



Same-Sex Unions Around the World Marriage, Civil Unions, Registered Partnerships— What Are the Differences and Why Do They Matter?

By Leslie J. Harris

In most states, a survivor has statutory rights in the estate of his or her deceased mate only if the two were married; similarly, only a surviving spouse, not other committed partners, can claim preferential estate and inheritance tax treatment. Because same-sex couples cannot marry in any state except Massachusetts, it seems that these benefits are not available to same-sex partners. But in five states in addition to Massachusetts and in more than a dozen countries, recent legislation extends estate rights to committed same-sex partners. This legislation is part of a worldwide

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trend toward giving legal recognition and protection to same-sex familial relationships. The legislation varies in three important respects: the extent to which it gives the partners familial rights in their dealings with third parties, the extent to which it gives the partners rights and duties between each other, and the extent to which the legislative scheme is available to opposite-sex as well as same-sex couples. A fourth important variation among jurisdictions is whether adult partners who can legalize their relationships have only one option (marriage or a civil union, for example), or whether they have a choice, such as between marriage and and as a civil union.

Rights and duties vis-à-vis third parties include rights to preferential

intrafamilial income and estate tax treatment; family benefits related to the employment of one partner, such as health insurance and family leave; the right to make health-care decisions for incompetent partners; and so on. Familial rights between the parties typically include property rights when the relationship ends because the parties break up or one partner dies and support and property rights during the relationship; they may include rights and duties regarding children.

In the United States, third-party rights and duties have received more attention than have rules regarding the relationship between the partners for two reasons: employment-related benefits, such as health insurance and pensions,

are such an important part of people's financial security, and almost all states allow cohabitants to make some kind of claim against each other when the relationship ends, based on contract or equitable principles. These so-called *Marvin* remedies, named after *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), the most well-known early case extending these remedies to unmarried cohabi-

federal government enacted legislation in July 2005 that permits same-sex marriage after courts in most of the provinces held that the Canadian Charter of Rights and Freedoms requires that same-sex couples be allowed to marry and that a statutory domestic partners law that provides almost all the benefits of marriage did not satisfy the Charter. *Halpern v. Canada (A.G.)*, [2003] 215

the partnership is open to both same- and opposite-sex couples. Couples who register under the French Pacte Civil de Solidarité (PCS), created in 1999, "obtain most of the rights and obligations traditionally associated with marriage in the fields of social welfare, housing, tax law and property rights, but a few significant distinctions will remain in the areas of inheritance and children, as well as in the event of a possible breakdown of the relationship." Eva Steiner, *The Spirit of the New French Registered Partnership Law—Promoting Autonomy and Pluralism or Weakening Marriage?*, 12 Child & Fam. L.Q. 1 (2000). In December 2004, the New Zealand parliament enacted a civil union law for same-sex couples that gives partners the same rights and duties that married opposite-sex couples have. Legislation in Australian states and territories provides for property distribution at the end of de facto relationships. In the Northern Territories, South Australia, and Tasmania, only heterosexual cohabitants are covered, while statutes in Victoria, Western Australia, the Australian Capital Territory, New South Wales, and Queensland apply to same- and opposite-sex couples. In these countries opposite-sex couples have the same kind of choice of family form that all couples in the Netherlands, Belgium, and Canada do, but same-sex couples are limited to the statutory alternative.

Other countries, including England and Wales, all the Scandinavian countries, and Germany, offer registered partnerships only to same-sex couples, leaving marriage exclusively for and the only option available to opposite-sex couples. In most of these countries, the legal effects of entering into a registered partnership are similar to those of marriage, though a number of them provide that certain aspects of the law of marriage, often pertaining to children, do not apply to the partnership.

In one American state, Massachusetts, same-sex couples, like opposite-sex couples, can marry,



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tants, are often available to same-sex couples as well. U.S. courts have also been relatively open to same-sex couples' consensual arrangements to share parenting of children, at least if the nonbiological parent wishes to adopt the child. Most of the states that have addressed the issue of adoption by a same-sex partner have approved it. See, e.g., *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003), and cases cited therein. In contrast, relatively more emphasis is placed on familial rights between the parties in many countries, especially in Western Europe, where the employment-related benefits are less important because the countries have extensive universal health and retirement programs.

