

2014

# The Geography of Marriage

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## Recommended Citation

LaPiana, William P., "The Geography of Marriage" (2014). *Articles & Chapters*. 978.  
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*Estates, Gifts and Trusts Journal*  
2014  
01/09/2014  
ARTICLES

**39 Estates, Gifts and Trusts Journal 3**
**The Geography of Marriage**

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In 1993, the Hawaii Supreme Court issued its decision in *Baehr v. Lewin*<sup>1</sup> holding that unless the state could show a compelling reason for denying a marriage license to a same-sex couple, the court would require that such licenses be issued. In Hawaii, the response was a statute expressly reserving the definition of marriage to the legislature, which then passed a "reciprocal beneficiary" statute giving some of the legal consequences of marriage to couples who could not marry. The most significant response, however, was a federal statute, the so-called Defense of Marriage Act (DOMA), signed into law by President Bill Clinton on September 21, 1996.<sup>2</sup> DOMA provided a federal definition of marriage — marriage involves "one man and one woman" — and stated that no state was required to recognize any other sort of marriage even if that marriage was valid in a sister state.

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<sup>1</sup> 74 Haw. 530, 852 P.2d 44 (1993).

<sup>2</sup> P.L. 104-199, 1 USC §7.

The Supreme Court of Vermont planted the next milestone on the road to same-sex marriage with its opinion in *Baker v. State*,<sup>3</sup> in which it found that the denial of a marriage license to a same-sex couple violated the "common benefits" clause of the state constitution<sup>4</sup> and told the legislature that unless it extended marriage, or at least the benefits of marriage, to same-sex couples the court could order that marriage licenses be granted. The result was the nation's first civil union legislation, which gave same-sex couples the choice to enter into a civil union that gave them all of the rights and responsibilities of marriage, denying their relationship only the word "marriage."

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<sup>3</sup> 170 Vt. 194 744 A.2d 864 (1999).

<sup>4</sup> "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community ...." Vt. Const. ch. 1 art. 7.

Then, in 2003, the Massachusetts Supreme Judicial Court in its opinion in *Goodridge v. Department of Public Health*,<sup>5</sup> held that denial of a marriage license to a same-sex couple lacked a rational basis and violated the equal protection guarantee of the Commonwealth's constitution. The remedy was to remand the case for the entry of an appropriate order, delayed 180 days to give the legislature the opportunity to act. It did not, and, consistent with the holding in the case, same-sex couples began to marry on May 17, 2004.

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<sup>5</sup> 440 Mass. 309, 798 N.E.2d 941 (2003).

Today, less than 10 years later (and only 20 years since the decision in *Baehr*), same-sex couples may validly enter into marriage in 18 states and the District of Columbia. And §3 of DOMA, defining marriage for all federal purposes as existing only between one man and one woman has been struck down as unconstitutional by a deeply divided United States Supreme Court in *United States v. Windsor*.<sup>6</sup>

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<sup>6</sup> 133 S. Ct. 2675 (2013).

Change like this taking place in a relatively short period of time is sometimes difficult to fully comprehend and even harder to explain. Even more remarkable is the way the change has come about. As Americans, we might expect that advances in civil rights come from the courts and, to the extent one sees the issue of same-sex marriage as a civil rights issue, the first steps were indeed taken by state supreme courts. But same-sex marriage has been instituted not only by court order but by legislation defining marriage to include same-sex couples and popular referenda adopting this new definition (and referenda to create statutes and constitutional provisions limiting the definition of marriage to one man and one woman have generally been overwhelmingly successful). Finally, states that enacted civil union legislation or other types of marriage substitutes, such as registered domestic partnerships, moved fairly quickly, especially after the *Windsor* decision, to enact what is now known as marriage equality.

This decline in the use of marriage substitutes in favor of allowing both same-sex and different-sex couples to marry has diminished somewhat the usefulness of describing the various sorts of marriage substitutes. After all, married means, well, married, and every couple who enter into the state-defined relationship of marriage are legally equal in every way to every other married couple, at least so long as they are in a jurisdiction that recognizes the validity of their marriage, and today most same-sex married couples find themselves in a jurisdiction that either recognizes their marriage or does not. Gone are the days (and mercifully brief they were) when, to use a geographical example, a validly married same-sex couple could board Amtrak's Acela in Boston en route to the nation's capital and be married in Massachusetts, without legal status in Rhode Island whose civil union statute forbade recognition of same-sex marriages valid where celebrated, married in Connecticut, married in New York, in a civil union in New Jersey, without legal status in Pennsylvania, in a Delaware civil union, recognized as married in Maryland even though they could not contract a marriage in that state, which did not have any sort of marriage substitute, and finally be a married couple once again in the District of Columbia. In December 2013, our hypothetical couple is just plain married, except in Pennsylvania where the couple has no legal status (although litigation now underway may change that).

