NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE TAX COURT COMMITTEE ON OPINIONS

RUCKSAPOL JIWUNGKUL, as the EXECUTOR of the ESTATE OF MAURICE R. CONNOLLY, JR.,	)	TAX COURT OF NEW JERSEY
Plaintiff,	)	DOCKET NO. 009346-2015
v.	)	Approved for Publication In the New Jersey Tax Court Reports
DIRECTOR, DIVISION OF TAXATION,	)	
Defendant.	)	

Decided: May 11, 2016[1]
Released for publication: June 23, 2017

Robyne D. LaGrotta for plaintiff (LaGrotta Law, LLC, attorneys).

Anna Uger for defendant (Christopher S. Porrino, Attorney General of New Jersey, attorney).

DeALMEIDA, P.J.T.C.

This constitutes the court's opinion with respect to the parties' cross-motions for summary judgment. The central question before the court is whether the New Jersey Domestic Partnership Act ("DPA"), N.J.S.A. 26:8A-1, et seq., provides that a surviving same-sex registered domestic partner is to be treated as a surviving spouse for purposes of calculating the New Jersey estate tax. If this question is answered in the affirmative, the New Jersey estate tax due in this case would be determined after application of a marital deduction, which would, in effect, eliminate a $101,041

*

[1] This opinion was issued in unpublished form on May 11, 2016. Given that the Superior Court, Appellate Division, issued a published opinion affirming the Judgment of this court for the reasons expressed in the May 11, 2016 opinion, this court elected to publish its opinion. See Jiwungkul v. Director, Div. of Taxation, ___ N.J. Super. ___ (App. Div. 2017).

assessment of estate tax on the estate of plaintiff's deceased registered domestic partner. For the reasons explained more fully below, the court concludes the Legislature did not intend to include in the DPA a requirement that a surviving same-sex registered domestic partner be treated as a surviving spouse for purposes of calculating the New Jersey estate tax.

The court's conclusion must be considered in light of the fact that in 2007, after enactment of the DPA, the Legislature enacted the Civil Union Act, which requires that a surviving same-sex civil union partner be treated as a surviving spouse for purposes of calculating the New Jersey estate tax. In addition, as of October 21, 2013, as a result of the Supreme Court's opinion in Garden State Equality v. Dow, 216 N.J. 314 (2013), same-sex couples are permitted to enter into marriage in New Jersey. A surviving spouse in a same-sex marriage is, of course, a spouse for purposes of calculating the New Jersey estate tax. Both of these State-sanctioned same-sex relationships, which would have provided plaintiff with the relief sought in this case, were available to plaintiff and his partner before his partner's death.

Plaintiff and his partner deliberately and publically elected not to enter into a civil union when that relationship became available to them some seven years before the partner died. The motion record establishes that plaintiff and his deceased partner considered civil unions to be inferior to marriage and refused to enter into a civil union as a matter of principle. In addition, although plaintiff and his partner intended to marry after issuance of the Court's opinion in Garden State Equality v. Dow, they selected a wedding date approximately seven months after the Court's decision. Unfortunately, plaintiff's partner died a few days before their planned wedding.

Without question, same-sex couples have a State and federal Constitutional right to access all of the rights and benefits of marriage, including the right to be treated as a surviving spouse for purposes of calculating the New Jersey estate tax. However, as is the case with any couple in New

Jersey, whether they are of the same sex or different sexes, the rights and benefits of marriage are afforded only to those people who enter into a State-sanctioned relationship affording those rights and benefits. Plaintiff and his partner did not take the steps necessary to be recognized in New Jersey as a couple with the rights of marriage. This is an unfortunate, but undeniable, fact.

Plaintiff's claim that the DPA is unconstitutional because it does not treat same-sex registered domestic partners as spouses for purposes of the New Jersey estate tax is groundless. New Jersey satisfied the State and federal Constitutions by making marriage available to plaintiff and his partner in October 2013. Having opened marriage to same-sex couples, the State is not precluded from maintaining existing domestic partnerships that provide some, but not all, of the rights of marriage to same-sex couples. It is the ability to marry that is enshrined in the State and federal Constitutions. Plaintiff and decedent had the ability to terminate their domestic partnership by getting married prior to decedent's death.

As a result of these conclusions, the court denies plaintiff's motion for summary judgment and grants the Director's cross-motion for summary judgment. The court will enter Judgment affirming the Director's denial of plaintiff's refund claim.

I. Findings of Fact

The court makes the following findings of fact based on the materials submitted by the parties in support of their motions.

Plaintiff Rucksapol Jiwungkul and decedent Maurice R. Connolly, Jr. started their relationship in 1983. They remained together for thirty-one years.