Generally, marriage is the legal arrangement that provides the most complete access to both types of legal protection, and other statutory schemes are usually compared to marriage. Four countries—the Netherlands, Belgium, Spain, and Canada—permit same-sex marriage. The Netherlands was the first country to recognize same-sex marriage. Title 5, Article 30(1), of the Dutch Civil Code was amended in 2000, effective April 1, 2001. Belgium followed suit in 2001. Spain's legislation was enacted in 2005. The Canadian

D.L.R.4th 223, aff'd, [2003] 225 D.L.R.4th 529, is the leading Canadian case. Legislation allowing same-sex marriage is expected to be proposed in South Africa.

Three of the countries that currently allow same-sex marriage also have comprehensive domestic partnership laws that apply to both same- and opposite-sex couples and that provide rights and duties between the parties and vis-à-vis third parties that are similar to marriage. The Netherlands and Belgium have permitted opposite and same-sex couples to enter registered partnerships since 1998 and 2000, respectively. The Canadian Modernization of Benefits and Obligations Act provides that all unmarried couples, opposite- and same-sex, who have lived together for at least one year are entitled to the same benefits and are, for purposes of federal law, under the same obligations as married couples. In these three countries, all otherwise eligible couples, of the same or opposite sex, have a choice between marriage and some form of domestic partnership.

A number of countries have registered partnerships, civil unions, or domestic partnerships. In some countries, including France, New Zealand, and some Australian states,

at least for the time being. The Supreme Judicial Court held in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), that denying the benefits of marriage to same-sex couples violates the state constitution and, in *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004), that civil union statutes do not solve the constitutional problem. Therefore, Massachusetts law does create an intermediate institution such as the domestic partnership or civil union. A constitutional amendment to overturn *Goodridge* and *Opinions of the Justices* has been proposed but cannot be voted on until 2006 at the earliest.

Six states have legislation that provides some of the legal benefits of marriage to same-sex couples. The legislation in one state, Maine, is limited. It permits same-sex couples and opposite-sex couples to register as domestic partners, thereby obtaining intestate succession rights equal to those of a surviving spouse. Other sections of the legislation give domestic partners, even if they have not registered, spouse-like rights in guardianship and other protective proceedings, rights to control the remains of a deceased partner, and spouse-like rights to employment-related health insurance. 2003 Me. Laws 672, codified in scattered sections of the Maine code.

The legislation in the other five states is more comprehensive. In two states, Vermont and Hawaii, the statutes were enacted in response to decisions from the highest state courts that denying same-sex couples the benefits of marriage violates their state constitutions. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997). Vermont's civil union legislation, which applies only to same-sex couples, provides all of the benefits of marriage that are available under state law. Vt. Stat. Ann. tit. 15, § 1201 et seq. (2000). The most distinctive feature of Hawaii's reciprocal beneficiaries relationship is that it is

open to any couple legally ineligible to marry each other, including not only same-sex couples but also, for example, closely related relatives. Hawaii's legislation does not address the parties' relationship to each other but provides limited rights against third parties, including hospital visitation, health-care decision-making, inheritance, and the right to bring wrongful death actions. Haw. H.B. 118 (1997), codified as Haw. Rev. Stat. ch. 572c and in scattered sections of the rest of the code.

The remaining three states, California, New Jersey, and Connecticut, have enacted legislation

Connecticut legislation. In contrast, the California and New Jersey laws allow opposite-sex couples in which at least one is older than 62, as well as same-sex couples, to enter into domestic partnerships. These opposite-sex couples are the only ones in the United States who currently have a choice between marriage and another legally recognized familial status.

