

MINUTES OF THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman John Edmonds at 1:30 P.M. on January 20, 2005 in Room 313-S of the Capitol.

Committee members absent: Representatives Kenny Wilk- excused

Committee staff present: Athena Andaya, Kansas Legislative Research Department  
Dennis Hodgins, Kansas Legislative Research Department  
Mary Torrence, Revisor of Statutes Office  
Carol Doel, Committee Secretary

Conferees: Mary Torrence, Office of the Revisor

Chairman Edmonds called the committee to order and reviewed the rules and regulations of the committee.

Next order of business was the introduction of bills.

Representative Mah requested a bill allowing people in Kansas to receive and send wine by mail.

Representative Hawk requested a bill dealing with permission to good Samaritan status to vets to medical personnel in the time of national disaster or terrorist attack.

Representative Dillmore requested a bill regarding municipalities and sale of firearms and ballistics testing thereof.

Representative Novascone requested a bill concerning claims relating to weight gain or obesity

With no objections all four bills were accepted for introduction.

Chairman Edmonds asked for a motion to adopt the minutes of the meeting from January 18, 2005.

Representative Siegfroid made a motion to adopt the minutes. Representative Burroughs seconded the motion with the exception of changing the word lumbar to lumber. Motion passed.

For the next order of business before the committee, Chairman Edmonds introduced Mary Torrence, Office of the Revisor of Statutes, who briefed the committee on the Senate Concurrent Resolution No. 1601 and the Current Kansas Law. Mrs. Torrence provided a copy of the proposed language changes to the amendment to the Kansas Constitution as well as the present language. (Attachment 1) The definitions of marriage were also addressed showing that according to the survey of states' laws by the National Conference of State Legislatures (NCSL), 43 states have statutory and/or constitutional provisions explicitly recognizing only marriages between a man and a woman. The NCSL survey also indicates that 17 states have adopted constitutional provisions addressing same-sex marriage. Only the state of Massachusetts recognizes same sex marriages. Four states appear not to address the issue of same sex marriages either in statute or constitutions. (Attachment 2)

Mrs. Torrence also provided the committee with information from Chapter 23, Articles 1 and 2 on domestic relations and the description of marriage. (Attachment 3)

Provided for review was a copy of the statutory rights and responsibilities of same-sex couples compared state-by-state which was taken from "An Analysis of the Law regarding Same-Sex Marriage, Civil Unions and Domestic Partnerships" by a working group on same-sex marriages and non-marital unions, American Bar Association section of family law. (Attachment 4)

Also provided for committee review was the Executive Summary of the Working Group on Same-sex marriages and Non-Marital Unions of the Family Law Section of the American Bar Association which covers the history of marriage, developments in the law regarding sexual orientation and gender identity, statutory protections, defense of marriage acts, recognition of same-sex partnerships and provision of benefits by private sector employers and public employers as well as recognition of same-sex couples in other countries. (Attachment 5)

CONTINUATION SHEET

MINUTES OF THE House Federal and State Affairs Committee at 1:30 P.M. on January 20, 2005 in Room 313-S of the Capitol.

Among the concerns voiced by the committee were:

- the possibility of the state being vulnerable to a federal court case should it be voted to amend the constitution;
- how this amendment would effect the employment benefits that are that are currently being offered;
- the effects on common-law marriage
- would it be possible for a same-sex couple to write a private contract to cover such things as as health decisions, child custody, property transfer, estate administration, and taxation

Chairman Edmonds advised that he has extended invitations to a number of members of the Legislature who are members of the Bar to address the committee regarding the issues of concern and constitutional aspects.

With no further business before the committee, the Chairman adjourned the meeting.



## Office of Revisor of Statutes

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### MEMORANDUM

**To:** House Committee on Federal and State Affairs  
**From:** Mary Torrence, Senior Assistant Revisor of Statutes  
**Date:** January 20, 2005  
**Subject:** Prohibitions against Same-Sex Marriage

#### Senate Concurrent Resolution No. 1601 and Current Kansas Law

Senate Concurrent Resolution No. 1601 proposes amending the Kansas Constitution to add the following provision:

**§ 16. Marriage.** (a) The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.

(b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.

The first subsection of the proposed amendment is very similar to the language of K.S.A. 2004 Supp. 23-101 which reads:

(a) The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void . . .

The language "between two parties who are of opposite sex" was added to the statute in 1980. The second sentence was added in 1996. That same year K.S.A. 2004 Supp. 23-115, which recognizes marriages as valid if they are entered into outside Kansas and are valid where entered into, was also amended to add the language:

. . . It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman . . .

FEDERAL AND STATE AFFAIRS

Date 1-20-05

Attachment 1



The 1996 amendments were enacted the same year that Congress passed the Defense of Marriage Act. The federal act provides that states are not required to recognize same-sex marriages entered into in another state. There is disagreement whether this can be done by state or federal statute or by state constitution because the Full Faith and Credit Clause of the United States Constitution, Article IV, Section 10, requires states to recognize the laws of other states.

With regard to subsection (b) of the proposed constitutional amendment, Kansas law does not contain a similar provision prohibiting the state from recognizing nonmarital relationships as having the rights and incidents of marriage.

### Definitions of "Marriage"

According to a survey of states' laws by the National Conference of State Legislatures (NCSL), 43 states have statutory and/or constitutional provisions explicitly recognizing only marriages between a man and a woman. Of those, Hawaii provides in its constitution that the legislature has the power to limit marriage to couples of the opposite sex and in statute specifies that marriage is only between a man and a woman. Two other states' statutes on marriage refer to "husband and wife" but do not clarify whether the two parties must be of opposite sex. The state of Massachusetts alone recognizes same-sex marriages. Four states do not address the issue either in statute or constitution.

### Rights or Incidents of Marriage

The NCSL survey indicates that 17 states have adopted constitutional provisions addressing same-sex marriage. Of those states, nine address the issue of the rights or incidents of marriage. Some include provisions stating that no relationship other than marriage will be recognized as entitled to the "benefits," "legal status" or "legal effect" of marriage. Others prohibit any "contractual relationship" or "civil union, domestic partnership, or other similar same-sex relationship," and in that way prevent same-sex partners from providing contractually for the traditional benefits marriage. Two provide that nothing in law will be construed to require benefits of marriage to be conferred on unmarried couples and one reserves to the legislature the power to determine "the legal rights, obligations, privileges, and immunities of marriage." In addition to constitutional provisions relating to the rights or incidents of marriage, states statutorily prohibit contractual relationships to achieve

a status similar to marriage, precluding same-sex couples from achieving the benefits of marriage in that manner.