In 2002, seven same-sex couples filed suit in the Superior Court seeking a declaration that New Jersey's laws prohibiting same-sex couples from entering into marriage violated the liberty and equal protection guarantees of the State Constitution. The couples also sought injunctive relief

compelling State officials to grant them marriage licenses. In an unpublished 2003 opinion, the trial court granted summary judgment in favor of the State defendants, after finding no State Constitutional right for same-sex couples to marry.

The couples thereafter filed an appeal with Superior Court, Appellate Division. While the appeal was pending, the Legislature enacted the DPA. L. 2003, c. 246. The statute took effect on July 10, 2004, and provided some, but not all, of the rights and obligations of marriage to same-sex couples who registered as domestic partners. Domestic partnerships were made available to couples "of the same sex and therefore unable to enter into a marriage with each other that is recognized by New Jersey law" as well as to "two persons who are each 62 years of age or older and not of the same sex . . . ." All couples are required to satisfy various statutory requirements to register as domestic partners. N.J.S.A. 26:8A-4(b)(5).

According to the DPA, domestic partners are "entitled to certain rights and benefits that are accorded to married couples under the laws of New Jersey, including . . . . an additional exemption from the personal income tax and the transfer inheritance tax on the same basis as a spouse." N.J.S.A. 26:8A-2d. The statute does not list among the "certain rights and benefits" accorded to registered domestic partners treatment as a spouse for purposes of calculating the New Jersey estate tax.

The transfer inheritance tax and the estate tax are separate assessments occasioned by a person's death. The transfer inheritance tax is a privilege levy upon the right of succession to property transferred by a decedent through a will or by intestacy. DeRosa v. Director, Div. of Taxation, 28 N.J. Tax 73, 77 (Tax 2014); N.J.S.A. 54:34-1, et seq.. "The tax is levied upon the transferee, and the amount thereof depends upon the value of the property transferred and the transferee's relationship to the decedent." Gould v. Director, Div. of Taxation, 2 N.J. Tax 316,

319-320 (Tax 1981). A Class A beneficiary of the decedent, which includes a spouse, pays no transfer inheritance tax on an inheritance. N.J.S.A. 54:34-2(a)(1).

The estate tax, on the other hand, is a tax "[u]pon the transfer of the estate of every resident decedent dying after December 31, 2001 which would have been subject to an estate tax payable" to the federal government under the Internal Revenue Code "in effect on December 31, 2001." N.J.S.A. 54:38-1(a)(2); Oberhand v. Director, Div. of Taxation, 193 N.J. 558, 568 (2008). The amount of New Jersey estate tax due is the maximum amount the federal government would have allowed as a credit against its tax for State death taxes as of December 31, 2001, minus the amount of New Jersey death taxes actually paid by the estate. N.J.S.A. 54:38-1(a)(2)(a)(i) – (a)(2)(b). The federal government allows a deduction from the taxable estate for federal purposes for property transferred to a spouse. I.R.C. §2056. This has the effect of making the estate smaller and, as a result, the available credit for State death taxes smaller. Thus, the New Jersey estate tax, which equals the maximum available federal credit for State death taxes, also is reduced when the federal government allows a marital deduction. See Estate of Booth v. Director, Div. of Taxation, 27 N.J. Tax 600, 614-615 (Tax 2014). As of December 31, 2001, the critical date under New Jersey law, the federal estate tax laws provided for an unlimited marital deduction. Id. at 616. Any property passed to a spouse was excluded from the taxable federal estate, reducing the available federal credit for State death taxes, which, in turn, reduced the estate's New Jersey estate tax liability.

At the time that the DPA was enacted, the federal government did not recognize same-sex marriages or consider a same-sex registered domestic partner to be a spouse for purposes of allowing the marital deduction for federal estate tax. New Jersey could, however, have enacted a statute calculating the New Jersey estate tax as if a surviving same-sex registered domestic partner was a surviving spouse under federal law. New Jersey is not bound by the federal government's

determination of whether a surviving partner is a spouse of a decedent. Estate of Booth, supra, 27 N.J. Tax at 621-626. "[I]t is State law that determines whether an individual is a spouse for purposes of application and allowance of the marital deduction." Id. at 621.

Consistent with the express reference to the transfer inheritance tax in the DPA, when enacting the DPA, the Legislature amended N.J.S.A. 54:34-2(a), a provision of the transfer inheritance tax statute, to provide that "[t]he transfer of property to a husband or wife, or a domestic partner as defined in section 3 of P.L. 2003, c. 246 (C: 26:8A-3), of a decedent shall be taxed at the following rates . . . . For transfers made on or after January 1, 1985 there shall be no tax imposed under this paragraph." L. 2003, c. 246, §36 (underlined text added to the statute). In addition, at the time of the enactment of the DPA, the Legislature amended N.J.S.A. 54:34-4, exempting from the transfer inheritance tax the transfer of certain pension payments to a registered domestic partner, N.J.S.A. 54A:1-2, a provision of the Gross Income Tax Act defining "dependents" to include registered domestic partners, and N.J.S.A. 54A:3-1, a provision of the Gross Income Tax Act providing for exemptions to that tax for registered domestic partners.