Until June 26, 2013, this little story was complicated enough, but with the invalidation of DOMA §3, the federal government is not prevented from recognizing valid same-sex marriages. Putting recognition into practice, however, turns out to be a complex task that various federal agencies have approached differently.

The IRS has decided to treat as married every married couple who has been validly married no matter where the couples reside.<sup>7</sup> The Social Security Administration, however, has initially decided that eligibility for spousal benefits requires the existence of a valid marriage and that the "number holder" (the person on whose earnings record the claim is being made) be domiciled at the time the application for benefits is made in a state that recognizes the marriage.<sup>8</sup> The Department of Labor has made different determinations for different federal regulatory regimes. For purposes of the Family Medical Leave Act (FMLA), the existence of a marriage depends on the law of the state where the employee resides.<sup>9</sup> Pension benefits from plans subject to ERISA, on the other hand, are subject to a place of celebration rule identical to the IRS rule: So long as a valid marriage exists, the couple is married, no matter where they reside.<sup>10</sup> The varying statutory and regulatory bases for these decisions are far beyond the scope of this brief article, but they, for now at least, are a fact and they illustrate clearly that the answer to the question, "Are you married?" directed to a same-sex couple, can only be answered, "It depends on where we are at the moment and in what context."

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<sup>7</sup> Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

<sup>8</sup> Soc. Sec. Admin., Program Operations Manual GN 00210 TN 03 (12/16/13).

<sup>9</sup> U.S. Dept. of Labor, Wage and Hour Division, Fact Sheet #28F.

<sup>10</sup> U.S. Dept. of Labor, Employee Benefits Security Administration, Technical Release No. 2013-04.

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The following chart, adapted from the Social Security Administration's Program Operations Manual and updated to include Illinois,<sup>11</sup> shows when same-sex marriages were first recognized and first allowed in the states:

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<sup>11</sup> The chart does not reflect late Dec. 2013 developments in Utah and New Mexico, which are discussed below.

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State	Date Same-Sex Marriages From Any Other State Were Recognized	Date Same-Sex Marriages Were Permitted in the State
California	June 17, 2008–November 4, 2008	June 17, 2008–November 4, 2008
	June 26, 2013–present	June 26, 2013–present
Connecticut	November 12, 2008	November 12, 2008
Delaware	July 1, 2013	July 1, 2013

Hawaii	December 2, 2013	December 2, 2013
Illinois	June 1, 2014	June 1, 2014
Iowa	April 30, 2009	April 20, 2009
Maine	December 29, 2012	December 29, 2012
Maryland	February 23, 2010	January 1, 2013
Massachusetts	May 17, 2004	May 17, 2004
Minnesota	August 1, 2013	August 1, 2013
New Hampshire	January 1, 2010	January 1, 2010
New Jersey	October 21, 2013	October 21, 2013
New York	February 1, 2008	July 24, 2011
Rhode Island	May 14, 2012	August 1, 2013
Vermont	September 1, 2009	September 1, 2009
Washington	December 6, 2012	December 6, 2012
Washington, DC	July 7, 2009	March 9, 2010

*California:* Marriage is recognized under the decision of the California Supreme Court in *In re Marriage Cases*,<sup>12</sup> which held that limiting marriage to different-sex couples is unconstitutional. Licenses were first issued on the date in the chart. The result in the case was overturned by the approval on November 5, 2008 of Proposition 8 amending the state constitution to limit marriage to one man and one woman. The California Supreme Court upheld the amendment but refused to invalidate the marriages that had been performed in the period when same-sex marriages were allowed. The federal district court for the Northern District of California held Proposition 8 to be unconstitutional in *Perry v. Schwarzenegger*,<sup>13</sup> and the Ninth Circuit affirmed in *Perry v. Brown*.<sup>14</sup> Certiorari was granted and the appeal dismissed by the U.S. Supreme Court on June 26, 2013.<sup>15</sup> The state immediately resumed issuing marriage licenses to same-sex couples.

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<sup>12</sup> 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683 (2008).

<sup>13</sup> 704 F. Supp. 2d 921 (N.D. Cal 2010).

<sup>14</sup> 671 F.3d 1052 (9th Cir. 2012).

