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# Though Obsolete, the Civil Union Continues to Mystify Courts

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# Verdict

NOVEMBER 24, 2015

JOANNA L. GROSSMAN

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Before there was marriage for same-sex couples, there was the civil union. It was a precursor to marriage equality, one that provided the benefits and obligations of marriage without the name—a political compromise before the Supreme Court ruled in favor of marriage equality. Although the civil union has been made essentially irrelevant, it continues to raise legal questions about the rights and status of its participants. A recent case in New York, *O’Reilly-Morshead v. O’Reilly-Morshead*



<http://law.justia.com/cases/new-york/other-courts/2015/2015-ny-slip-op-25354.html>), shows continuing confusion about a status that was not quite marriage, but not quite anything else either.

## The Civil Union's Role in History

Vermont was the first state to provide a marriage-like status for same-sex couples, which it did in 2000 in response to a ruling of the state's highest court the year before. In *Baker v. State* (<http://law.justia.com/cases/vermont/supreme-court/1999/98-032op.html>) (1999), the Vermont Supreme Court held that it was a violation of the Common Benefits Clause of Vermont's constitution to deny same-sex couples the right to marry *or* the right to enter into a substantially comparable, and legally recognized, relationship.

In the 180 days the court gave the legislature to craft an appropriate remedy for this violation, the legislature conceived of a new status—the civil union—that was identical to marriage in every respect other than name. Indeed, the Civil Union Act itself was short, since it globally amended all statutes referring to “husband” or “wife” with “or civil union partner” and marriage with “or civil union.” In implementation, Vermont courts treated civil unions like marriages, as the legislature intended. Civil union partners were granted the full panoply of rights and obligations, numbering at least in the hundreds, as married couples.

The civil union played a limited role in the national story on marriage equality. A handful of other states adopted their own civil union law, but most eventually replaced it with a marriage equality law as public opinion shifted and political pressure to “defend” traditional marriage against the gay-rights attack waned. But during the years when some states allowed same-sex couples to marry, some states allowed them to form civil unions but not marriages, and some states allowed no type of formal recognition, confusion abounded when civil union couples traveled or moved to states that did not have their own civil union laws.

The limbo that plagued civil union couples was well documented. A Vermont Commission on Family Recognition and Protection studied and summarized many of them in a **2007 report** (<http://www.leg.state.vt.us/workgroups/FamilyCommission/>). Chief among the difficulties was the near impossibility of dissolving civil unions. When civil unions were only available in Vermont, but contracted disproportionately by non-residents, this problem was especially acute. Under the original law, out-of-state couples could not divorce in Vermont because only residents could file for divorce there. (Vermont later enacted a law to allow non-resident couples to dissolve civil unions in Vermont upon proof that their home states would not entertain a suit for divorce.) And, for the most

part, such couples could not file in their home states, either, because the law did not recognize the civil union or any other legal form of same-sex relationship. As I **discussed in 2003** (<http://writ.news.findlaw.com/grossman/20030520.html>), some individuals found a sympathetic court to dissolve the union based on “equitable principles,” but many couples remained stuck in civil unions years after the end of the actual relationship because of this non-complementary patchwork of laws.

### ***Obergefell v. Hodges* and the End of the Civil Union**

In June 2015, the Supreme Court ended decades of conflict over whether same-sex couples ought to be permitted to marry or have their marriages respected as they crossed from one state to the next. (A detailed analysis of the ruling and the history that led to it is available **here** (<https://verdict.justia.com/2015/06/26/from-zero-to-fifty-in-eleven-years>).)

In a simple holding, the Court held, in ***Obergefell v. Hodges*** (<https://supreme.justia.com/cases/federal/us/576/14-556/>), that:

The Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex. . . . [T]he Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

This ruling put an end to bans on marriages by same-sex couples, but it also, practically speaking, put an end to the civil union. It was no longer constitutional for states to deny marriage equality for same-sex couples and thus no longer necessary to provide a marriage alternative to them.

*Obergefell* answered many questions, but raised others. As I have **written previously** (<https://verdict.justia.com/2015/09/15/when-one-door-opens-another-closes>), the ruling in favor of marriage equality resolved some complex issues of parentage, but destabilized others. The same is true for the economic consequences of marriage.

### ***O’Reilly Morshead v. O’Reilly-Morshead: Is a Civil Union a Marriage for Equitable Distribution Purposes?***

The two women involved in this case, Deborah and Christine, moved to New York in 2002. They entered into a civil union in Vermont in 2003. At the time, this was the only option for same-sex couples seeking formal recognition, as the first state would not issue marriage licenses to same-sex couples until May 2004, and a majority of civil union entrants resided outside Vermont. Deborah and Christine then married in Canada in

2006 after marriage equality was adopted there.

Now, the parties agree on only one thing—that they want a divorce. But they disagree about when they got married, a date that matters because it’s relevant to the equitable distribution of property. Under New York law, only marital property can be equitably divided in a divorce proceeding, and marital property accrues only during a legal marriage. (The category of “marital property” is further limited to property earned by either spouse during marriage, as opposed to property acquired through other means such as gift or inheritance.) The dispute in this case thus resolves around property acquired between 2003—the beginning of the civil union—and 2006—the beginning of the Canadian marriage, although the opinion does not make clear whether the most contested piece of property (a house) was acquired with earnings (a prerequisite to its being deemed marital property). But since the court treats the date of marriage as important, it must have deemed the disputed property to be marital as long as it was acquired during a legal marriage. So that is the \$64,000 question: when did the parties marry for equitable distribution purposes?

