

Legal Recognition of Same-Sex Couples' Marriages, Civil Unions & Domestic Partnerships

Some Developments in State Law

Buckel | November 2008

Increasingly, either in courts or legislatures, states are reducing or eliminating the harms they have caused by their exclusion of same-sex couples from marriage. In addition to those states (and countries) that have ended altogether the exclusion from marriage, many states have reduced the harms with laws providing for civil unions or domestic partnerships. But what do *other* states do with same-sex couples' marriages, civil unions, or domestic partnerships? Many have anti-gay constitutional or statutory laws affecting the recognition of same-sex relationships, but those laws do not always answer the question. This document focuses on some of the developments in state law regarding legal recognition of same-sex couples' relationships.

For resources on the growing protections for same-sex couples in several states, or the anti-gay state constitutional changes, consult our relationships resource page by visiting our page on "Protecting Same-Sex Relationships," <http://www.lambdalegal.org/marriage>.

Marriages

Recognition of marriages as a matter of comity

New York

Martinez v. County of Monroe, 850 N.Y.S.2d 740, 50 A.D.3d 189 (App. Div. 4th Dep't 2008) (holding that valid Canadian marriage of same-sex couple is entitled to recognition in New York for purposes of spousal health care benefits).

C.M. v. C.C., No. 301842-2008, ___ N.Y.S.2d ___, 2008 WL 4602300, 2008 N.Y. Slip Op. 28398 (Sup. Ct. N.Y. County Oct. 14, 2008) (recognizing Massachusetts marriage for purpose of jurisdiction to grant divorce).

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Golden v. Paterson, No. 26014/2008 (N.Y. Sup. Ct. Bronx County Sept. 2, 2008) (holding Governor’s executive directive ordering state agencies to recognize same-sex marriages legally solemnized in other jurisdictions “consistent with New York’s common law, statutory law, and constitutional separation of powers”).

Lewis v. New York State Dep’t of Civil Serv., No. 4078-07 (N.Y. Sup. Ct. Albany County Mar. 3, 2008) (holding State Department of Civil Service “within its authority” to adopt policy recognizing out of state marriages of same-sex couples for purpose of employee benefits), *appeal argued*, No. 504900 (App. Div. 3d Dep’t Oct. 15, 2008).

Beth R. v. Donna M., 853 N.Y.S.2d 501, 19 Misc. 3d 724 (Sup. Ct. N.Y. County 2008) (denying motion to dismiss divorce action and rejecting argument that Canadian marriage of same-sex couple is void under New York law), *appeal docketed*, No. 350284/07 (App. Div. 1st Dep’t Mar. 18, 2008).

Godfrey v. DiNapoli, No. 5896-06, 2007 WL 3054178 (N.Y. Sup. Ct. Albany County Sept. 5, 2007) (declaring “legal and not contrary to law” policy of State Comptroller recognizing out-of-state marriages of same-sex couples for retirement benefit purposes).

Godfrey v. Spano, 836 N.Y.S.2d 813, 15 Misc. 3d 809 (Sup. Ct. Westchester County 2007) (holding County Executive’s executive order requiring recognition of out-of-state marriages of same-sex couples as “lawful” and “valid exercise of County Executive’s power”), *appeal argued*, No. 2007-4303 (App. Div. 2d Dep’t June 23, 2008).

Funderburke v. New York State Dep’t of Civil Serv., 822 N.Y.S.2d 393, 13 Misc. 3d 284 (Sup. Ct. Nassau County 2006) (relying on *Hernandez v. Robles*, 855 N.E.2d 1, 7 N.Y.3d 338 (2006) to declare Canadian marriage of a same-sex couple “not a ‘marriage’” and denying access to spousal insurance benefits), *vacated and appeal dismissed as moot*, 854 N.Y.S.2d 466, 49 A.D.3d 809 (App. Div. 2d Dep’t 2008) (dismissing appeal as moot because “[d]uring the pendency of the appeal, [defendant] changed its policy regarding recognition of foreign same-sex marriages,” and granting *vacatur* on grounds that “Supreme Court’s orders could spawn adverse legal consequences for the plaintiff or be used as precedent in future cases, causing confusion of the legal issues in this area of the law,” citing *Martinez, supra.*)

