



Sampling of Legal Rights, Protections and Obligations for Married Families

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Marriage Today

When the government licenses marriage, it also confers an enormous array of legal protections on the married pair and any children they may have. Because of its longevity as a cultural institution, and because it is licensed by the state, marriage is understood as a very important institution, with inherent dignity and deserving of respect. Courts refer to the right to marry as a “fundamental right of free persons.”

Same-Sex Couples and Marriage in Maine

Committed same-sex couples are denied the right to marry in Maine even though they can meet the legal requirements imposed on other couples by the state. That denial imposes a variety of harms on those couples and any children they may have.

The state legislature and courts have begun to address some of the hardships imposed on committed same-sex couples because they are treated as “legal strangers” by the law.

A state registry allows some couples who have lived in the state for a year and who meet a variety of economic tests to receive limited probate-related rights, such as the right to inherit without a will and receive priority as guardians and conservators when the partner is disabled. The Legislature has also amended other statutes to allow qualified partners legal protections, such as the Family Medical Leave Act, domestic violence laws, and provisions allowing access to absentee ballots. By a decision of the Supreme Judicial Court interpreting state adoption law, same-sex couples may also jointly adopt their own children, thereby ensuring a parent-child relationship and providing emotional and legal security to their children. While joint adoption allows the parents to have a legal bond with their children, they remain legal strangers to one another.

These legislative and judicial measures are laudable and are making a difference, but none is the type of comprehensive protection provided by state-licensed marriage. Indeed, a computer search of Maine law on “Westlaw” shows that 411 laws use the term “marry,” “marital,” or “marriage” and 663 statutes use the term “spouse,” “husband,” or “wife.” These numbers do not include court rules, administrative regulations, policies or case law.

What follows are examples of how Maine laws provide a supportive legal framework for married couples and their children, providing both protections for and responsibilities on the married couple.

Ten Categories of Legal Protections For Married Couples

- 1. The law enables married families to be there for each other in difficult times.** For example, employees may use accrued sick and vacation time to care for a spouse, parent or child under the Family Care law, employer policies allow bereavement leave for a spouse and often for a death in the spouse’s immediate family, and everyone recognizes the right of a spouse to be by the other’s side in a hospital or an ambulance.¹ The law recognizes spouses as receiving priority when the other spouse is disabled and needs a guardian or conservator.²

The ability of same sex couples to tend to family needs in a crisis is severely limited. Family Care is not available, few employer policies allow bereavement leave for a gay or lesbian couple or their family members, and there is no universally recognized right for such a partner to attend to the other in an ambulance or hospital setting.³ Under legislation enacted in 2007, qualified domestic partners may now take time off from work to care for a seriously ill partner under Maine’s version of the federal Family and Medical Leave Act,⁴ so that such persons are no longer required to choose between caring for their partners and keeping their jobs. Same-sex partners have no automatic preference as guardians or conservators.⁵

- 2. The law regards married couples as an economic unit who are financially interdependent on one another.** For example, spouses must financially support one another⁶ and they can be responsible for debts incurred by the other.⁷ The law allows only married couples to file joint tax returns and pool any deductions

¹ 26 M.R.S.A. § 636.

² 18-A M.R.S.A. § 5-311 (2-A)(priority in guardianship proceedings); 18-A M.R.S.A. § 4-410 (3-A) (priority in conservatorship proceedings).

³ Any person may do a Health Care Power of Attorney, which should ensure access between the signer and his or her health care “agent” in the hospital.

⁴ 26 M.R.S.A. § 843.

⁵ Registered domestic partners are given such priority.

⁶ 19-A M.R.S.A. § 1504 (a person shall support his or her spouse and children when in need); 19-A M.R.S.A. § 1652 (establishing right to file legal claim for non-support).