The rights or incidents of marriage which are extended to same-sex couples in some states are reviewed in "An Analysis of the Law regarding Same-Sex Marriage, Civil Unions and Domestic Partnerships," by the Working Group on Same-Sex Marriages and Non-Marital Unions of the American Bar Association Section of Family Law.\* This publication includes a comparative table of the statutory rights and responsibilities of same-sex couples on a state-by-state basis. Among the rights granted in one or more states are status in making health care decisions; rights to hospital and nursing home visits; the right to inherit property; tax benefits such as homestead property allowances and exemption from inheritance and other taxes; employment benefits such as health insurance coverage, family and medical leave and other benefits typically extended to spouses; and the right to assert certain civil claims in wrongful death actions, tort actions, protection from abuse actions and other legal proceedings.

\* The analysis was published in the summer of 2004 and is available on line at <http://www.abanet.org/family/whitepaper/fullreport.pdf>.

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## Chapter 23.—DOMESTIC RELATIONS

### Articles

1. MARRIAGE.
2. MARRIED PERSONS.
4. ENFORCEMENT OF SUPPORT.
5. FAMILY PLANNING CENTERS.
6. MEDIATION OF DOMESTIC DISPUTES.
7. ENFORCEMENT OF VISITATION RIGHTS.
8. UNIFORM PREMARITAL AGREEMENT ACT.
9. UNIFORM INTERSTATE FAMILY SUPPORT ACT.
10. CASE MANAGEMENT.

### Article 1.—MARRIAGE

#### Cross References to Related Sections:

Social security number requested on marriage license application, see 74-148.

#### Law Review and Bar Journal References:

"Alternatives to litigation: Alternative dispute resolution services and where to find them," Kathy Kirk, 66 J.K.B.A. No. 7, 8 (1997).

#### 23-101. Nature of marriage relation. (a)

The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. The consent of the parties is essential. The marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relation shall only be entered into, maintained or abrogated as provided by law.

(b) The state of Kansas shall not recognize a common-law marriage contract if either party to the marriage contract is under 18 years of age.

**History:** L. 1867, ch. 84, § 1; G.S. 1868, ch. 61, § 1; R.S. 1923, 23-101; L. 1980, ch. 106, § 1; L. 1996, ch. 142, § 1; L. 2002, ch. 143, § 1; July 1.

#### Law Review and Bar Journal References:

"Dissolution of Non-Marital Relationships," Charles F. Harris, J.K.T.L.A. Vol. XXII, No. 2, 18 (1998).

"Common Law Marriage: Civil Contract or 'Carnal Commerce'," Mary D. Feighny, 70 J.K.B.A. No. 4, 20 (2001).

"2002 Legislative Wrap-Up," Paul T. Davis, 71 J.K.B.A. No. 7, 15 (2002).

"Conflict of Laws in Kansas: A Guide to Navigating the Dismal Swamp," Terri Savely Bezek, 71 J.K.B.A. No. 8, 21 (2002).

"The Fundamental Right to be Free of Arbitrary Categorization: The Brain Sciences and the Issue of Sex Classification," William Kitchin, 42 W.L.J. 257 (2003).

"Sex, Marriage, Medicine, and Law: What Hope of Harmony?" Thomas Wm. Mayo, 42 W.L.J. 269 (2003).

### CASE ANNOTATIONS

12. Trial court required to determine whether person was male or female at time marriage license was issued; several factors listed for consideration. In re Estate of Gardiner, 29 K.A.2d 92, 22 P.3d 1086 (2001).

13. State recognizes only traditional marriage between biological man and biological woman; marriage between post operative male-to-female transsexual to a man is void as against public policy. In re Estate of Gardiner, 273 K. 191, 42 P.3d 120 (2002).

### 23-102.

#### Law Review and Bar Journal References:

"Common Law Marriage: Civil Contract or 'Carnal Commerce'," Mary D. Feighny, 70 J.K.B.A. No. 4, 20 (2001).

**23-104a. Solemnizing marriage; persons authorized to officiate. (a)** Marriage may be validly solemnized and contracted in this state, after a license has been issued for the marriage, in the following manner: By the mutual declarations of the two parties to be joined in marriage, made before an authorized officiating person and in the presence of at least two competent witnesses over 18 years of age, other than the officiating person, that they take each other as husband and wife.

(b) The following are authorized to be officiating persons:

(1) Any currently ordained clergyman or religious authority of any religious denomination or society;

(2) any licentiate of a denominational body or an appointee of any bishop serving as the regular clergyman of any church of the denomination to which the licentiate or appointee belongs, if not

from the applicant for a marriage license a fee of \$50.

(b) The clerk of the court shall remit all fees prescribed by this section to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury. Of each remittance, the state treasurer shall credit 46% to the protection from abuse fund, 17.92% to the family and children trust account of the family and children investment fund created by K.S.A. 38-1808, and amendments thereto, 20% to the crime victims assistance fund created by K.S.A. 74-7334, and amendments thereto, and the remainder to the state general fund.

**History:** L. 1984, ch. 136, § 1; L. 1989, ch. 239, § 5; L. 1992, ch. 313, § 10; L. 1996, ch. 188, § 3; L. 2001, ch. 5, § 85; July 1.

**23-110. Records of marriages; indexing; certified copies or abstracts.** The secretary of health and environment shall index all records received pursuant to K.S.A. 23-109 and amendments thereto and, upon request, shall issue a certified copy or abstract of them which in all courts and for all purposes shall be prima facie evidence of the facts stated in them. For each certified copy or abstract a fee shall be paid to the secretary in an amount prescribed in accordance with, and disposed of in the manner provided by, K.S.A. 65-2418 and amendments thereto.

**History:** L. 1913, ch. 224, § 6; R.S. 1923, 23-110; L. 1956, ch. 52, § 7; L. 1957, ch. 431, § 6; L. 1963, ch. 398, § 9; L. 1967, ch. 203, § 1; L. 1973, ch. 309, § 13; L. 1975, ch. 462, § 29; L. 1976, ch. 145, § 121; L. 1978, ch. 347, § 5; L. 1980, ch. 106, § 7; L. 1983, ch. 286, § 16; L. 1984, ch. 147, § 8; L. 1984, ch. 135, § 2; L. 2002, ch. 160, § 1; May 23.

