

Alimony And Equitable Distribution In Long-Term Same-Sex Relationships

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This month is LGBT Pride month and throughout the country LGBT Pride festivals, the annual celebrations of LGBT identities, relationships, and achievements, are taking place. This year's Pride festivities will be especially meaningful in the ten states that have legalized same-sex marriage in this past year. In June 2013, the United States Supreme Court issued a historic decision in [United States v. Windsor](#) which struck down a major portion of the so-called Defense of Marriage Act. This decision directs that same-sex marriages that are legally recognized by individual states must be recognized by the federal government. This decision represents monumental progress for the LGBT community.

The decision in the [Windsor](#) case has since been cited by many states around the country, including New Jersey, in matters addressing the issue of legalizing same-sex marriage. In October 2013, the New Jersey Superior Court cited the [Windsor](#) decision as a major factor in its ruling that cleared the way for New Jersey to recognize same-sex marriages. Prior to that decision, same-sex couples were only allowed to form civil unions in New Jersey. Although civil unions were intended to provide the same State rights to same-sex couples as opposite-sex married couples, federal benefits were not available to same-sex couples in civil unions.

Now that same-sex couples can marry in New Jersey, they have the same rights and responsibilities of marriage previously only afforded to married opposite-sex couples. Many of these marital rights arise in the context of divorce, including the right to receive equitable distribution of property and the right to receive spousal support.

Given the unique history of this State's recognition of same-sex relationships, our Courts will need to look much more closely at the individual circumstances of a divorcing same-sex couple in a long-term relationship. Since same-sex marriage is in its infancy, Courts should apply greater scrutiny in considering the equitable rights of the parties in long-term relationships that were recently not legally

recognized.

One main area of concern for same-sex couples is the concept of alimony. The award of alimony to a divorcing spouse is provided for by statute. Specifically, [N.J.S.A. 2A:34-23\(b\)](#) provides for different types of alimony, including permanent alimony and limited duration alimony, and requires a court to consider thirteen non-exhaustive factors, including the duration of the marriage in granting an award of alimony.

Permanent alimony is required where there is a marriage of long duration and where one party is economically dependent on the other party. For instance, an award of permanent alimony would typically be appropriate in a twenty-year marriage where one party earned \$200,000 per year, and the other party worked a part-time job and mainly raised the children.

Limited duration alimony, however, is appropriate where there is shorter-term marriage and the dependent spouse has the skills and education necessary to return to the workforce. For example, limited duration alimony might be appropriate where the parties were married for eight years and the dependent wife can obtain a job where she is expected to increase her income over time and provide for her own expenses.

In either permanent or limited duration alimony cases, the courts analyze the exact same statutory factors, focusing specifically on the duration of the marriage. Hence, the type of alimony will often rest upon the length of the marriage. But what about same-sex couples who were legally prohibited from entering into a marriage until 2013? Should the length of the entire relationship, not the length of the marriage, be the critical factor in determining support?

Consider the scenario of a hypothetical same-sex couple. They have lived together in New Jersey since 1995 in a monogamous romantic relationship. Were it not for the general prohibition of same-sex marriage in New Jersey, the couple would have married many years ago. One party earns three times as much as the other and has been the primary breadwinner for much of their relationship. When marriage finally became available to same-sex couples in October 2013, they immediately married. Flash forward four years – the parties have experienced a significant breakdown in the marriage for a

variety of reasons and the dependent spouse wishes to dissolve the marriage. Should the duration of the relationship prior to the marriage be a factor in an alimony award?

In this scenario, the marriage itself has only lasted four years, but the relationship as a whole has existed for over 20 years. If a Court looked at this case from a traditional, simplified point of view, the dependent spouse could be awarded an extremely short duration of alimony, if any alimony at all, based upon a four year marriage. The dependent spouse, however, might argue that equity requires the entire duration of the relationship be considered in determining alimony because the parties would have been married for a substantially greater length of time if the couple had not been prohibited from doing so.

