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# The Effect of Pre-Legal Recognition Cohabitation on Alimony and Equitable Distribution in Same-Sex Dissolution Cases

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## INTRODUCTION

For decades, the LGBT[1] community has been fighting a war against inequality in the United States. This war is waged over rights that most people take for granted, simply because most people believe that they have an unconditional right to marry. Children are brought up being taught that one of life's main goals is to find a mate, marry, and have children. Marriage itself is considered a rite of passage, and often traditional parents do not allow their children to move out of their homes until they marry. For those individuals who identify as heterosexual,[2] this does not pose a problem. For LGBT folk, however, the situation is quite different.

As if struggling to find their sexual identity is not difficult enough, LGBT folk are left with no choice but to fight for the very rights that different-sex couples take for granted, including the right to marry and even get divorced. Over the past decade, the LGBT community has earned this marriage right in some states, but the battle still rages on at the federal level. Once the right to marry or at least be legally recognized as a couple became a reality for some LGBT couples, the focus remained on gaining this right federally for all LGBT folk, not just those in states that recognize same-sex marriage or civil unions. The right to a legally recognized relationship was, and still is, celebrated by LGBT folk and civil rights activists each time a new jurisdiction proclaims that love is love, no matter which genders share it. Unfortunately, and

[1] Throughout this writing, the term "LGBT folk" will be used to refer to lesbians, gay men, bisexuals, and transgender individuals.
[2] This term will be interchanged with "different-sex" throughout this writing.

despite what fairy tales say, love is not always forever, and sometimes irreconcilable differences arise between partners. The reality is that like different-sex couples, LGBT couples also face the prospect of a break-up. Therein lies the problem: What happens when newly-legally recognized couples declare an end to their relationships?

The first part of this writing will provide background information on what marriage means to LGBT folk, including how the perception of marriage has changed over the past five decades. It will also offer general background information on the various civil rights that same-sex couples have fought for and achieved in the past ten years. Part I also describes the need for and emergence of domestic partnerships both on the national and state[3] level, as well as the creation of civil unions in New Jersey.

The second section herein will discuss alimony and equitable distribution in New Jersey generally, as each concept relates to traditional[4] married couples. Part II covers New Jersey's alimony guidelines, and addresses the methods courts normally use in making alimony determinations in divorce cases. This section focuses particularly on the case of *McGee v. McGee*,[5] which introduced the concept of including pre-marital cohabitation in determining the length of a marriage for purposes of alimony and equitable distribution. New Jersey's equitable distribution guidelines are also addressed in this section.

Part III looks at alimony and equitable distribution in New Jersey through the lens of same-sex couples. It will discuss the three main options available to courts deciding same-sex divorces, analyzing the merits, or lack thereof, of each judicial approach. The first, and most logical approach is to treat same-sex couples the same as different-sex couples in terms of

[3] This writing focuses on New Jersey state law.
[4] The term "traditional" here refers to married couples consisting of one man and one woman.
[5] 648 A.2d 1128 (App. Div. 1994).

alimony and equitable distribution. The second approach is to rely on principles of palimony, acknowledging that same-sex relationships in New Jersey were not legally recognized until 2007, and thus it would be unfair to treat these relationships as long-term marriages. The third and final judicial approach is to treat same-sex legal relationships as if the parties chose to remain in a non-legally recognized relationship prior to the enactment same-sex legal recognition laws. This approach treats same-sex couples the same as unmarried different-sex couples who remained legally single by choice. Part III will also discuss alternative remedies that may be available to same-sex couples, in the event that courts adopt a different standard from traditional alimony and equitable distribution for same-sex dissolution cases.

The author concludes that true equality means equality across the board, in both marriage and divorce. The same rules that apply to heterosexual married couples should also apply to same-sex married or civilly united couples, in the interest of justice and traditional principles of equity and fairness. While palimony and alternative remedies such as constructive trust were same-sex couples' only available options for decades, courts need to stay aligned with the present day. History is changing. Fifty years ago, same-sex marriage seemed impossible, and now it is available in five states and the District of Columbia, recognized in three other states, with additional states offering some sort of protection or marriage alternative to same-sex couples.[6] It is counter-intuitive, given all the progress made in the past decade, for courts to refuse to apply the same standards for traditional divorce to same-sex couples.

[6] *See* Winning the Freedom to Marry: Progress in the States, http://www.freedomtomarry.org/states/ (last visited Apr. 25, 2010).

## I. BACKGROUND

Just as African-Americans and women fought for their equal rights, so too have LGBT folk struggled for the freedom to express their identity without fear of persecution. Over the past 40 years, LGBT folk have gained significant rights, such as the right to engage in private consensual sexual activity without criminal prosecution,[7] the right to adopt,[8] and eventually, the right to marry.[9] Of course, some of these rights vary by state, and a legal right in one state may not exist in another. As homosexuals came out of the proverbial closet and assimilated more into the mainstream over the past four decades, their need for more legal rights increased. However, same-sex legal relationship recognition was not always at the forefront of the battle for gay rights, as it is today.

Initially, LGBT folk were more concerned with developing their own identity and being treated equally as individuals than with achieving recognition[10] as a couple from society. In fact, for most LGBT folk in the 1960s, the issue of same-sex legal recognition barely even surfaced, and the mere idea of a same-sex couple uniting as a marital unit was so far-fetched that even the most pioneering gay rights activist could not fathom it.[11] For decades, most LGBT folk lived in a culture apart from heterosexuals, often keeping their life partners secret from their own parents and relatives, as coming out could jeopardize their physical safety.[12] Prior to 1969, the legal battles of gay men focused primarily on criminal law, and the fight for the right to practice

[7] *See* Lawrence v. Texas, 539 U.S. 558 (2003).
[8] Adoption rights are governed by the states; however some states permit either single or joint adoption by homosexual parents. Under the Full Faith and Credit Clause of the U.S. Constitution, all states must recognize legal adoptions performed in other states. *See* Adar v. Smith, 591 F.Supp. 2d 857 (E.D. La. 2008).
[9] *See* Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003). The right to marry is currently only available in Iowa, Massachusetts, Connecticut, New Hampshire, Vermont, and the District of Columbia.
[10] *See* FREDERICK HERTZ WITH EMILY DOSKOW, MAKING IT LEGAL: A GUIDE TO SAME-SEX MARRIAGE, DOMESTIC PARTNERSHIPS AND CIVIL UNIONS 8 (Nolo, First Edition 2009).
[11] *See id.*
[12] *See id.* at 7.