**23-115. Validity of marriages contracted without state.** All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state. It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman.

**History:** L. 1867, ch. 84, § 9; G.S. 1868, ch. 61, § 9; R.S. 1923, 23-115; L. 1996, ch. 142, § 3; July 1.

**Law Review and Bar Journal References:**

"Common Law Marriage: Civil Contract or 'Carnal Commerce'," Mary D. Feighny, 70 J.K.B.A. No. 4, 20 (2001).

"Conflict of Laws in Kansas: A Guide to Navigating the Dismal Swamp," Terri Savely Bezek, 71 J.K.B.A. No. 8, 21 (2002).

**CASE ANNOTATIONS**

3. State recognizes only traditional marriage between biological man and biological woman; marriage between post-operative male-to-female transsexual to a man is void as against public policy. In re Estate of Gardiner, 273 K. 191, 42 P.3d 120 (2002).

**23-128.**

**Law Review and Bar Journal References:**

"A Primer on Posthumous Conception and Related Issues of Assisted Reproduction," Michelle L. Brenwald and Kay Re-deker, 38 W.L.J. 599 (1999).

**23-129.**

**Law Review and Bar Journal References:**

"A Primer on Posthumous Conception and Related Issues of Assisted Reproduction," Michelle L. Brenwald and Kay Re-deker, 38 W.L.J. 599 (1999).

**23-130.**

**Law Review and Bar Journal References:**

"A Primer on Posthumous Conception and Related Issues of Assisted Reproduction," Michelle L. Brenwald and Kay Re-deker, 38 W.L.J. 599 (1999).

**Article 2.—MARRIED PERSONS**

**23-201. Married persons; separate property; marital property.** (a) The property, real and personal, which any person in this state may own at the time of the person's marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to a person by descent, devise or bequest, and the rents, issues, profits or proceeds thereof, or by gift from any person except the person's spouse, shall remain the person's sole and separate property, notwithstanding the marriage, and not be subject to the disposal of the person's spouse or liable for the spouse's debts.

(b) All property owned by married persons, including the present value of any vested or unvested military retirement pay, or, for divorce or separate maintenance actions commenced on or after July 1, 1998, professional goodwill to the extent that it is marketable for that particular professional, whether described in subsection (a) or acquired by either spouse after marriage, and whether held individually or by the spouses in some form of co-ownership, such as joint tenancy or tenancy in common, shall become marital property at the time of commencement by one spouse against the other of an action in which a final de-

# State Definitions of Marriage

State	Statute Cite	Relevant Language
Alabama	§ 30-1-19	<p>(a) This section shall be known and may be cited as the "Alabama Marriage Protection Act."</p> <p>(b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.</p> <p>(c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.</p> <p>(d) No marriage license shall be issued in the State of Alabama to parties of the same sex.</p> <p>(e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.</p>
Alaska	§ 25-05-013 [1996]	<p>(a) A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.</p> <p>(b) A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.</p>
	Constitution Article 1 § 25	To be valid or recognized in this State, a marriage may exist only between one man and one woman. [Amended 1998]
Arizona	§ 25-101 [1996]	C. Marriage between persons of the same sex is void and prohibited.
Arkansas	§§ 9-11-107, 109, 208, 803	<p>9-11-107: (a) All marriages contracted outside this state which would be valid by the laws of the state or country in which the marriages were consummated and in which the parties then actually resided shall be valid in all the courts in this state. (b) This section shall not apply to a marriage between persons of the same sex.</p> <p>9-11-109: Marriage shall be only between a man and a woman. A marriage between persons of the same sex is void.</p> <p>9-11-208: (c) Marriages between persons of the same sex are prohibited in this state. Any marriage entered into by persons of the same sex, where a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas and any contractual or other rights granted by virtue of that license, including its termination, shall be unenforceable in the Arkansas courts.</p> <p>9-11-803: (a)(1) A covenant marriage is a marriage entered into by one (1) male and one (1) female who understand and agree that the marriage between them is a lifelong relationship.</p>
Constitutional Amendment by Citizen Initiative	Constitution Article	<p>SECTION 1: Marriage. Marriage consists only of the union of one man and one woman.</p> <p>SECTION 2: Martial Status. Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the Legislature may recognize a common law marriage from another state between a man and a woman.</p> <p>SECTION 3: Capacity, rights, obligations, privileges, and immunities. The Legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage.</p> <p>NOTE: Amendment 3 was approved by voters on November 2, 2004.</p>
California	Fam. Code § 308.5 [2000]	<p><b>Proposition 22, which states: "Only marriage between a man and a woman is valid or recognized in California," was approved on March 7, 2000 by a margin of 61 to 39.</b></p> <p><b>NOTE: The California initiative process results in laws that may not be repealed or amended by the legislature alone unless specified in the law, but must go back to the voters through another initiative or referendum.</b></p>



# State Definitions of Marriage

	Fam. Code § 300	Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, except as provided by Section 425 and Part 4 (commencing with Section 500). <i>NOTE: This section was passed by the legislature in the 1970's.</i>
Colorado	§ 14-2-104	(1) Except as otherwise provided in subsection (3) of this section, a marriage is valid in this state if: (a) It is licensed, solemnized, and registered as provided in this part 1; and (b) It is only between one man and one woman. (2) Notwithstanding the provisions of section 14-2-112, any marriage contracted within or outside this state that does not satisfy paragraph (b) of subsection (1) of this section shall not be recognized as valid in this state.
Connecticut		
Delaware	§ 13-101 [1996]	(a) A marriage is prohibited and void between a person and his or her ancestor, descendant, brother, sister, uncle, aunt, niece, nephew, first cousin or between persons of the same gender.
Florida	§ 741.212 [1997]	(1) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state. (2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship. (3) For purposes of interpreting any state statute or rule, the term "marriage" means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union.
Georgia	§ 19-3-3.1 [1996]	(a) It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state. (b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.
Constitutional Amendment by Legislative Referendum	Constitution Article I § IV	<i>Recognition of marriage.</i> (a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state. (b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship. <i>NOTE: Amendment 1 was approved by voters on November 2, 2004.</i>

