

# GLAD

EQUAL JUSTICE UNDER LAW

## How to Get Married in New Hampshire

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This document is intended to provide general information only and cannot provide guidance or legal advice as to one's specific situation. Moreover, the law is constantly changing and this publication is based upon the information that is known to us as of this printing. For guidance on your particular situation, you must consult a lawyer. You should not act independently on this information. The provision of this information is not meant to create an attorney-client relationship. Check our website, [www.glad.org](http://www.glad.org), for more information.

If you have questions about this publication, other legal issues or need lawyer referrals, call GLAD's Legal InfoLine weekdays between 1:30 and 4:30 pm at:

800.455.GLAD (4523) or 617.426.1350

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# Introduction

On June 3, 2009, the New Hampshire General Court approved and Governor Lynch signed a marriage equality bill (House Bill 436, “An Act Relative to Civil Marriage and Civil Unions”<sup>1</sup>) that extended the right to marry to same-sex couples effective January 1, 2010. This legislation also ended the ability of same-sex couples to enter into civil unions in New Hampshire on the same effective date and allowed any couples already in a New Hampshire civil union to enter into marriage.<sup>2</sup> All still existing New Hampshire civil unions were automatically converted to marriages effective January 1, 2011.

At the insistence of the Governor, the legislature also passed two other bills (HB 73<sup>3</sup> and HB 310<sup>4</sup>), which affirm religious freedom protections with regard to marriage.

The process for getting married in New Hampshire basically requires the following basic steps:

1. an eligible couple submits an application for a license in any town or city in New Hampshire;<sup>5</sup>
2. the couple must pay the applicable fee and receive a marriage license from the clerk;<sup>6</sup>
3. the couple must have the marriage solemnized (i.e., have a ceremony) within 90 days of filing the application;<sup>7</sup>
4. once the ceremony has been performed, the person who performed it has 6 days to send the license back to the city or town where it was issued;<sup>8</sup>

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<sup>1</sup> See <http://www.gencourt.state.nh.us/legislation/2009/HB0436.html>.

<sup>2</sup> Previously, the state legislature passed a law in 2007 allowing same-sex couples in New Hampshire to enter into civil unions. See House Bill 437-FN-LOCAL. Under that law, civil unions provided the same rights, protections and obligations as are granted to a married spouse under state law.

<sup>3</sup> See <http://www.gencourt.state.nh.us/legislation/2009/HB0073.html>.

<sup>4</sup> See <http://www.gencourt.state.nh.us/legislation/2009/HB0310.html>.

<sup>5</sup> NH RSA 457:22.

<sup>6</sup> NH RSA 457:29.

<sup>7</sup> NH RSA 457:26.

<sup>8</sup> NH RSA 5-C:49 I.

5. the clerk will then file the original, and the couple can receive an official certificate of their marriage.

The detailed process for getting married in New Hampshire, whether you should enter a marriage, and what it all means are questions this publication is meant to address. Inevitably, you will have questions to which there are simply no definitive answers at this time. We will continue to update our publications as new developments occur over time.

**This document is intended to provide general information only and cannot provide guidance or legal advice as to one's specific situation. These questions and answers are based upon the information that is known to us as of this printing and that can change at any time. For guidance on your particular situation, you must consult a lawyer. You may call the GLAD Legal InfoLine at (800) 455-GLAD (4523) or check our website [www.glad.org](http://www.glad.org) for more information and to obtain lawyer referrals.**

# The Basics

## *Who can marry?*

To be eligible to marry in New Hampshire, both parties must:

**If a same-sex couple, be 18 years of age or older** (for different-sex couples, males under age 18 and at least age 14 and females under age 18 and at least age 13 may receive court permission to marry if at least one of them is a resident of New Hampshire)<sup>9</sup>

**Not be married or in a civil union or comprehensive domestic partnership to a *different person* (any dissolution or divorce must be final at the time of application)**

If you are married to or are in a civil union or comprehensive domestic partnership with a different person, you cannot marry your partner until you have dissolved the other relationship. Entering into another marriage before you have legally ended the first is considered a class B felony under New Hampshire's bigamy law and is punishable by up to seven years in prison,<sup>10</sup> or a fine of up to \$4,000 or both.<sup>11</sup> The municipal clerk will ask for proof of the dissolution.<sup>12</sup> For more information about getting married in New Hampshire if your relationship is already legally recognized in some way, see the section below, *What If I Already Have A Marriage, Civil Union Or Domestic Partnership From Another State?*.

**Not be in a civil union, licensed by a state other than New Hampshire, with the *same person***

New Hampshire officials are requiring couples who have a civil union licensed by a state other than New Hampshire to first dissolve their civil union before being permitted to marry *each other* in New Hampshire. For more detailed information, see the section below, *What If I Have A Marriage, Civil Union Or Domestic Partnership From Another State?*.

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<sup>9</sup> NH RSA 457:4.

<sup>10</sup> NH RSA 639:1

<sup>11</sup> NH RSA 651:2.

<sup>12</sup> NH RSA 5-C:42 IX.

**Not be closely related by blood or marriage to his or her intended spouse.<sup>13</sup>**

A person may not marry his or her:

- parent
- parent's sibling
- child
- sibling
- sibling's child
- grandchild
- first cousin.

***Do We Have To Be New Hampshire Residents?***

There is no simple answer to this question. There is no residency requirement for marriage in New Hampshire, and yet, a complexity is created by a 1979 New Hampshire law that states: “No marriage shall be contracted in this state 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 state in violation hereof shall be null and void.”<sup>14</sup> Currently, there are 14 states (**AZ, AR, DE, IN, KS, KY, ME, MN, MS, OH, SC, TN, TX, UT**) that have provisions that provide that if a same-sex couple were to marry then the marriage would automatically be considered void.

If you are a resident of one of these “void” states and intend to continue to reside there, GLAD recommends that you consider marrying in Massachusetts, Connecticut, Vermont, Iowa or the District of Columbia where there is no such prohibition. It is not clear how strictly New Hampshire enforces this law, but even if a New Hampshire town clerk issues you a marriage license, this New Hampshire law could be used at some point to challenge the validity of your marriage when you most need its protections. If, for some reason – such as location of family – New Hampshire is the desired location for getting married, residents from “void” states are strongly advised to consult a New Hampshire attorney before getting married there.

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<sup>13</sup> NH RSA 457: 2.

<sup>14</sup> NH RSA 457:44.

## *How do we get a marriage license?*

In order to obtain a New Hampshire marriage license, both parties must appear in person<sup>15</sup> and complete an “Intention of Marriage” application with the clerk of any city or town in New Hampshire.<sup>16</sup> One party may initiate the process of applying for a marriage license; however, the license will not be issued until signatures have been obtained from both parties.<sup>17</sup>

The applicants must provide the following information on the application worksheet:<sup>18</sup>

1. full name;
2. usual residence;
3. birthplace;
4. date of birth;<sup>19</sup>
5. social security number;
6. father’s full name and birthplace; and
7. mother’s maiden name and birthplace.