The Legislature did not, however, amend N.J.S.A. 54:38-1, et seq., the New Jersey estate tax statutes, to provide that a surviving same-sex registered domestic partner shall be considered a surviving spouse for purposes of calculating that tax. Such a legislative change would have been necessary to treat same-sex registered domestic partners as spouses for purposes of the New Jersey estate tax, given that the federal government does not recognize same-sex registered domestic partners as spouses for purposes of the marital deduction under federal estate tax laws.

On July 10, 2004, the day that the DPA took effect, plaintiff and the decedent registered as domestic partners.

On October 25, 2006, our Supreme Court issued its opinion in Lewis v. Harris, 188 N.J. 415 (2006). In that case, the Court held that the State Constitution requires that same-sex couples be afforded access to a government-sanctioned relationship that provides all of the rights and obligations of marriage. Although unanimous in their holding with respect to the constitutional mandate to recognize same-sex couples, the Justices split with respect to the remedy. Four Justices, constituting a majority, held that the constitutional mandate could be satisfied either by extending the ability to marry to same-sex couples or by providing a distinct, government-sanctioned relationship that would provide same-sex couples with all of the rights and obligations of marriage. A three-Justice minority held that the sole available remedy was to amend the marriage statutes to permit same-sex couples to marry. The Legislature, given 180 days to act, opted to enact legislation authorizing civil unions.

On February 19, 2007, the Civil Union Act became effective. L. 2006, c. 103. Pursuant to this statute, same-sex couples were authorized to enter into government-recognized civil unions with all of the rights and obligations afforded to married couples under State law. N.J.S.A. 37:1-33. Among the rights accorded to civil union partners is the right to be treated as a surviving spouse for purposes of calculating the New Jersey estate tax. According to the Civil Union Act, the "legal benefits . . . of spouses shall apply in like manner to civil union couples," including with respect to "laws relating to taxes imposed by the State . . . including but not limited to . . . tax deductions based on marital status . . . ." N.J.S.A. 37:1-32(n). In addition, the statute provides that "[w]herever in any law, rule, regulation, judicial or administrative proceeding or otherwise, reference is made to 'marriage,' 'husband,' 'wife,' 'spouse," . . . 'widow,' 'widower,' 'widowed' or another word which in a specific context denotes a marital or spousal relationship, the same shall include a civil union . . . ." N.J.S.A. 37:1-33.

After enactment of the Civil Union Act, the Division of Taxation amended regulations applicable to both the transfer inheritance tax and the New Jersey estate tax. See 39 N.J.R. 5185(a)(Dec. 17, 2007). One such regulation, N.J.A.C. 18:26-3A.8(e), provides that the New Jersey estate tax shall be calculated for the estate of a deceased civil union partner using a "marital deduction equal to that permitted a surviving spouse under the provisions of the Internal Revenue Code in effect on December 31, 2001 . . . ." The tax is determined "as though the Internal Revenue Code treated a surviving civil union partner and a surviving spouse in the same manner." Ibid. The regulation did not extend this treatment to existing same-sex registered domestic partners.

Plaintiff and decedent made a deliberate, and public, decision not to enter into a civil union. Decedent was quoted in the press as being "furious" about the passage of the Civil Union Act because he believed the law to be a perpetuation of discriminatory treatment of same-sex couples. New Jersey Civil-Union Bill Passes Committee. Neither Foes Nor Advocates Are Wholly Satisfied, The Philadelphia Inquirer, Dec. 8, 2006. Plaintiff confirmed in a certification filed with his motion that the couple "decided not to enter into a civil union because it was not equivalent to a marriage." The decision not to enter into a civil union was a legitimate expression of the couple's disagreement with a political decision. One could hardly fault a same-sex couple for refusing to enter into any State-sanctioned relationship they believed to be discriminatory. However, this decision, like many principled decisions, had consequences. One consequence was that plaintiff and decedent effectively elected not to take advantage of the many rights and benefits available to same-sex couples under the Civil Union Act. Had plaintiff and decedent entered into a civil union, as they had done with a domestic partnership, plaintiff would be entitled to the marital deduction he seeks before this court and his partner's estate would owe no New Jersey estate tax.