⁷ 22 M.R.S.A. § 14 (nursing facility); 30-A M.R.S.A. § 1561 (prisons), 34-B M.R.S.A. § 1409 (psychiatric and other behavioral institutions).

they may have.⁸ It allows only married couples to transfer real property to each other during the marriage (and at divorce) without paying a real estate transfer tax.⁹ Under federal law, spouses have an unlimited ability to make gifts and transfer property to one another.¹⁰ Under federal law, social security laws allow a lower earning spouse (or a spouse who has not worked long enough to earn a social security payment) to collect and increase his or her social security payment to half of the amount paid to the higher earning spouse.¹¹ This “spousal benefit” ensures that a spouse who takes time out of the job market in order to care for children or relatives can rely on the other spouse’s earnings in old age. Even most of the personal hunting and fishing laws allow spouses and immediate family members certain benefits, such as permitting family members to take crab and lobster when the licensed family member is present.¹²

None of these protections or obligations is available to same-sex couples, leaving them and their children more financially vulnerable than different-sex couples. Money issues are almost always significantly more complicated for same-sex couples because they are not treated as an economic unit and often must untangle their intertwined financial lives in order to deal with the government. One simple example: working families file four tax returns (2 individual state and 2 individual federal) in April, not two (joint state and joint federal), and they do so as “single” or “head of household” if they have children, even though their finances are jointly held. Even when couples try to protect each other financially, for example, by putting the other’s name on a deed to the family home, they must pay a transfer tax that spouses do not pay. There are no social security spousal protections for same-sex couples even after decades of paying into the system.

- 3. The law presumes spouses are each other’s closest confidantes and protects them from disclosure of their confidences.** The Maine Rules of Evidence provide that neither spouse may, without consent of the other, be required to share with others any private marital communication, including in lawsuits.¹³ Because of this presumed confidence, multiple provisions of law require spouses to disclose their relationships and attempt to prevent conflicts of interests in state and local government jobs and boards.¹⁴ The law limits debt collectors by making sure they talk to the debtor or spouse about accounts, but not others.¹⁵

⁸ 36 M.R.S.A. § 5113 (allowing taxpayers who file as married jointly federally to also file jointly on their state income taxes).

⁹ 36 M.R.S.A. § 4641-A(1)(A)(B) (a tax is imposed on each deed in which property is transferred - \$2.20 for each \$500 or fraction part of \$500 of the value of the property transferred, half imposed on the grantor and half on the grantee); 36 M.R.S.A. § 4641-C (exemption for deeds between husband and wife).

¹⁰ 26 U.S.C. §§ 1041, 2523.

¹¹ 42 U.S.C. § 402 (b), (c).

¹² 12 M.R.S.A. § 6431-E.

¹³ Me. R. Evid. 504. See also 15 M.R.S.A. § 1315.

¹⁴ See, e.g., 3 M.R.S.A. §§ 312-A(7-A), 317 (lobbyists); 1 M.R.S.A. §§ 1012(6), 1014 (legislators), 5 M.R.S.A. §§ 18, 19 (executive branch employees); 20-A M.R.S.A. § 1002 (school board members).

¹⁵ 32 M.R.S.A. § 11012 (Maine Fair Debt Collection Practices Act).

In lawsuits, a hostile party can attempt to force a same-sex partner to testify about private conversations with the partner who is involved in the lawsuit, including about the subject of the lawsuit. Same-sex couples often find themselves unable to communicate with debtors or insurance companies about the status of their partner's accounts. Many same-sex couples voluntarily disclose their relationships when they apply for or serve in public positions, but they are not required to do so.

4. **The law acknowledges that bad things happen that can devastate the family emotionally and financially and provides a safety net to diminish those hardships.** Under social security laws, the spouse of a disabled worker can receive benefits, both for him or herself, and also for any children under age 18.¹⁶ Under the joint state-federal Medicaid program, when one spouse needs long term nursing home care, there are safeguards which allow the community spouse to stay in the family home, to retain other assets, and to receive allowances for ongoing expenses.¹⁷ Wrongful death actions (and claims for conscious suffering) must be filed on behalf of a surviving spouse (or children if there is no spouse).¹⁸ Only a spouse can file legal actions for loss of consortium.¹⁹ For work-related deaths, only spouses can receive worker's compensation death benefits or file an action against a negligent employer.²⁰ The state retirement system pays accidental death benefits for employees solely to one's surviving spouse and/or dependent children.²¹

Same-sex couples are denied all of these protections, even if they have been together for decades or the survivor was financially dependent on the deceased spouse. A surviving partner who is caring for the couples' children, for example, would have no right to wage replacement under worker's compensation or other financial safety nets normally available for families.

