

Memorandum

To: League of Women Voters of Maine

From: Michael J. Levey, Esq., Levey and Wagley, PA, Attorneys at Law,
Jennifer B. Wriggins, Esq., Professor, University of Maine School of Law

Re: Same-sex Marriage and Maine Law

March 13, 2009

I. Introduction

Marriage in Maine is and always has been civil and secular in nature. As Professor Lawrence M. Friedman, a leading historian of United States legal history, notes, “[i]n England, ecclesiastical courts had jurisdiction over marriage and divorce, and the church had an important role in family law. The United States had no such court, and, after the early 19th century, no established churches. Family law was thoroughly secular in the United States.”¹ Marriage statutes are generally considered part of the state’s general power to regulate for general public welfare. The state’s power to regulate marriage is limited by the federal and state constitutions.² Marriage has been recognized as a fundamental right by the U.S. Supreme Court.³ It almost goes without saying that marriage is a centrally important way of organizing families and their legal rights and responsibilities to each other in this society.

In Maine, opposite sex couples may choose to marry or choose to remain unmarried. Same sex couples do not have those choices. They must remain unmarried. They are expressly prohibited from marrying.⁴

Maine is now engaged in a debate about whether to remove the prohibition against same sex couple marriage. This memorandum has been prepared to help illustrate some of the legal differences between being married (a choice available to opposite sex couples) and being unmarried (the only option available to same sex couples).

This memorandum first gives a short legal history of the institution of marriage in Maine. It then proceeds to discuss several different aspects of marriage law and the ways in which Maine law treats married couples differently from unmarried couples. In that discussion, this memorandum focuses on Maine law. Federal law also has many provisions which treat married persons differently from unmarried persons, for example, Social Security survivors’ benefits for surviving spouses. Federal law differences

¹ Lawrence M. Friedman, *A History of American Law* 202 (1985).

² See, *Loving v. Virginia*, 388 U.S. 1 (1967)(striking down as unconstitutional Virginia’s law banning interracial marriages).

³ *Zablocki v. Redhail*, 434 U.S. 374 (1972), *Loving v. Virginia*, 388 U.S. 1 (1967).

⁴ 19-A MRSA sec. 701(5).

between married and unmarried persons are generally beyond the scope of this memorandum.

This memorandum includes a discussion of domestic partnership provisions of Maine law. Finally, this memorandum has a brief discussion of civil unions, a legal concept which does not exist in Maine law, but has appeared in other jurisdictions.

The ways in which marriage matters in Maine are myriad. The laws pertaining to marriage are intricate and complex. This memorandum does not guarantee that every legal difference between married and unmarried couples is discussed - it attempts to provide illustrations of significant differences.

II. A short history of Marriage and the Law of Maine.

Marriage in Maine has always been governed by statutes and has always been civil in nature. As Maine used to be part of Massachusetts, Massachusetts marriage law used to apply in Maine.⁵ When Maine became a state in 1820, it passed its own marriage laws.

Marriage in Maine has a long history of being considered as a status, not a contract.⁶ Only those who have a marriage license are considered legally married. Maine, like Massachusetts, has never recognized common law marriage.⁷ There is no way to form a legally-recognized marriage if a couple lives together for a certain period of time, and no way to form a marriage by a contract.⁸

Marriage in Maine has been far from static. It has evolved in significant ways through a combination of legislative changes and court decisions.

Racial restrictions used to be a part of Maine's marriage law and were once enforced by Maine's highest court.⁹ Maine once had a statute banning interracial marriage. Initially this was passed when Maine was part of Massachusetts,¹⁰ but soon after Maine became a state in 1820, it passed its own law banning interracial marriage.¹¹ Maine repealed this law in 1883, forty years after Massachusetts repealed its law.¹²

⁵ Cases from the Maine Supreme Judicial court discuss this history. See, e.g., *Henriksen v. Cameron*, 622 A. 2d 1135, 1145 (1993)(Glassman, dissenting), *Holyoke v. Holyoke*, 78 Me. 404, 6 A. 827 (Me 1886). See also *Commonwealth v. Munson*, 127 Mass. 459 (1879).