homosexuality freely without fear of being arrested. Over the next decade, lesbians were mainly entwined in custody battles, often fighting their ex-husbands in court over their fitness to parent their own children based on their sexual orientation. The constant struggle for individual rights and validation as homosexuals was the norm for many years.[13]

Enter the Stonewall Riots in 1969.[14] The riots marked one of the first times[15] in American history that homosexuals and the Lesbian-Gay-Bisexual-Transgender (LGBT) community fought back with force against anti-gay oppressors and flagrant homophobia. In the decades following the historic riots, LGBT folk gradually began coming out of the closet and raising children outside of legal recognition status. The 1980s, however, saw the rise of the AIDS epidemic, which led to many members of the LGBT community shunned from their dying partners' hospital rooms because they were not legal relatives of their partners. As a result, a greater need for at least minimal legal benefits was created, and domestic partnership registration was born. Domestic partnerships were first enacted in Berkeley, California in 1984,[16] granting dental insurance and leave benefits to city employees. Medical insurance coverage was granted later that year,[17] and in 1985, West Hollywood created the first domestic partnership registry open to all city residents, including non-employees.[18]

In the 1990s, many same-sex couples began living more mainstream lives, similar to heterosexual married couples. The huge difference, of course, was that most same-sex couples

[13] *See generally* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993).
[14] *See* FREDERICK HERTZ WITH EMILY DOSKOW, MAKING IT LEGAL: A GUIDE TO SAME-SEX MARRIAGE, DOMESTIC PARTNERSHIPS AND CIVIL UNIONS 10 (Nolo, First Edition 2009). The Stonewall Riots took place in New York City's Greenwich Village, at the Stonewall Inn. In late June 1969, gay and lesbian demonstrators violently clashed with police. The riots marked the beginning of the gay rights movement in the United States.
[15] *See* Stoumen v. Reilly, 234 P.2d 969 (Cal. 1951).
[16] *See* FREDERICK HERTZ WITH EMILY DOSKOW, MAKING IT LEGAL: A GUIDE TO SAME-SEX MARRIAGE, DOMESTIC PARTNERSHIPS AND CIVIL UNIONS 11 (Nolo, First Edition 2009).
[17] *See id.*
[18] *See id*.

had none of the rights that different-sex couples did, and those who were registered domestic partners had only a few basic rights. In the late 1990s and early 2000s, the Marriage Equality Movement gathered steam, and slowly, some states began recognizing civil unions and same-sex marriages, along with domestic partnerships.[19]

New Jersey's Domestic Partnership Act went into effect on July 10, 2004, after being enacted on January 12, 2004.[20] The Act granted hospital visitation, medical decision-making rights, and medical leave rights to same-sex couples who were registered domestic partners, as well as health insurance eligibility, inheritance tax exemptions, and an additional personal exemption for state income taxes. The law also granted statutory protection through The Law Against Discrimination[21] against housing, credit, and employment discrimination based on domestic partnership status.[22] In enacting the new law, the state legislature declared that domestic partnerships were familial relationships, which assisted the state by establishing a private financial, physical, and emotional support network for the health of their participants.[23] The legislature went on to say that domestic partnerships only applied to same-sex couples, because these individuals were not permitted to marry under state law, but that they still deserved certain rights of married couples based on human dignity and autonomy.[24]

Despite the extra benefits awarded by domestic partnerships, same-sex couples in New Jersey were still not afforded the same legal status as married couples. In 2006, the landmark case of *Lewis v. Harris*[25] led to the enactment of New Jersey's Civil Union law. *Lewis* was

[19] *See id.*
[20] *See* State of New Jersey, Department of the Treasury, Divisions of Pensions and Benefits, Recent Legislation 2003, http://www.state.nj.us/treasury/pensions/newlaw03.shtml#246 (last visited Apr. 25, 2010).
[21] N.J. STAT. ANN. §10:5-1 (2010). *See also* N.J. STAT. ANN. § 26:8A-2 (2010).
[22] *See id.*
[23] *See id.*
[24] *See id.*
[25] 908 A.2d 196 (N.J. 2006).

brought by seven same-sex couples who were denied marriage licenses. The new civil union law, while not the desired goal of the plaintiffs, gave same-sex couples in New Jersey the same rights and benefits as married couples, without the title "married".

However, just as with different-sex couples, not all same-sex relationships are successful, and inevitably, some of them come to an end and the parties go their separate ways. For heterosexual couples in a marital relationship, one party can simply file for divorce when the relationship ends. For same-sex couples in New Jersey, however, who until recently had no option[26] to enter into a legally recognized relationship, the dissolution process is not so black and white. For example, in a heterosexual divorce, certain factors such as the length of the marriage are taken into account when determining alimony awards. In same-sex relationships that may have lasted 30 years but may have only been made legal a year or two before the relationship ended, it seems unfair to consider only the length of the formal legal relationship in determining an alimony award.

Because same-sex legal recognition has only existed for a short number of years, courts have not seen many same-sex dissolution cases. In New Jersey, a state which does not recognize same-sex marriage but does recognize civil unions, different-sex couples who divorce after a relatively short[27] marriage but who were cohabitating for many years prior to the marriage can "tack" on the years of cohabitation to the marriage, thus extending the length of the marriage and increasing an alimony award to the lower earning spouse.[28] However, this "tacking" process has not been applied in same-sex dissolution cases to date in New Jersey, possibly because of the lack of same-sex dissolution cases being decided and appealed. Same-sex couples face similar

[26] *See id.* *See also* N.J. STAT. § 37:1-28 (2010).
[27] *See* Twila B. Larkin, *Guidelines for Alimony: The New Mexico Experiment*, 38 FAM. L.Q. 29, Spring 2004, at 31.
[28] *See* McGee v. McGee, 648 A.2d 1128 (App. Div. 1994).

issues in terms of equitable distribution. When a heterosexual couple is divorced in New Jersey, all of the marital property is equitably divided between the parties. However, the issue of what exactly constitutes marital property varies by state and often is a hotly contested issue in divorce trials, especially if one spouse holds title to a large amount of property.