Rhode Island

Letter from Patrick C. Lynch, Att’y Gen., State of R.I., to Jack R. Warner, Comm’r, R.I. Bd. of Gov’rs for Higher Educ. (Feb. 20, 2007), *available at* http://ri.glad.org/News_Room/RIAttorneyGeneral_Statement.pdf (“whether based on Full Faith and Credit or on principles of Comity, Rhode Island will recognize same sex marriages lawfully performed in Massachusetts as marriages in Rhode Island”); *accord* Letter from Patrick C. Lynch, Att’y Gen., State of R.I., to Hon. Paul J. Tavares, Gen. Treas., State of R.I. (Oct. 19, 2004) (“a Massachusetts resident who is party to a same-sex marriage validly performed in Massachusetts would be eligible to receive

Spouse's Benefits" under the Teacher's Retirement System). *But see infra*, *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007).

Recognition of out-of-state marriages as the equivalent of a civil union

New Hampshire

"A civil union or a marriage between a man and another man or a woman and another woman legally contracted outside of New Hampshire shall be recognized as a civil union in this state, provided that the relationship does not violate the prohibitions of this chapter." N.H. Rev. Stat. Ann. § 457-A:8 (2008).

New Jersey

"[S]ame-sex marriages established under the laws of Massachusetts and foreign nations are valid in New Jersey and should be treated as civil unions in our State." Formal Op. Att'y Gen. (N.J.) No. 3-2007, 2007 WL 749807 (Feb. 16, 2007).

Non-recognition of marriages

Connecticut

Lane v. Albanese, 39 Conn. L. Rptr. 3, 2005 WL 896129 (Super. Ct. 2005) (adopting rationale in *Rosengarten v. Downes*, *infra*, holding in part that Massachusetts marriage not "family relations matter" giving rise to subject matter jurisdiction for dissolution), *accord* Op. Att'y Gen. (Conn.) No. 2005-024, 2005 WL 2293060 (Sept. 20, 2005) ("Out-of-state same-sex marriages have no legal force and effect here."), *superseded by* *Kerrigan v. Comm'r of Pub. Health*, No. 17716, ___ A.2d ___, 2008 WL 4530885 (Conn. Oct. 28, 2008) (holding that state constitution requires access to marriage for same-sex couples) *as stated in* Op. Att'y Gen. (Conn.) No. 2008-019, 2008 WL 4760988 (Oct. 28, 2008) ("the state must now recognize . . . out of state valid same sex marriages.").

New Jersey

Henefeld v. Twp. of Montclair, 22 N.J. Tax 166 (Tax Ct. 2005) (noting "public policy of this state against same-sex marriage," finding "no basis under New Jersey law" for recognition of Canadian marriage for property tax exemption), *superseded by* *Lewis v. Harris*, 908 A.2d 196, 188 N.J. 415 (2006) *and* N.J. Stat. Ann. § 37:1-31(a) (West 2007) *as stated in* *Godfrey v. Spano*, 836 N.Y.S.2d at 816 n.3, 15 Misc. 3d 809 at 814 n.3.

Oklahoma

O’Darling v. O’Darling, 2008 OK 71, 188 P.3d 137 (holding trial court properly vacated Decree of Dissolution of Marriage in action seeking dissolution of Canadian marriage of two women when “[n]either Appellant nor her counsel, acting as an officer of the court, gave notice to the bench that the purported marriage was one between two women,” and “parties and attorney failed to disclose controlling legal authority regarding same-sex marriage in Oklahoma,” all of which came to the court’s attention when “contacted by the local paper”; nevertheless reversing dismissal and remanding because trial court failed to give parties “notice and a right to be heard”).

Rhode Island

Chambers v. Ormiston, 935 A.2d 956 (R.I. 2007) (holding that “plain meaning” of “marriage” at time law creating the court passed indicates “Family Court is without jurisdiction to entertain” petition for divorce).

Criminal penalties for marrying in evasion of state law

Wisconsin

“Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.” Wis. Const. art. XIII, § 13.

