

LEGAL BACKGROUNDER NO. 1



MARRIAGE
& *Its Alternatives*

Jeanine M. Elbaz



PROGRAM IN LAW & JOURNALISM
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MARRIAGE AND ITS ALTERNATIVES

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MARRIAGE AND ITS ALTERNATIVES

BY JEANINE M. ELBAZ



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TABLE OF CONTENTS

I. Introduction	1
II. Marriage	3
III. Common-Law Marriage	24
IV. Civil Union	28
V. Domestic Partnership	35
VI. Cohabitation	49
VII. Current and Future Legal Reform	53
Notes	55
Appendix: State-by-State Comparison Chart	62

[UPDATE TO ELECTRONIC VERSION, p. 69](#)

The print version of this book went to press on April 9, 2009. Since then, several states have changed their laws. Updates to the text necessitated by these changes are listed at the back of this book, beginning on p. 69.



I. INTRODUCTION

Generally, any two adults may live together as a couple in the United States without legal objection, but not necessarily with legal protection. How much legal protection they can claim for the relationship depends on their circumstances and intentions. This monograph lays out the types of benefits and burdens the law provides, and charts the sorts of couples who may avail themselves of both. Of course, the major legal institution governing the arrangement of a couple living as spouses is marriage, though the law also provides various “lesser” forms of protection through civil unions and domestic partnerships by way of statute, and cohabitation by way of common law.

The federal government and all but four states confine legal marriage to heterosexual couples. (Only Connecticut, Iowa, Massachusetts, and Vermont, as of April 8, 2009, legally recognize same-sex marriage.) Marriage carries with it a range of legal benefits and obligations, including tax benefits and support obligations. Since not all

couples living together may legally marry, many states have extended many of the marriage benefits and obligations to these other couples through legally recognized marriage alternatives.

With the rise of political demands for legal recognition of same-sex relationships, some states have begun to provide legal benefits, rights, and obligations to same-sex couples. In 1999, Vermont was the first to establish a legal equivalent to marriage for same-sex couples—the civil union (superseded in Vermont by its same-sex marriage law effective September 1, 2009). Other states, such as Hawaii, had already enacted laws establishing marriage alternatives, though not equivalents. Civil union, currently available in only four states (Connecticut, Vermont, New Hampshire, and New Jersey), confers all the same rights and benefits, but not the status, of marriage.

Following Vermont's lead, many states have enacted another alternative to marriage, the domestic partnership, which is available to same-sex couples and certain opposite-sex couples (the partners typically must be over 62 years old). In many states where offered, the domestic partnership provides a limited number of marital benefits and obligations. Two states (California and Oregon) extend to domestic partners all the legal rights and responsibilities provided to married couples.

Many couples living together either cannot or do not avail themselves of these marriage alternatives. Consequently, courts have been faced with determining the rights of cohabiting couples, most frequently when their

MARRIAGE

relationships dissolve. By executing private contracts, cohabiters may be able to better protect their rights and obligations to one another. Most courts will enforce these contracts, at least in so far as they deal with property, estate, and support rights.

In the next several years, the major legal battleground over marriage will be a contest over whether to extend its entitlement to historically unconventional spousal couples. Currently, 46 states bar marriage to same-sex couples, and 43 of those states do not recognize same-sex marriages validly entered into elsewhere. As of January 1, 2009, 30 states have passed constitutional amendments expressly banning same-sex marriage,¹ and 40 states do not provide marriage alternatives. Pushing for change, various civil rights groups have pressed state legislatures to broaden the definition of marriage and to continue what may prove to be a reformist trend of establishing more robust legal alternatives to marriage.

II. MARRIAGE

Marriage is a legal union of a couple as spouses.² For most purposes, the definition of civil marriage, and the legal rights and obligations it bestows upon couples, is determined by the laws of each individual state. Thus, if a particular state permits same-sex couples to marry, then all state and local laws pertaining to marriage will be applied to married same-sex couples. Some benefits

and burdens are established by federal law, and under the Defense of Marriage Act, signed by President Clinton in 1996, marriage for all federal purposes is defined as “a legal union between one man and one woman as husband and wife.”³ Hence, no benefits and burdens conferred by federal law on married couples—social security, federal government employment benefits, tax benefits, and the like—are available to a same-sex couple that a state legally permits to marry.

Marriage is regulated by statute from before it commences to the time it is terminated. Couples must qualify to enter a marriage by meeting state mandated requirements. Even after the prerequisites are met and the marriage is solemnized, state statutes set basic rules governing the union. These may be altered by prenuptial agreements and wills and are largely enforced only upon termination. State laws also regulate how a marriage may be dissolved and what happens when one spouse dies. Of all couple relationships, marriage law bestows the broadest range of rights and responsibilities.

A. Entering the Marriage

Before two individuals marry, they each must be personally eligible to do so. Thus, the fundamental question: who may marry?

Age. A common misconception about the minimum age for marriage is that it corresponds with the age of legal adulthood or the age of consent. This false impression, however, is just that: the ages of majority, consent, and marriage differ in meaning (and are higher or lower

from state to state). At majority a person attains full legal rights as an adult;⁴ children cease to be minors and their parents' legal control and responsibilities terminate. The age of majority in most states is 18, but it is higher in Alabama (19), Mississippi (21), and Nebraska (19). At the separate age of consent, individuals are deemed legally competent to consent to sexual intercourse or marriage (without parental approval),⁵ and this age varies more from state to state than the age of majority. New York, for instance, has an age of majority of 18 but an age of consent of 17. Thus, a person may be deemed legally competent to consent to marriage or sexual activity before attaining the age that he or she is legally considered an adult.

The marriageable age is the absolute minimum age at which an individual is allowed to marry as of right or with parental consent. A person who marries in a state (e.g., New York) where the marriageable age (16 with parental consent; 14 with parental and judicial consent) is lower than the age of consent (17) would not be prosecuted for engaging in sexual activity in violation of the age of consent. Some jurisdictions do not provide a statutory age of consent, and therefore the marriageable age becomes the age at which an individual may legally engage in sexual activity.

In almost all states, 18 is the age for marriage without parental consent. In Nevada, it is 19. In Mississippi, individuals under the age of 21 (also the age of majority) cannot obtain a marriage license without notice to parents or legal guardians.⁶

There are some exceptions to the statutory age of eligibility. All the states allow marriage at a younger age if the prospective spouses obtain consent from their parents or approval from a state judge. If the girl is pregnant, some states allow marriage, with parental or judicial consent, at even younger ages than the eligibility age at which parents may consent. For example, Virginia allows an individual to marry at 16 with parental consent, and under 16 with parental consent and a physician's certification that the female is pregnant or gave birth within the previous nine months. Maryland allows marriage at 16 without parental or judicial consent, as long as the couple has a physician's certification that the female is pregnant or has given birth. Several states permit females to marry younger than males. However, most states have a minimum age at which even parents or a judge cannot consent to the marriage (e.g., New Hampshire allows females who are 13 to marry if the parents petition the court for permission, but not below this age).

Sex. In every state but Connecticut, Iowa, Massachusetts, and Vermont the law requires that spouses be of opposite sex. In the 1996 Defense of Marriage Act, Congress expressly permitted states to reject same-sex marriage and defined marriage for federal purposes as between members of the opposite sex.⁷

Since the United States Supreme Court heard its first same-sex marriage case in 1972,⁸ states have increasingly faced legal challenges to the ban against same-sex marriage. On May 17, 2004, Massachusetts became the first state to legalize same-sex marriage, when the

Supreme Judicial Court of Massachusetts held that a prohibition against homosexual marriage violated the state constitution.⁹ On May 15, 2008, the Supreme Court of California followed Massachusetts in overturning the state's ban on same-sex marriage,¹⁰ but less than six months later, on November 4, 2008, California voters passed a constitutional amendment reinstating the ban.¹¹ (That ban is currently under challenge as itself unconstitutional.) On October 10, 2008, Connecticut legalized same-sex marriage when the state supreme court declared unconstitutional the state's statutory ban, and same-sex couples there have been entitled to marry since November 12, 2008. On April 3, 2009, the Iowa Supreme Court held that the state's restriction of marriage to opposite-sex couples violated the state constitution, and four days later, on April 7, the Vermont legislature overrode the governor's veto of a statute legalizing same-sex marriage, making Vermont the first state to change its policy legislatively.

Under the federal Defense of Marriage Act, states may deny recognition of valid same-sex marriages entered into in another state. Thus, another state need not recognize as married or extend its marital benefits to a same-sex couple who marries in Massachusetts. The 37 states that have adopted their own Defense of Marriage Acts refuse to recognize same-sex marriages entered into in other states. New York, New Mexico, Rhode Island, and the District of Columbia, however, do recognize same-sex marriages validly entered into in other states (and presumably in other countries), even though none has legalized same-sex marriage.

Race. Since the Supreme Court's landmark ruling in *Loving v. Virginia*¹² in 1967, it has been unconstitutional to ban interracial marriage. Before *Loving*, some states had already repealed, or held unconstitutional, similar laws.

Nationality. No law prohibits a U.S. citizen having a foreign-born spouse. However, immigration laws play a role in marriage when the foreign-born spouse does not have residency status in the U.S. According to United States Immigration Support,¹³ more than 450,000 U.S. citizens marry foreign-born individuals each year, and then apply for them to obtain permanent residency (green card) status in the United States.¹⁴ Under immigration law, spouses of U.S. citizens are considered "immediate relatives," for whom the number of green cards available is unlimited. But even for spouses, the residency application is not automatically or quickly granted.

Marriages legally performed and valid in other countries are also legally valid in the U.S.,¹⁵ unless they offend the strong public policies of the state of residence (e.g., underage and polygamous marriages). However, foreign marriages are subject to the federal Defense of Marriage Act, which allows states to reject recognition of same-sex marriage entered into in other jurisdictions, including other countries. With the growth in same-sex marriages and other alternatives in other nations, such as Spain, Canada, Netherlands, Norway, and South Africa, the U.S. will likely revisit the issue of extending benefits to valid foreign same-sex marriages, at least for individuals relocated to the U.S. by their employers.

MARRIAGE

Kinship. Laws in all states restrict marriage between individuals who share a certain degree of consanguinity. Every state prohibits marriage between parents and children, brothers and sisters, aunts and nephews, and uncles and nieces. Twenty states allow first cousins to marry without limitation, and fewer than half the states completely bar first cousins from marrying. A few states allow cousins to marry under certain circumstances. For example, Utah allows first cousins to marry only if they are over the age of 65, or 55 with evidence of sterility.

Mental capacity. While an individual may need less mental capacity to marry than to execute a will,¹⁶ all states require at least a minimal measure of mental capacity. Marriage is usually considered a civil contract, and all contracts require that the parties entering it have sufficient mental capacity. For instance, a contract by an individual who is drunk or has a serious mental disability may be voidable. Likewise, a person must have sufficient mental capacity to be married. Capacity is defined as “the mental ability to understand the nature and effect of one’s acts,”¹⁷ and thus marital capacity requires an individual to understand the nature of the marital relationship and its responsibilities. Some states have a general requirement for mental capacity (e.g., Georgia requires that the individuals be of sound mind¹⁸), and some have more specific requirements (e.g., in Mississippi an individual cannot be drunk, insane, or an imbecile when marrying¹⁹).