**The emergence of legal same-sex relationships**

With same-sex couples today, often each partner brings a significant amount of his or her own assets into the relationship, because these couples often enter a legal relationship later in life, due to their previous inability to partake in a legal relationship. When one of these couples divorces, the equitable distribution of property becomes quite complex. Which rules apply? Should one partner's significant assets be considered "marital" property if the couple was cohabitating for several years before the relationship was formalized? Is it unfair to include that property if the original owner went into the relationship believing that his property would be kept separate? Does marriage equality also mean divorce equality, and should the same rules that apply to different-sex couples also apply to same-sex couples? If the same set of rules applies, is it fair to same-sex partners who for years had no legal relationship rights, and thus did not plan to deal with the obligations that come with a legal relationship? Conversely, if there is a different standard for same-sex dissolution cases, what recourse does the lower-earning or homemaking partner have? Case law in this area is sparse, largely because of the short history of same-sex legal recognition. This writing addresses these questions and explores the consequences of each approach under New Jersey law.

## II. ALIMONY AND EQUITABLE DISTRIBUTION GENERALLY

From a policy perspective, there are two rationales behind the awarding of alimony. First, there is a presumption that while one spouse often is the sole breadwinner or simply earns more income than the other spouse, the lower-earning or homemaking spouse has contributed in non-monetary ways,[29] through love and support, which allowed the higher-earning spouse to get ahead. Public policy dictates that as a result, the lower-earning spouse should share in the fruits of the higher-earner's labor. Second, marriage is viewed as a partnership,[30] and the spouses rely on each other; as the marriage progresses, the lower-earning spouse may depend on the higher-earning spouse for financial support, and it would be unjust to leave the lower-earning spouse with little or no financial means when the marriage breaks down. [31]

In New Jersey, alimony is determined by several factors, including:

> **(1)** The actual need and ability of the parties to pay;
>
> **(2)** The duration of the marriage or civil union;
>
> **(3)** The age, physical and emotional health of the parties;
>
> **(4)** The standard of living established in the marriage or civil union and the likelihood that each party can maintain a reasonably comparable standard of living;
>
> **(5)** The earning capacities, educational levels, vocational skills, and employability of the parties;
>
> **(6)** The length of absence from the job market of the party seeking maintenance;
>
> **(7)** The parental responsibilities for the children;

[29] *See* Rothman v. Rothman, 320 A.2d 496 (N.J. 1974) at 501-502.
[30] *See id.*
[31] *See* FREDERICK HERTZ WITH EMILY DOSKOW, MAKING IT LEGAL: A GUIDE TO SAME-SEX MARRIAGE, DOMESTIC PARTNERSHIPS AND CIVIL UNIONS 63 (Nolo, First Edition 2009).

> **(8)** The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;
>
> **(9)** The history of the financial or non-financial contributions to the marriage or civil union by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities;
>
> **(10)** The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;
>
> **(11)** The income available to either party through investment of any assets held by that party;
>
> **(12)** The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment; and
>
> **(13)** Any other factors which the court may deem relevant.[32]

New Jersey courts award four types of alimony: permanent, rehabilitative, reimbursement, and limited duration alimony. Permanent alimony is rarely awarded, and only in cases where the marriage lasted for a significant number of years and there was a significant disparity in income. For example, in a marriage that lasted 20 years or more, where one spouse filled the traditional homemaker role and the other earned significantly more income, permanent alimony is likely to be awarded. However, the term "permanent" is somewhat misleading, because if the payee spouse remarries, the payor spouse's alimony obligation terminates. This is because the payee spouse has now entered into a new marital partnership, and thus the former spouse is not obligated to support the new partnership.

[32] *See* N.J. STAT § 2A:34-23(a) (2010).

Rehabilitative alimony is awarded for a specific period of time, usually while the lower-earning spouse obtains training or education in order to secure sufficient employment to support him or herself. This type of alimony does not terminate if the payee spouse gets remarried, but does terminate once the payee spouse is in a position of self-support.[33] The goal of rehabilitative alimony is simply to allow the lower-earning spouse time to adjust to a new lifestyle outside the marriage, and to acquire a form of income to support herself.

Reimbursement alimony compensates a spouse for economic sacrifices made during the marriage, often in situations where one spouse went to school to earn a professional degree while the other spouse worked to support the marital partnership. Reimbursement alimony, like rehabilitative alimony, does not terminate once a spouse remarries. The policy behind reimbursement alimony is that while the spouse who earned the professional degree was in school, the other spouse supported the student spouse with the expectation that one day, both spouses would enjoy the benefits of the student spouse's professional degree.[34] If the parties divorce shortly after the student spouse is awarded his or her degree, the supporting spouse is likely to receive reimbursement alimony. However, if the parties divorce several years after the degree is awarded, the supporting spouse likely will not receive any reimbursement alimony, but he or she may instead receive the value of the professional degree in equitable distribution.

The last type of alimony in New Jersey, limited duration alimony is the most common type awarded. Limited duration alimony is awarded for a specific amount of time, and usually is awarded to spouses in mid-length marriages. Unlike reimbursement or rehabilitative alimony, limited duration alimony is not awarded to make one spouse whole or provide financial support

[33] *See* Hill v. Hill, 453 A.2d 537, 538 ( N.J. 1982).
[34] *See* Mahoney v. Mahoney, 453 A.2d 527, 534 (N.J. 1982).

while a former spouse obtains skills for gainful employment. This type of alimony is provided to address situations where some financial need is demonstrated, but the marriage was not of sufficient length to warrant permanent alimony.[35] Limited duration alimony is most similar to permanent alimony, in that both types recognize that marriage is an economic and social partnership, in which each party is dependent upon the other.[36] Once the marriage ends, this co-dependency does not immediately cease, as it takes time to establish a new lifestyle apart from the former marital unit. Few people enter a marriage and keep track of their debits and credits, with the intent of streamlining distribution of assets when the marriage breaks down. Conversely, reimbursement and rehabilitative alimony are similar to each other because each serves to fulfill a specific purpose, and once that purpose is achieved, these types of alimony terminate.

