex relationships not to seek legal recourse from domestic violence.").

164. For a discussion of disentangling of marriage-like status and domestic violence relief, *see id.* at 1844 ("The legal system defines who gets privileges and benefits by discerning who is married or most like a married person rather than by asking who should receive these benefits based on the purpose of such benefits.").

165. N.Y. FAM. CT. ACT § 812(1).

166. *Id.*

167. Custody and visitation would not need to be addressed by this law, as litigants with a legally recognized relationship to common children would be able to invoke the Family Court Act. *Id.*

of the relationship and of domestic violence, as different from stranger violence, will be a cause of some concern in legal, social, and political circles. However, the intimate nature of a relationship, or lack thereof, is a subjective judgment to make in the first place. For example, a woman who has a child by a man she met only once at a holiday party would have access to family court to obtain an order of protection because of the impregnation, yet a same-sex survivor of a multi-decade relationship that resulted in no children in common would not. These examples demonstrate the unintentional absurdity in defining intimacy.<sup>168</sup>

It may also be necessary, in this political and legal climate, to concentrate efforts on educating practitioners about the issues specific to LGBT intimate partner violence and to begin regular use of the above discussed non-traditional methods. This route, along with judicial education and collaborative practice models, such as sharing information, model papers, and universal training throughout the state for attorneys, will eventually sensitize the judiciary to these issues and allow practitioners to begin to approach these protections for LGBT survivors in an informed manner. It may also allow LGBT survivors to make informed legal and strategic decisions based on consistent practice and, it is hoped, outcomes.

## V. CONCLUSION

As the LGBT communities and their allies struggle to obtain legal recognition and protections for themselves, their partners, and their children, these communities are also confronting intimate partner violence. Anti-violence service providers must be aware of, and educated about, issues specific to the LGBT communities, and they must be willing to work in coalition with LGBT organizations to address LGBT intimate partner violence. New York laws that recognize LGBT relationships while offering civil legal protections against domestic violence are an ideal solution, but an impractical reality in light of *Hernandez*. In one recent case, the Supreme Court in New York County imposed the equivalent of equitable distribution factors<sup>169</sup> in a partition action<sup>170</sup> suggesting that, if read with *Cannisi*, courts are struggling to find a way to offer legal recognition to same-sex relationships. However, these cases have yet to reach the New York Court of Appeals. Until the legislature directly addresses the legitimacy of LGBT intimate partnerships, whether through marriage, civil unions,

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168. Because there are clear public policy reasons for different protections for victims with children in common with their batterers, I do not suggest here that this should change. I do, however, suggest that this is one way in which the Family Court Act measures the “intimacy” of a relationship when providing relief that may not involve the child at all—such as an order of protection. Under the circumstance, it seems unnecessary to restrict access to a non-child-related protection to litigants simply because they do not have children in common.

169. N.Y. DOM. REL. LAW § 236 pt. B(5)(d).

170. *C.Y. v. H.C.*, 237 N.Y.L.J. 22 (Sup. Ct. N.Y. County 2007).

or a state-wide domestic partnership scheme, we are left with a piecemeal approach in which LGBT survivors in some courts or counties may be more fortunate than those in others. Instead of this piecemeal approach, we should turn to incident-focused legislation to provide civil remedies, including economic protections, to survivors of LGBT domestic violence.