The clerk is then required to complete the following “statistical and legal information” on the worksheet for both of the parties:<sup>20</sup>

- the number which represents the currently intended marriage;
- if previously married, whether a civil annulment occurred or the marriage ended by death or divorce, as well as the date of civil annulment or when the last marriage ended;
- their race and ancestry;

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<sup>15</sup> NH RSA 5-C:42 (IV). Members of the armed forces are excused from this requirement of personal appearance, NH RSA 5-C:42 IV, and can use an alternative procedure detailed in N.H. Revised Statutes 5-C:42 V.

<sup>16</sup> NH RSA 457:22; see also NH RSA 5-C:41 I and 5-C:42 II. A marriage license in New Hampshire is “issued for a marriage ceremony to be performed in any city or town in the state of New Hampshire.” NH RSA 4-C:42 II.

<sup>17</sup> NH RSA 5-C:42 VI.

<sup>18</sup> NH RSA 5-C:41 II.

<sup>19</sup> You will need to bring proof of age with you to show the clerk. See NH RSA 457:23 I.

<sup>20</sup> NH RSA 5-C:41 III. New Hampshire law provides that each applicant must provide for inspection: (1) “a copy of the final divorce decree, if either or both parties are divorced”; and (2) “a copy of the death record of spouse, if either or both parties are widowed.” NH RSA 457:23 I(b)-(c). Those copies must be certified. (NH RSA 5-C:42 IX). If a former marriage has been civilly annulled, the clerk must review a certified copy of the civil annulment decree before a marriage license can be issued. NH RSA 5-C:42 X.

- their level of education;
- any waivers presented by the groom or the bride, either for time or age pursuant to RSA 457:4 through RSA 457:9<sup>21</sup> or RSA 457:26 and RSA 457:27;<sup>22</sup>
- whether proof of age of the bride and groom was demonstrated using identification with photograph;<sup>23</sup>
- if applicable, the divorce decree; and, if applicable, the death record of the former spouse.

In addition, the clerk will be required to inquire about prior civil unions as well.

After the clerk completes the information on the application worksheet as described in the preceding paragraph, the parties are required to add the following to the application worksheet:<sup>24</sup>

- if known, the date and the city or town where the marriage is intended to take place;
- if known, the name and address of the officiant for the marriage ceremony;
- the groom's mailing address and phone number;
- the bride's mailing address and phone number;
- the groom's signature and date signed;
- the bride's signature and date signed;
- certification that the information provided is correct to the best of his or her knowledge, and belief and that he or she is free to marry under the laws of New Hampshire.

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<sup>21</sup> NH RSA 457:4 through 457:9 are addressed to marriages that are allowable, with permission, for parties under 18 years of age. As noted above, same-sex couples can only marry if they are 18 years of age or older.

<sup>22</sup> New Hampshire law historically required a 3-day waiting period between the date the marriage application worksheet is filed and the issuance of the marriage license. However, that provision was repealed effective July 4, 2006. 2006 Session Laws, Chapter 86:5. Therefore, under current law, no time waivers are necessary.

<sup>23</sup> "An applicant for a marriage license shall provide positive identification consisting of a certified copy of a birth certificate or a driver's license or a passport or other license or identification that contains a photograph of the applicant and the applicant's name and date of birth." NH RSA 5-C:42 VII.

<sup>24</sup> NH RSA 5-C:41 IV.

When all of the foregoing information has been obtained, the city or town clerk prepares the marriage license, which is valid for not more than 90 days from the date of filing.<sup>25</sup>

New Hampshire has no blood tests or other medical requirements to obtain a marriage license.

The fee for obtaining a marriage license is currently \$45, payable to the clerk of the city or town.<sup>26</sup>

### *How do we solemnize the marriage?*

Measured from the date of application,<sup>27</sup> the marriage license is valid for 90 days.<sup>28</sup>

Officiants who are authorized to join two people in marriage include:

- in a civil ceremony, by New Hampshire justices of the peace or by certain federal judges
- in a religious ceremony, by any ordained “minister of the gospel” residing in New Hampshire and in regular standing within the denomination; any New Hampshire non-ordained clergy serving a religious body “after being licensed by the secretary of state”; any non-resident minister with a “pastoral charge wholly or partly” in New Hampshire (but only within his or her parish).<sup>29</sup>

In addition, the secretary of state may issue a special license, for a fee of \$25, to out-of-state “ordained or non-ordained ministers” or to out-of-state individuals authorized or licensed to perform marriages in their home state “authorizing him or her in a special case to marry a couple within the state.”<sup>30</sup>

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<sup>25</sup> NH RSA 457:26.

<sup>26</sup> NH RSA 457:29; see also 5-C:42 XIII.

<sup>27</sup> If the parties appear separately before the clerk and therefore the marriage application worksheet is signed and sworn to on two separate dates, the earlier date “shall be used by the clerk of the town or city to indicate when the intention of marriage was received and recorded and the date to be used to establish the beginning of the time period during which the license shall be valid.” NH RSA 5-C:42 XIV.

<sup>28</sup> NH RSA 457:26

<sup>29</sup> NH RSA 457:31 & 32.

<sup>30</sup> NH RSA 457:32.

## ***What happens after the marriage ceremony?***

The authorized officiant records the following on the marriage license after the ceremony has taken place:<sup>31</sup>

1. certification that she or he is duty authorized to solemnize this marriage;
2. the officiant's status;
3. the date of the marriage ceremony;
4. "the city, town or location and county" where the marriage occurred;
5. certification that the marriage conformed to the requirements of the New Hampshire marriage statute, Chapter 457, and that the information noted is correct to the best of his or her knowledge;
6. the officiant's signature, typed or printed name, her or his title and address;
7. "an indication of whether the ceremony was religious or civil."

The officiant is required to return the marriage certificate within 6 days to the clerk of the city or town that issued the license.<sup>32</sup> The officiant must do so if the marriage has taken place even if the parties "have a change of mind" after the ceremony and ask the officiant not to report it.<sup>33</sup>

"The date the marriage license is received by the clerk of the town or city from the officiant shall be recorded on the marriage certificate as the date the marriage registration is filed."<sup>34</sup> It shall be signed by the clerk and include the name of the city or town.<sup>35</sup>

The couple can then request a certified copy of the marriage certificate from the municipal clerk.

## ***How do I change my surname?***

Although the marriage application form does not have a place for requesting a change in your last name, you can still bring a certified copy of your

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<sup>31</sup> NH RSA 5-C:41 XV.

<sup>32</sup> NH RSA 5-C:49 I.

<sup>33</sup> NH RSA 5-C:49 VI.

<sup>34</sup> NH RSA 5-C:41 XVI.

<sup>35</sup> NH RSA 5-C:41 XVII.

marriage certificate to the Social Security Administration and the New Hampshire Division of Motor Vehicles<sup>36</sup> in order to change your last name on those identity documents.