Financial ability. No state statutes impose marriage restrictions based on the financial abilities of the couple.

In 1978, the U.S. Supreme Court struck down a Wisconsin statute that required non-custodial parents seeking a marriage license to first obtain a court order, which would be issued only if the non-custodial parent was up to date with child support payments and the child covered by the support order was in no danger of ever becoming a public charge.²⁰ In the case, the non-custodial father was unemployed and in arrears on his child support. In an opinion with no clear majority, the Court held that under the Fourteenth Amendment, the father could not, because of financial inability alone, be barred from obtaining a marriage license.

Plurality. Plural marriage—that is, having more than one living spouse at a time—is illegal under the bigamy laws of all states,²¹ and includes cohabitation with someone other than one's spouse.

Residency. No state requires a couple to reside in the state in which they are married. This open-door policy applies also to same-sex marriages. The four states that have authorized same-sex marriage do not impose any residency requirement for marriage. On July 15, 2008, the Massachusetts legislature repealed a 1913 law barring out-of-state residents from marrying in Massachusetts if the marriage would be void in their own states. Connecticut, Iowa, and Vermont never had such a prohibition.

Assuming that spouses-to-be meet the various personal prerequisites just reviewed, several additional requisites must be met before and during the actual solemnization of the marriage.

Medical status/blood test. Medical examinations, including blood tests, became mandatory in the majority of states beginning in the 1930s, before the advent of antibiotics.²² The purpose of these examinations was to determine whether either the bride or groom had a disease that might be passed onto potential offspring. But with the advent of medications, treatments, and cures for many diseases in the past eight decades, the concern of infecting a fetus has declined. While 47 states no longer require a blood test or physical examination for those wishing to marry, a few still do: Mississippi (test for syphilis only), Montana (test for females and rubella only, but may be waived), and New York (test for sickle-cell anemia, but only for those not Caucasian, Indian, or Oriental, and the test may be refused on religious grounds²³). The results of the blood tests in Montana and New York, however, do not legally affect a couple's plan to marry, since these states issue marriage licenses regardless. Only Mississippi disallows marriage if blood test results are positive for disease; an individual with syphilis is prohibited from marrying.

Foreign-born individuals wishing to marry U.S. citizens may be required to submit to a medical examination and blood test.²⁴

License. Every state requires that the couple apply for and receive a marriage license before solemnizing the marriage. While each state has its own requirements for the issuance of marriage licenses, to obtain a marriage license in all states applicants must certify that they have met basic eligibility requirements, provide identification,

and pay a fee. Marriage licenses in most states are not open-ended; they are valid for only a limited time.

Waiting period. Currently, 26 states have a statutory time period, from one to five days, during which couples who have applied for a marriage license must wait to receive it.²⁵ In some states, waiting periods do not apply to non-residents who choose to marry in the state. In Florida, the waiting period is waived upon completion of a marriage preparation course.²⁶ Some states impose additional waiting periods after a divorce. Wisconsin, for example, prohibits a party to a divorce from remarrying within six months of the judgment of divorce.²⁷

Presence. Most states require both prospective spouses to physically attend the marriage ceremony. Four states (California, Colorado, Montana, and Texas) allow a proxy marriage, in which a third person may stand in the absentee-spouse's place. Only Montana recognizes double-proxy marriage (so that both of the prospective spouses may be absent).²⁸ In California, proxy marriage is available only to members of the U.S. armed forces currently deployed and unable to be present at the marriage ceremony. All states except Iowa recognize a proxy marriage entered into in a state where proxy marriages are legal.²⁹

Who can solemnize. In all states, couples are permitted to solemnize their marriages in either civil or religious ceremonies. All states also have statutes that list who may perform marriage ceremonies. Some even allow the couple to solemnize the marriage themselves. In most states, judges, state officials, and religious leaders may

solemnize marriages, and in many states others may officiate also if registered with the state. Problems can arise, though, when an individual's certification to solemnize marriages is invalid. In York County, Pennsylvania, for example, a marriage was declared void because it was solemnized by an Internet-ordained minister, an official not authorized to perform the marriage by law.³⁰ Internet-ordained ministers, as well as individuals ordained by mail and fax, are currently entitled to officiate in all states, except certain counties in Pennsylvania, Virginia, and North Carolina.³¹

B. During the Marriage

Once married, spouses are entitled to many legal, social, and financial benefits. With these benefits also come legal obligations. As of 2009, the federal government provides over 1,000 legal benefits within 13 major categories to heterosexual married couples (these federal benefits of the United States Code represent benefits, rights, and privileges contingent on marital status or in which marital status is a factor).³² Each state also provides marital benefits and obligations, which vary from state to state. The following is a sketch of the major federal benefits: Social Security and related benefits, veterans' benefits, taxation, civilian and military service benefits, immigration benefits, and employee benefits.³³ As previously noted, however, under the federal Defense of Marriage Act, no federal benefits are available to same-sex couples even when validly married in Connecticut, Iowa, Massachusetts, Vermont or a foreign country.

Taxation. Married couples may file joint federal and state income tax returns each year, entitling them to larger deductions, credits, and exemptions than those available to single individuals. Even if they do not file a joint income tax return, however, they still reap extra benefits. One spouse filing separately may be able to claim the other as a dependent on his income tax return and thus receive a deduction that a single person could not otherwise receive.

Spouses also receive significant federal gift tax benefits. Single individuals are limited to giving \$12,000 per year to another individual tax-free. Married spouses, in contrast, may each give \$12,000 to the same individual tax-free.³⁴ Moreover, the annual \$12,000 tax-free gift limit does not apply between spouses, meaning that spouses may give each other unlimited tax-free gifts.

Federal monetary benefits. A spouse is entitled to receive a portion of a deceased spouse's Social Security benefits from the federal government, as well as a death benefit. He is also entitled to receive public assistance benefits. Furthermore, a spouse of an active or inactive member of the armed services is entitled to receive veterans' and military benefits, such as education, medical care, and loans.³⁵

Immigration. Marriage offers immigration benefits to foreign-born individuals seeking to reside in the U.S. Despite the long and complex process of applying for residency or citizenship in the U.S., foreign-born individuals married to U.S. citizens have a higher status than single immigrants trying to make the U.S. their home.

Federal and state employee benefits. Spouses of employees of the federal government and states receive many benefits, including health insurance, life insurance, retirement benefits, and sick leave to care for an ill spouse. Private employers may offer similar benefits. Most employers offer health insurance plans that may include spouses. Thus, an unemployed or uninsured spouse can usually maintain health insurance coverage under the other spouse's policy. Live-in partners to whom one is not married, however, must maintain their own health insurance policies to be covered. Under the Federal Family and Medical Leave Act, a federal or state employee, or employee of a private employer employing 50 or more individuals for at least 20 work weeks, may take up to 12 weeks off every 12 months to care for a spouse with a serious health problem.³⁶ Additionally, each state has its own laws regarding employee benefits for both public and private employers, which may expand those provided by the Federal Family and Medical Leave Act. These laws apply only to spouses and not to live-in partners.

Spousal privilege. In the U.S., spouses are afforded two protections in federal and state legal proceedings: the marital confidences privilege and the spousal testimonial privilege. The former protects the contents of private communications between the married couple in civil and criminal cases. The latter protects a spouse from having to testify against his or her spouse who is the defendant in a criminal case. These privileges come with exceptions, and do not apply in certain cases,

including divorce or child custody proceedings or cases of domestic or child abuse.³⁷ Nor do these privileges apply in all state courts. Each state's court system (as well as the federal system) has its own set of evidentiary rules, most of which include one or both of the federal spousal privileges.

Visitation in hospitals and prisons. Hospitals and prisons have implemented restrictions on who may visit their charges and when. Hospitals often limit visitors to spouses and family for various reasons related to the health of the patient. This limitation excludes a partner who wishes to visit, and whom the patient wishes to see, because he or she is not married to the patient. Some states, like North Carolina, have begun to consider same-sex partners as immediate family members when visiting their partners in the hospital.

All state and federal prisons allow inmates visitors, both family and friends. While each prison restricts visitors and visits in its own way, the law gives preferential treatment to spouses and family members. In federal prison, for example, inmates are limited to no more than ten non-family visitors, including an unmarried partner, whereas the number of family members is unlimited.³⁸ State prisons' policies vary along the same lines.

Property. Many states allow a married couple to own their real and personal property as tenants by the entirety, a form of ownership that accords certain protections from creditors of either spouse. In most community-property systems, tenancy by the entirety also bestows upon one spouse a 100% interest in the

MARRIAGE

ownership of the property if the other spouse dies, without having to go through probate.³⁹ In most common-law systems (which comprise the majority of states, including nearly all northeastern states), ownership and control of property during the marriage follows title. This means that each spouse owns or controls her own wages and personal property, and can spend, sell, and purchase without the permission of the other. In most states (whether common-law or community-property), property acquired before marriage or by gift or inheritance during marriage remains the separate property of each spouse, although a few states treat all property as joint. On divorce, in both community-property and common-law states, property (other than gifts and inheritances) acquired by either spouse, even if the other spouse did not assist in earning or acquiring it, is considered marital, and will be equitably divided between the spouses. Marital property includes not only savings and property acquired with marital earnings of either spouse, but also pension benefits and stock options earned during the marriage, and more.

Insurance. Insurance coverage for spouses varies among the states and among insurance companies. However, by law, public employers must provide their employees with the option of including the employee's spouse as a dependent on the employee's medical (including health and dental) insurance policy. By having a joint policy, the payments may be less per spouse than they would be for non-married individuals.

Children. A child born during a marriage to a hetero-

sexual couple is typically presumed to be the child of the husband and wife, even if reproductive technologies and sperm or eggs of others are used. However, most states permit either member of the couple to rebut this presumption within a specified period after the birth (typically by the husband seeking paternity testing), and some (e.g., California) also permit third parties claiming parental status to do so. Whether this presumption will be extended to couples married in Connecticut, Iowa, Massachusetts, Vermont, or any other state that chooses to recognize same-sex marriage is as yet unclear. Thus, non-disclaiming spouses are legally responsible for any child born to the wife.

Children born out of wedlock, regardless of any commitment of the parents to raise the child together, are not presumed to be the natural children of the father. Therefore, a legal (paternity) proceeding may be necessary to legally bind a father who does not agree to be named on the birth certificate or refuses to claim responsibility of his child. However, paternity proceedings are not necessary in most states if the father consents to be named on the child's birth certificate. Once so named as father, he automatically is responsible to support the child, and he may not waive that responsibility by agreement unless and until someone else assumes legal responsibility for the child (i.e., through adoption or other legal proceeding).

Married couples also retain the benefit of joint custody, joint parenting, and joint adoption of children. In some states, it is less difficult for a married couple than a single person to adopt a child. Utah, for example,

provides that spouses need only consent to an adoption to be eligible, whereas a child may be placed with a single individual only if it is in the best interests of the child.⁴⁰ Some states (e.g., Utah and Arkansas) even prohibit an unmarried cohabiting couple from adopting. Moreover, several states completely bar same-sex couples from adopting, while others that do not provide gay marriage permit same-sex couples to co-adopt (e.g., New York).