The state of New Jersey views marriage as an economic partnership[37] and divides up marital assets through equitable distribution. This does not mean that both spouses get an equal share of the assets acquired throughout the marriage, as in community property states. Instead, each spouse gets an equitable share of the marital assets depending on his or her contributions to the marital unit during the marriage. Contributions need not be economic. For example, if one spouse owns the marital home in his name alone, but the other spouse maintains the marital home throughout the marriage, the marital home will be subject to equitable distribution. This is because there is a rebuttable presumption that each party made substantial contributions, whether financial or non-financial, to the acquisition of income and property during the marriage.[38]

In New Jersey and other equitable distribution states, all property that was separately owned prior to marriage and kept separate throughout the marriage is not subject to equitable

[35] *See* Cox v. Cox, 762 A.2d 1040, 1046 (N.J. App. Div. 2000).
[36] *See id.*
[37] *See id.* at 1048.
[38] *See* N.J. STAT § 2A:34-23.1 (2010).

distribution. However, if this property is commingled at all with marital assets or improved with marital funds, it may be subject to equitable distribution. Inheritances bequeathed to one spouse only, so long as they are kept separate during the marriage, are the property of that spouse alone. Similar to alimony, equitable distribution is decided in New Jersey courts by reviewing a non-exhaustive list of criteria. These factors are:

**(1)** The duration of the marriage or civil union;

**(2)** The age and physical and emotional health of the parties;

**(3)** The income or property brought to the marriage or civil union by each party;

**(4)** The standard of living established during the marriage or civil union;

**(5)** Any written agreement made by the parties before or during the marriage or civil union concerning an arrangement of property distribution;

**(6)** The economic circumstances of each party at the time the division of property becomes effective;

**(7)** The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage or civil union;

**(8)** The contribution by each party to the education, training or earning power of the other;

**(9)** The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, or the property acquired during the civil union as well as the contribution of a party as a homemaker;

**(10)** The tax consequences of the proposed distribution to each party;

**(11)** The present value of the property;

**(12)** The need of a parent who has physical custody of a child to own or occupy the marital residence or residence shared by the partners in a civil union couple and to use or own the household effects;

**(13)** The debts and liabilities of the parties;

**(14)** The need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse, partner in a civil union couple or children;

**(15)** The extent to which a party deferred achieving their career goals; and

**(16)** Any other factors which the court may deem relevant.[39]

Equitable distribution is often hotly contested, especially because so much of it is subjective. Once the relationship is over, the working or higher-earning spouse may feel that the non-working or lower-earning spouse did not do his or her part to maintain the marital home and thus does not deserve the amount of assets he or she is given during equitable distribution, because he or she did not "earn" them. This is especially true with pensions, which often must be divided through a Qualified Domestic Relations Order, or "QDRO", so that the non-employee spouse may receive a certain percentage of the employee spouse's monthly pension once it goes into pay status. As always, everything depends on the level of amicability between the parties. Sometimes, the parties can agree on their own as to how they wish to divide up their assets, and can simply handle their divorce through mediation. These individuals end up saving themselves time and aggravation by avoiding attorney's fees accumulated through hours of motion practice, or worse, a lengthy divorce trial.

[39] *See* N.J. STAT § 2A:34-23.1 (2010).

## III. ALIMONY AND EQUITABLE DISTRIBUTION WITHIN THE CONTEXT OF SAME-SEX COUPLES

Currently, New Jersey does not permit same-sex marriage, but it does allow civil unions and domestic partnerships. New Jersey's civil union law[40] was enacted in 2006 in response to the landmark decision in *Lewis v. Harris*.[41] In *Lewis,* the court held that denying rights and benefits to committed same-sex couples that were statutorily given to their heterosexual counterparts violated the equal protection guarantee of the New Jersey Constitution.[42] Civil unions provide same-sex couples in New Jersey the same rights and benefits afforded to heterosexual couples under the state's marriage laws. However, in New Jersey, the term "marriage" is reserved for the union between a man and a woman, and same-sex couples continue to face inequality[43] even with the option of civil unions.

On March 18, 2010, Lambda Legal filed a motion with the Supreme Court of New Jersey, asking the court to order same-sex marriage[44] to ensure compliance with the original *Lewis* decision in 2006. The motion reactivated the original case brought by the plaintiffs in 2002, and argues that the state's civil union law fails to comply with the Supreme Court's mandate[45] in *Lewis*, because same-sex couples are still relegated to an inferior status even with

[40] *See* N.J. STAT § 37:1-28 (2010).
[41] 908 A.2d 196 (N.J. 2006).
[42] *See id.* at 200.
[43] N.J. Civ. Union Rev. Comm., *Final Report of the New Jersey Civil Union Review Commission, The Legal, Medical, Economic, & Social Consequences of New Jersey's Civil Union Law* 1 (Dec. 10, 2008).
[44] Lambda Legal Website, http://www.lambdalegal.org/in-court/cases/lewis-v-harris.html (last visited April 26, 2010).
[45] The Supreme Court of New Jersey gave the legislature 180 days to either amend the state marriage laws or create a statutory scheme that would provide same-sex couples the same benefits and rights of married couples. *See* Lewis at 224.

the availability of civil unions. If the motion is successful,[46] there will no longer be a need for civil unions, because same-sex couples will be legally permitted to marry.

Regardless of the outcome of the pending *Lewis* motion, the legal implications of marriage, and thus, civil unions truly become important once the union breaks apart, in that the state has a procedure for dissolution which must be followed.[47] In a heterosexual divorce, this means dealing with issues such as determining alimony, child custody and parenting time, and equitable distribution of property. New Jersey law provides that the same procedures that apply to heterosexual divorces also apply to civil unions.[48] However, the ending of relationships is never simple. Just as with heterosexual couples, same-sex couples are likely to disagree over the amount of alimony awarded, or whether alimony should be awarded at all. The main difference between heterosexual and same-sex dissolution cases is that there is an abundance of case law governing heterosexual divorce, while there is not yet a single published same-sex dissolution case in the state of New Jersey. This is likely due to the very recent establishment of civil unions, as most partners have just begun their legal relationships in this state within the past three years, and the likelihood of those relationships ending and making their way through the courts so quickly is not very great.

One issue that is likely to be of great concern to same-sex couples who wish to dissolve their relationships is that of the length of the union. New Jersey's civil union law[49] provides that the dissolution of civil unions will follow the same rules that apply to heterosexual divorces. As

[46] At the time of this writing, the case was currently before the New Jersey Supreme Court.
[47] *See* FREDERICK HERTZ WITH EMILY DOSKOW, MAKING IT LEGAL: A GUIDE TO SAME-SEX MARRIAGE, DOMESTIC PARTNERSHIPS AND CIVIL UNIONS 59 (Nolo, First Edition 2009).
[48] *See* N.J. STAT § 37:1-31 (2010).
[49] *See id.*

such, New Jersey judges must follow the alimony guidelines.[50] The second guideline refers to the length of the marriage or civil union. Obviously, no civil union formed in New Jersey will be longer than three years at the time of this writing, because *Lewis v. Harris* was not decided until late October 2006, and the New Jersey civil union law went into effect on February 19, 2007.[51] However, the majority of same-sex couples who entered into civil unions once the new law was signed had been living together for a significant amount of time prior to the legalization of their relationships. Unlike heterosexual couples who were cohabitating and chose not to marry, same-sex couples had no other option but to cohabitate absent legal recognition, with the exception of the enactment of domestic partnerships in 2004. Courts in New Jersey have allowed significant years of premarital cohabitation to be added on to the length of the marriage, particularly when a couple is cohabitating for a long period of time, then is married for only five years or less. In *McGee v. McGee*,[52] the court reversed and remanded the case on the issue of permanent alimony for the wife, even though the actual marriage lasted only two years, because the parties had been cohabitating for ten years, with the wife financially dependent on the husband. The court reasoned that while the duration of the marriage is one factor to be considered in determining alimony, the actual extent of economic dependency is more important than a party's actual status as wife or husband. [53]