Nor did the couple enter into a marriage or civil union in another State or country. As of February 19, 2007, New Jersey recognized foreign civil unions and same-sex marriages and accorded those relationships all the rights, and benefits of New Jersey civil union couples, including the marital deduction for purposes of calculating the New Jersey estate tax. See Attorney General Formal Opinion 3-2007 (Feb. 16, 2007).[2]

On June 26, 2013, the United States Supreme Court issued its opinion in United States v. Windsor, ___ U.S. ___, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013). In that case, the Court invalidated Section 3 of the federal Defense of Marriage Act ("DOMA"), 1 U.S.C.A. §7. That provision of the Act provided that only marriages between one man and one woman would be recognized for purposes of the application and interpretation of federal statutes. The Court held that that portion of the statute violates the Fifth Amendment because "no legitimate purpose" proffered by the federal government in defense of the provision "overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." Id. at ___ U.S. at ___, 133 S. Ct. at 2683-84, 186 L. Ed. 2d at 816-17. As a result of this holding, the federal government was required to treat same-sex married couples in the same manner as it treats different-sex married couples in the administration and application of federal laws.

---

[2] Notably, at the time that the Legislature authorized civil unions, it amended the DPA effective February 19, 2007 to limit any future domestic partnership to couples who are each 62 years of age or older. L. 2006, c. 103, §91 (enacted as N.J.S.A. 26:8A-4.1). The authorization of civil unions did not alter the rights and responsibilities of existing domestic partnerships, except that eligible domestic partners were given notice and an opportunity to enter into a civil union. Entry into a civil union, when joined by both parties to an existing domestic partnership, operates to terminate the domestic partnership. Ibid. When making these amendments to the DPA the Legislature did not amend the statute to require that a surviving same-sex registered domestic partner be treated as a surviving spouse for purposes of calculating the estate tax.

The Court's holding in Windsor, however, did not require the federal government to recognize same-sex couples in other State-sanctioned relationships, such as civil unions. This caused a disparity in the treatment of civil union couples and married couples in New Jersey. Because of the holding in Windsor same-sex couples in New Jersey civil unions were denied federal rights and benefits that were enjoyed by New Jersey married couples. See Rev. Rul. 2013-17, in which the IRS concluded that "[f]or Federal tax purposes, the terms 'spouse,' 'husband and wife,' 'husband,' and 'wife" do not include individuals (whether of the opposite sex or same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state. . . ." This disparity precipitated a change in New Jersey law.

On September 27, 2013, in Garden State Equality v. Dow, 434 N.J. Super. 163 (Law Div. 2013), the court held that in light of the United States Supreme Court's holding in Windsor, same-sex couples in New Jersey civil unions are denied federal benefits afforded to married couples in New Jersey, violating the State Constitution and the holding in Lewis v. Harris. To remedy this constitutional violation, the court ordered the State to issue marriage licenses to same-sex couples. The Supreme Court shortly thereafter denied the State's request for a stay of the trial court's decision. Garden State Equality v. Dow, 216 N.J. 314 (2013). The State subsequently withdrew its appeal of the trial court's decision, effectively permitting same-sex couples to marry in New Jersey beginning October 21, 2013. See As Gays Wed in New Jersey, Christie Ends Court Fight, The New York Times, Oct. 21, 2013.

After issuance of the Supreme Court's opinion in Garden State Equality plaintiff and decedent planned to get married. On May 27, 2014, seven months after the Garden State Equality opinion, plaintiff and decedent completed an application for a marriage license, which was

accepted by a local registrar of vital statistics. The application states that the couple planned to marry on June 8, 2014.

On June 2, 2014, decedent died unexpectedly. Because decedent passed away before the couple had their marriage solemnized, they were unmarried at the time of his death.

Plaintiff was named executor of his deceased partner's estate. He was also a beneficiary of the estate. It is undisputed that all of decedent's bequests to plaintiff were not subject to transfer inheritance tax by virtue of plaintiff's status as decedent's surviving registered domestic partner. Plaintiff filed a transfer inheritance tax return correctly excluding from that tax all bequests to plaintiff.

Plaintiff also filed a New Jersey estate tax return on behalf of decedent's estate. In the original return, plaintiff calculated the tax due without consideration of marital deduction under federal law and paid the tax. Subsequently, plaintiff filed an amended New Jersey estate tax return calculating the amount due as if plaintiff were a spouse entitled to the marital deduction under federal law. The amended return requested a refund of $101,041 in New Jersey estate tax.

On May 14, 2015, the Division of Taxation denied plaintiff's refund request. The denial explained that "a Domestic Partner receives the Class A exemption for Inheritance Tax purposes however, a Domestic Partner does not receive the Marital Deduction for Estate Tax purposes."

On June 11, 2015, plaintiff filed a Complaint in this court challenging the Director's denial of the refund request.

After discovery, plaintiff moved for summary judgment in his favor. The Director thereafter cross-moved for summary judgment in his favor. After the close of briefing, the court heard oral argument from counsel.