Medical decision making. When an incapacitated person cannot make his own medical decisions, the person's family is usually called upon to fulfill that role. Any competent person may execute a health care proxy, designating another person to make medical decisions for him or her, essentially establishing a power of attorney in the proxy. Problems arise, however, when a person becomes incapacitated without having executed a health care proxy. Most states provide that if the patient is married, his spouse has the authority to make medical decisions on behalf of the patient spouse, even without a proxy. If the patient is not married, this right usually goes to another family member, but not to an unmarried partner.

Estate planning and probate. Upon their deaths, married couples are entitled to various estate planning and property distribution benefits not available to single individuals. Certain life estate trusts, including the QTIP trust, QDOT trust, and marital deduction trusts are offered only to married couples.⁴¹ Furthermore, if one spouse dies without a will, the surviving spouse is gener-

ally entitled to receive a portion of the deceased spouse's estate through intestate succession. Intestate laws vary from state to state, but all provide that the surviving spouse will receive a share of the estate, whereas a non-spouse or non-relative would receive nothing.

In community-property states, since each spouse owns an undivided half interest in the community (marital) property, the surviving spouse is guaranteed his half of the property regardless of the dispositions in the deceased spouse's will. In many of these states, however, the surviving spouse has no right, by virtue of marital status alone, to claim the deceased spouse's separate property. Surviving spouses in common-law states are permitted to claim the separate property of the deceased spouse. Thus, even if one's spouse does have a will, but the surviving spouse is either left out of it or is dissatisfied with the benefit provided, the surviving spouse may elect against the will in common-law states and claim an elective share. A non-spouse does not have this right.

Death. When one spouse of a married couple dies, only the surviving spouse has the right to consent to postmortem examinations and procedures. The surviving spouse also has the benefit of making burial, funeral, or other arrangements.⁴²

When a third party is liable for the death of a spouse, the surviving spouse may sue and recover damages from that party for the wrongful death of the deceased spouse. While the majority of states require that the person suing for wrongful death either be the spouse of the deceased or a blood relative, some states have extended

this claim to significant others not married to or a blood relative of the deceased.⁴³

C. Termination of the Marriage

Death. The death of one spouse necessarily ends the marriage between two individuals. Of the three marriage termination options, death is the only one that generally does not require court involvement. However, situations may arise with respect to life-terminating medical procedures when court involvement may be necessary.⁴⁴

Annulment. An annulled marriage is one that, in effect, never legally existed. While annulment laws vary, they all generally condition annulment on fraud, bigamy, mental illness, forced consent, lack of consent to an underage marriage, or physical incapacity to consummate the marriage. Annulments are available only to couples who have been married a short time, usually no more than four years. Although an annulment legally erases a marriage, any children born during the marriage are considered legitimate, and a court may award custody and child support to one of the parents.⁴⁵

Divorce. A divorce is the legal dissolution of a marriage by a court.⁴⁶ Either spouse may file for divorce but will have the burden of proving several factors. First, the spouses must be legally married.⁴⁷ Second, the court from which divorce is sought must have jurisdiction and venue over the parties. Third, the spouse filing for divorce must establish one or more of the statutorily approved grounds for divorce in the particular state.

Some common grounds among the states include adul-

tery, cruel and inhuman treatment, separation for a specified time with or without a separation agreement, abandonment (actual or constructive⁴⁸), and confinement of one spouse in prison for a specified period. Currently, 49 states also recognize as a ground for divorce irreconcilable differences between the couple, a ground that does not require proving the other spouse at fault for the failure of the marriage. New York has yet to adopt this no-fault ground, although it will grant a no-fault divorce if both parties agree to it, execute a written separation agreement governing all the terms of separation and divorce (including property division, child support, and spousal support), and adhere to it for at least one year before seeking a formal divorce. This one-year wait is longer than the statutory period in most other states, some of which do not impose a waiting period when the divorce is based on irreconcilable differences. States that impose a mandatory separation period after which an irreconcilable differences divorce is automatic vary in the duration of this period from 60 days to two years.

A court's involvement in divorce is not limited to accepting the proof of grounds. Courts must also decide how to distribute assets, whether to order one spouse to provide support to the other, and when children are involved, to set legal and physical custody, visitation, and child support obligations.

Divorce can also affect the immigration status of a foreign-born spouse married to a U.S. citizen. A divorce granted after the foreign-born spouse obtains permanent residency (green card) does not affect the foreign-born

spouse's permanent residency status. However, a foreign-born spouse who was not married to the U.S. citizen-spouse for three years must wait five years to apply for full U.S. citizenship. In contrast, if a marriage is dissolved before the foreign-born spouse receives a green card, the foreign-born spouse is ineligible for a green card based on marriage to a U.S. citizen.

A major issue of increasing importance is same-sex divorce. The problem stems from residency requirements imposed by states to grant divorces. Even to consider a divorce case, courts must have jurisdiction over the claims and the parties, but to have jurisdiction over the parties, at least one party typically must reside in the state. Since only two states permit same-sex marriage, many same-sex couples living in other states travel to Massachusetts and Connecticut to marry and then return to their home state. If these couples do not establish residency in Massachusetts or Connecticut, however, they may not be divorced there. And since divorce laws in all the states define marriage as between a man and a woman, it is unclear whether these states will grant, or even consider, a divorce between same-sex spouses. Despite Rhode Island's recognition of same-sex marriages validly entered into in states that permit them, the Rhode Island Supreme Court ruled in 2007 that its family court lacked jurisdiction to dissolve a same-sex marriage validly entered into in Massachusetts.⁴⁹ Thus, even a state that does recognize an out-of-state same-sex marriage will not necessarily dissolve such a marriage.

More recently, in January 2009, a man filed for divorce

in Texas from his husband, whom he married in Massachusetts. The Texas attorney general said that he would intervene in the action to argue that the court lacks jurisdiction to dissolve, or even recognize, a same-sex marriage because Texas law strictly defines marriage as between a man and a woman.⁵⁰ If the attorney general prevails, questions arise over the status of the same-sex marriage: if one of the parties moves to a state that recognizes the marriage and commences a relationship with another person, is he considered a bigamist if he seeks recognition for the new relationship? If the parties move to a state that has jurisdiction to dissolve the marriage, what happens to the property acquired in Texas during the marriage since a court would not have jurisdiction over it? With such significant implications, the issue of same-sex divorce is likely soon to engage the attention of state legislatures and eventually to reach the United States Supreme Court.

III. COMMON-LAW MARRIAGE

Historically, many couples have lived together as married without having met the statutory requirements of marriage; e.g., they may have failed to obtain a license or to have participated in a marriage ceremony. But if a couple is capable of marrying under the statutes, “intend to be married, and hold themselves out to others as a married couple,”⁵¹ many states have recognized the relationship to be a common-law marriage, as legally

binding as a regular marriage. Common-law marriage was once accepted in 37 states, but with the advent of modern domestic relations statutes it has lost favor in many.⁵² Today, nine states and the District of Columbia continue to recognize newly formed common-law marriages.

While common-law marriage dispenses with many of the traditional prerequisites, such as blood tests, marriage licenses, waiting periods, and solemnization, it will be legally valid only if each person is eligible to marry under the marital state's marriage laws. Minors or an aunt and nephew may not circumvent their ineligibility to marry by holding themselves out as spouses under a common-law marriage. Statutory authority for traditional marriage governs what happens during the common law marriage and at its dissolution.

A. Entering the Common-Law Marriage

Anyone eligible to enter a traditional marriage is eligible to enter a common-law marriage. There are, however, a few exceptions, which are set forth below.

Age. Of the nine states (and the District of Columbia) that recognize newly formed common-law marriages, eight do not distinguish between marital age for traditional marriage and marital age for common-law marriage. The exception is Kansas, which refuses to recognize common-law marriage if either party is under 18.⁵³

Nationality. A traditional marriage is not required for a foreign-born individual to obtain U.S. residency by marriage to a U.S. citizen. Although it lacks a legal cere-

mony as proof of marriage, a common-law marriage is valid for immigration purposes if the laws of the couple's state of residence or the state in which they first held themselves out as married legally recognize common-law marriages.⁵⁴

Residency. Unlike traditional marriage, which may be legally contracted in any state, one of the fundamental requirements for common-law marriage is cohabitation in a state that legally recognizes it.

Date of Entry. In addition to the nine states that currently recognize common-law marriages newly entered into within their borders, five other states (Georgia, Idaho, Ohio, Oklahoma, and Pennsylvania) recognize common-law marriages entered into within their borders before certain specified dates.⁵⁵ New Hampshire recognizes common-law marriages as valid only at the death of one spouse.⁵⁶

Entry by court or administrative order. A sixteenth state, Utah, recognizes a common-law marriage only if it has been validated by a court or administrative order,⁵⁷ requiring the fact of the marriage to be established during or within one year after the marriage.

Entry by formal registration. Unlike the other states recognizing common-law marriage, Texas requires parties entering a common-law marriage to register their union with the state, though the couple need not participate in a formal ceremony.

B. During the Common-Law Marriage

Once a common-law marriage is legally established, the spouses are entitled to the same benefits of traditional

marriage and incur the same legal obligations. Even though most states do not permit common-law marriages to be formed within their borders, the U.S. Constitution requires all states to accord “full faith and credit” to the laws of sister states. Therefore, common-law marriages validly entered into in states that permit them are valid in every other state, even when the other state does not recognize common-law marriage itself. A state that does not permit common-law marriages to be entered into will nevertheless extend marital benefits to bona fide common-law spouses who move there.⁵⁸

Despite the Full Faith and Credit Clause of the U.S. Constitution requiring the states to recognize valid common-law marriages of other states, the federal Defense of Marriage Act permits states to reject same-sex marriages even if validly performed in other states. The distinction is that the Full Faith and Credit Clause protects common-law marriage of opposite-sex couples only. No common-law state has so far recognized same-sex common-law marriage.

The federal government recognizes common-law marriage for purposes of marital benefits, including taxation, assuming that the marriage was lawfully formed in a state that recognizes common-law marriage.

C. Terminating the Common-Law Marriage

Unlike the informal method of entering into a common-law marriage, a common-law marriage can be terminated only through formal procedures. There is no such thing as common-law divorce.⁵⁹ Common-law marriage, once

established, is treated the same as traditional marriage, and with one exception can only be terminated in the same way. Like traditional marriage, common-law marriage terminates by death of a spouse or by divorce,⁶⁰ but it cannot be terminated by annulment. Only Texas allows a common-law marriage to be annulled if the existence of the marriage has not been proved within two years of the couple's separation.⁶¹ Utah, additionally, automatically dissolves a common-law marriage if it has not been judicially established within one year of separation. Thus, parties to a common-law marriage that is not judicially recognized within this time limit may have difficulty dealing with issues, such as property division, that arise when the relationship ends.

