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Dissolution of New Jersey Civil Unions by Non-Resident Litigants

The Impossible Dream?

by Ronald A. Graziano

Currently, 22 states recognize civil unions, same-sex marriages or domestic partnerships.[1] New Jersey has now indirectly joined that group by abandoning an appeal of a lower court ruling mandating same-sex marriage. New Jersey's Civil Union Act has not been declared unconstitutional and still governs the same-sex couples who previously entered into civil unions.[2]

The requirements for a civil union license parallel those for a marriage license.[3] In fact, there are no differences. There is no residency requirement to obtain a marriage license or a civil union license.[4]

It is at the point of dissolution, however, that a divergence, perhaps unintended by the Legislature and unforeseen by same-sex couples, sometimes occurs.

A couple who marries in New Jersey but moves to another state need only meet that state's residency requirement to file for divorce. In many states, including New Jersey, that residency requirement is one year.[5] That same one-year residency requirement exists for dissolution of civil unions in New Jersey.[6] Of course, because marriage is recognized in all 50 states the principle of full faith and credit mandates that a marriage in any state can be dissolved in any other state. As a result, heterosexual married couples can divorce in all 50 states.[7] Not so for civil unions.

If a couple enters into a civil union in New Jersey and thereafter moves into a state that does not recognize civil unions, the couple is literally unable to dissolve that civil union unless one partner physically moves and meets the residency requirements of New Jersey or some other state that recognizes civil unions. For the reasons set forth below, this is clearly an impractical solution at best and, in most situations, a virtually impossible one at worst.

Realistically, one member of a civil union cannot just resign employment, leave home and move to another state for a year. Obviously these practical considerations make establishing residency an impossible solution. Some couples might lie about residency—an illegal and possibly immoral action that is certainly not the solution intended by the New Jersey Legislature. The couple could enter into a property settlement agreement and disentangle the economics of their relationship but they would remain in that civil union forever—never able to form a different civil union, never able to marry even if their current home state, while not recognizing civil unions, decides to allow same-sex marriages. Clearly, the New Jersey Legislature did not intend an original civil union to be, for all practical purposes, perpetual.

In effect, requiring a couple to remain economically and sociologically entangled beyond the time they desire their relationship to end is at least minimally bad policy and possibly actionably discriminatory.

This civil union dissolution issue in New Jersey is not a purely academic exercise. Under current law, "...partners in a civil union are deprived of significant federal benefits such as: family and medical leave; Medicare; immigration matters; military and veteran's affairs; filing a joint federal tax return; and participation in a Survivor Benefit Plan."[8] Absent a civil union dissolution and a subsequent same-sex marriage, that deprivation will persist.

As the situation currently stands, a couple in a civil union is barred from entering into a same-sex marriage because the undissolved civil union is an irremediable impediment. That seems to be the case in New Jersey and is specifically so in other states.[9]

One might argue that the solution is for New Jersey to automatically convert civil unions into same-sex marriages.

Of course, the current state authorities have not indicated any willingness to do so and, perhaps more importantly, such a 'conversion' without a couple's consent might be in and of itself unconstitutional, or at least unnecessarily autocratic.[10]

The author believes the most logical and practical solution is legislative. A simple amendment to the civil union statute eliminating any residency requirement for the dissolution of civil unions initially formed in New Jersey is all that is needed. This would not be the first or only residency requirement modification for 'divorce'—a cause of action for adultery has no residency requirement at all. An individual seeking a divorce on the basis of adultery need not meet the one-year residency requirement.[11] Of course, both parties would be required to certify under oath that each consents to dissolution in New Jersey and that their current home state does not recognize civil unions. This would avoid any complications arising out of conflicts with federal law, which now bars recognition across state lines of same-sex marriages. Furthermore, requiring this type of certification would eliminate fraud, abuse or other exploitation of the statute.

Some states have enacted legislation employing a similar approach.[12] However, those states sometimes graft provisions onto the remedial legislation that are both unfair and unnecessary. For example, Vermont mandates that a property settlement agreement be in place before the residency requirement waiver is permitted.[13] This additional requirement, however, deprives a same-sex couple of the ability to litigate or at least contest in some fashion economic issues arising out of their union.

The author believes New Jersey should not follow this approach, but instead should simply waive the classic residency requirement in situations where a dissolution of the civil union for a particular couple would otherwise be impossible absent unnecessary hardship.

N.J.S.A. 2A:34-10 could be amended by adding a third paragraph, as follows:

3. *Except that the one year bona fide residency requirement shall be waived in dissolution of civil union actions for civil unions formed in New Jersey if the partners to that civil union:*

   (a) Reside in a state that does not recognize civil unions; and

   (b) Consent, in writing, under oath, to jurisdiction in New Jersey of the dissolution proceeding and issues attendant to that proceeding. ⚖

Endnotes

1. The states include California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Vermont, Washington, Wisconsin, and the District of Columbia. Masuma Ahuja and Emily Chow, Same-sex marriage status in the U.S., *Washington Post,* washingtonpost.com/wp-srv/special/politics/same-sex-marriage/ (last updated Jan. 6, 2014).