3-2

# State Definitions of Marriage

<b>Hawaii</b>	§ 572-1 [1994]	In order to make valid the marriage contract, <b>which shall be only between a man and a woman</b> , it shall be necessary that: [ ]
	Constitution Article 1 § 23	Section 23. The legislature shall have the power to reserve marriage to opposite-sex couples. [ <i>HB 117 (1997) – passed election Nov 3, 1998</i> ]
<b>Idaho</b>	§§ 32-202, 209 [1996]	32-209: All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.
<b>Illinois</b>	§ 750-5-212 [1996]	(a) The following marriages are prohibited: (5) a marriage between 2 individuals of the same sex.
<b>Indiana</b>	§ 31-11-1-1 [1997]	Sec. 1. (a) Only a female may marry a male. Only a male may marry a female. (b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.
<b>Iowa</b>	§ 595.2 [1998]	1. Only a marriage between a male and a female is valid.
<b>Kansas</b>	§ 23-101 [1996]	(a) The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. The consent of the parties is essential. The marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relation shall only be entered into, maintained or abrogated as provided by law. (b) The state of Kansas shall not recognize a common-law marriage contract if either party to the marriage contract is under 18 years of age.
<b>Kentucky</b>	§§ 402.005, 020, 045 [1998]	402.005: As used and recognized in the law of the Commonwealth, "marriage" refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex. 402.020: (1) Marriage is prohibited and void: (d) Between members of the same sex; 402.045: (1) A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky. (2) Any rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts.
<i>Const. Amend. by Legislative Referendum</i>	Constitution § 233A	Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. <i>NOTE: Amendment 1 was approved by voters on November 2, 2004.</i>
<b>Louisiana</b>	Civil Code §§ 89, 3520 [1999]	§ 89: Persons of the same sex may not contract marriage with each other. A purported marriage between persons of the same sex contracted in another state shall be governed by the provisions of Title II of Book IV of the Civil Code. § 3520: A. A marriage that is valid in the state where contracted, or in the state where the parties were first domiciled as husband and wife, shall be treated as a valid marriage unless to do so would violate a strong public policy of the state whose law is applicable to the particular issue under Article 3519. B. A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.
<i>Const. Amend.</i>	Constitution Article XII,	Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents

# State Definitions of Marriage

<i>by Legislative Referendum</i>	Section 15 [2004]	thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman. <i>NOTE: This legislative referendum was approved by voters on September 18, 2004.</i>
Maine	§ 19A-701 [1997]	<b>1. Marriage out of State to evade law.</b> When residents of this State, with intent to evade this section and to return and reside here, go into another state or country to have their marriage solemnized there and afterwards return and reside here, that marriage is void in this State. <b>5. Same sex marriage prohibited.</b> Persons of the same sex may not contract marriage.
Maryland	Family Law § 2-201 [1973]	Only a marriage between a man and a woman is valid in this State. <i>NOTE: This statute was enacted in 1973, and so predates the current "Defense of Marriage" public discourse.</i>
Massachusetts		<i>NOTE: Same sex marriage is legal in Massachusetts. However, Title III, Chapter 207, Section 11 states: "No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void." This 1913 law is expected to prevent same sex marriages in Massachusetts between parties who reside in other states.</i>
<b>Michigan</b>	§§ 551.1, 271 [1996]	551.1: Sec. 1. Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state. 551.271: Sec. 1. (1) Except as otherwise provided in this act, a marriage contracted between a man and a woman who are residents of this state and who were, at the time of the marriage, legally competent to contract marriage according to the laws of this state, which marriage is solemnized in another state within the United States by a clergyman, magistrate, or other person legally authorized to solemnize marriages within that state, is a valid and binding marriage under the laws of this state to the same effect and extent as if solemnized within this state and according to its laws. (2) This section does not apply to a marriage contracted between individuals of the same sex, which marriage is invalid in this state under section 1 of chapter 83 of the revised statutes of 1846, being section 551.1 of the Michigan Compiled Laws.
<i>Const. Amend. by Citizen Initiative</i>	Constitution Article 1 § 25	Article 1, Section 25: To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose. <i>NOTE: This citizen initiative was approved by voters on November 2, 2004.</i>
Minnesota	§ 517.01 [1997]	Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage may be contracted only between persons of the opposite sex and only when a license has been obtained as provided by law and when the marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom one or both of the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void.
<b>Mississippi</b>	§ 93-1-1 [1997]	(2) Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.

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# State Definitions of Marriage

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<i>Const. Amend. by Legislative Referendum</i>	Constitution § 263-A	Section 263-A. Marriage may take place and may be valid under the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state. <i>NOTE: Amendment 1 was approved by voters on November 2, 2004.</i>
<b>Missouri</b>	§ 451-022 [2001]	1. It is the public policy of this state to recognize marriage only between a man and a woman. 2. Any purported marriage not between a man and a woman is invalid. 3. No recorder shall issue a marriage license, except to a man and a woman. 4. A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted.
	Constitution Article 1 § 33 [2004]	Article 1, Constitution of Missouri, is amended by adding thereto one new section, to be known as section 33, to read as follows: Section 33. That to be valid and recognized in this state, a marriage shall exist only between a man and a woman. <i>NOTE: This citizen initiative was approved by voters on August 3, 2004.</i>
<b>Montana</b>	§ 40-1-401 [1997]	(1) The following marriages are prohibited: (d) a marriage between persons of the same sex. (4) A contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited under subsection (1) is void as against public policy.
<i>Const. Amend. by Citizen Initiative</i>	Constitution Article XIII, Section 7	Article XIII of The Constitution of the State of Montana is amended by adding a new section 7 that reads: Section 7. Marriage. Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.  <i>NOTE: Citizen initiative 96 was approved by voters on November 2, 2004.</i>
<b>Nebraska</b>	Constitution Article 1 § 29 [2000]	Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska. <i>Source: Neb. Const. art. I, sec. 29 (2000); Adopted 2000, Initiative Measure No. 416.</i>
<b>Nevada</b>	§ 122.020	1. A male and a female person, at least 18 years of age, not nearer of kin than second cousins or cousins of the half blood, and not having a husband or wife living, may be joined in marriage.
	Constitution Article 1 § 21	"Only a marriage between a male and female person shall be recognized and given effect in this state." <i>NOTE: Citizen initiative was approved by voters in 2000 and 2002.</i>
New Hampshire	§43-457-1 and 2 [1987]	457-1: No man shall marry his mother, his father's sister, mother's sister, daughter, sister, son's daughter, daughter's daughter, brother's daughter, sister's daughter, father's brother's daughter, mother's brother's daughter, father's sister's daughter, mother's sister's daughter, or any other man. 457-2: No woman shall marry her father, her father's brother, mother's brother, son, brother, son's son, daughter's son, brother's son, sister's son, father's brother's son, mother's brother's son, father's sister's son, mother's sister's son, or any other woman. <i>NOTE: These statutes were amended and the language "or any other man" and "or any other woman" was added in 1987.</i>
New Jersey		
New Mexico	§ 40-1-18 § 40-2-1 thru 9	<i>NOTE: In a letter dated 2/20/04, the state attorney general issued an opinion that marriage licenses for same-sex couples would be invalid under current law, which refers to marriage applicants as "husband and wife." This "husband and wife" language does not rise to the level of banning same sex marriage. According to NCSL's definition, New Mexico does not have a DOMA.</i>