II. Conclusions of Law

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2. In Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995), our Supreme Court established the standard for summary judgment as follows:

> [W]hen deciding a motion for summary judgment under Rule 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

The court finds that there are no disputed material facts in this matter. The parties' claims, therefore, are ripe for resolution by motion.

The court's analysis of the validity of the Director's final determination begins with the familiar principle that the Director's interpretation of tax statutes is entitled to a presumption of validity. "Courts have recognized the Director's expertise in the highly specialized and technical area of taxation." Aetna Burglar & Fire Alarm Co. v. Director, Div. of Taxation, 16 N.J. Tax 584, 589 (Tax 1997)(citing Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 327 (1984)). The scope of judicial review of the Director's decision with respect to the imposition of a tax "is limited." Quest Diagnostics, Inc. v. Director, Div. of Taxation, 387 N.J. Super. 104, 109 (App. Div.), certif. denied, 188 N.J. 577 (2006). The Supreme Court has directed courts to accord "great respect" to the Director's application of tax statutes, "so long as it is not plainly unreasonable." Metromedia, supra, 97 N.J. at 327. See also GE Solid State, Inc. v. Director, Div. of Taxation,

132 N.J. 298, 306 (1993)("Generally, courts accord substantial deference to the interpretation an agency gives to a statute that the agency is charged with enforcing.").

As explained above, the computation of the New Jersey estate tax is based upon the amount of the federal State death tax credit allowable as of December 31, 2001. See Estate of Booth, supra. As of December 31, 2001, a reduction of the available credit for State death taxes, and therefore, a reduction in the New Jersey estate tax liability was available to married couples through the federal marital deduction. At the time of decedent's death, same-sex couples in New Jersey could obtain the benefit of the federal marital deduction either through entry into a civil union or through marriage. The civil union option for obtaining the benefit of the marital deduction was available to plaintiff and decedent as of February 19, 2007. The marriage option for obtaining the benefit of the marital deduction for New Jersey estate tax purposes was available to plaintiff and decedent as of October 21, 2013.

Although plaintiff and decedent were eligible to enter into either a civil union or a marriage as of the date of decedent's death, they did neither. The couple elected not to take advantage of the benefits of the civil union statute. In addition, the couple, although intending to marry, did not have their union solemnized prior to decedent's unexpected passing. Plaintiff does not ask this court to provide him with the benefits accorded to a surviving civil union partner under the Civil Union Act. Nor does plaintiff contend that he should be considered to have been married to the decedent. There is a longstanding policy in this State of not according statutory rights to couples who have not fulfilled the statutory requirements for a government-sanctioned relationship. See N.J.S.A. 37:1-10 (providing that no marriage contracted after December 1, 1939 shall be valid unless the couple first obtained a marriage license and had their marriage solemnized by a person authorized by law to do so); Yaghoubinejad v. Haghighi, 384 N.J. Super. 339, 341 (App. Div.

2006)(noting that N.J.S.A. 37:1-10 abolishes common law marriage in New Jersey). There is no legal basis on which the court could declare plaintiff to be a civil union partner or spouse, given his failure to enter into those relationships.

The only potential source of relief available to plaintiff is the DPA. There is no dispute that as of June 2, 2014, the date of decedent's death, plaintiff and decedent were registered domestic partners. Plaintiff, therefore, is entitled to the rights and benefits accorded to a surviving registered domestic partner. There is also no question that the DPA does not expressly provide that a surviving registered domestic partner is to be treated as a surviving spouse for purposes of calculating the New Jersey estate tax. The language of the statute is unequivocal. It expressly confers on registered domestic partners "certain rights and benefits that are accorded to married couples under the laws of New Jersey, including . . . . an additional exemption from the personal income tax and the transfer inheritance tax on the same basis as a spouse." N.J.S.A. 26:8A-2d. The statute does not in any way reference the New Jersey estate tax.

In addition, when enacting the DPA, the Legislature also amended N.J.S.A. 54:34-2(a) and N.J.S.A. 54:34-4, two provisions concerning the transfer inheritance tax, and N.J.S.A. 54A:1-2 and N.J.S.A. 54A:3-1, two provisions of the Gross Income Tax Act, to provide benefits for registered domestic partners. The Legislature did not amend the New Jersey estate tax statutes. A plain reading of the DPA, as corroborated by the amendment of specific tax statutes at the time that the DPA was enacted, in no way indicates that registered domestic partners are to be treated as spouses for purposes of calculating the estate tax. See Merin v. Maglaki, 126 N.J. 430, 434 (1992)(holding that statutory construction begins with the statute's plain language).