While the *McGee* standard has been followed in other heterosexual divorce cases,[54] it has not yet been used in any reported same-sex dissolution case. When it inevitably surfaces in same-

[50] *See* N.J. STAT § 2A:34-23 (2010)
[51] *See* Associated Press, *New Jersey governor signs civil unions into law*, http://www.msnbc.msn.com/id/16309688/, (last visited April 28, 2010).
[52] *See* McGee v. McGee, 648 A.2d 1128 (App. Div. 1994).
[53] *See id*. at 23.
[54] *See* Christopher v. Christopher, 2009 N.J. Super. Unpub. LEXIS 1761 (App.Div. July 7, 2009); De Saro v. De Saro, 2006 N.J. Super. Unpub. LEXIS 202 (App.Div. Mar. 23, 2006); Wass v. Wass, 710 A.2d 1053 (Ch. Div. 1998).

sex cases, courts will be faced with an unfortunate conundrum: whether or not to allow pre-union cohabitation in awarding alimony. Undoubtedly, many same-sex couples have been living for years as if they were married, supporting one another financially with one partner earning more money than the other. In these situations, the lower-earning partner would obviously want to receive permanent or limited duration alimony, because of his or her level of economic dependency on the other partner. The higher-earning partner, however, could argue that because he never had an option to enter into a legal relationship for the majority of the relationship, he had no expectation of ever having to pay alimony, and should not have to do so now that the relationship is over. Because there are no reported decisions on this subject, judges will have to carefully review the facts of each case in order to decide the most fair and just manner to handle these situations.

Take for example a homosexual man who had begun a relationship with his partner in the 1970s, when both partners were in their mid-twenties. The two men had been living together since the late 1970s, with this first partner ("Partner A") working as a stockbroker on Wall Street, and the second partner ("Partner B") taking care of the home and the parties' financial and personal affairs. Partner A spent long hours outside the home, earning a high salary and supporting Partner B financially. Partner B, on the other hand, has not worked since he began living with Partner A, but he always cooked and prepared all of Partner A's meals, did his laundry, tended to the parties' large outdoor garden, kept the house clean, and saw that all the bills were paid on time. Additionally, Partner B coordinated the busy weekend social schedules for himself and Partner A. The parties lived together happily in New Jersey for 25 years, and in 2007 when the civil union law was passed, they decided to enter into a civil union so that they could finally make their relationship truly "official", and so that they could enjoy all the

important rights and benefits that a heterosexual married couple could. A large reason behind their decision to legalize their relationship was because Partner A's family medical history included pancreatic cancer, and the two men wanted to be sure that Partner B would be taken care of outside of a will provision, because both partners feared a probate contest from Partner A's family. The two men also wanted to ensure Partner B had bedside access to Partner A, should he be hospitalized.

Now, in 2010, Partner A is still healthy and working, but the parties have decided to separate because of irreconcilable differences. The couple is now in their late 50s, and Partner B has continued to manage the home, just as he did for the last 30 years. When the parties go to court to dissolve their relationship, Partner B wants alimony as well as half of the marital home, which was titled in Partner A's name throughout the relationship. Partner B argues that he cannot find a job by which to support himself now that he spent the last 30 years taking care of the home. He wants permanent alimony and a share of the marital home, and feels that if he were in a heterosexual marriage, he would have been entitled to it due to the long duration of the marriage. Partner A, on the other hand, refuses to pay alimony and says that the marital home belongs to him because it has been titled in his name for the last 30 years. He argues that Partner B should get none of his hard-earned pay or his real estate, because they have only been in a legal relationship for just over three years, and in a heterosexual situation, no alimony would be awarded. Partner A further argues that because he and his partner had no option to legally unite for the majority of their relationship, he continued in the relationship for the majority of the last 30 years, thinking that aside from the parties' joint checking account, his money, property, and earning potential were his alone. He says it is not fair to tell him now that he must support

Partner B for life as if they were a different-sex couple, when for years their rights were anything but equal to a different-sex couple.

The above situation is a prime example of the situation that New Jersey courts will be inevitably faced with. The courts will have to decide whether to tell Partner B he has to figure out a way to support himself without aid from Partner A, or tell Partner A that his reliance on laws from before the 2007 civil union law is misguided, and he must now support Partner B through alimony payments and the shared proceeds from the sale of his home. Courts are damned if they do, and damned if they don't, so to speak. If Partner A gets his way and Partner B gets no alimony, he will undoubtedly appeal and argue that there is in fact a double standard for heterosexual and homosexual couples when it comes to dissolution, and this is precisely the type of situation that *Lewis* and the New Jersey civil union law sought to eradicate. There are some other options available to couples in this situation; namely palimony,[55] constructive trust, resulting trust, and quantum meruit.[56] While these remedies provide some possibility of recourse for same-sex couples in order to avoid unjust enrichment, equity requires that they are fact-sensitive and decided on a case by case basis, considering similar factors to those used in alimony determinations.[57] They do not offer the security of a definitive set of guidelines, as does alimony in traditional New Jersey divorce, but rather, a fifty-fifty chance after litigation of some sort of compensation for years of reliance.

[55] Enforcement of an express or implied contract.
[56] *See* Kozlowski v. Kozlowski, 403 A.2d 902, 909 (N.J. 1979) (Pashman, J., concurring) (citing Marvin v. Marvin, 557 P.2d 106, 110 (Sup. Ct. 1976)).
[57] Duration of relationship, amount and type of services provided by each party, personal and professional sacrifices made for the good of the relationship, and post-relationship earning ability. *See id.*

The author is of the opinion that judges are left with three options: (1) apply all the same rules of heterosexual divorce to same-sex dissolution, allowing years of pre-marital[58] cohabitation to lengthen the legal relationship; (2) apply a different set of rules that does not include pre-marital cohabitation as part of the legal relationship, but allow claims of palimony absent a written agreement; or (3) apply a strict set of rules which does not allow the incorporation of pre-marital cohabitation nor palimony absent a written agreement, and simply treats same-sex couples as if they were unmarried heterosexual couples who must have a written agreement in order to pursue a successful palimony claim.