<sup>15</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

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*Connecticut:* The state supreme court, in *Kerrigan v. Commissioner of Public Health*,<sup>16</sup> held that denying same-sex couples marriage licenses violated the state constitutional guarantee of equal protection under the law. The decision was handed down on October 28, 2008 and on remand the superior court issued an order under which marriage licenses would be issued to same-sex couples beginning on November 12, 2008.<sup>17</sup> The legislature followed suit and enacted marriage equality effective April 23, 2009.<sup>18</sup> At the same time, the legislature repealed the existing civil union statutes effective October 1, 2010.<sup>19</sup> Like other states that have made the transition from civil union to marriage, Connecticut allowed persons in a civil union to turn the civil union into a marriage and the remaining civil unions automatically become marriages on a stated date (October 1, 2010).<sup>20</sup>

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<sup>16</sup> 289 Conn. 135, 957 A.2d 407 (2008).

<sup>17</sup> *Kerrigan and Mock v. Department of Public Health*, 2008 WL 5203867 (Conn. Super. 2008) (Trial Order).

<sup>18</sup> Conn. Gen. Stat. §46b-20a.

<sup>19</sup> Conn. Gen. Stat. Ch. 815F.

<sup>20</sup> Conn. Gen. Stat. §§46b-38qq, 46b-38rr.

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*Delaware:* Delaware adopted civil union legislation effective on January 1, 2012 and legislation giving full marriage equality became effective on July 1, 2013.<sup>21</sup> The statutes also recognize as married for purposes of Delaware law "two persons of the same gender who are parties to a legal union other than a marriage" no matter how described so long as their union was legally entered into, would not be otherwise prohibited (as incestuous or bigamous), and carries with it "substantially the same rights, benefits, protections, responsibilities, obligations and duties as a marriage."<sup>22</sup>

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<sup>21</sup> Del. Code Ann. tit. 13, §101.

<sup>22</sup> *Id.*

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The civil union legislation has not been repealed, but civil unions will not be performed on or after July 1, 2013 and the parties to a civil union can apply for a marriage license and have the civil union converted into a marriage without solemnization.<sup>23</sup> On July 1, 2014, all existing civil unions will automatically be converted into marriages, and in all cases the effective date of the marriage for state law purposes is the date of the solemnization of the original civil union.<sup>24</sup> Civil unions were limited to persons of the same sex.<sup>25</sup>

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<sup>23</sup> Del. Code Ann. tit. 13, §§201–218.

<sup>24</sup> Del. Code Ann. tit. 13, §218(c).

<sup>25</sup> Del. Code Ann. tit. 13, §202(3).

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*Hawaii:* Hawaii, where it all began, authorized civil unions beginning on January 1, 2012. On November 13, 2013, the governor signed the bill amending Haw. Rev. Stat. Chapter 572 to authorize same-sex marriage, and the new law came into effect on December 2. The legislation also amends Haw. Rev. Stat. §572-3 to recognize as valid in Hawaii all marriages valid where celebrated. Hawaii's civil union statute<sup>26</sup> apparently remains intact and the legislation expressly does not invalidate existing reciprocal beneficiary arrangements.<sup>27</sup> The reciprocal beneficiary arrangement is available to any two persons who cannot legally marry and would include siblings or other relatives prohibited from marrying. The legislation also provides for marriages of persons currently in civil unions or reciprocal beneficiary arrangements. If partners in a civil union marry, the "rights, benefits, protections, and responsibilities" created by the civil union continue through the marriage and are "deemed to have first accrued as of the first date these rights existed under the civil union" and the same is true for those rights, benefits, protections, and responsibilities that were the result of the reciprocal beneficiary arrangement.

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<sup>26</sup> Haw. Rev. Stat §§572B-1–572B-11.

<sup>27</sup> Haw. Rev. Stat. §§572C-1–572C-7.

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*Illinois:* The Illinois "Religious Freedom and Marriage Fairness Act"<sup>28</sup> was signed by the governor on November 20, 2013 and goes into effect on June 1, 2014. It was preceded by civil union legislation effective June 1, 2011.<sup>29</sup> The new legislation allows parties to a civil union to apply for a marriage license at no charge and then have the marriage solemnized and for one year following the legislation's effect date parties to a civil union may have the civil union recorded as a marriage without the need for solemnization. The marriage begins on the date stated on the marriage certificate. As noted above, as in Hawaii, the rights under the marriage are deemed "to have first accrued" when those rights existed under the civil union.

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<sup>28</sup> 2013 Ill. Laws Public Act 098-0579 (codified as amended in scattered sections of 750 ILCS).

<sup>29</sup> 750 ILCS §§75/1–75/90.