IV. CIVIL UNION

In response to the politics of same-sex marriage, some states have created an alternative form of legal union for same-sex couples, providing them with the same rights and responsibilities granted to heterosexual married couples.⁶² This alternative to marriage is called a civil union, and while it provides the same state-level benefits of marriage to same-sex couples, it does not secure any of the rights and responsibilities of married couples provided by the federal government.

At the end of 2008, only four states offered civil unions: Connecticut, New Hampshire, New Jersey, and Vermont. (Although Connecticut permitted same-sex marriage in

2008, it did not invalidate the civil union law, even though its need has been mooted. Vermont, in amending its marriage law in 2009 to recognize same-sex marriage, apparently did eliminate the status of civil unions, though it is unclear whether partners to them will be considered married without solemnization.) Under the federal Defense of Marriage Act, states need not recognize civil unions entered into in other jurisdictions, whether states or foreign countries. For the purpose of any federal law in which marital status is a factor, the Defense of Marriage Act considers marriage to be between a man and a woman, and a spouse as a person of the opposite sex who is a husband or wife. Partners who have formed civil unions are thus not entitled to federal marriage benefits since they are not considered spouses.

Like marriage, civil unions are subject to the statutory provisions of each state where it is recognized. Couples seeking to enter into a civil union must be personally eligible to do so and must fulfill additional requirements prior to solemnization. Once the civil union is solemnized, state laws govern the relationship, as in marriage. Finally, civil unions may be dissolved like marriages, either by death or a court order.

A. Entering the Civil Union

Age. In states allowing civil unions, each partner must be at least 18 years old. New Jersey also allows individuals under the age of 18 to apply for a civil union with parental consent, and under the age of 16 with parental and judicial consent, consistent with the marriageable age.⁶³

Sex. Only same-sex individuals may enter a civil union. This marriage alternative is not available to heterosexual couples.

Race. Just as in marriage, people of any race may form a civil union.

Nationality. There is no nationality requirement. However, a foreign-born individual who enters into a civil union is not eligible for permanent residency (green card) based on the same-sex relationship in the U.S. because immigration laws provide such a benefit only for married couples.⁶⁴

Kinship. All four civil union states prohibit individuals from entering into a civil union with close blood relatives. A man may not enter into a civil union with his father, grandfather, son, grandson, brother, brother's son, sister's son, father's brother, or mother's brother, and likewise for a woman and her female relatives. Entering a civil union with one's cousin does not appear to be prohibited by the statutes.

Mental capacity. Each of the states allowing civil unions requires the individuals to have sufficient mental capacity. In Vermont, the civil union statute expressly declares that each individual must be of sound mind.⁶⁵ In New Hampshire, the civil union statute refers to the marriage law requisites for mental state eligibility.⁶⁶ In Connecticut, the civil union statute expressly prohibits issuing a civil union license to a person under the control of a conservator.⁶⁷ In New Jersey, the statute does not condition civil unions on a mental state. Rather, it allows a civil union to be nullified on the ground that

either or both of the parties lacked mental capacity to enter the civil union or were intoxicated by drugs or alcohol.⁶⁸

Financial Ability. No state restricts civil unions on the basis of a couple's financial abilities.

Plurality. The civil union states prohibit an individual from entering into a civil union if he or she is presently a party to another civil union, domestic partnership, or marriage (though Connecticut does not include domestic partnership in its eligibility statute).

Residency. Eligibility for civil unions does not depend on residency or citizenship in any of the civil union states.

Medical status/Blood test. Neither medical examinations nor blood tests are currently required for a couple to enter into a civil union.

License. To solemnize a civil union, a couple must first obtain a license, usually at a municipal clerk's office, by showing identification and paying a fee. Licenses are valid only for a certain period of time, ranging from 30 to 90 days, after which, if the civil union was not solemnized, the couple must reapply.

Waiting period. New Hampshire and New Jersey require a waiting period before the civil union license is issued. In Vermont, a civil union license may be immediately issued upon signature of one of the parties.⁶⁹ In Connecticut, both parties must appear before the registrar to sign the application.

Who can solemnize. Like marriages, civil unions must be solemnized by an authorized official. New Hampshire requires civil unions to be performed under the state marriage

laws, so individuals qualified to solemnize marriages may also solemnize civil unions. New Jersey also permits civil unions to be performed by those authorized to perform marriages. In Connecticut and Vermont, civil unions must be solemnized by individuals specifically authorized to certify them, including judges, clergy, and in Vermont, individuals registered as officials with the secretary of state.

B. During the Civil Union

Because the civil union was created to provide same-sex couples a legally recognized union parallel to marriage, it bestows upon the civil union couple all of the benefits, protections, and responsibilities the state provides to married couples. Thus, the states recognizing civil union legally treat it as they do marriage.⁷⁰ (The only difference between civil union and marriage on a state level is the name.) But the federal government does not recognize it. Parties to a civil union receive none of the federal benefits and protections offered married couples, including taxation, social security, federal disability, and family leave benefits. Civil unions are not, therefore, fully equivalent to marriage.

C. Terminating the Civil Union

The civil union states declare that the dissolution of a civil union follows the same procedures and is subject to the same rights and obligations as are involved in the dissolution of a marriage.⁷¹ Issues relating to children, property division, and financial support are resolved as they would be when a marriage dissolves.

Although there are no residency requirements to enter a civil union, there are residency requirements to terminate one. In all four civil union states, the residency requirements for dissolving a civil union are the same as for dissolution of a marriage. Thus, in Connecticut, a dissolution of civil union may be granted only when (1) at least one of the parties was a resident of the state for the 12 months preceding either the filing of the complaint for dissolution or the final judgment of dissolution, (2) one of the parties was domiciled in the state at the time of the civil union and returned to the state with the intention of remaining permanently before filing the complaint, or (3) the cause for dissolution arose after either party moved to the state.⁷² New Hampshire requires that (1) both parties have been domiciled in the state at the time of filing for dissolution, (2) the party filing for dissolution is domiciled in the state and personally serves the other party within the state, or (3) the party filing for dissolution has been domiciled in the state for one year immediately before the action commences.⁷³ New Jersey generally requires either that both parties have resided in the state at the time the cause of action arose and continue to reside there until the action is filed in court; or that since the time the action arose, either party has resided in the state for at least one year before the action commences.⁷⁴ In Vermont, dissolution of a civil union cannot be granted unless at least one of the parties has resided in the state for a period of one or more years immediately preceding the date of the final hearing of dissolution.⁷⁵

Because non-residents of the civil union states may validly enter a civil union in these states and the states impose residency requirements for terminating civil unions, legal issues have arisen over how non-residents may dissolve their civil union without having to move to a civil union state. As a result, parties of civil unions have sought judicial intervention in their own domiciliary states to dissolve the civil unions entered into elsewhere. Courts, however, have refused to grant dissolutions of civil unions contracted in other states, generally holding they lack jurisdiction. Since other states may not recognize civil unions, and their divorce laws specify the dissolution of a marriage between a man and a woman, courts have been reluctant to expand the divorce laws to marriage-like unions, leaving it to state legislatures to decide.

In 2002, the Connecticut Appellate Court affirmed a family court's decision that it had no power to dissolve a civil union entered into by one of its residents in Vermont.⁷⁶ Reasoning that the state's marriage laws do not include civil unions because civil unions are not between a man and a woman, and that the legislative history of the statute providing courts with jurisdiction to dissolve marriages do not provide this same authority over civil unions entered out-of-state, the Appellate Court held that a civil union is not a family relations matter, and therefore the family court has no jurisdiction to dissolve the civil union. Despite Connecticut's recognition of same-sex marriage in 2008, it has yet to be seen whether the state will follow or reject this 2002 decision.

V. DOMESTIC PARTNERSHIP

A third alternative to marriage that has been adopted in several states is the domestic partnership. Like a civil union, a domestic partnership is a legally recognized union similar to marriage. But domestic partnerships are not synonymous with civil unions. One major distinction is that civil unions are available only to same-sex couples, whereas domestic partnerships are available to both same-sex and some opposite-sex couples. Unlike civil unions, domestic partnerships in the majority of jurisdictions that recognize them do not provide all of the protections, benefits and responsibilities of marriage and are therefore often thought to carry a lesser status than civil unions.⁷⁷ Nevertheless, domestic partnerships offer same-sex couples who cannot marry or enter into civil unions, and certain opposite-sex couples who choose not to marry, legal protections they would not otherwise be eligible to receive.

In some jurisdictions, domestic partnerships are not recognized statewide but are limited to specific cities or counties. Thus, although a state may not offer domestic partnerships, a city within the state may do so, as do New York City, Boston, Tucson, Minneapolis, and Seattle, to name a few.⁷⁸ Domestic partnerships may be available to residents or employees of local jurisdictions or both. In New York City, for example, domestic partnership status is available to city residents and to couples if one of the partners is an employee of the city. A lack of domestic partnership recognition in a state, county,

or city does not legally preclude a private employer from extending certain marriage-like benefits, such as sick leave to care for an ailing partner, to an individual the employee claims as his domestic partner. However, the extension of some benefits, like health and life insurance, to domestic partners depends on the policies of the third-party company issuing the benefits, and not on the private employer.

The benefits and responsibilities of a domestic partnership vary from jurisdiction to jurisdiction, whether state or local, and may range from the enactment of a handful of laws benefiting domestic partners, as in Maryland, to all the rights granted married couples, as in California. Federal law does not recognize domestic partnerships, even if the domestic partnership is entered into in a state that recognizes it, and the Defense of Marriage Act provides that the states need not do so either. Hence, domestic partnerships are not entitled to federal benefits or responsibilities that come with marriage.

Currently, seven states (California, Hawaii,²⁹ Maine, Maryland, New Jersey, Oregon, and Washington) and the District of Columbia have established domestic partnerships. In addition, some form of domestic partnership recognition has been enacted, at least at the city level, in more than 25 states. For purposes of this monograph, however, the following discussion is limited to legislation recognizing domestic partnerships statewide.

A. Entering the Domestic Partnership

Eligibility requirements for domestic partnerships are

DOMESTIC PARTNERSHIP

neither as numerous nor as complex as those for marriage and civil union.

Age. All the domestic partnership states require that anyone entering a domestic partnership be at least 18 years old. Neither parents nor judges can consent to make domestic partnerships available to individuals younger than 18.

In addition, three of the states (California, Washington, and New Jersey) require that one party of an opposite-sex couple entering a domestic partnership be at least 62 years of age. The other four states have no additional age requirements.

Sex. Domestic partnerships are available to all same-sex couples that meet the other eligibility requirements of the state in which they are to be formed. Subject to the age requirements above, opposite-sex couples are also entitled to domestic partnership status in at least five of the states. However, in Oregon, only same-sex couples are eligible for domestic partnerships,⁸⁰ and in Hawaii, parties qualify for domestic partnerships only if they would be legally prohibited from marrying under Hawaii's marriage laws.⁸¹

Race. There are no requirements or restrictions relating to race in any of the domestic partnership states.

Nationality. There are no nationality requirements for eligibility to enter a domestic partnership. However, since domestic partnerships, like civil unions, are not recognized by federal law or for immigration purposes, a foreign-born individual cannot obtain residency status by being a domestic partner of a U.S. citizen.