5. **The law provides an enormous safety net to a surviving spouse upon death of his or her spouse.** Under social security laws, a surviving spouse can collect his or her deceased spouse's social security payment instead of his or her own.²² No estate taxes are due until after the death of the second spouse.²³ Under federal law, most spouses can continue employer-provided health coverage for 36 months after an employee's death.²⁴ As to distribution of property under state law, if there is no will, a spouse still automatically inherits a significant portion of the

¹⁶ 42 U.S.C. § 402 (b), (c).

¹⁷ 42 U.S.C.A. § 1396a (State plans for medical assistance), 42 U.S.C.A. §1396p (Liens, adjustments, and recoveries); 42 U.S.C.A. § 1396r-5 (treatment of income and resources for certain institutionalized spouses).

¹⁸ 18-A M.R.S.A. § 2-804.

¹⁹ 14 M.R.S.A. § 302.

²⁰ 39-A M.R.S.A. § 215 (compensation to dependent spouse for 500 weeks or lump sum payment); 39-A M.R.S.A. § 903 (right of action for surviving spouse).

²¹ 5 M.R.S.A. § 18003.

²² 42 U.S.C. § 402(e), (f).

²³ 26 U.S.C. § 2523.

²⁴ 29 U.S.C. §§ 1161-1163, 1167.

estate.²⁵ If there is a will, but it does not include the spouse, the spouse can still obtain a significant portion of the estate.²⁶ To protect survivors when the decedent died with significant debt, state probate law provides “allowances” to ensure some protection for the survivors against creditors. A surviving spouse is entitled to take a family allowance of \$12,000 per year for living expenses,²⁷ a homestead allowance of \$10,000 to protect the home,²⁸ and an allowance of \$7,000 for property like vehicles, furnishings and tools.²⁹ Registration and title on a vehicle can be transferred automatically to a surviving spouse without fees or taxes.³⁰ The law allows family businesses to prosper after death by allowing providing spousal survivorship rights in car, personal sports and recreational vehicle dealerships.³¹

Same-sex couples do not have these rights upon their partner’s death. Registered domestic partners have the right to inherit without a will, but no same-sex couples have no access to the automatic financial protections available to a surviving spouse.

- 6. The law provides protections to employees and their families and encourages employers to do the same.** Access to health insurance is a key issue for everyone. When a person marries, that event allows the employee to add his or her new spouse to employer provided health insurance.³² Although health insurance is a benefit that is a form of compensation, it is not considered taxable income to the employee.³³ After an employee leaves his or her job, federal law guarantees a continued period of health insurance coverage in certain circumstances.³⁴ Under “defined benefit plans,” a legal “spouse” may obtain a joint and survivor annuity, meaning payments continue after the death of the worker/retiree.

These benefits are not generally available to partnered gay or lesbian employees. When an employer provides health insurance benefits to “domestic partners,” the fair

²⁵ 18-A M.R.S.A. § 2-102 (this is also true of registered domestic partners).

²⁶ 18-A M.R.S.A. § 2-201 (elective share of 1/3 of augmented estate when will provides for spouse but surviving spouse wishes for a different share); 18-A M.R.S.A. § 2-301 (when a person marries after making out a will and fails to change the will to include the new spouse, the new spouse can take the whole estate, or half if there are surviving children or parents).

²⁷ 18-A M.R.S.A. § 2-403 (family allowance allowed for maintenance and has priority over all claims but the homestead allowance).

²⁸ 18-A M.R.S.A. § 2-401 (homestead allowance of \$10,000).

²⁹ 18-A M.R.S.A. § 2-402 (property exemption and rules for when there is a debt on the properties or when there is less than \$7,000 in the estate).

³⁰ 29-A M.R.S.A. §663 (transfer of motor vehicle title on death of spouse).

³¹ 10 M.R.S.A. § 1437 (survivorship in recreational vehicle dealerships).