Prior to May 27, 2009, the Passport Agency, citing the federal 1996 Defense of Marriage Act (DOMA), refused to honor the marriage certificate of a same-sex couple as a name change document and required couples to go through Probate Court to have their names changed or to wait 5 years before it would issue a passport that reflected their married name.

**The U.S. Department of State has now changed its policy and will permit a marriage certificate to be used as proof of a surname change, *provided the marriage certificate creates a way to legally change one's surname by operation of state law.* We believe that New Hampshire's procedure for changing your name via your marriage certificate satisfies this requirement.**

Based on GLAD's experience with couples who were married in Massachusetts, we would suggest that in addition to a certified copy of your marriage certificate that you also provide a copy of your New Hampshire drivers' license and/or Social Security card showing that you are in fact using your married name. If it is possible to file your passport application in person at a passport office, you may be able to resolve any problems that arise from a passport official who is not familiar with this new policy. The Passport Agency policy can be found at [http://www.glad.org/uploads/docs/publications/passport\\_manual.pdf](http://www.glad.org/uploads/docs/publications/passport_manual.pdf), and it may be advisable to mail a copy of it with your application or bring it with you if you go in person. Please contact GLAD if you encounter any problems.

**NOTE: If you come to marry in New Hampshire and return to a state that does not recognize your marriage, then most likely you will not be able to use the marriage certificate to change your name on identification documents and instead will need to go to your local court to get a court ordered name change.**

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<sup>36</sup> See <http://www.nh.gov/safety/divisions/dmv/driverlic/faq.html#A20>

***What exemptions does New Hampshire law provide to religious organizations, associations and societies around the solemnization and celebration of a marriage?***

Beyond the exemptions for religious institutions that already exist in New Hampshire’s anti-discrimination laws (see GLAD’s *New Hampshire Overview of Legal Issues for Gay Men, Lesbians, Bisexuals, and Transgender People* at <http://www.glad.org/uploads/docs/publications/nh-lgbt-overview.pdf> for more information), the new marriage law has created some additional exemptions for religious organizations and institutions specifically with regard to marriage.

First, no clergy are required to solemnize any marriage that is contrary to their religious teachings and practices, if doing so would violate their constitutional protections of free exercise of religion.<sup>37</sup> In addition, religious organizations, associations, or societies, or any nonprofit institutions or organizations operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, are also protected from having to participate in the solemnization of a marriage in violation of their religious beliefs.<sup>38</sup>

Second, a “religious organization, association, or society, or any individual who is managed, directed, or supervised by or in conjunction with such entities ” does not have to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if such request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage, the celebration of a marriage, or the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals, and such solemnization, celebration, or promotion of marriage is in violation of his or her religious beliefs and faith.<sup>39</sup> The extent of this exemption is not fully clear, although it seems likely that a church that rents its hall to the general public for weddings would not have to do so for a same-sex couple. This exemption also applies to nonprofit institutions that are “operated, supervised

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<sup>37</sup> NH RSA 457:37(I).

<sup>38</sup> NH RSA 457:37(II).

<sup>39</sup> NH RSA 457:37 III.

or controlled by or in conjunction with a religious organization, association, or society.”<sup>40</sup>

At the same time, individuals and secular businesses who are open to the general public --e.g., inns, photographers-- are still subject to New Hampshire’s non-discrimination laws.<sup>41</sup> This means that a wedding photographer or florist cannot refuse their services for your wedding simply because of individual objections against marriages between same-sex couples.

Finally, the new law also adds language to the law governing fraternal benefit societies, simply making clear what the law already requires: that the civil marriage laws do not: (a) affect the ability of any such society to determine eligibility for admission of its members; or (b) require any such society that is “operated, supervised or controlled by or in connection with a religious organization to provide insurance benefits to any person if to do so would violate the society’s free exercise of religion” as guaranteed by the United States and New Hampshire Constitutions.<sup>42</sup>

Ultimately, GLAD expects that there will not be many encounters of this sort between couples and qualifying institutions and organizations. However, if you encounter a problem, please contact GLAD and tell us what has happened. In the meantime, as you continue with the planning of your wedding celebration, the best advice is probably simply to move on.

### *Is there anywhere else that we can get married?*

Yes, currently Massachusetts, Connecticut, Iowa, Vermont, New York, the District of Columbia and Canada allow same-sex couples to marry and have no residency requirement. GLAD has detailed publications on how to get married in Massachusetts, Connecticut, Vermont and Canada on our website at <http://www.glad.org/rights/publications/c/marriage/>. For information about getting married in Iowa, New York and the District of Columbia contact Lambda Legal ([www.lambdalegal.org](http://www.lambdalegal.org)).

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<sup>40</sup> Id.

<sup>41</sup> NH RSA 354-A:17

<sup>42</sup> NH RSA 457:37 IV.

In addition, the Netherlands, Belgium, Spain, South Africa, Norway, Sweden, Portugal, Iceland, Argentina and Mexico City allow same-sex couples to marry, but some of these countries have requirements that make it difficult for non-citizens to marry. Moreover, you should speak with an attorney about other consequences of marrying outside the country, particularly with regard to potential differences in the treatment and respect of such marriages within the United States.

## What If I Already Have A Marriage, Civil Union Or Domestic Partnership From Another State?

*Is my marriage valid if I legally married outside New Hampshire prior to January 1, 2010?*

In most cases, yes. HB 436 states that every marriage legally contracted outside New Hampshire will be recognized as valid.<sup>43</sup> There is, however, an exception to this rule. Marriages from another jurisdiction that violate the prohibition on marrying certain blood relatives will not be respected in New Hampshire.<sup>44</sup>

*Can I get married in New Hampshire if I am already legally married?*

You cannot remarry the *same person* because, while some states allow couples to remarry each other, New Hampshire expressly prohibits remarriage unless the validity of the marriage has been questioned by a court, law enforcement or state registrars outside New Hampshire.<sup>45</sup>

If you have a marriage or civil union with one person and wish to marry a *different person*, you must first dissolve your existing relationship, since otherwise you would violate New Hampshire's bigamy law.<sup>46</sup> When you complete the marriage application, the clerk will ask you if you have been previously married, and if so you will need to furnish proof that it ended by death, divorce or annulment. For information about dissolving a marriage or civil union in New Hampshire, see the section below, *How Do I Get Out Of A Marriage Or Civil Union In New Hampshire?*

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<sup>43</sup> NH RSA 457:3

<sup>44</sup> NH RSA 457:2

<sup>45</sup> NH RSA 5-C:50-51; by contrast, New Jersey expressly allows couples to obtain a license for "remarriage or reaffirming a civil union." (N.J. Revised Statutes 37:1-7).

<sup>46</sup> NH RSA 639:1.