## THE FIRST JUDICIAL APPROACH: TREAT SAME-SEX DISSOLUTION AS IF IT WAS HETEROSEXUAL DIVORCE

The first judicial approach is in this author's view the most practical means of dealing with a same-sex dissolution case. In this approach, Family Part[59] judges in New Jersey would simply apply all the laws of heterosexual divorce to same-sex dissolutions. This would mean that all case law which would normally apply in a heterosexual divorce would also apply to same-sex dissolution. Under current New Jersey state law,[60] all the rules of heterosexual divorce are to apply to same-sex dissolutions. However, the method of permitting years of pre-marital cohabitation to be included when considering the length of a marriage[61] has not been codified. It is simply case law that is followed in heterosexual divorces to calculate alimony if a couple is

[58] The author uses the term "pre-marital" for the sake of simplicity and clarity of explanation, although same-sex couples still do not have the right to marry in New Jersey.
[59] The New Jersey judicial system is divided into the Municipal courts, Tax Court, Appellate Division, New Jersey Supreme Court, and the Superior Court. The Superior Court, which includes the trial courts, is divided into the Criminal Division, Civil Division, General Equity Division, and Family Division. *See* New Jersey Judiciary Website, http://www.judiciary.state.nj.us (last visited April 26, 2010).
[60] N.J. Stat. §37:1-31(b) (2010) explicitly provides that the 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.
[61] *See* McGee v. McGee, 648 A.2d 1128 (App. Div. 1994).

divorcing after a short marriage but a long period of cohabitation. Still, this approach appears to be most aligned with N.J. Stat. § 37:1-31, as it would apply all the rules of heterosexual divorce to same-sex dissolution. It is also supported by the New Jersey legislature's policy behind enacting the state civil union law. Justice Albin, writing for the New Jersey Supreme Court in *Lewis v. Harris*, stated:

> With New Jersey's legislative and judicial commitment to eradicating sexual orientation discrimination as its backdrop, the supreme court holds that denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of N.J. Const. art. I, para. 1. To comply with this constitutional mandate, the legislature must either amend the marriage statutes to include same-sex couples *or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples*.[62]

Proponents of applying the *McGee* method to same-sex couples would argue that *Lewis v. Harris* and N.J. Stat §37:1-31 demand that the same rules that apply to heterosexual couples must also apply to same-sex couples. The *Lewis* court reasoned that some sort of statutory scheme allowing same-sex couples a marriage-like relationship was required in order to comply with the equal protection guarantee[63] of the New Jersey state constitution. Because the legislature refused to say that marriage could be between two same-sex partners, it created the civil union statute. *Lewis* required that the legislature remove all equal protection barriers, so that same-sex couples and different-sex couples would be equally afforded the same rights and benefits under the New Jersey state Constitution. Implicit in this requirement is the notion that same-sex couples should be treated the same as different-sex couples in all aspects of marriage or marriage-like relationships, including the dissolution of these relationships. In the view of the

[62] Emphasis added. *See* Lewis v. Harris, 908 A.2d 196, 200 (N.J. 2006).
[63] N.J. CONST. art. I, para. 1 (2010).

*McGee* method proponents, it would seem unfair to deny a homemaking same-sex partner with significant pre-marital cohabitation the alimony and marital assets that a heterosexual spouse in the same situation would receive. This group would argue that under N.J. Stat. §37:1-31(a),[64] every law from whatever source derived that applies to married couples must also apply to same-sex couples. Most proponents of the application of the *McGee* method are likely to be lower-earning or homemaking partners in same-sex relationships, because they have been financially dependent on their partners for a significant amount of time.

Opponents of applying the *McGee* method to same-sex couples would argue that while N.J. Stat. §37:1-31 is the law now, it should be construed narrowly, taking into account that most same-sex relationships were formed with the understanding that the law had no place in their world. For decades, legal recognition was so completely unfathomable that from a policy perspective, it would be unfair to suddenly expect same-sex couples with short-term legal relationships to have to pay alimony or share the proceeds from the sale of their homes with an ex-partner. Members of this group are likely to be higher-earning or sole-earning partners of same-sex relationships. Many older members of this group would remember the years when legal recognition for same-sex couples seemed impossible, and may also be of the original school of thought that homosexuality allowed freedom to enjoy relationships outside of the binding ties and obligations of marriage. Furthermore, before *Lawrence v. Texas*[65] was decided in 2003, *Bowers v. Hardwick*[66] was the leading case on consensual homosexual sex. In 1986, *Bowers* upheld a Georgia law that criminalized private consensual sex in the context of homosexuals. In so doing, it sent a message to the LGBT community that the chances of marriage recognition

[64] N.J. STAT. §37:1-31(A) provides that civil union couples shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage.
[65] 539 U.S. 558 (2003).
[66] 478 U.S. 186 (1986).

were a distant dream, despite the budding domestic partnership registries in California. *Bowers* further reinforced the failed attempts for marriage recognition in *Baker v. Nelson*[67] in 1971, and *Singer v. Hara*[68] in 1974.

## THE SECOND JUDICIAL APPROACH: PALIMONY

In 1976 in California, Michelle Triola Marvin turned the legal world upside-down when she sued her live-in ex-boyfriend for rehabilitative payments similar to alimony for married couples, based on an oral promise that he would support her for life. *Marvin*[69] marked the first time in the United States that a court recognized the enforcement of a support agreement between two cohabiting partners in a nonmarital relationship. In so holding, the court explained that "the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed"[70] and that unmarried partners are just as competent as any other people to contract respecting their earnings and property rights.[71] The *Marvin* court expressly refused to revive the doctrine of common-law marriage, and further declared that agreements between nonmarital partners based solely on sexual services were unenforceable as a matter of law.[72] However, if other services, such as homemaking services, were provided in exchange for economic support, such agreements would be enforceable. The court reasoned that society's morals had changed, and that many couples chose to live together in contemplation of marriage, in order to ensure that such an undertaking

[67] In *Baker*, a same-sex couple was denied a marriage license because the two partners were not of different sexes. The couple sued to force the county clerk to issue the license, but the Minnesota Supreme Court held that marriage was limited to heterosexual couples. *See* 191 N.W.2d 185 (Minn. 1971).