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New York		
North Carolina	§ 51-1.2 [1996]	Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.
<b>North Dakota</b>	§ 14-03-01 [1997]	Marriage is a personal relation arising out of a civil contract between one man and one woman to which the consent of the parties is essential. The marriage relation may be entered into, maintained, annulled, or dissolved only as provided by law. A spouse refers only to a person of the opposite sex who is a husband or a wife.
<i>Const. Amend. by Citizen Initiative</i>	Constitution Article XI	A new section to Article XI of the Constitution of North Dakota is created and enacted as follows: Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect. <i>NOTE: This citizen initiative was approved by voters on November 2, 2004.</i>
<b>Ohio</b>	S.B. 272 [2004]	§ 3101.01 (C)(1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state. (2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state. (3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes is void ab initio. Nothing in division (C)(3) of this section shall be construed to do either of the following: (a) Prohibit the extension of specific benefits otherwise enjoyed by all persons, married or unmarried, to nonmarital relationships between persons of the same sex or different sexes, including the extension of benefits conferred by any statute that is not expressly limited to married persons, which includes but is not limited to benefits available under Chapter 4117. of the Revised Code; (b) Affect the validity of private agreements that are otherwise valid under the laws of this state.
<i>Const. Amend. by Citizen Initiative</i>	Constitution Article XV § 11	Section 11. Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage. <i>NOTE: This citizen initiative was approved by voters on November 2, 2004.</i>
<b>Oklahoma</b>	§§ 43-3, 3.1 [1996]	43.3: Any unmarried person of the age of eighteen (18) years or upwards and not otherwise disqualified is capable of contracting and consenting to marriage with a person of the opposite sex 43-3.1: A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.
<i>Const. Amend. by Legislative Referendum</i>	Constitution Article II § 35	Section 35. A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups. B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage. C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

# State Definitions of Marriage

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		<i>NOTE: This legislative referendum was approved by voters on November 2, 2004.</i>
<b>Oregon</b> <i>Const. Amend. by Citizen Initiative</i>	Constitution Article 15 § 5A	It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.  <i>NOTE: This citizen initiative was approved by voters on November 2, 2004.</i>
Pennsylvania	§§ 23-1102, 1704 [1996]	23-1102: "Marriage." A civil contract by which one man and one woman take each other for husband and wife. 23-1704: It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.
Rhode Island		
South Carolina	§ 20-1-15 [1996]	A marriage between persons of the same sex is void ab initio and against the public policy of this State.
South Dakota	§§ 25-1-1, 38 [1996]	25-1-1: Marriage is a personal relation, between a man and a woman, arising out of a civil contract to which the consent of parties capable of making it is necessary. Consent alone does not constitute a marriage; it must be followed by a solemnization. 25-1-38: Any marriage contracted outside the jurisdiction of this state, except a marriage contracted between two persons of the same gender, which is valid by the laws of the jurisdiction in which such marriage was contracted, is valid in this state.
Tennessee	§ 36-3-113 [1996]	(a) Tennessee's marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society. To that end, it is further the public policy of this state that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage. (b) The legal union in matrimony of only one (1) man and one (1) woman shall be the only recognized marriage in this state. (c) Any policy, law or judicial interpretation that purports to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman is contrary to the public policy of Tennessee. (d) If another state or foreign jurisdiction issues a license for persons to marry which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state.
Texas	Fam. Code §§ 2.001, 3.401, 6.204 [1973]  Government Code § 810.001 [2003]	2.001: (a) A man and a woman desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state. (b) A license may not be issued for the marriage of persons of the same sex. 3.401: (5) "Spouse" means a husband, who is a man, or a wife, who is a woman. A member of a civil union or similar relationship entered into in another state between persons of the same sex is not a spouse. 6.204: (a) In this section, "civil union" means any relationship status other than marriage that: (1) is intended as an alternative to marriage or applies primarily to cohabiting persons, and; (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage. (b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state. (c) The state or an agency or political subdivision of the state may not give effect to a: (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction, or; (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between

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		<p>persons of the same sex or a civil union in this state or in any other jurisdiction.</p> <p>810.001: (g) "<b>Civil union</b>" means any relationship status that grants to the parties of the relationship the same legal protections, benefits, and responsibilities as are granted to the spouses of a marriage.</p> <p>(h) For purposes of this title, the state may not give effect to a:</p> <p>(1) public act, record, or judicial proceeding that recognizes or validates a marriage or <b>civil union</b> between persons of the same sex; or</p> <p>(2) right or claim asserted as a result of the purported marriage or <b>civil union</b>.</p> <p>(i) Subsection (h) does not preclude the enforcement in this state of an order issued in another state relating to child custody, child support, or property division, including a qualified domestic relations order.</p>
Utah	§§ 30-1-2, 4 [1995]	<p>30-1-2: The following marriages are prohibited and declared void: (5) between persons of the same sex.</p> <p>30-2-4: A marriage solemnized in any other country, state, or territory, if valid where solemnized, is valid here, unless it is a marriage:</p> <p>(1) that would be prohibited and declared void in this state, under Subsection 30-1-2(1), (3), or (5); or</p>
	§30-1-4.1 [2004]	<p>Marriage recognition policy. (1) (a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.</p> <p>(b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.</p> <p>(2) Nothing in Subsection (1) impairs any contract or other rights, benefits, or duties that are enforceable independently of this section. <i>NOTE: SB 24 -Enacted 3/23/04</i></p>
<i>Const. Amend. by Legislative Referendum</i>	Constitution Article I § 29	<p>Article I, Section 29. [Marriage.] (1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.</p> <p><i>NOTE: This legislative referendum was approved by voters on November 2, 2004.</i></p>
Vermont	§ 15-1-8 [1999]	Marriage is the legally recognized union of one man and one woman. (1999)
Virginia	§ 20-45.2 [1997]	A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.
Washington	§§ 26-04-010, 020 [1998]	<p>26-04-010: (1) Marriage is a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable.</p> <p>26-04-020: (1) Marriages in the following cases are prohibited: (c) When the parties are persons other than a male and a female.</p> <p>(3) A marriage between two persons that is recognized as valid in another jurisdiction is valid in this state only if the marriage is not prohibited or made unlawful under subsection (1)(a), (1)(c), or (2) of this section.</p>
West Virginia	§§ 48-1-7, 18A [2000]	48-2-603: A public act, record or judicial proceeding of any other state, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state, territory, possession, or tribe, or a right or claim arising from such relationship, shall not be given effect by this state.
Wisconsin	§ 765.001	<p>[ ] Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support. [ ]</p> <p><i>NOTE: This "husband and wife" language does not rise to the level of banning same sex marriage. According to NCSL's definition, Wisconsin does not have a DOMA.</i></p>
Wyoming	§ 20-1-101	Marriage is a civil contract between a male and a female person to which the consent of the parties capable of

