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Gays can't marry, can divorce

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TRENTON -- Now that they've joined in civil union, can divorce be far behind for gay and lesbian couples?

Lawyers will quickly say yes, even talking up the new civil union as the first opportunity for same-sex couples to fight over equity rights. Child custody, however, is a different story.

"If someone has stayed home, raised a child, or there's a difference in earning capacity in the parties or incomes between the parties, and they together for let's say a few years, that means that one party can say I'm entitled to alimony," said John Eory, a family lawyer for Stark & Stark. "If they are together for a longer period of time, say 10 years, there's case law in the divorce world that say in cases like that, a person can start looking for permanent alimony. And there's nothing to bar someone coming out of a civil union to say 'I want permanent alimony.'"

New Jersey has allowed gay and lesbian couples to formalize their relationships and claim rights to the legal benefits -- but not the title of marriage.

Lawyers can't even call the separation of two gay people as a "divorce." It's a "dissolving" of the civil union.

Eory said cases, however, will be heard in a divorce court and by the same judge that hears heterosexual separation cases.

And when it's heard, the new union statute establishes for the first time the argument of equity between same-sex couples.

It abolishes the concepts behind the Domestic Partnership Act of 2004, Eory said legally allowed gay couples to form a domestic partnership.

But it didn't allow same-sex couples financial remedies if they break up, he said.

In Massachusetts, where gay marriage is legal, it took seven months for the courts to receive an appeal to end the union of two gay men. The big issue between them was the custody of three house cats.

In Vermont, the law permits anyone from anywhere to join in a civil union. But to divorce, one of the parties must live in the state for at least a year -- a hurdle that might keep the courts from getting too congested with spatting gays.

Now, with civil unions in New Jersey, legal questions surrounding the divorce of heterosexuals can, and will, be argued in a court of law.

For instance, there will be questions facing the handling of gay custody disputes with no state law to support the idea.

And what if a gay couple partnered up for the last decade, joined in on the civil union parade, and then decided to call it quits next year? How then are equity issues resolved?

Eory says issues like that will make for tough upcoming decisions for judges who will certainly be dealing with those issues in the not-so-distance future.

"You may have a biological parent and a psychologically involved parent, but your not going to have two biological parents," Eory said. "And the question is going to be, the non biological parent, will that person assume the same status as one of the biological parents in a custody case?"

"That's going to be interesting to see. But I see that in cases where for instance there's an adoption, then I think you're going to have a standard very much like two biological parents," the lawyer said. "Unlike a marriage, where the defense can be that they could have gotten married anytime within those 10 years and they didn't, the question will be will the court -- since the status of civil union wasn't there until 2007 -- be willing to look at the pre-civil union era in terms of fashioning an equitable remedy."

Eory said in a non-gay marriage those issues wouldn't come to fruition, because "it's not like someone invented marriage in 2007."

Assemblyman Reed Gusciora, who co-sponsored the new civil union law, chuckled yesterday in-between state house sessions when pondering the existence of gay divorce.

He pulled out the most stereotypical gay reference he could think of, almost in a way to hammer the point that while it's called a civil union, it's still companionship between two humans straight or not.

"They probably will have to fight over Judy Garland albums," he laughed.

"The Supreme Court decision was quite clear that they would set all the rights and privileges of marriage to same sex couples as heterosexual couples and that would imply the same rights to divorce."

Peter Frycki, the publisher of Out in Jersey Magazine and president of the Trenton Gay and Lesbian Civic Association, was miffed by the request to touch upon the divorce topic because he feels it's just another way for right-wing conservatives to prove gay marriage is a doomed idea.

"People are people," he said. "One of the comments made early with the civil union act, is they are not allowing us to marry. We can get divorced, but we can't get married?"

"They didn't want to actually start rewriting the divorce laws so they just made laws that said the dissolution of a union is the same as divorces. They finagled everything they could on this act, not to call it a marriage but to call it every right and privilege of a marriage that they can possibly think of. And there's going to be problems as we expect in the next several months somewhere because of that."

It could come in the way of separation battles, especially with unclear statutes covering child custody.

Eory says a judge would never decide a case with the presumption of what's ethical or not when involving gay relations.

For instance, what if a lesbian filed for the civil union, had a baby or adopted, and then fell in love with a man?

Cases like that already exist, Eory said. "There's always the honeymoon faze," he said. "It's going to make for some really interesting arguments."

We'll see.