“(1) The following may be fined not more than \$10,000 or imprisoned for not more than 9 months or both:

(a) *Penalty for marriage outside the state to circumvent the laws.* Any person residing and intending to continue to reside in this state who goes outside the state and there contracts a marriage prohibited or declared void under the laws of this state.” Wis. Stat. Ann. § 765.30 (West 2008).

Delaware

“A marriage is prohibited and void . . . between persons of the same gender.” Del. Code Ann. tit. 13, § 101(a) (2008). “The guilty party or parties to a marriage prohibited by § 101 of this title shall be fined \$100, and in default of the payment of the fine shall be imprisoned not more than 30 days.” *Id.* § 102 (2008).

“If a marriage prohibited by this chapter is contracted or solemnized outside of the State, when the legal residence of either party to the marriage is in this State, and the parties thereto shall afterwards live and cohabit as spouses within the State, they shall be punished in the same

manner as though the marriage had been contracted in this State.” Del. Code Ann. tit. 13, § 104 (2008).

Non-recognition of marriages under a “reverse evasion” statute

A few states have unique “reverse evasion” statutes that bar some out-of-state couples from marrying if they could not marry in their home state. Of those states, only Massachusetts has married same-sex couples, and thus implicated its reverse evasion statute in litigation regarding marriage. Massachusetts has since repealed the statute (2008 Mass. Acts ch. 216), but the related decisional law may nonetheless be useful background as other states with reverse evasion statutes take same-sex couples out of harm’s way and allow access to marriage.¹

Cote-Whitacre v. Dep’t of Pub. Health, 21 Mass. L. Rptr. 513, 2006 WL 3208758 (Super. Ct. 2006) (for the purpose of declaring the law under a “reverse evasion” statute for couples married in other states, holding that “same-sex marriage is prohibited in New York,” but, due to the lack of a statutory prohibition or controlling authority from high court, “is not prohibited in Rhode Island”).²

But see Gonzalez v. Green, 831 N.Y.S.2d 856, 14 Misc. 3d 641 (Sup. Ct. N.Y. County 2006) (holding Massachusetts marriage of New York residents “null and void” in New York under *Hernandez v. Robles* and in Massachusetts under reverse evasion statute), *called into question by Cote-Whitacre v. Dep’t of Pub. Health as stated in C.M. v. C.C., supra*. See also *Lane v. Albanese*, 39 Conn. L. Rptr. 3, 2005 WL 896129 (Super. Ct. 2005) (holding Massachusetts marriage of Connecticut residents “null and void” under reverse evasion statute).

¹ The other states with reverse evasion statutes are Illinois (750 Ill. Comp. Stat. Ann. 5/217 (West 2008)), New Hampshire (N.H. Rev. Stat. Ann. § 457:44 (2008)), Vermont (Vt. Stat. Ann. tit. 15, § 6 (2008)), Wisconsin (Wis. Stat. Ann. § 765.04 (West 2008)), and Wyoming (Wyo. Stat. Ann. § 20-1-103 (2008)).

² The final judgment was later amended to reflect that marriage for same-sex couples only became “prohibited” in New York with the issuance of *Hernandez v. Robles*, thus exempting from the reverse evasion law those marriages in Massachusetts of New York residents that were solemnized before the *Hernandez* opinion. See *Cote-Whitacre v. Dep’t of Pub. Health*, No. 04-2656-G (Mass. Super. Ct. May 10, 2007), available at <http://www.glad.org/marriage/Cote-Whitacre/AmendedFinalJudgment.pdf>.

Massachusetts has also since confirmed that it will perform same-sex marriages for couples from California, New Mexico, and the Northern Mariana Islands. See David Abel, *Same-Sex Couples from N.M. Allowed to Marry in Mass.: Bay State Agency Clarifies Ruling*, Boston Globe, July 27, 2007, at B3; GLAD, *Legal Issues for Non-Massachusetts Same-Sex Couples Who Married in Massachusetts*, available at http://www.glad.org/marriage/outofstate_legalissues.html; GLAD, *How to Get Married in Mass.* (Aug. 2008), available at <http://www.glad.org/marriage/how-to-get-married-ma.pdf>.