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		contracting is essential. <i>NOTE: this statute was originally enacted in 1876 and last amended in 1957.</i>
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**Appendix A: Statutory Rights and Responsibilities of Same-Sex Couples Compared State-by-State**

	<b>Alaska</b> (A. S. §47.24.016 §39.50.200)	<b>Arizona</b> (A.R.S. §36-3231 §36-843)	<b>California</b> (ABs 26, 25, 2005, 2216, SB 1661)	<b>Connecticut</b> (P.A. 02-105, Comptroller Memo 200-13)	<b>Delaware</b> (Merit Rules 5.3.4, 5.3.6.2, 5.3.6.3, 19)	<b>Hawaii</b> (H.R.S. §572C)	<b>Iowa</b> (AFSCME contract)
<b>Hospital and Nursing Home Visitation</b>	No provision	No provision	Private visits in hospitals and nursing homes	Private visits in nursing homes	No provision	Hospital and nursing home visitation	No provision
<b>Medical Decision-making</b>	Priority in protective service decision-making above all but surviving spouse	Priority in anatomical gift and health care decisions behind that of a patient's spouse, adult child or parent	Health care and end-of-life decisions for incapacitated partner	Priority in anatomical gift decisions above all but surviving spouse	No provision	Health care decisions Consent to perform an autopsy	No provision
<b>Civil Claims</b>	No provision	No provision	Wrongful death of partner Negligent infliction of emotional distress when serious injury to partner observed	No provision (but survivor can file administrative claim when maker is homicide victim)	No provision	Wrongful death of partner Loss of consortium Tort liability	Protection under domestic violence laws No provision
<b>Property Transfer Upon Death</b>	No provision	No provision	Simple will form includes box to check to leave property to surviving partner Inheritance under the intestacy laws identical to surviving spouse	Assumption of motor vehicle ownership upon maker's death	No provision	Inheritance under the intestacy laws Property rights (including joint tenancy) Family and homestead allowances and exempt property amount Right of election against will	No provision
<b>Appointment as Estate Administrator</b>	No provision	No provision	Same priority as a surviving spouse	No provision	No provision	Same priority as surviving spouse	No provision
<b>Employment</b>	No provision	No provision	Unemployment benefits upon partner relocation Family and medical leave to care for ill partner or partner's child Health insurance coverage for domestic partners Health insurance continuation upon death for partner and partner's children (state employees only) Death benefits and survivor's allowances (certain county employees)	Health care and pension benefits for same-sex domestic partners of state retirees and employees and their eligible dependent children Employers must notify employees of emergency phone calls involving designees Employers cannot discipline designees for attending court proceedings as homicide victim's representative	Bereavement leave to same-sex and different-sex domestic partners of state employees Sick leave for attendance at doctor's appointments of domestic partners or for the serious illness or injury of a domestic partner	Workers compensation Family and bereavement leave Limited health insurance coverage Death and retirement benefits for certain state and local employees	State employees of largest union are eligible for health and dental benefits for their domestic partners and the children of their domestic partners
<b>Taxation</b>	No provision	No Provision	Money spent to cover domestic partner and partner's children under employer's health plan is not taxable as income	No provision	No provision	Gifts of certain real estate interests between reciprocal beneficiaries are exempt from transfer taxes	No provision

	<b>Maine</b> (L.D. 1579, M.R.S.A. Title 24-A § 2832-A; § 2741-A)	<b>Massachusetts</b> (Exec. Order 340)	<b>Minnesota</b> (collective bargaining)	<b>Nevada</b> (N.R.S. 449.715, 451.024)	<b>New Mexico</b> (Exec. Order No. 2003-010)	<b>New Jersey</b> (P.L. 2003)	<b>New York</b> (union contract)
<b>Hospital and Nursing Home Visitation</b>	No provision	No provision	No provision	Visits in hospitals and nursing homes only if designated in writing	No provision	Hospital and nursing home visitation for domestic partners and their children	No provision
<b>Medical Decision-making</b>	Preference in funeral, burial and cremation decisions  Preference for medical or legal decisions for incapacitated domestic partner via guardianship or conservatorship	No provision	No provision	Rights to order burial of remains only if designated in writing	No provision	Medical or legal decisions for incapacitated domestic partner Consent to perform an autopsy  Authorize donation of the deceased partner's organs	No provision
<b>Civil Claims</b>	Victim's compensation rights	No provision	No provision	No provision	No provision	No provision	No provision
<b>Property Transfer Upon Death</b>	Inheritance under the intestacy laws Right of election against will	No provision	No provision	No provision	No provision	No provision	No provision
<b>Appointment as Estate Administrator</b>	Same priority as a surviving spouse	No provision	No provision	No provision	No provision	No provision	No provision
<b>Employment</b>	Insurers and health care providers must offer coverage for domestic partners at same cost as for spouse	Bereavement and family sick leave for certain state employees	Previously offered health insurance benefits to domestic partners of state employees partners	No provision	Benefits extended to domestic partners of state employees to same extent as spouses	Dental and health insurance benefits for domestic partners Retirement benefits for domestic partners of state employees	State employees are eligible for health, vision and dental benefits for their domestic partners
<b>Taxation</b>	No provision	No Provision	No provision	No provision	No provision	Domestic partner exempt from State inheritance tax on same grounds as spouse  Domestic Partner may be claimed as additional personal exemption for State income tax purposes if the partner does not file a separate income tax return	No provision