The court’s opinion is long on platitudes and poeticisms, but a little short on persuasive analysis. (Some of the writing falls short as well, such as the claim that “I” is an over-used pronoun (?), and that the words “I do” become innocuous when “separated, even by a comma.” I challenge the reader to come up with a sentence in which “I, do” could be used.)

Although courts in non-civil-union states used to divide over whether they could dissolve civil unions, several lower courts had agreed to do so in New York based on equitable principles. After *Obergefell*, it is clear that same-sex married couples can divorce or seek annulments on the same terms as any other married couple. But must civil unions also be dissolved on the same terms?

This court—only a trial court and subject to reversal on appeal—said no. Courts can dissolve civil unions, but only by drawing on their general powers of equity. And in that nebulous process, courts cannot—in the view of this particular court—make rulings about custody, property division, or spousal support that would ordinarily accompany a decree of divorce.

But could a civil union nonetheless signify the beginning of a marital union, especially for a couple who later enters a civil marriage? Again, this court said no. A civil union is not the equivalent of marriage. The court was admittedly dealing with two inconsistent precedents. An appellate division ruling in 2005, *Langan v. St. Vincent’s Hospital* (<http://law.justia.com/cases/new-york/appellate-division-second-department/2005/2005-07495.html>), held that a civil union partner was not a

surviving spouse for purposes of the state's wrongful death law. As I **wrote at the time** (<http://writ.news.findlaw.com/grossman/20051020.html>), this decision was poorly reasoned and wrong. But it stands nonetheless.

However, the New York Court of Appeals—the state's highest court—muddied the waters in 2010, when it decided *Debra H. v. Janice R.* (<http://law.justia.com/cases/new-york/court-of-appeals/2010/2010-03755.html>) There, the court held that a lesbian spouse acquired parental rights with respect to her partner's biological child because the two women had entered into a civil union before the child's birth. In reaching that conclusion, the court claimed to be deferring to Vermont law, which ostensibly gave civil union partners legal parentage rights over their partners' children conceived or born during the union. (As I discuss **here** (<http://writ.news.findlaw.com/grossman/20100511.html>) and **here** (<http://writ.news.findlaw.com/grossman/20100525.html>), this case would have been more sensibly predicated on the de facto parentage doctrine, in part because the court's understanding and application of Vermont parentage law lacked some necessary nuance.) It deferred to Vermont's treatment of the civil union on grounds of comity, the general principle of respect for sister states that is the animating force behind interstate marriage recognition law. (Despite the *O'Reilly-Morshead* court's statements to the contrary, marriages are not judgments and thus are not entitled to full faith and credit.)

The question, then, is whether a New York court should give effect to a Vermont civil union for purposes of starting the clock on the acquisition of marital property. Given New York's expansive approach to interstate marriage recognition—the highest court has never refused to give effect to an out-of-state marriage, even when the particular marriage type had been abolished by statute—it would make sense for courts to err on the side of recognition even for a status with an unfamiliar name. After all, under Vermont law in effect at the time of this couple's union, the civil union was defined to be identical to marriage in every respect other than name. Why, given the Court of Appeals's ruling in *Debra H.*, wouldn't this lead the court to err on the side of recognition? And given that the U.S. Supreme Court has now held that all bans on marriages by same-sex couples—the very system that led to the necessity of the civil union—are unconstitutional, wouldn't the obvious tendency be to avoid reinforcing the harm of the now-defunct second-class system?

Moreover, the *O'Reilly-Morshead* court expressly considers whether the civil union signals the beginning of an economic partnership sufficient to trigger equitable distribution rights—but concludes that it does not. This is a strange conclusion given that Vermont law clearly subjected civil union partners to precisely the same equitable distribution rules as married couples. The couple voluntarily opted for a status with



mandatory property-sharing obligations and, when given the chance to enter civil marriage, entered that as well. Although the court suggests that the party seeking equitable distribution in this case was seeking “broader ‘marital property’ rights than exist under New York law,” that is really not true. She was seeking the same marital property rights as any other spouse.

The trial court in this case refused to start the property-sharing clock from the date of the civil union. Rather, in its view, the clock started three years later when the couple married in Canada. Apparently, it was during this window that the only valuable piece of property was purchased.

### **Could Cohabitants’ Rights Come into Play?**

The court also considers, but curiously rejects, the argument that the couple had entered into an express property-sharing contract that would result in the same remedy as the application of equitable distribution principles. Under New York law, a married couple has property-sharing rights upon divorce because of the status of marriage. But unmarried couples can create the same rights by contract. Although New York rejected the broad view of “palimony” countenanced by the California Supreme Court in *Marvin v. Marvin* (<http://law.justia.com/cases/california/supreme-court/3d/18/660.html>), which allows for property-sharing rights based on a variety of principles including unjust enrichment, it has upheld express property-sharing contracts between unmarried cohabitants. Under the applicable precedents, the express agreement does not have to be in writing. There merely needs to be proof that the couple expressly agreed to enter an economic partnership with property-sharing rights. At the very minimum, doesn’t entry into a civil union satisfy that requirement? The couple entered a formal status that came with full rights (and obligations) of equitable distribution and even alimony. What greater evidence could there be of a couple’s intent to entangle their economic lives and share the spoils? But the court in this case refuses to recognize this as an independent theory of recovery.

### **Conclusion**

Having rejected what it viewed as the only viable theory of recovery, the court ruled that the disputed piece of property in this case was the separate property of its owner and could not be divided. The court dissolved the civil union, but refused to engage in the process of equitable distribution that normally takes place in a divorce proceeding. The civil union, even in its obsolescence, thus continues to perpetuate a system of second-class citizenship.



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