[68] 522 P.2d 1187 (Wash. Ct. App. 1974).
[69] 557 P.2d 106 (Cal. 1976).

[70] *See id*. at 122.
[71] *See id.* at 116.
[72] *See id.*

would be successful.[73] *Marvin* held that the courts should look to the parties' conduct in determining whether that conduct demonstrates an implied agreement of partnership or joint venture.[74]

*Marvin* paved the way for other jurisdictions to recognize claims of palimony.[75] Washington uses the term "meretricious relationship"[76] to refer to unmarried couples who live together in a stable, marital-like relationship with the knowledge that they are not in a lawful marriage. However, in *Vazquez v. Hawthorne,* the trial held that same-sex couples could not be in a meretricious relationship because they were not permitted to marry, and thus, were not entitled to the rights and benefits of a quasi-marriage.[77] On remand, however, the Supreme Court of Washington stated that equitable claims are not limited by the gender or sexual orientation of the parties[78]. New Jersey first allowed palimony claims in *Kozlowski v. Kozlowski*,[79]which relied on *Marvin* in holding that agreements by adult non-marital partners which are not explicitly and inseparably founded on sexual services are enforceable. *Kozlowski* and its descendants had been the law in New Jersey for 30 years, until recently.

Until January 2010, New Jersey allowed claims for palimony to be enforced absent a written agreement between the parties. However, on January 15, 2010, Governor John Corzine signed into law[80] a bill that required all palimony agreements to be in writing, to comply with the

[73] *See id.* at 122.
[74] *See id.*
[75] The term "palimony" was coined by Michelle Marvin's attorney, Marvin Mitchelson, combining the words "pal" and "alimony". *See* Robert Jablon, *Michelle Triola Marvin: Woman who waged a landmark palimony case dies at 76.* Tributes.com, http://www.tributes.com/show/Michelle-Marvin-87058757 (last visited April 27, 2010).
[76] *See* Vazquez v. Hawthorne, 994 P.2d 240, 241 (Wash. Ct. App. 2000) (quoting Connell v. Francisco, 898 P.2d 831 (Wash. 1995)).
[77] *See id.* at 243.
[78] *See* Vazquez v. Hawthorne, 33 P.3d 735, 737 (Wash. 2001).
[79] 403 A.2d 902 (N.J. 1979).
[80] *See* N.J. STAT. § 25:1-5 (2010).

Statute of Frauds.[81] The new law contradicts previously established case law in New Jersey which recognized oral contracts[82] and as recently as 2008, even went as far as saying that cohabitation was not a requirement[83] of a successful palimony claim. The new law requires not only that a promise of support be in writing, but also that each party seek the advice of independent legal counsel[84] at the time of the writing in order for the agreement to be enforceable. In creating the new palimony statute, the New Jersey legislature explicitly intended to overturn[85] *Devaney* and *Roccamonte.* Because the law is so new, at the time of this writing there are no reported cases showing how courts are dealing with it. It is unclear whether the law will apply retroactively to currently pending palimony cases, or to cases where palimony would have been warranted but for the new law. If the new law is retroactive and courts choose to consider only the length of the legal relationship in determining alimony awards for same-sex couples, manifest unfairness would result. Where a different-sex couple ended their relationship after only three years of marriage, but fifteen years of cohabitation, alimony would be determined based on fifteen years. For a same-sex couple in an identical situation, with no written palimony agreement, there exists a great likelihood of no alimony award at all, should the courts consider only the legal relationship.

The palimony approach applies to same-sex couples who either were cohabitating and never legalized their relationships, or were in a short-term legal relationship with a long-term cohabitation period, as in the case of Partner A and Partner B. Before the new law was enacted,

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[81] *See* RESTATEMENT (SECOND) OF CONTRACTS § 110, 1981.
[82] *See* Kozlowski v. Kozlowski, 403 A.2d 902 (N.J. 1979); Crowe v. DeGioia, 447 A.2d 173 (N.J. 1982); In Re Estate of Roccamonte, 808 A.2d 838 (N.J. 2002) (extending support claims to inheritance rights against the promisor's estate). All of these cases recognized that under traditional equitable principles, a marital-type relationship between two unmarried persons may rest upon a promise to support the other.
[83] *See* Devaney v. L'Esperance, 949 A.2d 743 (N.J. 2008), establishing the "totality of the circumstances" approach.
[84] *See* N.J. STAT. ANN. § 25:1-5(H) (2010).
[85] *See* S.B. 2091, 213th Leg., (N.J. 2010).

people like Partner B who might be denied alimony despite their dependence on their former partners could at least turn to palimony as a possible support option. Now, however, Partner B and others in his situation may be left with no recourse. To remedy such an injustice, courts could consider allowing palimony claims absent a signed writing for same-sex couples ending their long-term relationships, because for such a long time, palimony was their main option if their relationships ended. Alternatively, courts could also consider imposing a constructive trust over disputed property, in order to avoid one party being unjustly enriched.[86] It should be noted that the possible remedy of constructive trust is just that: a possibility. Courts have not yet ruled on a case in this area since the new palimony law was passed. Unlike unmarried different-sex couples, same-sex couples had no right to legalize their relationships until three years ago. Heterosexuals living in a marriage-like relationship always had the option to marry and benefit from the rights conferred by marriage. They chose not to do so and to depend on each other without a formal agreement. Same-sex couples in New Jersey depended on each other absent a formal legal relationship for decades because it was their only option,[87] absent seeking the costly advice of counsel and creating an express palimony agreement. Same-sex couples could not enter into civil unions until early 2007, which is extremely recent history, and under New Jersey divorce law, a three-year marriage is not sufficient to support an alimony claim. It seems unjust to tell a group of people who until recently, had no right to legalize their relationship, that they cannot receive alimony because their legal relationships were of short duration. It seems even more unjust to tell those same people that the 30 years they previously spent together as co-

[86] *See* New Jersey Family Law Blog: *What is a Constructive Trust?* http://www.njfamilylawblog.com/2010/02/what-is-a-constructive-trust.html (entry dated February 24, 2010).

[87] In 2004, New Jersey began allowing same-sex couples to register as domestic partners, which afforded them some, but not all, of the rights and benefits provided to married couples. *See* State of New Jersey, Department of the Treasury, Divisions of Pensions and Benefits, Recent Legislation 2003, http://www.state.nj.us/treasury/pensions/newlaw03.shtml#246 (last visited Apr. 25, 2010).

dependents because they had no right to marry or become one family unit under the law mean nothing in terms of financial support. Unfortunately, that might be precisely the effect the new palimony law has on same-sex couples.