   Utah, as of early 2014, is something of a unique procedural situation. The United States Supreme Court has upheld a federal appeals court decision temporarily staying a United States District Court decision declaring Utah's ban on same-sex marriage unconstitutional but the United States Department of Justice has nonetheless announced that it will recognize same-sex marriages conducted in Utah. Editorial Board, Utah's same-sex newlyweds should keep their status, *Washington Post,* (Jan. 8, 2014). Additionally, Oklahoma's same-sex marriage ban was deemed unconstitutional by a federal judge in Jan. 2014, and the decision is currently stayed pending appeal. Juliet Eilperin, Federal judge rules Oklahoma's same-sex marriage ban unconstitutional, *Washington Post,* (Jan. 14, 2014).
2. *Garden State Equality v. Dow,* __ A.3d __, M-208 Sept. Term 2013, 2013 WL 5687193 at *5 (N.J. Oct. 18, 2013).
3. "The Civil Union Act, while it may not see much use in the coming months, remains available for people who choose to use it. Even more important, though, the statute was presumptively valid 'so long as' it provided full and equal rights and benefits to same-sex couples. Based on recent events, the Civil Union Act no longer achieves that purpose." *Garden State Equality v. Dow,* __ A.3d __, M-208 Sept. Term 2013, 2013 WL 5687193 at *5 (N.J. Oct. 18, 2013) (*citing Lewis v. Harris,* 188 N.J. 415, 423 (2006)).
4. N.J. Stat. Ann. § 37:1-28.
5. N.J. Stat. Ann. § 2A:34-10.
6. N.J. Stat. Ann. § 2A:34-10.
7. The principal of comity is embodied in part by the full faith and credit clause and "puts the constitution behind a judgment instead of the too fluid, ill-defined concept of 'comity.'" *Williams v. State of N.C.,* 325 U.S. 226, 228 (1945). Comity provides that a state should give respect and deference to the legislative enactments and public policy pronouncements of other jurisdictions. It is applied voluntarily and when used by the court it leads to recognition and enforcement of the laws of the foreign state to the extent that they do not conflict with local laws or violate the public policy of the local state. *Sajjad v. Cheema,* 428 N.J. Super. 160, 180, (N.J. Super. Ct. App. Div. 2012), *citing In re Fischer's Will,* 119 N.J. Eq. 217, 223 (Preog. Ct. 1935). A juris-

diction that does not recognize same-sex marriage is not bound by the principle of comity in actions for divorce between same-sex couples because of the conflicting local policy and legal considerations of the non-recognizing state.

8. *Garden State Equality v. Dow*, __ A.3d __, M-208 Sept. Term 2013, 2013 WL 5687193 at *1, *6 (N.J. Oct. 18, 2013).
9. Colorado's new civil union law (Colo. Rev. Stat. Ann. § 14-15-101–19) enacted May 1, 2013, "prohibits anyone who is married or in a civil union in another state from entering a civil union in Colorado with someone other than their legally recognized spouse." Associated Press, First gay divorce finalized in Colorado, usatoday.com/story/news/nation/2013/07/30/first-gay-divorce-colorado/2600037/ July 30, 2013.
10. New Jersey's Civil Union Act creates an anomaly, which, although not the subject of this article, is nonetheless interesting: Does the statute violate the equal protection rights of heterosexual couples since it specifically limits its applicability to same-sex couples?
11. "[E]xcept that no action for absolute divorce or dissolution of a civil union shall be commenced for any cause other than adultery, unless one of those parties has been for the 1 year next preceding the commencement of the action a bona fide resident of this State." N.J. Stat. Ann. § 2A:34-10.
12. Vermont amended the residency requirements in 2012 for same-sex couples who were unable to obtain divorces in other states as a result of the foreign jurisdiction not recognizing the Vermont-sanctioned marriage or union. Vermont drops residency requirement for dissolving Vermont civil unions/marriages, Vermont Freedom to Marry, (April 27, 2012), vtfreetomarry.org/2012/04/vermont-drops-residency-requirements-for-dissolving-vermont-civil-unionsmarriages.html. The amended statute now permit divorces to be filed in Vermont provided that: "(1) the marriage was established in Vermont, (2) neither party's state of legal residence recognizes the couple's Vermont marriage for purposes of divorce, (3) there are no minor children who were born or adopted during the marriage, (4) the parties file a stipulation together with a complaint that resolves all issues in the divorce action." Vt. Stat. Ann. tit. 15, § 592, *as enacted by* Vt. H. 758 (2011-2012 Legislative Session).

    Prior to the amended Vermont residency statute, couples who were in foreign jurisdictions that did not recognize the union or marriage entered into in Vermont were left in situations where the obligations of the parties were unenforceable. *Austin v. Austin*, 75 Va. Cir. 240 (2008) (holding that the union created in Vermont was void in Virginia and no rights created by the union were enforceable by any court within the commonwealth). New York, based on principals of comity, permits its courts to have subject matter jurisdiction over an action for equitable and declaratory relief for dissolution of a civil union validly entered into outside of New York. *Dickerson v. Thompson*, 73 A.D.3d 52, 53, 897 N.Y.S.2d 298, 299 (2010). However, the appellate court noted explicitly that although the trial courts in New York have subject matter jurisdiction over these cases, "questions as to whether and to what extent relief may ultimately be afforded to the parties have no bearing on whether [the trial court] has subject matter jurisdiction." *Dickerson v. Thompson*, 73 A.D. 3d. 52, 56, 897 N.Y.S. 2d 298, 302 (2010). The opposite outcome occurred in *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 670 (Tex. App. 2010), review granted (Aug. 23, 2013) where the Court of Appeals of Texas held that the Texas courts lack subject-matter jurisdiction for a divorce proceeding that is brought by a party to a same-sex marriage entered into another state because same-sex marriage is proscribed in the Texas constitution.
13. 15 V.S.A. § 592(b)(4)(C)(v).

Ronald A. Graziano *is a principal of Graziano & Flynn in Cherry Hill. Throughout his nearly 40-year career he has been a trial lawyer with a concentration in family law matters. He is a frequent lecturer for the National Institute for Trial Advocacy (NITA) and is an adjunct professor at Rutgers School of Law–Camden.* *The author wishes to thank law professors Michael Dale, Stephanie Ledesma and J.C. Lore and law clerks Gina Imeprato and Keith Nagy for their assistance with this article.*