***What if I entered into a civil union in another state?***

If you have a civil union from another state, New Hampshire will recognize your civil union as a marriage, provided that the relationship does not violate any independent prohibitions contained in New Hampshire law.<sup>47</sup> That means that New Hampshire will grant you the same rights and benefits, and hold you to the same responsibilities, as a married couple in New Hampshire.

However, that does not mean your out-of-state civil union or equivalent status will be converted into a marriage—only that New Hampshire will recognize it as a marriage. Moreover, couples in a civil union from another state cannot apply to have their civil union converted to a marriage, nor will their civil union automatically convert to marriages as of January 1, 2011.

If you have a civil union license from a state other than New Hampshire and wish to marry the same person in New Hampshire, town clerks are being instructed to tell couples that they must first dissolve their civil union before they will be allowed to marry.

For many, dissolving a civil union may be cost prohibitive or, depending on where you live, impossible. In addition, dissolving your civil union would make you “legal strangers” again for a period of time, and therefore could expose you and your family to unforeseen risk and harm before you are able to marry in New Hampshire. For that reason, GLAD recommends that couples who are in this situation consider getting married in Massachusetts, Vermont, Connecticut, Iowa, New York or the District of Columbia since those states allow you to marry the same person without having to dissolve your existing civil union. Of course, if in the future you wish to sever all legal ties to your spouse, you will need to dissolve not only your marriage but also your out-of-state civil union.

If you have a civil union with one person and wish to marry a ***different person***, you must dissolve your civil union first, since otherwise you would have a legally recognized relationship with two different people which would violate New Hampshire’s bigamy law. Therefore, if you have previously

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<sup>47</sup> NH RSA 457:45

joined in a civil union with a former partner, you must dissolve your civil union first before you get married to your new partner. For information about how to dissolve a civil union in New Hampshire, see the section below, *How Do I Get Out Of A Marriage Or Civil Union In New Hampshire?*

***What if I have a comprehensive Domestic Partnership from California, Oregon, Washington or Nevada?***

If you are registered as domestic partners with the State of California (under A.B. 205), the State of Oregon (under the Oregon Family Fairness Act) or the State of Washington (under the Act Relating to Further Expanding the Rights and Responsibilities of State Registered Domestic Partners) or the State of Nevada (under an Act Relating to Domestic Relations. . .), you should be able to marry in New Hampshire, but it is possible that the town clerks will also treat your domestic partnership like an out-of-state civil union. If they do, you would not be permitted to marry the same person without first terminating your domestic partnership, as was discussed in the prior question about civil unions. If you encounter this problem, please contact GLAD's Legal InfoLine at 800-455-GLAD (4523). If you are required to first terminate your domestic partnership, you might consider marrying in Massachusetts, Connecticut, Vermont, Iowa, New York or the District of Columbia where this would not be necessary.

If you have a comprehensive domestic partnership with one person and wish to marry a ***different person***, you must dissolve your domestic partnership first, even if a New Hampshire clerk may allow you to marry.

Termination of a California domestic partnership can take different forms and, in some cases, does not require a court proceeding. You should seek advice and consult California's informative brochure at [www.ss.ca.gov/dpreistry/forms/sf-dp\\_termbrochure.pdf](http://www.ss.ca.gov/dpreistry/forms/sf-dp_termbrochure.pdf). For information about ending an Oregon, Washington or Nevada domestic partnership contact Lambda Legal ([www.lambdalegal.org](http://www.lambdalegal.org), 212-809-8585) or the National Center for Lesbian Rights ([www.nclrights.org](http://www.nclrights.org), 800-528-6257).

***What if I have a non-comprehensive Domestic Partnership?***

The term “domestic partnership” has no universal definition. The exact meaning of the term and the rights and responsibilities accorded to persons in a domestic partnership vary, sometimes dramatically, from jurisdiction to jurisdiction.

Maine and Wisconsin have non-comprehensive domestic partnerships. Colorado, Hawaii and Maryland have beneficiaries programs that are similar. Many municipalities also provide domestic partnerships.

If you have a municipal or non-comprehensive state domestic partnership and intend to marry a ***different person*** from the person with whom you presently have the domestic partnership, GLAD recommends that you consult an attorney about whether you need to dissolve the domestic partnership first.

Further, if you marry the person with whom you have registered as domestic partners, your marriage may impact your domestic partnership status, so it is important to look into the law of the state or municipality where you previously registered.

# What Are Some Things We Should Consider Before Entering Into A Marriage?

For any person, a marriage is an important commitment and should be considered carefully. Along with the important benefits and protections marriage can provide for your family, you also take on significant legal responsibilities and obligations to your spouse.<sup>48</sup>

In addition, particularly for same-sex couples, entering into a marriage can affect many aspects of your public and private life. Moreover, because only a few states have any sort of comprehensive relationship recognition for same-sex couples, it is important to plan for the worst, i.e., that entities in other states will not respect your marriage, while hoping for the best.

**Moreover, this is a rapidly evolving area of new law where some things are unclear and others are confusing and where we do not yet have a great deal of guidance as to the application and implementation of the law. Therefore, please remember that the information provided here is tentative and that circumstances may change rapidly. It is important to make an informed choice about whether to enter into a New Hampshire marriage based on your relationship with your partner and the unique circumstances of your life. You should consult an attorney in your home state before entering a marriage in New Hampshire.**

In preparing to consult with an attorney, here are a few issues to consider that uniquely affect married same-sex couples (most of these concerns also apply to civil union couples):

- It may be very difficult, or in some states, impossible, to terminate the marriage. Under New Hampshire law, a marriage can be terminated only if certain residency requirements are satisfied (see the question below, *How Do I Get Out Of A Marriage Or Civil Union In New Hampshire?*). Also, other

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<sup>48</sup> For example, under New Hampshire law, a spouse generally cannot completely disinherit a spouse by leaving the spouse out of her or his will unless the couple signed a valid prenuptial agreement that demonstrates such a mutual intent. As a result, a spouse is entitled to a share of your estate. NH RSA 560:10;561:1. In addition, under New Hampshire law, persons in a marriage may be in many circumstances responsible for the support of their spouses, including such things as medical bills.

states may or may not allow you to dissolve your marriage under those states' laws. With divorce in New Hampshire, the court will determine property division, alimony, child custody and child support if the parties cannot agree on these issues themselves. Under New Hampshire law, the court can consider any property owned by either or both of the parties as marital property subject to distribution in a divorce unless the parties enter into an otherwise valid pre-nuptial agreement addressing the question.<sup>49</sup>

- Entering into a New Hampshire marriage may complicate matters if you are in the process of adopting a child or considering adoption in the future. Some foreign countries welcome single-parent adoptions but do not allow same-sex couples to adopt. This is also true for some states in the United States.
- Being in a marriage could disqualify you from certain state government programs because your spouse's income and assets may be included with your own.
- An employer-sponsored domestic partnership plan may require you to be "single" in order to qualify. This could raise questions as to whether an employee in a marriage can participate.
- Once you are in a marriage, you have assumed a legal status that will have to be disclosed on forms and records in a variety of public and private contexts, which could disclose your sexual orientation publicly.
- Foreign nationals should not marry without consulting an experienced immigration attorney. Obtaining a marriage with your partner will not help fix immigration problems. In fact, it could lead to deportation or future denials of visa applications. For additional information consult GLAD's publication, *Warning for Same-Sex Binational Couples*, at [http://glad.org/uploads/docs/publications/Binational\\_Couples\\_Immigration\\_Warning.pdf](http://glad.org/uploads/docs/publications/Binational_Couples_Immigration_Warning.pdf).