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*Iowa:* The Iowa Supreme Court made same-sex marriage legal in Iowa by its opinion, in *Varnum v. Brien*,<sup>30</sup> holding that denying a marriage license to a same-sex couple violates state constitutional guarantees of equal protection of the laws. By its terms, the decision became effective upon the issuance of procedendo on the conclusion of the period for appeal (Iowa R. App. P. 6.1208), which duly occurred on April 27, 2009.<sup>31</sup> The date of the procedendo casts doubt on the dates given in the Social Security Administration chart, above. The legislature has not amended the statutes to reflect marriage equality.

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<sup>30</sup> 763 N.W.2d 862 (Iowa 2009).

<sup>31</sup> <http://www.iowacourts.gov/wfData/files/Varnum/procedendoVarnum.pdf>.

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*Maine:* Same-sex marriage became legal in Maine through approval in a referendum on November 6, 2012 ratifying amendments to the statutes. The approved provisions became effective on December 29, 2012. Three years earlier, the voters had rejected a bill passed by the legislature and signed by the governor allowing same-sex marriage. Marriage is gender neutral and same-sex marriages valid where celebrated are valid in Maine.<sup>32</sup> Maine still has a domestic partnership regime, which, like Wisconsin's described below, grants only limited rights, but is not limited to same-sex couples.<sup>33</sup>

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<sup>32</sup> Me. Rev. Stat. Ann. tit. 19-A, §§650-A, 650-B.

<sup>33</sup> Me. Rev. Stat. Ann. tit. 22, §2710.

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*Maryland:* Maryland voters approved same-sex marriage by referendum on November 6, 2012. The statutory amendments so approved <sup>34</sup> became effective on January 1, 2013. On February 23, 2010, Maryland's Attorney General issued an opinion in which he stated that same-sex marriages valid where celebrated are valid under the law of Maryland, a conclusion confirmed by the Maryland Court of Appeals (the state's highest court) in *Port v. Cowan*. <sup>35</sup>

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<sup>34</sup> 2012 Maryland Laws Ch. 2.

<sup>35</sup> 426 Md. 435, 44 A.3d 970 (2012).

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*Massachusetts:* Massachusetts became the first state to allow same-sex couples to marry by decision of the Supreme Judicial Court, as noted above. The *Goodridge* case was decided in 2003 and the holding became effective on the entry on remand of the trial order on May 17, 2004. <sup>36</sup>

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<sup>36</sup> *Goodridge v. Department of Public Health*, 2004 WL 5064000 (Mass. Super. 2004) (Trial Order); the Massachusetts statutes have not been amended to reflect marriage equality.

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*Minnesota:* Amendments to the Minnesota statutes legalizing marriage between two persons of the same sex became effective on August 1, 2013. <sup>37</sup> As amended, Minn. Stat. Ann. §517.01 defines a "civil marriage" as a "civil contract" between "two persons." Throughout the relevant statutes, the term "marriage" is now preceded by the word "civil."

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<sup>37</sup> 2013 Minn. Laws Ch. 74.

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*New Hampshire:* New Hampshire enacted legislation allowing same-sex couples to marry effective January 1, 2010, defining marriage as the "legally recognized union of 2 people" "regardless of gender." <sup>38</sup> Marriages valid where celebrated so long as they would be valid in New Hampshire and civil unions valid where entered into are also recognized as marriages in New Hampshire. <sup>39</sup> Civil unions were allowed under New Hampshire law beginning on January 1, 2008. No new civil unions may be established on or after January 2, 2010; before January 1, 2011, persons in civil unions on that date may apply for a marriage license and then have the marriage solemnized or apply for and receive a marriage certificate without the need for solemnization. On January 1, 2011, all existing civil unions are deemed to be marriages as of that date. <sup>40</sup> This transitional provision is identical to the Illinois provision and differs from that under the laws of Hawaii where marriage rights identical to rights given by civil union are deemed to have begun when the parties celebrated the civil union.

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<sup>38</sup> N.H. Rev. Stat. Ann. §457:1-a.

<sup>39</sup> N.H. Rev. Stat. Ann §§457:3, 457:45.

<sup>40</sup> N.H. Rev. Stat. Ann §457:46.

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*New Jersey:* New Jersey was a pioneer in formal domestic partnership arrangements, enacting enabling legislation in 2004. <sup>41</sup> The rights and obligations of domestic partnership, which was limited to same-sex couples and different-sex couples age 62 or older, were like but not identical to those of marriage, and some health and pension benefits were available only to domestic partners of the same sex who could not marry under state law. <sup>42</sup> Income and estate tax provisions applied in the same way as they did to married couples. <sup>43</sup> In addition, the statute set out several requirements for entering into a domestic partnership, including maintaining a common residence, and exhibiting at least one of a statutory list of indicia showing that the partners were "jointly responsible for each other's common welfare." <sup>44</sup>

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<sup>41</sup> N.J. Rev. Stat. §§26:8A-1 through 26:8A-13, effective July 10, 2004.