Courts will be reluctant, however, to allow a double-standard for same-sex couples to successfully claim palimony in a situation where unmarried different-sex couples would not be permitted to do so. As a result, courts should consider applying the previous palimony case law to pending palimony cases and to couples who have been cohabitating for a significant amount of time. The line has to be drawn somewhere, but it should be drawn at a point where it is not adversely affecting the lives of individuals who thought that they had some sort of recourse in case their relationship failed, only to find out that now they have nothing. The difference between couples who have been together for several years and couples who have been together for five years or less is reliance. New Jersey couples who allowed themselves to depend on each other, after *Kozlowski*, knew in the back of their minds that if their relationships failed, they had the option of palimony based on an oral contract. They relied on that option in going about their daily lives and establishing themselves as a couple outside of marriage. Now that the law has been passed, new couples who decide not to legally formalize their relationships have notice that their mutual support agreements must be in writing. As a result, there is no detrimental reliance on the part of these new couples, like there is with the majority of couples who had been relying on palimony as a remedy.

Courts could also consider making fact-sensitive inquiries about the way the parties to a palimony action conducted their daily lives, similar to how alimony determinations rely on a

number of factors including the length of the marriage. *Devaney v. L'Esperance*[88] recognized the "totality of the circumstances"[89] approach when making a palimony determination. The court held that cohabitation was not an essential element to a successful palimony claim, but a marital-type relationship must be demonstrated.[90] *Devaney* was the first case to eliminate the cohabitation requirement for palimony, which originally was a main element to establishing palimony. In declining to require cohabitation as an element of palimony cases in New Jersey, the court reasoned that many couples may hold themselves out as if they were married but do not live together.[91] Similarly, *In Re Estate of Roccamonte*[92] held that the right to support is created by contract,[93] and in palimony claims, the parties' acts and conduct must be examined in light of the surrounding circumstances. The court went on to say that broadly expressed general promises of support for life made by one party to the other are sufficient to form a contract, so long as some form of consideration is provided.[94] If *Devaney* could find reasons to eliminate the cohabitation requirement in 2008, and *Roccamonte* could enforce a broadly expressed promise of support against a decedent's estate, surely courts today could find a way to avoid the injustice which will inevitably be created by this new law.

## THE THIRD JUDICIAL OPTION: TREAT SAME-SEX COUPLES AS UNMARRIED INDIVIDUALS BY CHOICE

The third and final option seems to be the most unfair of all, because same-sex couples had no choice but to remain unmarried or disunited until three years ago. While same-sex

[88] *See* Devaney v. L'Esperance, 949 A.2d 743 (N.J. 2008).
[89] The court recognized that while cohabitation was relevant in determining the existence of a marital-type relationship, palimony cases are highly personal and all of the facts surrounding the relationship must be considered.
[90] *See id.* at 744.
[91] The court cited couples who are separated by reasons of employment, military service, or educational opportunities as examples. *See id.* at 751.
[92] 808 A.2d 838 (N.J. 2008).
[93] *See id.* at 842.
[94] *See id.*

couples did have the option of creating an express contract for mutual support, or purchasing property as joint tenants with rights of survivorship, many couples are not familiar with the laws[95] and do not consult legal counsel as their relationship progresses. However, if courts wanted to read the laws narrowly and refuse to apply the *McGee* method to same-sex couples and also read the new palimony law as applying to every couple regardless of length of relationship, same-sex couples would be left out in the cold. This author is of the opinion that such a harsh move on the part of the state judiciary is patently unjust and completely unacceptable, as it literally leaves same-sex individuals such as Partner B above with a minimal chance to succeed in life post-relationship. A narrow reading of the new palimony law concludes that without a written agreement, which was created in consultation with independent legal counsel on the part of both parties, same-sex couples in short-term civil unions are placed in the same position as different-sex couples in short-term marriages with no premarital cohabitation, regardless of the length of the same-sex couple's pre-union cohabitation period. This is because no couple registered in New Jersey can be part of a civil union lasting longer than three years (as of 2010), because of the when the civil union law was enacted. Thus, if they are not permitted to use the *McGee* method of lengthening marriages with pre-marital cohabitation periods, same-sex couples are left with, at most, three-year relationships. These hardly show the actual level of financial dependence between partners or, as *Devaney* mentions, the "totality of the circumstances".

Such a reading by the judiciary would do nothing but create outrage and inundate courts with frivolous lawsuits created by nit-picking former partners who are desperate to get any monetary compensation possible from their ex-lovers. A picture of the New Jersey judiciary this

[95] *See id.* at 843 (quoting Kozlowski v. Kozlowski, 403 A.2d 902, 906 (N.J. 1979)).

ugly should not and does not need to ever be painted, so long as the courts carefully consider the situations that same-sex couples in New Jersey have been placed in by the legislature. The Family Part in New Jersey is a Court of Equity,[96] and it would be a manifest injustice to punish people for not taking an option they were not permitted to take in the first place.

## CONCLUSION

This writing discussed the effect of pre-legal recognition cohabitation on same-sex dissolution cases. While New Jersey's civil union law provides that all civil union couples will be subject to the same rights and benefits conferred upon married couples, it neglects an important element: same-sex couples never had the option to marry until three years ago, yet they may have been living as married couples for decades. These couples should not be treated the same way as heterosexual couples who cohabitated absent marriage for a significant amount of time, then got married, and then divorced after a short-term marriage.

Courts will have to figure out how to treat these same-sex couples in long-term relationships with short-term legal periods, should their relationships end. They can treat same-sex couples exactly as they would treat married couples with significant cohabitation periods under *McGee*, or they can allow claims for palimony, acknowledging the fact that these couples depended on one another for years, despite their legal status. Unfortunately, courts can also take the easy way out, turning a blind eye to the plight of same-sex couples, treating them as if they had been unmarried by choice and demanding that all palimony agreements be in writing.

The chosen path of the courts will be revealed only through the passage of time. The New Jersey judiciary should act in the interest of fairness and justice. In doing so, it should view

[96] *See* Randazzo v. Randazzo, 875 A.2d 916, 924 (N.J. 2005).

same-sex dissolution cases in their historical context, and allow significant pre-registration cohabitation to be considered in determining the length of a civil union. In turn, alimony and equitable distribution would be appropriately determined in proportion with the actual level of economic dependency between the parties.