

To: Commission
From: Vito J. Petitti
Re: Civil Unions
Date: February 9, 2015

Memorandum

Executive Summary

A New Jersey Superior Court judge ruled, in *Groh v. Groh*¹, that family court has the authority to dissolve a civil union on the no-fault ground of irreconcilable differences. 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, courts and practitioners are reportedly nonetheless relying on no-fault irreconcilable differences grounds for civil union dissolutions.

Staff requests Commission approval to begin work in this area with the goal of recommending revision of New Jersey civil union dissolution grounds so as to reflect the law as articulated in the *Groh* decision.

Background

In 2006, the Supreme Court of New Jersey held in *Lewis v. Harris* that, although a fundamental right to same-sex marriage could not be found to exist in this State, the unequal dispensation of rights and benefits to committed same-sex partners would no longer be tolerated under New Jersey's Constitution, and same-sex couples in committed relationships should have rights, benefits, and responsibilities similar to those enjoyed by married heterosexual couples.⁴ Within two months of the *Lewis* decision, the Legislature enacted the New Jersey Civil Union Act.⁵ In the following month, in 2007, the Legislature enacted and the governor signed into law as P.L. 2007 a new cause of action *for marital divorce* based on irreconcilable differences. According to a January 22, 2007, Administrative Office of the Courts ("AOC") memorandum sent to New Jersey assignment judges, the governor noted in his signing statement that it was "his clear understanding that the new cause of action for divorce based on irreconcilable differences is applicable to civil unions as well as marriages."

¹ 2014 WL 7647544.

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

³ N.J. STAT. ANN. § 37:1-31 (West 2015).

⁴ 188 N.J. 415 (2006).

⁵ N.J. STAT. ANN. §§ 37:1-28 to -36 (West 2015).

Staff became aware that a discrepancy exists 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 ground of irreconcilable differences. The judge granted the dissolution despite that 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.

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.⁶ 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*."

The *Groh* opinion also addresses practical aspects of initiating a dissolution case in New Jersey. 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 difference in civil union dissolutions in practice, and no judge is known to have denied dissolution based on those grounds. The author characterized the *Groh* decision as clearing up the issue, at least for the professionals.

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:

⁶ 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."

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.

In order to gauge the potential impact of a revision to existing statute, Staff conducted some 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 existing statute. It would seem that synchronizing the above statutory sections

would require only modest revision, increasing the likelihood of achieving consensus among stakeholders.

Conclusion

Staff requests approval to conduct additional research and propose revisions calculated to resolve apparent discrepancies between existing statute, the *Groh* opinion, and actual divorce practice in New Jersey.