³² This is controlled by “HIPPA,” the Health Insurance Portability and Accountability Act of 1996. Pub. L. No. 104-191, 110 Stat. 1936 (1996).

³³ 26 U.S.C. § 106. Health benefits provided to a non-marital partner are not excluded from taxable income under 26 U.S.C. §§ 105 or 106 unless the partner is a dependent under § 106 or § 152.

³⁴ These protections come from “COBRA,” generally found at 29 U.S.C. §§ 1161-1168.

market value of those benefits is taxable income to the employee.³⁵ The two major state service retirement plans allow a worker to designate a joint and survivor annuity for the benefit of anyone, but legal spouses still have advantages in those system.³⁶ The surviving partner of a gay or lesbian public safety worker or veteran is denied those specific protections as well as worker's compensation benefits.

7. The law provides worker's compensation benefits when tragedy strikes on a job, as well as particular benefits to families who take on special risks as a public safety officer or because of past military service. When a married employee suffers a job-related injury or death, the surviving spouse is presumed to be dependent on the working spouse and is provided worker's compensation benefits in the amount of 80% of the average weekly wage for 500 weeks.³⁷ Spouses of state and municipal government employees may receive accidental death benefit payments.³⁸ When a law enforcement officer (police officer, firefighter or emergency services personnel) dies in the line of duty, the surviving spouse (and children, if any), receive a \$50,000 death benefit from the state,³⁹ and over five times that from the federal government.⁴⁰ This amount cannot be used to reduce the worker's compensation benefits otherwise payable.⁴¹ The surviving spouse and children are entitled to a tuition waiver for college education at state schools,⁴² and federal education benefits may be available as well.⁴³ Numerous federal benefits are available to a veteran's spouse, and in the state, those benefits include civil service job preferences,⁴⁴ certain property tax exemptions⁴⁵, and other services.

None of these protections is available to surviving spouses in same-sex couples.

³⁵ The only exception is if the partner qualifies as a tax dependent.

³⁶ For example, spouses receive notice if the worker chooses not to designate the spouse as the beneficiary of retirement benefits. 5 M.R.S.A. § 17804 (7)(State Employee and Teacher system); 5 M.R.S.A. § 18404 (7) (Participating Local Districts System). Spouses can receive disability benefits for themselves and their children whereas a same-sex partner would have to choose one or the other. 5 M.R.S.A. § 17952 (1)(B), 17953 (2), (4) & (5-A) (State Employee and Teacher system), 5 M.R.S.A. §§ 18552 (1)(B) & 18553 (2)(4) & (5-A) (Participating Local Districts system). Only spouses and children receive cost of living adjustments. 5 M.R.S.A. § 17953 (3)(D) (State Employee and Teacher system); 5 M.R.S.A. § 18553 (3)(D) (Participating Local Districts System).

³⁷ 39-A M.R.S.A. § 102(8)(A) & (B)(definitions of "dependent"); 39-A M.R.S.A. § 215 (1)(benefit).

³⁸ 5 M.R.S.A. § 17804 (5-F).

³⁹ 25 M.R.S.A. § 1612.

⁴⁰ The death benefit is set at \$250,000 but in practice is closer to \$300,000. *See* 42 U.S.C. § 3796 *et seq.* (death benefit for spouses of public safety officers). The education benefit for surviving spouses and children is found at 42 U.S.C. § 3796d-1(a)(1)(B).

⁴¹ 5 M.R.S.A. § 18005 (2). These benefits include a portion of the deceased employee's salary for up to 500 weeks or until the youngest child reaches age 18.

⁴² 20-A M.R.S.A. § 12553.

⁴³ 42 U.S.C. § 3796d-1 (Eligibility requirements for educational assistance to dependents of public safety officers killed or disabled in the line of duty).

⁴⁴ 5 M.R.S.A. § 7054.

⁴⁵ 36 M.R.S.A. §§ 653, 707 (property taxation of surviving spouse of veteran).

8. **When a relationship has failed, the law provides a mechanism for ending it and equitably dividing property, and in some cases, providing for ongoing support of a former spouse.**⁴⁶ A variety of state and federal laws enforce the parties' obligations to one another.