Civil Unions/Domestic Partnerships

Recognition of civil unions/broad domestic partnerships by parallel statute³

California

“A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership.” Cal. Fam. Code § 299.2 (West 2008).

Connecticut

Connecticut’s recognition statute applies only to civil unions “celebrated in a foreign country,” Conn. Gen. Stat. Ann. § 46b-38mm (West 2008), although the Attorney General has opined that “civil unions performed in other States are entitled to full faith and credit in Connecticut.” Op. Att’y Gen. (Conn.) No. 2005-024, 2005 WL 2293060 (Sept. 20, 2005); Op. Att’y Gen. (Conn.) No. 2008-019, 2008 WL 4760988 (Oct. 28, 2008).

New Hampshire

“A civil union or a marriage between a man and another man or a woman and another woman legally contracted outside of New Hampshire shall be recognized as a civil union in this state, provided that the relationship does not violate the prohibitions of this chapter.” N.H. Rev. Stat. Ann. § 457-A:8 (2008).

New Jersey

“A civil union relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the civil union relationship was created, shall be valid in this State.” N.J. Stat. Ann. § 37:1-34 (West 2007). *Accord* Formal Op. Att’y Gen. (N.J.) No. 3-2007, 2007 WL 749807 (Feb. 16, 2007) (“same-sex civil unions established under the current laws of Vermont and Connecticut, as well as same-sex domestic partnerships established under the laws of California, which provide rights that closely approximate those of New Jersey civil unions, will be valid in New Jersey and treated as civil unions in our State”).

³ Vermont and Oregon do not appear to have explicit recognition provisions.

Recognition of limited domestic partnerships by parallel statute⁴

New Jersey

“A domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the partnership was created, shall be valid in this State.” N.J. Stat. Ann. § 26:8A-6(c) (West 2007). *Accord* Formal Op. Att’y Gen. (N.J.) No. 3-2007, 2007 WL 749807 (Feb. 16, 2007) (“Domestic partnerships, reciprocal beneficiary relationships and other government-sanctioned, same-sex relationships that afford rights and obligations less expansive than the rights and benefits of marriage are valid in New Jersey and will provide all of the rights and obligations of a New Jersey domestic partnership. The domestic partnerships authorized by the current laws of Maine and the District of Columbia fall into this category.”)

New York

N.Y. Pub. Health Law § 2805-q (McKinney’s 2008) (recognizing “domestic partnership or similar relationship . . . entered into pursuant to the laws of the United States or of any state, local or foreign jurisdiction” for the purpose of hospital visitation); *id.* § 4201 (McKinney’s 2008) (recognizing same for purpose of disposition of remains).

Recognition of civil unions for the limited purpose of dissolution

Iowa

In re Marriage of Brown, No. CDCD 119660 (Iowa Dist. Ct. Nov. 14, 2003) (issuing “Decree of Dissolution of Marriage”), *decree amended*, No. CDCD 119660 (Dec. 24, 2003) (finding no subject matter jurisdiction to dissolve civil union but equitable subject matter jurisdiction to declare the status and rights of the parties), *cert. annulled sub nom. Alons v. Iowa Dist. Ct. for Woodbury County*, 698 N.W.2d 858 (Iowa 2005) (writ brought to challenge the district court’s amended decree annulled because plaintiffs, including state legislators, lacked standing).⁵

⁴ Hawai’i, Maine, Washington, and the District of Columbia do not appear to have explicit recognition provisions.

⁵ The original judgment was discussed in the media, leading third parties to enter the action and seek rescission of the judgment.

Maine

Keith v. Collette, No. CV-07-243 (Me. Super. Ct. Jan 10, 2008) (exercising general equity jurisdiction to dissolve civil union).

Massachusetts

Salucco v. Alldredge, 17 Mass. L. Rptr. 498, 2004 WL 864459 (Super. Ct. 2004) (holding “in accord with the decision in *Goodridge*” that “[parties] should be afforded all of the responsibilities and rights that flow from a civil union” and exercising “general equity jurisdiction to dissolve the civil union”).