This plain reading of the DPA is also consistent with the Legislative Fiscal Estimate issued by the Office of Legislative Services with respect to S-2820, the bill that ultimately was enacted

as the DPA. The Fiscal Estimate, which is intended to provide the Legislature with an accurate estimate of the revenue impact of the bill, see N.J.S.A. 52:13B-1, et seq., addresses only two taxes when estimating how the DPA will affect revenues: the transfer inheritance tax and the gross income tax. The Fiscal Estimate does not consider a change in revenues in the estate tax to be a relevant consideration under the DPA, corroborating the view that the statute does not contemplate surviving registered domestic partners being treated as surviving spouses for estate tax purposes.

Plaintiff argues that the Legislature's use of the term "including" after the phrase "certain rights and benefits" in the DPA connotes an intention to state some, but not all, of the rights and benefits accorded to registered domestic partners. There is support for plaintiff's position.

In Fraser v. Robin Dee Day Camp, 44 N.J. 480 (1965), the Court examined the question of whether a children's day camp was included in the "places of public accommodation" to which admission may not be denied based on race. The operator of the day camp, who conceded that he denied admission to children because they were African-American, argued that a day camp was not specifically listed in the Law Against Discrimination and was not, therefore, subject to the law's anti-discrimination provisions. Id. at 484-485. The relevant statutory provision provided that "'[a] place of public accommodation' shall include" followed by a list of dozens of specific types of public facilities and businesses. N.J.S.A. 18:25-5(l) (now N.J.S.A. 10:5-5(l)). Children's day camps were not specifically listed. The Court held that "[o]rdinarily, the term 'include' is used as a word of enlargement and not of limitation." Id. at 485 (citing Cuna v. Board of Fire Com'rs, 42 N.J. 292, 304 (1964)). After noting that civil rights statutes are to be read broadly, the Court concluded that

> [i]n light of the liberal construction to be given the Law Against Discrimination, we conclude that the listed places of public accommodation are merely illustrative of the accommodations the Legislature intended to be within the scope of the statute. Other

> accommodations, similar in nature to those enumerated, were also intended to be covered.
>
> [Id. at 486 (citations omitted).]

The Court thereafter examined the attributes of the children's day camp and compared those attributes to the attributes of the places of public accommodation specifically listed in the statute. Id. at 487. The Court observed that the statute "includes a lengthy enumeration of a wide variety of accommodations which can be characterized either as educational or recreational in nature," and concluded that a "day camp is essentially an educational-recreational accommodation for children. We therefore think it clear that respondent's day camp is the type of accommodation which the Legislature intended to reach." Ibid.; accord Levitt & Sons, Inc. v. Division Against Discrimination, 31 N.J. 514, 526 (holding that a statute that provides that "a publicly assisted housing accommodation" "shall include" specified types of publically financed housing was not meant to exclude other types of publically financed housing), app. diss., 363 U.S. 418, 80 S. Ct. 1257, 4 L. Ed. 2d 1515 (1960); see also Jackson v. Concord Co., 54 N.J. 113, 127-128 (1969)(holding that a statute which authorizes the Director of the Division of Civil Rights to award remedies for civil rights violations "including, but not limited to" certain remedies was not intended to exclude the award of remedies not specifically listed).

In Hennefeld v. Township of Montclair, 22 N.J. Tax 166 (Tax 2005), Judge Bianco relied on these decisions when holding that the DPA provides to same-sex registered domestic partners a local property tax exemption not specifically listed in the statute. In that case, one same-sex registered domestic partner was a 100% disabled veteran entitled to an exemption from local property taxes on his residence pursuant to N.J.S.A. 54:4-3.30. He owned the property with his same-sex registered domestic partner as joint tenants with the right of survivorship. During the

controversy over the property tax exemption, the couple re-conveyed the property to themselves as tenants by the entirety. Id. at 173.

In January 2004, the couple, who were married under the laws of Canada and in a civil union under the laws of Vermont, applied for the disabled veteran's exemption from local property taxes. The assessor denied the exemption because the disabled veteran owned the home with someone other than a spouse. After a hearing before the county board of taxation, the couple was awarded a 50% exemption on the property, based on the disabled partner's 50% ownership interest in the residence. Id. at 174. Shortly after issuance of the county board's Judgment, the DPA took effect. The couple registered as domestic partners in New Jersey two days after the statute's effective date. Id. at 173.