Unlike opposite-sex couples who have been living together for many years and choose not to be married, same-sex couples in New Jersey had no other option but to live together without legal recognition. There have been other cases in New Jersey in opposite-sex marriages which have held that pre-marital cohabitation may be considered in determining alimony. In McGee v. McGee, 277 N.J. Super. 1, (App. Div. 1994), the court held that the “extent of actual economic dependency, not one's status as a spouse, must determine the duration of support.” This standard has been applied to similarly situated opposite-sex marriages, but there are currently no reported cases in New Jersey involving same-sex divorce.

Equity may dictate that the dependent spouse could receive alimony based upon the length of the relationship in this case, but what about the supporting spouse who is expected to provide alimony? That party may argue that since marriage was unavailable he had no expectation that he would ever be called upon to support his spouse based upon an over 20-year relationship. It could be argued that the laws were different for the first twenty years of the relationship and the court should not retroactively create an expectation that explicitly did not exist before.

One complicating factor in the analysis of the duration of the marriage issue is the existence of civil unions in New Jersey since 2007. The New Jersey Supreme Court held in Lewis v. Harris, 188 N.J. 415 (2006), that the State must provide the same rights and benefits of marriage to committed same-sex couples that were given to opposite-sex couples. At the time, rather than provide same-sex couples

the ability to enter into marriages, New Jersey created civil unions. This separate status was to provide the same rights and responsibilities to same-sex couples as opposite-sex couples, with the only difference being the name of “marriage.” Thus, in the hypothetical, the supporting spouse would argue that the couple could have entered into a civil union many years before marriage was permitted, but they did not do so.

Many same-sex couples chose not to enter into a civil union in 2007 though they did have the ability to gain access to the same state rights as married couples in New Jersey. This could be true for many reasons. For instance, politically, the couple may have wished to wait for full-fledged marriage equality to be available, or they may not have wanted to enter into a relationship that was not recognized at the federal level. How does this factor into a court’s decision on whether or not the pre-marital relationship should apply to the duration of the subsequent alimony award?

The supporting spouse might argue that the marital rights were available to them through civil unions since 2007, and that the parties considered entering into a civil union, but decided against it. This could be seen as a knowing rejection of a marital-type relationship which could influence a court in its alimony decision.

Equitable distribution is another major issue where the duration of the marriage influences the outcome of a divorce. The State of New Jersey views marriage as an economic partnership and divides up marital assets through equitable distribution. Equitable distribution is a product of a New Jersey statute that which provides the courts with the power “to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage or civil union.” N.J.S.A. 2A:34-23(h). Similar to the alimony analysis, there is a long list of factors that courts must consider in making an award of equitable distribution, the first of which is the “duration of the marriage.”

Equitable distribution does not mean that both spouses get an equal share of the property. Instead, each spouse gets an “equitable” share of the marital assets depending on his or her contributions, both economic and non-economic, during the marriage. All property that was separately owned prior to marriage and kept separate throughout the marriage is generally not subject to equitable distribution.

Here, again, the issue of the length of the marriage and the date the court should use to determine the beginning of the relationship becomes less clear in the context of same-sex couples in long-term family relationships prior to their ability to marry. Are assets acquired during the relationship but prior to the marriage eligible for equitable distribution? The statute is clear that the only property that may be distributed is that acquired during the marriage. A court may be reluctant to distribute property held in one party's name that was acquired years prior to the marriage.

Education and advocacy based on the specific facts of each case is essential when dealing with long-term same-sex relationships. While our hypothetical couple above may have only entered into a same-sex marriage in 2013, it is imperative to provide context and specific facts to judges about the entirety of the relationship. Did the parties wear commitment rings throughout the marriage? Did they hold themselves out as married to friends and family prior to the 2013 wedding? Did they refer to one another as their partner or spouse? Did they both contribute to household expenses? These are all facts that could be reviewed and brought to the court's attention where appropriate.

Alimony and equitable distribution in long-term same-sex relationships is new territory in New Jersey. Trial courts in divorce matters are, above all else, courts of equity which should strive to reach a fair and just result. This requires a careful review of the specific facts of each case. Educating judges about the nature and context of same-sex relationships is important in obtaining a positive outcome.