Texas

In re Marriage of R.S. and J.A., No. F-185,063 (Tex. Dist. Ct. Mar. 3, 2003 (dissolving Vermont civil union and declaring parties “divorced”), *vacated* (Mar. 28, 2003)).⁶

West Virginia

In re Marriage of Gorman, No. 02-D-292 (W. Va. Fam. Ct. Jan. 3, 2003) (dissolving Vermont civil union, noting “[t]he parties are citizens of West Virginia in need of a judicial remedy to dissolve a legal relationship created by the laws of another state.”).

Non-recognition of civil unions

Connecticut

Rosengarten v. Downes, 802 A.2d 170, 71 Conn. App. 372 (App. Ct. 2002) (noting “strong legislative policy against permitting same sex marriages,” holding that Vermont civil union not “family relations matter” giving rise to subject matter jurisdiction for dissolution), *superceded by*

⁶ Original decision issued March 3, 2003 and noticed by local newspapers, *see, e.g., Judge OKs Beaumont Divorce*, Houston Chron., Mar. 8, 2003, at A36, and Associated Press, *see, e.g., Associated Press, Texas Judge Ends a Same-Sex Marriage in a Same-Sex Divorce*, Miami Herald, Mar. 9, 2003, at A2. State Attorney General intervened and requested that the judge reconsider the ruling. *See* Press Release, Office of the Attorney General of Texas Greg Abbott, *Attorney General Abbott Asks Judge to Overturn Recent Decision*, Mar. 27, 2003, available at <http://www.oag.state.tx.us/oagnews/release.php?print=1&id=107>; Melissa Drosjack, *Beaumont Judge Asked to Overturn Gay Divorce*, Houston Chron., Mar. 28, 2003, at A36. Judge vacated prior order the next day. *See* Press Release, Office of the Attorney General of Texas Greg Abbott, *Judge Vacates Order in Beaumont Divorce Case After Attorney General Abbott Intervenes*, Mar. 28, 2003, available at <http://www.oag.state.tx.us/oagnews/release.php?print=1&id=104>; Melissa Drosjack, *Gay Couple Won't Get Texas Divorce: Judge Throws Out Previous Decision to Sever Men's Union*, Houston Chron., Mar. 29, 2003, at A39.

Conn. Gen. Stat. Ann. § 46b-38nn, -38oo (West 2008) *as noted in Op. Att’y Gen. (Conn.) No. 2005-024, 2005 WL 2293060* (Sept. 20, 2005) (regarding *Rosengarten*, noting subsequently-passed civil union law “evince[s] a State public policy supporting civil unions and the recognition of civil unions, including civil unions that are performed in other States.”).

Georgia

Burns v. Burns, 560 S.E.2d 457, 253 Ga. App. 600 (Ct. App. 2002) (for purpose of post-divorce consent order’s prohibition on visitation with children while cohabiting outside a marriage, a Vermont civil union did not constitute a “marriage”).

Maryland

Lewis v. Smith, No. C-07-13986 (Md. Cir. Ct. Mar. 25, 2008) (refusing to exercise subject matter jurisdiction to annul Vermont civil union, relying on *Conoway v. Deane*, 401 Md. 219, 932 A.2d 571 (2007) to hold that “civil union . . . between same-sex couples has been determined to be against Maryland’s public policy”).

New Jersey

Hennefeld v. Twp. of Montclair, 22 N.J. Tax 166 (Tax Ct. 2005) (for purpose of property tax exemption, holding Vermont civil union “does not mandate New Jersey’s recognition of certain rights reserved to married persons”), *superseded by Lewis v. Harris*, 908 A.2d 196, 188 N.J. 415 (2006) *and* N.J. Stat. Ann. § 37:1-34 (West 2007).

New York

Langan v. State Farm Fire & Cas., 849 N.Y.S.2d 105, 48 A.D.3d 76 (App. Div. 3d Dep’t 2007) (ruling that civil union did not fall within comity rule to provide standing for workers’ compensation claim).