⁶ See *Adams v. Palmer*, 51 Me 481, 484-485 (Me. 1863)("marriage, though in some of its aspects resembling a contract, is rather to be regarded as a social relation, a status, with duties, rights and obligations established by the law of the State").

⁷ *Pierce v. Secretary, Health, Education, and Welfare*, 254 A.2d 46, 48 (1969).

⁸ See *Grishman v. Grishman*, 407 A.2d 9 (1979), *Pierce v. Secretary, Health, Education, and Welfare*, 254 A.2d 46, 48 (1969).

⁹ *Bailey v. Fiske*, 34 Me. 77, 1852 WL 1454 (1852).

¹⁰ 1786 Mass. Acts, ch. 3, sec. 7.

¹¹ Title 5, ch. 59 (1821)("No white person shall intermarry with a negro, Indian, or mulatto")

¹² The Maine Supreme Judicial court applied the applicable miscegenation law in 1852, finding that a fifty-nine year marriage between people that it deemed to be of different races was invalid because it violated the law. *Bailey v. Fiske*, 34 Me. 77 (1852).

Different treatment of married men and married women used to be a central feature of marriage laws. This different treatment by gender was embedded in many aspects of Maine's marriage law and was seen as integral to what marriage was. For example, husbands, but not wives, used to have primary liability for supporting their children.¹³ Another example is that before 1978, Maine statutes specified that only women could receive alimony (now called spousal support); this gender-specific provision was struck down in 1978 by Maine's highest court as unconstitutional.¹⁴ Under traditional principles, which eventually were changed by statutes that are still in force today,¹⁵ wives could not hold property or sign contracts.¹⁶ Under traditional principles, damages were available to a husband for loss of consortium if the husband's wife was injured, but those damages were not available to a wife if her husband was injured; the reason for the difference was that a husband was entitled to spousal services from his wife but a wife was not entitled to spousal services from her husband.¹⁷

Today, Maine's marriage laws are racially neutral and treat husbands and wives the same. Gender inequality has been replaced by gender equality, and one-way duties and obligations have been replaced by the principle that members of a married couple are mutually responsible for one another.

III. Financial security of the Partners

One of the functions of marriage is for the spouses to mutually provide support for one another. Many provisions of Maine law support this function.

Four important examples are in the area of wills and probate. First, if a spouse dies without a will, the law allocates a portion of the deceased's estate to the surviving spouse. For example, if the deceased dies without a will and there are no surviving children or parents of the deceased, the surviving spouse inherits the entire estate.¹⁸ Second, if a deceased wrote a will that excluded the surviving spouse, the surviving spouse is entitled to claim an "elective share" (generally speaking approximately one third) of the deceased spouse's estate, despite the will.¹⁹ Third, if a deceased made a will and later got married, but died without changing the will to include the new spouse, the new spouse will inherit as if the deceased spouse had no will. This is known as "the omitted spouse" rule. By way of example, the omitted spouse would, if the deceased died

¹³ *Pendexter v. Pendexter*, 363 A.2d 743, 746 (Me. 1976).

¹⁴ *Beal v. Beal*, 388 A.2d 72 (Me. 1978).

¹⁵ See e.g., 19-A MRSA secs. 801-806 (statutes that specify, for example, that a married person may own property in her or his own name).

¹⁶ See e.g., *Haggett v. Hurley*, 40 A. 561 (Me. 1898)(holding that despite changes in the common law removing disabilities of married women, wife could not form a business partnership with husband), *Appeal of Robinson*, 88 Me. 17, 22-23, 33 A. 652, 654-655 (1895).

¹⁷ See *Potter v. Schafter*, 161 Me. 340 (1965)(refusing to extend loss of consortium to a wife), *Allen v. Rossi*, 128 Me. 201, 204 (1929), *Britton v. Dube*, 154 Me. 319 (1958), 14 MRSA 302.

¹⁸ 18-A MRSA sec. 2-102.

