A Groundbreaking Decision Regarding Common-Law Marriage

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A Family Court judge in South Carolina recently made headlines and history when he ruled that a relationship between two unmarried women, who have held themselves out as a same-sex couple for more than three decades, shall be considered a common-law marriage. This groundbreaking decision permits the state of South Carolina to treat the two women as married for the past 30 years. This ruling has the potential to affect couples in similar same-sex relationships throughout not only South Carolina, but the other seven states that currently recognize common-law marriage.

The decision of the South Carolina Family Court relied heavily upon the U.S. Supreme Court decision of Obergefell v. Hodges, the landmark ruling that found that the United States Constitution guarantees same-sex couples the right to marry throughout the country.

A common-law marriage generally refers to a long-term relationship in which a man and woman share living arrangements and expenses and hold themselves out to the public as a married couple. In states that recognize common-law marriages, these relationships are generally considered to be the legal equivalent of the civil marriage, and spouses enjoy the same legal rights and obligations afforded to officially licensed married couples.

New Jersey does not recognize common-law marriages. To be considered married in New Jersey, a couple has to obtain a valid marriage license after a ceremony performed by an authorized person or institution.

Is it possible, though, that the equitability principles behind this recent South Carolina decision, which recognizes that same-sex relationships can be considered common-law marriages, can benefit same-sex couples here in New Jersey?

Take, for instance, the same-sex partners in New Jersey who have held themselves out as a monogamous couple for many years. They began cohabitating in 1993 and shared expenses, comingled their income, and accumulated assets. This couple married in 2013, shortly after New Jersey first recognized the right to marry for same-sex couples. Were it not for the general prohibition of same-sex marriage in New Jersey, this couple would have married 20 years ago.

Four years later, the couple experienced a breakdown of the marriage and filed for divorce. In this case, should the court look to the strict time frame of the marriage, i.e., the date of the marriage ceremony in 2013 through the filing of the complaint for divorce in 2017? Or is it more fair and equitable to consider the entirety of the same-sex couple's relationship?

The length of the marriage is an important factor when considering issues of alimony and equitable distribution of assets. The New Jersey alimony statute (N.J.S.2A:34-23) states that for any marriage that lasts less than 20 years, the total duration of alimony shall not exceed the length of the marriage, except in exceptional circumstances. So, in our example above, if the court were to use the strict four-year duration of the parties' actual marriage, the court may be constrained to order alimony for a term lasting no more than four years. An opposite-sex couple in similar circumstances, but who married at the start of their relationship in 1993, would be considered married for more than 20 years and, therefore, eligible for an open durational alimony award, which could last decades.

Likewise, assets acquired during the marriage are subject to equitable distribution. 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 generally is 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 only property acquired during the marriage may be distributed. Having been precluded from marrying for 20 years, is it fair for

that same-sex couple also to be precluded from distribution of assets that were acquired during their long-term relationship?

There are currently no published cases dealing with these issues as they relate to same-sex couples in New Jersey. But the principles of fairness and equity, which underline the recent South Carolina Family Court's decision to recognize a same-sex relationship as a common-law marriage, may similarly persuade New Jersey courts to look at the totality of the same-sex couple's relationship, rather than the strict time frame of the couple's legally permitted marriage, when addressing these important issues.

Every family's circumstances are different, and the ways in which New Jersey and other states are responding to and implementing marriage equality continue to evolve. It is important to discuss these questions with experienced professionals who have knowledge and can provide advice about how these issues affect same-sex couples.