	<b>Oregon</b> (Or. Adm. R. 101-015-0005, 101-010-0005, 101-020-0020, 101-020-0035, 101-030-0005)	<b>Pennsylvania</b> (collective bargaining)	<b>Rhode Island</b> (R.I. Gen. Laws §36-12-1 et seq.)	<b>Vermont</b> (15 V.S.A. §1201 et. seq. and 18 V.S.A. §5160 et. seq.)	<b>Washington</b> (WAC §182-12-119)
<b>Hospital and Nursing Home Visitation</b>	No provision	No provision	No provision	Hospital and nursing home visitation rights parallel with spouses Rights to emergency notification	No provision
<b>Medical Decision-making</b>	No provision	No provision	No provision	Health care decisions Consent to perform autopsy Anatomical gift, burial and cremation decisions	No provision
<b>Civil Claims</b>	No provision	No provision	No provision	Wrongful death of partner Loss of consortium Infliction of emotional distress General tort liability Protection under domestic violence laws Victim's compensation rights Access to all domestic relations laws	No provision
<b>Property Transfer Upon Death</b>	No provision	No provision	No provision	Inheritance under the intestacy laws Waiver of will equivalent to surviving spouse Property rights (including tenancy by the entirety) Homestead rights of surviving spouse	No provision
<b>Appointment as Estate Administrator</b>	No provision	No provision	No provision	Same priority in appointment as surviving spouse	No provision
<b>Employment</b>	Medical, dental, life insurance and long-term care benefits available to domestic partners of state employees	Family and sick leave to care for domestic partners of some state employees and their children	Health insurance coverage and benefits for domestic partners of state employees	Group insurance for state employees Workers compensation Family leave benefits	Medical, dental and life insurance benefits available to domestic partners of State workers and retired State employees
<b>Taxation</b>	No provision	No Provision	No provision	Homestead property tax allowance Benefits of laws relating to taxes imposed by the state or a municipality other than estate	taxe No provision

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### III. MISSION STATEMENT OF THE WORKING GROUP

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The mission of the American Bar Association Family Law Section Working Group on Same-Sex Marriages and Non-Marital Unions is to study and report to the ABA on the status and legal ramifications of recognition of same-sex marriages and non-marital unions.

### IV. EXECUTIVE SUMMARY

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In recent years, a prominent issue has been whether same-sex couples should be able to marry, form civil unions, or enter into domestic partnerships. In the last ten years, courts and legislatures have enacted or issued hundreds of court opinions, statutes, local ordinances, constitutional amendments, and proposed constitutional amendments to address these issues. Scrutiny of the issue rose to an even higher level after the Supreme Judicial Court of Massachusetts held in November 2003 that same-sex couples have a right to marry under the state's constitutional principles of individual liberty and equality.

To help promote objective analysis of the subject, the American Bar Association Section of Family Law created a Working Group on Same-Sex Marriages and Non-Marital Unions. The working group produced this white paper to describe the state of the law in the United States and other countries regarding same-sex marriages, civil unions, and domestic partnerships, and to clarify areas of law that would be impacted by recognition of such unions.

#### History of Marriage

The concept of marriage has changed over the centuries. In Biblical times, polygamy (having more than one wife) was common. Throughout the nineteenth century, polygamy also was practiced by Mormons in the United States and continues to be practiced in some Islamic cultures. Polyandry (having more than one husband) was practiced in Central Asia, particularly in Tibet, Sri Lanka, and southern India.

In second-century Rome, marriage contracts between two men of the same age were permitted, although men

who entered into such marriages also were ridiculed. The Catholic Church was not formally involved in marriage ceremonies until the Middle Ages. In 1753, England passed the Marriage Act, which took control of marriage from individuals and the church and vested it in the state as a legal entity. From that point on, marriages in England that had not taken place in the Church of England or in a synagogue were rendered invalid. Another marriage act, passed in 1836, provided that marriage was a civil action effected by mutual consent and did not require a religious ceremony.

American colonies provided a mixture of civil and religious marriage ceremonies, according to the laws and customs of the area. Common law marriages also were allowed. In the nineteenth century, members of the Oneida Community in New York practiced "complex marriage." Adult members of the community were married to all other adult members of the community, and the group regulated sexual contact. Interracial marriages were prohibited in many states until 1967, when the United States Supreme Court in *Loving v. Virginia* struck down such laws, saying: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness. . . ."

The Census Bureau reports that in the year 2000, there were 54.5 million married couples in the United States (made up of a man and a woman). In the same year, there were 5.5 million couples that were living together, but were not married. Of that number, about one in nine couples (594,000) had partners of the same sex, although that may be a low estimate.

## Developments in the Law Regarding Sexual Orientation and Gender Identity

**Sodomy statutes.** Over the last twenty years, the law has changed significantly regarding sexual orientation and gender identity. In 2003, the U.S. Supreme Court in the case of *Lawrence v. Texas*, overruled a 1986 case that upheld the sodomy conviction of two gay men for consensual conduct in the bedroom of one of the men's homes. The Court in *Lawrence* held that making private sexual conduct a crime was a violation of due process.

**Equal protection.** In another case, the U.S. Supreme Court struck down a state constitutional amendment that sought to preclude all enactments that would prohibit discrimination against persons based on their sexual orientation. The Court said that the state constitutional amendment was motivated by animus to a particular class of people and thus, under equal-protection analysis, the amendment was not rationally related to legitimate state interests.

**Employment discrimination.** Fourteen states and the District of Columbia have statutes that prohibit discrimination in employment on the basis of sexual orientation, and four of those states prohibit discrimination on the basis of gender identity. Some states use executive orders to prohibit such discrimination. No federal statute prohibits discrimination in employment on the basis of sexual orientation or gender identity.

**Custody and visitation.** A trend in the law is for states to treat a parent's sexual orientation as a neutral factor in deciding custody or visitation – meaning that a parent's sexual orientation will not justify loss of custody or a restriction on visitation, unless it is shown that the parent's sexual orientation or activities have harmed the child. In some states, however, being lesbian or gay, without any showing of harm, is sufficient to deny that parent custody or restrict visitation.

**Adoption.** Many states allow same-sex couples to enter into second-parent or joint adoptions. A second-parent adoption allows a same-sex partner to adopt her or his partner's biological or adoptive child without terminating the first legal parent's rights. Other states, however, including Florida, prohibit gay and lesbian individuals from adopting children.