Kinship. Hawaii allows any two individuals prohibited from marrying to enter a reciprocal beneficiary relationship regardless of relatedness.⁸² All the other domestic partnership states prohibit individuals from entering a domestic partnership with a close blood relative. The majority of these states define the prohibited relationship as any relationship that would prevent the parties from being married or between first cousins and closer. In Oregon, however, first cousins by adoption may enter a domestic partnership. New Jersey's kinship restrictions are even stricter. They prohibit two people related by blood, adoption, or marriage, including third cousins or closer, to enter into a domestic partnership.⁸³

Mental capacity. Like marriage and civil union, the domestic partnership is a form of civil contract, which requires that a party have sufficient mental capacity. Thus, all states recognizing domestic partnership require that the individuals entering a domestic partnership be capable of consenting to it.

Financial ability. No domestic partnership law includes financial ability as an eligibility component.

Plurality. To be eligible for a domestic partnership, an individual may not be married or a party to any other domestic partnership, civil union, or other legally recognized marriage alternative. In Maine, alone among the other domestic partnership states, a domestic partnership need not be legally dissolved before a party to the domestic partnership marries; a domestic partnership is automatically terminated if one party subsequently marries another person.⁸⁴

DOMESTIC PARTNERSHIP

Residency. Unlike the civil union states, all of the domestic partnership states, except Hawaii, have some type of residency requirement. Five of the states require that the couple reside in the same physical space to be eligible for a domestic partnership, though they need not be residents of most of these states. Maine, however, requires the couple to be domiciled together in Maine for at least 12 months preceding the filing for a domestic partnership.⁸⁵ In Oregon, at least one of the parties must be a resident of the State.⁸⁶ In New Jersey, a domestic partnership is possible even if neither party is a resident of the State. However, in such a case, at least one of the partners must be a member of a retirement system administered by the State.⁸⁷ For example, an individual who was an employee of, and receives a pension from, New Jersey may enter a domestic partnership in New Jersey even though he lives with his domestic partner in a different state.

Medical status/blood test. No state reviews a couple's medical status or requires the partners to undergo a blood test.

License, waiting period, and solemnization. Establishing a domestic partnership is much simpler than entering a marriage or civil union. Once the requisites are met, the couple in all but one of the states recognizing domestic partnerships must submit a domestic partnership form, and pay a fee, to the state or municipality designated by statute to register their domestic partnership. The exception is Maryland, which has not established a domestic partnership registry.⁸⁸ However, an individual who

asserts his or her status as a domestic partner may be required to provide an affidavit sworn by both partners that they have established a domestic partnership, and two evidentiary documents, such as proof of a joint checking account and joint ownership of a motor vehicle.⁸⁹ States may have more specific requirements, expressed in their legislation, for registration. For example, New Jersey requires that the couple be engaged in a “committed relationship of mutual caring,”⁹⁰ agree to support one another if the need arises, and demonstrate existing financial interdependence.⁹¹

Individuals have the option of filing their form personally or by mail in many states, but Hawaii permits registration by mail only.⁹² After registering the domestic partnership, individuals typically receive a certification of domestic partnership registration by mail from the office where the domestic partnership was registered. There is no statutory waiting period between the application for a domestic partnership and issuance of the certifying document, beyond the time it takes the municipality to process the application. Once the certifying document is received, the domestic partnership is valid, and no additional action needs to be taken. Thus, the domestic partnership is formalized by registration alone; no state requires a ceremony.

B. During the Domestic Partnership

Domestic partnerships were established as an alternative to both same-sex marriage and civil unions but with the objective of providing individuals in committed relation-

ships at least some of the same legal benefits, rights, and obligations. Domestic partners are not provided with all the extensive benefits and obligations offered to married couples and individuals in civil unions; and domestic partners are not entitled to receive any benefits or protections from the federal government. However, for couples who seek not only legal recognition of their relationships but some legal benefits to which they would not otherwise be entitled, the availability of domestic partnership status is a constructive option.

Domestic partners are entitled to all of the rights and responsibilities provided under the individual state's domestic partnership legislation, which may include health insurance, sick leave, death benefits, hospital visitation, joint property ownership, medical decisionmaking, and tax advantages. These rights and responsibilities, however, vary from state to state. Some provide only a handful of rights to which married couples are entitled; others provide a more wide-ranging spectrum of benefits.

State taxation. Many of the domestic partnership states provide some type of tax benefit to domestic partners, though the extent of benefits varies greatly. For example, the only tax benefit to domestic partners in Maryland is the power to add or remove a domestic partner's name from a deed of residence without incurring a tax liability, as with married spouses.²³ However, in California and Oregon, registered domestic partners are entitled to all of the benefits, responsibilities, and protections granted to married spouses, including state taxation benefits. Other states' domestic partnership tax

benefits range between these extremes. In Washington, for example, the only state tax benefits available to domestic partners include exemption from real estate excise taxes when property is assigned from one domestic partner to the other and the extension of property tax deferrals to a deceased's surviving domestic partner. The tax benefits in New Jersey are broader than in Washington; a domestic partner in New Jersey may claim the other partner as a dependent on his state tax return, and a domestic partner is exempt from paying state gift or estate taxes when receiving a gift or transfer in property from the other partner.

State employees. To some extent, domestic partners of state employees are entitled to receive the same benefits as married spouses of state employees. The breadth of these employment benefits varies from state to state. In California and Oregon, where domestic partners are entitled to all of the benefits of married couples, domestic partners receive all of the state employee benefits that spouses receive. Other states limit employee benefits available to domestic partners. For example, domestic partners of New Jersey employees are entitled to group health insurance coverage, pension, and retirement benefits only.

Visitation in hospitals and prisons. All of the domestic partnership states provide domestic partners the right to visit one another in the hospital. Similarly, in some but not all states an individual may visit a domestic partner incarcerated in a city or state prison under standard visitation procedures, which typically allow access to family and friends.

Medical decision-making. When a domestic partner becomes incapacitated and has not executed a health care proxy, all of the domestic partnership states allow the other partner to make medical decisions, just as a married spouse would. While the majority of the states bestow this right on domestic partners automatically, others require a formal proceeding for a domestic partner to acquire this benefit. In Maine, for example, a domestic partner is eligible to become the other partner's guardian or conservator, but only if the title is applied for.

Property. Like spouses, domestic partners in Washington⁹⁴ and California (the only two community-property states offering domestic partnerships) are considered co-owners of any property acquired during the domestic partnership. Thus, upon dissolution of a domestic partnership or death of a partner in these states, each partner would be entitled to receive half of any property acquired during the domestic partnership. In the other domestic partnership states, all of which are separate-property jurisdictions, the disposition of property acquired during the domestic partnership that does not constitute separate property depends on how each state defines the domestic partnership. Hawaii, for example, which provides limited rights to domestic partners, bestows the broadest right of property to domestic partners. Domestic partners may own their property as tenants by the entirety, meaning that when one partner dies, the other automatically inherits 100% of the interest in the property tax-free.⁹⁵ In contrast, Maryland's domestic

partnership laws do not even consider property ownership between domestic partners, so that upon dissolution of the partnership or death of a partner, there is no automatic protection for domestic partners with respect to property acquired during the partnership.

Health Insurance. The type of insurance benefits, if any, available to domestic partners varies from state to state and insurance company to insurance company. Some permit one domestic partner to receive medical and dental insurance through the other's policies, but other states and companies prohibit such benefits. Unlike married public employees, who are guaranteed the option of claiming their spouses as dependents on health insurance policies in all states, public employees in domestic partnerships are not guaranteed the option of claiming their partners as dependents on health insurance policies in even all of the domestic partnership states. Nevertheless, as of 2008, 13 states have enacted laws mandating that employers extend health insurance benefits to their employees' domestic partners.⁹⁶ And in all states private employers are permitted to offer their employees coverage for domestic partners, as long as the health insurance company is one that extends such benefits.

Additionally, any person may obtain health insurance on an individual basis without needing an employer. Many insurance companies have expanded their lists of qualified dependents to include domestic partners, even if the state in which the partners live fails to recognize domestic partnerships.

Children. The states offering domestic partnerships differ when it comes to children born after the domestic partnership is validated. Thus, the presumption that a child born of a marriage is the biological child of the couple does not necessarily extend to a child born of a domestic partnership. For example, Oregon's law declares that any rights granted to, or obligations imposed on, a spouse with respect to a child of either spouse also applies to domestic partners (so a child born to either of the partners subsequent to entry of the domestic partnership is considered the biological child of the couple),⁹⁷ whereas domestic partners in New Jersey do not automatically acquire rights and obligations with respect to children in such a situation.⁹⁸ Therefore, to establish a legal relationship between a child and the domestic partner who is not the biological parent, court proceedings may be necessary. Some states, like Maryland, have not enacted any legislation covering children of a domestic partnership.

With respect to children brought into the partnership (i.e., born before a domestic partnership has been validated), the domestic partner without the biological tie to the child may be permitted to adopt the child, as would a step-parent in a marriage. California, for instance, applies the same step-parent adoption procedures to domestic partners.

Estate planning and probate. When a domestic partner dies without a will, inheritance laws differ in how the deceased's estate is distributed. Many of the domestic partnership states (California, Hawaii, Maine, New

Jersey, and Oregon) provide that the surviving partner will inherit the deceased's property, as would a married spouse, whereas others restrict whether and when a domestic partner may inherit the deceased partner's property. Maryland's domestic partnership legislation does not include a provision for inheritance.

Another issue is whether a domestic partner is entitled to elect against the will of the deceased partner, meaning that if the surviving partner is either excluded from the will of the deceased partner or waives the bequest to him under the will, he may elect to receive the portion of the deceased's estate specified by the state. Typically, this right is reserved only for spouses. In California and Oregon, which grant domestic partners all of the benefits and obligations provided to spouses, a domestic partner has the right of election. In New Jersey, domestic partners are not entitled to an elective share.⁹⁹ In Washington, if a domestic partnership is registered after a will is executed that excludes the domestic partner, the excluded partner is not entitled to an elective share.

Spousal privilege. Most state laws granting a privilege against having to testify in court against the other spouse do not likely extend to domestic partners, since the privilege is limited to spouses. Since same-sex couples have raised this issue in state courts, the issue has become enough of a political problem that state legislatures are likely to consider broadening the scope of the privilege to domestic partners. California, which includes domestic partners in its definition of "spouse," has already done so.

Death. Many of the states recognizing domestic partnerships have extended certain death-related rights to the surviving partner of a domestic partnership. The majority of these states grant the surviving partner the right to decide various postmortem procedures, such as autopsies and funeral arrangements. Some states also allow a surviving partner to bring a wrongful death action against a person who caused the deceased partner's death.

C. Terminating the Domestic Partnership

Just as in marriage and civil union, death terminates a domestic partnership. It can also be dissolved by showing a lack of contract or an inability to enter into one—e.g., fraud, coercion, or mental incapacity. Although in some states proving the contractual difficulty is akin to divorce proceedings, in most of the states a partner who seeks to dissolve the partnership may do so simply by filing a form. Generally, the partnership is terminated when the form is filed in the appropriate municipal or state office, although in New Jersey and Oregon the partners must petition a court for a judgment dissolving the partnership. In some states, both parties must sign the form; in others, only one party need do so.