In this court, the couple argued, along with other points, that the DPA allowed for the award of the 100% property tax exemption on property jointly owned by same-sex registered domestic partners, despite the fact that this exemption is not mentioned in the statute. The court noted that in 2004, when the DPA was enacted, and in 2005 when it was deciding the couple's claims, same-sex couples were unable to enter into a marriage with each other recognized by New Jersey and that the Legislature intended to remedy this situation by providing certain tax benefits to same-sex domestic partners that were accorded to married couples. The court concluded that although the 100% disabled veteran's local property tax exemption was not listed among the "certain tax-related benefits" provided to same-sex registered domestic partners in the DPA, the Legislature intended to provide the exemption because it was accorded to married couples. Id. at 198-199. "This is particularly true," the court continued, "for same-sex domestic partners in those instances where they are denied 'certain rights and benefits . . . accorded to married couples', N.J.S.A. 26:8A-2(d), specifically because '[they] . . . are . . . unable to enter into a marriage with each other that is

recognized by New Jersey law, unlike persons of the opposite sex . . . .', N.J.S.A. 26:8A-2(e), and therefore 'do not have access to the protections and benefits offered by law to married couples.'" Id. at 199. The court observed that the couple "are not married in the eyes of New Jersey and therefore cannot hold title as tenants by the entirety," as could a married couple. Ibid. This prevented the couple from obtaining the 100% disabled veteran's property tax exemption.

The court does not find these precedents persuasive here. There can be little doubt that the judicial branch must be cautious when it purports to find in the unambiguous text of a statute an implied right not specifically granted by the Legislature. This is particularly true when that right is a tax preference, an entitlement to which is ordinarily reserved for those instances in which the Legislature has expressly provided an exception to the general rule of taxation. See e.g. Waksal v. Director, Div. of Taxation, 215 N.J. 224 (2013). The Legislature listed in the DPA specific tax benefits it intended to grant to same-sex couples in domestic partnerships. In addition, at the time that it enacted the DPA, the Legislature amended four specific statutory provisions regarding tax benefits to apply those benefits to same-sex registered domestic partners. The estate tax was not mentioned in the DPA, nor were the estate tax statutes amended when the DPA was enacted. Only extraordinary circumstances would warrant a court engrafting into the DPA a tax benefit not mentioned in the statute.

Those extraordinary circumstances may well have been present in Hennefeld. It is evident that the lynchpin of the court's reasoning in Hennefeld, and its primary justification for finding an implied tax exemption in the DPA, was the fact that the couple in that case was unable to enter into a marriage or other State-sanctioned relationship affording them a tax benefit available to married couples. On several occasions, the court justified its expansive reading of the DPA as a means of avoiding the disparate treatment suffered by the same-sex couple in that case.

This crucial fact is not present here. Plaintiff and decedent had a nearly seven-year window to enter into a civil union and a more than seven-month window to enter into a marriage. Either relationship would have entitled plaintiff to be treated as a surviving spouse for purposes of the New Jersey estate tax. Plaintiff and decedent, who cannot dispute that they were aware of their right to enter a civil union and marriage while decedent was still alive, failed to secure the benefits of those relationships. This is a material distinction justifying this court's departure from the rationale used in Hennefeld and explaining its decision to comply more closely with the judiciary's obligation to apply the plain meaning of unambiguous statutes.

In addition, the opinion in Hennefeld was issued before the Court's decision in Lewis v. Harris, supra. Although the Court in that case held that same-sex couples have a State Constitutional right to access the rights and benefits of marriage, it is the remedy that the Court ordered that is significant here. The Court held that the State Constitution could be satisfied by the Legislature either allowing same-sex couples to marry or authorizing a distinct relationship with all of the rights and benefits of marriage. The Court did not hold that the DPA, which existed at the time of the Court's decision, should be construed to accord to same-sex registered domestic partners all of the rights and benefits of marriage. As discussed at length above, the Legislature opted for enactment of the Civil Union Act, which provides that a surviving civil union partner is to be treated like a surviving spouse for purposes of the New Jersey estate tax.

When enacting the Civil Union Act, the Legislature amended the DPA to preclude any additional same-sex couples from entering into registered domestic partnerships (unless they are both over 62 years of age). In addition, the Legislature required that all existing same-sex domestic partners be advised of their right to enter into a civil union. These legislative acts paint a clear picture: all of the rights and benefits of marriage were to be available to same-sex couples through

a civil union. Domestic partnerships, with fewer rights and benefits than marriages, were no longer available to same-sex couples under 62 years of age. Although existing same-sex domestic partnerships remained valid, it is evident that the Legislature recognized that those relationships afford fewer benefits to same-sex couples than do civil unions. Why else mandate notice to registered domestic partners of their right to "upgrade" from a domestic partnership to a civil union?

When later developments resulted in a judicial decision that the Civil Union Act was itself constitutionally flawed (because federal benefits, not the State tax benefit sought here, were not provided to civil union partners), the Court determined that the appropriate remedy was to require the State to allow same-sex couples to marry. The Court did not hold that the DPA should be construed to provide same-sex registered domestic partners all of the rights and benefits of marriage.

