

Unmarried Same-Sex Partner Allowed To Sue For Emotional Distress After Witnessing The Death Of Her Partner's Biological Child

October 11, 2018 | by Thomas F. Dorn, Jr

On August 17, 2018, in an opinion approved for publication, the Appellate Division in *Moreland v. Parks* (A-4754-16T4) held that a plaintiff in a same-sex relationship who witnessed the biological child of her partner die from being struck by a motor vehicle can pursue a claim for bystander negligent infliction of emotional distress. The Honorable Jose Fuentes, P.J.A.D. wrote the opinion in this case in which the court was asked to address the applicability of *Portee v. Jaffee* to a same-sex couple.

Valerie Benning and l'Asia Moreland were a same-sex couple who lived together with l'Asia's two biological children, l'Zhir age 5 and l'Maya age 2. On January 30, 2009, while Valerie Benning and l'Maya were holding hands waiting to cross a street, a pickup truck collided with a fire truck and then struck and killed l'Maya. A civil lawsuit alleging various theories of liability was filed against several defendants. One allegation filed by Valerie Benning was bystander negligent infliction of emotional distress. The elements of a bystander claim are set forth in *Portee v. Jaffee*, 84 N.J. 88 (1980). To prevail in a bystander claim for negligent infliction of emotional distress, a plaintiff has to prove: (1) the death or serious physical injury of another caused by defendant's negligence, (2) a marital or intimate, familial relationship between plaintiff and the injured person, (3) observation of the death or injury at the scene of the accident, and (4) resulting severe emotional distress. In *Portee*, a mother witnessed her son die after he was trapped in an elevator door and shaft.

The evidence showed that plaintiff Benning and l'Asia Moreland began dating in August 2007 and started living together in 2008. They married in March 2014. l'Maya called Valerie "mom" prior to the accident on January 30, 2009. The Law Division concluded in a motion for Summary Judgment that plaintiff Benning did not meet element (2) of *Portee* as there was no intimate, familial relationship. The Appellate Division disagreed. In his opinion, Judge Fuentes noted that thirty-eight years ago when *Portee* was decided, gay, lesbian and transgender people were socially shunned and legally

unprotected. The concept in 1980 of same-sex couples with children “was considered by a significant number of our fellow citizens as socially and morally repugnant and legally absurd.” For the past few years, however, citizens “now recognize and protect the rights of LGBTQ people to equal dignity and treatment under the law.” Federal and State judges have held that same-sex couples may marry and have children.

Judge Fuentes found that a rational jury could find that Valerie and l'Maya had an intimate familial relationship at the time of l'Maya's tragic death. Furthermore, a rational jury could find that Valerie was a “de facto mother to this child, and felt her loss as deeply as any parent facing that horrific event.” The Appellate Division reversed and remanded the case back to the Law Division.

This decision follows New Jersey's laws that all individuals have inherent constitutional rights.