This brief review highlights the important distinctions among marriage, civil unions, registered or domestic partnerships, and reciprocal beneficiary relationships. Some advocates of same-sex marriage have

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without the spur of a judicial decision. 2003 Cal. Stat. 421 (A.B. 205), effective Jan. 1, 2005, codified as sections of the California Family Code; New Jersey Domestic Partnership Act, Pub. L. 2003, ch. 246 (2004), codified at N.J. Stat. Ann. § 26:8a-1 et seq.; An Act Concerning Civil Unions, Conn. Pub. Act No. 05-10 (2005) (effective Oct. 1, 2005). The California domestic partnership and the Connecticut civil union are very similar to the Vermont civil union; partners have virtually all the duties and benefits of marriage that the state can bestow. The New Jersey legislation is more limited, providing that the partners are jointly responsible for common living expenses but are not liable for each other's debts and do not automatically have rights in each other's property; it also provides protection against discrimination on the basis of familial status, hospital visitation rights, health-care decision-making rights, and treatment as spouses under state tax law. Only same-sex couples may enter into a civil union under the

also argued that in terms of legal consequences marriage is preferable to an alternative form in two additional ways, but in the United States today these differences are not significant. The first distinction pertains to whether a relationship is "portable," that is, whether it will be recognized and given legal effect in jurisdictions other than the one in which the parties entered into it. Generally, marriages valid where entered into are valid everywhere unless recognizing a marriage would offend a strong public policy of the jurisdiction asked to recognize the relationship. *Restatement (Second) of Conflict of Laws* § 283(2) (1971). Most states, however, have enacted statutory or constitutional provisions that deny recognition within that state to same-sex marriages entered into elsewhere. Constitutional challenges to these laws have begun to come before the courts, with mixed results. *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005) (state defense of marriage act does not violate the equal privileges and

immunities clause of the state constitution); *Castle v. State of Washington*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004) (state defense of marriage act violates the state privileges and immunities clause).

Because registered partnerships, civil unions, and other alternate forms are new and statutory, there is no common law rule regarding inter-jurisdictional recognition, and the limited case law is, again, mixed. *Rosengarten v. Downes*, 806 A.2d 1066 (Conn. 2002); *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002) (refusing to recognize Vermont civil unions); *Langan v. St. Vincent's Hospital of New York*, 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003) (recognizing civil union). Two states with domestic partnership laws also have statutes recognizing similar relationships from other states, N.J. Stat. Ann. § 26:8A-6; Cal. Fam. Code § 299.2. A Massachusetts case says that civil unions entered into in other states will be recognized there. *Salucco v. Alldredge*, 17 Mass. L. Rep. 498 (Mass. Super. Ct. 2004). Thus, interstate recognition of any kind of same-sex union within the United States is quite limited, at least for the near future.

The second claim in favor of marriage over domestic partnerships or civil unions is that only marriage qualifies people for a host of federal benefits. It is true that federal law treats married couples differently

from unmarried couples for many purposes, including income and estate taxes, Social Security, ERISA (pertaining to pension rights), and so on. And it is also true that generally federal law refers to state law to determine whether any couple is validly married. But the federal Defense of Marriage Act (DOMA) provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.

Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7. Unless Congress repeals the DOMA or it is held unconstitutional, only heterosexual couples can be married for purposes of federal law. The only courts that have heard constitutional challenges to the federal DOMA to date have rejected them. *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

Thus, the important distinctions among the statutes that have recently been enacted in the United States and in other countries with legal and cultural systems similar to those of the United States concern how closely the relationship approximates marriage, whether the relationship created by statute is open to all couples or only to same-sex pairs, and, related to that issue, whether the jurisdiction's statutes as a whole create alternative legal structures from which couples may choose. What then justifies these distinctions? Preserving marriage as a separate institution is often used as the justification for denying same-sex couples the right to marry in the United States, and this rationale has been accepted in some other countries. For example, registered partner-

ships under German law are considered not only different from but in some sense inferior to marriage. The German Constitution obliges the state to promote marriage and the family—a provision that is understood to be limited to opposite-sex marriage and as making it inappropriate to place a same-sex relationship on the same level as a "true" marriage. The legislative history of some of the Scandinavian registered partnership laws also indicates that marriage occupies a preferred position.