This is powerful evidence not available to the court in Hennefeld: when presented with the Constitutional mandate to provide same-sex couples with all the rights and benefits of marriage, the Legislature opted to establish civil unions. It did not vest those rights in registered domestic partnerships, a relationship the Legislature limited at the time that it made civil unions available. It is quite clear now that registered domestic partnerships, although valid in New Jersey, are not the vehicle through which the Legislature intended to provide same-sex couples with the rights and benefits of marriage. In addition, when the courts declared that only same-sex marriage could fully satisfy the State Constitution's mandate of equality, the disparate treatment of same-sex couples in the arena of marriage ended. Unlike the couple in Hennefeld, plaintiff and his partner were free to marry for several months before decedent died.

This court must apply the DPA as it is written, not as this court thinks it ought to be written, or as plaintiff would prefer it to be written. If the court were to find that the DPA contains an implied right of a surviving same-sex registered domestic partner to be treated as a surviving spouse for estate tax purposes, then there would arguably be no principled basis on which to find that any of the hundreds, or perhaps thousands, of rights and benefits afforded to married couples are also not impliedly included in the DPA. Yet, it is quite plain that before same-sex marriage became available the Legislature intended for civil unions to be the vehicle for providing all of the rights and benefits of marriage to same-sex couples, not domestic partnerships. Despite several junctures where it might have done so, the Legislature did not convert domestic partnerships into marriages.

There is no merit to plaintiff's argument that the DPA violates the State Constitution by not providing that a surviving same-sex registered domestic partner must be treated as a surviving spouse for purposes of the estate tax. As noted at length above, the ability of same-sex couples to access all of the rights and benefits of marriage has been effectuated in this State first through the Civil Union Act and later through access to marriage. Having provided those avenues to secure marriage rights, the Legislature is free to maintain other State-sanctioned relationships that provide fewer than all of the rights and benefits of marriage. The choice to provide one type of tax benefit and not another to taxpayers is subject to minimal judicial scrutiny absent an encroachment on a fundamental right or violation of a Constitutional protection. As our Supreme Court has explained, "with the exception of those cases in which a fundamental right is involved – and no such right is implicated here – 'a state statute does not violate substantive due process if the statute reasonably relates to a legitimate legislative purpose and is not arbitrary or discriminatory. Briefly stated, if a statute is supported by a conceivable rational basis, it will withstand a substantive due process

attack.'" Ocean Pines, Ltd v. Borough of Point Pleasant, 112 N.J. 1, 10 (1988)(quoting Greenberg v. Kimmelman, 99 N.J. 552, 563-64 (1985)(citations omitted)). The Court continued, "[w]hen reviewing a statute in light of such a challenge, we are concerned not with the wisdom of the legislation but solely with the question of whether it has a lawful purpose." Ibid. (citing Hutton Park Gardens v. Town Council, 68 N.J. 543, 563 (1975); Lane Distributors, Inc. v. Tilton, 7 N.J. 349, 365 (1951)).

The evident purpose of the DPA's grant of a transfer inheritance tax benefit but not an estate tax benefit to registered domestic partners is to protect revenue. "The power to raise revenue or to tax is among the most fundamental of governmental powers." In re: Commissioner of Ins. Orders A-92-189 and A-92-212, 137 N.J. 93, 98 (1994)(citing In re: Commissioner of Ins., 132 N.J. 209, 226 (1993)). The elected branches of government have considerable latitude to determine the State's fiscal policies, including the source and scope of tax revenue and the availability of tax benefits. It is within the Legislature's authority to provide fewer tax benefits to same-sex registered domestic partners than it provides to married couples, provided that same-sex couples have the right to marry as well.

Plaintiff and decedent elected not to enter into a civil union during the many years it was available to them. Nor did they marry promptly after the Court's decision in Garden State Equality v. Dow. They are, of course, free to order their affairs in any manner they see fit. They must, however, accept the legal consequences, including the ramifications of the tax laws, of their decisions. General Trading Co. v. Director, Div. of Taxation, 83 N.J. 122 (1980)(taxpayer is free to organize its financial affairs in any way it pleases, but is bound by the tax consequences of its decisions, even if unwise); accord Lugano v. Director, Div. of Taxation, 28 N.J. Tax 49 (Tax 2014)(holding that a taxpayer who fails to register as a domestic partner under the DPA is not

entitled to tax benefits under that statute), aff'd, 28 N.J. Tax 562 (App. Div.), certif. denied, 223 N.J. 281 (2015). Had they entered into a civil union during the many years it was available to them, or married sooner after the decision in Garden State Equality, decedent's unexpected passing would not have resulted in the estate tax liability contested in this case. Plaintiff and decedent suffered from a tragic turn of events, the tax consequences of which could have been avoided.

The court will enter Judgment affirming the Director's May 14, 2015 denial of plaintiff's refund claim.