



NEW JERSEY LAW REVISION COMMISSION

Final Report

Relating to

Civil Unions

March 19, 2015

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.
Please consult the New Jersey statutes in order to determine the law of the State.

Please send comments concerning this report or direct any related inquiries, to:

Vito J. Petitti, Esq., Counsel
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax) 973-648-3123
Email: vjp@njlrc.org
Web site: <http://www.njlrc.org>

Introduction

In *Groh v. Groh*, decided in March 2014 but not approved for publication until January 2015, a New Jersey Superior Court judge ruled that family court has the authority to dissolve a civil union on the no-fault ground of irreconcilable differences.¹ This is significant because, although irreconcilable differences is listed among the grounds for dissolution of marriages, New Jersey statute does not make such grounds explicitly available for dissolution of civil unions.² New Jersey's civil union statute, effective in 2007, specifies that "[t]he dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage."³ And indeed, in practice, New Jersey courts and practitioners are reportedly nonetheless relying on no-fault irreconcilable differences grounds for civil union dissolutions.

The Commission recommends a revision of New Jersey civil union dissolution grounds so as to reflect the current practice in New Jersey.

Background

In October 2006, the Supreme Court of New Jersey held, in *Lewis v. Harris*, that although same-sex marriage was not a fundamental right entitled to protection under the liberty guarantee of New Jersey's Constitution, unequal dispensation of rights and benefits to committed same-sex partners could no longer be tolerated and same-sex couples in committed relationships should have rights, benefits, and responsibilities similar to those enjoyed by married heterosexual couples.⁴ The plaintiffs in the case were seven same-sex couples who had been denied marriage licenses.

Two months after the *Lewis* decision, the New Jersey Legislature passed P.L. 2006, c.103, the New Jersey Civil Union Act, which then-Governor Corzine signed into law.⁵ Even though the state did not at the time recognize same-sex marriage, same-sex couples in civil unions were afforded new statutory rights, including dissolution grounds essentially identical to those of marriage.

In January 2007, the Legislature enacted and the governor signed into law as P.L. 2007, c.6, a new cause of action for marital divorce based on irreconcilable differences. The governor noted at the time in a signing statement it was his clear understanding that the new cause of action would be applicable to civil unions as well as marriages.⁶

To address potential confusion springing from the civil union statute's lack of an equivalent no-fault ground for dissolution, the Administrative Office of the Courts (AOC) noted

¹ 2014 WL 7647544.

² N.J. STAT. ANN. §§ 2A:34-2, -2.1 (West 2015).

³ N.J. STAT. ANN. §§ 37:1-28 et al. (West 2015).

⁴ 188 N.J. 426 (2006).

⁵ N.J. STAT. ANN. §§ 37:1-28 et al. (West 2015).

⁶ Supreme Court of New Jersey 2009-2011 Family Practice Committee Final Report, <http://www.judiciary.state.nj.us/reports2011/family.pdf> (last visited 1-22-2015).

in a January 2007 memorandum to New Jersey assignment judges the statutory requirement that the dissolution of civil unions follow the same procedures and be subject to the same substantive rights and obligations involved in the dissolution of marriage.⁷ The memorandum also cited the governor's signing statement.

Also in 2007, Edith Windsor and Thea Spyer, residents of New York and a same-sex couple, were married in a lawful ceremony in Ontario, Canada. Although New York recognized the marriage, when Spyer died in 2009, Windsor was barred from claiming the surviving spouse estate tax exemption because she did not qualify as a "surviving spouse" under the Defense of Marriage Act (DOMA). Windsor brought a Fifth Amendment Equal Protection claim and, in June 2013, the United States Supreme Court held, in *United States v. Windsor*, that DOMA's definition of marriage was unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment.⁸

In *Garden State Equality v. Dow*, decided in October 2013, six same-sex couples and an advocacy group sued the attorney general and commissioners of the Department of Human Services and Health and Senior Services, claiming that the Civil Union Act did not provide equal treatment to same-sex couples. The Superior Court entered summary judgment in favor of the plaintiffs, ruling that same-sex couples must be allowed to marry. The New Jersey Supreme Court denied the State's motion to stay the order.⁹

Although the effects of preventing same-sex couples from obtaining dissolution of their civil union by citing irreconcilable differences are apparent, so far there is little discourse regarding the unavailability of irreconcilable differences as a ground for same-sex couples in New Jersey.¹⁰ The information that is available, however, suggests that the intent of the New Jersey legislature in making irreconcilable differences a viable ground for divorce between opposite-sex couples was also meant to apply to same-sex partners.¹¹