<sup>42</sup> N.J. Rev. Stat. §26:8A-2(e).

<sup>43</sup> N.J. Rev. Stat. §26:8A-2(d).

<sup>44</sup> N.J. Rev. Stat. §26:8A-4(b).

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The domestic partnership, at least for same-sex couples, was doomed by *Lewis v. Harris* <sup>45</sup> and its holding that equal protection required that same-sex couples be given the same rights and obligations as married couples. In response, the legislature passed civil union legislation effective February 19, 2007. <sup>46</sup> The legislation limited civil unions to two parties of the same sex and stated that "[p]arties to a civil union shall receive the same benefits

and protections and be subject to the same responsibilities as spouses in a marriage.”<sup>47</sup> The legislation also put an end to future domestic partnerships for same-sex couples as of the effective date.<sup>48</sup> However, domestic partnerships can still be formed by two persons both of whom are over 62 years of age. The reason for the exception has to do with Social Security benefits. If two persons receiving Social Security old age pension benefits marry, it is possible that the benefits they receive as a married couple will be less than the sum of the individual benefits they received before marriage. The domestic partnership gives such couples the option of a legally recognized relationship without the possible Social Security complications of being married.

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<sup>45</sup> 188 N.J. 415, 908 A.2d 196 (2006).

<sup>46</sup> N.J. Rev. Stat. §§37:1-1-37:1-36.

<sup>47</sup> N.J. Rev. Stat. §37:1-29.

<sup>48</sup> N.J. Rev. Stat. §26:8A-4.1.

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The New Jersey civil union was in turn undone by another equal protection decision of the state courts, *Garden State Equality v. Dow*.<sup>49</sup> The court held that, because the decision in *Windsor* gave federal recognition only to “lawful marriages,” couples in New Jersey civil unions were not afforded the same status as married couples. The New Jersey Supreme Court granted the state's motion for immediate certification for appeal<sup>50</sup> but unanimously refused to stay the lower court's order that marriage begins for same-sex couples on October 21.<sup>51</sup> The state then withdrew its appeal, and same-sex marriage became a fact in New Jersey on October 21, 2013.

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<sup>49</sup> 2012 BL 344932 (N.J. Super. Ct. 2/21/12).

<sup>50</sup> 216 N.J. 1 (2013).

<sup>51</sup> 2013 WL 5687193 (2013).

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*New York*: New York's Marriage Equality Act became effective on July 24, 2011.<sup>52</sup> Beginning on that date, “[a] marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.”<sup>53</sup> The statute also states:

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<sup>52</sup> 2011 N.Y. Laws c. 95 (adding N.Y. Dom. Rel. Law §§10-a and 10-b).

<sup>53</sup> N.Y. Dom. Rel. Law §10-a(1).

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No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.<sup>54</sup>

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<sup>54</sup> *Id.* §10-a(2).

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Same-sex marriages valid where celebrated had been recognized as valid in New York since the decision of the Fourth Appellate Department in *Martinez v. County of Monroe* on February 1, 2008.<sup>55</sup> Such marriages were not quite the same as different-sex marriages, however. Because of the close connection between the federal income tax and estate tax systems, the New York tax authorities maintained that same-sex couples whose marriages were recognized in New York could not file joint income tax returns nor could the estate of the first spouse to die obtain a marital deduction for estate tax purposes for otherwise qualifying transfers to the surviving spouse.<sup>56</sup> This treatment changed with the passage of the Marriage Equality Act and, after the U.S. Supreme Court decision in *Windsor*, the state tax authorities decided to allow taxpayers to amend returns for which the statute of limitations remains open. Couples whose marriage were recognized before the passage of the Marriage Equality Act may file a joint income tax return, and estates of decedents whose marriages were recognized before passage of the Act may file for an estate tax refund based on the allowance of a marital deduction for qualifying transfers to the surviving same-sex spouse.<sup>57</sup>

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<sup>55</sup> 50 A.D.3d 189, 850 N.Y.S.2d 740 (2008).