Langan v. St. Vincent’s Hosp. of N.Y., 765 N.Y.S.2d 411, 196 Misc. 2d 440 (Sup. Ct. Nassau County 2003) (applying New York comity rule in context of wrongful death action to recognize Vermont civil union), *rev’d*, 802 N.Y.S.2d 476, 25 A.D.3d 90 (App. Div. 2d Dep’t 2005) (ruling that civil union did not fall within comity rule to provide standing for wrongful death claim), *appeal dismissed for lack of finality*, 850 N.E.2d 672, 6 N.Y.3d 890 (2006).

To address non-recognition in other states, statutorily providing for consent to personal jurisdiction for the purpose of dissolution

California

“The Declaration of Domestic Partnership shall require each person who wants to become a domestic partner to . . . (3) state that he or she consents to the jurisdiction of the Superior Courts of California for the purpose of a proceeding to obtain a judgment of dissolution or nullity of the domestic partnership or for legal separation of partners in the domestic partnership, or for any other proceeding related to the partners' rights and obligations, even if one or both partners ceases to be a resident of, or to maintain a domicile in, this state” Cal. Fam. Code § 298(c) (West 2008).

“The superior courts shall have jurisdiction over all proceedings relating to the dissolution of domestic partnerships, nullity of domestic partnerships, and legal separation of partners in a domestic partnership. The dissolution of a domestic partnership, nullity of a domestic partnership, and legal separation of partners in a domestic partnership shall follow the same procedures, and the partners shall possess the same rights, protections, and benefits, and be subject to the same responsibilities, obligations, and duties, as apply to the dissolution of marriage, nullity of marriage, and legal separation of spouses in a marriage, respectively, except as provided in subdivision (a), and except that, in accordance with the consent acknowledged by domestic partners in the Declaration of Domestic Partnership form, proceedings for dissolution, nullity, or legal separation of a domestic partnership registered in this state may be filed in the superior courts of this state even if neither domestic partner is a resident of, or maintains a domicile in, the state at the time the proceedings are filed.” Cal. Fam. Code § 299(d) (West 2008).

Oregon

“Each person signing a Declaration of Domestic Partnership consents to the jurisdiction of the circuit courts of Oregon for the purpose of an action to obtain a judgment of dissolution or annulment of the domestic partnership, for legal separation of the partners in the domestic partnership or for any other proceeding related to the partners' rights and obligations, even if one or both partners cease to reside in, or to maintain a domicile in, this state. Notwithstanding ORS 107.086, a petition for dissolution or annulment of the domestic partnership, for legal separation of the partners in the domestic partnership or for any other proceeding related to the partners' rights and obligations may be filed in the county in which either the petitioner or respondent last resided.” Oregon Family Fairness Act, 2007 Or. Laws ch. 99, § 6(4).

“On the Declaration of Domestic Partnership, each individual who wants to become a partner in a domestic partnership shall . . . (d) State that the individual consents to the jurisdiction of the

circuit courts of Oregon for the purpose of an action to obtain a judgment of dissolution or annulment of the domestic partnership or for legal separation of the partners in the domestic partnership, or for any other proceeding related to the partners' rights and obligations, even if one or both partners cease to reside in, or to maintain a domicile in, this state." Oregon Family Fairness Act, 2007 Or. Laws ch. 99, § 6(5).

Civil unions and “reverse evasion” statutes

Vermont and New Hampshire currently offer civil unions to same-sex couples, but also have so-called “reverse evasion” statutes barring out-of-state couples from marrying if they cannot marry in their home state. N.H. Rev. Stat. Ann. § 457:44 (2008); Vt. Stat. Ann. tit. 15, § 6 (2008).

In *Miller-Jenkins v. Miller-Jenkins*, the Vermont Supreme Court held that Vermont's reverse evasion statute does not apply to civil unions. 2006 VT 78, ¶¶ 31-40, 180 Vt. 441, 912 A.2d 951.

It is unclear whether New Hampshire's reverse evasion statute pertaining to marriage will be held to apply to civil unions. See, e.g., GLAD, *New Hampshire Civil Unions* 5-6 (July 2007), available at http://www.glad.org/New_Hampshire_Civil_Unions.pdf.