¹⁹ 18-A MRSA sec. 2-201.

with no children or parents, receive the entire estate, regardless of what the will says.²⁰ Fourth, the Probate Code protects a surviving spouse from creditors.²¹ For example, the surviving spouse is entitled to a homestead allowance of \$10,000, free of the claims of creditors of the estate.²² All four of these sets of provisions protect a surviving spouse and support a vision of marriage as based on mutual support and as providing financial security protections to spouses.

By contrast, the survivor of a same sex unmarried couple has none of the above Probate Code protections. The absence of Probate Code protections for the unmarried surviving partner are partially ameliorated, but only partially, by some of the provisions of Maine's Domestic Partner laws, discussed later in this memorandum.

Maine law explicitly requires spouses to support one another when in need.²³ It includes a procedure where a person can seek court support if her or his spouse is not providing support.²⁴ It also provides a mechanism for enforcing such a court order, if a person's spouse does not obey it.²⁵

By contrast, same sex partners have no duty to support one another.

Many other provisions of Maine law reflect an assumption that a person will support her or his spouse. For example, Maine's Wrongful Death act provides protection for the spouse of one who has died as a result of the negligent or wrongful conduct of another. The spouse is entitled to enumerated damages which are based on the financial loss caused to the surviving spouse by the loss of the deceased spouse.²⁶ The same sex surviving partner of a person who suffered a wrongful death is not entitled to those damages.

In other personal injury actions, the spouse of an injured victim has the right to recover damages for loss of consortium (the loss of comfort and companionship the spouse suffers as a result of the injuries to the injured victim).²⁷ Loss of consortium is not available to the same sex unmarried partner of the injured victim.

²⁰ 18-A MRSA sec. 2-301.

²¹ 18-A MRSA sec. 2-401, 2-402, 2-403.

²² 18-A MRSA sec. 2-402.

²³ 19-A MRSA 1504 provides that "a person shall support that person's...spouse when in need." 19-A MRSA 1652 states that a spouse can file a claim in court ordering the other spouse to support him or her. This was originally a gender-specific duty requiring a husband to support his wife. Now it is a gender-neutral, two-way duty. Courts generally do not get involved in ongoing marital relationships in the absence of abuse, and the concept of marital privacy has a constitutional dimension, but these enduring provisions reflect a vision of a married couple as a financially interdependent unit.

²⁴ 19-A MRSA states that a spouse can file a claim in court ordering the other spouse to support him or her.

²⁵ 19-A MRSA sec. 2101 et. seq. Many other specific statutes provide benefits connected to a spouse's work. See e.g., 5 MRSA sec. 17804(5-F), 5 MRSA sec. 18003.

²⁶ 18-A MRSA sec. 2-804 (b)(surviving spouse without minor children receives all damages, surviving spouse with minor children receives half damages).

²⁷ Jack H. Simmons, Donald N. Zillman, David D. Gregory, *Maine Tort Law* sec. 19.05 (2001 edition), *Sawyer v. Bailey*, 413 A.2d 165 (Me. 1980)(loss of consortium not available to engaged person), *Poirier v U.S.*, 745 F. Supp. 23 (Me. 1990).

Workers' compensation laws presume each spouse to be dependent on the other and provide that when an employee suffers a job-related death, the surviving spouse shall receive 80% of the employee's average weekly wage for 500 weeks.²⁸ By contrast, a surviving partner in a same sex couple has no such opportunity for benefits if his or her partner suffers a job-related death.

Further, Maine's law assumes that a spouse is automatically considered appropriate for appointment as a guardian for a disabled person.²⁹ Same sex partners have no such priority to appointment.

Spouses of state employees (including teachers) have protections which provide benefits for them when the employee/teacher retires, or if the employee/teacher dies in the course of her or his employment.³⁰ The same sex partner of such a state employee has no such protections.

Maine's law of divorce gives the court the power to make equitable awards of marital property for each of the spouses, and to provide spousal support.³¹ Same sex partners do not have access to Maine's law of "equitable distribution of marital property" or spousal support. The law of divorce will be discussed further in this memorandum.