**Military.** The "Don't Ask, Don't Tell Policy" has been in effect since 1993. The policy provides that a member of the armed forces shall be discharged if: (1) the member has engaged in or has solicited another to engage in "homosexual acts"; (2) the member has stated that he or she is lesbian, gay, or bisexual, or words to that effect; or (3) the member has married or attempted to marry a person of the same sex. In the year 2000, 1,231 service members were discharged under the policy. Multiple legal actions are challenging the policy.

**Schools.** Eight states and the District of Columbia have laws prohibiting discrimination or harassment of students on the basis of sexual orientation, and three states (California, Minnesota, and New Jersey) explicitly prohibit discrimination or harassment in schools on the basis of gender identity or expression. At least four states have promulgated professional standards for educators, prohibiting discrimination against students on the basis of sexual orientation. In addition to these statutes, courts have held that failure of a school to respond to discrimination on the basis of actual or perceived sexual orientation violates the Equal Protection Clause.

**Transgender people and marriage.** Only a handful of courts have ruled on the validity of a marriage entered into after a transsexual person has undergone sex-reassignment. At least two courts have recognized the individual's reassigned sex for the purpose of marriage. In contrast, a few courts have ruled that, for purposes of marriage, a person's legal sex is irrevocably determined at birth.

## Areas of Law Affected

The United States government's General Accounting Office (GAO) has identified 1,138 federal rights, responsibilities, and privileges automatically accorded to couples based on marital status. In addition, state and local governments as well as private organizations provide hundreds of additional rights based on marital status. The areas of law include: family law, taxation, health-care law, probate, torts, government benefits and programs, labor law, private-sector benefits, real estate, bankruptcy, immigration, and criminal law. If recognition is given to same-sex marriages and other unions or partnerships, more than one thousand rights and responsibilities of different-sex couples will be extended to cover couples of the same sex.

## Case Law

Three state supreme courts have declared (or seemed prepared to declare) substantial rights to same-sex couples. In November 2003, the Supreme Judicial Court of Massachusetts held in *Goodridge v. Department of Public Health* that same-sex couples have a right to marry under the state constitution's principles of individual liberty and equality. Four years earlier, the Supreme Court of Vermont held that same-sex couples do not necessarily have a right to marry, but they do have a right under the state constitution to the same benefits and protections as different-sex couples who marry. In 1993, the Supreme Court of Hawaii held that a prohibition of marriage by same-sex couples might constitute sex discrimination under the state constitution. After that decision, Hawaii amended its constitution to allow the legislature "to reserve marriage to opposite-sex couples."

Courts of review in six other jurisdictions (Arizona, the District of Columbia, Kentucky, Minnesota, Pennsylvania, and Washington) have held that prohibitions of same-sex marriages were constitutional under different principles, including due process and equal protection. In the Massachusetts *Goodridge* case, three justices dissented, stating that the decision of whether to allow same-sex couples to marry should be made by the legislature, not the courts.

### **Statutory Protections**

Many states provide statutory protections and rights to same-sex couples, and some states provide benefits to state employees in same-sex relationships. These rights, protections, and benefits vary from state to state.

Only one state permits civil unions (Vermont), two states provide reciprocal beneficiary relationships (Hawaii and Vermont), and three states provide state domestic partnership registries (California, Maine, and New Jersey). Vermont's civil-union status grants same-sex couples all of the hundreds of state-conferred rights and responsibilities as different-sex couples, at least while the couple resides in Vermont. Other states provide more limited protections, ranging from one to two to approximately sixty to seventy of the hundreds of state-conferred rights. Such rights include, but are not limited to: hospital visitation, the right to make health-care decisions, eligibility for certain tort claims, workers' compensation, family leave, eligibility for family health insurance for state employees, inheritance under the intestacy laws, and state tax deductions or exemptions. In addition to statutory protections, approximately seventy cities and counties also provide domestic partner registries.

### **Defense of Marriage Acts (DOMAs)**

In the mid-1990s, states began enacting so-called "defense of marriage acts" (DOMAs). The purpose of the state DOMAs is to prohibit same-sex couples from marrying within the state and to provide that the state will not recognize such marriages performed in other states. By April 2004, thirty-eight states had DOMAs, four of which are provided in the respective state's constitutions.

The U.S. government has a defense of marriage act that provides for the purpose of federal laws and regulations: "'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 a wife." The federal DOMA also provides that no state shall be required to recognize a marriage entered into by a same-sex couple in another state.

In 2003 and 2004, resolutions were introduced in Congress to amend the United States Constitution to provide that "Marriage in the United States shall consist only of the union of a man and a woman" and to further

provide that neither the federal constitution nor state constitutions shall be construed to require that marital status or the legal incidents of marriage be conferred on any union other than the union of a man and a woman. Amendment of the U.S. Constitution requires a two-thirds vote of both the House and the Senate and approval by three-quarters of the states.

### **Recognition of Same-Sex Partnerships and Provision of Benefits by Private Sector Employers and Public Employers**

The number of private sector employers offering domestic-partnership health benefits has increased by 39% in the last three years – to a total of approximately 6,800 employers. The number of Fortune 500 companies offering health benefits is now at 211.

Ten state governments provide health benefits for domestic partners, and as of April 2004, 130 city and county governments provide such benefits. More than 40% of these entities have offered the rights since 2000. Only 2% or less of employees eligible for employer-provided domestic partnership benefits actually apply for coverage.

### **Recognition of Same-Sex Couples in Other Countries**

Presently, three countries allow same-sex couples to marry (Netherlands, Belgium, and several provinces in Canada). Canada is expected to extend such privileges to couples throughout the country some time in 2005.

In addition to full marriage rights, many northern European countries allow same-sex couples to enter into legal relationships with most of the rights and responsibilities of marriage. In 1989, Denmark became the first country to offer same-sex couples the right to enter into a registered partnership, and Denmark was followed by Norway, Sweden, Iceland, and Finland. Generally, registered partnerships provide all rights and responsibilities associated with marriage, except that in some countries, partners cannot adopt children who are not biologically related to one of the parents.

In 1995, Hungary extended common law marriage to same-sex couples. Since that time, Croatia, France, Portugal, and Germany, have created legal recognition for same-sex couples. In France, the recognition is called a "civil solidarity pact" (PACS), which allows for the registration of private contracts between two unmarried and unrelated individuals – either same-sex or different-sex – and grants access to benefits and obligations similar to those that exist for married couples. In several other countries, including Brazil, Colombia, Costa Rica, the Czech Republic, Israel, and New Zealand, same-sex couples have been granted some rights or responsibilities associated with marriage.