To terminate by form, most states require the mutual written consent of both parties. Hence, if one party wishes to remain in the domestic partnership and refuses to sign the form, this method is unavailable. In Maine, however, a partner who wishes to terminate the domestic partnership without the consent of the other may file

a separate form that merely requires a signature and proof that a notice of termination was served on the other partner.¹⁰⁰ California and Washington are much more strict when it comes to termination by form, allowing this method only if the parties can satisfy various conditions as of the time the form is filed: (1) there are no minor children of the relationship born or adopted before or after the domestic partner registration, (2) neither party is pregnant, (3) the domestic partnership has existed no longer than five years, (4) neither party has any ownership interest in real property, (5) there are no unpaid obligations beyond a certain limit, (6) the parties have executed an agreement setting forth the division of assets, and (7) the parties waive the right to support from each other.¹⁰¹ Termination becomes effective at different times depending on the state and method used. The effective date of termination by form ranges from immediately (Maine) to six months (California). When court intervention is required to terminate a domestic partnership, termination is effective when the judge signs the order or judgment of termination.

In New Jersey, unlike marriage and civil union, a domestic partnership between opposite-sex partners (at least 62 years old) automatically terminates if the partners marry each other.¹⁰²

When a domestic partnership terminates, state involvement in issues like spousal support, child custody, and distribution of property varies. Some states apply the same procedures for these ancillary issues as they would in the dissolution of a marriage, while others rely on the

courts to determine such issues on a case-by-case basis. Hence, the domestic partners will be better served if they have a contract spelling out how each such issue will be resolved if the partnership terminates. While courts may be reluctant to uphold contractual provisions concerning the welfare of children without further inquiry into the facts and circumstances, courts in states that do not provide procedures to settle these issues may be more willing to sustain such an agreement.

VI. COHABITATION

When couples are not eligible for, or choose not to take advantage of, marriage or the other marriage alternatives, they may decide instead to cohabit, meaning that they may simply live together. While cohabitation is another alternative to marriage, it is not a legally recognized union automatically entitled to the protections and benefits conferred upon marriage, civil union, or domestic partnership. On the other hand, cohabiters also do not incur any legal responsibilities to one another merely by living together.

Cohabitation has always been an arrangement common among same-sex couples due, in part, to their lack of legal options. Over the past three decades, cohabitation has also become a widespread trend among opposite-sex couples, despite the availability to them of legal protections. Since 1970, the number of opposite-sex couples cohabiting in the U.S. has increased from

500,000 to over five million.¹⁰³ Yet no state has enacted any legislation to specifically govern the rights and obligations of cohabitation.

A. Entering Cohabitation

Cohabitation is much simpler to enter than marriage, civil unions, and domestic partnerships. It simply requires two individuals, usually in an emotionally and physically intimate relationship but not in any legal union, to reside together. Since states have no statutes governing cohabitation, and since it is not, in any event, a legal relationship, there are no eligibility requirements. This was not always the case. A half century ago, it was unlawful in every state for unmarried individuals of the opposite sex to live together. Currently, four states (Florida, Michigan, Mississippi, and Virginia) still criminalize cohabitation, though these laws are generally not enforced. Only Mississippi criminalizes the act of cohabiting per se; Florida, Michigan, and Virginia all require a showing of “lewd and lascivious” cohabitation.¹⁰⁴ Furthermore, only Virginia criminalizes the cohabitation of any persons, whereas the other states limit this prohibition to opposite-sex couples.

B. During Cohabitation

Many individuals who cohabit without being married or having registered a civil union or domestic partnership choose to protect their rights and obligations to one another by executing private contracts. Much like pre-nuptial and postnuptial agreements entered into by some

spouses, private contracts between cohabiters may govern their financial and personal rights and obligations during the time they live together.

State courts can play a role in cohabitation when called upon to enforce contractual provisions. The extent to which a court will intervene in these personal private contracts varies, however. Many courts in the past have been reluctant to enforce contractual agreements between unmarried cohabitants.¹⁰⁵ Still, even some conservative courts have upheld contractual agreements between unmarried cohabiting couples when the contracts strictly relate to financial issues rather than the personal relationship.¹⁰⁶ Generally, all courts enforce contractual property provisions between cohabitants.

The advantage of cohabitation with a contractual agreement is the flexibility that it allows couples: they may establish their own terms of the relationship, rather than rely on a particular state's deciding each person's rights and obligations to one another. The major disadvantage to this alternative is that not all marriage-like rights and obligations can be created by contract, such as the right to file joint tax returns, the right to sue for wrongful death of a spouse or partner, or the right of a step-parent to adopt.¹⁰⁷ Another major disadvantage is that there is no guarantee that a court will uphold or enforce some or all of the provisions in these personal agreements.

Nevertheless, entering a private contract provides more protection to each party than cohabiting without one. Many unmarried individuals live together without a

written agreement, and thus may be bound only by one another's words. Since it is much more difficult for oral assurances to be proved, and since some oral agreements are not enforceable, it may be more advantageous for an unmarried couple to cohabit with a formal written document despite its shortcomings.

C. Terminating Cohabitation

Ending a cohabitive relationship is straightforward and simple—the parties need do nothing more than separate. If one partner dies, the surviving partner is not entitled to automatic benefits as a surviving spouse would be. Thus, issues related to asset distribution would have had to be settled in a legal document, such as a will or private contract.

When cohabitation ends by separation, problems may arise if the parties do not have a contractual agreement governing separation issues. Nevertheless, there is judicial precedent for court resolution of unmarried couples' rights to contract. In *Marvin v. Marvin*,¹⁰⁸ the celebrated “palimony”¹⁰⁹ case, the California Supreme Court declared that unmarried couples may create both written and oral contracts, that if neither of these contracts has been created a court may examine the couple's actions to determine whether an implied contract exists, and that if no implied contract is found, a court may presume that the parties intended to deal fairly with one another. The court may then apply legal notions of equity and fairness to resolve financial and property issues.¹¹⁰ Although many courts have followed the prin-

ciples set out in *Marvin*, no court outside California is bound by the case, and therefore may decide a similar case differently. Indeed, several states (such as New York) have declined to follow *Marvin*, choosing instead to recognize only explicit oral or written contracts, and not agreements implied from the parties' behavior.

VII. CURRENT AND FUTURE LEGAL REFORM

In the next few years, the political push for change to marriage laws is certain to intensify. Civil rights organizations, such as the American Civil Liberties Union and Lambda Legal Defense and Education Fund, continue to challenge state and federal laws that do not extend marriage-like benefits or recognition to same-sex couples, and to support legislatures that do.

As of early spring 2009, many groups have teamed up to urge the California Supreme Court to overturn Proposition 8, the constitutional amendment banning same-sex marriage in California.¹¹¹ With support from major businesses (e.g., Google and Levi Strauss & Co.), local business groups (e.g., San Francisco Chamber of Commerce), legal organizations (California NAACP, Mexican-American Legal Defense and Educational Fund, Asian-Pacific American Legal Center, and California Rural Legal Assistance), various labor organizations (United Healthcare Workers and the California Labor Federation), and professors and scholars from prominent universities and law schools

across the country, among others, it is obvious that marriage laws and their availability to same-sex couples have become a priority on many political and legislative agendas.

In Maine, for example, a coalition of individuals and organizations, including EqualityMaine, the Maine Civil Liberties Union, the Maine People's Alliance, and the Portland Chapter of the NAACP, was formed to present new legislation during the 2009 legislative session to end the ban on marriage of same-sex couples, and a bill to that end was introduced in the state senate in January 2009.¹¹² Similar efforts are underway in New Hampshire, where a bill legalizing same-sex marriage was close to enactment at press time. Bills to legalize same-sex marriage are also pending in the legislatures of Illinois, Maryland, Minnesota, New Jersey, New York, and Washington, though these are not expected to pass in 2009. Advocates in Rhode Island are said to be awaiting the departure of the Republican governor from office in 2011.¹¹³

In addition to challenging state legislatures, organizations supporting same-sex marriage and recognition of marriage alternatives have been encouraging city legislatures across the country to establish rights rejected by their states. For example, when the Alliance Defense Fund challenged the legality of New Orleans' domestic partner registry, Lambda Legal joined the lawsuit at the city's request, and secured a ruling upholding the city's policy.¹¹⁴

With the increase in legal recognition of relationships outside the traditional marriage definition, and in state-

NOTES

wide and local challenges to marriage laws by various groups, it seems inescapable that the terrain of marriage and its alternatives will experience considerable shifts in the immediate years ahead.

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4. *Black's Law Dictionary* at 25.
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7. 1 U.S.C. § 7.
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MARRIAGE AND ITS ALTERNATIVES

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41. 26 U.S.C. § 2056.
42. *Edwards v. Franke*, 364 P.2d 60, 63 (Alaska 1961).
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MARRIAGE AND ITS ALTERNATIVES

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67. Conn. Gen. Stat. § 46b-33ii(a)(2009).
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73. N.H. Rev. Stat. Ann. § 458:5.
74. N.J. Stat. Ann. § 2A:34-10.
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76. *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (Conn. App. 2002).
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NOTES

Affecting Gay, Lesbian, Bisexual, and Transgender Families, <http://www.thetaskforce.org/downloads/reports/reports/FamilyPolicy.pdf> (2002).

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79. In Hawaii, unmarried couples who qualify and register with the state are termed “reciprocal beneficiaries,” rather than domestic partners. Since the reciprocal beneficiary relationship is parallel to the domestic partnership, it is considered a domestic partnership for purposes of this discussion. Vermont has also established a reciprocal beneficiary relationship, which provides a limited number of marriage benefits to two persons who are blood-relatives or related by adoption. The intent is not to give benefits to “couples” but to relatives for limited purposes, and is thus not treated as a marriage alternative in this discussion.
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81. Haw. Rev. Stat. §572C-4.
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83. N.J. Stat. Ann. § 26:8A-4.
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92. State of Hawaii Dept. of Health, *About Reciprocal Beneficiary Relationships*, <http://hawaii.gov/health/vital-records/vital-records/reciprocal/index.html#eligible> (accessed November 25, 2008).
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MARRIAGE AND ITS ALTERNATIVES