The Commission became aware of a discrepancy between New Jersey statute and the way divorce law is apparently being practiced upon the publication of a January 20, 2015, New Jersey Law Journal article detailing the recently published Superior Court decision in *Groh* that, notwithstanding the fact that the no-fault ground of irreconcilable differences is absent from the list of grounds for dissolution of a civil union, same-sex couples can legally dissolve their civil unions based upon irreconcilable differences. In that case, the parties had amicably resolved all of their pending issues in a written settlement agreement and sought a judgment dissolving their civil union on the no-fault grounds of irreconcilable differences. The judge granted the dissolution despite the fact that N.J.S. 2A:34-2.1 does not explicitly include irreconcilable differences as an applicable ground for dissolution of a civil union.

⁷ Administrative Office of the Courts Memorandum dated 1/22/2007.

⁸ 133 S.Ct. 2675 (2013).

⁹ 216 N.J. 314 (2013).

¹⁰ Sterling Education Services (SES) Legal Blog, <http://www.sterlingeducation.com/the-sterling-blog/bid/90779/Irreconcilable-Differences-Grounds-Non-Existent-for-Civil-Union-Dissolution> (last visited 1-22-2015).

¹¹ *Id.*

The judge in *Groh* reasoned that, prior to enactment of the irreconcilable differences law, the respective lists of grounds for marital and civil union dissolutions were essentially mirror images of each other, and therefore the Legislature’s intent was to create a symmetry between the recognized causes of action for divorce and dissolution of a civil union, in a manner consistent with the terms and constitutional spirit of *Lewis*.¹² Also, the judge noted the absence of language in the legislative history of either the Civil Union Act or the statutory provision for the dissolution of civil unions which reflects any specific intent by the Legislature to permit only heterosexual married couples the ease of ending their marriages on such no-fault grounds, while simultaneously denying this same basic right and convenience to same-sex couples seeking to amicably dissolve their civil unions. Moreover, “the denial of such right would constitute a fundamental breach of constitutional rights and equal protection as enunciated by the Supreme Court in *Lewis*.”

Without a change to the statute, self-represented litigants reading and relying upon the explicit wording of N.J.S. 2A:34–2.1 – and even seasoned attorneys – could reach erroneous conclusions regarding the dissolution of a civil union on the ground of irreconcilable differences. For example, some litigants otherwise qualifying for no-fault dissolution could unnecessarily wait to be physically separated for 18 months (instead of the six months required under no-fault grounds).

According to the New Jersey Law Journal, divorce attorneys in this state already rely on irreconcilable differences in civil union dissolutions in practice, and no judge is known to have denied dissolution based on those grounds. The publication characterized the *Groh* decision as clearing up the issue, at least for the professionals.

In fact, there is disagreement among practice guides regularly consulted by New Jersey family law practitioners. New Jersey Family Law, by Matthew Bender & Company, Inc., advises that the grounds for dissolution of a civil union are similar to those for dissolution of a marriage, *including the grounds of irreconcilable differences*.¹³ A footnote within the practice guide refers to a case note annotation under N.J.S. 2A:34-1, which attributes “the legislature’s failure to amend the Civil Union Act to add this no-fault ground” to a “drafting oversight,” citing *Groh*.

Alternatively, New Jersey Family Law Practice, by New Jersey Institute of Continuing Legal Education, specifies that “irreconcilable differences is *not* a cause of action for civil union dissolution.”¹⁴ [Emphasis added.]

¹² According to the judge, the only notable semantic difference was that in the divorce statute, there was a cause of action under N.J.S.A. 2A:34–2(a) for “adultery,” as opposed to N.J.S.A. 2A:34–2.1(a)’s cause of action for “voluntary sexual intercourse between a person who is in a civil union and an individual other than the person’s partner in a civil union couple.”

¹³ 1 New Jersey Family Law § 2-18.

¹⁴ NJ Family Law Practice § 14.7B.

Proposed Revision

In order to gauge the potential impact of a modest, limited scope revision to existing statute, the Commission conducted preliminary outreach to representatives of the AOC and the Family Law section of the New Jersey State Bar Association, and received unqualifiedly positive comments from each regarding a project to clarify the existing statute.