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<sup>49</sup> See generally NH RSA 458, 458-B, 458-C, 461-A.

# What Protections Do We Gain From A Marriage in New Hampshire?

A marriage gives you automatic inclusion within and under hundreds of New Hampshire state laws that apply to spouses, family and next of kin. Note if you were already in a civil union, all of these state marital laws also apply to your civil union. Here are some categories of New Hampshire laws that relate to marriage:

- family law;
- title, tenure, descent and distribution, intestate succession, wills, survivorships, or other incidents of the acquisition, ownership or transfer (during life or at death) of real or personal property;
- state and municipal taxation;
- probate courts and procedure;
- group insurance for government employees;
- state family leave benefits;
- financial disclosure and conflict-of-interest rules;
- protection against discrimination based on marital status;
- emergency and non-emergency medical care and treatment, hospital visitation and notification, and authority to act in matters affecting family members;
- state public assistance benefits;
- workers' compensation;
- crime victims' rights;
- marital privileges in court proceedings; and
- vital records and absentee voting procedures.

Many private parties – e.g., businesses, employers, public accommodations, insurance companies, etc. – are subject to the state law prohibiting discrimination based on marital status.<sup>50</sup> Of course, the non-discrimination law already prohibits sexual orientation discrimination and that will continue.

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<sup>50</sup> See, e.g., NH RSA 354-A:1,7,10 and 17; 417:4 VIII; 417-A:3; 417-B:2. In many instances, the non-discrimination law will mean equal treatment for same-sex spouses. However, because of federal law, there may be circumstances in which this non-discrimination protection will not be available to same-sex spouses. For examples of where federal law may direct different treatment for same-sex spouses, see the section *Will I Be Able To Get Health Insurance Through My Employer For My New Hampshire Spouse?* below.

Employers with fewer than six employees are exempt from the non-discrimination law as are “exclusively social clubs” and “fraternal or religious associations or corporations” if “such club is not organized for private profit.”<sup>51</sup>

Family law attorneys highly recommend that couples consider entering into a prenuptial agreement before joining in a marriage to clarify what they consider to be the length of their relationship, the ways they wish their property to be divided (in the event that their wishes vary from usual dissolution laws), and other matters of particular concern to them.

Although being in a marriage offers many protections for you and your family, GLAD strongly recommends a “belt and suspenders” approach – i.e., also consult with an attorney who can work with you to put in place the legal planning documents that will offer your relationship and family the maximum protection. You should use the services of an attorney to:

- gain expert advice and use multiple strategies (through wills, trusts, agreements) to ensure your wishes can be met to the largest degree possible no matter what the situation at your death;
- do tax planning – income tax, gift tax, estate tax – at the state and federal levels;
- do Medicaid and long term care planning, concerning issues like assets available to both spouses, asset transfer issues, and liens.

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<sup>51</sup> NH RSA 354-A:2 VII.

# Respect For Your New Hampshire Marriage

## *Respect by the Federal Government*

Because of the 1996 federal Defense of Marriage Act (DOMA), the current federal government does not recognize the marriages of same-sex couples and therefore does not extend to same-sex spouses the more than 1138 federal laws that condition benefits, protections and responsibilities on marriage. This includes federal taxes, Social Security, immigration, veterans' benefits and many more. In addition, federal law interacts with New Hampshire state law in many ways that have yet to be catalogued. Some of these will almost certainly treat same-sex married couples differently than different-sex married couples unless corrective action is taken.

GLAD has filed two federal lawsuits, *Gill et al. v. OPM et al* and *Pedersen et al. v. OPM et al.*, to challenge Section 3 of DOMA (see [www.glad.org/doma](http://www.glad.org/doma) for detailed information). Should GLAD succeed in these lawsuits, or should Congress repeal DOMA Section 3, some or all of the federal laws where marriage is relevant will be applicable to married same-sex couples who live in states where their marriage is respected.

## *Respect for the Marriages of Same-Sex Couples Outside of New Hampshire*

First, the good news. Your Connecticut marriage will be respected as a marriage in Massachusetts, Iowa, Vermont, New Hampshire, New York and the District of Columbia and also most likely in Maryland and New Mexico although same-sex couples can not marry in these states.

It will be respected as a civil union in New Jersey and Illinois and in Delaware (beginning January 1, 2012), and it will be respected as a domestic partnership in the state of Washington.

There is uncertainty as to how other states will treat the marriage of a same-sex couple. Although states have a strong tradition of recognizing marriages that are legal where they were celebrated (unless the state has strong public policy against the recognition of the marriage), unfortunately, many states currently do have laws, constitutional provisions or controlling appellate

decisions that can be deemed to create a “strong public policy” against recognizing the marriages of same-sex couples.

Even in states that do not respect the marriages of same-sex couples, there is nothing to prevent private parties – e.g., businesses, employers, public accommodations, insurance companies, etc. – from respecting your marriage.

***What should we do if our marriage is not respected?***

Some types of unfair treatment can be the basis of a lawsuit, and other times the unfairness may not be suitable for a court to address. Even when litigation is an option, it is not the only option. It is always essential to weigh the chances of success or failure because bad results in lawsuits can have effects reaching far beyond your particular situation and affecting other families, too. For a further discussion of this see

<http://www.glad.org/uploads/docs/publications/make-change-not-lawsuits09.pdf>.

If you feel you have been discriminated against, you should contact GLAD or one of the other LGBT legal organizations. We can help you figure out what options you have to enforce your rights.

Many ways exist to advocate in your home state about why your marriage should be respected. You can work with local marriage equality organizations to educate the public, mobilize supporters, and lobby your state legislature. You can write letters to the editor of your local paper about why your family needs the protections due to your marriage. You can participate in efforts to defeat anti-gay constitutional amendments, legislation, and ballot initiatives on both the state and federal levels. You can share your story by participating in public forums. For more information about these kinds of efforts, contact GLAD.

## How Will A Marriage Affect My Children?

**There is no more important question than establishing legal parenthood. This document can only provide general information. For you and your children, we cannot urge more strongly that you consult an attorney about undertaking co-parent adoption for any current non-legal parents – particularly in light of the information below.**

As to legal status as parents, if both parties to the marriage were parents before the marriage (e.g., through joint or second-parent adoption), both parties remain parents.