In short, Maine's marriage law treats spouses as financially interdependent, and protects spouses in a variety of ways including the following: (a) a surviving same sex partner is not protected from being left out of a will, or inheriting when there is no will, or having protections superior to creditors of the deceased; (b) a same sex partner is not entitled to statutory damages from the wrongdoer who causes the death of the partner³²; (c) same sex partners cannot claim loss of consortium; (d) a same sex partner can not recover under workers compensation for the job-related death of his or her partner; (e) same sex partners do not have the same protections if their state employee/teacher partner retires, or dies in the course of employment; (f) same sex partners do not owe a duty of support to one another; (g) same sex partners are not able to have the benefit of a court's power to make equitable distributions of marital property or awards of spousal support.

IV. Dissolution of Marriage by Divorce or Judicial Separation – Property and Spousal Support

One of marriage law's functions is the orderly disposition of property when couples divorce, and the determination of whether support obligations should continue after a marriage ends. With respect to the division of property, the law of divorce/judicial separation permits the court to look beyond simply "who has title" to property when

²⁸ 39-A MRSA sec. 102(8)(A) & (B), 39-A MRSA sec. 215(1).

²⁹ 18-A MRSA sec. 5-311.

³⁰ See e.g., 5 MRSA sec. 17804(5-F), 5 MRSA sec. 18003.

³¹ 19-A MRSA secs. 951-A, 953.

³² 18-A MRSA sec. 2-804(b).

determining the fair distribution of property.³³ The court is required to consider, for example, the contribution of a spouse as a homemaker, and the economic circumstances of each spouse at the time of the property division.³⁴ The court's power to make fair awards of property is known as the "equitable distribution" power of the court. (The federal law provides significant tax help to spouses in divorce. Federal tax law provides that transfers between spouses in connection with a divorce are not taxable events.³⁵)

By contrast, when unmarried couples separate, there is no "equitable distribution" mechanism for fairly dividing property. The absence of that doctrine for same sex couples who need to unwind their properties in a court action require them to litigate with "partition" theories, or "partnership" theories, or other creative theories of law which are not designed to be like nor based on "equitable distribution", making litigation likely to be more expensive for the same sex couple.³⁶ Moreover, there is a wide range of judicial approaches in the state of Maine as to how courts look at unmarried couples' property disputes, making their outcomes less predictable.³⁷ (And, tax law does not help the same sex couple- if separating same sex couples need to divide assets by ownership transfers between them, those transfers may be taxable events.)

Maine's divorce and judicial separation laws authorize, in appropriate cases, spousal support (formerly called alimony). The laws give judges the power to recognize that after divorce, a member of a couple may have genuine long-term or short-term financial needs that should be met by the former spouse in appropriate circumstances.³⁸ The obligation of a spouse to support his or her spouse is so important under Maine law that a judge can override a premarital agreement if enforcing it when a couple divorces would mean that a divorced spouse would end up on welfare.³⁹ In other words, the law provides that a judge can order a spouse to pay spousal support upon divorce even if the spouses have agreed in advance that spousal support would never be owed.

By contrast, when a same sex couple separates, even after many years and even if one partner has been completely financially dependent on the other, there is no basis in Maine law for the payment of support in the nature of spousal support.⁴⁰

³³ 19-A MRSa sec. 953.

³⁴ 19-A MRSa sec. 953.

³⁵ 26 USC 1041.

³⁶ See, e.g., *Wood v. LeGoff*, 152 ME. 19, 121 A.2d 468 (1956)(resulting trust doctrine).

³⁷ See e.g., *Ring v. Thompson*, Superior Court CV-94-216(Aug. 29, 1996)(Fritzsche, J.), *Jasch v. Dubord*, Superior Court CV-86-82 (Sept. 29, 1988)(Alexander, J.)

³⁸ 19-A MRSa sec. 951-A. In recognition of this kind of situation, federal law provides that alimony payments are tax deductible for the person paying them and are income to the recipient. Internal Revenue Code secs. 62, 71.

³⁹ 19-A MRSa sec. 608(2).

⁴⁰ While much was made in the 1970s of the concept of 'palimony', allowing support to be paid to a financially dependent partner after the breakup of an unmarried couple relationship, which originated in the *Marvin v. Marvin* case, 557 P.2d 106 (Cal. 1976), the concept has not taken hold.