In contrast, courts in Canada and the Massachusetts Supreme Judicial Court have held that privileging traditional marriage is not a constitutionally sufficient rationale for denying same-sex couples access to marriage while granting it to opposite-sex couples. These opinions recognize that "marriage" is unique because of the social and personal significance attached to the relationship. In *Goodridge*, the Massachusetts court said,

Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. . . . Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition. . . .

Without the right to marry—or more properly, the right to choose to marry—one is excluded from the full range of human experience and denied full protection of the laws for one's "avowed commitment to an intimate and lasting human relationship."

Goodridge, 798 N.E.2d at 954, 957. Explaining its conclusion that a civil union law would not solve the constitutional problem identified in *Goodridge*, the Massachusetts court said,

Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. The holding in *Goodridge*, by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal. . . .

The bill's absolute prohibition of the use of the word "marriage" by

mental social institution of marriage perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships, violating the Canadian Charter of Rights and Freedoms.

The European countries that open registered partnerships to opposite- and same-sex couples and that also allow same-sex marriage deliberately create a range of legal alternatives for organizing relationships from which couples may choose. The Law Commission of Canada in a report called *Beyond Conjugal* (2001) (see accompanying box) recommended that Canada take the same path. In the

cohabitants between themselves at the end of their relationships. This case law serves the salutary purpose of protecting weaker parties who have not thought to, or who have been unable to, protect their own interests by marrying (when that is possible) or entering into a contract, but its limits are also apparent. First, the case law solutions deal with rights between the parties; very few cases address the relationship of the couple to third parties. Second, because the case law solutions are after-the-fact, they do not facilitate planning and are unpredictable.

Thus, in most states, cohabitants, including same-sex couples, have no readily accessible way of entering into a legal status that defines and protects their relationship, and all but heterosexual couples older than 62 in California and New Jersey have no choice between marriage and an alternative such as a civil union or domestic partnership. But until the question of whether to recognize same-sex relationships at all has played out more fully in the United States, it seems unlikely that legislatures will turn their attention to the broader question of whether society would be best served by creating a range of family status relationships from which partners can choose. ■

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"spouses" who are the same sex is more than semantic. The dissimilitude between the terms "civil marriage" and "civil union" is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status. The denomination of this difference by the separate opinion of Justice Sosman (separate opinion) as merely a "squabble over the name to be used" so clearly misses the point that further discussion appears to be useless. . . . If, as the separate opinion posits, the proponents of the bill believe that no message is conveyed by eschewing the word "marriage" and replacing it with "civil union" for same-sex "spouses," we doubt that the attempt to circumvent the court's decision in *Goodridge* would be so purposeful.

Opinions of the Justices to the Senate, 802 N.E.2d at 569, 570. Similarly, in *Halpern v. Canada (A.G.)*, [2003] 215 D.L.R.4th 223, aff'd, [2003] 225 D.L.R.4th 529, the highest Ontario provincial court held that excluding same-sex couples from the funda-

United States local domestic partnership laws that are available to opposite- as well as same-sex couples move toward this approach, but because of the limited authority of local governments they do not have a substantial practical effect. At the statewide level legal recognition of alternatives to marriage is largely limited to case law that provides for rights of unmarried

The Law of Same-sex Relationships on the Web

Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, Feb. 9, 2005, available at www.stateline.org/live/ViewPage.action?siteNodeId?136&languageId?1&contentId?15966.

Halpern v. Canada, available at www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.htm.

Law Commission of Canada, *Beyond Conjugal* (2001), available at www.lcc.gc.ca/research_project/cpra-en.asp.

Kees Waaldijk, *Chronological Overview of the Main Legislative Steps in the Process of Legal Recognition of Homosexuality in 36 European Countries*, available at <http://athena.leidenuniv.nl/rechten/meijers/index.php3?m?10&c?128>, last updated April 2003.

The Civil Partnership Act of 2004 (England and Wales), available at www.womenandequalityunit.gov.uk/lgbt/partnership.htm.

New Zealand civil union legislation, available at www.civilunions.org.nz.

Fourie and Bonthuis v. Minister of Home Affairs, available at wwwserver.law.wits.ac.za/sca/judgment.php?case_id?12942.