<sup>56</sup> [http://www.tax.ny.gov/pdf/memos/multitax/m11\\_8c\\_8i\\_7m\\_1mctmt\\_1r\\_12s.pdf](http://www.tax.ny.gov/pdf/memos/multitax/m11_8c_8i_7m_1mctmt_1r_12s.pdf) (income tax);  
[http://www.tax.ny.gov/pdf/memos/estate\\_&\\_gift/m11\\_8m.pdf](http://www.tax.ny.gov/pdf/memos/estate_&_gift/m11_8m.pdf) (estate tax).

<sup>57</sup> [http://www.tax.ny.gov/pdf/memos/multitax/m13\\_5i\\_10m.pdf](http://www.tax.ny.gov/pdf/memos/multitax/m13_5i_10m.pdf).

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*Rhode Island:* Rhode Island's civil union legislation became effective on July 1, 2011.<sup>58</sup> The statute was unusual for including a provision providing extensive protection to individuals who refuse to "treat as valid" any civil union because of "sincerely held religious beliefs."<sup>59</sup> The legislation also included a provision that granted recognition of other states' civil unions and registered domestic partnerships so long as they do not grant "the status of marriage."<sup>60</sup> Both of these provisions are substantially more restrictive than those found in other states' civil union legislation. On May 14, 2012, the governor issued an executive order directing all state agencies to recognize same-sex marriages valid where celebrated.<sup>61</sup> The next step came almost exactly one year later when the same governor signed legislation allowing same-sex couples to marry in Rhode Island beginning on August 1, 2013.<sup>62</sup> The legislation also allows those in civil unions to merge the civil union into a marriage either with or without solemnization of the marriage.<sup>63</sup>

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<sup>58</sup> R.I. Gen. Laws §§15-3.1-1-15-3.1-13.

<sup>59</sup> R.I. Gen. Laws §15-3.1-5.

<sup>60</sup> R.I. Gen. Laws §15-3.1-8.

<sup>61</sup> [http://www.governor.ri.gov/documents/executiveorders/2012/Executive\\_Order\\_12-02.pdf](http://www.governor.ri.gov/documents/executiveorders/2012/Executive_Order_12-02.pdf).

<sup>62</sup> R.I. Gen. Laws §15-1-1.

<sup>63</sup> R.I. Gen. Laws §15-3.1-12.

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*Vermont:* Vermont was the first state to create civil unions and the first to allow same-sex couples to marry by enacting legislation that defined marriage as "the legally recognized union of two people." The legislation, effective September 1, 2009, also states that when the word "marriage" is used in any statute, the word means a "civil marriage."<sup>64</sup> Unlike other states that have replaced civil unions with marriage, Vermont did not enact legislation to simplify the transition from civil union to marriage but the legislation creating "civil marriage" did repeal the statutory provisions governing the issuing of civil union licenses and the solemnization of civil unions.<sup>65</sup>

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<sup>64</sup> Vt. Stat. Ann. tit. 15, §8.

<sup>65</sup> 2009 Vt. Acts & Resolves no. 3 §12.

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*Washington:* Like Maine and Maryland, the state of Washington legalized marriage equality by popular vote on November 6, 2012. The legislation approved by the voters became effective on December 6 of the same year.<sup>66</sup> Washington had enacted registered domestic partnership legislation effective July 22, 2007.<sup>67</sup> As in other states that have replaced marriage substitutes with marriage, registered domestic partnerships can be turned into marriages by obtaining a marriage license and solemnizing the marriage. On July 14, 2014, all remaining registered domestic partnerships where the parties are the same sex will become marriages. The legal date of such successor marriages, whether solemnized or created by operation of law, is "the date of the original state registered domestic partnership." However, no doubt in response to the possible effects of marriage on Social Security benefits, the legislation exempts from automatic merger domestic partnerships where at least one partner is age 62 or older.<sup>68</sup>

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<sup>66</sup> Wash. Rev. Code §26.04.010 (defining marriage).

<sup>67</sup> Wash. Rev. Code §§26.60.010-26.60.901.

<sup>68</sup> Wash. Rev. Code §26.60.100.

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*District of Columbia:* Marriage became gender neutral in the District of Columbia on March 9, 2010 under legislation that became effective on March 3.<sup>69</sup> Legislation recognizing same-sex marriages validly celebrated elsewhere became effective on July 7, 2009.<sup>70</sup>

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<sup>69</sup> D.C. Code Ann. §46-401.

<sup>70</sup> D.C. Code Ann. §46-405.01.

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*New Mexico:* Until recently, this state had been an outlier. It alone among the states neither allowed nor prohibited same-sex marriage, although several counties in the state had been issuing marriage licenses to

same-sex couples, some on the initiative of the county clerk and some because the clerks were under orders to do so from the courts. The New Mexico Supreme Court accepted a request from the state's Association of Counties to give a definitive ruling, and, on December 19, 2013, issued an opinion making same-sex marriages legal in the state.<sup>71</sup>

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<sup>71</sup> *Griego v. Oliver*, No. 34,306 (N.M. 12/19/13).