If one party to the marriage was not a parent before the marriage, the marriage will not change that. He or she will be considered a stepparent, carrying whatever legal weight that status has in New Hampshire. The sure way to become a legal parent in this situation is for the non-legal parent to adopt the child. Moreover, that adoption decree from the court is a legal judgment. As a result, it should be recognized broadly outside of New Hampshire and have legal significance independent of the marriage.

If two people joined in a marriage subsequently have a child, both parties may be presumed to be the legal parents of a child born to either of them. In New Hampshire, a child born into a marriage is presumed to be the child of both parties. Nonetheless, this is just a presumption and does not have the same effect as a court judgment. It is subject to being challenged and overturned.

In addition, the marriage could encounter a lack of respect in some states, so relying on the fact of the marriage alone to protect your children is not the best approach. Therefore, GLAD strongly recommends that you consult a lawyer and continue the practice of securing a second-parent adoption in order to obtain a decree of legal parenthood that is independent of the marriage.

Unfortunately, in New Hampshire the question of joint or second parent adoption by a same-sex couple has not been addressed expressly by the New Hampshire statutes on adoption or by any authoritative ruling by the state

supreme court.<sup>52</sup> Second parent adoptions have been granted at the lower court level in some counties, but denied in others.<sup>53</sup> However, with the availability of marriage, same-sex married couples, but not unmarried couples, now have a clear avenue to second parent adoption through the stepparent adoption process.<sup>54</sup>

- *Miller-Jenkins Sidebar*

Relying on a partner's good will, or even on the fact that a child was born into a marriage or civil union, is not the best way to ensure ongoing parental rights of both parents if a couple later separates. A case in point is *Miller-Jenkins v. Miller-Jenkins*. This case has been in litigation since 2004, has involved two state Supreme Courts (Vermont and Virginia), and has already made several trips to the U.S. Supreme Court. Proceedings are ongoing.

In that case, Janet and Lisa had a child, Isabella, while they were in a civil union. Janet did not adopt. After the couple separated, Lisa moved to Virginia and used both the lack of an adoption, and Virginia's laws hostile to same-sex relationships to thwart Janet's contact with their daughter. Finally, however, the Virginia courts agreed that the Vermont courts had the authority to make custody and visitation decisions.

After many attempts to get Lisa to allow Janet visitation rights, in November, 2009, the Vermont Family Court issued an order granting Janet responsibility for the day-to-day care of Isabella while granting Lisa liberal visitation rights. The transfer of custody was to have taken place on January 1, 2010. However, Lisa failed to appear at the appointed time, and an arrest warrant was issued. Lisa and Isabella still have not been found.

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<sup>52</sup> The New Hampshire Supreme Court rejected a petition to jointly adopt by a divorced heterosexual couple in 1987, a decision read by some as also likely blocking joint or second-parent adoptions by same-sex couples. See In Re Jason C., 129 N.H. 762, 533 A.2d 32 (1987). The court read the absence of any procedure for custody determinations within the adoption process to indicate that the legislature did not intend to grant adoptions under these circumstances. The court's determination also turned on the fact that allowing a divorced couple to adopt jointly would not further the legislature's intent to limit adoption to applicants who would most likely provide a unified and stable household for the child.

<sup>53</sup> AnnMarie Timmins, Adoption Law Is Up For Interpretation, Concord Monitor, Apr. 10, 2006, at [www.concordmonitor.com/apps/pbcs.dll/article?AID=/20060410/REPOSITORY/604100308](http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20060410/REPOSITORY/604100308).

<sup>54</sup> NH RSA 170-B:4 IV.

GLAD and local counsel represent Janet in the Vermont proceedings. For more information about the case, go to <http://www.glad.org/work/cases/miller-jenkins-v-miller-jenkins>.

Beyond these considerations, entering into a marriage will provide your children with every protection and benefit that the New Hampshire government (but not the federal government) extends to enhance the security and safety of children's lives.

## Will I Be Able To Get Health Insurance Through My Employer For My New Hampshire Spouse?

If you are employed by the State of New Hampshire, a New Hampshire county or a New Hampshire municipality, your same-sex spouse will be entitled to the same health insurance rights and benefits provided to different-sex, married employees.

If you are employed by the federal government, the federal Defense of Marriage Act (DOMA) means that health plans offered through the Federal Employees Health Benefits Program currently do not cover same-sex spouses of federal employees.

If you are self-employed, you should be able to purchase coverage for your same-sex spouse on the same terms as a self-employed different-sex, married individual.

If you are a private sector employee, the picture is more complicated and evolving. First, your employer may not be required to offer health insurance or spousal or family coverage.

Assuming your employer provides individual, spousal and family coverage, your employer is certainly permitted to extend coverage to same-sex spouses. Nothing prevents an employer from providing spousal health insurance benefits. The issue is whether a private employer can be required to extend such coverage.

Most private employer health plans are covered by a federal law known as ERISA (Employee Retirement Income Security Act). Under ERISA, there are two types of health plans: insured plans and self-insured plans.

Insured plans are regulated by state insurance laws. An insured plan in New Hampshire, governed by New Hampshire law, must provide coverage to same-sex spouses of employees if coverage is extended to different-sex spouses of employees.<sup>55</sup> Contact GLAD's Legal InfoLine if your company has an insured plan and refuses to provide coverage to your same-sex spouse.

For self-insured plans, employers can choose whether to extend coverage for same-sex spouses, but it is generally believed that they are not legally required to do so unless the definition of spouse in the plan includes same-sex spouses. That being said, employers with self-insured plans may try to argue that they are prevented by either ERISA or federal DOMA from providing spousal coverage to same-sex spouses. This is not true; nothing in ERISA or DOMA prevents employers from providing spousal coverage.

You should be able to find out if your health insurance plan is an insured or self-insured plan by asking your human resources department or supervisor.

Under a federal law known as COBRA, private employers with 20 or more employees are required to continue group health coverage for departing employees and covered dependents for a set period of time following certain events. As COBRA rights come from federal law, employers can deny COBRA rights to the same-sex spouses of employees.

However, under a state continuation law, a "mini-COBRA law," fully insured plans must provide continuing coverage to same-sex spouses, regardless of the size of the group.<sup>56</sup> New Hampshire state and municipal plans should also provide this continuation coverage. Yet, this state continuation law does not apply to self-insured health plans. Even with self-insured companies, however, employers are free to extend these benefits voluntarily if available in the insurance marketplace.

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<sup>55</sup> See State of New Hampshire Insurance Department Bulletin INS 07-088-AB dated December 18, 2007 at <http://www.nh.gov/insurance/media/bulletins/2007/documents/ins07-088ab.pdf>. Although this Bulletin was written about civil union spouses, the same rules apply to married same-sex spouses. This position is further supported by the New Hampshire Unfair Insurance Trade Practices Act. (See N.H. Revised Statutes 417:4 VIII (b), (c), (d) and (e)).

<sup>56</sup> NH RSA 415:18.