V. Children and Parental Rights & Responsibilities

The relationship between marriage and parentage is important. Marriage has traditionally functioned to recognize and formalize legal ties between parents and children.⁴¹ Maine law presumes that a child born when a couple is married is a child of the couple.⁴² While this presumption is rebuttable,⁴³ it remains as a baseline linking marriage with children. Moreover, the protections and responsibilities in the law for spouses are protections and responsibilities that indirectly protect children as well. Since children are dependent on parents, the protections the law provides for spouses can result in greater security for the child.

Many heterosexual couples with children choose not to marry. In doing so, they voluntarily forego the many protections and responsibilities of marriage available to spouses. Over time, the parental rights and responsibilities and parentage statutes have been revised to help children and to reflect the reality that many heterosexual couples have children without being married. Laws now allow early determination of parentage issues, ensure that both parents have a duty to support children and require that decisions about custody are made in the best interests of the child if parents separate.⁴⁴

Same sex couples often plan, have and jointly raise children, in Maine, as well as in other states. The statutes concerning parental rights and responsibilities and parentage are not well-adapted to same sex parents. There have been ongoing efforts to have the law modified so that parentage of children of same sex couples can be readily determined at an early stage, but that is an issue that is largely distinct from same sex marriage.

Unlike heterosexual couples, same sex couples cannot choose the option of marriage. For those couples, the presumption that a child born within the marriage is a child of the couple is absent. More significantly, when the law does not allow parents to marry, the protections and responsibilities for spouses cannot be available to help the children. In addition, children of such couples may experience the prohibition on their parents marrying as stigmatizing and undermining of their family. Same sex couples who are parents similarly may find the law's refusal to recognize the marriage and family relationship to be stigmatizing and undermining.

⁴¹ While in the past the laws of legitimacy had the effect of treating children born outside of marriage in a very disadvantageous manner, those inequities have largely been redressed by statute and court decision. See e.g. 19-A MRSA sec. 1502 (rights of children born out of wedlock), *Levy v. Louisiana*, 391 U.S. 68 (1968)(holding unconstitutional wrongful death statute that did not allow children born out of wedlock to sue for the wrongful death of their mother).

⁴² Maine Rule of Evidence 302.

⁴³ 19-A MRSA sec. 1564.

⁴⁴ See 19-A MRSA secs. 1501, 1502, 1504, 1510, 1552-1616, 1653, 1654.

VI. Laws Recognizing the Relationship between Spouses – Testimonial Privileges and Conflict of Interest Laws

Marriage protects the privacy and the confidential relationship of the spouses. At the same time, this recognition of the special relationship between spouses also requires that conflicts of interest need to be recognized in order to protect fairness in governmental decisions.

Maine law protects the confidential relationship between spouses by providing that married individuals in Maine may not be compelled to testify against their spouses.⁴⁵ This testimonial privilege is not available for same sex partners.

There are many Maine laws aimed at protecting society from the bias, nepotism, or conflicts of interest that may arise from marriage. These include, for example, governmental ethics rules.⁴⁶ The policy of these laws is to protect the public from interspousal connections in public matters where the spouses may not be able to be unbiased.

These laws do not apply to same sex partners. The law does not recognize the conflicts of interest and bias that may be created by unmarried couples' relationships, and may permit same sex couples to engage in public matters even though their relationship, being similar to a marriage, may be biased and thus may undermine the public interest.

VII. Maine's Domestic Partner Laws

Maine has various laws pertaining to 'domestic partners.' While these laws ameliorate some of the differences in legal treatment of same sex couples, they do not provide equivalent protections or responsibilities to marriage.

Maine has a domestic partner registry which was established in 2004.⁴⁷ For purposes of the registry, Maine law defines "domestic partner" as "2 unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare."⁴⁸ They must have lived in the state for one year or more before registering.⁴⁹ It includes a procedure for filing a form with the state registry, and also includes a termination procedure.⁵⁰ Registration with the domestic partner registry allows a domestic partner to inherit from a deceased partner, if the deceased partner has no will.⁵¹ It gives the surviving domestic partner priority for

⁴⁵ Maine Rule of Evidence sec. 504.