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103. Jayson, USA Today, *More View Cohabitation as Acceptable Choice*, http://www.usatoday.com/news/nation/2008-06-08-cohabitation-study_N.htm (last updated June 9, 2008, 12:51 p.m.).
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106. *Id.* citing *Gilden v. Crooke*, 414 SE2d 645 (Ga. Sup. Ct. 1992); *Posik v. Layton*, 695 So.2d 759 (Fla. Ct. App. 1997).
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STATE	SOURCE OF LAW	MARRIAGE			LICENSE			LEGAL ALTERNATIVES
		AGE	COMMON LAW	SAME-SEX	MEDICAL TEST	WAITING PERIOD	# DAYS VALID AFTER ISSUED	
Alabama	Code of Alabama Title 30 ¹	18 ²	No	No	No	None	30	None
Alaska	Code of Alaska Title 25 ³	18 ⁴	No	No	No	3 days ⁵	90	None
Arizona	Arizona Revised Statutes Title 25 ⁶	18 ⁷	No	No	No	None	365	None
Arkansas	Arkansas Code Title Title 9-2-11 ⁸	18 ⁹	No	No	No	None	60	None
California	California Family Code ¹⁰	18 ¹¹	No	No	No	None	90	Domestic Partnership
Colorado	Colorado Revised Statutes Title 14 ¹²	18 ¹³	Yes ¹⁴	No	No	None	30	None
Connecticut	General Statutes of CT title 46b ¹⁵	18 ¹⁶	No	Yes	No	None	65	Civil Union
Delaware	Delaware Code Title 13 ¹⁷	18 ¹⁸	Yes	No	No	24 hours ¹⁹	30 ²⁰	None
Florida	Florida Statutes Title XLIII ²¹	18 ²²	No ²³	No	No	3 days ²⁴	60	None
Georgia	Official Code of Georgia Title 19 ²⁵	18 ²⁶	No ²⁷	No	No	None	Indefinite	None
Hawaii	Hawaii Revised Statutes §572 ²⁸	18 ²⁹	No	No	No	3 days ³⁰	30	Reciprocal Beneficiaries ³¹
Idaho	Idaho Statutes Title 32 ³²	18 ³³	No ³⁴	No	No	None	Indefinite	None
Illinois	Illinois Compiled Statutes Ch. 750 ³⁵	18 ³⁶	No	No	No	1 day ³⁷	60	None
Indiana	Indiana Code Title 31 ³⁸	18 ³⁹	No	No	No	None	60	None
Iowa	Iowa Code Title XV ⁴⁰	18 ⁴¹	Yes	Yes	No	3 days ⁴²	Indefinite	None
Kansas	Kansas Statutes Ch. 23 ⁴³	18 ⁴⁴	Yes ⁴⁵	No	No	3 days ⁴⁶	180	None
Kentucky	Kentucky Revised Statutes Title XXXV ⁴⁸	18 ⁴⁷	No	No	No	None	30	None
Louisiana	Louisiana Revised Statutes Title 9 ⁴⁹	18 ⁵⁰	No	No	No	3 days ⁵¹	30	None
Maine	Maine Revised Statutes Title 19-A ⁵²	18 ⁵³	No	No	No	None	90	Domestic Partnership ⁵⁴
Maryland	Maryland Code: Family Law Title 2 ⁵⁸	18 ⁵⁵	No	No	No	2 days ⁵⁶	180	Domestic Partnership ⁵⁷
Massachusetts	General Laws of Massachusetts Part II Title III ⁶¹	18 ⁵⁹	No	Yes	No	3 days ⁶⁰	60	None

STATE	SOURCE OF LAW	MARRIAGE			LICENSE			LEGAL ALTERNATIVES
		AGE	COMMON LAW	SAME-SEX	MEDICAL TEST	WAITING PERIOD	# DAYS VALID AFTER ISSUED	
Michigan	Michigan Compiled Laws Ch. 551 ⁶²	18 ⁶³	No	No	No	3 days ⁶⁴	60	None
Minnesota	Minnesota Statutes Ch. 517 ⁶⁵	18 ⁶⁶	No	No	No	5 days ⁶⁷	180	None
Mississippi	Mississippi Code Title 93 ⁶⁸	21 ⁶⁹	No	No	Yes ⁷⁰	3 days ⁷¹	Indefinite	None
Missouri	Missouri Revised Statutes Title XXX ⁷³	18 ⁷²	No	No	No	None	30	None
Montana	Montana Code Annotated Title 40 ⁷⁴	18 ⁷⁵	Yes	No	Yes ⁷⁶	None	180	None
Nebraska	Nebraska Revised Statutes Ch. 42 ⁷⁷	19 ⁷⁸	No	No	No	None	365	None
Nevada	Nevada Revised Statutes Title 11 ⁷⁹	18 ⁸⁰	No ⁸¹	No	No	None	365	None
New Hampshire	New Hampshire Statutes Title XLIII ⁸⁴	18 ⁸²	Yes ⁸³	No	No	None	90	Civil Union
New Jersey	New Jersey Statutes Title 37 ⁸⁵	18 ⁸⁶	No ⁸⁷	No	No	3 days ⁸⁸	30	Civil Union Domestic Partnership ⁸⁹
New Mexico	New Mexico Statutes Ch. 40 ⁹⁰	18 ⁹¹	No	No	No	None	Indefinite	None
New York	New York Domestic Relations Law Sections 5–25 ⁹³	18 ⁹²	No	No	Yes ⁹³	2 days ⁹⁴	60	None
North Carolina	North Carolina General Statutes Ch. 51 ⁹⁷	18 ⁹⁶	No	No	No	None	60	None
North Dakota	North Dakota Century Code Title 14 ⁹⁹	18 ⁹⁸	No	No	No	None	60	None
Ohio	Ohio Revised Code Title XXXI ¹⁰⁰	18 ¹⁰¹	No ¹⁰²	No	No	None	60	None
Oklahoma	Oklahoma Statutes Title 43 ¹⁰³	18 ¹⁰⁴	No ¹⁰⁵	No	No	3 days ¹⁰⁶	10	None
Oregon	Oregon Revised Statutes Ch. 106 ¹⁰⁷	18 ¹⁰⁸	No	No	No	3 days ¹⁰⁹	60	Domestic Partnership
Pennsylvania	Pennsylvania Consolidated Statutes Title 23 ¹¹³	18 ¹¹⁰	No ¹¹¹	No	No	3 days ¹¹²	60	None
Rhode Island	Rhode Island General Laws Title 15 ¹¹⁶	18 ¹¹⁴	Yes ¹¹⁵	No	No	None	90	None
South Carolina	South Carolina Code of Laws Title 20 ¹¹⁸	18 ¹¹⁷	Yes	No	No	2 days	Infinite	None
Utah	Utah Code Title 30 ¹²⁸	18 ¹²⁹	Yes	No	No	None	30	None

STATE	SOURCE OF LAW	MARRIAGE			LICENSE			LEGAL ALTERNATIVES
		AGE	COMMON LAW	SAME-SEX	MEDICAL TEST	WAITING PERIOD	# DAYS VALID AFTER ISSUED	
South Dakota	South Dakota Codified Laws Title 25 ¹²¹	18 ¹¹⁹	No ¹²⁰	No	No	None	20	None
Tennessee	Tennessee Code Title 36 ¹²²	18 ¹²³	No	No	No	None ¹²⁴	30	None
Texas	Texas Family Code Title I ¹²⁵	18 ¹²⁶	No	No	No	3 days ¹²⁷	31	None
Vermont	Vermont Statutes Title 18 ¹³⁰	18 ¹³¹	No	Yes	No	None	60	Civil Union Reciprocal Beneficiaries ¹³²
Virginia	Virginia Code Title 20 ¹³³	18 ¹³⁴	No	No	No	None	60	None
Washington	Revised Code of Washington Title 26 ¹³⁶	18 ¹³⁵	No	No	No	3 days	60	Domestic Partnership
West Virginia	West Virginia Code Ch. 48 ¹³⁷	18 ¹³⁸	No	No	No	None ¹³⁹	60	None
Wisconsin	Wisconsin Statutes Ch. 765 ¹⁴⁰	18 ¹⁴¹	No	No	No	5 days ¹⁴²	30	None
Wyoming	Wyoming Statutes Title 20 ¹⁴³	18 ¹⁴⁴	No	No	No	None	Indefinite	None

NOTES

¹ <http://www.legislature.state.al.us/CodeofAlabama/1975/coatoc.htm>.

² 16 with parental consent.

³ <http://www.legis.state.ak.us/cgi-bin/foioisa.dll/stattx08/query=?doc/%7Bt1775%7D>.

⁴ 16 with parental consent; 14 with judicial order.

⁵ Waiting period may be waived if it would result in undue hardship or delay in an individual case (Section 25.05.161).

⁶ <http://www.azleg.state.az.us/ArizonaRevisedStatutes.asp?Title=25>.

⁷ Under 18 with parental consent; under 16 with parental consent and judicial approval.

⁸ <http://www.arkleg.state.ar.us/SearchCenter/Pages/arkansascode.aspx>.

⁹ 17 for males and 16 for females with parental consent; under these minimum ages if the female is pregnant with parental consent and judicial order.

¹⁰ <http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=fam&codebody=&hits=All>.

¹¹ Under 18 with judicial order (which shall require the parties to participate in premarital counseling) and written parental consent.

¹² <http://www.michic.com/colorado/pext.dll?f=templates&fn=main-h.htm&cp=>.

¹³ Under 18 with parental consent or judicial approval; under 16 with parental consent and judicial approval.

¹⁴ Parties must be at least 18 years of age.

NOTES (continued)

- ¹⁵ <http://www.cga.ct.gov/asp/menu/statutes.asp>.
- ¹⁶ Under 18 with parental consent, or judicial consent if the minor is not a U.S. resident; under 16 with judicial consent.
- ¹⁷ <http://delcode.delaware.gov/>.
- ¹⁸ Under 18 with judicial order; the court shall consider the parents' wishes in making its determination.
- ¹⁹ May be shortened by discretion of Clerk of the Peace.
- ²⁰ May be extended by discretion of Clerk of the Peace, but not to exceed 180 days.
- ²¹ <http://www.leg.state.fl.us/STATUTES/>.
- ²² 16 with written parental consent.
- ²³ Common-law marriages entered into before January 1, 1968 are valid.
- ²⁴ May be waived if parties complete premarital preparation course or parties are not state residents or parties assert hardship.
- ²⁵ <http://www.lexis-nexis.com/hottopics/gacode/default.asp>.
- ²⁶ 16 with judicial order, which shall only be provided with parental consent in presence of court.
- ²⁷ Common-law marriages entered into before January 1, 1997 are valid.
- ²⁸ <http://www.capitol.hawaii.gov/site1/hrs/default.asp>.
- ²⁹ Under 18 with written parental consent; 15 with written parental consent and judicial approval.
- ³⁰ May be waived by district magistrate.
- ³¹ Hawaii Revised Statutes §572C.
- ³² <http://www.legislature.idaho.gov/idstat/TOC/IDStatutesTOC.htm>.
- ³³ Under 18 with written parental consent; under 16 with written parental consent and judicial order.
- ³⁴ Common-law marriages entered into before January 1, 1996 are valid.
- ³⁵ <http://www.ilga.gov/legislation/ilcs/ilcs2.asp?ChapterID=59>.
- ³⁶ 16 with written parental consent.
- ³⁷ May be waived by court order.
- ³⁸ <http://www.in.gov/legislative/jc/code/>.
- ³⁹ 17 with parental or judicial approval; 15 with parental or judicial approval, the female is pregnant or a mother, and the male is the putative or actual father.
- ⁴⁰ <http://www.legis.state.ia.us/Current/tablesandindex/>.
- ⁴¹ 16 with written parental consent and judicial approval.
- ⁴² May be waived by court order.
- ⁴³ <http://www.kslegislature.org/legsvy-statutes/index.do>.
- ⁴⁴ 16 with parental consent; 15 with judicial consent.
- ⁴⁵ Only for those at least 18 years of age.
- ⁴⁶ May be waived by court order.
- ⁴⁷ 16 with parental consent; under 18, if pregnant, with court order.
- ⁴⁸ <http://www.lrc.state.ky.us/krs/titles.htm>.
- ⁴⁹ <http://www.legis.state.la.us/lss/tsrssearch.htm>.
- ⁵⁰ 16 with parental or judicial consent; under 16 with parental consent and judicial approval.