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*Utah*: On December 20, 2013, a federal district court held that Utah's ban on same-sex marriage violated the U.S. Constitution's guarantees of equal protection and due process under the law.<sup>72</sup> After the district court and the 10th Circuit<sup>73</sup> denied the state's motion to halt implementation of the ruling, Utah, on December 31, asked the U.S. Supreme Court to consider halting implementation of the district court decision.

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<sup>72</sup> *Kitchen v. Herbert*, No. 2:13-cv-00217 (D. Utah 12/20/13).

<sup>73</sup> See *Kitchen v. Herbert*, No. 13-4178 (10th Cir. 12/24/13).

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Several states still have "marriage substitutes." *Colorado*, whose constitution defines marriage as a union of one man and one woman,<sup>74</sup> enacted civil union legislation effective May 1, 2013.<sup>75</sup> Like other civil union statutes, it gives the parties to the civil union the benefits and protections and responsibilities of spouses.<sup>76</sup> The statute also contains a "legislative declaration" with respect to joint tax returns stating that, because the federal government does not allow couples not in a federally recognized marriage to file joint tax returns, couples in a civil union cannot file joint state income tax returns until "statutory change" is enacted allowing civil union couples to file joint returns.<sup>77</sup> While federal recognition for tax purposes of marriages valid where celebrated no matter where the couple lives is now the rule, it will probably not affect Colorado tax practice because the statutory change required by the state statute is a change at the state level and there is no federal legislation allowing couples in civil unions to file joint income tax returns.

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<sup>74</sup> Colo. Const. Art. 2 §31.

<sup>75</sup> Colo. Rev. Stat. §§14-15-101–14-15-119.

<sup>76</sup> Colo. Rev. Stat. §14-15-103(1).

<sup>77</sup> Colo. Rev. Stat. §14-15-117.

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Colorado continues to authorize designated beneficiary relationships.<sup>78</sup> The legislation allows any two people to become designated beneficiaries of each other by filing an agreement. Once the status is established, the couple has enumerated rights vis-à-vis each other, including the right to inherit all of the first to die's probate property if no descendants of the decedent survive the decedent and one-half if descendants do survive. The statute includes a statutory form for establishing a designated beneficiary relationship. Something like a statutory short form power of attorney, it allows the parties to grant or withhold rights by initialing next to the appropriate description. This flexibility makes the designated beneficiary regime very different from marriage, or even civil unions or registered domestic partnerships, which are all-or-nothing arrangements, except as they are modified by valid agreements (and by wills).

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<sup>78</sup> Colo. Rev. Stat. §§15-22-101–15-22-112.

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*Nevada's* registered domestic partnership legislation<sup>79</sup> makes all the consequences of marriage attendant on domestic partnership status.<sup>80</sup> There is, however, one exception: The statute expressly does not require that any private or public employer grant the same health care benefits to a registered domestic partner given a spouse.<sup>81</sup>

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<sup>79</sup> Nev. Rev. Stat. Ch. 122A.

<sup>80</sup> Nev. Rev. Stat. §122A.200.

<sup>81</sup> Nev. Rev. Stat. §122A.210.

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*Oregon* also has a registered domestic partnership regime.<sup>82</sup> Effective January 1, 2008, same-sex couples have been able to register as domestic partners and have all the rights and responsibilities of spouses, with an exception made for employee benefit plans if treating domestic partners as spouses would endanger favorable

treatment of the plans under federal law, an exception that may now be moot.<sup>83</sup> Recognition of same-sex marriages, however, began October 16, 2013.

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<sup>82</sup> Or. Rev. Stat. §§106.300–106.340.

<sup>83</sup> Or. Rev. Stat. §§106.310, 106.340.

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Finally, *Wisconsin* has a limited domestic partnership law<sup>84</sup> that is available only to same-sex couples and is specifically declared by the legislature not to be equivalent to marriage because the Wisconsin constitution bars not only same-sex marriage but also any arrangement equivalent to marriage.<sup>85</sup> Therefore, there is not a broad statement of rights but rather individual statutes have been amended to include domestic partners with spouses (in the intestacy statute, for example). But because domestic partnership is not marriage, partners are not subject to the marital property regime (more or less equivalent to community property) nor is the relationship barred by divorce — all that is required is an ex parte filing.<sup>86</sup>

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<sup>84</sup> Wis. Stat. §§770.001–770.18.