Another federal law that has a major impact on health insurance rights is *HIPAA*. This law provides for “special” enrollment rights, which allow dependents of a covered employee to enroll outside of a group plan’s open enrollment period. Because of *DOMA*, private employer plans in New Hampshire are not required to grant same-sex spouses these federal rights. However, for reasons of fairness and administrative simplicity, plans that cover same-sex spouses will likely do so on the same terms as for married different-sex couples.

For insurance coverage purposes, the New Hampshire Insurance Department has stated that same-sex couples who have entered into marriages or civil unions in other states or comprehensive state domestic partnerships should be recognized as equivalent to a New Hampshire marriage for insurance purposes. It has also stated that same-sex couples who have entered into legally recognized relationships in Colorado, California, Maine, Maryland, Hawaii, New Jersey, Wisconsin and the District of Columbia will be evaluated on a case-by-case basis so long as they are same-sex partners and comply with New Hampshire law.<sup>57</sup> If your state, municipal or insured plan refuses to recognize these non-New Hampshire relationships, please contact GLAD.

As to tax consequences, when employers extend coverage to the spouses of married, heterosexual employees, that benefit comes tax-free to the employee. However, because of *DOMA*, if an employer extends coverage to a same-sex spouse of an employee, the “fair market value” of those benefits is treated as income to the employee and added to the employee’s W-2 at the end of the year, unless your spouse qualifies as your tax dependent for healthcare purposes. Contact GLAD or a tax lawyer or accountant if you have concerns about how your employer is calculating the “fair market value” of this benefit, or if you have questions regarding the qualifications for tax dependent status in this context.

Finally, complicated issues arise if New Hampshire residents work in New Hampshire or in other states for companies based in other states or if the

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<sup>57</sup> See <http://www.nh.gov/insurance/media/bulletins/2007/documents/ins07-088ab.pdf>.

Will I Be Able To Get Health Insurance Through My Employer  
For My New Hampshire Spouse?

health insurance company is based in another state. The obligation to extend coverage to same-sex spouses may depend on a variety of factors. Similar complicated issues arise for non-residents who marry in New Hampshire, return home and seek spousal health insurance benefits from their non-New Hampshire employer. For more information, see GLAD's publication, *Same-Sex Spousal Health Benefits in Massachusetts After Goodridge* at <http://www.glad.org/uploads/docs/publications/hla-glad-health-benefits.pdf>. Even though this publication was written for Massachusetts, most of the information applies to any state where the marriages of same-sex couples are recognized. GLAD recommends that you call us or speak with an attorney if any of these difficulties arise.

## Can A Same-Sex Married Couple in New Hampshire File A Joint Tax Return?

In light of federal marriage discrimination (that is, the so-called “Defense of Marriage Act” or “DOMA”), the federal government does not consider a married same-sex couple as married for purposes of federal laws, including for filing of federal income taxes. **As a result, on *FEDERAL* tax returns, same-sex married or civil union couples are *NOT* allowed to use the married filing jointly or married filing separately status, but each member of the couple *MUST* file as single.**

GLAD recommends, however, that married couples consider designating in some way that the marriage has occurred. Ideas for designating your true marital status without claiming that status are discussed below. Doing so could help to avoid penalties for underpaying taxes and could also prevent others from using the designation of “single” on the tax return to argue or prove that a person is not really married when that issue arises in other legal contexts (i.e. applying for a mortgage or other loan). In order to acknowledge both the discriminatory federal law as well as the truth of your marriage, accountants suggest two options for designating your marital status on a “single” return:

1. Include a cover letter or disclosure form with the tax return. The disclosure form allows a taxpayer to highlight to the IRS issues raised by the tax return. It could include a statement that the taxpayer was married to a person of the same sex as of a certain date (and the marriage certificate could be attached as well), and that the only reason he or she is filing as a single person is because of the federal discriminatory law known as “DOMA.”
2. On the tax return itself, put an asterisk by the “x” in the “single” box, and indicate somewhere on the form (such as the margin) that the taxpayer is married to a person of the same-sex, the date of the marriage, and that this designation as “single” is for federal income tax filing purposes only.

Can A Same-Sex Married Couple In New Hampshire File A Joint Return?

New Hampshire does not have a state income tax. However, if some of your work is in another state that recognizes your marriage or civil union, then you will be required to file as either married filing jointly or married filing separately.

Contact GLAD's Legal InfoLine at 800-455-GLAD (4523) if you need further information or want referrals to a tax attorney.

# How Do I Get Out Of A Marriage Or Civil Union In New Hampshire?

Marriages and civil unions in New Hampshire are dissolved pursuant to RSA 458, the New Hampshire statute that governs annulment, divorce and separation.

There are residency requirements for obtaining a dissolution of a civil union or a marriage in New Hampshire. Specifically, you must satisfy one of the following requirements:<sup>58</sup>

1. both parties reside in the state when the action was commenced; or
2. the plaintiff resides in the state and the defendant was personally served with process within the state; or
3. the plaintiff resided in the state for at least one year before the action is commenced.

In summary, residency is a requirement for a dissolution or divorce in New Hampshire although it can be satisfied in several ways. However, at a minimum, one of the parties to the marriage or civil union must be a resident of New Hampshire when the dissolution action is commenced. That residency might well need to be of a year's duration prior to the commencement of the dissolution action although it clearly can be shorter in the circumstances designated in (2) above.

Satisfying the residency requirement gives the New Hampshire court jurisdiction over the parties. In addition, New Hampshire law requires the court to have jurisdiction "of the alleged cause," which means that "jurisdiction of the cause for dissolution exists when it wholly arose or accrued while the plaintiff was domiciled in the state, and not otherwise."<sup>59</sup> You will need to consult an attorney to determine whether and/or how you might satisfy this requirement of New Hampshire law.

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<sup>58</sup> NH RSA 458:5 I-III.

<sup>59</sup> NH RSA 458:4 & 6.

Same-sex married couples will also be able to divorce in Massachusetts, Vermont, Iowa, New Hampshire, New York and the District of Columbia (and possibly in Maryland and New Mexico), provided they meet the residency requirements for divorce. In addition, New Jersey, Illinois and, beginning January 1, 2012, Delaware may dissolve the relationship as a civil union.

Civil union couples can also dissolve their relationship in Vermont, New Hampshire, New Jersey, Rhode Island and, beginning January 1, 2012, in Delaware and Hawaii. In addition, a state that provides same-sex couples with all the state-based rights of different-sex married couples (e.g. California, Oregon, Washington and Nevada) is more likely to be willing to dissolve same-sex relationships, even ones that are different from their form of recognition. There have also been a small number of dissolutions in states which don't provide any comprehensive form of legal recognition for same-sex couples (e.g. Maine).

If you reside in any of the New England states and have questions about dissolving a marriage or civil union, contact GLAD's Legal InfoLine at 800-455-4523. If your residence is outside of New England and you have questions about the dissolution of a marriage or civil union, you should contact Lambda Legal (212-809-8585) or the National Center for Lesbian Rights (800-528-6257).