Currently, the respective lists of dissolution grounds are “essential” but not perfect mirror images of each other, due to the inherent differences between marriage and civil unions. For example, as noted above, the marital dissolution cause of adultery is unique to marriage, although there is a civil union counterpart. Also, the causes of separation under marital and civil union dissolution closely resemble each other but are distinguished by the use of the terms “husband and wife” and “civil union couple,” respectively. Likewise, the Commission’s proposed revision to N.J.S. 2A:34-2.1 conforms to the greatest extent possible with the existing no-fault language in the marital statute. For ease of comparison, both statutory sections are provided in the Appendix, below.

Appendix

As regards the available grounds for the dissolution of marriage and civil union, the relevant provisions of New Jersey law, N.J.S. 2A:34-2 and -2.1, are as follows, with proposed new language underlined:

2A:34-2. Causes for divorce from bond of matrimony

Divorce from the bond of matrimony may be adjudged for the following causes heretofore or hereafter arising:

- a. Adultery;
- b. Willful and continued desertion for the term of 12 or more months, which may be established by satisfactory proof that the parties have ceased to cohabit as man and wife;
- c. Extreme cruelty, which is defined as including any physical or mental cruelty which endangers the safety or health of the plaintiff or makes it improper or unreasonable to expect the plaintiff to continue to cohabit with the defendant; provided that no complaint for divorce shall be filed until after 3 months from the date of the last act of cruelty complained of in the complaint, but this provision shall not be held to apply to any counterclaim;
- d. Separation, provided that the husband and wife have lived separate and apart in different habitations for a period of at least 18 or more consecutive months and there is no reasonable prospect of reconciliation; provided, further that after the 18-month period there shall be a presumption that there is no reasonable prospect of reconciliation;
- e. Voluntarily induced addiction or habituation to any narcotic drug as defined in the New Jersey Controlled Dangerous Substances Act, P.L.1970, c. 226¹ or habitual drunkenness for a period of 12 or more consecutive months subsequent to marriage and next preceding the filing of the complaint;
- f. Institutionalization for mental illness for a period of 24 or more consecutive months subsequent to marriage and next preceding the filing of the complaint;
- g. Imprisonment of the defendant for 18 or more consecutive months after marriage, provided that where the action is not commenced until after the defendant's release, the parties have not resumed cohabitation following such imprisonment;
- h. Deviant sexual conduct voluntarily performed by the defendant without the consent of the plaintiff;

i. Irreconcilable differences which have caused the breakdown of the marriage for a period of six months and which make it appear that the marriage should be dissolved and that there is no reasonable prospect of reconciliation.

2A:34-2.1. Grounds for dissolution of civil unions

The dissolution of a civil union may be adjudged for the following causes:

a. voluntary sexual intercourse between a person who is in a civil union and an individual other than the person's partner in a civil union couple;

b. willful and continued desertion for a period of 12 or more consecutive months, which may be established by satisfactory proof that the parties have ceased to cohabit as partners in a civil union couple;

c. extreme cruelty, which is defined as including any physical or mental cruelty that endangers the safety or health of the plaintiff or makes it improper or unreasonable to expect the plaintiff to continue to cohabit with the defendant; except that no complaint for termination shall be filed until after three months from the date of the last act of cruelty complained of in the complaint, but this provision shall not be held to apply to any counterclaim;

d. separation, provided that the partners in a civil union couple have lived separate and apart in different habitations for a period of at least 18 or more consecutive months and there is no reasonable prospect of reconciliation; and provided further that, after the 18-month period, there shall be a presumption that there is no reasonable prospect of reconciliation;

e. voluntarily induced addiction or habituation to any narcotic drug, as defined in section 2 of the "New Jersey Controlled Dangerous Substances Act," P.L.1970, c. 226 (C.24:21-2) or in N.J.S.2C:35-2 of the "Comprehensive Drug Reform Act of 1987," N.J.S.2C:35-1 et al., or habitual drunkenness for a period of 12 or more consecutive months subsequent to establishment of the civil union and next preceding the filing of the complaint;

f. institutionalization for mental illness for a period of 24 or more consecutive months subsequent to establishment of the civil union and next preceding the filing of the complaint; or

g. imprisonment of the defendant for 18 or more consecutive months after establishment of the civil union, provided that where the action is not commenced until after the defendant's release, the parties have not resumed cohabitation following the imprisonment.

h. irreconcilable differences which have caused the breakdown of the civil union for a period of six months and which make it appear that the civil union should be dissolved and that there is no reasonable prospect of reconciliation.