NOTES (continued)

- ⁵¹ May be waived by judge or justice of the peace authorized to perform the marriage.
- ⁵² <http://www.mainelegislature.org/legis/statutes/19-A/title19-Ach0sec0.html>.
- ⁵³ 16 with parental consent; under 16 with parental and judicial consent.
- ⁵⁴ Maine Revised Statutes Title 22 § 2710.
- ⁵⁵ 16 with parental consent or physician's certification that female is pregnant or has given birth; 15 with parental consent and physician's certification that female is pregnant or has given birth.
- ⁵⁶ May be waived by court order if one of the parties to be married is a resident of the state or a member of the U.S. armed forces.
- ⁵⁷ Maryland Senate Bill 566 and Senate Bill 597.
- ⁵⁸ <http://www.michie.com/maryland/jpext.dll?f=templates&fn=main-h.htm&2.0>.
- ⁵⁹ Under 18 with parental consent and court order.
- ⁶⁰ May be waived by court order; may be waived in the event of imminent death of one of the parties upon authorization by religious official.
- ⁶¹ <http://www.mass.gov/legis/laws/mgl/g-l-pt2-toc.htm>.
- ⁶² [http://www.legislature.mi.gov/\(S\(43popb45ata15a32pvccpe55\)\)/mleg.aspx?page=GetObject&objectname=mcl-chap551](http://www.legislature.mi.gov/(S(43popb45ata15a32pvccpe55))/mleg.aspx?page=GetObject&objectname=mcl-chap551).
- ⁶³ 16 with written parental consent; probate judge may perform marriage of parties under 16 with parental consent.
- ⁶⁴ May be waived by county clerk.
- ⁶⁵ <https://www.revisor.leg.state.mn.us/statutes/?view=part&start=517&close=519>.
- ⁶⁶ 16 with parental consent or judicial approval.
- ⁶⁷ May be waived by court order.
- ⁶⁸ http://www.sos.state.ms.us/ed_pubs/mscode/.
- ⁶⁹ If under 21, notice of application is sent to parents; 17 for males and 15 for females with parental consent; under the minimum age by court order if the parents petition the court to waive the minimum age.
- ⁷⁰ Blood test for syphilis only.
- ⁷¹ May be waived by court order.
- ⁷² 15 with parental consent; under 15 with court order.
- ⁷³ <http://www.moga.mo.gov/STATUTES/STATUTES.HTM>.
- ⁷⁴ http://data.opi.mt.gov/bills/MCA_toc/40.htm.
- ⁷⁵ 16 with parental consent and judicial approval; the parties must complete at least two marriage counseling sessions.
- ⁷⁶ Blood test required for females only and only for rubella immunity; may be waived if both parties sign and file an informed consent form.
- ⁷⁷ <http://www.nebraskalegislature.gov/laws/browse-chapters.php?chapter=42>.
- ⁷⁸ 17 with written parental consent.
- ⁷⁹ <http://www.leg.state.nv.us/NRS/Index.cfm>.
- ⁸⁰ 16 with parental consent; under 16 with parental consent and court order.
- ⁸¹ Common law marriages entered into before March 29, 1943 are valid.
- ⁸² 14 for males and 13 for females if the parents petition the court for permission.
- ⁸³ Common law marriages effective only at death.
- ⁸⁴ <http://www.gencourt.state.nh.us/rsa/html/nhtoc.htm>.

NOTES (continued)

- ⁸⁵ http://lis.njleg.state.nj.us/cgi-bin/om_isapi.dll?clientID=19611004&depth=2&expandheadings=off&headingswithhits=on&infobase=statutes.nfo&softpage=TOC_Frame_Pg42.
- ⁸⁶ 16 with parental consent; under 16 with parental consent and judicial approval.
- ⁸⁷ Common law marriages contracted before December 1, 1939 are valid.
- ⁸⁸ May be waived by court order.
- ⁸⁹ New Jersey Statutes Title 26.
- ⁹⁰ <http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&c2.0>.
- ⁹¹ 16 with parental consent; under 16 with court order.
- ⁹² 16 with parental consent; 14 with parental and judicial consent.
- ⁹³ Blood test for the purpose of discovering sickle-cell anemia required for parties not of the Caucasian, Indian or Oriental race; may be refused due to religious beliefs.
- ⁹⁴ May be waived by court order or if one of the parties is a member of the armed forces.
- ⁹⁵ <http://public.leginfo.state.ny.us/menugetf.cgi>.
- ⁹⁶ 16 with written parental consent; 14 with court order if the female is pregnant or has a child, and if the male is the putative father.
- ⁹⁷ <http://www.ncleg.net/gascripts/Statutes/StatutesTOC.pl>.
- ⁹⁸ 16 with written parental consent.
- ⁹⁹ <http://www.legis.nd.gov/cencode/r14.html>.
- ¹⁰⁰ <http://codes.ohio.gov/orc>.
- ¹⁰¹ Under 18 with parental consent and participation in marriage counseling.
- ¹⁰² Common law marriages contracted before October 10, 1991 are valid.
- ¹⁰³ <http://www.lsb.state.ok.us/>.
- ¹⁰⁴ 16 with parental or judicial consent; under 16 with court order to settle a suit for seduction or paternity, or if the female is pregnant or has an illegitimate child.
- ¹⁰⁵ Common law marriages formed before November 1, 1998 are valid.
- ¹⁰⁶ Waiting period for parties under 18 only.
- ¹⁰⁷ <http://www.leg.state.or.us/ors/>.
- ¹⁰⁸ 17 with parental consent.
- ¹⁰⁹ May be waived by court order.
- ¹¹⁰ 16 with parental consent; under 16 with parental and judicial consent.
- ¹¹¹ Common law marriages entered into before January 1, 2005 are valid.
- ¹¹² May be waived by court order.
- ¹¹³ <http://government.westlaw.com/linkedslice/default.asp?SP=pac-1000>.
- ¹¹⁴ 16 for females with parental consent; under 16 for females and under 18 for males with court order.
- ¹¹⁵ *DeMelo v. Zompa*, 844 A.2d 174 (R.I. 2004).
- ¹¹⁶ <http://www.rilin.state.ri.us/Statutes/>.
- ¹¹⁷ 16 with written parental consent if parties reside with parents; under 18 with written consent of female's parent(s) if female is pregnant.
- ¹¹⁸ <http://www.scstatehouse.gov/code/statmast.htm>.
- ¹¹⁹ 16 with written parental consent.
- ¹²⁰ Common law marriages entered into before July 1, 1959 are valid.

NOTES (continued)

- ¹²¹ <http://legis.state.sd.us/statutes/TitleList.aspx>.
- ¹²² <http://www.michic.com/tennessee/tpext.dll?f=templates&fn=main-h.htm&cp=>
- ¹²³ 16 with written parental consent; age restriction may be waived by court order.
- ¹²⁴ If parties are under 18 and parents do not join the application, a three day waiting period applies; may be waived by court order.
- ¹²⁵ <http://www.statutes.legis.state.tx.us/>.
- ¹²⁶ 16 with parental consent or court order; 15 with court order.
- ¹²⁷ May be waived if applicant is a member of the armed forces, performs work for the U.S. Department of Defense, completes a premarital education course, or by court order.
- ¹²⁸ <http://le.utah.gov/~code/code.htm>.
- ¹²⁹ 16 with parental consent; 15 with parental consent, court order and premarital counseling (if reasonably available).
- ¹³⁰ <http://www.leg.state.vt.us/statutes/statutes2.htm>.
- ¹³¹ 16 with written parental consent; 14 with court order.
- ¹³² Vermont Statutes Title 15, Chapter 25; only blood-relatives or those related by adoption are eligible. Civil unions have been superseded by changes to Title 18, §§ 5160-5165, enacted over the governor's veto on April 7, 2009, and effective September 1, 2009.
- ¹³³ <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC>.
- ¹³⁴ 16 with parental consent; under 16 with parental consent and certificate of physician certifying that the female is pregnant or was within the previous nine months.
- ¹³⁵ 17 with parental consent.
- ¹³⁶ <http://apps.leg.wa.gov/RCW/>.
- ¹³⁷ <http://www.legis.state.wy.us/WVCODE/code.cfm>.
- ¹³⁸ 16 with written parental consent; under 16 with written parental consent and court order.
- ¹³⁹ Two day waiting period for parties under 18; may be waived by court order.
- ¹⁴⁰ <http://www.legis.state.wi.us/rsb/stats.html>.
- ¹⁴¹ 16 with parental consent.
- ¹⁴² May be waived at discretion of county clerk if parties pay an additional fee.
- ¹⁴³ <http://legisweb.state.wy.us/statutes/statutes.aspx>.
- ¹⁴⁴ 16 with parental consent; under 16 with judicial approval.

UPDATE

Since this edition went to press on April 8, 2009, an additional state, New Hampshire, has legalized same-sex marriage, bringing the total to five. Two other states, Colorado and Nevada, have created domestic partnership regimes, bringing the total to nine.

A. Same-Sex Marriage

[pp. 1-3, 6, 62-63] On May 6, 2009, Maine briefly became the fifth state to allow same-sex couples to marry, when the governor signed a legislative enactment. But the law did not take effect. On election day in November, Maine voters repealed the legislation by referendum. On June 3, New Hampshire became the sixth state to authorize same-sex marriage, like Maine by legislative enactment and the governor's signature. The law takes effect January 1, 2010. It exempts clergy and religious organizations from having to solemnize or participate in same-sex marriage ceremonies.

B. Civil Unions

[pp. 7, 28-29, 62] Connecticut has codified its supreme court ruling that established same-sex marriage, and in so doing has invalidated its civil union law as of October 1, 2010, though all civil unions entered into before then will be treated as marriages.

C. Domestic Partnership

[pp. 36, 62-63] On April 9, Colorado became the eighth state to authorize domestic partnerships when it enacted a “Designated Beneficiary Act,” which provides couples the status of domestic partnership with a difference in name only. The new law provides couples with some benefits of marriage, including joint tenancy over property, inheritance rights, and medical decision-making, among others. Washington expanded its domestic partnership statute to provide partners with all the benefits and responsibilities conferred upon spouses. Nevada became the ninth state, when the legislature overrode the governor’s veto on May 31. The Nevada law takes effect on October 1, 2009, provides the same legal rights and obligations as marriage, and is available to both same-sex and opposite-sex couples.

Last updated December 1, 2009



ABOUT THIS BOOK

In the United States, marriage is the predominant form of legal recognition for couples. But marriage is generally unavailable to same-sex couples. Challenges to the ban on same-sex marriage have been increasing, and a few states have established marriage alternatives. *Marriage and Its Alternatives* is a comprehensive and readable comparison of marriage in its traditional and common-law forms with the emerging alternatives, including civil union and domestic partnership.

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