⁴⁶ See, e.g. 1 MRSA 1012.

⁴⁷ 22 MRSA 2710.

⁴⁸ 22 MRSA sec. 2710(2).

⁴⁹ This residency requirement is significantly more demanding than Maine's marriage law, which does not have a residency requirement. 19-A MRSA secs 650-653.

⁵⁰ 22 MRSA sec. 2710(3),(4).

⁵¹ 18-A MRSA 2-102(if registered domestic partner dies without a will, surviving domestic partner will receive the same proportion of the deceased's estate as a surviving spouse would receive).

administering the deceased's estate.⁵² A registered domestic partner has priority for appointment as a conservator or guardian of the incapacitated partner.⁵³

Maine has other statutes pertaining to "domestic partners" that may apply to same sex partners, regardless of registration in the registry. For example, domestic partners receive some protections under the domestic abuse laws,⁵⁴ the Family Medical Leave law,⁵⁵ some statutes relating to health insurance,⁵⁶ and custody of remains of a deceased person.⁵⁷ These various statutes include a variety of definitions of 'domestic partner.'⁵⁸

The Domestic Partner Registry and Maine's other domestic partnership laws do not create equality between same sex couples and married couples. As described above, being on the domestic partner registry does not provide substantial Probate Code protections that married persons have. (For example, the domestic partner does not have the right to take an elective share of the deceased's estate, if the deceased's will excludes the domestic partner.⁵⁹ Similarly, a domestic partner is not given the protection of the "omitted spouse" rule.⁶⁰) In addition, as described previously in this memorandum,⁶¹ only spouses can recover in wrongful death actions; only spouses can claim loss of consortium; only spouses are presumed dependent and entitled to compensation for work-related deaths of a spouse, only spouses can be helped when there is a work-related death of a state employee/teacher; only spouses can use divorce and judicial separation laws to achieve equitable distribution of property, and spousal support.

A same sex couple desiring the benefits and responsibilities of domestic partnership provisions bears a heavy burden. In addition to taking steps to register with the state registry, such a couple must go through the other statutory provisions, determine whether or not they apply to the couple's situation, and may need to take other steps to be covered by the laws. Because of different definitions in different statutes, a couple could be domestic partners under some statutes and not others. The different definitions and provisions create only a patchwork of protections, and also are confusing, complex, and unwieldy.

⁵² 18-A MRSA sec. 3-203(a)(4-A).

⁵³ 18-A MRSA sec. 5-311(b)(2-A).

⁵⁴ 15 MRSA sec. 320, 19-A MRSA sec. 4002.

⁵⁵ 26 MRSA 843.

⁵⁶ 24-A MRSA sec. 4249(requiring HMOs to offer policies to proven domestic partners on same terms as spouses).

⁵⁷ 22 MRSA sec. 2843.

⁵⁸ For example, the definition in 22 MRSA sec. 2843(1)(D)(1-A)(custody of remains) differs from the definition in the Family and Medical Leave Act. 26 MRSA sec. 843(7), and also from the definition in the protection from abuse statute, 19-A MRSA sec. 4002(4).

⁵⁹ 18-A MRSA sec. 2-201.

⁶⁰ 18-A MRSA sec. 2-301.

⁶¹ These assertions pertain to spouses as contrasted to domestic partners. For some of these statutes, children may have a right to recover.

VIII. Civil Union Legislation

The concept of civil unions originated in Vermont as an alternative to marriage for same-sex couples. As defined in Vermont law, civil unions extend all of the state-based legal rights of spouses, whether they are based in statutes, common law, or other sources of law. But civil unions are different from marriage. As noted above, marriage in Maine has long been recognized as a status, and also has been recognized as a fundamental right. The term “marriage” is familiar, and evokes the committed and interdependent status of a couple. That term has a positive connotation. The term “civil union” is a less familiar phrase. It may imply and have the consequence that the couple whose relationship bears that label are considered to have a relationship which is somehow less centrally important than that of those persons who are married.

IX. Conclusion

It is hoped that this memorandum will provide some assistance in looking at Maine law and seeing the present different treatment given to married couples on the one hand, and same sex couples on the other.