<sup>85</sup> Wis. Const. Art. 13, §13.

<sup>86</sup> Wis. Stat. §770.12.

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This very brief summary of the state of marriage equality in the United States suggests that the future of the marriage substitutes is likely to be dim. The *Windsor* decision has been read by most commentators and certainly by federal agencies to make a valid marriage the *only* way to obtain federal recognition of a legally defined union or relationship. The following from the Department of Labor's guidance to employee benefit plans sums up the situation quite well:

The terms “spouse” and “marriage,” however, do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union, regardless of whether the individuals who are in these relationships have the same rights and responsibilities as those individuals who are married under state law. The foregoing sentence applies to individuals who are in these relationships with an individual of the opposite sex or same sex.<sup>87</sup>

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<sup>87</sup> U.S. Dept. of Labor, Employee Benefits Security Administration, Technical Release No. 2013-04.

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In this legal landscape, the decision of the New Jersey courts that any legal relationship short of marriage is a less than adequate means for complying with the guarantee of equal protection of the laws for all is understandable and indeed, depending on one's point of view, absolutely required. Whether or not other states with marriage equivalents will follow is an open question. In some of these states, constitutional provisions defining marriage as a union between one man and one woman will have to be overcome. Oregon, for example, will hold a referendum in the 2014 general election to repeal the constitutional definition of marriage and enact marriage equality. In others, suits seeking rulings that marriage equality is constitutionally required go forward. A case brought in the federal district court in Nevada was decided against the plaintiffs before the decision in *Windsor*, the court holding that Nevada has a rational basis for limiting marriage to different-sex couples and the prohibition on same-sex marriage did not violate the requirement of equal protection.<sup>88</sup> The plaintiffs have appealed to the Ninth Circuit.

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<sup>88</sup> *Sevick v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012).

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The lack of federal status for the marriage substitutes has probably ensured that no more will be created and that they will never develop into or lead to the development of new legal structures for intimate relationships. It is difficult to remember that, when the idea that same-sex couples should have legal recognition of their relationships was truly radical, there was some opposition to marriage as an obsolete institution designed to perpetuate male domination of women, and there certainly were some who thought that the goal should be a new form of legal tie that would at very least be egalitarian. The reciprocal beneficiary arrangement might have been the first step on the road to developing new legal structures. While Hawaii's version was and is available to any two persons who cannot marry, Colorado's designated beneficiary legislation is available to any two persons, so long as they are not married or in a civil union, and it allows couples to make some choices about what rights and obligations to give and assume. There is a custom tailored side to reciprocal beneficiary designations that is absolutely not a part of marriage, which, except to the extent it is modified by valid pre- and post-nuptial agreements, is clearly “one size fits all.”

But the story may not be over. The executive committee of the Judicial Council of the Ninth Circuit has ruled in favor of a former employee of the federal court for the District of Oregon who made a claim for back wages to compensate her for the expense of providing health insurance for her same-sex registered domestic partner after the federal Office of Personnel Management refused to treat the partner as a spouse for employee benefit purposes.<sup>89</sup> The judges held that the denial of benefits involved unlawful discrimination in two ways:

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<sup>89</sup> *In re Fonberg*, 2013 BL 336658 (9th Cir. Jud. Council 11/25/13).

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Fonberg and her partner are treated differently in two ways. First, they are treated differently from opposite-sex partners who are allowed to marry and thereby gain spousal benefits under federal law. This is plainly discrimination based on sexual orientation, which the District of Oregon's EDR [Employee Dispute Resolution] Plan prohibits. They are also treated unequally vis-à-vis same-sex couples in other states in the circuit, who may marry and thus gain benefits under *Windsor*. This violates the principle that federal employees must not be treated unequally in the entitlements and benefits of federal employment based on the vagaries of state law. Here, Oregon law suffers from precisely the same deficiency that the Supreme Court identified in *Windsor* with respect to the Defense of Marriage Act. Both these forms of discrimination are prohibited under the Oregon EDR Plan.

The holding in this employee discrimination case is certainly limited to federal employees. But, it could be the first opening to treating all persons in marriage substitutes who by law are given the same rights and obligations as married persons in the same way the law treats persons in lawful marriages. Just when one might think that the story of same-sex marriage is on its way to its denouement, another plot line may still be very much alive. Granted, extending the status of lawfully married spouses to persons in a legal relationship defined by statute to be the same as marriage in all but name will not necessarily lead to anything drastically new, but it may help more same-sex couples gain legal security.

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ISSN 1947-3923

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