# What Legal Protections Can Same-Sex Couples In New Hampshire Acquire Without Being In A Marriage Or Civil Union?

Here are a number of steps a New Hampshire couple can take to safeguard their relationship *without being in a marriage or civil union*:

**Because the establishment of legal statuses for same-sex couples is new throughout the country and taking different forms, this is a rapidly evolving area of the law where there are ongoing questions and considerable uncertainty as to where the law is heading. As a result, no one has sure answers to many important questions. Protecting your relationship and your family is obviously important and means that you should consult an attorney for advice on your particular situation. With or without a New Hampshire marriage or civil union, there are a number of steps a New Hampshire couple can take to safeguard their relationship:**

- 1. Relationship Agreement or Contract:** Agreements regarding property and finances should be respected and honored according to ordinary rules of contract law, but it is important to note that the New Hampshire Supreme Court has not yet ruled on the subject. A number of other states have found such agreements enforceable, including Massachusetts.
- 2. Durable General Power of Attorney:** Any competent person may appoint another person as his or her “attorney-in-fact” for money, property and/or other matters in the event the one becomes incapacitated or disabled.<sup>60</sup> If no such appointment is made, then a “family” member will be empowered to make decisions for the disabled or incapacitated individual. A power of attorney must be signed and notarized.
- 3. Advance Directive for Health Care:** Since medical care providers look to next-of-kin to make health care decisions for an

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<sup>60</sup> NH RSA 506:6.

incapacitated individual, an unmarried person must create an advance directive for health care if he or she wishes a person other than immediate family to make those medical decisions when he or she lacks either the temporary or permanent capacity to do so for herself or himself. Under New Hampshire law, a person may appoint a health care “agent” to make those decisions for him or her upon incompetence, i.e., when the person no longer is able to do so.<sup>61</sup> People should give a copy of the advance directive for health care to their doctors and should also consider giving it to family members.

Within this document, a person can also deal with end-of-life issues. New Hampshire law permits a person to make advance decisions about medically-administered nutrition and hydration as well as life sustaining treatments without which the person would die.<sup>62</sup>

The advance directive for health care must be signed by the person giving the power of attorney and two witnesses.<sup>63</sup> Neither of the witnesses can be the agent, the person’s spouse or heir, a beneficiary under the person’s will or trust, the attending physician or nurse practitioner (or any person acting under the direction or control of either of these). No more than one witness can be the person’s health or residential care provider or such provider’s employee.<sup>64</sup> Alternatively, the advance directive can be signed in the presence of a notary public or justice of the peace.<sup>65</sup>

New Hampshire law provides a form that has two parts: (1) a durable power of attorney for health care; and (2) a living will.<sup>66</sup> A person can complete either part or both, but the advance directive

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<sup>61</sup> NH RSA 137-J:1.

<sup>62</sup> See NH RSA 137-J:1 I(b) and 137-J:2 XIV (defining “living will”).

<sup>63</sup> If physically unable to sign, the person’s name may be signed by another in the person’s presence and at her or his “express direction.” (N.H. Revised Statutes 137-J:14 II).

<sup>64</sup> NH RSA 137-J:14.

<sup>65</sup> NH RSA 137-J:14 I(b).

<sup>66</sup> NH RSA 137-J:20.

must be “substantially in the form set forth” by statute.<sup>67</sup>  
Revocation is governed by statute.<sup>68</sup>

If a guardian is later appointed for a person, the Court presumes the power of attorney for health care remains in the best interests of the person who gave it unless there is clear and convincing evidence to the contrary.<sup>69</sup>

4. **Appointment of Guardian:** New Hampshire’s broad guardianship laws allow, among other things, an individual to nominate another person as the guardian of their person, estate, or both.<sup>70</sup> There is a rebuttable presumption that the nominated person shall be appointed. The advantages of nominating a guardian in advance is that you are selecting the person to take over all aspects of your financial matters. Under New Hampshire law, an individual can also name any persons he or she wishes to exclude from consideration as guardian; and a court cannot appoint any person so excluded.
5. **Will:** Without a will, a deceased unmarried person’s property passes to: (1) his or her children; (2) if no children, to his or her family, as carefully delineated by statute; and (3) if no family as provided by statute, to the state of New Hampshire.<sup>71</sup> If the unmarried person wishes to provide for others, such as his or her partner, a will is essential. Even if a person has few possessions, he or she can name in the will who will administer his or her estate. If a person has children, she or he can nominate the future guardian of a child in a will.
6. **Funeral Planning Documents:** Upon death, under New Hampshire law in the absence of instructions, a person’s body is given to their next-of-kin, carefully delineated by statute in order of

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<sup>67</sup> NH RSA 137-J:13 II.

<sup>68</sup> NH RSA 137-J:15.

<sup>69</sup> NH RSA 137-J:21

<sup>70</sup> NH RSA 464-A:10.

<sup>71</sup> NH RSA 561:1 II.

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priority, beginning with the spouse and passing to various blood relations.<sup>72</sup> This means that a person's own partner has no automatic right to remove the body, write an obituary, or make plans for a final resting place. To avoid that problem, you should create a written, signed document (witnessed and notarized) which designates the person you want to be able to have custody and control of your remains.<sup>73</sup> (Some people include these instructions as part of a will, but since a will may not be found for days after death, it is preferable to give the instructions to the person you want to take care of matters as well as to family).

In the absence of written instructions, a surviving partner can petition the New Hampshire probate court for the residence of the deceased for an award of custody and control if she or he establishes: (1) a "closer personal relationship to the subject than the next of kind"; (2) he or she "lived with the subject"; and (3) was "not in the employ of the subject or the subject's family."<sup>74</sup>

Finally, a person can, before death, file a petition in the probate court regarding custody and control of one's remains.<sup>75</sup> This may be an important avenue to pursue if conflict is anticipated.

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<sup>72</sup> NH RSA 290:17 II; see also 290:16 IV (defining "next of kin").

<sup>73</sup> NH RSA 290:17.

<sup>74</sup> NH RSA 290:19 III.

<sup>75</sup> NH RSA 290:19 I.



Gay & Lesbian Advocates & Defenders (GLAD) is the leading legal rights organization in New England dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression. Through impact litigation, education and public policy work, GLAD seeks to create a better world that respects and celebrates diversity—a world in which there is equal justice under law for all.

GLAD's Legal InfoLine and publications are provided *free of charge* to all who need them. We hope that those who are able will make a contribution to ensure that GLAD can continue the fight for equal justice under the law.

To make a tax-deductible contribution, log on to [www.glad.org](http://www.glad.org), or call us at (800) 455-GLAD (4523) with your credit card, or mail your check, payable to GLAD to 30 Winter Street, Suite 800, Boston, MA 02108. If your workplace has a matching gift program, please be sure to have your donation matched. Please contact us if you would like more information on becoming a GLAD partner.

*Thank You!*



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