Without a doubt, same-sex couples are disadvantaged in unwinding their relationships compared to similar heterosexual couples. Same-sex couples do not have the same access to court to resolve their relationships because the divorce applies only to married persons. The uses of equity and partnership theories on which same-sex couples must rely in court are unpredictable, fail to provide the same protections, and are more expensive to litigate as well. When parties or courts do attempt to unwind a relationship, they are impeded by law in doing so fairly. For example, certain retirement accounts held by one party like 401ks cannot be divided between a worker and his or her non-marital partner by way of a Qualified Domestic Relations Order⁴⁷, thereby taking important assets off the table for division. Even if a couple tried to compensate for the fact that one partner is "enriched" by being able to retain solely owned retirement accounts by transferring the family home to the other partner, such transfers are taxable unless linked to a divorce of spouses.⁴⁸

9. **When a married couple has a child, the child is presumed to be the child of the married pair.**⁴⁹ Such parents are responsible for the child's financial support. If the married couple separates while the child is a minor, the law provides an ordered and reliable system for allocating parental rights and responsibilities and child support.⁵⁰ Unmarried heterosexual couples may rely on the paternity law for sorting out parental rights and responsibilities of a child born to them.⁵¹

Although same-sex couples often plan together to have children and jointly raise them, the law does not reflect this reality. Same-sex couples do not have access to this system of rules, and must instead rely on the equity jurisdiction of the courts to prove the bona fides of their relationship and their parenting before a court will consider allocating parental rights and responsibilities to a non-birth or non-adoptive parent.

⁴⁶ 19-A M.R.S.A. § 901 (divorce jurisdiction); 19-A M.R.S.A. §§ 951-A, 952, 953 (property division and spousal support).

⁴⁷ 26 U.S.C. § 414(p) (Internal Revenue Code definition); 29 U.S.C. § 1056(d)(3)(B-D)(ERISA definition). See also 5 M.R.S.A. § 17059 (permitting QDRO for state retirement funds).

⁴⁸ 26 U.S.C. § 1041 (no gain or loss realized on transfers between spouses related to divorce); 26 U.S.C. § 72(t)(2)(C) (10% early withdrawal penalty from certain retirement accounts); 26 U.S.C. 408 (d)(6) (non-qualified withdrawals subject to income tax). Note also that alimony payments are deductible from income tax for the payor in a divorce, but not for a partner in a same-sex couple making payments to a former partner. 26 U.S.C. § 215.

⁴⁹ Me. Rule Evid. 302 (establishing presumption in favor of married couple and burden on party seeking to prove illegitimacy to produce evidence and persuade fact finder beyond a reasonable doubt).

⁵⁰ 19-A M.R.S.A. § 1001 et seq., 19-A M.R.S.A. § 1504 (support).

⁵¹ 19-A M.R.S.A. § 1151 et seq.

10. Married couples are often given better access to insurances. Under HIPPA, most employers must allow covered employees to enroll a new spouse into a health plan outside of the normal, limited open enrollment period. Some employers allow employees to contribute on a pre-tax basis to the cost of health insurance and medical costs both for the employee and a spouse.⁵² The value of spousal (and dependents') health benefits are not taxable income to the employee. State law allows one spouse to buy insurance on the other even when the other doesn't know.⁵³ A spouse is considered a member of the family for purposes of obtaining a life insurance policy for two or more members of a family.⁵⁴

Same-sex couples do not have access to “spousal insurance” or Flexible Savings Accounts or Health Savings Accounts for their partners. Some employers provide “domestic partner” health insurance to their employees with partners of the same-sex, but those benefits are taxable income to the employee at the fair market value of the insurance. As a general matter, because there is no legal marker for a same-sex couple’s relationship, and any markers like “domestic partnership” that might exist are either not known or respected, same-sex couples face hurdles in obtaining life insurance for their families.

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⁵² These cafeteria plans, as well as Health Savings Accounts and Flexible Savings accounts, are a critical source of compensation for employees.

⁵³ 24-A M.R.S.A. § 2408 (Insurance contract).

⁵⁴ 5 M.R.S.A. § 7054.